

SUPREME COURT OF NIGERIA
7TH DECEMBER, 2012. SC. 229/2007
CORAM:- C. M. CHUKWUMA-ENEH, S. GALADIMA,
B. RHODES-VIVOUR, M. D. MUHAMMAD,
C. B. OGUNBIYI, JJSC

ALHAJI FATAI AYODELE ALAWIYE APPELLANT
AND
MRS. ELIZABETH ADETOKUNBO
OGUNSANYA RESPONDENT

COURTS - Stay of execution - Grant - Parties - Court exercises its discretion judicially and judiciously - Where applicant has presented necessary materials - For grant of stay (H1)

STAY OF EXECUTION - Grant - Purpose of - Stay is granted to maintain status quo ante - So as to preserve the res from being destroyed - Pending the determination of an appeal (H2)

JURISDICTION - Fundamental nature of - Court cannot deal with a matter without jurisdiction - As absence of same renders proceedings therein a nullity (H3)

APPEALS - Stay of execution - Grant - Justification - Court is justified to grant stay - Where notice of appeal has disclosed substantial arguable grounds (H4)

APPEALS - Notice of appeal - Amendment - Notice can be amended at any stage of the proceedings in court - With leave of court predicated upon special circumstances (H5)

ACTIONS - Court Processes - Legal practitioners - Signature - Since the processes were not signed by person cognizable as legal practitioner - The action should be struck out (H6)

JURISDICTION - Issue of - Time to raise - Jurisdiction can be raised at any stage of proceedings - Even for first time in Supreme Court (H7)

APPEALS - Brief - Filing - Mistake of counsel - Effect - Party ought not to be made to suffer - Because of delay of his counsel in filing brief (H8)

SUPREME COURT - Powers - S.C. Act s.22 - The court is empowered to deal with any case before it on appeal - Including power to act as trial court (H9)

APPEALS - Supreme Court - Fresh issue on jurisdiction - Leave - Leave must be obtained - To raise the issue for the first time - In Supreme Court (H10)

ACTIONS - Judgments - Jurisdiction - Court processes - Defect in - As the processes have been voided as being nullities - Decisions arising therefrom are nullities (H11)

FACTS

By a Motion on Notice brought under Order 2 rule 3(1)(2), Order 6 rule 2 and Order 8 rules 4, 11, 12 of Supreme Court Rules (as amended) 1999; and under sections 22, 24 and 27 of Supreme Court Act Cap. 515 LFN 2004 and also under section 233(3) of the Constitution of the Federal Republic of Nigeria 1999 (as amended), appellant/applicant prays the Court for inter alia, an order staying execution of the judgment of the Court of Appeal, an order for leave to raise fresh issue and file an additional ground of appeal on issue of jurisdiction not raised before the Court of Appeal and an order granting leave to appellant to amend his notice of appeal. The ground for these prayers among others is, that the payment of the judgment debt ordered by the High Court and Court of Appeal will negatively affect appellant's financial standing to prosecute the appeal.

Appellant also contends that the critical initiating processes in the matter have been signed and issued by a non-cognizable legal practitioner of the law firm of "Chief Afe Babalola SAN & Co" otherwise incapable under the Legal Practitioners Act to sign the initiating processes. And thus these erroneous acts have rendered the said initiating processes nullities and that same have voided the action

itself. In reaction, respondent urged the Court to refuse the application on the ground that the Court has become *functus officio* (since the reliefs have once been refused by the Court). Respondent further argued that to raise the fresh issue on jurisdiction will lead to a miscarriage of justice.

ISSUE FOR DETERMINATION

“Whether the appellant has disclosed sufficient reasons for a favourable exercise of the discretion of this Honourable Court in allowing the application in its entirety”

HELD (Unanimously dismissing the action per

CHUKWUMA-ENEH JSC)

Stay of Execution - Grant

1. And having given the foregoing due consideration, I venture to say in principle that the applicant in this application has invoked the court’s exercise of its discretion in its favour, firstly to grant a stay of execution in this matter. I must again say that it is trite that the court’s discretionary power in this regard has to be exercised judicially and judiciously in essence based on the applicant placing before the court all the necessary materials to enable the court to do so in his favour otherwise it is a non-starter being a relief predicated upon equitable principles. And this is so in this instance on the peculiar circumstances of the case and again against the background of balancing the competing interests of the parties to the said reliefs. (p. 2971 A)

Stay of Execution - Grant - Purpose

2. Coming to the issue of stay of execution proper: again it is trite that the purpose of stay of execution is to keep the state of affairs in status quo ante so as to preserve the Res, the subject matter of litigation from being destroyed, dissipated and/or wasted; in most cases pending the determination of an appeal in the matter. It more or less prevents the judgment creditor from exercising any of the rights adjudged in his favour by the court in the judgment sought to be stayed. There is al-

ready a pending appeal in this matter and the instant prayer for a stay of execution is predicated upon it and usually it is not granted where there is no pending appeal and when granted it is normally to subsist pending the determination of the appeal as in the instant appeal. The notice of appeal in principle
B does not ipso facto operate as a stay and the court has the jurisdiction to grant stay of execution either conditionally or otherwise. (p. 2971 C)

C JURISDICTION - Fundamental nature of
3. It is settled law, all the same that a court cannot deal with a matter without jurisdiction being the enabling power of a court to entertain a matter before it as no matter however brilliantly a matter is conducted without jurisdiction it is a nullity and a
D sheer waste of the time of the court. (p. 2975 G)

APPEALS - Stay of Execution - Grant
4. And as I have wondered, taking the issue of jurisdiction in the instant matter cannot rightly be challenged on the ground
E of the right being stale or out of time. Although this in principle is so, nonetheless, the court has the last say in such matters as it has the power to grant leave or allow fresh evidence to be adduced on appeal on a substantial issue of law
F raised for the first time under exceptional circumstances in the interest of justice and to avoid a miscarriage of justice. In this way the court is obliged not to allow litigants to make a meal of it by abuse of court process in that regard as it would be against public policy to allow concluded matters willy-nilly
G to be so re-opened and thus open the floodgates to no end to litigation. All the same, it is settled that where a notice of appeal has disclosed substantial grounds of appeal to be argued in an appeal as the issue of jurisdiction in this matter, there is every likelihood, indeed justification for the court to exercise
H its discretion of granting a stay of execution. (p. 2975 H)

APPEALS - Notice of appeal - Amendment
5. The above provisions are clear and have stipulated the proper modus operandi of seeking leave of court to raise ad-

ditional ground of appeal and fresh issue in an appeal proceeding that is by application as the instant one. This Rule implies that a notice of appeal can be amended at any stage of the proceedings in a court with the leave of the court so also raising of any fresh issue as here as well. However, leave in the circumstances, has to be predicated upon special circumstances in other words, leave cannot be granted as a matter of course. (p. 2978 H)

Court Processes -Legal practitioners - Signatures

6. Be it noted that the writ of summons, the statement of claim and the Notice of cross-Appeal upon which the decisions have been predicated have not been signed and issued by a person cognizable as a legal practitioner under the Legal Practitioners Act and has opened this action to be struck out in limine. (p. 2979 D)

JURISDICTION - Issue of - Time to raise

7. I think if I may recap that it is trite to hold that jurisdiction being a constitutional issue and the bedrock upon which the powers of a court is founded can be raised at any stage of the proceedings in a matter even for the first time in this court as the apex court. Therefore, it goes without saying that where at any stage of the proceedings in a court, the court becomes seized of the fact of its want of jurisdiction to deal with a matter before it, it is enjoined to put a final stop to the proceedings in the matter and to strike it out without more whether or not the point on want of jurisdiction has been taken suo motu by the court or on the application of the parties. (p. 2979 E)

APPEALS - Brief - Filing - Mistake of counsel

8. On the peculiar facts of the instant matter and as I have conjured from my reasoning above, the applicant has relied on the exceptional circumstance as stated herein in explaining his delay in filing his appellant's brief of argument out of time which in the main is the mistake of counsel. The applicant has gone to town in trying to explain away the surround-

ing circumstances to the counsel's mistakes here and I am satisfied on that score and based on decided authorities (sic) ought not generally to be visited on the applicant as a party ought not to be made to suffer because of the mistakes of his counsel. (p. 2981 E)

B

SUPREME COURT - Powers - S.C Act s.22

9. I would have been done so far in this appeal but I think this is a case I have to invoke the extraordinary powers of this court under section 22 of the Supreme Court Act to deal with the real issue in controversy in the appeal. Having made that point this I have done so by granting the reliefs per the application above I now go on to deal with this case under section 22 (supra). Firstly, this section has given this court wide enough power to deal with any case before it on appeal. The power includes the power given to High Court as the trial court as here. The real issue in this appeal is as to the jurisdiction of the trial court to deal with this matter ab initio and the appeal therefrom to the lower court. There can be no doubt therefore, that this court as the apex court has the power to deal with this matter in the interest of justice and dispense with the appropriate reliefs as to meet the justice of the case. And so to save the time of the court even then where as here such reliefs have not been specifically claimed but the matter has been extensively argued in their respective briefs. An appellate court as this court has the power to follow this course in the interest of justice as made evident in this court's decision in Ameachi v. INEC (2008) AFWLR (Pt.407) 1 at 102 - 103. (pp. 2982 D/2984 B)

G

APPEALS - Supreme Court - Fresh issue on jurisdiction

10. It must be observed that unless and until leave to raise fresh issue and as well as the ground of appeal upon which it is predicated is put in place it is not acceptable to raise the issue of jurisdiction for the first time in this court. This is basic on the peculiar facts of this matter and on the authority. (p. 2982 E)

H

Judgments - Jurisdiction - Court processes -

11. What I am saying in other words, is to the effect that all the critical materials to enable this court evincingly determine this matter are before this court; indeed these initiating processes as I have outlined above are purportedly initiating processes in this matter meaning in effect that the proceedings before the two lower courts including their respective decisions have been predicated on the said fatally defective initiating processes. And once these processes have been voided as being nullities it must follow logically that the said decisions of the two lower courts must necessarily be voided as also being nullities. And I so find. Again, the initiating processes being nullities have fundamentally robbed the trial court of the jurisdiction to entertain and enter judgment in this suit so also the lower court's decision on appeal therefrom and the resultant Notice of Cross-Appeal also filed in this matter; again, I so find. It follows from so holding that the instant suit not having been initiated by due process of law is a nullity. (p. 2983 B)

REPRESENTATION

Dr. O. F. Ayeni with A.U.J. Udoh, M.I. Fadipe, F. Ukpe and O. Adeosun,
for the Appellant

Kehinde Ogunwumiju with Ademola Abimbola & Monisola Oladapo,
for the Respondent

CASES REFERRED TO

Madukolu v. Nkemdilim (1962) 1 ANLR 587

Jov v. Dom (1999) 9 NWLR (Pt.620) 538

Fajunwa v. Adibi (2004) 17 NWLR (Pt.903) 544, 562

Owie v. Ighiwi (2005) 5 NWLR (pt.917) 184 at 216.

Kwajaffa v. Bank of the North Ltd. (2004) 13NWLR (pt. 889) 146

Okafor v. Nweke (2007) 10 NWLR (Pt.1043) 521

John v. Iboroma & Ors. (1990) 6 NWLR (pt.555) 542

Williams v. Hope Rising voluntary Society (1982) 1 SC.145

Nalsa Team Associates v. N.N.P.C. (1991) 8 NWLR (pt.212) 652

Koya v. UBA Ltd. (1997) 1 NWLR (Pt.481) 251

Sken-Consult (Nig) Ltd. & Anor. V. Ukey (1981) SC.4

Eke v. Military Administrator, Imo state (2007)All FWLR (Pt.381) 1720

Vaswani Trading Co. v. Savalakh & Co. (1972) 12 SC.p.77

Incar (Nig) Plc. v. Bolex Enterprises (Nig.) Ltd. (1966) 8 NWLR (Pt.469) 687

STATUTES & RULES REFERRED TO

^B Constitution of the Federal Republic of Nigeria 1999 (as amended), ss.6(6)(b), 36(1) and (2)233(3)

Legal Practitioners Act Cap 207 LFN 1990, ss. 2 and 24

Supreme Court Act Cap 515 LFN 2004, ss.22, 24 and 27

^C Supreme Court Rules 1999 (as amended), O.2 r.3(1)(2), O.6 r.2, O.8 r.4, 11, 12

LEAD JUDGMENT BY CHUKWUMA-ENEH JSC

^D This Notice of Motion is brought firstly under Order 2 Rule 3(1) and (2); Order 6 Rule 2, as well as Order 8 Rules 4, 11, 12 Supreme Court Rules as Amended 1999, and secondly under Sections 22, 24 and 27 Supreme Court Act Cap. 515 Laws of the Federation 2004 and thirdly under section 233(3) -Constitution of the Federal Republic of Nigeria, 1999 (as Amended), praying this Court
^E for the following:

(1) an order staying execution of the Judgment of the Court of Appeal in Appeal No.CA/1/52/97 delivered on 7/7/2033.

^F (2) an order for leave to raise fresh issue and file an additional ground of Appeal on issue of jurisdiction not raised before the lower court.

^G (3) an order granting leave to the Appellant/Applicant to amend the Appellants' Notice of Appeal in terms of the proposed Amended Notice of Appeal tendered as Exhibit AFA6 to the affidavit in support of the Notice of Motion in substitution to the Notice of Appeal dated 29th June, 2007 but filed on 3rd July, 2007.

(4) an order deeming the Amended Notice of Appeal dated 28/5/2010 as having been properly filed.

^H (5) an order enlarging time within which the Appellant may file his brief of argument in this Appeal and

(6) an order deeming the Appellant's brief of argument dated 28/5/2010 already filed and served as having been properly filed and served.

The grounds upon which these prayers are brought are as fol-

lows:

1. The payment of the judgment debt ordered by the two lower courts will negatively affect the Appellant's financial standing to prosecute this Appeal.

2. The Appellant/Applicant has instructed additional counsel to prosecute the Appeal before this Honourable court, and the new team of counsel intend to raise the issue of jurisdiction before this Honourable Court, and for the first time. B

3. The Notice of Appeal filed on 3rd July, 2007 did not contain the issue of jurisdiction now sought to be raised nor was any ground predicated in it on the incompetence of the trial court to entertain the suit or the lower court to determine the appeal therefrom. C

4. The issue of jurisdiction can be raised at any stage of the proceedings, even before this Honourable Court sitting as court of final appeal, and for the first time. D

5. The Appellant intends to prosecute the Appeal to its logical conclusion by filing his Appellant's brief of Argument in the Appeal.

6. The action before the trial court was incompetent as the writ of summons, further Amended writ of summons (filed on 10th February, 1995) and 3rd Further Amended Statement of claim (filed on 25th May, 1995) were not signed by any cognizable legal practitioner. E

7. The Notice of Cross Appeal dated and filed on 9th January, 1996 on behalf of the Respondent as Respondent/Cross Appellant in the Court of Appeal of Nigeria and which was allowed is incompetent as it was not signed by any cognizable legal practitioner. F

8. This court struck out the earlier application for stay of execution on 4th June, 2007 in the belief that the Record of Appeal was not transmitted when it had in fact been transmitted. This Application will aid the expeditious determination of the Appeal. G

The application is supported by an affidavit of 32 (thirty-two) paragraphs with 6 (six) exhibits. And these exhibits which have been exhibited to the said supporting affidavit are as follows: H

(1) Certified Copy of the Judgment of the Court of Appeal delivered on 7th of July, 2003 marked as "Exhibit AFA1"

(2) Copy of Notice of Appeal filed on 3rd July, 2007 marked

as “Exhibit AFA2”

(3) Certificate of Occupancy which is in respect of the property that is an uncompleted office block building marked as “Exhibit AFA3”

(4) A valuation by Registered Estate Surveyors, Tai Alli & Partners & Co., dated 14th September, 2009 marked as “Exhibit AFA4”

(5) The certified copy of the letter proving transmission and entry of the Record of Appeal dated 10th August, 2007 from the Court of Appeal Ibadan to this Court marked as “Exhibit AFA5”

(6) proposed Amended Notice of Appeal marked as “Exhibit AFA6”.

The applicant has in addition filed on 28/9/2010 a second affidavit in support of the application. He also has filed, in support of the instant application appellant/applicant’s brief and a reply brief on 7/6/2012 and 18/5/2010 respectively. These processes have been adopted on 25/9/2012 by the applicant at the oral hearing of the application and have been relied on to urge the Court to grant the prayers sought in the application. The applicant also has highlighted not having previously raised the issue of jurisdiction, the grounds appeal predicated upon it as per the Amended Notice of Appeal filed on 9/1/1996, the incompetence of the trial court to entertain the suit, the incompetence of the lower court’s determination of the appeal therefrom - constitutes the central questions in the matter while also underscoring the point that no fresh evidence is required to sustain the issue of jurisdiction in the cause and again, to sustain the fresh issue sought to be raised in the Suit. He has alluded to the critical initiating processes in the matter (i.e. the Writ of Summons, the Statement of Claim and the Notice of Cross-Appeal) which as can be seen have been signed and issued by a non-cognizable legal practitioner of the law firm of “Chief Afe Babalola SAN & Co” otherwise incapable under the Legal Practitioners Act to sign the initiating processes. And thus these erroneous acts have rendered the said initiating processes nullities that have voided the action itself.

This in a nutshell is the crux of this matter from applicant’s perspective. The Respondent to the application on the other hand has in response filed two counter-affidavits the first is filed on 22/7/2010 and the second on 5/5/2011 and a Respondent’s brief, all in

opposition to the application. These processes having been adopted at the oral hearing of the application on 25/9/2012 the Respondent has urged this court to refuse all the prayers in the application, and in regard to the order of stay of execution particularly so on the ground that this court has become functus officio and relies on “Exhibit A” filed on 22/7/2010 to buttress the point and to show that that relief has once been refused by this court. B

On the second relief to wit: on entitlement to raise issue on jurisdiction - the Respondent has submitted that although she apparently concedes that the relief is grantable where no fresh evidence is required and has raised a substantial point of law in order to avoid any miscarriage of justice that these pre-conditions even then do not exist here to justify the instant application. She also concedes that the other prayers on whether the application will entail adducing further evidence and leave for enlargement of time to perfect these processes as already filed and served, have to succeed or fail depending on which way prayer two above has gone. He urges that to raise the fresh issue will definitely lead to a miscarriage of justice instead. This represents the Respondent’s reaction at the oral hearing of the application. C D E

The applicant in his brief of argument has set out a sole issue for determination as follows:

“Whether the appellant has disclosed sufficient reasons for a favourable exercise of the discretion of this Honourable Court in allowing the application in its entirety” F

On the question of stay of execution he has in expatiating on the inherent jurisdiction of the court to stay its judgments referred to and relied on *Vaswani Trading Co. v. Savalakh & Co.* (1972) 7 NSCC p.692 or (1972) 12 SC p.77 and has urged that on proof of special circumstances that the court may accede to the application for stay where the applicant as here has raised a threshold issue of jurisdiction of the court as per Exhibit AFA6. See: *Incar (Nig.) Plc. & Anor. V. Bolex Enterprises (Nig.) Ltd.* (1996) 8 NWLR (Pt.469) 687 and particularly so that the execution if not stayed the res stands to be destroyed and thus foist upon the court a situation of complete helplessness so that any order eventually made in the instant appeal will be rendered nugatory apart from impinging on his right to exercising his constitutional right of appeal. see *Fatoyinbo v. Osadeyi* (2002) 11 G H

NWLR (Pt.778) 384. The court is urged to preserve the res by granting a stay of execution.

On leave to raise fresh issues and amend the Notice of Appeal as per “Exhibit AFA6” in the application: On this question, the applicant has referred to the two proposed grounds of appeal sought to be raised in the proposed Amended Notice of Appeal as per “Exhibit AFA6” as being crucial in their relationship to the issue of jurisdiction of the trial court to entertain the suit ab initio and the power of the Court of Appeal to entertain the appeal therefrom as well as the notice of cross-appeal that has been raised as herein. All this because the writ of summons, the statement of claim and the Notice of Cross-Appeal have not been signed as prescribed by the Legal Practitioners Act by a person who is a legal practitioner in being and therefore are nullities. See *Madukolu v. Nkemdilim* (1962) 1 ANLR 587 at 595, *Jov v. Dom* (1999) 9 NWLR (Pt.620) 538 at 547 B-C and so that the leave to raise a fresh issue has to be laid on a serious question of law/jurisdiction - a threshold matter deserving to be given due consideration at any stage of the proceedings no matter the status of the court that is seized of the matter. Also see: *Fajunwa v. Adibi* (2004) 17 NWLR (Pt.903) 544, 562, *Owie v. Ighiwi* (2005) 5 NWLR (pt.917) 184 at 216. He also has argued that no further evidence is needed apart from advertng to the instant record of appeal to establish and sustain the fresh issue that has arisen in the cause as per the said initiating processes having been signed and issued by “Chief Afe Babalola, SAN & Co” a non-cognizable legal practitioner in law. See: *Kwajaffa v. Bank of the North Ltd.* (2004) 13 NWLR (pt. 889) 146 at 167. The court is urged that the writ of summons and Statement of Claim as well as the Notice of Cross-Appeal have ex facie showed that the action has not been initiated by due process as they, each of them, have not been signed and initiated by any cognizable person qualified to practice law as per the Legal Practitioners Act. And so that “Chief Afe Babalola, SAN & Co.” not being the name of a person in being is incapable of acting as a legal practitioner to sign and issue the said initiating processes in this matter in contradistinction to the position as held and decided in the case of *Okafor v. Nweke* (2007) 10 NWLR (Pt.1043) 521, 531-532. I shall come to expound on the cited case later on in this discourse against the backdrop of the facts of this matter.

On Enlargement of Time: The applicant under section 6(6) (b) and section 36(1) and (2) of the 1999 Constitution as amended has urged the court to grant extension of time to file the appellant's brief of argument and amended notice of cross-appeal based upon the exceptional circumstances of this matter and that the applicant/appellant has all the same filed the appellant's brief of argument and the notice of cross-appeal for deeming orders to show his being up and doing in prosecuting the appeal to avoid any further delay in hearing the appeal expeditiously. See: *John v. Iboroma & Ors.* (1990) 6 NWLR (pt.555) 542 BC, *Williams v. Hope Rising voluntary Society* (1982) 1 SC.145 at 152, *Nalsa Team Associates v. N.N.P.C.* (1991) 8 NWLR (pt.212) 652. The court is urged to grant all the prayers sought in this regard in the application.

The Respondent has set out a sole issue for determination in this matter as:

“whether or not appellant has fulfilled conditions necessary for the court to exercise discretion in granting the reliefs sought by him?”

The Respondent even then has approached this issue by raising therefrom sub-issues as will be examined in extenso in this discourse to wit:

(a) Whether or not the appellant is entitled to an order of stay of execution:

In this regard the Respondent states that this is a ploy to delay the appeal as it is settled law that the court will not ordinarily grant a stay where the same has previously been refused and submits that the refusal of a similar application on 3/3/2009 with N30,000 (costs yet unpaid) amounts to a dismissal and has opined that the applicant should have provided a Bank guarantee against depositing his Certificate of Occupancy in court; and

(b) Whether or not the appellant is entitled to raise fresh issue of jurisdiction:

The Respondent has reiterated the guiding principles for dealing with such matters including as conceded that the appellate court will allow a party to raise a point not raised in the court below where it is on a point affecting substantive or procedural law in order to avoid a miscarriage of justice and upon leave of court as it is not automatic and timeously made in circumstances where no further

evidence is required and injustice will be occasioned if refused. But he has urged that these conditions have not been satisfied by the applicant. See *Jov. Dom* (supra). It is contended that the circumstances in *Okafor v. Nweke* (supra) are different as here where the applicant is seeking to have a second bite at the cherry after 15 years of the date of the originating process being attacked here.

(c) Whether or not granting of the appellant's application will entail adducing further evidence to prevent an obvious miscarriage of justice:

The Respondent has recapitulated the position that the application is not allowable having failed to meet the principles outlined above where no substantial points of law or procedure are involved and further evidence will be required. See: *Koya v. UBA Ltd.* (1997) 1 NWLR (Pt.481) 251 at, 266 - 267, *Sken-Consult (Nig) Ltd. & Anor. V. Ukey* (1981) SC.4 at 10. And further relies on *Ogundele v. Agiri* (2009) 18 NWLR (pt.1173) 246 -249 to submit that a Registered Law Firm or Partnership can competently issue out the instant processes in its name. The court is urged to dismiss the application.

The applicant in his reply brief has not in my view addressed any new points or issues and again in my opinion none has arisen from the Respondent's brief of argument but he has proceeded, against what a reply brief is designed to encompass, to re-arguing the points he has already argued or ought to have argued in his main brief in other words in repetition of the main brief. I take it there is nothing to urge as per his reply brief and it is discountenanced. See: *Eke v. Military Administrator, Imo state* (2007) All FWLR (Pt.381) 1720 at 1741.

I have thoroughly perused and scrutinized the processes filed by both the applicant and the Respondent in this application including their respective briefs in support of the relative positions, they, each of them, have taken in this matter as well as their oral submissions in expatiation of their respective arguments in the briefs of argument. Their submissions therein have been all encompassing in dealing with the reliefs sought in this application and particularly so on the incompetency of the initiating processes as the instant Writ of Summons, further amended Writ of Summons, the Statement of Claim and the Notice of Cross-Appeal on having been signed by a non-cognizable legal practitioner under the Legal Practitioners Act.

And having given the foregoing due consideration, I venture to say in principle that the applicant in this application has invoked the court's exercise of its discretion in its favour, firstly to grant a stay of execution in this matter. I must again say that it is trite that the court's discretionary power in this regard has to be exercised judicially and judiciously in essence based on the applicant placing before the court all the necessary materials to enable the court to do so in his favour otherwise it is a non-starter being a relief predicated upon equitable principles. And this is so in this instance on the peculiar circumstances of the case and again against the background of balancing the competing interests of the parties to the said reliefs.

Coming to the issue of stay of execution proper: again it is trite that the purpose of stay of execution is to keep the state of affairs in status quo ante so as to preserve the Res, the subject matter of litigation from being destroyed, dissipated and/or wasted; in most cases pending the determination of an appeal in the matter. It more or less prevents the judgment creditor from exercising any of the rights adjudged in his favour by the court in the judgment sought to be stayed. There is already a pending appeal in this matter and the instant prayer for a stay of execution is predicated upon it and usually it is not granted where there is no pending appeal and when granted it is normally to subsist pending the determination of the appeal as in the instant appeal. The notice of appeal in principle does not ipso facto operate as a stay and the court has the jurisdiction to grant stay of execution either conditionally or otherwise.

The source of the court's inherent jurisdiction exercisable in this regard is as conferred by Section 6(6) of the 1999 Constitution (as amended) and other Supreme Court Rules and Act as have been acknowledged by this court in Vaswani Trading Co. v. Savalakh & Co. (1972) 12 SC.p.77, per Coker JSC to wit:

"...it is true and correct to observe that the notice of appeal does not operate as a stay of execution and section 24 of the Supreme Court Act makes this more clear; but it is equally correct to point out that the section does not prescribe in favour of any execu-

tion being carried out during the pendency of an appeal. Indeed, by the provision it stipulates that during the pendency of an appeal, the Supreme Court has got the jurisdiction to accede to the application for a stay of execution conditionally or otherwise..." See also *Incar (Nig) Plc. v. Bolex Enterprises (Nig.) Ltd. (1966) 8 NWLR (Pt.469)* B 687. It is exercised based on equitable principles and this is very evident when the court is balancing the competing interests of the parties in an application for stay. It is paramount to bear in mind first and foremost that a successful litigant is entitled to the fruits of his success in the suit and that any delay of his right to the fruits of his success C must to be predicated and justified upon exceptional circumstances and that this is so notwithstanding that the appellant's right to present his appeal ought not to be impeded vis-à-vis in the interest of preserving the res. The principles guiding the court's exercise of its discretion in regard to either grant or refuse an application for stay of D execution pending appeal have been eloquently expounded in numerous cases as in *Vaswani Trading Co. v. Savalakh & Co. (1972) 12 SC.77*, *Okafor & Ors. v. Nnaife (1987) 4 NWLR (pt.64) 129 at 136-137*, *Intercontractors (Nig.) Ltd. v. U.A.C. of Nig. Ltd. (1988) 1 NSCC* E (Vol.19) 73; *Incar (Nig.) Plc. v. Bolex Enterprises (Nig.) Ltd. (1996) 8 NWLR (pt.469) at 687*, *Ajomale v. Yadaut No.2 (1991) 5 NMLR (pt.191) 260 at 286*, *Olunloyo v. Adeniran (2001) 14 NWLR (Pt.734) 699 at 409-710*. In considering the foregoing factors vis-a-vis the F general balance of convenience of the parties in this matter a wide range of matters based on the affidavits of the parties have to be taken into account. I will set out very crucial paragraphs of their affidavits later in this judgment.

Having gone through the affidavits of the parties the fundamental G issue of the jurisdiction of the trial court to entertain this matter ab initio has seriously been put in issue in this application with regard to "Exhibit AFA6" i.e. the proposed Amended Notice of Appeal on the backdrop of the ground of Appeal on jurisdiction as raised therein and the fresh issue which has been raised therefrom to be H resolved in this application vis-a-vis providing the exceptional circumstances upon which to found the stay. For purposes of identifying these issues I make due reference to the affidavits as I set out the crucial paragraphs as per the applicant and the Respondent in the matter to wit:

Firstly, as per the applicant's supporting affidavit as follows:

"9. In monetary terms, the judgment of the Court of Appeal was that I should pay the plaintiff the sum of Five Million Naira as damages for libel and slander with N250,000.00 as costs.

10. I do not have the aggregate sum of N5.25 Million in cash hence it is not possible for me to pay the judgment debt and the costs immediately, and to be liable to pay the said sum of N5.25 Million awarded against me, I would have to sell at least one of the two properties that I own.

11. My matrimonial home occupied by my wife, my children and I is situate at 110 Ejirin Road, Ijebu-Ode, and the only other property that I own is at 57, Folagbade Street, Ijebu-Ode. Now produced, shown to me and marked Exhibit AFA3 is a copy of the Certificate of Occupancy in respect of the said property.

14. Apart from the two properties aforementioned, I do not own any other properties that can fetch any amount of money remotely near the damages and costs awarded, and it is beyond that once I sell the property at Folagbade Street, I can no longer recover same ever if I win this appeal.

16. I will be completely ruined unless this Honourable Court graciously grants a stay of execution of the Judgment and costs pending the determination of my Appeal.

17. The Respondent, at the time the judgment was delivered by the High Court, was a School Teacher whose annual income was N36,000 per annum and will not be in a position to refund the judgment sum if my appeal succeeds.

21. I am prepared to deposit the original certificate of occupancy (Exhibit AFA3) in court as an assurance that same would not be sold or dealt with until the appeal is disposed of.

27 While holding a conference in chambers in respect of this appeal discovered from the said Record of Appeal that neither Writ of Summons nor Statement of Claim or indeed the various amendments made thereto were signed by any legal practitioner as required by law. There is now produced, shown to me and marked as Exhibit AFA6 the proposed Amended Notice of Appeal.

28. Further fundamental defects were found in the record tending to vitiate the Notice of Cross-Appeal filed in the Court of Appeal by the Respondent (as Respondent/Cross Appellant) and dated

9th January, 1996 on jurisdictional grounds.

29. I was also informed by Bambo Adesanya, Esq. SAN and I verily believe him that the failure to sign the writ of summons and Statement of Claim and the various amendments made thereto together with the Notice of Cross-Appeal dated and filed on 9th January, 1996, by any cognizable legal practitioner on the faces of the respective documents is one which affects the competence of the action upon which the judgment was obtained as well as the jurisdiction of the trial and lower courts to entertain the action predicated thereon.

30. Both the Amended Notice of Appeal and Appellant's Brief of Argument dated 28th May, 2010 have now been filed and served, and I have been advised by Bambo Adesanya, Esq., SAN whom I verily believe that allowing my application will save the time of the court and aid in an expeditious determination of same."

Again secondly, as per the Respondent's 1st counter-Affidavit are as follows:

"That contrary to the Appellant/Applicant's averments in paragraphs 26, 27, 28 and 29 which are denied, I know as Counsel that:

(i) The Respondent won at the trial court and Court of Appeal on the merits of this case.

(ii) That the leave being sought is one that is within the discretion of the court to grant or refuse and such leave is not automatic but based on fulfillment of certain conditions.

(iii) That I also know as Counsel that the Appellant Counsel has not furnished the court with conditions that will enable the court grant his prayers to file additional grounds.

(iv) That the issue of the person who signed the originating processes not being on the roll of legal practitioners should have been raised before the trial court or timeously to afford the Respondent the opportunity to respond to same by adducing further arguments and evidence in rebuttal.

(v) That a grant of this leave being sought by the Appellant will only enable the Appellant dwell on technicalities rather than the substantial justice of this case.

(vi) That the Appellant has not raised any substantial or novel issue of law to be argued in which its absence would occasion a miscarriage of justice.

(vii) *That I also know that a point must be fundamental, involving substantial question of law, whether procedural or in substance and it must be plain, needing no further evidence for a decision to be reached in order to prevent a miscarriage of justice.*

(viii) *That the point being raised is one inviting my Lords to embark on a voyage of discovery.* B

(ix) *That the point being raised by the Appellant also questions the presumption of regularity of the judgments of the two lower courts contrary to the provisions of the Evidence Act.*

(x) *That the only miscarriage of justice that can be occasioned in this application is on the Respondent if the application is granted.”* C

In sum, my surmise on having considered the above depositions by the parties arising from the vexed facts in issue in this application is to determine whether or not exceptional circumstances have been established for the applicant's entitlement to an order of stay of execution and to amend the Notice of Appeal to support raising a ground of appeal on jurisdiction upon which is founded a fresh issue not previously raised before the two lower courts as per “Exhibit AFA6” as well as enlargement of time to file the appellant/applicant's Amended Notice of Appeal and the appellant's brief of argument in the appeal on the settled principles guiding the court in granting applications of this nature. It is against this prism that I have now gone on to discuss this matter. It seems to me from my summation of the foregoing depositions of the parties that an issue on jurisdiction of the two lower courts to entertain this action ab initio has been raised by “Exhibit AFA6”. Thus making it all the more incumbent upon an appellant as the applicant here to raise a constitutional right to appeal based on a substantial issue of law as jurisdiction even though belatedly as to take that point at any stage of the proceedings of a court even in this court as the apex court is trite although on having sought firstly leave of this court to do so. See: *Jov v. Dom* (supra). ***It is settled law, all the same that a court cannot deal with a matter without jurisdiction being the enabling power of a court to entertain a matter before it as no matter however brilliantly a matter is conducted without jurisdiction it is a nullity and a sheer waste of the time of the court. And as I have wondered, taking the issue of jurisdiction in the instant matter cannot rightly be challenged on the ground of the right being stale or*** F G H

out of time. Although this in principle is so, nonetheless, the court has the last say in such matters as it has the power to grant leave or allow fresh evidence to be adduced on appeal on a substantial issue of law raised for the first time under exceptional circumstances in the interest of justice and to avoid a miscarriage of justice. In this way the court is obliged not to allow litigants to make a meal of it by abuse of court process in that regard as it would be against public policy to allow concluded matters willy-nilly to be so re-opened and thus open the floodgates to no end to litigation.

All the same, it is settled that where a notice of appeal has disclosed substantial grounds of appeal to be argued in an appeal as the issue of jurisdiction in this matter, there is every likelihood, indeed justification for the court to exercise its discretion of granting a stay of execution. See *Martins v. Nicanner Food Co. Ltd.* (1988) 2 NWLR (Pt.74) 75, *Josien Holdings Ltd v. Bornameed Ltd.* (1995) NWLR (pt.371) 254 and thus constituting it a special circumstance in such an application as here. It is also correct to say that not every ground of law will constitute Special circumstance to sustain an order of stay. See: *Joy. v. Dom* (supra) - which case has decided that leave of court is required to raise a substantive issue of law for the first time in this court. However, in this matter it is the issue of jurisdiction that has cropped up as the main issue, i.e. the power of the two lower courts to entertain this matter as courts of competent jurisdiction in the matter; and as always the issue of jurisdiction is a substantial ground of appeal to be raised and argued in an appeal.

It therefore follows from my reasoning above that an application as the instant one for an order to preserve the res being well grounded ordinarily without more ought to be granted. I must however, observe that in the event of execution being levied in regard to the instant lower court's judgment in this action even on the peculiar facts of this matter vis-à-vis the amended Notice of appeal as per "Exhibit AFA6" raising thereof a cogent point of jurisdiction of the two lower courts to entertain this action; as it appears to me, its refusal where the levy of execution is enforced is bound to foist upon this court a situation of complete helplessness besides rendering the judgment of this court nugatory, again, if the appeal is eventually

successful.

However, on examining the other side of the coin the Respondent has gone a long way to soothe the applicant's anxious nerves in this regard by making it abundantly clear in paragraphs 3.06 of her brief thus:

"... that granting a stay is unnecessary as appellant is not under any threat of execution of the judgment of the lower court until final adjudication in respect of the appeal. The Respondent had refrained from executing the judgment believing that the appellant would pursue his appeal expeditiously rather than resort to numerous applications for stay which inevitably delay the matter. see T.S.A. Ind. Ltd. v. Kema Inv. Ltd. (2006) 2 NWLR (pt. 964) 30 at 316 - 317 paragraphs E-G and p. 315 paragraphs E-H and has made the salient point that the Supreme Court held that it is not every situation that one raises a point of law that an order of stay of execution will be granted."

I have set out the foregoing abstract to position the true situation of the facts in this matter and to underscore the point that the Respondent's position so far in this matter may have been after all to expedite the disposal of the appeal timeously and is not in a hurry to levy execution and so, in actual fact has made no threats to levy execution either now or in the future until the final determination of the appeal. The implication of the foregoing Respondent's subtle assertion as articulated as per the abstract above would have sufficed to affect the mind of this court in pinning her down to her open-ended undertaking not to levy execution while the appeal is prosecuted to its conclusion in this court and so avoid the instant tedious proceedings. This is so as the essence of stay of execution is to prevent the threats of the judgment creditor igniting a process to realizing the fruits of the judgment declared in his favour. In that wise, it is my view as informed by decided authorities that stay of execution ought not to be granted merely for the sake of putting the court to the exercise of granting it as a matter of course as it must be aimed at rightly suspending the plaintiff's rights where the threats to initiate the enforcement of the judgment creditor's right as declared in his favour in the suit is imminent and real. Importantly, therefore stay of execution is not intended to be casually exploited by the appellant so as to go to sleep over prosecuting his appeal to its logical conclusion with due

diligence as it would otherwise result in frustrating a judgment creditor to a state of ad nauseam with court business vis-à-vis as the instant creditor realising the fruits of his judgment.

The said assertion by the Respondent also belies the urgency and the need to grant a stay here arising from no apparent threats from the judgment creditor tilting the scales of balance of convenience for granting the application. See: chief Shodeinde & Ors. v. The Registered Trustees of the Ahmadiyya Movement-in-Islam (1980) 1/2 SC.163. The situation of the applicant's obsession for stay of execution in this matter as portrayed by the Respondent here is rendered all more convincing by the fact of the applicant having made a similar obvious application that has failed rather than as is expected from a more serious appellant pursuing diligently the prosecution of the appeal matters expeditiously.

For all this, and having taken an overview of the conclusions I have arrived at in this appeal I do not see it fit and proper albeit necessary to grant a stay of execution here, even in principle when it will serve no useful purpose as I will show anon as per the final orders of this court in this appeal. After all, it is a discretionary matter. In the circumstances of the peculiar facts of this matter, the discretion ought to be exercised by this court acting judicially and judiciously and so, I leave the matter to rest on the clear open-ended undertaking given by the Respondent as per the said assertion not to levy execution until the final determination of the appeal, is reached. And I so hold.

B. On leave to raise fresh issue and amend the Notice of Appeal. The applicant has rightly sought leave to amend the Notice of Appeal by filing two additional grounds of appeal as per "Exhibit AFA6" and to seek leave to raise fresh issue of jurisdiction not raised in the two lower courts. The process directly in issue in this regard is rightly grounded on the purport of the provisions of Order 8 Rule 2(5) which provides:

"The appellant shall not without the leave of court urge or be heard in support of any ground of appeal not mentioned in the Notice of Appeal, but the court may in its discretion allow the appellant to amend the grounds of appeal upon payment of fees prescribed for making such amendment and upon such terms as the court may deem just."

The above provisions are clear and have stipulated the

proper modus operandi of seeking leave of court to raise additional ground of appeal and fresh issue in an appeal proceedings that is by application as the instant one. This Rule implies that a notice of appeal can be amended at any stage of the proceedings in a court with the leave of the court so also raising of any fresh issue as here as well. See: Fagunwa v. Adili (supra). B

However, leave in the circumstances, has to be predicated upon special circumstances in other words, leave cannot be granted as a matter of course. C

The applicant in this matter has projected as constituting special circumstances for the instant application the issue of want of jurisdiction in the trial court to entertain the suit ab initio and the nullity of the lower court's judgment on appeal from the trial court's decision to it and again, the nullity of the Notice of cross-Appeal of 9/1/1996 as an initiating process in the cause. Therefore the premise for taking the issue of jurisdiction here can neither be flawed for being fanciful nor whimsical. **Be it noted that the writ of summons, the statement of claim and the Notice of cross-Appeal upon which the decisions have been predicated have not been signed and issued by a person cognizable as a legal practitioner under the Legal Practitioners Act and has opened this action to be struck out in limine.** D E

I think if I may recap that it is trite to hold that jurisdiction being a constitutional issue and the bedrock upon which the powers of a court is founded can be raised at any stage of the proceedings in a matter even for the first time in this court as the apex court. Therefore, it goes without saying that where at any stage of the proceedings in a court, the court becomes seized of the fact of its want of jurisdiction to deal with a matter before it, it is enjoined to put a final stop to the proceedings in the matter and to strike it out without more whether or not the point on want of jurisdiction has been taken suo motu by the court or on the application of the parties. See Owie v. Ighiwi (2005) 5 NWLR (Pt.917) 184 at 216. F G H

I have now to advert to the applicant's application seeking leave to raise fresh issue in this court and the two additional grounds of appeal by amending the original Notice of Appeal as per "Exhibit

AFA6” the amended Notice of Appeal. The guiding principles in this regard are as laid down in the cases of Joy v. Dom (supra) and Kwajaffa v. Bank of the North (supra) to wit:

- (a) Obtain the leave of the Supreme Court.
- (b) Ensure that the new points sought to be raised involve substantial issues of substantive or procedural law which need to be allowed to prevent an obvious miscarriage of justice.
- (c) Show that no further evidence is required to resolve the issue for determination.

C For an applicant as here to succeed in taking the above issues the foregoing three factors have to co-exist in the application. The applicant has filed the instant application seeking leave of this court to raise a fresh issue of jurisdiction. The proposed amended notice of appeal “Exhibit AFA6” shows clearly the additional grounds of appeal upon which the fresh issue being raised in this court for the first time is predicated. They concern, if I may recap, the Writ of Summons and the statement of claim and various amendments thereto and the Notice of Cross-Appeal of 9/1/2006 in regard to the appeal to this court and I must add even although in this respect it is clear that once the decisions of the two lower courts are declared to be nullities the instant Notice of Cross-Appeal becomes of no moment as an initiating process in this appeal as it has no *lis extant* upon which to stand. It evaporates into the thin air as if it has never existed. The applicant’s complaint as per the said “Exhibit AFA6” is founded on the fact that the said initiating processes have not been signed or issued by a legal practitioner cognizable under the Legal Practitioners Act but by “Chief Afe Babalola, SAN & Co” a law firm which is not a legal practitioner known to the law. The applicant has submitted in that event that the judgments so predicated on these initiating processes are also nullities. There can be no doubt that the issue sought to be raised here is of substantial law to be argued i.e. on the issue of jurisdiction of the two lower courts and it goes to the root of the instant action *vis-à-vis* the vires of the court to deal with the matter. It is evident that no further evidence is needed to be adduced to resolve the said fresh issue in that the writ of summons, the statement of claim and the notice of cross-appeal at the centre of the said fresh issue as canvassed and referred to here, have formed part of the record of appeal now before this court. It is on this basis that I have

come to hold that the instant issue on jurisdiction can be raised in limine. See: Egbe v. Adefarasin (supra). Having satisfied the three pre-conditions to raise the said fresh issue and amend the Notice of Appeal, the application has merit and consequently, it is granted as prayed. Specifically, leave to amend the Notice of Appeal as per “Exhibit AFA6” and to raise the fresh issue on jurisdiction as distilled from it is hereby granted as prayed. B

C. On Enlargement of Time: The applicant for the above relief has come under Order 2 Rule 31 (1) of the Supreme Court Rules 1985 (as amended) and it provides as follows:

“The court may enlarge the time provided by these Rules for the doing of any thing to which these Rules apply, or may direct a departure from these Rules in any other way when this is required in the interest of justice.” C

By the foregoing provisions the court is conferred with the power to enlarge the time provided in the Rules where it is proper to do so to meet the ends of justice in the matter and the other party is to be compensated in costs where the justice of the matter so demands. D

On the peculiar facts of the instant matter and as I have conjured from my reasoning above, the applicant has relied on the exceptional circumstance as stated herein in explaining his delay in filing his appellant’s brief of argument out of time which in the main is the mistake of counsel. The applicant has gone to town in trying to explain away the surrounding circumstances to the counsel’s mistakes here and I am satisfied on that score and based on decided authorities (sic) ought not generally to be visited on the applicant as a party ought not to be made to suffer because of the mistakes of his counsel. Also see: Ibosdo v. Enarofia (1980) 5/7 SC.42, G.B.A. Akinyele V. The Appraiser (1971) 1 ANLR 162 at 165; Doherty v. Doherty (1964) 1 ANLR 299; Bowaje v. Adedinuke (1976) 6 SC.143 at 47. Again, on having granted the reliefs sought under item ‘B’ above with regard to filing of the Amended Notice of Appeal and raising of a fresh issue therefrom, it goes without more that the enlargement of time to regularize the said processes already filed and served ought to be granted without more and it is so granted. And I so hold. E F G H

To show a positive commitment by the applicant to diligently prosecute this appeal there is already filed and served the Amended Notice of Appeal dated 28/5/2012 as well as the Appellant's brief of argument also dated 28/5/2012 all for a deeming order. Having found that the applicant has placed enough materials as I have posited herein
 B to enable the court consider the instant application I find the Respondent's opposition to this relief as misconceived and so the relief is granted and time is hereby extended as prayed so that the applicant's Amended Notice of Appeal and the Appellant's brief of
 C argument already filed and served are deemed so properly filed and served today. And I so order.

In the result, excepting as to my finding and pronouncement on the instant application for stay of execution there is merit in the rest of the reliefs sought in the main application and with regard to
 D the respective prayers 2, 3, 4, 5 and 6 therein they, each of them, are granted as prayed. And I make no order as to costs.

***I would have been done so far in this appeal but I think this is a case I have to invoke the extraordinary powers of this court under section 22 of the Supreme Court Act to deal with
 E the real issue in controversy in the appeal. It must be observed that unless and until leave to raise fresh issue and as well as the ground of appeal upon which it is predicated is put in place it is not acceptable to raise the issue of jurisdiction for the first time in this court. This is basic on the peculiar facts of
 F this matter and on the authority.*** See: Jov v. Dom (supra).

***Having made that point this I have done so by granting the reliefs per the application above I now go on to deal with this case under section 22 (supra). Firstly, this section has
 G given this court wide enough power to deal with any case before it on appeal. The power includes the power given to High Court as the trial court as here.*** See: Jadesimi v. Okotie Eboh (1986) 5 NMLR (pt.16) 264; Chief Ejowhonu Edok-Eter v. Mandillas Ltd. (1986) 5 NWLR (pt.39) 1; Chief Ekpo v. Chief Utong (1991) 7
 H SC. (pt. 11) 52. ***The real issue in this appeal is as to the jurisdiction of the trial court to deal with this matter ab initio and the appeal therefrom to the lower court.***

Before expatiating on the purports of the provisions of that section I am minded to observe as I have held herein that the mate-

rials consisting of the instant court processes to wit: the Writ of Summons, the Statement of Claim and the Notice of Cross-Appeal, the initiating processes as filed in this matter and as signed and issued by “Chief Afe Babalola, SAN & Co.” - a non-cognizable Legal practitioner as laid before this court have formed integral parts of the record of appeal as transmitted to this court. B

What I am saying in other words, is to the effect that all the critical materials to enable this court evincingly determine this matter are before this court; indeed these initiating processes as I have outlined above are purportedly initiating processes in this matter meaning in effect that the proceedings before the two lower courts including their respective decisions have been predicated on the said fatally defective initiating processes. And once these processes have been voided as being nullities it must follow logically that the said decisions of the two lower courts must necessarily be voided as also being nullities. And I so find. Again, the initiating processes being nullities have fundamentally robbed the trial court of the jurisdiction to entertain and enter judgment in this suit so also the lower court’s decision on appeal therefrom and the resultant Notice of Cross-Appeal also filed in this matter; again, I so find. It follows from so holding that the instant suit not having been initiated by due process of law is a nullity. See Macfoy v. U.A.C. Ltd. (1962) AC. 152; and in Madukolu v. Nkemdilim (supra) per Bairamain JSC, this court has found to effect that a court is competent when- C D E F

“(1) It is properly constituted as regards numbers and qualifications of the members of the bench and no member is disqualified for one reason or another; and G

(2) the subject-matter of the case is within its jurisdiction, and there is no feature in the case which prevents the court from exercising its jurisdiction; and

(3) the case comes before the court initiated by the due process of law, and upon fulfillment of any condition preceded to the exercise of jurisdiction.” H

The above abstract of Madukolu’s case (supra) has underscored how the jurisdiction competence of the trial court and the lower court as well as this court has been fatally afflicted by the vice of

not having initiated this action by due process of law resulting from the nullities of the said initiating processes arising from their not having been signed and issued by a legally cognizable person acting as a Legal Practitioner under the Legal Practitioners Act. Being initiating processes their voidity, permit me to repeat, has destroyed the foundation of the causes in this matter rendering them void ab initio, again See: Macfoy v. U.A.C. (supra).

There can be no doubt therefore, that this court as the apex court has the power to deal with this matter in the interest of justice and dispense with the appropriate reliefs as to meet the justice of the case. See: Onuaguluchi v. Ndu (2001) 3 SCA.8, Oshohoja v. Amudo [1992] 6 NWLR (pt.250) 690. ***And so to save the time of the court even then where as here such reliefs have not been specifically claimed but the matter has been extensively argued in their respective briefs. An appellate court as this court has the power to follow this course in the interest of justice as made evident in this court's decision in Ameachi v. INEC (2008) AFWLR (Pt.407) 1 at 102 - 103.***

Having put this case on the proper perspective and regular course by granting reliefs 2, 3, 4, 5 and 6 of the above application in this matter, the next question is as to whether this action itself ought to be allowed by this court to proceed any further to the stage of filing and exchanging of the briefs of argument for the eventual determination of the matter on appeal. To determine this question it seems to me that this court against the backdrops of the Writ of Summons, the Statement of Claim and the Notice of Cross-Appeal being the initiating processes deployed in this matter and having otherwise been rendered nullities as will be showed anon it is beyond argument that the action itself is also a nullity and must be set aside as the issue of jurisdiction of the two lower courts in dealing with this matter is well taken. Meaning that the action, itself on appeal to this court ought to be struck out in limine. This procedure is in sync with the principle that jurisdiction can be taken at any stage of the proceedings even in this court in an appeal as in this case and that at any stage a court becomes aware that it lacks the jurisdiction to deal with a case, it is bound to stop the proceedings as here and strike it out. see: Macfoy v. U.A.C. (supra), Madukolu v. Nkedilim (supra), Elelu-Habeeb v. Attorney-General of the Federation (2012) 13 NWLR

(pt.1318) 423, *Ada v. N.Y.S.C.* (2004) NWLR (pt.891) 639; - in the last cited case I made that point and this court upheld the finding. The upshot of what I am saying here if I may repeat is that this action however brilliantly conducted is ultimately gravely afflicted by the vice of not having been initiated by due process of law as the said writ of summons, the statement of claim and the Notice of Cross-Appeal being the initiating processes in this matter have been voided for having been signed and issued by a legal practitioner not cognizable under the Legal Practitioners Act and, therefore, the two lower courts have no jurisdictional competence to entertain the action ab initio. Flowing from my reasoning above the assertion that this matter ought to be disposed of in limine becomes imperative. See: *Egbe v. Adefarasin* (1987) 1 NSCC (Vol.18) 1 at 3 paragraphs 20-25 on a comparable question of taking the issue of limitation in limine.

To assume this extraordinary power under Section 22 (supra) in the circumstances I am satisfied as to the conditions precedent to exercising this power in that all the materials to enable this court reach its conclusion in this matter are available before the court meaning that no further evidence is needed to be adduced to invoke the powers conferred under the section to deal with this matter by this court; that the real issue in this appeal is as distilled from the additional grounds of appeal on the fresh issue of want of jurisdiction extensively canvassed herein - in the briefs of the parties and that there is need to save the valuable time of the court on grounds of public policy as well as to avoid multiplicity of hearings in the matter. Besides, the issue in this context in this matter has raised a substantial issue of law for which leave to raise the issue of jurisdiction for the first time in this court has been granted. In this regard I have to advert to the manner of wrongfully signing and issuing the said writ of summons, statement of claim and the notice of cross-appeal i.e. initiating processes by a non-cognizable Legal Practitioner of the Law Firm of "Chief Afe Babalola, SAN & Co" and to hold that they are therefore nullities and void ab initio resulting in the action itself being also a nullity all the same again as its foundation has been fatally eroded. I have adverted to these foregoing circumstances to opine clearly that even though this question has been raised by this court suo motu that the parties have nonetheless had the opportunity to exhaust themselves as extensively posited in their depositions and the sup-

porting briefs to the application on the issue so raised by the court; implying that they, each of them, cannot later on complain of not having been heard on the issue. The situation in this matter vis-a-vis the decision of this court in the case of *Okafor v. Nweke* (2007) 10 NWLR (Pt.1043) 521, is identical in every respect. This court in the cited case has decided that “J.H.C. Okolo SAN & Co.” is not a legal person and so cannot under the Legal Practitioners Act sign and issue legal processes to wit: a notice of appeal and appeal as well as the applicant’s brief of argument in the said cited case otherwise signed and issued by a Law Firm known as “J.H.C. Okolo, SAN & Co.” - being a non-cognizable person under the Legal Practitioners Act and so the said legal processes are incompetent processes and have to be set aside. In the same vein, the instant initiating processes as I have all along set out herein in this action have been signed and issued by “Chief Afe Babalola, SAN & Co.” a non legal practitioner- not known to the law as well as not being a legal practitioner as enrolled to practice law in this country under the Legal Practitioners Act. The two cases are on all fours. There can be no gainsaying that the principle in *Okafor v. Nweke* (supra) binds this court in deciding the instant case that the said initiating’ processes have been wrongfully signed and issued by “Chief Afe Babalola, SAN & Co.” a non-cognizable legal practitioner under the law and clearly are void Processes as the instant ones must be signed and issued by a person in being in the proper name of the person as enrolled to practice law in this country under the Legal Practitioners Act. See: Section 2 and 24 of the Legal Practitioners Act and *Okafor v. Nweke* (supra). Anything short of this manner of signing and authenticating of legal processes is unacceptable. It is clear that the jurisdiction of the trial court unquestionably has been clearly rendered unequivocally of no effect by the nullities of the initiating processes in this matter ab initio and so also its decision and the decision of the lower court on the appeal therefrom and that they (i.e. the two lower courts), each of them, if I may repeat, have no jurisdiction to entertain the matter. In short, the action has not been initiated by due process of law nor have the necessary conditions to enable the two lower courts invoke their jurisdiction to deal with the matter fulfilled and consequently the action is a nullity and must be voided. And I so hold.

I therefore set aside the purported judgments of the two lower

courts in this matter. And the instant suit in its entirety being incompetent is hereby struck out with no order as to costs. Action struck out.

RHODES-VIVOUR JSC

B

The originating processes were signed by “Chief Afe Babalola SAN & Co”, the signature is not readable. Now, a court is competent when:

(a) it is properly constituted as regards the members and qualifications of its members bench, and no member is disqualified for one reason or another; and C

(b) the subject matter of the case is within its jurisdiction and there is no feature in the case which prevents the court from exercising its jurisdiction; and D

(c) the case coming up before the court was initiated by due process of law, and upon fulfilment of any condition precedent to the exercise of jurisdiction.

This case is on all fours with SLB Consortium Ltd v. NNPC 2011 9 NWLR Pt.1252 P.317. In that case the originating summons and the amended statement of claim complained of were signed by “Adewale Adesokan & Co”. Since Adewale Adesokan & Co is not a legal practitioner whose name is on the roll the originating processes were defective and the appeal arising from the proceedings initiated and conducted without jurisdiction was incompetent. In this matter the originating processes were signed by “Chief Afe Babalola SAN & Co”. It is clear that those processes were not signed by a person known to law, the name not being on the roll, and so the originating processes were signed contrary to section 2 and 24 of the Legal Practitioners Act. Chief Afe Babalola SAN & Co is not a legal practitioner known to law, the said originating processes are defective and all proceedings that arose from the said defective processes are nullities. The proceedings were conducted without jurisdiction and so incompetent. In SLB Consortium Ltd v. NNPC 2011 9 NWLR Pt.1252 P.317. I explained how processes filed in court are to be signed. I said: E F G H

“All processes filed in court are to be signed as follows:

(a) First, the signature of counsel, which may be any con-

traption;

(b) Secondly, the name of counsel clearly written;

(c) Thirdly, who counsel represents;

(d) Fourthly, name and address of legal firm.”

I then went on to say that:

B “Once it cannot be said who signed the process, it is incurably bad, and rules of court that seem to provide a remedy are of no use as a rule cannot override the Legal Practitioners Act. There must be strict compliance with the law...”

C In this case there was a signature of counsel, but no name of counsel known to law. A signature without the name of counsel is incurably bad.

For this, and the reasoning and conclusions in the leading judgment prepared by my learned brother Chukwuma-Eneh, JSC D which I read in draft, I agree that this suit is incompetent and it is hereby struck out with no order of costs.

OGUNBIYI JSC

E The application on notice was filed on the 7th June, 2010 and seeking an order of this court for the following six reliefs:-

F “1. AN ORDER staying execution of the judgment of the Court of Appeal in Appeal No. CA/1/52/97 delivered on the 7th day of July, 2003 in Appeal No. CA/1/52/1997 between Alhaji A.F. Alawiye v. Mrs. Elizabeth Adetokunbo Ogunsanya (Coram: Oimage, Tabai, and Adekeye, JJCA) and the order for costs given on the same day pending the determination of the appeal lodged against the same.

G 2. AN ORDER granting leave to the Appellant/Applicant to raise fresh issue and file an additional Ground of Appeal; to wit: issue of jurisdiction not raised previously before the lower Court.

H 3. AN ORDER granting leave to the Appellant/Applicant to amend the Appellant’s Notice of appeal in terms of the Proposed Amended Notice of Appeal tendered as Exhibit AFA6 to the Affidavit in support of the Notice of Motion in substitution to the Notice of Appeal dated 29th June, 2007 but filed on 3rd July, 2007.

4. AN ORDER deeming the Amended Notice of Appeal dated the 28th May, 2010 as having been properly filed, appropriate filing fees having been paid.

5. AN ORDER enlarging time within which the Appellant may file his Brief of Argument in this Appeal.

6. AN ORDER deeming the Appellant's Brief of Argument dated 28th May, 2010 already filed and served as having been properly filed and served."

The nine grounds predicated the application are also as follows:-

1. The payment of the judgment debt ordered by the two lower Courts will negatively affect the Appellant's financial standing to prosecute this appeal.

2. The Appellant/Applicant has instructed additional Counsel to prosecute the Appeal before this Honourable Court, and the new team of Counsel intend to raise the issue of jurisdiction before this Honourable Court, and for the first time.

3. The Notice of appeal filed on 3rd July, 2007 did not contain the issue of jurisdiction now sought to be raised nor was any ground predicated in it on the incompetence of the trial Court to entertain the suit or the lower Court to determine the appeal therefrom.

4. The issue of jurisdiction can be raised at any stage of the proceedings, even before this Honourable Court sitting as Court of final appeal, and for the first time.

5. The Appellant intends to prosecute the appeal to its logical conclusion by filing his Appellant's Brief of Argument in the appeal.

6. The action before the trial Court was incompetent as the writ of summons, Further Amended Writ of Summons (filed on 10 February, 1995) and 3rd Further Amended Statement of Claim (filed on 25th May, 1995) were not signed by any cognizable legal practitioner.

7. The Notice of Cross Appeal dated and filed on 9th January, 1996 on behalf of the Respondent as Respondent/Cross Appellant in the Court of Appeal of Nigeria and which was allowed is incompetent as it was not signed by any cognizable legal practitioner.

8. This Court struck out the earlier application for stay of execution on 4th June, 2007 in the belief that the Record of Appeal was not transmitted when it had in fact been transmitted.

9. This Application will aid the expeditious determination of the Appeal.

Supporting the application are series of affidavits and counter affidavits as well as briefs of arguments by both parties. Order 8 Rule 2(5) Supreme Court Rules provides that:

B *“The appellant shall not without the leave of the court urge or be heard in support of any ground not mentioned in the notice of appeal, but the court may in its discretion allow the appellant to amend the grounds of appeal upon payment of fees prescribed for making such amendment and upon such terms as the court may deem just.”*

C The appellant/application can therefore only raise a fresh issue or amend his Notice of Appeal by the leave of this court first sought and obtained. The principle of law enshrined in the foregoing provision is well established by judicial authorities. The case of Jov V. Dom (1999) 9 NWLR (Pt.620) 538, 547 is for instance in reference where Belgore JSC (as he then was) held amongst others and said:-

D *“a party to an appeal that intends to raise a new issue or introduce a novel matter into an appeal must seek leave to do so.”*

E The general principle of law is also trite that an amendment can be made at any time before judgment provided that the doing so will not overreach or prejudice the other party. It is also reasonable that an amendment which would determine the justice of a case one way or the other ought to be granted. It is however elementary to restate that the exercise of discretion must be judicious and judicial. The central fulcrum of this application is whether or not this court can exercise its discretion in granting leave for the applicant to raise fresh issue for purpose of filing additional grounds of appeal and hence amend the appellant/applicant’s Notice of Appeal. In the exercise of such discretion, it is expected that the court will take into account the nature of the proposed additional ground of appeal sought to be raised as fresh issue which in this case is jurisdictional as evidenced on the relief sought on the application, as well as the affidavit in support of the motion with particular reference made to paragraphs 27, 28 and 29, which reproduction are as follows:-

H *“27. On 20th November, 2009, Dr. Olumide Ayeni, Victor Abasiakan-Ekin, Esq., Nsikak Udoh, Esq. and Otenghabun Ebose, Esq. of counsel while holding a conference in chambers in respect of this appeal discovered from the said record of Appeal that neither Writ of Summons nor statement of claim or indeed the various amendments made thereto were signed by any legal practitioner as required*

by law. There is now produced, shown to me and marked as Exhibit AFA6 the Proposed Amended Notice of Appeal.

28. Following further telephone conferences held by Dr. Olumide Ayeni with Bambo Adesanya, Esq SAN, further fundamental defects were found in the record tending to vitiate the Notice of Cross-Appeal filed in the Court of Appeal by the Respondent (as Respondent/Cross Appellant) and dated 9th January, 1996 on jurisdictional grounds. ^B

29. I was also informed by Bambo Adesanya, Esq. SAN and I verily believe him at the failure to sign the Writ of Summons and Statement of Claim and the various amendments made thereto together with the Notice of Cross-Appeal dated and filed on 9th January, 1996, by any cognizable legal practitioner on the faces of the respective documents is one which affects the competence of the action upon which the judgment was obtained as well as the jurisdiction of the trial and lower courts to entertain the action predicated thereon.” ^C

Recourse should also be had to the proposed additional ground 7 of the grounds of appeal which clearly raises the question of incompetence of the suit ab initio wherein the originating processes were alleged to be incompetent. The said ground and the particulars (a),(b),(c),(d),(e),(f) and (g) are all in evidence and reproduced hereunder for clearer comprehension. ^E

“GROUND SEVEN

The learned Justices of the Court of Appeal erred in law thereby occasioning a miscarriage of justice to the appellant by affirming the judgment of the High court of Ogun State sitting at Ijebu-Ode, when the judgment was a nullity ab initio by reason of the absence of jurisdiction to determine the suit. ^F

PARTICULARS

(a) The suit forming the basis of the judgment of the trial court affirmed by the lower court was incompetent and was not commenced by due process of law.

(b) The suit did not fulfil the condition precedent to the exercise of jurisdiction by the trial Court which the Court of Appeal ought to have reversed. ^H

(c) The writ of Summons, statement of claim and the various amendments thereto, filed in the suit were not signed by any cogni-

zable legal practitioner as envisaged in Section 2(1) Legal Practitioners Act Cap 207 Laws of the Federation of Nigeria 1990.

(d) *The Writ of Summons, Statement of Claim and the various amendments were signed by CHIEF AFE BABALOLA SAN & CO. who is not a Legal Practitioner under the Legal practitioners Act*
B *Cap 207 LFN 1990.*

(e) *The Writ of Summons, Statement of Claim and the amendments thereto not having been signed by a legal practitioner or the Respondent were all null and void.*

(f) *Order 25 Rule 4(1) Ogun State High Court (Civil Procedure) Rules, 1988 which is applicable to this appeal mandatorily requires all Pleadings to be signed by a legal practitioner or the party where he sues or defends in person.*
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(g) *The suit forming the basis of the judgment of the trial*
D *court affirmed by the lower court was undertaken without jurisdiction on the basis of a void statement of claim and its amendments thereto."*

In response to the averments in paragraphs 27, 28 and 29 supra, the Respondent by his counter affidavit had this to say at paragraph 18(iv) - (x).
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"(iv) That the issue of the person who signed the originating processes not being on the roll of legal practitioners should have been raised before the trial court or timeously to afford the Respondent the opportunity to respond to same by adducing further arguments and evidence in rebuttal.
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(v) That a grant of this leave being sought by the Appellant will only enable the appellant dwell on technicalities rather than the substantial justice of this case.

(vi) That the appellant has not raised any substantial or novel issue of law to be argued in which its absence would occasion a miscarriage of justice.
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(vii) That I also know that a point must be fundamental, involving substantial question of law, whether procedural or in substance and it must be plain, needing no further evidence for a decision to be reached in order to prevent a miscarriage of justice.
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(viii) That the point being raised is one inviting my lords to embark on a voyage of discovery.

(ix) That the point being raised by the Appellant also ques-

tions the presumption of regularity of the judgments of the two lower Court's contrary to the provisions of the Evidence Act.

(x) That the only miscarriage of justice that can be occasioned in this application is on the Respondent if the application is granted."

The totality of the counter affidavit was to render the applicant's objection a mere technicality and only procedural in nature. This contention, the applicant's counsel submitted is too late in the day and therefore cannot now be raised at this stage.

From the affidavit evidence before us and also the record of appeal, it is a fact that the processes subject of contention, that is to say the writ of summons and statement of claim and also the various amendments made thereto together: with the Notice of cross-appeal, prima facie were all signed by Chief Afe Babalola, SAN & Co. It is evident from the application that the issue sought to be raised for the first time, as borne out by the proposed Amended Notice of Appeal reproduced vide ground no 7 of the ground of appeal are substantial points of law. In other words, that the processes upon which the proceedings of the court were predicated and judgment obtained at the trial court and affirmed by the lower court were not signed or issued by any Legal Practitioner as envisaged, prescribed or stipulated by the Legal Practitioners Act. In the same vein, the notice of cross-appeal was also afflicted by the same vice. I also hasten to say that all the processes alleged as incompetent are originating processes and the effect was to render the entire proceedings predicated thereupon a nullity. In other words, the incompetent nature of the processes had robbed the two lower courts of jurisdiction to entertain the suit, which in principle had not been commenced by due process of law. The case of *Madukolu V. Nkemdilim* (1962) 1 All NLR 287, at 595 is in reference wherein a court is competently adjudged as constituted where it has satisfied all the requisite requirements which are mandatory. With the suit, the subject matter of the purported judgment being incompetent for want of due process of law, the absence of jurisdiction is very fundamental. Contrary to the submission by the learned Respondent's counsel therefore, the defect is not only procedural or a mere technicality but very fundamental and touches on the root foundation of the case. The authority in the case of *Okafor V. Nweke* (2007) 10 NWLR (Pt 1043) 521 at 531 - 532 per Onnoghen JSC is very, much in point.

In the absence of jurisdiction, the lower court and albeit the trial court had acted in futility. In principle, the applicant's application is premised on special circumstance which had satisfied the good and substantial reason for the exercise of discretion in his favour. There cannot be a better reason than the absence of jurisdiction. On the
B totality therefore and with the two lower courts having acted without jurisdiction, the purported suit upon which this application is predicated is non existent and incompetent.

Consequently and in the same terms as the lead judgment of
C my learned brother Chukwuma-Eneh therefore I also strike out the suit and abide by the order made therein the lead judgment, as to costs.

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