

**SUPREME COURT OF NIGERIA**

15TH JUNE, 2012. SC. 283/2008

**CORAM:- M. MOHAMMED, C. M. CHUKWUMA-ENEH,  
J. A. FABIYI, B. RHODES-VIVOUR, O. ARIWOOLA, JJSC**

ELDER O. O. OKEREKE .....APPELLANT  
(PRESIDENT UTUTU  
DEVELOPMENT UNION)

V.

KALU JAMES ..... RESPONDENT

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APPEALS - Preliminary objection - Incorporated in brief - Propriety  
- The procedure is an accepted practice - As same obviates need to  
file separate notice of objection (H1)

OBJECTIONS - Preliminary objection - Basis - Since such objection  
deals with law - No affidavit is necessary - But when facts are in issue  
- Affidavit would be necessary (H2)

OBJECTIONS - Appeals - Preliminary objection - Purpose - The  
objection seeks to terminate hearing of appeal - But where same did  
not end appeal - Motion on notice should be filed (H3)

PRACTICE & PROCEDURE - Customary courts - Proceedings - The  
proceedings therein should be examined - As rules of superior court  
of record are not strictly followed in such courts (H4)

APPEALS - Notice of appeal - Filing - Time frame - By s.27(2)(b)  
Supreme Court Act - Criminal appeal to the court must be filed within  
30 days from date Court of Appeal delivered its judgment (H5)

**FACTS**

Accused/respondent was arraigned before an Abia State Customary Court on one count charge of failure to pay the sum of N400 being levy imposed on taxable adults in respondent's community and thereby committed an offence punishable under section 14 of the Customary Court (Amendment) Edict No. 10 of 1986. Respondent pleaded not guilty. After the trial, respondent was found guilty

of the offence and was thus sentenced to two weeks imprisonment or in the alternative to pay a fine of N50. In addition, respondent was ordered to pay the sum of N400 levy to the Chairman of one Ututu Development Union. Respondent was dissatisfied with the sentence. Hence, he appealed to the High Court of Abia State, Ohafia. The court confirmed the decision of the Customary Court. On further appeal to the Court of Appeal, the court set aside the judgment of the High Court, acquitted and discharged respondent and ordered that the sum of N400 paid by respondent be returned to him. Being aggrieved, appellant filed appeal at the Supreme Court. Respondent filed preliminary objection to the hearing of the appeal on the grounds inter alia, that the Notice of Appeal is incompetent having been filed out of time and appellant has no right of Appeal.

**HELD** (Unanimously dismissing the appeal per **RHODES-VIVOUR JSC**)

*Preliminary objection - Incorporated in brief - Propriety*

**1. At the hearing of the appeal on the 22nd of March 2012, Mr. I. Angulu adopted the appellant's brief filed on the 22nd of October 2008 and urged this court to allow the appeal. On the other side Mr. O. J. Oghenejakpor adopted the respondent's amended brief deemed filed on the 18th of March, 2009. He referred us to a Preliminary objection argued in the brief and urged this court to dismiss the appeal. The respondent argued a Preliminary objection in his brief. This is now accepted practice as that procedure obviates the need to file a separate Notice of Preliminary objection.** (p. 2390 D)

*Preliminary objection - Basis*

**2. A preliminary objection deals strictly with Law, so no affidavit is necessary, but when facts are in issue an affidavit would be necessary.** (p. 2390 G)

*Appeals - Preliminary objection - Purpose*

**3. A Preliminary Objection is filed against the hearing of the appeal. The clear intention being to contend that the appeal**

**is incompetent or fundamentally defective. Consequently, if it succeeds the hearing of the appeal abates. Where a respondent's objection if successful would not terminate the hearing of the appeal, a Motion on Notice should be filed.**

(p. 2390 G)

*Customary courts - Proceedings*

**4. Rules of procedure and practice in superior court of record are not strictly followed in Customary Courts. It follows naturally that proceedings from Customary Courts should be examined in detail. This entails identifying the issues before that court. The substance of the matter, and not the form it was presented. After such a diligent examination of proceedings before the Customary Court it becomes easy categorizing the proceedings as either civil or criminal.** (p. 2391 H)

*Notice of appeal - Filing - Time frame*

**5. Since the appeal to this court is a criminal appeal subsection 2(b) of section 27 supra is applicable. The judgment of the Court of Appeal was delivered on the 16th of June 2008, while the Notice of Appeal was filed on the 1st of August 2008. The appellant is expected to file his Notice of Appeal within 30 days from the 16th of June, 2008. According to the provisions of the law under reference, a criminal appeal to this court from a judgment delivered on 16th June 2008 is to be filed on or before the 17th of July, 2008 for it to be valid. Notice of Appeal filed on 1st August 2008 was filed clearly out of time. It is incompetent. Consequently there is no appeal before this court.** (p. 2393 H)

## NOTABLE POINT OF INTEREST

### **RHODES-VIVOUR JSC**

#### ***1. Filing of appeal out of time - Procedures***

All is not yet lost for the appellant. He can still appeal by invoking subsection (4) of section 27 supra. File an application for extension of time within which to appeal, supported by an affidavit showing:

- (a) good and substantial reasons for failure to appeal within

the time prescribed by section 27 (2) (b) supra; and

(b) grounds of appeal which prima facie show good cause why the appeal should be heard.

(a) and (b) must coexist. A judge would readily exercise his discretion to grant extension of time to appeal if satisfied with (a) and B (b). (p. 2394 B)

### **REPRESENTATION**

I. Angulu with A. Nnabulu; N. Ezinwa-Ukoha, M. D. Chijoke and I. Eke, for the Appellant  
C O. J. Oghenejakpo with S. G. Ediagbonuvie and E. J. Oghenejakpor, for the Respondent

### **CASES REFERRED TO**

D Maigoro v. Garba (1999) 10 NWLR (Pt. 624) 570  
Ajide v. Kelani (1985) 3 NWLR (Pt. 12) 240  
Sanni v. Ademiluyi (2003) 3 NWLR (Pt. 807) 402  
Afribank Nig. Plc. v. Akwara (2006) 5 NWLR (Pt. 974) 619  
Abubakar v. Yar'Adua (2008) 4 NWLR (Pt. 1078) 465  
E Auto Import Export vs. Adebayo (2003) 1 SCM 54

### **STATUTES & RULES REFERRED TO**

Customary Court (Amendment) Edict 1986, s. 14  
Constitution of Federal Republic of Nigeria 1999, ss. 36, 40  
F Supreme Court Act Cap S15 LFN 2004, s. 27(1)(2)(3)(4)  
Customary Court Rules of Imo State, O. 11 rr. 1-5

### **LEAD JUDGMENT BY RHODES-VIVOUR JSC**

G The proceedings from which this appeal arose commenced in an Abia State Customary court presided over by three lay members. In that court the charge against the respondent read:

That you Kalu James of Obiene Ututu in the Customary Court District of Ore - said (sic) being a taxable adult did fail to pay the sum  
H of N400 being levy and present (sic) imposed on taxable adults (male and female) in Ututu Community for settlement of refugees displaced from their homes and thereby committed an offence punishable under section 14 (third schedule) column B, line 6 of the Customary Court (Amendment) Edict No 10 of 1986.

The accused person/respondent pleaded not guilty. After a trial he was sentenced to two weeks imprisonment or in the alternative to pay a fine of N50 (fifty naira). In addition, the court ordered the respondent to pay the sum of N400 levy to the chairman, Ututu Development Union.

The High Court sitting at Ohafia, in Abia State confirmed the decision of the Customary court. On further appeal to the Court of Appeal, that court set aside the judgment of the High Court, acquitted and discharged the respondent and ordered that the sum of N400 paid by the respondent be returned to him. This appeal is against that judgment. Briefs were duly filed and exchanged. The appellant's brief was filed on the 22nd of October 2008, while the respondent's brief was deemed duly filed and served on the 18th of March, 2009. An amended reply brief was filed on the 12th of March, 2009. In the appellant's brief, six issues were formulated for determination. They are:

1. Whether by the stipulations of section 14 third schedule Part B item 6 of the Imo state Customary Court Edict No. 10 of 1986 as applicable to Abia State, the Customary court Arochukwu had both the criminal and civil jurisdiction to convict and sentence the respondent to two weeks imprisonment or N50 fine and still exercise its civil jurisdiction of making an order that the respondent pay the N400 levy for which the appellant (Town Union) brought the defaulter to the customary court.

2. Whether the Court of Appeal was right when it held that the charge, trial and conviction of the respondent was not prescribed in a written Law and therefore violated section 36 (12) of the 1999 Constitution.

3. Whether the Court of Appeal was right when it held that to compel members of the Ututu Development Union to pay levy was a violation of their Constitutional rights as prescribed by section 40 of the 1999 Constitution.

4. Whether the Court of Appeal was right when it held that rules of procedure as prescribed by Order 11 Rules 1-5 of the Customary Court Rules of Imo State applicable in Abia State were never followed and therefore this case was not initiated by due process.

5. Whether the Court of Appeal was right in deciding this case which emanated from a Customary Court purely from the angle of

strict rules of criminal law and procedure.

On the other side of the fence the respondent formulated two issues: They are:

1. Whether in view of the provisions of section 33 (12) of the Constitution of Nigeria, 1979, in pari materia with section 36 (12) of the Constitution of Nigeria, 1999 and Order 11 Rule 5 of the Customary Court rules of Imo State (as applicable in Abia State), the Court of Appeal was not correct when it held that the Customary Court lacked the jurisdiction to try, convict and sentence the respondent.

2. Whether the imposition of the levy of N400 by the Ututu Development Union on the Respondent was not, as found by the Court of Appeal, a contravention of the respondent's right to freedom of association guaranteed under the provisions of section 37 of the Constitution of Nigeria, 1979, in pari materia with section 40 of the Constitution of Nigeria, 1999.

***At the hearing of the appeal on the 22nd of March 2012, Mr. I. Angulu adopted the appellant's brief filed on the 22nd of October 2008 and urged this court to allow the appeal. On the other side Mr. O. J. Oghenejokpor adopted the respondent's amended brief deemed filed on the 18th of March, 2009. He referred us to a Preliminary objection argued in the brief and urged this court to dismiss the appeal. The respondent argued a Preliminary objection in his brief. This is now accepted practice as that procedure obviates the need to file a separate Notice of Preliminary objection.*** See Maigoro v. Garba 1999 10 NWLR (pt. 624) p.570, Ajide v. Kelani 1985 3 NWLR pt.12 p.240, Sanni v. Ademiluyi 2003 3 NWLR pt.807 p.402.

***A preliminary objection deals strictly with Law, so no affidavit is necessary, but when facts are in issue an affidavit would be necessary. A Preliminary Objection is filed against the hearing of the appeal. The clear intention being to contend that the appeal is incompetent or fundamentally defective. Consequently, if it succeeds the hearing of the appeal abates. Where a respondent's objection if successful would not terminate the hearing of the appeal, a Motion on Notice should be filed.*** Learned counsel for the respondent by way of a Preliminary objection urges this court to strike out or dismiss the ap-

peal on the following grounds.

(a) The Notice of Appeal is incompetent having been filed out of time and the appellant had no right of Appeal.

(b) The Notice of Appeal is incompetent for failure of the appellant to sign the notice of appeal as required by law.

(c) Grounds 1, 2, and 3 are grounds of mixed law and fact for which no leave was sought to bring them. B

(d) Ground 4 is incompetent for being argumentative.

(e) Ground 5 is incompetent for failing to complain of any error in the judgment of the Court of Appeal.

(f) Ground 6 is incompetent for being vague. C

In amplification Mr. O. J. Oghenejakpor, learned counsel for the respondent observed that the Notice of Appeal was filed on the 1st of August, 2008 while judgment was delivered on the 16th of June 2008. He submitted that since there was none compliance with the provisions of section 27 (2) (b) of the Supreme Court Act the Notice of Appeal is incompetent having been filed out of time. Reliance was placed on Afribank (Nig) Plc. v. Akwara (2006) 5 NWLR pt.974, p.619. Concluding he further submitted that all the grounds of Appeal are incompetent and liable to be struck out because they are grounds of fact or of best grounds of mixed law and fact for which leave of the Court of Appeal or this court was not obtained before they were filed. Learned counsel for the appellant argued that the matter is a town Union case that gave rise to a civil matter, namely payment of N400 town Union levy and a criminal matter of payment of N50 fine or two weeks imprisonment for failure to pay the town union levy of N400, contending that the case is a mixed grill of Civil and Criminal. He submitted that the Customary Court was exercising its civil jurisdiction when it ordered the respondent to pay the N400 levy for which the respondent was brought to the Customary Court by the appellants when the respondent defaulted in paying the said levy. In conclusion, he submitted that all the grounds of appeal are grounds of law, and by the Notice of Appeal the matter is a civil matter Reliance was placed on Abubakar v. Yar'Adua (2008) 4 NWLR pt.1078, p.465. F G H

***Rules of procedure and practice in superior court of record are not strictly followed in Customary Courts. It follows naturally that proceedings from Customary Courts should***

**be examined in detail. This entails identifying the issues before that court. The substance of the matter, and not the form it was presented. After such a diligent examination of proceedings before the Customary Court it becomes easy categorizing the proceedings as either civil or criminal.**

B The charge before the customary court against the respondent/accused person was for failure by him to pay Ututu Development levy imposed on taxable adults. He entered not guilty plea, was granted bail. Thereafter there was a trial. The customary court concluded proceedings as follows:

C *“So based on the evidence before this court and the facts at the disposal of the court, the court finds the defendant Kalu James guilty of the charge and hereby sentence him to two weeks imprisonment or in the alternative pay N50 (fifty naira fine). In addition he D should pay the sum of N400 (four hundred Naira) to the chairman Ututu Development Union today before he is released. This is the verdict and orders of this Honourable court.”*

The concluding part of the High Court judgment runs as follows:

E *“This appeal, to say the least, is frivolous. It lacks substance or any iota of merit. It fails and it is accordingly dismissed. The appellant ought to be condemned in substantial costs.*

*But in all the circumstances, no order as to costs. The conviction and sentence of the appellant by the court below (the trial court), F are hereby affirmed.”*

On further appeal the respondent was successful. The Court of Appeal had this to say:

G *“Having thus satisfied myself that the appeal is meritorious, it is hereby allowed by me.*

*Consequently, the judgment of the court below dated 15/10/01 upholding the conviction of the appellant by the trial customary court Arochukwu is hereby set aside. The conviction and sentencing of the appellant by the said trial customary court Arochukwu are H hereby quashed. The appellant is hereby discharged and acquitted of the charge in question. The respondent is ordered to refund to the appellant the sum of N400 paid by the appellant.”*

There is no doubt in my mind after examining the proceedings in the customary court that the respondent as the accused person

was charged for failure to pay Ututu Development Levy. He entered a not guilty plea. He was granted bail. There was a full blown trial thereafter. At the end of the trial he was convicted and sentenced accordingly. On appeal to the High Court the conviction and sentence were affirmed. On further appeal to the Court of Appeal the conviction and sentence were quashed. The appellant/respondent was acquitted and discharged and the sum of N400 was ordered to be refunded to him. The words, “Charge”, “Bail”, “Conviction”, “Sentence” appear only in Criminal trial. The proceeding in the Customary Court has all the trappings of a criminal trial. I am in the circumstances satisfied that the proceedings in the Customary Court were a criminal trial and the appeal to this court is a criminal appeal. Part V of the Supreme Court Act Cap S15 Laws of the Federation of Nigeria 2004 is titled “Procedure” “Time for appealing” and it reads:

27(1) where a person desires to appeal to the Supreme Court he shall give notice of appeal or notice of his application for leave to appeal in such manner as may be directed by rules of court within the period prescribed by subsection (2) of this section that is applicable to the case.

(2) The periods prescribed for the giving of notice of appeal or notice of application for leave to appeal are -

(a) in an appeal in a civil case, fourteen days in an appeal against an interlocutory decision and three months in an appeal against a final decision;

(b) in an appeal in a criminal case, thirty days from the date of the decision appealed against.

(3) Where an application for leave to appeal is made in the first instance to the court below, a person making such application shall, in addition to the period prescribed by subsection (2) of this section, be allowed a further period of fifteen days, from the date of the hearing of the application by the court below, to make an application to the Supreme Court.

(4) The Supreme Court may extend the periods prescribed in subsection (2) of this section.

***Since the appeal to this court is a criminal appeal subsection 2(b) of section 27 supra is applicable. The judgment of the Court of Appeal was delivered on the 16th of June 2008, while the Notice of Appeal was filed on the 1st of August 2008.***

**The appellant is expected to file his Notice of Appeal within 30 days from the 16th of June, 2008. According to the provisions of the law under reference, a criminal appeal to this court from a judgment delivered on 16th June 2008 is to be filed on or before the 17th of July, 2008 for it to be valid. Notice of Appeal filed on 1st August 2008 was filed clearly out of time. It is incompetent. Consequently there is no appeal before this court.**

All is not yet lost for the appellant. He can still appeal by invoking subsection (4) of section 27 supra. File an application for extension of time within which to appeal, supported by an affidavit showing.

(a) good and substantial reasons for failure to appeal within the time prescribed by section 27 (2) (b) supra; and  
(b) grounds of appeal which prima facie show good cause why the appeal should be heard.

(a) and (b) must coexist. A judge would readily exercise his discretion to grant extension of time to appeal if satisfied with (a) and (b).

A Preliminary objection is filed against the hearing of an appeal. In this case the preliminary objection was properly filed as its success has put an end to the hearing of the appeal. In the light of all that I have been saying, the Preliminary objection succeeds. The Notice of Appeal is incompetent, and it is hereby struck out. There would be no need considering grounds (b) to (f) of the Preliminary objection as the Preliminary objection is easily sustained on ground (a).

### **MOHAMMED JSC**

This appeal arose from the judgment of the Arochukwu Customary Court in Abia State delivered on 10th December, 1996 in case No. CC/AR/195C/96. The Appellant was charged and tried by that Court for the offence of:-

*“Failure to pay Ututu Development Levy imposed on taxable adults (male/female in Ututu Community for settlement of Refugees displaced from their homes and thereby committed an offence Punishable under Section 14 (third schedule) column 3 line 6 of the Customary Court (Amendment) Edict No. 10 of 1986.”*

The Appellant's plea to the charge against him was recorded by the trial Court as follows -

*"PLEA: The accused Person pleaded guilty of non payment of the levy because of ill-health and that he is prepared to pay the levy and too he is an Ututu man."*

Upon the plea of the Appellant to the charge against him, the trial Court proceeded to convict and sentence him in its judgment delivered on 10th December, 1996 where the trial Court said - The Court finds the accused person guilty of non-payment of Ututu Development Union Levy is N400.00 and sentence him to a fine of fifty Naira or two weeks imprisonment to be served at Nigerian Prisons, Arochukwu. In addition he is to pay the Ututu Development Union levy before he is released. There is no doubt whatsoever that from the registration number of the case that was heard by the trial Court being No. CC/AR/195C/96, the charge for the offence upon which the Appellant was tried and the judgment of the trial Court convicting the Appellant of the offence charged for which the Appellant was found guilty and sentenced to a fine of N50.00 or two weeks imprisonment to be served at Nigerian prisons Arochukwu, the case which was heard and determined by the trial Court was a criminal case which was properly heard under the jurisdiction of that Court. It is the same case that went on appeal to the High Court of Abia State where the Appellant's appeal was heard and dismissed and his conviction and sentence affirmed. However, the Appellant's further appeal to the Court of Appeal in the same case succeeded and his conviction sentence and order of the payment of N400.00 Ututu Development Union Levy were set aside and the Appellant was discharged and acquitted. From the record of this appeal, it is quite plain that the case that started at the Arochukwu Customary Court on 10th December, 1996 and went through the Abia State High Court to the Court of Appeal culminating in the judgment of that Court on 16th June, 2008, remained a criminal case and has nothing to do with a civil matter. It is my view that the fact that the judgments of the two of the three Justices of the Court of Appeal talked of not making any order as to costs which has no legal backing after the determination of the criminal appeal, does not automatically turn the appeal into a civil appeal as erroneously conceived by the Appellants before this Court in their appeal.

By the provisions of Section 27 of the Supreme Court Act, the present appeal by the Appellants from the decision or judgment of the Court of Appeal in a criminal case must be filed 30 days from the date of the decision appealed against. It is not difficult therefore to see that since the judgment of the court below was given on 16th June, 2008 and the Appellant's notice and grounds of appeal was not filed until 1st August, 2008, the appeal was clearly filed out of time and hence incompetent. It is for the above reasons and fuller ones contained in the lead judgment of my learned brother Rhodes-Vivour, JSC which I have had the opportunity of reading before today and with which I entirely agree, that I also strike out the appeal for being incompetent upon sustaining the Respondents Preliminary Objection.

D

### ***CHUKWUMA-ENEH JSC***

I have had the advantage of reading in draft the judgment of my learned brother Rhodes-Vivour JSC with which I agree entirely.

The notice of appeal in this matter on which this appeal is predicated being incompetent for reasons ably set out in the lead judgment the jurisdictional competence of the court to deal with the appeal cannot be activated and therefore the appeal being incompetent should be struck out. I abide by the order contained in the lead judgment.

F

### ***FABIYI JSC***

I have read before now the judgment just delivered by my learned brother Rhodes-Vivour, JSC. I agree that the process which was filed to initiate this appeal, to wit: the Notice of Appeal being grossly defective, the appeal is incompetent and should be struck out.

The judgment of the Court of Appeal was delivered on 16th June, 2008. Since this is a criminal appeal, section 27 (2) (b) of the Supreme Court Act Cap. S15 Laws of the Federation of Nigeria 2004 mandates that in an appeal in a criminal case, notice of appeal should be filed thirty days from the date of the decision appealed against.

In this matter, the Notice of Appeal was filed on 1st August,

2008. Same was filed clearly out of time. In effect, the initiating process of the appeal was not at one with due process of the law. The case must come before the court initiated by due process of law and fulfillment of any condition precedent to activate the court's competence and a'fortiori jurisdiction. See: *Madukolu v. Ors. v. Nkemdilim* (1962) NSCC 374 at 399-380. I agree with my learned brother that as the Notice of Appeal is incompetent, same is hereby struck out along with the appeal. B

### ARIWOOLA JSC

This appeal is against the decision of the court below Port Harcourt Division delivered on 16th June, 2008. The Notice of Appeal was filed on 1st August, 2008 though dated 28th July, 2008. A careful perusal of the proceedings of the trial Customary Court D showed that the trial was more of a criminal rather than civil matter. There is no doubt, the law prescribed the period within which any aggrieved party desirous of appealing to this court must file the Notice of Appeal in criminal matters.

Section 27 subsection 2(b) of Part V of the Supreme Court E Act, Cap 2 S15, Laws of the Federation of Nigeria, 2004 states thus:-

*"27(2) The periods prescribed for the giving of notice of appeal or notice of application for leave to appeal are...*

*(b) in an appeal in a criminal case, thirty days from the date of the decision appealed against."* F

There is no doubt, the Notice of Appeal in the instant appeal was filed out of time and without leave of court so to do. In *Auto Import Export vs. Adebayo* (2003) 1 SCM 54, court per Iguh, JSC observed as follows:-

*"I think I ought to state that it cannot be over-emphasized that appeals generally are creations of statute and failure to comply with the statutory requirements prescribed by the relevant laws under which such appeals may be competent and properly before the court will deprive such appellate court of jurisdiction to entertain the appeal. H See Kudiabor v. Kudanu 6 WACA 14. In particular, failure to file an appeal within the statutory period of time prescribed by law without obtaining an extension of time within which to appeal in accordance with the provisions of the Rules or to comply with the statutory re-*

*quirements which are conditions precedent to the filing of a valid appeal constitutes a grave irregularity, so fundamental that there would be no appeal which the appellate court could lawfully entertain.*”See also; Afribank Nig. Plc vs. Akwara (2006) 1 SCM 17 at 27-28. I cannot agree less with the reasoning above.

B The Respondent had raised in his brief of argument a preliminary objection to the competence of the appeal, inter alia, that the Notice of Appeal was filed out of time. I am of the firm view and not in the slightest doubt that the preliminary objection raised by the  
C Respondent is sustainable and is hereby sustained. The Notice of Appeal filed against the judgment of the court below delivered having been filed out of time incompetent and therefore there can be no appeal based on an Incompetent Notice of Appeal.

In the circumstance, for this and the fuller reasons adumbrated  
D by my learned brother, Rhode-Vivour, JSC in the leading judgment, I too uphold the preliminary objection, and hereby, have the Notice of Appeal struck out for being incompetent robbing this court of jurisdiction to hear the appeal. I agree entirely with the lead judgment that there no need to consider other grounds of objection. I abide by  
E the consequential orders in the leading judgment, including the order on costs.

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