

**SUPREME COURT OF NIGERIA**  
FRIDAY 12TH JULY, 2013. SC. 310/2009  
**CORAM:- W. S. N. ONNOGHEN, C. M. CHUKWUMA-  
ENEH, M. D. MUHAMMAD, C. B. OGUNBIYI,  
K. B. AKA'AH, JJSC**

FIICHARLES ORGAN & 14 ORS ..... APPELLANTS  
(For themselves and on behalf of  
other Nigeria Liquefied Natural  
Gas Limited Corporate Security  
Service Otherwise Known as  
Supernumerary Police Officers)  
AND  
1. NIGERIA LIQUEFIED  
NATURAL GAS LIMITED  
2. COMMISSIONER OF POLICE,  
RIVERS STATE ..... RESPONDENTS

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APPEALS - Cross appeal - Filing - Respondent who seeks either the setting aside - Or the complete reversal of finding of lower court - Can only do so through a substantive cross appeal (H1)

APPEALS - Right of appeal - Ground of law - 1999 Constitution s. 241(a)(b) - Where ground involves questions of law alone - Appeal would be as of right - But other appeals shall be by leave of either trial or appellate court (H2)

APPEALS - Leave - Necessity of - Where it is required - It is condition precedent to the exercise of right of appeal - And failure to obtain leave when needed - Renders any appeal filed incompetent - As no jurisdiction is conferred on appellate court (H3)

APPEALS - Fresh issue - Leave - Party who seeks to file and argue new issue on appeal - Must first seek and obtain leave of court - Save where such fresh issue touches on jurisdiction (H4)

APPEALS - Grounds - Basis - Grounds and issues they give rise to - Must relate and challenge the decision appealed against - As they

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must not be formulated in vacuo (H5)

MASTER & SERVANT - Termination - Conditions - Employer although can fire - But must adhere to the conditions of service - Before employee is fired - Otherwise he can be held liable for unlawful termination (H6)

CONTRACTS - Employment contract - Proof - Appellants who alleged wrongful termination of their employment - Must not only prove existence of such contract - But also the terms of the contract that was breached (H7)

CONTRACTS - Declaratory reliefs - Proof - Appellants must establish their entitlement to the reliefs - Upon the strength of their own case - And not on the weakness of respondents' case (H8)

APPEALS - Concurrent findings - Findings of the two lower courts are unassailable - As appellants were unable to prove - Existence of contract of employment with respondents (H9)

***FACTS***

Plaintiffs/appellants commenced this suit against defendants/respondents by originating summons filed at the High Court of Rivers State, seeking for determination of this question inter alia - whether on a proper construction of the employment of appellants, appellants are not entitled to be recognized as staff of 1<sup>st</sup> respondent. Upon the determination of the questions, appellants among other claims, sought for a declaration that they are staff of 1<sup>st</sup> respondent and as such, are entitled to enjoy all the benefits of 1<sup>st</sup> respondent. Further to their originating summons, appellants filed motion ex-parte seeking for orders restraining respondents from determining their employment. However, appellants' employments were determined by respondents irrespective of the aforesaid motion and the court orders in favour of appellants.

Appellants' case is that having been recruited in different batches from the year 2000 by 1<sup>st</sup> respondent, they are staff of the latter and not the staff of 2<sup>nd</sup> respondent. On the other hand, 1<sup>st</sup> respondent maintained that in accordance with the provision of the Police Act,

appellants are supernumerary police officers posted to it by 2<sup>nd</sup> respondent. Hence, 1<sup>st</sup> respondent contends that appellants remain the employees of 2<sup>nd</sup> respondent. At the end of hearing in the matter, the court held that appellants have not made out a case for the reliefs sought and that there is no evidence to prove that they are employees of 1<sup>st</sup> respondent. Appellants' claims were therefore dismissed. Aggrieved, appellants appealed to the Court of Appeal, Port Harcourt Division. The appeal was dismissed and trial court's judgment affirmed. Aggrieved further, appellants appealed to Supreme Court.

### **ISSUES FOR DETERMINATION**

(1) Whether the Court of Appeal was right when it struck out ground 8 of the grounds of appeal.

(2) Whether on a proper application of the law to the evidence before the Court of Appeal, that court was right when it affirmed the judgment of the trial court to the effect that appellants are supernumerary police officers and members of the Nigeria Police Force and

(3) Whether the Court of Appeal was right when it granted appellants' reliefs 2 and 4 pursuant to the provision of section 18 (IV) of the Police Act?

**HELD** (Unanimously dismissing the appeal per **MUHAMMAD JSC**)

*Cross appeal - Filing*

**1. It is instructive to state though that whereas the 1st respondent in their arguments disagree with the lower court's findings on reliefs 2 and 4 as canvassed thereat by the appellants, the 2nd respondent completely supports the lower court on the point. The applicable principle here is that a respondent who seeks either the setting-aside of the finding of the lower court or the complete reversal of the finding by an appellate court can only do so through a substantive cross appeal. In such a situation, a respondent's notice does not even suffice.** (p. 3535 C)

*APPEALS - Right of appeal - Ground of law*

**2. Rights of appeal are statutorily conferred. In the case at hand, appellants' right of appeal from the final decision of the trial court sitting at first instance, by virtue of Section 241 (a) of the 1999 Constitution lies as of right to the court below.**

**B Except where the ground of appeal involves questions of law alone in which case, as provided for under Section 241 (b) of the same Constitution an appellant's appeal would also be as of right, other appeals from the decision of the trial High Court shall be by leave of either the trial or appellate court.**  
**C (p. 3536 E)**

*APPEALS - Leave - Necessity of*

**D 3. It is trite that leave of court, where it is required, is a condition precedent to the exercise of the right of appeal. Accordingly, failure to obtain leave where it is required renders any appeal filed incompetent as no jurisdiction can be conferred on the appellate court.**

**E In the case at hand the issue of 1st respondent's contempt which was not raised and determined at the trial court could not have been considered by the court below in the absence of the necessary leave having been sought and obtained by the appellants. The ground of appeal and the issue distilled from the ground as raised remain incompetent. The decision of the court below in that regard is unassailable. Like the court below, learned counsel for the 1st respondent is right in his submission that this court is without the jurisdiction to hear and determine the very issue for the same reasons. Resultantly,**  
**F G appellants 1st issue in the instant appeal is hereby resolved against them. (pp. 3536 G/3538 H)**

*APPEALS - Fresh issue - Leave*

**H 4. It must also be stated that generally leave of court is required to raise a new issue on appeal. Where a party seeks to file and argue any fresh issue, being an issue that was not raised and determined by the trial court and is being raised for the first time in the appellate court, he must first seek and obtain leave of court before filing such issue.**

**Except the point or issue being raised by the appellant touches on jurisdiction which can be raised at any time, he would not be allowed to, without leave sought and obtained, raise and argue a point not raised or argued at the trial court.** (p. 3537 A)

B

*APPEALS - Grounds - Basis*

**5. The point has earlier been made in this judgment that appellants' right of appeal enures to them only against the judgment from which they appeal. It is indeed a well settled principle of law that grounds of appeal and indeed the issues they give rise to must relate and challenge the decision appealed against. They must not be formulated in nubibus. The two, the ground of appeal and the issue from same must be connected with a real controversy between the parties.** (p. 3638 C)

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*MASTER & SERVANT - Termination - Conditions*

**6. It is beyond dispute that appellants' claim for wrongful termination is founded on contract. Again it is trite that he who hires can fire. It nevertheless remains the law that an employer must observe and adhere to the conditions under which the employee is hired before such an employee can be fired otherwise the employer can ipso facto be held liable for unlawful termination of the services of the employee.** (p. 3542 C)

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*CONTRACTS - Employment contract - Proof*

**7. In the instant case where the appellants allege wrongful termination of their employment by the 1st respondent the onus is on them to prove not only the existence of a contract of employment between them and the 1st respondent but the terms of the very contract their employer breached in bringing the contract to an end.** (p. 3542 E)

G

*CONTRACTS - Declaratory reliefs - Proof*

**8. An appraisal of the reliefs the appellants seek from and are refused, by both courts, for want of proof of the existence of the contract of employment they assert exist between them and the 1st respondent are declaratory. The appellants must**

H

***establish their entitlements to the reliefs upon the strength of their own case and not on the weakness of the respondents' case.***

***It remains my considered view that reliefs are granted to a plaintiff if he succeeds in proving his claim. Failure to do that***  
B ***disentitled the plaintiff to the reliefs which are dependent on the worthiness of the claim in the first place.***

***In the case at hand the fact of the appellants being employees of the 1st respondent, which fact creates their right to their 2nd - 6th reliefs, is what both courts below refused***  
C ***them for their failure to prove same. It is amazing and perverse that the court below in spite of its finding in respect of appellants' 1st relief proceeded to grant them those other reliefs which are dependent on the 1st relief.***

D (pp. 3542 F/3544 A)

*APPEALS - Concurrent findings*

***9. On the cause the appellants identified in their originating summons as well as the documents they annexed thereto, the***  
E ***question the courts must be able to answer is whether indeed there exists a contract of employment between the appellants and the respondents breach of which entitles the appellants to the reliefs they claim. The concurrent findings of the two***  
F ***courts alluded to earlier in this judgment which evolve from the evidence the appellants supplied, and was rightly adjudged unavailing to them, are unassailable. Once a plaintiff is unable to prove his case the court must dismiss the claim. This is the concurrent verdict of the two courts below. And this explains***  
G ***the resolution of Appellants' 2nd issue against them and the inability of this court to interfere with the judgment of the court below.*** (p. 3542 H)

### **REPRESENTATION**

H Ledum Mitee, for Appellant

Seyi Sowemimo (SAN), with Remi Coker (Miss) - 1st Respondent  
Dame N. C. Iroegbu DCL Rivers State - 2nd Respondent, for Respondent

**CASES REFERRED TO**

- Amaechi v. INEC (2008) 5 NWLR (pt. 1080) 227  
F.A.T.B. v. Ezegbu (1992) 9 NWLR (pt. 264) 123  
Osawaru v. Ezeiruka (1973) NSCC 390  
Ogwuru v. Coop-Bank Ltd. (1994) 8 NWLR (pt. 365) 685  
SPDC Nig. Plc. v. Dino (2007) 2 NWLR (pt. 1019) 438 B  
Onwuka v. Omogui (1992) 3 NWLR (pt. 230) 393  
Obot v. CBN (1993) 8 NWLR (pt. 310) 140  
Obi v. INEC (2007) ALL FWLR (pt. 378) 1116  
Osianya v. Afribank (Nig) Plc (2007) 6 NWLR (pt. 1031) 565 C  
Nyambi v. Osadim (1977) 2 NWLR (pt. 485) 1  
Olanrewaju v. Ogunleye (1997) 2 NWLR (pt. 485) 12  
Atoyebi v. Govt. of Oyo State (1994) 5 NWLR (pt. 344) 290  
Shittu v. Egbeyemi (199b) 6 NWLR (pt. 457) 650  
Babuga v. State (1996) 7 NWLR (pt. 460) 279 D  
Gbadamosi v. Dairo (2007) 3 NWLR (pt. 1021) 282

**STATUTES REFERRED TO**

- Police Act, s. 18(IV)  
Constitution of Federal Republic of Nigeria 1999, s. 6(6)(a) E  
Supreme Court Act, s. 22  
Labour Act 2004, s. 91  
Evidence Act, s. 150(2)

**LEAD JUDGMENT BY MUHAMMAD JSC**

The appellants herein as plaintiffs at the Rivers State High Court, hereinafter referred to as the trial court, took out an originating summons against the respondents as the defendants seeking the determination of the following questions:- G

*“(1) Whether on a proper construction of the employment of the Plaintiffs:-*

*(a) The circumstances and manner of employment of the plaintiffs.*

*(b) The police wireless message dated D.T.O. 301015/10/2001 H with reference CH: 3100/BDE PT/FHQ/ABJ/Vol. 1/55.*

*(c) The NLNG spy police force announcement.*

*(d) The address of Mr. Maduka, the then Human Resources Manager of the 1st Defendant on the passing out parade of the plain-*

*tiffs on 5th May, 2000 as contained in a video tape and*

*(e) The identity cards issued to the plaintiffs by the 1st defendants.*

*The plaintiffs are not entitled to be recognized as staff of the 1st defendant?*

B *(ii) Whether the action of the 1st defendant in withholding the payment of plaintiffs' entitlements is not in violation of the plaintiffs rights by law and the Constitution?*

C *(iii) Whether the defendant is right and/or empowered to further withhold or delay the payment of plaintiffs' entitlements?*

*(iv) Whether the plaintiffs are not entitled to enjoy the benefits being enjoyed by other employees of the 1st Defendant?"*

Upon the determination of the foregoing questions by the court, the appellants sought the following reliefs:-

D *"1. A declaration that the Plaintiffs are staff of the 1st Defendant, and as such, entitled to enjoy all the benefits of the 1st Defendant.*

*2. A declaration that the Plaintiffs are entitled to be paid their accrued entitlements by the 1st Defendant.*

E *3. A declaration that the action of the Defendants in withholding or delaying the payment of the Plaintiffs' entitlements is in violation of the Plaintiffs' rights under the law and the constitution.*

F *4. An Order directing the 1st Defendants, its servants and officials to pay the Plaintiffs their accrued entitlements in the sums respectively computed in favour of each plaintiff.*

G *5. An injunction restraining the 1st Defendant, its servants or agents from withholding or delaying or continuing to withhold or delay the payment of the accrued entitlements of the Plaintiffs or interfering with the plaintiffs, rights to receive such entitlements as and when due.*

*6. An injunction restraining the Defendants, jointly and severally, their servants, agents from intimidating or victimizing the plaintiffs."*

H The originating summons which was filed by the appellants on 23rd August 2004 was supported by a fourteen paragraph affidavit and five annexures marked as Exhibits A-E and a further and better affidavit dated and filed on 19-7-2005 to which Exhibit FBA1 was annexed.



Further to their originating summons, the plaintiffs/appellants filed a motion ex-parte seeking the trial court's orders to restrain the respondents from determining their employment. In spite of their being aware of the motion and Ugbari J's orders of 3rd September 2004 in favour of the appellants, the respondents all the same determined appellants' employment before the suit at the trial court was decided. B

In its response to the originating summons, the 1st respondent filed an eight paragraph counter-affidavit and a six paragraph further counter-affidavit. The 2nd respondent filed no counter-affidavit. C

Appellants' case is that, having been recruited in different batches from the year 2000 by the 1st respondent, they are staff of the latter and that they remain so rather than the staff of the 2nd respondent the 1st respondent asserts they are. It is further their case that they are, like all other staff of the 1st respondent, entitled to all due and accruable benefits. D

On the other hand, the case of the respondents is that in accordance with the provision of the Police Act, being supernumerary police officers employed by the Nigerian Police Force, the 2nd Respondent, and posted to the 1st respondent, the appellants remain employees of the 2nd respondent. E

At the end of the trial, the court at page 385 identified the task the parties urged it to perform thus:-

*"The court has been called upon to interpret the police Act and the Exhibits aforesaid; I shall proceed to do just that."* F

The court in its application of the extant law to the facts of the case of both sides reasoned at pages 385-387 of the record of appeal as follows:-

*"From the above it is clear that Supernumerary Police Officers are not employees of the Person who is availing himself of their service such as the 1st Defendant, but are members of the Police Force..."* G

*The Plaintiffs have described themselves as such both in the Originating Summons and the Affidavits. Furthermore exhibits A and E, which they are relying on, also referred to them as Supernumerary Police Officers. I have no difficulty in holding that the Plaintiffs are Supernumerary Police Officers who by the Police Act are members of the Nigerian Police Force."* H

The court concluded as follow:-

*"I hold in all that the Plaintiffs have not made out a case for the reliefs sought. The Plaintiffs have not shown by the evidence before me that they are employees of the 1st Defendant. Accordingly the Claims are hereby dismissed."*

Dissatisfied with the foregoing decision of the trial court, the B plaintiffs appealed to the Court of Appeal sitting at Port Harcourt, hereinafter referred to as the court below. In its decision dated 5th March 2009, the court below dismissed appellants appeal and affirmed the trial court's judgment in part. Further aggrieved, the C appellants have appealed to this Court on an eleven ground Notice of appeal.

Parties have filed and exchanged their briefs of argument including appellants' reply brief all in keeping with the rules of this court. At page 8 of their brief, the appellants have distilled three issues as having arisen for the determination of the appeal. The issues D read:-

(1) Whether the Court of Appeal was right when it struck out ground 8 of the grounds of appeal.

(2) Whether on a proper application of the law to the evidence E before the Court of Appeal, that court was right when it affirmed the judgment of the trial court to the effect that appellants are supernumerary police officers and members of the Nigeria Police Force and

(3) Whether the Court of Appeal was right when it granted F appellants' reliefs 2 and 4 pursuant to the provision of section 18 (IV) of the Police Act?

The 1st respondent has distilled a lone issue from the grounds of appeal in the appellants' notice as having arisen for the determination G of the appeal. The issue reads:-

*"Whether or not the justices of the Court of Appeal were right in law and on the evidence in holding that the plaintiffs/appellants being supernumerary Policemen ore not employees of the 1st respondent company but rather those of the Nigeria Police Force."*

H The 2nd respondent adopted the 2nd and 3rd issues distilled by the appellants and in addition formulated a 3rd issue that reads thus:-

*"Whether this Honourable Court need interfere with the concurrent decision of the lower court or not to uphold some?"*

On their 1st issue, learned appellants' counsel submits that Ughari J. who commenced hearing into the case had, on 3rd September 2004 restrained the respondents from terminating the appellants' employment. Following respondents' persistent disobedience of the order, appellants served the appropriate forms 128 and 129 on the respondents after the transfer of the case to Uriri J. The appellants, learned counsel submits, were to move the motion for the committal of the respondents before Thompson J. on 16-2-2005 who however preferred to determine the issue of jurisdiction of the court that was raised; that even after the court's determination of the issue and the continued contempt by the respondents, the court declined entertaining the appellants' motion for committal of the respondents. Eventually, learned appellants counsel submits, appellants' employment was terminated in spite of the injunctive order the trial court earlier issued against the respondents. The lower court, argues learned counsel, equally ignored appellants prayers which on the authority of *Amaechi v. INEC* (2008) 5 NWLR (pt 1080) 227 and *F.A.T.B. v. Ezegbu* (1992) 9 NWLR (pt 264) 123 at 147, the court is empowered to address. The situation arose consequent upon the court's decision striking out ground 8 of the appeal from which the appellants 2nd issue at the court below was distilled. Learned counsel urges that the issue which was wrongly discarded be considered and upon the resolution in appellants' favour this Court by virtue of Section 6 (6) (a) of the 1999 Constitution and Section 22 of the Supreme Court Act makes the restorative injunctive order nullifying the purported dismissal of the appellants by the respondents.

Responding, learned counsel to the 1st respondent contends that the issue of contempt by the respondents neither form part of the record of proceedings nor the judgment of either the trial court or the court below. This, argues learned counsel, made it impossible for the court below to review the decision of the trial court. The court below at pages 379 - 387 of the record of appeal found as a fact that the issue was never tried. The respondents were never adjudged by the trial court to have acted in contempt of its order as exhibit C, the instrument of the dismissal of the appellants, was held to be issued by the 2nd respondent. On that alone, contends learned counsel, the court below could not have granted the appellants the relief the appellants sought against the 1st respondent since it did not issue ex-

hibit C. Besides, further argues learned 1st respondent counsel, neither the trial judge nor the court below could have made the orders for the committal of the respondents sought by the appellants since the contempt was never committed before any of the two. Rather, it was the very judge who had issued the injunctive order restraining the respondents which was breached that should have heard and decided appellants, committal proceedings.

Finally under the issue, learned 1st respondent counsel contends that the appellants at pages 374, 375 - 376 of the record, by the procedure they agreed to and adopted, clearly abandoned their resolve to raise the issue of committal proceedings as no such issue was raised and argued by parties in their written addresses at the trial court. The issue before this court being equally out of context and nebulous, submits learned counsel should be discountenanced.

2nd respondent did not respond to appellants' arguments under the latter's 1st issue.

Under their 2nd issue, the appellants contend that the court below in affirming the trial court's judgment that the appellants are supernumerary police officers and members of the police force has seriously erred. Referring to page 479 lines 12-24 of the record of appeal, learned appellants' counsel contends that the court, in its application of the law to the facts on record. Exhibits E and FBA1 which the court below held to be in conflict with paragraphs 3 and 4 of the supporting affidavit to the originating summons, it is argued, reflects the court's wrong interpretation of the paragraphs. Had the court read the totality of appellants' affidavit and further affidavit together rather than interpreting the particular paragraphs in isolation, the lapse in the court's judgment would have been avoided. The court's failure to particularly read paragraphs 3 and 4 of the supporting affidavit along paragraph 11 of the same affidavit, submits learned counsel, accounts for the lower court's perverse finding. Exhibits E and FBA1, learned counsel insists, are not placed before the court in proof of the fact that appellants are supernumerary police officers whose appointment are necessarily made under the Police Act. Instead, the two exhibits are put in place to shift the burden of proof from the appellants to the 1st respondent. The perverse decision of the trial court, argues learned appellants counsel, could not have rightly been affirmed if this point had been fully appreci-

ated by the court below. The burden of introducing initial evidence, learned appellants, counsel concedes, is on the plaintiff/appellants. That burden, learned counsel contends, not being static, however shifts to the person who would fail if further evidence is not adduced. In the case at hand, it is submitted, the respondents having failed to adduce further evidence should have lost out. Reliance is placed by counsel on Nigerian Maritime Service Ltd. v. Afolabi (1978) NSCC 80 at 83 and Osawaru v. Ezeiruka (1973) NSCC 390 at 391. B

Concluding, learned appellants' counsel insists that the burden on the appellants is to prove that they were in the employment of the 1st respondent which employment is not regulated by the police Act. Where the 1st respondent that initiated the employment has the statutory duty of ensuring that it has complied with the statutory requirements for their employment as Supernumerary Police Officers fails to meet those preconditions and still takes benefit of their services, 1st respondent, by virtue of Section 91 of the Labour Act 2004, cannot deny being employers of the appellants simply by not issuing the latter their appointment letters. Learned counsel relies on Ogwuru v. Coop-Bank Ltd. (1994) 8 NWLR (Pt. 365) 685 at 704 and Ceder Stationeries Ltd. v. IBWA Ltd. (2000) 5 NWLR (Pt. 690) 338 at 350 and In Re Mbamalu (NDIC) v. Enyibros Food Processing Co. (Nig) Ltd. (2002) FWLR (Pt. 85) 246 at 251 and urges that since respondents have not established appellants employment to be pursuant to the provision of the Police Act, it is wrong for the court below to have affirmed the trial court's decision in that regard. In resolving their 2nd issue, both decisions, counsel concludes, should be nullified. C D E F

It is pertinent to state that appellants' 2nd issue is similar to 1st respondent's 2nd issue. Responding to appellant's arguments under their similar issue learned 1st respondent's counsel submits that the lower court's decision that the appellants are supernumerary police officers and members of the Nigerian Police Force is beyond reproach. The appellants, learned counsel argues, bore the onus of proof of establishing that they were employees of the 1st respondent. At page 471 of the record, it is submitted, the lower court in its judgment, alluded to that fact stressing that exhibits A and FBA1 the appellants rely on do not support their case. Instead, it is submitted, the court further held and correctly too that both exhibits A and FBA1 support H

the case of the 1st Respondent. The appellants cannot be reasonably heard on their submission that Section 150 (2) of the Evidence Act dealing with presumption of regularity for persons who acted in public capacity does not apply to exhibits A and FBA1. The court below is right, learned counsel submits, to have so held and in refusing to be bound by the numerous inapplicable decisions the appellants relied upon. The earlier decision of the court below in *Shell Petroleum Dev. Co. of Nig. Plc. v. Stephen Dino & 3 Ors.* (2007) 2 NWLR (pt. 1019) 438 at 469 binds the court and the court is right to have applied the decision therein in the determination of the appeal before it on the same law and facts. Learned counsel urges that the issue be resolved against the appellants.

Arguing their 3rd issue, learned appellants' counsel refers to the 2nd and 4th reliefs they urged the court below to grant them. The court, it is argued, wrongly invoked the provisions of Section 18 (4) of the Police Act instead of granting the said reliefs pursuant to exhibit B1, 1st respondent's employee Handbook. Payment under Section 18(4) of the Police Act, it is argued, is to be made in advance. The court's order that the payment be made rather in arrears destroys the basis of its being made. Being in breach of the law pursuant to which it was made, learned counsel contends, the order cannot stand. If this court resolves appellants' 2nd issue in their favour, learned counsel submits, the grant of their 2nd and 4th reliefs pursuant to Section 18 (4) of the Police Act automatically crumbles. The reliefs, it is contended, then accrues on the basis of exhibit B1, 1st respondent's Handbook which at pages 16, 17, 21, 25 and 32 provides for appellants' entitlements. Relying on *Onwuka v. Omogui* (1992) 3 NWLR (Pt. 230) 393 at 399 - 400 and *OBOT v. CBN* (1993) 8 NWLR (Pt. 310) 140 at 163, learned counsel urges that this court orders the 1st respondent to compute appellants' entitlements as provided for by the Handbook and pay same to the appellants. Learned appellant's counsel prays that the issue be resolved in appellants favour and on the whole allow the appeal.

On appellants' 3rd issue which is similar to their 3rd issue, learned counsel to the 1st respondent submits that the lower court is partly right in granting the appellants the 2nd and 4th reliefs they sought from the court. It is however contended that none of the parties addressed the court on the issue and it was wrong of the court

to have granted the relief which parties before it did not seek. Besides, the reliefs the appellants prayed the two courts are tied to their 1st relief and once that particular relief was refused all others tied to it fail. Appellants, remuneration, learned counsel argues, then becomes 2nd respondents responsibility. On the whole, learned 1st respondent counsel submits that since the concurrent findings of the two lower courts cannot rightly be interfered with, the appeal must fail. B

Be it noted that the 2nd respondent's brief contains similar arguments under their 1st and 2nd issues as those advanced particularly under 1st respondent's 2nd and 3rd issues for the determination of the appeal. It serves no significant purpose to further reproduce the arguments here. C

***It is instructive to state though that whereas the 1st respondent in their arguments disagree with the lower court's findings on reliefs 2 and 4 as canvassed thereat by the appellants, the 2nd respondent completely supports the lower court on the point. The applicable principle here is that a respondent who seeks either the setting-aside of the finding of the lower court or the complete reversal of the finding by an appellate court can only do so through a substantive cross appeal. In such a situation, a respondent's notice does not even suffice.*** See LCC v. Ajayi (1970) 1 ALL NLR 291 and African Continental Seaway Ltd. v. Nigerian Dredging Roads and General Works Ltd. (1977) 5 SC 236 and William's v. Daily Times (1990) 1 NWLR (Pt. 124) 1. The point was succinctly put by my learned brother Mohammed, JSC in Obi v. INEC (2007) ALL FWLR (Pt. 378) 1116 at 1198-1199 thus:- D E F

*'The traditional role of a respondent to an appeal is to defend the judgment appealed against. If any respondent wants to depart from this traditional role by attacking the judgment appealed against in any manner, that respondent is obliged by the rules of court to file a cross-appeal. A respondent to an appeal who neither files a cross-appeal, nor a respondent's notice, will not be allowed to even file a brief of argument attacking the judgment appealed against or be allowed to present oral argument in the course of the hearing of the appeal. In the instant case, the 6th and 7th respondents, who neither cross-appealed nor filed a respondent's notice will not be allowed to adduce arguments attacking the judgment appealed against. All the* G H

*arguments in their respondent brief will be ignored. Lagos City Council v. Ajayi (1970) 1 ALL NLR 297; Eliochin (Nig.) Ltd. v. Mbadiwe (1986) 1 NWLR (Pt. 14) 47; Adefulu v. Oyesile (1989) 5 NWLR (Pt. 122) 377; Oguma Association Companies Limited v. IBWA Ltd. (1988) 1 NWLR (Pt. 73) 658; Kotoye v. Central Bank of Nigeria (1989) 1 NWLR (Pt. 98) 419.'*

In the instant case the application of the extant principle on the point necessitates that 1st respondent's arguments under the 2nd issue be and is hereby discountenanced.

On their being served with 1st respondent's brief, the appellants filed their reply thereto wherein it is insisted that the court below is wrong to have applied its earlier decision in Shell Petroleum Development Company of Nigeria Plc v. Stephen Dino & 3 ors (supra). Learned counsel submits that the applicable decision to the facts of the case at hand is Johnson v. Mobil Producing Co. (Nig) unlimited (2010) 7 NWLR (Pt. 1194) 462. The lower court's wrong reliance of the Dino's case and refusal to be bound by the Johnson's case, it is stressed, entitle the appellants to succeed. It is so urged.

Appellants' complaint under their 1st issue is that the lower court's decision striking out their 2nd issue for the determination of their appeal before the court as well as the ground from which same was distilled is perverse. It is my considered view that the respondents are on a firm ground for contending otherwise.

***Rights of appeal are statutorily conferred. In the case at hand, appellants' right of appeal from the final decision of the trial court sitting at first instance, by virtue of Section 241 (a) of the 1999 Constitution lies as of right to the court below. Except where the ground of appeal involves questions of law alone in which case, as provided for under Section 241 (b) of the same Constitution an appellant's appeal would also be as of right, other appeals from the decision of the trial High Court shall be by leave of either the trial or appellate court.***

***It is trite that leave of court, where it is required, is a condition precedent to the exercise of the right of appeal. Accordingly, failure to obtain leave where it is required renders any appeal filed incompetent as no jurisdiction can be conferred on the appellate court.*** See Nalsa and Team Associates v. N.N.P.C. (1991) 8 NWLR (pt. 212) 652; Nyambi v. Osadim (1977)



2 NWLR (pt. 485) 1 and Olanrewaju v. Ogunleye (1997) 2 NWLR (Pt 485) 12.

***It must also be stated that generally leave of court is required to raise a new issue on appeal. Where a party seeks to file and argue any fresh issue, being an issue that was not raised and determined by the trial court and is being raised for the first time in the appellate court, he must first seek and obtain leave of court before filing such issue.*** B

***Except the point or issue being raised by the appellant touches on jurisdiction which can be raised at any time, he would not be allowed to, without leave sought and obtained, raise and argue a point not raised or argued at the trial court.*** C

Now, appellants' 8th ground of appeal and the issue distilled from same struck out by the court below are herein under reproduced from pages 393 and 408 of the record of appeal respectively. D

***"GROUND 8 ERROR IN LAW***

*The learned trial judge erred in law in indulging the 1st Defendant's continuing disobedience of the court's order.*

***Particulars of Error***

*(1) The 1st Defendant has socked the Plaintiffs/Appellants on record on account of commencement of the present action.* E

*(2) There was a positive order of court to the 1st Defendant to reinstate the plaintiffs/appellant.*

*(3) The 1st Defendant/Respondent had continued to remain in contempt of said order of court.* F

*(4) The court continued to hear and indulge the 1st Defendant/Respondent in spite of their continued disobedience of the court's order."*

Appellants 2nd issue for the determination of their appeal at G the court below reads:-

***"2 Whether the trial court was right in indulging the Defendants' continuing disobedience of the courts order to reinstate the Appellants forthwith."***

In striking out appellants 8th ground of appeal and the issue distilled from it for the determination of the appeal before it, the court below reasoned at pages 463 - 464 of the record of appeal thus:-

***"I have carefully considered the issues formulated by the ap-***

*pellants, particularly issue 2... None of the four questions raise the issue of contempt of court or the respondents, right to be heard... The trial court made no pronouncement in the judgment on the issue of contempt...*

*I am of the view and I do hold that ground 8 of the Notice of Appeal and issue 2 formulated thereon do not arise from the judgment appealed against. They are incompetent and accordingly struck out."*

My examination of the record of appeal affirms the lower court's conclusion that appellants' complaints as circumscribed by their 8th ground of appeal and the issue that evolve from it do not arise from the decision of the trial court the appellants by both purport to appeal from.

***The point has earlier been made in this judgment that appellants' right of appeal enures to them only against the judgment from which they appeal. It is indeed a well settled principle of law that grounds of appeal and indeed the issues they give rise to must relate and challenge the decision appealed against. They must not be formulated in nubibus. The two, the ground of appeal and the issue from same must be connected with a real controversy between the parties.***

In *Atoyebi v. Govt. of Oyo State* (1994) 5 NWLR (pt. 344) 290 at 305 this Court per Iguh, JSC observed as follows:-

*'An appeal presupposes the existence of some decision which is appealed against on a given point. Where therefore, there is no complaint in respect of a decision that has arisen from a judgment appealed against, such a decision may not form the basis of an issue for determination by an appellate court. The appellate jurisdiction of this court inter alia is to review the decisions and/or judgments of the Court of Appeal. If therefore, an issue neither arose nor called for the determination of the Court of Appeal which therefore, did not consider the issues, it seems to me that such an issue may not form the basis of an appeal to the Supreme Court and a purported appeal to this court on such an issue will be incompetent and may be struck out.'* (Underlining mine for emphasis).

***In the case at hand the issue of 1st respondent's contempt which was not raised and determined at the trial court could not have been considered by the court below in the ab-***

**sence of the necessary leave having been sought and obtained by the appellants. The ground of appeal and the issue distilled from the ground as raised remain incompetent. The decision of the court below in that regard is unassailable. Like the court below, learned counsel for the 1st respondent is right in his submission that this court is without the jurisdiction to hear and determine the very issue for the same reasons. Resultantly, appellants 1st issue in the instant appeal is hereby resolved against them.** B

The appellants on the basis of their 2nd issue seek a reversal of the concurrent findings of the trial High Court and the court below to the effect that from the evidence on record the 1st respondent is not the employer of the appellants and that instead the appellants are 2nd respondent's employees. It is trite that the Supreme Court will not interfere with the findings of fact made by both the High Court and the Court of Appeal where there is sufficient evidence in support of such findings and where there is no substantial error apparent on the record of proceedings such as violation of some principle of law or procedure occasioning miscarriage of Justice. See Shittu v. Egbeyemi (199b) 6 NWLR (Pt. 457) 650 and Babuga v. State (1996) 7 NWLR (pt. 460) 279. C D E

By their originating summons, the appellants having asserted that they are employees of the 1st respondent whose employment the latter unlawfully determined, sought the declaratory reliefs outlined earlier in this judgment. The appellants rely on exhibits A, E and FBA1 as proof of the fact of their being employees of the 1st respondent. Appellants' case is significantly averred to in paragraphs 3 and 4 of the affidavit in support of their originating summons thus:- F

*"3 That the plaintiffs are supernumerary police Officers (spy police) with Nigeria Liquefied Natural gas (NLNG) Ltd., the 1st Defendant on record.* G

*4. That I was recruited by the 1st Defendant as Staff of its then known production, Fire and Safety Security Department now known as Corporate Security Service on the 1st February 2000, along 89 others which made up the first Batch sequel to an announcement by the 1st Defendant. A copy of the announcement is exhibit A hereof.* H

*11. That sequel to the action of the 1st Defendant as aforesaid we sought clarification of our status from the 2nd Defendant and*

*were in consequence given a copy of a police wireless message dated D.T.O 301015/10/2007 with reference CH: 3100B DEPT/FHQ/ABJ/ Vol. 1/55 designating us as staff of the 1st Defendant. A copy of the message is exhibit E hereof. ”*

B Paragraphs 3 and 4 of appellants, further affidavit in support of their originating summons are hereunder reproduced for their relevance:-

C *“3. That on 5th July, 2005 during an interview with our solicitors in their office for the review of our case, we were advised by L. A. Mitee, Esq., and we believe him, that we should explore the possibility of visiting the offices of the Inspector General of Police for further document to rebut the allegations by the 1st Defendant in paragraph 3 of its Counter Affidavit that we were employed by the Police.*

D *4. That following our said Counsel’s advice I visited the Police Force Headquarters in Abuja on the 11th and 12th of July 2005 and I was given a copy of Police internal memorandum dated 2nd July, 1993 which is Exhibit FBA1 hereof. ”*

E Paragraphs 1 - 3 of exhibit A referred to in paragraph A of the affidavit in support of appellants originating summons and annexed thereto read:-

*“1. The Inspector General of police has given approval for the establishment of on NLNG SPY Police Force.*

F *2. Arrangements have been concluded for the recruitment of 100 able bodied (sic) and women into three cadres (rank and file, inspector, officer) of the formation as first batch.*

G *3. The recruitment/selection exercise will be handled by the police authorities as represented by the Commissioner of police, Rivers State Police Command in line with statutory police recruitment procedure, NLNG representatives from PFS and HRP Department will monitor the processes. ”*

H In joining issues with the appellants, the 1st respondent particularly averred in paragraphs 3, 4 and 5 of their further counter-affidavit in opposition to appellants affidavit in support of the originating summons thus:-

*“3. That the plaintiffs are not employees of the first Defendant and as such were never given letters of employment by the first Defendant.*

4. *That the recruitment/selection of all employees of the first Defendant Company is handled solely by its Human resources Department and not by the Police Authorities as was done in the case of the plaintiffs.*

5. *That exhibit FB A1 attached to the plaintiffs recent Further affidavit further attests to the fact that the Plaintiffs are a special category of Police officers albeit, not assigned to general duties.”*  
*In the light of the evidence led by the plaintiffs/appellants, the trial court firstly held at page 386 of the record thus:-*

*“From the above it is clear that Supernumerary Police Officers are not employees of the person who is availing himself of their service such as the 1st Defendant, but are members of the Police Force.*

*The question is whether the Plaintiffs are Supernumerary Police Officers.*

*The plaintiffs have described themselves as such both in the Originating Summons and the Affidavits. Furthermore exhibits A and E, which they are relying on, also referred to them as Supernumerary Police Officers. I have no difficulty in holding that the Plaintiffs are Supernumerary Police Officers who by the Police Act are members of the Nigerian Police Force...”*

*The court admirably concluded as follows:-*

*“I hold in all that the Plaintiffs have not made out a case for the reliefs sought. The Plaintiffs have not shown by the evidence before me that they are employees of the 1st Defendant. Accordingly the Claims are hereby dismissed.”*

*In affirming the trial court’s foregoing decision, the court below, see page 472 lines 7 - 8 and page 475 lines 8 - 14, reasoned firstly as follows:-*

*“...By virtue of sections 135, 136 and 137 (1) above, the burden of proving that they are staff of the 1st respondent lies on the appellants...*

*It is pertinent to note at this stage that the appellants did not exhibit any letters of appointment setting out the terms and conditions of their employment and any remuneration therefore. No reference was made to the existence of such letters. Evidence of the terms and conditions of their employment is essential in a case of this nature where the appellants seek a declaration based on a purported contract between themselves and the 1st respondent.”*

The court at page 479 of the record of appeal inferred that the appellants have failed to prove their case thus:-

*“In the final analysis I agree with the learned trial Judge that the appellants failed to discharge the onus on them of proving that they are staff of the 1st respondent. From all the evidence before the Court the learned trial judge was correct when he held that the appellants are supernumerary police officers who by virtue of the Police Act are members of the Nigeria Police Force.”*

Learned appellants’ counsel is clearly wrong in his insistence that the foregoing concurrent findings of the two courts are perverse and must therefore be set-aside.

***It is beyond dispute that appellants’ claim for wrongful termination is founded on contract. Again it is trite that he who hires can fire. It nevertheless remains the law that an employer must observe and adhere to the conditions under which the employee is hired before such an employee can be fired otherwise the employer can ipso facto be held liable for unlawful termination of the services of the employee.*** See *Garuba v. Kwara Investment Co. Ltd. (2005) 5 NWLR (Pt 917) 160; Osianya v. Afribank (Nig) Plc (2007) 6 NWLR (pt. 1031) 565.*

***In the instant case where the appellants allege wrongful termination of their employment by the 1st respondent the onus is on them to prove not only the existence of a contract of employment between them and the 1st respondent but the terms of the very contract their employer breached in bringing the contract to an end.***

***An appraisal of the reliefs the appellants seek from and are refused, by both courts, for want of proof of the existence of the contract of employment they assert exist between them and the 1st respondent are declaratory. The appellants must establish their entitlements to the reliefs upon the strength of their own case and not on the weakness of the respondents’ case.*** See *Gbadamosi v. Dairo (2007) 3 NWLR (Pt. 1021) 282 and Dada Dosunmu (2006) 18 NWLR (Pt. 1010) 134.*

***On the cause the appellants identified in their originating summons as well as the documents they annexed thereto, the question the courts must be able to answer is whether indeed there exists a contract of employment between the***

**appellants and the respondents breach of which entitles the appellants to the reliefs they claim. The concurrent findings of the two courts alluded to earlier in this judgment which evolve from the evidence the appellants supplied, and was rightly adjudged unavailing to them, are unassailable. Once a plaintiff is unable to prove his case the court must dismiss the claim. This is the concurrent verdict of the two courts below. And this explains the resolution of Appellants' 2nd issue against them and the inability of this court to interfere with the judgment of the court below.**

Appellants contend under their 3rd issue that the court below is wrong when it ordered the 1st respondent to pay their entitlements arising from the contract the appellants are adjudged unable to prove. The trial court has held that the appellants in failing to establish their claim are disentitled to all the reliefs they seek on the basis of their claim. The trial court's decision is indeed beyond reproach.

At page 481 of the record however, in reversing the decision of the trial court, the court below reasoned as follows:-

*"By their relief 1, they are claiming the right, as staff, to enjoy all the benefits of the 1st respondent. The lower court found, and rightly too, that the appellants failed to prove that they were staff of the 1st respondent. They were therefore not entitled to relief 1.*

*However the 1st respondent having availed itself of the services of the appellant as supernumerary police officers was obliged to comply with section 18 (4) of the Police Act. There was no evidence before the lower court of such compliance. I therefore agree with learned counsel for the appellants that the learned trial judge was in error to have dismissed their reliefs 2 - 6. This issue is accordingly resolved in favour of the appellants.*

*In conclusion the appeal succeeds in part. The judgment of the High Court of Rivers State holden at Port Harcourt in suit No. PHC/1409/2004 delivered on 7/12/05 dismissing the appellants' reliefs 2 - 6 is hereby set aside. Reliefs 2 - 6 of the originating summons are hereby granted. Reliefs 2 and 4 are granted pursuant to the provisions of section 18 (4) of the police Act."*

All the reliefs the appellants seek are on the basis of the fact that they are employees of the 1st respondent and no more. It is not their case as exhibits A, E and FBA1 tend to suggest that they are

employees of the 2nd respondent and that the 1st respondent who by virtue of section 18(4) of the Police Act is obliged to pay their quarterly aggregate salary in advance should comply with the law. Were it to be so, the trial court would have been wrong and the court below right to that end. ***It remains my considered view that reliefs are granted to a plaintiff if he succeeds in proving his claim. Failure to do that disentitled the plaintiff to the reliefs which are dependent on the worthiness of the claim in the first place.***

***In the case at hand the fact of the appellants being employees of the 1st respondent, which fact creates their right to their 2nd - 6th reliefs, is what both courts below refused them for their failure to prove same. It is amazing and perverse that the court below in spite of its finding in respect of appellants' 1st relief proceeded to grant them those other reliefs which are dependent on the 1st relief.***

In *Morohunfola v. Kwara State College of Technology* (1990) 4 NWLR (Pt. 145) 406 this court per Karibi-Whyte, JSC stated at page 527 paragraphs E - G as follows:-

*'The aim of the declaration being to ascertain and determine the right of the applicant to remain an employee of the defendant, the letter of appointment of the appellant is a sine qua non of his pleading. The declaration sought cannot be granted in vacuo. It must be granted in relation to the employment. There can be no termination unless the appointment terminated was an appointment by the person or authority terminating. The letter of appointment is undoubtedly the creator of the right sought to be declared.'*

In the instant case, appellants remain disentitled to all the reliefs they seek because of their inability to prove the fact of their being employed, as they claim, by the 1st respondent. I so hold.

Though resolving appellants 3rd issue in their favour and allowing the appeal in part, on the whole, the appeal is hereby dismissed. The lower court's decision in respect of appellants 2nd - 6th reliefs are hereby set aside and in its place the trial court's decision thereon restored.

There shall be costs against the appellants in the sum of N100,000 in favour of the respondents.



**ONNOGHEN JSC**

This is an appeal against the judgment of the Court of Appeal, Holden at Port Harcourt in appeal no. CA/PH/290/2006 delivered on the 5th day of March, 2009 in which the court dismissed the appeal of appellants against the decision of the High Court of Rivers State in suit no. PHC/1409/2004 in which the court dismissed the suit of appellants, then plaintiffs, on the 7th day of December, 2005. B

The appellants, as plaintiffs, issued an originating summons against the respondents in which they called for the determination of the following questions:

*“(i) Whether on a proper construction of the employment of the plaintiffs: C*

*(a) The circumstance and manner of employment of the plaintiffs.*

*(b) The police wireless message dated DTO: 30/015/10/2001 with reference CH.3100/BDEPT/FHQ/ABJ/Vol. I/55. D*

*(c) The NLNG SPY Police Force Announcement.*

*(d) The Address of Mr. Maduka, the then Human Resources Manager of the 1st defendant on the passing out parade of the plaintiffs on 5th May, 2000 as contained in a video tape, and E*

*(e) The identity cards issued to the plaintiffs by the 1st defendant.*

*The plaintiffs are not entitled to be recognized as staff of the 1st defendant?*

*(ii) Whether the action of the 1st defendant in withholding the payment of plaintiffs’ entitlements is not in violation of the plaintiffs’ right by law and the constitution? F*

*(iii) Whether the 1st defendant is right and/or empowered to further withhold or delay the payment of plaintiffs’ entitlements? G*

*(iv) Whether the plaintiffs are not entitled to enjoy the benefits being enjoyed by other employees of the 1st defendant.”*

As a follow up to the determination of the above questions, appellants sought the following reliefs, to wit:-

*“1. A declaration that the plaintiffs are staff of the 1st defendant and as such, entitled to enjoy all the benefits of the 1st defendant. H*

*2. A declaration that the plaintiffs are entitled to be paid their accrued entitlements by the 1st defendant.*

3. *A declaration that the action of the defendants in withholding or delaying the payment of the plaintiffs entitlement in violation of the plaintiffs' rights under the law and the constitution.*

4. *An order directing the 1st defendant, its servants and officials to pay to the plaintiffs their accrued entitlements in the sums respectively computed in favour of each plaintiff.*

5. *An injunction restraining the 1st defendant, its servants or agents from withholding or delaying or continuing to withhold or delay the payment of the accrued entitlements of the plaintiffs or interfering with the plaintiffs' rights to receive such entitlements as and when due.*

6. *An injunction restraining the defendants, jointly and severally, their servants, agents from intimidating or victimizing the plaintiffs".*

D It is the case of appellants that they are members of staff of the 1st respondent who recruited them in different batches from the year 2000, but have been denied their entitlements on the ground that they are supernumerary police officers thereby making them the staff of the 2nd respondent.

E The trial judge held that appellants are not members of staff of the 1st respondent but are supernumerary police officers or constables and as such members of the Nigeria Police Force, the 2nd respondent. The above judgment was affirmed by the lower court upon appeal by the appellants. The instant appeal is therefore a further appeal.

F Learned counsel for appellants LEDUM MITEE ESQ in the appellant brief deemed filed and served on the 24th day of November, 2010 has formulated three issues for the determination of the G appeal. The issues are as follows:-

"1. *Whether the Court of Appeal was right when it struck out ground 8 of the grounds of appeal and issue 2nd formulated thereon? (Ground 11)*

H 2. *Whether on a proper application of the law to the evidence before the Court of Appeal that court was right when it affirmed the judgment of the trial court to the effect that the appellants are supernumerary police officers and members of the Nigeria Police Force? (Grounds 1 and 9)*

3. *Whether the Court of Appeal was right when it granted*

*appellant reliefs 2 and 4 pursuant to the provision of Section 18(4) of the Police Act (Ground 10)”.*

On the other hand learned senior counsel for 1st respondent, SEYI SOWEMIMO, SAN submitted a single issue for determination in the 1st respondent brief filed on 13th December 2010 to wit:-

*“Whether or not the learned justices of the Court of Appeal<sup>B</sup> were right in law and on the evidence in holding that the plaintiffs/appellants being supernumerary policemen are not employees of the 1st respondent company but rather those of the Nigeria Police Force”.*

On his part, learned counsel or the 2nd respondent, DAME<sup>C</sup> NGOZI C. IREOGBU adopted appellant’s issues 2 and 3 as being the real issues for the determination of the appeal.

It is my considered view that having regards to the facts of the case as contained in the record of appeal, the grounds of appeal arising from the decision of the lower court, I agree with the opinion<sup>D</sup> of learned senior counsel for 1st respondent that the real issue in contention is as formulated by the learned Senior Advocate of Nigeria, as a resolution of that issue will dispose of the appeal one way or the other.

It is not in dispute that the lower courts concurrently found/<sup>E</sup> held that appellants are supernumerary police officers and members of the Nigeria Police Force and that appellants have the burden of proof that they are employees of the 1st respondent.

I have carefully gone through the record of appeal particularly<sup>F</sup> the documents exhibited to the affidavits in support of the originating summons and have not seen a single letter of appointment of the appellants exhibited to the said affidavits to define the status of appellants as staff of the 1st respondent as claimed. This is very strange and fatal to the case of appellants who claim that they are members<sup>G</sup> of staff of the 1st respondent and as such entitled to all the rights and privileges enjoyed by other staff of the 1st respondent. Appellants, however tendered Exhibit A which in short does not support their claim at all.

Paragraphs 1 - 3 of Exhibit A reads thus:

*“NLGN SPY POLICE FORCE*

*The Inspector General of Police has given approval for the establishment of an NLNG SPY Police Force. Arrangements have been concluded for the recruitment of 100 able bodied (sic) and women*

<sup>H</sup>

*into three cadres (rank and file, inspector, officer) of the formation as first batch.*

*The recruitment/selection exercise will be handled by the police authorities as represented by the Commissioner of Police, Rivers State Police Command in line with statutory police recruitment procedure. NLNG representatives from PFS and HRP Department will monitor the processes". See page of the record of appeal.*

It is very clear from the above document, exhibited by appellant allegedly in support of their claim, that the 1st respondent is not the employer of appellants but the Nigeria Police Force and that the lower courts were right in so finding/holding.

It is for the above reasons and the more detailed reasons contained in the lead judgment of my learned brother MUSA DATIJJO MUHAMMAD, JSC, which I had a preview of that I agree that this appeal is grossly without merit and deserves to be dismissed.

I therefore order accordingly and abide by the consequential orders made in the said lead judgment including the order as to costs. Appeal dismissed.

E

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**CHUKWUMA-ENEH JSC**

I have read the Lead judgment of my learned brother Muhammad, JSC in this matter and I agree with him that the appeal lacks merit and should be dismissed and I abide by the orders contained therein.

F

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**OGUNBIYI JSC**

I read in draft the lead judgment just delivered by my learned brother Musa Dattijo Muhammad, JSC and I agree that the appeal is devoid of any merit and should be dismissed.

The further appeal is from the judgment of the Court of Appeal Port Harcourt Division delivered on 5th March, 2009 which affirmed part of the decision of the High Court of Rivers State delivered on 7th December, 2005 wherein the appellants' suit was dismissed.

H

At the High Court the appellants as plaintiffs by originating summons had called upon the trial court to determine a number of

questions and therefore sought for six reliefs upon determination of the questions which are all specified in the lead judgment.

The appellants' case as could be gleaned from the record of appeal is that having been recruited by the 1st respondent in different batches from the year 2000, they are therefore staff of the 1st respondent; however, and unlike other staff of the 1st respondent they were denied entitlements due and accruable to them on the contention that they are supernumerary police officers and so ore staff of the 2nd respondent. The trial court on the 7th December, 2005, dismissed the plaintiffs/appellant's claims on the ground that, they are supernumerary police officers or constables and therefore members of the Nigeria Police Force, (2nd respondent).

Being dissatisfied with the judgment of the trial court, the plaintiffs/appellants appealed to the Court of Appeal sitting in the Port Harcourt Division. The lower court affirmed the judgment of the trial court that the appellants are supernumerary police officers who, by virtue of the police Act are members of the Police Force.

In its further decision, the lower court held as incompetent and accordingly struck out ground 8 of the Notice of Appeal and issue 2 predicated thereon as being alien to the judgment of the trial court appealed against.

The court below however, set aside the judgment of the trial court dismissing appellants' reliefs 2 - 6 of the originating summons but granted some pursuant to the provisions of section 18(4) of the police Act, on the basis that the 1st respondent, having availed itself of the services of the appellants as supernumerary police officers, was obliged to comply with section 18(4) of the police Act.

Appellants have now appealed against the Court of Appeal decision by filing eleven grounds of appeal from which three issues ore distilled. While the 1st respondent raised only one issue the 2nd respondent formulated two. In my opinion, the totality of this appeal con adequately be determined on the lone issue formulated by the 1st respondent which forms the crux of the appeal as follows:-

Whether or not the learned justices of the Court of Appeal were right in law and on the evidence in holding that the plaintiffs/appellants being supernumerary policemen are not employees of the first respondent company but rather those of the Nigeria Police Force.

In his submission on this issue, the learned appellants' counsel

re-affirmed that exhibit 'A' is not an official act envisaged by S.150(1) of the Evidence Act; that exhibit 'A' is an act of the 1st respondent, a company incorporated under CAMA by the Corporate Affairs Commission not enjoying presumption pursuant to S.150(1) which presupposes the regularity of judicial and official acts.

B At page 479 of the record of appeal the lower court in upholding the judgment of the trial court held and said:-

*"From all the evidence before the court the learned trial judge was correct when he held that the appellants are supernumerary police officers who by virtue of the Police Act are members of the Nigeria Police Force."*

Submitting on the foregoing conclusion, the appellants' counsel held the lower court was in error because it relied on the trial judge who did not conduct a proper evaluation of all the evidence on record and consequently come to the wrong conclusion that the appellants are supernumerary police officers and members of the Nigeria Police Force. The court below, learned counsel argument was therefore wrong in affirming that the appellants are supernumerary police officers contrary to the documentary evidence before it and the police Act.

On behalf of the respondents, it was submitted in response that the appeal lacks merit and ought to be dismissed; that both the trial High Court and Court of Appeal were quite right in concurrently holding that the appellants, being supernumerary police officers, are employees of the Nigeria Police Force and not employees of the first defendant company. It was further submitted that the plaintiffs at the trial court failed to provide satisfactory evidence to sustain their claims.

For the determination of this appeal, the law is trite and well settled that in civil cases, the onus is on him who asserts to prove and it must be on the balance of probability. It is for the trial court judge to weigh the evidence by both parties on an imaginary scale and decide on the preponderance of evidence in whose favour the pendulum of justice would tilt. The document exhibit 'A' for instance is very crucial in deciding this appeal.

On a community reading of Exhibit 'A', it will be revealed that the recruitment of the appellants was made at the instance of the Nigeria Police Force through the Inspector General of Police.

The reproduction of Exhibit 'A' reads as follows:-

*“NLNG SPY POLICE FORCE*

*The Inspector General of Police has given approval for the establishment of an NLNG SPY POLICE FORCE. Arrangements have been concluded for the recruitment of one hundred (100) able bodied men and women into three cadres (rank and file, Inspector, of-* B  
*ficer) of the formation as first batch.*

*The recruitment/selection exercise will be handled by the police Authorities as represented by the Commissioner of Police, Rivers State Police Command, in line with statutory police recruitment procedure. NLNG Representatives from PFS and HRP department will* C  
*however monitor the processes.”*

On a careful perusal and examination of exhibit ‘A’ it is clear that the recruitment of the SPY police officers was to be under taken by the Commissioner of police. By paragraphs 3 and 4 of the affidavit in support of the originating summons, the appellants deposed D that they ore supernumerary police officers recruited on 1st February 2000 as staff of 1st respondent; it is also pertinent to state that by Exhibits ‘E’ and FBA1 the police Authorities had banned the employment of such officers in 1993, vide police Internal Memo of 20/ E 7/93. Intriguingly, it would call to question for the appellants to describe themselves as supernumerary police officers in 2004. In other words, the exhibits ‘E’ and FBA 1 are, in fact, in conflict with paragraphs 3 and 4 of the affidavit in support. Put differently, if the police Authorities had banned the employment of supernumerary police F officers in 1993, the appellants claim as such officers in 2004 is without basis. The lower court in its judgment at page 479 of the record did not in my view mince its words when it held thus and said:-

*“...Exhibits ‘E’ and FBA 1 are in fact in conflict with paragraphs 3 and 4 of the affidavit in support of the originating summons wherein* G  
*the appellants over that they are supernumerary police officers recruited on 1st February 2000 as staff of the 1st respondent. If the police Authorities had banned the employment of supernumerary police officers in 1993 on what basis did they describe themselves as* H  
*such in 2004? They cannot approbate and reprobate. Furthermore, I agree with the learned trial judge that Exhibits ‘E’ and FBA 1 could not override or supersede the provisions of the police Act.*

*In the final analysis I agree with the learned trial judge that the appellants failed to discharge the onus on them of proving that they*

*are staff of the 1st respondent. From all the evidence before the court the learned trial judge was correct when he held that the appellants are supernumerary police officers who by virtue of the police Act are members of the Nigeria Police Force. This issue is accordingly resolved against the appellants."*

B The conflict created by the appellants has added an extra burden on them to adduce evidence to substantiate. The averment on the affidavit must be supported by evidence as a backup for proof. The lower court cannot be faulted by affirming what the trial court did. The appellants have failed to prove their claim on the balance of probability. They could not have been entitled to judgment in their favour. The said issue is resolved against them and in favour of the respondents.

D With the refusal and dismissal of relief 1, all other reliefs which are predicated thereon cannot also succeed but are all likewise dismissed.

E With the few words of mine and more particularly relying on the fuller reasonings by my learned brother Musa Datijjo Muhammad, JSC in his lead judgment, I also dismiss the entire appeal as lacking in merit and I abide by the order made as to costs.

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

F The Plaintiffs who were Supernumerary Police Officers claimed they were staff who were recruited by the 1st Defendant in different batches from the year 2000, but unlike other staff of the 1st Defendant were denied entitlements due and accruable to them on the ground that they were staff of the 2nd Defendant. They instituted an action by originating summons and sought for a determination of the following questions to wit:

- (i) Whether on a proper construction of the Plaintiffs:
  - (a) The circumstances and manner of employment of the plaintiffs
  - (b) The Police Wireless Message dated DTO: 301015/10/2001 with reference CH.3100/B DEPT/FHQ/ABJ/VOL. 1/55
  - (c) The NLNG SPY Police Force Announcement
  - (d) The address of Mr. Maduka, the then Human Resources Manager of the 1st Defendant on the passing out parade of the Plain-



tiffs on 5th May, 2000 as contained in a video tape; and

(e) The identity cards issued to the Plaintiffs by the 1st Defendant, the Plaintiffs are not entitled to be recognised as staff of the 1st Defendant?

(ii) Whether the action of the 1st Defendant in withholding the plaintiffs' entitlements is not in violation of the plaintiffs' rights by law B and the Constitution?

(iii) Whether the 1st Defendant is right and/or empowered to further withhold or delay the payment of Plaintiffs' entitlements

(iv) Whether the Plaintiffs are not entitled to enjoy the benefits C being enjoyed by other employees of the 1st Defendant? Upon the determination of the above questions the plaintiffs asked for the following reliefs:-

1. A declaration that the Plaintiffs are staff of the 1st Defendant, and as such, entitled to enjoy all the benefits of the 1st Defendant D

2. A declaration that the Plaintiffs are entitled to be paid their accrued entitlements by the 1st Defendant

3. A declaration that the action of the Defendants in withholding or delaying the payment of the Plaintiffs' entitlements is in violation E of the Plaintiffs' rights under the law and the Constitution.

4. An order directing the 1st Defendant, its servants and officials to pay to the Plaintiffs their accrued entitlements in the sums respectively computed in favour of each Plaintiff

5. An injunction restraining the 1st Defendant, its servants or agents from withholding or delaying or continuing to withhold or delay the payment of the accrued entitlements of the plaintiffs or interfering with the plaintiffs' rights to receive such entitlements as and when due. F

6. An injunction restraining the Defendants, jointly and severally, their servants, agents from intimidating or victimizing the plaintiffs. G

The Originating Summons was supported by a 14 paragraph affidavit with Exhibits A - E annexed. The plaintiffs also filed a further and better affidavit dated and filed on 19/7/2005 to which was attached Exhibit FBA1. H

In response the 1st Defendant filed an 8 paragraph Counter-Affidavit and a further counter - affidavit containing 6 paragraphs.

The 2nd Defendant did not file any counter-affidavit.

Alongside the Originating Summons the plaintiff filed a Motion Ex-parte seeking injunctive orders against the Defendants. After becoming aware of the pendency of the suit and the injunction sought against them, the Defendants proceeded to terminate the Plaintiffs employment for exercising their constitutional right of an action in court. This development was brought to the attention of Ugbari J, on 3rd September, 2004 who presided over the matter and having listened to the arguments of counsel who were in court proceeded to grant the following injunctive orders:

*"1. restraining the defendants, their servants, agents officers howsoever from giving effect to memoranda dated 23rd August, 2004 and 1st September, 2004 in so far as they purport to dismiss or howsoever doing away with the Plaintiffs/Applicants' employment on account of their instituting this suit against the defendants pending the determination of the Motion on Notice dated 23rd August, 2004 pending in this suit*

*2. restraining the defendants, their agents, servants, officers howsoever from harassing intimidating or howsoever sanctioning the Plaintiff/Applicants on account of their instituting this suit pending the determination of the Motion on Notice dated 23rd August, 2004 pending in this suit".*

By agreement of the parties, written submissions were ordered and filed and in her judgment delivered on 7th December 2005, the learned trial Judge Thompson J. who was now seised of the matter dismissed the Plaintiffs' claims holding that they were Supernumerary Police Officers or Constables and members of the Nigeria Police Force.

Being dissatisfied with the judgment of the trial court, the Plaintiff's filed an appeal to the Court of Appeal Port Harcourt. Division in appeal No. CA/PH/290/2006. In a unanimous decision the Court of Appeal, Port Harcourt Division (*"hereinafter to be referred to as the court below"*) affirmed the judgment of the trial court to the effect that the appellants are Supernumerary Police Officers who are members of the Police Force by virtue of the Police Act. The order of the High Court dismissing the Plaintiffs' reliefs 2 - 6 in the originating summons was however set aside and the said reliefs were granted in favour of the appellants. The court below specifically stated that *"re-*

*liefs 2 and 4 are granted pursuant to the provisions of section 18(4) of the Police Act”.*

The appellants were still not satisfied and appealed to this Court in their Notice of Appeal dated 3rd June, 2009 containing eleven (11) grounds of appeal from which the following three issues were formulated:-

1. Whether the Court of Appeal was right when it struck out ground g of the grounds of appeal and issue 2 formulated thereon (Ground 11)

2. Whether on a proper application of the law to the evidence before the Court of Appeal, that court was right when it affirmed the judgment of the trial court to the effect that the appellants are Supernumerary Police Officers and members of the Nigeria police Force? (Grounds 1 and 9)

3. Whether the Court of Appeal was right when it granted appellants reliefs 2 and 4 pursuant to the provision of section 18(4) of the police Act? (Ground 10)

The first respondent submitted a lone issue for determination which is: Whether or not the learned Justices of the Court of Appeal were right in law and on the evidence in holding that the plaintiffs/Appellants being supernumerary policemen are not employees of the first respondent company but rather those of the Nigeria police Force.

Apart from the sole issue distilled by the 1st respondent, learned counsel proceeded to deal with the other issues raised in the appellants, brief.

In the 2nd respondent's brief which was filed on 15/4/2013 but deemed filed on the same date, three issues were raised for determination as follow:-

1. Whether on a proper application of the law to the evidence before the lower court was the lower court right when it affirmed the judgment of the trial court to the effect that the appellants are Supernumerary police Officers and members of the Nigeria Police Force? (Distilled from grounds 1 and 9)

2. Whether the lower court was right when it granted the appellants' reliefs 2 and 4 pursuant to the provision of section 18(4) police Act (Distilled from ground 10)

3. Whether this Honourable Court need interfere with the con-

current decision of the lower courts or ought not to uphold same?

No indication was given in the brief from which ground of appeal this issue was distilled. I have perused through the grounds of appeal and there is none that can accommodate issue 3. The 2nd respondent neither cross-appealed nor filed a Respondent's Notice.

B The issue has no leg on which to stand. It is incompetent and is accordingly struck out.

The appellants filed a Reply in answer to the 1st Respondent's brief in which they sought to distinguish the observation made by the Court of Appeal in *Shell Petroleum Development Company of Nigeria Plc v. Stephen Dino & 3 Ors. (2007) 3 NWLR (Part 1019) at 469* on the ground that the observation of Oimage, JCA would be appropriate if the Supernumerary Police Officers were appointed in compliance with the Police Act which is not the case in the instant appeal.

D This appeal is hinged on the claim by the appellants that they were employed by the 1st respondent and so are entitled to enjoy all the benefits accruable to them by the 1st respondent. This is why they are not happy with the court below when it ordered that the benefits they were claiming should be paid to the Accountant-General of the Federation in accordance with Section 18(4) of the Police Act. It also explains the reason for their argument that their appointment as Supernumerary Police Officers did not comply with the Police Act. In so arguing, they forgot that they commenced the action by Originating Summons which implied that the facts were not in dispute and all that was in contention is the interpretation to the police Act and other documents which were annexed to the affidavits and counter-affidavits as Exhibits.

G Dealing with the main issue in the appeal the court below pointed out that the appellants did not exhibit any letters of appointment setting out the terms and conditions of their employment and any remuneration therefor. It is trite law to state for a party seeking a declaration that a contract is substituting or was entered into by the disputing parties there must be evidence oral or documentary of the terms and conditions of such contact. See: *Nitel v. Oshodin (1999) 8 NWLR (Part 616) 528 Morohunfola v. Kwara State College of Technology (1990) 4 NWLR (Part 146) 505 at 509 and NEPA v. Olagunju (2005) 3 NWLR (Part 913) 602 at 632*. The appellants have not produced any document which spells out the terms of their contact

with the respondents. The letter of employment is the bedrock on which any of the appellants can lay claim to being employees of the respondent and without the production of such a document, no employment can be inferred. The employees' Handbook issued by 1st Respondent is not a substitute for the letter of employment.

The document submitted by the appellants to support the claim of being employees of the respondent is exhibit 'A'. In paragraphs 3 and 4 of the affidavit in support, the 1st appellant deposed to the following facts:

*"3. That the Plaintiffs are Supernumerary police Officers (Spy Police) with Nigeria Liquefied Natural Gas (NLNG) Limited, the 1st Defendant on record*

*4. That I was recruited by the 1st Defendant as staff of its then known Production, Fire and Safety Security Department now known as Corporate Security Service on the 1st February, 2000 alongside 89 others which made up the First Batch sequel to an announcement by the 1st Defendant. A copy of the announcement is Exhibit A hereof"*

The court below considered paragraphs 1 - 3 of Exhibit 'A' which carries the heading "NLNG SPY POLICE FORCE" and the following information:

*"The Inspector General of police has given approval for the establishment of an NLNG Spy police Force. Arrangements have been concluded for the recruitment of 100 able bodied (sic) and women into three cadres (rank and file, Inspector, Officer) of the formation as first batch. The recruitment/selection exercise will be handled by the Commissioner of Police, Rivers State Police Command, in line with Statutory Police recruitment procedure. NLNG Representation from PFS and HRP department will however monitor the processes".* The interpretation given to Supernumerary Police Officer under section 2 of the police Act is:

*"a police officer appointed under section 18, 19 or 21 of this Act or under on authorization given under section 20 of this Act".*

Section 18 (1), (2) & (4) were reproduced and the argument put forward by learned counsel for the appellants in contending that their recruitment by the 1st respondent was sequel to Exhibit A (which is that they were recruited by 1st respondent. The Court went on to find that -

*“From a careful examination of the portion of Exhibit ‘A’ produced earlier it is stated in apparent compliance with section 18 (1) of the Police Act that the 1st respondent had applied to and obtained approval from the Inspector General of Police for the establishment of the NLNG police Force. It is also evident from Exhibit A that the*  
 B *persons to be recruited would be in three cadres, namely rank and file, inspector and officer”*

Section 214 (1) of the 1999 Constitution was also reproduced. The court below found that the appellants by relying on Exhibit ‘A’  
 C conceded they were recruited through an exercise conducted by the police Authorities and agreed with the trial Judge in finding there was a presumption of regularity of official acts as provided in section 150 of the Evidence Act. This finding and exposition of the law cannot be faulted. For a proper appreciation of the resolution of the issue, I will  
 D reproduce sections 18 (1), (2), (3), (4) and (6) Police Act and section 214 (1) of the Constitution which state:

*“18(1) Any person (including any government department) who desires to avail himself of the services of one or more police officers for the protection of property owned or controlled by him*  
 E *may make application therefore to the Inspector-General stating the nature and situation of the property in question and giving such other particulars as the Inspector-General may require*

*(2) On the application under the forgoing subsection the Inspector-General may, with the approval of the President, direct the*  
 F *appropriate authority to appoint as Supernumerary Police Officers in the Force such number of persons as the Inspector-General thinks requisite for the protection of the property to which the application relates.*

*(3) Every Supernumerary Police Officer appointed under this*  
 G *section -*

*(a) shall be appointed in respect of the area of the police province or where there is no police province or, where there is no police province the police district or police division in which the property*  
 H *which he is to protect is situated:*

*(b) shall be employed exclusively on duties connected with the protection of that property;*

*(c) shall, in the police area in respect of which he is appointed and in any police area adjacent thereto, but not elsewhere, have the*

*powers, privileges and immunities of a police officer; and*

*(d) subject to the restrictions imposed by paragraph (b) and (c) of this subsection and to the provisions of section 22 of this Act, shall be a member of the Force for all purposes and shall accordingly be subject to the provision of this Act and in particular the provisions thereof relating to discipline.* B

*(4) Where any Supernumerary Police Officer is appointed under this Act, the person availing himself of the services of that officer shall pay to the Accountant-General -*

*(a) on the enlistment of the officer, the full cost of the officer's uniform; and* C

*(b) quarterly in advance, a sum equal to the aggregate of the amount of the officer's pay for the quarter in question and such additional amounts as the Inspector-General may direct to be paid in respect of the maintenance of the officer during that quarter; and any sum payable to the Accountant General under this subsection which is not duly paid may be recovered in a summary manner before a magistrate on the complaint of any superior police officer:-* D

*Provided that this subsection shall not apply in the case of an appointment made on the application of a department of the Government of the Federation.* E

*(6) Where the services of a supernumerary police officer are withdrawn in pursuance of subsection (5) of this section in the course of a quarter for which the sum mentioned in subsection (4)(b) of this section has been paid to the Accountant - General, the Accountant-General shall pay to the person by whom that was paid a sum which bears to that sum the same proportion as the unexpired portion of that quarter bears to the whole of that quarter"* F

Section 214 (1) of 1999 Constitution stipulates - G

*"There shall be a Police Force for Nigeria, which shall be known as the Nigeria Police Force, and subject to the provisions of this section no other police Force shall be established for the Federation or any part thereof"*

Since the 1st appellant deposed to the affidavit in support of the originating summons and admitted in paragraph 3 that the appellants who were the plaintiffs in the Originating Summons are Supernumerary police Officers, the argument that the payments stipulated in section 18(4) of the Police Act ought to be made in advance, H

not in arrears cannot change their status to being employees of the 1st respondent. I find that the entire arguments advanced by learned counsel for the appellants is porous and must therefore collapse as a pack of cards as the appellants have nothing to hold on to establish the claim of being employees of the 1st respondent who are entitled  
B to any benefits. The appeal completely lacks merit and perforce must be dismissed while the judgment of the court below which affirmed the decision of the trial court is further affirmed.

For this and the more detailed reasons given in the leading  
C judgment of my learned brother, MUSA DATIJO MUHAMMAD, JSC, I too dismiss the appeal and abide by the consequential orders made as to costs. Appeal dismissed.

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