

SUPREME COURT OF NIGERIA
4TH MAY, 2012. SC. 71/2008 (CONS.)
CORAM:- W. S. N. ONNOGHEN, I. T. MUHAMMAD,
O. O. ADEKEYE, B. RHODES-VIVOUR,
N. S. NGWUTA, JJSC

1. NIGERIAN NATIONAL
PETROLEUM CORPORATION

2. HON. ATTORNEY GENERALAPPELLANTS
OF THE FEDERATION

AND

1. FAMFA OIL LIMITEDRESPONDENT

APPEALS - Grounds - Mixed law & fact - Nature - How determined
- Court should examine the grounds and their particulars - In order
to identify the nature of complaint (H1)

APPEALS - Grounds - Preliminary objections - When relevant -
Objections are filed against hearing of appeal - But where there are
grounds to sustain appeal - Motion on notice should be filed (H2)

AFFIDAVITS - Averments - Failure to deny - Effect - Since appellants
failed to make proper denial - The averments of respondent are
deemed admitted (H3)

STATUTES - Interpretation - Principles - Ordinary meaning must be
given to the words used - So as to bring out intention of the legisla-
ture (H4)

CONFLICT OF LAWS - Oil & Gas - Petroleum Act vis-à-vis Back-in-
Right Regulation - Oil mining lease - Acquisition of - Procedure -
Method provided by Petroleum Act - Should be strictly followed (H5)

COURTS - Statutes - Adherence - Court should ensure that it is bound
by statutory provisions - In order to promote justice (H6)

STATUTES - Petroleum law - Exhibit EE2 - Validity of - The exhibit is
invalid - Since the parties cannot by consent - Alter provisions of the

1948 NNPC v. Famfa Oil Ltd (2012) 5 KLR (pt. 312) 1947; (2012)

Petroleum Act (H7)

APPEALS - Judgments - Challenge - Respondent's role - His duty is to defend the appeal - But where he is dissatisfied with parts of judgment - A cross appeal should be filed (H8)

SUPREME COURT - Appeals - Amendment of record - Supreme Court Act s.22 - The court has power to amend record - Where it is satisfied that there are accidental slips and omissions (H9)

FACTS

Plaintiff/respondent was initially granted an Oil Prospecting Licence by the Federal Government of Nigeria. However, following a judgment of Federal High Court, Abuja in an earlier dispute between the parties, the licence was converted to an Oil Mining Lease. Thereafter, defendants/appellants wrote a letter to respondent wherein it purportedly acquired 50% interest in the said lease. Being dissatisfied, respondent filed this action by way of originating summons at the Federal High Court, Abuja claiming inter alia - a declaration that the Federal government cannot deal with the lease or any interest in respect of any minerals within the territorial waters or Exclusive Economic Zone, except in accordance with the provisions of the Petroleum Act.

At the end of trial, the court upheld the 50% acquisition by appellants. Aggrieved, respondent appealed to the Court of Appeal, Abuja. The court allowed the appeal and held that the acquisition is void since it did not comply with the Petroleum Act. The judgment of the trial court was thus set aside. Not satisfied, appellants filed separate notices of appeal at Supreme Court. Respondent filed notice of preliminary objections against the appeals and also filed cross-appeal.

ISSUE FOR DETERMINATION

Whether the acquisition of 50% interest in OML 127 by the Federal Government of Nigeria was done in compliance with the provisions of the Law and the Constitution.

HELD

(Unanimously dismissing the appeal per

RHODES-VIVOUR JSC)*APPEALS - Grounds - Mixed law & fact - Nature*

1. At times the difference between a ground of law and a ground of mixed law and facts can be very narrow. Labelling a ground of appeal error of law, or misdirection may not necessarily be so. The appellation is irrelevant in determining whether a ground of appeal is of law or mixed law and fact. The court should examine the grounds and their particulars and identify the substance of the complaint. In that way the issue of whether a ground of appeal is of law and fact would be resolved. Identifying a ground of appeal on facts is easier. (p. 1955 H)

APPEALS - Grounds - Preliminary objections - When relevant

2. If I may add to the above, where, as in this appeal the Preliminary objection was filed against some grounds of appeal and there are other grounds of appeal that can sustain the appeal, a preliminary objection was inappropriate. The respondent ought to have filed a Motion of Notice since the Preliminary objection if successful would not have terminated the hearing of the appeal as there were other grounds of appeal to sustain the appeal. Preliminary Objections are only filed against the hearing of an appeal and not against one or more grounds of appeal which cannot stop the court from hearing the appeal. (p. 1965 E)

AFFIDAVITS - Averments - Failure to deny - Effect

3. When the Originating process (as in this case) is an Originating Summons, the affidavits filed in support serve as the statement of claim, while the counter-affidavits serve as statement of defence. The affidavits are the pleadings for the case. The material averment in the respondent's pleadings (paragraphs 31) is that he spent thousands of dollars on the exploration of the field. It is not a valid denial in law for the appellants to simply say that the averment in paragraph 31 is untrue and incorrect. Nowhere in the counter-affidavit or the fur-

ther counter-affidavit is the averment in paragraph 31 properly denied. Paragraph 4(b) is a bare denial and bare denials amount to no denial in Law. I am in the circumstances satisfied that the respondent spent thousands of millions of United States Dollars on the exploration of the field. (p. 1968 G)

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STATUTES - Interpretation - Principles

4. It is long settled that in the interpretation of statutes the words used must be given their ordinary meaning and interpretations must be done to bring out the clear intention of the legislature. (p. 1973 C)

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CONFLICT OF LAWS - Oil & Gas

5. I agree with the Court of Appeal. There was no negotiation before the Federal Government took 50% participating interest in OWL 127. It was taken by the Federal Government in accordance with the provisions of the Back-in-Right Regulation of 2003. The back-in-Right Regulation 2003 is a subsidiary legislation promulgated by the Minister under Section 9 (a) and (h) of the Petroleum Act. The Petroleum Act is substantive or Principal Law. It is the principal law that provides subsidiary legislation the source of its existence. Without Principal Law there can be no subsidiary legislation, and so subsidiary legislation must conform with the principal law. The petroleum Act is principal law, a statute. Where it prescribes a particular method of exercising statutory power the procedure so laid down must be followed without any deviation whatsoever. If any provision of the Regulations are inconsistent with the provisions of the Act/Statute the provisions of the Regulation shall to the extent of inconsistency be declared void. Under the Back-in-Right Regulations 2003 there is no provision for negotiation, while section 35 of the first schedule to the Petroleum Act makes it mandatory that before the Federal Government of Nigeria acquires its 50% interest in an OML it must negotiate with the recipient of the OML Licence. I am satisfied that the appellants acted under the Back-in-Right Regulation of 2003 to acquire interest in OML 127 in clear violation of the provisions of paragraph 35 of the 1st sched-

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ule of the Petroleum Act. The provisions of the Regulations can never be read in derogation to the provisions of the Petroleum Act. The acquisition by the Federal government of Nigeria was wrong. (p. 1974 C)

COURTS - Statutes - Adherence

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6. I must observe that the schedule of an Act/Statute is part of the Act and it is as potent as any part of the Act. It is the duty of the court to ensure that it is bound by rules made under the law of the land. Such rules can never be ignored. If it does, the attainment of justice may be left to the whims and fancies of powerful individuals and this would not be in the interest of justice. Exhibit EE2 was signed by officials of the NNPC and the respondent. This with respect is not in accordance with paragraph 35 of the first schedule to the Petroleum Act which states clearly that the Minister shall negotiate. (p. 1975 A)

STATUTES - Petroleum law - Exhibit EE2 - Validity of

7. Exhibit EE2, the agreement executed by the parties was done in clear violation of the provisions of paragraph 35 of the first schedule to the Petroleum Act. It remains for all time a worthless piece of paper in the light of the long settled position of the law that parties even by consent cannot alter the provision of a statute. The fact that the Minister for Petroleum did not execute exhibit EE2 is conclusive evidence that there was non compliance with paragraph 35 of the first schedule to the Petroleum Act. (p. 1975 D)

Judgments - Challenge - Respondent's role

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8. In an appeal the duty of the respondent is to defend the appeal. But where a respondent agrees with the judgment, but is dissatisfied with some parts of the judgment or seeks to correct errors, a cross-appeal ought to be filed. (p. 1978 B)

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SUPREME COURT - Appeals - Amendment of record

9. By virtue of Section 22 of the Supreme Court Act and Order 8 Rule 12 of the Supreme Court Rules the Supreme Court has power to amend the Record of Appeal when it is satisfied

that there are accidental slips, and obvious omissions on the Records. This power to amend is exercised to correct errors in the Record of Appeal. What then are the accidental slips in the Record of Appeal? The complaint of the respondent/cross-appellant (plaintiff) is that the Federal Government of Nigeria wrongly acquired its interest in OML 137. The Hon. Attorney-General of the Federation (1st respondent in the Court of Appeal) represents the Federal Government of Nigeria. The Court of Appeal made orders against the NNPC instead of against the Hon. Attorney-General of the Federation. That is the accidental slip the cross-appeal seeks to correct.

(p. 1978 E)

REPRESENTATION

- D Alhaji Ibrahim, SAN with R. Ogunneso, SAN, A. Oyeyipo, O. Balogun (Miss), O. Adegboyega and S. Sule, for 1st appellant
Taiwo Abe with K. Osuji for the 2nd Appellant/2nd Cross-respondent
- B.A. M. Fashaun, SAN with O.M. Bodunde, for the Respondents
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CASES REFERRED TO

- FGN v. Zebra Energy Ltd (2002) 18 NWLR (pt. 798) 162
Ogulaji v. A.G. Rivers State (1997) 6 NWLR (pt. 508) 20
UNTHMB v. Nnoli (1994) 5 NWLR (pt. 363) 326
- F Ajuwa v. SPDC (2011) 12 SC (Pt. IV) 118
Opuiyo v. Omoniwari (2007) 6 SC (Pt. 1) 35
Ajide v. Kelani (1985) 3 NWLR (Pt. 12) 248
Ogbechie v. Onochie (No.1) (1986) 2 NWLR (Pt. 23) 484
- G Orakosin v. Merkiti (2001) 9 NWLR (Pt. 719) 529
Nwadike v. Ibekwe (1987) 4 NWLR (Pt. 67)
Anukam v. Anukam (2008) 5 NWLR (Pt. 1081) 455
First Bank Nig. Plc v. Abraham (2008) 18 NWLR (Pt. 111) 8
O' Kelly v. Trust House Foile Plc (1983) 3 ALL ER 468
- H Rutter v. Tregent (1879) 12 Ch. D 758
Lewis & Peat Ltd v. Akhimien (1976) 1 ANLR (Pt. 1) 469
Eliochin (Nig) Ltd v. Mbadiwe (1986) 1 NWLR (pt. 14) 47

STATUTES & RULES REFERRED TO

Petroleum Act Cap. P10 LFN 2004, ss. 2(1)(a)(b)(c)(3), 9(1)(a)(h), para. 35 of 1st Schedule

Constitution of Federal Republic of Nigeria, ss. 36, 42, 44(1), 233(2)(a)(3)

Back-in-Right Regulations 2003, para. 2(1)

Supreme Court Act, s. 22

Supreme Court Rules, O. 8 r. 12(1)

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LEAD JUDGMENT BY RHODES-VIVOUR JSC

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The respondent as plaintiff took out an originating summons against the appellants, (the defendants) claiming the following reliefs:

1. A declaration that the President, Vice President or Officers in the Public Service at the Federation cannot grant any Oil Prospecting License (OPL) or any Oil Mining Lease (OML) or any interest whatsoever in respect of any Minerals, Minerals oils and natural gas in, under or upon the territorial waters and Exclusive Economic Zone of Nigeria to any person or persons except under and in accordance with the provisions of the Petroleum Act Cap. P10 of the Laws of the Federal Republic of Nigeria, more particularly Section 2(1)(a)(b) and (c) as well as Section 2(3).

2. A declaration that by virtue of paragraph 8 of the first Schedule to the Petroleum Act, the first respondent cannot grant an Oil Mining Lease to any other person or persons except the holder of an Oil Prospecting Licence.

3. A declaration that the President, Vice President or Officers in the Public Service of the Federation cannot acquire any interest in an Oil Prospecting Licence (OPL) or Oil Mining Lease (OML) except under and in accordance with the provisions of:

(a) Paragraph 35 of the First Schedule

(b) Section 44(1) of the Constitution of the Federal Republic of Nigeria.

4. A declaration that the purported acquisition of 50% of the applicant's interest or any interest whatsoever in OML-127 in as much as it was not done in compliance with the provisions of the law and the Constitution as stated above is illegal, unconstitutional, null and void and cannot confer any interest whosoever in OML 127 in the second respondent (that is due process of the law must be followed).

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5. A perpetual injunction restraining the second respondent, its assign, servants, privies, subsidiaries, whatsoever, howsoever, whomsoever from exercising any right in the said OML 127 or any party or portion thereof.

Adah, J of the Federal High Court, Abuja Division presided. At the end of the trial which was on affidavits and documentary evidence the learned trial judge held that the acquisition of 50% of the plaintiff's interest in OML 127 was done in compliance with the provisions of the law and the Constitution. Dissatisfied with this judgment, the respondent filed an appeal. The appeal was heard in the Court of Appeal Abuja Division. That court allowed the appeal, and set aside the judgment of the trial court. The following orders were made:

1. The compulsory and arbitrary acquisition of the interest of the appellant by the 2nd respondent as outlined in letters of acquisition dated 27th January, 2005 and 19th April, 2005 is hereby declared illegal, unlawful, wrongful and thus null and void.

2. It is hereby declared that the purported acquisition of 50% of the appellant's interest in OML, 127 in as much as it was not done in compliance with the provisions of the law paragraphs 35 of Cap. 10 of the LFN 2004 and the constitution is illegal, unconstitutional, null and void and cannot confer any interest whatsoever in OML 127 in the 2nd respondent, without due process of the Law.

3. An order is hereby made directing the 2nd respondent to return to the appellant all his interest in OML 127 illegally acquired.

4. An injunction is hereby granted restraining the 2nd respondent, its assigns, servants, privies, subsidiaries, whomsoever from interfering with the rights of the appellant in the said OML 127.

This appeal is against that judgment. In accordance with Rules of this court briefs of argument were filed and exchanged. The 1st appellants brief was deemed filed on the 23rd day of March, 2009. The 2nd appellants brief was filed on the 23rd of September, 2009.

For the purpose of clarity two Notices of Appeal were filed. The 1st appellants Notice of Appeal is in SC.71/2008, while the 2nd appellants Notice of Appeal is in SC.178/2008. Motion filed on 11/11/11 by learned counsel for the respondent. B.A.M. Fashaun SAN was for consolidation as SC.71/2008 and SC.178/2008. On 14/2/12 in the absence of objection from opposing counsel both suits were

consolidated under SC.71/2008. The respondents brief was filed on the 28th of September, 2010. There is a cross-appeal. I will make reference to the relevant briefs in due course. Learned counsel for the respondent, Mr. B.A.M. Fashaun SAN argued in his brief a Preliminary Objection against both appeals. On the 1st appellants' appeal it was his contention that grounds 1, 2, 3, 4, 6 and 7 contained in the Notice of Appeal are either grounds of fact or of mixed law and fact which require leave. He submitted that since leave was not obtained before they were filed they ought to be struck out. Reliance was placed on section 233(2) (3) of the Constitution. *Ajide v. Kelani* 1985 3 NWLR Pt. 12 P.248, *Ogbechie v. Onochie* (No.1) 1986 2 NWLR Pt. 23 P.484 Learned counsel for the 1st appellant Alhaji Ibrahim SAN observed that grounds, 1, 2, 3, 4, 6 and 7 in his Notice of Appeal are grounds of Law. Relying on *Orakosin v. Merkiti* 2001 9 NWLR Pt. 719 p.529, *Nwadike v. Ibekwe* 1987 4 NWLR Pt. 67 p.718. He urged this court to dismiss the preliminary objection. On the 2nd appellants appeal, learned counsel for the respondent observed that grounds 1, 2, 3 and 4 of the grounds of appeal in the 2nd appellants Notice of Appeal are grounds of mixed law and fact for which leave is required under section 233(3) of the Constitution. He urged this court to strike out the grounds of Appeal.

In response, learned counsel for the 2nd appellant, Mr. T. Abe observed that all his grounds of appeal are grounds of Law. Relying on *Anukam v. Anukam* 2008 5 NWLR Pt. 1081 p.455. *First Bank of Nig. Plc. V. Abraham* 2008 18 NWLR Pt. 1118 P. 172. He urged this court to dismiss the preliminary objection since the grounds do not come under section 233(3) of the Constitution.

Section 233(2)(a) of the Constitution states that:

"An appeal shall lie from decision of Court of Appeal to the Supreme Court as of right in the following cases

(a) Where the ground of appeal involves question of law alone, decision in any civil or criminal proceedings before the Court of Appeal."

Section 233(3) of the Constitution states that:

"Subject to the provisions of subsection (2) of this section, an appeal shall lie from the decisions of the court of Appeal to the Supreme Court with leave of the Court of Appeal or the Supreme Court."

At times the difference between a ground of law and a

ground of mixed law and facts can be very narrow. Labelling a ground of appeal error of law, or misdirection may not necessarily be so. The appellation is irrelevant in determining whether a ground of appeal is of law or mixed law and fact. See Ajuwa & Anor. v. S.P.D.C. 2011 12 SC (Pt. IV) P118, Opuiyo v. Omoniware B 2007 6 SC Pt. 1 p. 35. **The court should examine the grounds and their particulars and identify the substance of the complaint. In that way the issue of whether a ground of appeal is of law and fact would be resolved. Identifying a ground of appeal on facts is easier.** Ogbechie & Ors. v. Onochie & Ors. 1986 1 C NSCC P.443 and Nwadike v. Ibekwe 1987 4 NWLR Pt. 67 p. 718

Both judgments of this court provide an illuminating guide to resolving the issue. In Ogbechie & Ors. v. Onochie & Ors. (supra) this court adopted the explanation given by the authors of the Law Quarterly Review vol. 100 of October, 1984. The authors explained thus:

1. If the tribunal purports to find that particular events occurred although it is seised of no admissible evidence that the events did in fact occur, it is a question of law. But where admissible evidence has been led its assessment is entirely for the tribunal; in other words it is a question of fact.

2. If the tribunal approached the construction of a legal term of art in a statute on the erroneous basis that the statutory wording bears its ordinary meaning it is a question of law.

3. If the tribunal approaches the construction of a statutory word or phrase bearing an ordinary meaning on the erroneous basis that it is a legal term of art, it is question of law.

4. If the tribunal though correctly treating a statutory word or phrase as a legal term of art errs in elucidation of the word or phrase it is a question of law.

5. If the tribunal errs on its conclusion (that is, in applying the law to the facts) in a case where this process requires true skill of a trained lawyer, it is error of law.

6. If, in a case where a conclusion can as well be drawn by a layman (properly instructed on the law) as by a lawyer, the tribunal reaches a conclusion which cannot reasonably be drawn from the facts as found. In that event the superior court has no option but to assume that there has been some misconception of the law. But the issue may admit of more than one possible resolution. The inferior

tribunals conclusion may be one of the possible resolutions; yet it may be a conclusion which the superior court (had it been seised of the issue) would not have reached. Nevertheless, the inferior tribunal does not err in law. The matter is one of degree; and a superior court with jurisdiction to correct only errors of law will not intervene.

In *Nwadike v. Ibekwe* supra this court explained further that - B

(a) it is an error in law if the adjudicating tribunal took into account some wrong criteria in reaching its conclusion. *O' Kelly v. Trust House Foile PLC* 1983 3 ALL ER p. 468

(b) Several issues that can be raised on legal interpretation of deeds, documents, term of arts and inference drawn therefrom are grounds of law *Ogbechie v. Onochie* (supra) at p.491. C

(c) Where a ground deals merely with a matter of inference, even if it be inference of fact, a ground formed from such is a ground of law *Benmax v. Austin Motor C. Ltd.* 1945 ALL ER p. 326 D

(d) Where a tribunal states the law in point wrongly, it commits an error in law.

(e) Where the complaint is that there was no evidence or no admissible evidence upon which a finding or decision was based, same is regarded as a ground of law. E

(f) If a judge considers matters which are not before him and relies on them for the exercise of his discretion, he will be exercising same on wrong principles and this will be a question of law. *Metal Construction (W.A.) Ltd. v. Migliore* (supra) p.315 F

Now, the grounds of appeal filed by Alhaji Ibrahim, SAN on behalf of the 1st appellant are as follows:-

GROUNDS OF APPEAL

1. The learned justices of the Court of Appeal erred in law when they held that the Federal Government decision to exercise G and the actual exercise of its right to a participating interest in OML 127 vide its letters of 27th January, 2005 and 19th April, 2005 were arbitrary and offended paragraph 35 of the First Schedule to the Petroleum Act Cap. 10 LFN 2004 and this has occasioned a miscarriage of justice. H

PARTICULARS

(a) Paragraph 35(a) of the First Schedule to the Petroleum Act empowers the Minister of Petroleum Resources to impose on a licence or lease special terms and conditions as to participation by the

Federal Government in the venture to which the license or lease relates on terms to be negotiated between the parties.

(b) Pursuant to this provision, a term of OPL 216 was the vesting in the life of any subsequent Oil Mining Lease (OML), a right to participating interest by the Federal Government.

B (c) The Federal High Court, Abuja (Coram; B.F.M. Nyako, J) in suit No. FHC/ABJ/CS/275/2000 in its judgment against which no appeal was ever filed, recognized the existence of this right of the Federal Governments participating interest in any future OML 127, which OPL 216 translated into.

C (d) Contrary to the view held by the court below, the Federal Government taking up of participating interest in OML 127 vide its letters of 27th January, 2005 and 19th April, 2005 is a realization of the right which had inured in its favour from the time OPL 216 came D into being.

2. The learned Justices of the Court of Appeal erred in law and on the facts when they held as follows:

E *"The Respondents centered all their case and submission on what is called the Back-in-Right Regulation 2003... It is clear that these Regulations made no reference to negotiation quite in contradiction to the Principal Law, in paragraph 35 of Cap. 10. This is where I find the complaint of the Appellant to be valid."* And this has occasioned a miscarriage of Justice.

F PARTICULARS

(a) The Respondents' case was never centred solely on the Back-in-Right Regulations 2003

G (b) The Respondents relied on other grounds to show that the taking up of participating interest by the Federal Government in OML 127 was done in compliance with the relevant portions of the law and the constitution.

H (c) The Respondents relied upon the written agreement that is Exhibit EE1 annexed to the Respondents further counter-affidavit to the originating summons which provided for the basis for operating any OML derived from OPL 216.

(d) There was no contradiction between the Back-in-Right Regulations 2003 and the Principal Law i.e. the Petroleum Act Laws of the Federation of Nigeria, 2004.

(e) The Honourable Courts finding that the complaint of the

Appellant was valid, was on wrong premise.

3. The Court of Appeal erred in law when after considering the provisions of paragraph 35 of the first schedule of the Petroleum Act Cap. P10 LFN 2004 and the provision of para. 2(1) of the Back-in-Right Regulations 2003 held thus: *"It is clear that these Regulations made no reference to negotiation quite in contradiction to the principal law in paragraph 35 of Cap. 10. This is where I find the complaint of the Appellant to be valid. It is the law that subsidiary legislation must conform with the principal law which provided the source of their existence."* And proceeded to nullify the Federal Government's acquisition of participating interest in OML 127 based on the provisions of the said Regulations.

PARTICULARS

(a) There is no conflict between paragraph 35 of the first Schedule to the Petroleum Act and paragraphs 2(1) of the Back-in-Right Regulations 2003 in that the two provisions deal with two different situations: Whereas paragraph 35 of the Schedule relates to negotiation of terms that must take place before a license or lease is created, paragraph 2(1) of the Regulations relates to a situation where the Federal government's right to a participating interest in an OML is already agreed and/or negotiated between the Minister and the Appellant in the OPL document and the former is merely seeking to exercise the already accrued right.

(b) There is nothing in paragraph 35 of the first schedule to the Act forbidding either express or impliedly, the giving of effect to terms already agreed and/or negotiated in an OPL which are to come into operation in a subsequent OML.

(c) The court below misconceived the purport of these provisions and viewed the relevant provisions of the Regulations as not being in conformity with the provisions of the Petroleum Act and thereby occasioned a miscarriage of Justice.

(4) The learned Justices of the Court of Appeal misdirected themselves when they held:-

"I believe the appellant is also on a firm ground to protest the discriminatory nature the whole exercise was conducted. When his interest was arbitrary (sic) acquired, it was a different story with regard to the holding of his Technical partners, Deep Star and petrobras. The interest of these two were left intact. The consequence of this

arbitrary allocations smacks of complete alienation of the Appellant, even from his own technical partners.”

PARTICULARS

(a) The issue of the alleged “discriminatory nature” of the exercise of the Federal Government’s rights to participating interest in OML 127 was raised for the first time without leave of the Court of Appeal.

(b) It was never the case of the appellant from the inception of this action that it had been discriminated against by the Federal Government of Nigeria.

(c) There is no law that states that the Federal Government must take certain proportion of interest from all the partner to the OML and not from only one partner thereto.

(d) From the evidence before the Honourable Trial Court was nothing discriminatory about the said exercise of the Federal Government’s rights to participating interest in OML 127 as the interest of all parties including the Technical partners were taken into consideration.

6. The learned Justices of the Court of Appeal misdirected themselves when they held that:-

“There is the argument put across by the learned counsel to the Respondents that negotiation talked about in paragraph 35 of the Petroleum Act Cap. 10 LFN 2004 should have taken place at the application level and not when the application has already been granted. This submission to my mind in a double edge sword, either way the respondents would come out injured and this has occasioned a miscarriage of justice.”

PARTICULARS

(a) Paragraph 35 of the Petroleum Act clearly provides for negotiations to take place at the application stage for a licence or a lease.

(b) It was at the stage of granting the licence (OPL 216) that the term allowing the Federal Government to take up participating interest in any subsequent OML was interested in the licence (OPL 216).

(c) The validity or otherwise of the term of OPL 216 were not in issue in this instant action.

(d) The humble submissions of the Respondents were there-

fore in order and followed the position of the law on the issue.

(e) There was in anyway evidence before this Honourable Court that negotiations did not take place between the parties.

7. The learned Justice of the Court of Appeal Justices erred when they held that:-

“In the first place, it was the same 2nd respondent that processed the application of conversion of OPL 216 to OML 127 by the Appellant, 2nd Respondent made no effort to call upon the Appellant to negotiate. It went ahead to approve the conversion. It clearly flies in the face of 2nd Respondent to try to claim that the negotiations should be at application level. In the second place, 2nd Respondent could have barely (sic) its face to seek for negotiations with the Appellant before his interest was arbitrarily and discriminatory (sic) acquired, the way it was done” and this occasioned a miscarriage of justice.

PARTICULARS

(a) The Respondent never processed or approved the application of conversion of OPL 216 to OML 127.

(b) The 2nd Respondent never arbitrarily and discriminatorily acquired the Appellants interest.

(c) The undisputed evidence and indeed the Appellant’s case, before the Honourable Court was that the Ministry of Petroleum Resources of the Federal Government of Nigeria (hereinafter referred to as *“the Ministry of Petroleum Resources”*) wrote to the Appellant to notify it of the Federal Government of Nigeria intention to take up its participating interest in OML 127.

(d) Additionally all stakeholders in OPL 216 including the Appellant and 2nd Respondent agreed in writing on the basis for operating any Oil Mining Lease derived from OPL 216 as evidenced by Exhibit EE1 annexed to the Respondent’s further counter-affidavit to Originating Summons.

(e) A misconception of the facts of the case led to the finding of the Honourable Court that the submissions of the Respondents with respect to negotiations talked about in paragraph 35 of the Petroleum Act were self injurious.

Applying the pronouncements of this court in the two cases earlier alluded to, ground 1 complains about the wrongful application of the Law. It is a ground of Law ground 2 complains of a mis-

conception by the court of the case of the appellant. It is a ground of mixed law and fact. Ground 3 complains of a misunderstanding by the court of the Bank-in-Rights Regulations 2003 and paragraph 35 of the First Schedule to the Petroleum Act. It is a ground of Law. Ground 4 complains of a decision based on a complaint that was raised for the first time without leave of court. It is a ground of mixed law and fact. Ground 6 complains about misunderstanding of the court of paragraph 35 of the first schedule to the Petroleum Act. It is a ground of law. Ground 7 complains that the court did not take into account undisputed facts before reaching its decision. It is a ground of mixed law and facts. Grounds 1, 3, 5, 6 are grounds of law, while grounds 2, 4 and 7 are grounds of mixed of law and fact. They are caught by section 233(3) of the constitution and are hereby struck out. Grounds 1, 3, 5 and 6 are grounds of law and they sustain the appeal. I now turn to consider similar preliminary objection to the 2nd appellants' grounds of appeal.

The 2nd Appellants Notice of Appeal contains six grounds of appeal. Preliminary objection was raised to grounds 1, 2, 3 and 4. They read:-

E ERROR IN LAW

The learned Justices of the Court of Appeal erred in law in holding that the Federal Government decision to exercise and the actual exercise of its right to a participating interest in OML 127 vide its letters of 27th January, 2005 and 19th of April, 2005 were arbitrary and offended paragraph 35 of the First Schedule to the Petroleum Act Cap. 10 LFN 2004 and this has occasioned a miscarriage of Justice.

PARTICULARS

(a) Paragraph 35(a) of the first schedule to the Petroleum Act empowers the Minister of Petroleum Resources to impose on a license or lease special terms and conditions as to participating by the Federal Government in the venture to which the license or lease relates on terms to be negotiated between the parties.

(b) Pursuant to the above provision, a term of OPL 216 was the vesting in the Federal Government of Nigeria, a right to participating interest in any future Oil Mining Lease (OML).

(c) The Federal High Court Abuja (Coram B.F.M. Nyako J), in suit No. FHC/ABJ/CS/275/2000 in its judgment of 22/11/2004 against

which no appeal was filed, recognized the existence of the right of the Federal Governments participating interest in any future OML 127, which OPL 126 translated into.

(d) Contrary to the view held by the Court of Appeal, the Federal Government taking up of participating interest OML 127 vides its letters of 27th January, 2005 and 19th April, 2005 is a realization of the right which had inured in its favour from the time OPL 216 came into being. B

2. The learned Justice of the Court of Appeal erred in law and occasioned a miscarriage of justice when they held that;

"The Respondents centered all their case and submission on what is called the Back-in-Right Regulation 2003... it is clear that these Regulations made no reference to negotiation quite in contradiction to the principal law, in paragraph 35 of Cap. 10 this is where I find the complaint of the Appellant to be valid." C

D
PARTICULARS

(a) The Respondents case was never centred on the Back-in-Right Regulation 2003.

(b) The Respondents relied on other grounds to show that the taking up of participating interest by the Federal Government of Nigeria in OML 127 was done in compliance with the relevant portions of the Law and 1999 Constitution. E

(c) The Respondents also relied upon the written agreement that is Exhibit EE1 annexed to the Respondents further counter-affidavit to the Originating Summons which provided the basis for operating any OML derived from OPL 216. F

(d) There is no contraction between the Back-in-Right Regulation 2003 and the Petroleum Act Cap. 10 LFN 2004.

(e) The Honourable Courts finding that the complaint of the Appellant was valid, was therefore on wrong premise. G

3. The learned justices of the Court of Appeal erred in law when after considering the provisions of paragraph 35 of the first schedule of the Petroleum Act Cap. 10 LFN 2004 and the provisions of paragraph 2(1) of the Back-in-Right Regulation 2003 held thus - H
"It is clear that these Regulations made no reference to negotiation quite in contradiction to the Principal Law in paragraph 34 of Cap. 10, this is where I find the complaint of the Appellant to be valid. It is the law that subsidiary legislation must conform with the principal law

which provided the source of their existence.” And then proceeded to nullify the Federal Government acquisition of participating interest in OML 127 based on the provisions of the said Regulations.

PARTICULARS

(a) The provisions of paragraph 35 of the first schedule to the Petroleum Act Cap. 10 LFN 2004 and that of paragraph 2(1) of the Back-in-Right Regulations 2003 are not in conflict as both provisions deal with different situation.

(b) While paragraph 2(1) of the Back-in-Right Regulation 2003 deals with situation where the Federal Government seeks to exercise its right to a participating interest in an OML as already agreed or negotiation between the Minister and the Applicant in the OPL document which right has now accrued, paragraph 35 of the first schedule to the Petroleum Act relates to negotiation of terms before a licence or lease is created.

(c) Nothing in paragraph 35 to the first schedule to the Petroleum Act Cap. 10 LFN 2004 prohibits the bringing into effect in an OML of terms already agreed or negotiated in an OPL.

(d) The lower courts misconception of the import of these provisions and its view that the Back-in-Right Regulations 2003 is in conflict with Petroleum Act occasioned a miscarriage of Justice.

4. The learned justices of the Court of Appeal misdirected themselves when they held:

“I believe the appellant is also on a firm ground to protest the discriminatory nature the whole exercise was conducted. When his interest was arbitrarily acquired, it was a different story with regards to the holding of his Technical Partners Deep Star, and petrobras, the interest of these two were left intact. The consequences of this arbitrary allocations snacks of complete alienation of the Appellant, even from his own technical partners.”

PARTICULARS

(a) The appellant never argued at the court of first instance that he was discriminated against by the Federal Government of Nigeria in the exercise of the participating interest in OML 127 and the issue of the alleged “discriminatory nature” of the exercise was raised for the first time without leave of the Court of Appeal.

(b) From the evidence before the Honourable High Court there was nothing discriminatory about the said exercise of the Federal

Governments rights to participating interest in the OML 127 as the interest of all the parties including the Technical partners were taken into consideration.

Ground 1 complains about a misunderstanding of the law. It is a ground of law. Grounds 2 and 3 complain about misconception of the Back-in-Right Regulations 2003 and paragraph 35 of the first schedule of the Petroleum Act. Both grounds are grounds of law. Ground 4 complains of no evidence before the court upon which it could have validly reached its decision. It is a ground of law. The 2nd appellants' grounds of appeal are grounds of law. They are not caught by the provisions of section 233(3) of the Constitution. As regards the 2nd appellant the Preliminary objection is dismissed.

In General Electric Co. v. Harry Akande 2011 4 NSCQR P. 611. I explained the purpose of a Preliminary Objection as follows:-

"Order 2 Rule 9 of the Supreme Court Rules allows a respondent to rely on a Preliminary objection to the hearing of an appeal. The purpose being to bring the hearing of the appeal to an end for being incompetent or fundamentally defective. Consequently a successful preliminary objection terminates the appeal....."

If I may add to the above, where, as in this appeal the Preliminary objection was filed against some grounds of appeal and there are other grounds of appeal that can sustain the appeal, a preliminary objection was inappropriate. The respondent ought to have filed a Motion of Notice since the Preliminary objection if successful would not have terminated the hearing of the appeal as there were other grounds of appeal to sustain the appeal. Preliminary Objections are only filed against the hearing of an appeal and not against one or more grounds of appeal which cannot stop the court from hearing the appeal.

MAIN APPEAL

At the hearing of the appeal on the 14th day of February, 2012, learned counsel for the 1st appellant, Alhaji Ibrahim SAN adopted his brief deemed filed on 23/3/09 and 1st appellants reply brief and 1st cross-respondents brief deemed filed on 14/2/12. He observed that Oil Minerals are vested in the Federal Government and the Federal Government does not need to negotiate with anyone before taking over an Oil Field. He urged this court to allow the

appeal, grant the 1st appellant all the reliefs sought and dismiss the cross-appeal.

Learned counsel for the 2nd appellant, Mr. T. Abe adopted the 2nd appellants brief filed on 23/9/09, and the 2nd cross-respondents brief deemed filed on 14/2/12. He urged this court to allow the
B appeal and dismiss the cross-appeal.

Learned counsel for the respondent, Mr. B.A.M. Fashaun, SAN, adopted the respondents brief filed on 28/9/10 opposing both appeals. The brief also includes the argument in support of the cross-
C appeal. He also adopted his cross-appellants reply brief filed on 5/9/11 and in amplification of his briefs he observed that the issue for determination is whether the Federal Government of Nigeria followed procedure laid down by statute for acquiring interest in OML 127. He further observed that the Federal Government did not follow laid
D down procedure as provided in paragraph 35 of the first schedule of the Petroleum Act and so the acquisition was wrong. He urged the court to dismiss the appeal and allow the cross-appeal.

Learned counsel for the 1st appellant formulated the following issues for determination of this appeal.

E 1. Whether the exercise of the undoubted and un-denied right of the Federal Government of Nigeria to a participatory interest in OML 127 was valid and in accordance with the Law.

2. Whether the court below was right when it relied on the
F alleged discriminatory nature or the exercise by the Federal Government of Nigeria of its right to a participatory interest in OML 127 when this issue was raised for the first time at the court below by the respondent herein and whether the manner of the exercise of the said right was discriminatory or in violation of the respondents fundamental human right.
G

3. Whether the negotiations envisaged by paragraph 35 of the Petroleum Act Cap.10 Laws of the Federation of Nigeria were expected to have taken place before the application for the OML was granted.

H 4. Whether the appellant processed or approved the application for conversion of OPL 216 to OML 127 or arbitrarily discriminatorily acquired the respondent's interest.

On his part, learned counsel for the 2nd appellant formulated the following issues for determination.

1. Whether the Federal Governments exercise of its right to participatory interest in OML 127 was done in accordance with the relevant laws of the Federal Republic of Nigeria.

2. Whether the lower court can validly rely on the alleged issue of discrimination in the Federal Government exercise of its right to participatory interest in OML 127 when the said issue was raised by the respondent for the first time of the court below and without leave. B

3. Whether the respondents fundamental right to fair hearing provided for under section 36 of the 1999 Constitution was infringed by the Federal Governments exercise of its right to participatory interest in OML. C

4. Whether the negotiation envisaged by paragraph 35 of the Petroleum Act Cap 10 Laws of the Federation of Nigeria 2004 should have taken place before the application for an OML was granted.

On the other side of the fence learned counsel for the respondent formulated the following issues. D

1. Whether the Court of Appeal was right in holding that the manner of acquisition of 50% of respondent's interest in Oil Mining Lease 127 was arbitrary, not in compliance with applicable law, particularly the Petroleum Act Cap. 10 of the Federation of Nigeria, 2004 and was therefore, illegal, unconstitutional, null and void. E

2. Whether the Court of Appeal was entitled, in the circumstances, to treat the point raised by the first respondent of its being denied a fair hearing in the process of acquisition of its interest in Oil Mining Lease 127 as being contrary to the provisions of section 36(1) of the Constitution of the Federal Republic of Nigeria, 1999 and deciding the same in favour of the first respondent. F

3. Even if the complaint of the discriminatory nature of the acquisition of the first respondents interest in Oil Mining Lease 127 was raised for the first time by the respondent at the Court of Appeal, whether having regard to the facts and proceedings before the Federal High Court and its judgment on the one hand and the lower court on the other, it led to a miscarriage of justice. G

It is the duty of an Appeal Court when hearing appeals to examine very carefully the issues formulated by the parties to identify the real grievance of the appellant. In such an exercise the court can adopt issues formulated by either side or formulate issue that would determine the real grievance of the appellant. After a diligent exami- H

nation of the issues formulated I am of the firm view that a sole issue resolves this appeal, and it is:

Whether the acquisition of 50% interest in OML 127 by the Federal Government of Nigeria was done in compliance with the provisions of the Law and the Constitution.

B I must now state the facts and circumstances of this case. This is important since facts have no views. On the 5th of May, 1993 the respondent applied for an Oil Prospecting Licence (OPL) from the Federal Government of Nigeria. The respondent was successful, and so he was issued OPL 216. Clause 2 of the Licence states that;

C *“The license is granted subject to the Petroleum Act 1969 and the Regulations thereunder now in force or which may come into force during the continuance of this License....”*

On being given OPL 216 the respondent is to prospect for Oil. D This it did by entering into joint venture agreements with Star Deep Water Petroleum Ltd. (hereinafter called STAR) and Petrobas. Prospecting for oil costs a lot of money. The respondent deposed to this fact in paragraphs 31 and 32 of his affidavit in support of his Originating Summons when it said:

E *“31. The plaintiff and its Technical Partners Star and Petrobas have exerted a lot of manpower and thousands of Millions of United States Dollars on the exploration of the field.*

32. Up till the date of this Originating Summons the plaintiff has neither been offered nor paid any compensation for the purported acquisition.” F

The respondents (i.e. the appellants) jointly filed a 6 paragraph counter-affidavit and a 5 paragraph further counter-affidavit deposed to by Ernest Edi, a litigation officer in the legal firm of learned counsel for the 1st appellant. Paragraph 4(b) of the further counter-affidavit reads:

(6) Paragraph 31, 33, 34, 35 and 36 of the plaintiffs said affidavit dated 26/7/2005 are untrue and incorrect.

H ***When the Originating process (as in this case) is an Originating Summons, the affidavits filed in support serve as the statement of claim, while the counter-affidavits serve as statement of defence. The affidavits are the pleadings for the case. The material averment in the respondent’s pleadings (paragraphs 31) is that he spent thousands of dollars on the explo-***

ration of the field. It is not a valid denial in law for the appellants to simply say that the averment in paragraph 31 is untrue and incorrect. Nowhere in the counter-affidavit or the further counter-affidavit is the averment in paragraph 31 properly denied. Paragraph 4(b) is a bare denial and bare denials amount to no denial in Law. See Rutter v. Tregent 1879 12 Ch. D p.758 Lewis and Peat Ltd. v. Akhimien 1976 1 ANLR Pt. 1 P469. **I am in the circumstances satisfied that the respondent spent thousands of millions of United States Dollars on the exploration of the field.**

Now, while the respondent was prospecting for Oil, the appellants wrote to the respondent on 23/3/2000 wherein it purported to acquire 40% of OPL 216. The respondent quickly filed suit No. FHC/ABJ/275/2000 for:

1. A declaration that the purported acquisition by the Federal Government of 40% out of Famfa's 60% interest in the claimant's Oil Producing License (OPL 216) is illegal, unconstitutional and void and of no legal consequence whatsoever and as such, is not capable of divesting from Famfa the said 40% of its participating interest in OPL 216 or any interest whatsoever thereon and cannot confer any right or interest thereon in the Nigerian National Petroleum Corporation.

2. An order of perpetual injunction restraining the Nigerian National Petroleum Corporation from claiming or exercising any right in or over present interest of the claimant in the said OML 216 or any portion thereof."

On 22/10/04 Nyako J, delivered a Ruling. Relevant extracts from the Ruling runs as follows:

"...I must find that the acquisition of the Plaintiffs (now respondent's) 40% interest is a breach of the agreement between the parties. An Oil prospecting Licence is different from an Oil Mining License and I shall discountenance all arguments in that regard. The action of the Government is premature and pre-emptive, thus illegal, null and void and it is consequently set aside. And the second relief consequently follows the first relief already granted."

The above simply states the obvious, and it is that the Government has no right to participate in an OPL 216. It does have a right to participate in an OML. The judgment is inviolate in the absence of

an appeal. Subsequently the respondent applied for an OML (i.e. an Oil Mining Lease). This was granted to the respondent by appellant's letter dated 14/12/04. An Oil Mining Lease, OML is granted after Oil has been found in large quantities. The appellant is entitled to 50% interest in OML 127 as of right. Now, barely a month after the conversion of OPL 216 to OML 127 the appellants wrote to the respondent on 27/1/05. Relevant extracts from that letter reads:

"Pursuant to the court judgment and in accordance with the provisions of the Back-in-Right Regulation of 2003, we wish to notify you that five-sixth of your equity has been taken over by Government bringing the parties participating interest in the derived OML 127 to be as follows:

	<i>NNPC</i>	<i>- 50%</i>
	<i>Star Deep</i>	<i>- 32%</i>
D	<i>Famfa</i>	<i>- 10%</i>
	<i>Petrobas</i>	<i>- 8%</i>

The above is to enable you, proceed with your obligations under the OML."

On 19/4/05 the appellants wrote another letter - Ref. PI. BAL/ 3717/S. 205/VOL.2/80 titled.

"RE: ACQUISITION OF PARTICIPATING INTEREST IN OML 127

I am hereby directed to inform you that in exercise of the right, the Federal Government of Nigeria hereby takes a 50% participating interest in the block. This interest is vested in the Nigerian National Petroleum Corporation (NNPC).

Consequent upon above therefore, the breakdown of the participating interest in OML 127 will be as follows:

G	<i>1. NNPC</i>	<i>- 50%</i>
	<i>2. Star Deep</i>	<i>- 32%</i>
	<i>3 Famfa Oil Ltd</i>	<i>- 10%</i>
	<i>4. Petrobas</i>	<i>- 8%"</i>

This is what the Court of Appeal had to say on the above.

H *"The language of these two letters is clear; they all conveyed a message of the exercise of naked power exercised in a most arbitrary manner; all under the guise of exercising rights conferred by the so-called Back-in-Rights Regulations. It is no surprise that the appellant (now respondent) cried out for the way and manner his interest in*

OML 127 was forcefully acquired without any negotiation as clearly provided for in the Law paragraph 35 of Cap 10 LFN 2004.”

Learned counsel for the 1st appellant observed that the right of the Federal Government of Nigeria to a participating interest in an Oil Mining Lease (OML) is devoid of any controversy. Reference was made to the appellant's letter dated 10/8/93 wherein the appellant allocated OPL 216 to the respondent. He submitted that the interpretation of paragraph 35 of the first schedule to the Petroleum Act does not envisage a situation where the Minister will first confer with and seek consent of the Licensee or Lessee before imposing special terms and conditions. Relying on UTC v. Pamotei 1989 2 NWLR pt. 103 p.244, Ojokolobo v. Alamu 1987 3 NWLR pt. 61 p.377

On the interpretation of statutes he submitted that negotiation is not necessary before the Federal Government takes 50% in OML 127. He submitted that the Back-in-Right to Regulations under which appellants acted to acquire 50% interest in OML 127 is permissible in the exercise of the Ministers power under section 9 (1) (a) and (h) of the Petroleum Act. Finally, he submitted that the Court of Appeal failed to consider Exhibit EE2, which contained the terms agreed for operating OML 127 and that the appellants complied with the provisions of paragraph 35 of the first schedule to the Petroleum Act. He urged this court to allow the appeal, set aside the judgment of the Court of appeal and reaffirm the judgment of the trial Federal High Court.

Learned counsel for the 2nd appellant observed that there was negotiation as contemplated by paragraph 35 (a) of the first schedule to the Petroleum Act and this is buttressed by the fact that all the stakeholders in OPL 216 met on 11th July, 2003 including the respondent and agreed on the basis for operating any OML that will be derived from the OPL, further observing that the agreement is Exhibit EE2. He submitted that the Federal Governments exercise of its right to participatory interest was done in accordance with the Laws of the Federal Republic of Nigeria. He submitted that the acquisition by the Federal Government of 50% was done in accordance with the Back-in-Right Regulation 2003. Finally he submitted that negotiation was held with the respondent as contemplated by the Petroleum Act. He urged this court to set aside the judgment of the Court of Appeal and allow the appeal.

Learned counsel for the respondent observed that Exhibit EE2 was a working arrangement between the original members of the joint venture and is in no way connected with the entry of the Federal Government into the venture. He observed that the agreement is dated 11/7/03 while the two letters of acquisition are dated 27/1/05 and 19/4/05, contending that it conclusively demonstrates that the appellants bullied the partners and forced themselves into the business without any legal instrument or authorization to justify same. He submitted that Exhibit EE2 has no evidential value. Learned counsel further observed that the appellants never intended to negotiate and did not negotiate the terms and conditions of the entry of the Federal Government into OML 127 with the respondent, contending that there was none compliance with the provisions of paragraph 35 of the first schedule of the Petroleum Act. Finally, learned counsel submitted that the Back-in-Right Regulations is directed against Nigeria enterprises to deprive them of their property, contending that it violates Section 42 of the Constitution as well as Article 2 of the African Charter on Human and Peoples Rights, and so its illegal and unconstitutional and should be expunged from the statute books. He urged this court to dismiss the appeals and uphold the judgment of the Court of Appeal.

I must observe that counsel in their briefs of argument made lengthy submissions on issues such as interpretation and construction of the Constitution. Whether a corporate body is entitled to protection under Section 42 of the Constitution, Supremacy of the Constitution, Enforcement of fair hearing rights, Payment of compensation duress etc, issues that do not quite address the sole issue which is:

Whether the Federal Government of Nigeria followed procedure laid down by statute for acquiring interest in OML 127.

Relevant Legislation for consideration in this appeal are:

1. The Constitution of Nigeria
2. The Petroleum Act, Cap 10 Laws of the Federal of Nigeria 2004.
3. The Back-in-Right Regulation 2003.
4. Oil Prospecting Licences (conversion To Oil Mining Leases i.e. OPL to OML)

All sides agree that with the allocation of OML 127 to the respondent the appellant, i.e. the Federal Government of Nigeria is

entitled to 50%. The issue is whether the Federal government of Nigeria followed the procedure laid down by statute for acquiring that interest. Paragraph 35 of the first schedule to the Petroleum Act states that -

“35. If he considers it to be in the public interest, the Minister may impose on a licence or lease to which this statute applies special terms and conditions not inconsistent with this Act including (without prejudice to the generality of the foregoing) terms and conditions as to -

(a) Participation by the Federal Government in the venture to which the licence or lease relates on terms to be negotiated between the Minister and the applicant for the licence or lease; and...”

It is long settled that in the interpretation of statutes the words used must be given their ordinary meaning and interpretations must be done to bring out the clear intention of the legislature. See Mobil v. F.B.I.R. 1977 3 SC P53, Toriola v. Williams 1982 7 SC p. 27, Ojokolobo v. Alamu 1987 3 NWLR pt.61 p. 377, Attorney-General of the Federation v. Ijewere 1986 4 NWLR pt. 37 P659.

The clear intention of the legislature is that negotiations should take place between the Minister for petroleum and the applicant for an OML Licence. The reasoning of the legislature is that the Minister while negotiating must take into account the huge sums of money spent by the applicant drilling for oil, and ensure that the 50% stake of the Federal Government of Nigeria in the OML is well taken care of on terms acceptable to the Government. The question to be answered is did the Minister for Petroleum negotiate with the applicant. Addressing this court on the 14th February, 2012 learned counsel for the 1st appellant said that Oil, Minerals are vested in the Federal Government and so negotiation is not necessary. Both counsel for the appellants also relied on Exhibit EE2, an agreement signed on 11/7/03.

Letters written to the respondent dated 27/1/05 and 19/4/05 are instructive. The letter dated 27/1/05 reads in part:

“Pursuant to the court judgment and in accordance with the provisions of the Back-in-Right Regulation of 2003, we wish to notify you that five-sixth of your equity has been taken over by Government...”

And the letter dated 19/4/05 reads:

"I am hereby directed to inform you that in exercise of the right, the Federal Government of Nigeria hereby takes a 50% participating interest in the block.

This interest is vested in the Nigeria National Petroleum Corporation (NNPC)"

On both letters the Court of Appeal said:

"The language of these two letters is clear; they all conveyed a message of the exercise of naked power exercised in a most arbitrary manner; all under the guise of exercising rights conferred by the so called Back-in-Rights Regulation."

I agree with the Court of Appeal. There was no negotiation before the Federal Government took 50% participating interest in OWL 127. It was taken by the Federal Government in accordance with the provisions of the Back-in-Right Regulation of 2003. The back-in-Right Regulation 2003 is a subsidiary legislation promulgated by the Minister under Section 9 (a) and (h) of the Petroleum Act. The Petroleum Act is substantive or Principal Law. It is the principal law that provides subsidiary legislation the source of its existence. Without Principal Law there can be no subsidiary legislation, and so subsidiary legislation must conform with the principal law. The petroleum Act is principal law, a statute. Where it prescribes a particular method of exercising statutory power the procedure so laid down must be followed without any deviation whatsoever. See FGN v. Zebra Energy Ltd. 2002 18 NWLR pt. 798 p. 162, Ogulaji v. A.G. Rivers State 1997 6 NWLR pt. 508 p. 20, UNTHMB v. Nnoli 1994 5 NWLR pt. 363 p. 326. If any provision of the Regulations are inconsistent with the provisions of the Act/Statute the provisions of the Regulation shall to the extent of inconsistency be declared void. Under the Back-in-Right Regulations 2003 there is no provision for negotiation, while section 35 of the first schedule to the Petroleum Act makes it mandatory that before the Federal Government of Nigeria acquires its 50% interest in an OML it must negotiate with the recipient of the OML Licence. I am satisfied that the appellants acted under the Back-in-Right Regulation of 2003 to acquire interest in OML 127 in clear violation of the provi-

sions of paragraph 35 of the 1st schedule of the Petroleum Act. The provisions of the Regulations can never be read in derogation to the provisions of the Petroleum Act. The acquisition by the Federal government of Nigeria was wrong.

I must observe that the schedule of an Act/Statute is part of the Act and it is as potent as any part of the Act. It is the duty of the court to ensure that it is bound by rules made under the law of the land. Such rules can never be ignored. If it does, the attainment of justice may be left to the whims and fancies of powerful individuals and this would not be in the interest of justice. Exhibit EE2 was signed by officials of the NNPC and the respondent. This with respect is not in accordance with paragraph 35 of the first schedule to the Petroleum Act which states clearly that the Minister shall negotiate.

In Menakaya v. Menakaya 2001 9 - 10 SC p.1 Ogundare, JSC said:

"Suffice is to say that parties cannot by conduct or consent alter the constitution or a statute."

Exhibit EE2, the agreement executed by the parties was done in clear violation of the provisions of paragraph 35 of the first schedule to the Petroleum Act. It remains for all time a worthless piece of paper in the light of the long settled position of the law that parties even by consent cannot alter the provision of a statute. The fact that the Minister for Petroleum did not execute exhibit EE2 is conclusive evidence that there was non compliance with paragraph 35 of the first schedule to the Petroleum Act.

Furthermore, Exhibit EE2 was executed on 11/7/2003 over one year, before letters arbitrarily acquiring 50% interest in OML 127 were sent out on 27/1/05 and 19/4/05. Negotiation by the Minister with recipient of on OML should be done at the time of consideration of the application for the licence and not years before oil is found or in anticipation of oil being found.

Section 44 (1) of the Constitution states that:

"44(1) No movable property or any interest in an immovable property shall be taken possession of compulsorily and no right over or interest in any such property shall be acquired compulsorily in any part of Nigeria except in the manner and for the prescribed by a law

that..."

The Federal Government of Nigeria has a right to a participating interest of 50% in OML 127 (and indeed in any OML). In the light of the fact that there was non compliance by the Minister of Petroleum with the clear provisions of Paragraph 35 of the First Schedule of the Petroleum Act, the acquisition by the Federal Government of Nigeria in OML 127 was illegal and unconstitutional. It offends section 44 (1) of the Constitution.

I am in complete agreement with the judgment of the Court of Appeal. The appeal fails and it is hereby dismissed.

CROSS APPEAL

In the Respondent's/Cross-Appellant's brief filed on 28/9/10 two issues were formulated for determination of the Cross-appeal. They are:

1. Whether the lower court mistook the appellant for the second respondent in the findings complained of and if so whether those findings ought to be corrected.

2. Whether the decision (orders) made against the appellant (as 2nd respondent in the lower court) ought not to be made against the second respondent (Attorney-General of the Federation) (as 1st respondent) or both the appellant and the second respondent (as respondents of the lower court).

Learned counsel for the 1st appellant/1st cross-respondent and 2nd appellant/ 2nd cross-respondent in their briefs deemed filed on 14/2/12 adopted the two issues formulated by the respondent cross-appellant.

The names of the parties as they appear on the briefs are misleading. NNPC and the Hon. Attorney-General of the Federation filed separate appeals to this court after they lost at the Court of Appeal. The NNPC appeal is SC71/2008, while the Hon. Attorney-General of the Federation appeal is SC 178/2008. By order of court of the hearing of the appeal on 14/2/12 both appeals were consolidated under SC. 71/2008. The 1st appellant/1st cross-respondent is NNPC, while the 2nd appellant/2nd cross-respondent is the Hon. Attorney-General of the Federation. In the Court of Appeal the 1st respondent was the Hon. Attorney-General of the Federation, while NNPC was the 2nd respondent. This is important for a much clearer understanding of this cross-appeal.

Arguing both issues together learned counsel for the respondent/cross-appellant observed that the cross-appeal was filed to enable this court correct error made in the judgment of the Court of Appeal by

(i) replacing “*2nd respondent*” with “*Respondents*” in line 12 of page 612 of the Record; B

(ii) replacing “*2nd respondent*” with “*1st respondent*” in line 8 of page 627 line 4 of page 629 and line 14 and 26 of page 630 of the Record.

(iii) amending the orders made by the Court of Appeal by deleting “*2nd respondent*” as stated in Order 1 and substituting with “*1st respondent*”: Amending Order 2, 3, 4 by deleting “*2nd respondent*” in these Orders and substituting with “*Respondents*”. C

Learned counsel observed that the respondent/cross-appellant (as plaintiff) complaint is against the Federal Government of Nigeria for wrongly acquiring its interest in OML 127, contending that since the 1st appellant/1st cross-respondent (1st respondent in Court of Appeal) represents the Federal Government of Nigeria and the 2nd appellant/2nd cross-respondent’s (2nd respondent in Court of Appeal) interest, the Record of Appeal should be corrected so that the judgment is shown to be against the Hon. Attorney-General of the Federation, the representative of the Federal Government of Nigeria. Relying on Section 22 of the Supreme Court Act, Order 8 Rule 12 of the Supreme Court Rules. *Kate Enterprises Ltd V. Daewoo Nig. Ltd.* 1985 2 NWLR pt. 5 p. 116, *Adekeye V. Chief Akin-Olugbade* 1987 3 NWLR pt. 60 p. 214. He submitted that these corrections are needed because the Court of Appeal made findings against NNPC, contending that the lower court meant the Hon. Attorney-General of the Federation. In his brief deemed filed on 14/2/12, Learned counsel for the 1st appellant/cross-respondent conceded that the Court of Appeal definitely mistook the 1st appellant for the 2nd appellant in its judgment, submitting that the cross-appeal is academic as it does not matter if the Court of Appeal mistook the 1st appellant for the 2nd respondent. Reference was made to *Iweka v. SCOA* 2000 7 NWLR pt. 644 p.325, *Nkwocha v. Gov. of Anambra State* 1984 1 SCNLR p.634. He urged this court to refrain from making the Order for correction of the decision. In his brief also deemed filed on 14/2/12. Learned counsel for the 2nd appellant/2nd cross-respondent D E F G H

observed that the Court of Appeal neither mistook NNPC for the Attorney-General of the Federation contending that the respondent cross-appellant got exactly what it prayed for in its originating summons. He urged this court to dismiss the cross-appeal in its entirety with substantial costs.

B ***In an appeal the duty of the respondent is to defend the appeal. But where a respondent agrees with the judgment, but is dissatisfied with some parts of the judgment or seeks to correct errors, a cross-appeal ought to be filed.*** See *Eliochin (Nig) Ltd v. Mbadiwe* 1986 1 NWLR pt. 14 p. 47. Section 22 of the Supreme Court Act reads in part:

“The Supreme Court may from time to time make any order necessary for determining the real question in controversy in the appeal, and may amend any defect or error in the record of appeal...”

D Order 8 Rule 12 (1) of the Supreme Court Rules states that:
“(1) In relation to an appeal the Court shall have all the powers and duties as to amendment and otherwise of the court of first instance, and, where that court is not the court of trial, the court of trial”

E ***By virtue of Section 22 of the Supreme Court Act and Order 8 Rule 12 of the Supreme Court Rules the Supreme Court has power to amend the Record of Appeal when it is satisfied that there are accidental slips, and obvious omissions on the Records. This power to amend is exercised to correct errors in the Record of Appeal. What then are the accidental slips in the Record of Appeal? The complaint of the respondent/cross-appellant (plaintiff) is that the Federal Government of Nigeria wrongly acquired its interest in OML 137. The Hon. Attorney-General of the Federation (1st respondent in the Court of Appeal) represents the Federal Government of Nigeria. The Court of Appeal made orders against the NNPC instead of against the Hon. Attorney-General of the Federation. That is the accidental slip the cross-appeal seeks to correct.***

The judgment of the Court of Appeal is part of the Records of Appeal. The corrections proposed in the Record of Appeal are as follows:

Line 12 of page 612 reads:

"... I think it is important to mention that, before the application to convert OPL 216 to OML 127, the appellant had to go to the Federal High Court and instituted an action against the 2nd respondent..."

"2nd respondent" is deleted and in its place "respondents" is inserted. B

Line 8 of page 627 reads:

"...the judge clearly said that the 2nd respondent could not and should not have acquired the 40% interest of the appellant in that venture and declared the acquisition null and void."

"2nd respondent" is deleted and in its place "1st respondent" is inserted C

Line 4 of page 629 reads:

"...written to the appellant by the 2nd respondent..."

"2nd respondent" is deleted and in its place "1st respondent" is inserted D

Line 14 of page 630 reads:

"It is also worth mentioning that the way and manner the 2nd respondent ignored the Law..."

"2nd respondent" is deleted and in its place "1st respondent" is inserted E

Line 26 of page 630 reads:

"...In the first place, it was the same 2nd respondent that processed the application of conversion of OPL 216 to OML 127 by the appellant, 2nd respondent made no effort to call upon the appellant to negotiate."

"2nd respondent" is deleted and in its place "1st respondent" is inserted. F

The Orders made by the Court of Appeal in the concluding part of the judgment on page 631 of the Record of Appeal reads:

1. The compulsory and arbitrary acquisition of the interest of the appellant by the 2nd respondent as outlined, in letters of acquisition dated 27th January, 2005 and 19th April, 2005 is hereby declared illegal, unlawful, wrongful, unconstitutional and thus null and void. H

2. It is hereby declared that the purported acquisition of 50% of the appellant interest in OML 127 in as much as it was not done in compliance with the provisions of the law paragraph 35 of Cap 10 of

the LFN 2004 and the Constitution is illegal, unconstitutional, null and void and cannot confer any interest whatsoever in OML 127 in the 2nd respondent, without due process of the Law.

3. An Order is hereby made directing the 2nd respondent to return to the appellant all his interest in OML 127 illegally acquired.

B 4. An injunction is hereby granted restraining the 2nd respondent, its assigns, servants, privies, subsidiaries, whomsoever from interfering with the rights of the appellant in the said OML 127.

The corrections proposed are:

C “2nd respondent in Order 1 is deleted and in its place “1st respondent” inserted.

In orders 2, 3, and 4 “2nd respondent” is deleted and in its place “respondents” inserted.

The Court of Appeal found, quite rightly in my view that the D Federal Government of Nigeria wrongly acquired the respondent/cross-appellants interest in OML 127. It is clear that the Court of Appeal mistook the NNPC for the Hon. Attorney-General of the Federation, (the representative of the Federal Government of Nigeria).

E By correcting that error wherever it occurred in the Record of Appeal it becomes clear that the pronouncements and orders are in the main against the Hon. Attorney-General of the Federation and ought to have been made against him and not the NNPC. Accordingly the Cross-Appeal succeeds.

F For the avoidance of doubt,

1. Grounds 2, 4 and 7 of the 1st appellants appeal are struck out, Grounds 1, 3, 5 and 6 sustain the 1st appellants appeal.

2. Preliminary objection against the 2nd appellants appeal is dismissed.

G 3. The judgment of the Court of Appeal is confirmed. Accordingly this appeal is dismissed.

4. The Cross Appeal succeeds and it is allowed. Costs of N50,000.00 each against the appellants.

H

ONNOGHEN JSC

I have had the benefit of reading in draft the lead judgment of my learned brother RHODES-VIVOUR, JSC just delivered. I agree with his reasoning and conclusion that the appeals are without merit

and should be dismissed and the cross appeal allowed.

The main issue for determination is whether the manner of acquisition by the Federal Government, one of the appellants in the appeals, of 50% of the first respondent's interest in the Oil Mining Lease 127 was in compliance with the relevant law, to wit, Petroleum Act, Cap 10, Laws of the Federation of Nigeria, 2004. B

It is clear from the provisions of Section 44(3) of the Constitution of the Federal Republic of Nigeria, 1999 that the "*Control of all minerals, mineral oil, etc*" "*shall vest in the Government of the Federation*", which said minerals/mineral oils "*shall be managed in such a manner as may be prescribed by the National Assembly*". C

It is in pursuance of the above constitutional provision that the Petroleum Act was enacted which provides in paragraph 35(a) of the First Schedule thereof that the Federal Government can impose any terms and conditions on the license or lease granted under the Petroleum Act, which terms and conditions "*must*" by the provisions of paragraph 35(a)(ii) of the said First Schedule, "*be negotiated*" and "*not be inconsistent with this Act*" - See Sub-paragraph (iii) of 35(a). D

It is clear from a community reading of the provisions that the word "*impose*" does not connote absolutism but subject to "*negotiation between the parties*". The imposition is therefore to be as a result of an agreement following negotiation between the parties. Was there any "*negotiation between the parties*" resulting in the acquisition of the 50% interest in question? From the records the answer to the above question is clearly in the negative. At pages 609-610 of the record, the lower court found/held, rightly in my view, as follows:- E

"Against this background, to bring home the point made by the appellant in his complaint that the action of the respondents is arbitrary and without any due process I reproduce the contents of the two letters written to the appellants by the 2nd respondent. F

The first letter is dated January, 27th, 2005. The relevant portion reads as follows:-

Pursuance to the court judgment and in accordance with the provisions of the Back-in-Right Regulation of 2003, we wish to notify you that five-sixth of your equity has been taken over by Government bringing the it parties participating interest in the derived OML 127 to be as follows:- H

NNPC..... 50%

Star Deep 32%

Famfa ... 10%

Petrobras..... 8%

The above is to enable you proceed with your obligation under the OML.”

B The second letter is dated 19th April, 2005 with Rep. P1. BAL/3717/-S.205/Vol.2/80 the most relevant portion reads as follows:-

“RE-ACQUISITION OF PARTICIPATING INTEREST IN OML 127

C *I am hereby directed to inform you that in exercise of the right, the Federal Government of Nigeria hereby takes a 50% participating interest in the block. This interest is vested in the Nigerian National Petroleum Corporation (NNPC).*

D *Consequent upon the above therefore, the breakdown of the participating interests in OML 127 will be as follows:-*

1. NNPC ... 50%

2. Star Deep ... 32%

3. Famfa ... 10%

4. Petrobras ... 8%”

E The language of these two letters is clear, they all conveyed a message of the exercise of naked power exercised in a most arbitrary manner; all under the guise of exercising rights conferred by the Regulation. It is no surprise that the appellant cried out for the way and manner his interest in OML 127 was forcefully acquired without any
F negotiation as clearly provided for in the Law, paragraph 35 of Cap. 10 LFN 2004

G I am of the considered view that for the minister to act under paragraph 35(a) of the First Schedule, he must negotiate the terms and conditions with the first respondent in this appeal as to the participation of the Federal Government in OML 127. It is a mandatory provision which has to be complied with for the acquisition to be valid. It is my further view that the said provisions of the Act cannot be modified, altered or in any way varied by an executive fiat or
H subordinate legislation contrary to the provisions of Section 44 of the Constitution of the Federal Republic of Nigeria, 1999. The Rule of Law must always prevail if chaos and lawlessness is to be avoided in our society. It is for the above and the more detailed reasons contained in the said lead judgment of my learned brother that I too find

no merit in the appeals and consequently dismissed same. I abide by the consequential orders made in the said judgment including the order as to costs. Appeals dismissed. Cross appeal allowed.

MUHAMMAD JSC

B

I read in advance the judgment of my learned brother Rhodes-Vivour, JSC. I agree with him in his reasoning and conclusions in both the main and cross appeals. I adopt all orders made therein including order on costs.

C

ADEKEYE JSC

I was privileged to read in advance the judgment just read by my learned brother Bode Rhodes-Vivour JSC. This appeal is against the judgment of the Court of Appeal, Abuja Division allowing the appeal against the Federal High Court Abuja. Two Notices of Appeal were filed by the two appellants separately. The appeal SC.71/2008 was entered in respect of the 1st appellant's Notice of Appeal and SC. 178/2008 for the 2nd appellant. The learned senior counsel for the respondent applied that both appeals be consolidated in a motion filed on 11/11/11. This court consolidated both appeals on 14/2/12. My learned brother rightly and aptly disposed of the preliminary objection in this appeal. I agree with him that the competent grounds of appeal can sustain the appeal. The core and germane issue for determination is as formulated by my learned brother and I agree with him as follows:-

"Whether the acquisition of 50% interest in OML 127 by the Federal Government of Nigeria was done in compliance with the provision of the law and the Constitution."

It is common ground that the Federal Government is entitled to 50% interest in the allocation of OML 127 to the appellant. The crucial issue thereafter is whether the Federal Govt of Nigeria followed the proper procedure laid down by statute for acquiring that interest. Section 35 of the First Schedule to the Petroleum Act reads-

"If he considers it to be in the public interest, the Minister may impose on a licence or lease to which this statute applies special terms and conditions not inconsistent with this Act including without (with-

out prejudice to the generality of the foregoing) terms and conditions as to- (a) Participation by the Federal Government in the venture to which the licence or lease relates on terms to be negotiated between the Minister and the applicant for the licence or lease.”

My Lord exhaustively considered the facts of this case, the agreement EE2 executed by the parties on 11/7/03 and the Back-in-Right Regulation 2003. The parties in their transaction cannot interpret the Back-in-Right Regulation 2003 to override the Substantive Law - the Petroleum Act or to the detriment of the application of the Petroleum Act which is a statute. The Petroleum Act as the substantive law prescribes the method for exercising statutory powers which must be complied with to the letter.

On gleaning through the Back-in-Right Regulation 2003, a subsidiary law; it gives no room for negotiation between the parties. On the contrary, Section 35 of the first Schedule to the Petroleum Act makes it mandatory that before the Federal Government of Nigeria acquires a 50% interest in an OML, there must be a negotiation with the recipient of the OML Licence. The courts in the interpretation of Statutes must not encourage the government to violate its own laws. Moreover, the agreement EE2 was executed on 11/7/2003 over one year before letters arbitrarily acquiring 50% interest in OML 127 were sent out to other interested parties. It is imperative that negotiation by the Minister with the recipient of an OML should be done at the time of consideration of the application for the licence and not in anticipation of discovery of oil. I agree with fuller reasons given by my learned brother in the lead judgment that the acquisition of 50% interest by the Federal Government of Nigeria in OML 127 in breach of the proper procedure laid down by statute is illegal and unconstitutional. I also agree that the judgment of the Court of Appeal the subject matter in this appeal is impeccable. The appeal therefore fails and it is accordingly dismissed. The cross-appeal succeeds.

I abide with the consequential orders made in the lead judgment. I assess the costs of the appeal as N50,000.00 against each appellant.