

SUPREME COURT OF NIGERIA

10TH DECEMBER, 2010. SC. 246/2004

**CORAM:- C. M. CHUKWUMA-ENEH, J. A. FABIYI, O. O.
ADEKEYE, S. GALADIMA, B. RHODES-VIVOUR, JJSC**

1. LEADERS OF COMPANY LTD.
(PUBLISHERS OF "THIS DAY") APPELLANTS
2. JIBRIL DAUDA
AND
MAJOR GENERAL MUSA BAMAIYI RESPONDENT

ACTIONS - Issues - Raising and resolution suo motu - Propriety - Its wrong for a court to raise an issue suo motu - And resolve a case on that basis - Without inviting the parties to address it on the issue (H1)

COURTS - Records of proceedings - Binding effect - Courts are bound by their records - And must look into them at the time of writing their judgments (H2)

FACTS

The plaintiff/respondent obtained judgment at the High Court of Kaduna State in Suit No. KDH/2/49/97 against the defendants/appellants on 7th October, 1998. After judgment was reserved but prior to its delivery, appellants had, by way of motion on notice sought for leave of the trial court to adduce evidence and address the court before the delivery of judgment in the matter. But the trial court heard and dismissed the application on the said 7th October, 1998 before proceeding to deliver its judgment. So, on 26th September, 2002, appellants applied for extension of time to seek leave and to appeal against the ruling dismissing their application.

The application was granted and the notice of appeal filed accordingly. The appeal subsequently came up for hearing and was heard on 28th April, 2004 without objection from any of the parties as to whether extension of time was obtained before filing of the appeal, and the Court of Appeal did not ask the parties to address it on the point. Yet, when the court was delivering its judgment, it raised the point suo motu and erroneously held that no such extension was sought and obtained before the appeal was filed. It consequently

struck out the appeal without hearing the parties on the point. Dissatisfied, appellants have brought this appeal against the judgment of Court of Appeal.

ISSUES FOR DETERMINATION

‘1. Whether or not the Court of Appeal Learned Justices can suo motu raise an objection to a Notice of Appeal and the grounds contained therein at the time of writing judgment, deal with the issue alone and proceed to strike out the Notice and grounds of appeal together with the issues, formulated thereon, without hearing the parties or calling upon the parties to address the court on the issue.’

2. Whether the Lower Court was not duty bound to regard its records of Court, at the time of writing and delivery of its judgment.”

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

Issues - Raising and resolution suo motu - Propriety

1. On the 12th October, 2010 when we took this appeal, learned Counsel for the parties having identified their respective briefs of argument, agreed that the Court below erred in law to have raised the issue as to the competence of the Notice of Appeal suo motu, without affording the parties an opportunity to address it on the point. Both Counsel placed reliance on the cases of *KATTO v C. B. N* (1999) 6 NWLR (Pt.607) 390.

This Court in *KATTO’S* case (*supra*) held thus:

“On no account should a Court of law raise a point suo motu, no matter how clear it may appear to be, and proceed to resolve the case between the parties thereon without inviting them or Counsel on their behalf to address the Court on the point. If it does so, it will be in breach of a part’s fundamental right to fair hearing. In the instant case, the Court of Appeal was wrong in raising the issue of jurisdiction suo motu and proceeding to decide the appeal thereon without inviting Counsel to address it thereupon”

The Appellants were denied fair hearing at the Court below. (p. 2652 A/D)

Records of proceedings - Bindingness - Effect on court

2. I shall be brief in considering the second issue. It is trite law that the courts are bound by their records and must look into its records. If the Learned Justices of the Court below had looked into the Court records, they would have seen that the Appellants had obtained the neces-

sary leave for extension of time to comply with S.25 (4) of the Court of Appeal Act (Supra), before filing their Notice of Appeal on the 2nd day of October, 2002.

The resolution of these two issues in favour of the Appellants determines the Appeal. The proceedings before the Court below having been held to be null and void, it would be an exercise in futility to consider other issues raised by the Respondent in his brief of argument.

In conclusion, I hold that the appeal succeeds. (p. 2652 G)

NOTABLE POINT OF INTEREST

RHODES-VIVOUR JSC

1. S. 22 of Supreme Court Act is inapplicable to null judgments

Section 22 of the Supreme Court Act confers on this Court wide power to do what the Court of Appeal ought to have done but did not do. It unfortunately cannot be invoked in this case simply because the judgment of the Court of Appeal is a nullity. A judgment is a nullity when it is clear that a party was denied a fair hearing.

REPRESENTATION

Kemi Balogun Esq. with him Peace A. Obi (Miss) for the Appellants. L. Okeke Esq. for the Respondent

CASES REFERRED TO

Duriminiya v. C.O.P (1961) NNLR 70 at 74

Oje v. Babalola (1991) 4 NWLR pt. 185 pg. 267

Ajuwon v. Akanni (1993) 9 NWLR (Pt. 316) 182

Kotoye v. C. B. N (1989) 1 NWLR pt. 98, pg 419

Olatunji v. Adisa (1995) 2 NWLR pt. 376, pg. 167

Salubi v. Nwariaku (1997) 5 NWLR (Pt. 505) 442

Adeniran v. Alao (1992) 2 NWLR pt. 223, pg. 350

Araka v. Ejeagwu (2000) 15 NWLR pt. 692, pg. 684

ADEGOKE v ADIBI (1992) 5 NWLR (pt.242) at 410

Adigun v. A-G Oyo State (1987) 1 NWLR pt.53, pg. 678

Okafor v. A-G Anambra State (1991) 3 NWLR pt. 200, pg. 59

ADIGUN v. A.G. OF OYO STATE (1987) 1 NWLR (pt.56) p.197

OKAFOR v. A.G. ANAMBRA STATE (1991) 6 NWLR (pt.200) 659

Adejumo v. David Hughes & Co. Ltd. (1989) 5 NWLR pt. 120 pg. 146

Dennis Ivienagbor v. Henry Osato Bazuaye (1999) 6 SCNJ 235 at 243

STATUTE REFERRED TO

Court of Appeal Act, Cap 75, L. F. N., 1990, S. 25(4)

B

LEAD JUDGMENT BY GALADIMA JSC

This is an Appeal against the Judgment of the Court of Appeal, Kaduna Division. In the Judgment delivered on 26 July, 2004, the learned Justices of the Court of Appeal, struck out the 1st and 2nd Appellants' Notice of Appeal dated 2nd October, 2002, and the grounds of appeal contained therein for being incompetent. The Judgment of the trial court delivered on 7th October, 1998 in suit No. KDH/2/49/97 was affirmed and the 1st and 2nd Appellants were ordered to pay the sum of N7, 000.00 as costs to the Respondent.

The summary of facts relevant to this appeal is exposed as follows: The Respondent who was the plaintiff at the trial Court obtained judgment on 7th October, 1998 against the 1st and 2nd Appellants who were the defendants.

Prior to the delivery of judgment, the Appellants had applied by way of a Motion on Notice to the trial Court on 30th September, 1998 for an order granting leave to the Defendants to adduce oral and documentary evidence and open its defence in the suit and thereafter address the Court before judgment is entered. The Motion was argued by the parties. The Learned trial judge dismissed the application before proceeding to deliver his judgment on the 7th October, 1998. Dissatisfied, the Appellants herein then filed their Notice of Appeal on the 13th October, 1998.

Subsequently, on 26 September, 2002, the appellants applied for an extension of time for leave to appeal against the ruling of the trial court delivered on the 7th October, 1998, together with leave to appeal and an extension of time to appeal against the said ruling. It is note worthy that the trial Court granted the Appellants their application on 26th September, 2002. The appellants also sought the leave of Court to file their Brief of Argument out of time on 14 day of May, 2003. The Court of Appeal granted the Appellants their application to file their Brief of Argument out of time. The Respondent also filed their brief.

On 28th April, 2004 when the Appeal came up for hearing at the Court below, the parties adopted their briefs of argument and

the court reserved Judgment.

It is again note worthy that throughout the hearing of the Appeal the issue as to whether there was an application for an extension of time, as prescribed by the provisions of section 25(4) of the Court of Appeal Act. Cap. 75, L.F.N., 1990, before the Appellants filed their Notice of Appeal dated 2nd October, 2002, was NEVER raised by any of the parties, neither did the Learned Justices raise the issue themselves, to enable parties address the Court on that point. Furthermore, the Notice of Appeal was filed on the 2nd October, 2002 and not on the 4th October, 2002 as stated in the lead judgment. On 4th October, 2002, the said Notice of Appeal was certified as True Copy at the High Court of Justice, Kaduna.

However, on the 26th July, 2004, the Learned Justices, whilst delivering their judgment, raised suo motu the fact that there was no application for extension of time as prescribed by the Court of Appeal Act. Cap 75, L.F.N. 1990 and there was nothing whatsoever before the Lower Court to show that time was extended to the Appellants to file their Notice of Appeal dated 2nd October, 2002 out of time. The Court held that the Appellants' Notice of Appeal together with the grounds stated therein were incompetent and were accordingly struck out.

The Appellants being dissatisfied with the judgment of the Court below appealed. The Notice of Appeal contained three grounds. Two issues identified for determination are as follows:

'1. Whether or not the Court of Appeal Learned Justices can suo motu raise an objection to a Notice of Appeal and the grounds contained therein at the time of writing judgment, deal with the issue alone and proceed to strike out the Notice and grounds of appeal together with the issues, formulated thereon, without hearing the parties or calling upon the parties to address the court on the issue.'

2. Whether the Lower Court was not duty bound to regard its records of Court, at the time of writing and delivery of its judgment. "

On the other hand the Respondent, in his brief filed on 17th March, 2010 raised sole issue thus:

"Whether it is right for the Court of Appeal to raise the issue of incompetent Notice of Appeal suo motu and proceeded to dealt (sic) with issue without argument from the notices."

It would appear that the Appellants found it necessary to react

to the points raised in the Respondent's brief, when they filed their Reply brief on 13th April, 2010.

However, **on the 12th October, 2010 when we took this appeal, learned Counsel for the parties having identified their respective briefs of argument, agreed that the Court below erred in law to**
 B **have raised the issue as to the competence of the Notice of Appeal suo motu, without affording the parties an opportunity to address it on the point. Both Counsel placed reliance on the cases of KATTO v C.B.N. (1999) 6 NWLR (pt. 607) 390. ADENIJI v. ADENIJI (1972) 1 All NLR 298 and ADEGOKE v ADIBI (1992) 5 NWLR (pt. 242) at 410 and ATANDA v LAKANMI (1974) 3 SC.109.**
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Indeed, with the consensus of the parties that the Court below erred in law to have raised the issue as to the competence of the Notice of Appeal suo motu, without affording the parties an opportunity to address it on the point, this has resolved the first issue. **This Court in KATTO'S case (supra) held thus:**
 D

"On no account should a Court of law raise a point suo motu, no matter how clear it may appear to be, and proceed to resolve the case between the parties thereon without inviting them or Counsel on
 E **their behalf to address the Court on the point. If it does so, it will be in breach of a part's fundamental right to fair hearing. In the instant case, the Court of Appeal was wrong in raising the issue of jurisdiction suo motu and proceeding to decide the appeal thereon without inviting Counsel to address it thereupon"**
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The Appellants were denied fair hearing at the Court below. This court has held in a plethora of cases that where a party has been denied fair hearing the entire proceeding no matter how well conducted will amount to a nullity. See ADIGUN v. A.G. OF OYO STATE (1987)
 G 1 NWLR (pt. 56) p.197 OKAFOR v A.G. ANAMBRA STATE (1991) 6 NWLR (pt. 200) 659.

I shall be brief in considering the second issue. It is trite law that the courts are bound by their records and must look into its records. If the Learned Justices of the Court below had looked into
 H **the Court records, they would have seen that the Appellants had obtained the necessary leave for extension of time to comply with S.25 (4) of the Court of Appeal Act (Supra), before filing their Notice of Appeal on the 2nd day of October, 2002.**

The resolution of these two issues in favour of the Ap-

pellants determines the Appeal. The proceedings before the Court below having been held to be null and void, it would be an exercise in futility to consider other issues raised by the Respondent in his brief of argument.

In conclusion, I hold that the appeal succeeds. I set aside the judgment of the court below and order that the appeal be remitted to that Court for a rehearing by a different panel. B

It make no order as to costs.

FABIYI JSC

 C

I have read before now the judgment just delivered by my learned brother, Galadima JSC. I agree with the reasons therein advanced to arrive at the conclusion that the appeal is meritorious and should be allowed. D

The crux of the matter is that the Court of Appeal, Kaduna Division ('the court below' for short) suo motu raised the issue of competence of the appellants' notice of appeal dated 2nd October, 2002 and the grounds of appeal therein in its judgment. It struck out the notice of appeal, the grounds of appeal and arguments canvassed by both parties on grounds 1 and 2 without giving the parties the opportunity to address it on same. The court below goofed as it is extant at page 167 of the record that the required leave to appeal was granted by the court below on 26/9/2002. E

The court below embarked upon a thankless job as both learned counsel for the parties maintained that the stance posed was misplaced. They maintained that a judge should confine himself to the issue raised by the parties before it and that whenever an issue is raised suo motu, the parties must be given an opportunity to address on the point. F G

Let me start by making the point that the raising of the issue of competence suo motu while writing the judgment equates with what is often referred to as cloistered justice. It is not the duty of a court to embark upon same by making enquiry into the case outside the court. A judge is an adjudicator; not an investigator. See: *Duriminiya v. C.O.P* (1961) NNLR 70 at 74; *Dennis Ivienagbor v. Henry Osato Bazuaye* (1999) 6 SCNJ 235 at 243. H

A Judge should not raise a point suo motu without hearing from the parties. This is to avoid being accused of descending into

the arena. He has no business to bridge the yawning gap in the case of a party to the proceedings. See: *Ajuwon v. Akanni* (1993) 9 NWLR (Pt. 316) 182; *Salubi v. Nwariaku* (1997) 5 NWLR (Pt. 505) 442; *Olorunfemi v. Asho & 2 Ors.* (1999) 1 S.C. 55.

B It is not correct for a court to give a decision on a point of which opportunity was not afforded counsel to argue at the hearing and particularly a point which throughout the hearing was not raised. See: *Victino Fixed Odds Ltd. v. Joseph Ojo & 2 Ors.* (2010) 3 SC (Pt. 1) 1, *Hambe v. Huezze* (2001) 2 SC 26 AT 39; (2001) 4 NWLR (Pt. 703) 372 at 388.

C A denial of right to be heard as herein is a breach of constitutional right as enshrined in Section 36 (1) of the 1999 Constitution. Such cannot and ought not be condoned in any respect. See: *Otapo v. Sunmonu* (1987) 2 NWLR (Pt. 56) 197; *Adigun & Ors. v. A. G. of Oyo State & 2 Ors.* (1987) 2 NWLR (Pt. 56) 197.

It is certain to me that the court below crossed the line by raking up the point of competence of the appeal which turned out to be dead wrong suo motu without hearing the parties. Such has turned out to be counter productive. It should never be repeated.

E For the above reasons and those carefully set out in the lead judgment, I too, feel strongly that the appeal should be allowed. I order accordingly. The appeal is remitted to the court below for a rehearing by a different panel.

F I make no order as to costs.

ADEKEYE JSC

G I had read in draft the judgment just delivered by my Learned Brother, Suleiman Galadima JSC. My Lord in his lead judgment had exhaustively considered the two issues settled for determination and I agree in toto with his reasoning and conclusion that the appeal be allowed and furthermore, that justice of the case demands that this suit be remitted back to the court of Appeal for rehearing before a different panel of H Justices.

The lower court was in error to have raised the issue that the appellants must obtain the requisite leave to file an appeal out of time in compliance with the provision of Section 25 (4) of the Court of Appeal Act, Cap, 75, Laws of the Federation of Nigeria, 1990, in its

judgment delivered on the 26th of July, 2004. The issue was not raised by the respondent during the hearing of the appeal or by the Justices themselves to enable the parties to address the court on that point. The court suo motu, on its own volition raised and considered this issue in its judgment thereafter.

It is trite law that a court has no jurisdiction to raise an issue suo motu and unilaterally resolve it in its judgment without hearing both sides, however clear the issue may appear to be. Where a court raised an issue suo motu, it is fair that the court should hear counsel to the parties on the matter particularly from the party that may be adversely affected as a result of the issue raised. Where a court raised an issue without giving counsel the opportunity to address on it, the court would clearly be in breach of the principle of fair hearing. The rationale behind the principle that a court should be wary in raising an issue suo motu is to maintain the role of the court as an independent adjudicator in Nigerian adversary system of jurisprudence. There is a legal duty on the court to give the parties or their legal representatives the opportunity to react or address it on the issue raised.

Araka v. Ejeagwu (2000) 15 NWLR pt. 692, pg. 684

Olatunji v. Adisa (1995) 2 NWLR pt. 376, pg. 167

Oro v. Falade (1995) 5 NWLR pt. 395 pg.385

Oje v. Babalola (1991) 4 NWLR pt. 185 pg. 267

Adeniran v. Alao (1992) 2 NWLR pt. 223, pg. 350

Adejumo v. David Hughes & Co. Ltd. (1989) 5 NWLR pt. 120
pg. 146

Yusuff v. N. T. C. Ltd. (1977) 6 SC 39

Maiyaki v. Mandoya (1988) 3 NWLR pt. 81, pg. 226

It is however noteworthy that it is not in all cases where a court raises an issue suo motu that will lead to reversal of the decision so reached. The appellate court sitting over such judgment must be convinced that the issue so taken suo motu is substantial and has led to a miscarriage of justice against the appellant.

This takes me to examine the nature of the issue raised suo motu by the lower court in the appeal and its effect on the appellants. The 1st and 2nd appellants filed an application for an order to appeal against the Ruling of the lower court delivered on the 7th October, 1998. This application, a Notice of Appeal was filed on the 13th of October, 1998. On the 26th of September, 2002 - the 1st and 2nd appellants prayed for

the tripod orders in an application to appeal out of time against the Ruling. Both applications are on pages 68-71 and 143 - 166 of the record of proceedings respectively. The lower court granted the application on the 26th of September, 2002. The Notice of appeal was filed by the appellants/applicants on the 2nd of October, 2002. Vide
 B pages 75 - 77 of the Record.

Parties exchanged their briefs and the lower court heard the appeal on the 28th of April, 2004. During the hearing neither the parties nor the court raised the issue of the application for extension of time as prescribed by the provisions of Section 25 (4) of the Court of Appeal Act, Cap, 75, Laws of the Federation of Nigeria, 1990. The
 C lower court in its judgment delivered on the 26th of July, 2004, dismissed the appeal, and affirmed the judgment of the trial court. Whilst delivering the judgment, the lower court unilaterally raised the issue
 D that there was no application for extension of time to appeal as stipulated by the provisions of Section 25 (4) of the Court of Appeal Act, Cap, 75, Laws of the Federation of Nigeria, 1990- and particularly that there was nothing before the lower court to show that time was extended to the appellants to file their Notice of appeal dated the 2nd
 E of October, 2002 out of time. The matter became more complicated by the decision of the lower court in the judgment that the Notice of Appeal dated 2nd October, 2002 with the grounds therein were incompetent and proceeded to strike out the grounds and the issues
 F formulated from them by both parties suo motu.

The 1st and 2nd appellants were deprived of the opportunity of addressing the court on this issue and more important of drawing the attention of the lower court to the relevant pages of the Record of Appeal where the appellant were granted leave to appeal out of time. This issue
 G raised by the court suo motu and particularly the decision to strike out the appeal of the 1st and 2nd appellants without being heard is not only substantial, it has also occasioned a miscarriage of justice against these appellants. The issue raised suo motu by the lower court without recourse to the parties or their counsel was not only material but it affected
 H the substantive matter before the lower court and its eventual judgment. This court has a duty to nullify the judgment of the lower court. A decision of a court which breaches the principle of fair hearing as enshrined in Section 36 (1) of the 1999 Constitution of the Federal Republic of Nigeria, is null and void.

Adigun v. A-G Oyo State (1987) 1 NWLR pt.53, pg. 678

Okafor v. A-G Anambra State (1991) 3 NWLR pt. 200, pg. 59

Mohammed v. Kano Native Authority (1968) 1 All NLR pg. 424 ;

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

I abide by the consequential orders in the lead judgment including the order as to costs.

RHODES-VIVOUR JSC

Relevant extracts from the judgment of the Court of Appeal reads thus:

“since the decision is in respect of an interlocutory application, the decision appealed against was given on the 7th of October, 1998 and the Notice of Appeal was filed on the 4th of October, 2002 almost four years from the date the decision was given. There is no application for extension of time as prescribed by the provisions of section 25(4) of the Court of Appeal Act, Cap 75, L.F.N 1990 and there is nothing whatsoever before the court to show that time was extended to the appellants to file their Notice of Appeal out of time. Therefore, the appellants Notice of Appeal dated the 2nd of October, 2002 and filed in this Court on 4th October, 2002 is grossly incompetent. The grounds of appeal contained therein and issues Nos 1, 2 and 3 formulated from the said grounds of appeal are equally incompetent. Accordingly, the Notice of Appeal dated 2nd of October, 2002 by the Appellants and the ground of appeal contained therein are struck out for being incompetent. Equally struck out are Issues Nos 1, 2 and 3 formulated by the appellants and Issue No.1 formulated by the respondent and all submissions in their support contained in the briefs of arguments filed by the appellants and the respondent.”

And so the appellants’ entire Interlocutory appeal was struck out. A judge should make it a duty to scrutinize his own Record of proceedings and take notice of its contents. The Records of Appeal show that the appellants by a Motion on Notice filed on the 9th of April, 2002 applied for:

1. An order granting an extension of time within Which to seek leave to appeal against the ruling of the Kaduna State High

Court of Justice per Dogara Mallam J. delivered on the 7th day of October, 1998.

2. An order granting leave to the appellants/Applicants to appeal on grounds of mixed Law and facts against the ruling of the Kaduna State High Court of Justice per Dogara Mallam J. delivered on the 7th day of October, 1998.

3. An order granting an extension of time to the Appellants/Applicants within which to appeal against the ruling of the Kaduna High Court of Justice per Dogara Mallam J. delivered on the 7th day of October, 1998.

4. An order deeming the Notice of Appeal dated the 13th day of October, 1998 and filed on the same day which said Notice of Appeal contains grounds of Appeal (grounds 3 and 5) which touch on the said ruling of Dogara Mallam J. delivered on the 7th day of October, 1998 as having been properly filed and served.

On the 26th of September, 2002 the Court of Appeal, granted the prayers. See page 167 of the Record of Appeal. The Court said:

“Prayer 4 is withdrawn and struck out. Orders as prayed, time to appeal against the interlocutory decision of the Court below delivered on 7/10/98 is extended for 7 days, extension of time to apply for leave is granted as well as leave to appeal against the decision of Dogara J. delivered on 7th October, 1998 is granted. Costs of N2,500 to Respondent.”

Records of Appeal reveal that there was an application for extension of time to seek leave to appeal, leave to appeal and extension of time to file Notice of Appeal, and these prayers were granted on the 26th of September, 2002. Consequently the Notice of Appeal dated 2/10/02 and filed on 4/10/02 together with the issues formulated from the said grounds are very competent. The Court of Appeal was in grave error to strike out the Notice of Appeal in the mistaken belief that the appellants did not obtain leave. This issue never arose during the hearing of the appeal, it arose when the learned justice of Appeal was preparing his judgment.

It has been stated in a plethora of cases that a judge has no jurisdiction to raise an issue and proceed to resolve it without giving counsel an opportunity to be heard.

See my observations on raising issues suo motu in,
F.R.N. v. Obegolu 2006 18 NWLR Pt. 1010 P.202.

Issues such as this, if for some reason the learned judge is not

satisfied with the Record, he ought to have invited counsel to address him on whether leave was obtained.

Striking out the Notice of Appeal (Supra) is a clear denial of fair hearing. Audi alteram partem, simply means hear the other side. It denotes basic fairness and a generally accepted standard of natural justice. In practice it means that the judge should allow both parties to be heard and ensure he listens to the point of view or case of each side. Striking out the appellants Interlocutory appeal when the appeal (supra) was properly filed before the Court of Appeal is a denial of the appellants right to fair hearing as provided by Section 36 of the Constitution.

Section 22 of the Supreme Court Act confers on this Court wide power to do what the Court of Appeal ought to have done but did not do. It unfortunately cannot be invoked in this case simply because the judgment of the Court of Appeal is a nullity. A judgment is a nullity when it is clear that a party was denied a fair hearing.

For this, and the reasoning in the leading judgment delivered by Galadima, JSC, I too will order that this appeal be heard all over again before another Panel of the Court of Appeal.

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