

SUPREME COURT OF NIGERIA
11TH DECEMBER, 2009. SC. 76/2007
CORAM:-D. MUSDAPHER, A. M. MUKHTAR,
I. F. OGBUAGU, J. A. FABIYI, O. O. ADEKEYE, JJSC

1. PROFESSOR B. J. OLUFEAGBA
2. PROFESSOR S. O. ODULEYE
3. PROFESSOR E. E. ADEGBIJA
4. PROFESSOR AKANJI NASIRU
5. PROFESSOR A. S. ANJORIN
6. PROFESSOR E. O. ODELOWO
7. PROFESSOR A. SHITTU-AGBETOLA
8. PROFESSOR BISI OGUNSINA
9. PROFESSOR A. E. ANNOR
10. DR. OREYUSUF
11. DR. B. S. ADANA
12. DR. BODE OMOJOLA
13. DR. FRANCIS OYEBADE
14. DR. O. E. ALANA
15. DR. YETUNDE OSUNFISAN
16. DR. (MRS.) O. O. OLORUNTOBA-OJU
17. DR. P.O. OLATUNJI APPELLANTS
18. DR. R.J.E. NDOM
19. DR. K.A. ADENIJI
20. DR. E. A. AFOLAYAN
21. DR. O. O. OBILODAN
22. DR (MRS.) F. FAGBEMI
23. DR. M.D. ADESINA
24. DR. I. O. OLAOYE
25. DR. B. A. SOLAGBERU
26. DR. A. B. MAKANJUOLA -
27. DR. (MRS.) A. A. OLATUNJI
28. DR. I. K. KOLAWOLE
29. DR. S. AJAYI
30. DR. O.R. FABAYO
31. DR. S. O. OYEWO
32. DR. TAIYE ALUKO
33. MR. O. OGUNBIYI
34. MR. E. A. ADIGBOLE

- 35. MR. YINKA ADIGUN
- 36. MR. SAM AMUSAN
- 37. MR. A. S. AJIBOYE
- 38. MRS. M. B. MAKANJUOLA
- 39. MRS. R. B. ADEKEYE
- 40. MR. TAIYE ADEOLA
- 41. MR. FELIX AKINSIPE
- 42. MR. O. T. OKEWANDE
- 43. MR. O. ODUNMADE
- 44. MR. A. F. F. FADIPE

AND

- 1. PROFESSOR SHUAIB OBA
ABDUR-RAHEEM
(Vice-Chancellor University of Ilorin)
- 2. TUNDE BALOGUN
(Registrar University of Ilorin)
- 3. UNIVERSITY OF ILORIN
- 4. THE GOVERNING COUNCIL
OF UNIVERSITY OF ILORIN

..... RESPONDENTS

PARTIES - Appeals - Juristic personality - Death of co-parties - Effect - Where a sole party to an appeal dies - And is not substituted - The appeal ends - But this is not the case where there are surviving co-parties (H1)

ACTIONS - Cause of action - Survival - Upon death of plaintiff - Where several plaintiffs jointly sue - For benefits accruing severally to them - The suit survives to surviving plaintiffs - Upon the death of any of the plaintiffs (H2)

APPEALS - Basis - Points not decided against appellant - An appeal presupposes the existence of a decision appealed against - There cannot be an appeal against what had not been decided - Against a party (H3)

MASTER & SERVANT - Conduct of staff - Scandalous conduct - How determined - It can only be determined in a judicial enquiry -

Where fair hearing will be afforded the staff who is accused (H4)

JURISDICTION - Appellate courts - Conclusions not supported by record - An appellate court is bound by the record - It has no jurisdiction to draw conclusions - Which are not supported by the record (H5)

CONTRACTS - Statutory provisions - Waiver - Applicability - Statutory provisions cannot be waived - As no one is permitted to contract out or waive - A rule of public policy (H6)

MASTER & SERVANT - Reinstatement - Interim employment - Effect - Securing employment following unlawful dismissal is not a bar to reinstatement - But affected staff has to account for overlapping remuneration (H7)

MASTER & SERVANT - Allegation of misconduct - Applicability of Trade Dispute Act - Since respondents maintain that the termination - Was not based on participation in strike - The provisions of the Act are inapplicable (H8)

ESTOPPEL - Issue estoppel - Industrial Arbitration - Applicability - As neither the parties nor the subject matter in this case - Is the same as that in the industrial arbitration - Issue estoppel cannot apply (H9)

FACTS

Before the Federal High Court Ilorin, plaintiffs/appellants sued defendants/respondents claiming sundry reliefs by which they challenged their various dismissals from the employment of the 3rd respondent. The relevant facts are that appellants, who are all lecturers in the employ of 3rd respondent, partook in a nationwide strike engaged on by Academic Staff Union of Universities (ASUU). While the strike was lingering, respondents issued an ultimatum for appellants to resume work which ultimatum was disobeyed, whereupon respondents purported to terminate appellants respective appointments vide a letter titled "cessation of appointment" variously served on them, for an alleged failure to discharge their duties. It is the contention of appellants that they could not be so dismissed without following the

disciplinary procedure laid down by the University of Ilorin Act which procedure required that they be granted fair hearing.

It was in evidence that some of the appellants have taken up substitute employment while waiting for the resolution of their dispute with respondents. Moreover, two of the appellants on record died before the conclusion of trial at the High Court. At the end of hearing, trial court found in favour of appellants and gave judgment as prayed, the terms of which included an order of reinstatement and payment of all salaries and allowances. Aggrieved, respondents appealed to Court of Appeal which allowed the appeal by majority decision. It held inter alia, that the death of two of the appellants on record without substitution was fatal to the case of the appellants. It also held that appellants, by the terms of the memorandum of appointment variously signed by them, had waived their statutorily guaranteed right to fair hearing. Dissatisfied, appellants have brought this appeal against the judgment of Court of Appeal.

ISSUES FOR DETERMINATION

“1. Whether the majority justices of the court below were right in holding that the whole action of the plaintiffs/appellants was rendered incompetent by reason of the death of two (2) out of the forty-four (44) plaintiffs before the case was concluded at the trial court.

2. Whether the majority justices were right in holding that the appellants’ appointments were properly terminated by the respondents by virtue of section 15(3) of the University of Ilorin Act Cap. 455 Laws of the Federation 1990 and without regard to section 15(1) on procedure for termination of appointment

3. Whether the decision of the learned majority justices of the court below, that the appellants were offered opportunity of fair hearing by the respondents (and that the appellants rejected this) before their appointments were terminated was based on any pleadings and evidence on record.

4. Whether the learned majority justices of the court below were right in holding that the appellants waived their statutorily guaranteed rights to fair hearing merely by reason of signing Memorandum of Appointment on assumption of duty.

5. Whether the majority justices of the court below were right in holding that the appellants are not entitled to order for reinstatement.

ment, and for payment of their salaries, allowances and entitlements. And whether the said justices were right in holding that the appellants have secured alternative employment elsewhere and that their positions in the University have been filled by the respondents.

6. Whether the majority justices of the court below were right in holding that the appellants were not entitled to their salaries, allowances and other entitlements by reason of alleged participation in strike.

7. Whether the majority justices of the court below were right in holding that the appellants' case was caught by issue estoppel."

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

Juristic personality - Death of co-parties - Effect

1. It goes without any shred of doubt that the court can only assume jurisdiction over juristic persons. If a sole party to an appeal dies and there is no substitution, it hardly needs any gain-saying that the appeal ends.

In this appeal, it is agreed that three (3) out of the forty-four (44) appellants have passed on. I do not for one moment feel that this should invalidate the whole case on appeal. This is because each of the remaining 41 appellants is in court in his/her own right, and if any claim is granted, such will ensure to each of them individually and/or personally. Without any doubt, I say that the whole case cannot be struck out for this reason as strenuously urged by the respondents. (p. 2681 D)

Cause of action - Survival - Upon death of plaintiff

2. In this action, it is clear that for convenience and avoidance of multiplicity of actions, the suit was filed by the 44 plaintiffs jointly while the benefits are to accrue to each of them severally. There is sense behind same as pointed out in the case of *Ige v. Farinde (1994) 7NWLR (Pt. 354) 42*. In the prevailing circumstance of the death of two of the 44 plaintiffs in a joint action, the same survives to the other plaintiffs. I agree that it is only in actions for libel or defamation or sedition that cause of action cannot survive a dead plaintiff as pronounced by this court in *Oguigo v. Oguigo*. (p. 2686 E)

APPEALS - Basis - Points not decided against appellant

3. An appeal ordinarily presupposes the existence of a decision appealed against. In the absence of such a decision on a point, there cannot possibly be an appeal against what had not been decided against a party. Since there was no decision by the trial court in respect of the point relating to ‘good cause’ advanced before the court below, it lacked the vires to consider same on appeal.

It should be pointed out here that the respondents who maintained at the trial court that the appellants were not sacked on disciplinary grounds or for any reason cannot turn round at the court below to canvass the point relating to ‘good cause’. (p. 2688 F)

Conduct of staff - Scandalous conduct - How determined

4. The 4th respondent cannot jump into a conclusion under section 15 (3) of the Act to say that the conduct of a staff is of scandalous or disgraceful nature and as such the staff concerned is no longer able to discharge the functions of his office without giving him notice of the allegation and opportunity of being heard. Due process prescribed by section 15 (1) of the Act must be followed as ‘good cause’ can only be determined in a judicial enquiry where fair hearing will be afforded the staff who is accused. (p. 2689 D)

JURISDICTION - Conclusions not supported by record

5. An appellate court is always bound by the record and the record only. It has no jurisdiction to go outside the record and draw conclusions which are not supported by the record.

It is glaring to me that the conclusion in the lead judgment of the court below as well as the concurring judgment that the appellants were offered opportunity for fair hearing which they declined is not borne out of the record. It is not the case of the respondents. It was not pleaded and the evidence of D.W.I, as pointed out, is to the contrary. (p. 2692 E/G)

Statutory provisions - Waiver - Applicability

6. The letters of appointment, the Memorandum of Appointment curled from Exhibit 81- the Senior Staff Regulations are made subject to the University of Ilorin Act., Cap 455 and relevant provisions of the 1999 Constitution in their implementation. In effect, the provisions of the Senior Staff Regulations - Exhibit 81 are subservient

and subordinate to the applicable provisions of section 15 of the University of Ilorin Act, Cap 455 and Section 36 (1) of the 1999 Constitution. The provisions of the stated statutes cannot be waived as no one is permitted to contract out or waive a rule of public or constitutional policy like fair hearing which is guaranteed under section 36 (1) of the 1999 Constitution. Parties cannot by conduct or consent alter the Constitution or a statute. (p. 2694 D) B

Reinstatement - Interim employment - Effect

7. I note that PW.2 admitted that some of the appellants secured employments elsewhere ‘to keep body and soul together’. This, on its own, does not constitute a bar to their reinstatement. In *Eperokun v. University of Lagos* (supra) at page 117, it was held by this court that the appellants therein were entitled to reinstatement even if they had secured other employments during the pendency of the case and subject only to harmonization of any overlapping remuneration. C
D

In this case, the respondents are obliged to reinstate the living appellants to their offices which have been disrupted by this litigation. Any appellant who secured ‘employment’ during the impasse should account to the respondents for any overlapping remuneration in his/her own interest. (p. 2695 H) E

Allegation of misconduct - Applicability of Trade Dispute Act

8. It is extant in Exhibit 1 that the respondents maintained that the appellants’ appointments were not terminated for any participation in strike action. Since the matter has nothing to do with strike according to the respondents, application of the provisions of the Trade Disputes Act is of no moment. Parties should not employ a game of hide and seek. F
G

This matter has to do with allegation of misconduct levelled against the appellants for which they were not taken through the procedure laid down in the applicable section 15 of the University of Ilorin Act, Cap 455, 1990. (p. 2697 D) H

Issue estoppel - Industrial Arbitration - Applicability

9. A plea of issue estoppel by a defendant is geared at preventing a plaintiff from re-litigating an issue previously decided in a former suit. The parties and subject matter must be the same.

In this matter, it is beyond argument that the parties before the IAP are not the same with the parties in this case at the trial court. The case at the IAP was a trade dispute. The case at the trial court involved master and servant relationship in which the appellants claimed declaratory and mandatory orders which do not fall within the jurisdiction of IAP. The alleged award was withdrawn by the Minister of Labour.

With all the above, it is clear that issue estoppel cannot avail the respondents. (p. 2698 C)

NOTABLE POINTS OF INTEREST
FABIYI JSC

1. Waiver is the voluntary relinquishment of a right

Waiver has been defined in Black's Law Dictionary, 5th Edition at page 1417 as the intentional or voluntary relinquishment of a known right or such conduct as warrants an inference of the relinquishment of such right. The renunciation, repudiation, abandonment or surrender of some claim, right, privilege or of the opportunity to take advantage of some defect, irregularity or wrong. (p. 2694 B)

OGBUAGU JSC

2. Concurring judgment has equal weight with leading judgment

In paragraph 7.09 at page 17 of the Respondents' Brief, it is submitted that Ground 4 of the grounds of appeal is/was predicated on the concurring opinion of Abdullahi, JCA and therefore, that it is incompetent and liable to be struck out. I note however, that in the case of Emeka Nwana v. Federal Capital Development Authority & 5 ors. (2004) 13 NWLR (Pt.889) 128 @ 140 -141: (2004) 7 SCNJ. 90 @ 97 - 98, Niki Tobì, JSC stated as follows:

"A concurring judgment has equal weight with or as a leading judgment. A concurring judgment compliments, edifies and adds to the leading judgment. It could at times be an improvement of the leading judgment, when the Justices add to it certain aspects which the writer of the leading judgment did not remember to deal with. In so far as a concurring judgment performs some or all the above functions, it has equal force -with or as the leading judgment in so far as the principles of stare decisis are concerned. (p. 2710 E)

ADEKEYE JSC

3. Persons claiming severally may be joined as plaintiffs

The Rules of the court permit joinder of parties within persons claiming jointly, severally or in the alternative as plaintiffs or defendants so as to avoid multiplicity of actions particularly where they have common interest and common questions of law, and common demand. Judgment of court shall be given to one or more of the parties as may be found to be entitled to reliefs in the action. Such action shall continue upon the death of any of the parties as long as there are survivors appearing in the matter before the court. (p. 2714 E)

REPRESENTATION

J. O. Baiyeshea, SAN; with him S. Ipinlaiye; Mrs. V. O. Awomolo, W. Ismail, O. Oyediran, R. S. Baiyeshea and Mrs. M. O. Belawu for the Appellants.

Yusuf Ali, SAN; with him Dr. W. O. Egbewole, K. K. Eleja, S. O. Oke, A. Tarfa, A. Akoja and N. N. Adeboye for the Respondents.

CASES REFERRED TO

- Okotie v. Olugor (1995) 5 SCNJ 271
- Fairlakes Hotels (1988) 5 NWLR (Pt 92) 1
- Egbe v. Alhaji (1990) 1 NWLR (Pt. 128) 546
- Nwadike v. Ibekwe (1987) 4 NWLR (Pt 67) 718
- Momodu v. Momodu (1991) 2 SCNJ 15 at 21-22
- Ezenwosu v. Ngonadi (1988) 3 NWLR (Pt. 81) 163
- Egbe v. Alhaji (1990) 1 NWLR (Pt 128) 546 at 590
- Madukolu v. Nkemdilim (1962) 2 SCNLR 341 at 348
- Madukolu v. Nkemdilim (1962) 1 All NLR 578 at 594
- Amuda v. Adelodun (1994) 8 NWLR (Pt. 360) 23 at 31
- Kurfi v. Mohammed (1993) 2 NWLR (Pt 277) 602 at 612
- Honika Sawhill Nig. Ltd v. Hoff (1994) 2 NWLR (Pt 326) 22
- Carlen Nigeria Limited v. Unijos & Anr (1994) 1 NWLR (Pt. 323) 63
- Nigerian Nurses Association v. A. G. Federation (1981) 1 FNLR 55 at 60
- ASR Co. Ltd v. O. O. Biosah v. Ede (1995) 3 NWLR (Pt. 385) 564 at 577

STATUTES & RULES REFERRED TO

University of Ilorin Act, Cap 455, L. F. N. 1990, s. 15

Supreme Court Rules, 1999, O. 8 rr. 2 and 9

Federal High Court (Civil Procedure) Rules, 2000, 0.12 rr. 30, 31 and 32

^B Constitution of Federal Republic of Nigeria, 1999, s. 36

LEAD JUDGMENT BY FABIYI JSC

^C This is an appeal against the majority judgment of the Court of Appeal, Ilorin Division handed out on 12th July, 2006 in which it reversed and set aside the judgment of Olayiwola, J. of the Federal High Court, Ilorin delivered on 16th July, 2005.

^D In paragraph 21 of the statement of claim, the appellants herein, as plaintiffs at the trial court, claimed against the respondents herein as defendants thereat as follows:-

“21. WHEREOF the plaintiffs claim against the defendants are as follows:-

^E (a) A declaration that the defendants’ letter dated 22nd May, 2001 to the plaintiffs titled ‘Cessation of Appointment’ purporting to terminate the plaintiffs’ appointment with the 3rd defendant is ultra-vires, null and void and of no effect whatsoever.

(b) A declaration that the plaintiffs are still in the service of the 3rd defendant.

^F (c) A declaration that the defendants are bound to comply with the directive of Federal Government of Nigeria to reinstate the plaintiffs as contained in the letter of National Universities Commission dated 29th June, 2001 with reference NUC/ES/261 to the pro-chancellor of the 4th defendant and the 1st defendant.

^G (d) A declaration that the defendants are not entitled to summarily terminate the plaintiffs’ appointment without complying with the provisions of the University of Ilorin Act Cap. 455 Laws of the Federation and other relevant statutes

^H (e) A declaration that the purported termination of the plaintiffs’ appointment by the defendants under the guise of ‘Cessation of Appointment’ or under any guise whatsoever is contrary to the provisions of the Pensions Act of Nigeria in that plaintiffs are permanent and pensionable staff of the University.

(f) A declaration that the contents of any purported letter of

appointment or memorandum purportedly signed by the plaintiffs cannot override the provisions of University of Ilorin Act Cap. 455 Laws of the Federation 1990 regarding the nature, tenure and discipline of staff of Unilorin and all other matters connected or pertaining thereto.

(g) A declaration that the purported termination of plaintiffs' B appointment by the defendants negates the fundamental rights provisions of the Constitution of the Federal Republic of Nigeria 1999.

(h) An order compelling the defendants to comply with directive of the Federal Government through the National Universities Commission dated 29th June, 2001 with reference NUC/ES/261 to C the defendants to reinstate the plaintiffs.

(i) An order compelling the defendants to reinstate and/or restore the plaintiffs to their posts in University of Ilorin with all their rights, entitlements and other perquisites of their offices. And an order compelling the defendants to pay to the plaintiffs all their salaries and allowances from February, 2001 till the day of judgment and thenceforth."

The defendants filed a joint statement of defence in which they joined issues with the plaintiffs. At the trial, each side of the divide E called two witnesses.

P.W.I was Prof. B. J. Olufeagba. He testified that all the plaintiffs were lecturers of University of Ilorin who were sacked for embarking on strike action as members of Academic Staff Union of Universities (ASUU). Through him, Exhibits 1-261 were tendered and F admitted in evidence. He denied that the plaintiffs received letters of ultimatum asking them to resume work. He maintained that they were not queried and taken through any disciplinary procedure before 'cessation of appointment' letters were issued to the plaintiffs. G He said that the national negotiating team had agreed that no one should be victimized as a result of the strike action. He said that the Federal Government directed the National Universities Commission (NUC) to request the recall of the sacked lecturers vide Exhibit 122 but the defendants disobeyed the directive. He stressed that the H letters of 'cessation of appointment' were based on misconduct. He maintained that neither he nor any other plaintiff was a party to the case between the Federal Government and Academic Staff Union of Universities at the Industrial Arbitration Panel.

PW.2 was Prof. Taiwo Oloruntoba-Oju. Through him, Exhibits 262-265 were admitted in evidence. He testified that lecturers were prevented from entering the University premises during the period of strike. He admitted that a few of the plaintiffs had secured employment 'to keep body and soul together'.

B D.W.I was Mr. Marcel Eya Ogbonna, a Chief Executive Officer in charge of Administration at the University. Through him, Exhibits D3 - D42 were admitted in evidence. He maintained that the appointments of the plaintiffs were properly terminated for failure to discharge their duties. He said the Federal Government did not sanction the defendants for disobeying the directives contained in Exhibit 122. He said the Federal Government took National Academic Staff Union of Universities to the Industrial Arbitration Panel (IAP) for threatening another strike if the lecturers were not reinstated. He conceded that the 'cessation of appointment' was based on allegation of misconduct.

D W.2 was Mr. Titus Agboola Adeyemi. Through him, Exhibits D45a and D45b were tendered in evidence. He was a Principal Assistant Registrar who maintained that the vacancies created after the termination of plaintiffs' appointment had been filled by the University in the interest of the students.

The learned trial Judge was properly addressed by learned counsel on both sides. He applied the relevant laws to the facts gathered by him and in his considered judgment delivered on 16th July, 2005, he found in favour of the plaintiffs and held as follows:-

F "In the light of the foregoing, it is my opinion that the plaintiffs are entitled to the reliefs sought from court in reliefs 1- 9. It is also hereby ordered that the defendants should reinstate and/or restore the plaintiffs to their posts in the University of Ilorin with all their rights, entitlements and other perquisites of their offices. The defendants are also hereby ordered to pay to the plaintiffs all their salaries and allowances from February 2001 till day of judgment and thenceforth except the two who are dead, whose salaries and allowances should cease on the date of death."

H The defendants felt unhappy with the decision of the learned trial judge and appealed to the Court of Appeal vide Notice of Appeal filed on 27th July, 2005. In its own judgment handed out on 12th July, 2006, the Court of Appeal, by a majority decision, al-

lowed the appeal and dismissed the plaintiffs' case.

The plaintiffs felt irked by the stance taken in the majority decision and in expression of their total displeasure with the majority judgment of the Court of Appeal, filed with the leave of that Court a Notice of Appeal containing eight grounds of appeal.

As mandated by the Rules of this court, briefs of argument were filed on behalf of the parties. The appeal was heard by this court on 28th September, 2009. At the earliest opportunity, Mallam Yusuf Ali, Senior Counsel for the Respondents alerted the court on the preliminary objection to grounds of appeal raised and argued in the brief filed on behalf of the respondents. That is how it should be. It is a clarion call that same be considered at the on set. Mr. J. O. Baiyeshea, Senior Counsel for the appellants adopted the Appellants' brief of argument filed on 26-4-07 as well as the Reply Brief filed on 20-3-08 and urged that the appeal be allowed. In the same vein, Mallam Yusuf Ali, SAN adopted the respondents' brief of argument filed on 22-6-07 and urged that the appeal be dismissed.

I now have the duty to consider the preliminary objection to the propriety of the grounds of appeal as raised and argued in the respondents' brief.

On behalf of the respondents, it was submitted that the court can only assume jurisdiction over juristic persons. Learned counsel cited the cases of *Nigerian Nurses Association v. A. G. Federation* (1981) 1 FNLR 55 at 60; *Carlen Nigeria Limited v. Unijos & Anr* (1994) 1 NWLR (Pt. 323) 63. It was pointed out that since the 3rd, 9th and 29th appellants are dead; the appeal becomes incompetent and liable to be struck out. The cases of *Okotie v. Olugor* (1995) 5 SCNJ 271 and *Ezenwosu v. Ngonadi* (1988) 3 NWLR (Pt. 81) 163 were cited.

Learned counsel submitted that where there is an incompetent appeal, it robs the appellate court of jurisdiction as the condition precedent for adjudication is missing and subsequent steps taken on the appeal will amount to nullity as decided in *Madukolu v. Nkemdilim* (1962) 2 SCNLR 341 at 348. He submitted that vide order 8 Rule 9 (5) of the Supreme Court Rules, the effect of a dead party to an appeal is the striking out of same in its entirety.

Learned counsel submitted that the rules of this court disallow the filing of grounds of appeal that are general in terms, prolix, argu-

mentative and unwieldy. Further, he stressed that where the complaints in the particulars to a ground are independent complaints on their own, then the particulars and the ground will be struck out. He asserted that where a ground of appeal is vague, this court will strike out same vide Order 8 Rule 2 (2), (3) and (4) of the Rules of this court. He felt that grounds 2, 3, 5, 6, 7 and 8 of the grounds of appeal suffer from all the vices prescribed by the provisions of the stated rules of court. He maintained that the grounds are not only vague, argumentative and general in terms but they do not disclose reasonable grounds on which this court will adjudicate. He cited the cases of *Amuda v. Adelodun* (1994) 8 NWLR (Pt. 360) 23 at 31, *ASR Co. Ltd v. O. O. Biosah v. Ede* (1995) 3 NWLR (Pt. 385) 564 at 577.

Learned counsel submitted that a ground of appeal can only be predicated on the ratio decidendi of a case and not against an obiter dictum. He felt that a ground of appeal that is predicated on the concurring opinion of a justice as in ground 4 of the grounds of appeal is incompetent and liable to be struck out. He cited the cases of *In Re: Shyllon* (1994) 6 NWLR (Pt 353) 735 at 752, *Egbe v. Alhaji* (1990) 1 NWLR (Pt 128) 546 at 590. He urged that grounds 2, 3, 4, 5, 6 and 7 be struck out and the appeal should be dismissed. He cited *Kurfi v. Mohammed* (1993) 2 NWLR (Pt 277) 602 at 612.

On behalf of the appellants, senior counsel pointed it out in the Appellants' Reply Brief that the dead parties in the case of *Nigeria Nurses Association v. A. G. Federation* (*supra*), were the sole parties as against three (3) out of forty-four (44) appellants in this case and same cannot invalidate the whole case on appeal. He felt that the case of *Carlen Nigeria Ltd. v. Unijos* has no relevance to this case. Learned counsel further pointed it out that each of the remaining 41 appellants is in court in his/her own right and claims granted will ensure to each of them individually and personally. He felt that the death of three (3) out of 44 appellants cannot invalidate the whole appeal or lead to the striking out of same. He cited the case of *Momodu v. Momodu* (1991) 2 SCNJ 15 at 21-22.

Learned counsel observed that objection in respect of grounds 2, 3, 5, 6, 7 and 8 of the grounds of appeal appears half-hearted and not specific. He asserted that it is general in nature and there is a failure to demonstrate how the stated grounds are defective. He sub-

mitted that none of the grounds of appeal is argumentative, vague or prolix. He observed that grounds 3, 4, 5, 6, 7 and 8 have been quoted directly from what the justices stated in making their decision, being challenged in this appeal.

Learned counsel observed that a ground of appeal like ground 4 can be directed at a concurring judgment. He cited *Nwana v. FCDA* (2004) All FWLR (Pt. 220) 1245 at 1254. He felt that the cases of *In Re: Shyllon* (supra) and *Egbe v. Alhaji* (supra) are not relevant to this appeal. Learned counsel urged that the preliminary objection be dismissed.

The respondents objected to ground 1 of the grounds of appeal which, without its particulars, reads as follows:-

GROUND ONE

The majority justices of the Court of Appeal erred in law by holding that the whole action of the plaintiffs/appellants was rendered incompetent by reason of the death of two (2) out of the Forty-four (44) plaintiffs during the pendency of the case at the trial court."

It goes without any shred of doubt that the court can only assume jurisdiction over juristic persons. If a sole party to an appeal dies and there is no substitution, it hardly needs any gain-saying that the appeal ends. This was the position in the case of *Nigerian Nurses Association v. A. G. Federation* (supra).

In this appeal, it is agreed that three (3) out of the forty-four (44) appellants have passed on. I do not for one moment feel that this should invalidate the whole case on appeal. This is because each of the remaining 41 appellants is in court in his/her own right, and if any claim is granted, such will ensure to each of them individually and/or personally. Without any doubt, I say that the whole case cannot be struck out for this reason as strenuously urged by the respondents. This is as decided in the case of *Momodu v. Momodu*, (supra).

In short, ground 1 of the grounds of appeal, as reproduced above, is competent. The objection raised to same does not hold water.

The respondents attacked grounds 2, 3, 5, 6, 7 and 8 of the grounds of appeal. Reliance was placed on Order 8 Rule 2 (2) (3) and (4) of the Supreme Court Rules, 1999 which provides as follows:-

“2(2) If the grounds of appeal allege misdirection or error in law the particulars and the nature of misdirection or error shall be clearly stated.

(3) The notice of appeal shall set forth concisely and under distinct heads the grounds upon which the appellant intends to rely at the hearing of the appeal without any argument or narrative and shall be numbered consecutively.

(4) No ground which is vague or general in terms which discloses no reasonable ground of appeal shall be permitted, save the general ground that the judgment is against the weight of evidence and any ground of appeal or any part thereof which is not permitted under this rule may be struck out by the Court of its own motion or on application by the respondent.”

From the above, it is glaring that a ground of appeal can only be competent if the particulars and the nature of the alleged misdirection or error are clearly stated. The ground must not be argumentative, vague or general in terms. It must disclose reasonable complaint against a ratio decidendi in the decision as opposed to an obiter dictum. A ground of appeal must be directed at the decision of the court below. See *Egbe v. Alhaji (1990) 1 NWLR (Pt. 128) 546*; *A.G., Oyo State v. Fairlakes Hotels (1988) 5 NWLR (Pt 92) 1*.

The particulars to a ground of appeal must be in tandem with it. If the particulars are at cross purpose to the ground of appeal, it becomes defective and liable to be struck out. See *Honika Sawhill Nig. Ltd v. Hoff (1994) 2 NWLR (Pt 326) 22*; *Nwadike v. Ibekwe (1987) 4 NWLR (Pt 67) 718*.

A clear perusal of grounds 2, 3, 5, 6, 7 and 8 of the grounds of appeal shows to me that none of them is general in terms, vague or argumentative. They disclose reasonable grounds in which complaints are directed at ratio decidendi of the decision of the court below. Ground 2 complains about the error in law in holding that appellants’ appointments were properly terminated under section 15(3) of the University of Ilorin Act, 1990. Ground 5 relates to the holding of the court below that the appellants ‘waived’ their rights to employment with statutory flavour under section 15 of University of Ilorin Act by reason of signing memorandum of appointment. Grounds 3, 6, 7 and 8 relate to salient complaints touching on vital pronouncements by the court below. In all, adequate and precise particulars

were supplied to each of the grounds. I cannot surmise how those grounds can be blown off with a wave of the back-hand.

It has been variously held that rules of court must be obeyed. See *Afolabi v. Adekunle & Ors. (1983) 14 NSCC 398, 405; University of Lagos v. Aigoro (1985) 1 NWLR (Pt. 1) 143*. But in obeying the rules of court, technicality should be avoided so as to pave way for the current notion of substantial justice. In short, I do not see my way through in striking out any of the stated grounds. They are pronounced to be in order and accordingly saved.

The objection to ground 4 of the grounds of appeal rests on the complaint that it relates to a concurring judgment. The decision of this court in *Nwana v. FCDA*, (supra) at page 1245 settles the point. Opinions expressed in a concurring judgment form part of a court's decision. In short, ground 4 of the grounds of appeal is basically alright.

The appellants should be allowed to ventilate their complaint as in ground 4 of the grounds of appeal.

In short, all the eight grounds of appeal are substantially in order. The appeal was initiated with due process and in compliance with the rules of court. This court is accordingly imbued with jurisdiction which is basic and fundamental to determine this appeal. A judgment which is delivered without jurisdiction is null and void. See *Timitimi v. Amabebe 14 WACA 379; Mustapha v Governor of Lagos State (1987) 4 SCNJ 143; Tukur v. Governor of Gongola State (1987) 4 NWLR (Pt 117) 517 at 545; Madukolu v. Nkemdilim (1962) 1 All NLR 578 at 594*.

I hereby overrule the preliminary objection for want of merit. I now proceed to determine the appeal on its merit.

The seven issues formulated on pages 6-7 of the appellants' brief of argument for determination in this appeal read as follows :-

"1. Whether the majority justices of the court below were right in holding that the whole action of the plaintiffs/appellants was rendered incompetent by reason of the death of two (2) out of the forty-four (44) plaintiffs before the case was concluded at the trial court.

2. Whether the majority justices were right in holding that the appellants' appointments were properly terminated by the respondents by virtue of section 15(3) of the University of Ilorin Act Cap.

455 Laws of the Federation 1990 and without regard to section 15(1) on procedure for termination of appointment

3. *Whether the decision of the learned majority justices of the court below, that the appellants were offered opportunity of fair hearing by the respondents (and that the appellants rejected this) before their appointments were terminated was based on any pleadings and evidence on record.*

4. *Whether the learned majority justices of the court below were right in holding that the appellants waived their statutorily guaranteed rights to fair hearing merely by reason of signing Memorandum of Appointment on assumption of duty.*

5. *Whether the majority justices of the court below were right in holding that the appellants are not entitled to order for reinstatement, and for payment of their salaries, allowances and entitlements.*
D *And whether the said justices were right in holding that the appellants have secured alternative employment elsewhere and that their positions in the University have been filled by the respondents.*

6. *Whether the majority justices of the court below were right in holding that the appellants were not entitled to their salaries, allowances and other entitlements by reason of alleged participation in strike.*

7. *Whether the majority justices of the court below were right in holding that the appellants' case was caught by issue estoppel."*

F On behalf of the respondents, the five issues decoded for a due determination of the appeal contained on pages 18-19 of their brief of argument read as follow:-

"1. *Whether the decision of the Court of Appeal in dismissing the appellants' case by reason of the death of two (2) of the appellants can be assailed in the circumstances of this case.*

2. *Whether the Court of Appeal was not right in holding that the appellants' appointments were properly terminated in the circumstances of the case.*

3. *Whether the Court of Appeal was not right in holding that the appellants waived their right under section 15 of the University of Ilorin Act Cap. 455 LFN 1990 when they signed the memorandum of appointment.*

4. *Whether the Court of Appeal was not right in holding that the appellants were not entitled to their claim before the trial court.*

5. Whether the Court of Appeal was not right in holding that the appellants' right to fair hearing was not breached in the circumstances of this case."

The seven (7) issues couched for determination of the appeal by the appellants appear to be all embracing. Indeed, they subsume the issues formulated by the respondents; as it were. I now proceed to consider the issues contained in the appellants' brief of argument.

ISSUE 1

"Whether the majority justices of the court below were right in holding that the whole action of the plaintiffs/appellants was rendered incompetent by reason of the death of two (2) out of the forty-four (44) plaintiffs before the case was concluded at the trial court."

On behalf of the appellants, it was submitted that the decision of the court below which stated that the whole action in the trial court was rendered incompetent merely because two (2) out of the forty-four (44) plaintiffs died before the case was concluded is erroneous and has no basis. Learned counsel observed that the action was filed jointly while the benefits are to accrue to the plaintiffs severally. He maintained that in effect, the joint action survives automatically to the other plaintiffs. He cited *Smith v. London and North Western Railway (1853) E&B 69*, *Joseph Adebayo Osaguma v. Mil Gov. Ekiti State (2001) SCJN 30*, He felt that as a general rule, cause of action will not survive a dead plaintiff only in actions for libel, defamation or sedition vide the decision in *Oguigo v. Oguigo (1999) 12 SCNJ 191*.

Learned counsel submitted that the learned justice in the lead judgment failed to consider the appropriate rules of the trial court to wit: Order 12 Rules 30, 31 and 32 of the Federal High Court Civil Procedure Rules, 2000 which point at the conclusion that the death of the two plaintiffs was not fatal to the plaintiffs' case and that the whole case is not rendered incompetent.

Learned counsel observed that by virtue of the provisions of Regulations 11.3.0 to 11.5.2 at pages 65 and 66 of Exhibit 81, the Revised Senior Staff Regulations of the 3rd respondent, a suit of this nature survives the death of a plaintiff as it involves pecuniary benefits or property in estate which should go to the next-of-kin or legal representative. He submitted that even without an application to the court, the next-of-kin of a deceased staff of the University will ordinarily be entitled to claim the benefits of a deceased husband or

parent.

Learned counsel felt that the case of *Whyte v. Jack (1996) NWLR (Pt 431) 407 at 422* relied upon by lead writer of the judgment of the court below is inapplicable to the facts and circumstances of this case.

B On behalf of the respondents, it was submitted that with the demise of the 3rd and 29th plaintiffs, they ceased to be juristic personalities and could not maintain an action. He again referred to *Carlen Nigeria Limited v. Unijos* (supra) and cited *Nzom v. Jinadu (1987) 1 NWLR (Pt. 51) 533*. He opined that a court will not assume jurisdiction when an aspect of the case is not within jurisdiction. He cited the case of *Tukur v. Governor of Gongola State (1989) 3 NSCC 225 at 241; Okoroma v. UBA (1999) 1 NWLR (Pt. 587) 359 at 382*.

D Learned counsel felt that since the two deceased plaintiffs were not substituted, the whole action should be struck out. He cited the case of *Ajayi v. Igbino ghene (2001) 15 NWLR (Pt 735) 33 at 45-46*. He maintained that order 12 Rule 32 is not applicable to the facts of this case.

E Learned counsel further submitted that the appellants' claims were personal and enure to their benefits alone and their rights died with them. He again referred to *Whyte v. Jack (supra)*. He urged that the appeal be dismissed on this score.

F ***In this action, it is clear that for convenience and avoidance of multiplicity of actions, the suit was filed by the 44 plaintiffs jointly while the benefits are to accrue to each of them severally. There is sense behind same as pointed out in the case of Ige v. Farinde (1994) 7 NWLR (Pt. 354) 42. In the prevailing circumstance of the death of two of the 44 plaintiffs in a joint action, the same survives to the other plaintiffs. See Smith v. London & North Western Railway (supra). I agree that it is only in actions for libel or defamation or sedition that cause of action cannot survive a dead plaintiff as pronounced by this court in Oguigo v. Oguigo (supra).***

H It is pertinent at this point to refer to Regulation 11.3.1 of Exhibit 81, the Revised Senior Staff Regulations which provides as follows:-

“If a member of staff who has completed 10 or more years of continuous service dies in service, his registered next-of-kin or

designated survivors shall be entitled to a sum equivalent to the deceased's salary for one year as well as to gratuity and pension such deceased member of staff would have been awarded had he retired on the date of his death."

A proper appreciation of the above is that even though the two plaintiffs died during the hearing at the trial court, they would be presumed to have died as officers of the 3rd respondent whose death benefits would enure to the benefits of their next-of-kin, heirs and personal representatives. The 2nd leg of the claim stated in leg 21(j) of the plaintiffs' claim to wit: 'An order compelling the defendants to pay the plaintiffs all their salaries and allowances from February 2001 till the date of judgment and thenceforth' no doubt, survives the dead plaintiffs.

Order 12 Rule 30 of the Federal High Court (Civil Procedure) Rules, 2000 provides as follows:-

"The death of a plaintiff or defendant shall not cause the suit to abate if the cause of action survives."

Order 12 Rule 31 states as follows:-

"If there are two or more plaintiffs or defendants and one of them dies and if cause of action survives the surviving plaintiff or plaintiffs ----- the suit shall proceed at the instance of the surviving plaintiff or plaintiffs ----."

I have earlier depicted that the cause of action survives the dead plaintiffs. Their deaths cannot cause the suit to abate. It was erroneous for the majority justices of the court below to have found otherwise. The case of *Whyte v. Jack* (supra) heavily relied upon by the majority justices of the court below is inapplicable to the peculiar facts and circumstances of this case. It is not a sole plaintiff that died in this case in hand where there are 44 plaintiffs. The death of the two plaintiffs should not affect the rights and status of the remaining living plaintiffs. The suit survived and was rightly continued at the instance of the living plaintiffs. The death of two (now three) plaintiffs did not invalidate the case of the plaintiffs. It was preposterous to have found otherwise. Such led to a glaring miscarriage of justice. The issue is resolved in favour of the appellants.

ISSUE TWO

"Whether the majority justices were right in holding that the appellants' appointments were properly terminated by the respon-

dents by virtue of section 15(3) of the University of Ilorin Act Cap 455 Laws of the Federation, 1990."

Arguing issue 2, learned counsel for the appellants observed that issue of 'good cause' in virtue of section 15 (3) of the University of Ilorin Act, Cap 455 Laws of the Federation, 1990 was not part of the respondents' case at the trial court. He stressed the point that the respondents' case at the trial court was that the appellants were not sacked for misconduct or for any offence. He felt that issue of 'good cause', a fresh issue seriously protested against by him, was wrongly allowed by the majority justices of the court below contrary to many decisions of this court. He cited the cases of *Babalola v. State (1989) 4 NWLR (Pt. 115) 264*; *Akuneziri v. Okenwa (2000) 12 SCNJ 242 at 267*; *Kwajaffa v. Bank (2004) 5 SCNJ 121 at 136 - 137*.

The respondents' counsel kept mute on the above salient point in the brief of argument of the respondent. During his oral submission when the appeal was heard, senior counsel for the respondents maintained that they joined issue and made 'further argument' at the court below in respect of 'good cause'. That is to say it was a fresh issue which was surreptitiously brought up at the court below even without leave of that court.

That was not good enough. This court has often pronounced that there should be consistency in prosecuting a case at the trial court as well as in the appeal court. There should be no somersault. This is because such ploy often engenders giving the other side surprise from the art of playing a fast one. See *Ajide v. Kelani (1985) 3 NWLR (Pt. 12) 248*.

An appeal ordinarily presupposes the existence of a decision appealed against. In the absence of such a decision on a point, there cannot possibly be an appeal against what had not been decided against a party. Since there was no decision by the trial court in respect of the point relating to 'good cause' advanced before the court below, it lacked the vires to consider same on appeal. See Babalola v. The State (supra).

It should be pointed out here that the respondents who maintained at the trial court that the appellants were not sacked on disciplinary grounds or for any reason cannot turn round at the court below to canvass the point relating to 'good cause'. That is akin to blowing hot and cold in the same matter and a court

of record should not allow same. The respondents made a case diametrically opposed to the case strenuously canvassed in the High Court at the court below. They still continue with same in this court. It is odd and ought not to be permitted. See *Akuneziri v. Okenwa (supra)* at page 267; *Kwajaffa v. Bank (supra)* at 136-137.

In short, it was erroneous for the majority justices to approve the ploy embarked upon by the respondents and wrongly act on it to the detriment of the appellants. This should have been the end of this issue. I shall however expatiate briefly on the application of the provision of section 15 (3) of the University of Ilorin Act 1990 relating to 'good cause'.

It is extant on the faces of Exhibits 82-119 and 218-261 - 'cessation of appointment' letters that the appellants were accused of misconduct to wit: failure to obey council directives. The respondents' witness - DW1 admitted same that the appellants were accused of misconduct by the respondents and that they were, not heard before they were unilaterally sacked.

It is glaring that **the 4th respondent cannot jump into a conclusion under section 15 (3) of the Act to say that the conduct of a staff is of scandalous or disgraceful nature and as such the staff concerned is no longer able to discharge the functions of his office without giving him notice of the allegation and opportunity of being heard. Due process prescribed by section 15 (1) of the Act must be followed as 'good cause' can only be determined in a judicial enquiry where fair hearing will be afforded the staff who is accused.** See *Bamgboye v. University of Ilorin (1999) 6 SCNJ 295 at 355 (2002) 2 NWLR (Pt. 622) 290 at 352-353; 349.*

In a similar situation in the case of *Adeniyi v. Gov. Council Yabatech (1993) 6 NWLR (Pt. 300) 426* at page 457, *Karibi-Whyte, JSC* pronounced as follows:-

"It is an important principle of construction of statutes that the section should be read as a whole. ---- Section 12 (3) deals with cases of termination or suspension of any member of staff for good cause. 'Good cause' has been defined to include conduct which could justifiably be categorised as 'misconduct' in section 12 (1).

The observance of the rules of natural justice invariably applies to all the situations in section 12 since they involve the determination of

the civil rights and obligations of the person affected. See section 33 (1) Constitution 1979."

By parity of reasoning, section 15 of the University of Ilorin Act should be read as a whole. 'Good cause' under section 15 (3) of the Act must pass the test laid down in section 15 (1) so as to satisfy the dictate of section 36 (1) of the 1999 Constitution. It is beyond plausible argument to say that the 4th respondent could summarily sack the appellants for 'good cause' without recourse to the salient provisions of section 15 (1) of the Act. The majority judgment crossed the line when it was concluded that section 15 (3) of the Act is a departure from section 15 (1) of the same Act and as such, previous decisions of this court are not applicable. That position, no doubt, was wrong in law. Section 15 (3) is not a license to sidetrack the disciplinary procedure set out in section 15 (1) of the Act once misconduct is imputed against the appellants as herein done.

I have no atom of hesitation in resolving issue 2 against the respondents and in favour of the appellants.

ISSUE 3

"Whether the decision/conclusion of the learned majority justices of the court below that the appellants were offered opportunity for fair hearing by the respondents and that the appellants rejected this before their appointments were terminated was based on any pleadings and evidence on record."

On behalf of the appellants it was observed that the learned majority justices wrongly decided that the appellants' appointments could be summarily terminated as the respondents had done by virtue of section 15 (3) of the University of Ilorin Act. He felt the opinion that the appellants were given opportunity for fair hearing is contradictory and baseless.

Learned counsel maintained that there was clear imputation of misconduct by the respondents against the appellants in Exhibits 218-261 and Exhibits 82-119 which was also confirmed by DW1 under cross-examination. He asserted that the appellants were not given any opportunity for fair hearing.

Learned counsel submitted that it is not the duty of the court below to fish for non-existent evidence or presume same for a party when the party concerned did not advance or produce such evidence. He cited the cases of *Milton Paul Ohwovoriole (SAN) v. Fed-*

eral Republic of Nigeria & 3 Ors. (2003) FWLR (Pt. 141) 2019 at 2036; Dennis Ivienagbor v. Henry Osato Bazuaye (1999) 6 SCNJ 235 at 243; Paul D. Fubara & Ors. v. Chief Raymond D. Ogolo & Ors. (2003) (Pt. 169) FWLR 1285 at 1312-1313.

Learned counsel for the respondents submitted that there is no need for a hearing under section 15(3) as there is no allegation of misconduct in Exhibits 89-119 to justify the invocation of the rules of fair hearing since the termination was based on 'good cause'. He referred to the evidence of DWI at page 365 of the record, of appeal wherein he stated that the appellants' appointments were terminated for failure to discharge their duties.

Learned counsel for the respondents submitted that reference in the concurring judgment to exhibit 20 was a mere slip which has not occasioned a miscarriage of justice. He cited *Ndulue v. Ibezim (2000) 12 NWLR (Pt. 870) 139* at 168. He urged that the issue be resolved against the appellants.

It is clear that as can be traced in Exhibits 82-119, there was deliberate imputation of grave misconduct by respondents against the appellants. Such imputations include allegations that 'you have not discharged your academic responsibilities,' 'you have still not complied with council's directives.' As confirmed by DWI under cross-examination at page 368 of the record of appeal, the appellants were not afforded any opportunity for fair hearing. The respondents never pleaded or asserted facts at the trial court that they offered opportunity to the appellants to be heard on any allegation. There is no evidence on record that I can see wherein the appellants were offered opportunity for fair hearing. To cap it, an offer for fair hearing was not part of the case of the respondents at the court below. Even before this court learned counsel for the respondents still maintained the same poise.

All the above notwithstanding, the respondents still said the appellants were offered opportunity for fair hearing but they failed to utilize same. In the lead judgment of the court below, it was stated that the appellants 'were invited to come to a meeting with the authority to iron out things but they turned down the invitation for reasons best known to them'. In the concurring judgment, T. Abdullahi, JCA said the appellants were, in exhibit 20, invited to defend themselves on the allegation levelled against them.

The above position, as depicted, was clearly wrong. There is no evidence pointing at the conclusion that the appellants were given opportunity for fair hearing which they declined. Exhibit 20 is a letter of employment of the 23rd plaintiff/appellant. I cannot see any other exhibit which contains invitation referred to in the concurring judgment.

It must be stated in clear terms that it is not the responsibility of a court to set up for parties a case different from the one set up by the parties themselves in the pleadings and their evidence. See *Oniah v. Onyiah* (1989) 1 NWLR (Pt. 99) 514; *Ojo-Osagie v. Adonri* (1994) 6 NWLR (Pt 349) 131.

It is not the duty of the court of appeal to fish or scuttle around for evidence or to go to the extent of presuming same when a party fails to produce it. See *Milton Paul Ohwovoriole (SAN) v. Federal Republic of Nigeria & 3 Ors. (supra)* at page 2036.

It has been stated unequivocally by this court that the type of evidence a court can act on is the evidence which was exposed and canvassed in court, A Judge cannot, by examining documents outside the court, act on what he considers he has discovered on an issue when that was not supported or brought to the notice of the parties to be agitated in the usual adversarial procedure. See *Dennis Ivienagbor v. Henry Osato Bazuaye (supra)* at page 243.

With equal force, it has been pronounced by this court that **an appellate court is always bound by the record and the record only. It has no jurisdiction to go outside the record and draw conclusions which are not supported by the record.** And where the conclusion of the Court of Appeal is not borne out from the record; as in this case, this court is competent to interfere as such conclusion is perverse. See *Paul D. Fubara & Ors. v. Raymond D. Ogolo & Ors. (supra)* at pages 1312-1313.

It is glaring to me that the conclusion in the lead judgment of the court below as well as the concurring judgment that the appellants were offered opportunity for fair hearing which they declined is not borne out of the record. It is not the case of the respondents. It was not pleaded and the evidence of D.W.I, as pointed out, is to the contrary. Exhibit 20 was wrongly referred to in the concurring judgment. A document tendered as exhibit should be carefully considered in appraising same. In short, it

was wrong to hold that the appellants were afforded the opportunity for fair hearing which they rejected. The reverse is the case herein. It is a glaring miscarriage of justice which justifies interference as such conclusion is perverse. I accordingly interfere with same. The issue is resolved in favour of the appellants and against the respondents.

ISSUE FOUR

“Whether the learned majority justices of the court below were right in holding that the appellants ‘waived’ their rights to employment with statutory flavour under section 15 of Unillorin Act merely by reason of signing memorandum of appointment.”

Learned counsel for the appellants observed that the issue of waiver was not raised by the respondents at the trial court. It was raised for the first time at the court below without leave. He asserted that the trial court did not render any decision on same. He maintained that the court below ignored his submission and complaint about the procedure and wrongly upheld the contention of the respondents. He urged that the decision of the court below rendered on the issue be set aside.

Learned counsel submitted that the learned majority justices of the court below were wrong in holding that the appellants waived their rights to employment with statutory flavour under section 15 of the University of Ilorin Act by reason of signing memorandum of appointment. He referred to the conclusion as being incorrect and perverse. He submitted that the provisions of a statute or constitution are sacrosanct and parties cannot by conduct or consent alter the constitution or statute. He cited *Oviasu v. Oviasu (1973) 11 S.C. 315*; *Menakaya v. Menakaya (2001) 16 NWLR (Pt 738) 204 and 252*; *Ogbonna v. A.G. Imo State (1992) 1 NWLR (Pt. 220) 674*. He observed that issue of waiver is incompetent as it is a matter of fair hearing which confers rights of a public nature as a matter of public policy’ and that ‘the provisions of such statute cannot be waived as no one is permitted to contract out or waive a rule of public or constitutional policy. He further cited the cases of *Bamigboye v University of Ilorin (1990) 6 SCNJ 295 at 305*; *Olaniyan v. University of Lagos (1985) 2 NWLR (Pt. 9) 599*, *Eperokun v. University of Lagos (1986) 4 NWLR (Pt 34) 163*.

On behalf of the respondents, it was submitted by learned counsel that a party can waive all his personal legal rights which appellants

did by signing memorandum of appointment. He referred to *Ariori v. Elemo* (1983) 1 SCNLR 139; *Mobil Producing (Nig) Unlimited v. LASEPA* (2002) 18 NWLR (Pt. 798) 1 at 37; *Menakaya v. Menakaya* (2001) 16 NWLR (Pt 738) 203 at 263. He urged that the decision of the court below be upheld on this score.

B Waiver has been defined in Black's Law Dictionary, 5th Edition at page 1417 as the intentional or voluntary relinquishment of a known right or such conduct as warrants an inference of the relinquishment of such right. The renunciation, repudiation, abandonment or surrender of some claim, right, privilege or of the opportunity to take advantage of some defect, irregularity or wrong. *Atlas life Ins. Co. v. Schrimsher* 179 OKL. 643, 66 page 2d 944, 948.

C Waiver was not made an issue at the trial court. It was wrong to raise it at the court below without the leave of that court. The issue D was incompetent and should have been ignored. This should have ended the point touching on waiver. But I need to expatiate a little bit.

I should point it out that ***the letters of appointment, the Memorandum of Appointment curled from Exhibit 81- the Senior Staff Regulations are made subject to the University of Ilorin Act., Cap 455 and relevant provisions of the 1999 Constitution in their implementation. In effect, the provisions of the Senior Staff Regulations - Exhibit 81 are subservient and subordinate to the applicable provisions of section 15 of the University of Ilorin Act, Cap 455 and Section 36 (1) of the 1999 Constitution. The provisions of the stated statutes cannot be waived as no one is permitted to contract out or waive a rule of public or constitutional policy like fair hearing which is guaranteed under section 36 (1) of the 1999 Constitution. Parties cannot by conduct or consent alter the Constitution or a statute.*** The cases of *Oviasu v. Oviasu* (supra) and *Menakaya v. Menakaya* (supra) at page 305; *Olaniyan v. University of Lagos* (supra); *Eperokun v. University of Lagos* (supra) are in point.

H In short, I say, with due diffidence to the learned majority justices of the court below, that the holding that the appellants waived their statutorily guaranteed rights to fair hearing vide the dictates of section 15 of the University of Ilorin Act and section 36 (1) of the 1999 constitution merely by signing 'Memorandum of Appointment'

on assumption of duty was erroneous. It has no support in law. I hereby resolve this issue in favour of the appellants and against the respondents.

ISSUE FIVE

“Whether the majority justices of the court below were right in holding that the appellants are not entitled to order for reinstatement and order for payment of their salaries, allowances and entitlements. And whether the said justices were right in holding that the appellants have secured alternative employment elsewhere and that their positions in the University have been filled by the respondents.”

Learned counsel for the appellants maintained that there is no evidence on record to support the conclusion of the learned majority justices of the court below that the positions of the appellants had been filled. He felt that the court cannot be left to speculate or go on a voyage of discovery.

Learned counsel submitted that even if it is true that the appellants who are University Dons secured employments elsewhere during the impasse, that cannot be a bar to an order of reinstatement. He again referred to *Eperokun v. Unilag* (supra) at 177. He submitted that where an appointment with statutory flavour has been found to be wrongly determined the appropriate order is one of reinstatement. He again referred to *Eperokun v. Unilag* (supra) at 177; *Nnoli v. UNTH Management Board* (1994) 10 SCNJ 71 at 75, 91-92, *Iderima v. Rivers State* (2005) 7 SCNJ 493 at 504.

Learned counsel for the respondents submitted that the court below was right when it held that the appellants were not entitled to claim of salaries and allowances for the period for which they were not at work as to hold otherwise would amount to encouraging illegality.

It was held in the case of *Archibong v. Ita* (2004) All FWLR (Pt 197) 930 at page 955 that a court of law cannot speculate or conjecture. It is dangerous to do so in the absence of evidence. In this case, I am unable to trace from the evidence on record the number of appellants who have secured employment elsewhere; the number of vacant positions and those already allegedly filled.

I note that P.W.2 admitted that some of the appellants secured employments elsewhere ‘to keep body and soul together’. This, on its own, does not constitute a bar to their

reinstatement. In *Eperokun v. University of Lagos (supra)* at page 117, it was held by this court that the appellants therein were entitled to reinstatement even if they had secured other employments during the pendency of the case and subject only to harmonization of any overlapping remuneration.

B In this case, the respondents are obliged to reinstate the living appellants to their offices which have been disrupted by this litigation. Any appellant who secured ‘employment’ during the impasse should account to the respondents for any overlapping remuneration in his/her own interest.

C This position is further reinforced by the fact that it was the respondents who refused to put an end to the impasse as at 29th June, 2001 when they refused to comply with the directive of the National Universities Commission - the parent body of the respondents to reinstate the appellants as contained in Exhibit 122 which reads as follows:-

“The Pro-chancellor, University of Ilorin The Pro-chancellor, University of Nigeria, Nsukka.

Federal Government/ASUU Negotiation

E I am directed to draw the attention of your council to the cases of academic staff whose rights’ of continuous employment have been wrongly and prejudicially affected as a direct consequence of the national strike of ASUU and to request you to kindly reverse such action taken by your Council/Administration in order to ensure peace and harmony in the campuses in the country and in the spirit of negotiations.

F Signed by Professor Munzali Jibril, OFR Executive Secretary”.

One cannot understand the reasons for the intransigence put to bear by the respondents. If they had complied, the matter would have ended by 29th June, 2001. It is in evidence that the authorities of University of Nigeria, Nsukka complied and averted unnecessary impasse. That is how it should be. I do not for one moment see why the appellants who are on this side of the divide should not be reinstated with their full salaries and allowances. The living appellants must be, and they are hereby, reinstated. That is the law. ‘Good faith’ should always be the watch words in human administration. The issue is hereby resolved in favour of the appellants and against the respondents.

ISSUE SIX

“Whether the majority justices of the court below were right in holding that the appellants were not entitled to their salaries, allowances and other entitlements by reason of strike action.”

Learned counsel for the appellants submitted that the respondents’ case at the trial court was that the appointments of the appellants were not terminated for any participation in strike action vide Exhibit 1. He felt that payment or non-payment over ‘participation in strike’ was not an issue. B

Learned counsel observed that the allegation contained in the letter to the appellants is not that the appellants were on strike for which Trade Disputes Act may be applicable. Allegations bordered on misconduct for which the appellants were not afforded fair hearing. C

Learned counsel for the respondents felt that the provisions of Trade Dispute Act are applicable. D

It is extant in Exhibit 1 that the respondents maintained that the appellants’ appointments were not terminated for any participation in strike action. Since the matter has nothing to do with strike according to the respondents, application of the provisions of the Trade Disputes Act is of no moment. Parties should not employ a game of hide and seek. E

This matter has to do with allegation of misconduct levelled against the appellants for which they were not taken through the procedure laid down in the applicable section 15 of the University of Ilorin Act, Cap 455, 1990. F The right of the appellants should not be remotely tied to the inapplicable provision of the Trade Disputes Act as erroneously done by the court below. Without much ado, this issue is also resolved against the respondents. ISSUE SEVEN G

“Whether the majority justices of the court below were right in holding that the appellants’ case was caught by ‘issue estoppel’”

Learned counsel for the appellants submitted that the learned majority justices of the court below erred in holding that the appellants’ case was caught by issue estoppel as they did not consider the relevant materials placed before them. He observed that the appellants were not parties to the case at the Industrial Arbitration Panel (TAP). He stressed that the parties in Exhibit 40 are different from the parties in this case and the case of the appellants at the Federal H

High Court was first in time. He felt that the claim of the appellants herein at the trial court which was for declaratory reliefs and mandatory orders are not within the jurisdiction of IAP or even the National Industrial Court. He cited the case of *Western Steel Workers Union v. Iron Steel Workers No. 2 (1987) NWLR (Pt. 49) 284*; *Kalango v. Dokubo (2003) WRN Vol. 16* paragraph 32 at 49. He observed that the court below acted on Exhibit 38 - 'a notice of award', not an 'award'.

I tried to trace the stand point of the respondents on this issue to no avail.

A plea of issue estoppel by a defendant is geared at preventing a plaintiff from re-litigating an issue previously decided in a former suit. The parties and subject matter must be the same. See *MILAD Benue State v. O. Ulegede (2001) 10 SCNJ 43*; *Western Steel Workers Union v. Iron Steel Workers No. 2 supra*.

In this matter, it is beyond argument that the parties before the IAP are not the same with the parties in this case at the trial court. The case at the IAP was a trade dispute. The case at the trial court involved master and servant relationship in which the appellants claimed declaratory and mandatory orders which do not fall within the jurisdiction of IAP. See *Kalango v. Dokubo (supra)*. **The alleged award was withdrawn by the Minister of Labour.**

With all the above, it is clear that issue estoppel cannot avail the respondents. The learned trial Judge got it right when he found that:

"It is therefore crystal clear that the issue and parties are different from the parties before this honourable court in respect of this matter further more the award has been withdrawn."

I am of the considered opinion that the learned justices of the court below were wrong in finding that issue estoppel availed the respondents. Such a conclusion was erroneous. I resolve this issue in favour of the appellants.

Before I draw the curtain, I wish to stress the purport of the doctrine of *stare decisis*. It is that a point of law that has been decided and settled by a superior court should be followed by lower courts. There is sense in it to avoid confusion. See *Royal Exchange Assurance Nig. Ltd. v. Aswani Textiles Ind. Ltd. (1991) 2 NWLR (Pt. 176)*

639 at 672. It is not proper to refuse to follow the decision of a superior court. A lower court should tow the line. See *Atolagbe v. Awuni & Ors.* (1997) 7 SCNJ 1 at pages 20, 24 and 35. If the doctrine of stare decisis was followed by the learned majority justices, all forms of furor would have been averted.

In conclusion, I find that this appeal is, no doubt, meritorious. B
It is hereby allowed. The decision of the majority justices of the court below is hereby set aside. In its place, the judgment of the trial Judge is restored to the effect that the living forty-one (41) appellants are hereby reinstated and should be paid their salaries and allowances C
from February 2001. For the three plaintiffs who died during the protracted litigation, may their souls rest in peace. It has been written of old that 'it is appointed unto men once to die, but after this the judgment.' In their graves, they must be crying for justice. An incidental order is clearly warranted. See *Nneji v. Chukwu* (1988) 3 NWLR (Pt. D
78) 184 at 208. They are deemed to have passed on while in service. Their salaries and allowances shall cease on their respective dates of death.

The appellants are entitled to costs assessed in this court at E
N50,000.00; in the court below N10,000.00 and at the trial court N5,000.00.

MUSDAPHER JSC

I have read before now the judgment of my Lord Fabiyi, JSC F
just delivered with which I entirely agree. The fundamental issue in the determination of this appeal includes the question whether the appellants were afforded fair hearing as enshrined and entrenched in the Constitution as found by the majority decision of the court below. I am of the view the appellants were not confronted with the G
allegations made against them, the decision of the respondents was therefore clearly in breach of the Constitution and the decisions necessarily rendered null and void.

I accordingly allow the appeal of the appellants and abide by H
all the consequential orders proposed in the aforesaid judgment.

MUKHTAR JSC

The gravamen of this appeal is to my mind centered on the principle of fair hearing. Many reliefs and remedies were sought by the appellants in the trial court, some of which are:-

B *"1. A declaration that the defendants' letter dated 22nd May 2001 to the plaintiffs titled "cessation of Appointment" purporting to terminate the plaintiffs' appointment with the 3rd defendant is ultra vires, null and void and of no effect whatsoever.*

C *7. A declaration that the purported termination of the plaintiffs' appointment by the defendants negates the fundamental right provisions of the Constitution of the Federal Republic of Nigeria 1999.*

D *8. An order setting aside the purported termination of plaintiffs' Appointment and nullifying the defendants' letter to the plaintiffs in that regard."*

In its judgment, the Federal High Court gave the reliefs sought by the appellants inclusive of the above, after finding in their favour. The respondents who were the defendants in the High Court appealed to the Court of Appeal, who by a majority of two to one allowed the appeal. Aggrieved by the majority decision in the appeal, the plaintiffs appealed to this court. Briefs of argument, to wit an appellants' reply brief of argument were exchanged by Learned Counsel and Senior Counsel. Seven issues for determination were raised in the appellants' brief of argument, and I will hereunder reproduce the issue I will highlight in this contribution. It is:-

G *"Whether the decision/conclusion of the learned majority Justices of the Court below, that the appellants were offered opportunity for fair hearing by the respondents (and that the appellants rejected this) before their appointments were terminated was based on any pleadings and evidence on record."*

The respondents in their brief of argument raised five issues, two of which are:-

H *"4. Whether the Court of Appeal was not right in holding that the appellants were not entitled to their claim before the trial court.*

5. Whether the Court of Appeal was not right in holding that the appellants' right to fair hearing was not breached in the circumstances of the case."

In their brief of argument, the respondents raised and argued

a notice of preliminary objection, the grounds of which are as follows:-

- “1. *The appeal was brought in the name of dead persons.*
2. *The appeal was filed in flagrant violation of the rules of this Honourable court and the law.*
3. *The appeal is liable to dismissal for being incompetent.* B
4. *Grounds 2, 3, 5, 6, 7 and 8 are incompetent.*
5. *Ground 4 is incompetent not being an attack on the leading judgment but a concurring judgment.”*

The argument of the learned Senior Counsel on ground one revolves around the death of the 3rd, 9th and 29th appellants, in respect of whom the right of appeal does not exist. It is his contention that in the circumstance, the appeal is incompetent and liable to be struck out. The cases of *Okotie v. Olughor* 1995 5 SCNJ 217, and *Ezenwosu v. Ngonadi* 1988 3 NWLR part 81 page 163 and order 8 D Rule 9 (5) of the Supreme Court Rules were relied upon.

It is my view that these authorities will be applicable if all the parties are dead or the matter is taken in a representative capacity and the parties are dead. In the case at hand there are still surviving appellants, as not all the appellants are deceased. I therefore find no merit in this argument on ground (1), and I overrule it. E

The competence of grounds 2, 3, 5, 6, 7 and 8 was attacked by the respondents. It is argued that the grounds are vague, argumentative, general in terms without disclosing reasonable grounds on which the court will adjudicate. The cases of *Amuda v. Adelodun* 1994 8 NWLR part 360 page 23, *ASR Co. Ltd v. P.O. Biosah & Co. Ltd* 1997 11 NWLR part 5 27 page 145, and *Oge v. Ede* 1995 3 NWLR part 385 page 564 were/are cited in support. I have perused these grounds of appeal thoroughly, and I subscribe to the argument in the appellants’ reply brief of argument that the respondents have not been specific in their complaint on the defect of the grounds. I agree that none of the grounds is vague, argumentative or prolix. They are competent and valid grounds of appeal, and they arise from the decisions of the lower court, so I will not strike them out. In this wise issues 2, 3, 4, 5, 6 and 7 formulated to be covered by the aforementioned grounds of appeal are valid and will not be struck out. F G H

On ground (4) of appeal the respondents’ quarrel is that it was

predicated on the concurring opinion of Abdullahi JCA, and so is liable to be struck out. The learned Senior Advocate referred to *In Re: Shyllon* 1994 6 NWLR part 353 page 735, and *Egbe v. Alhaji* 1990 1 NWLR part 128 page 546.

I fail to see any correlation between the submission of the learned Senior Counsel on page 17 of the respondents' brief of argument and the purport of the above authorities, in as far as this objection is concerned. I therefore consider the argument of no moment. In fact I subscribe to the reply of the learned counsel for the appellants as for as this objection is concerned. See *Nwana v. FCDA* 2004 All FWLR part 220 page; 1245 cited by him. Besides, even if ground (4) as postulated is struck out, there is still ground (3) which relates to issue No. (3) supra, that revolves around fair hearing. For the foregoing, I overrule the preliminary objection raised by the respondents in its entirety.

Issue (3) in the appellants' brief of argument is an issue I would like to highlight, for as I have indicated above it is a very important aspect of the case, for it raises the issue of the prevalence of fair hearing in the proceedings that led to the decision of the court below. In a situation like the one in the instant case where a party's employment has been terminated, the principle of fair hearing may come to play, and where it becomes relevant it is the law that it forms part of the pleadings. In this case, the respondents have professed that the appellants were given fair hearing, and it is on record that the lower court subscribed to it. The respondents did not plead that the appellants were availed the opportunity to be heard on whatever allegations that were raised against them before their appointments were terminated. The lower court in its majority judgment was therefore wrong when it held that the appellants were invited to state their case or defend themselves by way of offering them fair hearing. The lower court definitely erred in its majority judgment. It went beyond what was before it by way of the record of proceedings. The law is trite that an appellate court should confine itself to the material before it, base its findings on it and not attempt to make a case for any party where none exist.

The doctrine of fair hearing as stipulated in Section 36 (1) of the Constitution of the Federal Republic of Nigeria states the following:-

“36-(1) In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality.”

As the appellants were not afforded fair hearing, by being invited to make their representation, the above provision of the constitution has been violated, and so their dismissal from the employment of the respondents was not in accordance with the tenet of the law. Authorities abound that in a case of this nature with same facts where a party is deprived of its livelihood, a contravention of the law that requires that an aggrieved party must be availed the opportunity to be heard, the termination or dismissal becomes null and void. See *Olaniyan v. University of Lagos* 1985 2 NWLR part 9 page 599, *Busari v. Edo State Civil Service Commission* 1999 4 NWLR part 599 page 365, and *Eperokun v. University of Lagos* 11986 4 NWLR part 34 page 162.

This issue has been thoroughly dealt with in the lead judgment of my learned brother Fabiyi JSC. I have read in advance the lead judgment, and I am in full agreement that the appeal is meritorious and should succeed. I allow the appeal, and set aside the majority judgment of the Court of Appeal, Ilorin division, I abide by all the consequential orders made in the lead judgment.

OGBUAGU JSC

This is an appeal against the majority Judgment of the Court of Appeal, Ilorin Division (hereinafter called “the court below”) delivered on 12th July, 2006, allowing the appeal of the defendants/Respondents and setting aside the decision of the learned trial Judge - Olayiwola, J. of the Federal High Court, Ilorin delivered on 26th July, 2005, and dismissing the claims of the Appellants. However, Ogunwumiju, JCA dissented.

Dissatisfied with the said Judgment, the Appellants, have appealed to this Court on Eight (8) Grounds of Appeal and have formulated seven (7) issues for determination which are reproduced in the lead Judgment of my learned brother, Fabiyi, JSC. On their part,

the Respondents, have raised Preliminary Objection as to the competence of the appeal itself on the following grounds:

“1. The appeal was brought in the name of dead persons.

2. The appeal was filed in flagrant violation of the rules of this Honourable court and the law.

B *3. The appeal is liable to dismissal for being incompetent.*

4. Grounds 2,3,5,6,7 and 8 are incompetent.

5. Ground 4 is incompetent not being an attack, on the leading judgment but a concurring judgment”.

C I note that in paragraph 8.00 page 18 of the Respondents’ Brief, the following appear:

“IN THE ALTERNATIVE, in case our objection does not find favour with Your Lordships, the respondents have formulated five (5) issues from the grounds of appeal which we believe encompasses all the areas of disputes in this appeal”.

So be it.

The issues at paragraph 9.00 of the said Brief, read as follows:

E *“1. Whether the decision of the Court of Appeal in dismissing the appellants case by reason of the death of two (2) of the appellants can be assailed in the circumstances of this case.*

2. Whether the Court of Appeal was not right in holding that the appellants appointment were properly terminated in the circumstances of this case.

F *3. Whether the Court of Appeal was not right in holding that the appellants waived their right under Section 15 of the University of Ilorin Act Cap 455 LFN 1990 when they signed the memoranda of appointment.*

G *4. Whether the Court of Appeal was not right in holding that the appellants were not entitled to their claim before the trial court.*

5. Whether the Court of Appeal was not right in holding that the appellants’ right to fair hearing was not ; breached in the circumstances of this case”

H The facts of this case leading to the instant appeal, could be seen from the Statement of Claim at pages 78 to 79 of the Record and paragraph 21 thereof also reproduced in the lead Judgment of my learned brother, Fabiyi, JSC, is clear and unambiguous as to the claims of the Appellants against the Respondents’ Claims (a) to (g) are for declarations and the claims in h to k read as follows:

“(h) An order setting aside the purported termination of plaintiffs’ appointment (sic) and nullifying the defendant’s letter of 22nd May, 2001 to the Plaintiffs in that regard.

(i) An Order compelling the defendant (sic) to comply with directive of the Federal Government through the National Universities Commission dated 29th June, 2001 with reference NUC/ES/261 to the defendants to reinstate the plaintiffs. B

(k) An Order compelling the defendants to reinstate and/or restore the plaintiffs to their posts in University of Ilorin with all their rights, entitlements and their pre-requisites of their offices. And an Order compelling the defendants to pay to the plaintiffs all their salaries and allowances from February, 2001 till the day of judgment and thenceforth.” C

I note that the Respondents, joined issues with the Appellants in their Further Amended Statement of Defence at pages 373 - 379 D of the Record denying liability. This occasioned the Appellants, filing an Amended Reply which appears at pages 396 - 400 of the Records. After the close of pleadings, the case went into trial and each of the parties called two witnesses. At the close of evidence, the learned counsel for the parties, addressed the court. In a well considered E judgment, at pages 424 to 451 of the Records, the learned trial Judge, granted all the reliefs sought by the Appellants. Surprisingly to me, a majority of the learned Justices, allowed the appeal and dismissed the Appellants’ case in spite of the clear and unambiguous statutory F provision in Section 15 of Unilorin Act which as a matter of fact recognized or is a restatement as it were, of Section 36 of the Constitution of the Federal Republic of Nigeria, 1999 which provides for everyone to be accorded fair hearing in all situations where the rights are at stake. G

Instead of honourably and humbly conceding this very fundamental principle or entrenched law, which was flagrantly breached by the Respondents and given a blessing so to say, by the majority Judgment of the court below, what I see regrettably, is the Preliminary Objections and submissions that are with respect, anti- H
thetic to truth and justice. One of them, is that the death of two or three of the Plaintiffs, renders the entire action incompetent and unmaintainable. Wonders, it is said, shall never end.

Another most disgusting if not disturbing aspect of the Respon-

dents' case, is that since some or few of them, got an alternative employment, "to keep the body and soul together", they have lost their chances of being reinstated even where it is clear to me as held by the trial court that the purported termination, was wrongful, null and void and of no effect. But see the pronouncements of the learned Justices of this Court in the case of Eperekun & 2 ors. v. University of Lagos (1986) 4 NWLR (Pt. 134) 162 (a), 127 -128; 133, 152-153 and 191. I have a hunch that there must be much that meets the eyes in the sustained opposition by the Respondents, to restore the living Appellants to their posts. But since I and the Court, are not allowed to speculate anything, I say no more than to deal with some other material aspects of this appeal.

I recall that when this appeal came up for hearing on 28th September, 2009, the learned leading counsel for the Respondents - AN, Esq., (SAN) insisted that the facts of this case are not the same or similar to the earlier case in Suit S.C. 75/2007 - Dr. Taiwo v. Oloruntoba-Oju & 4 ors. v. Prof. Shuaibo Abdul-Raheem & 3 ors. in which judgment was given by this Court on 13th June 2009 - per Adekeye, JSC and reported in (2009) 5-6 S.C. (Pt.II) 57; (2009) 7 SCNJ. The Appellants leading counsel - Baiyeshea, Esq., held a contrary view. After some legal "skirmishes" or submissions for and against, and adoption of the respective Briefs of Argument, Judgment was reserved till today.

I have had the privilege of reading before now, the said lead Judgment of my learned brother, Fabiyi, JSC just delivered. I agree with his treatment of all the issues and the conclusions. For purposes of emphasis, I will make my contribution even briefly. I will touch and deal with the said Preliminary Objection.

Firstly; the appeal, was certainly not brought in the name of dead persons as stated in the said Objection. The Respondents, concede that out of the forty-four (44) plaintiffs, forty-one (41) are alive. Surely, in the case of In Re: Ezenwosu v. Ngonadi (1988) 3 NWLR (Pt. 81) 163; there was only one plaintiff who died three days before the Notice of Appeal, was filed in his name. In the case of Eketie & 2 ors. (not Okatie) as appears both in the Respondents' Brief and Appellants' Reply Brief) Okotie v. Olughor & 6 ors. (1995) 5 SCNJ. 217, the action, was brought in a representative capacity. It was held by this Court that where an action is instituted in a representative

capacity and/or against persons in a representative capacity, such an action, is not only by or against the named Plaintiffs or defendants, and are also by and against those named plaintiffs or defendants, and are also by and against those the named parties represent who are not stated nomine. Therefore, where the cause of action survives, the death of a party, such action, is not terminated by death. B This principle also applies to an appeal. That where all the named parties in a representative action die, the action, provided it is still maintainable, (such as in a declaration of title) subsists on behalf of and/or against those they represent but who have not been mentioned in the proceedings nomine. It can be seen, that the above two cases relied on by the Respondents, are not applicable to the instant case leading to this appeal. Without much ado, I, with respect, see no substance or merit in this ground and in the other grounds of Objection and I hereby overrule them. I hold that the action was brought jointly, while the benefits of the successful action, will accrue to the plaintiffs severally. More importantly, there is also the claim in paragraph 21 (j) of the relief sought and the provision in Regulation 11.3.1 of Exhibit 81. C D

I note also and this is not disputed by the Respondents, that even the directive of the (NUC) - National Universities Commission in its letter through the Executive Secretary, Ref. No. NUC/ES/261 dated 29th June, 2001 - Exhibit 122 to the 3rd Respondent to reinstate the Appellants, was completely ignored and disobeyed with impunity. There is evidence in the Record that a similar letter to a sister University-UNN - University of Nigeria, Nsukka, was complied with by that University. E F

There is also the concession by the Respondents through the DW1 - A Chief Executive Officer in charge of administration of the University that the "*cessation of appointment*", to the Appellants, was based on allegation of misconduct. This is the more reason why the Appellants, should have been heard or given the opportunity to be heard. In the case of *Nwokoro & ors. v. Onuma & anor. (1990) 3 NWLR (Pt. 136) 22 @ 35; (1990) 5 SCNJ, 93 @ 103* -per H Nnaemeka-Agu, JSC, it was held that the right to be heard, is so fundamental a principle of our adjudicatory process, that it cannot be compromised on any ground. The principle of fair hearing, not only demands but also dictates that the parties to a case, must be

heard. On his part, Obaseki, JSC stated that a hearing can only be fair, when all the parties to the dispute, are given a hearing or an opportunity of a hearing. That if one of the parties, is refused a hearing or not given the opportunity to be heard, the hearing cannot qualify as fair hearing. That without fair hearing, the principle of natural justice is abandoned. See also the case of George v. Dominion Flour Mills Ltd. (1963) 1 SCNLR 117@, 123 - per Bairamian, F.J. cited in the case of Adeniyi v. Governing Council of Yaba College of Technology (1993) 6 NWLR (Pt.300) 426 @ 450-451; (1993) 7 SCNJ. 304 @ 322-323 - per Karibi-Whyte, JSC.

In the case of Ekuma v. Silver Eagle Shipping Agencies PH Ltd. (1987) 4 NWLR (Pt. 65) 472 @, 486, - per Nnaemeka-Agu, JSC again stated that the rule of *audi alteram partem* postulates that the court or other tribunal, must hear both sides at every material stage of the proceeding before handing down a decision. That it is a rule of fairness. That a court (tribunal or body such as 3rd and 4th Respondents), cannot be fair, unless it considers both sides of the case as may be presented by both sides. Section 33(1) of the 1979 Constitution of the Federal Republic of Nigeria, 1979, was referred to. See also the case of Agbahomovo & ors. v. Eduyagbe & 6 ors. (1999) 9 NWLR (Pt. 594) 170 @ 184, 181; (1999) 2 SCNJ. 94 - per Onu, JSC. Even in the Holy Bible, God Almighty, heard from Adam and Eve, before pronouncing punishment on each of them. See the case of R. v. Chancellor of Cambridge (1723) 1 Strange 557 - per Fortescue, J. in his graphic analogy.

The learned trial Judge at page 377 of the Records, referred to Chapter 8 of the said Revised Senior Staff Regulations and Section 15 (1) of the Unilorin Act, Cap, 455 which stipulates the provision to be followed or complied with and which he reproduced and held at page 378 thereof inter alia, thus:

"I make bold to say that this provision has not been complied with....."

His Lordship referred to the decisions of this Court in the cases of Eperokun v. Unilag (1986) 4 NWLR (Pt.34) 163 @ 171 and Bamigboye v. University of Ilorin (1999) 6 SCNJ. 295 @ 302 and found as a fact and held thus:

"In my opinion, in this matter, the procedure was not followed and this renders the termination unlawful, invalid, null and void. See

Eperokun's case (supra)”.

I agree and to avoid any doubt, I also reproduce the said provision. It reads as follows:

“if it appears to the council that there are reasons for believing that any person employed as a member of the academic or administrative or professional staff of the University other than the Vice Chancellor should be removed from office or employment on the ground of misconduct or inability to perform the functions of his office or employment, the council shall —

(a) give notice of those reasons to the person in question;

(b) afford him an opportunity to make representations in person on the matter to the council;

(c) if he or so request make arrangement for joint committee of the council.

[the underlining mine)

I note that the appointment of the Appellants, has statutory flavour -i.e. it is protected by statute . I even note that in their Amended Reply to the Statement of Defence, in their paragraph 10 thereof, they averred and in evidence at page 277 of the Records, they testified that the Respondents prevented the Appellants from entering any of the campuses of the University since April, 2001. This evidence, was not challenged by the Respondents.

In the case of *Bamigboye v. Unilorin (supra) @ page 316*. Onu, JSC stated inter alia, as follows:

“Section 15 of the University of Ilorin Act confers on the University staff a “special status” over and above the normal contractual relationship of master and servant. Consequently, the only ‘way to terminate such a contract of service with “statutory flavour” is to adhere strictly to the procedure laid down in the statute i.e. in the case in hand, the University of Ilorin Act”

I entirely agree. In the circumstances, the Respondents will not be allowed by me or by this Court, to ignore with impunity, the law or Act that created them and purport to hide behind the letters of appointment and memorandum and to purport to terminate the appointments of the Appellants contrary to the clear and unambiguous Provisions of Section 15 of the Act. I so hold. See also the case of *United Bank of Nigeria Ltd, v. Ogboh (1995)2 NWLR (Pt. 360) 647 @ 669; (1995) 2 SCNJ. 1.*

In the case of Orugbu & anor. v. Bulara Una & 10 ors. (2002) 9 SCNJ. 12; (2002) 9- 10 S.C. 61. Niki Tobi, JSC, dealt with “fair hearing”, and at page 22 of the SCNJ., he stated inter alia, as follows:

“*The fair hearing principle entrenched in the Constitution is so fundamental in the judicial process or the administration of justice that breach of it will vitiate or nullify the whole proceedings and a party cannot be heard to say that the proceedings were properly conducted and should be saved because of such proper conduction.*”

“*Once the appellate court comes to the conclusion that there is/was a breach of the principle of fair hearing, the proceedings (and I add decision), cannot be salvaged as they are null and void ab initio*”.

At pages 33 - 34, the following appear, inter alia;

“*Natural justice rule of audi alteram partem simply means “hear the other side”*” See Olanikan v. University of Lagos (1985) 2 NWLR (Pt. 9) 599; Chief Otapo v. Sunmonu (1987) 2 NWLR (Pt. 58) 587” (it is also reported in (1987) 15 SCNJ. 57)

So be it in the instant appeal. I find as a fact and hold that there was a gross breach of fair hearing of the Appellants by the Respondents. On this ground alone, the appeal succeeds. If the termination is/was *ab initio*, the said reliefs granted by the trial court, cannot be disturbed by me. I endorse and uphold them.

In paragraph 7.09 at page 17 of the Respondents’ Brief, it is submitted that Ground 4 of the grounds of appeal is/was predicated on the concurring opinion of Abdullahi, JCA and therefore, that it is incompetent and liable to be struck out. I note however, that in the case of Emeka Nwana v. Federal Capital Development Authority & 5 ors. (2004) 13 NWLR (Pt.889) 128 @ 140 -141: (2004) 7 SCNJ. 90 @ 97 - 98, Niki Tobi, JSC stated as follows:

“*A concurring judgment, has equal weight with or as a leading judgment. A concurring judgment compliments, edifies and adds to the leading judgment. It could at times be an improvement of the leading judgment, when the Justices add to it certain aspects which the writer of the leading judgment did not remember to deal with. In so far as a concurring judgment performs some or all the above functions, it has equal force -with or as the leading judgment in so far as the principles of stare decisis are concerned.*”

However, a concurring judgment is not expected to deviate

from the leading judgment. A concurring judgment, as the name implies, must be in agreement with the leading judgment, A concurring judgment, which does its own thing in its own way outside the leading judgment, is not a concurring judgment but a dissenting judgment.

The mere fact that concurring judgment mentioned in a positive and correct way what is not contained in the leading judgment does not make it wear the appellation of dissenting judgment. In so far as what is contained there is relevant to the issue in the matter, the judgment is acceptable as a concurring judgment”.

Honestly and with the greatest respect, I do not see anything wrong with this ground. What the learned Justice stated, was a repetition and concurrence of what was already contained in the lead Judgment at pages 636 to 638 in respect of Issue 3 of the Appellants although differently couched. I have deliberately refrained from commenting on the contents of those pages. They are very amazing and perhaps, very disturbing to me to say the least. But if I may, the majority judgment had this to say inter alia:

“..... I agree that the respondents’ employment has statutory flavour with permanent pensionable rights and their appointments can only be terminated in accordance with the provisions of a statute - Olaniyan v. Unilag (supra) and Eperokun v. Unilag (supra) however where the provisions of an act (sic) appeared to be slightly different from the others, it is not necessary to make use of those cases decided differently”. [the underlining mine]

However, from what is said about a concurring judgment, the mention of what one of the members of the panel said in that ground, does not in my respectful view, prevent it from being a concurring judgment that agreed with the lead judgment.

Lastly, on Waiver, It was not raised in the trial court. It was raised and dealt with for the first time in the court below without the leave of that court being sought and obtained. It was therefore, a non-issue before this Court. I so hold. In any case, absolute or mandatory unlike directory statutory provision, cannot be waived. It must be obeyed and complied with strictly.

See the case of *Woodward v. Sarson (1875) L. R. 10*.

In summary, the said judgment of the majority Justices of the court below, can in no way stand. I say no more about it.

I have read the well written dissenting judgment of Ogunwumiju, JCA. See the judgment of this Court in the case of Bank of Baroda v. Iyalabani Ltd. (2002) 7 SCNJ. 287, which approved all the findings made or the reasoning and conclusion in the dissenting Judgment of Ayoola, JCA (as he then was). This is notwithstanding that generally, B counsel are advised not to rely on or resort to a dissenting judgment. See in the case of Ishaya Bamiyi v. The State (2001) 8 NWLR (Pt. 715) 270; (2001) 4 SCNJ. 103 @ 121 - per Uwaifo, JSC. I am also aware that my learned brother, Niki Tobi, JSC in the said case of Orugbu & C anor. v. Balara Una & ors. (supra) stated that a dissenting judgment however powerful, learned and articulate, is not the Judgment of the Court and therefore, not binding since the Judgment of the Court is the majority judgment which is binding. But with the greatest respect, instances abound, where some majority judgments of the Court of D Appeal, have been set aside by this Court and approval is given to a minority judgment which reflects the justice of the case on appeal, in any case, even if the said Ground 4 is struck out, the appeal will still succeed at least, on the sole ground that the Respondents, breached the said fundamental rights of the Appellants to have been accorded E fair hearing.

It is from the foregoing and the fuller reasons and conclusion of my learned brother, Fabiyi, JSC, that I too, allow this appeal which is meritorious and succeeds. I too, hereby set aside the said majority F judgment of the court below and I accordingly, restore the decision of the trial court. I commend the minority judgment which in my respectful but firm view, is sound. Finally, I abide by the consequential orders in the said lead judgment including that in respect of costs.

G

ADEKEYE JSC

The 1st- 44th Appellants, who were engaged as lecturers of the University of Ilorin by the endorsements on their writ of summons filed on 21/8/01 and paragraph 21 of their Statement of Claim requested from court against their employers, the Respondents before H the Federal High Court, Ilorin, the under mentioned; -

“(a) A declaration that the letter dated 22nd of May 2001 to the plaintiffs titled “Cessation of Appointment” purporting to terminate the plaintiffs’ appointment with the 3rd defendant is ultra-vires,

null and void and of no effect whatsoever.

(b) A declaration that the plaintiffs are still in the service of the 3rd defendant.

(c) A declaration that the defendants are bound to comply with the directive of the federal Government of Nigeria to reinstate the plaintiffs as contained in the letter of National Universities Commission dated 29th June 2001 with Reference NUC/ES/261 to the Pro-Chancellor of the 4th defendant and the 1st defendant.

(d) A declaration that the defendants are not entitled to summarily terminate the plaintiffs' appointment without complying with the provisions of the University of Ilorin Act Cap 45.5 Laws of the Federation and other relevant Statutes.

(e) A declaration that the purported termination of the plaintiffs' appointment by the defendants under the guise of "Cessation of Appointment" or under any guise whatsoever is contrary to the provisions of the Pensions Act of Nigeria in that the plaintiffs are permanent and pensionable staff of the University.

(f) A declaration that the contents of any purported Letter of Appointment or memorandum purportedly signed by the plaintiffs cannot override the provisions of the University of Ilorin Act Cap 455 Laws of the Federation 1990 regarding the nature, tenure and discipline of staff of Unilorin and all other matters connected or pertaining thereto.

(g) A declaration that the purported termination of the plaintiffs' appointment by the defendants negates the fundamental rights provisions of the constitution of the Federal Republic of Nigeria.

(h) An order setting aside the purported termination of the plaintiffs' appointment and nullifying the defendants' letter of 22nd May 2001 to the plaintiffs in that regard.

(i) An order compelling the defendants to comply with the directive of the Federal Government through the Universities Commission dated 29th June 2001 with Reference NUC/ES/261 to the defendants to reinstate the plaintiffs.

(j) An order compelling the defendants to reinstate and/or restore the plaintiffs to their posts in University of Ilorin with their rights, entitlements and other perquisites of their offices. And an order compelling the defendants to pay to the plaintiffs all their salaries and allowances from February 2001 till the day of judgment and thence-

2714 Olufeagba v. Abdur-Raheem (2009) 12 KLR Adekeye JSC
forth.”

At the trial court the parties as plaintiffs and defendants exchanged pleadings, after which the matter proceeded to trial. In the considered judgment delivered on the 26th of July 2005 the trial court granted all the reliefs sought by the plaintiffs.

B Being aggrieved by the decision, the 1st - 4th defendants Professor Shuaib Oba Abdul-Raheem “as Vice-Chancellor, Mr. Tunde Balogun as Registrar, University of Ilorin and the Governing Council of the University, filed an appeal at the Court of Appeal Ilorin. In its
C judgment, delivered on the 12 of July 2006, the Court of Appeal allowed the appeal by a majority decision of the court. The plaintiffs/ respondents being dissatisfied with the majority decision of the lower court, appealed to this court. The appellants distilled seven issues from the eight grounds of appeal raised in the Notice of Appeal. Issue
D One challenged the competency of the appeal to this court in the event of the demise of two of the plaintiffs before the case was concluded at the trial court, and the third plaintiff a month after the judgment of the trial court was delivered.

My Lord, had aptly disposed of this issue in his leading judgment. I however wish to subscribe, that this point belongs to the area of our procedural law in the Nigerian Legal System. The Rules of the court permit joinder of parties within persons claiming jointly, severally or in the alternative as plaintiffs or defendants so as to avoid
F multiplicity of actions particularly where they have common interest and common questions of law, and common demand. Judgment of court shall be given to one or more of the parties as may be found to be entitled to reliefs in the action. Such action shall continue upon the death of any of the parties as long as there are survivors appearing
G in the matter before the court.

The Federal High Court as a court of Record has provisions in the Federal High Court Civil Procedure Rules 2002 particularly Order 12 Rules 30, 31, 32, 33, 34 and 35 which provide for an action in the event of death of the plaintiffs or defendants. Order 12 Rule
H 30 stipulates that: -

“The death of a plaintiff or defendant shall not cause the suit to abate if the cause of action survives.”

Order 12 Rule 31 states that:-

“If there are two or more plaintiffs or defendants, and one of

them dies, and if the cause of action survives the surviving plaintiff or plaintiffs alone or against the surviving defendant or defendants alone, the suit shall proceed at the instance of the surviving plaintiff or plaintiffs against the defendant or defendants.”

Numerous court judgments have followed the provisions in the Rules of Court, and interpreted same to suit the circumstances of a particular case. B

Regulations 11.3.0 to 11.5.2 of pages 65-66 of the Revised Senior Staff Regulations of the University of Ilorin make provision for the benefit and entitlements which can accrue to a deceased member of staff in the event of a judgment given in favour of such deceased member where the action succeeds. Issues 2 to 4 are interwoven in that they relate to whether the procedure adopted for the termination of employment of the appellants by virtue of Section 15 (3) of the University of Ilorin Act Cap 455 Laws of the Federation D 1990 and without regard to Section 15 (1) on procedure for termination of such appointment were proper. Moreover, whether the decision of the learned majority Justices of the Court below that the appellants were offered opportunity of fair hearing by the respondents (and that the appellants rejected this) before their appointments were terminated were based on pleadings and the evidence on Record, Further whether the appellants can waive their statutorily guaranteed rights to fair hearing merely by reason of signing Memorandum of Appointment on assumption of duty. E

The majority judgment of the court below pronounced at pages F 635 - 636 of the Record that: -

“My understanding is that the cessation was reflected under section 15 (3) of the University of Ilorin Act Cap 455. The issue is the question of waiver which is right to any person. The respondents had G waived any rights they may have under the provisions of section 15 of Unilorin Act by signing the Memorandum of Appointment. Since the respondents decided to join in the ASUU strike contrary to what they have both signed with the University Authority, they should have H themselves to blame. There is evidence that all other workers were on their duty post at the material period working but the respondents refused to work. It is also in evidence as I stated in this judgment that the respondents were invited to come to a meeting with the authority to iron out things but the respondents turned down the

invitation for the reason best known to them. one they say, can lead a horse to a river but cannot force it to drink water. Their attitude (i.e. respondents') cannot find support in law. I refer to the Supreme Court's case of Scott-Emakpor v. Iluobe 1979 1 SO pg.6 Mankomu v. Salman (2005) 4 NWLR 270/301 and 653/673. I think I will agree

B *with the learned counsel to the appellants in this appeal that in terminating the appointment of the respondents under section 15 (3) of the Unilorin Act, the University has done its reasonable best to reasonably comply with the Section 15 of that Act. Bamgboye v. Unilorin*

C *(1999) 10 NWLR pt. 622 pg. 90 at 302 and Esiaga v. Unical (2004) 7 NWLR pt. 872 pg. 366 at 387. I agree that the respondents' employment has statutory flavour with permanent pensionable rights and their appointments can only be terminated in accordance with the provisions of a statute — Olaniyan v. Unilag (supra) and Eperokun*

D *v. Unilag (supra), however where the provisions of an act appeared to be slightly different from the others, it is not necessary to make use of those cases decided differently. The provisions of section 15 (3) of the University of (sic) Act is a complete departure from section 15(1) of the Unilorin Act (supra) which is in pari materia with that of Lagos*

E *University Act. I hold that under section 15 (3) of the University of Ilorin Act Cap 255, the appellants' action in terminating the employment of the respondents was done within the dictates of that section and it is in order."*

F *As a follow up the learned senior advocate for the respondents submitted that the letters of termination, Exhibits 82 -119 did not indicate that they were issued on disciplinary grounds, therefore Section 15 (1) of the University of Ilorin Act is inapplicable. The lower court ruled that it is not in all cases that, section 15 (1) of the Univer-*

G *sity of Ilorin Act must be resorted to before the employee/employer relationship could be brought to an end. Section 15 (1) of the University Act and regulations 3.4.0 of the Senior Staff Regulations contains the same provisions. Section 15 (1) of cap 455 provides as follows: -*

H *"If it appears to the Council that there are reasons (or believing that any person employed as a member of the academic or administrative or professional staff of the University other than the Vice-Chancellor should be removed from his office of employment on the ground of misconduct or of inability to perform the functions of his*

office or employment, the council shall: -

(a) Give notice of those reasons to the person in question.

(b) Afford an opportunity of making representations in person on the matter to the Council and

(c) If he or any three members of council so requests within the period of one month beginning with the dates of the notice- to make arrangement B

(i) For a joint committee of the Council and the Senate to investigate the matter and report on it to the Council and

(ii) For the person in question to be afforded an opportunity of appearing before and being heard by the investigating committee with respect to the matters.” C

It is noteworthy according to the provisions of Section 15 (I) that the procedure must be complied with where a member of the academic, administrative or professional staff of the University is removed from his employment on the ground of misconduct or of inability to perform the functions of his office and the latter is in effect Section 15 (3). And if the Council after considering the report of the investigating committee is satisfied that the person in question should be removed as aforesaid, the Council may so remove him by an instrument in writing signed on the direction of the Council. D

The appellants' appointment were terminated by the respondents by means of the cessation letters dated 22th May 2001 - Exhibits 82 - 119. The contents of the letters reveal clearly that the respondents terminated the appellants' appointment for misconduct to wit “*disobedience of council directives*”. The conclusion that the appellants were invited to come to a meeting with the authority to iron out things but they turned down the invitation for reason best known to them cannot be justified in the face of overwhelming evidence of ASUU strike and that the lecturers were denied access to the University premises so as to prevent disruption of academic activities particularly end of semester examinations. E

The learned justices in the majority decision of the lower court identified the employment relationship in existence between the parties as that with statutory flavour. An avalanche of court decisions have pronounced that where contract of service enjoys statutory protection it can only be terminated in the manner prescribed by the governing statutory provisions, a breach of which renders the act F

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ultra vires and void. The contract cannot be discharged on the agreement of parties without compliance with the enabling statutory provision. There is a presumption that when the legislature confers a power on an authority to make a determination, it intends that the power shall be exercised in accordance with the rules of natural justice. Statutory provisions establishing a corporate body like the University of Ilorin always empower the body to employ staff and discipline them. Once the statutory provisions are clear as to how to deal with an erring servant, they must be adhered to strictly including a clear observation of the principle of fair hearing. Bidge v. Baldwin (1964) A.C. pg. 40 at pgs. 75 – 76, Olaniyan v. University of Lagos (1985) pt. 9 NWLR pg. 599 Eperokun v. University of Lagos (1986) 4 NWLR pt. 34 pg. 162 Bankole v. N.B.C. (1968) 2 All NLR pg, 372 Shitta-Bey v. Federal Public Service Commission (1981) 1 S.C. 40; Olatunbosun v. NISER Council (1988) 3 NWLR pt. 80 pg. 25 Aiyetan v. N.I. F.O.R. (1987) 3 NWLR pt. 59 pg. 48 Garba v. University of Maiduguri (1986) 1 NWLR pt. 18 pg, 550 Adeniyi v. Governing Council of Yaba College of Technology (1993) 6 NWLR pt. 300 pg. 426 and UNTHB v. Nnoli (1994.) 8 NWLR pt. 363 pg. 376 SC.

Besides being entrenched in section 36 (1) of the 1999 Constitution, where it encompasses the twin pillars of natural justice namely:

- (a) Audi alteram partem (hear the other side)
- (b) Nemo iudex in causa sua (no one should be a judge in his own cause)

Fair hearing is broadly speaking also a common law doctrine that in the determination of his civil rights and obligations a person is entitled to a fair hearing within a reasonable time by a court or tribunal established by law.

There is provision under section 15(1) of the University Act to set up a joint committee of the Council and Senate to investigate the matter and report to Council. Such committee according to reported authorities though an administrative body is at that material time exercising judicial functions in the sense that it has to decide on the materials before it between an allegation and defence - the burden placed upon it requires the committee to observe rules as follows:-

- (a) A person who may be adversely affected by any decision based on the inquiry must be informed of the way in which he may

be so affected and of the substance of the complaint against him or of the ground upon which he may be so affected with sufficient particularity as will enable him to answer them if he can.

(b) Such person must be informed of all relevant evidence or statements adduced in support of the complaints or grounds alleged against him. B

(c) Such person must be given a fair opportunity to make a statement relevant to the inquiry and to correct or controvert any relevant statement or report adduced to his prejudice.

In effect the representation made to the council does not have to be oral — it may be in writing with full attestation by the person affected. C

Ceylon University v. Terrendo (1960) I WLR pg. 223 at pgs. 231 - 233. The Queen v. The Administrator Western Nigeria Law Report 313 at pg.316 D

Lagos University College of Medicine v. Adegbite- (1973) NLR pg. 247 at pgs. 264 - 265;

Hart v. Military Gov. Rivers State, Suit No. SC/96/1973 (1976) 10 N.S.C.C. 622 at pg. 632.

There is no evidence of the Council complying with the foregoing steps particularly in the prevailing circumstance at the material period of ASUU strike and the lecturers being denied ingress into the University Campus. E

On the aspect of the appellants waiving their rights to fair hearing by endorsing their memorandum of employment, I make haste to elaborate that in an employment tainted with statutory flavour, the reason for termination of the employment is very crucial to the case of both parties. The reason must be ascertainable and must be in accordance with the letter of appointment, memorandum of appointment, the Revised Senior Staff Regulations and the University of Ilorin Act Cap 455 Laws of the Federation of Nigeria. The majority decision of the justices of the court of appeal claimed that the respondents had waived' any rights they may have under the provisions of section 15 of Unilorin Act by signing the memorandum of appointment. F G H

A clause in the letters of appointment explains that: -

"The appointment, which is subject to the University regulations, shall be for a total period of two years only"

Regulations 1.1.3 at page 1 of the senior staff regulations reads: -

B *“A member shall hold office on such terms and conditions of service as may be set out in any contract in writing, between him and the University such contract being signed on behalf of the University by the Registrar or by such other persons as may be authorized for that purpose by the University and any such contract shall contain or be deemed to contain a provision that terms and conditions therein specified are subject to the provisions of the Act, the statutes and regulations of the University.”*

C Where the provision of a section is made subject to another one in application, the provision of the latter section governs, controls and prevails over the provision made subject to it. In other words the provisions of the memorandum of appointment and the Revised Senior Staff Regulations are subservient, subordinate and inferior to D the provisions of the University Act, and are consequently rendered subject to it.

Tukur v. Government of Gongola State (1989) 4 NWLR pt. 117 pg. 517

FRN v. Osahon (2006) 5 NWLR pt. 973 pg. 261

E Comptel International SPA v. Denson Ltd. (1996) 2 NWLR pt. 459 pg. 170

NDIC v. Okem Ent. Ltd. (2004) 10 NWLR pt. 880 pg. 107.

F Fair hearing is a constitutional right which is entrenched in our Constitution - as section 36 (1) of the Constitution of the Federal Republic of Nigeria. It is therefore a constitutional and subsequently a fundamental right which cannot be waived or of which any citizen can be unjustly stripped.

Bamgboye v. University of Ilorin (1999) 10 NWLR pt. 622 pg. 290

G Chigbu v. Tonimas (Nig.) Ltd (1999) 3 NWLR pt. 593 pg. 115.

H Another tricky legal point raised in this appeal relates to the order for reinstatement, payment of salaries, allowances and entitlement of the appellants. The grouse of the appellants about this issue in the conclusion of the majority justices was based on conjecture and not on concrete, ascertainable information about the state of affairs of the appellants. The appellants submitted that it would be unjust to use the non-existent evidence of alternative jobs against them. The courts had made clear and unequivocal pronouncements as to the consequential effect of termination of employment embed-

ded in statutory flavour, whereupon the authority flagrantly omitted to comply with the procedure for termination in the way and manner prescribed by any relevant statute, as null and void. This clearly conforms with the reasoning that the principle of fair hearing is not a mere adjudication but a doctrine that enjoins that once a party entitled to be heard before deciding a matter is denied opportunity of being heard, the order or decision entered thereon would be vacated. M.A.A. v. Orjekor (1998) 6 NWLR pt. 553 pg. 265, 267. B

The senior employee of a university can only be validly removed from service if the procedure prescribed by law was followed. The remedy to unlawful termination of employment is reinstatement. The mere fact that the employees had secured another gainful employment or have been replaced are not factors to prevent the court from making the requisite orders. C

Olaniyan v. University of Lagos (1985) 2 NWLR pg. 599, at pgs 612-613 and 622-623 Eperokun v. University of Lagos (1986) 4 NWLR pg. 34 at pg. 162 Bamgboye v. University of Ilorin (1999) 6 SCNJ pg. 296 at pg. 316. D

My Lord, Onu JSC, admirably captured this in the case Nnoli v. UNTHMB (1994) 10 SCNJ at pg. 93 paras. 5-17 where he said; E

“Once the retirement was declared null and void, that is to say that the decision retiring her from the services of UNTH was declared to be no decision, I do not see how and why the other reliefs could be denied her. It is as if she was never retired from the services. The plaintiffs’ contract of employment was in the circumstances of this case unilaterally repudiated by the defendants. There is nothing legally standing in her way to have her job or office back with all the attendant rights, privileges and benefits. In other words, she is entitled to be restored to her status quo ante.” F G

The logical conclusion is that if the appellants had remained in service up till the age of retirement, they would have earned their salaries, allowances and all other entitlements. The pertinent question now is, if they were wrongfully dismissed, should they lose these benefits? H

It is my conclusion that the appellants are entitled to reinstatement even if they had secured other employments during the pendency of their case and subject only to harmonization of any over-

lapping remuneration.

For the foregoing and the fuller reasons ably expounded by my learned brother, Fabiyi JSC in the leading judgment, I agree that the appeal is meritorious. I abide by the consequential orders in the leading judgment including the order for costs.

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