

COURT OF APPEAL LAGOS DIVISION
FRIDAY 20TH JUNE, 2014. CA/L/100/2014
CORAM:- S. D. BAGE, Y. B. NIMPAR, J. Y. TUKUR, JJCA

SEPLAT PETROLEUM DEVELOPMENT APPELLANT
AND
1. BRITANIA-U NIGERIA LIMITED
2. CHEVRON NIGERIA LIMITED
3. CHEVRON U.S.A. INC. RESPONDENTS
4. BNP PARIBAS SECURITIES CORP.
5. MR. HERMAN PATEL

APPEALS - Record - Compilation of - CA Rules O. 8 r. 1 - Duty is on Registrar of HC to compile record - But appellant is only required to do so after expiration of 60 days - And if the Registrar failed to act (H1)

APPEALS - Record - Verification of - Parties to an appeal are required to appear to settle record - And where a party declines to attend - He should not turn around to challenge the compilation (H2)

APPEALS - Record - Where not complete - Appellate court cannot hear an appeal with incomplete records - As such incomplete record affects the competence of the court (H3)

JURISDICTION - Fundamentality of - It is a threshold issue that can be raised at any stage even for first time on appeal - And absence of same renders the entire proceeding a nullity (H4)

JURISDICTION - Absence of - Orders of court - Court must have jurisdiction before making a preservative order - Hence trial court erred by considering the application - When there is objection to its jurisdiction (H5)

ORDERS OF COURT - Discharge - Application for - Propriety - Application of 27/12/13 to discharge order made on 23/12/13 is within time - And valid to invoke provisions of FHC Rules O. 27 r. 12 (H6)

ORDERS OF COURT - Ex parte order - Discharge - O. 26 rr. 11 & 12 - Ex parte order of injunction should not last more than 14 days - Upon application by affected party to have it discharged or varied (H7)

RULES OF COURT - Shall - Interpretation of - The word commands mandatoriness - Except in few cases where court in doing substantial justice - Interpreted shall as permissive (H8)

APPEALS - Respondent's notice - Objection to - Appellant seeking to oppose the notice must file preliminary objection - And he is not allowed to raise the objection in his brief (H9)

APPEALS - Respondent's notice - Validity of - As there was no where in the record that bears the claim of 1st respondent - CA cannot determine such claim on appeal (H10)

FACTS

Before the Federal High Court Lagos, plaintiff/1st respondent commenced this action and by way of motion ex parte, it sought for the orders inter alia, interim injunction restraining defendants/respondents and their agents from proceeding to invite bid to divest the 40% participating interest of Chevron Nigeria Limited in Oil Mining Lease 52, 53 and 55 in Nigeria in favour of any person in derogation from an earlier agreement, whereby the parties entered into binding contract for the acquisition of the OML 52, 53 and 55 by 1st respondent, pending the determination of the motion on notice. The motion was taken ex parte and the trial court granted the application. Upon the service of the order of the court, appellant brought an application seeking to discharge the order.

1st respondent upon being served with appellant's application wrote a letter to the court asking for an earlier date for hearing. The matter was adjourned and on the date fixed for hearing, only appellant, 1st and 2nd respondents were present in court. There was no proof of service on the other parties. The situation necessitated a further adjournment. On the adjourned date, all parties were in court and appellant, 2nd – 5th respondents all informed the court of their various pending applications challenging the jurisdiction of the court.

Learned counsel to 1st respondent sought for time to react to the various applications. He also applied orally that the amended interim order be extended to abide the hearing of the pending applications. In its ruling, the court extended the life of the interim order of injunction on the premise that the condition precedent that will warrant its expiration had not been fulfilled. Dissatisfied, appellant appealed to the Court of Appeal.

ISSUES FOR DETERMINATION

1. Whether the learned trial judge in the face of two applications challenging the jurisdiction of the court to entertain the suit as constituted, was right in taking arguments on a separate oral application to extend the interim injunction and delivering a ruling in respect of same without first determining its jurisdiction.

2. Whether in the circumstances of the case as at 27th January, 2014, the learned trial judge could validly extend the life span of the order of interim injunction granted ex-parte on the 13th of December, 2013 and amended on the 18th of December, 2013 notwithstanding the provision of Order 26 Rule 12 of the Federal High Court (Civil procedure) Rules 2009.

HELD (Unanimously allowing the appeal per **NIMPAR JCA**)

APPEALS - Record - Compilation of

1. The contention of the 1st Respondent in the preliminary objection is that going by the rules of this court, Order 8 Rule 1, the duty of compiling record of appeal is that of the Registrar of the court below and within 60 days after the filing of the notice of appeal.

The rule provides thus:

“The registrar of the court below shall within sixty days after the filing of a notice of appeal compile and transmit the Record of Appeal to the court.”

The rule requires the Appellant to compile records only after the expiration of 60 days and where the registrar of the court below has failed to compile the record of appeal. The burden is primarily that of the Registrar of the court below

and the duty on the appellant arises at the expiration of 60 days and only if the Registrar has failed to compile the record.

Where however the Registrar acts within the rules, the appellant is not under any obligation to compile records of appeal. (p. 2659 G)

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APPEALS - Record - Verification of

2. Furthermore the rules require the parties to an appeal to appear to settle records and that is an opportunity for all parties to make observation and even object to certain aspects of the record of appeal. Where a party declines to attend the settlement of records meeting, he should not turn round to challenge the compilation of the record. (p. 2660 B)

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D *APPEALS - Record*

3. An Appellate court cannot hear an appeal with incomplete records, the reason being that an incomplete record affects the competence of the court. (p. 2661 D)

E *JURISDICTION - Fundamentality of*

4. The issue of jurisdiction is fundamental to any adjudication. It has been decided by a long line of cases that it is the life wire of determination. It is a threshold issue that can be raised at any stage of the proceedings even on appeal and for the first time. Unless there is jurisdiction the entire proceedings is a nullity no matter how well conducted.

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Jurisdiction can be challenged in various forms and in this case, it was by a preliminary objection. It has been decided that once jurisdiction is challenged, the court should first determine whether it has jurisdiction or not. That at that stage the only jurisdiction the court has is to determine whether it has jurisdiction or not and not to do any other business of the court with regards to the subject matter. (p. 2665 B)

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JURISDICTION - Absence of

5. The question of whether preservative orders can be sustained, made or considered while objections to jurisdiction are pending can be simply answered by saying that the court

must first have jurisdiction before a preservative order can be made. Can a court without jurisdiction preserve any right? All that was before the court with life must be placed at abeyance until jurisdiction is determined. The trial court therefore erred by considering an oral application to extend the life of an interim injunction when objections to the court's jurisdiction were pending. There was no challenge to the majesty of the court to warrant that step. In any case the life of the interim order of injunction had expired so there was nothing to preserve. That makes the authority of the court on the interim order also spent. This issue is resolved in favour of the appellant. (p. 2666 H) B
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ORDERS OF COURT - Discharge - Application for - Propriety

6. The issue here is whether the Appellant applied within seven days. It is clear that the order stands to be the one dated 23rd December, 2013 and therefore the application to discharge made on the 27th December, 2013 is certainly within time and valid to invoke the provisions of Order 27 Rules 12. D

The rules require the 7 days to start running from the date of service and not from the date of the order. (p. 2677 B) E

ORDERS OF COURT - Ex parte order - Disc

7. By the tenor of the Order 26 Rule 11 and 12 quoted earlier in this judgment, the court has the discretion to discharge or vary the order. Order 26 Rule 11 makes it permissive by the use of the word 'May'. Rule 12 on the other hand makes use of the word 'Shall' to provide for the life span of the ex parte order which it limited to 14 days after the party affected has applied for the order to be varied or discharged; or last 14 days after the application to vary or discharge has been argued. Here the application to discharge was not argued so the second arm of the rule is not relevant. What is in focus is the first part which covers the filing of the application to discharge. Rule 12(2) provides that if the motion to vary or discharge the ex parte order is not taken within fourteen days of its being filed, the ex parte order shall lapse. This is a categorical and emphatic provision. By the combined understand- F
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ing to be derived from the provision above, an ex parte order of injunction should not last more than 14 days upon the application by the affected party to have it discharged or varied. Rule 11 uses may, Rule 12 uses shall and parties in this appeal went to great length in arguing whether shall should be interpreted as permissive or mandatory. (p. 2677 E)

RULES OF COURT - Shall - Interpretation of

8. Agreed that rules of court do not have the force of substantive legislations and they are meant to aid the court in doing justice, the word shall generally has come to command mandatoriness except in a few cases where the court in doing substantial justice interpreted 'shall' as permissive.

The issue here is simple, by rule 11 the term "may" was used and in Rule 12 the term "shall" was used which means that the Chief Judge of the Federal High Court was conscious in the usage of the words in Order 26 Rule 11 and 12. That being the case, the intention of the framers of the rules is to make the word 'shall' used in Rule 12 imperative and mandatory. The purpose of course is not far fetched; it is to preserve a res or a right in order to give room for both sides to be heard satisfying the rule of hearing both sides. To abolish it could also cause serious damage and therefore to create a balance, stringent rules are made to guide the making and sustenance of ex-parte orders of injunction. The interpretation put forward by the 1st Respondent would not cure the mischief but put more fire to it and doing so would defeat the aim of justice. (p. 2678 B/F)

APPEALS - Respondent's notice - Objection to

9. It is settled practice that an appellant seeking to oppose a respondent's notice to contend must file a preliminary objection and this is in compliance with Order 10 Rule 1 of the rules of this court. An appellant is not allowed to raise an objection to competence of a respondent's notice to contend in his brief. This is because the notice to contend is like a cross appeal with its grounds and not based on the grounds of the notice of appeal of the appellant. Since the appellant

did not file a preliminary objection to the 1st Respondent's notice to contend that the decision of the court below be varied, it is not allowed to do so in his reply brief. (p. 2681 A)

APPEALS - Respondent's notice - Validity of

10. Now to the merit of the notice to contend and vary the decision of the court below. We have gone through the record of appeal and it was nowhere maintained that the 1st Respondent sought for such an order from the court below. That being the case, it is a fresh claim which this court cannot determine. Parties are at liberty to ask that of the court when trial resumes. This is an appellate court and the record of proceedings does not bear out the contention of the 1st Respondent. (p. 2681 D)

NOTABLE POINT OF INTEREST

NIMPAR JCA

1. Interim injunction – Duration of

Interim injunction is a temporary injunction made pending the service of processes on the respondents to preserve rights or res.

No interim or ex-parte order of injunction is made as of right to last beyond a period of time. It is a temporary relief given ex-parte and therefore none should be made to last beyond a short period as doing so would offend the right of parties to be heard before any order is made against their interest. (p. 2679 H)

REPRESENTATION

D. D. Dodo SAN, OFR, Etigwe Uwa SAN FC ARB, Paulyn Abhulimen AC/ARB, Chinasa Unaegbunam FER ARB, Vincent Owhor, Esq., for Appellant

Rickey Farfa SAN, A. J. Owonikoko Esq. SAN, Andrew Malgwi Esq., O. Keshinro (Mrs.), Bola Olukosi Esq., Mummi Bamidele Esq., V.C. Mbaaezue (Mrs.) 1st Respondent

A. O. Ayodeji 2nd & 4th Respondents

A. V. Etuwewe 3rd & 5th Respondents

CASES REFERRED TO

- Lewis v. UBA Plc (2006) 1 NWLR (pt. 961) 546
Okochi v. Animkwai (2003) 18 NWLR (pt. 251) 1
Orugbo v. Uma (2002) 9 SCNJ 12
Okunzua v. Amosu (1992) 6 NWLR (pt. 248) 416
B Peenock Ltd. v. Hotel Presidential Ltd. (1982) 12 SC 1
Oloba v. Akereja (1989) 3 NWLR (pt. 84) 508
IBWA Ltd. v. Parex Int'l Co. Nig. Ltd. (2000) 7 NWLR (pt. 663) 105
Sken Consult Nig. Ltd. v. Ukey (1981) NSCC Vol. 12
C Ebhodaghe v. Okoye (2000) 18 NWLR (pt. 905) 472
Kotoye v. CBN (1989) 1 NWLR (pt. 98) 419

STATUTES & RULES REFERRED TO

- Court of Appeal Practice Direction 2013, r. 6(b)
D Sheriff & Civil Process Act LFN 2004, s. 99
Federal High Court (Civil Procedure) Rules 2009, O. 26 r. 11, 12
Court of Appeal Rules 2011, O. 8 r. 1

LEAD JUDGMENT BY NIMPÁR JCA

- E The appellant is the 5th Respondent in the suit initiated by the plaintiff, (the 1st Respondent) at the Federal High Court Lagos in suit No FHC/L/CS/1711/2013. The suit was commenced by a writ of summons supported by a statement of claim. The plaintiff (1st Respondent herein) applied by way of an ex-parte motion dated 12th
F December, 2013 wherein it prayed for 8 orders amongst which are order 5 - 9 relevant to this appeal and reproduced as follows:
1. AN ORDER of interim injunction restraining the 1st, 2nd, 3rd and 4th Defendants/Respondents, their servants, agents, privies,
G proxies, fronts, staffers or hirelings howsoever called from proceeding or continuing to invite bids, offering or accepting, negotiating or engaging in any transaction or contract calculated or purporting to transfer, sell, farm out or otherwise charge, encumber, deal in, dispose of or divest the 40% participating interest of Chevron Nigeria
H Limited in Oil Mining Lease 52, 53 and 55 in Nigeria in favour of any person, entity or whomsoever at all in derogation from or in disregard of the agreement entered into between the plaintiff and the 1st Defendant on 14th and 15th November, 2013 whereby the parties entered into binding contract for the acquisition of the OML 52, 53

and 55 by the plaintiff from the 1st Defendant pending the determination of the motion on notice.

2. AN ORDER of interim injunction restraining the 1st, 2nd, 3rd and 4th Defendants/Respondents either by themselves or by their agents from declaring the 5th Defendant/Respondent or any other bidder apart from the Plaintiff/Applicant as the preferred winner for the assignment of the 1st Defendant/Respondent 40% interest on OMLS 52, 53 and 55 in Nigeria pending the determination of the motion on notice. B

3. AN ORDER of interim injunction restraining the 1st, 2nd, 3rd and 4th Defendants/Respondents either by themselves or by their agents from executing a definitive agreement or any other agreement with the 5th Defendant/Respondent or any other bidders apart from the Plaintiff/Applicant or any other bidder apart from the Plaintiff/Applicant or purporting to assign the 1st Defendant/Respondent's 40% interest in OMLS 52, 53 and 55 in Nigeria to any third party pending the determination of the motion on notice. C

4. AN ORDER of interim injunction restraining the 1st, 2nd, 3rd and 4th defendants/respondent either by their agents from taking any further step(s) whatsoever with the 5th defendant/respondent or any other bidder apart from the Plaintiff/Applicant in purporting to conclude the assignment of the 1st Defendant/Respondent's 40% interest in OMLS 52, 53 and 55 in Nigeria pending the determination of the motion on notice. E

5. AND FOR SUCH further order or orders as the honourable court may deem fit to make in the circumstances; inclusive of imposition of undertaking as to damages. F

The motion was supported by an affidavit of 104 paragraphs duly sworn to by one Mrs. Uju C. Ifejika, the Chairman/Chief Executive of the Plaintiff/Applicant Company. There are annexures attached and marked as Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16C, 16D, 17, 18A, 18B, 18C, 22, 23, 24A, 24B, 25, 26 and 26 to support the application. G

The motion was taken ex-parte and the trial court granted the application on the 13th December, 2013. The substantive suit and the motion on notice were thereafter adjourned to the 27th January, 2014. On the 18th day of December, 2013, the 1st Respondent applied for an amendment of the order of court by an application H

dated 18th December, 2013. The amendment was granted on the 23rd of December, 2013 and the court further adjourned the suit to the 27th January, 2014.

Upon service on the Applicant as 5th Respondent at the lower court, it filed an application dated 27th December, 2013 seeking to
B discharge the interim order.

The 1st Respondent herein upon being served with the appellant's application wrote a letter to the court asking for an earlier date for hearing. The matter was fixed for hearing of the motion on the 10th January, 2014. On the 10th January, 2014 only the appel-
C lant, 1st and 2nd Respondent were present in court, there was no proof of service on the other parties. The matter was further ad-
D journed to the 27th January, 2014. On the said date, all parties were in court and the appellant, 2nd - 5th Respondents all informed the
D court of their various pending applications challenging the jurisdiction of the court. Learned counsel to the 1st Respondent sought for time to react to the various applications, he also applied orally that the interim orders made on the 13th December, 2013, amended on
E 23rd December, 2013 be extended to abide the hearing of the pending applications.

The lower court in its ruling extended the life of the interim order of injunction on the premise that the condition precedent that will warrant its expiration had not been fulfilled.

The appellant being dissatisfied with the said ruling appealed
F to this court on 3 grounds of appeal.

The appellant formulated 2 issues for determination namely:

1. Whether the learned trial judge in the face of two applica-
G tions challenging the jurisdiction of the court to entertain the suit as constituted, was right in taking arguments on a separate oral applica-
G tion to extend the interim injunction and delivering a ruling in respect of same without first determining its jurisdiction.

2. Whether in the circumstances of the case as at 27th Janu-
H ary, 2014, the learned trial judge could validly extend the life span of the order of interim injunction granted ex-parte on the 13th of De-
H cember, 2013 and amended on the 18th of December, 2013 notwithstanding the provision of Order 26 Rule 12 of the Federal High Court (Civil procedure) Rules 2009.

The 1st Respondent upon being served with the Notice of

Appeal, filed two separate Respondent's notices both dated 7th day of February, 2014. They were filed directly in this court. It also raised a preliminary objection to the appeal. Form 10A and Form 10B are reproduced here below:

FORM 10A

*"NOTICE BY 1ST RESPONDENT OF INTENTION TO CON-
TEND THAT DECISION OF COURT BELOW BE VARIED.
BROUGHT PURSUANT TO ORDER 9 OF COURT OF APPEAL
RULES, 2011 AND UNDER THE INHERENT JURISDICTION OF
THIS COURT."*

*TAKE NOTICE that upon the hearing of the above Appeal the
1st Respondent herein intends to contend that, in the event of the
appeal being allowed in whole or in part, the consequential order of
the court below, Federal High Court, Lagos State, Coram Hon. Jus-
tice Yunusa in FHC/L/CS/1711/2013, dated the 27th day of Janu-
ary, 2014 shall be varied as follows:*

*That parties be bound to maintain the status quo as at the date
of the ruling (27th January, 2014) pending when all preliminary
objections by the Appellant and the 2nd to 4th Respondents have
been taken, so that the hearing of the motion for interlocutory in-
junction on which the interim injunction is parasitic, shall abide the
decisions made on the preliminary objections.*

*AND TAKE NOTICE that the grounds on which the 1st Re-
spondent intends to rely are as follows:*

*1. The 1st Respondent filed a motion on notice for interlocu-
tory injunction along with its motion ex-parte, the lower court granted
the orders sought in the motion ex-parte on 13th December, 2013.*

*2. The ex-parte orders were made to last till the hearing and
determination of the 1st Respondent's motion on notice.*

*3. The Appellant and 2nd to 4th Respondent were promptly
served with the ex-parte orders and the motion on notice together
with the 1st Respondent's other original processes.*

*4. The applicant and 2nd to 4th Respondent have filed several
processes including notices of preliminary objection to stall the prompt
determination of the 1st Respondent pending motion on notice for
interlocutory injunction.*

*5. The interim orders made on the 27th January, 2014 was
made inter parties after the lower court entertained arguments from*

all parties as to the priority of pending application, their ripeness for hearing and thereof on the ex-parte order.

Dated this 7th day of February, 2014"

The second Respondent's notice to contend is also reproduced below.

B *FORM 10B*

"1ST RESPONDENT'S NOTICE OF INTENTION TO CONTEND THAT DECISION OF COURT BELOW BE AFFIRMED ON GROUNDS OTHER THAN THOSE RELIED ON THE COURT BELOW BROUGHT PURSUANT TO ORDER 9 RULES 2 OF COURT OF APPEAL RULES 2011 AND UNDER THE INHERENT JURISDICTION OF THIS COURT.

TAKE NOTICE that upon the hearing of the above appeal, the 1st Respondent intends to contend that the decision of the court below, FEDERAL HIGH COURT, LAGOS STATE, Coram Hon. Justice Yunusa in suit no FHC/L/CS/1711/2013 dated the 27th day of January, 2014 shall be affirmed on the ground other than those relied on by the court below.

AND TAKE NOTICE that the grounds on which the Respondent intends to rely on as follows:

1. The life-span of the ex-parte order made by the lower court was not caught by the provision of Order 26 Rule 11 of the Federal High Court (Civil Procedure) Rules, 2009 providing for lapse of ex-parte orders where there is a valid motion on notice to discharge, vary or set aside of the order and such motion is not taken within 14 days of filing same as there was no valid motion for discharging brought by the Appellant within 7 days of the service of the said ex-parte orders on it in compliance with Order 26 Rule 11 of the Federal High Court (Civil Procedure) Rules, 2009.

2. Filing of motion to discharge the ex-parte order within 7 days of service thereon is a condition precedent to invoking the provision of Order 26 Rule 12 of the Federal High Court (Civil Procedure) Rules, 2009. The said condition precedent was not fulfilled by the Appellant in the suit leading to this appeal.

3. The provision of Order 26 Rules 12 of the Federal High Court (Civil Procedure) Rules 2009 on automatic lapse of an ex-parte order is not mandatory or self executing without a valid motion to discharge having first been argued and a ruling delivered having

regard to the said rules of Court.

4. The provision of Order 26 Rule 12 of the Federal High Court (Civil Procedure) Rules 2009, on lapse of an ex-parte order upon failure to determine a valid motion for interim injunction within fourteen days, is ultra vires, in effective and in operative in law, being inconsistent with Section 294(1) & 318 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) and the decision of the Supreme Court in *ROSSEK V ACB LTD* (1993) 8 NWLR (Pt. 312) 382 at 471 - 472 paragraph 5 - A.

5. The subsequent filing of notices of preliminary objection by the Appellant and other Respondents was not capable of stripping the lower Court of the powers to preserve the dignity of its authority and protect the res in litigation, when the said objections were (as agreed by all parties) not ripe for hearing on 27th January, 2014.

6. The 2nd Respondent (1st Defendant at the lower Court) to whom the ex-parte orders were principally directed did not challenge the orders or seek to discharge them at all as required by Order 26 Rules 11 and 12 of the Federal High Court (Civil Procedure) Rules 2009.

Dated this 7th day of February, 2014"

The 1st Respondent also in support of its two Respondent's Notices to contend and in reaction to the main appeal formulated 2 issues for determination as follows:

1. Whether the learned Trial Judge properly construed Order 26 Rules 12 of the Federal High Court (Civil Procedure) Rules, 2009 in holding that the condition precedent to warrant automatic discharge of ex-parte order of injunction made on 13th December, 2013 had not been fulfilled under the rule.

2. Whether the interim ex-parte order of injunction made by before the filing of preliminary objection by Appellant and other Defendants were rightly kept alive pending the disposal of the objection and the motion for interlocutory injunction.

For a holistic determination of the appeal, the issues formulated by the appellant which also covers the issues of the respondent are hereby adopted as issues for determination in this appeal.

Issue one of the appellant covers issue two of the 1st Respondent and issue 1 of the respondent can conveniently come under issue 2 of the appellant. But before delving into the main appeal, it

would be necessary to determine the notice of preliminary objection filed by the 1st Respondent and dated 5th day of March, 2014. The preliminary objection was brought pursuant to Order 10 to Rule 1 and Order 8 Rules 4 of the Court of Appeal Rules, the inherent jurisdiction of this Honourable Court. The grounds upon which the objection is taken states thus:

1. The record of Appeal is incompetent by reason of failure of the Appellant to reflect proper and comprehensible records of appeal to proceedings at pages 733 - 736 and 833 - 845 before the trial Court.

2. In an interlocutory appeal of the instant type appellant has a duty to assist the Registrar of the Court below by ensuring the compilation of proper and useful records of appeal under Rule 6(b) of the Court of Appeal Practice Direction 2013.

The preliminary objection is supported by an affidavit of 9 paragraphs duly sworn to by Sesan Adebayo, a litigation assistant with Messrs Synergy Attorney, legal firm representing the 1st Respondent.

As required by the rules of this Court, arguments in support of the preliminary objection are in the 1st Respondent brief of Argument filed on 5/3/14.

Learned counsel to the 1st Respondent formulated a sole issue for determination under the preliminary objection. It states as follows:

1. Whether Appellant has compiled and transmitted competent and valid record of Appeal.

The Appellant reacted to the preliminary objection in its reply brief filed on the 17/3/14. The sole issue distilled by the 1st Respondent shall be the issue for determination in resolving the preliminary objection.

In arguing the sole issue the 1st Respondent submitted that the Appeal is based on an incompetent record of Appeal which makes the Appeal incompetent. Learned counsel cited Order 8 Rule of the Court of Appeal Rules 2011 and Rule 6(b) of the Court of Appeal Practice Direction, 2013 in respect of interlocutory appeals. He contended that it was the duty of the Appellant to assist in compiling the record of Appeal but that the record in the Appeal here does not reflect the exact proceedings as conducted before the trial Court.

Counsel submitted that the Appellant goaded the Registrar of the lower court to compile and transmit an incomprehensible and unintelligible record of proceedings therefore, instead of assisting the Court in reaching a just decision; it would serve to confuse and mislead the Court. Learned counsel for the 1st Respondent identified pages 733 - 736 and 833 - 845 of the record. Counsel further argued that no Appeal can be properly determined with reference to the mumble jumble record of the proceedings before the Court. He cited the case of LEWIS VS. UBA PLC (2006) 1 NWLR (Pt.961) 546 at 565 where an Appellant's failure to compile a proper record of proceedings at the trial Court led the Court of Appeal to hold that the appeal is incompetent.

Counsel then urged the Court to decline jurisdiction to entertain the instant Appeal as he cited the case of EKWEREKWU VS. EGBOCHE (2010) 14 NWLR (Pt 1213) 194 at 206 which held that incompetent record affects the jurisdiction to hear the appeal, it ask if the court has jurisdiction to entertain and determine same since the issue of jurisdiction is fundamental and it touches on the competence of the Court to entertain and adjudicate on same. He finally urged the Court to uphold preliminary objection and strike out the Appeal.

In response, the Appellant in its reply brief dated 14th March, 2014 filed on the 17/3/14, referred to the Court of Appeal Practice Direction, 2013 particularly paragraph 6 (b) which provides for the time within which the Registrar of the Court below shall compile and transmit the record of Appeal to the Court. Also mentioned is Rule 6(d) and 6(h) of the Practice Direction 2013. Appellant contended that the Notice of Appeal was filed on 31st January, 2014 and record transmitted on the 6th of February, 2014. The 1st Respondent was served with the record of Appeal on the 5th February, 2014. The Appellant posited that, that being the case, Rule 6 of the Court of Appeal Practice Directions, 2013 has been complied with and therefore the argument of the 1st Respondent is untenable and irrelevant.

The 1st Respondent's objection is also touching on the alleged unintelligent and incomprehensible portion of the record at pages 733 - 736 and 833 - 845 of the record. Learned senior counsel urged the Court on the basis of that to declare the said record of Appeal incomplete and invalid relying on AUIT & WIBORG NIG LTD V NIBEL INDUSTRIES LIMITED (2010) 11 NWLR Pt 1220 486 at

496 where the Supreme Court held thus:

“[This] Court is therefore bereft of the grounds on which the application was opposed and fortiori the grounds on which the Court below adjudged the application incompetent. It is my view therefore that this Appeal ought to have been struck out for incomplete record of proceedings at the Court below”.

The appellant defined the key word used by the 1st Respondent as basis for the submission that there is no complete record of Appeal. In doing so, the Appellant relied on the New International Webster’s Comprehensive Dictionary of the English Language 2004 Edition for the definition of the words as follows: “unintelligible” and “incomplete” as: “unintelligible” means “impossible to understand, indiscernible, obscure indistinct.” “not complete” means; imperfect, lacking in certain parts”.

Learned senior counsel for the Appellant brought out the distinction between unintelligible/incomprehensible as against “incomplete” in that the former means the pages exist but are unclear whilst for the latter it means the relevant pages identified do not exist at all.

In reaction to the case of *AUIT & WIBONG (NIG) LTD V NIBEL INDUSTRIES LTD.* supra, counsel distinguished that case and said the ruling and arguments of counsel were not part of the record of Appeal thus rendering the record of Appeal incomplete whilst in this case, the record is there but not clear. He submitted that the reason for that cannot be placed at the door step of the Appellant since it was the Registrar of the lower Court that compiled the record. He narrowed down the objection of the 1st Respondent by saying that the 1st Respondent appears to complain that the record is not comprehensive as distinct from the allegation in the preliminary objection that the record is not complete. He argued that there is a difference between the two.

Arguing further, counsel submitted that all parties are bound by the record of Appeal as the 1st Respondent did not challenge the record as required of a party who contends that the record is not complete. He cited the case of *OGLI OKO MEMORIAL FARM LIMITED V NIGERIAN AGRICULTURAL AND COOPERATIVE BANK LIMITED* (2008) 12 NWLR PT 1098 421 AT 427 to buttress the submission that since the record of appeal had not been impeached, all parties are bound by the record and it also means that is the record

of the lower court which must form part of the record of appeal. In any case, counsel further argued, that this Court is able to reach a decision on the available record transmitted by the Registrar.

On the allegation that the Appellant goaded the registrar into compiling the record of Appeal, the Appellant submitted that the procedure for compilation of record of Appeal is covered by the Court of Appeal Practice Direction 2013 particularly Rule 6 and that the weighty allegation is not supported by relevant facts since the Appellant has no control over the internal workings of the lower Court. Appellant submitted that the 1st Respondent did not attend the meeting called for parties to settle record and therefore it cannot be heard to complain. Appellant finally urged the Court to dismiss the preliminary objection.

The sole issue for determination under the preliminary objection was highlighted earlier in this judgment and it is simply a challenge to the record of Appeal compiled by the Registrar of the lower Court upon the filing of the notice of Appeal by the Appellant. The preliminary objection is founded on two grounds namely:

1. The record of Appeal is incompetent by reason of failure of the Appellant to reflect proper and comprehensible records of proceedings at pages 733 - 736 and 833 - 845 before the trial Court.

2. In an interlocutory Appeal of the instant type, Appellant has a duty to assist the Registrar of the Court below by ensuring the compilation of proper and useful record of appeal under Rule 6(b) of the Court of Appeal Practice Direction 2013.

The first complaint of the 1st Respondent is that the record of Appeal is not proper and comprehensible particularly at pages 733 - 736 and 833 - 845. In arguing these points, the 1st Respondent by the sole issue asked whether the Appellant has compiled and transmitted competent and valid record of Appeal.

The contention of the 1st Respondent in the preliminary objection is that going by the rules of this court, Order 8 Rule 1, the duty of compiling record of appeal is that of the Registrar of the court below and within 60 days after the filing of the notice of appeal.

The rule provides thus:

“The registrar of the court below shall within sixty days after the filing of a notice of appeal compile and transmit the

Record of Appeal to the court.”

The rule requires the Appellant to compile records only after the expiration of 60 days and where the registrar of the court below has failed to compile the record of appeal. The burden is primarily that of the Registrar of the court below and the duty on the appellant arises at the expiration of 60 days and only if the Registrar has failed to compile the record.

Where however the Registrar acts within the rules, the appellant is not under any obligation to compile records of appeal. Furthermore the rules require the parties to an appeal to appear to settle records and that is an opportunity for all parties to make observation and even object to certain aspects of the record of appeal. Where a party declines to attend the settlement of records meeting, he should not turn round to challenge the compilation of the record.

Here the 1st Respondent did not allege that the record of appeal was compiled by the Appellant. It admitted that the Registrar of the lower court did the compilation. The complaint is basically that some of the pages of the record of appeal are “unintelligible” and “incomprehensible” to use 1st Respondent’s words. This of course affects the legible content of the record and not the absence of some pages of the record as alleged. It also admits of a record duly compiled but which does not make sense upon a reading of same. It is different from a portion of the record left out. The record of appeal before the court is therefore complete but with some portions unintelligible. The authority of *AUIT & WIBORG (NIG) LTD. VS. NIBEL INDUSTRIES LTD* Supra is therefore inapplicable as in that case the record was incomplete with pages left out and that is in sharp contrast with the situation on hand. Furthermore, the duty being that of the officer of the lower court, and the appellant not being such officer cannot be held responsible for the unreadable portion of the record of appeal. Those indeed are the internal processes of the court below and not within the control of the Appellant.

In any case, the 1st Respondent did not challenge the record if indeed it was incomplete. The process of challenging record has been settled by a number of authorities one of which is the case of *PEREMOLIZE NIGERIA LTD & ANOR V GLOBE MOTORS HOLDING LTD* (2007) LPELR 4840 (CA) where this court held thus:

“Any party disputing the record of proceedings of the lower court must take steps to set such proceedings aside.

Where a party fails to do, he cannot be heard to challenge such proceedings on appeal”. See page 15 - 16.

The court went on to state that the record of proceedings of a court is presumed to be correct until the contrary is proved. Any party challenging record must swear to an affidavit setting out the facts or part of the proceedings omitted or wrongly stated in the records. Such affidavit is usually served on the Judge and or the Registrar of the court who would then if he desires to contest the affidavit swear to and file a counter affidavit. See also the case of SOMMER V. FEDERAL HOUSING AUTHORITY (1912) 1 NWLR (PT. 219) 548.

The rules of this court on compilation of record of appeals in an interlocutory appeal are clear and straight forward.

An Appellate court cannot hear an appeal with incomplete records, the reason being that an incomplete record affects the competence of the court. See the cases of AULT & WIBORG (NIG) LTD V NIBEL IND. LTD. (2010) 11 NWLR (Pt 1220) 486 at 496; CHIEF OKOCHI & 2 ORS v CHIEF ANIMKWOI & 2 ORS (2003) 18 NWLR (Pt 251) 1; ORUGBO & ANOR v BULARI UMA & 10 ORS (2002) 9 SCNJ 12 and SOMMER V FEDERAL HOUSING AUTHORITY SUPRA. The record of appeal is also binding on all parties until the contrary is proved. See SOMMER v. FEDERAL HOUSING AUTHORITY (1992) 1 NWLR (Pt.219) 548 at 560; OKUNZUA V. AMOSU (1992) 6 NWLR (Pt 248) 416 at 432 and A.G. OYO STATE V FAIRLAKES HOTEL (No.2) (1989) 5 NWLR (Pt.121) 255 at 278 - 279.

We agree with the 1st Respondent that Rule 6(4) of the Practice Direction 2013 transfers to an appellant the duty to compile records after 30 days of failure to compile by the Registrar of the court below but that situation did not arise in this case. The objection of the 1st Respondent therefore fails and is hereby dismissed.

Now to the main appeal, the Appellants issue one is distilled from ground 2 of the notice of Appeal and the issue questions whether the learned trial judge was right to take argument on an oral application when the jurisdiction of the Court was challenged and delivering a ruling on the oral application without first determining the question of jurisdiction. This shall be taken together with issue two of the 1st

Respondent.

Addressing the first issue, the Appellant submitted that as 5th Defendant in the lower Court, it filed a notice of preliminary objection upon the following ground:

B *“The alleged contract for sale of OMLS 52, 53, and 55 is a simple contract in respect of which the Federal High Court lacks jurisdiction to adjudicate one by virtue of the provision of Section 251(1) Constitution of the Federal Republic of Nigeria (1999) as amended”.*

C By another motion on notice dated 24th January, 2014 Appellant prayed the Court for an order striking out plaintiff’s statement of claim on the ground that it discloses no reasonable cause of action and other relevant statutes. Counsel argued that once a Court lacks jurisdiction, parties cannot confer jurisdiction or use any statutory provision to impose one as lack of jurisdiction is irreparable leaving the court with no option but to strike out the suit for want of jurisdiction.

Appellant emphasized the issue of jurisdiction as a threshold matter that it determines competence and the power of the court to validly adjudicate on any matter, he relied on the case of **TRADE BANK PLC V UCHEGBUNAM (2003) 17 NWLR PT 848 39**. He further stressed the importance of jurisdiction to any Court to such an extent that it can be raised at any stage of proceedings even on appeal for the first time and also by the Court. That any proceedings conducted without jurisdiction amounts to a nullity, no matter how well such proceedings were conducted. He cited **BOGBAN VS DIWHRE (PT. 951) 301 INCOMPLETE CITATION:, WESTERN STEEL WORKS LTD V IRON & STEEL WORKERS UNION (1986) 3 NWLR PT.30 617, BARCLAYS BANK OF NIGERIA v CBN (1976) 6 SC 175; OLOBA V AKEREJA (1988) 3 NWLR PT.84 508; ODOFIN v AGU (1992) 3 NWLR PT.229 350, JERIC (NIG.) LTD. V UBN PLC (2001) 15 NWLR PT. 691 447; NDIC V CBN (2002) 7 NWLR PT.766 272 AT 295 AND PEMO JESSICA ENTERPRISES LTD V. LEVENTIS TECHNICAL CO. LTD. (1992) 5 NWLR PT.244 675.**

H The Appellant listed instances an objection to jurisdiction can be taken as follows:

- a. On the basis of the statement of claim
- b. On the basis of the evidence received or;
- c. By a motion supported by affidavit giving the full facts upon

which reliance is placed; or

d. On the face of the writ of summon where appropriate, as the capacity in which action was being brought or against who the action was brought.

Appellant further contended that where the objection is by way of a preliminary objection, the Court should accord it priority before taking any step in the matter, he cited *MONGUNO v BLUEWHALES & CO* (2011) 2 NWLR PT.1231 289. The submission also distinguished between a preliminary objection and an action for demurrer as decided in the case of *NDIC V CBN* supra.

Counsel observed that though the preliminary objection to the Court's jurisdiction was filed and brought to notice of the Court, the court failed to give it priority before proceeding to take steps in the proceeding. That at the end time of the objection, the trial Court only had enough jurisdiction to determine whether it had jurisdiction or not and nothing more, citing again the case of *BUGBAN V DIWHRE SUPRA* AT PAGE 304. Appellant further relied on the following: *PEENOCK LTD V HOTEL PRESIDENTIAL LTD* (1982) 12 SC 1; *OLOBA v AKEREJA* (1989) 3 NWLR (PT. 84) 508; *IBWA LTD & ANOR V PAREX INTERNATIONAL CO. (NIG.) LTD.* (2000) 7 NWLR (PT.663) 105 (2000) 4 SCNJ 200 AT 230.

The Appellant further argued that without jurisdiction every step taken is without foundation and the aphorism expounded by Lord Denning in *MACFOY V UAC LTD.* (1962) AC 152 that you cannot place something on nothing and expect it to stand becomes relevant as this was followed by the Supreme Court in the case of *NDIC V. CBN* Supra at page 292 that once the issue of jurisdiction is raised in a suit, the Court must not give order in the suit affecting the Defendant until the issue is settled.

Counsel further argued that in the face of the challenge to the jurisdiction of the Court, the trial Court still went ahead to extend the life-span of the ex-parte order of interim injunction in disregard to the procedure recommended in the case of *BOGBON V. DIWHRE* supra that the trial court ought to first determine jurisdiction before taking any further step in the matter.

1st Respondent's issue 2 states thus:

Whether the interim ex-parte order of injunction made by before (sic) the filing of preliminary objection by Appellant and other

Defendant were rightly kept alive pending the disposal of the objections and the motion for interlocutory injunction.

Learned counsel for the 1st respondent adopted their arguments under issue 1 and further submitted in reaction to Appellant's issue 2 that the issue goes to the dignity and authority of the Court because the other parties particularly the one outside the country were yet to react to the pending motion. That the party outside Nigeria needed 30 days to respond to the motion, he relied on Section 99 of the SHERIFF AND CIVIL PROCESS ACT, LFN 2004 and the case of SKEN CONSULT (NIG.) LIMITED v. G. SECONDEY UKEY (1981) NSCC Vol. 12, 1 AT 10.

Arguing further counsel submitted that some of the grounds founding the motion to discharge the ex-parte order named issues meant for defence and not that stage of the trial. Furthermore, it was contended that under the rules only a party affected by the order can apply to have it discharge and that the Appellant discountenanced the issue of jurisdiction that must be taken first when it was raised. He argued that it was competent for the Court to protect its authority and dignity before resolving the issue of jurisdiction, he cited the case of BARCLAYS BANK OF NIG. LTD V. C.B.N. (1976) 1 NWLR 409; OSADEBEY'S CASE (SUPRA) AT 59. He contended that it is an exception to the general rule that jurisdiction where challenged must be resolved first. He relied on EBHODAGHE V. OKOYE (2000) 18 NWLR (PT. 905) 472 AT 490 – 491.

1st Respondent's position is that the motion challenging jurisdiction was not ripe for hearing and therefore could not deprive the trial Court of the powers to extend the life of the order made on 13th December, 2013. It urged the Court to follow the decision in the case of EBHODAGHE'S case supra. It further contended that the situation would have been different if there were no interim order of injunction before the challenge to jurisdiction as was explained by OGUNTADE JSC IN EBHODAGHE'S case supra.

Learned counsel finally urged the Court to resolve this issue in favour of the 1st Respondent's notices to contend.

This issue questions the jurisdiction of the trial court to entertain an oral application to extend the life of the ex-parte order of injunction without first determining the challenges to its jurisdiction.

The fact that there were pending applications before the trial

court challenging its jurisdiction to determine the substantive suit is not disputed. The trial court had made an interim order of injunction on parties before the service of processes and upon the service of processes, some of the parties challenged the jurisdiction of the trial court.

The issue of jurisdiction is fundamental to any adjudication. It has been decided by a long line of cases that it is the life wire of determination. It is a threshold issue that can be raised at any stage of the proceedings even on appeal and for the first time. Unless there is jurisdiction the entire proceedings is a nullity no matter how well conducted. This is supported by a plethora of cases, see UBA PLC V ADEMOLA (2008) LPELR 5066 (CA); DAIRO V UBA (2007) ALL FWLR (PT 392) 1846 at 1872 - 1873; UTH & ORS V ONOYIVWE & ORS (1991) LPELR 3436 (SC) and OBIUWEUBI v CBN (2011) LPELR - 2185 (SC).

Jurisdiction can be challenged in various forms and in this case, it was by a preliminary objection. It has been decided that once jurisdiction is challenged, the court should first determine whether it has jurisdiction or not. That at that stage the only jurisdiction the court has is to determine whether it has jurisdiction or not and not to do any other business of the court with regards to the subject matter. See the case NDIC V. CBN Supra at page 292 where the court held as follows:

“Once the issue of jurisdiction is raised in a suit, the court must not give an order in the suit affecting the defendant until the issue is settled.”

That of course is instructive because without jurisdiction the court cannot validly make an order affecting the parties. What if at the end the court finds that it has no jurisdiction? Can the court reverse any damage done to any of the parties without jurisdiction? It is safer to err on the side of caution by determining jurisdiction first before proceeding.

The complaint of the Appellant is that the trial court proceeded to make an order extending the life span of the interim injunction without determining its jurisdiction which was challenged.

The 1st Respondent tried to justify the action of the trial judge by the argument that the court had a duty to protect its authority and integrity before resolving the issue of jurisdiction. Furthermore, that

taking oral arguments without determining the issue of jurisdiction was based on the fact that the preliminary objections to jurisdiction were not ripe for hearing.

A court duly constituted has inherent jurisdiction to take certain steps but in so doing, it must conform or be rooted in Constitutional or Statutory provisions donating the court with such powers. A court cannot have any inherent power to protect its authority or dignity outside statutory powers. It is jurisdiction that enables the court to have authority and dignity. A court is naked and exposed without jurisdiction. It is therefore the general rule to determine jurisdiction first whilst it is an exceptional rule to take steps in defending or protecting the authority of the court first before jurisdiction.

The case of *EBHODAGHE V. OKOYE* Supra relied upon by the 1st Respondent is distinguishable with the case under consideration. There was the issue of contempt and contempt of court is a serious challenge to the authority of the court and not just the courts competence to determine issues. That was an exceptional case because the majesty of the court was impugned and the court would not sit and watch its authority brought to disrepute. That is not the case here.

The court in the face of a challenge to its jurisdiction can take other applications along the objection to jurisdiction but must first determine jurisdiction before ruling on the other aspects of the applications taken if and only if it has jurisdiction. See *SENATE PRESIDENT v. NZERIBE* Supra. Jurisdiction is not what any court can toy with, it is the root and foundation of competence to determine matters and it would be wrong of any court to defer the determination of a challenge to jurisdiction whilst considering any other application on the excuse that the applications challenging the jurisdiction of the court were not ripe for hearing. At that stage the court should only adjourn the applications challenging jurisdiction to allow other parties react to the application in respect to rules of fair hearing. Any step taken while any application challenging jurisdiction is pending is wrong. The only jurisdiction such a court has is to determine its jurisdiction and no more. See the case of *NDIC V CBN* (2002) 7 NWLR (PT 766) 272 at 296 - 297.

The question of whether preservative orders can be sustained, made or considered while objections to jurisdiction

are pending can be simply answered by saying that the court must first have jurisdiction before a preservative order can be made. Can a court without jurisdiction preserve any right? All that was before the court with life must be placed at abeyance until jurisdiction is determined. The trial court therefore erred by considering an oral application to extend the life of an interim injunction when objections to the court's jurisdiction were pending. There was no challenge to the majesty of the court to warrant that step. In any case the life of the interim order of injunction had expired so there was nothing to preserve. That makes the authority of the court on the interim order also spent. This issue is resolved in favour of the appellant.

The Appellant's issue two is distilled from ground 1 and 3 of the notice of Appeal and it states thus:

Whether in the circumstances of the case as at 27th January, 2014 the learned trial judge can validly extend the life-span of the order of interim injunction granted ex-parte on the 13th of December, 2013 and amended on the 18th of December, 2013 notwithstanding the provision of ORDERS 26, RULE 12 OF THE FEDERAL HIGH COURT (CIVIL PROCEDURE) RULES 2009.

Appellant restated the facts leading to the appeal and emphasized that the court delivered its ruling on 27th of January, 2014, on the 1st Respondent's oral application for extension of the order of interim injunction. The Court extended the order of interim injunction upon the premise that a condition precedent to warrant the demise of the order earlier made had not been fulfilled. The contention is that this is contrary to Order 26 Rule of the Federal High Court Civil Procedure Rules which was relied upon by the 1st Respondent in getting the ex-parte order. Appellant placed emphasis on order 26 Rule 12(1) and (2) read together with Order 26 Rule 11. The kernel of the Appellant's argument is that in the face of the clear provision of order 12 Rule 2 which provides that if a motion to vary or discharge an ex-parte order is not taken after fourteen days of its being filed, the ex-parte shall lapse.

The Appellant distilled 4 scenarios contemplated by order 26 Rule 12 read together with order 26 Rule 11 as follows:

a. Once an interim order of injunction is made under these

rules, a party affected may immediately apply to vary or discharge the order interim seven days of service of the order.

b. No order made on motion ex-parte shall last for more than fourteen days upon the application of the affected party to vary or discharge the order.

B c. No order should last for more than fourteen days after arguments have been taken on the application to vary or discharge the ex-parte order.

d. Where a motion to vary or discharge an ex-parte order is not taken within fourteen days of its being filed, the ex-parte order shall lapse.

Furthermore, Appellant emphasized the imperativeness of the word “shall” used in the provision which implies a definite occurrence as established in a long line of cases, particularly the cases of D NWANKWO V YAR ADUA (2011) 13 NWLR PT 1263 81 & ONOCHIE V ODOGWU (2006) 6 NWLR PT 975 65 to illustrate the point.

Counsel contended that appellant as 5th Respondent having filed a motion pursuant to order 26 R 11 of the Federal High Court E Civil Procedure Rule, 2009 seeking to discharge the order made ex-parte and dated 27th day of December, 2013 and that by order 26 Rule 12(2) the order made ex-parte ought to have expired fourteen days after the 27th December. The 5th Defendant/Appellant having F filed its motion and since the motion was not taken within fourteen days period limited by rules of Court, the order automatically lapsed, he relied on ODUTOLA V. LAWAL (2002) 1 NWLR PT .749 633.

He further argued that the potency of an ex-parte is always limited and courts are enjoined not to allow ex- parte orders to over- G stay, he relied on BOGBAN V. DIWHIRE supra and that the trial court should have been guided by its rules which laid down a clear guide in order not to overreach the provision of the rules. That in the exercise of a discretionary power, the Court ought to act judicially and judiciously, he cited the cases of GENERAL OIL LTD V ODUNTAN (1990) H 7 NWLR PT 163 423 AT 441.

On the trial court’s distinction between an interim order of injunction and an ex-parte injunction in arriving at the decision to extend the life span of the interim injunction, counsel submitted that it is a distinction without a difference as such difference does not exist

under the Nigerian legal jurisprudence, he relied on the cases of UNIBIZ (NIG) LTD V C.B.C.L LTD (2003) 6 NWLR PT 816, 402; AL-CATEL KABEL METAL (NIG.) PLC V. OJUGBELE (2003) 2 NWLR PT 805 429. He argued that Interim injunctions are granted ex-parte unlike those granted upon motion on notice which are referred to as interlocutory injunction and therefore an ex-parte injunction is an interim injunction and the judge therefore was in error in creating a distinction that led him to hold that order 26 Rule 12 of the rules of the trial Court are inapplicable to the case before him.

Learned counsel submitted that order 26 Rule 12(1) and (2) apply to the order of injunction made upon a motion ex-parte and specifically to the orders of injunction made ex-parte made by the judge on 13th December, 2013 and amended on the 18th December, 2013. He relied on BOGBAN V. DIWHRE supra and the definition of interim order by G.S Gupta in the book Law of Injunctions, 7th Edition page 191.

Another area of complaint from the Appellant is that the trial judge extended the life-span of the interim order indefinitely. Counsel further argued that parties were not given an opportunity to address the Court on the distinction between interim injunction and ex-parte injunction thereby denying parties their right to fair hearing which is a pinnacle of our legal jurisprudence entrenched in the Nigerian Constitution. That such denial to fair hearing entitles the Court of Appeal to intervene in order to serve the interest of justice, he cited the cases of WAPPAH V. MOURAH (2006) 18 NWLR PT 1010 18 AT 45; GODWIN JOSIAH V. THE STATE (1985) 1 NWLR 125 AT 141; KOMU STATE (1992) 4 NWLR PT 233 17; UDO V STATE (1988) 3 NWLR PT 82 316.

That in the face of the order of interim injunction having lapsed, the Court lacked jurisdiction to extend the operation of such an order, he cited the case of ALH. AMINU AHMED & CO. NIG. LTD. V AFRICAN INT'L BANK LTD (2001) 10 NWLR PT.721 39.

The Appellant in its reply on points of law on the issue of inconsistency between the rules of Court and the Federal High Court Act raised by the 1st Respondent submitted that Section 9 delineates the way and manner in which the courts should exercise its powers and that the Court even though allowed under Section 9(2) to adopt an independent procedure, that can only be done if there is no leg-

isolation or rules of Court on the though allowed under Section 9(2) to adopt an independent procedure, that can only be done if there is no legislation or rules of Court on the issue and only for the purpose of doing substantial justice between the parties. That Section 1(2) and 44 gives the Chief Judge control and power to make rules which were made as the Federal High Court Civil Procedure Rules 2009. The said rules provided for the grant of interim or interlocutory injunction and as well as the discharge of same.

On the reference to Section 318 of the constitution and the decision in KUBOR V. DICKSON (2013) 4 NWLR PT 1345 as authority for 1st Respondent's argument that ex-parte order of injunction is a decision, and to that extent, orders 26 rules 11 and 12 are inconsistent with the Constitution, counsel submitted that order 26 Rules 11 and 12 was not in issue in that case, which was the filing of a notice of discontinuance after an ex-parte order of interim injunction was procured and that it would automatically reverse steps which had been taken when the order was alive. Counsel further argued that the decision quoted was part of a minority judgment and relied CHIEF THOMAS EKPEMPOLO & ORS V. GODWIN EDRENODA & ORS (2009) 3- 4 SC 56. It further argued that Order 26 Rule 11 and 12 are not inconsistent with the Constitution as S.294(5) settles any controversy and that Order 26 Rule 11 and 12 are mandatory and not discretionary, the cases NWANKWO V. YAR'DUA SUPRA AND ONOCHIE V. ODOGWU SUPRA relied upon.

The Appellant urged the Court to discountenance the arguments of the 1st Respondent founded on the authority of PROGRESS BANK (NIG.) PLC V. O.K. CONTRACT POINT HOLDINGS SUPRA on the interpretation of the word "*shall*" in rules of Court and that the wordings of O. 26 r. 12 are very clear with an emphatic phrase of "*the ex-parte order shall lapse*" in subsec. 2 of Or. 26 Rule 12.

Furthermore that compliance with Orders 26 Rule 11 and 12 cannot defeat the ends of justice because it was instituted to cure the mischief of rampart ex-parte orders and to agree with the 1st Respondent would mean reviving the mischief.

On whether the trial Court has powers to extend the life-span of the interim injunction, the Appellant in response submitted that once an order for interim injunction has expired by effluxion of time, it cannot be revived or the life span extended. It relied on ALH.

AMINU AHMED & CO. LTD V AFRICAN INTERNATIONAL BANK (2001) 10 NWLR (Pt 721) 391 at 403 as it contended that the authority of OLIVER V. DANGOTE SUPRA is actually an authority that once an order has lapsed, it cannot be revived. That the decision in ROSSEK V. ACB (1993) 8 NWLR PT.312 382 is in applicable because it was decided on a different set of rules. B

Reacting to the argument that the Appellant did not apply within 7 days to discharge the ex-parte order, counsel submitted that the argument of the 1st Respondent overlooked the fact that pursuant to a second ex-parte motion, the Court amended the earlier order on the 23rd December, 2013 to which another enrolled order was served on the Appellant as 5th Defendant. C

Counsel submitted that position of the law is clear on the issue as decided in the case of J.C. LTD. V. EZEMA (1996) 11 NWLR PT.443 416 AND OLIVER V. DANGOTE INDUSTRY LTD. (2009) D 10 NWLR PT 1150 457 to the effect that once an order has been amended, that which was before the amendment is no longer before the Court. The Appellant also relied on AMANAMBU V. OKAFOR (1966) 1 ALL NLR 205 AND ROTIMI V. MCGREGOR (1974) 11 SC 133. E

Flowing from above, counsel contended that the 5th Defendant/Appellant's motion of 27th December, 2013 was properly filed on the order of 23rd December, 2013.

On 1st Respondent's issue 2 paragraph 6.00 - 6.20 of the 1st Respondents brief of argument which supports the submission that the trial judge was right to have left the jurisdictional issue to extend the life of the ex-parte order without limitation, the Appellant submitted that it amounts to granting a perpetual order of injunction and arguments of 1st Respondent cannot stand in the face of NDIC V. CBN supra F G

Counsel submitted that the issue of jurisdiction is fundamental and can be raised at any time and when raised the Court is left with just the jurisdiction to determine its jurisdiction and nothing more, it relied on the case of ALHAJI AMINU AHMED & CO. NIG. LTD. V. AFRICAN INTERNATIONAL BANK LTD. SUPRA. H

On the two Respondents notices, which seeks a variation of the orders of the trial Court, the Appellant submitted that because there was no prayer for status quo at the Court below, the Respon-

dents notices are incompetent as this Court cannot grant what was not before the trial Court as that would amount to this Court assuming original jurisdiction in the matter. Appellant finally urged the court to allow the Appeal.

B The 1st Respondent in support of the Respondent's notice formulated issue No 1 which states thus:

Whether the leaned trial judge properly construed Orders 26 Rules 12 of the Federal High Court (Civil Procedure) Rule 2009 in holding that the condition precedent to warrant automatic discharge C of ex-parte order of injunction made on 13th December, 2013, had not been fulfilled under the Rule.

Proffering arguments in respect of this issue counsel submitted that the bench ruling at page 851 of the record founded this Appeal and that in the face of intervening applications challenging jurisdiction D of the Court, the court ruled at page 851 wherein it distinguished between interim order of injunction and ex-parte injunction. Counsel argued that the Appellant misconstrued Order 26 Rule 11 and 12 of the Federal High Court (Civil Procedure) Rules, 2009 but agreed with the 4 scenarios contemplated by Order 26 Rule 11 and 12 of E the Federal High Court (Civil Procedure) Rule 2009 as presented in appellant's brief paragraph 3.2.9 page 13 - 14.

Counsel contended that the rule must be interpreted holistically and bearing in mind that it deals with interim and interlocutory F injunction. He argued that the source of power to grant injunction is granted in section 13 of the Federal High Court Act while the rules are purely for procedural purposes and therefore the Rules cannot take away the powers of the Court to grant injunction.

Furthermore, that in interpreting the rule there is inconsistency G between substantive law and the Constitution of the Federal Republic of Nigeria. That a Court of Law in determining the right of parties is entitled to make interlocutory orders to preserve the subject matter of an action pending final determination of the respective rights of the parties, he cited the case of UNIBIZ (NIG.) LTD V. C.B.C.L LTD H SUPRA AND ALCATEL KABEL METAL (NIG) PLC V. OJUGBELE Supra.

Learned counsel further submitted that a Court, could pending final determination of a matter make preservative orders which may be interim (to last for a specific period) or interlocutory (to last

until the final determination of the action) He relied on the following cases: **BOLSIN V ALTRINCHAM U.D.C** (1903) 1 K.B. 547 AND **ATTAMAH V ANGLICAN BISHOP OF NIGERIA** (1999) 13 NWLR (PT. 633) 6 AT 9.

Counsel submitted that the trial Court extended the life-span of the pending order of injunction and adjourned the matter for the hearing of all pending application and that the inability of the Court to determine the motion of the Appellant to discharge the order of injunction did not also divest the court of jurisdiction to extend the interim order of injunction and that order 26 Rule 11 and 12 do not apply to a situation where an aggrieved party fails to apply within 7 days as required by the rules. In reaction to paragraph 3.2.9, 3.2.22, 3.2.23, 3.2.24, 3.2, 25 and 3.5.26 of the Appellant's brief of argument, counsel submitted as follows:

1. The application for variation or discharge of an order made ex-parte, may be made within seven days 7 of the service of the order or within such further time as the Court shall allow.

2. No order made on motion ex-parte shall last for more than fourteen days after the party or person affected by the order has applied for the order to be varied or discharged.

3. No order made on motion ex-parte shall last for another fourteen days after application to vary or discharge it has been argued.

Counsel went on to submit that an order of interim injunction can rightly last for more than fourteen days if the party affected by the order fails to apply within seven days to discharge same and slated for hearing within 14 days and that the motion in this case was filed on 27th December, 2013 belatedly but that the 1st Respondent applied for an earlier hearing date which was the 10th January, 2014 and which satisfied the 14 days requirement. He submitted that it was Appellant's refusal to proceed that warranted the adjournment and therefore Appellant cannot benefit from its own wrong.

Counsel further argued that upon the fixing of the motion to discharge the order within 14 days the remainder of Order 26 Rule 11 will cease to avail and 14 days limitation no longer applicable.

Counsel admitted that the interpretation of order 26 Rule 11 and 12 in the case of **OLIVER V. DANGOTE INDUSTRY LIMITED** (2009) 10 NWLR PT 1150 457 AT 489 - 490, was obiter. He sub-

mitted that there is no time limit for taking arguments on the motion to discharge. He asked the Court to discountenance the authorities of *BOZBAN V. DIWHIRE* (supra) and *FMBN LTD V. DESIRE GALLERY LTD SUPRA* but rely on *CHRISTLEB V. MAJEKODUNMI* (2008) 16 NWLR (PT 1113) 324 AT 354 AND *ALC V NNPC* (2005) B 11 NWLR (PT. 951) 274.

Counsel contended that Appellant's application to discharge the order of interim injunction was incompetent, he cited *NWANKWO V. ABAZIE* (2003) 12 NWLR (PT. 834) 381 AND *ONWUKA V. ONONYI* (2009) 11 NWLR (PT. 1151) SC 174 at 206 to buttress the point that where an act is required to be done in a particular way or manner and it is done otherwise, the act remains void and only a proper application can cure the defect.

D Counsel submitted that the trial Court exercised its inherent powers to extend the life-span of its earlier order and be relied on the case of *A.G. FEDERATION V. FAFUNWA - ONIKOYI* (2006) 18 NWLR (PT 1010) 51 and *LEEDO PRESIDENTIAL MOTEL LTD V BANK OF THE NORTH, LTD* (1998) 10 NWLR (PT 696) 364. He further argued that by the definition of decision in the Constitution of E the Federal Republic of Nigeria, Section 318, the interim order of the trial Court was a decision and therefore, it cannot be caught by the 14 days ultimatum provided for under order 26 of the Federal High Court Rules. He cited the case of *KUBOR V. DICKSON* (2003) 4 F NWLR (PT 1345) 534 AT 582 to support the submission and that the ex-parte order of injunction was a decision within the contemplation of section 318 of the constitution and therefore it cannot lapse, he relied on the contributions of *OGUNBIYI J.S.C IN KUBOR'S* case supra at page 592 where the learned Jurist defined the word decision in a minority judgment. Also in the case of *PURIFICATION TECHNIQUE (NIG.) LTD V JUBRIL* (2012) 18 NWLR (PT 133) SC 109 G AT 139 where the Court held that a decision subsist regardless of any error of law or facts there in until it is set aside or vacated by Court.

H a Counsel broadened the scope of argument by submitting that a Court of competent jurisdiction does not include the Chief Judge of the Federal High Court acting administratively in enacting the rules of Court, in this case Order 26 Rule 11 and 12, because they place a limitation on the Court, it is inconsistent with Section 294(1) and (5) of the Constitution of the Federal Republic of Nigeria (as amended).

That Constitutionally, 90 days is allowed the Court to deliver its judgment but here 14 days limit in disregard of Section 294(1) and (5) of the constitution, he cited IGWE V KALU (2002) 5 NWLR (PT. 761) 678 AND ABC LTD V AJUGWU (2012) 6 NWLR PT (1295) CA 97 126. He called on this Court to give the rule of the trial Court a directory interpretation as it can not override a Constitutional provision. He urged this Court to apply the blue pencil Rule as was done in A.G ABIA V A.G FEDERATION (2012) 6 NWLR (PT. 763) SC 264 AT 436 AND OSADEBEY V. A.G BENDEL STATE (1991) 1 NWLR OF 169 525 AT 599, 7 Up Bottling Co. Ltd V. Abiola & Sons Ltd (1995) 3 NWLR (Pt 383) 257 at 280 - 281; NWAIGWE V F.R.N (2009) 16 NWLR (Pt 1166) CA 169 at 195. On the doctrine of covering the field.

Arguing the issue further, it is the contention of the 1st Respondent that the Rules of Court should not stultify the court's exercise of discretion in granting ex-parte injunction as a right conferred by the constitution cannot be taken away or interfered with by a subsidiary legislation, Counsel relied on ADISA V. OYINOLA (2000) 10 NWLR PT 674 117 AT 171 to argue that rules of court cannot take away discretion of the court since the trial Court was statutorily empowered to grant ex-parte injunction in the interest of justice, he relied on GRASEG (NIG) LTD V. R.T.T.D.C (2012) 13 NWLR (PT 1316) 168 AND KENOM V TEKAM (1989) 5 NWLR (PT. 121) 366.

On the use of the word "shall" in Order 26 Rule 11 of the Federal High Court Rules, counsel submitted that it is not an immutable rule of interpretation that the word "shall" must be given a mandatory meaning as it may have the meaning of guidance or directive. He cited the case of PROGRESS BANK NIG PLC V. O.K CONTRACT PAINT HOLDINGS (1998) 1 NWLR (PT. 532) 38 AT 47 - 48 in support as it urged the Court to discountenance the authorities of NWANKWO V. YAR'ADUA SUPRA; ONOCHIE V. ODOGWU (SUPRA); ODUTOLA V. LAWAL (Supra) and GENERAL OIL LTD V. ODUNTAN (SUPRA) relied upon by the Appellant.

The contention is that the trial judge gave reasons for extending the life of the ex-parte order, and quoted one of the features of interim injunction in the case of N.A.B KOTOYE V CENTRAL BANK OF NIGERIA & 7 OTHERS (1989) 1 NWLR (PT. 98) 419 AT 422 - 433 to submit the trial Court was on good ground to order the par-

ties to abide by the said order made ex parte pending the determination of all applications because the applications were not ripe for hearing, the CASE Of OLOWU V. BUILDING STOCK LTD (2004) 4 NWLR PT. 864 445 cited in support.

B In supporting the position taken by the trial Court, counsel submitted that the reasoning of the trial Court is unimpeachable as it represents the correct statement of law and that an Appeal Court will not reverse a trial Court if its decision on the merit is correct, he relied on the decision in APGA V. UMEH (2011) 8 NWLR (PT.1250) SC 544 AT 557 AND GARBA V. OMOKHODION (2011) 15 NWLR (PT. 1269) SC 145 AT 174.

C Counsel urged the Court to resolve this issue in favour of 1st Respondent and the uphold the interim preservative order pending when all motions are determined and to avoid a situation where at the end the victorious party is not left with an empty victory. It relied on KIGO NIG LTD. V. HOLMAN BROS NIG. LTD (1980) 5 - 7 SC 60.

This issue challenges the competence of the trial judge to extend the life span of the order of interim injunction granted on 13th December, 2013 and amended on a motion dated 18th December 2012 notwithstanding the provision of Or. 26 Rule 12 of the Federal High Court (Civil Procedure) Rules 2009. By the provision of Order 26 Rule 12 of the trial court Rules of court which provides as follows:

F *"Fourteen days after application to vary or discharge it has been argued."*

Before delving into the main issues herein, the question as to whether it was the order of 13th December, 2013 or 23rd December, 2013 that is in issue must be resolved. The court made an interim order of injunction first on the 13th December, 2013 and by another ex parte application dated on the 18th December, 2013 amended the order made on the 13th December, 2013 on the 23rd December, 2013. By so doing the order of 13th December, 2013 is no longer alive having been subsumed into the amended order of 23rd December, 2013. It was this order that attracted the application of appellant to discharge same made on the 27th December, 2013. The 1st Respondent's challenge is that it was made out of time. By order 26 Rule 11 of the Rules of the trial court, it provides as follows:

"11. Where an order is made on a motion ex-parte, any per-

son affected by it may, within seven days after service of it, or within such further time as the court should allow, apply to the court by motion to vary or discharge it; and the court may on notice to the party obtaining the order either refuse to vary or discharge it, with or without imposing terms as to cost or security, or otherwise, as seems just, or without imposing terms as to cost or security, or otherwise, as B
seems just.”

The issue here is whether the Appellant applied within seven days. It is clear that the order stands to be the one dated 23rd December, 2013 and therefore the application to discharge made on the 27th December, 2013 is certainly within C
time and valid to invoke the provisions of Order 27 Rules 12.

The rules require the 7 days to start running from the date of service and not from the date of the order.

The trial court in its ruling extending the life span of the interim D order of injunction, the application for which was made orally, held that the condition precedent to its expiration was none existent and it went further to distinguish between interim and ex-parte order of injunction. To see the way out of the question, one may ask what are those conditions precedent for the expiration of an ex parte order of E injunction after 14 days from the date it was made and after the party affected has applied for it to be discharged?

By the tenor of the Order 26 Rule 11 and 12 quoted earlier in this judgment, the court has the discretion to discharge or vary the order. Order 26 Rule 11 makes it permissive by the use of the word ‘May’. Rule 12 on the other hand makes use of the word ‘Shall’ to provide for the life span of the ex parte order which it limited to 14 days after the party affected has applied for the order to be varied or discharged; or last 14 days after the application to vary or discharge has been argued. Here the application to discharge was not argued so the second arm of the rule is not relevant. What is in focus is the first part which covers the filing of the application to discharge. Rule 12(2) provides that if the motion to vary or F
discharge the ex parte order is not taken within fourteen days of its being filed, the ex parte order shall lapse. This is a categorical and emphatic provision. By the combined understanding to be derived from the provision above, an ex parte order G
 H

of injunction should not last more than 14 days upon the application by the affected party to have it discharged or varied. Rule 11 uses may, Rule 12 uses shall and parties in this appeal went to great length in arguing whether shall should be interpreted as permissive or mandatory.

B Agreed that rules of court do not have the force of substantive legislations and they are meant to aid the court in doing justice, the word shall generally has come to command mandatoriness except in a few cases where the court in doing substantial justice interpreted ‘shall’ as permissive. See the case of PROGRESS BANK (NIG.) PLC. V. O.K. CONTRACT PAINT HOLDING SUPRA where the court held at page 47 - 48 as follows:

*“It is true that generally when the term “shall” or “shall not,” is used in a statute or rules of court, it takes a mandatory meaning”.
D But it is not an immutable rule of interpretation that the word “shall” must be given a mandatory meaning this is particularly so when at times it is used in rules of court. This may just have the meaning of a guiding requirement or directive. This is because as mandatory rules of court are not as sacrosanct as mandatory statutory provisions, court
E of justice are more inclined to regard as directory or permissive any provision in rules of court which appear mandatory, if it is implicit in the provision in question or if combination of other provision with the provision in question so dictates or if the ends of justice demand that it is to be so construed.”*

**F The issue here is simple, by rule 11 the term “may” was used and in Rule 12 the term “shall” was used which means that the Chief Judge of the Federal High Court was conscious in the usage of the words in Order 26 Rule 11 and 12. That
G being the case, the intention of the framers of the rules is to make the word ‘shall’ used in Rule 12 imperative and mandatory. The purpose of course is not far fetched; it is to preserve a res or a right in order to give room for both sides to be heard satisfying the rule of hearing both sides. To abolish it
H could also cause serious damage and therefore to create a balance, stringent rules are made to guide the making and sustenance of ex-parte orders of injunction. The interpretation put forward by the 1st Respondent would not cure the mischief but put more fire to it and doing so would defeat the aim**

of justice. To stop the abuse of ex-parte injunctions was re emphasized by the apex court in KOTOYE V. CBN (1989) 1 NWLR (PT 98) 419 at 450 and ENEKWE V IMB LTD (2006) 11 - 12 SC 3.

I agree with learned counsel for the appellant that the use of the term 'shall' in order 26 Rule 12 is emphatic and mandatory, Order 26 Rule 12(2) categorically says the order shall lapse after fourteen days from the date the motion to discharge or vary is filed. To lapse means: To pass away or revert to someone else because conditions have not been fulfilled or because a person entitled to possession has failed in some duty, to become void.

Therefore as at the date the life span of the ex-parte was extended, which was the 27th January, 2014 and taking 14 days from the date of making the application to discharge by the appellant which is 27th December, 2013, the order made ex-parte had lapsed and there was no making the application to discharge by the appellant which is 27th December, 2013, the order made ex parte had lapsed and there was no life to sustain it. It would have required another application for the court to make an interim order of injunction. None was so filed and the oral application of counsel cannot take the place of a formal application which must be supported by an affidavit of urgency. Going by the operation of order 26 Rule 12(2) the order made on the 23rd of December, 2013 had no life by the 27th January, 2014.

On the pre-conditions to the expiration of the order of ex parte injunction, Order 26 Rule 12(1) and (2) provides specifically that it cannot last for more than 14 days upon an application to discharge same. There is no other condition for it to last beyond 14 days in a kind of situation we have on hand. The trial judge erred in extending the life span of a spent order.

Also the attempt to distinguish between interim order of injunction and ex-parte order of injunction is nothing but semantics. The question is which one did the court then make on the 23rd December, 2013? Can there be an interim order of injunction not made on an ex-parte application? The attempt to distinguish the two amounts to creating distinction without a difference.

Interim injunction is a temporary injunction made pending the service of processes on the respondents to preserve rights or res.

No interim or ex-parte order of injunction is made as of right

to last beyond a period of time. It is a temporary relief given ex-parte and therefore none should be made to last beyond a short period as doing so would offend the right of parties to be heard before any order is made against their interest. See the case of BOGBON VS. DIWHRE Supra where the court held at page 294 - 295 as follows:

B *“By that very name injunction granted on ex-parte application can only be property interim in nature. They are made without notice to the other side to keep matters in status quo to a named date usually not more than a few days or until the respondent can be put on notice. The rationale of an order made on such application is that delay to be caused by, in the ordinary way of putting the other side on notice would or might cause an irreparable or serious mischief. Such injunctions are for cases of real urgency.”*

The court in the said judgment went on to say:

D *“An injunction is a serious matter and it must be treated seriously”*. See also the following cases UNIBIZ NIG LTD V. C.B.N. LTD (2003) 6 NWLR (PT 816) 402; ALCATEL KABEL METAL NIG. PLC. V. OJUGBELE (2003) 2 NWLR (PT 805) 42.

E The argument on inconsistency and conflict with the Constitution is unnecessary and because the 1st Respondent is erroneously equating an ex-parte order of injunction with final orders of court made on merit after hearing both sides. That is not the case here. An interim order made on an ex-parte motion can never be the same as final order made inter parties.

F The 1st Respondent’s first notice to contend that decision be varied and parties be bound to maintain the status quo as at the date of the ruling being 27th January, 2014 pending the determination of all preliminary objections by the Appellant and 2nd to 4th Respondents have been taken so that the motion on notice for interlocutory injunction shall abide the decision of the court on the preliminary objections. Having determined that the order earlier made had lapsed there is no foundation upon which the variation can be made. Fundamentally, an ex-parte order is to preserve the res pending putting the other parties on notice. That has been done in this case. There is therefore no need for the order on parties to maintain status quo.

H The 1st Respondent after the hearing of the appeal filed additional authorities with extensive arguments in support. It is fundamental to oppose the appellant's subtle objection to the competence

of the first Respondents notice to contend that the decision be varied by asking the parties to maintain status quo.

It is settled practice that an appellant seeking to oppose a respondent's notice to contend must file a preliminary objection and this is in compliance with Order 10 Rule 1 of the rules of this court. An appellant is not allowed to raise an objection to competence of a respondent's notice to contend in his brief. This is because the notice to contend is like a cross appeal with its grounds and not based on the grounds of the notice of appeal of the appellant. Since the appellant did not file a preliminary objection to the 1st Respondent's notice to contend that the decision of the court below be varied, it is not allowed to do so in his reply brief. See IBE V. ONUORAH (1999) 14 NWLR (PT 638) 340 at 350. B
C

It is wrong of counsel to reopen arguments when the appeal has been heard and behind the other parties. There must be an end to litigation. The arguments are discountenanced but authorities considered. D

Now to the merit of the notice to contend and vary the decision of the court below. We have gone through the record of appeal and it was nowhere maintained that the 1st Respondent sought for such an order from the court below. That being the case, it is a fresh claim which this court cannot determine. Parties are at liberty to ask that of the court when trial resumes. This is an appellate court and the record of proceedings does not bear out the contention of the 1st Respondent. E
F

On the whole therefore the two 1st Respondent notices to contend fail. The ruling of the trial court extending life span of the ex-parte order amended on the 23rd December, 2013 is hereby set aside. The appeal succeeds. G

BAGE JCA

I had the unique opportunity of reading in draft the eloquent judgment of my learned brother, Y. NIMPAR JCA, just delivered. I am in complete agreement with the reasoning and the conclusion reached. I will only add a few words of my own, on the word "shall" when used in a statute. Its meaning and import was considered by H

the Supreme Court in UGWU & ANOR VS. ARARUME & ANOR (2007) 6 S.C. (Pt. 1) 88. The apex court stated as follows:

“*Shall*” when used in a statute may be used as implying futurity or implying a mandate, direction or giving permission the word ‘shall’ when used in a statutory provision imports that a thing must be done and that when the negative phrase ‘shall not’ is used, it implies that something must not be done. It is a form of command or mandate. Generally when the word ‘shall’ is used in a statute, it is not permissive. It is mandatory; The word ‘shall’ in its ordinary meaning is a word of command which is normally given a compulsory meaning because it is intended to denote obligation. It is sometimes intended to be directory only and in that case it is equivalent to ‘may’ and will be construed as being merely permissive.”

I am in complete agreement with the interpretation to order 26 Rule 12 of the Federal High Court Civil Procedure) Rules 2009, contained in the leading judgment. The word ‘shall’ used therein is emphatic and it is mandatory. Order 26 Rule 12(2) categorically provides that the order made ex-parte shall lapse after fourteen (14) days from the date the motion to discharge or varied is filed. There is no condition under the Rules of the trial court of whatever kind for such an order to last beyond 14 days. I agree that the trial judge erred in extending the life span of a spent order. The ruling of the trial court extending the life span of the ex parte order, as rightly adjudged, as amended on the 23rd of December, 2012, in the leading judgment, is also set aside by me. For all the detailed reasoning contained in the leading judgment, I also hold that the appeal succeeds.

TUKUR JCA

I have had the privilege of reading before today the judgment of my learned brother YARGATA BYENCHAT NIMPAR, JCA.

I agree entirely with the reasoning and conclusion in the lead judgment and have nothing useful to add.

I too allow the Appeal and hereby set aside the ruling of the trial Court extending the life span of the ex parte order amended on the 23rd December 2013.