

**SUPREME COURT OF NIGERIA**  
FRIDAY 12TH APRIL, 2013. SC. 166/2003  
**CORAM:- M. S. MUNTAKA-COOMASSIE,**  
**B. RHODES-VIVOUR, N. S. NGWUTA, O. ARIWOOLA,**  
**M. D. MUHAMMAD, JJSC**

ENTERPRISE BANK LIMITED	..... APPELLANT
AND	
1. DEACONESS FLORENCE	
BOSE AROSO	
2. CHIEF DEJI OLATUNJI	
3. ENGR. OLA OLATUNJI	.....RESPONDENTS
4. EVANG. (MRS.) ADUKE	
OMODARA	
5. MISS BUSAYO OLATUNJI	
6. MR. FEMI OLATUNJI	
(For themselves and as representatives of the children of Chief M. O. Olatunji)	

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COURTS - FHC - Jurisdiction - The fact that the COP was once a party and is an agency of FG - Is not enough for the case to be tried by FHC - As there was no claim against him (H1)

ACTIONS - Parties - Joinder of - A person is made party to an action - If the action cannot be effectually and completely settled unless he is a party (H2)

COURT PROCESSES - Parties - Striking off - Estoppel - Where counsel is allowed to delete party from his process - And all counsel proceed to do so and the case is concluded without objection - All sides are deemed satisfied (H3)

WRIT OF SUMMONS - Service of - Outside jurisdiction - Ekiti HC Rules O. 5 r. 1 - The writ is issued by Registrar - And such a process can only be served outside jurisdiction after leave is obtained (H4)

WRIT OF SUMMONS - Service of - Objection - Irregularity in issuance/service of the writ - Will not nullify the proceedings/judgment -

Since appellant took fresh steps in therein (H5)

ACTIONS - Detinue - Proof - Plaintiff must inter alia plead evidence that - He is owner of the property - He has right to possession - And that defendant is in actual possession of the property (H6)

ACTIONS - Detinue - Damages - Measure of damages in detinue is inter alia - Market value of the goods detained - And money representing the normal loss through detention of the goods (H7)

APPEALS - Jurisdiction - Damages - In absence of appeal the trial court's judgment remains inviolate - And SC has no jurisdiction since it handles appeals from CA and not from HC (H8)

### **FACTS**

Before the High Court of Ekiti State sitting at Ado-Ekiti, plaintiff/respondents commenced this action against defendant/appellant, seeking among others for a declaration that appellant's action in trespassing upon and forcefully removing respondents' properties is unlawful and a declaration that the continued detention of the properties despite demand is wrongful and that respondents' are entitled to the immediate possession of their properties. Sometime in 1986, one Kayode Olatunji applied and obtained a loan facility from appellant. The loan was guaranteed by his father Chief M.O. Olatunji (also respondents' father). The father put forward a building as collateral for the transaction.

When the said Kayode defaulted in payment of the loan, appellant obtained judgment against him under the undefended list procedure from Ondo State High Court. The judgment was later registered in Ekiti State High Court. However, Chief M.O. Olatunji was not a party to the proceedings and no notice of default was served on him. Following the judgment, his properties were forcefully taken away on the instructions of appellant. This incident prompted Chief M.O. Olatunji (now represented by respondents) to institute the action in detinue. At the trial, the parties called several witnesses and tendered documents in support of their cases. In his judgment, the learned trial Judge found for respondents and awarded damages against appellant. Aggrieved, appellant appealed to the

Court of Appeal Ilorin division while respondents cross-appealed. The main appeal was dismissed while the cross-appeal was allowed. Aggrieved further, appellant appealed to Supreme Court.

### **ISSUES FOR DETERMINATION**

#### Issue 1

Whether the court below was right in dismissing objections to the jurisdiction of the High Court of Justice of Ekiti State on two points:

(i) Joinder of Commissioner of Police and the deletion of same as 4<sup>th</sup> defendant.

(ii) Issuance of the writ of summons for service outside Ekiti State.

#### Issue 2

Whether the learned Justice of the Court of Appeal were correct in their decision which upheld the appellant's liability to the respondent in the tort of detainee despite the fact that the appellant was not in actual possession of the equipment at the time the respondent demanded for its return.

#### Issue 3

Whether the Court of Appeal applied the correct principles of law in the assessment of special damages for the value of Sawmill equipment, generator, loss of sawmill equipment, loss of income-profit and cost of damaged fence in favour of the respondent.

## **HELD** (Unanimously dismissing the appeal per

**RHODES-VIVOUR JSC**)

*COURTS - FHC - Jurisdiction*

**1. The Commissioner of Police was at a time the 4<sup>th</sup> defendant. The fact that the COP was once a party and is an agency of the Federal Government is not enough for the case to be tried by the Federal High Court. There must be a claim against him. In this case, there was none, and so the Federal High Court had no jurisdiction. The correct venue for the trial was the State High Court.**

**An examination of the originating processes reveals that there is no claim against the Commission of Police Ekiti State, and**

**so the provisions of Section 230(1)(q)(r)(s) of Decree No. 107 of 1993 do not apply. The State High Court is the proper court to hear this matter. Even if the Commissioner of Police was a necessary party, which he is not, not making him a party would not affect or defeat the claim.** (p. 3376 A/E)

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*Parties - Joinder of*

**2. The long settled position of the law is that a person is made a party to the action if and only if the action cannot be effectually and completely settled unless he is a party. The plaintiff has an unfettered right to decide the person against whom to proceed. So also the courts have power to make changes as regards the parties so that in the end there is an effectual adjudication on all matters in controversy.** (p. 3376 C)

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*Parties - Strike off - Estoppel*

**3. A notice of discontinuance is usually filed and heard before proceedings against a party is terminated and his name struck off, but where the court allows counsel to delete a party from his process, and all counsel proceeds to delete the name of the Commissioner of Police as the 4<sup>th</sup> defendant from their pleadings etc and the case proceeds to conclusion without objection, it is conclusive that all sides are satisfied. The appellant is estopped by conduct from complaining on appeal.**

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(p. 3376 H)

*WRIT OF SUMMONS - Service of - Outside jurisdiction*

**4. Order 5 rule 1 of the High Court (Civil Procedure) Rules of Ekiti State states that the writ of summons shall be issued by the Registrar and Rule 6 of Order 5 states that:**

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**“Subject to the provision of these Rules or of any written law in force in the state, no writ of summons for service out of the jurisdiction, or of which notice is to be given out of jurisdiction shall be issued without the leave of court or a judge in chambers.”**

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**The combined effect of the above is that the writ of summons shall be issued by the Registrar and such a process can only be served on the adverse party residing out of jurisdic-**

**tion after leave is obtained.**

**Once the plaintiff (respondent) presented both processes to the Registrar as was done on 22/8/97 and the appropriate fees paid (as was done), in the eyes of the law the plaintiff has done all that is required of him for proceeding to commence. His responsibility comes to an end. It is now the responsibility of the Registrar to ensure compliance with the law. The plaintiff cannot be held liable for incompetent handling of his application/processes by staff in the Registry.** (p. 3378 E)

*WRIT OF SUMMONS - Service of - Propriety*

**5. Granted, there was irregularity in the issuance/service of the writ of summons by the Registry, such an irregularity will not nullify the proceedings and the judgment of the trial court confirmed by the Court of Appeal in view of Order 2 rule 1(1) of the High Court (Civil Procedure) Rules of Ekiti State. Did the appellant take a fresh step?**

**The appellant (defendant) is said to have taken a fresh step if he makes any application to the court. Filing statement of defence is also a fresh step in proceedings. After the appellant (as 1<sup>st</sup> defendant) was served with the writ of summons which he now claims is void, he entered unconditional appearance, filed his statement of defence and amended it. The appellant took part in the proceedings until judgment was delivered. He did not raise objection to the issue and service of the writ of summons. His protests now are clearly an afterthought. He has taken several steps in the proceedings and the time to object to the service of writ of summons on him was at the time it was served on him or immediately thereafter. The objection has not been made within a reasonable time. The writ of summons was in the circumstances properly served on the appellant.** (p. 3379 C)

*ACTIONS - Detinue - Proof*

**6. To succeed in a claim of/for detinue the plaintiff (in this case the respondents) must plead and lead credible evidence to establish the fact that;**

**1. He is the owner of the property**

**2. He has an immediate right to possession of the property.**

**3. The defendant (appellant) is in actual possession of the property.**

**4. That he (the respondents) made a demand on the Defendant to deliver/return his property to him.**

**5. That the defendant (appellant) continues to hold unto the property without lawful excuse and the defendant failed to deliver the property despite repeated demands.**

**C The appellant had possession of the respondents' goods on 13/8/97 after the respondents' goods were illegally taken away from the respondents premises by agents of the appellant and hurriedly sold the same day, 13/8/97 at an auction that an Ondo State High Court found to be illegal. The auction sale was a total nullity. The appellant parted with possession of the goods improperly, consequently title in the goods remained with the appellant on 14/8/97 when the respondent made a demand for them and thereafter. The seizure and sale of the respondents' goods having been declared invalid, the subsequent purchase of the goods by a thirty party is invalid. The respondent has been able to show by credible evidence that the appellant wrongfully/illegally parted with possession of the goods on 13/8/97. The appellant is liable in detinue to the respondents. (pp. 3381 D/3383 C)**

*ACTIONS - Detinue - Damages*

**7. The measure of damages in cases of detinue is:**

**1. The market value of the goods detained**  
**2. A sum of money representing the normal loss through the detention of the goods.**

**3. In cases where the goods have not been profit making the damage for loss arising from the owner's inability to make use of the specific goods which may be classified into general and special damages.**

**In a claim for detinue the respondent (plaintiff) is entitled to damage for loss arising from his inability to make use of his goods, and this can be recovered under either general or special. Furthermore if the plaintiff is able to show /that he has**

**suffered special damages by the detention of his goods such damages if reasonably foreseeable is recoverable.**

**In an action for detinue the plaintiff if successful is entitled to damages till Judgment. In this case from 13/8/97 when the goods were taken away to 21/3/2000 when judgment was delivered. The replacement cost is assessed as at the date of judgment.** (p. 3384 H) B

### *Jurisdiction - Damages*

**8. Learned counsel for the respondents' observed that PW2 led evidence on the stolen sum of N175,000 and the trial court granted the sum as one of the items of special damages. He further observed that since there was no ground of appeal complaining about it in the Court of Appeal and that court made no pronouncement on it, this court has no jurisdiction to pronounce on the award.** C  
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**The sum of N175,000.00 was awarded by the High Court for loss of cash in hand. There was no appeal. The Judgment of the High Court on this issue remains inviolate in the absence of an appeal.** E

**In the absence of leave to raise the issue this court has no jurisdiction to consider the award since this court handles appeals from the Court of Appeal and not from the High Court. This issue is resolved in favour of the respondents.** (p. 3386 B) F

## NOTABLE POINTS OF INTEREST

### **RHODES-VIVOUR JSC**

#### ***1. Grounds of appeal – Distinction*** G

Before making the distinction between grounds of law, mixed law and facts, and facts, first of all read carefully the ground of appeal and its particulars to understand thoroughly the substance of the complaint. Find out if the ground of appeal contests facts. If it does it can only be a ground of facts or mixed law and facts. H

Once facts are not in dispute, that is to say facts are settled. A ground of appeal can never be on facts or mixed law and facts. The ground of appeal can only complain of the wrong application of the

law to settled facts and that is a ground of law. It is very easy to identify a ground of appeal on facts. (p. 3367 B)

## ***2. Court – Competence of***

This court laid down the principles concerning jurisdiction, it said that  
B a court is competent when:

(1) it is properly constituted as regards number and qualifications of the members of the bench and no member is disqualified for one reason or another; and

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

(3) the case comes before the court initiated by due process of law and upon fulfillment of any condition precedent to the exercise of jurisdiction. (p. 3374 G)

## ***3. Conditional appearance – Meaning of***

Conditional appearance is an appearance under protest and usually means an appearance to object to the court's jurisdiction.

E An unconditional appearance means that the party entering appearance has no complaints and is satisfied with issues of Jurisdiction. (p. 3380 A)

## ***REPRESENTATION***

F Professor T. Osipitan, SAN with A. M. Kayode and J. Ozuloha, for the Appellant

Chief A. S. Awomolo, SAN with Chief V. O. Awomolo; O. Ibrahim, A. Oguntaye; T. Osobo and A. Arosanya, for the Respondents

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## ***CASES REFERRED TO***

Nwadike v. Ibekwe (1987) 4 NWLR (pt. 67) 718

Ajayi v. Omorogbe (1993) 6 NWLR (pt. 301) 512

Oluwole v. L.S.D.P.C. (1983) 5 SC 1

H Ojemen v. Momodu (1983) 1 SCNLR 188

N.N.P.C. v. Famfa Oil Ltd. (2012) All FWLR (pt. 635) 204

Ogbechie v. Onochie (1986) 1 NSCC 443

NEPA v. Edegbenro (2002) 18 NWLR (pt. 798) 79

University of Abuja v. Ologe (1996) 4 NWLR (pt. 445) 706

Noibi v. Fikola (1987) 1 NWLR (pt. 52) 619

U.T.B. v. Ukpabia (2000) 8 NWLR (pt. 670) 570

Bronik Motors Ltd. v. Wema Bank Ltd (1983) 1 SCNLR 296

Barclays Bank of Nig. Ltd. v. CBN (1976) 6 SC 173

Madukolu v. Nkemdilim (1962) 1 All NLR 581

PDP v. Sylva (2012) All FWLR (pt. 637) 606

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Nwabueze v. Okoye (1988) 4 NWLR (pt. 91) 664

### **STATUTES RULES REFERRED TO**

Constitution of the Federal Republic of Nigeria, ss. 233(2), 251

C

Supreme Court Rules, O. 6 r. 1

High Court (Civil Procedure) Rules of Ekiti State, O. 2 rr. 1 & 2(i), O. 5 rr. 1 & 6

### **LEAD JUDGMENT BY RHODES-VIVOUR JSC**

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This is an appeal from the judgment of the Ilorin Division of the Court of Appeal, delivered on the 25<sup>th</sup> of March 2002 which affirmed the judgment of an Ado-Ekiti High Court that entered judgment against the appellant and in favour of the respondents. The facts are these.

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In 1986 Kayode Olatunji trading under the name Kaylat Enterprises applied for a loan facility from the appellant. He was successful. The loan was guaranteed by his father. Chief M. O. Olatunji, the Managing Director of a company called Olukayode & Sons Nig. Ltd. The business of the company was/is sawmilling. To perfect the guarantee Chief M. O. Olatunji put forward a building at Ado-Ekiti as collateral. A deed of legal mortgage dated 18/11/86 was duly executed. To further secure the loan Chief M.O. Olatunji executed a personal guarantee form. Unfortunately Kayode Olatunji defaulted. He failed to meet his financial obligations and so judgment was obtained against him under the undefended list procedure from an Ondo State High Court on the 6<sup>th</sup> of August 1997. Chief M.O. Olatunji was not a party to the proceedings and notice of default of debt or demand were never served on him following the default of his son, the principal debtor. The Ondo State High Court judgment was registered at a High Court in Ekiti State and on the 13<sup>th</sup> of August 1997 the 2<sup>nd</sup> defendant (in the High Court), an auctioneer, acting on behalf of the appellant in company of heavily armed policemen went to

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the Sawmill factory of Chief M.O. Olatunji and at gun point carted away the entire sawmill equipment, a 75 KVA generator and cash.

As a result of the strange and frightening events of the 13<sup>th</sup> of August 1997, Chief M. O. Olatunji had a cause of action and so he sued the appellant, its agent and another on a writ of summons and B further amended statement of claim for:

1. A declaration that the action of the defendants in trespassing upon, violently and forcefully removing the sawmill/factory equipment and tools of the plaintiff on the 13th day of August 1997 and C the use of gun against his person is unlawful, irregular, reckless and a violation of the plaintiff's constitutional rights.

2. A declaration that the continued holding unto, detention and denial of the plaintiff of his Sawmill equipments despite demand and the order of this court is wrongful and illegal and the plaintiff is D entitled to possession of his properties forthwith.

3. An Order directing the defendants to return all the Sawmill factory equipment, generating sets and the tools to the plaintiff's premises in specie and install them to their original positions tested and made functional within 2 days from the date of judgment.

E 4. Damages for wrongful detention and losses arising from the illegal, unlawful and reckless actions for the defendant's. During trial the defendants were:

1. Owena Bank PLC (now Enterprise Bank Ltd)
- F 2. Oreoluwa Falana (the Auctioneer)
3. Chief Olukayode (he bought Chief M.O. Olatunji's Sawmill Equipment/Generator e.t.c.)

Seven witnesses testified for the plaintiffs while two witnesses testified for the 1<sup>st</sup> and 2<sup>nd</sup> defendants. The 3<sup>rd</sup> defendant gave evidence for himself. A total of thirty-eight documents were admitted in G evidence.

In a judgment delivered on the 21<sup>st</sup> of March 2000 the learned trial judge ruled that the plaintiff's claims against the 1st and 2<sup>nd</sup> defendants succeeded and proceeded to award the sum of H N30,273,000.00 (thirty million, two hundred and seventy three thousand Naira) against only the 1st and 2<sup>nd</sup> defendants. Only the 1<sup>st</sup> defendant Owena Bank Plc (now Enterprises Bank Ltd) lodged an appeal.

In the penultimate paragraph of the judgment delivered on

the 25<sup>th</sup> of March 2002 the Court of Appeal per Onnoghen JCA (as he then was) said:

*“In conclusion it is my considered view that there are no merits in the main appeal which is accordingly dismissed while I find merit in the cross appeal which is accordingly allowed in the terms contained in this Judgment...”* B

And in the final paragraph his Lordship said:

*“Consequently the judgment of Hon. Justice D. F. Babalola in suit No. HAD/37/97 delivered on 21st March, 2000 is hereby varied in terms contained in this judgment with each party to bear his costs...”* C

This appeal is against that judgment. In accordance with Order 6 rule 1 of the Supreme Court Rule, briefs of argument were filed and exchanged by counsel. The appellant’s 2<sup>nd</sup> amended brief was filed on the 3<sup>rd</sup> of October 2012 while the respondents’ brief was D filed on the 8<sup>th</sup> of October 2012.

At this stage I would suspend consideration of the issues formulated in view of the fact that learned counsel for the respondent has by way of a preliminary objection challenged several of the grounds of appeal from which the issues were formulated. The proper course E would be to consider the preliminary objection. Thereafter one would be in a better position to consider the issues relevant to resolve this appeal.

By notice of preliminary objection filed on 8/10/12 learned F counsel for the respondents’ submits that grounds 1, 2, 5, 6, 7, 10 & 13 in the amended notice of appeal are incompetent in that they violate section 233 (2) of the Constitution, contending that all the grounds are of mixed law and facts which required leave but that leave was not obtained. Relying on *Kano Textile Printers Plc v. Gloede & Hoff (Nig.) Ltd.* (2005) 36 WRN p.73: (2002) 2 NWLR (Pt. 751) 420: *Ubaka Paid Okoye v. The Chief Lands Officer of Rivers State* (2005) 43 WRN p.1 (reported as *Brings v. Chief Lands Officer of Rivers State of Nigeria* (2005) 12 NWLR (Pt. 938) 59). He urged this G court to strike out the said grounds. H

In reply learned counsel for the appellant argued that all the grounds of appeal are grounds of Law. He observed that where a challenge of a ground of appeal relates to non-primary, unchallenged and undisputed facts, such a ground of appeal is a ground of law.

Reliance was placed on *Nwadike v. Ibekwe & ors* (1987) 4 NWLR (Pt. 67) p.718; *Ajayi v. Omorogbe* (1993) 6 NWLR (Pt. 301) p.512.

He urged this court to dismiss the preliminary objection, section 233 (2) of the 1999 Constitution reads:

B *“(2) An appeal shall lie from decisions of the Court of Appeal to the Supreme Court as of right in the following cases:*

*(a) Where the ground of appeal involves questions of law alone, decision in any civil or criminal proceedings before the Court of Appeal;*

C *(3) Subject to the provision of sub-section (2) of this section, an appeal shall lie from the decision of the Court of Appeal to the Supreme Court with the leave of the Court of Appeal or the Supreme Court.*

D By virtue of the above if the ground of appeal from the Court of Appeal to the Supreme Court involves questions of law alone the appellant can appeal as of right. If or when a ground of appeal is based on facts alone or on mixed law and facts, it cannot be filed in the Supreme Court unless leave is sought and obtained. See: *Oluwole v. L.S.D.P.C.* (1983) 5 SC p. 1; *Nwadike v. Ibekwe* (1987) 4 NWLR E (Pt. 67) p.718.

The above is very important in that the Supreme Court would have no jurisdiction to hear an appeal where the grounds of appeal are on facts or/and mixed law and facts and the appellant never sought and obtained leave to file the grounds. See: *Ojemen v. Momodu* (1983.) 1 SCNLR p. 188. In *N.N.P.C. & Anor v. Famfa Oil Ltd.* (2012) All FWLR (Pt.635) p.204; (2012) 17 NWLR (Pt. 1328) 148.

F I did a comprehensive examination and review of leading cases on the distinction between grounds of law, mixed law and facts G and facts and observed that.

*“At times this difference between a ground of law and a ground of mixed law and facts can be very narrow. Labeling a ground of appeal error of law, or misdirection may not necessarily be so. The appellation is irrelevant in determining whether a ground of appeal is H of law or mixed law and fact.”*

On how to make the distinction I said that:

*“The court should examine the grounds and their particulars and identify the substance of the complaint.*

*In that way the issue of whether a ground of appeal is of fact or*

*mixed law and fact would be resolved. Identifying a ground of appeal on facts is easier...”*

See further *Ogbechie & Ors. v. Onochie & Ors.* (1986) 1 NSCC p.443; (1986) 2 NWLR (Pt. 23) 484; *Nwadike v. Ibekwe* (1987) 4 NWLR (Pt. 67) p.718; *Ajuwa & Anor. v. LSDPC* (2011) 12 SC (Pt. IV) p. 118; (2011) 18 NWLR (Pt. 1279) 797; *Opuio v. Omoniwari* (2007) 6 SC (Pt. 1) p.35; (2007) 16 NWLR (Pt. 1060) 415. B

Before making the distinction between grounds of law, mixed law and facts, and facts, first of all read carefully the ground of appeal and its particulars to understand thoroughly the substance of the complaint. Find out if the ground of appeal contests facts. If it does it can only be a ground of facts or mixed law and facts. C

Once facts are not in dispute, that is to say facts are settled. A ground of appeal can never be on facts or mixed law and facts. The ground of appeal can only complain of the wrong application of the law to settled facts and that is a ground of law. It is very easy to identify a ground of appeal on facts. D

It is important I reproduce all the grounds of appeal complained of seriatim and make findings accordingly. E

Ground 1:

The learned Justice of the Court of Appeal erred in law by holding that the respondent case as constituted at the trial court is competent when it was apparent on the record that leave was not obtained before it was issued for service outside Jurisdiction. F

Particulars of Error:

*(a) Respondent instituted the process at the trial court by filing his writ on 22/8/97.*

*(b) Respondent indicated on the writ that it was to be served G outside the jurisdiction of Ekiti State.*

*(c) On the same date, respondent filed an application for leave for the said writ to be issued and served on the defendant.*

*(d) Leave was granted for the said writ to be issued and served on 25/8/97. H*

*(e) Whereas Order 5 rule 15 of the trial court prescribes that a writ is issued as soon as the processes are filed.*

*(f) The respondent in his affidavit of urgency deposed to on 22/8/97 deposed to the fact that he had filed all necessary processes.*

*(g) Despite all the documentary and affidavit evidence supporting the fact that leave was not obtained before the writ was issued, the lower court held that it was not satisfied by the record that leave to issue the writ was not obtained."*

The complaint in this ground is that the court was wrong to hold that the respondent's case was competent when it was clear that leave to issue the writ of summons was granted after the writ was issued instead of before the writ of summons was issued. The settled facts are that the writ of summons is dated 22/8/97 while leave to issue writ of summons was granted on 25/8/97.

The ground of appeal is not contesting settled facts. What the ground of appeal is saying is that the judge made a wrong inference from established facts that are apparent on the record of appeal. That the judge disregarded evidence in the writ of summons dated 22/8/97 when he held that it was served on 25/8/97. What the judge did according to the ground of appeal amounts to failure to ascribe proper weight to relevant materials and established facts (the dates). This is a ground of law.

#### Ground 2:

The learned Justices of the Court of Appeal erred in law when they held the appellant liable to the respondent in the tort of detinue.

#### Particulars of Error:

(a) The unchallenged evidence on record shows that the appellant had parted with possession of the Sawmill equipments to Samuel Olukayode & Sons Ltd prior to the commencement of the action.

(b) The learned Justices of the court of Appeal ignored the principle that the gist of detinue lies in unconditional refusal by a person in possession to surrender possession of chattels.

(c) The non-joinder of Samuel Olukayode & Sons Ltd that was admittedly in possession of the sawmill equipments was fatal to the suit.

The settled facts are that on the 13<sup>th</sup> of August 1997 agents of the appellant took away the respondents sawmill equipments and sold it at an Auction on the same day. The respondent made a demand for the return of his equipment.

The complaint is that on these facts both courts ought not to have found the appellant liable for the ton of detinue. That is to say

both courts wrongly applied the law to undisputed facts. The ground of appeal questions the application of the law of detinue to settled facts. This is a ground of law. Particular C is naked. It is abandoned. Ground 5

The learned Justice of the Court of Appeal erred in law by awarding the sum of N4,375.000 to the respondent as the replacement and installation costs of 75 KVA Leyland Generator taken away. B

*Particulars of Error*

(a) The respondent claim was an item of special damages which was not strictly proved as required by law. C

(b) The evidence were at variance with the pleading.

(c) There was no evidence of the value of the 75KVA Leyland Generator at the time of removal.

(d) The pleading is devoid of the date and purchase price of the 15 KVA Leyland Generator. D

(e) The award was made on the basis of new for old.

(f) The respondent did not adduce evidence of the installation cost of the Generator.

The complaint is that the award for special damages was wrong since it was awarded without taking into consideration the principles governing an award in a case of detinue. The award was made without evidence and the award ought not to have been made as the plaintiff/respondent failed to attain the standard of proof required for such an award. This is clearly a ground of law. Facts are not in issue. E F

*Ground 6*

The learned Justices of the Court of Appeal erred in law when they held that the respondent was entitled to damages assessed at N50,000.00 per day for period of 365 days as loss of income on the equipments. G

*Particulars of Error*

(a) The claim for loss of income was not strictly proved as required by law.

(b) The award for 365 days ignored the principle that the respondent has a duty to mitigate his losses by immediately replacing the equipment and Generator. H

The complaint is that the court considered and applied wrong principles of law in awarding N50.000 per day for a period of 365 days for loss of income on equipment. Furthermore the court failed

to properly apply the principles when considering mitigation of damages. In other words the court misapplied the Urn on the issue of damages for loss of use, and the position of the law that the respondent has a duty to mitigate his losses. This is a ground of law.

**Ground 7**

- B** The learned Justices of the Court of Appeal erred in law when they held that income tax assessment and payments made by the respondent were not relevant for the purpose of assessing the loss of income claimed by the respondent.

**C** **Particulars of Error**

(a) The respondent instituted the action in his personal capacity. Tax payments made by him are relevant for the purpose of determining his income.

- (b) The income tax paid by the respondent rendered the respondents' claim of daily profit of N50.000 improbable.

The ground questions the holding by the Court of Appeal that the income tax assessment of the respondent is irrelevant when addressing the claim for loss of income. This reasoning in the view of the appellant amounts to a wrongful exclusion of vital evidence.

- E** This is a ground of law.

**Ground 10**

The learned Justices of the Court of Appeal erred in laws when they held the appellant liable for the sum of N175.000.00 being money allegedly taken the appellants and their agents/servants.

**F** **Particulars of Error**

(a) The allegation of unlawful taking of N175.000.00 was an allegation of crime which was expected but was not proved beyond reasonable doubt as required by law.

- G** The sum of N175,000.00 is/was alleged to have been taken away by agents of the appellant when they carted away the respondents sawmill equipment etc on the 13th of August 1997.

- H** The complaint is that there must be proof beyond reasonable doubt before the appellant can be held liable and in this case there was no such proof. This is a ground of law.

**Ground 13**

The learned Justices of the Court of Appeal erred in law by holding that learned trial judge should not (in the absence of specific pleading on mitigation have suo motu applied the principle of miti-

gation of losses in the assessment of damages.

Particulars of Error

(a) Learned trial judge was entitled to consider and apply relevant principles in the assessment of damages.

(b) The appellant is not duty bound to plead mitigation of damages as quantum of damages claimed is presumed to be in issue. B

The complaint is whether mitigation of damages should be pleaded and whether correct principles were considered before damages were assessed. This is a ground of law.

My Lords, the appellant has not challenged facts in any of the grounds of appeal. In grounds 1, 2, 5, 6, 7, 10 and 13 the appellant is challenging the application of the law to undisputed facts. The grounds of appeal are grounds of law. By virtue of section 233(2) of the Constitution, leave is not necessary before they are filed. They are filed as of right. Consequently the preliminary objection is hereby D dismissed.

The Main Appeal

Learned counsel for the appellant Professor T. Osipitan, SAN distilled eight issues from his amended notice of appeal which contained thirteen grounds of appeal. The issues are: E

1. Whether the Court of Appeal rightly held that the writ of summons which was issued by the respondent in Ekiti State and for service on the appellant in Ondo State was properly issued.

2. Whether the Court of Appeal rightly held that despite the joinder of the 4<sup>th</sup> defendant as a party to the suit, Ekiti State High Court still had jurisdiction to entertain the respondents' suit. F

3. Whether the learned Justices of Court of Appeal were correct in their decision which upheld the appellant's liability to the respondents in the ton of detinue despite p the fact that the appellant G was not in actual possession of the equipment at the time the respondents demanded for its return.

4. Whether the Court of Appeal applied the correct principles of law in the assessment of special damages for the value of Sawmill equipment. Generator, loss of Sawmill equipment, loss of H income profit and cost of damaged fence in favour of the respondents.

5. Whether learned Justices of the Court of Appeal applied the correct principles of law in arriving at the decision to award the

sum of N4.375.000 being the cost of a new Leyland Generator for the purpose of replacing the respondents' used Generator.

6. Whether the learned Justices of the Court of Appeal correctly or wrongly endorsed the award of N18 million as loss of income on the respondents' Generator.

B 7. Whether the respondents who alleged that the appellant and his agent stole the sum of N175,000.00 from the Sawmill discharged the required onus.

C 8. Whether the learned Justice of the Court of Appeal rightly or wrongly reversed the decision of the court H below which allowed the appellant to amend her statement of defence.

On his part, learned counsel for the respondents Chief A. S. Awomolo, SAN formulated four issues for determination. They read:

D 1. Whether the court below was right in dismissing objections to the jurisdiction of the High Court of Justice of Ekiti State on two points:

(i) Joinder of Commissioner of Police and the deletion of same as 4<sup>th</sup> defendant.

E (ii) Issuance of the writ of summons for service outside Ekiti State.

2. Whether the Court of Appeal correctly appreciated the facts of this case by applying the law on the ton of detinue and not conversion

F 3. Whether the Court of Appeal correctly applied the principles for award of special damages on the claims for detinue, particularly for the replacement of the equipment detained particularly, having regards to the cost of replacement at the date of judgment instead of the date of removal.

G 4. Whether the Court of Appeal was right in the treatment of the award of special damages particularly having regards to matters relating to:

H (a) Past personal income tax of the respondent;  
(b) Mitigation of damages, raised *suo motu*, by the trial judge.  
(c) Loss of use/profit.

After a careful consideration of the issues formulated by both sides it is clear that the respondents' issue 1 and the appellant's issues 1 and 2 ask the same question. That is also the case with the appellant's issue 3 and the respondents' issue 2, the appellant's issue 4, 5, 6. 7

and the respondents issue 3 cover principles to consider in assessing special damages and different heads of monetary awards. They would be taken together for ease of understanding.

Issue 1 is the respondents' issue 1.

Issue 2 is the appellant's issue 3.

Issue 3 is the appellant's issues 4, 5, 6 and 7 and the respondents' issue 4. The appellant's issue 8 would be taken as issue 4, the final. B

At the hearing of the appeal on the 4<sup>th</sup> of February 2013 learned counsel for the appellant Professor T. Osipitan, SAN adopted the appellant's second amended brief filed on the 3<sup>rd</sup> of October 2012, response to preliminary objection and reply on points of law both filed on the 19<sup>th</sup> of October 2012. In amplification he observed that the respondents' cause of action is that the appellant is retaining his property after a demand was made, contending that without a refusal there can be no detinue. He observed that demand for the goods was made a day after sale and that at the time they came to court, 3<sup>rd</sup> party had taken the goods/property. He urged this court to allow the appeal. C D

Learned counsel for the respondents' Chief A. S. Awomolo, SAN observed that even if the appellant's are not in physical possession it is not a defence to detinue. He urged on us to dismiss the appeal. E

Issue 1

Whether the court below was right in dismissing objections to the jurisdiction of the High Court of Justice of Ekiti State on two points: F

(i) Joinder of Commissioner of Police and the deletion of same as 4<sup>th</sup> defendant. G

(ii) Issuance of the writ of summons for service outside Ekiti State.

Issue 1(i) asks the question whether the State High Court had jurisdiction to hear this case in view of the fact that the Commissioner of Police for Ekiti State, an agent of the Federal Government was the 4<sup>th</sup> defendant. H

Learned counsel for the appellant observed that the Court of Appeal erred when they held that the trial court rightly assumed jurisdiction because no claim was made against the 4<sup>th</sup> defendant. He

observed that adverse findings were made by the court against the 4<sup>th</sup> defendant contending that the proper forum to hear the suit is the Federal High Court since the 4<sup>th</sup> defendant is an agent of the Federal government. Reliance was placed on section 230 (i) (p) (Q) and (R) of the 1979 Constitution. NEPA v. Edegbenro (2002) 18 NWLR (Pt. B 798) 79 at p.95; University of Abuja v. Ologe (1996) 4 NWLR (Pt. 445) p.706. He submitted that the name of the 4<sup>th</sup> defendant was deleted but the non-joinder is fatal to his case, and the Federal High Court ought to have heard the case.

C Replying learned counsel for the respondents observed that the Commissioner of Police was initially the 4th defendant but after amendments and corrections were effected, the Commissioner of Police was deleted by both parties an appellant did not complain. Relying on Noibi v. Fikola (1987) 1 NWLR (Pt. 52) p.619.

D He submitted that the appellant conceded to the deletion of the Commissioner of Police. He urged the court to dismiss the objection.

E Section 230(i) of the 1979 Constitution under which this case was considered, now section 251(i) of the 1999 Constitution contains several items which only the Federal High Court has jurisdiction to entertain. They are exclusive to the Federal High Court and in a plethora of cases the courts have explained the said provisions. See U.T.B. v. Ukpabia (2000) 8 NWLR (Pt. 670) p.570; N.E.RD.C. v. Goze (Nig.) Ltd. (2000) 9 NWLR (Pt.673) p.542.

F It must be elementary now that cases conducted without jurisdiction no matter how well handled are a waste of time as the entire proceeding would amount to a nullity. See Bronik Motors Ltd. & Anor v. Wema Bank Ltd. (1983) 1 SCNLR p. 296. Barclays Bank of Nig. Ltd. V. Central Bank of Nig. (1976) 6 SC p. 173; In Madukolu & Ors v. Nkemdilim (1962) 1 All NLR p.581; (1962) 2 SCNLR 341.

This court laid down the principles concerning jurisdiction, it said that a court is competent when:

H (1) it is properly constituted as regards number and qualifications of the members of the bench and no member is disqualified for one reason or another; and

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

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

This issue on jurisdiction falls within (2) above. The Court of Appeal examined processes and section 230(i)(q)(r)(s) of the 1979 Constitution and had this to say: B

*“...In fact the 1<sup>st</sup> respondent made no allegation against the Commissioner of Police neither did he claim any relief against him in the statement of claim. The fact being what they are, the question that falls for decision is whether the mere fact that the said Commissioner of Police is mentioned as a party in the writ of summons robs the trial court, being a State High Court of the jurisdiction to entertain the case having regards to the provision of Decree 107 of 1993, section 230(i)(q)(r) and (s) thereof.”* C

The Court of Appeal went on, per Onnoghen, JCA (as he then was): D

*“...I have carefully gone through the claims in the statement of claim (further amended) and there is no claim whatsoever against the Commissioner of Police, Ekiti State neither was his name reflected in the said document as a party to the action. It is therefore my considered view that since no claim was made on the Commissioner of Police, Ekiti State let alone in terms of the provisions of section 230 (i) (q) (r) (s) of Decree No. 107 of 1993 the jurisdiction of the State High Court in hearing and determining the present action cannot be doubted. I therefore hold that the Ekiti State High Court of Justice has the competence to hear and determine the matter...”* E

I am in complete agreement with the Court of Appeal. In PD.P v. T. Sylva & 2 Ors. (2012) All FWLR (Pt. 637) p.606; (2012) 13 NWLR (Pt. 1316)85, I explained jurisdiction under section 251 of the Constitution and said that; F

*“When the jurisdiction of the Federal High Court is in issue the following must co-exist;*

*(a) The parties or a party must be the Federal Government or its agency.* H

*(b) Subject matter of the Litigation.” Satisfying the above is not the end of the matter.*

*“The pleadings of the plaintiff must be carefully examined so as to understand the facts and circumstances of the case in order to*

*determine if the claims are within the jurisdiction of the court. It is clearly not enough only to have an agency of the Federal Government as a party before Federal High Court has jurisdiction...”*

Applying the above to the facts of this case. **The Commissioner of Police was at a time the 4<sup>th</sup> defendant. The fact that the COP was once a party and is an agency of the Federal Government is not enough for the case to be tried by the Federal High Court. There must be a claim against him. In this case, there was none, and so the Federal High Court had no jurisdiction. The correct venue for the trial was the State High Court.**

**The long settled position of the law is that a person is made a party to the action if and only if the action cannot be effectually and completely settled unless he is a party. The plaintiff has an unfettered right to decide the person against whom to proceed. So also the courts have power to make changes as regards the parties so that in the end there is an effectual adjudication on all matters in controversy.** However the non joinder of a party cannot defeat a claim. See Van Gelder Apsiman & Co. v. Sowerby Bridge United District Flour Society (1890) 44 Ch.D p.374; Onayemi v. Okwiubi & Anor (1966) NMLR p.50.

**An examination of the originating processes reveals that there is no claim against the Commission of Police Ekiti State, and so the provisions of Section 230(1)(q)(r)(s) of Decree No. 107 of 1993 do not apply. The State High Court is the proper court to hear this matter. Even if the Commissioner of Police was a necessary party, which he is not, not making him a party would not affect or defeat the claim.**

A very important point is that 4<sup>th</sup> defendant in the trial court was the Commissioner of Police, but after amendments and corrections effected to the processes the name of the 4<sup>th</sup> defendant was deleted by both sides. The further amended statement of claim and the appellant's own pleadings on which this case was fought does not have a fourth defendant or the Commissioner of Police as the 4<sup>th</sup> defendant. There are only three defendants.

**A notice of discontinuance is usually filed and heard before proceedings against a party is terminated and his name struck off, but where the court allows counsel to delete a party**

***from his process, and all counsel proceeds to delete the name of the Commissioner of Police as the 4<sup>th</sup> defendant from their pleadings etc and the case proceeds to conclusion without objection, it is conclusive that all sides are satisfied. The appellant is estopped by conduct from complaining on appeal.***

A party (the appellant) cannot acquiesce to a procedure and then turn round after trial to complain- B

(ii) asks the question whether the Court of Appeal rightly held that the writ of summons which was issued by the respondent in Ekiti State and for service on the appellant in Ondo State was properly issued. C

Learned counsel for the appellant observed that this suit was filed in Ekiti State but since the 1st, 2<sup>nd</sup> and 3rd defendants at the trial court resided in Ondo State the writ of summons must be served on them in Ondo State after leave must first have been obtained from the Ekiti High Court. He further observed that the writ of summons which is endorsed for service out of jurisdiction (i.e. in Ondo State) is dated 22/8/97 but it was on 25/8/97 that the plaintiff obtained leave on an *ex pane* motion for service of the writ of summons out of jurisdiction. He submitted that the substantive suit was before the trial court on 22/8/97 before leave was granted to issue the writ of summons on 25/8/97, contending that leave was obtained after this writ of summons had already been issued on 22/8/97. Concluding he submitted that since leave was not first obtained before it was issued the entire proceedings are void. Reliance as placed on *Nwabueze v. Okoye* (1988) 4 NWLR (Pt. 91) p.664; *N.E.P.A. v. Onah* (1997) 1 NWLR (Pt.484) p.680. D E F

Learned counsel for the respondent observed that the appellant received the writ of summons, filed an unconditional memorandum of appearance, filed pleadings, participated in the full trial, amended statement of defence, led evidence and copiously addressed the court, further observing that it was in the Court of Appeal that invalidity and incompetence of the writ of summons was raised for the first time. He submitted that the law presumes that the appellant was aware of the alleged irregularity immediately the writ of summons was served in August 1997 and so appellant is estopped at this stage from complaining. Reliance was placed on *Adegoke Motors Ltd. v. Adesanya* (1989) 2 NSCC Vol. 20 p.327; (1989) 3 NWLR (Pt. 109) G H

3378 Enterprise Bank Ltd. v. Aroso (2014) 9-11 KLR Rhodes-Vivour JSC  
250; Odita Investment Co. Ltd. v. Talabi (1997) 10 NWLR (Pt.523)  
pt.1.

He urged the court to dismiss the appeal on this point.

The writ of summons for service out of jurisdiction in Ondo State is dated 22/8/97, while application ex pane for leave to serve  
B the writ of summons on the appellant in Ondo State is dated 22/8/97. The application was granted on 25/8/97. The complaint is that leave ought to come before the writ of summons.

This is how the Court of Appeal handled the issue. That court  
C said:

*"It is on record that the appellant was duly served with the writ of summons so issued and it proceeded to file an unconditional appearance following same up with the filing of the statement of defence. The appellant also participated fully in the trial without raising  
D any objection to the issues and services of the writ of summons on it. The appellant only protested when it lost the case at the lower court. From the authorities of the Supreme Court reproduced earlier in this judgment. It is clear that the law is not on the side of the appellant. The Jaw presumes that the appellant has lost his right to complain of  
E the original defect due to the fact that he has taken steps in the proceedings after becoming aware of the defect..."*

**Order 5 rule 1 of the High Court (Civil Procedure) Rules of Ekiti State states that the writ of summons shall be issued by the Registrar and Rule 6 of Order 5 states that:**  
F

***"Subject to the provision of these Rules or of any written law in force in the state, no writ of summons for service out of the jurisdiction, or of which notice is to be given out of jurisdiction shall be issued without the leave of court or a judge  
G in chambers."***

**The combined effect of the above is that the writ of summons shall be issued by the Registrar and such a process can only be served on the adverse party residing out of jurisdiction after leave is obtained.**

H **Once the plaintiff (respondent) presented both processes to the Registrar as was done on 22/8/97 and the appropriate fees paid (as was done), in the eyes of the law the plaintiff has done all that is required of him for proceeding to commence. His responsibility comes to an end. It is now the**

**responsibility of the Registrar to ensure compliance with the law. The plaintiff cannot be held liable for incompetent handling of his application/processes by staff in the Registry.**

Order 2 Rule 2(i) (supra) states that:

*(i) Where in beginning or purporting to begin any proceeding or at any stage in the course of or in connection with any proceeding, there has by reason of anything done or left undone, been a failure to comply with the requirements of these Rules, whether in respect of time, place, manner, form or content or in any other respect, the failure may, be treated as an irregularity and if so treated will not nullify the proceedings, or any document, Judgment or order therein.*"

**Granted, there was irregularity in the issuance/service of the writ of summons by the Registry, such an irregularity will not nullify the proceedings and the judgment of the trial court confirmed by the Court of Appeal in view of Order 2 rule 1(1) of the High Court (Civil Procedure) Rules of Ekiti State.**

Order 2 rule 2(i) supra States that:

*(i) An application to set aside for irregularity any proceeding, any step taken in any proceedings or any document, judgment or order therein shall not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity.*

***Did the appellant take a fresh step?***

***The appellant (defendant) is said to have taken a fresh step if he makes any application to the court. Filing statement of defence is also a fresh step in proceedings. See Niger Progress Ltd. v. N.E.L. Corp. (1989) 3 NWLR (Pt. 107) p.68. After the appellant (as 1<sup>st</sup> defendant) was served with the writ of summons which he now claims is void, he entered unconditional appearance, filed his statement of defence and amended it. The appellant took part in the proceedings until judgment was delivered. He did not raise objection to the issue and service of the writ of summons. His protests now are clearly an afterthought. He has taken several steps in the proceedings and the time to object to the service of writ of summons on him was at the time it was served on him or immediately thereafter. The ob-***

***jection has not been made within a reasonable time. The writ of summons was in the circumstances properly served on the appellant.***

Conditional appearance is an appearance under protest and usually means an appearance to object to the court's jurisdiction.

B An unconditional appearance means that the party entering appearance has no complaints and is satisfied with issues of Jurisdiction.

C The appellant as first defendant entered unconditional appearance. There is thus an irrebuttable presumption that the appellant has no complaints whatsoever on the issuance and service of writ of summons on him. With the entry of unconditional appearance, an objection to the competence of the writ of summons is no longer a live issue it is clearly an afterthought.

D There is no substance in learned counsel for the- appellant's contention that the writ of summons was incompetent, invalid or that the Ekiti State determine the respondents' (plaintiffs') claims. Both courts below were correct on this issue.

## Issue 2

E Whether the learned Justice of the Court of Appeal were correct in their decision which upheld the appellant's liability to the respondent in the tort of detainee despite the fact that the appellant was not in actual possession of the equipment at the time the respondent demanded for its return.

F Learned counsel for the appellant observed that at the time the respondent demanded for the Sawmill equipment, they (respondents) knew and the evidence disclosed that the appellant was not in actual physical possession of the equipment submitting  
G that the appellant having parted with possession of the equipments to a third party, the appellant could no longer be liable in detainee. Reliance was placed on WA. Oilfields Sen: Ltd. v. UA.C. (Nig.) Ltd. (2000) 13 NWLR (Pt.683) p.68; Lufthansa v. Odiese (2006) 7 NWLR (Pt. 978) p.34. He submitted that since the respondent failed to es-  
H tablish that the appellant was in physical possession of the equipments on 14/8/97 when the respondent demanded from the appellant the return of the equipments, the respondents' claim or detainee should be dismissed.

Replying learned counsel for the appellant observed that on

the state of the pleadings the appellant did not hold out any defence, contending that the appellant did not even say it had no physical possession or had wrongfully transferred the respondents sawmill equipment to a third party. Reliance was placed on *Marthem Industries Nig Ltd. M.F. Kent WA. Ltd* (2005) SC (Pt. II) p.121; (2005) 10 NWLR (Pt. 934) 645. B

Concluding he submitted that it is no defence to show that the goods were not in the possession of the appellant when demanded, G if the appellant improperly parted with the possession of them. Reliance was placed on *Jones v. Dowie* 184 19 M & I p.19; *Eeve v. Palmer* (1858) 5 C.B. (NS) p. 84; *General & Finance Facilities Ltd. v. Cooks Cars (Romford) Ltd.* (1963) 2 All ER p.314. C

He urged this court to resolve this issue in favour of the H respondents. :

***To succeed in a claim of/for detinue the plaintiff (in this case the respondents) must plead and lead credible evidence to establish the fact that;*** D

***1. He is the owner of the property***

***2. He has an immediate right to possession of the property.*** E

***3. The defendant (appellant) is in actual possession of the property.***

***4. That he (the respondents) made a demand on the Defendant to deliver/return his property to him.*** F

***5. That the defendant (appellant) continues to hold unto the property without lawful excuse and the defendant failed to deliver the property despite repeated demands.***

It is settled that there is no controversy as regards 1, 2, 4 above. The issue is whether the claim for detinue can succeed in the light of the fact that the goods were no longer in the custody of the appellant when the respondents made a demand for them on 14/8/97. G

Again there would be no need to layout the pleadings to see when the demand was made. The respondents' case is that they made a demand for their goods/property on 14/8/97 after it was taken away forcefully from them a day before, i.e. on 13/8/97 in frightening circumstances. H

The trial court held that the illegal manner of seizing the Re-

spondents' goods rendered the transfer of possession of the said goods to a third party null and void. That court said:

*"Therefore, the removal and the subsequent sale of the plaintiffs sawmill would not have been validly made pursuant to or in exercise of the right of the 1<sup>st</sup> defendant in the deed of legal mortgage. For the reasons already stated, the attachment of the plaintiff's property /properties, assets, sawmill equipment and tools in execution of judgment of the Ondo State High Court in Suit No. HOD/124/97 between Owena Bank Nig. Plc v. Kayode Olatunji are invalid, unlawful and illegal.*

*The Court of Appeal agreed with trial High Court when it said: "...it is a principle of law that you do not give what you did not have, usually expressed in Latin as "nemo dat quod on habet" That being the case, it is my view that having regards the findings of the learned trial Judge earlier reproduced while dealing with this issue, particularly to the effect that the removal and subsequent sale of the equipments by the appellant are invalid, unlawful and illegal, it means in effect that the appellant is still in constructive adverse possession of the equipments since what is said to be invalid, unlawful and illegal cannot confer any legal right on any person. In short it means that the transfer to the alleged third party or stranger does not exist since the appellant has no title to pass. That being the case, I agree with the trial court that the appellant is liable in detinue to the 1<sup>st</sup> respondent".*

Now, has the respondent (as plaintiff) established that the appellant was in actual possession of sawmill equipment etc on 14/8/97 when he made a demand for them. Both courts below say notwithstanding the fact that the said goods were "sold" on 13/8/97 they were in possession of the appellant on 14/8/97 when the respondent made a demand for them. The reasoning of the Court of Appeal was that since the removal of the goods from the respondents' premises was illegal, the transfer of the said goods to a third party was illegal as the appellant had no title to pass. Since no title passed according to the Court of Appeal, the appellant was still in constructive adverse possession, and a claim in detinue succeeds.

I must explain the correct position of the law on detinue. The essence of detinue is that the defendant holds on to property belonging to the plaintiff and fails to deliver the property to the plaintiff when a demand is made. The goods must be in the custody of the

defendant at the time the demand for them is made before an action in detinue can succeed. The cause of action in detinue is the refusal of the defendant to return the goods to the plaintiff after the plaintiff must have made a demand for them. A claim for detinue would fail if at the time the plaintiff made a demand the goods were not in the defendants' actual possession. In such a case the plaintiff might have a cause of action in conversion but definitely not detinue. The plaintiff can still sue in detinue and succeed if he is able to show by credible evidence that defendant wrongfully or improperly parted with possession of the goods before plaintiff made a demand for them.

***The appellant had possession of the respondents' goods on 13/8/97 after the respondents' goods were illegally taken away from the respondents premises by agents of the appellant and hurriedly sold the same day, 13/8/97 at an auction that an Ondo State High Court found to be illegal. The auction sale was a total nullity. The appellant parted with possession of the goods improperly, consequently title in the goods remained with the appellant on 14/8/97 when the respondent made a demand for them and thereafter. The seizure and sale of the respondents' goods having been declared invalid, the subsequent purchase of the goods by a thirty party is invalid. The respondent has been able to show by credible evidence that the appellant wrongfully/illegally parted with possession of the goods on 13/8/97. The appellant is liable in detinue to the respondents.***

Both courts below were correct in their findings. In the light of the fact that respondent established by credible compelling evidence his claim, it is now necessary I examine the different heads of claim and monetary awards granted to see if they can be sustained.

### Issue 3

Whether the Court of Appeal applied the correct principles of law in the assessment of special damages for the value of Sawmill equipment, generator, loss of sawmill equipment, loss of income-profit and cost of damaged fence in favour of the respondent.

I did say earlier that this issue shall also cover the different heads of damages awarded by the trial court and considered by the Court of Appeal.

The trial High Court made the following monetary awards:

	1. Leyland generator 75 KVA	N4,375,000.00
	2. C.D.6 sawmill machine with Saw doctor and rails	N3,950,000.00
	3. 20 inches planning machine	N 380,000.00
	4. Small circular with 7½ H.P.	
B	Electric motor	N 220,000.00
	5. One complete mechanical tools	N 220,000.00
	6. Cost of rebuilding the generator House	N 75,000.00
C	7. Cost of transporting C.D. from Ibadan in Oyo State to Ido-Ekiti in Ekiti State	N 50,000.00
	8. Loss of cash in hand	N 175,000.00
	9. Cost of retaining the equipments by the 1 <sup>st</sup> and 2 <sup>nd</sup> respondents	N18,250,000.00
D	10. For humiliating dehumanizing and torturing the plaintiff on 13/8/97	N 2,500,000.00
	11. For unlawful entry into the plaintiff's sawmill on the 13/8/97	N 100,000.00
E	A total of N30,273,000.00 (Thirty million, two hundred and seventy three thousand Naira).	

After the Court of Appeal dismissed the appeal it proceeded to reduce the monetary awards. This is what the Court of Appeal had to say:

*I hereby hold that on the authority of Artra Ind. (Nig) Ltd v. NBC (1998) 4 NWLR (Pt. 546) p.358 the award of N100,000.00 for trespass made by the learned trial judge in addition to the awards under items 1 to 7 as to cost of sawmill machines removed from the 1st respondents sawmill is hereby set aside on the ground that the said N100,000.00 was awarded in error of law."*

The above in effect means that the judgment sum as pronounced by the Court of Appeal is made up of sums under Items 8, 9, 10 above i.e. N20,925,000 .00. (Twenty million, nine hundred and twenty-five thousand Naira) and the sum awarded in the cross-appeal.

In the absence of a cross-appeal it means that respondents are in full agreement with the sums awarded by Court of Appeal.

**The measure of damages in cases of detainee is:**

**1. The market value of the goods detained**

**2. A sum of money representing the normal loss through the detention of the goods.**

**3. In cases where the goods have not been profit making the damage for loss arising from the owner's inability to make use of the specific goods which may be classified into general and special damages.** See *Odumosu v. ACB Ltd.* (1976) 11 SC p.55. B

**In a claim for detinue the respondent (plaintiff) is entitled to damage for loss arising from his inability to make use of his goods, and this can be recovered under either general or special. Furthermore if the plaintiff is able to show /that he has suffered special damages by the detention of his goods such damages if reasonably foreseeable is recoverable.** C

**In an action for detinue the plaintiff if successful is entitled to damages till Judgment. In this case from 13/8/97 when the goods were taken away to 21/3/2000 when judgment was delivered. The replacement cost is assessed as at the date of judgment.** D

In conversion damages would be assessed at the value of the goods at the date of conversion, (i.e. the market value at the date of conversion). Damages in claims in detinue are much higher than in conversion. E

I have examined the submissions of learned counsel for the appellant and it is so clear that his argument was on damages in the tort of conversion rather than detinue. Such an argument is irrelevant in view of the fact that the courts below and this court found the appellant liable in detinue. Considering damages in conversion would amount to this court engaging in an academic exercise. Courts ought to restrict themselves to consider and determine only live issues. See *Oyeneye v. Odugbesan* (1972) 4 SC p. 244; *Nwacha Gov of Anamhra State* (1984) 1 SCNLR p.634; *Bakare A.C.B. Lid.* (1986) 3 NWLR (Pt. 26) p.47. F

Learned counsel for the appellant assumed that this court would overrule both courts below and find the appellant liable in the tort of conversion. That has not been the case. The monetary awards in detinue are sustained. H

The award of N175,000.00. Learned counsel for the appel-

lant observed that the said sum was alleged by the respondents to have been stolen by the appellant, his agent and servants on 13/8/97. He submitted that the allegation being one of crime the respondent failed to prove the allegation beyond reasonable doubt contending that the said sum ought not to have been allowed.

B ***Learned counsel for the respondents' observed that PW2 led evidence on the stolen sum of N175,000 and the trial court granted the sum as one of the items of special damages. He further observed that since there was no ground of appeal complaining about it in the Court of Appeal and that court made no pronouncement on it, this court has no jurisdiction to pronounce on the award.***

C ***The sum of N175,000.00 was awarded by the High Court for loss of cash in hand. There was no appeal. The Judgment of the High Court on this issue remains inviolate in the absence of an appeal.***

D ***In the absence of leave to raise the issue this court has no jurisdiction to consider the award since this court handles appeals from the Court of Appeal and not from the High Court. This issue is resolved in favour of the respondents.***

Issue 4

Whether the learned justice of the Court of Appeal rightly or wrongly reversed the decision of the court below which allowed the appellant to amend her statement of defence.

F The appellant's 31 page second amended appellant's brief filed on the 3<sup>rd</sup> of October 2012, lists eight issues for consideration on pages 4 and 5 of the brief, but there is no argument on the above, listed as issue 8. In the absence of submissions on late amendments the issue is deemed abandoned. In the light of all that I have been saying this appeal is dismissed. The appellant shall pay cost assessed at N50,000.00.

## H **MUNTAKA-COOMASSIE JSC**

This is an appeal against the decision of the Court of Appeal Ilorin Division, in which the Court of Appeal affirmed the judgment of the Ado-Ekiti High Court of justice which entered judgment in favour of the respondent therein. The Court of Appeal unanimously

agreed with the judgment of the trial court in its judgment read by Onnoghen, J.C.A. (as he then was) and has this to say:

*“In conclusion it is my considered view that there are no merits in the main appeal which is accordingly dismissed while I find merit in the cross-appeal which is accordingly allowed in the terms contained in the judgment ...consequently the judgment of Hon. Justice D.F. Babalola in suit No. HAD/37/97 delivered on 21<sup>st</sup> March, 2000 is hereby varied in terms contained in this judgment with each party to bear his costs.”*

It is therefore a fact that there are two concurrent decisions of the lower courts namely, High Court of justice and the Court of Appeal.

In accordance with our rules, Order 6 rule 1 of the Supreme Court Rules, parties filed and exchanged their respective briefs of argument. The 2<sup>nd</sup> amended brief of the appellant was duly filed on 3/10/2012 while the respondents’ brief of argument was filed on 8/10/12. By the way, the respondents’ counsel on behalf of his client filed a preliminary objection - in which he challenged most of the grounds of appeal. I do not have to produce the P.O. in this judgment I shall state that there is no dispute vis-à-vis the facts, and they are never in dispute. The relevant issue now is to consider the proper application of the relevant law. In other-words, the facts of this case pointed to the application of law on detinue or conversion.

The respondents’ preliminary objection insisted that the appellant’s ground of appeal Nos. 1,2,5,7,10 and 13 are grounds of mixed facts and law and they needed leave of the court to sustain , them. When the appellant’s counsel countered and forcefully stated that all the seven grounds of appeal challenged are grounds of law simpliciter and there is no need for leave before they could be termed competent grounds. Both counsel argued and submitted.

I have gone through the judgment of my learned Lord Rhodes-Vivour, just delivered. I entirely agree with his reasons and conclusions for which he arrived at his decision to dismiss this appeal. His lordship has painstakingly treated the live issues filed before us and has clearly and correctly too in my view, arrived at unassailable decision. I have nothing more useful to add other than to say that I too, loud that the appeal is devoid of merit same is hereby dismissed by me. I endorse the order as to costs.

**NGWUTA JSC**

I have had the opportunity of reading in draft the lead judgment just delivered by my lord, Rhodes-Vivour, J.S.C.

The reasoning leading to the conclusion dismissing the appeal is exhausted. I have nothing useful to add.

Based on the sound reasoning and conclusion, I also dismiss the appeal with N50.000.00 to the appellant.

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**ARIWOOLA JSC**

I had the opportunity of reading in draft the lead judgment of my learned brother, Rhodes-Vivour, JSC just delivered. His Lordship has meticulously dealt with all the relevant issues and principle of law involved. I am in total agreement with the reasoning and conclusion arrived thereat. I have nothing more to add. I too will dismiss the appeal for lacking in merit. Accordingly, the appeal is dismissed.

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

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**MUHAMMAD JSC**

I had a preview of the lead judgment of my learned brother, Rhodes-Vivour, J.S.C., and entirely agree with his reasoning and conclusion that the appeal lacks merit. His Lordship has exhaustively considered all the issues raised by the appeal and leaves one in no doubt as to the fate the appeal suffers. This court remains very unwilling to interfere with concurrent findings offsets by the lower courts and maintains the same position in respect of the instant appeal which is against these findings of the two courts.

I adopt the resolution of the issues raised by the appeal in the lead judgment as mine in dismissing the appeal and abide by the consequential orders reflected therein including those on costs. Appeal dismissed.