

SUPREME COURT OF NIGERIA
17TH JULY, 2009. SC. 216/2002
CORAM:- A. I. KATSINA-ALU, M. MOHAMMED,
W. S. N. ONNOGHEN, C. M. CHUKWUMA-ENEH,
M. S. MUNTAKA-COOMASSIE, JJSC

OUR LINE LIMITED APPELLANT
AND

1. S.C.C. NIGERIA LIMITED

2. IKECHUKWU UKANWOKE RESPONDENTS

(By his next friend, Friday Ukanwoke)

3. UNIVERSAL INSURANCE CO. LIMITED

COURTS - Constitution - Defects in - Effect - It renders the proceedings before the court a nullity - Such defect being extrinsic to the adjudication (H1)

COURTS - Judicial officers - Appointment date - And swearing-in date - There is a distinction between the former and the latter - The former is the date of elevation - The latter marks assumption of office (H2)

COURTS - Jurisdiction - Elevation of judges - Effect - It deprives the judge of jurisdiction to continue with matters - Pending before him prior to the elevation (H3)

EVIDENCE - Value - Documents - Gazette - Probative value of - It is prima facie proof of any fact of a public nature - Which it is intended to notify (H4)

EVIDENCE - Weight - Facts in gazette - Weight to be attached - How ascertained - It is a matter of inference - To be drawn from established facts (H5)

DOCUMENTS - Written instruments - Construction - Rules - The words must be taken in their ordinary sense - Unless that would lead to some absurdity - Or inconsistency with the rest of the instrument (H6)

DOCUMENTS - Effect - Gazette Notice No. 149 - It has no effect in altering the position of the judgment of Court of Appeal - As the list containing the elevation of the Chief Judge - Does not belong therein (H7)

FACTS

The plaintiff/appellant sued 1st and 2nd defendants/respondents for sundry reliefs. 3rd party/respondent was subsequently joined in the action. In the course of trial, the learned trial judge, Justice A. I. Iguh (as he then was) was appointed a Justice of the Supreme Court, though the date for his swearing-in was scheduled to be on a date to be published latter. Consequently, on the next adjourned date, respondents' counsel questioned the jurisdiction of the learned trial judge to continue to hear the matter, whereupon the court ruled that it had such jurisdiction, considering that the appointment would not take effect until the swearing-in had been done on the future date yet to be published.

Eventually, judgment was given to appellant against respondents. Aggrieved, respondents appealed to Court of Appeal on sundry grounds one of which was that subsequent to the date of his appointment to Supreme Court, learned trial judge lacked jurisdiction to continue with the matter as he did. This contention was upheld by Court of Appeal which consequently ordered that the case be remitted back to the high court for trial de novo by another judge. Dissatisfied, appellant has brought this appeal against the judgment of Court of Appeal.

ISSUE FOR DETERMINATION

“Whether the verdict of the lower Court is right in view of the relevant notification published in the Federal Republic of Nigeria Official Gazette No. 37 vol. 80 of 4th March, 1993.”

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

COURTS - Constitution - Defects in - Effect

1. The law is well settled on the effect of defect in the constitution of a Court on the proceedings of the Court. Any defect in the competence of a Court, renders the proceedings before it a nullity, a defect of competence being extrinsic to the adjudication. This position of the

law was well articulated in the much quoted dictum of Bairamian, F. J. in *Madukolu & Ors. v. Nkemdelim & Ors.* (1962) 1 All N.L.R. 581; (1962) 2 S.C.N.L.R. 341 at pages 589 - 590 and 348 of the reports where the learned Judge observed -

“A Court is competent when -

1. It is properly constituted as regards numbers and qualifications of the members off the bench, and no member is disqualified for one reason or another; and

2. The subject matter of the case is within its jurisdiction and there is no feature in the case which prevents the Court from exercising its jurisdiction; and

3. The case comes before the Court initiated by due process of law and upon fulfillment of any condition precedent to the exercise of jurisdiction, any defect in competence is fatal, for the proceedings are a nullity however well conducted and decided; the defect is extrinsic to the adjudication.”(p. 2094 B)

Judicial officers - Appointment date - And swearing-in date

2. It is quite plain in my view that as at 4th June, 1993, the fact that the learned trial Chief Judge had been elevated to the Supreme Court resulting in the change in his designation to ‘J.S.C’ as opposed to ‘C.J.’ is not at all in doubt. The fact that the learned trial Chief Judge was required to be sworn in on a date to be announced later was only to comply with another requirements of the 1979 Constitution as amended in Section 254 (1).

This of course means that the exercise of the act of the appointment itself is entirely different from the requirement of taking oath before assuming office or performing the functions of the office. This is in line with the decision of this Court in *Ogbuinyinya & Ors. vs. Obi Okudo & Ors.* (1979) All N.L.R. 105 at 116 where Idigbe J.S.C. (of blessed memory) in the lead judgment, made very clear distinctions between the date of appointment and the date of swearing-in of judicial officers appointed under the relevant provisions of the applicable constitution. (p. 2096 B/H)

COURTS - Jurisdiction - Elevation of judges - Effect

3. With the appointment of the learned trial Chief Judge on or about 3rd June, 1993 as a Justice of the Supreme court, he had ceased to

be the Chief Judge of Anambra State by that appointment and therefore deprived of the jurisdiction to conclude the hearing and ultimate determination of the Plaintiff/Appellant's case before him as he did in the judgment of the trial Court of 20th July, 2001, which the Court below, rightly in my view, declared a nullity for having been given
B without jurisdiction. (p. 2097 F)

EVIDENCE - Value - Documents - Gazette

4. As documentary evidence, the contents of a Gazette, as stated in
C the law, is prima facie proof of any fact of a public nature, which the Gazette is intended to notify. The question is, what is the meaning of these Latin words or expression? The term prima facie is defined in Blacks Law Dictionary (6th Edition) at page 1189 to mean-

D *"At first sight; on the first appearance; on the face of it; so far as it can be judged from the first disclosure; presumably; a fact presumed to be true unless disproved by some evidence to the contrary....."*

E By this definition then, a notification of appointments and other communications of the Federal Government of Nigeria in the Official Gazette, is merely a fact presumed to be true unless disapproved by some evidence to the contrary. (p. 2098 H)

F **EVIDENCE - Weight - Facts in gazette**

5. Notice of appointments given or published in the Official Gazette, is not a conclusive proof that the appointments have been made on the effective dates given in the notice. This is because although the
G Official Gazette containing the notification for such appointments may be before the Court as documentary evidence under the Evidence Act, the weight to be attached to the contents of the document, is entirely another matter having regard to the requirement of the law that every piece of evidence placed before the Court, is subject to be
H tested for credibility, weight or cogency to determine its acceptability. In this respect, the weight to be attached to a document, like the Official Gazette in the present case, is a matter of inference to be drawn from established facts and in this regard both the trial Court and the Appellate Court are in the same position when the question

involved, is the proper weight to be attached to the document.
(p. 2099 C)

Written instruments - Construction - Rules

6. On the evidential value of Government Notice Published in Gazette or notification of appointments, Idigbe JSC (of blessed memory) had this to say in the case of Ogbuinyinya and Ors.v. Okudo (supra) at page 118 -

"One of the cardinal rules of construction of written instruments is that the words of a written instrument must In general be taken in their ordinary sense notwithstanding the fact that any such construction may not appear to carry out the purpose which it might otherwise be Supposed was intended by the maker or makers of the instrument. The rule is that in construing all written instruments, the grammatical and ordinary sense of the words should be adhered to, unless that would lead to some absurdity or some repugnancy or inconsistency with the rest of the instrument; the instrument has to be construed according to its literal import unless again there is something else in the context which shows that such a course would tend to derogate from the exact meaning of the words." (p. 2099 G)

DOCUMENTS - Effect - Gazette Notice No. 149

7. As the Notice No. 149 has stated clearly on the face of it that it was to notify judicial appointments which have been made before the date of the publication of the Gazette, having regard to the overwhelming evidence on the record of the trial Court to the contrary, the list of the appointments made after the date of the Gazette is rather foreign to the notice. Certainly, the list containing the appointment of the learned trial Chief Judge to the Supreme Court does not belong to the Official Gazette of 4th March, 1993 which is notifying the general public of the appointments already made to the Supreme Court and other Courts and NOT those appointments which were to be made in the future after the date of the Official Gazette of 4th March, 1993. On the face of the Notice in the Official Gazette on the appointment of the learned trial Chief Judge to the Supreme Court therefore, that notice has no effect whatsoever in altering the position of the judgment of the Court below. (p. 2102 F/H)

NOTABLE POINTS OF INTEREST

CHUKWUMA-ENEH JSC

1. Objection - The manner of raising was irregular

I must emphasis that it is not the law that a party making such objection particularly in the middle of hearing a matter as the instant one
B does not need to swear to an affidavit which otherwise would strengthen his case on the facts relied upon. Besides, it is well known that facts form the foundation of the law-. It is my view in the circumstances of this case that a formal notice of motion supported by an
C affidavit and a counter-affidavit if being opposed ought to have been filed with all the materials including critical documents and instruments as the gazette relied upon for and against the objection albeit duly exhibited to the affidavits. (p. 2111 C)

D 2. Issue of the gazette was a fresh issue raised without leave

There can be no gain-saying that the introduction of the said official gazette in this matter for the first time in this court has raised a substantial issue of law or mixed law and fact; and as to the propriety of introducing further evidence as regards the controversy surrounding
E the date of His Lordship's appointment, that is to say, whether it is before 20/7/93 i.e. the date of the trial court's decision or it has taken effect from 13/9/1993 as per the said gazette, the appellant thus has introduced in this appeal a fresh issue without leave of court.
F (p. 2112 D)

3. Appellate court may hear fresh issues raised without leave

There can be no doubt as to the power of an appellate court as this court notwithstanding the settled principles established both by the
G rules of this court and such decisions as STOOL OF ABINABINA V. ENYIMADA 12 WACA 171 and EJIOFODOMI V. OKONKWO (1982) 11 SC.74 at 93-98 that without the leave of court, an appellant cannot be heard on a point of law not raised in the court below; the court can even on its own motion in the interest of justice deal
H with a point raising fresh issue which has raised a substantial point of law, and moreso where it goes to the jurisdiction of the trial court although such point has neither been raised before the trial court nor raised and argued as in this case on appeal in the court below.
(p. 2114 E)

REPRESENTATION

C. C. Echetebe (Mrs.) for the Appellant
L. A. Njemanze for the 1st and 2nd Respondents
O. J. Nnadi for the Third Party Respondent

B

CASES REFERRED TO

Ayeni v. Dada (1978) 3 S.C. 35 at 61
EJIOFODOMI V. OKONKWO (1982) 11 SC.74 at 93-98
Gaji v. Paye (2003) 8 N.W.L.R. (Pt. 823) 583 at 599 - 560
LAPADE APATAKU & ORS. V. IDOWU ALAB1 (1985) 1 NSCC (Vol. C
) 294 at 296
N.E.C. V. WODI (1989) 2 NWLR (Pt. 104) 444 at 454
Obiakor v. The State (2002) 10 N.W.L.R. (Pt. 776) 612 at 626
Ogbuinyinya v. Okudo (No.2), (1990) 7 SCNJ. 29, 43-45 & 49
OGUMA V. IB.W.A LTD. (1988) 1 NWLR (Pt. 73) 658 at 672
Umenwuwaku v. Ezeana (1972) 5 S.C. 543
Utih v. Onoyivwe (1991) 1 N.W.L.R. (Pt. 166) 166 at 206

D

STATUTES REFERRED TO

Constitution of Federal Republic of Nigeria, 1979, ss. 211 & 254
Evidence Act cap 112, L.F.N. 1990, ss. 75, 113 & 135

E

BOOK REFERRED TO

Blacks Law Dictionary (6th Edition) page 1189

F

LEAD JUDGMENT BY MOHAMMED JSC

The Appellant in this appeal was the Plaintiff at the trial High Court of Justice Anambra State and was the 1st Respondent at the Court of Appeal Enugu Division. The 1st and 2nd Respondents in this Court were the Defendants at the trial High Court while at the Court of Appeal, they were the Appellants. The Third Party Universal Insurance Company which was joined in the action at the trial High Court was the 2nd Respondent at the Court of Appeal. The 1st and 2nd Respondents as Defendants at the trial Court who were dissatisfied with the judgment of the trial Court against them jointly appealed against it to the Court of Appeal Enugu where in their Appellants' brief of argument for the determination of their appeal, they

H

raised 8 issues. The first of these issues being one on jurisdiction states

“Whether the trial court had the jurisdiction to conclude the trial at the High Court on 20th July, 1993 when the learned trial Judge was appointed as a Justice of the Supreme Court in June, 1993.”

B In line with the requirements of the law, the Court of Appeal
heard the parties on their respective briefs of argument and in a re-
served judgment delivered on 8th February, 2001 allowed the ap-
peal on the issue of jurisdiction alone holding that by his appoint-
ment as a Justice of the Supreme Court on or about 3rd June, 1993,
C the learned trial Chief Judge had lost the jurisdiction to conclude the
hearing of the case between the parties and the delivery of judgment
on 20th July, 1993. The Court below therefore nullified the judg-
ment of trial Court and remitted the case to the trial High Court for
D hearing de novo. With this conclusion, the Court below decided not
to consider any of the remaining 7 issues canvassed before it by the
parties. Thus, the Appellant which was the Plaintiff at the trial Court
and the 1st Respondent at the Court below being dissatisfied with the
judgment of the Court of Appeal, has now appealed against it to this
E Court on two grounds of appeal filed on its behalf and from which
one single issue for determination was raised namely -

*“Whether the verdict of the lower Court is right in view of the
relevant notification published in the Federal Republic of Nigeria Of-
ficial Gazette No. 37 vol. 80 of 4th March, 1993.”*

F For a better appreciation of this issue for determination can-
vassed in this appeal, it is appropriate to state the facts which are
largely not in dispute between the parties.

The Appellant which was the Plaintiff at the trial Onitsha High
G Court of Anambra State instituted its action for damages in negli-
gence in suit No. 0/239/89 on 24th August, 1989. After the exchange
of pleadings between the parties, the case proceeded to hearing be-
fore Iguh Chief Judge of Anambra State (as he then was) on 15th
November, 1990. The case for the Plaintiff was closed on 8th De-
H cember, 1992 while that of the Defendant was closed on 24th May,
1993 when further hearing in the matter was adjourned to 4th June,
1993 for the Third Party Defendant to open its case. Meanwhile be-
fore the adjourned date, on or before 3rd June, 1993, it was an-
nounced and published in various Newspapers, some parts of the

Nigerian Weekly Law Report, Electronic and Print Media that the learned trial Chief Judge Iguh C. J. (as he then was) had been appointed a Justice of the Supreme Court JSC and will be sworn in on a date to be announced in due course.

With this development, when the case came up on the adjourned date of 4th June, 1993, the learned Counsel to the Defendants now Respondents, raised the question of whether or not having regard to the appointment of the learned trial Chief Judge, the case of the parties before him could still proceed. The learned trial Chief Judge replied in the affirmative explaining that his appointment to the Supreme Court was to take effect on a future date and therefore proceeded with the hearing of the case in which judgment was delivered on 20th July, 1993. It was this judgment that was set aside on appeal by the Court of Appeal for being a nullity having been given without jurisdiction on the part of the trial High Court. The question for resolution therefore in this appeal is whether or not the Court below was right in its judgment now on appeal.

Learned Senior Counsel for the Appellant has argued that on the authority of the decision of this Court in *Apataku & Ors. v. Alabi* (1985) 1 N.S.C.C. 294 at 296, the onus of proof of lack of jurisdiction on the part of the trial Court lies on the Defendants now Respondents who made the allegation and which onus according to the learned Senior Counsel was not discharged by the Respondents. Learned Senior Counsel for the Appellants relying on the case of *Ogbuinyinya & Ors. v. Okudo & Ors.* (1979) All N. L. R. 105, pointed out that the effective date of the appointment of the learned trial Chief Judge to the Supreme Court as duly published in the Federal Republic of Nigeria Official Gazette No. 37 Vol. 80 Lagos of 4th March, 1993, was 13th September 1993; that according to the learned Senior Counsel, being the position, the judgment of the trial Court delivered on 20th July, 1993, was not affected by the appointment of the learned trial Chief Judge to Supreme Court which could have deprived the Court of its jurisdiction as alleged by the Respondents; that in this respect the Court below was wrong in its judgment declaring the judgment of the trial Court a nullity on account of it having been given in the absence of jurisdiction and therefore urged this Court to allow the appeal.

The position taken by the 1st and 2nd Respondents in this

appeal is contained in their brief of argument filed on 11th November, 2003. Learned Counsel observed that from the record of the trial Court, it is quite clear that the issue of the absence of jurisdiction of that Court was duly raised by the learned Counsel to the Defendants now Respondents in the Court's proceedings of 4th June, 1993 and duly considered and determined by the learned trial Chief Judge who held that he still had jurisdiction to conclude the trial; that from that part of the record of the trial Court, there is no dispute that the appointment of the learned trial Chief Judge to the Supreme Court of Nigeria took place in June, 1993 before the judgment of the trial Court was delivered on 20th July, 1993, in spite of the fact that he was not sworn in until 13th September, 1993; that although the learned trial Chief Judge was sworn in on 13th September, 1993 as published in the Nigeria Weekly Report, the fact that the appointment was made in June 1993 is not also in dispute; that the distinction between the date of appointment of a judicial officer and the date of his swearing in, had been clearly brought out by this Court in *Ogbuinyinya v. Okudo* (1979) 6-9 S.C. 32. Learned Counsel urged this Court not to rely on the Federal Republic of Nigeria Official Gazette No. 37 Volume 80 of 4th March, 1993 purportedly notifying the appointment of the learned trial Chief Judge to the Supreme Court of Nigeria in March, 1993 even before the said appointment was made, in view of the resultant absurdity on the face of the Gazette. Counsel therefore urged this Court to dismiss the appeal.

For the thirty Party Respondent however, it was the contention of its learned Counsel that while agreeing on the position of the law regarding the onus on the person who alleges want of jurisdiction to prove the same as laid down by this Court in *Apataku v. Alabi* (supra) and Section 135(1) of the Evidence Act, that onus had been discharged by the Respondents having regard to the evidence on record including the admission of the learned trial Chief Judge (as he then was). Relying on Section 75 of the Evidence Act, learned Counsel observed that facts admitted need no further proof and that the appointment of the learned trial Chief Judge to the Supreme Court having been admitted by him on record of the trial Court, need no further proof; that the admission of the appointment was made while the case of the parties was still pending before the trial Court was also quite obvious according to the learned Counsel who further stressed

that the Court below was right in relying on further evidence on the appointment from the publications of the same in the Nigerian Weekly Law Reports; that on the authority of same case of Ogbuinyinya v. Okudo (supra), learned Counsel argued that once a Judge had been appointed a Justice of the Supreme Court or the Court of Appeal, the Judge ceases to function as a Judge of the High Court irrespective of the date he will be sworn in. Learned Counsel to the thirty Party Respondent then called in aid the provisions of Sections 211(2) and 254(1) of the 1979 Constitution of Nigeria to support his submission that the learned trial Chief Judge having lost the jurisdiction to continue with the hearing of the case between the parties on his appointment, ought to have relinquished the case for hearing by another Judge in line with the case of Madukolu v. Nkemdelim (1962) 2 All N.L.R. 581. B C

As for the reliance placed upon the Federal Republic of Nigeria Official Gazette No. 37 Volume 80 of 4th March, 1993, which gave the effective date of appointment of Justice A. I. Iguh to the Supreme Court as 13th September, 1993, by the Appellant, learned Counsel submitted that the notification will not save the judgment delivered on 20th July, 1993, when it was already clear that Hon. Justice Iguh had been appointed a Justice of the Supreme Court; that the effective date of 13th September, 1993 given in the Official Gazette, was no more than the effective date the learned trial Chief Judge was sworn in to begin to discharge his functions in the new office as Justice of the Supreme Court because that act of swearing in, did not affect the fact that he had already been appointed a Justice of the Supreme Court before the date the judgment of the trial Court was delivered on 20th July, 1993. Learned Counsel noted that the Official Gazette was not available to the trial Court or the Court of Appeal and as such this Court is entitle to look at it in resolving the issue for determination taking into consideration that notification of appointment in the Gazette is not conclusive proof that the appointment had been made if decision of this Court in Gbafé v. Gbafé (1996) 6 N.W.L.R (Pt. 455) 417 at 434 is applied and therefore the learned Counsel urged this Court to dismiss the appeal. D E F G H

As earlier identified in this judgment, the only issue for determination is whether the Court below was right in its decision that the trial Court had been deprived of its jurisdiction to conclude the hear-

ing and determination of the Plaintiff/Appellant's claims before it by the appointment of the learned trial Chief Judge to the Supreme Court. This calls into question of whether or not the trial High Court of Anambra State was competent to have delivered the judgment in the dispute between the parties on 20th July, 1993 in spite of the elevation of the learned trial Chief Judge to the Supreme Court on or about 3rd June, 1993. ***The law is well settled on the effect of defect in the constitution of a Court on the proceedings of the Court. Any defect in the competence of a Court, renders the proceedings before it a nullity, a defect of competence being extrinsic to the adjudication. This position of the law was well articulated in the much quoted dictum of Bairamian, F. J. in Madukolu & Ors. v. Nkemdelim & Ors. (1962) 1 All N.L.R. 581; (1962) 2 S.C.N.L.R. 341 at pages 589 - 590 and 348 of the***

reports where the learned Judge observed -

"A Court is competent when -

1. It is properly constituted as regards numbers and qualifications of the members off the bench, and no member is disqualified for one reason or another; and

2. The subject matter of the case is within its jurisdiction and there is no feature in the case which prevents the Court from exercising its jurisdiction; and

3. The case comes before the Court initiated by due process of law and upon fulfillment of any condition precedent to the exercise of jurisdiction, any defect in competence is fatal, for the proceedings are a nullity however well conducted and decided; the defect is extrinsic to the adjudication."

See also the case of Umenwuwaku v. Ezeana (1972) 5 S.C. 543.

The law is indeed well settled as agreed by the parties in this appeal in their respective briefs of argument that where the ground of appeal relied upon is a challenge to the jurisdiction of the Court, this can be raised at any time of the trial and even on appeal, but where a party raises issue of jurisdiction, the onus is on him to give prima facie evidence of such lack of jurisdiction. See Apataku & Ors. V. Alabi (1985) 1 N.S.C.C. 294. The question therefore is whether the Respondents in this appeal who were the Appellants at the Court below had discharged the burden placed on them by law

in showing that the trial High Court lacked jurisdiction to deliver its judgment given on 20th July, 1993. The Court below indeed answered this question in the affirmative from the record of appeal placed before it. The proceedings of the trial Court of 4th June, 1993, is quite revealing in this respect. The relevant part of the proceeding of that day-at pages 10 - 11 of the supplementary record reads: B

“Chief Njemanze - wonders whether the facts of the Ogbuinyinya case are relevant in this case or whether they are distinguishable from the facts of this case in view of my recent designation as a supreme Court Justice.

Court - it seems to me that the facts in the Ogbuinyinya case are clearly distinguishable from the situation that has arisen in this case. The appointment of the Hon. Justice Nnaemeka-Agu to the Court of Appeal was with immediate in the Ogbuinyinya case as against the present situation which it is clearly decreed that my appointment will not take effect and shall only take effect on a future date to be published and on which date I would be sworn in. In the circumstance and after due consultation with the Hon. C. J. N, it is clear that I remain in my current post in this State pending further action. Unlike Ogbuinyinya case, my appointment in issue is yet to take effect.” C D E

From these proceedings of the trial Court of 4th June, 1993, it is not at all in doubt that by that date, the appointment of the learned trial Chief Judge as a Justice of the Supreme Court, had already been communicated to him even though the effective date of the appointment on which date he would be sworn-in as a Justice of the Supreme Court was to be published in due course. Furthermore, this appointment of the learned trial Chief Judge was also published not only in the newspapers and electronic media but also in various volumes of the Nigeria Weekly Law Reports beginning with (1993) 4 N.W.L.R. (Pt. 288) of 7th June, 1993 where the appointment of four Justices to the Supreme Court including the learned trial Chief Judge was published as follows - F G

“The following Justices have been elevated to the Supreme Court Bench -

- 1. Hon. Justice Uthman Mohammed, JSC*
 - 2. Hon. Justice Sylvester Umaru Onu, JSC*
 - 3. Hon. Justice Yekini Olayiwola Adio, JSC*
 - 4. Hon. justice Anthony ikechukwu Iguh, JSC*
- H

Hon. Justices Mohammed, and Onu will be sworn-in on Thursday 3rd June, 1993 While Justices Adio and Iguh, will be sworn-in on a date to be announced later."

The contents of this publication entirely agrees with the pronouncement of the learned trial Chief Judge in the proceedings of the trial Court of 4th June, 1993 on the position of his appointment to the Supreme Court. ***It is quite plain in my view that as at 4th June, 1993, the fact that the learned trial Chief Judge had been elevated to the Supreme Court resulting in the change in his designation to 'J.S.C as opposed to 'C.J.' is not at all in doubt.*** That appointment was in fact made in accordance with the enabling powers conferred on the President under Section 211(2) of the 1979 Constitution of the Federal Republic of Nigeria which was then in force as amended. In other words by the pronouncements of the learned trial Chief Judge in the proceedings of the trial Court of 4th June, 1993, contained in the supplementary records of this appeal at pages 10 - 11, the fact of the elevation of the learned trial Chief Judge from the Bench of the Anambra State High Court to the Bench of the Supreme Court of Nigeria, is not at all in dispute. ***The fact that the learned trial Chief Judge was required to be sworn in on a date to be announced later was only to comply with another requirements of the 1979 Constitution as amended in Section 254(1)*** with states -

"254(1) A person appointed to any judicial office shall not begin to perform the functions of office until he has taken and subscribed the Oath of Allegiance and the Judicial Oath prescribed in the Sixth Schedule of this constitution."

This of course means that the exercise of the act of the appointment itself is entirely different from the requirement of taking oath before assuming office or performing the functions of the office. It is for this reason that I find myself agreeing with the Court below in its judgment that the learned trial Chief Judge was already a Justice of the Supreme Court of Nigeria when he decided to proceed with the hearing of the Plaintiff/Appellant's claims on 4th June, 1993, culminating in the delivery of judgment on 20th July, 1993. ***This is in line with the decision of this Court in Ogbuinyinya & Ors. vs. Obi Okudo & Ors. (1979) All N.L.R. 105 at 116 where Idigbe J.S.C. (of blessed memory) in the***

lead judgment, made very clear distinctions between the date of appointment and the date of swearing-in of judicial officers appointed under the relevant provisions of the applicable constitution where he said -

"Section 128 of the Constitution of the Federation No. 20 of 1963 as amended by Section 1 (c) of schedule to the Constitution (Amendment) (No. 2) Decree No. 42 of 1976 makes it imperative that 'a judge of the Federal Court of Appeal shall not enter upon the court of his office unless he has taken or 'subscribed the Oath of Allegiance and such Oath for the execution of the duties Of his Office as may be prescribed by Parliament.' A close look at Section 128 of the Constitution (No. 20 of 1963) as amended by the Schedule to Decree No. 42 of 1976 shows Clearly that the Section is intended to lay down a condition precedent to the functioning but NOT the appointment of Judge .That Section impliedly recognises the fact of appointment (already as a Judge) of the incumbent of that public office but makes the swearing of the prescribed oaths condition precedent to his functioning in that office."

This interpretation and application of the provisions of Section 128 of the 1963 Constitution as amended which are in Pari materia with the provisions of Section 254(1) of the 1979 constitution as amended, under which the learned trial Chief Judge was sworn in as a Justice of the Supreme court on 13th September, 1993, after his appointment in June, 1993, is very relevant to the present case. In other words **with the appointment of the learned trial Chief Judge on or about 3rd June, 1993 as a Justice of the Supreme court, he had ceased to be the Chief Judge of Anambra State by that appointment and therefore deprived of the jurisdiction to conclude the hearing and ultimate determination of the Plaintiff/Appellant's case before him as he did in the judgment of the trial Court of 20th July, 2001, which the Court below, rightly in my view, declared a nullity for having been given without jurisdiction.**

I am however fully aware that the judgment of the Court below was arrived at in the absence of the Federal Republic of Nigeria Official Gazette No. 37 Volume 80 published on 4th March, 1993, being relied upon by the Appellant in support of the issue for determination of this appeal. Although the official Gazette relied upon by

the parties in this appeal in the sole issue argues in their respective briefs of argument was not tendered and received in evidence by this Court at the hearing of this appeal, the fact that the document was used in support of the fundamental issue of jurisdiction in this Court which can be raised even orally or suo- motu by the Court, I decided
 B to look at the document in resolving the only issue raised and argued in this appeal. See *Gaji v. Paye* (2003) 8 N.W.L.R. (Pt. 823) 583 at 599 - 560; *Obiakor v. The State* (2002) 10 N.W.L.R. (Pt. 776) 612 at 626; *Ijebu Ode Local Government v. Adedeji Balogun and Co.* (1991)
 C 1 N.W.L.R. (Pt. 166) 136 at 153; *Oloba v. Akereja* (1988) 3 N.W.L.R. (Pt. 84) 508; *Osadebay v. A. G. Bendel State* (1991) 1 N.W.L.R. (Pt. 169) 525; *Okesuji v. Lawal* (1991) 1 N.W.L.R. (Pt. 214) 126 and *Utih v. Onoyivwe* (1991) 1 N.W.L.R. (Pt. 166) 166 at 206. The next question therefore I am required to examine and determine is whether
 D the surfacing of this Federal Republic of Nigeria Official Gazette No. 37 Volume 80 of 4th March, 1993, containing the publication of the appointments of Judicial Officers including the learned trial Chief Judge in the processes of the appeal in this Court, can have any effect on the judgment of the Court below.

E Official Gazettes are a class of official documents which Section 113 (a) (i) of the Evidence Act CAP 112 of the Laws of the Federation of Nigeria 1990, made provision for as part of the provisions made for documentary evidence under the Act. The Section states -

F “113. *The following public documents may be proved as follows -*

(a) *Acts of the National Assembly or laws of a State legislature, proclamations, treaties or other acts of State, Orders, notifications, nominations appointments and other official communications of the*
 G *Government of Nigeria or of any State thereof or of any Local Government -*

(i) *Which appears in the Federal Gazette or the Gazette of a State, by production of such Gazette, and shall be*
facie proof of any fact of a public nature which they were intended to
 H *notify:*”

A Gazette therefore serves as official communication of the Government of Nigeria or of any State thereof or of any Local Government. **As documentary evidence, the contents of a Gazette, as stated in the law, is prima facie proof of any fact of a public**

nature, which the Gazette is intended to notify. The question is, what is the meaning of these Latin words or expression? The term prima facie is defined in Blacks Law Dictionary (6th Edition) at page 1189 to mean-

“At first sight; on the first appearance; on the face of it; so far as it can be judged from the first disclosure; presumably; a fact presumed to be true unless disproved by some evidence to the contrary.....”

By this definition then, a notification of appointments and other communications of the Federal Government of Nigeria in the Official Gazette, is merely a fact presumed to be true unless disapproved by some evidence to the contrary. In other words notice of appointments given or published in the Official Gazette, is not a conclusive proof that the appointments have been made on the effective dates given in the notice. This is because although the Official Gazette containing the notification for such appointments may be before the Court as documentary evidence under the Evidence Act, the weight to be attached to the contents of the document, is entirely another matter having regard to the requirement of the law that every piece of evidence placed before the Court, is subject to be tested for credibility, weight or cogency to determine its acceptability. In this respect, the weight to be attached to a document, like the Official Gazette in the present case, is a matter of inference to be drawn from established facts and in this regard both the trial Court and the Appellate Court are in the same position when the question involved, is the proper weight to be attached to the document. See Attorney General, Oyo State v. Fairlakes Hotels Limited (1989) 5 N.W.L.R. (Pt. 121) 255 at 282 - 283; Ayeni v. Dada (1978) 3 S.C. 35 at 61 and Akinola v. Oluwo (1962) 1 All N.L.R. 224; (1962) 1 S.C.N.L.R. 352.

On the evidential value of Government Notice Published in Gazette or notification of appointments, Idigbe JSC (of blessed memory) had this to say in the case of Ogbunyiya and Ors.v. Okudo (supra) at page 118 -

“One of the cardinal rules of construction of written instruments is that the words of a written instrument must In

general be taken in their ordinary sense notwithstanding the fact that any such construction may not appear to carry out the purpose which it might otherwise be Supposed was intended by the maker or makers of the instrument. The rule is that in construing all written instruments, the grammatical and ordinary sense of the words should be adhered to, unless that would lead to some absurdity or some repugnancy or inconsistency with the rest of the instrument; the instrument has to be construed according to its literal import unless again there is something else in the context which shows that such a course would tend to derogate from the exact meaning of the words. On the above principles on construction of written instruments, the content of Exhibit SC (1) can have no other meaning than that the appointment of Nnaemeka-Agu J. as a Judge of the Federal Court of Appeal was intended to and did take effect from the 15th day of June, 1977. An express provision in an instrument excludes any stipulation which would otherwise be implied with regard to the same subject mater - *expressum facit cessare tacitum*. In the circumstances, there is no room for the view, in the face of the express language (of Exhibit SC (1), that the appointment of Nnaemeka-Agu J. as a Judge of the Federal Court of Appeal was intended to take effect at a date subsequent to the 15th June, 1977..."

In the instant case, applying the above rules of construction of written instruments to the Notice No. 149 published in the Official Gazette dated 4th March, 1993 notifying the general public the appointments of Judicial Officers, is it really the intention of the makers of that notice to include in that notice the notification of the appointments of judicial officers yet to be made by the appointing authorities? Certainly not. To construe that legal notice in its ordinary sense would definitely lead to some absurdity, repugnancy and inconsistency with the rest of the document especially the date of the Gazette being 4th March, 1993 notifying appointments yet to be made in June and September, 1993.

In the case at hand, the appointment of the learned trial Chief Judge to the Supreme Court and the appointments of other Judicial Officers is contained in the Government Notice No. 149 in that Official Gazette No. 37 Volume 80 of 4th March, 1993, which reads -

"Government NOTICE No. 149

APPOINTMENT OF JUDGES

The following judicial appointments which were made to the Supreme Court of Nigeria, Court of Appeal, State High Courts and Sharia Court of Appeal respectively are notified for general information.

<i>Name</i>	<i>Appointment</i>	<i>Effective Date</i>	
<i>Justice Abubakar Bashir Wali</i>	<i>Kadi, Sharia Court of Appeal of Kano State</i>	<i>16-6-1970</i>	B
<i>Justice Shehu Usman Mohammed</i>	<i>Judge, High Court of North-Central State and North-Eastern State</i>	<i>15-1-1974</i>	C
<i>Justice Muhammadu Lawal Uwais</i>	<i>Judge, High Court of North-Central State and North-Eastern State</i>	<i>15-1-1974</i>	
<i>Justice Abubakar Bashir Wali</i>	<i>Judge, High Court of Kano State</i>	<i>25-1-1975</i>	D
<i>Justice Muhammadu Lawal Uwais</i>	<i>Acting Chief Judge of High Court of Kaduna State</i>	<i>15-3-1976</i>	
<i>Justice Shehu Usman Mohammed</i>	<i>Chief Judge of High Court of Kaduna State</i>	<i>1-1-1979</i>	E
<i>Justice Abubakar Bashir Wali</i>	<i>Justice, Supreme Court</i>	<i>20-8-1987</i>	
<i>Justice Emmanuel Obioma Ogwuegbu</i>	<i>Justice, Court of Appeal</i>	<i>24-9-1987</i>	
<i>Justice Yekini Olayiwola Adio</i>	<i>Justice, Court of Appeal</i>	<i>2-3-1988</i>	F
<i>Justice Anthony Ikechukwu Iguh</i>	<i>Chief Judge of High Court of Anambra State</i>	<i>11-4-1991</i>	
<i>Justice Idris Legbo Kutigi</i>	<i>Justice, Supreme Court</i>	<i>12-2-1992</i>	G
<i>Justice Michael Ekundayo Ogundare</i>	<i>Justice, Supreme Court</i>	<i>12-2-1992</i>	
<i>Justice Shehu Usman Mohammed</i>	<i>Justice, Supreme Court</i>	<i>21-4-1992</i>	
<i>Justice Sylvester Umaru Onu</i>	<i>Justice, Supreme Court</i>	<i>3-6-1993</i>	H
<i>Justice Uthman Mohammed</i>	<i>Justice, Supreme Court</i>	<i>3-6-1993</i>	

<i>Name</i>	<i>Appointment</i>	<i>Effective Date</i>
<i>Justice Yekini Olayiwola Adio</i>	<i>Justice, Supreme Court</i>	<i>13-9-1993</i>
<i>Justice Anthony Ikechukwu Iguh</i>	<i>Justice, Supreme Court</i>	<i>13-9-1993"</i>

B

It is quite plain from the above Government Notice No. 149, that it was published in the Official Gazette to notify - *"Judicial Appointments which were made."* From the list of the appointees, it can be seen that the appointments made covered a period from 16th June, 1970, when Justice Abubakar Bashir Wali was appointed Kadi Sharia Court of Appeal of Kano State, to 21st April, 1992 when Justice Shehu Usman Mohammed (of blessed memory), was appointed to the Supreme Court. It is observed that this period also effectively covered the appointment of the learned trial Chief Judge himself as the Chief Judge of Anambra State on 11th April, 1991. However, taking into consideration of the date of publication of the Official Gazette, 4th March, 1993 and the intention of the publication of the notice in that Gazette - namely, to notify judicial appointments which have been made, that notice cannot possibly also accommodate the appointments of the learned trial Chief Judge along with others made to the Supreme Court on 3rd June, 1993 and 13th September, 1993, as shown in the Notice in view of the resultant inconsistency and absurdity in reporting an event on 4th March, 1993, the date of the Gazette, which by virtue of the dates shown in the Notice,, was yet to take place. That is to say ***as the Notice No. 149 has stated clearly on the face of it that it was to notify judicial appointments which have been made before the date of the publication of the Gazette, having regard to the overwhelming evidence on the record of the trial Court to the contrary, the list of the appointments made after the date of the Gazette is rather foreign to the notice.*** How the appointments made to the Supreme Court on 3rd June, 1993 and 13th September, 1993, could have found their way into the list of appointments made to the Supreme Court, Court of Appeal, High Courts and Sharia Court of Appeal between 16th June, 1970 and 21st April, 1992 in Official Gazette released on 4th March, 1993, is not only baffling but rather strange. ***Certainly, the list containing the appointment of***

the learned trial Chief Judge to the Supreme Court does not belong to the Official Gazette of 4th March, 1993 which is notifying the general public of the appointments already made to the Supreme Court and other Courts and NOT those appointments which were to be made in the future after the date of the Official Gazette of 4th March, 1993. On the face of the Notice in the Official Gazette on the appointment of the learned trial Chief Judge to the Supreme Court therefore, that notice has no effect whatsoever in altering the position of the judgment of the Court below. In other words the Court below which did not have the benefit of the consideration of the official Gazette in the determination of the appeal before it and having regard to the circumstances of this case with the undisputed facts contained in the record of the trial Court which was placed before the Court below, that Court was quite right in its judgment that the trial Court was deprived of the jurisdiction to conclude the hearing and determination of the Plaintiff/Appellant's claims before it when it delivered its judgment on 20th July, 1993, after the elevation of the trial Chief Judge to the Supreme Court of Nigeria.

In the result this appeal must fail and the same is hereby dismissed. The judgment of the Court below of 8th February, 2001 remitting the case to the trial Court for hearing de-novo is hereby affirmed with no order on costs.

KATSINA-ALU JSC

I have had the advantage of reading in draft the judgment of my learned brother Mahmud Mohammed JSC. I agree with it, and for the reasons which he gives I also dismiss the appeal. I make no order as to costs.

ONNOGHEN JSC

The issue in this appeal as formulated by the learned Senior Counsel for the appellant DR. L. J. O. IBIK, SAN in the appellant's brief of argument filed on the 1st day of November, 2002 and adopted in argument of the appeal on the 20th day of April, 2009 and which has been agreed upon by learned counsel for the respondents in

their respective briefs of argument is:

“Whether the verdict of the lower court is right in view of the relevant notification published in the Federal Republic of Nigeria Official Gazette No. 37 Vol. 80 of 4th March 1993?”

B The facts of the case, as relevant to the determination of the appeal, have been detailed in the lead judgment of my learned brother, MOHAMMED, JSC and I do not intend to repeat them here except as may be relevant to the point of emphasis.

C It is very clear from the record, particularly the admission of the learned Chief Judge in the proceedings of the 4th day of June, 1993 at pages 10-11 of the supplementary records that the learned Chief Judge had been appointed a Justice of the Supreme Court of Nigeria before that date, 4th June, 1993 and that what was left for him to do to enable him perform the duties assigned to the office of D Justice of the Supreme Court of Nigeria is his being sworn in, which was to take place on a date to be determined. It is settled law that what is admitted needs no proof. That being the case, the fact of the appointment or elevation of the learned trial Chief Judge, haven been admitted remains established, the issue resulting therefrom being the legal effect of that appointment on the jurisdiction of the trial E court presided by the said Chief Judge subsequent to the said elevation. It is the argument of the learned Senior Counsel for the appellant that in so far as the learned trial Chief Judge was not sworn in as at the date he delivered judgment in the case leading to the F instant appeal, the court presided over by him had jurisdiction to hear and determine the case.

It is not disputed that by the provisions of section 254(1) of the 1979 Constitution, a person appointed to the office of justice of the G Supreme Court of Nigeria can only function in that office if he subscribes to the oath of Allegiance and the Judicial Oath. The section provides thus:-

H *“254(1), A person appointed to any judicial office shall not begin to perform the functions of office until he has taken and subscribed the oath of Allegiance and the Judicial Oath prescribed in the Sixth Schedule of this Constitution.”*

Two things clearly emerge from the simple meaning of the above provisions of section 254(1) of the 1979 Constitution. These are:

(a) appointment of a person to a judicial office and,

(b) performance of the functions of the judicial office to which the person is so appointed.

It is therefore obvious that a person must first be appointed to a judicial office before he can subscribe to the oaths of allegiance and office. The subscription of the person so appointed to the oaths of allegiance and office is the condition precedent to his performing the functions assigned to the judicial office to which he has been appointed. It follows therefore that a person appointed to a judicial office who has not subscribed to the oaths of allegiance and office remains an appointee to that office but is incapable of functioning in the said office until duly sworn into office. The moment he subscribes to the oaths of Allegiance and office he becomes capable of functioning in that office. The fact that he has not been sworn into office does not mean that he has not been appointed to that office.

The issue in this appeal is not the jurisdiction of the learned trial Chief Judge to function in his capacity as a Justice of the Supreme Court, which by the clear provisions of section 254(1) of the 1979 Constitution can only be invoked after he had been sworn into that office, but the jurisdiction of the learned trial Chief Judge to continue to function in the office of a trial judge on the Anambra State High Court Bench after the date of his appointment as a Justice of the Supreme Court of Nigeria, though yet to be sworn into that office.

I hold the considered view that by the fact of the appointment of the learned trial Chief Judge as a Justice of the Supreme Court of Nigeria, he ceased to be a trial judge and took on the robes of a Justice of the Supreme Court irrespective of the fact that he was yet to be sworn in since his swearing in remains relevant only to his assumption of office of Justice of the Supreme Court of Nigeria- see the decision of this Court in the case of *Ogbuinyinya vs Okudo* (1979) All NLR 105 at 116.

On the Government Notice No. 149 published in the official Gazette; it is very clear that it is not relevant to the determination of the appeal in view of the fact that the said Gazette was neither pleaded nor tendered and admitted in evidence before the court. It therefore grounds to no issue being evidence on facts not pleaded. That apart, the Gazette is dated 4th March, 1993 but purports to report on events that purports to have taken place on 13th September, 1993 - months

before the said events took place. The Gazette cannot be said to have retrospective effect as the relevant event reported therein was not in the past but in the future. To put it mildly, I hold the view that the Gazette, in so far as it contains information relevant to the appointment of the learned Chief Judge to the Supreme Court of Nigeria which it reports to have taken place on 13th September, 1993 when the Gazette itself is dated 4th March, 1993 appears to be very much suspect.

In conclusion, I agree with the reasoning of my learned brother MOHAMMED, JSC that the appeal is not meritorious and ought to be dismissed and consequently ordered accordingly. I abide by all the consequential orders made in the said lead judgment including the order as to costs.

Appeal dismissed.

D

CHUKWUMA-ENEH JSC

In this matter the plaintiff (appellant) has appealed against the decision of the Court of Appeal (Enugu Division) delivered on 8/2/2001 declaring the decision of the High Court given on 20/7/1993 as null and void as the trial Chief Judge, Hon. Justice A. I. Iguh, (as he then was) has lost the jurisdiction over the matter on having in the course of the proceedings in the matter been appointed a Justice of the Supreme Court.

This matter has been commenced as an action in negligence in that about 14/3/89 at Onitsha, the plaintiff has agreed to hire for use by the defendants a certain earthmover known as FD-20 Fiat Allis Bulldozer for an indefinite period and thereafter its return to the plaintiff at the rate of N2,500 per diem. The plaintiff has claimed against the defendants the sum of N5,222,500 in negligence made up of special and general damages or alternatively the sum of N5,222,500.00 being special damages in bailment.

In the course of hearing of this matter about June 1993, the aforesaid presiding Chief Judge has been elevated to the Supreme Court Bench. The appointment apart from having been announced through the electronic media, it has been published in various Law Reports including Nigerian Weekly Law Reports starting with the edition of (1993) 4 NWLR (Pt.288) and in its every other subsequent

parts thereafter.

In the light of the appointment, the defendants in this suit have raised the issue of competency of the proceedings in view of the apparent want of jurisdiction to deal with the matter any longer by Hon. Justice A. I. Iguh.

The trial court presided over by Hon. Justice A. I. Iguh, Chief Judge (as he then was) on 4/6/1993 has ruled on the application on the issue of want of jurisdiction having been raised as at page 10 of the supplementary record of appeal as follows:

"It seems to me that the facts in the Ogbuinyinya case are clearly distinguishable from the situation that has arisen in this case. The appointment of Nnaemeka Agu to the Court of Appeal was with immediate effect in the Ogbuinyinya case as against the present situation in which it is clearly decreed that my appointment will not take effect and shall only take effect on a future date to be published and on which date I would be sworn in. In the circumstances and after due consultation with the C.J.N., it is clear that I remain in my current post in this state pending further action. Unlike in the Ogbuinyinya case, my appointment in issue is yet to take effect."

In the result the case has proceeded to it's final decision of 20/7/1993 given by Hon. Justice A. I. Iguh Chief Judge (as he then was) in favour of the plaintiff. The defendants being aggrieved by the decision have appealed to the Court of Appeal raising 10 grounds of appeal from which they have distilled 8 issues for determination. The 3rd party as the 2nd respondent to the appeal filed no brief of argument and has not been present in the court below on 13/11/2000 at the hearing of the appeal. At the court below the defendants are the appellants and the plaintiff is the respondent. The only issue contested in the appeal has raised the issue of jurisdiction to continue and determine the matter. The court below on 8/2/2001 on allowing the appeal on the issue of jurisdiction has made no declarations with regard to the other issues raised for determination and discussed by the parties in the briefs of argument. In that regard the court below has declared that:

".....the appeal succeeds on the ground that the learned trial Chief Judge had no jurisdiction to continue the case after he had ceased to be a Judge of the Anambra State High Court following his appointment to the Supreme Court Bench. Accordingly, I set aside

the judgment of the Onitsha Judicial Division of the Anambra State High Court given on 20/7/1993 in Suit No.0/239/89.”

It is against this decision that the plaintiff (appellant) by a notice of appeal dated 8/5/2000 containing two grounds of appeal has appealed the matter to this court. The plaintiff is the appellant and the defendants, the respondents in this court in this appeal. The parties including the third party have filed and exchanged their respective briefs of argument. The plaintiff (appellant) in his brief of argument has raised the sole issue for determination as follows:

“Whether the verdict of the lower court is right in view of the relevant notification published in the Federal Republic of Nigeria Gazette No.37 Vol.80 of 4th March, 1993.”

The 1st and 2nd defendants/respondents have raised also a single issue for determination to wit:

“Whether the trial court had the jurisdiction to conclude the trial at the High Court on 20/7/93 when the learned trial Chief Judge was appointed as a Justice of the Supreme Court in June 1993.”

The Third Party/Respondent in its brief of argument has raised one issue for determination to wit:

“Whether the Court of Appeal was right when the court held that the trial Chief Judge lacked the jurisdiction from 4/6/93 up to 20/7/93 to continue with the proceedings and to deliver judgment on 20/7/93.”

If I may observe all the aforesaid issues for determination are coterminous in questioning the jurisdiction of the trial court to continue with this matter as from 4/6/93 to the final judgment; in that wise, as from the moment of the supervening event as the announcements and publications in the media and in the law reports of the said appointment. The three issues can be taken together.

The plaintiff/appellant has argued that the basis of the finding of the lower court that Iguh C. J. (as he then was) has been elevated to the Supreme Court Bench prior to 3/6/93 though sworn in on 13/9/93 has been founded on a mere conjecture in so far as the court is obliged to take judicial Notice of Govt. Notice No. 149 headed “Appointment of Judges” and published in the Federal Republic of Nigeria Official Gazette No. 31 Vol.80 Lagos 4th March 1993 which publication has unequivocally stated that Justice Anthony Ikechukwu Iguh has been appointed to the Supreme Court Bench on 13/9/93

as the effective date of appointment. And so, it has been submitted that the defendants having failed in regard to discharging the onus of proof on them on this critical issue, that is to say, upon the backdrop of the principle: *Omnia presumuntur rite esse acta*, which maxim has been expressed in section 150(1) and (2) of the Evidence Act, the lower court ought to have rejected forthrightly the defendants' submission on the question of want of jurisdiction of the presiding Chief Judge, A. I. Iguh, Chief Judge (as he then was) to continue and determine the matter as his Lordship rightly has done. See: *LAPADE APATAKU & ORS. V. IDOWU ALAB1* (1985) 1 NSCC (Vol.) 294 at 296 paragraphs 51-53. The court is urged to allow the appeal and set aside the order to hear the case *de novo* as declared by the court below and in lieu thereof to enter judgment in favour of the plaintiff/appellant thus resolving the issue of want of jurisdiction of the trial court to deal with the instant matter in favour of the plaintiff/appellant and send the case back to the court below to resolve all the other issues unresolved by it in the appeal before it.

The 1st and 2nd respondents have argued that the appointment has been to the knowledge of the learned trial Chief Judge as has been ruled upon by the said trial court on 4/6/1993 as contained at p.10 Vol. 11 of the of supplementary Record of Appeal. They have submitted that the said appointment has been published in the Guardian Newspaper of 28/6/93 and the Nigerian Weekly Law Reports starting from the edition of (1993) 4 NWLR (Pt.288) until 13/9/93, the date of the swearing in. It is contended as far as the said Gazette is concerned that the publication in the gazette is material only in making it known to the public that 13/9/93 is the effective date of swearing-in, even moreso that the Ogbuinyinya case has drawn a clear distinction between "appointment" *per se* and "swearing-in" into offices of situations as in this case, of a Justice of the Supreme Court/Court of Appeal. It is alleged as absurd that the said Gazette has been backed dated to 4/3/1993 long even before the announcement has been made. It is also submitted that the plaintiff has not before filing the instant brief of argument proffered any documents on the said appointment and swearing-in of Hon. Justice A. I. Iguh as the said Gazette has not been brought to the notice of the two lower courts before their respective decisions on the issue even though it has issued as far back as 4/3/93. The court is urged to dismiss the

appeal; uphold the decision of the court below setting aside the decision of the Onitsha High Court.

The third party's case has firstly noted that the onus of proof in this case lies on the person who alleges want of jurisdiction to prove it. See also *APATAKU & ORS. V. ALAB1* (1985) 1 NSCC P.294 at B 296 paragraphs 51-53 and Section 135 (1) of the Evidence Act. It has submitted that the fact of the appointment of the learned Chief Judge to the Supreme Court Bench having been admitted in the ruling of the trial court of 4/6/1993 (which is sufficient to disqualify C him) needs no further proof. See Section 75 of the Evidence Act. It has also referred to and relied on the publications of the appointment in the Nigerian Weekly Law Reports (NWLR) beginning with the edition of (1993) 4 NWLR (Pt. 288) until 13/9/93 when his Lordship has been sworn in as a Justice of the Supreme Court (JSC) and D also on the case of *OGBUINYINYA V. OKUDO* (supra) as deciding that once a Judge has been appointed a Justice of the Supreme Court/ Court of Appeal, the Judge ceases to function as in this case as a High Court Judge. Furthermore, it has relied on Sections 211(2) and 254(1) of the 1979 Constitution as amended for these submissions E and even then that it is also the case whether or not his Lordship were to have been appointed as a Justice designate as contemplated in the Ogbuinyinya case. See *MADUKOLU V. NKEMDILIM* (1962) 2 ANLR 581. And that in the scenario, the Federal Republic of Nigeria official gazette No.37 Volume 80 of 4/3/1993 giving the effective date F of appointment of Hon. Justice A. I. Iguh to the Supreme Court Bench as 13/9/93 will not save his judgment delivered on 20/7/93 in the instant matter when it has become clear even to his Lordship that he has already been appointed to the Supreme Court Bench; and G so, that the publication in the said gazette has raised a rebuttable presumption. See: *GBAFE V. GBAFE* (supra). It has submitted that even though the said gazette has not been available to the High Court and court below when their respective decisions have been decided that this court, all the same, is entitled to look at it, and to reject the H same as proof of his Lordship's appointment as at 20/7/1993 when he delivered the said judgment in this case, which appointment has already been announced in the media and published in the Nigerian Weekly Law Reports. It has submitted that the gazette has to be seen purely as a notification of the effective date of swearing in of His

Lordship to commence performing as a Justice of the Supreme Court. The third party has therefore urged the court to dismiss the appeal and affirm the judgment of the court below.

The foregoing has succinctly represented the state of the respective cases of the parties in this appeal.

I think I must start my discussion of this case by examining one or two crucial points thrown up thereof by the objection taken in limine as to want of competency of the proceedings in this matter by reason of the supervening event of the announcement and publication in the electric media and Law Reports of His Lordship's appointment to the Supreme Court Bench. I must emphasise that it is not the law that a party making such objection particularly in the middle of hearing a matter as the instant one does not need to swear to an affidavit which otherwise would strengthen his case on the facts relied upon. Besides, it is well known that facts form the foundation of the law-. It is my view in the circumstances of this case that a formal notice of motion supported by an affidavit and a counter-affidavit if being opposed ought to have been filed with all the materials including critical documents and instruments as the gazette relied upon for and against the objection albeit duly exhibited to the affidavits. If this procedure had been followed the hoopla that has been raised in this case about the record of appeal of the trial court as being incomplete for not containing the relevant proceedings of 4/6/1993 would have been obviated while also the said gazette in the eye of the storm in this matter would have been properly brought to the notice of the two lower courts for their respective findings particularly as the said gazette has already issued from the Government Printer as far back as 4th March 1993 - a long time before the proceedings of 4/6/1993 (as quoted above) and the judgments of the trial court and the court below in this case.

As has been found in *NORTH STAFFORDSHIRE RTY. CO. V. EDGE* (1920) AC per Lord Birkenhead L. C. and referred to with approval in *AGU V. IKEWIBE* (supra):

"The efficiency and authority of a Court of Appeal and especially a final Court of Appeal are increased and strengthened by the opinion of the learned Judges who have considered these matters below. To acquiesce in such an attempt as the appellants have made in this case is in effect to undertake decisions which may be of the

highest importance without having required any assistance at all from the Judges in the courts below.”

B There is no doubt that the opinion of this court in this case would have been strengthened and further enhanced by the lower courts representing in their decisions their perception of the parties’ respective cases on this issue and more particularly their respective findings on the issue of the said gazette which is central to this appeal in this court. See: OGUMA V. IB.W.A LTD. (1988) 1 NWLR (Pt. 73) C 658 at 672. The said gazette regrettably has not even been produced before this court even then all sides to this appeal have not only looked at and read it they have made the government notice No. 149 published in the said gazette of the said appointment, the sole critical issue of discussion in this appeal.

D There can be no gain-saying that the introduction of the said official gazette in this matter for the first time in this court has raised a substantial issue of law or mixed law and fact; and as to the propriety of introducing further evidence as regards the controversy surrounding the date of His Lordship’s appointment, that is to say, whether it E is before 20/7/93 i.e. the date of the trial court’s decision or it has taken effect from 13/9/1993 as per the said gazette, the appellant thus has introduced in this appeal a fresh issue without leave of court.

F It is important to observe that the parties to this matter have not challenged the propriety of introducing the said gazette at this stage into these proceedings. Indeed, all the parties are agreed on it in that they have copiously referred to and relied on it in canvassing their respective submissions here; although they can waive proving the gazette.

G It is settled that in civil cases formal proof of a document can be waived. See; OKEKU V. OBIDIFE (1965) 1 ANLR 50; (1965) NMLR 113. See Section 112 (1) (a) of the Evidence Act. That is to say that as in this case the said appointment of His Lordship to the Supreme Court Bench may be proved by the production of the said H gazette before the court and as provided in Section 112; it shall be treated as prima facie proof of any fact of a public nature contained therein which it has been intended to convey. And so, generally such instrument as the said gazette having been placed before the court it has to be admitted in evidence under Sections 112 and 115 of the

Evidence Act and be marked as an exhibit as in the Ogbuinyinya case where the gazette was so marked as Exhibit "SC 1". The said gazette has not been produced before this court and there is no way of the presumption of genuineness can enure in its favour. See: also N.E.C. V. WODI (1989) 2 NWLR (Pt. 104) 444 at 454. In the interest of justice, the court would have been prepared to overlook proving of the said gazette since the parties have not taken any objection over that issue even although the appellant at the oral hearing of the appeal in this court has lost the opportunity of bringing the said gazette to the notice of the court or in any other way by tendering it from the Bar.

The serious implication for not proving the gazette by producing it before this court is that this court is precluded from making inquiries by itself for its own information from the source of the said gazette when it would have been otherwise legitimate and proper for it to do so i.e. refer to, look at and read it by its mere production from the Bar. This has not been done here. In the absence of formally producing the said gazette before this court and it being accepted by this court as evidence of its content; there is no way this court can act on said gazette that is not present before it.

This takes me to the important question of the propriety of introducing for the first time in this court the said gazette on the issue of His Lordship's appointment to the Supreme Court Bench without leave of this court first obtained and this is even moreso when the said gazette has existed since 4/3/1993. The fact that the parties (particularly the appellant having relied on it as the basis of his sole issue for determination) has thereby raised a new issue in the appeal is indisputable. See: AGU V. IKEWIBE (1991) 22 NSCC (Pt. 1) 385. This is moreso as the issue of the said gazette has not surfaced before the two lower courts. It is settled that an appellant on appeal from the court below may not take a point which he has not taken or argued in the court below - this is in accord with the principle of rehearing of the case in this court. The only qualification is that an appellant is entitled to challenge the judgment of the court below on the ground on which it has been decided and particularly where it has raised a substantial point of law moreso on issue of jurisdiction. See: ANISMINIC V. FOREIGN COMPENSATION CORPORATION (1969) 2 A/C 147 at 170 followed by this court in the case of BARCLAYS

BANK LTD. V. C.B.N. (1976) 6 SC. 175, It cannot be said that the said gazette has not challenged the decision of the court below on the very critical ground upon which it has been decided, that is, on his Lordship's appointment vis-a-vis the power of Hon. Justice Iguh to continue and conclude this matter. The issue of jurisdiction can be raised at any time, even on appeal and can be taken suo motu by the court. The only qualification is where it seems most likely that further relevant evidence would have been called. An official gazette as the instant one is a public document within the operations of the provisions of sections 97 (1) (c), 111, 112 and 114 of the Evidence Act and as I have said above it is proved in proceedings in court by mere production of the Gazette followed by its formal tendering not necessarily through a witness on Oath and marking it as an exhibit in the proceedings. The court must then scrutinize it in considering the matter before it and as I said above proving of a document can be waived. See: OGBUINYINYA V. OKUDO (supra).

Furthermore, if I may repeat, it is judicially noticed on its mere production and at Common Law it is evidence of acts of State but not acts of public officials. However, at this stage of the proceedings raising new issues as to law, facts and calling of new evidence cannot be foisted upon the court through the platform of introducing the said gazette thus raising fresh issues for the first time in the matter without leave of court. This is definitely-unacceptable in the circumstances. However, there can be no doubt as to the power of an appellate court as this court notwithstanding the settled principles established both by the rules of this court and such decisions as STOOLOF ABINABINA V. ENYIMADA 12 WACA 171 and EJIOFODOMI V. OKONKWO (1982) 11 SC.74 at 93-98 that without the leave of court, an appellant cannot be heard on a point of law not raised in the court below; the court can even on its own motion in the interest of justice deal with a point raising fresh issue which has raised a substantial point of law, and moreso where it goes to the jurisdiction of the trial court although such point has neither been raised before the trial court nor raised and argued as in this case on appeal in the court below. See: OTEGBADE V. ADEKOYA (1962) 2 ANLR 52, and see also AGU V. IKEWIBE (supra) - In this case, this court cannot embark upon determining the fresh issue as per the said gazette even as it touches on the jurisdiction of the trial court without the said gazette

being placed before this court as the said gazette is the fulcrum of that argument. In the result, I find that the said gazette has not scaled through the first precondition of being proved as provided by the law i.e. by its mere production before this court. I will in the circumstances discontinue the said gazette as most irrelevant and improperly introduced in dealing with this matter. B

In sum, what I have been trying to say here is that the said gazette is not present in this court, and this court therefore cannot be expected to speculate on the contents of the said government notice No. 149 on the said appointment in the said gazette. It would have otherwise introduced new evidence which has raised a fresh issue for the first time in this court and being a matter not having been considered in both lower courts leave of this court has to be first sought and obtained. For the avoidance of doubt leave of this court has not been sought and obtained in regard to introducing the said gazette in this court. On both grounds, the appellant's arguments here cannot be founded upon the said gazette. C D

In the Ogbuinyinya case the gazette i.e. Exhibit SC. 1 has been produced before this court from the Bar. So also in the cases cited in the Ogbuinyinya case including MAJEKODUNMI V. THE QUEEN E (1952) 14 WACA 64 at 66-67 and VINCENT ISIBOR V. THE STATE (1971) 1 ANLR 248 and a foreign decision as in BAWA SARUP SINGH V. THE CROWN TN THE HIGH COURT LALORE In each of the above cited cases the gazette in question has legitimately found itself F before the court. This is not the case in this matter. It is on these grounds that I have discountenanced the said gazette as it is not proved in this appeal.

The parties' attempt to foist the said gazette on this court, through the back door is therefore unsuccessful. I have endeavoured in the foregoing discussion to express my opinion on the said gazette. In the circumstances, the proof of the appointment of His Lordship has to be proved by another means as the original gazette of 4/3/93 has not been formally produced here and the court is precluded from speculating on its contents on the said appointment. The said appointment has otherwise been established by another means as I have to fall back for the resolution of this issue on the same materials as have been placed before the lower courts; firstly these include the ruling of 4/6/1993 - showing that His Lordship A. I. Iguh C.J. (as he then was) H

has been aware of his appointment to the Supreme Court Bench; hence, even on this ground alone, I cannot see anyway the decision of the trial court of 20/7/93 can stand. His Lordship's appointment to the Supreme Court Bench clearly has been prior to 4/6/1993 when the trial court has ruled on the objection whether or not to continue
 B with the matter as from 4/6/93 when the objection has been taken. Furthermore, there is credible evidence of media announcement and publications in the Guardian Newspapers and the Law Reports as from NWLR (part 288) to the date of swearing-in on 13/9/1993. I
 C think the lower court has summed up other modes of proving the said appointment when at pages 132 last paragraph to the first paragraph at page 133 of the record Vol.11 whereof it has held thus:

*"I agree with learned Senior Advocate for the respondent that publication in the newspapers without offering evidence of the pub-
 D lication is not sufficient to prove an appointment notwithstanding the general euphoria with which the announcement of such a prominent appointment to the apex court is always greeted within and outside the professional coterie. But publication in the Law Reports is a different kettle offish and one which this court is entitled to take judicial
 E notice of as a source of judicial authorities for it by virtue of sub-section 74 (1) (j) of the Evidence Act the court is enjoined to take notice of 'the names of the members of the court' which must include the wider membership of the upper and lower courts at large and by virtue of sub-section (3) thereof implies making reference to
 F a book or document taking judicial notice of publication in the Law Reports as regards appointment to judicial offices is, in my view, quite legitimate and proper. Therefore, I do not share the view of learned Senior Advocate for the respondent that to prove the appointment
 G of a judicial officer to a higher office the instrument of appointment must be produced as an inflexible rule. If we take the statements of the law by the exponents of the law from the Law Reports as a matter of course it will be illogical to ignore any publication relating to the career advancement of the judicial officers who are the
 H authors of the opinion contained in the Reports. True enough, Ogbuinyinya v. Okudo, supra, based the date of appointment of the judicial officer concerned on the Government Notice in the Federal Government Gazette the decision does not exclude other modes of proof where in this era of dearth of government publica-*

tions the appropriate official Gazette is not available.....

The notification that Hon. Justices Adio and Iguh would be sworn in on a date to be announced later was repeated in each part of the Law Reports from part 289 to part 302 (covering the period of 14th June to 13th September) and in part 303 of 20/9/93 there was the notification that the two justices had been sworn in on 13th September, 1993. From these publications there is, in my view, a rebuttable presumption that the learned trial judge, A.I. Iguh, C.J., as he then was, was elevated to the Supreme Court Bench prior to 3rd June 1993 but was not sworn in until 13th September, 1993. If learned Senior Advocate for the respondent who made the instrument of appointment of the learned trial Chief Judge the fulcrum of his argument did not produce evidence to rebut the presumption it becomes irrebuttable and theorizing about the nature of the appointment, whether retrospective, contemporaneous, prospective or conditional an empty rhetoric: see *Ogbunyiya v. Okudo (No.2)*, (1990) 7 SCNJ. 29, 43-45 & 49. In view of this, the fact is settled that Iguh, C.J., as he then was, was elevated to the Supreme Court Bench prior to 3/6/93 though sworn in as a justice of that court on 13/9/93.”

Since I have discountenanced the government Notice No. 149 of the said gazette with regard to the appointment of his Lordship, I see no useful purpose in examining the question of when an appointment as in this case takes effect.

The foregoing abstract cannot be faulted in its reasoning on the peculiar facts of this case. I adopt it in deciding this case. It is for the above reasons and conclusion and a much fuller discussion of the issues raised in this matter in the judgment of my learned brother Mohammed JSC which I have read before now that I agree with him that, there is no merit in the appeal and that it should be dismissed. I also dismiss it and endorse orders contained in the said judgment.

MUNTAKA- COOMASSIE JSC

I have had the privilege of reading in draft the lead judgment of my Lord Mahmud Mohammed JSC in this appeal. I entirely agree with it.

The facts are meticulously and carefully stated all the live issues

presented to us for and considerations were completely thrashed out. In my view his Lordship in his characteristic manner, thoroughly and correctly arrived at a just conclusion. I cannot improve on the reasons and conclusions arrived at I therefore adopt them with respect, as mine. For those reasons he relied upon to dismiss the appeal I too
B dismiss this appeal for lacking in merits. The decisions of the court below remitting the case to the retrial court on hearing afresh is sustained, without any further delay. No order as to cost.

C

D

E

F

G

H