

**SUPREME COURT OF NIGERIA**  
FRIDAY 19<sup>TH</sup> APRIL, 2013. SC. 10/2004  
**CORAM:- M. MOHAMMED, J. A. FABIYI, B. RHODES-  
VIVOUR, M. U. PETER-ODILI, K. B. AKA'AH, JJSC**

1. ALLISON AKENE AYIDA
  2. MRS. REMI VICTORIA AYIDA
  3. OLADIPO AKANNI OLUMUYIWA  
WILLIAMS, SAN ..... APPELLANTS
  4. DR. (MRS.) HENRIETTA MARIA  
WILLIAMS
  5. FLOUR MILLS OF NIGERIA PLC  
AND
  1. TOWN PLANNING AUTHORITY ..... RESPONDENTS
  2. MEGA INVESTMENT LIMITED
- 

ORDERS OF COURT - Mandamus - Grant - Conditions for - Applicant must establish that he made prior demand for the performance of the duty - But that same was refused by the public authority (H1)

STATUTES - Validity - Lagos Urban Planning Law Edict No. 2 of 1998 - The High Court rightly applied the Edict in dismissing appellants' alternative reliefs - As the provisions therein did not oust jurisdiction of the court (H2)

ACTIONS - Mandamus - Injunction - Claim for - Procedure - By High Court Rules of Lagos State O. 43 r. 1 - The reliefs could be claimed and considered separately (H3)

INJUNCTIONS - Grant - Basis for - Order of declaration or injunction can only be granted - If appellants established their legal right - To the subject matter of the claim (H4)

ACTIONS - Town planning Law - Contravention of - Appellants do not have injunctive relief under Lagos Urban Planning Law - And they failed to show how they will suffer greater injury than others - By alleged contravention of that law (H5)

**FACTS**

2<sup>nd</sup> defendant/2<sup>nd</sup> respondent had without a prior written approval of the Lagos State Town Planning Authority, acquired and converted for commercial purposes properties Nos. 14A & 14B Idowu Martins Street, Victoria Island – Lagos, which were until then used for residential purposes. Plaintiffs/appellants felt uncomfortable with the conversion of the properties to commercial premises. They therefore wrote a complaint letter to the then Military Governor of the State. There was no positive response to the letter.

Consequently, appellants commenced this action at the High Court of Lagos State, seeking for an order of mandamus to compel 1<sup>st</sup> defendant/1<sup>st</sup> respondent to demolish or order the demolition of the properties. Appellants equally claimed alternative reliefs touching on declaration, prohibition and injunction. The court in its ruling, refused to grant the order sought by appellants on the ground that appellants did not fulfill the condition for grant of such order, as no demand was made to the Planning authority to carry out the duty. The court also dismissed appellants' alternative reliefs for not showing sufficient interest in the subject matter of the claim. Dissatisfied, appellants appealed to the Court of Appeal, Lagos Division. The court dismissed the appeal. Aggrieved further, appellants appealed to Supreme Court.

**ISSUES FOR DETERMINATION**

*“(1) Whether Nigerian law requires that an applicant for an order of mandamus must establish that he made a prior demand for performance of the duty sought to be enforced and the authority concerned refused to comply with the demand.*

*(2) Whether the Court below erred in holding that the High Court was right to have invoked the provision of Edict No.2 of 1998 and hold that Edict had effectively revoked Section 42 of the Town and Country Planning Law (TCPL)*

*(3) Whether the Court below erred in law in refusing to grant the alternative reliefs for declaration and injunction as claimed by the Appellants.”*

**HELD** (Unanimously dismissing the appeal per

**MOHAMMED JSC)**

*Mandamus - Grant - Conditions for*

**1. The only question was whether the Appellants had satisfied the requirements for the grant of such relief for the trial Court to exercise its discretion in their favour. While the Respondents in this appeal which were the Defendants at the trial Court urged the trial Court to refuse the Plaintiffs/Appellants' application for the reason that there was no demand on the 1<sup>st</sup> Respondent to perform the duty sought to be enforced by the Appellants and the 1<sup>st</sup> Respondent refused to comply, the Appellants were of the strong view that the law does not require them to comply with this requirement before the Order of Mandamus sought by them could be issued in their favour by the trial Court. Both the trial Court and the Court below thought that the Respondents were correct on their stand that in Nigeria before an Order of Mandamus can issue, there must be a demand to perform the duty sought to be enforced followed by refusal to perform.**

**The position is therefore quite plain that the requirement of demand for performance of the public duty countered with refusal to perform is part of the requirements of the law to be complied with before an Applicant for an Order of Mandamus can be entitled to that relief.**

**In the case at hand, it is not at all in dispute that prior to the filing of the Appellants' application for the Order of Mandamus at the trial Court there was no communication between them and the 1st Respondent requesting it to perform the duty of demolishing the buildings and structures of the 2<sup>nd</sup> Respondent on Numbers 14A and 14B of Idowu Martins Street Victoria Island, Lagos and that the demand or request was refused. For this reason the trial Court was on a very firm ground in law in refusing the Appellants' application for Mandamus and the Court below was equally right in affirming the decision of the trial Court on appeal. In this respect the first issue in this appeal on whether Nigerian law requires that an Applicant for an Order of Mandamus must establish that he made a prior demand for the performance of the duty sought to be enforced to comply with the demand is resolved**

*in the affirmative. This is because without making the demand for the performance of the public duty, the body on which the order is sought, would not be in a position to take decision to comply with the demand or not, since where the demand for the performance of the duty is complied with, the need to approach the Court for an Order of Mandamus to enforce compliance with the demand cannot arise.* (p. 1824 G)

*STATUTES - Validity*

*2. Quite contrary to the argument of the Appellants in support of this issue, the repeal of the provisions of the Town and Country Planning Law of Lagos State 1994 containing Section 42 thereof by the new Urban and Regional Planning Board Law contained in Edict No. 2 of 1998, did not oust the jurisdiction of the High Court of Lagos State to hear the case of the Appellants brought to that Court by way of Judicial Review seeking for an order of Mandamus. Therefore to me, all the cases cited and relied upon by the Appellants tending to show that the Urban and Regional Planning Board Law of Lagos State brought into force by Edict No. 2 of 1998 is not an existing law or unconstitutional or that its provisions are void by virtue of Section 6 of the Interpretation Act, are quite irrelevant to the situation in the present case. This is because it is not at all in dispute that the Urban and Regional Planning Board Law contained in Edict No.2 of 1998 retroactively came into force on 1<sup>st</sup> October, 1997 while the Appellants' case was filed at the trial Court on 30<sup>th</sup> October, 1997. Unfortunately for the Appellants, the provisions of the new Urban and Regional Planning Board Law does not contain penal provisions against illegal conversion or change of use of land or building as the case was under the repealed 1994 Town and Country Planning Law. In the circumstances therefore the trial Court was on a firm ground in applying the new law in dismissing the Appellants alternative reliefs sought in their action against the Defendants now Respondents. The Court below was equally right in affirming that decision.* (p. 1830 G)

*Mandamus - Injunction - Claim for - Procedure*

**3. Close examination of the reasons given by the Court below in support of the trial Court's refusal of the Appellants' alternative claims for declaration and injunction, the approach of the Court below in linking the refusal of these claims to the earlier refusal of their relief for Mandamus on rather entirely different grounds, is indeed wrong in law. The Appellants are justified in my view, in seeking for separate consideration of the grounds upon which their alternative claims were refused. This is because by the provisions of Order 43 Rule 1 of the High Court of Lagos State (Civil Procedure) Rules 1994, the reliefs of Mandamus, injunction and declaration could be claimed and considered separately.** (p. 1833 E)

*INJUNCTION - Grant - Basis for*

**4. The law is trite that the order of declaration or injunction as claimed by the Appellants can only be granted if the Appellants had established their legal right to the subject matter of the claim which would have entitled them to the orders sought. The power is discretionary for which the claimant must establish his right and as such the reliefs are not granted contrary to accepted principles guiding the exercise of discretion by the Courts. In other words the Appellants claims for declaration and Injunction by way of Judicial Review as was the case in the present appeal, the claims of the Appellants must pass the same test of the Appellants having to show sufficient interest in the subject matter affecting their claims as enjoined by Order 43 Rule 3(5) of the Lagos State High Court (Civil Procedure) Rules which stated that leave to apply for judicial review cannot be granted by Court unless the Applicant has established sufficient interest in the matter which the application relates. The same Rules in Order 43 Rule 1(2)(c) also provide that relief of declaration or injunction may only be granted if it would be just and convenient in the circumstances of the case. That is why the issue of balance of convenience in the determination of the reliefs claimed, is also relevant.** (p. 1834 E)

*ACTIONS - Town planning Law - Contravention of*

**5. From the evidence on record, the complaints of the Appellants in this case relate to a number of alleged contraventions of the provisions of the Lagos State Town and Country Planning Law 1994 and Regulations made under that law in the construction, use and occupation of the land and premises at Numbers 14A and 14B of Idowu Martins Street, Victoria Island, Lagos. The Appellants have clearly failed to show how the alleged contraventions of the law and regulations affected their personal rights or interest not being the owners or users of the properties the subject of their complaints. Nor did the Appellants show that they have suffered or likely to suffer any injury greater than that of any other member of the public or residents of Idowu Martins Street, Victoria Island Lagos where the buildings or structures of the 2<sup>nd</sup> Respondent the subject of the Appellants complaints are located and which buildings or structures were put in place with the approval of the 1<sup>st</sup> Respondent. This being the position of the situation on the ground, it is not difficult to see that the Appellants have no recognizable rights under the law with respect to the properties and premises the subject of their complaints that required protection by a declaratory or injunctive order. The Court below, in my view was on very strong ground in dismissing the Appellants appeal on their alternative claims.** (p. 1835 B)

## NOTABLE POINT OF INTEREST

### MOHAMMED JSC

#### **1. Order of mandamus – Meaning and purpose**

The question is what is this Order of Mandamus? The Prerogative Order of Mandamus commands any person or body to whom it is directed to perform a public duty imposed by law. In other words the writ will lie where a Government agency like the 1st Respondent in this case, the Lagos State Town Planning Authority, has failed to exercise its discretion at all or where the exercise has been absurd or abused as claimed by the Appellants In this case. In which case the agency will be directed to exercise its duty properly. In Nigeria, at least in so far as statutory bodies like the 1st Respondent and other

bodies created by the Constitution of the Federal Republic of Nigeria are concerned, Nigerian superior Courts will Order Mandamus to such bodies to compel them to carry out the duties assigned to them in accordance with the Constitution or the statute creating them. Therefore the first relief of Mandamus sought by the Appellants at the trial Court was quite within the powers of the trial High Court to grant it. (p. 1824 C)

### **CASES REFERRED TO**

- Fawehinmi v. Akilu (1987) 4 NWLR (pt. 67) 797  
Adeniran v. Interland Transport Ltd. (1991) 9 NWLR (pt. 214) 155 C  
Shitta-Bey v. Federal Public Service Commission (1981) 1 SC 40  
Fawehinmi v. IGP (2002) 7 NWLR (pt. 767) 606  
Atungwu v. Ochukwu (2000) 1 NWLR (pt. 641) 507  
Shitta-Bey v. Federal Public Service Commission (1981) 1 SC 40 D  
Osadebey v. A-G Bendel State (1991) 22 N.S.C.C. (pt. 1) 137  
Afolabi v. Governor of Oyo State (1985) 2 NWLR (pt. 9) 734  
Adegbenro v. Akintola (1963) 1 All NLR 299  
Adesanya v. Adewole (2000) 9 NWLR (pt. 671) 127  
Unongo v. Aku (1983) 14 N.S.C.C. 563 E  
A-G Lagos State v. Dosumu (1989) 3 NWLR (pt. 111) 552  
Din v. A-G Federation (1998) 4 NWLR (pt. 87) 147  
Chukwumah v. Shell Petroleum (1993) 4 NWLR (pt. 289) 512  
Judicial Service Commission v. Omo (1990) 6 NWLR (pt. 157) 401 F

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

- Constitution of the Federal Republic of Nigeria 1979, ss. 4(9), 6(6)(b)  
Town & Country Planning Law of Lagos State 1994, s. 42  
Town & Country Planning Law of Lagos State Edict No. 2 of 1998 G  
Interpretation Act 1964, s. 6  
High Court of Lagos State (Civil Procedure) Rules 1994, O. 43 rr. 1(2)(a)-(c), 3(5)

### **BOOKS REFERRED TO**

- Judicial Remedies in Public Law 2<sup>nd</sup> Ed. pp. 199 - 200 paras. 6 – 63  
American Jurisprudence 2<sup>nd</sup> Ed. vol. 52 p. 414 para. 91  
Corpus Juris Secundum vol. 55 para. 32  
Halsbury's Laws of England 4<sup>th</sup> Ed. vol. 1 p. 134 para. 124 H

**REPRESENTATION**

Ms. F.R.A. Williams, for the appellants

Lawal Pedro, SAN, Solicitor-General Lagos State with A. P. Ameh and Justin Jacob, for the 1<sup>st</sup> respondent

B Mr. Kemi Balogun with Mrs. Adenle Ehaku, for the 2<sup>nd</sup> respondent

**LEAD JUDGMENT BY MOHAMMED JSC**

C The proceedings in this matter were commenced by an application or judicial review wherein the Appellants as Plaintiffs/ Applicants claimed against the Respondents who were the Defendants/ Respondents to the application, the following reliefs.

D “1(i) *An order of MANDAMUS directed to the Town Planning Authority for Lagos State to compel the said Town Planning Authority to demolish or give orders for the demolition of the buildings on the property located at No. 14A Idowu Martins Victoria Island, Lagos forthwith or (in the alternative) after service of necessary notice or as the Court should direct;*

E at Nos. 14A and 14B Idowu Martins Street, Victoria Island, Lagos by the 2<sup>nd</sup> Respondent (Mega Investments limited) through its tenants, licensees, or other persons constitutes a contravention of regulation 29(1) of the Town and Country Planning (Building Plan) Regulation Cap 188, Laws of Lagos State of Nigeria, 1994;

F (iii) *An order of mandatory injunction commanding the said 2<sup>nd</sup> Respondent to take forthwith all lawful steps to remove all tenants, licensees and other persons put by it in occupation of the said building or any portion thereof and*

G (iv) *An order of prohibitory injunction restraining the 2<sup>nd</sup> Respondent from granting occupational rights in the said buildings to tenants, licensees or other person without a Certificate of Completion and Fitness for Habitation issued by the Town Planning Authority.*

H (v) *A declaration that the Town Planning Authority for Lagos State has no power to waive or to grant the 2<sup>nd</sup> Defendant any liberty to dispense with that Defendant’s obligation to comply with the requirements of Section 42(1)(a) of the Town and Country Planning Laws as the provisions of the said sub-section apply to the buildings*

at Nos. 14A and 14B, Idowu Martins Street, Victoria Island, Lagos;

(vi) A declaration that the development and the entry into occupation as well as the continuing use by the 2<sup>nd</sup> Respondent of the premises at Nos. 14A and 14B Idowu Martins Street, Victoria Island, Lagos is illegal and unlawful as it constitutes a contravention of the provisions of Section 42(1)(a) of the Town and Country Planning Law and Regulations 29(1), 38(16) and 38(18) of the Town Planning (Building Plan) Regulations;

(vii) An injunction restraining the 2<sup>nd</sup> Respondent, its servants, agents and licensees from using or continuing to use the buildings located at Nos. 14A and 14B Idowu Martins Street, Victoria Island, Lagos, otherwise than for residential and other non-commercial purposes.”

It is clear from the record that the principal relief claimed at the trial Court by the Plaintiffs/Applicants, was one of mandamus in relief (i) while all the remaining reliefs (ii) - (vii), were merely claimed in the alternative in the event of their failure to succeed in relief (i). The 2nd Respondent as a Defendant in the matter, in addition to meeting the case of the Plaintiffs/Appellants on the merit in its defence, also raised an issue of law touching on the legal entity of the 1st Respondent. On 7<sup>th</sup> April, 2011, the learned trial Judge after hearing the parties on the reliefs sought by the Plaintiffs/Applicants in their application in his judgment in the matter came to the decision that the Appellants/Plaintiffs were not entitled to the order of mandamus as sought and consequently refused the grant of that principal relief. The learned trial Judge also in that judgment came to the decision that the Appellants/Plaintiffs had not been able to establish their alternative claims and accordingly dismissed the Appellants/Plaintiffs claims in their entirety.

Dissatisfied with the judgment of the trial Lagos High Court, the plaintiffs/Appellants appealed to the Court of Appeal Lagos Division which after hearing the parties on their respective briefs of argument, in a unanimous judgment delivered on 17<sup>th</sup> July, 2002, dismissed the appeal and affirmed the judgment of the trial Court on the main relief and alternative reliefs claimed by the Plaintiffs/Appellants. Aggrieved by the decision of the Court of Appeal, the Plaintiffs/Appellants are now on a further and final appeal to this Court by a Notice of appeal dated 20<sup>th</sup> August, 2002 containing 5 grounds of

appeal. In this appeal, the Appellants brief of argument filed in support of the same contains 3 issues for determination of their appeal. The issues are -

B “(1) *Whether Nigerian law requires that an applicant for an order of mandamus must establish that he made a prior demand for performance of the duty sought to be enforced and the authority concerned refused to comply with the demand.*

C (2) *Whether the Court below erred in holding that the High Court was right to have invoked the provision of Edict No.2 of 1998 and hold that Edict had effectively revoked Section 42 of the Town and Country Planning Law (TCPL)*

D (3) *Whether the Court below erred in law in refusing to grant the alternative reliefs for declaration and injunction as claimed by the Appellants.”*

These 3 issues in the Appellants brief of argument were adopted by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in their respective briefs of argument.

The dispute between the parties in this appeal arose from the action of the 2<sup>nd</sup> Respondent in this appeal, Mega Investment Limited in pursuing its land development programme on properties Numbers 14A and 14B Idowu Martins Street Victoria Island, Lagos which were being used for residential purposes but which the 2<sup>nd</sup> Respondent had acquired and converted for commercial purposes as Mega Plaza without a prior written approval of the Planning Authority of Lagos State. The Appellants felt aggrieved and two of them the 1<sup>st</sup> and 4<sup>th</sup> Appellants by a letter to the then Military Administrator of Lagos State complained that the two one story residential houses in question were demolished by Mega Plaza Limited and in their places now stands what the Complainants described as imposing and intimidating four story structure on the site of one of the demolished building. The other premises according to the Complainants, contains structures fitted with stalls for open shopping while the main building stood in the area like an intimidating colossus in the midst of a conglomerate of peace loving dwarfish residential houses. The Complainants therefore pleaded with the Military Administrator of Lagos State to use his good offices as the Chief Executive of the State to compel Mega Plaza Limited to convert its building structures at 12/14 Idowu Martins Street, Victoria Island, Lagos, to luxurious apartments

as initially authorized or in the alternative to effect the demolishing of the structures on the grounds of the alleged violations of Physical Planning and Environmental Authorities Bye-Laws and Regulations of Lagos State. The Plaintiffs/Appellants were therefore in Court to actualize their demands when there was no positive response from the Military Administrator. B

On the 1<sup>st</sup> issue of whether Nigerian law requires that an applicant for an order of Mandamus must establish that he made a prior demand for the performance of the duty sought to be enforced and the authority concerned refused to comply with the demand, the learned Counsel to the Appellants pointed out that the Court below did not deal with the question of mandamus satisfactorily because the purpose of judicial review of the acts of public and administrative authorities is to ensure not only that the scope and limits of statutory powers are not exceeded by such authorities and bodies but that they abide by the law; that the Courts can make the orders of certiorari, prohibition, Mandamus and Habeas Corpus to compel public authorities and bodies to perform or not to perform those duties, actions or omissions which by law they are required to perform. Learned Counsel insisted that Mandamus is not and has never been a creature of common law but of equity because the Supreme Court Ordinance of 1914 by which the Statute of General Application and principles of Equity came into force on 1<sup>st</sup> January, 1914 and by which the equitable remedies of Certiorari, Prohibition, Mandamus and Habeas Corpus lie, are all equitable and discretionary remedies under the principles of equity and not the common law and therefore Mandamus being an equitable remedy does not require demand to amend before asking for the relief. Learned Counsel relied on Monograph by C. Lewis on Judicial Remedies in Public law 2<sup>nd</sup> edition published in 2000 at pages 199 - 200 paragraphs 6-63; Volume 52 of the 2<sup>nd</sup> edition of American Jurisprudence page 414 paragraph 91 and what the learned authors of Corpus Juris Secundum said at paragraph 32 of volume 55 and argued that no demand to amend is required before application for Mandamus is made in Nigeria as the decision of this Court in Fawehinmi v. Akilu (1987) 4 N.W.L.R. (Pt. 67) 797 at 834 is merely an orbiter - dictum which is not binding on the issue now before the Court. Learned Counsel referred to the provisions of Section 6(6)(b) of the 1979 C

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Constitution which extends the judicial powers of Courts to all matters between Government or authority and any person in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to civil rights and obligations of that person, to allow a common law rule to restrict persons right to apply for an order of Mandamus against a public authority, is to attempt to curtail a right guaranteed by the Constitution. The case of *Adeniran v. Interland Transport Ltd.* (1991) 9 NWLR (Pt. 214) 155 at 178 was cited where this Court dealt with restriction of the right of a citizen to have access to Court to abate public nuisance. Learned Counsel concluded his arguments on this issue and urged this Court to resolve the issue in favour of the Appellants.

For the 1st Respondent however, it was submitted that an order of Mandamus like any other prerogative order is granted at the discretion of the Court and not as a matter of course; that in the exercise of its discretion the Court is guided by laid down principles or conditions which have received judicial blessing as in *Shitta-Bey v. Federal Public Service Commission* (1981) 1 S.C. 40; that one of such conditions or requirements to be fulfilled before an Applicant may be entitled to an order of Mandamus is that there must have been a demand or request by the Applicant and a refusal or neglect by the Respondent to perform a public duty as stated in *Fawehinmi v. Akilu* (1987) 4 N.W.L.R. (Pt. 67) 797. Learned senior Counsel for the 1<sup>st</sup> Respondent observed that a careful study of the scholarly expositions by learned authors of the publications on Mandamus relied upon by the Appellants, had revealed that contrary to the stand of the Appellants' Counsel, the general principle of law relating to "demand and refusal" as a requirement for an order of Mandamus have remained unchanged but only modified or restricted by the learned authors of the monographs in the case of duties owed to the general public and where there is no one especially empowered to demand performance of the duties. With regard to the decision of this Court in *Fawehinmi v. Akilu* (supra) on the requirement of demand and refusal by an Applicant for Mandamus to be entitled to relief, learned Counsel said though the observation is obiter-dictum in that case, the pronouncement of this Court on the subject represent the general principle of law relating to requirement of demand and refusal a condition precedent to bringing an action for a Prerogative Order of

Mandamus, was cited by the learned senior Counsel in urging this Court to resolve this issue against the Appellants particularly when the case of *Adeniran v. Interland Transport Ltd.* (1991) 9 N.W.L.R. (Pt. 214) 155 referred by the Appellants Counsel what this Court was faced with in that case, related to the rule of law that a private person cannot sue in nuisance except at the relation of the A-G. B

On this first issue for determination, learned Counsel to the 2<sup>nd</sup> Respondent had observed that from the record, it is quite clear that all parties in this appeal are ad-idem on the point that prior to the commencement of the proceedings leading to this appeal, no demand was made on the 1<sup>st</sup> Respondent by the Appellants for the performance of the duty now sought to be enforced by the proceedings culminating in this appeal; that the argument of the Appellants on this issue is misconceived because even if the argument of the Appellants that the requirement of demand and refusal as laid down in *Fawehehmi v. Akilu* (supra) is a mere obiter-dictum, the judgment of the Court below nonetheless stands as that Court did not apply that case as a binding authority on the subject. It was the contention of the 2<sup>nd</sup> Respondent that the requirement of demand and refusal laid down in *Fawehehmi v. Akilu* (supra), whether orbiter or not, represents the position at the common law and therefore applies to Nigerian Courts. Halsbury's Laws of England 4th Edition Vol. 1 page 134 at paragraph 124 was also relied upon by the 2<sup>nd</sup> Respondent where a number of English decisions were reviewed to the effect that demand for performance must precede application for judicial review of Mandamus. This position, according to the learned Counsel accords with the decision of this Court in *Fawehehmi v. Inspector General of Police* (2002) 7 N.W.L.R. (Pt. 767) 606 at 697 - 698 and the decision of the Court of Appeal in *Atungwu v. Ochukwu* (2000) 1 N.W.L.R. (Pt. 641) 507 at 516 - 517 and therefore urged this Court to resolve the issue against the Appellants. C D E F G

As rightly observed by the learned Counsel to the 2<sup>nd</sup> Respondent, part of the decision of the Court below that gave rise to this first issue for determination in this appeal is contained in the judgment of Oguntade, JCA (as he then was) at page 702 of the Record of appeal where he summed up the case of the Appellants, after distinguishing the requirement in their case from that of the requirement of a pre-action notice prescribed by Statutes, he observed – H

“The case relied upon by Chief Williams SAN i.e. *Adeniran v. Interland Transport Ltd. (supra)* relates to the right of a citizen to bring an action in nuisance as it is affected by the distinction whether it is a private or public nuisance and the necessity for the Attorney general to bring a related action. But in this case, I deal with the claim  
 B for Mandamus. The necessity for a prior demand and refusal is understandable as it forms an integral part of the Plaintiffs case. In the instant case the essence of the claim of the Plaintiff was that a public body which had duties imposed on it by law failed to perform that  
 C duty. The insistence that a demand and refusal be shown before a suit is brought is part and parcel of what the Plaintiff needs to prove to show that indeed a case for the issuance of an Order of Mandamus has arisen. It is not in the character of pre-action notice.”

The question is what is this Order of Mandamus? The Pre-  
 D rogative Order of Mandamus commands any person or body to whom it is directed to perform a public duty imposed by law. In other words the writ will lie where a Government agency like the 1st Respondent in this case, the Lagos State Town Planning Authority, has failed to exercise its discretion at all or where the exercise has been  
 E absurd or abused as claimed by the Appellants In this case. In which case the agency will be directed to exercise its duty properly. In Nigeria, at least in so far as statutory bodies like the 1st Respondent and other bodies created by the Constitution of the Federal Republic of  
 F Nigeria are concerned, Nigerian superior Courts will Order Mandamus to such bodies to compel them to carry out the duties assigned to them in accordance with the Constitution or the statute creating them. See *Bashir Alade Shitta-Bey v. Federal Public Service Commission* (1981) 1 S.C. 40 at 57 - 58. Therefore the first relief of Mandamus sought by the Appellants at the trial Court was quite within the  
 G powers of the trial High Court to grant it. **The only question was whether the Appellants had satisfied the requirements for the grant of such relief for the trial Court to exercise its discretion in their favour. While the Respondents in this appeal which**  
 H **were the Defendants at the trial Court urged the trial Court to refuse the Plaintiffs/Appellants' application for the reason that there was no demand on the 1<sup>st</sup> Respondent to perform the duty sought to be enforced by the Appellants and the 1<sup>st</sup> Respondent refused to comply, the Appellants were of the strong**

**view that the law does not require them to comply with this requirement before the Order of Mandamus sought by them could be issued in their favour by the trial Court. Both the trial Court and the Court below thought that the Respondents were correct on their stand that in Nigeria before an Order of Mandamus can issue, there must be a demand to perform the duty sought to be enforced followed by refusal to perform.** This position was endorsed by this Court in its decision though obiter-dictum in the case of Fawehinmi v. Akilu (1987) 4 N.W.L.R. (Pt. 67) 797 at page 834 where Obaseki JSC said -

*“The Court may refuse to make an Order of Mandamus:*

*(1) Unless it has been shown that a distinct demand for performance of the duty has been made and that the demand has deliberately not been complied with - R. V. Witts & Berks Canal Co. (1835) 3 Ad & EC 477; R. V. Stoke-On- Trent Town Clerk (1912) 2 KB 518;*

*(2) Where there is undue delay;*

*(3) Where the Applicant’s motives are unreasonable”*

This statement by Obaseki, JSC on the requirement for performance of the duty sought to be enforced and deliberate refusal to comply as condition for the grant of an Order of Mandamus, might have originated from the position on the subject as expressed in Halsbury’s Laws of England 4th Edition Volume 1 p. 134 paragraph 124 where the authors said on the Order of Mandamus as follows -

*“As a general rule, the Order will not be granted unless the party complained of has known what it was he was required to do, so that he had the means of considering whether or not he should comply, and it must be shown by evidence that there was a distinct demand of that which the party seeking the Mandamus desires to enforce and that demand was met by refusal.”*

In addition, this general rule on the grant of Order of Mandamus was further endorsed by this Court in the case of Fawehinmi v. Inspector General of Police (2002) 7 N.W.L.R. (Pt. 767) 606 at 697 - 698 where Kalgo, JSC said-

*“The prerogative writ of Mandamus is issued or ordered by the Courts to secure or enforce the performance of a public duty. It is pre-eminently a discretionary power and the Courts will decline to award it if other legal remedies are available and effective. An Applicant for the grant of the order must show that he has sufficient legal*

*interest to protect and that he has demanded the performance of the public duty from those obliged to do so and was refused.”*

Furthermore, this requirement of demand and refusal as a condition to be complied with before bringing an action for an Order of Mandamus in Nigeria was recently applied by this Court in Chief  
 B Ohakim v. Chief Agbaso (2010) 6 - 7 S.C. 85 at 132 where my learned brother, Onnoghen, JSC in the lead judgment said -

*“In an application for Judicial Review by way of an Order of Mandamus, the applicant is expected to fulfill certain conditions such  
 C as that which requires the Applicant to first and foremost request the public body to perform the duty in question and that body fails and or refuses to do so before an Application for Mandamus is presented at the High Court to compel performance of the said duty, ... The reason why a request for performance of the official duty has first to  
 D be made before issuance of the Order of Mandamus is to offer the public body or person concerned the opportunity of making amends on performing the duty. It is only when the person or body fails or refuses to do so that he or they can be compelled by an Order of Mandamus to do so. The prior demand for performance is to offer  
 E the public body the needed opportunity to perform the public duty in question or make amends.”*

**The position is therefore quite plain that the requirement of demand for performance of the public duty countered  
 F with refusal to perform is part of the requirements of the law to be complied with before an Applicant for an Order of Mandamus can be entitled to that relief.**

**In the case at hand, it is not at all in dispute that prior to the filing of the Appellants’ application for the Order of  
 G Mandamus at the trial Court there was no communication between them and the 1st Respondent requesting it to perform the duty of demolishing the buildings and structures of the 2<sup>nd</sup> Respondent on Numbers 14A and 14B of Idowu Martins Street Victoria Island, Lagos and that the demand or re-  
 H quest was refused. For this reason the trial Court was on a very firm ground in law in refusing the Appellants’ application for Mandamus and the Court below was equally right in affirming the decision of the trial Court on appeal. In this respect the first issue in this appeal on whether Nigerian law requires**

***that an Applicant for an Order of Mandamus must establish that he made a prior demand for the performance of the duty sought to be enforced to comply with the demand is resolved in the affirmative. This is because without making the demand for the performance of the public duty, the body on which the order is sought, would not be in a position to take decision to comply with the demand or not, since where the demand for the performance of the duty is complied with, the need to approach the Court for an Order of Mandamus to enforce compliance with the demand cannot arise.***

The second issue for determination in this appeal is whether the Court below erred in law in holding that the High Court was right to invoke the provisions of Edict No. 2 of 1998 and to hold that, that Edict had effectively revoked Section 42 of the Town and Country Planning Law. In resolving this issue, it is necessary to look into the case of the parties at the trial Court. The complaint of the Appellants at the trial Court was that the buildings which were the subject matter of the dispute at Numbers 14A and 14B Idowu Martins Street, Victoria Island, Lagos, Regulations and therefore the Defendant/Respondent ought to demolish the buildings or otherwise restrain the 2<sup>nd</sup> Defendant/Respondent in the use of the buildings as laid down under Section 42 of the Town and Country Planning Law of Lagos State. However, the provisions of this law had been repealed by the Lagos State Urban and Regional Planning Board Edict 1997 which was published as Edict No. 2 of 1998. Although the Edict was made on 13<sup>th</sup> January, 1998, it came into force retrospectively on 1<sup>st</sup> October, 1997, while the action of the Appellants that gave rise to this appeal was commenced on 30<sup>th</sup> October, 1997 at the time when the provisions of Section 42 of the Town and Country Planning Law of Lagos State had been retrospectively repealed by Edict No. 2 of 1998 which came into force with effect from 1<sup>st</sup> October, 1997. Consequently, by the repeal of Section 42 of the Town and Country Planning Law, the new provisions of the regulations allowed persons contravening the Town and Country Planning Regulations to be penalized by payment of imposed charges by the 1<sup>st</sup> Respondent the Town Planning Authority. The contention of the Respondents at the trial Court; the Court below and in this Court is that since the 2<sup>nd</sup> Respondent the owner of the properties the subject of the Appellants' application had

been so penalized and the charges paid, there was no duty on the 1<sup>st</sup> Respondent to ask that the buildings of the 2<sup>nd</sup> Respondent be demolished as being demanded at the trial Court by the Appellants. The Appellants then responded, by urging the trial Court to apply Section 6 of the Interpretation Act 1964 to punish the 2<sup>nd</sup> Respondent for violating the Town Planning Regulations under Section 42 of the Town and Country Planning Law in spite of the fact that that provision had been repealed. Learned Appellants' Counsel therefore urged this Court to rely on the case of *Osadebey v. Attorney General Bendel State* (1991) 22 N.S.C.C. (Pt. 1) 137 also reported in (1991) 1 N.W.L.R. (Pt. 169) 525 at 596 - 597 on the approach to legislation by Military Governments, to refuse to give Edict No.2 of 1998 a retrospective effect so as to give effect to the repealed Section 42 of the Town and Country Planning Law on the general principle that the rights of parties to an action are to be decided according to the law as it existed when the action was begun as stated by this Court in the cases of *Afolabi v. Governor of Oyo State* (1985) 2 N.W.L.R. (Pt. 9) 734, and *Alhaji Adegbenro v. S. L. Akintola* (1963) 1 All N.L.R. 299 at 305 -309 and *Adesanya v. Adewole* (2000) 9 N.W.L.R. (Pt. 671) 127. Appellants Counsel therefore urged this Court to hold that the Appellants' rights have not been extinguished by virtue of the presumption against retrospective operation of Edict No. 2 of 1998 which the Appellants also urged this Court to declare unconstitutional by virtue of Section 4(9) of the 1999 Constitution which is identical with Section 4(9) of the 1979 Constitution which was in force when the Edict was promulgated. The case of *Unongo v. Aku* (1983) 14 N.S.C.C. 563, was cited in support of this argument by the Appellants who finally on this issue urged the Court to declare Edict No.2 of 1998 void on the ground that it purported to oust the jurisdiction of the High Court to determine the Plaintiffs/Appellants claim on its merit.

As far as the 1<sup>st</sup> Respondent is concerned on the second issue for determination in this appeal, its learned senior Counsel regarded the Lagos State Town and Country Planning Law 1994, Section 42 of which is being heavily relied upon by the Appellants in this issue, as a spent law having been repealed by the Lagos State Urban and Regional Planning Board Edict No.2 of 1998. That having regard to the commencement date of the Edict being 1<sup>st</sup> October, 1997 and

the Appellants action was filed on 30<sup>th</sup> October, 1997, the Appellant's action premised under the repealed law was incompetent and liable to be dismissed; that Section 6 of the Interpretation Act 1990 Laws of the Federation of Nigeria only preserved the previous operation of the repealed law on anything duly done or suffered under the law and is therefore not applicable to the Appellants action which was commenced and continued under the repealed law but after the commencement of the new law. On the argument of the Appellants that Edict No. 2 of 1998 is unconstitutional, learned senior Counsel referred to Section 6(6)(d) of the Constitution which vested judicial powers in the Courts which clearly stated that such judicial powers shall not extend to any action or proceedings relating to any existing law made on or before the 1<sup>st</sup> January, 1966 for determination of any question as to the competence of any authority or person to make any such law. The case of Attorney General Lagos State v. Dosumu (1989) 3 N.W.L.R. (Pt. 111) 552 and Din v. Attorney General of the Federation (1998) 4 N.W.L.R. (Pt. 87) 147 at 171, were relied upon by the learned senior Counsel who pointed out that Lagos State Urban and Regional Planning Board Edict No. 2 of 1998 contains no provision that imposes penalties by way of charges for illegal change of use of land with retrospective effect and for that reason the provision of Section 4(9) of the Constitution that prohibits law creating an offence with retrospective effect, was not applicable to Edict No. 2 of 1998; that the Edict therefore having passed the test of an existing law, is part of the statutes in force in Lagos State and for that reason learned senior Counsel urged this Court to resolve this issue against the Appellants.

Learned Counsel to the 2<sup>nd</sup> Respondent also after tracing the background of the decisions of the trial Court and the Court of Appeal on the question of the validity of Edict No. 2 of 1998, had argued that the provisions of the new law which retrospectively repealed the Town and Country Planning Law of Lagos State particularly the provisions relating to contraventions which were criminal offences, then Edict No. 2 of 1998 had not offended any provision of the 1999 Constitution not even the of Section 4(9) thereof; that the Edict therefore remains in full operation not having offended any known provisions of the 1999 Constitution. On the question of the provision of Section 6 of the Interpretation Act, learned Counsel urged

this Court to uphold the position of the Courts below that it does not apply in the present case and finally urged this Court to uphold the Constitutional validity of Edict No.2 of 1998 as was held by the Courts below to resolve this issue against the Appellants.

Coming to the issue of whether the Court below acted in error in law in holding that the trial High Court was right to invoke the provisions of Edict No. 2 of 1998 and to hold that; that Edict had effectively revoked Section 42 of the Town and Country Planning Law, 1994, I have to bear in mind that the provisions of Edict No.2 of 1998 were promulgated by the Military Administration of the then Lagos State to bring into force the new Lagos State Urban and Regional Planning Board Law to replace the then existing Lagos State Town and Country Planning Law of 1994. From the title of that Edict no doubt it was aimed at facing the growing urban development of Lagos by approaching the task with modern coloration. The penal provisions in the old law were replaced with modern provisions which put emphasis on payment of monetary charges for breaches of the provisions of the law and the regulations to be made under the law. The Appellants have dissipated a lot of energy and time to attack the validity of the Edict No.2 of 1998 which was made by a Military Administrator of Lagos State which therefore remained part of the existing statutes applicable in Lagos State without citing any subsequent Lagos State Law which abrogated the provisions of that Urban and Regional Planning Board Law contained in that Edict No.2 of 1998. That law was certainly not part of a number Federal Military Government Decrees which were swept away on coming into force of the 1999 Constitution to effectively pave the way for taking off of Civilian Democratic Government.

***Quite contrary to the argument of the Appellants in support of this issue, the repeal of the provisions of the Town and Country Planning Law of Lagos State 1994 containing Section 42 thereof by the new Urban and Regional Planning Board Law contained in Edict No. 2 of 1998, did not oust the jurisdiction of the High Court of Lagos State to hear the case of the Appellants brought to that Court by way of Judicial Review seeking for an order of Mandamus. Therefore to me, all the cases cited and relied upon by the Appellants tending to show that the Urban and Regional Planning Board Law of***

***Lagos State brought into force by Edict No. 2 of 1998 is not an existing law or unconstitutional or that its provisions are void by virtue of Section 6 of the Interpretation Act, are quite irrelevant to the situation in the present case. This is because it is not at all in dispute that the Urban and Regional Planning Board Law contained in Edict No.2 of 1998 retroactively came into force on 1<sup>st</sup> October, 1997 while the Appellants' case was filed at the trial Court on 30<sup>th</sup> October, 1997. Unfortunately for the Appellants, the provisions of the new Urban and Regional Planning Board Law does not contain penal provisions against illegal conversion or change of use of land or building as the case was under the repealed 1994 Town and Country Planning Law. In the circumstances therefore the trial Court was on a firm ground in applying the new law in dismissing the Appellants alternative reliefs sought in their action against the Defendants now Respondents. The Court below was equally right in affirming that decision.***

The last and third issue in this appeal is whether the Court below erred in law in refusing to grant the alternative reliefs for declaration and injunction as claimed by the Appellants. In the application before the trial Court, the Appellants in addition to their claim for an order of mandamus had also claimed in the alternative a number of declaratory and injunctive reliefs. The refusal of all these alternative reliefs by the trial High Court was further affirmed on appeal by the Court of Appeal. In support of this issue, the Appellants are faulting the decision of the trial Court affirmed by the Court below that the Appellants ought to fail in their alternative reliefs following their failure to succeed in proving their main claim for Order of Mandamus. The Appellants are also challenging the decision of the trial Court as affirmed by the Court below that the claims of the Appellants in the alternative for declaratory and injunctive reliefs, were indirect way of securing the enforcement of the penal provisions of Section 42 of the Town and Country Planning Law, particularly the provision dealing with demolition of structures put up in violation of the planning law and regulations. Learned Counsel to the Appellants virtually repeated his arguments in support of the first and second issues for determination in the present issue and came to the conclusion that the alternative reliefs claimed being discretionary reliefs grant-

able by the trial Court, the trial Court ought to have considered them on their own merits before exercising its discretion to refuse them and therefore urged this Court to allow the appeal, set aside the judgment of the Court of Appeal and enter judgment for the Plaintiffs/Appellants in the reliefs, claimed by them in the alternative.

B In reacting to the 3<sup>rd</sup> Issue for determination, the learned senior Counsel for the 1<sup>st</sup> Respondent had submitted that before an order of declaration or injunction as claimed by the Appellants can be granted, the Appellants must establish their legal right which entitled them to the orders sought to protect those rights as stated in C *Chukwumah v. Shell Petroleum* (1993) 4 N.W.L.R. (Pt. 289) 512. Learned senior Counsel further argued that any claim for declaration and/or injunction by way of Judicial Review as in the present case, must pass the same test of showing sufficient interest in the subject D matter as enjoined by Order 43 Rule 3(5) of the High Court of Lagos State (Civil Procedure) Rules 1994, particularly under Rule 1(2)(a) - (c) which allows the seeking of such reliefs by way of application for Judicial Review: that the Appellants having failed to link their specific interest in their complaints for the 2<sup>nd</sup> Respondent's contravention of E Town and Country Planning Law and Regulations in the construction, use and occupation of the land and the premises of Number 14 Idowu Martins Street, Victoria Island Lagos, not being the owners of the properties, the Appellants' claims were bound to fail as found by F the trial Court and affirmed by the Court of Appeal.

In its response to the arguments of the Appellants on this last and final issue in this appeal, the 2<sup>nd</sup> Respondent through its learned Counsel also strongly argued that the Appellants having failed to establish their alternative claims as required under Order 43 Rule 1 of G the Lagos State High Court (Civil Procedure) Rules 1994, the trial Court was right in refusing the claims while the Court below was also right in affirming the decision of the trial Court in this respect. Also relying on the cases of *Chukwumah v. Shell Petroleum* (supra) and *Judicial Service Commission v. Omo* (1990) 6 N.W.L.R. (Pt. 157) H 401, the learned Counsel urged this Court to dismiss the appeal on this issue.

In the resolution of this final and last issue for determination in this appeal touching on whether the Court below erred in law in refusing to grant the alternative reliefs for declaration and injunction

claimed by the Appellants, my starting point shall be to look into the reason given by the Court below in supporting the decision of the trial Court in refusing these alternative claims. This can be found in the judgment of the Court below at pages 707 - 708 of the records of appeal wherein the lead judgment of Oguntade, JCA (as he then was) gave these reasons thus- B

*“The crucial question now is - having rightly held that the (sic) Appellant not having shown a demand and refusal could not bring a claim for Mandamus, could the lower Court grant the alternative reliefs claimed by the Appellants? I think not. The reason is simple. The enforcement of the penal provision under Section 42 of the T.C.P.L. is a duty placed directly on the shoulders of the 1<sup>st</sup> Respondent. All the alternative declarations sought in their claims by the Appellants were an indirect way to secure the enforcement of the penal provisions of Section 42 and in particular the provision dealing with demolition. If a fine were to be imposed, only the 1<sup>st</sup> Respondent could do it. If a demolition were to be undertaken, only the 1<sup>st</sup> Respondent could do it. It seems to be contradictory in principle to say that the 1<sup>st</sup> Respondent could not be compelled in Mandamus to perform a public duty on the ground that there has not been a demand and refusal and at the same time order same body under the alternative claims to perform more or less the same public duties.”* C D E

**Close examination of the reasons given by the Court below in support of the trial Court’s refusal of the Appellants’ alternative claims for declaration and injunction, the approach of the Court below in linking the refusal of these claims to the earlier refusal of their relief for Mandamus on rather entirely different grounds, is indeed wrong in law. The Appellants are justified in my view, in seeking for separate consideration of the grounds upon which their alternative claims were refused. This is because by the provisions of Order 43 Rule 1 of the High Court of Lagos State (Civil Procedure) Rules 1994, the reliefs of Mandamus, injunction and declaration could be claimed and considered separately.** That Rule provides- F G H

“1. An application for:

- (a) An order of Mandamus, prohibition, or certiorari or
- (b) An injunction restraining a person from acting in any office in which he is not entitled to act, shall be made by way of an applica-

*tion for judicial review in accordance with the provisions of this order.*

*(2) An application for a declaration or an injunction (not being an injunction mentioned in sub-rule (1)(b) may be made by way of an application for judicial review, and on such application the granted on any application for judicial review, and on such application the*

B *Court may grant the declaration or injunction claimed if it considers that having regard to:*

*(a) The nature of the matters in respects of which relief may be granted by way of an order of Mandamus, prohibition or certiorari;*

C *(b) The nature of the persons and bodies against whom relief may be granted by way of such an order; and*

*(c) all the circumstances of the cases, it would be just and convenient for the declaration or injunction to be granted on any D application for judicial review."*

The question therefore to be determined now is whether after putting aside the refusal of the Appellants main claim for the Order of Mandamus, on the same evidence of the affidavits of the parties on record, the Appellants had succeeded in proving or establishing

E *their alternative claims for declaration and injunction by virtue of Order 43 Rule 1(2) of the Lagos State High Court (Civil Procedure) Rules 1994. **The law is trite that the order of declaration or injunction as claimed by the Appellants can only be granted if the Appellants had established their legal right to the subject***

F *matter of the claim which would have entitled them to the orders sought.* The cases of Chukwumah v. Shell Petroleum (1993) 4 NWLR (Pt. 289) 512 and Judicial Service Commission v. Omo (1990) 6 NWLR (Pt. 157) 407, readily come to mind on the power of Court

G *to make or grant a declaratory or injunctive relief. **The power is discretionary for which the claimant must establish his right and as such the reliefs are not granted contrary to accepted principles guiding the exercise of discretion by the Courts. In other words the Appellants claims for declaration and Injunction***

H *by way of Judicial Review as was the case in the present appeal, the claims of the Appellants must pass the same test of the Appellants having to show sufficient interest in the subject matter affecting their claims as enjoined by Order 43 Rule 3(5) of the Lagos State High Court (Civil Procedure) Rules*

*which stated that leave to apply for judicial review cannot be granted by Court unless the Applicant has established sufficient interest in the matter which the application relates. The same Rules in Order 43 Rule 1(2)(c) also provide that relief of declaration or injunction may only be granted if it would be just and convenient in the circumstances of the case. That is why the issue of balance of convenience in the determination of the reliefs claimed, is also relevant. From the evidence on record, the complaints of the Appellants in this case relate to a number of alleged contraventions of the provisions of the Lagos State Town and Country Planning Law 1994 and Regulations made under that law in the construction, use and occupation of the land and premises at Numbers 14A and 14B of Idowu Martins Street, Victoria Island, Lagos. The Appellants have clearly failed to show how the alleged contraventions of the law and regulations affected their personal rights or interest not being the owners or users of the properties the subject of their complaints. Nor did the Appellants show that they have suffered or likely to suffer any injury greater than that of any other member of the public or residents of Idowu Martins Street, Victoria Island Lagos where the buildings or structures of the 2<sup>nd</sup> Respondent the subject of the Appellants complaints are located and which buildings or structures were put in place with the approval of the 1<sup>st</sup> Respondent. This being the position of the situation on the ground, it is not difficult to see that the Appellants have no recognizable rights under the law with respect to the properties and premises the subject of their complaints that required protection by a declaratory or injunctive order. The Court below, in my view was on very strong ground in dismissing the Appellants appeal on their alternative claims.*

In the result, all the three issues raised in the Appellants brief of argument and adopted by the Respondents in their respective briefs of argument for resolution in this appeal having been resolved against the Appellants, the appeal itself must fail and the same is hereby dismissed. I do not regard it as appropriate to make any order on costs.

**FABIYI JSC**

I have had a preview of the judgment just delivered by my learned brother, Mahmud Mohammed, JSC. I agree with the reasons therein advanced to arrive at the conclusion that the appeal should be dismissed.

B I seek leave to chip in a few words of my own. The principal claim of the appellants against the respondents at the trial court is for an order of mandamus to compel the 1<sup>st</sup> respondent to demolish or give order for the demolition of the property at No. 14 Idowu Martins Street, Victoria Island, Lagos constructed by the 2<sup>nd</sup> respondent on alleged breaches of applicable law. There are other alternative claims touching on declaration, prohibition and injunction.

C The claims were closely contested before the trial court. The learned trial judge was properly addressed by learned counsel on both sides on the reliefs sought by the plaintiffs/applicants in their application. In her judgment, she found that the applicants were not entitled to the order of mandamus sought and that the alternative claims were not established. The action was dismissed.

D The appellants appealed to the Court of Appeal, Lagos Division. On 17th July, 2002, same was dismissed. This is a further and final appeal to this court.

E I wish to comment briefly on issue 1 decoded by the appellants. It appears to be the crucial or determinant Issue. It reads as follows:-

F *“(1) Whether Nigerian Law requires that an applicant for an order of mandamus must establish that he made a prior demand for performance of the duty sought to be enforced and the authority concerned refused to comply with the demand.”*

G Mandamus has been defined as ‘a writ issuing from a court of competent jurisdiction commanding an inferior tribunal, board or corporation to perform a purely ministerial duty imposed by law. Nebel v. Nebel 241 NC 491, 85 S.E 2d 876, 882. Extraordinary writ which lies to compel performance of a ministerial act or mandatory duty where there is a clear legal right in the plaintiff and a corresponding duty on the defendant, and a want of any other appropriate and adequate remedy. Cohen v. Ford 19 Pa. Comwlth 417; 339 A-2d 175, 177 (Blacks Law Dictionary Sixth Edition, page 961).

Parties are at one that the general principle of ‘demand and

refusal' as a requirement for an order of mandamus was not complied with by the appellants who strenuously maintained that same is not the law in Nigeria. The respondents argued to the contrary and felt that for such failure on the part of the appellants, the action at the trial court was a non-starter.

An order of mandamus engenders the exercise of discretion by the court. The requirement of 'demand and refusal' was endorsed by this court in the case of *Fawehinmi v. Akilu* (1987) 4 NWLR (Pt. 67) 797 at page 834. Though pronounced in an obiter-dictum, Obaseki, JSC maintained that the court may refuse to make an order of mandamus unless it has been shown that 'demand and refusal' principle has been complied with, inter alia. Further in Halsbury's Law of England, 4th Edition Volume 1 page 134 paragraph 124, the authors maintain that 'demand and refusal' is a general principle which must be complied with to rest an order. That is the position of this court in *Fawehinmi v. Inspector General of Police* (2002) 7 NWLR (Pt. 767) 606 at 697 - 698 per Kalgo, JSC. See: also *Chief Ohakim v. Chief Agbaso* (2010) 6-7 SC 85 at 132 where Onnoghen, JSC maintained the same stance and explained that prior demand for performance is to offer the public body the needed opportunity to perform the public duty in question or make amends.

I am of the considered opinion that the requirement of 'demand and refusal' precondition is quite legitimate. I see nothing unconstitutional in it as canvassed on behalf of the appellants. It is a requirement that has come to stay and cannot be readily wished away.

For the above, and of course the detailed reasons ably adumbrated in the lead judgment which I hereby adopt, I too, feel that the appeal deserves to be dismissed. I order accordingly and abide with all the consequential orders therein contained; that relating to costs inclusive.

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### ***RHODES-VIVOUR JSC***

I had the privilege of reading in draft the judgment of my learned brother, Mohammed, JSC. I agree entirely with his lordships reasoning and conclusion.

The principal relief claimed at the trial court was for Manda-

mus. That is to compel the 1<sup>st</sup> respondent (the Administrative body that approves building plans) to demolish or give order for the demolition of the property situated of No. 14 Idowu Martins Street Victoria Island Lagos, constructed by the 2<sup>nd</sup> respondent.

B The appellants' action become necessary because the land on which the structure (Mega Plaza) was constructed by the 2<sup>nd</sup> respondent was earmarked by the 1<sup>st</sup> respondent for Residential Development but in violation of section 42 of the Town and Country Planning Law 1994 the 2<sup>nd</sup> respondent erected a commercial structure.

C Mandamus is a writ issued by a court to compel the performance of a particular act by an Administrative Body. It is an equitable remedy granted at the discretion of the court and as with all exercise of discretion the judge is expected to consider the rules governing it and not act as he likes. Before the Writ of Mandamus is granted by a judge, the judge must be satisfied that the applicant has sufficient interest in the matter to which the application relates and that he demanded the performance of a public duty from the Administrative Body (or those responsible) and they refused to comply. There is also the added responsibility for the demand to be made timeously. Consequently any person who approaches the court asking that the law should be enforced provided he is affected by it has sufficient interest. The court will not entertain an application from a busybody or meddlesome interlopers who interfere in things that do not concern them, but would readily entertain an application from a person who asks that the law should be declared and enforced. See Shitta-Bey v. Fed Public Service Commission 1981 1 SC p. 40, Fawehinmi v. IGP 2002 7 NWLR pt.767 p. 606.

G In Ohakim v. Agbaso 2010 6-7 SC p. 85 Onnoghen, JSC explained the Order of Mandamus thus:

H *"...The order of Mandamus is to offer the public body or person concerned the opportunity of making amends... It is only when the person or body fails or refused to do so that he or they can be compelled by an Order of Mandamus to do so. The prior demand for performance is to offer the public body the needed opportunity to perform the public duty in question or make amends."*

My lords, the demand by the applicants/appellants to the 1<sup>st</sup> respondent to perform its duties must precede the application for

Mandamus. The applicant/appellant never made the requisite demand to the 1<sup>st</sup> respondent before it rushed to court asking for mandamus. Consequently the 1<sup>st</sup> respondent was not given an opportunity to make amends let alone agree or refuse to comply. Both courts below were right in concluding that the Writ of Mandamus was not available to the appellants. B

Furthermore, the application for Mandamus' was brought under the Town and Country Planning Law of Lagos State. That law prohibited change of use of land. The appellants' application was brought to court on 30/10/97, but as at 1/10/97 Edict No.2 of 1998 was in force. That legislation, the Urban and Regional Planning Law C allowed conversion of change of use of land. Both courts below were right to apply the new legislation and dismiss all the appellants' reliefs in the circumstances.

For this, and the comprehensive reasoning in the leading judgment both courts below were correct. The appeal is dismissed. D

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**PETER-ODILI JSC**

I agree with the judgment just delivered by my learned brother, Mahmud Mohammed, JSC and I shall show my support for the reasoning and decision with some comments. E

The Appellants herein in the High Court of Lagos State as Applicants commenced this case by way of an application for judicial review. They sought for an order of Mandamus to compel the 1<sup>st</sup> Respondent to demolish or give orders for the demolition of the property at No. 14 Idowu Martins Street, Victoria Island, Lagos constructed by the 2<sup>nd</sup> Respondent on grounds of alleged breaches of the Town and Country Planning Law of Lagos State. They also sought for alternative claims of declaration, prohibition and injunction in case the Court of trial declined to grant the order of mandamus. F G

The parties filed their respective affidavits in support of their various positions and after consideration of the affidavit evidence and submissions of counsel, the learned trial judge. D. F. Akinsanya J. H held that the Applicants were not entitled to the order of mandamus sought. She further held that the Applicants had not established the alternative claims and thereby dismissed the action.

Dissatisfied with the decision, the Appellants/Applicants ap-

pealed to the Court of Appeal, which on the 17<sup>th</sup> July, 2002 dismissed the appeal. Further aggrieved, the Appellants have come before the Supreme Court on appeal.

On the 29<sup>th</sup> January, 2013 date of hearing the learned counsel for the Appellants adopted their Brief of Arguments settled by Ms  
B F. R. A. Williams and filed on 22/3/2011.

In the Brief of Argument, learned counsel raised three questions for determination which are as stated hereunder, viz:-

1. Whether Nigerian Law requires that an Applicant for an  
C Order of Mandamus must establish that he made a prior demand for performance of the duty sought to be enforced to comply with the demand.

2. Whether the Court below erred in law in holding that the High Court was right to have invoked the provision of Edict No. 2 of  
D 1998 and to hold that the Edict had effectively revoked Section 42 of the Town and Country Planning Law (TCPL).

3. Whether the Court below erred in law in refusing to grant the alternative reliefs for declaration and injunction as claimed by the Appellants.

E The learned counsel for the 1<sup>st</sup> Respondent, Lawal Pedro, SAN adopted their Brief of Argument filed on 18/4/11 and also took the option of utilizing their issues as formulated by the Appellants.

F For the 2<sup>nd</sup> Respondent, learned counsel on its behalf adopted their Brief settled by Oluwakemi Balogun and filed on 30/3/2011. He also adopted the issues as framed by the Appellants.

On my part I adopt the issues as raised by the Appellants for ease of reference in the determination of this appeal.

#### QUESTION 1:

G This question asks if Nigerian Law requires that an Applicant for an order of Mandamus must establish that he made a prior demand for performance of the duty sought to be enforced and the authority concerned refused to comply with that demand. The stance of the Court below is that mandamus cannot be issued if there was  
H no prior demand for performance, this in the light of Common Law perspectives. Learned counsel for the appellants takes a different view stating that Mandamus is not a creature of the common law but of equity and so the judicial review called for in the remedy of Mandamus can issue without the demand being first made. This is in line

with the fact that equity goes to substance and not depend on form. He cited *Ezenwa v Bestway Elect MFT Co* (1999) 8 NWLR (Pt.613) 60 at 78 -79; *Fawehinmi v Akilu* (1987) 4 NWLR (Pt. 67) 797.

For the 1<sup>st</sup> Respondent, Mr. Lawal Pedro SAN stated that an order of mandamus like any other prerogative order is granted at the discretion of the court and not as a matter of course. That in the exercise of its discretion the court is guided by laid down principles or conditions. He said one of the requirements or conditions to be fulfilled before an applicant may be entitled to an order of mandamus is that, there must have been a demand or request by the Applicant and a refusal or neglect by the Respondent to perform a public duty. He cited *Shitta Bey v. FPSC* [1981] 1 SC 40; *Fawehinmi v. Akilu* (1984) 4 NWLR (Pt.67) 797; *Chief Ohakim v Chief Agbaso* (2010) 6 - 7 SC 85.

The learned Solicitor General went on to say that the provisions of the Nigerian Constitution particularly Section 6 dealing with Judicial powers of the court has no impact on the law of mandamus in Nigeria. He relied on *Adeniran v. Interland Trans Ltd.* (1991) 9 NWLR (Pt. 214) 155.

For the 1<sup>st</sup> Respondent was further stated that the requirement or rule of law that called for a “demand and refusal” before an order of mandamus could be sought for or obtained in just like a pre-action notice which is meant to give the respondent time or opportunity to enable him decide whether or not to perform the public duty in question and should not be regarded as unnecessary and improper legal impediment to access to court. That it is a condition precedent that is not inconsistent with Section 36 (1) of the 1999 Constitution (Section 33 (1) of the 1979 Constitution) and Section 6 (6) (b) of the same Constitution. He cited *Amadi v. NNPC* (2000) 6 G SC (Pt. 1) 66 at 95 - 96.

Learned counsel for the 2nd Respondent contended that the common law requirement of demand being made on the authority concerned before bringing an application of mandamus forms part of Nigerian Law and is not a matter of speculation. He relied on *Fawehinmi v IGP* (2002) 7 NWLR (Pt. 767) 606 at 697 - 698; *Atungwu v. Ochukwu* (2005) 1 NWLR (Pt. 641) 507.

The stance of the Appellants in answer to the question posed here is that the right of the Appellants or anyone seeking access to

the Court in keeping with Section 6 (6) (b) of the Constitution ought not to be curtailed by any restrictions. The respondents have disagreed with that stance of the Appellants. The provisions of Section 6 (6) (a) (b) of the Constitution are thus:-

B 6 (1) The judicial powers of the Federation shall be vested in the courts to which this section relates, being courts established for the Federation.

(6) The judicial powers vested in accordance with the foregoing provisions of this section -

C (a) shall extend notwithstanding anything to the contrary in this Constitution, to all inherent powers and sanctions of a court of law.

(b) shall extend to all matters between persons or between government or authority and to any person in Nigeria, and to all D actions and proceedings relating thereto, for the determination or any question as to the civil rights and obligations of that person.”

Considering this constitutional provision, the question that naturally crops up is if a person can without doing anything else being aggrieved against a public authority’s failure to perform a public E duty come straight to court to ventilate that complaint without first making a demand which, when refused or neglected to be answered proceeds to court straightaway by an order of Mandamus.

A recourse to the historical perspective of the Order of Mandamus needs be made, at least within the judicial authorities which had F traced that journey from the English law courts from which we derive what we have as our jurisprudence. That was the anchor on which the Court below based its decision. See Halsbury’s Laws of England (4<sup>th</sup> Edition Vol. 1) Page 134 at Para, 124) wherein the learned authors stated thus:-

G *“As a general rule the order will not be granted unless the party complained of has known what it was required to do, so that he had the means of considering whether or not he should comply, and it must be shown by evidence that there was a distinct demand of that which the party seeking the mandamus desires to enforce, and that demand was met by a refusal...”*

The Court below in the case at hand held, per Oguntade, JCA (as he then was) as follows at page 699 of the Record thus:-

*“It is necessary for me to state here that the remedy offered*

*by proceedings for mandamus is largely discretionary. And the remedy had long been considered and granted in accordance with some well established principles. Indisputably, it is a common law procedure created and used in England by our colonial masters and which we inherited in Nigeria as a part of the common law."*

The Court below went on further to expatiate thus:

*"I said earlier in this judgment that the use of mandamus to compel performance by public officials of public duties was extensively issued in England and that the common law practice was received in Nigeria as part of our laws. It has always been the requirement of the common law that before recourse is made to the court for an order of mandamus, there ought to be a demand and refusal"*

This position as to how a process can properly qualify to be a suit in which the order of mandamus can be made was applied by this Court in *Fawehinmi v. I.G.P.* (2002) 7 NWLR (Pt. 767) 606 at 697 - 698 wherein Kalgo JSC said:

*"The prerogative writ of mandamus is issued or ordered by the courts to secure or enforce the performance of a public duty. It is pre-eminently a discretionary power and the courts will decline to award it if other legal remedies are available and effective. An Applicant for the grant of the order must show that he has sufficient legal interest to protect and that he had demanded the performance of the public duty from those obliged to do so and was refused."*

The principle enunciated again and again in regard to the issue of demand and refusal as a pre-condition to entering the court armed with a writ for mandamus has been followed in a long line of cases which do not need be repeated here. All that needs to be said is that the pre-condition cannot be taken to mean that a party's access to the court ably provided for by the constitution has been removed or restricted. What I see as the purport of the pre-condition is that the court be not made a clearing house for all administrative duties of public functionaries in the Country and in so doing inundate the court with an avalanche of suits that would definitely overcome the court's capacity. Also the logic for the demand and refusal first made would give room to a possible defendant redressing whatever generated the complaint and make unnecessary the recourse of a judicial proceeding which really should be a last option. Therefore, while it is accepted that the right of party to approach the court is inviolate, it

must be noted that where regulations as to how that access is to be made cannot be ignored as it is a condition precedent duly recognised and must be fulfilled before the commencement of the process can be said to be competent. Flashing Section 6 (6) (a) (b) of the Constitution without due regard to the appropriate rules of court or the legal condition precedent would be no more than an act in futility. See *Amadi v. NNPC* (2000) 6 SC (Pt. 1) 66 at 95 - 96; *Chief Ohakim v. Chief Agbaso* (2010) 6 - 7 SC 85.

In the light of the above, I have no difficulty in going along with the concurrent findings of the two courts below and resolve this issue 1 against the Appellant. That is to say it is mandatory that a demand and refusal must first be made before the taking out of the writ of mandamus.

### QUESTION 2

Which question has to do with whether the Court below erred in law in holding that the High Court was right to have invoked the provision of Edict NO. 2 of 1998 and to hold that the Edict had effectively revoked Section 42 of the Town and Country Planning Law (TCPL).

Ms. Williams of counsel contended for the appellant that this court has as far back as 1991 in the case of *Osadebe v. A. G. Bendel State* (1991) 22 NSCC (Pt.1) 137 at 182 stated the approach to be taken with respect to legislation by military governments and that with regard to a repealed law having a retrospective effect on the rights of parties in pending proceedings unless the contrary is asserted by law. That the Court below should have applied Section 6 of the Interpretation Law 1964 and in that way upheld the rights which had accrued when they were initiated. He referred to *Afolabi v. Governor of Oyo State* (1985) 2 NWLR (Pt.9) 734; *Adegbenro v. S.L. Akintola* (1963) 1 All NLR 299 at 305 - 309; *Adesanoye v. Adewole* (2000) 9 NWLR (Pt. 671) 127.

She submitted that the rights of the appellants had not been extinguished by virtue of the presumption against retrospective operation of Edict No.2 of 1998 and all the claims of the Appellants i.e. Mandamus, Declarations and Injunction could be sustained. That in the case in hand Edict No. 2 relates to offences or contraventions and so the Edict cannot have a retrospective effect in view of Section 4 (9) of the Constitution.

Learned counsel for the 1<sup>st</sup> Respondent in his reaction stated that the Town and Country Planning Law 1994 is a spent law having been repealed by Lagos State Urban and Regional Planning Edict No. 2, 1998. That in view of the fact that the commencement date of the Edict was 1<sup>st</sup> October 1997 and commencement date of the action by the Appellants was on the 30<sup>th</sup> October 1997, the appellant's action under the repealed law was incompetent and liable to be dismissed. That Section 6 of the Interpretation Law did not apply. He relied on *A.G Lagos State v Hon. Justice Dosunmu* (1989) 3 NWLR (Pt.111) 552. *Uwaifo v A.G. Bendel State* (1982) 7 SC 124; *Din v A.G. Federation* (1988) NWLR (Pt. 87) 171. B C

For the 2<sup>nd</sup> Respondent, learned counsel on their behalf, Mr. Balogun submitted along the same lines as the 1<sup>st</sup> Respondent and said Edict No.2 has constitutional validity and the Court below was right to have held as the trial court did that it was proper to invoke the provisions of that Edict. D

In brief, the stand of the Appellant as put forward by Ms Williams is that the right of the appellants are to be decided according to the Town and Country Planning Law 1994 which was the law in existence at the time the cause of action accrued. This was attacked vehemently by learned counsel for the respondents who contended that the 1994 TCPL Law was spent and the operative law was the Lagos State Urban and Regional Planning Edict No.2 of 1998 which took effect from 1<sup>st</sup> October 1997 while the action was commenced by the Appellants on 30<sup>th</sup> October 1997. E F

Learned counsel for the Appellants' position is anchored on Section 6 of the Interpretation Act, Laws of the Federation of Nigeria 1990 which preserves previous operations of a repealed law or anything done or suffered under an enactment which later is repealed. G Tackling the views put forward by the appellants, the two Courts below held thus:-

In the words of the learned trial Judge:

*"It is trite law that the substantive law existing at the time a cause of action arises governs the determination of the action and the rights and obligations of the parties must be determined in accordance with the substantive law when the cause of action arose. Thus a change of law (according to the Interpretation Act 1964 aforesaid) after the cause of action has arisen will not affect accrued rights and* H

obligations.

*As the law maker's intention must reflect in the enactment, it is not unusual to see such a change effected as retrospective. See A. G Lagos State v. Dosunmu (1989) 2 NWLR (PL 111) 552; Alao v. Akapo (1988) 1 NWLR (Pt. 71).*

B *So therefore Edict No. 2 of 1988 aforesaid has manifested such an intention."*

The Court below in its own judgment resolved the issue thus:

C *"The Appellants' suit was brought on 30/1/97. Under Section 42 TCPL, the 1<sup>st</sup> Respondent had the duty to demolish any building that constituted a contravention of the TCPL. However, under Edict No.2 of 1998, Section 42 of TCPL was repealed and any person contravening town planning regulations could be penalized by the imposition of charges. The contention of the Respondents was*  
D *that since the 2<sup>nd</sup> Respondent had been so penalized and the charges paid, there was no duty on 1<sup>st</sup> Respondent to ask that the building of the 2<sup>nd</sup> Respondent be demolished. The Appellants on the other hand argued that Section 6 of the Interpretation Law ought to be applied and the punishment prescribed under Section 42 TCPL imposed on*  
E *the 2<sup>nd</sup> Respondent... Now by Edict No.2 of 1998, Section 42 of TCPL was repealed Edict No.2 of 1998 was passed at a time when the Appellants had already commenced their suit in court.*

*Ordinarily, the court would not have given it a retroactive interpretation had not the Edict itself expressed that it was to come into*  
F *force on 1/10/97. It seems to me therefore that Section 6 of the Interpretation Law could not be applied in view of the express intention of the lawmaker to make Edict No.2 retroactive. Section 6 of the Interpretation Law would only apply if there been no indication in*  
G *the wording of Edict No.2 of 1998 conveying that it was to be made retroactive.*

*It seems to me therefore that the Lower court was right to have invoked the provisions of Edict No.2 of 1998. The reason relied upon by the Lower court is that Edict No.2 of 1998 was an existing*  
H *law within the meaning of Section 315 of the 1999 Constitution. The reason I give is that the intention of the Edict as made clear in the wording was to repeal Section 42 of TCPL and that it effectively repealed the said enactment. The result is that the 1<sup>st</sup> Respondent was permitted to impose penalties by way of charges as against the demo-*

*lition of buildings as granted under Section 42 of TCPL which was repealed.”*

The findings of the two Courts below as recaptured in quote above cannot be faulted since they are backed by the applicable laws. That is to say that the Appellants’ stance that Edict No. 2 is unconstitutional by virtue of Section 4 (q) of the constitution holds no water as the 1<sup>st</sup> Respondent exercised the discretion available to it in the performance of its duty under the Town and Country Planning Law of Lagos State Chapter 188 (as amended by Edict No.6 of 1995) by the imposition of penalty by way of contravention charges which had been paid by the 2<sup>nd</sup> Respondent and so to attempt through another route to get the 1<sup>st</sup> Respondent to still perform the duty would just not do. I rely on *Shitta - Bey v. FPSC 35(1981) 2 SC 40*.

Again, for effect the Appellants brought their claims under the Town and Country Planning Law, a law that had been repealed by the Lagos State Urban and Regional Planning Edict No. 2 of 1998 which Edict No. 2 expressly provided that it would take effect from 1<sup>st</sup> October 1997. The implication is clear enough that as at 30<sup>th</sup> October 1997 when the Appellants commenced their action the TCPL law under which they came to court had died and of no effect. Therefore these arguments by the Appellants for recourse to that spent law or the invitation to enter into the constitutionality or validity of the retrospectively of Edict No. 2 of 1998 is best left in the realm of imagination. See *Olugbode v. Sanni (1985) 2 NWLR (Pt. 7) 282*.

The conclusion of what I have stated above is that I adopt the findings and decision of the two Courts below in respect to this Issue 2 which I also resolve against the Appellants and in favour of the Respondents.

### QUESTION NO.3:

This raises the issue whether the Court below erred in law refusing to grant the alternative reliefs for declaration and injunction as claimed by the Appellants. Ms Williams of counsel stated that it does not follow that because no action lies at common law for mandamus on the ground of absence by the Appellant of a prior demand for performance, all other remedies not based upon mandamus cannot be pursued. She said this in view of Section 6 (6) (b) of the Constitution and the principle that Appellant’s right of access to seek redress in a court of law in a matter of this nature cannot be taken

away or curtailed. She relied on *Pyx Granite Co. Ltd v. Ministry of Housing & Local Government* (1960) AC 260 at 286.

Ms Williams contended further that the court has jurisdiction to interfere by way of declaration or injunction where a person deliberately acts in flagrant violation or reckless disregard of criminal law or contraventions of the statute law such as that prescribed by Section 42 (i) of the TCPL. That the respondents were under a serious misconception of their legal rights and duties in thinking that the payment of annual contravention charges or the purported grant of retrospective approval for the buildings in question gave the 2<sup>nd</sup> Respondent the licence to nullify the contraventions of TCPL or the Regulations by the 2<sup>nd</sup> Respondent.

Mr. Lawal Pedro SAN stated that before an order of Declaration or Injunction as claimed by the Appellants can be granted, the Appellants must establish their legal right which entitle them to the orders sought. He relied on *Chukwumah v. Shell petroleum* (1993) NWLR (Pt. 289) 512 at 553; *Judicial Service Commission v. Omo* (1990) 6 NWLR (Pt. 157) 407.

That the declarations and injunctive reliefs sought by the Appellants cannot be considered under any other law or rule except under the provisions of Order 43, Rule 1 (2) (2)-(C) of the High Court of Lagos State (Civil Procedure) Rules 1994.

Mr. Balogun of counsel for the 2<sup>nd</sup> Respondent in his submissions was of similar to the views espoused by learned counsel for the 1<sup>st</sup> Respondent and there is no point in repeating them here.

The issue herein raised is with the relief or prayer in the alternative of an order for declaration or injunction as claimed by the Appellants. The Lagos State High Court (Civil Procedure) Rules 1994, Order 43, Rule 1 (2) (a) - (c) applicable herein provides as follows:-

*“(1) An application for:*

*(a) An order of mandamus, prohibition or certiorari; or*

*(b) An injunction restraining a person from acting or in which he is not entitled to act, shall be made by way of an application for judicial review in accordance with the provisions of this Order.*

*(2) An application for a declaration or an injunction (not being an injunction mentioned in sub-rule (1) (b)) may be made by way of an application for judicial review, and on such an application the court may grant the declaration or injunction claimed if it considers*

that having regard to:

(a) *The nature of the matters in respect of which relief may be granted by way of an order of mandamus, prohibition or certiorari;*

(b) *The nature of the persons and bodies against whom relief may be granted by way of such an order; and* B

(c) *All the circumstances of the case, it would be just and convenient for the declaration or injunction to be granted on an application for judicial review.”*

In regard to these alternative remedies the Court below said C  
inter alia:-

*“The crucial question now is - having rightly held that the appellant, not having shown a demand and refusal could not bring a claim for mandamus, could the Lower court grant the alternative reliefs claimed by the appellants? I think not. The reason is simple. D  
The enforcement of the penal provision under Section 42 of the T.C.P.L. IS a duty placed directly on the shoulders of the 1<sup>st</sup> Respondent. All the alternative declarations sought in their claims by the appellants were an indirect way to secure the enforcement of the E  
penal provisions of Section 42 and in particular the provision dealing with demolition.”*

These alternative claims shall be quoted hereunder, viz:-

*“In the alternative to claim (i)*

(i) *A declaration that the occupation of the buildings located F  
at Nos. 14A and 14B Idowu Martins Street, Victoria island, Lagos, by the 2<sup>nd</sup> Respondent (Mega Investments Limited) through its tenants, licensees, or other persons constitutes a contravention of regulation 29 (1) of the Town and Country Planning (Building Plan) Regulations, Cap. 188, Law of Lagos State of Nigeria, 1994;* G

(ii) *An order of mandatory injunction commanding the said 2<sup>nd</sup> Respondent to take forthwith all lawful steps to remove all tenants) licensees and other person put by it in occupation of the said buildings or any portion thereof;*

(iii) *An order of prohibitory injunction restraining the said 2<sup>nd</sup> H  
Respondent from granting occupational rights in the said buildings to tenants, licensees or other persons without a certificate of completion and Fitness for Habitation issued by the Town Planning Authority;*

(iv) *(iv) A declaration that the development and the entry*

*into occupation as well as the continuing use by the 2<sup>nd</sup> Respondent of the premises at No. 14A and 14B Idowu Martins Street, Victoria Island, Lagos is illegal and unlawful as it constitutes a contravention of the provisions of Section 42(1) (3) of the Town and Country Planning Law and regulations 29 (1), 38 (16) and 38 (1) of the Town and Country Planning (Building Plan Regulations);*

(v) *An injunction restraining the 2<sup>nd</sup> Respondent, its servants, agents and licensees from using or continuing to use the building located at Nos. 14A and 14B Idowu Martins Street, Victoria Island, Lagos, otherwise than for residential and other non-commercial purposes.”*

I am persuaded by the submissions of learned counsel for the 2<sup>nd</sup> Respondent that these reliefs (ii), (iii) (iv) 2 (ii) and 2 (iii) are incompetent as the two Courts below found. That in an application for judicial review being a special procedure is only available against a public body in a public law matter and the body against whom the reliefs whether principal or alternative can be sought must be a public body whose activities can be controlled by judicial review. That is not the case here, since the alternative claims are the enforcement of perceived private law rights by the Appellants against the 2<sup>nd</sup> Respondent which is a private entity. Therefore, the Appellants have not established a legal right upon which the orders sought may be granted. The cases of *Chukwumah v. Shell Petroleum Development Corporation* (1993) NWLR (Pt. 289) 512; *Judicial Service Commission v. Omo* (1990) 6 NWLR (Pt. 157) 401 are apt for our purpose in this case at hand.

From the foregoing and the fuller and more detailed reasoning in the lead judgment, I dismiss this appeal which lacks merit. I affirm the concurrent findings and decisions in the two Lower courts while I abide by the consequential orders in the lead judgment.

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### **AKA'AH S JSC**

I was privileged with a preview of the judgment of my learned brother, Mohammed, JSC. I agree with his resolution of all the issues raised in the appeal. I just want to add a few words for emphasis on the necessity for a party to make a demand on the Government agency to perform a statutory duty assigned to it before applying for

an order of mandamus to issue compelling the said Government agency to carry out the duty.

The prerogative order of mandamus commands any person or body to whom it is directed to perform a public duty imposed by law. In other words the writ will be where a Government agency has failed to exercise its discretion at all or where the exercise has been absurd or abused in which case the agency will be directed to exercise its duty properly. So far as statutory bodies are concerned the Nigerian superior courts will order mandamus to compel them to carry out the duties assigned to them in accordance with the constitution or the statutes creating them. See: Bashir Alade Shitta - Bey vs. Federal Public Service Commission (1981) 1 SC 40 at 57 - 58.

The respondents who were the defendants had urged the trial court to refuse the plaintiffs' application because there was no demand on the 1<sup>st</sup> respondent to perform the duty sought to be enforced by the plaintiffs which the 1<sup>st</sup> respondent refused to comply. The appellants had argued that the law does not require them to comply with this requirement before the order of mandamus sought by them could be issued. But the trial Court and the Court of Appeal ruled that the respondents were correct on their stand that in Nigeria before the Order of Mandamus can issue there must be a demand to perform the duty sought to be enforced followed by the refusal to perform. That is the correct legal position. See: Fawehinmi vs. Akilu (1987) 4 NWLR (Part 67) 797 at 834 per Obaseki, JSC: Fawehimi vs. Inspector - General or Police (2002) 7 NWLR (Part 767) 606 at 697- 698 and Chief Ohakim vs. Chief Agbaso (2010) 6-7 SC 85 at 132.

For this and the more detailed reasons contained in the leading judgment of Mohammed, JSC I too find that the appeal has no merit and it is accordingly dismissed with no order on costs.