

SUPREME COURT OF NIGERIA
FRIDAY 18TH JANUARY, 2013. SC. 92/2004
**CORAM:- I. T. MUHAMMAD, J. A. FABIYI, M. U. PETER-
ODILI, O. ARIWOOLA, S. S. ALAGOA, JJSC**

CHIEF M. A. INEGBEDION APPELLANT
AND
1. DR. SELO-OJEMEN
2. OTIBHOR OKHAE TEACHING
HOSPITAL IRRUA RESPONDENTS

APPEALS - Issues - Proliferation - Omega Bank case - It is not the number of issues in a brief that determine the quality - Or that determine the success of an appeal (H1)

AFFIDAVITS - Averments - Contradiction - Where a party does not file counter affidavit - To contradict averments in affidavit in support of motion - He is deemed to have admitted them (H2)

CONSTITUTIONAL LAW - Jurisdiction - Federal High Court - Exclusive jurisdiction is vested on the court by 1999 Constitution s. 251(1)(p)(q)(r) - Over matters in which Fed. Govt. or its agency is a party (H3)

FACTS

Before the High Court of Edo State Uromi, plaintiff/appellant contended that he went to 2nd defendant/respondent's hospital to conduct an HIV/AIDS test with his estranged wife. He further stated that 1st respondent diagnosed him of HIV positive following the laboratory test conducted by 2nd respondent. Appellant was asked to return in three months time for a confirmatory test. Meanwhile appellant went to another hospital for the same kind of test. The result of the 2nd test revealed that appellant was HIV negative. A confirmatory test at 2nd respondent's hospital after three months revealed that appellant was HIV negative.

Appellant further alleged that 1st Respondent breached the doctor/patient relationship by disclosing the first result of his HIV test to his wife and to a prophet propelling appellant's action for the tort

of negligence, defamation and breach of doctor/patient relationship against 1st respondent and 2nd respondent. Respondents filed a Motion on Notice challenging the jurisdiction of the Court to hear the matter on the ground that according to section 251(1)(p)(q)(r), 2nd respondent being a Federal Government Agency, could not be sued in the State High Court. After hearing, the court upheld the application and struck out appellant's suit for want of jurisdiction. On appeal by appellant to the Court of Appeal Benin City, the court dismissed the appeal and affirmed the decision of the trial court. Aggrieved further, appellant filed appeal to Supreme Court.

ISSUE FOR DETERMINATION

"Whether the lower court was right in holding that in view of S.251 (1) (p), (q), and (r) of the 1999 Constitution of the Federal Republic of Nigeria the trial court lacked the jurisdiction to entertain the Suit."

HELD (Unanimously dismissing the appeal per ALAGOA JSC)

APPEALS - Issues - Proliferation

1. On the proliferation of issues in a Brief of Argument, the Supreme Court per Dahiru Musdapher, JSC (as he then was) in OMEGA BANK (NIG) PLC V. O.B.C. LTD. (2005) 8 NWLR (PART 928) 547 had this to say-

"This Court has on several occasions condemned the proliferation of issues in Briefs of Argument. It is not the number of issues for determination formulated that determines the quality of a brief or that determines the success of an appeal."
(p. 75 E)

AFFIDAVITS - Averments - Contradiction

2. The Appellant never filed a Counter-Affidavit at all, talk less of one where it countered the deposition that the 2nd Respondent is an agency of the Federal Government. The Respondents therefore submitted that the Appellant is deemed to have admitted that the 2nd Respondent is a Federal Government Agency. It is trite law, respondents' Counsel submitted that

where a party does not file a counter-affidavit to contradict material averments in the affidavit in support of the motion, he is deemed to have admitted them.

If it is not being canvassed by the Appellant that the 2nd Respondent ought to have exhibited a document in proof that it is indeed a Federal Government Agency and nothing in the Appellant's Brief of Argument is suggestive of this, is it not enough that the 2nd Respondent has deposed in an affidavit that it is a Federal Government Agency? The Appellant did not file a counter-affidavit to contradict this assertion and it is deemed admitted by the Appellant. This postulation of the law has indeed become sacrosanct. (p. 77 A)

Jurisdiction - Federal High Court

3. The question having now been settled that the 2nd Respondent, Otibhor Okhae Teaching Hospital, Irrua is an agency of the Federal Government, the next relevant question is whether the Appellant's claim relates to the administration or management and control of the 2nd Respondent. Paragraph 25 of the Statement of Claim is a claim in aggravated and/or exemplary damages for defamation, negligence and breach of Doctor/Patient Confidence which undoubtedly relates to the administration or management of the Otibhor Okhae Teaching Hospital, Irrua sued as the 2nd Defendant in the trial court and is the 2nd Respondent in this appeal and in the lower Court. The effect of Paragraphs (p), (q) and (r) of Section 251 (1) of the 1999 Constitution is to vest exclusive jurisdiction on the Federal High Court over all civil causes and matters in which the Federal Government or any of its agencies is a party. The proviso to section 251 (1) of the 1999 Constitution does not in any way detract from the exclusive jurisdiction conferred on the Federal High Court by virtue of section 251 (1) (p), (q) and (r). Consequently the proviso cannot apply. (p. 78 F)

REPRESENTATION

Chief Michael Inegbedion, Esq., for the Appellant

E. I. Esene, Esq., with Onyebuchi Ifeanyi, for the Respondent

CASES REFERRED TO

- Omega Bank (Nig) Plc v. O.B.C. Ltd (2005) 8 NWLR (Pt. 928) 547
 Iwoha v. NIPOST Ltd (2003) 8 NWLR (Pt. 822) 308
 Agu v. Ikewibe (1991) 3 NWLR (Pt. 180) 385
 B A-G Bendel State v. Aideyan (1989) 4 NWLR (Pt. 118) 640
 Ugo v. Obiekwe (1989) 1 NWLR (Pt. 99) 566
 Adelaja v. Fanoiki (1990) 2 NWLR (Pt. 131) 137
 Adisa v. State (1991) 1 NWLR (Pt. 168) 490
 C Agu v. NICON Insurance Plc (2000) 6 WRN 57
 N.S.C. v. U.W.L. (2000) 22 W.R.N. 54
 Onwuka v. Owolewa (2001) 28 W.R.N. 89
 A-G Ondo State v. A-G Ekiti State (2001) 50 W.R.N. 1
 UNIL & Ors. v. Oyalana (2001) 52 W.R.N. 75
 D F.M.B. v. Oloho (2002) 97 LRCN 875
 Mojekwu v. Iwuchukwu (2005) 11 WRN 1
 NEPA v. Edeghero (2002) 103 LRCN 2280

STATUTES & RULES REFERRED TO

- E Constitution of Federal Republic of Nigeria 1999, s. 251(1)(p)(q)(r)
 Evidence Act Cap. 112 LFN 1990, s. 87
 High Court Rules of Bendel State 1988, O. 8 r. 1&2

LEAD JUDGMENT BY ALAGOA JSC

- F The Appellant as Plaintiff took out a Writ of Summons against the Respondents as Defendants at the Edo High Court, Ekpoma Judicial Division claiming damages for negligence, defamation and breach of Doctor/Patient confidence. So much of the facts as are necessary
 G and as can be gleaned from the Statement of Claim are that the Plaintiff went to the hospital of the 2nd Defendant for the purpose of having an HIV/AIDS test conducted on him and his estranged wife. The test was carried out by the 1st Defendant Dr. Selo-Ojemen, a medical doctor employed by the 2nd Defendant hospital who informed the Plaintiff that he was H.I.V. positive. He was however advised to come back to the 2nd Defendant hospital in three months time to have this test confirmed. Plaintiff then proceeded to another hospital, St. Camillus Hospital, Uromi, Edo State for another test
 H which in fact revealed that he was H.I.V. negative. Meanwhile the

confirmatory test after three months at the 2nd Defendant hospital revealed that Plaintiff was in fact H.I.V. negative. It was the allegation of the Plaintiff that the doctor/patient relationship which existed between the Plaintiff and the Defendants had been breached by the Defendants who had disclosed the result of the first test which showed that the Plaintiff was H.I.V. positive to the Plaintiff's wife and a prophet, which prophet had attempted and failed to capitalize on Plaintiff's medical condition to extort money from him. It was the contention of the Plaintiff that the 1st Defendant, Dr. Selo-Ojemen falsely and maliciously wrote and/or published information about the Plaintiff imputing H.I.V./AIDS to the Plaintiff which caused the Plaintiff incalculable damage and injury to his reputation and to his family and professional life. Plaintiff relied in part on RES IPSA LOQUITUR in that according to him, the 2nd Defendant hospital had failed in its duty to:

1) Provide competent staff

2) Provide adequate and efficient plant and equipment and

3) Provide a safe, efficient and effective system of work and supervision in order to discharge the duty of care owed to the Plaintiff as a patient. The 1st Defendant doctor in so acting was an agent, servant and/or employee of the Otiabor Okhae Teaching Hospital, Irrua sued as the 2nd Defendant in this action and the 1st Defendant at all material times acted in the course of the 2nd Defendant's business. Plaintiff therefore contended that the 2nd Defendant is vicariously liable for all the tortious acts and omissions of the 1st Defendant which acts and omissions are a treacherous grand design to perpetuate fraud on the Plaintiff hence the plaintiff's claims against the Defendants jointly and severally. The Defendants filed a memorandum of appearance and by Motion on Notice dated the 21st June, 2001, and brought pursuant to Order 8 Rules 1 and 2 of the High Court (Civil Procedure) Rules 1988 of Bendel State as applicable in Edo State and the inherent jurisdiction of Court, prayed for *"An order striking out this suit on the ground that the court lacks the jurisdiction to entertain same."*

PARTICULARS:

"The suit is not maintainable against the 2nd Defendant in that the 2nd Defendant being a Federal Government Agency, cannot be sued in this Honourable Court AND for such further order or orders

as this Honourable Court may deem fit to make in the circumstance.”

It is instructive to reproduce paragraphs 3, 4 and 5 of the Affidavit in Support of this motion which read as follows:

3. That I know as a fact that the 2nd Defendant/Applicant was created by an Act of the National Assembly.

B 4. That being a creation of the National Assembly, it is a Federal Government Agency supervised by the Federal Ministry of Health and as such an action of this nature is not maintainable against it in this court.

C 5. That the 1st Defendant is an agent of the 2nd Defendant.
There is no indication from the records that the Plaintiff filed a counter-affidavit to this motion. After arguments of Counsel on both sides, the learned trial Judge Amaize J. in a considered ruling delivered on the 13th May, 2002 upheld the submission of the Defendants’ Counsel and struck out the Plaintiff’s suit for want of jurisdiction on the part of the Court.

E Aggrieved by this ruling, the Plaintiff (hereinafter referred to as “the Appellant”) appealed to the Court of Appeal sitting in Benin City which by its judgment delivered on the 27th February, 2004 dismissed the appeal. This is a further appeal to the Supreme Court by a Notice of Appeal dated the 26th March, 2004. It consists of five Grounds from which the Appellant formulated the following three issues in his Brief of Argument dated 5th July, 2004 and filed same day for determination by this court.

F Issue (i) was the Court of Appeal right in holding that the 2nd Respondent was a Federal Government Agency based on the finding that Appellant did not contradict 2nd Respondent’s affidavit evidence to that effect? (Ground 1)

G Issue (ii) was the Court of Appeal right in failing to interpret and apply the proviso to paragraphs (p), (q) and (r) of S. 251 of the 1999 constitution to the facts of this case? (Grounds 2, 3 and 4)

H Issue (iii) was the Court of Appeal right in upholding the ruling of the Trial Court striking out Appellant’s claim for lack of jurisdiction in the State High Court? (Ground 5)

For their part the Respondents distilled the following sole issue for determination by this Court in paragraph 3 of their Brief of Argument dated 26th May, 2006, filed on the 28th June, 2004 but deemed properly filed on the 24th January, 2007 thus -

“Whether the lower court was right in holding that in view of S. 251 (1) (p), (q) and (r) of the 1999 Constitution of the Federal Republic of Nigeria, the trial court lacked jurisdiction to entertain the suit.”

This appeal came up for hearing on the 23rd October, 2012. Chief Michael Inegbedion appeared in person for Appellant, adopted and relied on his Brief of Argument earlier referred to and urged us to allow the appeal, set aside the judgment of Court below and the ruling of the trial Judge delivered on the 13th May, 2002. B

E. I. Esene appearing as Counsel for the Respondents adopted and relied on the Respondents' Brief of Argument and urged us to dismiss the appeal. C

I have read through the issues formulated by the parties in their respective Briefs of Argument. The issues formulated by the Appellant appear to me somewhat proliferated. From a cursory look D at those issues, it becomes apparent that Issues (i) and (ii) are encapsulated and can be accommodated in Issue (iii). That appears to be the approach adopted by the Respondents who have formulated a single issue for determination of this appeal. It is in that respect that I agree with the Respondents' contention in paragraph 3 of their (Re- E spondents') Brief of Argument that the sole issue formulated by them meets Issues (i), (ii) and (iii) formulated by the Appellant. ***On the proliferation of issues in a Brief of Argument, the Supreme Court per Dahiru Musdapher, JSC (as he then was) in OMEGA BANK (NIG) PLC V. O.B.C. LTD. (2005) 8 NWLR (PART 928) 547 had this to say-*** F

“This Court has on several occasions condemned the proliferation of issues in Briefs of Argument. It is not the number of issues for determination formulated that determines the quality of a brief or that determines the success of an appeal.” G

See also IWOHA V. NIPOST LTD (2003) 8 NWLR (PART 822) 308; AGU v. IKEWIBE (1991) 3 NWLR (PART 180) 385; A-G. BENDEL STATE V. AIDEYAN (1989) 4 NWLR (PART 118) 640; UGO V. OBIEKWE (1989) 1 NWLR (PART 99) 566; ADELAJA V. FANOIKI H (1990) 2 NWLR (PART 131) 137; ADISA V. THE STATE (1991) 1 NWLR (PART 168) 490.

I will and have therefore adopted the sole issue formulated by the Respondents in their Brief of Argument in determining this ap-

peal. For the avoidance of doubt that sole issue is

“Whether the lower court was right in holding that in view of S.251 (1) (p), (q), and (r) of the 1999 Constitution of the Federal Republic of Nigeria the trial court lacked the jurisdiction to entertain the Suit.”

B Even at the risk of sounding repetitive, this sole issue is all encompassing covering all the three issues formulated by the Appellant in his Brief of Argument. It is at this juncture that it becomes necessary to reproduce the provisions of Section 251, (1) (p), (q) and (r):-

C Section 251 (1) *“Notwithstanding anything to the contrary contained in this Constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, the Federal High Court shall have and exercise jurisdiction to the exclusion of any other Court in civil causes and matters -*

D *(p) the administration or the management and control of the Federal Government or any of its agencies;*

(q) subject to the provisions of this Constitution, the operation and interpretation of this Constitution in so far as it affects the Federal Government or any of its agencies;

E *(r) any action or proceeding for a declaration or injunction affecting the validity of any executive or administrative action or decision by the Federal Government or any of its agencies and ...*

F *Provided that nothing in the provisions of paragraphs (p), (q) and (r) of this sub-section shall prevent a person from seeking redress against the Federal Government or any of its agencies in an action for damages, injunction or specific performance where the action is based on any enactment, law or equity.”*

G The Respondents submitted and the Court below so held that the Appellant’s claim fell within the purview of Section 251 (1) (p). This sub-section of Section 251 (1) it will be recollected vests the exercise of exclusive jurisdiction on the Federal High Court on matters pertaining to the administration or the management and control of the Federal Government or any of its agencies. Appellant has submitted that the onus is on the 2nd Respondent to prove that it is indeed an agency of the Federal Government as the issue of the status of the 2nd Respondent in this suit is identical with the issue of jurisdiction. For its part, the 2nd Respondent filed an affidavit in support of the motion deposing to the fact that it is a Federal Govern-

ment Agency.

The Appellant never filed a Counter-Affidavit at all, talk less of one where it countered the deposition that the 2nd Respondent is an agency of the Federal Government. The Respondents therefore submitted that the Appellant is deemed to have admitted that the 2nd Respondent is a Federal Government Agency. It is trite law, respondents' Counsel submitted that where a party does not file a counter-affidavit to contradict material averments in the affidavit in support of the motion, he is deemed to have admitted them. Reference was made to the following cases:- AGU V. NICON INSURANCE PLC (2000) 6 WRN 57 at 63; N.S.C. v. U.W.L. (2000) 22 W.R.N. 54 at 63; ONWUKA V. OWOLEWA (2001) 28 W.R.N. 89 at 106; A.G. OF ONDO STATE v. A.G. OF EKITI STATE (2001) 50 W.R.N. 1 at 31; UNIL & ORS v. OYALANA (2001) 52 W.R.N. 75. Respondents further submitted that the case of F.M.B. V. OLLOH (2002) 97 LRCN 875 at 883 - 884 relied upon by the Appellant is inapplicable to the present situation. In that case, there was a dispute as to whether the Appellant was an agency of the Federal Government and since the Supreme Court could not find any evidence to support the Appellant's contention that it was an agency of the Federal Government, it held that the Appellant is not an agency of the Federal Government. The Respondents could not be more right in these submissions. ***If it is not being canvassed by the Appellant that the 2nd Respondent ought to have exhibited a document in proof that it is indeed a Federal Government Agency and nothing in the Appellant's Brief of Argument is suggestive of this, is it not enough that the 2nd Respondent has deposed in an affidavit that it is a Federal Government Agency? The Appellant did not file a counter-affidavit to contradict this assertion and it is deemed admitted by the Appellant. This postulation of the law has indeed become sacrosanct.*** In ADEYINKA ABOSEDE BADEJO V. FEDERAL MINISTRY OF HEALTH (1996) 8 NWLR (PART 464) 15 Supreme Court per Mohammed JSC said as follows:

"It is an elementary principle of law that facts contained in an affidavit form part of documentary evidence before the court. Where an affidavit is filed deposing to certain facts and the other party does not file a counter-affidavit, the facts deposed to in the affidavit would

be deemed unchallenged and undisputed.” See ADEKOLA ALAGBE V. HIS HIGHNESS SAMUEL ABIMBOLA & 2 ORS (1978) 2 SC 39.

A careful reading of the submissions of Counsel for the Appellant while arguing the motion brought by the Respondents for striking out shows that no references were made or arguments canvassed by the Appellant that the 2nd Respondent was not a Federal Government Agency quite apart from the fact that the Appellant did not file a Counter-Affidavit to that effect. Respondents’ Counsel would therefore appear to me to be right that at the trial Court, Respondents’ motion for striking out for want of jurisdiction by that Court was argued by both Counsel on the basis that the 2nd Respondent was a Federal Government Agency. By the same token it was not proper for the Appellant to canvass arguments that paragraph 4 of the affidavit in support of the Respondents’ motion for striking out the Suit for want of jurisdiction by that Court being a legal argument and conclusion offended against Section 87 of the Evidence Act, Cap. 112 Laws of the Federation of Nigeria 1990 and should therefore be struck out. This is because it was never an issue placed before the court below for its resolution and that court could therefore not make a pronouncement on it. See NWOKOLO OLIKOR & ANOR V. OFILI OKONKWO & ORS (1970) ALL NLR 89; MOJEKWU V. IWUCHUKWU (2005) 11 WRN 1; CHUKWUMA OKWUDILI v. AMAMCHUKWU OBIKWE & ANOR (1989) 1 NWLR (PART 99) 556 P. 580; STANDARD CONSOLIDATED DREDGING & CONSTRUCTION CO. V. KATONCREST NIG. LTD. (1986) 5 NWLR (PART 44) 791 at 799; OKOYE V. N.C.F. CO. LTD. (1991) 6 NWLR (PART 199) 501.

The question having now been settled that the 2nd Respondent, Otiabor Okhae Teaching Hospital, Irrua is an agency of the Federal Government, the next relevant question is whether the Appellant’s claim relates to the administration or management and control of the 2nd Respondent. Paragraph 25 of the Statement of Claim is a claim in aggravated and/or exemplary damages for defamation, negligence and breach of Doctor/Patient Confidence which undoubtedly relates to the administration or management of the Otiabor Okhae Teaching Hospital, Irrua sued as the 2nd Defendant in the trial court and is the 2nd Respondent in this appeal and in the lower Court.

The effect of Paragraphs (p), (q) and (r) of Section 251 (1) of the 1999 Constitution is to vest exclusive jurisdiction on the Federal High Court over all civil causes and matters in which the Federal Government or any of its agencies is a party. See NEPA V. EDEGBERO (2002) 103 LRCN 2280 at 2281 - 2282. The proviso to section 251 (1) of the 1999 Constitution does not in any way detract from the exclusive jurisdiction conferred on the Federal High Court by virtue of section 251 (1) (p), (q) and (r). Consequently the proviso cannot apply.

From the foregoing, the sole issue for determination must be resolved in favour of the Respondents against the Appellant and it is hereby so resolved. The Appeal lacks merit and is hereby dismissed. The judgment of the Court of Appeal, Benin Division delivered on the 27th February, 2004 upholding the ruling of Amaize J. of the Ekpoma High Court, Edo State delivered on the 13th May, 2002 is hereby affirmed. Parties are however to bear their own costs.

MUHAMMAD JSC

I had the privilege of reading in draft, the judgment just delivered by my learned brother, Alagoa, JSC. I am in agreement with him that the trial court lacked jurisdiction to entertain the matter as one of the parties that is, the 2nd respondent is an Agency of the Federal Government. The law is unequivocally stated by the 1999 Constitution [as amended] in section 251 (1) (p), (q), (r) and by this Court that where in a matter, one of the parties is the Federal Government or any of its Agencies, it is only the Federal High Court that has exclusive jurisdiction. A State High Court lacks jurisdiction to entertain such a matter. See: NATIONAL ELECTRIC POWER AUTHORITY V. EDEGBERO (2002) 18 NWLR (part 789) 79. I too, dismiss the appeal. I abide by consequential orders made in the lead judgment.

PETER-ODILI JSC (CFR)

I agree with the judgment just delivered by my learned brother, Alagoa JSC and in placing my support on record, I shall make some comments.

This is an appeal by the Appellant who was Plaintiff at the trial State High Court of the Ekpoma Judicial Division of Edo State High Court. The claim before the High Court was for negligence, defamation and breach of Doctor/Patient confidence. The Plaintiff's claim was struck out for want of jurisdiction and the appeal to the Court of Appeal was dismissed hence this appeal to the Supreme Court.

FACTS BRIEFLY STATED:

The Appellant's case at the High Court is that he went to the 2nd Defendant/Respondent's hospital to conduct an HIV/AIDS test with his estranged wife. That after the laboratory test was conducted by the 2nd Respondent, the 1st Respondent herein, an employee of 2nd Respondent diagnosed him and informed him that he was HIV positive. Appellant was asked to return in 3 months time for a confirmatory test. Meanwhile the Appellant went to another hospital, St. Camillus Hospital, Uromi, Edo State for another test, the result of which revealed he was HIV negative. A confirmatory test at the 2nd Respondent's Hospital after three months revealed that the Appellant was HIV negative. Appellant alleged that the 1st Respondent breached the doctor/patient relationship by disclosing the first result of his HIV test to his wife and to a prophet propelling appellant's action for the tort of negligence, defamation and breach of doctor/patient relationship against the 1st Respondent and 2nd Respondent as the employer of 1st Respondent. The Respondents at the Court of trial filed a Motion on Notice challenging the jurisdiction of the Court to hear this matter on the ground that according to section 251 (i) (p), (q), (r), the 2nd Respondent being a Federal Government Agency, could not be sued in the State High Court. After hearing arguments from Counsel on either side, the High Court in a considered ruling upheld the application and struck out the appellant's suit for want of jurisdiction.

On appeal to the Court of Appeal, that Court per Augie JCA dismissed the appeal and affirmed the decision of the trial Court. It is against that judgment of the Court of Appeal that the Appellant has approached this Court. This court on the 23rd October, 2012 heard the appeal in the course of which learned Counsel for the Appellant, Chief Michael A. Inegbedion adopted their Brief of argument filed on 5/7/04. In the Brief was distilled three issues for determination, viz:-

1. Was the Court of Appeal right in holding that the 2nd Respondent was a Federal Government Agency, based on the finding that the Appellant did not contradict the 2nd Respondent's affidavit evidence to that effect?

2. Was the Court of Appeal right in failing to interpret and apply the proviso to paragraphs (p), (q) and (r) of Section 251 (1) of the 1999 Constitution to the facts of this case? B

3. Was the Court of Appeal right in upholding the ruling of the trial Court striking out Appellant's claim for lack of jurisdiction in the State High Court? C

Mr. Esene, learned Counsel for the Respondents adopted their Brief settled by N. A. Inegbedion, filed on 28/6/2006 and deemed filed on 24/1/07. In the Brief of Argument, the single issue arising for determination in this appeal is as follows:-

Whether the Lower Court was right in holding that in view of section 251 (1) (p), (q) and (r) of the 1999 Constitution of the Federal Republic of Nigeria, the trial Court lacked jurisdiction to entertain the suit. D

I am satisfied that this sole issue crafted by the Respondents meets the need in the settling of the dispute in this appeal and I shall make use of it. E

Arguing, learned Counsel for the Appellant contended that the Appellant was not in a position to admit or deny the status of the 2nd Respondent since such a fact was not within the knowledge of the appellant. That the onus was on the 2nd Respondent to prove on the law that the 1st Respondent was indeed a Federal Government Agency. That the claim of the status of the 1st Respondent must be strictly proved by the 2nd Respondent based on the Law and Principles of Agency. He cited *Tsokwa Oil v. Bank of the North* (2002) 97 LRCN 1235 at 1238; *Federal Mortgage Bank v. Oloho* (2002) 97 LRCN 875 at 882. For the appellant, it was further submitted that both the Trial Court and the Court below were in error to have given Section 251 (1), (p), (r) of the 1999 Constitution the interpretation they gave in view of the proviso to that Section. He referred to *NEPA V. Edeghero* (2002) 103 LRCN 2280; *NDIC v. FMB Ltd.* (1997) 50 LRCN 1207; *Federal Mortgage Bank of Nigeria V. NDIC* (1999) 66 LRCN 162; *Adisa v. Oyinwola & Ors* (2000) 2 SCNQR 1264 at 1269. F G H

That the combined all-embracing effect of paragraphs (p), (q)

and (r) works hardship on the ordinary person who cannot afford access to the Federal High Court and so the intendment of the proviso was to obviate this hardship and enhance the ordinary persons access to the court. Learned Counsel for the Appellant stated that the State High Court still enjoys the unlimited jurisdiction status subject
 B only to the provisions of Section 236 (1) of the 1979 Constitution, similar to 272 (1) of the 1999 Constitution. That the Supreme Court has in a long line of cases established that the Constitution or any Statute should not be interpreted so as to oust or restrict the jurisdiction
 C of a Superior Court of Record. He cited the case of *Adisa v. Oyinwola & Ors* (supra). He urged the Court in the alternative to overrule and depart from *NEPA V. Edegbero* (supra).

That the relationship between Appellant and the 2nd Respondent is purely contractual as in the case of *Federal Mortgage Bank v. Olloh* (supra) and that the proviso applies to save the jurisdiction of the State High Court.

Responding, learned Counsel for the Respondent said the Plaintiff's claim had to do with the administration or management and control of the 2nd Respondent herein and the case was caught
 E up by paragraph (p) of Section 251 (1). That 2nd Respondent filed an affidavit in support of the motion deposing to the fact that the 2nd respondent is a Federal Government Agency which deposition was not contradicted by a counter-affidavit and so Appellant is deemed
 F to have admitted that the 2nd Respondent is a Federal Government Agency. That it is trite law that where a party does not file a counter-affidavit to contradict material averments in the supporting affidavit, he is deemed to have admitted them. He relied on *Agu v. NICON Insurance Plc* (2000) 6 WRN 57 at 63, *N.S.C. V. U.W.L.* (2000) 22
 G WRN 54 at 63; *Onwuka v. Owolewa* (2001) 28 WRN 89 at 106 etc.

Learned counsel for the Respondents went on to say that the proviso to Section 251 (1) does not in any way detract from the exclusive jurisdiction conferred on the Federal High Court by virtue of Section 251 (1) (p) (q) and (r). That the proviso is only relevant or
 H applicable where what is in issue is "an action for damages, injunction or specific performance where the action is based on any enactment, law or equity and this case does not fall into that category and the proviso cannot avail the Appellant. He cited *NEPA v. Edegbero* (2002) 103 LRCN 2280.

To answer this single issue raised in the determination of this appeal, there is need to make a foray into the Records and pointedly to the supporting affidavit of the defendant/appellant/respondent in their motion urging the Court of Trial to strike out the suit of the plaintiff/respondent now appellant on the ground that the State High Court of Benin lacked jurisdiction to entertain the suit aforesaid. B

In the Affidavit, Learned Counsel for the Applicant now Respondent deposed that the 2nd defendant/applicant was created by an Act of the National Assembly and is a Federal Government Agency supervised by the Federal Ministry of Health and so the action of the Plaintiff is not maintainable. Also that the 1st defendant/respondent C is an agent of the 2nd defendant.

It is to be said at the base of the matter whether or not the action falls within the provisions of the 1999 Constitution Section 251, (1), (p), (q) and (r) with the ousting power to direct the State D High Court to keep off adjudication where the events or factors prevailing come within these limiting provisions. That section provides as follows:- “SECTION 251 (1):

(1) Notwithstanding anything to the contrary contained in this Constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, the Federal High Court shall have and exercise jurisdiction to the exclusion of any other Court in civil cases and matters:- E

(p) the administration or the management and control of the Federal Government or any of its agencies; F

(q) subject to the provisions of this Constitution, the operation and interpretation of this Constitution in so far as it affects the Federal Government or any of its agencies;

(r) any action or proceeding for a declaration or injunction G affecting the validity of any executive or administrative action or decision by the Federal Government or any of its agencies and...”

Mr. Inegbedion, for Appellant contends that the proviso to Section 251 (1) above stated has covered this suit bringing it within the jurisdiction of a State High Court. That proviso is as follows:- H

“Provided that nothing in the provision of paragraphs (p), (q) and (r) of this subsection shall prevent a person from seeking redress against the Federal Government or any of its agencies in an action for damages, injunction or specific performance where the action is

based on any enactment, law and equity.”

When that motion was argued at the trial Court, the Respondents defending the suit had relied on the provisions of Section 251 (1) (p) of the 1999 Constitution. That the matter fell squarely in those areas of administration or management and control of the 2nd Respondent which was a Federal Government agent, a position averred in their supporting affidavit which was not countered by the Appellant and Plaintiff at that Court since they did not file a counter-affidavit. That by the omission, the resultant effect is that Appellant had admitted to the 2nd Respondent being an agency of the Federal Government, while the 1st Respondent was its agent and the subject-matter of the suit within the concept of management and control thereby falling into the ambit of the Section 251 (1) (p) (q) and (r). The bottom line then being that the State High Court’s jurisdiction had been effectively ousted and the proper forum being the Federal High Court. The meaning in other words is that the suit being instituted in the State High Court was a fundamentally defective action and the Court was right to decline jurisdiction when the motion was moved. See *Agu v. NICON Insurance Plc.* (2000) 6 WRN 57 at 63; *Onwuka v. Owolewa* (2001) 28 WRN 89 at 106; *NEPA v. Edeghero* (2002) 18 NWLR (pt. 789) 79.

As I said earlier, the Appellant’s stance is that the proviso to Section 251 (1) grants to the State High Court the jurisdiction to adjudicate on the matter of the negligence, defamation and breach of the doctor/patient confidence allegations against the appellant, on the ground that they were within the ambit of “*any enactment, law or equity*”. I am at one with my learned brother, Onnoghen JCA (as he then was) in the case of *Ayeni v. University of Ilorin* (2000) 6 NWLR (Pt. 644) 290 in which he properly defined what Section 251 provides and the Proviso with the phrase “any enactment, law or equity” means. I will quote him and he said:

“For the avoidance of doubt, the proviso does not say that the State High Court shall have jurisdiction in matters touching and concerning the Federal Government or its agencies, where the action is founded on “any enactment, law or equity. It is difficult to imagine an action of the Federal Government or its Agency, which does not arise in the course of its administration or management and control. The provision is very wide..... Simply put, the section is saying clearly that

every cause of action against the Federal Government or its agency irrespective of its nature shall be heard and determined exclusively in the Federal High Court”.

It is not difficult to see that the case of *Ayeni v. Unilorin* (supra) has interpreted that Section 251 fully, the import being the all embracing provision of Section 251 of the 1999 Constitution once the Federal Government or its agencies are involved in matters concerning their actions in the administration, management and control. That was the basis of the ever cited *NEPA v. Edeghero* (supra) a judgment of the Supreme Court.

From the above and the well adumbrated reasoning in the lead judgment, I too dismiss the appeal and abide by the consequential orders, therein made.

ARIWOOLA JSC

The appellant herein was the plaintiff at the trial High Court of Edo State in the Ekpoma Judicial Division Holden at Ekpoma while the respondents were the defendants. The appellant had sued the respondents claiming the following as endorsed on his Writ of Summons:-

“The Plaintiff’s claim against the defendants jointly and severally is:

- 1. For the sum of N500, 000.00 (Five Hundred Thousand Naira) being costs of medical examinations and transportation.*
- 2. For the sum of N250, 000.000.00 (Two hundred and Fifty Million Naira) aggravated and/or exemplary damages for defamation and/or negligence and for breach of Patient/Doctor confidence.”*

After having caused an appearance to be entered for them, the respondents via a Motion on Notice filed on 22/6/2001 challenged the competence of the trial Court to entertain the appellant’s claim against them in the following terms:-

“An order striking out this suit on the ground that the Court lacks the jurisdiction to entertain same.

Particulars:-

The suit is not maintainable against the 2nd defendant in that the 2nd defendant being a Federal Government Agency cannot be sued in this honourable Court.”

In the affidavit in support of the above Motion on Notice, the defendants deposed, inter alia, as follows:

“3. That I know as a fact that the 2nd defendant/applicant was created by an Act of the National Assembly.

4. That being a creation of the National Assembly, it is a Federal Government Agency supervised by the Federal Ministry of Health, and as such an action of this nature is not maintainable against it in this court.

5. That the 1st defendant is an agent of the 2nd defendant.”

There is no doubt as clear from the Record of Appeal that the appellant did not file any counter-affidavit to oppose, contradict or controvert the above depositions of one of the Counsel for the respondents. The application was therefore argued on the facts contained in the supporting affidavit of the defendants/applicants/respondents.

In its considered ruling of May 13, 2002 on the respondents’ objection to its jurisdiction, the trial State High Court upheld the objection and struck out the appellant’s action before it. After considering the provisions of Section 251 (1) (p), (q) and (r) of the 1999 Constitution (as amended) in relation to the appellant’s claim against the respondents, the trial State High Court finally came to the following conclusion;

“...for as long as the second defendant remains a party in this suit, it is not maintainable in this court. The proper forum is the Federal High Court.”

The appellant was not satisfied with the ruling. By his Notice of Appeal filed on 21/5/2002 the appellant appealed to the Court below challenging the Ruling of the trial High Court in striking out his claim, for not being maintainable before it. The Court below in its Benin Division on 27th February, 2004, upheld the decision of the trial High Court, dismissed the appeal in its unanimous decision and affirmed the ruling of Amaize, J. of 13th May, 2002. The said judgment is now reported in *Inegbedion V. Selo-Ojemen & Anor (2004) 12 NWLR (Pt. 887) 411.*

Aggrieved by the decision of the Court below led to this further appeal to this Court, by the plaintiff/appellant. It is clear from the record that the main issue in the matter is the effect of Section 251 (1) (p), (q) and (r) of the 1999 Constitution, (as amended) on the

appellant's claim before the trial High Court and whether the Court below was right in upholding the trial Court's decision in declining jurisdiction to entertain the appellant's claim.

As earlier stated, the appellant herein did not file any counter-affidavit to controvert or contradict the facts contained in the affidavit in support of the Motion that sought the order for striking out the claim. It is trite law that any unchallenged and uncontradicted fact in an affidavit remains undisputed and is deemed admitted by the adversary and the court will so hold. However, it is also the law that any such unchallenged and uncontradicted facts which are deemed admitted in the affidavit must be capable of proving and supporting the applicant relying on such facts. In other words, it has been held that the affidavit evidence which is said to be unchallenged must necessarily be cogent and strong enough to sustain the case of the applicant. See *Ogojeifo V. Ogojeifo* (2006) 1 SCM 113, *Alagbe V. Abimbola* (1978) 2 SC 39 at 40, *Egbuna V. Egbuna* (1989) 2 NWLR (Pt.106) 773 at 777.

Ordinarily therefore, the fact that the appellant did not controvert or contradict the facts in the supporting affidavit, even though same is verifiable, being also a matter of an existing statute, the fact is deemed admitted. In my view, the interpretation given to the provisions of Section 251 (1) in particular, subsection (1) (p) of the 1999 Constitution (as amended) by the trial High Court of Edo State on its competence in handling the appellant's claim which was affirmed by the Court below is unassailable and cannot be faulted. I agree with the two Courts below that as long as the 2nd respondent was a party to the suit, the action was not maintainable in the State High Court. As a result the proper forum was the Federal High Court.

For the above brief comment and the fuller and more detailed reasoning in the lead judgment of my learned brother, Alagoa, JSC with which I am in total agreement, I also hold that the appeal lacks merit and should be dismissed. It is accordingly dismissed by me.

I abide by the consequential orders in the lead judgment including that on costs.