

COURT OF APPEAL AKURE DIVISION
MONDAY 19TH MAY, 2014. CA/AK/70/2012
CORAM:- S. DENTON-WEST, M. A. OWOADE,
C. I. JOMBO-OFO, JJCA

1. EXECUTIVE GOVERNOR OF
OSUN STATE
2. OSUN STATE CIVIL SERVICE
COMMISSION
3. OSUN STATE GOVERNMENT APPELLANTS
4. HON. ATTORNEY-GENERAL
OSUN STATE
AND
BARRISTER N. O. FOLORUNSHO RESPONDENT

OBJECTIONS - Preliminary objection - Purpose - The objective is to terminate a case at the preliminary stage - So that only issues that are free from known legal handicap go to trial (H1)

COURTS - Proceedings - Rules - Court does not operate in vacuum - It operates within the ambit of the enabling laws and rules (H2)

COURTS - Preliminary objection - Determination of - The trial court has discretion by O. 22 r. 2 of its Rules - To entertain any point of law raised in pleadings before or at the trial (H3)

OBJECTIONS - Preliminary objection - Limitation law - Pleadings - Substance of the objection is a special defence - Which must be pleaded specifically by party - Before relying on same (H4)

ACTIONS - Limitation law - Purpose - It is to protect defendant from injustice of facing a stale claim - In view of the likelihood that evidence which was earlier available - May have faded (H5)

JURISDICTION - Determination - Court has jurisdiction to determine - Whether it has jurisdiction to hear a case (H6)

COURTS - Action - Hearing - Nothing prevents the court from de-

termining the respondent's case - Hence argument that the substantive suit was not ripe for hearing is of no moment (H7)

ACTIONS - Statutes - Limitation law - Being a civil servant in Osun State - Trial court rightly held that it is the State's law and not the Federal enactment - That applies to employment of respondent (H8)

COURTS - Adjournment - Grant - Discretion lies with trial court - Which must exercise same judicially and judiciously - Deciding on competing issues of justice and of speedy determination of the issues (H9)

FAIR HEARING - Breach - Allegation of - Fairness is expected from both sides - Hence appellants cannot complain of denial of fair hearing - Having not been fair to the court and respondent (H10)

FACTS

This action was commenced by plaintiff/respondent against defendants/appellants at the High Court of Osun State Osogbo. The claims are inter alia, for a declaration that appellants' letter of sometime in 2005 purportedly determining respondent's appointment as the Solicitor-General & Permanent Secretary in the State Ministry of Justice is illegal. Respondent alternatively claims for an order on appellants to pay to respondent all his arrears of salaries, allowances and other entitlements incidental thereto. Appellants did not file defence but raised a preliminary objection. The court ordered them to file their defence and incorporate the preliminary objection. Appellants refused to file their defence, despite the several adjournments made in the matter for that purpose. Respondent in the circumstance opened his case and again the matter was adjourned three times for cross-examination of respondent and his witness.

Instead of proceeding with cross-examination, appellants applied for stay of proceedings and leave to appeal. Application for leave to appeal was granted, but that for stay of proceedings was refused. The matter was thereafter adjourned for adoption of written addresses. On the adjourned date, appellants brought another motion for stay of proceedings. The court in its ruling dismissed the latest motion as lacking in merit and an abuse of court process. There was

yet another adjournment for adoption of final addresses. Again on the adjourned date, appellants orally applied for stay of proceedings on the ground that they had applied to the Court of Appeal for stay of proceedings. The oral application was ruled against since no appeal has been entered on any of the rulings of the appeal court. In the circumstance, respondent adopted his written address and appellants made no response. In its judgment, the court granted respondent's prayers 1, 2, 3 entirely and 4 in the alternative. Not satisfied, appellants appealed to the Court of Appeal Akure Division.

ISSUES FOR DETERMINATION

1. Whether the appellants, without first filing their defence and specifically pleading the point of law they intend to rely upon on the strength of Order 22 Rules 1 and 2 of the High Court (Civil Procedure) Rules of Osun State (as Amended) 2008 which abolished Demurrer proceedings can be heard on the preliminary objection and more particularly in a situation in which the appellants have refused, failed/or neglected to file their defence and incorporate the point of law in line with the ruling of the trial court.

2. Whether the applicable law in the genre of cases of employment with statutory flavour as in the respondent's case is not the Limitation Law of Osun State 2003 Cap 70 which puts the limitation period at 5 years from the date on which the cause of action arose with particular reference to the respondent's contract of employment.

3. Whether by discountenancing a spurious letter of adjournment written by the appellants' counsel that he was otherwise engaged in another matter at the Court of Appeal, Akure on the day the case was slated for definite hearing i.e. 8/4/2011, the trial Judge thereby denied the appellants fair hearing in the case.

HELD (Unanimously dismissing the appeal per
DENTON-WEST JCA)

OBJECTIONS - Preliminary objection - Purpose

1. There is no doubt that the objective of preliminary objection is to terminate a case at the preliminary stage. That is to say that it is only issues that are free from any known legal handicap that should go to trial. (p. 2510 C)

COURTS - Proceedings - Rules

2. By way of preliminary, it must be noted that the court does not operate in vacuum. It operates within the ambit of the enabling laws and rules. (p. 2510 F)

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COURTS - Preliminary objection - Determination of

3. Order 22 Rule 2 gave the trial court the discretion to entertain any point of law raised in the pleadings before or at the trial. From the records, the learned trial Judge elected to entertain the appellants' preliminary objection at the trial. I am unable to find anything wrong with that decision of the learned trial court. It would have been a different ball game had the learned trial Judge refused completely to entertain the preliminary objection. (p. 2511 F)

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OBJECTIONS - Preliminary objection - Limitation law - Pleadings

4. Further, this position is strengthened by the fact that the substance of the preliminary objection is a special defence which must be pleaded specifically by a party before that party can validly rely on same.

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In view of the foregoing provisions and judicial precedents, it is not possible to raise and rely on special defence provided by Limitation Law without having pleaded same in the statement of defence. From the record of proceedings at the lower court, it is clear that the learned trial judge severally adjourned for the appellants to file their defence and plead whatever defence they may have but the appellants blatantly ignored the court's direction to their own detriment. It will be quite preposterous for the appellants to complain for their refusal to heed the court's direction. To this end, this issue is resolved against the appellants in favour of the respondent.

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(pp. 2511 H/2512 D)

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ACTIONS - Limitation law - Purpose

5. In resolving this issue, I agree with the appellants' counsel's submission that one of the purposes of limitation period is to protect a defendant from injustice of having to face a stale

claim in view of the fact that there is a strong likelihood that evidence which was available earlier may have faded.

(p. 2515 A)

JURISDICTION - Determination

6. However, it is trite that a court has the jurisdiction to determine whether it has jurisdiction to hear a case. (p. 2515 C) B

Action - Hearing

7. Having formally and validly too struck out the appellants' preliminary objection, the trial court has no further impediment to hearing and determining the case of the respondent. C

The argument of the appellants' counsel that the substantive suit was not ripe for hearing is of no moment given the fact that it was the appellants that refused to file their statement of defence so as to enable parties close their pleadings and conduct pretrial conference. No party can hold the court to ransom indefinitely. A court is under a statutory duty to assert its control over proceedings before it. (p. 2515 H) D

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Statutes - Limitation law

8. At pages 312-315 of the record, the learned trial Judge did evaluate the evidence as led by the respondent and his witnesses at the hearing and therefore found for respondent. Further, even in the ill-fated preliminary objection, it was not in contention that the respondent is a confirmed officer whose employment enjoys statutory flavour. It is further not in dispute that the respondent was before his purported termination of appointment a Civil Servant occupying the position of Solicitor-General and Permanent Secretary in the Ministry of Justice, Osun State. There is in operation in Osun State a limitation law of Osun State, 2003. Therefore, a Federal Enactment i.e. Public Officers Protection Act cannot at the same time operate in Osun State. The learned trial Judge was right to have held that it is Limitation Law of Osun State 2003 and not Public Officers Protection Act that applies to the employment of the respondent herein. On the strength of this, this issue is also resolved against the appellants. (p. 2516 F) F

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COURTS - Adjournment - Grant

9. There is no doubt that the question of whether any trial court should grant an application for adjournment made by any of the parties lies within the exclusive discretion of the said court. And like all judicial discretions, must be exercised judicially and judiciously. This entails that the exercise of such discretion should always depend on the circumstances of each case. When considering whether to grant the application for adjournment or refuse same, the court is obligated to decide on the competing issues of doing justice and of speedily determining the issues before it.

Distilled from the foregoing is the notorious fact that granting of adjournment by the court cannot be automatic or just for the asking. That being so, the appellants' counsel submission that their letter seeking for adjournment on the ground that their counsel seized of this matter was at the Court of Appeal alone was enough to persuade the court to grant the adjournment cannot but be erroneous because the court is obligated to weigh several factors before deciding whether to grant the application for adjournment or not. (p. 2518H)

FAIR HEARING - Breach - Allegation of

10. Fairness is expected from both sides because both parties are entitled to fair hearing. Worsening the situation, a search conducted by the respondent's counsel at the Court of Appeal, Akure, showed that the letter seeking for adjournment was a calculated attempt to deceive the trial court as the Court of Appeal, Akure did not adjourn any matter to Friday 8/4/2011. This is a very reprehensible conduct and a disrespect to the dignity of the Honourable Court. It is an assault on the integrity of the bar before the bench which must be discouraged with all seriousness. The appellants cannot complain of denial of fair hearing because they have not been fair to both the court and the respondent. Given the above undisputed facts, it would have been a denial of fair hearing to the respondent had the court granted the adjournment on the basis of a spurious letter intentionally calculated to mislead

the trial court by the appellants' counsel.

He who comes to equity must come with clean hands. In this case, it is an uncontroverted fact that the appellants' letter dated 8/4/2011 seeking for adjournment was spurious and a calculated attempt to deceive the trial court. Can it be said that the appellants' hands are clean in seeking the adjournment of 8/4/2011? The answer is clearly in the negative. Therefore they cannot complain of fair hearing since they have not been fair to both the proceedings and the respondent. On the strength of the above I also resolve this issue against the appellants. (pp. 2519 H/2521 B) B
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NOTABLE POINTS OF INTEREST

DENTON-WEST JCA

1. Demurrer – Definition of D

Black's Law Dictionary, 8th Edition at page 465 defined "demurrer" thus:

"A pleading stating that although the facts alleged in a complaint may be true, they are insufficient for the plaintiff to state a claim for relief and for defendant to frame an answer." (p. 2511 D) E

2. Government officials should comply with court orders

At this juncture, it is pertinent to strongly deprecate the attitude of some government officials in defending actions against the governments in courts of law. In the instant case, the record of proceedings as borne out by the record of appeal is replete with instances of the trial court orders and directions being ignored with impunity. That is not good for the overall good of the nation. The government, courts and all other agencies of government are all statutory creations for the overall well-being of the citizenry. One should not disrespect or bring the other into disrepute. It is the same court whose directions and orders were ignored that is now approached for redress by the appellants. Government officials should set the right standard in observing the rule of law. (p. 2521 D) F
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CASES REFERRED TO

Efet v. INEC (2011) 7 NWLR (pt. 1423)

2504 Executive Gov. of Osun State v. Folorunsho (2015) 7 KLR CA

- Yaro v. Arewa Construction (2007) 6 SCNJ 418
A.G. Federation v. ANPP (2003) NWLR (pt. 851) 182
Kemtas Nig. Ltd. v. Fab Enieh Nig. Ltd. (2007) All FWLR (pt. 384) 320
Okereke v. Yar-adua (2008) 12 NWLR (pt. 1100) 9
B Eya v. Olopade (2011) LPELR-SC168/2001
Balogun v. Onokoro (1984) 10 SC 267
Oforlete v. State (2007) 7 SCNJ 162
Jiwue v. Dimlong (2003) NWLR (pt. 824) 154
C FCDA v. Naibi (1990) 3 NWLR (pt. 138) 270
Chime v. A.G. Federation (2008) All FWLR (pt. 439) 550
Ibrahim v. JSC Kaduna State (1998) 14 NWLR (pt. 584)
Mosojo v. Oyetayo (2003) 7 SCM 119
Fagbule v. Rodrigues (2002) 7 NWLR (pt. 765) 188
D APGA v. Umeh (2011) 8 NWLR 429
International Insurance Group Ltd. v. Alao (1990) 3 NWLR (Pt. 141) 773
Solanke v. Ajibola (1968) 1 ALL NLR 46
University of Lagos v. Aigoro (1985) 1 NWLR (Pt. 1) 143
E Ijeoma v. State (1990) 6 NWLR 567 @ 581
Sanni v. Agara (2008) 4 WRN 142
ED Tsokwa & Sons Ltd. v. CFAO (1993) 4 NWLR 120

STATUTES & RULES REFERRED TO

- F Limitation Law of Osun State 2003 Cap 70
Public Officers Protection Act
High Court (Civil Procedure) Rules 2008 of Osun State, O. 15 r. 7,
O. 22 rr. 1 & 2

G **BOOK REFERRED TO**

Black's Law Dictionary 8th Ed. p. 465

REPRESENTATION

- H K. A. Tijani (Esq.) (A.C.S. Ministry of Justice, Osun State), for the Appellants
N. O. Folorunsho (Esq.) appeared in person, for the Respondent

LEAD JUDGMENT BY DENTON-WEST JCA

By a writ of summons filed on 10/03/2009 and an Amended Statement of Claim dated and filed on 18/02/2011, the claimant (hereinafter called the respondent) commenced an action against the defendants (hereinafter called the appellants) before the High Court of Osun State sitting at Osogbo Judicial Division claiming the following reliefs: B

“1. A declaration that the defendants’ letter Ref. No. HS/10/187 dated 9th day of May, 2005 purportedly determining his appointment as the Solicitor-General and Permanent Secretary in the Ministry of Justice of Osun State is unconstitutional, invalid, illegal, ultra vires, contrary to Osun State Service Regulations, null and void, in violation of due process of law and in contravention of the claimant’s constitutional right to fair hearing. C

2. A declaration that the claimant’s termination from Osun State Civil Service is illegal, unconstitutional and contrary to Osun State Public Service Regulations and therefore invalid, ineffectual, null and void, and of no effect whatsoever. D

3. Declaration that the claimant cannot be relieved of his post without following due process, and lack of which culminated in the infringement of his fundamental rights to fair hearing and therefore to justice. E

4. An order on the defendants jointly and severally to reinstate the claimant to his former position as the Solicitor-General and Permanent Secretary, the position he held before his purported termination from service. F

Alternatively, an order on the defendants to pay to the claimant all his arrears of salaries, allowances and other entitlements incidental thereto and all increments accruing to him from the date of his arbitrary retirement on 9th May, 2005, until judgment and from the date of judgment until he is due for retirement. G

The defendants did not file a defence to this action but raised a preliminary objection. The learned trial Judge, O. D. Afolabi, J. ordered the appellants to file their defence and incorporate the preliminary objection in it in view of the fact that demurrer proceedings has been abolished in Osun State by virtue of Order 22 of the High Court (Civil Procedure) Rules, 2008 of Osun State. The appellants attempted to heed this order and filed a motion for extension of time H

to file their defence. But the motion was struck out for failure to comply with the extant rules of court. The appellants did not attempt to re-file the motion. Rather, the appellants sought to move their preliminary objection and the court ordered them to file their defence and include their preliminary objection to final Address of counsel in view of the respondent's pending motion for judgment in default of defence, and the case was adjourned to enable the appellants file their defence. On the next date, the appellant still did not file their defence. The respondent then opened his case and it was adjourned for three times to enable the appellants cross-examine the respondent and his witness. Rather than cross-examine them, appellants brought a motion for stay of proceedings and leave to appeal. In a considered ruling, the court granted leave to appeal but refused to stay proceedings and the prayer to deem as properly filed a Notice of Appeal that has not been filed. The matter was adjourned for adoption of Written Addresses. On the next date, for adoption of Written Addresses, appellants brought another motion for stay of proceedings they just filed which has not been served on the respondent. The said motion was adjourned twice and in a considered ruling, the motion was dismissed for lacking in merit and an abuse of court process. The matter was again adjourned for adoption of counsel's Final Addresses. And on that date, appellant orally applied for stay of proceedings on the ground that they had applied to the Court of Appeal for stay of proceedings. The oral application was ruled against since no appeal has been entered on any of the rulings of this court. The respondent adopted his Written Address and the appellants in reply said they have nothing to say. In his judgment delivered on 19/12/2011, the learned trial judge granted respondent's prayers 1, 2, 3 entirely, and 4 in the alternative. Aggrieved, the appellants appealed to this court via Notice of Appeal containing 4 grounds of appeal and filed on 21/12/2011.

The parties duly filed and exchanged their briefs of argument in compliance with the rules of this court. The appellants' brief settled by Toyin Bolaji Adegoke (Mrs.) (Director of Civil Litigation and Advisory Services, Osun State) is dated 18/01/2013 and filed on the same day but deemed filed and properly served on 20/2/2013, while the respondent's brief settled by N. O. Folorunsho (Esq.) is dated 15/2/2013 and filed on the same day.

At the hearing of the appeal on 20/2/2013, K. A. Tijjani (Esq.) (Assistant Chief State Counsel) for the appellants adopted and relied on the appellants' brief of argument and urged us to allow the appeal and set aside the judgment of the trial court. N. O. Folorunsho (Esq.) while adopting and relying on his brief of argument, urged us to uphold the judgment of the trial court in this appeal. B

From the four grounds of appeal contained in their Notice of Appeal, the appellants distilled the following three issues for determination:

1. Whether the court was right to have discountenanced the hearing of the preliminary objection of the appellants which challenged the jurisdiction of the court at the preliminary stage of the suit. C
2. Whether the lower court has not denied the appellants fair hearing when it discountenanced the letter of adjournment written and submitted on behalf of the counsel to the appellants that he was otherwise engaged in the Court of Appeal, Akure. D
3. Whether it was right for the lower court to have given judgment to the respondent without considering the jurisdiction of court to hear and determine the case as raised before him in the preliminary objection of the appellants before it. E

The respondent on his part also distilled three issues for the determination of this appeal, thus:

1. Whether the appellants, without first filing their defence and specifically pleading the point of law they intend to rely upon on the strength of Order 22 Rules 1 and 2 of the High Court (Civil Procedure) Rules of Osun State (as Amended) 2008 which abolished Demurrer proceedings can be heard on the preliminary objection and more particularly in a situation in which the appellants have refused, failed/or neglected to file their defence and incorporate the point of law in line with the ruling of the trial court. F G
2. Whether the applicable law in the genre of cases of employment with statutory flavour as in the respondent's case is not the Limitation Law of Osun State 2003 Cap 70 which puts the limitation period at 5 years from the date on which the cause of action arose with particular reference to the respondent's contract of employment. H
3. Whether by discountenancing a spurious letter of adjournment written by the appellants' counsel that he was otherwise engaged in another matter at the Court of Appeal, Akure on the day

the case was slated for definite hearing i.e. 8/4/2011, the trial Judge thereby denied the appellants fair hearing in the case.

Given the similarities in substance, I shall adopt the three issues as formulated by the respondent as being encompassing in resolving this appeal.

B ISSUE ONE

Whether the appellants, without first filing their defence and specifically pleading the point of law they intend to rely upon on the strength of Order 22 Rule 1 and 2 of the High Court (Civil Procedure) Rules of Osun State (as Amended) 2008 which abolished Demurrer proceedings can be heard on the preliminary objection and more particularly in a situation in which the appellants have refused, failed/or neglected to file their defence and incorporate the point of law in line with the ruling of the trial court.

D Learned counsel for the appellants in addressing this issue, submitted that the purpose of preliminary objection is to terminate a case at infancy without dissipating energies on fruitless matter in court proceedings. He relied on *Efet v. INEC & Ors.* (2011) 7 NWLR (Pt. 1423); *Yaro v. Arewa Construction & Ors.* (2007) 6 SCNJ 418. Counsel opined that the appellants' contention via preliminary objection is that the respondent at the court below did not comply with enabling law and therefore his action should be dismissed. He called in aid *A.G. Federation v. All Nigeria Peoples Party & Ors.* (2003) NWLR (Pt. 851) 182. Counsel argued that by the said preliminary objection, the appellants contend that the action of the respondent is statute barred having regard to the relevant laws. Counsel called in aid the cases of *Kemtas Nig. Ltd. v. Fab Enieh Nig. Ltd.* (2007) ALL FWLR (Pt. 384) 320 - 336; *Okereke v. Yar-adua* (2008) 12 NWLR (Pt. 1100) 9 to the effect that a successful preliminary objection deprives a court of jurisdiction and/or terminates the case before it. Further, counsel relied on the case of *Shell BP Petroleum Development Company v. Onasanya* (1976) 6 SC 89 @ 94 to the effect that it is the statement of claim and not the statement of defence that the court is to consider in deciding whether it has jurisdiction or not. Counsel further submitted that the apex court in the said *Shell BP Petroleum Development Company v. Onasanya* (supra) said that a point of law or defence which will be decisive of the whole suit can be raised by preliminary objection, motion or even orally. It is submitted

that a court has the jurisdiction to decide whether it has jurisdiction. Counsel relied on *Arabella v. Nigeria Agricultural Insurance Incorporation* (2008) 5 SCM 39 @ 57.

Further, said counsel, a court has the duty to examine grounds of objection in a preliminary objection even in the absence of a reply brief. He relied on *Eya & Anor v. Olopade & Anor* (2011) LPELR-SC168/2001. Counsel submitted that the court can under its inherent powers entertain a preliminary objection even if the only court process filed is writ of summons and an affidavit in support of the interlocutory application (sic) and that the issue of jurisdiction is not a matter of demurrer proceedings. He relied on *Arjay & Ors. v. Airline Management Support Ltd.* (2003) 5 SCM 17 29-30. Finally on this issue, counsel submitted that a point of law or defence can be raised on preliminary objection or in a motion if the point of law will be decisive of the whole litigation (sic). He relied on *Arabella's case* (supra).

Reacting, learned counsel for respondent submitted that appellants cannot be heard on their preliminary objection without first filing a defence to the action and incorporate therein the point of law they intend to canvass. He relied on Order 15 Rule 7 of the Osun State Civil Procedure Rules 2008 as Amended and submits that the limitation law cannot be raised as a preliminary objection without pleadings. He relied further on *Ishola Balogun v. Wahabi Onokoro & Ors.* (1984) 10 SC 267-269.

Secondly, counsel submitted that taking preliminary objection without defence filed would amount to demurrer proceedings which has been abolished in Osun State by virtue of Order 22 Rules 1 and 2 of Osun State High Court Civil Procedure Rules 2008 as Amended. Further, counsel submitted that allusion to matters of facts or inference to be made from application of the law to the facts which makes a sight (sic) incompetent or un-maintainable like issues of cause of action, locus standi, estoppels, illegality, enforceability of cause of action are not matters of pure law, they must be pleaded in the statement of defence and set down for hearing as a point of objection. Counsel referred to pages 307-310 of record of proceedings and submit that the appellant did not respect the rulings of the court by refusing to file their statement of defence. Counsel further submitted that after the court struck out the appellants, motion for extension of

time to file their statement of defence, they refused to re-file the said motion and to cross-examine the respondent and his witnesses. Counsel therefore argued that unchallenged and un-contradicted evidence must be accepted by the court. He relied on *Linus Onwuka v. R. I. Omogui* (1992) 3 SCNJ 98; *Patrick Oforlete v. State* (2007) 7 SCNJ 162. Counsel referred to paragraphs 7 and 8 of the appellants' affidavit in support of motion for extension of time to file statement of defence at page 168 of the Record of Proceedings and submitted that the appellant had by that abandoned their preliminary objections by failing to file the statement of defence.

C RESOLUTION OF ISSUE ONE:

There is no doubt that the objective of preliminary objection is to terminate a case at the preliminary stage. That is to say that it is only issues that are free from any known legal D handicap that should go to trial. See *Yaro v. Arewa Construction & Ors.* (2007) 6 SCNJ 418. However, a number of grounds can qualify as both special defences and/or preliminary objection. In the instant case, the ground of preliminary objection of the appellant at the lower court is that the respondent's case is statute barred, having E been caught by the Limitation Law. It must be noted that the grouse of the appellants in this appeal is not as to the merit or demerit of the said preliminary objection, but on the correctness of the lower court's direction that the said preliminary objection be incorporated into the appellants' final Written Address; for the court to resolve all issues F together. This is understandable given the fact that the said preliminary objection was not moved to afford the lower court the opportunity to have ruled on it.

By way of preliminary, it must be noted that the court G does not operate in vacuum. It operates within the ambit of the enabling laws and rules. In the case of *Ezegba v. F.A.T.B. Ltd.* (1992) 1 NWLR (Pt. 216) 197 @ 206 this court per Tobi, J.C.A. (as he then was) held regarding rules of court thus:

H *"Rules of court are meant to be obeyed. They are not made for the fun of them qua subsidiary legislation. Similarly the hierarchy of the courts is not there for the fun of it..."*

In the same vein, the Supreme Court on the need to comply with the mandatory provisions of the rules of court in the case of *Edun v. Odan Community* (1980) 8/11 SC 103 opined as follows:

“When a rule of court makes a mandatory provisions it is incumbent of a litigant to ensure that such provisions is complied with for it is made to be obeyed and not brushed aside even if inadvertently where the rule provides for a cure, then a litigant can seek to cure the defect or oversight, but where it does not, he must face the wrath of the law. It is all in the interest of justice and to miscarriage (sic) of justice.” B

At page 311 of the record of appeal, the trial court gave its reasons for refusing to allow the appellants move the said preliminary objection and instead directed that same be incorporated in the counsel’s written address for the court’s consideration. The learned trial Judge relied on Order 22 of Osun State High Court (Civil Procedure) Rules. The said Order 22 provides thus: C

“22 (1) No demurrer shall be allowed

(2) Any party may by his pleadings raise any point of law and the judge may dispose of the point so raised before or at the trial.” D

Black’s Law Dictionary, 8th Edition at page 465 defined “demurrer” thus:

“A pleading stating that although the facts alleged in a complaint may be true, they are insufficient for the plaintiff to state a claim for relief and for defendant to frame an answer.” E

Order 22 Rule 1 of Osun State High Court (Civil Procedure) Rules expressly abolished demurrer.

At this juncture, one would ask, what is the nature of the appellants’ preliminary objection at the lower court? It is clear that it borders on Limitation Act which is a special defence. **Order 22 Rule 2 gave the trial court the discretion to entertain any point of law raised in the pleadings before or at the trial. From the records, the learned trial Judge elected to entertain the appellants’ preliminary objection at the trial. I am unable to find anything wrong with that decision of the learned trial court. It would have been a different ball game had the learned trial Judge refused completely to entertain the preliminary objection. Further, this position is strengthened by the fact that the substance of the preliminary objection is a special defence which must be pleaded specifically by a party before that party can validly rely on same.** See *Jiwue v. Dimlong* (2003) NWLR (Pt. 824) 154 @ 180-181; *FCDA v. Naibi* (1990) 3 NWLR (Pt. 138) 270 F G H

@ 281.

Specifically in Chime v. A.G. Federation (2008) ALL FWLR (Pt. 439) 550 @ 563 paragraph A - B, this court held thus:

B *"In view of the foregoing, it becomes clear that special defence such as Limitation Act or Law must be specifically and expressly pleaded in the statement of defence, otherwise it cannot be considered by the trial or appeal court. The rules of court are made to be followed and their provisions binding on a party who is conducting a proceeding in court."*

C Putting paid to this issue, Order 15 Rule 7 of Osun State High Court (Civil Procedure) Rules 2008 as Amended explicitly provide thus:

D *"Where a party raises any ground which makes a transaction void or voidable or such matters as fraud, limitation law, relevance payment, performance, facts showing insufficiency in contract, or illegally either enactment or by common law, he shall specifically plead same."*

In view of the foregoing provisions and judicial precedents, it is not possible to raise and rely on special defence provided by Limitation Law without having pleaded same in the statement of defence. From the record of proceedings at the lower court, it is clear that the learned trial judge severally adjourned for the appellants to file their defence and plead whatever defence they may have but the appellants blatantly ignored the court's direction to their own detriment. It will be quite preposterous for the appellants to complain for their refusal to heed the court's direction. To this end, this issue is resolved against the appellants in favour of the respondent.

G ISSUE TWO:

H Whether the law in the genre of cases of employment with statutory flavour as in the respondent's case is not the limitation law of Osun State 2003 Cap 70 which puts the limitation period at 5 years from the date on which the cause of action arose with particular reference to the respondent's contract of employment.

In arguing this issue, learned counsel for the appellant submitted that the purpose of limitation period is to protect a defendant from injustice of having to face a stale claim in view of the fact that there is a strong likelihood that evidence which was available earlier

may have been lost and the memories of witnesses may have faded. He relied on *JFS Investment Ltd. v. Brawal Line Ltd.* (2010) 18 NWLR (Pt. 1225). Counsel submitted that the respondent's claim is statute barred, same having being caught by Section 2 (a) of the Public Officers Protection Act. He further called in aid the case of *Ibrahim v. Judicial Service Committee, Kaduna State & Anor* (1998) 14 NWLR (Pt. 584). Counsel further submitted on another front that the learned trial Judge heard this case when same was not ripe for hearing because the court had not conducted the pre-trial conference as required by Order 25 of Osun State High Court Amended Civil Procedure Rules, 2008. B C

Counsel argued that as at 8/4/2011, it was the preliminary objection of the appellant that was ripe for hearing and not the substantive case since pleadings have not been concluded and pre-trial conference yet to be conducted. Counsel called in aid the case of *FRN v. Gold* (2007) 10 SCM 32-54 to attack the finding of fact by the learned trial Judge at page 9 of the record of appeal and submitted that Section 2 (a) of the Public Officers Protection Act was the basis of the appellant's preliminary objection at the lower court which touches on the jurisdiction of the court and not a demurrer proceedings as indicated by the Judge in his judgment. Counsel further submitted that the Supreme Court in the case of *FGN & Ors. v. Zebra Energy Ltd.* (2002) 14 SCM 199-155, defined public officer to include Governor of a state. It is counsel's further argument that the limitation period is determined on the day of occurrence of action complained about and not on the consequence or result of same. He relied on *Mosojo v. Oyetayo & Ors.* (2003) 7 SCM 119 @ 121. Finally, counsel submitted that it is trite law that if the time pleaded in the writ of summons and statement of claim is beyond the period allowed by the limitation law, the action is statute barred. He urged us to resolve this issue for the appellant, allow the appeal and set aside the judgment of the lower court. D E F G

Reacting learned counsel to the respondent recounted all the exhibits tendered and submitted that all the exhibits confirmed that the respondent is a confirmed officer whose employment enjoys statutory flavour. And therefore that the Public Officers Protection Act 2004 Laws of the Federation which applies to only items on the exclusive legislative list does not apply to his employment. He relied on H

Rasheed Busari v. Osun State Water Corporation (2008) ALL FWLR 1587 ratio 1 & 3. Counsel submitted that it is the Limitation Law of Osun State which put 5 years limitation for institution of suits against a public officer that applies to his employment. He relied on Olawole Akinbode v. Chief Registrar, Osun State High Court Judicial Service Commission in Suit No. CA/I/36/96; Nawa v. Cross River State (2008) ALL FWLR 809 @ 819 ratio 7 (unreported).

Counsel argued that the respondent did not write any letter of retirement as claimed by the appellants in exhibit P10, which letter of retirement, appellants has not produced for the court to peruse. Further the appellants have not denied that the respondent is a confirmed officer in the Civil Service of Osun State whose employment enjoys statutory flavour. Counsel pointed out that sufficient opportunity was given to the appellants to present their case but they refused to do so and therefore cannot be heard to complain of fair hearing. He relied on Mact v. University of Makurdi & Ors. (2006) NWLR 173. Counsel recounted that on 13/5/2011, instead of appellants cross-examining the respondent or ask for adjournment to study his evidence in chief and thereafter cross examine him, the appellants orally applied to move the preliminary objection earlier ruled against by the court and which they have not appealed against.

Counsel therefore submitted that the appellants have thereby waved their right and cannot complain of lack of fair hearing. Further, counsel recounted that on 20/5/2011 when PW2 gave evidence in chief, the appellants refused also to cross-examine both PW1 and PW2 and rather informed the court that they do not have anything to say. It was submitted by counsel that the appellants were given adequate opportunity to present their case but that they enjoyed bluffing the court. And therefore cannot be heard to talk about denial of fair hearing even when they refused to file their defence. He relied strongly on M.M.S. Ltd v. Oteju (2005) 14 NWLR (Pt. 945) 541 and the unreported case of Abayomi Fabunmi v. Registered Trustee of Four Square Gospel Church in Nigeria delivered on 12th December, 2011, per Chinwe Iyizoba, JCA of this Akure Division in Suit No. CA/I/315/2009. Finally on this issue, it was submitted for the respondent that the appellants did not comply with provisions of Section 37 of the Public Services Commission Regulations 1978 applicable to Osun State. It was pointed out that the said Section 37 set

out procedures for termination of appointment of Public Officer in Osun State which the appellants on this case flagrantly disregarded.

RESOLUTION OF ISSUE TWO

In resolving this issue, I agree with the appellants' counsel's submission that one of the purposes of limitation period is to protect a defendant from injustice of having to face a stale claim in view of the fact that there is a strong likelihood that evidence which was available earlier may have faded. See JFS Investment Ltd. v. Brawal Line Ltd. (2010) 18 NWLR (Pt. 1225). B

However, it is trite that a court has the jurisdiction to determine whether it has jurisdiction to hear a case. See A.G. Bendel State & 2 Ors. v. PLA Aideyan (1989) 4 NWLR (Pt. 118) 646; S. B. Salami v. Chairman LEDB (1989) 5 NWLR (Pt. 123) 539 SC; Bronik Motors Ltd. & Anor v. Wema Bank Ltd. (1933) 6 SC D 158. C

I have stated earlier on while resolving Issue One that from the entire record of proceedings as borne out the record of appeal, that the trial court did not refuse to hear the preliminary objection of the appellants. At page 311 of the record of appeal, the trial Judge gave his reason for directing the appellants to file their statement of defence and incorporate their preliminary objection in their Written Address for the court to consider everything together. This, I must say is not out of place. Further at the same page 311 of the record of appeal, the learned trial Judge reasoned that since special defences such as limitation law are required to be pleaded otherwise it cannot be considered by the trial or Appeal Court, the appellants having failed to file their pleadings in order to give their special defence a foundation, formally struck out the said preliminary objection. This action by the learned trial Judge cannot be faulted at all, given the provisions of Order 2 Rules 1 and 2 of the Osun State High Court (Civil Procedure) Rules 2008 (as amended) and the case of Jiwue v. Dimlong (supra); FCDA v. Naibi (supra); Chime v. A-G Federation (supra); JFS Investment Ltd. v. Brawal Line Ltd. (supra). Put in another way, the kind of objection raised by the appellants in their preliminary objection is such a special defence that cannot stand unless and until a statement of defence is filed and same is specifically pleaded. E F G H

Having formally and validly too struck out the appellants'

preliminary objection, the trial court has no further impediment to hearing and determining the case of the respondent.

The argument of the appellants' counsel that the substantive suit was not ripe for hearing is of no moment given the fact that it was the appellants that refused to file their statement of defence so as to enable parties close their pleadings and conduct pretrial conference. No party can hold the court to ransom indefinitely. A court is under a statutory duty to assert its control over proceedings before it. In *Fagbule v. Rodrigues* (2002) 7 NWLR (Pt. 765) 188 @ 207, the court opined thus:

"From the series of events unleashed in the record, I am bound to agree with the learned trial Judge that the learned counsel for the appellant was making all "ploy" to make it impossible for the case to be determined. Where a party or his counsel orchestrates a designed plan to foist a position of helplessness or naivety upon a court, it is the duty of that court to assert its control over the proceedings before it."

The wheel of justice would have been grounded if the court must wait indefinitely for a defendant to file his statement of defence anytime he so wishes. It must be noted that the writ of summons was filed in this matter on 10/03/2009 and up till 19/12/2011 when judgment was given, the appellants have refused to file their statement of defence. The learned trial Judge was eminently right to have allowed the respondent to prove his case and judgment given thereon.

At pages 312-315 of the record, the learned trial Judge did evaluate the evidence as led by the respondent and his witnesses at the hearing and therefore found for respondent. Further, even in the ill-fated preliminary objection, it was not in contention that the respondent is a confirmed officer whose employment enjoys statutory flavour. It is further not in dispute that the respondent was before his purported termination of appointment a Civil Servant occupying the position of Solicitor-General and Permanent Secretary in the Ministry of Justice, Osun State. There is in operation in Osun State a limitation law of Osun State, 2003. Therefore, a Federal Enactment i.e. Public Officers Protection Act cannot at the same time operate in Osun State. The learned trial Judge was right

to have held that it is Limitation Law of Osun State 2003 and not Public Officers Protection Act that applies to the employment of the respondent herein. On the strength of this, this issue is also resolved against the appellants.

ISSUE THREE

Whether by discountenancing a spurious letter of adjournment written by the appellants' counsel's that he was otherwise engaged in another matter at the Court of Appeal, Akure on the day the case was slated for definite hearing i.e. 8/4/2011, the trial Judge thereby denied the appellants fair hearing in the case. B

Learned counsel for the appellant submitted that the learned trial Judge failed to exercise his discretion judicially and judiciously by his decision to discountenance the letter from their counsel seeking adjournment on the basis that he is in the Court of Appeal and this resulted in denial of fair hearing to the appellants. He relied on APGA D & Anor. v. Umeh & Ors. (2011) 8 NWLR 429. Further, counsel argued that the trial court failed to consider the circumstances of this case and its peculiar nature, given the fact that they raised issue of jurisdiction via their preliminary objection. Counsel submitted that letter of adjournment on the ground that their counsel was before Court of Appeal without more was enough for the court to grant adjournment. He relied on Obeta v. Okpe (1996) NWLR (Pt. 473) 401 (sic) and submitted that where a court wrongly exercised its discretion in refusing an application for adjournment, the court thereby denied the party fair hearing. Counsel further submitted that the fact that Court of Appeal, Akure did not sit on Friday 8th of April, 2011 or does not sit at all on Fridays is not enough ground for the trial court to refuse to grant adjournment as sought by their counsel's letter. Be that as it may, said counsel that a litigant should not be made to suffer for the sin of his counsel. He called in aid the case of Sanni v. Agara (2008) 4 WRN 142. Finally on this issue, counsel called in aid the case of ED Tsokwa & Sons Ltd. v. CFAO (1993) 4 NWLR 120 and Section 36, Constitution of Federal Republic of Nigeria, 1999 (as amended) to the effect that every party should be given ample time to present his case including granting an adjournment. F G H

Reacting to this issue via his Issue No. 3 in his brief of argument, the learned respondent's counsel pointed out that it is on record

that on 11/3/2011, the learned trial Judge made an order that the appellants should file their defence and incorporate their preliminary objection in their defence or reduce their preliminary objection to final Written Address if they have no defence to file; and that appellants' counsel, one Adekilekun Tijani was present in court that day.

B Consequent on this ruling, the respondent withdrew his earlier application for judgment in default of defence and the case was adjourned to 8/4/2011 for hearing. Counsel stated that on 8/4/2011, the appellants wrote a spurious letter to court seeking for adjournment on the ground that a hearing notice was served on him for another case before Court of Appeal, Akure. Counsel noted that a copy of the said hearing notice was not attached to the letter and the respondent strongly opposed the application. The trial court refused the application for adjournment and the respondent opened his case after which

C the case was adjourned for cross-examination by the appellants. On the next date, said counsel, instead of cross-examining the respondent, the appellants applied to move the preliminary objection without filing the defence as the court had ordered earlier and the court refused. Counsel went further to point out that the appellants brought

E a motion on notice for leave to appeal against the ruling of 8/4/2011 and for stay of proceedings. Leave to appeal was granted while that of stay of proceedings was refused. Counsel submits further that the respondent filed a counter affidavit and attached a letter of clarification with endorsement from the Court of Appeal that it does not sit

F on Fridays and specifically did not sit on Friday 8/4/2011. Consequent upon the above stated facts, counsel submitted that the appellants attempted to mislead the court by the said letter of adjournment when no hearing notice was sent by the Court of Appeal. He

G urged us to resolve this issue for the respondent.

RESOLUTION OF ISSUE THREE:

Submitting on this issue, learned counsel for the appellants argued that by discountenancing their counsel's letter that he was at the Court of Appeal on that particular adjourned date the trial court

H failed to exercise its discretion judicially and judiciously. ***There is no doubt that the question of whether any trial court should grant an application for adjournment made by any of the parties lies within the exclusive discretion of the said court. And like all judicial discretions, must be exercised judicially and judi-***

ciously. This entails that the exercise of such discretion should always depend on the circumstances of each case. When considering whether to grant the application for adjournment or refuse same, the court is obligated to decide on the competing issues of doing justice and of speedily determining the issues before it. See International Insurance Group Ltd. v. Alao (1990) 3 NWLR (Pt. 141) 773; Solanke v. Ajibola (1968) 1 ALL NLR 46; University of Lagos v. Aigoro (1985) 1 NWLR (Pt. 1) 143; Ijeoma v. State (1990) 6 NWLR 567 @ 581. **Distilled from the foregoing is the notorious fact that granting of adjournment by the court cannot be automatic or just for the asking. That being so, the appellants' counsel submission that their letter seeking for adjournment on the ground that their counsel seized of this matter was at the Court of Appeal alone was enough to persuade the court to grant the adjournment cannot but be erroneous because the court is obligated to weigh several factors before deciding whether to grant the application for adjournment or not.** Now, the poser here is what is the circumstances of this case.

From the record of proceedings as contained on page 281 of the record of appeal, the appellants made the respondent withdraw his motion for judgment in default of defence on the understanding that the suit was to be heard on the merit on 8/4/2011 after the appellants must have filed their defence. On the said 8/4/2011, the appellants wrote to court for an adjournment on the ground that a hearing notice was served on him by this court that the case of Obokun L.G.A. & 1 Or v. Osun State Boundary Adjustment Commission has been fixed for the same 8/4/2011. A photocopy of the hearing notice is expected by prudent practice to have been annexed to the said letter for adjournment in view of the serious commitment and undertaking the appellants' counsel had made that resulted in the respondent withdrawing his motion for judgment in default of defence and the court adjourning the matter for hearing to 8/4/2011. Further, the appellants also failed to redeem their commitment to the said 8/4/2011 by refusing to even file their statement of defence. That is to say that if the appellants had filed their statement of defence on or before the 8/4/2011, the learned trial Judge may have considered them serious enough to grant the said adjournment. **Fair-**

ness is expected from both sides because both parties are entitled to fair hearing. Worsening the situation, a search conducted by the respondent's counsel at the Court of Appeal, Akure, showed that the letter seeking for adjournment was a calculated attempt to deceive the trial court as the Court of Appeal, Akure did not adjourn any matter to Friday 8/4/2011. This is a very reprehensible conduct and a disrespect to the dignity of the Honourable Court. It is an assault on the integrity of the bar before the bench which must be discouraged with all seriousness. The appellants cannot complain of denial of fair hearing because they have not been fair to both the court and the respondent. Given the above undisputed facts, it would have been a denial of fair hearing to the respondent had the court granted the adjournment on the basis of a spurious letter intentionally calculated to mislead the trial court by the appellants' counsel. Indeed the dictum of Supreme Court per Niki Tobi in the case of *Inakoju v. Adeleke* (2009) 3 LC 39 @ 167 paragraph H to 168 paragraph A - F is most apt here thus:

"Litigation is not a game of cleverness, smartness or tricks. It is not a hide and seek game where one of the parties in all cleverness and smartness fakes ambush and waits with all acrobatic dexterity for the opponent to fall into a trap and get him thoroughly harmed or destroyed. Litigation is not a game of chess where one of the parties attempts to trap the opponent's king to obtain victory. On the contrary, litigation has an in-built dispute settling mechanism where the parties come out in the open to make their cases frankly and not cunningly or craftily. A party who seeks fair hearing from the court must also be fair in the litigation to the adverse party and to the proceedings. A party who intentionally files motions to delay the proceedings is not fair to the adverse party and the proceedings. He should not in any way annoy the proceedings. He has a duty to respond to the procedural needs or requirements of the litigation without applying any baits because the adverse party is a human being; not a fish. He must come out and embrace the litigation with all honesty and sincerity of purpose. Where he decides to plant mines in the judicial process to obtain victory in the event of a possible slip on the part of the court or the adverse party, such party will not be in a position to ask for the fair hearing of a case, because he has not

shown fairness in the process itself. The principles of equity and fair play will certainly deny him of the fair hearing principle that he refused to surrender in the judicial process. Although fair hearing is a constitutional guarantee, it has some resonance in the principles of equity and fair play. Can the appellants really ask for what they were unable to supply in the hearing of this case? I ask again, can they, this time rhetorically?" B

He who comes to equity must come with clean hands. In this case, it is an uncontroverted fact that the appellants' letter dated 8/4/2011 seeking for adjournment was spurious and a calculated attempt to deceive the trial court. Can it be said that the appellants' hands are clean in seeking the adjournment of 8/4/2011? The answer is clearly in the negative. Therefore they cannot complain of fair hearing since they have not been fair to both the proceedings and the respondent. On the strength of the above I also resolve this issue against the appellants. C
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At this juncture, it is pertinent to strongly deprecate the attitude of some government officials in defending actions against the governments in courts of law. In the instant case, the record of proceedings as borne out by the record of appeal is replete with instances of the trial court orders and directions being ignored with impunity. That is not good for the overall good of the nation. The government, courts and all other agencies of government are all statutory creations for the overall well-being of the citizenry. One should not disrespect or bring the other into disrepute. It is the same court whose directions and orders were ignored that is now approached for redress by the appellants. Government officials should set the right standard in observing the rule of law. E
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Having resolved the three issues in this matter against the appellants, I hold that this appeal lacks merit and is hereby dismissed. The judgment of the Osun State High Court sitting at Osogbo, delivered on 19th day of December, 2011 is hereby affirmed. I make no order as to cost. H

OWOADE JCA

I read in draft the judgment delivered by my learned brother

Sotonye Denton-West, JCA.

I agree with the conclusion and I also abide with the consequential order(s).

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JOMBO-OFO JCA

I read before now in draft the lead judgment just delivered by my learned brother DENTON-WEST, JCA and I agree with the reasoning and conclusion reached therein by him.

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The appeal which obviously is lacking in merit ought to be and is hereby dismissed. In the event the judgment of the Osun State High Court delivered 19th December, 2011 is accordingly affirmed. I make no order as to costs.

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