

SUPREME COURT OF NIGERIA
FRIDAY 12TH JUNE, 2015. SC. 189/2005
CORAM:- S. GALADIMA, M. U. PETER-ODILI,
O. ARIWOOLA, M. D. MUHAMMAD,
K. M. O. KEKERE-EKUN, JJSC

1. H. R. H. IGWE KRIS

ONYEKWULUJE

2. ARTEX INVESTMENT LIMITED

..... APPELLANTS

AND

1. BENUE STATE GOVERNMENT

2. THE ATTORNEY-GENERAL OF

BENUE STATE

..... RESPONDENTS

3. JUDICIAL COMMISSION OF INQUIRY

INTO THE AWARD OF CONTRACT TO

ARTEX INVESTMENT LTD FOR THE

SUPPLY AND INSTALLATION OF

30 X 30 KW FM TRANSMITTERS TO

RADIO BENUE

FUNDAMENTAL RIGHTS - Public document - Attachment of -
Though words used in O. 3 r. 1 of the Rules are discretionary - There
is still need to attach the proceedings - To arrive at a fair decision
(H1)

CONTRACTS - Arbitration clause - Is a procedural provision whereby
parties agree - That only disputes should be submitted to arbitration
- And it does not limit rights or remedies of parties (H2)

TRIBUNALS - Decision - Mistake in - Provided that the mistake in
decision of a tribunal was committed within its jurisdiction - Superior
court exercising supervisory jurisdiction - Cannot readily interfere
(H3)

COURTS - Tribunal - Supervision of - Application - For superior
court to prevent tribunal from exceeding its jurisdiction - Applicant
must present facts necessary to justify grant of the order sought (H4)

STATUTES - Public holidays - Public Holidays Act s. 1 recognizes only days listed in schedule to the Act as holidays - And courts are bound under Evidence Act 2011 s. 122(g) - To take judicial notice of such days (H5)

FAIR HEARING - Breach - Allegation of - Appellants who participated fully in the proceedings of 3rd respondent - Cannot now complain of denial of fair hearing (H6)

FACTS

This action was instituted by plaintiffs/appellants against defendants/respondents at High Court of Benue State, Makurdi, seeking inter alia for an order of certiorari to quash the proceedings of 3rd respondent (i.e. Judicial Commission of Inquiry into the award of contract to ARTEX Investment Limited for the supply and installation of 30 X 30 KW FM Transmitters to Radio Benue) on the ground that 3rd respondent lacked jurisdiction and did not comply with the rules of natural justice among others. The bone of contention in that matter is that 1st respondent (Benue State Government) had through certain officers entered into a contract with appellants for the supply of FM Transmitters for its radio station called - Radio Benue. The Transmitters that were supplied were the first to be produced by 2nd appellant (ARTEX Investment Limited) and could not meet the requirements of 1st respondent.

Not satisfied with the whole transaction, 1st respondent found the performance of some of its officers wanting in the contract. To ensure compliance to due process in the matter, 1st respondent set up 3rd respondent pursuant to section 2 of the Commission of Inquiry Law, Laws of Northern Nigeria 1963. Appellants submitted to the proceedings of 3rd respondent and therein counter-claimed against 1st respondent. At the end, appellants were not satisfied with the outcome of the fact-finding mission of 3rd respondent. In reaction, appellants commenced the action. Hearing commenced in the matter and at the end of which the court dismissed the action on the ground that appellant failed to prove that 3rd respondent lacked jurisdiction to inquire into the contract. Aggrieved, appellants appealed to the Court of Appeal Jos Division. The court dismissed the appeal and affirmed the trial court's decision. Aggrieved further, appellants have

come before Supreme Court on appeal.

ISSUES FOR DETERMINATION

“1. Could the fact of the appellants participating “under duress” and “under protest” at the proceedings before the 3rd respondent be rightly and legally construed as abandoning a mutually agreed requirement in the Contract (Exhibit 2) that insists on recourse to Arbitration?”

2. Whether the failure of the Lower Court in not considering the unjustified finding and punishment meted on the 1st appellant despite its having been one of the ISSUES does not rob its judgment of its efficacy.

3. Were the reliefs sought by the appellants founded on a breach of the Rules of Natural Justice or for want of jurisdiction. Should the answer be in the affirmative, can it be said that the Lower Court looked at/considered the Affidavits filed with the appellants application.

HELD (Unanimously dismissing the appeal per GALADIMA JSC)

FUNDAMENTAL RIGHTS - Public document - Attachment of

1. Order 3 rule 1 of the Fundamental Rights (Enforcement Procedure) Rules, (supra) now Order 10 rule 1 of 2009 Rules states thus:

“In the case of an application for an order to remove any proceedings for the purpose of their being quashed, the applicant may not question the validity of any order, warrant, commitment, conviction, inquisition or record unless before the hearing of the motion or summons, he has served a certified copy thereof together with a copy of the application on the Attorney General of the Federation or of any state in which the application is being heard, as the case may be, or accounts for his failure to the satisfaction of the court or Judge hearing the motion or summons.”

Similar provision is also found in Order 34 Rule 9(2) of the High Court (Civil Procedure) Rules of Benue State and most High Court Rules of other states, Federal Capital Terri-

tory and Federal High Court Rules 2013 (as amended). I am of the respectful view that though the words used in the rules are “may not question,” when the validity of the proceedings is in issue, it is only right that the court should be in a position to look at the proceedings in order to fairly decide whether it does not meet the principles of natural justice or it was an exercise in excess of jurisdiction. There is a pitfall in relying solely on the excerpts of the applicant in a supporting affidavit, as this may be exposing the court to the danger of relying on what an interested party has already decided to bring before the court for favourable consideration of his application. No doubt, although the supporting affidavit in this application could be said to be abundantly copious, there is still the need for the appellants to have attached the proceedings. The affidavit, cannot by any stretch of imagination, take that place of record of proceedings sought to be quashed which the law requires that it must be produced before the court.

The arguments of the appellants’ counsel in their issue 6, is that they had served summons to produce the proceeding on the 1st and 2nd Respondents. I must quickly observe that a proceeding of the commission is a public document that can be easily obtained on payment of a prescribed fee to the appropriate officer. It is not enough for the appellants to argue that the law only requires them to merely serve notice to produce and no more. I am not satisfied with this lame excuse. The Appellants have not shown they have tried and encountered some difficulties. In appropriate cases, courts have been urged to shy away from the narrow technical approach to justice which characterized some earlier decisions. However, to insist, as the law demands, making available all relevant materials before the court for the fair disposal of the matter between the parties is not insisting on technical justice. (p. 2062 B)

H
CONTRACTS - Arbitration clause

2. I agree with the learned counsel for the Respondents that an arbitration clause in a contract is only a procedural provision whereby the parties agree that only disputes should be

submitted to arbitration. This does not exclude or limit rights or remedies of parties, but simply provides a procedure by which the parties may settle their grievance. (p. 2064 A)

TRIBUNALS - Decision - Mistake in

3. I cannot agree more. The two courts below concurrently stressed this point, quite succinctly debunking the argument of learned counsel for the Appellants on this point, which I, as well consider faulty in the circumstance. I agree that a Tribunal may commit a mistake or error of law in reaching its decision. However, so long as the mistake/error is committed within the confines of its jurisdiction, a superior court, exercising supervisory jurisdiction cannot readily interfere with it. That is, a Tribunal may decide a point of law or fact wrongly whilst keeping well within its jurisdiction. (p. 2065 B)

COURTS - Tribunal - Supervision of - Application

4. It is not however in doubt, that a superior court, exercising supervisory jurisdiction, can interfere or intervene to prevent a statutory tribunal from exceeding the jurisdiction allowed it by law, but it must be borne in mind, and this is also settled, that an applicant, such as the appellants herein have a duty to establish clearly all the facts necessary to justify the grant of the order sought. He must justify the facts upon which the application has been made.

As I have said, since the Appellants failed to produce the proceedings of the 3rd Respondent before the lower Court, the Judge was right in refusing the application. (p. 2065 E)

STATUTES - Public holidays

5. Learned Counsel was of the erroneous impression that the Nigerian Bar Association Annual Conference week usually held between August and September of every year constitute public holidays on which days, the courts or judicial bodies such as the 3rd Respondent should not have conducted any official business.

In the case of KAIGAMA v. NEC (1993) 3 NWLR (Pt.284) 681 and many others, "holiday" is defined as a 'day which is a

Sunday or a public holiday” Section 1 of the Public Holidays Act Cap P40, Laws of the Federation of Nigeria, recognizes only the days listed in the schedule to the Act as “Public Holidays.”

Under Section 174(9) of the Evidence Act, then applicable, now 122(g) of Evidence Act 2011, Courts are bound or guided to take judicial notice of the public festivals, feasts, and holidays notified in the Federal Gazette or fixed by an Act. (p. 2066 C)

FAIR HEARING - Breach - Allegation of
6. When a party who is entitled to be heard is denied a hearing before a decision affecting him is made, then by virtue of S.36 of the Constitution of the Federal Republic of Nigeria 1999 that decision cannot bind him; because he is not given the opportunity of being heard. In the case at hand, the records show that the Appellants fully participated in the proceedings of the 3rd Respondent from the beginning to the end of the sitting. They cannot now complain that they were denied of fair hearing.
In view of the foregoing, I hold that the Appellants’ right to fair hearing was not in any way breached. They appeared before the 3rd Respondent at all times material to the proceedings. They were accorded ample opportunity to be heard on their defence and were heard. (p. 2066 G)

NOTABLE POINT OF INTEREST

GALADIMA JSC

1. Requirement of a good brief of argument

I do not intend to say much on the required format and contents of a good brief of argument. However, I must observe that two briefs of the parties run short of minimum requirement of what a good brief should be! Particularly, I am not impressed with the way the 8 issues were formulated by the appellants, which issues the learned counsel for the Respondents has adopted. The issues are not properly formulated, encompassing the grounds of appeal. They are not precise, but verbose and rigmarole.

However, in the circumstance, I would still not disturb the sequence of the Appellants' issues as couched, hoping that the various complaints raised therein shall be salvaged for the determination of the appeal. (p. 2055 D)

REPRESENTATION

B

F. M. Ebofuame - Nezan (Mrs.) with Dickson Omaiye Esq. and Eleojo M. Musa (Miss), for the Appellants

S. E. Elema Esq. with Henry Chaha Esq., for the Respondents

CASES REFERRED TO

C

Kaigama v. NEC (1993) 3 NWLR (pt. 284) 681

Onyeama v. Oputa (1987) 3 NWLR (pt. 60) 259

Abdulsalam v. Salawu (2002) 6 SCNJ 388

Adisa v. Oyinwale (2000) 6 SCNJ 290

D

West Minster Bank v. Edwards (1942) AC 529

Colony Development Board v. TF Kamson & Ors (1955) 21 NLR 75

Udekwa v. Nwokwu (1976) 2 All NLR 387

Igwe v. Kalu (2002) FWLR (pt. 122) 1

Lawson-Jack v. SPDC Ltd (2002) 7 SCNJ 121

E

Itaye v. Ekaidere (1978) 9-10 & 11-12 SC 25

Maiwa v. Abdu (1936) 1 NWLR (pt. 515) 22

Abia State University v. Anyaibe (1996) 3 NWLR (pt. 439) 646

Uti v. Federal Road Safety Commission (2001) 1 CHR 434

F

Action Congress v. INEC (2007) FWLR (pt. 378) 1012

Judicial Service Commission of Cross River State v. Young (2013) 11 NWLR (pt. 1364) 1

Nwaoboshi v. Military Governor, Delta State (2003) 5 SC 120

Commissioner of Lands v. Edo-Osagie (1974) 12 SC 117

G

Confidence Insurance Ltd v. Trustees of O.S.C.E. (1999) 2 NWLR (pt. 591) 373

STATUTES & RULES REFERRED TO

H

Commission of Inquiry Law Laws of Northern Nigeria 1963, s. 2

Evidence Act Cap E14 LFN 2004, s. 109

Evidence Act LFN 2011, s. 122(g)

Fundamental Rights (Enforcement Procedure Rules) 1980, O. 3 r. 1

High Court (Civil Procedure) Rules of Benue State, O. 34 r. 9(2)

Public Holidays Act Cap P40 LFN 1990, s. 1

Arbitration Rules 1st Schedule to Arbitration Act Cap A18 2004, Article 3

Constitution of the Federal Republic of Nigeria 1979, s. 42(3)

B

LEAD JUDGMENT BY GALADIMA JSC

The 1st respondent entered into contract with the 2nd respondent for the supply and installation of 30 x 30 KW FM Transmitters to the 1st respondent's Radio Broadcasting Station. The contract contained an Arbitration clause which provides for recourse to it, in the event of *"any dispute in the course of the execution of the said contract which in the opinion of the parties cannot be resolved amicably."*

C

Dissatisfied with the qualities of the materials supplied for the Transmitters and the conduct of both the staff and officers of the 2nd appellant and the 1st respondent, the said 1st respondent herein set up Judicial Commission of Inquiry under Section 2 of the Commission of Inquiry Law, Laws of Northern Nigeria 1963, to ascertain whether there was abuse, misuse, or misappropriation of money meant for the project, in any way. To further ascertain whether there was any improper or fraudulent practice or unjust enrichment by any person and to apportion blame and recover the monies believed to have been misappropriated, unjustly obtained, or fraudulently administered.

E

F

At the end of sittings of the 3rd respondent, it issued out a White Paper which indicted the 2nd appellant, and it was requested to refund N85,575,111.60 (Eighty Five Million, Five Hundred and Seventy Five Thousand, One Hundred and Eleven Naira, Sixty Kobo).

G

Dissatisfied, with the outcome of the White Paper of the 3rd respondent, the appellants filed a suit No. FHC/EN/CP/68/2000 claiming the following reliefs:

H

"a. AN ORDER OF CERTIORARI to remove into this Honourable Court for the purpose of its being quashed, the Recommendations of The HON. JUSTICE (MRS.) ELIZABETH KPOJIME JUDICIAL COMMISSION OF INQUIRY (EXHIBIT 7) INTO THE AWARD OF CONTRACT TO ARTEX INVESTMENT LIMITED FOR THE SUPPLY AND INSTALLATION OF 30 X 30 KW FM TRANSMIT-

TERS TO RADIO BENUE.

b. *AN ORDER OF CERTIORARI* to remove into this Honourable Court for the purpose of its being quashed, the gazette Government WHITE PAPER (Exhibit 13A) arising from Exhibit 7 wherein is contained malignant, unfair, inequitable, vicious and injurious conclusions and directives that malign, injure and impugn the characters, reputation and goodwill of the 1st and 2nd Applicants. ^B

c. *A DECLARATION* that no dispute as envisaged by Article 7 of the AGREEMENT BETWEEN BENUE STATE GOVERNMENT AND ARTEX INVESTMENT LTD. (EXHIBIT 2) was ever declared/mentioned as existing between the 2nd Applicant and 1st respondent. ^C

d. *A DECLARATION* that the Hon. (Mrs.) Justice Kpojime's Judicial Commission of Inquiry was neither an *ARBITRATION* in Law nor the type of Arbitration as contemplated by the parties in the contract (EXHIBIT 2). ^D

e. *A DECLARATION* that the FINDINGS/RECOMMENDATIONS OF THE HON. (MRS.) JUSTICE ELIZABETH KPOJIME'S JUDICIAL COMMISSION OF INQUIRY EXHIBIT (not being an *ARBITRATION*) was an exercise in futility. ^E

f. *A DECLARATION* that the Government WHITE PAPER or any decision/conclusion premised on the recommendation of the said inquiry is invalid, null and void and of no effect whatsoever.

g. *A DECLARATION* that EXHIBIT 5 further inviting the Applicants' Counsel after; ^F

a) The Judicial Commission of Inquiry had formally closed its public sitting,

b) And during Court vacation,

c) And during which vacation the Applicant leading counsel was away in Ilorin for both the National Executive Committee and Conference (both of the Nigerian Bar Association) was inconsequential, legally impermissible, and worthless, on the grounds that unless counsel subscribed to the attending and the taking of evidence before a Court/Tribunal/Quasi Tribunal during vacation, any proceedings taken during that period remain legally impermissible, worthless and null and void. (*Audi alterem partem*). ^G

h. *A DECLARATION* that Mr. Manyi (who during the Radio Benue Contract was Secretary in the 1st respondent's Tender Board) ^H

and who had earlier deliberated on and took decisions on aspects of the contract (EXHIBIT 2) and also issued EXHIBIT 83 should not later have been allowed to sit as a Commissioner/Judge/Member and co-authored the Recommendation (EXHIBIT 7) UPON WHICH THE 1ST AND 2ND RESPONDENTS RELIED BEFORE ISSUING THE

B White Paper (EXHIBIT 13A).

i. A DECLARATION that by allowing/having Mr. M.A. Manyi partake as Commissioner/Judge/Member in investigating and also passing a verdict on the conducts of the 1st and 2nd Applicants is in violation of the 1st and 2nd Applicants' Constitutional Rights of fair hearing (Nemo debet esse judex in propria causa).

C j. A DECLARATION that in so far as the 1st respondent was a party to the contract (EXHIBIT 2) and later as complainant, it could not, under the equitable doctrine of FAIR HEARING unilaterally try or determine the conduct of the other party 2nd APPELLANT (Nemo debet esse Judex in propria causa).

k. A DECLARATION that the 3rd respondent obtained the "evidence" from 1st and 2nd Applicants and their agents under duress, illegally, unlawfully and ultra-vires the terms of the contract (EXHIBIT 2).

l. A DECLARATION that in so far as Justice (Mrs.) Kpojime's Commission of Inquiry was not the CORPORATE AFFAIRS COMMISSION, the former's inquiry, investigation and dabbling into the internal affairs of the 2nd Applicant was legally unauthorised and ultra-vires.

m. A DECLARATION that Engr. Okonu's impartiality and fairness as a Judge/Member/Commissioner in the said Justice (Mrs.) Elizabeth Commission of Inquiry could not be granted in view of his being a CONTRACT SUPPLIER to Radio Benue and in trade competition with the 2nd Applicant.

n. A DECLARATION that the HON. (MRS.) JUSTICE ELIZABETH KPOJIME'S JUDICIAL PANEL had no JURISDICTION and a fortiori? the Government WHITE PAPER (EXHIBIT 13A) decision/ conclusions having been founded on nothing, is null and void and of no effect whatsoever.

o. A DECLARATION that under the principle of Law enunciated in the case of SALOMON VS. SALOMON & CO. LTD. (1887) AC 22, the 2nd Applicant is its own SEPARATE LEGAL ENTITY ca-

pable of existence and performance of its registered objects.

p. A DECLARATION that under the principle of Law enunciated in the common law case of SALOMON VS. SALOMON & CO. LTD. (1897) AC 22, THE 1st Applicant by virtue of his being a subscriber to the 2nd Appellant is not liable in any shape or form.

q. A DECLARATION that the Benue State Governor could not in the exercise of his power under the BENUE STATE COMMISSION OF INQUIRY LAW (Cap. 25 Vol. LAW OF NORTHERN NIGERIA) AUTHORISE THE INVESTIGATION OF THE CONDUCT OF THE 2ND Applicant (A Limited Liability Company) in relation to the latter's pursuit or execution of any of its registered objects.

r. AN ORDER of Injunction restraining the 1st, 2nd and 3rd respondents from re-awarding the contract of the supply of any part of the 30 x 30 KW FM Radio Transmitters contract to any person or persons.

s. AN ORDER of Injunction restraining the 1st, 2nd and 3rd respondents from either opening the transmitter room, or repairing handling of any of the transmitter or A.V.R. or anything or component related to or pertaining to the 30 x 30 KW FM Radio Transmitters.

t. AN ORDER of Injunction restraining the 1st, 2nd and 3rd respondents from handling, touching, operating or disposing of the 2 KW Artex Investment Ltd. Provided TRANSMITTERS in Makurdi, Idekpa, and Katsina-Ala.

u. AN ORDER of Injunction restraining the 1st, 2nd and 3rd respondents or any of their agents from summoning, threatening or harassing the 1st and 2nd Applicant or any of them.

v. AN ORDER of Injunction restraining the 1st, 2nd and 3rd respondents from further interfering, WITH THE LIBERTY of the 1st Applicant and from investigating into the Internal Affairs of the 2nd Applicant.

w. AN ORDER that the 1st respondent pays to the 1st and 2nd Applicants Five Million Naira (N5,000,000.00) general damages."

In sum, the contention of the appellants at the trial High Court was that the 3rd respondent sitting as a Commission of Inquiry violated the appellants' right to fair hearing and that the said Commission exceeded its jurisdiction. Hence their reason for approaching the court to quash the White Paper issued by the 2nd respondent,

based on the Report of Inquiry submitted by the 3rd respondent.

In it's considered judgment of 23/1/2001, the trial court dismissed the appellants' application. It held that they failed to establish that the 3rd respondent lacked jurisdiction to inquire into the contract between the appellants and the 2nd respondents.

B On appeal to the Court of Appeal, Jos Division, the court endorsed the trial court's findings.

This is further appeal to this court by the appellants against the decision of the court below. The Amended Notice of Appeal of the appellants contained 17 Grounds of appeal. From the Grounds, a total of 8 extremely unwieldy issues have been raised for determination as follows:

D *"1. Could the fact of the appellants participating "under duress" and "under protest" at the proceedings before the 3rd respondent be rightly and legally construed as abandoning a mutually agreed requirement in the Contract (Exhibit 2) that insists on recourse to Arbitration? Distilled from Grounds 7, 13 and 17*

E *2. Whether the failure of the Lower Court in not considering the unjustified finding and punishment meted on the 1st appellant despite its having been one of the ISSUES does not rob its judgment of its efficacy. Distilled from Ground 8*

F *3. Were the reliefs sought by the appellants founded on a breach of the Rules of Natural Justice or for want of jurisdiction. Should the answer be in the affirmative, can it be said that the Lower Court looked at/considered the Affidavits filed with the appellants application. Distilled from Grounds 10 and 12*

G *4. Did the cumulative conducts of the 1st, 2nd and 3rd respondents whereupon the appellants were indicted, and penalized on the basis of paragraphs 2 and 3 of Exhibit 7 pass the litmus test handed down by the Supreme Court in the landmark case of ACTION CONGRESS & 1 OR AND INDEPENDENT NATIONAL ELECTORAL COMMISSION (INEC) (2007) FWLR (Pt.378) page 1012. Distilled from Grounds 5 and 14*

H *5. Was the Lower Court right in stating that it: "Was not in a position or able to know or find out whether the 3rd respondent exceeded its powers including the terms of reference"" Distilled from Grounds 7*

6. Was the Lower Court right when it concluded that the ap-

pellants did not explore alternative methods of “getting a public document to be before a Court where the party required to produce it or make it available refuses or neglects to do so.” Distilled from Ground 15

7. Does the 1st respondent’s legal authority to constitute a Judicial Commission of Inquiry pursuant to section 2 of the Commission of Inquiry Law allow that he detracts from a mutually binding contract it voluntarily entered into with the 2nd appellant? Distilled from Ground 9

8. Whether the non-requirement/application of the Evidence law did not necessitate a constitutionally competent Court, rather than the 3rd respondent, to determine paragraphs 2 and 3 of Exhibit 3? Distilled from Grounds 3, 6 and 11”

In the respondent’s brief of argument, the 8 issues formulated by the appellant’s were adopted as arising for determination in this appeal.

I do not intend to say much on the required format and contents of a good brief of argument. However, I must observe that two briefs of the parties run short of minimum requirement of what a good brief should be! Particularly, I am not impressed with the way the 8 issues were formulated by the appellants, which issues the learned counsel for the Respondents has adopted. The issues are not properly formulated, encompassing the grounds of appeal. They are not precise, but verbose and rigmarole.

However, in the circumstance, I would still not disturb the sequence of the Appellants’ issues as couched, hoping that the various complaints raised therein shall be salvaged for the determination of the appeal.

In the Appellants’ issue No.1, their complaint is that they participated in the proceedings of the Commission of Inquiry under duress and protest. That the Appellants had stated in their memorandum to the 3rd Respondent dated 11/7/1999, (Exhibit 114) that the 3rd Respondent lacked jurisdiction and that they were therefore appearing under duress and protest. For this, they contended that 3rd Respondent should have first resolved the issue of jurisdiction before embarking on the terms of reference; relying on *ONYEAMA v. OPUTA* (1987) 3 NWLR (Pt.60) page 259; *ALHAJI SAIDU ADULSALAM & 1 OR v. ALHAJI ABDULRAHEEM SALAWU* (2002) 6 SCNJ 388 at

396. Learned counsel for the Appellants therefore submitted that there had been dispute between the parties, contrary to the holding of the two courts below, and recourse ought to have been had to the Arbitration clause contained in the Agreement Exhibit 2. That the fact that there was dispute this necessitated the setting up of the Commission of Inquiry with the terms of reference that clearly suggest this. It is further submitted that had a dispute not arisen, the 3rd Respondent would not have sent a subpoena; Exhibit ‘H’ and issuance of bench warrant to arrest the 1st Appellant and the staff of the 2nd Appellant with a perilous threat which made the Appellants to appear before the Commission of Inquiry. That the acceptance of court processes on protest cannot ripen into a waiver.

Learned counsel has contended that the lower Court wrongly hung on to the technical requirement of production of the Commission’s proceedings before it, contrary to the decision in *ZAMANI LEKWOT & 6 ORS v. JUDICIAL TRIBUNAL ON CIVIL & COMMUNAL DISTURBANCES IN KADUNA STATE & ANOR* (1997) 8 NWLR (Pt.515) 229 at 235; (1997) 7 SCNJ 347 at 354-356, to the effect that the provisions of “concrete facts” in additions to the exhibits upon which a court can determine the truth of what actually transpired would suffice in place of a formal proceedings.

It is finally urged on this court to hold that the court below was wrong in concluding that the trial court had jurisdiction.

Responding to this issue, learned counsel to the Respondents submitted that the Appellants were not in any form of “duress” and neither did they attend or appear at the proceedings under “protest”. It is contended that the Appellants did not make jurisdiction an issue before the Commission and strongly demanded a ruling on it; though they feebly appealed to the State High Court to stop the proceedings of the 3rd Respondent on ground of lack of jurisdiction without justification. That the Appellants who refused, neglected or failed to take various options available to them cannot now turn around to accuse the 3rd Respondent that it failed to accord them fair hearing.

On the issue of submission of the dispute between the parties for Arbitration, as provided in the agreement, learned counsel has contended that the option was open to the Appellants to utilize the provision of Article 3 of the Arbitration Rules, (1st schedule to the

Arbitration Act Cap. A18, 2004) and to issue a Notice of Arbitration to the 1st Respondent. That the Appellants did not make a case to 3rd Respondent on the question of jurisdiction to enable it decide. That the argument of the Appellants that their submission of Exhibit 114 (Memo of Protest) was enough for the 3rd Respondent to first resolve on the question of jurisdiction, was fallacious and has no legal basis. B

It is finally submitted that the actions of the Appellants in their failure, refusal and neglect to take advantage of legal and Constitutional remedies available to them, when they felt unhappy about the setting up of the 3rd Respondent, can be construed, as abandoning their right to submit the dispute, if any, to the Arbitration. C

In the second issue, the Appellants are complaining about alleged unjustified findings of, the Commission on and punishment meted on the 1st Appellant. The learned counsel has contended D that even though the contract entered into by the parties clearly depicted 2nd Appellant as the party responsible for the supply and installation of Radio Transmitters, the 3rd Respondent, unfairly adjudged the 1st Appellant as the person that failed to execute the contract within the stipulated period even some variations were made in the contract with the consent of the said 3rd Respondent. E

The Respondent has faulted the Appellants on the alleged “unjustified findings” of the Commission which is said to have led to the miscarriage of justice. Learned Counsel has submitted that the only way the 1st Appellant could have proved unjustified finding and punishment meted out to him, is by exhibiting the Record of the Proceedings of the 3rd Respondent which led to unjustified finding. That if the Appellants had produced the record it could have been found unfavourable to them. It is the contention of the Respondent that Exhibit 7, which is the White Paper of the 1st Respondent, does not constitute the Record of the 3rd Respondent’s Proceedings. That as a public document, it was not certified contrary to Section 109 of the Evidence Act. Reliance was also placed on the case of MAJOR-GENERAL ZAMANI LEKWOT & ORS v. JUDICIAL TRIBUNAL ON CIVIL AND COMMUNAL CRISIS IN KADUNA STATE (supra). F G H

On issue No.3, it is the contention of the Appellants that the reliefs sought by them were firmly predicated on a breach of the Rules of Natural justice and for want of jurisdiction. That the grounds

for the reliefs sought are contained on pp.11-12 of the record. It is submitted by the learned counsel that the lower Court having stressed the view that a court could be permitted to look at any Affidavit filed with the Application of this nature it should have taken a hard look at the Affidavits that were filed and accompanied with the Appellants' Application. That the facts deposed to in the two sets of Affidavits namely, an Affidavit of 77 paragraphs and 12 Exhibits and a further Affidavit of 8 paragraphs to which the White Paper, Exhibit 13A, was exhibited were worthy of serious consideration.

Relying on the English case of *REX v. NORTHUMBERLAND AND COMPENSATION APPEAL TRIBUNAL - Ex-parte SHAW*, (1951) 11 KB 771 (the very case the lower Court also referred to), learned counsel submitted that the 3rd Respondent should have strictly observed the Rules of Natural Justice as expressed in the Latin phrase *Audi Alteram Partem*. Reliance was further placed on several dicta on this point in the cases of *ADEDEJI v. POLICE CIVIL SERVICE COMMISSION* (1968) NMLR 102; *ONWUZULIKE v. C.S.D ANAMBRA STATE* (1992) 3 NWLR (Pt.232), 791 at 815.

The Appellants had complained that the proceedings of the 3rd Respondent were conducted in their absence and. counsel. Evidence was taken from vital witness when they had no opportunity of cross-examination. It is contended that it was this witness that saw to the contract (Exhibit 2). He conceived the contract which was executed, while he was the Commissioner of Finance of the 1st Respondent.

Learned Counsel has further agitated that, although by Exhibit 5, the Appellants' Counsel were invited by the 3rd Respondent to a re-summed sitting of the Commission it has been shown in Exhibit 6, a complaint from the Appellants' Counsel, stating that the day was a vacation and CW38 should be recalled for cross-examination, on a more convenient date.

Learned Counsel for the Respondent on this issue has contended that from the volume of processes filed at the trial court as well as the court below, the main relief sought by the Appellants was for an order of certiorari to quash the recommendations of the 3rd Respondent. He submitted that such an order can only be made on the grounds of lack of jurisdiction; breach of the Rules of natural justice; clear error on the face of the record and fraud or collusion. It

is submitted, that, in the peculiar circumstances of this case, certiorari proceeding brought pursuant to the Fundamental Rights Enforcement Procedure Rules, the mere filing of 77 paragraphs Affidavit, sworn to by one Ifeanyi Okumah in support of the application and no more, does not constitute sufficient Evidence to entitle the appellants to the granting of orders and reliefs sought. That the production of the Record of Proceedings of the 3rd Respondent sought to be quashed is vital to the success of the application. Relying on the authority of *ZAMINI LEKWOT'S* case (supra); *ABIA STATE UNIVERSITY v. ANYAIBE* (1996) 3 NWLR (pt. 439) 646.

ISSUES 4 AND 8

The submissions of learned counsel for the Appellants on these issues are that the cumulative conducts of the 1st, 2nd and 3rd Respondents as set out, in the 77 paragraphed affidavit in support of the appellants' application, are genuine fear that the appellants' Fundamental Human Right were to be infringed and indeed were, when they were found guilty of crimes of fraud, misappropriation, unjust enrichment and resultant imposition of penalties and punishment, which are matters appertaining exclusively to the judicial function of a regular court, where the Appellants would have been formally, arraigned and be guaranteed fair hearing. Reliance was placed on the cases of *ACTION CONGRESS AND ANOTHER v. INEC* (2007) 1 FWLR (Pt.378) 1012. *GARBA v. UNIVERSITY OF MAIDUGURI* (1986) 1 NWLR (Pt.18) PP575 - 578, *RAYMOND DANGHOETE v. CIVIL SERVICE COMMISSION & PLATEAU STATE* & 2 ORS (2001) 4 SCNJ 131.

Learned Counsel for the Respondent, on the issues, has conceded that the 3rd respondent, as a quasi-judicial body, was not vested with the power of a regular court that can convict and sentence the appellants for offence and imposition of penalties/punishments, but it was set up to see whether there was abuse, misappropriation or misapplication of the money in any way, and whether again there was any improper or fraudulent practice or unjust enrichment by any person or persons. That from the terms of reference given to the 3rd Respondent, it cannot be said that it was set up to try and sentence the Appellants, in the strict sense of it. That the 3rd Respondent was not set up as a criminal court of justice to determine and penalize or punish offenders but as a facts finding body to see to the proper

conduct between them and the 1st Respondent herein. In the course of the inquiry, the 3rd Respondent is empowered to establish and identify the person or persons involved in the shady execution of the contract and recommend other appropriate actions.

B It is for the foregoing reasons, the Respondents have argued that the sum of (N85,575,111.60, Eighty-Five Million, Five Hundred and Seventy-Five Thousand, One Hundred and Eleven Naira, Sixty Kobo) representing the overpayments, was recommended to be recovered from the Appellants.

C As I have already observed, it was unnecessary for the Appellants to have raised so many issues for the determination of this simple appeal. Issues Nos. 5 and 6 are mere embellishments or emphasis of the core issue No.1 underpinning the decision in ZAMANI LEKWOT's case (supra) whilst issue 6 dealing with the production of secondary D evidence in the absence of original Exhibit 7, was one of the germane complaint of the Appellants in issue 2 that led to the alleged "unjustified findings" and punishment meted on the 1st Appellant. To my mind, these issues are intricately related and could be taken together.

E Now I shall consider the germane issues raised by the parties in this appeal. Learned counsel has submitted in Appellant's issue 2 that the failure of the lower Court in not considering the unjustified finding and punishment meted on the 1st Appellant, despite its having F been made an issue robbed its judgment of any efficacy and legitimate adjudication. In other words, the Appellants are alleging that the court below failed to consider the findings and recommendation of the 3rd Respondent. The Respondents have argued otherwise. That there was no such failure of the Court below. That the Appellants G have not proved their allegation. They submitted that the only way to prove unjustified findings and punishment, is by exhibiting the Record of Proceedings of the 3rd Respondent which failure to consider led to "unjustified findings."

This point came up both at the trial court and the court below. H Amongst the facts, the court below found were not disputed by the Appellants as observed on page 518 of the Record is that:

"The Appellants, do not dispute the fact that they did not produce the proceedings of the 3rd Respondent before the lower Court. In ground particulars (f) it is stated that:

“The learned trial Judge was wrong in law by holding that: “for lack of the record of proceedings before the court, I am unable to conclude that the sitting of the Tribunal in August when the High Court was on vacation and the chamber of Appellants’ Counsel was on vacation was of such a grave nature as to effect the proceedings before the Tribunal.” B

As a matter of fact, one of the main reasons for the learned trial Judge to refuse the application was in these words at page 419 lines 28 to 31 of the Records. It read as follows:

I note that in Ground 8 particular (b), it is stated as follows: C

“The Respondents especially the (3rd) Respondent is in possession and having at all material times the said proceedings in their custody which proceedings they have refused or neglected to deliver to the Appellants despite all entreaties.”(sic) meaning entreaties.”

In the case of GENERAL ZAMANI LEKWOT (RTD) & 10 ORS D v. JUDICIAL TRIBUNAL ON CIVIL & COMMUNAL DISTURBANCES IN KADUNA STATE & ANOR (SUPRA) relied upon by the court below, this court has held, inter alia that:

“...No court in this country can set aside, nullify or quash any proceedings or decisions not before it. Courts rely on concrete facts before them and not on guess-work and to ask any court to make decision on guess-work and matters not exhibited before it is unjust and can, depending on the circumstance of the case, amount to abuse of court process...” E

The proceeding of the 3rd Respondent referred to here is Exhibit 7 the Recommendations of the Commission to the State Government, the 1st Respondent. It is a Public document within the meaning of S.109 of the Evidence Act Cap E14 LFN, 2004 then applicable, now S.105 Evidence Act 2011 and could only have been F G relied upon and proved in the manner provided in the Act.

What I understand from the complaint of the Respondents is that the Appellants did not make available a certified copy of the Recommendations of the Commission before the trial court. That Exhibit 7 is not certified and it was not signed by the members of the Commission. For this reason, Order 3 rule 1 of the Fundamental Rights (Enforcement Procedure Rules) 1980 was not duly complied with. H

In his reply to this point, the learned counsel for the Appellants

submitted that the language used in the said Order 3 Rule 1 (supra) is “may” and this leaves the Appellants with an option. That apart from the fact that the Ministry of Justice via 2nd Respondent was served with notice to produce, the copious facts deposed to in the 77 paragraphed Affidavit were sufficient concrete facts and it was not
 B necessary for the Appellants to produce the proceedings of the commission as this was mere technicalities aimed at stultifying the course of justice.

**Order 3 rule 1 of the Fundamental Rights (Enforcement
 C Procedure) Rules, (supra) now Order 10 rule 1 of 2009 Rules states thus:**

*“In the case of an application for an order to remove
 any proceedings for the purpose of their being quashed, the
 applicant may not question the validity of any order, warrant,
 D commitment, conviction, inquisition or record unless before
 the hearing of the motion or summons, he has served a certified
 copy thereof together with a copy of the application on the Attorney General of the Federation or of any state in which
 the application is being heard, as the case may be, or accounts
 E for his failure to the satisfaction of the court or Judge hearing
 the motion or summons.”*

Similar provision is also found in Order 34 Rule 9(2) of the High Court (Civil Procedure) Rules of Benue State and
 F most High Court Rules of other states, Federal Capital Territory and Federal High Court Rules 2013 (as amended). I am of the respectful view that though the words used in the rules are
 “may not question,” when the validity of the proceedings is in issue, it is only right that the court should be in a position to
 G look at the proceedings in order to fairly decide whether it does not meet the principles of natural justice or it was an exercise in excess of jurisdiction. There is a pitfall in relying solely on the excerpts of the applicant in a supporting affidavit, as this may be exposing the court to the danger of relying
 H on what an interested party has already decided to bring before the court for favourable consideration of his application. No doubt, although the supporting affidavit in this application could be said to be abundantly copious, there is still the need for the appellants to have attached the proceedings. The affi-

davit, cannot by any stretch of imagination, take that place of record of proceedings sought to be quashed which the law requires that it must be produced before the court.

The arguments of the appellants' counsel in their issue 6, is that they had served summons to produce the proceeding on the 1st and 2nd Respondents. I must quickly observe that a proceeding of the commission is a public document that can be easily obtained on payment of a prescribed fee to the appropriate officer. It is not enough for the appellants to argue that the law only requires them to merely serve notice to produce and no more. I am not satisfied with this lame excuse. The Appellants have not shown they have tried and encountered some difficulties. In appropriate cases, courts have been urged to shy away from the narrow technical approach to justice which characterized some earlier decisions. However, to insist, as the law demands, making available all relevant materials before the court for the fair disposal of the matter between the parties is not insisting on technical justice.

In issues 1, 5 and 7, learned counsel for the appellants, has submitted that the 3rd Respondent lacked legal authority to constitute a Judicial Commission of Inquiry to pry into the affairs of contract mutually entered into between the 2nd appellant and the 1st Respondent, which contract provides for submissions of disputes to Arbitration.

The position of the 1st Respondent is that it did not detract from any contract entered into with the 2nd Appellant in setting up the 3rd Respondent. 1st Respondent's grouse was not just against the contract (Exhibit 2) nor the Appellants but against even its own officials as can be seen from the wordings of the terms of reference given to the 3rd Respondent. In the overall execution of the contract, the 1st Respondent has shown that some other persons had various roles to play, which have produced, different unpleasant results working against the interest of the 1st Respondent.

The position of the 1st Respondent was such that if it had declared a dispute regarding Exhibit 2 and issued and served a notice of arbitration pursuant to Article 3 of the Arbitration Rules, it would not have been able to address the issues of the misconduct or

misbehaviour of its public officers in connection with the contract.

I agree with the learned counsel for the Respondents that an arbitration clause in a contract is only a procedural provision whereby the parties agree that only disputes should be submitted to arbitration. This does not exclude or limit rights or remedies of parties, but simply provides a procedure by which the parties may settle their grievance. May I observe that the 3rd Respondent was brought about by the 1st Respondent, having recourse to Commission of Inquiry Law Cap 25, Laws of Northern Nigeria, which Law is equally applicable to Benue State. This empowers the Governor's unfettered discretion to set up a Commission of Inquiry as the need arises. See *GOVERNOR OF KADUNA STATE & 2 ORS v. LAWAL KALOMA* (1981-1982) BSLR Vol. III at 40; and *DA KIM & ANOR v. HON. JUSTICE EMEFO & 6 ORS* (2001) FWLR (Pt.66) 729. On this point, the learned trial Chief Judge held on pp.416-417 of the records thus:

"Applicants' Counsel referred to several authorities that touch on arbitration and when it can be constituted. He however admitted in his address that there was no dispute and the 3rd Respondent was not an arbitration Panel. I agree with him on this point. 3rd Respondent is not said to have pretended to be arbitration to Exhibit 2. There has been no disagreement between the parties as to the execution of the contract, there was no need for arbitration. When considering whether 3rd respondent had jurisdiction to do what she did or not, it is the law setting up the commission of inquiry that should be in focus and not any other law. As 3rd Respondent is not accused of going outside the terms of reference prescribed for her under the instrument that brought her to life, I do not see any basis for holding that she acted without jurisdiction."

Stressing this point further and agreeing with the trial Chief Judge, the Court of Appeal per Ogbuagu JCA (as he then was) on page 520 of the record held:

"I agree with the learned counsel for the Respondents that even from Exhibit 7, - the Recommendations of the Commission to the State Government, the 3rd Respondent followed or complied strictly with the Terms of Reference that appears (sic) in paragraph 5 of the affidavit sworn to on behalf of the Appellants in support of the said application and appears at pages 13 and 14 of the Records. That

being so, I also agree with the Respondents' learned counsel's submission, that the 3rd Respondent acted within jurisdiction having regard to the law/statute empowering the 1st Respondent to set it up and the terms of reference. Indeed, I agree with the learned judge that the law setting up the 3rd Respondent is what should be looked at or be the focus and certainly not that pertaining to Arbitration." B

I cannot agree more. The two courts below concurrently stressed this point, quite succinctly debunking the argument of learned counsel for the Appellants on this point, which I, as well consider faulty in the circumstance. I agree that a Tribunal may commit a mistake or error of law in reaching its decision. However, so long as the mistake/error is committed within the confines of its jurisdiction, a superior court, exercising supervisory jurisdiction cannot readily interfere with it. That is, a Tribunal may decide a point of law or fact wrongly whilst keeping well within its jurisdiction. See SHODEINDE v. THE REGISTERED TRUSTEES OF AHMADIYYA MOVEMENT-IN-ISLAM (1980) 1-2 SC. 225; OLANIYI v. AROYEHUN & ORS. (1991) 5 NWLR (Pt.194) 653 at 685. C D

It is not however in doubt, that a superior court, exercising supervisory jurisdiction, can interfere or intervene to prevent a statutory tribunal from exceeding the jurisdiction allowed it by law, but it must be borne in mind, and this is also settled, that an applicant, such as the appellants herein have a duty to establish clearly all the facts necessary to justify the grant of the order sought. He must justify the facts upon which the application has been made. See THE QUEEN v. THE MINISTER OF LOCAL GOVERNMENT, Ex-parte, The AKALAKO OPAFO (1959) WNLR 294 and QUEEN v. THE ALAKE OF ABEOKUTA & 31 ORS (1960) WNLR 288. E F G

As I have said, since the Appellants failed to produce the proceedings of the 3rd Respondent before the lower Court, the Judge was right in refusing the application on the authorities of GENERAL LEKWOT & ORS v. JUDICIAL TRIBUNAL CIVIL & COMMUNAL DISTURBANCES IN KADUNA STATE (supra). H

In view of the fact that the Appellants herein, have placed great premium on the vexed question of theirs not being granted fair hearing on this matter in their issue No. 3 and which dovetails into other

issues already considered, I shall give special consideration on the said issue. Both the trial High Court and the Court of Appeal dealt with this point. The former was brief, the latter quite in detail. The Appellants cannot claim they were not accorded fair hearing. The affidavit in support of their Application has shown that the Commission rounded up its public sitting on 4/8/99 and applicant's counsel was served on 6/8/99 when the evidence of Professor Hagher and Ameh Esq. was to be taken. It was contended, that the principal in the Appellants' Chambers was not in town as his chamber was on vacation.

Learned Counsel was of the erroneous impression that the Nigerian Bar Association Annual Conference week usually held between August and September of every year constitute public holidays on which days, the courts or judicial bodies such as the 3rd Respondent should not have conducted any official business.

In the case of KAIGAMA v. NEC (1993) 3 NWLR (Pt.284) 681 and many others, "holiday" is defined as a 'day which is a Sunday or a public holiday'" Section 1 of the Public Holidays Act Cap P.40, Laws of the Federation of Nigeria, recognizes only the days listed in the schedule to the Act as "Public Holidays."

Under Section 174(9) of the Evidence Act, then applicable, now 122(g) of Evidence Act 2011, Courts are bound or guided to take judicial notice of the public festivals, feasts, and holidays notified in the Federal Gazette or fixed by an Act. See IMPORT - EXPORT v. J.A.A. ADEBAYO & 2 ORS (2003) FWLR (Pt.14) 1686 at 1702.

When a party who is entitled to be heard is denied a hearing before a decision affecting him is made, then by virtue of S.36 of the Constitution of the Federal Republic of Nigeria 1999 that decision cannot bind him; because he is not given the opportunity of being heard. In the case at hand, the records show that the Appellants fully participated in the proceedings of the 3rd Respondent from the beginning to the end of the sitting. They cannot now complain that they were denied of fair hearing.

The Learned trial judge, at page 419 lines 16-23 of the Records

stated that:

“It appears applicant (sic) wanted the best of the two worlds where they won in their submissions, the benefits would go to them but where they lost their dormant volcano world (sic) would be activated as has been done. I share the view that by participating from the beginning of the commission to the close of it, even counter-claiming in their address the applicant cannot rightly claimed (sic) that they appeared before the Panel by co-ocision (sic) “meaning coercion) as claimed.”

In view of the foregoing, I hold that the Appellants’ right to fair hearing was not in any way breached. They appeared before the 3rd Respondent at all times material to the proceedings. They were accorded ample opportunity to be heard on their defence and were heard.

In the final analysis, I cannot disturb the concurrent findings of facts by two courts below as they have not been shown to be perverse or not reached as the result of a proper consideration of facts placed before them. In the circumstances, the decision of the Court of Appeal is hereby affirmed, and the appeal is accordingly dismissed. I make no order as to costs in the overall circumstances of this appeal. Appeal dismissed.

PETER-ODILI JSC

I am in total agreement with the judgment and reasoning just delivered by my learned brother, Suleiman Galadima, JSC and I shall express my support by making some comments.

The Appellants, also applicants before the Benue State High Court Holden at Makurdi had applied to that Court for an order of Certiorari to quash the proceedings of the 3rd Respondent, Judicial Commission of Inquiry Into the Award of Contract to ARTEX Investment Limited For the Supply and Installation of 30 X 30 KW FM Transmitters to Radio Benue on the ground that the 3rd Respondent lacked jurisdiction and did not comply with the rules of natural justice among others.

The trial Court, presided over by Hwande J. (as he then was) refused all the reliefs sought by the Appellants/Applicants dismissing the application in its entirety.

Dissatisfied with the decision the Appellants appealed to the Court of Appeal, Lower Court for short, which affirmed the decision of the trial High Court and dismissed the appeal. The Appellants in dissatisfaction further, has come before the Supreme Court on 17 grounds of appeal.

B FACTS BRIEFLY STATED:

The 1st Respondent, Benue State Government had through certain officers entered into a contract with the Appellants for the supply of FM Transmitters for its radio station called 'RADIO BENUE'.
 C The Transmitters that were supplied were the first to be produced by the 2nd Appellant ARTEX Investment Limited and could not meet the requirements of the 1st Respondent who, being dissatisfied with the whole transaction, found the performance of some of its officers wanting in the contract. The 1st Respondent setting out to have due
 D process complied with, set up the 3rd Respondent sequel to Section 2 of the Commission of Inquiry Law, Laws of Northern Nigeria 1963.

The Appellants submitted to the proceedings of the Commission and therein counter-claimed against the 1st Respondent. At the end, the Appellants being not satisfied with the outcome of the fact-finding mission of the 3rd Respondent filed an action, Suit No.MHC/
 E 225/2000 which was determined in favour of the Respondents, which decision was affirmed by the Lower Court thus producing this appeal before the Apex Court.

At the hearing on 23rd day of March, 2015, learned counsel
 F for the Appellants, Mrs. Ebofuane-Nezan adopted the Brief of Arguments of the Appellants settled by Chief Mamman Mike Osuman SAN and filed on the 21st day of May, 2008. Also adopted by learned counsel is the Reply Brief of the Appellants filed on the 13th day of
 G May, 2008.

For the Appellants, eight issues were formulated for determination which are stated as follows:-

1. Could the fact of the Appellants participating "under duress" and "under protest" at the proceedings before the 3rd Respondent be rightly and legally construed as abandoning a mutually agreed requirement in the Contract (Exhibit 2) that insists on recourse to Arbitration? Distilled from Grounds 7, 13 and 17.
 H

2. Whether the failure of the Lower Court in not considering the unjustified finding and punishment meted on the 1st appellant

despite its having been one of the ISSUES does not rob its judgment of its efficacy. Distilled from Ground 8.

3. Were the Reliefs sought by the appellants founded on a breach of the Rules of Natural Justice or for want of jurisdiction. Should the answer be in the affirmative, can it be said that the Lower Court looked at/considered the Affidavit filed with the appellants application. Distilled from Grounds 10 and 12. B

4. Did the cumulative conducts of the 1st, 2nd and 3rd respondents whereupon the appellants were indicted, and penalized on the basis of paragraphs 2 and 3 of Exhibit 7 pass the litmus test handed down by the Supreme Court in the landmark case of ACTION CONGRESS & 1 OR. AND INDEPENDENT NATIONAL ELECTORAL COMMISSION (INEC) (2007) FWLR (Pt.378) page 1012. Distilled from Grounds 5 and 14. C

5. Was the Lower Court right in stating that it: “was not in a position or able to know or find out whether the 3rd respondent exceeded its powers including the terms of reference.” Distilled from Ground 1. D

6. Was the Lower Court right when it concluded that the appellants did not explore alternative methods of “getting a public document to be before a Court where the party required to produce it or make it available refuses or neglects to do so.” Distilled from Ground 15. E

7. Does the 1st respondent’s legal authority to constitute a Judicial Commission of Inquiry pursuant to Section 2 of the Commission of Inquiry Law allow that he detracts from a mutually binding contract it voluntarily entered into with the 2nd Appellant? Distilled from Ground 9. F

8. Whether the non-requirement/application of the Evidence law did not necessitate a constitutionally competent Court, rather than the 3rd respondent, to determine paragraphs 2 and 3 of Exhibit 3? Distilled from Grounds 3, 6 and 11. G

Mr. S.E. Elema, of counsel for the Respondents adopted the Brief of Arguments settled by Mrs. Mojisola Sule and filed on the 13th day of March, 2009. He also adopted the issues as crafted by the Appellants. H

Those issues as identified would be used for the determination of this appeal with some of them jointly handled.

ISSUE NO. 1:

Could the fact of the Appellants participating “under duress” and “under protest” at the proceedings before the 3rd Respondent be rightly and legally construed as abandoning a mutually agreed requirement in the Contract (Exhibit 2) that insists on recourse to Arbitration?

In canvassing the position of the Appellants, learned counsel stated that it was incumbent on the 3rd Respondent to have resolved the issue of jurisdiction before entering into the time consuming task of embarking on Exhibit 7, the Recommendation upon which the 1st and 2nd Respondents relied before issuing the White Paper (Exhibit 13A). That having expressly noted the Appellants’ point that their appearance was under duress and under protest, the 3rd Respondent should have, out of the abundance of caution, asked to be addressed on it. That following the Appellants’ specific reference to paragraph 7 of the Contract (Exhibit 2), it was obvious that the Appellants wished to stick to the mutually agreed terms of the Agreement that contains a clause which stipulates recourse to Arbitration in times of disagreement/dispute that could not be resolved amicably.

Learned counsel for the Appellants contended that the Appellants having raised the issue of a lack of jurisdiction on the 3rd Respondent, it ought to have been resolved before embarking on the terms of reference. She referred to *Onyeama v Oputa* (1987) 3 NWLR (Pt.60) 259; *Alhaji Saidu Abdulsalam v. Alhaji Abdulraheem Salawu* (2002) 6 SCNj 388 at 396. That the issue of jurisdiction can be anytime as was done before the Lower Court. She relied on *Alhaji Karimu Adisa v. Emmanuel Oyinwole & Anor* (2000) 6 SCNj 290.

It was submitted for the Appellants that the Lower Court failed to appreciate the circumstances under which the Appellants appeared and that an acceptance of Court processes on protest cannot ripen into a waiver. She referred to *Caribbean Trading & Fidelity Corporation v. NNPC* (1992) 7 NWLR (Pt.252) 161 at 182.

That the Appellants, no matter their conduct, lacked the legal competence to abandon the mutually agreed requirement in the contract (Exhibit 2) that insisted on recourse to Arbitration. That jurisdiction is statutory and cannot be conferred by acquiescence or agreement of parties. Stated further for the Appellants is that Exhibit 2 was an Agreement in writing and could not be waived orally or by

conduct. She cited *West Minster Bank v Edwards* (1942) AC 529 at 533 & 536; *Colony Development Board v. TF Kamson & Ors* (1955) 21 NLR 75; *Udekwo v Nwokwu* (1976) 2 All NLR 387.

Learned counsel for the Respondents contended that the action of the Appellants in failing, refusing and neglecting to take advantage of legal and constitutional remedies available at the first instance if they felt aggrieved by acts of the Respondents, can safely be construed as abandoning a mutually agreed requirement in Exhibit 2. That there is nothing on the face of Exhibit 2 precluding the Appellants from giving the notice of arbitration. B

The angle of contention by the Appellants is that no matter their conduct, the mutually agreed requirement in the contract Exhibit 2 which insisted on recourse to Arbitration cannot be abandoned as it remained sacrosanct. This under the principle that the Agreement being in writing cannot be varied orally or by conduct and thereby made the need for a consideration of the issue of jurisdiction, a condition that must be dealt with before the court ventured into the merits of the matter. C D

In countering that position above, learned counsel for the Respondents said the matter cannot be so dispatched since the Appellants never raised the issue of jurisdiction before the 3rd Respondent nor appealed to the High Court to stop the Commission's proceedings. That the appellants gave up that right when they failed to take recourse under Article 3 of the Arbitration Rules First Schedule to the Arbitration Act 2004 Cap A18 to issue a notice of arbitration to the 1st Respondent. That, that failure was tantamount to abandoning the resort to arbitration before anything else and so it is too late in the day to now tout the issue of arbitration. E F

It is difficult not to be persuaded along the line of thinking of the Respondents' counsel, as the facts bear out the fact that Appellants, after going along with the Commission's proceedings and not utilising the facility available to them of firstly issuing the notice of arbitration cannot turn around to wish away the commission and its proceedings based on the lack of the utilization of the provisions of the arbitration clause in the agreement. This issue is resolved in favour of the Respondents and against the Appellants. G H

ISSUES 2 AND 3:

Whether the failure of the Lower Court in not considering the

unjustified finding and punishment meted on the 1st Appellant despite its having been one of the issues before it does not rob its judgment of its efficacy.

B Were the reliefs sought by the Appellants founded on breach of the Rules of Natural Justice or for want of jurisdiction should the answer be in the affirmative, can it be said that the Lower Court looked at/considered the affidavits filed with the Appellants Application.

C Learned counsel for the Appellants submitted that the failure of the court below in not considering the unjustified findings and punishment meted on the 1st Appellant despite it being made an issue robbed its judgment of its efficacy as the issue was germane being one that had to do with the fate and violation of the human rights of the 1st Appellant. He cited *Igwe v. Kalu* (2002) FWLR (Pt.122) D page 1 at 20; *Lawson-Jack v. SPDC Ltd* (2002) 7 SCNJ 121 at 134 etc.

E It was contended further for the appellants that anybody whether Ministerial, Administrative or Commission of Inquiry, it is bound to follow the elementary rules of natural justice the moment its actions or inactions will affect the rights and interests of others. That in this case, proceedings were conducted in the absence of the Appellants and their counsel and Appellants denied the opportunity of being present and also disallowed from recalling for the purpose F of cross-examination the witness that testified in their absence. That the proceedings were therefore a nullity. He referred to *Oborevbori Itaye & Ors v. Okuowe Ekaidere & Ors* (1978) 9-10 & 11-12 SC 25 at 35.

G For the Respondents, it was submitted that there was no failure on the part of the Court of Appeal to consider the findings and recommendations of the 3rd Respondent. That as the Appellants alleged otherwise, the burden was on them to prove same. That Exhibit 7 is the Government White Paper on the Recommendation of the 3rd Respondent and so had to be certified to be used. He referred H to Section 109 of the Evidence Act; *Maiwa v Abdu* (1936) 1 NWLR (Pt.515) 22 at 35.

It was canvassed for the Respondents that in the peculiar circumstances of the certiorari proceedings brought pursuant to the Fundamental Rights Rules, only the affidavits filed by the Appellants

will not constitute sufficient facts/evidence to entitle them to the orders sought. He relied on *Lekwot & Ors v. Judicial Tribunal on Civil and Criminal Crisis in Kaduna State* (supra); *Abia State University v. Anyaibe* (1996) 3 NWLR (Pt.439) 646; *Uti v. Federal Road Safety Commission* (2001) 1 CHR 434.

For the Appellants, is put forward that the Court below failed to consider the findings and recommendations of the 3rd Respondent which brings to focus the principle that he who asserts must prove. In this regard the question that is thrown up is whether the Appellants who made the assertion had discharged the burden of proving the alleged unjustified findings and punishment meted out to him. Of note in answering that question is that the Appellants had not proffered the report of the 3rd Respondent rather, what was evidenced was the Government White Paper of the reaction of the Government. Some facets have therefore shown up which cannot be ignored. Firstly, under Order 3, Rule 1(i) of the Fundamental Rights Rules is provided that every application for an order to remove proceedings for quashing must be accompanied with a certified true copy. In this instance, that mandatory provision had not been complied with, thus bringing into relevance and application the case of *Major-General Zamani Lekwot & Ors v Judicial Tribunal on Civil and Criminal Crisis in Kaduna State* (1997) 8 NWLR (Pt.515) 22 at 35, a case similar and apposite to the case at hand. In that case, the Appellants sought to have the proceedings of the Judicial Tribunal on Civil and Criminal Crisis in Kaduna State set aside without attaching a certified true copy of the proceedings of the tribunal to the application. The High Court dismissed the application which decision was affirmed by the Court of Appeal. On further appeal to the Supreme Court, the apex court while dismissing the said application at the High Court affirmed the decisions of the two Lower Courts and Belgore JSC (as he then was) said:-

“This application is flawed ab initio that I find it completely unjust to call this Court to adjudicate on it. The judgment of the Tribunal complained against allegedly delivered on 2nd February 1992 and the proceedings of the Tribunal of 4th day of December, 1992 are unfortunately mere guess work as they are not exhibited with this application before us. Are we to rely on newspaper reports, which are no more than new items, with variations in different media on

the same facts as alternatives to exhibiting the certified true copies of the decisions and proceedings? No Court in this Country can set aside, nullify or quash any proceedings or decisions not before it. Courts rely on concrete facts before them and to ask any court to make a decision not on guess-work and matters not exhibited before it, is unjust and can, depending on the circumstances of the case, amount to abuse of court process. It is therefore obvious that the prayers before this Court are not supported by facts”.

In the case at hand, the Appellants exhibit the Government White Paper which cannot take the place of the Record of proceedings containing the findings and recommendations of the Judicial Commission of Inquiry, 3rd Respondent and so without it before the trial Court, there was nothing to act upon and so just as in the Lekwot case (supra), going further would be acting on guess-work or rumour or on an issue not placed before the court which is not the business of court. Therefore, the lapse or vacuum created by the absence of those essential materials is fundamental and so fatal to the proceedings at the High Court whereby the order of certiorari is sought. See *Abia State University v. Anyaibe* (1996) 3 NWLR (Pt.439) 646, and Court of Appeal decision which I am in agreement with to the effect that an action under the Fundamental Rights Rules, 1979 is a peculiar and special action provided for in the Rules pursuant to Section 42(3) of the 1979 Constitution. In that wise, for the Court to have jurisdiction, the procedure specifically provided for must be followed as the Rules have same force of law as the Constitution itself. See also *Uti v Federal Road Safety Commission* (2001) 1 CHR 434.

The questions here raised are clearly in favour of the Respondents and against the Appellants.

ISSUES 4, 5 AND 8:

4. Did the cumulative conducts of the 1st, 2nd and 3rd Respondents whereupon the Appellants were indicted, and penalised on the basis of paragraphs 2 and 3 of Exhibit 7 pass the litmus test handed down by the Supreme Court in the landmark case of *Action Congress & Anor v INEC* (2007) FWLR (Pt.378) 1012.

5. Was the Lower Court right in stating that it was not in a position or able to know or find out whether the 3rd Respondent exceeded its powers including the terms of reference.

8. Whether the non requirement/application of the Evidence

Law did not necessitate a constitutionally competent Court, rather than the 3rd Respondent to determine paragraphs 2 and 3 of Exhibit 3.

For the Appellants, was submitted that the Court below had a duty of treating Exhibits 7 and 13A as material evidence since they were not impugned. He cited *Pincen v The State* (1997) 1 NWLR (Pt.480) 234. B

It was stated further for the Appellants that the cumulative findings that stigmatised the Appellants following a finding that they defrauded, misappropriated and unjustly enriched themselves were matters within the exclusive powers of a Court of law after the full procedural exercise of a criminal trial embarked upon and concluded. He referred to *Sokefun v. Akinyemi* (1981) NCCR 135; *Action Congress v. INEC* (2007) All FWLR (Pt.18) 1 etc. C

That the very facts that would have enabled the Lower Court to know and find out whether the 3rd Respondent exceeded its powers contained in the affidavits in support of the Application. Also, that the fact that the 3rd Respondent was not required to conform with the Evidence Act meant it was ill-equipped and not expected to determine criminal liability. D E

Learned counsel for the Respondents contended that the 3rd Respondent's findings and recommendations are not in the terms of sentence and conviction known to criminal trials.

It was also submitted for the Respondents that the Lower Court was right in stating that it was not in a position or able to know or find out whether the 3rd Respondent exceeded its powers including the terms of reference since the materials upon which such a finding could be made were not placed before the trial and the appellate courts. That it was impossible to tell if there was any error on the face of the record since there was no record, He cited *Katto v. CBN* (1991) 12 SCNJ 1 at 15; *G. Cappa Plc v. Abumme & Sons Nig. Ltd.* (2002) FWLR (Pt.95) 349 at 364. F G

The Appellants' grouse as captured in the issues above is that the 3rd respondent was endowed with judicial powers and had carried on as if it were a competent court with capacity to indict and penalize the Appellants even though it is a mere quasi-judicial body, This grievance is anchored in the Terms of Reference particularly Terms 2 and 3 which are:- H

“2. Ascertain and ensure full accountability of the money so far paid on the said contract and determine whether there was abuse, misuse, misappropriation or misapplication of the money in any way.

3. Whether there was any improper or fraudulent practice or unjust enrichment by any person who had dealings of any kind with the contract in any way and if abuse, misuse, misapplication, improper or fraudulent practice or unjust enrichment are established, identify the person or persons involved, apportion blame and recover or recommend appropriate recovery and disciplinary or other appropriate actions.”

These concerns of the Appellants are not supported by the Records as the terms of Reference prescribed that the Commission make findings and recommendations and those are what are found in the Record and not to support convictions and sentences to terms of imprisonment as known to law. That the Commission made strong recommendations bordering on indictments do not translate to convictions. In this regard, the Lower Court was right in stating that it was not in a position to know or ascertain whether the commission exceeded its powers as stated in the Terms of Reference. This is so because the proceedings of the commission were neither placed before the trial Court nor the Court of Appeal.

That being the case, it cannot be properly said that the court below acted in error on the face of the record when such a record was not available. That is to say that the court in its administration of justice do not operate on instincts since cases are decided on hard facts based on proof by admissible and credible evidence and not that evidence the court would have to discern from intuition or prophetic deduction. I place reliance on *Francis Adesegun Katto v. Central Bank of Nigeria* (1991) 12 SCNJ 1 at 15; *G. Cappa Plc v. Abumme & Sons Nig. Ltd* (2002) FWLR (Pt. 59) 349 at 364.

Clearly, the questions raised herein are settled against the Appellants and in favour of the Respondents.

ISSUES 6 AND 7:

Was the Lower Court right when it concluded that the Appellants did not explore alternative methods of getting a public document to be before a court where the party required to produce it or make it available refuses or neglects to do so?

Does the 1st Respondent's Legal authority to constitute a Judi-

cial Commission of Inquiry pursuant to Section 2 of the Commission of Inquiry Law allow that it detracts from a mutually binding contract it voluntarily entered into with the 2nd Appellant?

Learned counsel for the Appellants contended that as long as evidence exists to prove that the Appellants had utilised one of the prescribed methods in an effort to getting public documents to be before a Court where the party required to produce it or make it available, such party has a legal right under the circumstance to rely on secondary evidence thereof in proof of his case or in contradiction of that defaulting party's case. He relied on *Buhari v Obasanjo* (2005) All FWLR (Pt.258) 1604; *Gbadamosi v Kabo Travels Ltd* (2000) 8 NWLR (Pt.668) 243 at 273; *Awuse v. Odili* (2005) All NLR (Pt.26); *Oloyode v. Pior* (2005) All FWLR (Pt.279) 248.

Further canvassed for the Appellants is that the 1st Respondent had the power to set up the Commission of Inquiry with the terms of reference, that did not entitle it to violate the Appellants or interfere with the terms of the legal contract, Exhibit 2. He cited *Baker Marine Nig. Ltd v. Chevron Nig. Ltd* (2006) All FWLR (Pt.326) 235; *Fakorede & Ors v. A.G. Western State* (1972) 1 All NLR 178 at 189 etc.

Learned counsel for the Respondents submitted that there is no evidence before the Lower Court that the Appellants exhausted all the options available to them before heading for the courts empty handed. That an arbitration clause is only procedural in that a provision whereby the parties agree that only disputes should be submitted to arbitration does not exclude or limit rights or remedies but simply provides a procedure under which the parties may settle their grievance.

That it is not an exclusion clause and so the parties are free, such a clause notwithstanding to pursue their claims in the Courts to grant a stay of proceedings. He cited *Commissioner of Lands v. Edo-Osagie & Ors* (1974) 12 SC 117; *Confidence Insurance Ltd v. Trustees of O.S.C.E.* (1999) 2 NWLR (Pt.591) 373.

The Lower Court was on solid ground in concluding that the Appellants did not explore alternative methods of getting a public document to be before the court as demanding for the production of the necessary document not being positively responded to, the Appellants ought to have done something more to ensure that the said

documents were before court. It is not an acceptable excuse that the party asked to produce failed, neglected or refused to make available the said documents without more. This is because Order 3, Rule 1(1) of the Fundamental Rights Rules stipulates mandatorily that the applicant serve a certified true copy of the proceedings sought to be quashed together with a copy of the application on the Attorney General of the State in which the application is being heard and so there ought to be those when the Appellants asked the 2nd Respondents to produce the Record of Proceedings of the 3rd Respondent and it failed to do so, the Appellants should not, as in this instance, laid back in slumber without exhausting other options available to them and show evidence in that regard before entering the court with an empty can. Furthermore, that the 2nd Respondent did not produce the required documents would not justify the attempt by the Appellants to utilise inadmissible documents, secondary evidence of public documents not certified. In that regard, Section 97 of the Evidence Act is not a palliative, nor do the case of *Buhari v. Obasanjo* (2005) All FWLR (Pt.258) All NWLR (Pt.261); Section 102 Evidence Act on Public documents and admissibility thereof. It therefore behooves a party who seeks a certified true copy of a public document and encounters difficulties to go the extra mile to establish same so that the court can make an exception for the secondary evidence.

The Appellants had made a lot of fuss on the Arbitration Clause embedded in Exhibit 2, the Contract Agreement which Appellants posit made it a no go area for the Respondents having the contract X-rayed under the Commission of Inquiry and a Government White Paper on the findings and recommendations produced. That position, the Respondents reject on the ground that an arbitration clause is only procedural and does not exclude or limit rights or remedies but merely provides procedure under which the parties may settle their grievance since, as in this instance, a resort to the Courts was not ruled out. This I agree with. I place reliance on *Commissioner of Lands v. Edo-Osagie & Ors* (1974) 12 SC 117; *Confidence Insurance Ltd v. Trustees of O.S.C.E.* (1999) 2 NWLR (Pt.591) 373.

Indeed, the 3rd Respondent had not taken over the powers of an arbitration panel or the court but was a fact finding Commission. Again, of note is that the Appellants seem to miss the way since they had not even served a notice of arbitration, thereby activating the

Clause and so there was no bar on the Commission of Inquiry from carrying out the assignment given it by the 1st Respondent.

The issues 6 and 7 are also resolved in favour of the Respondents. In conclusion therefore, all the issues favourably answered for the Respondents and going along the fuller and better reasoning in the lead judgment, I have no difficulty in upholding the concurrent findings and decisions of the two Lower Courts. I hold that the appeal lacks merit and I dismiss it. I abide by the consequential orders earlier made.

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ARIWOOLA JSC

I had the privilege of reading in draft, the lead judgment just delivered by my learned brother, Galadima, JSC. I admire the way His Lordship dealt with all the issues involved and I am in total agreement with the reasoning and the conclusion that the appeal is indeed devoid of merit. It deserves to be dismissed. Accordingly, I hereby dismiss same.

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

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MUHAMMAD JSC

I read in draft the comprehensive lead judgment of my learned brother Galadima JSC, just delivered which I hereby adopt as mine in dismissing the unmeritorious appeal. I abide by the consequential orders contained in the said lead judgment including the order on costs.

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KEKERE-EKUN JSC

This is an appeal against the judgment of the Court of Appeal, Jos Division delivered on 2nd March 2005, which affirmed the ruling of the High Court of Benue State, sitting at Makurdi delivered on 23rd January 2001 refusing to quash the recommendations of the 3rd respondent and the Government White Paper arising therefrom.

The facts giving rise to this appeal have been fully set out in the lead judgment of which I have had a preview before now. Before

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proceeding further, I must state that I am in agreement with the reasoning and conclusion that the appeal lacks merit and should be dismissed. I have a few comments in support of the lead judgment and for emphasis.

B Learned counsel for the appellants filed seventeen grounds of appeal and distilled eight issues therefrom, I agree with my learned brother, Galadima, JSC that the said issues are prolix, unwieldy and unnecessarily repetitive. The formulation of issues for determination is meant to assist the court in narrowing down the real issues in controversy arising from the grounds of appeal. It is important that issues C for determination are concise and succinct to avoid beclouding the principal issues in contention with subsidiary issues.

The appellants contend, among other issues, that the 1st respondent lacked jurisdiction to constitute the 3rd respondent having D regard to a clause in their contract that provides for recourse to arbitration; that the 3rd respondent failed to observe the rules of natural justice in the course of performing its assignment; and that it exceeded its powers by investigating and/or deciding on matters touching on the commission of a criminal offence. I shall deal with the issue of E jurisdiction on the basis of an arbitration clause first. The effect of an arbitration clause in an agreement was well stated in: *Royal Exchange Assurance v. Bentworth Finance (Nig.) Ltd. (1976) 11 SC (Reprint) 96 @ 107 lines 22-30* thus:

F *“An arbitration clause in a written contract is quite distinct from the other clauses. Whereas the other clauses in a written contract set out obligations which the parties undertake towards each other, the arbitration clause merely embodies the agreement of both parties that if any dispute should occur with regard to the obligations which G the other party has undertaken to the other, such dispute should be settled by a tribunal of their own constitution or choice. The appropriate remedy therefore for a breach of a submission is not damages but its enforcement.”* See also: *Obembe v. Wemabod Estates Ltd. (1977) 5 SC (Reprint) 70.*

H In *Magbagbeola v. Sanni (2002) 4 NWLR (Pt. 756) 193* it was held that an arbitration clause is only procedural in that a provision whereby parties agree that any dispute should be submitted to arbitration does not exclude or limit rights or remedies but simply stipulates a procedure under which the parties may settle their differences.

In other words, the existence of an arbitration clause in a contract merely postpones the right of the contracting parties to resort to litigation. In the instant case, as admitted by learned counsel for the appellants in his address before the trial court, and as noted by that court in the course of its judgment at page 416 of the record, there was no dispute between the parties regarding the execution of the contract. The essence of setting up the Commission of Inquiry was to examine the execution of the contract to determine whether due process was followed and to determine the cause of any lapses on the part of the appellants and its own officers. The issue of arbitration therefore did not arise. The lower Court agreed with this finding at page 525 of the record. I find no reason to disturb those findings. I also agree with the lower Court that by virtue of Section 2 of the Commission of Inquiry Law, 1963, Laws of Northern Nigeria applicable in Benue State, the Governor has unfettered discretion to set up a Commission of Inquiry as the need arises.

On the issue of fair hearing, the appellants raised several issues. They alleged, inter alia, that some of the proceedings were conducted in their absence. That an application to re-call witnesses who had testified in their absence was refused. They also contended that the trial court was wrong not to have considered their complaint of lack of fair hearing and basing its decision on failure to produce the proceedings sought to be quashed. It is their contention that the court ought to have made use of the facts copiously deposed to in their 77-paragraph supporting affidavit and 8-paragraph further affidavit to consider and resolve their complaints of errors in law, violations of the rule of law and excess of jurisdiction against the 3rd respondent. It was further argued that the lower Court was wrong in holding that the notice to produce issued by the appellants to the 3rd respondent to produce the record of proceedings was of no moment, as they had complied with Section 98 of the Evidence Act, 1990 and therefore secondary evidence of the proceedings and White Paper were admissible.

The critical consideration here is whether the production of the proceedings sought to be quashed is a sine qua non for the exercise of the court's discretion in favour of an application for judicial review. In the case of: *Nwaoboshi v. Military Governor, Delta State & Ors.* (2003) 5 SC 120; (2003) 11 NWLR (Pt. 831) 305 @ 318 D-E,

Uwaifo, JSC stated the purpose of a writ of certiorari thus:

“The writ [of certiorari] is issued in order that the court may bring the proceedings of the inferior tribunal or court before it for inspection and if there is due cause disclosed to quash them. It lies only against bodies exercising judicial or quasi-judicial authority and in respect of acts performed by them in that capacity.”

Fabiya, JSC in: Judicial Service Commission of Cross River State v. Young (2013) 11 NWLR (Pt. 1364) 1; (2013) 12 SCM 98; (2013) 56 NSCQR 577 @ 614-615 E-A referred to the textbook Practice and Procedure of the Supreme Court, Court of Appeal and High Courts of Nigeria (1995 edition) by T. Akinola Aguda at pages 654-655, wherein the learned author (of blessed memory) stated the purport of an order of certiorari as follows:

“Certiorari is one of the prerogative writs whose main function is to ensure that inferior courts or anybody entrusted with performance of judicial or quasi judicial functions keep within the limits of the jurisdiction conferred upon them by statutes which create them. Therefore, an order of certiorari will lie to remove into the High Court for purpose of being quashed any judgments, orders, convictions or other proceedings of such inferior courts or body, civil or criminal made without or in excess of jurisdiction.”

Per Rhodes-Vivour, JSC at page 618 E-G (supra):

“Certiorari is one of the prerogative writs, the other mandamus, used by the courts to restrain the abuse or misuse of power, or to correct errors of law, wrong exercise of discretion by tribunals, public authorities and Government Officials. Once a public authority acts judicially or administratively, its conduct is subject to control by the courts by means of certiorari or mandamus.”

What can be gleaned from the above expositions on the writ of certiorari is that it is a peculiar procedure whereby the proceedings sought to be quashed are physically brought before the court. This position is buttressed by the provisions of Order 3 Rule 1 of the Fundamental Rights (Enforcement Procedure) Rules 1980 (now Fundamental Rights (Enforcement Procedure) Rules 2009, which states:

“In the case of an application for an order to remove any proceedings for the purpose of their being quashed, the applicant may not question the validity of any order, warrant, commitment, conviction, inquisition or record unless before the hearing of the motion or

summons he has served a certified copy thereof together with a copy of the application on the Attorney General of the Federation or of any state in which the application is being heard, as the case may be, or accounts for his failure to the satisfaction of the court or Judge hearing the motion or summons.”

Order 34 Rule 9(2) of the High Court Civil Procedure Rules of Benue State contains similar provisions. B

On the importance of exhibiting the proceedings of the inferior tribunal sought to be quashed, this court in the case of Zamani Lekwot v. Judicial Tribunal on Civil and Communal Disturbances in Kaduna State & Anor. (1997) 8 NWLR (Pt. 515) 22 @ 34 E-F; 35 E-F and 36 B-D held thus: C

Per Kutigi, JSC (as he then was) at page 34 E-F:

“No court would make an order setting aside or nullifying proceedings or judgments on which it has never set its eyes! I think mere affidavit verifying the facts would to my mind be insufficient. And I so hold.”

Per Belgore, JSC (as he then was) at page 35 E-F:

“No court in this country can set aside, nullify or quash any proceedings or decisions not before it. Courts rely on concrete facts before them and not on guess-work and to ask a court to make a decision on guess-work and matters not exhibited before it is unjust and can, depending on the circumstances of the case, amount to an abuse of court process.” E

And finally, per Ogundare, JSC at page 36 C-D: F

“The application now before us is akin to an application for certiorari whereby the proceedings they seek to nullify or the judgment of the tribunal are sought to be quashed. Such an application will not be granted where the proceedings and judgment are not placed before the court or sufficient explanation given for failure to do so.” G

From the above excerpts of the judgment it is clear that it is mandatory that the proceedings or judgment to be quashed must be placed before the court before it can exercise its powers in relation thereto. In the instant case, the appellants were unable to give any cogent reason for their failure to bring up the proceedings of the 3rd respondent. I agree entirely with the court below that the issuance of a notice to produce in the circumstances of this case is of no moment. H

There is no reason given to explain why the appellants were unable to obtain a certified true copy of the proceedings, which constitute a public document within the meaning of Section 109 of the Evidence Act 1990 (now Section 102 of the Evidence Act 2011). It would indeed be very dangerous for the court to rely on the averments in the appellants' supporting affidavit without the advantage of seeing the entire proceeding. This is because it is only natural that the appellants would place before the court facts, which support their position, which may not necessarily be a true reflection of all that transpired in the case.

I therefore agree with the court below that the appellants' failure to place the proceedings of the 3rd respondent before the trial court, was a fundamental omission. There was no basis upon which the court could determine whether they were denied fair hearing, whether the 3rd respondent exceeded its jurisdiction or whether there was any error committed on the face of the record to warrant the quashing of the proceedings or the White Paper. The copious averments in the supporting affidavit did not meet the legal requirement for the exercise of the court's discretion in the appellants' favour.

For these and the more detailed reasons given by my learned brother, Galadima, JSC in the lead judgment, I also find the appeal to be without merit. I accordingly dismiss it and abide by the order for costs.

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