

SUPREME COURT OF NIGERIA
FRIDAY 20TH MAY, 2016. SC. 470/2013
CORAM:- S. GALADIMA, O. RHODES-VIVOUR, N. S.
NGWUTA, M. U. PETER-ODILI, M. D. MUHAMMAD, JJSC

OKECHUKWU BENSON

..... APPELLANT

V.

1. COMMISSIONER OF POLICE

2. ATTORNEY-GENERAL, RIVERS STATE RESPONDENT

SUPREME COURT - Power - SC Act s. 22 - Application of - The section is invoked where lower court has jurisdiction to entertain matter under consideration - But failed or neglected to do so (H1)

FUNDAMENTAL RIGHTS - Enforcement - Ex parte application - In the absence of respondents' processes - The necessary materials for the invocation of powers of appellate Courts are missing (H2)

APPEALS - Reliefs - Grant - Court of Appeal was right not to have gone beyond - Granting the relief of leave to enforce fundamental right - As sought by appellant (H3)

FACTS

Accused/appellant was charged on three counts charge of conspiracy and armed robbery before a Chief Magistrate Court of Rivers State sitting in Port Harcourt. Appellant's plea was not taken and he was remanded in prison custody, pending a direction from the Director of Public Prosecutions. No information was filed against appellant. Subsequently, appellant applied to the High Court of Rivers State, Port Harcourt for leave to enforce his fundamental rights.

The Court refused the leave and struck out the application on the ground that section 41 of the Constitution does not seem the appropriate right of the applicant which is being infringed as the case rather comes within sections 35 and 41 of the 1999 Constitution, Articles 6 and 12 of the African Charter. The Court further held that appellant has not made out a prima facie case for the enforcement of his fundamental rights but was at liberty to apply for bail. Dissatisfied with the judgment, appellant appealed to the Court of Appeal

Port Harcourt Division. The Court heard the appeal and granted appellant leave to enforce his fundamental rights. The case was thus remitted to the Chief Judge of Rivers State for assignment to another Judge of the High Court for hearing.

ISSUE FOR DETERMINATION

Whether the refusal of the Honourable Learned Justices of the Court of Appeal to hear and determine the Appellant's substantive application on the merits was proper?

HELD (Unanimously dismissing the appeal per **PETER-ODILI JSC**)

SUPREME COURT - Power - SC Act s. 22 - Application of

1. Taking a cue from Respondent's submission, it has to be said that the operation of Section 22 of the Supreme Court Act, Cap S15, LFN 2004 is not as a matter just for the asking as certain conditions must co-exist before such an invocation of Section 22 (supra) can be effected. These conditions are thus:-

1. The lower Court or trial Court must have the legal power to adjudicate in the matter before the appellate Court can entertain it.

2. The real issue raised by the Claim of the Appellant at the lower Court or trial Court must be seen to be capable of being distilled from the grounds of appeal.

3. All necessary materials must be available to the Court for consideration.

4. The injustice or hardship that will follow if the case is remitted to the Court below must clearly manifest itself.

Another way of saying the same thing is that Section 22 of the Supreme Court Act can only be invoked where the Courts below are clothed with the requisite jurisdiction to entertain and determine the matter under consideration but failed and or neglected to do so. In this instance, the Court of Appeal lacks the jurisdiction to utilize Section 15 or 16 of the Court of Appeal Act and just like the trial Court, the processes of the Respondents were not present. Therefore, the jurisdiction to act was lacking. (pp. 2604 H/2612 A)

FUNDAMENTAL RIGHTS - Enforcement

2. The Appellant is urging this Court to do what the Court of Appeal ought to have done utilizing the provisions of Section 15 of the Court of Appeal Act and for this Court Section 22 of the Supreme Court Act deriving the force of the invitation from the fact that the necessary materials for the consideration and adjudication of the substantive matter are already in the record which materials are:

- 1. Motion paper**
- 2. Statement in support of motion**
- 3. Verifying affidavit/affidavit in support of motion, exhibits.**

Also to be part of the consideration are the inordinate length of time about 9 years between the trial Court and the hearing of this appeal and the need to ensure that justice is served.

Those arguments by the Appellant are indeed seductive but something fundamental is missing, which is the fact that those materials available on the record from which the journey up to this Court commenced are without any input of the Respondents who ought to be heard. To elaborate, the Appellant went to the Court of Appeal upon the refusal of the trial Court to grant him leave to enforce his fundamental rights based on his ex-parte application. At that point, the Respondents were not in a position to file any process in reaction to Appellant's application being ex-parte and so the materials Appellant is touting as before the Court are not complete in the absence of the Respondents' processes, Respondents having had no opportunity of filing any processes at the trial Court and so all the conditions necessary for the invocation of the powers of the Court of Appeal under Section 15 or 16 of the Court of Appeal Act and Section 22 of the Supreme Court Act are absent. (p. 2611 C)

APPEALS - Reliefs - Grant

3. Also to be tackled is that the relief sought by the Appellant at the Court below as can be seen in the Notice of Appeal to

the Court of Appeal is to allow the appeal and grant leave to the Appellant to enforce his fundamental rights which reliefs were awarded by the Court below and so the Court below was right not going beyond that and granting a relief outside the claim sought by the Appellant.

- B ***On the whole, I answer the question raised as issue positively in that the Court of Appeal was right to refuse to hear and determine the Appellant's substantive application on the merits and from the foregoing, I see no basis in disturbing what the Court of Appeal did and so I hereby dismiss this appeal***
C ***which is unmeritorious.*** (p. 2612 D)

NOTABLE POINT OF INTEREST

RHODES-VIVOUR JSC

D 1. *Fundamental rights – Courts to speed up hearing of*

- It took the Court of Appeal nine years to reverse the High Court on the issue as to whether the Appellant is entitled to leave to enforce his fundamental rights. Matters involving the fundamental rights of any person, especially the liberty of the individual, should be given priority over all other matters and heard immediately they are filed in Court. Courts should, where possible ignore procedural formalities when considering such matters and assume an activist role by Ruling immediately after hearing arguments, or very soon thereafter. On no account should any person be kept in custody for a day longer than is necessary. The liberty of an individual must at all times be paramount. The judiciary must assume a more robust role in affairs of the fundamental rights of an individual. (p. 2613 G)

G REPRESENTATION

TUDURU EDE, for the Appellant

DENNIS OKWAKPAN, for the Respondents

CASES REFERRED TO

- H Uzoukwu v. Ezeonu II (1991) 6 NWLR (pt. 200) 708
Hassan v. Aliyu (2010) 17 NWLR (pt. 1223) 547
Agbakoba v. INEC (2008) 18 NWLR (pt. 1119) 489
Obi v. INEC (2007) 11 NWLR (pt. 1036) 565
Elendu v. Ekwoaba (1998) 12 NWLR (pt. 578) 320

Hassan v. Aliyu (2010) 17 NWLR (pt. 1223) 547

R. v. Chancellor University of Cambridge (1723) Strange 557

STATUTES & RULES REFERRED TO

Constitution of the Federal Republic of Nigeria 1999, ss. 35, 36, 41

Court of Appeal Act, ss. 15, 16

Supreme Court Act Cap S15 LFN 2004, s. 22

Fundamental Rights (Enforcement Procedure) Rules 2009, O. II, rr. 1-7, O. IV rr. 1, 2, 4 (a)-(c) (i) - (v), O. x, r. I; O. xi, O. xii rr. 1-5 and O. xv rr. 1-4

LEAD JUDGMENT BY PETER-ODILI JSC

This appeal is against the judgment of the Court of Appeal, Port Harcourt Division delivered on 8/3/2013 wherein leave was granted to apply for the enforcement of his fundamental rights and the case remitted to the Chief Judge of Rivers State for assignment to another Judge of the High Court of Rivers State for determination.

Again aggrieved with the decision, the Appellant has come before the Supreme Court upon a Notice of Appeal filed on the 9/4/2013.

FACTS:

The Appellant was charged on the 30/10/03 before a Chief Magistrate Court of Rivers State sitting in Port Harcourt.

The charge was on three counts of conspiracy and armed robbery. Pleas were not taken and Appellant was remanded in prison custody and the case file was directed to be sent to the Director of public prosecutions (DPP) of Rivers State. No information was filed against him.

On the 20/08/04 Appellant applied to the High Court of Rivers State, sitting in Port Harcourt for leave to enforce his fundamental rights. The Court was presided over by B. E. Ugbari J. who refused the leave and struck out the application on the ground that Section 41 of the Constitution does not seem the appropriate right of the applicant which is being infringed as the case rather comes within Sections 35 and 41 of the 1999 Constitution, Articles 6 and 12 of the African Charter.

That the Appellant/Applicant had not made out a prima facie case for the enforcement of his fundamental rights but was at liberty

to apply for bail.

That High Court Ruling set the ball of appeals rolling culminating in the present appeal.

Mr. Tuduru Ede of counsel for the Appellant on the 25th day of February, 2016 adopted the Brief of Argument of the Appellant
B filed on the 3/10/13 in which he raised a lone issue which is thus:-

Whether the refusal of the Honourable Learned Justices of the Court of Appeal to hear and determine the Appellant's substantive application on the merits was proper? Grounds 1-3

C Learned counsel for the Appellant also adopted a Reply Brief filed on the 21/11/2013.

Dennis I. Okwakpan Esq., for the Respondent adopted the Brief of Argument of the Respondent filed on the 18/11/2013. He also adopted the issue as crafted by the Appellant which is good
D enough for the determination of this appeal and I shall utilize it.

SOLE ISSUE:

Whether the refusal of the Honourable learned Justices of the Court of Appeal to hear and determine the Appellant's substantive application on the merits was proper.

E Mr. Ede of counsel for the Appellant contended that having regard to the fact that he had spent a long time in detention, that the extant Fundamental Rights (Enforcement Procedure) Rules is different from the one applicable when he applied for relief in the trial
F Court, having regard to the overriding objectives of the Fundamental Rights (Enforcement Procedure) Rules of 2009, that the need for leave and provisions relating thereto in the Fundamental Rights (Enforcement Procedure) Rules applications having been repealed and having regard to the provisions of Section 16 of the Court of Appeal
G Act as well as the force of decided authorities and having regard that he formally pleaded for application of Section 15 of the Court of Appeal Act and so the Court below might to have decided his substantive request to enforce his fundamental rights under Sections 35 and 41 of the 1999 Constitution. That this Court should, utilizing
H Section 22 of the Supreme Court Act make use of Section 16 of the Court of Appeal Act in granting the application of the Appellant. That the application is meritorious and ought to have been granted by the Court of Appeal and so, this Court should do the needful.

The Appellant further submitted that he had spent an inordi-

nate length of time about 9 years between the trial Court and the hearing of this appeal and the interest of justice will be better served by eliminating the delay that would arise in the event of remitting the case back to the trial Court for hearing should the Appellant be successful here. That the new rules of procedure for enforcement of fundamental rights which automatically affects this appeal is under Order II, Rule II thereof, leave has become unnecessary to enforce fundamental right and all that is required now might be to direct the Respondents to file their counter affidavit to the application, which in a way is reception of further evidence on appeal, He cited Uzoukwu v Ezeonu II (1991) 6 NWLR (Pt. 200) 708 at 751 per Nasir PCA.

It was submitted for the Appellant that this Court should treat the application for leave as if it were the main application for enforcement of fundamental rights itself since the Appellant appealed against the wrong procedure adopted by the learned trial judge who treated the application for leave as well as his refusal to grant leave. He referred to Preambles 1, 2, 3, (a) - (g). Order II, Rules 1-7. Order IV, Rules 1, 2, 4 (a) - (c) (i) - (v), Order x, Rule I; Order xi, Order xii, Rules 1- 5 and Order xv, Rules 1-4 of Fundamental Rights (Enforcement Procedure) Rules 2009. He cited State v Boundary Settlement Commissioner (1985) 3 NWLR (Pt.12) 335 at 343 - 384 etc.

That Section 22 of the Supreme Court Act is invoked and applicable because under the Fundamental Rights (Enforcement Procedure) Rules of 2009 and Section 15 of the Court of Appeal Act, both the trial High Court as well as the Court of Appeal are clothed with requisite jurisdiction to entertain the matter subject to this appeal for enforcement of the fundamental rights of the Appellant. He referred to Hassan v. Aliyu (2010) 17 NWLR (Pt.1223) 547 at 601 per Onnoghen JSC.

Learned counsel for the Respondent countered the arguments canvassed by the Appellant submitting that the conditions which must co-exist for the application of Section 22 of the Supreme Court Act are not available in this appeal.

That the real issue raised by the claims of the Appellant at the trial Court is not capable of being distilled from any of the Appellant's grounds of appeal filed on 9/4/2013 to the Supreme Court. He cited Agbakoba v. INEC (2008) 18 NWLR (pt. 1119) 489 at 557 - 558; Obi v. INEC (2007) 11 NWLR (Pt.1036) 565.

Mr. Dennis Okwakpan of counsel for the Respondents contended further that the Appellant went to the Court below upon the refusal of the trial Court to grant him leave to enforce his fundamental rights based on his ex-parte application and therefore at that stage, the Respondents were not in a position to file any process in reaction to Application. That since fair hearing requires that the Respondents have a say on the Appellant's application therefore, the requirement for the invocation of Section 15 of the Court of Appeal Act by the Court below was not present. Also, that the relief claimed by the Appellant at the Court of Appeal being, allowing the appeal and granting leave for the enforcement of his fundamental rights were not the reliefs in the trial Court, He cited *Elendu v Ekwoaba* (1998) 12 NWLR (Pt.578) 320 at 336.

In reply on points of law, learned counsel for the Appellant said having appealed against the wrong procedure adopted by the learned trial judge who treated the leave application as the main application as well as his refusal to grant the leave, the Court of Appeal ought to have under Section 15 of the Court of Appeal Act heard and determined the whole application by treating the leave application as the main application.

In brief, the Appellant is asking this Court to rule differently from what the Court of Appeal did as it ought to have decided the Appellant's substantive application on the merit under Sections 35 and 41 of the 1999 Constitution having regard to the provisions of Section 16 of the Court of Appeal Act and the Appellant having formally pleaded for application of Section 15 of the Court of Appeal Act and in doing so act under Section 22 Supreme Court Act.

Disagreeing, the Respondents contend that the conditions necessary for the lower Court's invocation of its powers under Section 15 (now 16) of the Court of Appeal Act are absent in this case apart from the lower Court not being competent to grant to the Appellant a relief not sought and so an invocation of Section 22 of the Supreme Court Act by this Court is out of the question.

Taking a cue from Respondent's submission, it has to be said that the operation of Section 22 of the Supreme Court Act, Cap S15, LFN 2004 is not as a matter just for the asking as certain conditions must co-exist before such an invocation of Section 22 (supra) can be effected. These conditions are

thus:-

1. The lower Court or trial Court must have the legal power to adjudicate in the matter before the appellate Court can entertain it.

2. The real issue raised by the Claim of the Appellant at the lower Court or trial Court must be seen to be capable of being distilled from the grounds of appeal.

3. All necessary materials must be available to the Court for consideration.

4. The injustice or hardship that will follow if the case is remitted to the Court below must clearly manifest itself.

I place reliance on the cases of Agbakoba v INEC (2008) 18 NWLR (Pt. 1119) 489 at 557 - 558; Obi v INEC (2007) 11 NWLR (Pt. 1036).

At the trial Court, the claim by the Appellant was by an application, ex-parte which I shall quote verbatim hereunder and thus:-

“IN THE MATTER OF AN APPLICATION FOR REDRESS FOR THE INFRINGEMENT OF FUNDAMENTAL RIGHTS AND IN THE MATTER OF:

OKECHUKWU BENSON - APPLICANT

AND

1. COMMISSIONER OF POLICE

2. ATTORNEY GENERAL, RIVERS STATE - RESPONDENTS

MOTION EX-PARTE

ORDER 1 RULE 2(1), (2) & (3) FUNDAMENTAL RIGHTS (ENFORCEMENT PROCEDURE) RULES SECTION 46 (1) 1999 CONSTITUTION

TAKE NOTICE that this Honourable Court will be moved on the ... day of August 2004 at the hour of 9 O'clock in the forenoon or so soon thereafter as **COUNSEL** for the **APPLICANT** can be heard for the reliefs following:

(a) **AN ORDER** for leave to apply for redress for the infringement of applicants fundamental rights.

(b) **A DECLARATION** that the continued detention of the Applicant on remand at the Federal Prisons, Port Harcourt from 30th October 2003 till present on the orders of the Chief Magistrate Court 1, port Harcourt pursuant to charge **NO. PMC/249c/2003** constitutes an infringement of Applicants fundamental rights and therefore

unlawful, illegal, unconstitutional, null and void.

(c) *A DECLARATION that the continued detention of the APPLICANT at the Federal Prisons, Port Harcourt on the remand order of the Chief Magistrate Court 1, Port Harcourt in Charge NO. PMC/349c/2003 of 30th October 2003 is a violation of the Applicant's rights to effective remedy/fundamental rights to fair hearing.*

(d) *AN ORDER to remove into this Honourable Court for quashing therefore the entire proceedings of the Chief Magistrate Court 1, Port Harcourt with all orders made therein contained in the proceedings in charge NO. PMC/349c/2003 dated the 30th day of October 2003 remanding the Applicant to prisons.*

(e) *A mandatory order directing the Respondents to release the Applicant from Prison detention forthwith either with or without conditions/and or admitting him to bail.*

(f) *N1 Million exemplary/aggravated damages against the Respondent jointly and severally for the unwarranted infringement of the Applicant's fundamental rights.*

(9) *AN ORDER directing the Respondents to deliver in writing an apology to the Applicant for the unwarranted infringement of the fundamental rights.*

ALTERNATIVELY

(h) *AN ORDER directing the Respondents to put the Applicant up for immediate trial.?*

AND for such orders or further orders as this Honourable Court may deem fit to make under Order 6 Rule 1 (1) of the aforesaid Rules in the circumstances."

The learned trial judge, Ugbari J held thus:-

"... I hold the view that the applicant has not made out a prima facie case for this Court to grant his leave to apply to enforce his fundamental rights as alleged under the Fundamental Rights (Enforcement procedure) Rules. He is at liberty to come by way of an application for bail. Accordingly, I hereby refused his application and it is accordingly struck out".

The Appellant set out for redress by Notice of Appeal to the Court below by the Notice of Appeal recast below and thus:-

"BETWEEN

OKECHUKWUBENSON - APPLICANT/APPELLANT

AND

1. COMMISSIONER OF POLICE - RESPONDENTS

2. ATTORNEY GENERAL, RIVERS STATE

NOTICE OF APPEAL

TAKE NOTICE that the Applicant being dissatisfied with the decision more particularly stated in the whole decision of the Court contained in the Ruling of the High Court of Rivers State Presided over by His Lordship Honourable Justice Ugbari, Judge, dated the 25th day of August 2004 doth hereby appeal to the Court of Appeal upon grounds set out in paragraph 3 and will at the hearing of the Appeal seek the relief set out in paragraph 4.

AND the Appellant further state that the names and addresses of the persons directly affected by the appeal are those set out in paragraph 5.

2. PART OF DECISION OF THE LOWER COURT COMPLAINED OF: The whole decision.

3. GROUNDS OF APPEAL:

1. The learned trial judge erred in law in refusing the *ex parte* application for leave to apply for redress for infringement of applicant's fundamental rights.

PARTICULARS OF ERRORS

(a) It was clear that a *prima face* case for the grant of leave was made out by the APPLICANT.

(b) The Court at the stage of the application for leave should not be concerned with the merits, propriety or totality of the strength of the substantive application.

(c) At the moment leave is sought the scale based on the Applicant's Affidavit/Statement titled in favour of applicant in the exercise of the Court's discretion.

2. The learned trial judge erred in law in holding that the application by way of fundamental rights enforcement/leave application is inappropriate for purposes of challenging remand in custody by the learned Chief Magistrate.

PARTICULARS OF ERRORS

(a) The fundamental rights application in this matter is suitable, valid and in accordance with the 1979 Fundamental Rights (Enforcement procedure) Rules

(b) The present application is for leave to challenge violations of Applicant's rights in Chapter IV of the 1999 Constitution and Afri-

can Charter on Human & Peoples Rights Act.

(c) The learned trial judge failed to direct his mind that leave was as well being sought to enforce right to bail in accordance with Section 35 (4) & (5) of the 1999 Constitution & Articles 6 and 12 of African Charter on Human & Peoples Rights Act.

B *3. The learned trial judge erred in law in determining the application for leave as though it were the substantive application by deciding on the merits of the entire case.*

PARTICULARS OF ERRORS

C *(a) The substantive application has not been filed, as leave application was what was before the learned trial judge.*

(b) The learned trial judge prejudged the entire process of enforcing the Applicant's rights in limine.

D *(c) The Court should not be concerned with the strength or merits of the substantive application at this stage.*

(d) The learned trial judge should have concerned himself with the true facts of the Statements, Grounds and Verifying Affidavit annexed to the application.

E *(e) The learned trial judge should have concerned himself with whether on the facts disclosed, leave could have issued.*

(f) The learned trial judge misdirected himself when he observed that bail application was more appropriate in view of the material facts disclosed on the Affidavit.

F **4. RELIEF SOUGHT FROM THE COURT OF APPEAL:**
TO ALLOW the Appeal, set aside the decision of the Court below and grant leave as sought by the Appellants."

G The Court of Appeal as per Ejembi - Eko JCA allowed the appeal, holding that the trial Court ought to have granted the leave and the appellate Court granted leave to the Appellant to enforce his fundamental rights stating that the real issue raised by the claims of the Appellant at the trial Court is not capable of being distilled from any of his grounds of appeal captioned above.

H A perusal of the Notice of Appeal to this Court would be helpful at this point which is as follows:-

"NOTICE OF APPEAL

TAKE NOTICE that I OKECHUKWU BENSON being dissatisfied with the judgment more particularly stated in the part of the decision of the Court of Appeal, Port Harcourt Division contained in

the judgment of the Court of Appeal aforesaid dated the 8th day of March 2013 delivered same day remitting the hearing and determination of my substantive application for enforcement of my fundamental rights to the trial High Court of Rivers State doth hereby appeal to the Supreme Court upon the grounds set out in paragraphs 3 and will at the hearing of the appeal seek the reliefs set out in paragraph 4. B

GROUND OF APPEAL

1. The learned Justices of the Court of Appeal erred in law when they refused to assume jurisdiction to hear and determine the Appellant's substantive application for enforcement of his fundamental rights on its merits when they held that "The case shall be assigned by the Chief Judge of Rivers State to a Judge of the High Court of Rivers State, other than B.E. Ugbari, J. to hear and determine". C

PARTICULARS OF ERRORS

(a) The learned Justices of the Court of Appeal ought to have heard and determined the substantive application at once. D

(b) All processes for the hearing and determination of the substantive application on its merits were before the Court of Appeal.

(c) The application is for enforcement of fundamental rights of the Appellant. E

(d) Leave under the present and operative Fundamental Rights (Enforcement procedure) Rules regime is unnecessary.

(e) The application and processes of the Appellant in the record are sufficient for the Court of Appeal to hear the substantive application having allowed the appeal. F

2. The learned Justices of the Court of Appeal erred in law when they held that "The case shall be assigned by the Chief Judge of Rivers State to a Judge of the High Court of Rivers State, other than B.E. Ugbari, J. to hear and determine". G

PARTICULARS OF ERRORS

(a) The Court of Appeal ought to have heard and determined the substantive application to enforce Appellant's rights.

(b) The present fundamental rights rules require no leave. H

(c) Remittance of the substantive application to the trial Court to be heard will be time wasting.

(d) The Court of Appeal could have heard and determined the main application under Section 15, Court of Appeal Act, Cap C

36.

(e) Under Order II Rule II of the Fundamental Rights Rules 1999 leave is unnecessary.

(f) The Court of Appeal could have called for additional evidence by directing Respondents to file counter affidavit to the application.

(g) The Court of Appeal could have acted on the authority of *Uzoukwu v Ezeonu II* (1991) 6 NWLR (Pt.200) 708, 751 to receive additional evidence.

(h) Hearing and determining the application on the authority of *Inakoju v Adeleke* (2007) 4 NWLR (Pt.1025) 423, 692-692 E-D would have served the interest of justice.

(i) The appeal that the Court of Appeal allowed was against the wrong procedure adopted by the trial Judge.

(j) The Court of Appeal could have treated the application for leave as if it were the main application for enforcement of fundamental rights and should have heard and determine same.

3. The learned Justices of the Court of Appeal erred in law in failing to have treated the application for leave as the main application when they held that

“The case shall be assigned by the Chief Judge of Rivers State of the High Court of Rivers State, other than B.E. Ugbari, j, to hear and determine”.

PARTICULARS OF ERRORS

(a) The Appellant’s appeal which the Court of Appeal determined was against the wrong procedure adopted by the trial Judge.

(b) The Court of Appeal ought to have assumed jurisdiction under Section 15 of the Court of Appeal Act and determined the merits of the main application.

(c) The Court of Appeal ought to have assumed jurisdiction under Section 15 of the Court of Appeal Act to have heard and determined the merits of the main application.

(d) The Court of Appeal ought to have acted under the Preambles 1, 2, 3 (a) - (g) and Order II Rules 1-7 etc of the Fundamental Rights Rules 1999.

(e) The Court of Appeal ought to have acted on the authority of *Obinyan v Military Governor* (1972) 4 SC 248, 257 and *State v Boundary Settlement Commissioner* (1985) 3 NWLR (Pt.12) 335 to

have heard and determined the substantive application rather than remitting same to the trial High Court to be heard.

4. Reliefs sought from the Supreme Court:

To allow the appeal, set aside the decision of the Court of Appeal, Port Harcourt Division remitting the application to the Chief Judge of the High Court of Rivers State for assignment to another Judge for hearing and determination, the Supreme Court to hear the substantive application to enforce fundamental rights of the Appellant under Section 22 of the Supreme Court Act and grant Appellant's application."

The Appellant is urging this Court to do what the Court of Appeal ought to have done utilizing the provisions of Section 15 of the Court of Appeal Act and for this Court Section 22 of the Supreme Court Act deriving the force of the invitation from the fact that the necessary materials for the consideration and adjudication of the substantive matter are already in the record which materials are:

- 1. Motion paper**
- 2. Statement in support of motion**
- 3. Verifying affidavit/affidavit in support of motion, exhibits.**

Also to be part of the consideration are the inordinate length of time about 9 years between the trial Court and the hearing of this appeal and the need to ensure that justice is served.

Those arguments by the Appellant are indeed seductive but something fundamental is missing, which is the fact that those materials available on the record from which the journey up to this Court commenced are without any input of the Respondents who ought to be heard. To elaborate, the Appellant went to the Court of Appeal upon the refusal of the trial Court to grant him leave to enforce his fundamental rights based on his ex-parte application. At that point, the Respondents were not in a position to file any process in reaction to Appellant's application being ex-parte and so the materials Appellant is touting as before the Court are not complete in the absence of the Respondents' processes, Respondents having had no opportunity of filing any processes at the trial Court

and so all the conditions necessary for the invocation of the powers of the Court of Appeal under Section 15 or 16 of the Court of Appeal Act and Section 22 of the Supreme Court Act are absent.

Another way of saying the same thing is that Section 22 of the Supreme Court Act can only be invoked where the Courts below are clothed with the requisite jurisdiction to entertain and determine the matter under consideration but failed and or neglected to do so. In this instance, the Court of Appeal lacks the jurisdiction to utilize Section 15 or 16 of the Court of Appeal Act and just like the trial Court, the processes of the Respondents were not present. Therefore, the jurisdiction to act was lacking. See Hassan v. Aliyu (2010) 17 NWLR (Pt.1223) 547 at 601; Agbakoba v INEC (2008) 18 NWLR (Pt.1119) 489 at 557-558; Obi v INEC & Ors (supra) 639-640.

Also to be tackled is that the relief sought by the Appellant at the Court below as can be seen in the Notice of Appeal to the Court of Appeal is to allow the appeal and grant leave to the Appellant to enforce his fundamental rights which reliefs were awarded by the Court below and so the Court below was right not going beyond that and granting a relief outside the claim sought by the Appellant. In this, I cite Elendu v Ekwoaba (1998) 12 NWLR (pt. 578) 320 at 336.

On the whole, I answer the question raised as issue positively in that the Court of Appeal was right to refuse to hear and determine the Appellant's substantive application on the merits and from the foregoing, I see no basis in disturbing what the Court of Appeal did and so I hereby dismiss this appeal which is unmeritorious. I affirm the decision and orders of the Court of Appeal which set aside the decision of the trial High Court and granted leave to the Appellant to apply for the enforcement of his fundamental rights and the assignment by the Chief Judge of Rivers State to a judge of the High Court other than B.E. Ugbari, J. to hear and determine the matter.

GALADIMA JSC

I have been obliged a copy of the judgment of my learned

brother PETER-ODILI, JSC just delivered. I am in agreement that this Appeal is lacking in merit and ought to be dismissed.

The nature of reliefs sought and circumstances under which they were brought before the trial Court by the Appellant and the necessary materials for the consideration and adjudication of the substantive matter are already copied in the record. It is however noted that the claim of the Appellant was by way of an application *ex parte*. In the absence of the Respondents' processes, it would be difficult, as it is unfair to utilize Section 22 of the Supreme Court Act of this Court to do what the Court of Appeal ought to have done in the circumstance, under the provisions of Section 16 of the Court of Appeal Act.

The Court below was right to have remitted the Appellants' application for hearing and determination for enforcement of his fundamental rights at High Court of Rivers State. I affirm this decision and orders made by the Court below remitting the Appellant's application to the Rivers State Chief Judge for assignment to another Judge to hear and determine the matter expeditiously.

RHODES-VIVOUR JSC

I have had the advantage of reading in draft the leading judgment of my learned brother, Peter-Odili, JSC. I agree with it and for the reasons which His lordship gives I, too would dismiss the appeal. I intend to comment on the indefensible length of time it took for the Court of Appeal to arrive at its decision. The Appellant applied to a Port Harcourt High Court on 20 April, 2004 for leave to enforce his fundamental rights. Leave was refused and the application struck out. On 8 March, 2013 the Court of Appeal reversed the High Court and granted the Appellant leave to enforce his fundamental rights.

It took the Court of Appeal nine years to reverse the High Court on the issue as to whether the Appellant is entitled to leave to enforce his fundamental rights. Matters involving the fundamental rights of any person, especially the liberty of the individual, should be given priority over all other matters and heard immediately they are filed in Court. Courts should, where possible ignore procedural formalities when considering such matters and assume an activist role by Ruling immediately after hearing arguments, or very soon there-

after. On no account should any person be kept in custody for a day longer than is necessary. The liberty of an individual must at all times be paramount. The judiciary must assume a more robust role in affairs of the fundamental rights of an individual.

B For this, and the comprehensive reasoning in the leading judgment, I too dismiss the appeal.

NGWUTA JSC

C I read in draft the lead judgment just delivered by my learned brother, Mary Ukaego peter Odili, JSC. I entirely agree that the appeal has no merit and ought to be dismissed.

In his determined effort to enforce his fundamental rights appellant is urging the Court to breach the same right of his opponents.

D He claimed that the necessary materials for the Court to, invoke its powers under Section 22 of the Supreme Court Act were already in the record. He listed the material as:

(1) Motion paper.

(2) Statement in support of motion.

E (3) Verifying affidavit/affidavit in support of motion, Exhibits.

The respondents did not file any processes and there was no showing that they were given the opportunity and they failed to file their counter-affidavit. His claim that all the necessary materials are before the Court is false. A grant of the appellant's right would amount to a violation of the respondent's right to fair hearing under Section 36(1) of the Constitution of the Federal Republic of Nigeria, 1999 by a breach of the impartiality principle therein embedded.

F It would also violate the basic principle and pillar of fair hearing propounded by the Creator in the Garden of Eden at the trial of Adam and Eve and re-stated for the first time on the material plane of existence in the case of *R. v. Chancellor, University of Cambridge* (1723) Strange 557.

G For the above and the fuller reasons in the lead judgment which I adopt I also dismiss the appeal for want of merit. Appellant should, in his better interest, apply for bail as suggested by the trial Court.

H Appeal dismissed.

MUHAMMAD JSC

I read in draft the lead judgment of my learned brother Mary Ukaego Peter-Odili JSC, just delivered. I entirely agree with the reasoning and conclusion therein that the appeal lacks merit and I do also dismiss it.

I must emphasize that this Court only steps into the shoes of the lower Court, by virtue of Section 22 of the Supreme Court Act, to do that which the lower Court by law should have done but left undone. This is only feasible if the necessary facts and materials are available to this Court and parties have had impute into what the Court is urged to decide. In the case at hand, the necessary materials on the basis of which the Court is urged to decide are not before the Court. The Court, it follows, cannot make the decision being urged upon it. Having failed to provide the Court with the materials necessary for the reliefs he seeks, the appellant disentitles himself from the said reliefs.

For this and the fuller reasons given in the lead judgment, I pronounce the appeal unmeritorious and dismiss same. I abide by the consequential orders made in the lead judgment including the order on costs.

F

G

H