

SUPREME COURT OF NIGERIA
FRIDAY 28TH FEBRUARY, 2014. SC. 149/2006
**CORAM:- M. S. MUNTAKA-COOMASSIE, M. U. PETER-
ODILI, O. ARIWOOLA, K. M. O. KEKERE-EKUN,
J. I. OKORO, JJSC**

THE REGISTERED TRUSTEES OF
THE AIRLINE OPERATORS OF NIGERIA APPELLANT
AND
NIGERIAN AIRSPACE
MANAGEMENT AGENCY RESPONDENT

ACTIONS - Commencement - Originating summons - Amendment
- Duly made takes effect from date of the original document - And it
applies to every successive amendment (H1)

COURTS - Actions - Justice - Need for - Courts have duty to do
substantial justice - And allow formal amendment as are necessary -
For the ultimate achievement of justice and end of litigation (H2)

ACTIONS - Commencement - Legal capacity - Non existing person
cannot institute action in court - Nor will action be allowed to be
maintained against defendant - Who is not a legal person (H3)

ACTIONS - Commencement - Legal personality - Source - Juristic
personality is donated by enabling law - And where it is provided
that a party must sue or be sued in a name - He cannot be sued in
any other name (H4)

APPEALS - Jurisdiction - Actions - Commencement - Wrong name -
Where parties are not in doubt as to parties to appeal - Wrongful
heading of the appeal does not affect competency of court - To hear
same on merit (H5)

ACTIONS - Commencement - Misnomer - Occurs when mistake is
made as to name of a person who sued or was sued - Or when
action is brought by or against the wrong name of a person (H6)

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ACTIONS - Commencement - Misnomer - Effect - Misnomer that will vitiate proceedings would be such - That will cause reasonable doubt - As to identity of person intending to sue or be sued (H7)

APPEALS - Hearing - Preliminary objection - Filing - Condition - Respondent with such objection to appeal - Shall give appellant three days prior notice - Setting out grounds of the objection (H8)

APPEALS - Hearing - Preliminary objection - Non compliance - Where respondent fails to comply with the rule - Court may either refuse to entertain the objection - Or adjourn hearing at the cost of respondent (H9)

APPEALS - Objections - Incorporated in brief - Notice of objection can be given in respondent's brief - And respondent need not thereafter give a separate notice (H10)

APPEALS - Objection - Leave - Magit's case - Respondent who incorporated objection in his brief - Needs leave of court to move the objection before the hearing of substantive appeal (H11)

SUPREME COURT - Judgment - Binding nature - Counsel who knows the decision of the court on an issue and yet does otherwise - Has himself to blame because the court thrives in even handed justice (H12)

APPEALS - Party - Consistency - Appellant having contended at trial court that the services - Were part of what they paid for under Ticket Sales Charge - Cannot set up a new case other than that which it presented at trial court (H13)

STATUTES - Interpretation - Principle - Where words used in statute are clear and unambiguous - Court should give them their ordinary natural and literal meaning - In order to establish intention of law maker (H14)

AVIATION - Revenue drive - Power - By NAMA Act s. 11 - Respondent has power not only to charge for 30% air ticket sales - But also

to charge en route local facility services (H15)

FACTS

Before the Federal High Court Lagos, plaintiff/appellant commenced this action via originating summons, seeking for answers to the questions to wit whether defendant/respondent is entitled under the relevant law to impose a Domestic en-route charges and whether respondent can arbitrarily substitute the charges payable by appellant. To this end, appellant sought for the following relief inter alia, declaration that payment of 5% Ticket Sales Charge by appellant to respondent complies with section 7(i)(r) of Decree No. 48 of 1999 for services provided and precludes respondent from imposing the Domestic en-route Charges. The charge imposed by respondent was “Domestic Air Navigation or Domestic En-route Charges” for services rendered to airline operators on domestic airspace. At the end of hearing, the court held inter alia that respondent had no statutory power to levy the domestic en-route charges. It declined to grant the declaratory reliefs but granted the injunctive relief.

Appellant had prior to delivery of the judgment sought for an order to change its name to wit “*The Incorporated Trustees of Airline Operators of Nigeria*” in place of the name “*Airline Operators of Nigeria*”. The court granted the application and overruled the objection of respondent. Dissatisfied with the judgment of the court, respondent appealed to the Court of Appeal Lagos Division. Appellant filed preliminary objection in its brief of argument wherein it contended that the appeal is not arguable. A reply was filed by respondent. At the hearing of the appeal, appellant was absent. Learned counsel for respondent urged the court to strike out the objection for failure of appellant to file a formal notice and to argue it orally in compliance with Order 3 Rule 15 of the Court of Appeal Rules 2002. The court agreed with the learned counsel and in its ruling held that the preliminary objection was incompetent for being in breach of the rules of the court. It was accordingly discountenanced. The appeal was thus determined on merit and at the end of which the court held that respondent had the power under the enabling law to levy the domestic en-route charges. It allowed the appeal and set aside the decision of the trial court. Aggrieved, appellant lodged appeal in Supreme Court.

ISSUES FOR DETERMINATION

1. Whether the appeal at the Lower Court was not incompetent in view of the fact that the Respondent therein is not a “person”/ body known to law.

B 2. Whether the Lower Court was not in error to have struck out the Appellant as Respondent’s Preliminary objection on the basis that it was not in compliance with Order 3 Rule 15 of the Court of Appeal Rules 2002 when the number of days between the filing of the preliminary objection in the brief and the hearing of the appeal exceeded three days.

C 3. Whether the Lower Court was right in holding that Section 11(b)(iv) of the Nigeria Airspace Agency Act empowers the Respondent as Appellant to levy in addition to ticket sales charges, “*domestic enroute charges.*”

D

HELD (Unanimously dismissing the appeal per OKORO JSC)

E *ACTIONS - Commencement - Originating summons - Amendment*

F **1. There is no modicum of doubt that the Appellant herein commenced this action at the High Court with the Name “Air-line Operators of Nigeria.” Both parties attest to this as the facts are sacrosanct on it. The matter was prosecuted with that name until the Appellant woke up from slumber and realized that such a name was unknown to law. It then filed a motion to have the name corrected which the learned trial judge obliged on the date judgment in the matter was delivered. That amendment, with all intents and purpose took effect from the**

G **date of the originating process filed. This is so because an amendment duly made takes effect from the date of the original document sought to be amended and this applies to every successive further amendment of which ever nature and at whatever stage it is made. Therefore, when the learned trial**

H **judge granted the amendment, it dated back to when the Originating Summons was issued and the action would continue as if the amendment was inserted from the beginning.** (p. 631 H)

Actions - Justice - Need for

2 It is trite that in civil litigations, courts have a duty to aim at and to do substantial justice and allow formal amendments as are necessary for the ultimate achievement of justice and the end of litigation. The amendment thus granted by the trial court was proper. (p. 632 E) B

ACTIONS - Commencement - Legal capacity

3. It is now well settled that a non-existing person, natural or artificial cannot institute an action in court, nor will an action be allowed to be maintained against a Defendant, who as sued, is not a legal person. (p. 632 H) C

ACTIONS - Commencement - Legal personality - Source

4. Juristic or legal personality can only be donated by the enabling law. This can either be the Constitution or a Statute. If the enabling law provides for a particular name by way of juristic or legal personality, a party must sue or be sued in that name. He cannot sue or be sued in any other name. The rationale behind this is that law suits are in essence the determination of legal rights and obligations in any given situation. Therefore only such natural and juristic persons in whom the rights and obligations can be vested are capable of being proper parties to law suits before courts of law. (p. 632 H) D E F

Jurisdiction - Actions - Commencement - Wrong name

5. I must say that the Respondent herein as Appellant at the Court below may have goofed when it decided to use the name of the Appellant herein as originally and inappropriately used at the trial court before the amendment. But was that fatal to the appeal? I do not think so. It is trite that an appeal is a continuation of the case from the court below. It does not initiate a fresh case. As it were, the parties were not in doubt as to the parties to the appeal. Where parties to an appeal are not in doubt but the appeal is wrongly headed, as was done at the court below, it cannot affect the competency of the court to hear the appeal on its merit. (p. 633 C) G H

ACTIONS - Commencement - Misnomer

6. In any case, this is a situation in law which is referred to as a misnomer. A misnomer can be said to be a mistake in name, i.e. giving incorrect name to a person in the writ of summons. It occurs when a mistake is made as to the name of a person who sued or was sued or when an action is brought by or against the wrong name of a person. (p. 634 A)

ACTIONS - Commencement - Misnomer - Effect

7. In the instant case, the Appellant herein actually initiated the suit giving birth to this appeal at the High Court with the name he is now abandoning. All the processes he filed at the court below bore that name even after the amendment was granted at the High Court. He did not contest that name at the court below. He has not shown how he has been affected by the use of that name. Let me state emphatically here that when both parties are quite familiar with the entity envisaged in a Writ of Summons and could not have been misled or have any real doubt or misgiving as to the identity of the person suing or being sued, then there can be no problem of mistaken identity to justify a striking out of the action. A misnomer that will vitiate the proceedings would be such that will cause reasonable doubt as to the identity of the person intending to sue or be sued. The end result of all I have said above is that this issue does not avail the Appellant at all. It is resolved in favour of the Respondent. (p. 634 C)

APPEALS - Hearing - Preliminary objection - Filing - Condition

8. The above rule of the Court of Appeal appears to me to be very clear and unambiguous. It often happens that a Respondent to an appeal may have issues which he considers strong enough to stop the hearing of an appeal. And because, the right of appeal is either given by the Constitution or an enabling Act of Parliament, the courts would not allow it to be taken away just like that. This is why the rules of court make it mandatory that a Respondent intending to rely upon a preliminary objection to the hearing of an appeal "shall" give the Appellant three clear days notice thereof before the hearing,

setting out the grounds of the objection and shall file twenty copies with the Registrar within the same time. The provision is to give the Appellant sufficient notice of the objection so that he would not be taken by surprise. (p. 636 F)

APPEALS - Hearing - Preliminary objection - Non compliance B
9. Order 3 Rule 15(3) (supra) gives the court the discretion where a respondent fails to comply with this rule. The court may either refuse to entertain the objection or may adjourn the hearing at the cost of the Respondent or may make such other order as it thinks fit. (p. 637 A) C

APPEALS - Objections - Incorporated in brief
10. This court has given judicial interpretation to the above rule of court particularly Order 3 Rule 15(1) thereof on the issue of notice. It has been held that although the rule is that a respondent intending to rely on preliminary objection should give the Appellant three days notice before the hearing of the appeal, if such notice is given in the Respondent's brief, it will suffice. In other words, such notice can be given in the brief of the Respondent. In such situation, a Respondent need not thereafter give a separate notice. (p. 637 B) D E

APPEALS - Objection - Leave - Magit's case
11. I refer to the decision of this court in PATRICK D. MAGIT V. UNIVERSITY OF AGRICULTURE, MAKURDI & ORS (2005) 19 NWLR (pt.959) 211 at 238 page 239 paras A - C where this court, per Ogbuagu, JSC held as follows: F

"However, on a more serious note, the method of raising a preliminary objection, apart from giving the Appellant three clear days notice before the date of hearing, is now firmly settled. It may be in the respondent's brief, by a formal separate notice or written objection or both. But there is need for a respondent or his counsel, with the leave of court, to move the objection before the hearing of the substantive appeal. Again, on page 239 thereof, paragraph G, this court held that: G H

"Since the learned counsel for the Respondent, never sought for leave to move the said objection neither did he

breathe/say a word about it before or during the oral hearing of the appeal, the same, is deemed by me as having been abandoned."

That is the position of this court on this issue, at least for now. The complaint of the Appellant in this issue is that he not only gave notice of preliminary objection in the brief, he also argued the preliminary objection in the brief but the lower court discountenanced same merely because he and his counsel were not in court to move the court to consider same before the appeal was heard. That could have sounded as technicality especially as the Appellant at the court below (now Respondent) has replied to it in its reply brief. But this court has taken a firm decision on the matter. (p. 637 C)

D SUPREME COURT - Judgment - Binding nature

12. Where this court has made consistent pronouncement on an issue, no matter how a party feels to the contrary, he has no choice than to submit to the wisdom of this court and continue to pray that may be one day his feeling may become a reality. A Counsel who knows the decision of this court on an issue and yet does otherwise, has himself to blame because this court thrives in even handed justice. (p. 639 A)

F Party - Consistency

13. As was rightly pointed out by the Learned Senior Counsel for the Respondent in their brief, the case of the Appellant at the trial court was an invitation to the court to interpret Section 7(1)(r) of the Nigerian Airspace Management Agency (Establishment etc) Act Cap. No. 90, Laws of the Federation of Nigeria, 2004 as to whether the Agency i.e. the Respondent is entitled to impose a "so-called" Domestic En-Route Charges." It was never their case that the Respondent did not establish that it has provided the services. I do agree with the Learned Counsel for the Respondent that for the Appellant to require at this stage that the Respondent must establish that it has provided the said services is to attempt to set up a new case other than that which it presented at the trial court. The contention of the Appellant at the trial court was not that the

Respondent did not render the services for which it introduced the domestic en-route charges, rather its contention was that these services were part of what they paid for under the Ticket Sales Charge. It is trite that a party cannot be allowed to set up a new case on appeal other than that which it presented at the trial court. There must be consistency in this regard. B
The end result is that all the arguments of the Appellant in this regard go to no issue and of no moment. (p. 640 E)

STATUTES - Interpretation - Principle

14. Now, what can we make out of the above provisions? The cardinal principle of interpretation of statute is that where the words used in a statute are clear and unambiguous the courts should give them their ordinary natural and literal meaning in order to establish the intention of the law maker. It is only where the ordinary or literal meaning of the clear and unambiguous words fails to bring out the intention of the law-maker or leads to an absurdity that resort is had to constructive interpretation. (p. 643 D) D

AVIATION - Revenue drive - Power

15. Based on the myriad of functions of the Respondent listed in Section 7 of the Act reproduced above, Section 11 thereof clearly states the sources of income of the Respondent including Section 11(b) (i) - "en-route local, international facility charges", (b) (iv) - "30 percent of the air ticket sales charges" amongst others. It gives the Agency the power to establish and maintain a fund which shall be paid and credited all fees and funds accruing from the sources listed therein including (b) (i) and (b) (iv) already set out above. It follows unequivocally that one of the head of funds collectable by the Respondent is funds accruing from "en-route local, international facility charges." I agree entirely with the court below that if the intention of the law maker is that "en-route local facility charges" should not be levied and collected by the Respondent, provision would not have been made for its lodgment in a fund created under Section 11 of the Act wherein 30% ticket sales charges which the Appellant conceded Respondent has F G H

the power to collect, are also paid into. It has to be noted that ticket sales charge is unmistakably a charge separately provided for by virtue of Section 11(b) (iv) while that of en-route local charge is in Section 11 (b) (i).

No matter how one looks at the provision, the Respondent is legally endowed to charge for “en-route local facility service.” As I said earlier, the Appellant did not complain at the trial court that the Respondent did not establish that it had provided the said services. Rather it was that the Respondent has no power to levy the charges. For me, the Act establishing the Respondent proves otherwise. Accordingly, I agree with the lower court that based on the Section of the Act already stated, the Respondent has power not only to charge for 30 percent air ticket sales but also to charge en-route local facility services. This issue, as it turns out does not assist the case of the Appellant. (p. 643 F)

REPRESENTATION

O. Jolaawo, Esq. with F. C. Ani, Esq., and M. A. Yunusa, Esq., for the Appellant
Adetunji Oyeyipo, SAN with Mabrok K. Olayiwola, Esq., for the Respondent

CASES REFERRED TO

- Adewunmi v. A-G Ekiti State (2002) 2 NWLR (pt. 751) 474
Afolabi v. Adekunle (1983) 2 SCNLR 141
Abubakar v. Yar’adua (2008) 19 NWLR (pt. 1120) 1
Surakatu v. Nigeria Housing Dev. Society Ltd. (1981) 4 SC 26
Ekwere v. State (1981) 9 SC 3
Ikpasa v. State (1981) 9 SC 5
Onwunali v. State (1992) 9 SC 48
Imonikhe v. A-G Bendel State (1992) NWLR (pt. 248) 396
Oja v. Ogboni (1976) 1 NMLR 95
Okolo v. Union Bank of Nigeria Ltd. (1999) 10 NWLR (pt. 623) 1
SPDC Nig. Ltd. v. Ambah (1999) 3 NWLR (pt. 593) 1
Auto Import Export v. Adebayo (2000) 18 NWLR (pt. 799) 554
Okorodudu v. Okoromadu (1977) 3 SC 29
University of Lagos v. Aigoro (1985) 1 NWLR (pt. 1) 143

Magit v. University of Agriculture Makurdi (2005) 19 NWLR (pt. 959) 211

STATUTE & RULES REFERRED TO

Nigerian Airspace Management Agency Act Cap N90 LFN 2004, ss. 7(i)(r), 11 B
Court of Appeal Rules 2002, O. 3 r. 15(3), O. 6 r. 9(5)

LEAD JUDGMENT BY OKORO JSC

By an originating summons dated 11th January, 2002, Airline Operators of Nigeria commenced an action against the Respondent herein and three others. It set out two questions for determination by the trial court as follows:- C

“i. Whether having regard to the provisions to Section 7(i)(r) and or any other section of the Nigerian Airspace Management Agency (Establishment etc) Decree No. 48 of 1999 which defines the functions of the 1st Defendant to include “charge for services provided by the Agency” and the payment of 5% (five percent) Ticket Sales Charge (TSC) by the Plaintiffs (sic) to the Defendants, the Plaintiffs are not in compliance with the law to entitle the 1st Defendant to impose a “So-Called” Domestic En-Route Charges. E

ii. whether having regard to the said Section 7(i) (r) and or any other section of Decree No. 48 of 1999, the Defendants have and or can exercise any powers to the detriment of the Plaintiffs to arbitrarily vary and or substitute the charges payable by the Plaintiff.” F

The Plaintiff then sought the following reliefs from the trial Federal High Court:

“(a) A declaration that the payment of 5% (five percent), Ticket Sales Charge (TSC) by the Plaintiffs to the Defendants is in compliance with Section 7(i)(r) or any other section(s) of Decree No. 48 of 1999 for services provided for by the Defendants and precludes the 1st Defendant from the imposition of a so-call (sic) domestic en-route charges. G

(b) A declaration that the defendants have no power either under Section 7(i)(r) and or any other section(s), of Decree No.48 of 1999, to the detriment of the Plaintiffs to arbitrarily vary and or substitute the charges payable and being paid by the Plaintiffs;

(c) An order of perpetual injunction restraining the Defendants

either by themselves their agents, servants, representatives, privies and or whosoever acting for and or on their behalf from imposing any further and or other charges except as provided by the law and or has being complied by the Plaintiffs.”

The Originating summons was supported by an Affidavit. The Respondent herein filed a counter affidavit to the originating summons. The 3 other Respondents, apart from the Respondent herein, were struck out for various reasons in the course of the trial and appeal. The Appellant and the Respondent thereafter adopted their respective final written addresses and the matter was adjourned for judgment. In a judgment delivered on the 19th day of June, 2003, the trial court, held that the Plaintiff’s action succeeded and that the Respondent has no statutory power to levy the domestic en-route charges. The Court refused to grant the declaratory reliefs but went ahead to grant the sole injunctive relief.

Before the judgment of the court was delivered, the Plaintiff by motion on notice dated 4th of April, 2003 sought an order of the trial court granting leave to amend the originating summons “*to properly reflect the name of the Plaintiff to wit: “The Incorporated Trustees of Airline Operators of Nigeria” in place of the name: “Airline Operators of Nigeria.” This application was granted by the trial court in spite of opposition from the Respondent. See Page 113 of the Record.*

The Respondent by Notice of Appeal dated 6th August, 2003 filed an appeal contesting the decision of the trial court. The Notice of Appeal contains 4 grounds. The Notice of Appeal was subsequently amended pursuant to an order of the court below and the extant Notice of Appeal is the one dated the 8th day of January, 2004 at Pages 135 - 138 of the Record. The Appellant’s brief of argument at the court below dated 11th May, 2004 is at Pages 154-172 of the Record. In response to the Respondent’s brief of argument in the court below, the Appellant herein (as Respondent in that court) filed its own brief of argument. The said brief of argument which is dated the 28th of April, 2005 is at Pages 186 - 204 of the Record of Appeal. In its said brief, the Appellant herein gave notice of a preliminary objection wherein he contended that “The 1st Respondent’s objection is that the Appeal is not arguable”.

The Appellant thereafter embedded argument in respect of

the Preliminary objection in its brief. In reaction to the Appellant's brief at the court below, the Respondent herein filed a reply brief dated 8th of June, 2005. See Pages 202 - 204 of the Record. When the appeal came up for hearing on the 17th day of November, 2005, the Appellant herein was absent and was not represented by counsel, (pages 205 - 206 of the Record). Counsel to the Respondent herein then moved the court to strike out the Appellant's (who was Respondent) objection for failure to file a formal notice of preliminary objection and to argue it orally in court whereupon the court below reserved judgment. The judgment of the court below which is dated the 15th day of February, 2006 is at Pages 207 - 238 of the Record. In its said judgment the court below held that the objection of the Appellant fell foul of Order 3 Rule 15 of the Court of Appeal Rules, 2002 and accordingly adjudged it incompetent and discounted same. The court below then considered the appeal on its merit and allowed it. In a unanimous judgment, the court held that the Respondent herein had the power under the enabling law to charge the domestic en-route charges and the decision of the trial court was set aside.

Dissatisfied with decision of the court below, the Appellant herein under the name "*The Registered Trustees of the Airline Operators of Nigeria*" filed a Notice of Appeal dated 20th March, 2006.

The Notice of Appeal contains three grounds of appeal out of which the Appellant has formulated three issues for determination. When this appeal came up for hearing on 3rd December, 2013, O. Jolaawo Esq., Counsel for the Appellant leading other Counsel adopted their brief filed on 4/5/2010 but deemed properly filed on 13/10/10. The three issues as contained in the said brief are as follows:-

1. Whether the appeal at the Lower Court was not incompetent in view of the fact that the Respondent therein is not a "person"/ body known to law.
2. Whether the Lower Court was not in error to have struck out the Appellant as Respondent's Preliminary objection on the basis that it was not in compliance with Order 3 Rule 15 of the Court of Appeal Rules 2002 when the number of days between the filing of the preliminary objection in the brief and the hearing of the appeal exceeded three days.

3. Whether the Lower Court was right in holding that Section 11(b)(iv) of the Nigeria Airspace Agency Act empowers the Respondent as Appellant to levy in addition to ticket sales charges, “*domestic enroute charges.*”

On the same date, Adetunji Oyeyipo, SAN who led another Counsel for the Respondent also adopted their brief filed on 9/1/12. In the said brief, three similar issues as that of the Appellant are also distilled.

They include:

1. Whether the appeal as constituted at the Court below was competent to allow the court to hear and determine the appeal on its merit.

2. Was the Court of Appeal right when it discountenanced the Appellant’s preliminary objection because the Appellant neither filed a formal notice of preliminary objection nor argued the objection orally before that court.

3. Has the Respondent, Nigerian Airspace Management Agency the power to levy, in addition to the ticket sales charge, any other charge including the domestic en-route charges under the Nigerian Airspace Management Agency (Establishment etc) Act Cap. N90 Laws of the Federation of Nigeria, 2004.

Since both issues distilled by the Appellant and that of the Respondent speak the same language, I shall proceed to resolve them *seriatim*.

It was the argument of the learned counsel for the Appellant on the first issue that although the Plaintiff (now Appellant) commenced this action at the trial court as Airline Operators of Nigeria, the said name was amended to “*Incorporated Trustees of Airline Operators of Nigeria*” and as such the amendment took effect from the date of commencement of the action, relying on the cases of *ADEWUNMI V. ATTORNEY-GENERAL EKITI STATE* (2002) 2 NWLR (pt.751) 474 at 506, *AFOLABI v. ADEKUNLE* (1983) 2 SCNLR 141. Learned Counsel contended that when the Respondent herein filed an appeal at the court below and deliberately used the Plaintiff’s name which was before the amendment, he was suing a wrong party. That is to say, that the Respondent as Appellant at the lower court prosecuted its appeal against a “*Respondent*” who is not a person in law. He opined that the Respondent being an artificial person, its

correct nomenclature ought to have been employed in prosecuting the matter against it at the lower court. In conclusion, Learned Counsel submitted that the legal personality of the Appellant as Respondent before the lower court having been conferred by statute, the Respondent herein as Appellant at the Court of Appeal could not have properly been given judgment against the Respondent therein in any other name as a court cannot give judgment against a person not known to law. He cited and relied on the case of ABUBAKAR V. YAR'ADUA (2008) 19 NWLR (pt. 1120) 1 at 15 - 125 paras. G - H. He urged the court to resolve this issue in favour of the Appellant.

In his reply, the Learned Senior Counsel for the Respondent referred to the processes filed by the Appellant herein as Respondent at the Court below in which it referred to itself as *"Airline Operators of Nigeria"* and submitted that the parties were never in doubt as to the parties to the appeal. He argued further that where the parties to an appeal are not in doubt but the appeal is wrongly headed, it cannot affect the competence of the court to hear the appeal on its merit, relying on the following cases:- NOFIU SURAKATU V. NIGERIA HOUSING DEVELOPMENT SOCIETY LTD. (1981) 4 SC 26, AKAI AKPAN UDO EKWERE V. THE STATE (1981) 9 SC. 3, GODWIN IKPASA V. THE STATE (1981) 9 SC 5, ORUONYE ONWUNALI V. THE STATE (1992) 9 SC 48.

Furthermore, the Learned Senior Counsel submitted that an appeal is a continuation of the case from the court below and does not initiate a fresh case. According to him, since the trial court had held that the suit initiated under the name Airline Operators of Nigeria was competent enough to allow an amendment to the Incorporated Trustees of Airline Operators of Nigeria, the mistake in putting down the correct name of the Appellant in the heading of the Notice of Appeal does not go to the competence of the appeal. He then urged this court to resolve this issue against the Appellant.

The Appellant's Counsel in his reply brief submitted that the defect in the Respondent's Notice of Appeal (Appellant at the Court below) was in law much more fundamental than those in the authorities cited by the Respondent in its brief. That it is as to substance and not merely form. He urged this court to so hold.

There is no modicum of doubt that the Appellant herein commenced this action at the High Court with the Name "Air-

line Operators of Nigeria.” Both parties attest to this as the facts are sacrosanct on it. The matter was prosecuted with that name until the Appellant woke up from slumber and realized that such a name was unknown to law. It then filed a motion to have the name corrected which the learned trial judge
 B *obliged on the date judgment in the matter was delivered. That amendment, with all intents and purpose took effect from the date of the originating process filed. This is so because an amendment duly made takes effect from the date of the original document sought to be amended and this applies to every*
 C *successive further amendment of which ever nature and at whatever stage it is made. Therefore, when the learned trial judge granted the amendment, it dated back to when the Originating Summons was issued and the action would continue as*
 D *if the amendment was inserted from the beginning.* See ADEWUNMI V. ATTORNEY-GENERAL EKITI STATE (2002) 2 NWLR (pt.751) 474, IMONIKHE V. ATTORNEY-GENERAL, BENDEL STATE (1992) NWLR (pt. 248) 396, OJA v. OGBONI (1976) 1 NMLR 95, OKOLO V. UNION BANK OF NIGERIA LTD (1999) 10 NWLR (pt. 623), SHELL PETROLEUM DEVELOPMENT CO. NIG. LTD V. AMBAH (1999) 3 NWLR (pt. 593) 1.

It is trite that in civil litigations, courts have a duty to aim at and to do substantial justice and allow formal amendments as are necessary for the ultimate achievement of justice and the end of litigation. The amendment thus granted by
 F *the trial court was proper.*

Although the Respondent has touched a bit on this, it is not the main issue. The real issue, is that after the said amendment, the
 G Respondent herein, as Appellant at the court below still used the name originally used to commence the suit at the trial court (for which amendment was effected) to prosecute its appeal. It is this that the Appellant herein is contending that judgment was given by the court below against a wrong party or a party unknown to law.

H *It is now well settled that a non-existing person, natural or artificial cannot institute an action in court, nor will an action be allowed to be maintained against a Defendant, who as sued, is not a legal person. Juristic or legal personality can only be donated by the enabling law. This can either be the*

Constitution or a Statute. If the enabling law provides for a particular name by way of juristic or legal personality, a party must sue or be sued in that name. He cannot sue or be sued in any other name. See ANYAEGBUNAM V. OSAKA (2000) 5 NWLR (pt.657) 386, FAWEHINMI V. NIGERIAN BAR ASSOCIATION (No. 2) (1989) 2 NWLR (pt. 105) 558 at 595, ABUBAKAR V. YAR'ADUA (2008) 19 NWLR (PT. 1120) 1 at 150 - 152 paras. G - H. **The rationale behind this is that law suits are in essence the determination of legal rights and obligations in any given situation. Therefore only such natural and juristic persons in whom the rights and obligations can be vested are capable of being proper parties to law suits before courts of law.**

I must say that the Respondent herein as Appellant at the Court below may have goofed when it decided to use the name of the Appellant herein as originally and inappropriately used at the trial court before the amendment. But was that fatal to the appeal? I do not think so. It is trite that an appeal is a continuation of the case from the court below. It does not initiate a fresh case. As it were, the parties were not in doubt as to the parties to the appeal. Where parties to an appeal are not in doubt but the appeal is wrongly headed, as was done at the court below, it cannot affect the competency of the court to hear the appeal on its merit. This is the view long held by this court in ORUONYE ONWUNALI V. THE STATE (1982) 9 SC 48 wherein Eso, JSC (of blessed memory) held that:

"This court has in the case of NOFIU SURAKATU V. NIGERIA HOUSING DEVELOPMENT SOCIETY LTD & ANOR. (1981) 4 SC. 26 overruled ADIS-ABABA V. ADEYEMI (1976) 12 SC. 51 and since then technical grounds like wrong heading of an appeal does not fetter hearing an appeal on merit."

I strongly agree. May be I should reiterate the view expressed by Aniagolu, JSC (of blessed memory) in JOSEPH AFOLABI & 2 ORS V. JOHN ADEKUNLE & ANOR. (1983) 2 SCNLR 141 at 150 that-

"...it is perhaps necessary to emphasize that justice is not a fencing game in which parties engage themselves in an exercise of out-smarting each other in a whirligig of technicalities, to the detriment of the determination of the substantial issues between them..."

As I said earlier, there is nothing in the record to show that any of the parties was in doubt as to the parties or issues in court and there is no indication that there was any miscarriage of justice.

In any case, this is a situation in law which is referred to as a misnomer. A misnomer can be said to be a mistake in name, i.e. giving incorrect name to a person in the writ of summons. It occurs when a mistake is made as to the name of a person who sued or was sued or when an action is brought by or against the wrong name of a person. In EMERPO J. CONTINENTAL LTD V. CORONA S. & CO., (2006) 11 NWLR (pt. 991) 365, this court held that a misnomer occurs when the correct person is brought to court in a wrong name.

In the instant case, the Appellant herein actually initiated the suit giving birth to this appeal at the High Court with the name he is now abandoning. All the processes he filed at the court below bore that name even after the amendment was granted at the High Court. He did not contest that name at the court below. He has not shown how he has been affected by the use of that name. Let me state emphatically here that when both parties are quite familiar with the entity envisaged in a Writ of Summons and could not have been misled or have any real doubt or misgiving as to the identity of the person suing or being sued, then there can be no problem of mistaken identity to justify a striking out of the action. A misnomer that will vitiate the proceedings would be such that will cause reasonable doubt as to the identity of the person intending to sue or be sued. The end result of all I have said above is that this issue does not avail the Appellant at all. It is resolved in favour of the Respondent.

The second issue attacks the decision of the lower court which discountenanced the notice of preliminary objection given in the brief of the Appellant which was 1st Respondent at the Court below. The said 1st Respondent's brief was filed on 25th April, 2005 based on the lower court's granting of extension of time for 21 days to file same. The Respondent herein as Appellant at the lower court filed its Appellant's Reply Brief on 10th June, 2005 wherein it proffered arguments in reply to the 1st Respondent's preliminary objection. The appeal giving rise to the instant appeal to this court was heard on

17th November, 2005. It was the contention of the Appellant that by Order 3 Rule 15 of the Court of Appeal Rules 2002, applicable at the date the appeal was heard at the court below, it was meant to put the Appellant on notice of the existence of the preliminary objection and not to spring a surprise on the Appellant at the hearing, relying on the case of *AUTO IMPORT EXPORT V. ADEBAYO* (2000) 18 NWLR (pt. 799) 554. It is his further submission that the time between when the Appellant at the lower court was put on notice of the preliminary objection and the time within which the appeal was taken being much longer than the three days required by the Court of Appeal Rules, and the fact evident from the record that the Appellant at the lower court did respond comprehensively to the preliminary objection in its Appellant's reply brief, the purport and intendment of the said rules had been satisfied. It was further contended that although the Counsel for the Respondent at the court below was absent when the appeal was heard, and the lower court having invoked Order 6 Rule 9(5) of the Court of Appeal Rules 2002, and deeming the Respondent's brief as argued, the preliminary objection being an integral part of it, the lower court was in grave error to have discountenanced the notice of preliminary objection. He urged this court to resolve this issue in favour of the Appellant.

In his reply, the Learned Senior Counsel for the Respondent submitted that when the Appellant and its Counsel were absent at the hearing of the appeal, it was proper for the court below to invoke Order 3 Rule 15(i) & (3) of the Court of Appeal Rules 2002, to discountenance the notice of preliminary objection. That the exercise of discretion by the court below to strike out the preliminary objection is unassailable. He relies on the case of *OKORODUDU V. OKOROMADU* (1977) 3 SC. 29 and *UNIVERSITY OF LAGOS V. AIGORO* (1985) 1 NWLR (pt. 1) 143. According to Counsel, the discretion of the court to discountenance the preliminary objection instead of granting an adjournment was done judicially and judiciously. He submitted further that the decision of this court in *AGBAKA V. AMADI* (supra) relied upon by the Appellants was arrived at in the light of the peculiar circumstances of that case in that the objection taken by the Appellant in that case was very strong and the court held that where the grounds of appeal are vague or general in terms or disclose no reasonable ground of appeal, even the court could

suo motu raise the issue and invite counsel to address the court on it. Learned Counsel concluded that apart from AGBAKA V. AMADI (supra), in a vast majority of cases in this court, the court insist that a party intending to rely on a preliminary objection to the hearing of an appeal, must comply with the rules, citing these cases, to wit: NIGERIAN LABORATORY CORPORATION & ANOR. V. PACIFIC MERCHANT BANK LTD (2012) 15 NWLR (pt.1324) 505 at 518 and CHIEF SUNDAY ORIORIE & ORS V. CHIEF SUNDAY OSAIN (2012) 16 NWLR (pt.1327) 560 at 578. He urged this court to resolve this issue in favour of the Respondent.

Let me start by looking at Order 3 Rule 15 of the Court of Appeal Rules 2002, applicable to the issue at hand. It states:

“15(1) A Respondent intending to rely upon a preliminary objection to the hearing of the appeal shall give the Appellant three clear days notice thereof before the hearing setting out the grounds of the objection and it shall file such notice together with twenty copies thereof with the Registrar within the same time.

(2) No objection shall be taken to the hearing of an appeal on the ground that the amount fixed by the Registrar of the Court below under Rule 8(1) of this Order were incorrectly assessed.

(3) If the respondent fails to comply with this rule, the court may refuse to entertain the objection or may adjourn the hearing thereof at the cost of the Respondent or may make such other order as it thinks fit.”

The above rule of the Court of Appeal appears to me to be very clear and unambiguous. It often happens that a Respondent to an appeal may have issues which he considers strong enough to stop the hearing of an appeal. And because, the right of appeal is either given by the Constitution or an enabling Act of Parliament, the courts would not allow it to be taken away just like that. This is why the rules of court make it mandatory that a Respondent intending to rely upon a preliminary objection to the hearing of an appeal “shall” give the Appellant three clear days notice thereof before the hearing, setting out the grounds of the objection and shall file twenty copies with the Registrar within the same time. The provision is to give the Appellant sufficient notice of the objection so that he would not be taken by surprise.

Order 3 Rule 15(3) (supra) gives the court the discretion where a respondent fails to comply with this rule. The court may either refuse to entertain the objection or may adjourn the hearing at the cost of the Respondent or may make such other order as it thinks fit.

This court has given judicial interpretation to the above rule of court particularly Order 3 Rule 15(1) thereof on the issue of notice. It has been held that although the rule is that a respondent intending to rely on preliminary objection should give the Appellant three days notice before the hearing of the appeal, if such notice is given in the Respondent's brief, it will suffice. In other words, such notice can be given in the brief of the Respondent. In such situation, a Respondent need not thereafter give a separate notice. I refer to the decision of this court in PATRICK D. MAGIT V. UNIVERSITY OF AGRICULTURE, MAKURDI & ORS (2005) 19 NWLR (pt.959) 211 at 238 page 239 paras A - C where this court, per Ogbuagu, JSC held as follows:

"However, on a more serious note, the method of raising a preliminary objection, apart from giving the Appellant three clear days notice before the date of hearing, is now firmly settled. It may be in the respondent's brief, by a formal separate notice or written objection or both. But there is need for a respondent or his counsel, with the leave of court, to move the objection before the hearing of the substantive appeal. See the recent case of TIZA & ANOR V BEGHA (2005) 15 NWLR (pt.949) 616, (2005) 5 SCNJ 168 at 178 - per Musdapher, JSC, citing the cases of CHIEF NSIRIM V. NSIRIM (1990) 5 SCNJ 174, (1990) 3 NWLR (pt. 138) 285, OKOLO V. UNION BANK OF NIG. LTD (1998) 2 NWLR (pt. 539) 618, AREWA TEXTILE PLC V. ABDULLAHI & ANOR (1998) 6 NWLR (pt. 554) 508, AJIDE V. KELANI (1985) 3 NWLR (pt.12) 285 at 257, 258. See also FAWEHINMI V. NBA (No. 1) (1989) 2 NWLR (pt. 105) 494 at 515, 516, (1989) 4 SCNJ, 1 and SALAMI V. MOHAMMED (2000) 9 NWLR (PT. 673) 469; (2000) 6 SCNJ 281."

Again, on page 239 thereof, paragraph G, this court held that:

"Since the learned counsel for the Respondent, never

sought for leave to move the said objection neither did he breathe/say a word about it before or during the oral hearing of the appeal, the same, is deemed by me as having been abandoned."

That is the position of this court on this issue, at least for now. The complaint of the Appellant in this issue is that he not only gave notice of preliminary objection in the brief, he also argued the preliminary objection in the brief but the lower court discountenanced same merely because he and his counsel were not in court to move the court to consider same before the appeal was heard. That could have sounded as technicality especially as the Appellant at the court below (now Respondent) has replied to it in its reply brief. But this court has taken a firm decision on the matter. In a recent case of NATIONAL DEMOCRATIC PARTY (NDP) V. INDEPENDENT ELECTORAL COMMISSION (INEC) (2012) 12 SC. (pt. IV) 24 at 45, this court held as follows:

"It is pertinent to refer to the notice of preliminary objection given by the Respondent on page 4 of its brief of argument. It is equally apposite to say that the said preliminary objection was not moved before this court though argued, hence same was deemed abandoned and liable to be discountenanced. It should be noted that the preliminary objection raised by the Respondent in its brief of argument cannot be deemed argued along with the brief. This is because the Respondent is required to specifically seek leave of court and obtain same when the appeal is being heard to move its objection. Therefore, the Respondent not having been available to seek leave and obtain same to argue its preliminary objection, same is of no moment, it is deemed abandoned and liable to be struck out - See CHIEF NSIRIM V. NSIRIM (1990) 5 SC (pt. 11) 94; ONOCHIE & ORS V. ODOGWU & ORS (2006) 2 SC (pt. 11) 153, ATTORNEY-GENERAL RIVERS STATE v. UDE & ORS (2006) 7 SC (pt. 11) 133, Accordingly, the notice of preliminary objection incorporated in the Respondent's brief of argument is hereby discountenanced and struck out,"

In view of the above unequivocal pronouncements of this court on this issue, the complaint of the Appellant on issue No. 2 cannot find solace in the mouth watering arguments which its coun-

sel made in its brief, though commendable. ***Where this court has made consistent pronouncement on an issue, no matter how a party feels to the contrary, he has no choice than to submit to the wisdom of this court and continue to pray that may be one day his feeling may become a reality. A Counsel who knows the decision of this court on an issue and yet does otherwise, has himself to blame because this court thrives in even handed justice.***

I need not say more on this. Issue 2 is accordingly resolved against the Appellant.

The third and final issue for determination in this appeal is whether the lower court was right in holding that Section 11(b)(iv) Nigeria Airspace Management Agency Act empowers the Respondent as Appellant to levy in addition to ticket sales charges, “domestic en-route charges.”

In his submission, the Learned Counsel for the Appellant, after making reference to Sections 7(1)(r) and 11 of the Act (supra) submitted that the plain words of section 7(1) (r) taken in their ordinary meaning mean that the payments made to the Respondent should be for services rendered. That it presupposes that the said services and the fact of their having been rendered ought to be specified before the Respondent can lawfully claim payment for them. According to him, paragraphs 7(1)(a) - (q) provide for the functions which the Respondent is statutorily empowered to perform while Section 11 of the Act on its part, though it mentioned revenue from specific sources, does not confer any power to charge and that what it provides for is the duty to establish and maintain a fund into which shall be paid and credited fees accruing from the mentioned sources. He concluded that domestic en-route charges are not specified as services to be provided for and/or charged for by the Respondent.

In reply, the Learned Senior Advocate of Nigeria for the Respondent submitted that Appellant’s construction of Section 7 and 11 of the Act is myopic. That for the Appellant to require at this stage that the Respondent must establish that it has provided the said services is to attempt to set up a new case. He submitted that a Plaintiff cannot set up a new case other than that which it presented at the trial court, relying on the cases of ADEGOKE MOTORS LTD V. ADESANYA (1989) 3 NWLR (pt.109) 250 at 266 and OREDOYIN

V. AROWOLO (1989) 4 NWLR (pt. 114) 172 at 211.

It was a further submission of the Learned Counsel for the Respondent that this action having been instituted by way of originating summons which by its very nature calls for the determination of the rights of the parties based on the construction of a law or written documents, parties are therefore not at liberty to begin to contest facts.

In conclusion, the Learned Silk submitted that the objective of Section 7 of the Act is to vest in the Respondent responsibilities which include ensuring that air travel is safe both within the domestic air route and the international air route by providing services to make air travel safe. That Section 7(1)(r) then gives the Respondent the power to charge for services provided by it. He urged this court to resolve this issue against the Appellant.

In coming to its conclusion in the judgment giving birth to this appeal, the court below stated on page 228 of the record of appeal as follows:

“Also, Appellant has the power to levy, in addition to the ticket sales charge per Section 11(b) (iv) en-route local facility. Resultantly, the challenge to the lawful exercise by the Appellant of its powers is futile.”

The above decision is what the Appellant herein has urged this court to set aside. **As was rightly pointed out by the Learned Senior Counsel for the Respondent in their brief, the case of the Appellant at the trial court was an invitation to the court to interpret Section 7(1)(r) of the Nigerian Airspace Management Agency (Establishment etc) Act Cap. No. 90, Laws of the Federation of Nigeria, 2004 as to whether the Agency i.e. the Respondent is entitled to impose a “so-called” Domestic En-Route Charges.” It was never their case that the Respondent did not establish that it has provided the services. I do agree with the Learned Counsel for the Respondent that for the Appellant to require at this stage that the Respondent must establish that it has provided the said services is to attempt to set up a new case other than that which it presented at the trial court. The contention of the Appellant at the trial court was not that the Respondent did not render the services for which it introduced the domestic en-route charges, rather its**

contention was that these services were part of what they paid for under the Ticket Sales Charge. It is trite that a party cannot be allowed to set up a new case on appeal other than that which it presented at the trial court. There must be consistency in this regard. See ADEGOKE MOTORS LTD V. ADESANYA (supra) and OREDOYIN V. AROWOLO (supra). **The end result is that all the arguments of the Appellant in this regard go to no issue and of no moment.** B

Having said that I shall now examine the decision of the lower court in line with the provision of the Act in issue. For ease of reference, I shall reproduce Section 7 (1) and Section 11 of the Act which deal with functions of the Agency and Funds of the Agency respectively. C

Section 7 (1) provides:

“7. Functions of the Agency” D

“(1) The Agency shall:

(a) provide air traffic services in Nigeria, including air traffic control, visual and non-visual aids, aeronautical telecommunications services and electricity supplies relating thereto, to enable public transport, private, business and military aircraft fly, as far as practicable and as safely as possible; E

(b) provide aerodromes at all the major Nigerian airports, the navigation services necessary for the operation of aircraft taking-off and landing and integrate them into the overall flow of air traffic within the Nigerian airspace; F

(c) minimize or prevent interference with the use or effectiveness of all apparatus used in connection with air navigation and for prohibiting or regulating the use of all such apparatus and the display of signs and lights liable to endanger aircraft and endanger the use of the Nigerian airspace; G

(d) generally secure the safety, efficiency and regularity of air navigation, as may be deemed appropriate from time to time;

(e) require persons engaged in or employed in or in connection with air navigation, to supply meteorological information for the purpose of air navigation, as may be deemed appropriate from time to time; H

(f) provide adequate facilities and personnel for effective security of navigational aids outside the airport perimeters;

(g) create conditions for the development, in the most efficient and economic manner, of air transport services,

(h) procure, install and maintain adequate communication, navigation and surveillance and air traffic management facilities at all airports in Nigeria.

B (i) ensure an effective co-ordination in the use of the Nigerian airspace in line with established standards and procedures;

(j) ensure the co-ordination at all levels of decisions relating to airspace management and air traffic control in Nigeria.

C (k) hold meetings with the armed forces on Nigeria's international obligations as they relate to civil and military co-ordination;

(l) promote familiarization visits by civil and military personnel to air traffic service units;

D (m) maintain permanent liaison with the civil air traffic services units and all relevant air defence units, in order to ensure the daily integration or segregation of civil and military air traffic operating within the same or immediately adjacent portions of the Nigerian airspace, employing civil or military radars as necessary.

E (n) obviate the need for civil aircraft to obtain special air defence clearance;

(o) take necessary steps to prevent, as far as possible, penetration of controlled airspace by any aircraft, civil or military without co-ordination with the air traffic control unit concerned.

F (p) encourage research and development relating to all aspects of the Nigerian airspace designed to improve air safety.

(q) undertake systems engineering development and implementation for communications, navigation and surveillance and air traffic management.

G (r) charge for services provided by the Agency;

(s) co-ordinate the implementation of search and rescue services; and

H (t) discharge the operational, technical and financial air traffic service commitments arising from Nigeria's membership of international organization and other air navigation agencies".

Section 11 of the Act also provides:

"11. Fund of the Agency

There shall be established and maintained for the Agency a fund into which shall be paid and credited:

(a) all subventions and budgetary allocation from the Government of the Federation;

(b) all fees and funds accruing from:-

(i) en-route local, international facility charges;

(ii) over flight charges;

(iii) charges on Class B messages;

(iv) 30 percent of the air ticket sales charges;

(v) 30 percent of the cargo sales charges;

(vi) sales of information;

(vii) violation of airspace fines;

(viii) rentage of property, plant and equipment;

(ix) contract registration fees.

(e) all return on investments;

(f) foreign aid and assistance from bilateral agencies; and

(g) all other sums which may, from time to time, accrue to the Agency”.

Now, what can we make out of the above provisions?

The cardinal principle of interpretation of statute is that where the words used in a statute are clear and unambiguous the courts should give them their ordinary natural and literal meaning in order to establish the intention of the law maker. It is only where the ordinary or literal meaning of the clear and unambiguous words fails to bring out the intention of the law-maker or leads to an absurdity that resort is had to constructive interpretation. See ADISA V. OYINWOLA (2000) 10 NWLR (pt. 674) 116 at 174.

Based on the myriad of functions of the Respondent listed in Section 7 of the Act reproduced above, Section 11 thereof clearly states the sources of income of the Respondent including Section 11(b) (i) - “en-route local, international facility charges”, (b) (iv) - “30 percent of the air ticket sales charges” amongst others. It gives the Agency the power to establish and maintain a fund which shall be paid and credited all fees and funds accruing from the sources listed therein including (b) (i) and (b) (iv) already set out above. It follows unequivocally that one of the head of funds collectable by the Respondent is funds accruing from “en-route local, international facility charges.” I agree entirely with the court below

that if the intention of the law maker is that “en-route local facility charges” should not be levied and collected by the Respondent, provision would not have been made for its lodgment in a fund created under Section 11 of the Act wherein 30% ticket sales charges which the Appellant conceded Respondent has the power to collect, are also paid into. It has to be noted that ticket sales charge is unmistakably a charge separately provided for by virtue of Section 11(b) (iv) while that of en-route local charge is in Section 11 (b) (i).

No matter how one looks at the provision, the Respondent is legally endowed to charge for “en-route local facility service.” As I said earlier, the Appellant did not complain at the trial court that the Respondent did not establish that it had provided the said services. Rather it was that the Respondent has no power to levy the charges. For me, the Act establishing the Respondent proves otherwise. Accordingly, I agree with the lower court that based on the Section of the Act already stated, the Respondent has power not only to charge for 30 percent air ticket sales but also to charge en-route local facility services. This issue, as it turns out does not assist the case of the Appellant.

On the whole, having resolved the three issues against the Appellant it only needs to be said that this appeal is devoid of any scintilla of merit and is hereby dismissed. I award costs of N100,000.00 in favour of the Respondent.

MUNTAKA-COOMASSIE JSC

I had the privilege of reading in draft the lead judgment rendered by my learned brother John Okoro JSC. I entirely agree with his lordship’s reasoning which I adopt, with respect.

The three (3) issues were all resolved against the Appellant. The appeal therefore lacks merit.

Based on the Section of the Act already stated, the Respondent has power not only to charge for 30 percent air ticket sales but also to charge en-route local facility services.

PETER-ODILI JSC

I agree with the judgment just delivered by my learned brother, John Inyang Okoro JSC. To show my support with the reasoning, I shall make my comments.

The appellants as plaintiff commenced the suit which culminated in this appeal through an Originating summons dated 11th January 2002 at the Federal High Court, Lagos setting out the following questions for determination.

1. Whether having regard to the provisions of Section 7(1)(r) and or any other Sections of the Nigeria Airspace Management Agency (Establishment etc) Decree No.48 of 1999 which defines the function of the 1st defendant to include “*Charges for services provided by the Agency*” and the payment of 5% (five percent) ticket sales charges (TSC) by the plaintiffs to the defendants, the plaintiffs are not in compliance with the law to entitle the 1st defendant to impose a “*so called*” Domestic En-route Charges.

2. Whether having regard to the said Section 7(1)(r) and or any other Sections of Decree No.48 of 1999 the defendants have and or can exercise any powers to the detriment of the plaintiffs to arbitrarily any and or substitute the charges payable by the plaintiff.

Pursuant to the questions submitted, the plaintiffs sought the following reliefs:

(a) A declaration that the payment of 5% (five percent) Ticket Sales Charge (TSC) by the plaintiff to the defendant is in compliance with Section 7(i) (r) or any other Section(s) of Decree No. 48 of 1999 for services provided or by the defendant and precludes the 1st defendant from the imposition of a so-called domestic en-route charges.

(b) A declaration that the defendants have no power either under Section 7(i)(r) and or any other Section (s) of Decree No. 48 of 1999 to detriment of the plaintiff to arbitrarily vary and or substitute and being paid by the plaintiff.

(c) An order of perpetual injunction restraining the defendant either by themselves, agents, servants, representatives, privies and or whomsoever acting for and on their behalf from imposing any further and or other charges except as provided by law and or as being complied (sic) by the plaintiffs.

The charges in respect of which the appellant as plaintiff com-

menced the said suit were imposed by the 1st respondent as “*Domestic Air Navigation or Domestic En-Route Charges*” for services rendered to airline operators on domestic airspace.

B After the submissions of written addresses and hearing, the trial court delivered its judgment on the 19th of June 2003 wherein the court held among other things that the Originating Summons succeeded and that the respondent had no statutory power to levy the domestic en-route charges. The court refused to grant the declaratory reliefs but went ahead to grant the sole injunctive relief.

C Before the delivery of the judgment, the plaintiff by motion on notice dated 4th of April, 2003 sought an order of the trial court granting leave to amend the originating summons “*to properly reflect the name of the plaintiff to wit*”. *The Incorporated Trustees of Airline Operators of Nigeria*”, in place of the name “*Airline Operators of Nigeria*”. The application was granted by the trial court overruling the objection of the respondent.

E Aggrieved by the said ruling, the respondent filed a Notice of Appeal to the Court of Appeal. The appellant herein filed a Preliminary Objection on the ground that the appeal was not arguable. The court below overruled the preliminary objection and went ahead to hear the appeal on its merits. In its judgment, the Court of Appeal allowed the appeal holding that the respondent herein had the power under the enabling law to charge the domestic en-route charges and the decision of the trial court was set aside.

F Dissatisfied, the appellant herein under the name “*the Registered Trustees of the Airline Operators of Nigeria*” filed a Notice of Appeal dated 20th March, 2006.

G At the hearing on 3rd December, 2013, Mr. O. Jolaawo of counsel for the appellant adopted the Brief of Argument he settled and filed on 4/5/10 which was deemed properly filed on 13/10/10. Also adopted is the Reply Brief filed on 1/1/13 and deemed properly filed on 14/1/13. In the Brief of Argument of the appellant were formulated three issues for determination which are stated as follows:

H 1. Whether the appeal at the Lower Court was not incompetent in view of the fact that the respondent therein is not a “*person/body*” known to law. (Ground One).

2. Whether the Lower Court was not in error to have struck out the appellant as respondent’s preliminary objection on the basis

that it was not in compliance with Order 3 Rule 15 of the Court of Appeal Rules 2002 when the number of days between the filing of the preliminary objection in the brief and the hearing of the appeal exceeded three days. (Ground two)

3. Whether the Lower Court was right in holding that Section 11(b) (iv) of the Nigerian Airspace Agency Act empowers the respondent as appellant to levy in addition to ticket sales charges, *“Domestic En-route Charges”* (Ground Three). B

Learned Senior Advocate, Adetunji Oyeyipo adopted the Brief of Argument he settled for the respondent, filed on 9/1/13 and deemed filed on 14/1/13. He also distilled three issues for determination, viz: C

1. Whether the appeal as constituted at the court below was competent to allow the court to hear and determine the appeal on its merit? D

2. Was the Court of Appeal right when it discountenanced the appellant’s preliminary objection because the appellant neither filed a formal notice of preliminary objection nor argued the objection orally before that court?

3. Has the respondent, Nigerian Airspace management agency the power to levy, in addition to the ticket sales charge, any other charge including the domestic en-route charges under the Nigerian Airspace Management Agency (Establishment etc) Act Cap No. 90 Laws of the Federation of Nigeria 2004? E

I find it easy to utilize the issues as drafted by the appellant’s learned counsel. F

ISSUES ONE & TWO

These questions raise the point on the competence of the appeal at the Court of Appeal and if that court was not in error when it struck out the preliminary objection raised thereat by the respondent therein which is now the appellant. G

Mr. Jolaawo of counsel contended for the appellant that the presence of proper parties before a court grounds the court’s jurisdiction over the parties so as to enable it to adjudicate over the issues presented before it for adjudication. He cited *Green v Green* (1987) 3 NWLR (Pt. 61) 480; *Oloriode v. Oyebi* (1984) 1 SCNLR; That the appellant admit that they commenced this action as plaintiff as Airline Operators of Nigeria but submit that there was an amendment granted H

by the trial court to correct the name to reflect the plaintiff's proper and legal name. That amendment granted takes effect in law from the date of the commencement of the action. He cited *Adewumi v. A.G. Ekiti State* (2002) 2 NWLR (Pt. 75) 474 at 506; *Afolabi v. Adekunle* (1983) 2 SCNLR 141.

B For the appellant was further submitted that the correct nomenclature of the appellant as Respondent at the lower court is "*The Registered Trustees of the Airline Operators of Nigeria*" and is the name under which it is registered and thereby conferred with legal
C personality which connotes the power to sue and be sued in the said name. That the legal personality of the appellant as respondent before the lower court having been conferred by statute the respondent herein as appellant at the Court of Appeal could not have properly been given judgment against the respondent therein in any other
D name as a court cannot give judgment against a person not known to law. He referred to *Abubakar v. Yar'Adua* (2008) 19 NWLR (Pt. 1120) 1 at 150 - 152.

That the operation of the law with respect to legal personality and capacity to sue and be sued is one of strict operation.

E In respect to the issue of the preliminary Objection raised by now appellant at the court below, learned counsel for the appellant said the extant Court of Appeal Rules at the time of hearing in the Court of Appeal was Order 3 Rule 15 of the Court of Appeal Rules which are *impari materia* to Order 2 Rule 9(1) and (2) of the Supreme Court Rules. That in keeping with those rules, the appellant
F herein who was respondent in the court below said they met the provisions which provided for at least three days notice and so when the Court of Appeal struck out the Objection for inadequate notice
G to the other party it did so in error. He relied on *Auto Import Export v Adebayo* (2002) 18 NWLR (Pt. 799) 554 at 580; *Agbaka v. Amadi* (1998) 11 NWLR (Pt. 527).

Mr. Jolaawo of counsel also stated that the absence of the respondent at the hearing of the appeal would have produced the
H effect of considering the Preliminary Objection well argued in their brief as abandoned. That Order 6 Rule 9(5) of the Court of Appeal rules 2002 would have seen to the saving of the objection and being taken alongside the brief of argument as argued.

In response, Mr. Oyeyipo SAN stated that the respondent as

appellant in the court below adopted the name by which the plaintiff/now appellant instituted the action at the trial court to wit:

“Airline Operators of Nigeria”. That the appellant herein in its brief of argument at the court below also adopted that name and kept referring to the 1st respondent in that name. Also in all the processes the appellant filed at the court below. B

Learned senior counsel said the parties were never in doubt as to the parties to the appeal and so the appeal being wrongly headed cannot affect the competence of the court to hear the appeal on its merit. That it is trite that an appeal is a continuation of the case from the trial court since the appeal does not initiate a fresh case. He said as the trial court had held that the suit initiated under the name *“Airline Operators of Nigeria”* “was competent enough to allow the amendment of the name of the plaintiff to *“the Incorporated Trustees of airline Operators of Nigeria*, and this at the instance of the appellant D herein, that the mistake in not putting down the correct name of the appellant in the heading of the Notice of Appeal does not go to the competence of the appeal. He cited *Nofiu Surakatu v. Nigeria Housing Development Society Limited* (1981) 4 SC 26; *Akai Akpan Udo Ekwere v. The State* (1981) 9 SC. 3; *Godwin Ikpasa v. The State* E (1981) 9 SC 6; *Oruonye Onwunali v The State* (1982) 9 SC 48.

On the matter of the Preliminary Objection, Mr. Oyeyipo SAN said the court below exercised its discretion judiciously and judicially in striking out the objection aforesaid. He relied on *Okorodudu v Okoromadu* (1977) 3 SC 29; *University of Lagos v. Aigoro* (1985) F 1 NWLR (Pt. 1) 143; *Nigerian Laboratory Corporation & Anor v. Pacific Merchant Bank Limited* (2012) 15 NWLR (Pt. 1324) 505 at 518; *Chief Sunday Oriorio & Ors v. Chief Sunday Osain* (2012) 16 NWLR (Pt. 1327) 560 at 578. G

In reply on point of law, Mr. Jolaawo of counsel for the appellant said the defect in the respondent’s notice of appeal as appellant at the lower court is in law much more fundamental than the respondent’s counsel is making out. That it goes to the root of the appeal being one to substance and not merely of form. H

The appeal has it’s background with an interesting slant in that appellant commenced the action against the respondent under the name of *“Airline Operators of Nigeria”* as plaintiff. Just before judgment at that court of trial, the appellant as plaintiff applied though

it was opposed by the respondent as defendant to have the plaintiffs name reflected as “*The Incorporated Trustees of Airline Operators of Nigeria*”. The trial court ruled in favour of the plaintiff and effected the amendment of their name and proceeded to judgment. There was no appeal on that amendment, rather the respondent as appellant in the Court of Appeal initiated the appeal in the original name of the plaintiff, that is “*Airline Operators of Nigeria*”. The appellant in the Court of Appeal or the court below contested the grant of the declaratory reliefs asked for by the plaintiff/respondent/appellant. The court below found for the defendant/appellant now respondent and set aside those declaratory reliefs asked for by the plaintiff now appellant hence the current appeal at which the appellant herein is stating that the appeal in the court below was incompetent since the appeal was initiated against “*Airline Operators of Nigeria*”, now no longer a juristic person thereby throwing up the special feature I earlier referred to.

It is now settled law that an appeal is a continuation of the case from the court of trial and the appeal does not stand alone as an independent process without the linkage to the proceedings in the court of first instance. It is therefore with that fact that the wrong heading of a party at the appeal stage as happened in this instance in the court below would not have the effect of rendering the appeal incompetent or described as an appeal against a person, as that against a party unknown to law which would have the effect of a fatality and debar the appeal court from hearing the appeal on its merit. See *Nofiu Surakatu v. Nigeria Housing Development Society Limited* (1981) 4 SC 26; *Akai Akpan Udo Ekwere v The State* (1981) 9 SC. 3; *Oruonye Onwunali v The State* (1982) 9 SC 48.

Also must be stated that nothing has been established to show that any of the parties in that appeal was in doubt as to who the parties were or what the contest at the appellate forum was on. Clearly, this is one of those instances of a misnomer, a mistake not strange as a human error not going into the root of the appeal or the process.

It is for the reason that the wrong heading on appeal is a genuine mistake that the submission of learned counsel for the appellant, that the appeal in the Court of appeal was incompetent which would have affected the process in the Supreme Court is a submission that just will not fly. Indeed, that contention falls flat and cannot

be saved by the cases of *Green v Green* (1987) 3 NWLR (Pt. 61) 480; *Oloriode v Oyebe* (1984) 1 SCNLR; which circumstances are opposite the situation in the case in hand.

Also needed to be said is that when that amendment of the name of the plaintiff was properly reflected by the order of the court of trial it went back to the date of commencement of the action in such a way as if the mistake amended had not taken place. I rely on *Adewunmi v Attorney General of Ekiti State* (2002) 2 NWLR (Pt. 751) 474 at 506, a Supreme Court decision.

On the next issue of whether the Court of Appeal was right in striking out the Preliminary Objection, the appellant herein as respondent in the court below, was right or not. In the case at hand the appellant did not file the preliminary objection, in a separate process rather, the objection and arguments thereof were incorporated in the Brief of Arguments. Preliminary Objection has been provided for under Order 3 Rule 15 of the Court of Appeal Rules 2002, the relevant rules applicable at the point in time. It stipulates thus:

“15 - (1) A Respondent intending to rely upon a preliminary objection to the hearing of the appeal shall give the appellant three clear days notice thereof before the hearing setting out the grounds of objection and it shall file such notice together with twenty copies thereof with the registrar within the same time.

(2) No objection

(3) If the respondent fails to comply with this rule, the court may refuse to entertain the objection or may adjourn the hearing thereof at the cost of the respondent or may make such other order as it thinks fit”.

On the date of hearing of the appeal, the respondent now appellant was not present nor represented by counsel and so the preliminary objection embedded in the Brief of Argument was not moved and the court below, per M. D. Muhammad JCA (as he then was) held:

“In the instant case, we prefer to stick to the very rewarding principle that rules of court, for the purpose of attaining consistency and allowing parties to fully prepare for matters must be obeyed. Resultantly, 1st respondent’s objection that has fallen foul of Order 3 Rule 15 is accordingly adjudged incompetent and discountenanced. The justice of the instant case justified this conclusion.”

The appellant herein in rejecting that conclusion of the court below, asserts that they complied with Order 3 Rule 15 of the Court of Appeal Rules 2002 and that the case of *Agbaka v. Amadi* (1998) 11 NWLR (Pt.527) 16 at 25 availed their course. Learned counsel for the appellant failed to appreciate the extenuating circumstances in *Agbaka v Amadi* for which this court, per Ogwuegbu JSC felt, there could be an exception to the application of Order 3 Rule 15, this being that when the respondent had raised an objection in their brief of argument and given the appellant the opportunity to react to it, when they amended their grounds of appeal and their briefs of argument, they did not incorporate the objection. It was based on that mitigating feature of a very strong objection which went to the root of the appeal that this court in *Agbaka* (supra) was satisfied to grant that exception. It is not a relief easily granted as in this instance where even the appellant and counsel were absent to point at the Preliminary Objection and so the preliminary objection was not covered when the brief was taken as argued. Therefore the objection being not such as the court could suo motu with or without the address of counsel attend to, the result is of course that the objection is abandoned. For certain, the court below exercised its discretion over that preliminary objection judicially and judiciously. See *Okorodudu v. Okoromadu* (1977) 3 SC 29; *University of Lagos v. Aigoro* (1985) 1 NWLR (Pt. 1) 143; *Chief Sunday Oriorio & Ors v. Chief Sunday Osain* (2012) 16 NWLR (Pt. 1327) 560 at 578.

From the above stated reasons, clearly the two questions raised under Issues 1 and 2 are resolved against the appellant and in favour of the respondent.

ISSUE THREE

This poses the question if the lower court was right in holding that Section 11(b)(iv) Nigerian Airspace Agency Act empowers the respondent as appellant to levy in addition to ticket sales charges, “*domestic en-route charges.*”

Referring fully to the relevant provisions of Decree No.48 of 1999 with particular reference to Sections 7(i) (r) and 11, learned counsel for the appellant said that there being no specific mention in the Decree for domestic en-route charges that means that same cannot be charged lawfully by the respondent. That the literal rule of interpretation if employed here will give the words used in the decree

particularly Sections 7 and 11 thereof their ordinary, natural and literal meaning and that reliance on same in this instance brings out the intention of the lawmaker. He cited *Miscellaneous Offences Tribunal v. Okoroafor* (2001) 18 NWLR (Pt.745) 295 at 355; *NDIC v. Okem Ent. Ltd.* (2004) 10 NWLR (Pt.880) 107 at 184 - 185; *A.G. Bendel State v. A.G. Federation* (1981) 10 SC 1; *Owena Bank v. N.S.E. Ltd.* (1997) 8 NWLR (Pt.515) 1; (1972) 3 SC 45. B

The learned counsel for the respondent countered in response by stating that the implication of the principle that an appeal is a continuation of the case at trial is that at the appellate state a plaintiff cannot set up a new case. He cited *Adegoke Motors Limited v Adesanya* (1989) 3 NWLR (Pt. 109) 250 at 266; *Oredoyin v Arowolo* (1989) 4 NWLR (Pt. 114) 172 at 211. That a holistic reading of Section 7 of Cap N90 reveals that the respondent is charged with the function of providing wide ranging air traffic services in Nigeria which include air Traffic control, navigation services etc. That the objective of the section is to vest in the respondent responsibilities which include ensuring that air travel is safe both within the domestic air route and the international air route by providing services to make air travel safe and that section 7 (i) (r) then gives the respondent the power to charge for services provided by it. C D E

The learned Senior Advocate contended that sections 7 and 11 read together would produce the unavoidable conclusion that will be arrived at, which is that the respondent has the power to charge fees and impose fines for all the services it renders or for infractions of its regulations and to pay all funds accruing to it into a fund established and maintained by it. He placed reliance on the cases of: F

Miscellaneous Offences Tribunal v. Okoroafor (2001) 18 NWLR (Pt.745) 295 at 355; *NDIC v. Okem Ent. Ltd.* (2004) 10 NWLR (Pt.880) 107 at 184 - 185. *A.G. Bendel State v. A.G. Federation* (1981) 10 SC 1; *Owena Bank v. N.S.E. Ltd.* (1997) 8 NWLR (Pt.515) 1; *Adejumo v. Governor of Lagos State* (1972) 3 SC 45 at 196 G H

In answer to the question herein posed as to whether or not the respondent had the power to place levies on ticket sales charges and domestic en-route charges. I would quote the relevant sections of the Nigerian Airspace Management Agency (Establishment etc)

Act, Cap N90 LFN 2004 being sections 7 and 11 thereof.

SECTION 7: FUNCTIONS OF THE AGENCY

1. The Agency shall:

- a. Provide air traffic services in Nigeria, including air traffic control, visual and non-visual aids, aeronautical telecommunications services and electricity supplies relating thereto, to enable public transport, private, business and military aircraft fly, as far as practicable and as safely as possible;
- b. Provide aerodromes at all the major Nigerian airports, the navigation services necessary for the operation of aircraft taking-off and landing and integrate them into the overall flow of air traffic within the Nigerian airspace’
- c. Minimize or prevent interference with the use or effectiveness of all apparatus used in connection with air navigation and for prohibiting or regulating the use of all such apparatus and the display of signs and lights liable to endanger the use of the Nigerian airspace;
- d. Generally secure the safety, efficiency and regularity of air navigation;
- e. Require persons engaged in or employed in or in connection with air navigation, as may be deemed appropriate from time to time;
- f. Provide adequate facilities and personnel for effective security of navigational aids outside the airport perimeters;
- g. Create conditions for the development, in the most efficient and economic manner, of air transport services;
- h. Procure install and maintain adequate communication, navigation and surveillance and air management facilities at all airports in Nigeria;
- i. Ensure an effective co-ordination in the use of the Nigeria airspace in line with established standards and procedures;
- j. Ensure the co-ordination at all levels of decisions relating to airspace management and air traffic control in Nigeria;
- k. Hold meetings with the armed forces in Nigeria’s international obligations as they relate to civil and military co-ordination;
- l. Promote familiarization visits by civil and military personnel to air traffic services units;
- m. Maintain permanent liaison with the civil air traffic services units and all relevant air defence units, in order to ensure the

daily integration or segregation of civil and military air traffic operating within the same or immediately adjacent portions of the Nigerian airspace, employing civil or military radars as necessary;

n. Obviate the need for civil aircraft to obtain special air defence clearance;

o. Take necessary steps to prevent, as far as possible, penetration of controlled airspace by any aircraft, civil or military without co-ordination with the air traffic control unit concerned; B

p. Encourage research and development relating to all aspects of the Nigerian airspace designed to improve air safety; C

q. Undertake systems engineering development and implementation for communications, navigation and air traffic management;

r. Charge for services provided by the Agency;

s. Co-ordinate the implementation of search and rescue services; and D

t. Discharge the operational, technical and financial air traffic service commitments arising from Nigeria's membership of international organisation and other air navigation agencies.

Section 11 also provides thus: E

FUNDS OF THE AGENCY

"There shall be established and maintained for the Agency a fund into which shall be paid and credited:

a. All subventions and budgetary allocation from the Government of the Federation; F

b. All fees and funds accruing from-

i. En-route local, international facility charges

ii. Over flight charges;

iii. Charges on Class B messages' G

iv. Thirty percent of the air ticket sales charges;

v. Thirty percent of the cargo sales charges;

vi. Sales of information;

vii. Violation of airspace fines;

viii. Rentage of property, plant and equipment; H

ix. Contract registration fees.

c. All fines payable for violation of air navigation regulations;

d. All sums accruing to the Agency by way of gifts, endowments, bequests, grants or other contributions by persons and orga-

nizations;

e. All return on investments;

f. Foreign aid assistance from bilateral agencies; and

g. All other sums which may, from time to time, accrue to the

Agency.

B The court below also reproduced the above provisions, analysed them carefully, applied the golden rule of interpretation of statutes and held that the respondent is the Agency empowered under Section 11(b) i and iv *“to charge, collect and pay into a fund it maintains for that purpose en-route local facility charges in addition to the 30% of the air ticket sales charges and all other charges under (ii), (iii), (v) g of the same section”*

C Considering the above cited sections of the Act, the court below held, inter alia, that the Agency was empowered, *“to charge, D collect and pay into a fund it maintains for the purpose of en-route local facility charges, in addition to the 30% of the air ticket charges and all other charges under (ii), (iii), (v) g of the same section”*

The learned counsel for the appellant contends that there is no specific mention in the Act, particularly in section 7 thereof to enable the respondent make domestic en-route charges and so cannot charge such charges, therefore making the interpretation employed by the court below erroneous. The reaction of the court below who made the interpretation of sections 7 and 11 of the Act as shown in the judgment of the court below would be captured in brief and in quote hereunder:

“The fallacy of this submission is irrepressible. One keeps only that which it collects. If the intention is that en-route local facility charge would not be levied and collected by the appellant, provision would not have been made for its lodgment in a fund created under Section 11 of the Decree wherein the ticket sales charges which 1st respondent conceded has the power to collect are also paid into. And ticket sales charge is unmistakably a charge separately provided for by virtue of Section 11(b) (iv).”

H I certainly flow along the reasoning and conclusion of the court below which cannot be faulted. The interpretation of the court below is literal and purposive and anything else would be going outside the very provisions of Sections 7 and 11. Also this is one of those statutes which provisions must be read together and not in isolation

so that the intendment of the lawmaker is not lost and the purpose of the statute defeated. I would cite in support the cases of *Ansaldo (Nig.) Ltd v. N.P.F.M.B.* (1991) 2 NWLR (Pt. 174) 392; *Obayuwana v. Governor of Bendel State & Anor.* (1982) 12 SC 147

In conclusion this issue 3 is resolved in favour of the respondent as sections 7 and 11 of the Act read together would produce the empowerment to the respondent to effect those levies or charges. The court below was right in its reasoning and decision, I see no reason for departure or to upset what they did. B

The three issues resolved against the appellant and with the fuller reasoning in the lead judgment, I dismiss this appeal. I abide by the consequential orders made. C

ARIWOOLA JSC

I had the opportunity of reading in draft the lead judgment of my learned brother, Okoro, JSC. I agree entirely with the reasoning therein and the conclusion arrived thereat. The said appeal is no doubt unmeritorious and deserves to be dismissed. Accordingly, I also dismiss the appeal. D

I abide by the consequential order in the said lead judgment including the order on costs in favour of the respondent. E

KEKERE-EKUN JSC

I have had the privilege of reading in draft the judgment of my learned brother, OKORO, JSC just delivered. I agree with the reasoning and conclusion that this appeal lacks merit and should be dismissed. F

This is an appeal against the judgment of the Court of Appeal, Lagos Division delivered on 15/2/2006 allowing the appeal of the respondent herein and setting aside the judgment of the Federal High Court, Lagos Division delivered on 19/6/2003. At the trial court, the appellant herein, as plaintiff filed an originating summons dated 11/1/2002 for the determination of the following questions: G

"i. Whether having regard to the provisions to Section 7 (i) (r) and or any other section of the Nigerian Airspace Management Agency (Establishment etc.) Decree No. 48 of 1999 which defines H

the functions of the 1st Defendant to include “charge for services provided by the Agency” and the payment of 5% (five percent) Ticket Sales Charge (TSC) by the Plaintiffs to the Defendants, the Plaintiffs are not in compliance with the law to entitle the 1st Defendant to impose a “So-called” Domestic En-Route Charges.

B *ii. Whether having regard to the said Section 7(i)(r) and or any other section of Decree No. 48 of 1999, the Defendants have and or can exercise any powers to the detriment of the plaintiffs to arbitrarily vary and or substitute the charges payable by the Plaintiff.”*

C Upon the determination of the questions posed, it sought the following reliefs:

“a. A declaration that the payment of 5% (five percent), Ticket Sales Charge (TSC) by the Plaintiffs to the Defendants is in compliance with Section 7(i) (r) or any other section(s) of the Decree
D *No. 48 of 1999 for services provided for he Defendants and precludes the 1st Defendant from the imposition of a so-call (sic) domestic en-route charges.*

b. A declaration that the defendants have no power either under Section 7(i)(r) and or any other section(s) of Decree No. 48 of
E *1999, to the detriment of the Plaintiffs to arbitrarily vary and or substitute the charges payable and being paid by the Plaintiffs;*

c. An order of perpetual injunction restraining the Defendants either by themselves their agents, servants, representatives,
F *privies and or whoever acting for and or on their behalf from imposing any further and or other charges except as provided by the law and or as being complied by the Plaintiffs.”*

The suit was instituted in the name of “Airline Operators of Nigeria” to challenge the “Domestic Air Navigation” or “Domestic En-
G route Charges” imposed on the appellant (as plaintiff by the respondent for services rendered to airline operators on domestic routes. The respondent reacted to the summons by filing a counter affidavit. The parties also exchanged written addresses and the matter was adjourned for judgment. Before the delivery of the judgment on 19/
H 6/2003 the appellant sought leave to amend the originating summons to properly reflect the name of the plaintiff to wit: “The Incorporated Trustees of Airline Operators of Nigeria”. Despite stiff opposition by the respondent, the application was granted. Thereafter the court proceeded to deliver its judgment.

In its judgment, the trial court held that the plaintiff's claim succeeded on the ground that the appellant herein had no statutory power to levy the domestic en-route charges. It declined to grant the declaratory reliefs but granted the injunctive relief. The respondent herein (as appellant) was dissatisfied with the decision and appealed to the lower court vide a notice of appeal filed on 8/8/03. In the notice of appeal the appellant herein (as 1st respondent) was initially described as "Airspace Operators of Nigeria." The name of the appellant was subsequently amended with leave of the lower court to read, "Airline Operators of Nigeria", without taking cognisance of the earlier amendment of the name as ordered by the trial court on 19/6/03. The parties duly filed and exchanged briefs of argument at the court below. The appellant herein gave notice of preliminary objection in its brief of argument wherein it contended that the appeal is not arguable. The respondent herein filed a reply thereto. At the hearing of the appeal, the appellant was absent. Learned counsel for the respondent urged the court to strike out the preliminary objection for failure of the appellant to file a formal notice and to argue it orally in compliance with Order 3 Rule 15 of the Court of Appeal Rules 2002. The lower court agreed with learned counsel for the respondent and in its judgment held that the preliminary objection was incompetent for being in breach of the rules of that court. It was accordingly discountenanced. The court proceeded to determine the appeal on its merits and unanimously held that the respondent had the power under the enabling law to levy the domestic en-route charges. It allowed the appeal and set aside the decision of the trial court. It is the appellant's dissatisfaction with this decision that has given rise to this appeal.

From the three grounds of appeal contained in the notice of appeal filed on 20/3/2006 the appellant distilled three issues for determination. They are:

1. Whether the appeal at the lower court was not incompetent in view of the fact that the Respondent therein is not a "person"/ body known to law.

2. Whether the lower court was not in error to have struck out the Appellant as Respondent's Preliminary Objection on the basis that it was not in compliance with O 3 R 15 of the Court of Appeal Rules 2002 when the number of days between the filing of the Pre-

liminary Objection in the brief and the hearing of the appeal exceeded 3 days.

3. Whether the lower court was right in holding that Section 11(b) (iv) of the Nigeria Airspace Agency Act empowers the Respondent as Appellant to levy in addition to ticket sales charges, “domestic
B en route charges”.

It is the contention of learned counsel for the appellant, O.O. JOLAAWO ESQ., that by the amendment of its name to read “Air-
C line Operators of Nigeria” the respondent herein had prosecuted its appeal against a non-existent respondent, as it could only sue and be sued in its corporate name, Incorporated Trustees of Airline Operators of Nigeria. He argued that in the circumstances the lower court could not properly have given judgment in this case against a non-juristic person.

D Learned Senior Counsel for the respondent, A. OYEYIPO, SAN on the other hand argued that the parties were never in doubt as to the parties to the appeal. He submitted that in view of the fact that an appeal is a continuation of the case from the court below and the trial court had allowed the amendment of the respondent’s name,
E the error in not stating the respondent’s correct name in the notice of appeal does not go to the competence of the appeal.

It is not in dispute between the parties that upon the application of the appellant herein at the trial court, its name as contained in the originating summons was amended to read “*The Incorporated
F Trustees of Airline Operators of Nigeria*”. The relevant application is at pages 88 - 91 of the record. It was granted “*in terms*” at page 113 of the record. The law is settled that once an amendment is granted, what stood before the amendment is no longer material before the
G court. See: Katto Vs CBN (1999) 6 NWLR (Pt.607) 390 @ 412 D - E; Rotimi Vs. McGregor (1974) 11 SC 133 @ 152. It is also settled law that an amendment takes effect from the date of the original document sought to be amended. Once the amendment is made the action will continue as if the amendment had been inserted from the
H beginning. See: A.G. Ekiti State Vs Adewumi & Anor (2002) 1 SC 47 @ 63 lines 31 - 41; Sneade vs. Watherton (1904) 1 K.B. 295 @ 297; Oguma Associated Companies (Nig.) Ltd. vs. I.B.W.A. (1988) 1 NWLR (Pt.73) 658 @ 673 C - D. It follows therefore that to all intents and purposes the proper respondent in the appeal before the

lower court was the incorporated Trustees of Airline Operators of Nigeria, notwithstanding the error committed by the respondent in using the name as originally contained in the originating summons. The error in my view, amounts to a misnomer, since by the amendment granted by the trial court the proper parties were already before the court. I also agree with learned counsel for the appellant that none of the parties was misled by the mistake as to the proper parties to the appeal. B

The courts have been admonished time and time again to eschew technicalities in favour of substantial justice. In the instant case, the error does not affect the competence of the appeal and cannot deter the court from considering the appeal on its merits. This issue is accordingly resolved against the appellant. C

With regard to Issue 2, it is the appellant's contention that having raised and argued a preliminary objection in its brief of argument in compliance with Order 3 Rule 15 of the Court of Appeal Rules 2002, to which the respondent duly responded, the lower court erred in discountenancing it. He was of the view that the respondent had ample notice of the preliminary objection/ as the appeal was heard much later than three days after it was filed. He also noted that the respondent filed a comprehensive reply thereto. He relied on: *Agbaka Vs Amadi* (1998) 11 NWLR (Pt.572) 16 @ 25. He attempted to distinguish the facts of this case from the facts in: *Oforkire Vs Maduiké* (2003) 5 NWLR (Pt.812) 166 @ 178 - 179 D - B; also reported in (2003) 1 SCNJ 440, wherein this court held that the giving of a notice of preliminary objection in a respondent's brief does not dispense with the need for the respondent to move the court at the oral hearing of the appeal for the relief prayed for. The distinction, in his view is that in *Agbaka's* case the respondent's counsel was in court but failed to make any submission in respect of the preliminary objection, while in the instant case learned counsel, though absent, was deemed to have argued the appeal pursuant to Order 6 Rule 9 (5) of the Court of Appeal Rules 2002 on the basis of his brief, which incorporated the preliminary objection. F G H

Learned Senior Counsel for the respondent submitted that the lower court judiciously and judicially exercised its discretion under Order 3 Rule 15(3) of the Rules by declining to entertain the preliminary objection after giving careful consideration to relevant

authorities and the rules of court. He also pointed out that most of the decisions of this court, including very recent ones, support the position taken by the lower court.

I think it is fair to say that the method of raising a preliminary objection, apart from giving the appellant three clear days notice from the date of hearing, is now firmly settled. The respondent may file a separate, formal notice of preliminary objection. Alternatively, he may raise the objection in his brief of argument or he may employ both options. The decided authorities on the issue are to the effect that there is the need for the respondent or his counsel to seek the leave of the court to move the objection before the hearing of the appeal. The effect of failure to move the objection during the oral hearing of the appeal is that it is deemed abandoned. See: Tiza & Anor. Vs Begha (2005) 15 NWLR (949) 616; (2005) 5 SC (Pt.II) 1 @ 7 where His Lordship Musdapher, JSC stated thus:

“By virtue of Order 3 Rule 15(1) of the Court of Appeal Rules, a respondent intending to rely upon a preliminary objection to the hearing of the appeal shall give the appellant three clear days notice thereof before hearing, setting out the grounds of the objection. Notice of preliminary objection can also be given in the respondent’s brief, but a party filing it in the brief must ask the court for leave to move the objection [when] the oral hearing of the appeal commences. See: Nsirim Vs Nsirim (1990) 3 NWLR (Pt.138) 285; Okolo Vs Union Bank of Nigeria (1988) 2 NWLR (Pt.539) 618; Arewa Textiles Plc. Vs Abdullahi & Brothers Owsawa Ltd. (1998) 6 NWLR (Pt.554) 508; Ajide Vs Kelani (1985) 3 NWLR (Pt.12) 248.” (Emphasis supplied). See also: Magit Vs University Of Agriculture & Ors. (2005) 19 NWLR (959) 211 @ 238 - 239 H-D; Oforkire Vs Maduike (supra).

In Magit Vs University of Agriculture & Ors, (supra), this court stressed the fact that failure to bring the notice in accordance with Order 2 Rule 9 of the Supreme Court Rules, which is in pari materia with Order 3 Rule 15(1) of the Court of Appeal Rules 2002, i.e. failure to file a formal notice of preliminary objection, does not render the preliminary objection ineffective. Reference was made to: Agbaka Vs Amadi & Anor. (supra); Maigoro Vs Garba (1999) 10 NWLR (Pt.624) 555 and Ajide vs. Kelani (supra). However the court held that in view of the failure of learned counsel for the respondent

to seek leave to move the objection at the hearing of the appeal the objection was deemed to have been abandoned. See also: *Nigerian Laboratory Corporation & Anor vs. Pacific Merchant Bank Ltd.* (2012) 15 NWLR (Pt.1324) 505 @ 518 B; *A.G. Rivers State Vs. Ude* (2006) 17 NWLR (Pt.1008) 436.

The argument of learned counsel for the appellant that the preliminary objection ought to have been considered, as the respondent at the court below was deemed to have argued the appeal based on its brief, which incorporated arguments in respect of the said objection, is quite ingenious. B

However, a party who is absent from court cannot be in a better position than if he had been physically present. A respondent who has argued a preliminary objection in his brief must orally seek leave to move the objection at the hearing of the appeal. If he is absent, he forfeits that right. I am therefore of the view that in the circumstances of this case the lower court rightly discountenanced the preliminary objection. I resolve this issue against the appellant. C D

With regard to issue 3, I have carefully examined Sections 7 and 11 of the Nigerian Airspace Management Agency (Establishment etc) Act, Cap. N90 Laws of the Federation of Nigeria (LFN) 2004, which have been set out in full in the lead judgment by my learned brother, Okoro, JSC. Among the functions of the agency, as set out in Section 7(1) of the Act are sub-section (i) [to] “ensure an effective coordination in the use of the Nigerian Airspace in line with established standards and procedures”; sub-section (r) [to] “charge for services provided by the agency.” Section 11 provides for the establishment and maintenance of a fund into which various monies collected by the respondent by way of fees and/or charges shall be paid. E F
Section 11(b) itemizes the various fees and charges. Specifically in sub-paragraph (b) (i) and (iv) it refers to “en-route local, international facility charges” and “30% of the air ticket sales charges”. It is the appellant’s contention that having imposed and collected a 5% Ticket Sales Charge, it amounts to a duplication of charges for the respondent to seek to impose a Domestic En-route charge in addition thereto. G H
The duty of the court when interpreting legislation is to read the enactment as a whole in order to give a sensible meaning to the words used and thereby determine the intention of the law maker. The words used in a statute must be given their natural or ordinary

meaning. See: Ugwu Vs Ararume (2007) 12 NWLR (Pt.1048) 367 @ 519 A - E; Adah Vs. NYSC (2001) 1 NWLR (Pt.963) 65; Tukur vs. Govt of Gongola State (No.2) (1998) 4 NWLR (Pt.117) 517; Ojokolobo Vs. Alamu (1987) 3 NWLR (Pt.61) 377. The court must avoid any interpretation that would lead to absurdity. See: Ansaldo B (Nig.) Ltd. Vs. N.P.F.M.B. (1991) 2 NWLR (Pt.174) 392.

A calm reading of Sections 7 and 11 of the Act referred to shows that the fees and charges itemised in Section 11(b) (i) - (g) are derivable from the execution of the Agency's functions as spelt out in C Section 7 thereof Funds accruing from "en-route local, international facility charges" and "air ticket sales charges" are provided for separately. Giving the words used their natural and ordinary meaning and taking the legislation as a whole, the intention of the lawmaker must be that the respondent is empowered to impose charges under D the separate heads. I am therefore in agreement with the lower court when it held at page 228 of the record as follows:

"One keeps only that which he collects. If the intention is that "en-route local facility charges" would not be levied and collected by the appellant [respondent herein], provision would not have been E made for its lodgment under Section 11 of the Decree wherein the ticket sales charges is unmistakably a charge separately provided for by virtue of Section 11(b)(iv)."

I agree with the court's conclusion that the respondent has F the power to levy. In addition to the ticket sales charge, en-route local facility charge. I therefore resolve this issue against the appellant.

For the above and more detailed reasons well articulated in the lead judgment, I also find this appeal totally lacking in merit. I G dismiss it accordingly. I affirm the judgment of the lower court and abide by the order on costs.