

**SUPREME COURT OF NIGERIA**  
FRIDAY 1ST JULY, 2016. SC. 268/2005  
**CORAM:- S. GALADIMA, N. S. NGWUTA, M. U. PETER-  
ODILI, C. B. OGUNBIYI, K. M. O. KEKERE-EKUN,  
J. I. OKORO, A. SANUSI, JJSC**

1. MISIRI ALIMI  
2. OSENATU RAIMI ..... APPELLANTS  
3. SHITTA RABIU  
    AND  
1. ASANI KOSEBINU  
2. MUSTAPHA OGUNBIYI ..... RESPONDENTS  
3. SAFIU SHITTU  
4. MUSA ABUDU

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COURTS - Proceedings - Judge's chambers -Is not a regular court room with free access to the public - Hence the proceedings in chambers was an incurable irregularity (H1)

JUDGMENTS - Delivery in chambers - Reason - Delivery of judgment in chambers to fall within 90 days time frame - Cannot waive mandatory provision that judgment is to be delivered in the open (H2)

JURISDICTION - Court - Proceedings - Court must act within its powers - Hence as Constitution did not empower trial court to sit and deliver judgment in chambers - The Judge acted in futility (H3)

***FACTS***

Plaintiffs/appellants' claims before the High Court of Lagos State coram E. F. Longe J. are for declaration of title to land, injunction and damages for trespass. The action was brought in a representative capacity and defendants/respondents were equally sued in a representative capacity. Following the conclusion of addresses by both learned counsel for the parties, the Court ordered a visit to the locus in quo. At the locus, the learned trial Judge made personal observations and took statements from people thereat. The learned trial judge thereupon reserved judgment for 27<sup>th</sup> June, 2001. Judgment was

3540 *Alimi v. Kosebinu* (2016) 7 KLR (pt. 390) 3539; (2016) 17 not delivered on the reserved date, but on the 28<sup>th</sup> June, 2001.

The judgment was delivered in the Chambers of the learned trial Judge for the reason that there was power outage. Being aggrieved with the judgment, respondents appealed to the Court of Appeal Lagos Division. The appeal was heard and the judgment of the trial Court was set aside on the ground that a Judge's Chambers was outside the constitutional provision of a public place where judgment is delivered. Dissatisfied, appellants appealed to the Supreme Court challenging the decision of the Court of Appeal contending that the Judge's Chambers was in order for the delivery of the judgment. Respondents have cross-appealed.

### **ISSUE FOR DETERMINATION**

Whether the Court of Appeal was right to have set aside the judgment of the lower court delivered in chambers in violation of section 36(3) of the Constitution of the Federal Republic of Nigeria, 1999.

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

*COURTS - Proceedings - Judge's chambers*

**1. Indeed, just as the court below found, a judge's chambers cannot be classified as a regular courtroom or a place to which members of the public have right to go in and out since such access is dependent on the invitation or consent of the judge or may be by his permission. It therefore implies that a constitutional right to which members of the public apart from the litigants and counsel are entitled cannot be at the whim of a Judge whatever the status of the court the judge is presiding over. A part of the court's proceedings which ought to be public and is conducted in the confines of the judge's chambers is clearly one done in secrecy and detracts from the impartiality, independence, publicity and unqualified respect which enshrouds justice given openly without fear or favour. Its acceptance by the public at large and the confidence it demands depend on these qualities which must be strictly adhered to. What occurred in the trial High Court was a clear aberration, an irregularity so profound as to be incurable.** (p. 3547 D)

*JUDGMENTS - Delivery in chambers - Reason*

**2. It is to be noted that the reason advanced by the appellant in line with what the trial Judge stated to be his reasons for delivering the judgment in chambers being the possible effluxion of time to deliver judgment within the 90 days time frame, is reason that cannot create the waiver of having the judgment in the open and in public as the provisions of section 36(1) and (3) are too deep seated as cannot bow to such things as a waiver as it is mandatory stipulation. This is all the more so since Section 294 of the Constitution that has prescribed the time frame within which judgments are to be delivered has provided for the allowance of an explanation and where no injustice would occur to any party for the breach to be waived.** (p. 3547 H)

*JURISDICTION - Court - Proceedings*

**3. Also to be stated is that the court at all times must act within its vires and where it lacks the jurisdiction to carry out any act, any such act is a nullity. Therefore since the constitution has not granted the trial court the jurisdiction to take the proceedings and judgment in the private confines of the judge's chambers, the judge acted in futility when he set out to deliver the judgment in his chambers. He also did not have the power to give consent for whoever to come into the chambers to hear his pronouncement of the decision of court.** (p. 3548 D)

**REPRESENTATION**

I. O. Ajomo for the Applicant

Olukayode Ogunjobi for the Respondents

**CASES REFERRED TO**

Oviasu v. Oviasu (1973) 1 All NLR 730

Nigerian Arab Bank v. Barri Engineering (1995) 8 NWLR (pt. 413) 257

Oyeyipo v. Oyinloye (1987) 1 NWLR (pt. 50) 356

Nwadike v. Ibekwe (1987) 4 NWLR (pt. 67) 1 All ER 705

Clement v. Iwuanyanwu (1989) 3 NWLR (pt. 107) 39

Ifezue v. Mbadugha (1984) 15 NSCC 314

Abrashi v. C.O.P (2005) 5 NWLR (pt. 917) 36

NEPA v. Onah (1997) 1 NWLR (pt. 680)

Awuse v. Odili (2004) ALL FWLR (pt. 212) 1611

Madukolu v. Nkemdilim (1962) 2 SCNLR 341

B Atologbe v. Awuni (1997) 9 NWLR (pt. 522) 536

English Exporters (London) Ltd v. Ayanda (1973) 3 SC 51

Deduma v. Okorodudu (1976) 9-10 SC 310

Adigun v. A-G Oyo State (1987) 1 NWLR (pt. 53) 578

C Kotoye v. Central Bank of Nigeria (1989) 1 NWLR (pt. 98) 419

### **STATUTE REFERRED TO**

Constitution of the Federal Republic of Nigeria 1999, ss. 36(3), 294

### **D LEAD JUDGMENT BY PETER-ODILI JSC**

This is an appeal against the decision of the Court of Appeal, Lagos Division which set aside the judgment of the High Court of Lagos State that was delivered in the chambers of the learned trial Judge, E. F. Longe J.

E The respondent as plaintiff claimed against the appellant as defendants as per their Amended Writ of Summons dated 30<sup>th</sup> day of October, 1990 thus:

1. A declaration that the parcel of land delineated in Plans  
F Nos. LA/127/CA/88 and LA/144/CA 88 drawn by in Ademola Ashipa belongs to the plaintiff's family.

2. The sum of N5,000.00k being damages for trespass committed by the defendant jointly and severally against the plaintiff's farmland on 12<sup>th</sup> October, 1990 by destroying the cassava, maize,  
G tomatoes, okro, pineapples and kola-nuts trees cultivated thereon.

3. An injunction restraining the defendants by themselves, their servants however from further acts of trespass on the said land.

### **BACKGROUND FACTS**

H The appellants' claims as per the Amended Writ of Summons before the trial court are for declaration of title to land, injunction and damages for trespass.

The appellants sued in representative capacity and the respondents were also sued in representative capacity.

The appellants filed an Amended Statement of Claim dated

13<sup>th</sup> December, 1994 and filed an Amended Reply dated 12<sup>th</sup> February, 1992. The respondents filed an Amended Statement of Defence dated 19<sup>th</sup> January, 1998.

At the close of the further addresses of both counsel the learned trial judge ordered a visit to the locus suo motu. Parties and their respective counsel went to the locus with the learned trial judge. At the locus, the trial judge made personal observations and took statements from people thereat. The learned trial judge thereupon reserved judgment for 27<sup>th</sup> June, 2001. Judgment was not delivered on 27<sup>th</sup> June, 2001, but on 28<sup>th</sup> June, 2001. Same was delivered in the chambers of the learned trial judge for the reason that there was power outage.

The defendants/respondents being dissatisfied with the judgment appealed to the Court of Appeal, Coram: K. B. Aka'ahs, M. D. Muhammed and M. L. Garba JJCA and in a lead judgment delivered by M.D Muhammed JCA (as he then was) set aside the judgment of the trial High Court on the ground that a judge's chambers was outside the constitutional provision of a public place where the judgment could be delivered.

The appellant aggrieved has come before the Supreme Court challenging the decision of the Court of Appeal contending that the Judge's Chambers was in order for the delivery of the judgment. The respondent cross-appealed.

On the 26<sup>th</sup> day of April, 2016 learned counsel for the appellant, I. O. Ajomo Esq. adopted the Brief of Argument filed on the 28/2/2006 which was settled by Titiola Akinlawon. In the Brief were distilled three issues for determination which are thus:

1. Having tacitly found that the Judge's chambers in the case at hand was accessible to the public, whether the Court of Appeal was guilty of a fatal misdirection or error, not to have categorized the chambers as a public place for purposes of Section 36(3) of the 1999 constitution, simply because it was not ordinarily accessible (Grounds II and III).

2. Should the Court of Appeal have applied the decision in *Oyeyipo v Oyinloye* as opposed to misapplying the decisions in *Nigeria Arab Bank v Barri Engineering*, *Oviasu v Oviasu* and *Abrashi v C.O.P* (Ground I, IV, V, VI).

3. Assuming "arguendo" that delivery of the judgment in cham-

bers was a breach of the constitution, what order ought the Court of Appeal have made in the circumstances (Grounds VII).

Otunba Kayode Ogunjobi learned counsel for the respondent adopted their Brief of Argument filed on the 7/2/08 and deemed filed on the 6/5/09 and he raised three issues for determination, viz:

B 1. Whether the Court of Appeal was right to have set aside the judgment of the lower court delivered in chambers in violation of section 36(3) of the Constitution of the Federal Republic of Nigeria, 1999.

C 2. Whether the Court of Appeal was right in apply Nigeria Arab Bank v Barri Engineering, Oviasu v Oviasu and Abrashi v C.O.P as opposed to Oyeyipo v Oyinloye and whether the court correctly applied the cases.

D 3. What is the effect of a judgment delivered in breach of constitutional provision.

I need to state that the respondents cross-appeal in their Brief of Argument earlier referred to in the main appeal that is the Brief filed on 7/2/08 and deemed filed on the 6/5/09.

E The appellant/cross-respondents filed on 28/8/09 a Brief of Argument settled by Titilola Akinlawon.

#### MAIN APPEAL

F Whether the Court of Appeal was right to have set aside the judgment of the lower court delivered in chambers in violation of section 36(3) of the Constitution of the Federal Republic of Nigeria, 1999.

G In urging this court to allow the appeal, learned counsel for the appellant contended that applying the proper test of “actual accessibility” the judgment of the trial court was delivered in public and that the Supreme Court had in the cases of Oviasu v Oviasu (1973) 1 ALL NLR 730; Nigerian Arab Bank v Barri Engineering (1995) 8 NWLR (Pt. 413) 257 as opposed to Oyeyipo v Oyinloye (1987) 1 NWLR (Pt. 50) 356 adopted the test of actual accessibility but held that the circumstances in the former two cases did not pass the test.

H That the proper order the Court of Appeal ought to have made was to set aside delivery of the judgment and not the proceedings, as judgment per se did not occasion any miscarriage of justice.

That in the alternative in so far as they did not adopt the test of actual accessibility, the cases of Oviasu v Oviasu and Nigerian Arab

Bank v Barri Engineering (supra) ought to be departed from and overruled whilst the latter ought to be nullified having not been delivered by a full panel.

Learned counsel for the appellant relied on a number of cases such as: Nwadike v Ibekwe (1987) 4 NWLR (Pt. 67) 1 ALL ER 705; Clement v. Iwuanyanwu (1989) 3 NWLR (Pt. 107) 39 at 54; Ifezue v B Mbadugha (1984) 15 NSCC 314 etc.

For the respondents, learned counsel contended that neither Oviasu v Oviasu nor Nigeria Arab Bank v Barri Engineering (Nig.) Ltd., is an authority for the proposition that delivery of judgment in chambers under any circumstance cannot amount to delivery in public and the absence of public was the rationale for vitiating the proceedings and judgment in both cases. That where proceedings are conducted in private and judgment delivered in public, the judgment is null and void. He said conversely where proceedings were held in public and judgment was not delivered in public, the proceedings on which the judgment is based together with the judgment are null and void. That the reason for that is that there is a fundamental breach of the provision of the constitution in relation to the adjudication and such proceedings so conducted amounts to grave injustice. He cited Abrashi v C.O.P (2005) 5 NWLR (Pt. 917) 36 at 49, NEPA v Onah (1997) 1 NWLR (Pt.680); Awuse v Odili (2004) ALL FWLR (Pt. 212) 1611 at 1648.

The appellants counsel urges the appeal be allowed on the fact that there was “actual accessibility” and so it can be taken that the judgment was delivered in public. That the proper order to be made is a setting aside of the delivery of the judgment while the proceedings survived.

Respondent’s stance is that the proceedings having been conducted in public and the judgment must be delivered in public, failing which as in this instance where the judgment was delivered in private, all proceedings, judgment inclusive are a nullity as a constitutional breach had arisen.

At the root of this contest is the application of section 36(1) and 3 of the 1999 constitution which stipulates thus:

*“1. In the determination of his civil rights and obligations including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a rea-*

*sonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality.*

3. *The proceedings of a court or the proceedings of any tribunal relating to the matters mentioned in Subsection (1) of this Section (including the announcement of decisions of the court or tribunal) shall be held in public.*”

The Court of Appeal or court below in its judgment anchored by Musa Dattijo Muhammed JCA (as he then was) in its interpretation of Section 36(1) and (3) of the constitution of the Federal Republic of Nigeria 1999 held thus:

“*What follows from a community reading of the above provisions is that a court or tribunal must, in their proceeding in relation to the civil rights and obligations of persons, conduct and proceedings and pronounce their decisions in that regard in public. The appellant had argued and relied on the dicta of the Justices of the Court of Appeal as well as the Supreme Court in their decisions in Nigeria Arab Bank v Barri Engineering (Nig.) Ltd. and Oyeyipo v Oyinloye (supra) which tend to suggest that what “a public” place is as envisage under Section 36(3) of the 1999 Constitution, is a question of fact.*”

The lower court stated further at page 475 as follows:

“*It is further submitted that given the particular facts of the instants case, the judge’s chambers wherein the decision of the lower court was pronounced was such a public place in the context of S.36(3).*”

*The decision of Oyeyipo v Oyinloye must be outrightly discounted from this discourse. The rationes decidendi in Oyeyipo v Oyinloye is on the constitutionality of the Supreme Court’s right to sit in chambers as provide by the Apex Court’s rules of practice. It never was an issue in that case, as it presently is, whether or not sitting in chambers to pronounce decision satisfies the provisions of S.36(1) and (3) of the 1979 Constitution and Order 43 Rule 1 of the adjec-tival law of the lower court.*

*And coming to the decision in Barri’s case, this court per Ayoola JCA, (as he then was) was correct in stating that whether or not a place is a public place within the context of S. 36(1) and (3) of the 1999 Constitution, is a question of fact. What the court did not do*



then was to internalize the rule of evidence which dispenses of proof of such facts that should be taken judicial notice of in the course of proceedings. All judicial officers and indeed the genuine consumers of the services of such officers, who are privy to the conduct of judicial functions, know that the Judge's Chambers is not a place that can, without pretensions, be called a public place where persons have the rights to freely enter into and exit from. By Section 74(m) of the Evidence Act, judicial notice should be taken of "the course of proceedings" in the lower court. And the course has been that proceeding including pronouncement of decision in the State or Federal High Courts, have always been conducted in the open court rather than the Chambers of lower court resorted to in the delivery of its judgment. The Supreme Court's decision in the Barri's case is a profound restatement of this practice and recognition of same."

**Indeed, just as the court below found, a judge's chambers cannot be classified as a regular courtroom or a place to which members of the public have right to go in and out since such access is dependent on the invitation or consent of the judge or may be by his permission. It therefore implies that a constitutional right to which members of the public apart from the litigants and counsel are entitled cannot be at the whim of a Judge whatever the status of the court the judge is presiding over. A part of the court's proceedings which ought to be public and is conducted in the confines of the judge's chambers is clearly one done in secrecy and detracts from the impartiality, independence, publicity and unqualified respect which enshrouds justice given openly without fear or favour. Its acceptance by the public at large and the confidence it demands depend on these qualities which must be strictly adhered to.** See Barri's case (supra). **What occurred in the trial High Court was a clear aberration, an irregularity so profound as to be incurable** and a situation that is now well settled up to recently in this court's decision in Abrashi v C.O.P (2005) NWLR (Pt. 917) 36 at 49 which went along the decisions in Oviasu v Oviasu (Supra) Nigeria Arab Bank v Barri Engineering (Nig.) Ltd. (Supra).

**It is to be noted that the reason advanced by the appellant in line with what the trial Judge stated to be his reasons for delivering the judgment in chambers being the possible**

***effluxion of time to deliver judgment within the 90 days time frame, is reason that cannot create the waiver of having the judgment in the open and in public as the provisions of section 36(1) and (3) are too deep seated as cannot bow to such things as a waiver as it is mandatory stipulation. This is all the more so since Section 294 of the Constitution that has prescribed the time frame within which judgments are to be delivered has provided for the allowance of an explanation and where no injustice would occur to any party for the breach to be waived.***

***“294 (1) Every court established under this constitution shall deliver its decision in writing not later than ninety days after the conclusion of evidence and final addresses and furnish all parties to the cause or matter determined with duly authenticated copies of the decision within seven days of the delivery thereof.”***

The provision above has been interpreted to have the effect of the judgment delivered after 90 days not automatically invalidated as long as no miscarriage of justice has ensued.

***Also to be stated is that the court at all times must act within its vires and where it lacks the jurisdiction to carry out any act, any such act is a nullity. Therefore since the constitution has not granted the trial court the jurisdiction to take the proceedings and judgment in the private confines of the judge’s chambers, the judge acted in futility when he set out to deliver the judgment in his chambers. He also did not have the power to give consent for whoever to come into the chambers to hear his pronouncement of the decision of court.*** See *Madukolu v Nkemdilim* (1962) 2 SCNLR 341 and *Atologbe v Awuni* (1997) 9 NWLR (Pt. 522) 536.

For effect, it needs be stated that the provisions of Section 36(1) and (3) of the 1999 Constitution are such that being a public right neither party to the litigation can waive the right or adjust it as it is a right donated by the Constitution. See *Ngwo v Monye* (1970) 1 ALL NLR 91; *Ofune v Okoye* (1966) 1 ALL NLR 94.

Finally I would say there is nothing upon which I can hinge a departure from what the court of Appeal did in that the entire proceedings of the trial court including that judgment had been vitiated as a result of the trial court’s breach of Section 36(3) of the 1999

Constitution when it pronounced its decision in chambers and the conclusion is that the Court of Appeal was right in allowing the appeal before it and setting aside the entire proceedings of the trial High Court including the Judgment. Therefore, this appeal lacks merit and is dismissed as I uphold the decision of the court below setting aside the decision and proceedings of the trial High Court. B

### CROSS APPEAL

The Notice of the Cross-Appeal and grounds without the particulars are thus:

The respondents in the main appeal and now cross appellants identified a single issue which is thus: C

Whether aside of its delivery in chambers the judgment of the trial court is otherwise valid.

The appellants in the main appeal and cross-respondents herein crafted a sole issue which is as follows: D

Whether it was a misdirection to hold that in consequence of the delivery of the judgment in chambers vitiating the entire proceedings “there is nothing left in the proceedings of the court to which other issues formulated by the parties to the appeal would be considered. E

Clearly the question raised herein is whether or not the judgment delivered in chambers of the judge is valid or not.

Canvassing the position of section 36(3) of the 1999 constitution in the instant case does not in any way affect the correctness or otherwise of the decision and so the court below ought to have relied on this court’s decision in *Alidu Adan v National Service Corps (2004) ALL FWLR (Pt. 223) 1850 at 1857* and considered the three issues raised by the respondents/cross-appellants relating to the merit of the judgment itself. F

For the cross-respondents, learned counsel submitted that there was no misdirection in what the Court of Appeal did and that the entire proceedings are vitiated for failure to comply with the constitutional provisions means that all other issues are academic and nothing remains to be determined by the court. He cited *English Exporters (London) Ltd v Ayanda (1973) 3 SC 51 at 56*. G

This Cross-appeal is not one to waste any time with, since the implication of the outcome of the main appeal which has been dismissed is that there is nothing on which this Cross-appeal can be H

founded, the entire proceedings of the trial High Court having been vitiated. The only option open is a striking out of this appeal and it is hereby struck out.

In the end the appeal having been dismissed, the cross-appeal struck out. Parties are to bear own costs.

B

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**GALADIMA JSC**

The draft of the leading judgment of my learned brother MARY UKAEGO PETER-ODILI, JSC has been made available to me. I quite appreciate the efficient and precise resolutions of all salient issues submitted by the parties for determination of the appeal. I do not have much more to contribute. I agree that appeal lacks merit and ought to be dismissed. I too dismiss it. I abide by all the consequential orders made in the judgment including those as to costs.

D

Appeal dismissed.

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**NGWUTA JSC**

I read before now the lead judgment just delivered by my learned brother, Mary U. Peter-Odili, JSC. Based on the reasoning in the lead judgment I agree that the appeal is bereft of merit and this conclusion rendered the cross-appeal an academic exercise.

Notwithstanding the reasons in the judgment of the trial Court, the delivery of the judgment in chambers is a breach of the provision of Section 36(3) of the Constitution of the Federal Republic of Nigeria 1999 (as amended).

Proceedings held in chambers including the delivery of judgment cannot be said to have been “held in public” within the intentment of Section 36(3) (supra). The Court below was right to have set aside the proceedings as null and void.

In view of the above and the fuller reasons in the lead judgment I also dismiss the appeal for lack of merit. I also strike out the cross-appeal from which the cross-appellant stand to derive benefit.

H

Appeal dismissed.

Cross-appeal struck out

**OGUNBIYI JSC**

I read in draft the lead judgment of my learned brother Mary Ukaego Peter-Odili, JSC. I agree that the appeal is devoid of any merit and should be dismissed while the cross-appeal as a consequence should be struck out.

This is an appeal against the decision of the Court of Appeal Lagos Division which set aside the judgment of the trial court and the antecedent proceedings as being in violation of section 36(3) of the 1999 Constitution on the ground that the judgment was delivered in Chambers.

The appellants filed their writ of summons claiming a Declaration of title to family land.

At the close of the hearing, the case was adjourned to 20/2/2001 for judgment; on that day, the learned trial judge delivered a pre-judgment requesting further address on an area of conflict and counsel further addressed the court on 16/5/2001.

The learned trial judge thereafter suo moto ordered a visit to the locus. The counsel in company of the parties and the trial Judge all went to the locus where proceedings were recorded by the court and the case was adjourned for judgment on the 27/6/2001.

There is no record of what happened on the 27/6/2006, but on the 28/6/2006 judgment was delivered in Chambers. The learned trial Judge, after according the appearance of parties and counsel recorded why judgment was to be delivered in Chambers and said:-

*“This is the second day that the judgment could not be read in open court because there was no electricity in the Court room. We therefore decided with consent of parties counsel to read it in Chambers.”*

On appeal by the Defendant/Appellant to the Court of Appeal, the trial court’s judgment was set aside. The appeal now before us has raised three issues for determination and which were reproduced in the lead judgment. I will not repeat same in this judgment.

My brother has adequately dealt with the three issues comprehensively in his lead judgment and I adopt the reasons and conclusions arrived thereat. However, I wish to put in one or two comments of mine on the 1<sup>st</sup> issue raised which states as follows:-

Whether the Court of Appeal was right to have set aside the judgment of the trial court delivered in Chambers in violation of sec-

tion 36(3) of the Constitution.

Section 36(3) of the Constitution under reference states thus:-

*“The proceedings of a court or any tribunal relating to matters mentioned in subsection (1) of this (including announcement of the decisions of the court or tribunal) shall be held in public.”*

B It is not in contention that the judgment of the trial court was delivered in the Chambers of the learned trial judge. Prominent in the trial court’s reason for such decision was the absence of electricity in the court room and he said, *“we therefore decided with consent of the parties counsel to read it in Chambers.”* The Judge further stated  
C the statutory requirement that judgment must be read within three months.

The general principal of law is well established that a breach by a court of the right of fair hearing is crucial and goes to the root of the  
D trial court’s jurisdiction. If established, it nullifies the entire proceeding in which the breach occurred leaving nothing for the appellate court’s further scrutiny. See *Deduma v. Okorodudu* (1976) 9-10 SC 310 and *Adigun v. Attorney General Oyo State* (1987) 1 NWLR (Pt. 53) 578.

E The applicable law to the instant case is Section 36(1) and (3) which provision is the same with those under the 1979 Constitution i.e. Section 33(1) and (3).

With Section 36(3) having been reproduced earlier, sub-section (1) also states:-

F *“In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such a manner as to secure its independence and impartiality.”*  
G

A communal reading of the two subsections together enjoins that a court or tribunal must in their proceeding in relation to the civil rights and obligations of persons, conduct such proceedings and pro-  
H nounce their decisions in that regard in public. In the case of *N. A. B. Ltd v. Barri Engineering (Nig) Ltd* (1995) 5 NWLR (Pt. 413) 257 at 290 and *Oyeyipo v. Oyinloye* (1987) 1 NWLR (Pt. 50) 356 at 377 the question of what constitutes a public place under section 36(3) of the 1999 Constitution was suggested as being a question of fact.

By section 74(m) of the Evidence Act, judicial notice should be taken of “the course of proceeding” in the lower court which includes pronouncement of decision in the State or Federal High Courts which must always be conducted in the open court and not in chambers as it was erroneously resorted to by the trial court.

For all intents and purposes and as rightly held by the lower court, the delivery of the judgment in chambers by the trial court was, in breach of Section 36(3) of the Constitution. The consequential effect of the breach is fundamental and thus rendering the entire proceedings of the trial court a nullity.

My learned brother has dealt comprehensively with the issues raised in this appeal and I also subscribe to the conclusion that the lower court had no option but did rightly set aside the judgment of the trial court delivered in Chambers and in breach of the Constitutional provision to the right to fair hearing. The appeal is devoid of any merit and I also dismiss same in terms of the leading judgment.

On the cross appeal, same I hold has no basis as one cannot put something on nothing and expects it to stand. It will surely collapse as it cannot stand in the air. Same is therefore struck out.

While the appeal is dismissal, the cross appeal is hereby struck out. I also make no order as to costs.

### **KEKERE-EKUN JSC**

I have had the benefit of reading in draft the judgment of my learned brother, Mary Ukaego Peter-Odili, JSC, just delivered. I agree with the reasoning and conclusion that the appeal lacks merit and should be dismissed. I wish to add a few words in support of the lead judgment.

The brief facts of the case relevant to this appeal are that at the conclusion of trial before the High Court of Lagos State, Ikeja Judicial Division, which included oral and documentary evidence, the case was adjourned to 27/6/2001 for judgment. The judgment was not delivered on that day. The following day, 28/6/2001, judgment was delivered by the learned trial judge in chambers. He made the following note at page 205 of the record:

“This is the second day that this judgment could not be read in open court because there was no electricity in the court room we

therefore decided with consent of the two parties counsel to read it in chambers”. (Emphasis mine)

The defendants/respondents were dissatisfied with the judgment and appealed to the court below on several grounds. On 4/7/2005, the court below allowed the appeal and set aside the entire proceedings as well as the judgment delivered therein for being in violation of Section 36(3) of the 1999 Constitution. The appellant is dissatisfied with the decision and has appealed to this court. Both parties filed and exchanged briefs of argument and each distilled three issues for determination, which have been set out in the lead judgment.

The crux of this appeal is whether the Court of Appeal was right to have set aside the judgment of the lower court, which was delivered in chambers in violation of Section 36(3) of the Constitution of the Federal Republic of Nigeria 1999.

Section 36(3) of the 1999 Constitution provides as follows:

*“36(3) The proceedings of a court or the proceedings of any tribunal relating to the matters in subsection (1) of this section (including the announcement of the decisions of the court of tribunal) shall be held in public.”*

It is contended on behalf of the appellants that in determining whether there was compliance with Section 36(3) of the 1999 Constitution, the court below adopted the wrong test and thereby misdirected itself. Learned counsel argued that the court wrongly applied the ordinary accessibility test rather than the test of actual accessibility. In effect it is the appellant’s contention that what the court ought to have considered was whether the chambers of the learned trial Judge was in fact accessible to the public at the time the judgment was delivered and not whether the chambers was ordinarily accessible to the public. Referring to the dictionary definition of “public”, “publicity” and “public place” and several decided cases, learned counsel argued that “public” as contemplated by Section 36(3) of the 1999 Constitution means a place where the persons concerned have access as of right or at the invitation of or with the permission of the occupier for purposes of the suit. Learned counsel submitted that the chambers was a public place at the time the judgment was delivered because access was given to all those present on the invitation of and with the permission of the trial Judge. The decisions of this court in:



Oyeyipo Vs Oyinloye (1987) 1 NWLR (Pt. 50) 356@377 B-D and N.A.B. Ltd. Vs Barri Engineering (Nig). Ltd. (1995) 8 NWLR (Pt. 413) 257 @ 279 A-B & 290 B-D were referred to.

Learned counsel for the respondents on the other hand referred to the proceedings of 28/6/2000 when judgment was delivered (reproduce infra) and observed that there was no indication in the record that the parties or the public in general were invited into the chambers of the learned trial Judge for the delivery of the judgment, nor was there any record that the chambers was open to the public while the judgment was being delivered. He argued that the decision in Oyeyipo's case (supra) relied upon by learned counsel for the appellant is restricted to its peculiar facts. He submitted that "public" in relation to judicial proceedings and judgment within the meaning of Section 36(3) of the 1999 Constitution means the public at large and not the parties to the suit as asserted on behalf of the appellants. He argued that the right to a public hearing is not private to the parties concerned with the proceedings or judgment in a suit and therefore cannot be waived. He noted that there is no record as to what transpired at the delivery of judgment in the Judge's chambers nor is there any record to show that the parties were present. He urged the court to hold that the lower court properly construed the provisions of Section 36(3) of the 1999 Constitution.

It is important to note that Section 36(3) of the 1999 Constitution falls within Chapter IV of the said Constitution, which guarantees the basic human rights of the citizens of this country. Section 36 provides for the right to fair hearing. Subsection (1) provides:

36. (1) In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality."

Section 36(3), which requires that the proceedings of a court or tribunal shall be held in public, is one of the means by which the right to hearing is actualized. This is in conformity with the adage that "*justice must not only be done, it must be seen to have been done.*" The attributes of fair hearing as stated in Kotoye Vs Central Bank of Nigeria & Ors. (1989) 1 NWLR (Pt. 98) 419 @ 414 were reiterated

by this court in *Baba vs N. C. A.T.C. Zaria* (19991) 7 SC (Pt. 1) 58 @ 81-83. They include the following:

(i) that the court shall hear both sides not only in the case but also in all material issues in the case before reaching a decision which may be prejudicial to any party in the case;

B (ii) that the court or tribunal shall give equal treatment, opportunity, and consideration to all concerned;

(iii) that the proceedings shall be held in public and all concerned shall have access to and the informed of such a place of public hearing;

C (iv) that having regard to all the circumstance, in every material decision in the case, justice must not only be done but must manifestly and undoubtedly be seen to have been done.

As rightly observed by learned counsel for the respondents the D test usually adopted in determining the impartiality of a court is the common law ‘reasonable man’ test, which envisages that any member of the public, sitting in the courtroom should be able to observe the entire proceedings from beginning to end and leave with the impression that justice was done. Such a ‘reasonable man’ should be E able to enter and exit the court at any time during the course of the proceedings without obtaining permission from the court. The Judge’s chambers on the other hand is his “*inner sanctum*” as it were. It is certainly not a place ordinarily accessible to the public without his express permission.

F “*The passage in Obaseki, JSC’s judgment in Oyeyipo Vs Oyinloye (supra) being an obiter dictum is not binding on the court below. What is binding is the clear and unambiguous ratio decidendi in the decision of this court in Oviasu Vs Oviasu (supra) to the effect*  
G *that sitting in chambers to hear an action is a fundamental irregularity, which touches the legality of the whole proceeding including the judgment and the incidental orders made thereunder. It is not the regular hearing of an action in court.*”

His Lordship stated further at page 290 B-D (supra):

H “*...sitting in chambers to deliver judgment is not, on the facts before us, sitting in public or in open court. A Judge’s chambers is not one of the regular courtrooms nor is it a place to which the public have a right of ingress and egress as of right, except on invitation by or with the permission of the judge. There is no evidence that such*

*invitation was issued to the public in this case nor is there evidence that any member of the public attended. The facts before us show that counsel for the parties were already seated in the regular courtroom waiting for the Judge to sit and deliver judgment when they were called into chambers and the judgment was delivered by the learned trial Judge. There is in this case, a clear breach of the mandatory provisions of section 33(3) and (13) of the 1979 Constitution and Order 36 rule 1 of the High Court Rules of Lagos State. The defect here is fundamental and goes to the root of the entire proceedings.*" (Emphasis mine) B

Section 33(3) of the 1979 Constitution referred to is in *pari materia* with Section 36(3) of the 1999 Constitution. In the instant case, there was nothing in the record of 28<sup>th</sup> June 2000 to show that the parties or the general public were included in the invitation to the chambers of the learned trial Judge. In other words, learned counsel for the parties who attended the delivery of the judgment in chambers were there on the express invitation of the learned trial Judge. C

At pages 476 and 477 of the record, the lower court held *inter alia* as follows:

*"...all judicial officers and indeed the genuine consumers or the services of such officers, how are privy to the conduct of judicial functions, know that the Judge's Chambers is not a place that can, without pretensions, be called a public place where persons have the right to freely enter into and exit from.*" E

*...The Supreme Court's decision in the Barri's case is a profound restatement of this practice and recognition of same.*" F

*...It is my firm and considered view that a place qualifies under S.36(3) of the 1999 Constitution to be called "public", and which a regular Courtroom is, if it is outrightly accessible and not so accessible on the basis of the "permission" or "consent" of the Judge. In the case at hand, but for the "permission" or "consent" of the Judge to have the judgment delivered in his Chambers, neither the parties nor their counsel and indeed the public at large would have had access as of right to the Judge's Chambers. It is of essence of justice that not only should it be done but that it should actually be seen to be done.*" G

I am of the view that this pronouncement of the court below is in consonance with the spirit of Section 36(3) of the 1999 Constitution. In so far as the general public did not have access to the learned H

trial Judge’s chambers, it was not a public place within the contemplation of Section 36(3) of the 1999 Constitution. Once again I call in aid the authority of *N. A. B. Ltd. Vs Barri Engineering (Nig.) Ltd.* (Supra) at 290 E-F, per Ogundare,

“*The delivery of judgment is, in my respectful view, part of the hearing of a cause or matter. A breach of the mandatory constitutional provisions is more than a mere technicality; it is fundamental. And it is no argument that there was been no miscarriage of justice.*

...*The right provided under Section 33(3) and (13) and Order 36 rule 1 is a public right for “every court of justice is open to every subject of the King” per Lord Halsbury in Scott Vs Scott (supra). “The court must be open to any who may present themselves for admission” per Lord Blanesburgh in McPherson Vs McPherson (supra).*

...*Being a public right, therefore, the defendant nor any party to a suit cannot waive the right – see Arriori Vs Elemo (1983) 1 ALL NLR 1; (1983) 1 SCNLR 1.*”

I am in full agreement with the court below and my learned brother in the lead judgment that the delivery of judgment in chambers by the learned trial Judge constitutes a fundamental defect that goes to the root of the entire adjudication and renders it null and void.

For these and the more detailed reasons stated in the lead judgment, I hold that this appeal is devoid of merit. It is accordingly dismissed. The cross-appeal, which challenges the judgment, which has been nullified is hereby struck out. The judgment of the lower court delivered on 4<sup>th</sup> July, 2005 is affirmed. I abide by the order on costs made in the lead judgment.

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### **OKORO JSC**

I read in draft the lead judgment of my learned brother, Mary Ukaego Peter-Odili, JSC just delivered in agreement that this appeal is devoid of any scintilla of merit and deserves an order of dismissal. My learned brother has efficiently resolved all the salient issues submitted for the determination of this appeal. I shall chip in a few words of mine in support of the judgment.

The main issue in this appeal is whether judgment delivered in

the Chambers of the learned trial Judge is valid and constitutional. This comes on the heel of Section 36(3) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) which states that:

*“The proceedings of a court or the proceedings of any tribunal relating to the matters mentioned in sub-section (1) of this Section (including the announcement of the decision of the Court of tribu- B  
nal) shall be held in public.”*

The above constitutional provision is so clear and unambiguous that it does not need any cannon of interpretation to understand same. It means that both the proceedings and the judgment generated therefrom must be done in public. The question may be asked must be done in public. The question may be asked whether the chambers of a judge constitute a public place. In justifying the delivery of the judgment in his Chambers rather than the open court, the learned trial judge said as follows:-

*“This is the second day that this judgment could not be read in open court because there was no electricity in the court room, we therefore decided with consent of the parties’ counsel to read it in Chambers.”*

There is no doubt, and it is common knowledge that the Chambers of a judge is the office of that judge which is not usually open to the public except by permission of the judge. It is not a place where members of the public have the right of ingress and egress at will such right is only available in the open court.

In NAB LTD. V Barri Engineering Nig. Ltd (1995) 8 NWLR<sup>F</sup> (Pt. 413) 257 at 290 paras B-D, this court held that any act of secrecy, however desirable it might seem, detracts from the aura of impartiality, independence, publicity, and unqualified respect which enshrouds justice given without fear or favour. That is acceptance by the public at large and the confidence it demands, depends on these aura being strictly adhered to. In that case, Kutigi, JSC (as then was) made it succinctly clear in the following words on page 276 of the report:

*“The irregularity occasioned by the delivery of the judgment in Chambers contrary to clear and unambiguous provisions of Section 33(3) of the 1979 Constitution above is very fundamental and vitiates the whole trial.”*

It should be noted that Section 33(3) of the 1979 Constitution

alluded to above is in pari materia with Section 36(3) of the 1999 Constitution of the Federal Republic of Nigeria (as amended). Thus whether under the 1979 Constitution or 1999 Constitution, the provision is that a court or tribunal must, in their proceedings in relation to the civil rights and obligations of persons, conduct such proceedings and pronounce their decisions in public.

The court below concluded that *“the delivery of the judgment in chambers by the lower court being in breach of S. 36(3) of the 1999 Constitution has vitiated the whole trial.”* (See page 477 of the record). I agree entirely. The fact that counsel to both parties and the court agreed to read the judgment in chambers does not change the position. The reason is that parties and the court cannot conspire to breach the provisions of the constitution of Nigeria or any law for that matter. The action of the court in the circumstance, was to say the least, illegal. The said judgment cannot be allowed to stand. Proceedings of court and delivery of judgment must be done in open court as prescribed by the organic law of Nigeria. It should be otherwise.

Based on the above and the more succinct reasons enunciated in the lead judgment, I agree that this appeal lacks merit. It is hereby dismissed by me. I abide by all the consequential order made in the lead judgment, that relating to orders for retrial and costs, inclusive.

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F **SANUSI JSC**

The present appeal is against the judgment of the Court of Appeal (the lower court or court below) delivered on 4<sup>th</sup> July, 2005 which set aside the judgment of the High Court of Lagos State (the trial court) on the ground basically, that the proceedings of the trial High Court violated the provisions of Section 36(3) of the constitution of the Federal Republic of Nigeria of 1999.

As plaintiffs at the trial court, the appellant instituted a suit against the present respondents as defendants thereat claiming the following reliefs:-

1. A declaration that that parcel of land described as Plan No. 5 LA/127/LA/88 and A/144/LA/88 drawn by Ademola Ashipa belong to the plaintiffs' family.
2. An injunction restraining the defendants and their agents

from further acts of trespass.

3. The sum of N5,000.00 damages for trespass.

When proceedings commenced in earnest the plaintiffs, now appellants called nine witnesses to prove their claim while the defendants/respondents called six witnesses for their defence to the title of the land. At the close of the defence, learned counsel for the parties addressed the court. The trial judge after the presentation of addresses by learned counsel delivered a pre judgment requesting for further addresses from learned counsel for the parties on the area in conflict. Thereafter, the learned trial judge visited the locus in quo before he finally delivered his judgment on 28/6/2001 in his chambers wherein he stated on page 205 of the record as below:-

*“The plaintiffs are hereby given judgment as follows:*

*(a) a declaration that they are owners of the parcel of land delineated on Plan No. LA/127/LA/188 and LD/144/LA/88...*

*It is also agreed therewith the statutory order that judgment must be read within 3 months overrides the procedural rule under Order 38 Rules 1 and 2 that judgment must be read in the open court finally even though the judgment is read in chambers anyone who feels bad about that method have to convince the High Court that he has been prejudiced by that method.”*

The respondents herein, became dissatisfied with the judgment of the trial court hence they appealed to the lower court. The lower court in its considered judgment, inter alia, held that the entire proceedings of the trial court was vitiated as a result of the trial court’s violation of Section 36(3) of the 1999 Constitution when it delivered its judgment in its chambers. The lower court further held that nothing was left in the remaining issues for determination raised by the parties to this appeal required to be considered any more. It finally found in favour of the appellant before it, now respondent.

The appellants being aggrieved with the decision of the court below, appealed to this court. Parties to this appeal filed and exchanged briefs of arguments. Each of the appellants and respondents learned counsel raised three issues for determination. However, I am of the view that the core issue that calls for determination of this appeal resolves on issue No. 1 raised in the appellants’ brief of argument and the corresponding issue raised in the respondents’ brief of argument. As that is the crux of this appeal, I will concern myself with that issue

which I will reproduce hereunder.

The first issue raised in the appellants' brief of argument reads:-

*"Having tactically find that the judges (sic) chambers in the case at hand was accessible to the public, whether the Court of Appeal was guilty of a fatal mis-direction or error not to have categorized the chambers as a "public place" for purposes of Section 36(3) of the 1999 Constitution simply because it was not ordinarily accessible."*

On the other hand the respondents, in their joint brief couched their first issue as below:-

*"Whether it was a misdirection to hold that in consequence of delivery of the judgment in chambers vitiating the entire proceedings "there is nothing left in the proceedings of the Court to which other issues formulated by the parties to the appeal would be considered."*

On this issue the learned counsel for the appellant submitted that the court below was wrong to have adopted the actual accessibility test in determining whether a place is "public" or otherwise for the purpose of Section 36(3) of the 1999 Constitution. He referred to the case of Oyeipo vs Oyinloye (1987) 1 NWLR (pt. 50) 356 where at page 377 this court held thus:-

*"When the court sits in chambers all that means is that the judges of the court are transacting the business of the court in the chambers instead in open court.*

*...It does not mean a court is not sitting in public. A court can sit in open court and yet decided to exclude members of the public other than parties or their legal representatives from hearing in exercise of its statutory powers. See Section 33(3) of the Constitution of Federal Republic of Nigeria 1979. A judge may sit in chambers without excluding members of the public. It is therefore not unconstitutional to sit in chambers."*

He argued that the word "public" as contemplated by the provisions of Section 36(3) of the 1999 Constitution, means a place where the persons concerned have access as of right or at the invitation or with permission of the occupier for the purpose of the suit. He then stated that the chambers of the learned trial judge at the material time of delivery of judgment was a public place. He argued that after all, the access was given to all those present on the invitation of and with the permission of the trial judge. He further relied on the authorities of R v Caine (1935) 1 ALL ER 705 and McPherson v McPherson (1935)



All ER 105. He finally urged this court to resolve this issue in the appellants favour.

In his reaction, the learned counsel to the respondents distinguished the above cases relied on by the appellants' learned counsel and argued that all those cases including Oyeyipo case are irrelevant to the determination of "public" in the context of Section 36(3) of the 1999 Constitution. He added that the remarks made on page 377 relied on the appellant was merely *biter dictum* remarks by Obaseki JSC. He argued that there was no evidence on the record to show that other members of public were invited to the chamber when the trial court wanted to deliver its judgment on 28/6/2001.

Section 36(3) of the 1999 Constitution reads thus:-

*"The proceedings of a court or the proceedings of any tribunal relating to matters mentioned in sub-section (1) of this section (including the announcement of the decision of the court or tribunal shall be held in public."*

It is worthy of note that the trial court in trying to justify its resolve to sit and deliver its judgment in its chambers stated thus:-

*"This is the second day that this judgment could not be read in open court because there was no electricity in the court room, we therefore decided with consent of the parties counsel to read it in chambers."*

To my mind, the above reason given by the trial court to justify its resolve to deliver its judgment in chambers is not cogent. Even if other non parties were invited to the chambers to listen or witness the delivery of the judgment on that day, it can not be said in actual sense, that it was read in public as contemplated by the provisions of Section 36(3) of the 1999 Constitution. By that provision members of public even require no invitation or consent or agreement of the court to enter into the court hall and listen to or witness proceeding at will, and without any hindrance as that is what open court as the phrase "in public" means.

Thus, with these few remarks and for the detailed reasoning given in the lead judgment of my learned brother Mary Ukaego Peter-Odili JSC, which I entirely agree with and adopt as mine, I also hold that this appeal lacks merit and it is accordingly dismissed by me as it is a nullity. I also order that the appeal be remitted to the trial court for retrial by another judge. With regard to the cross-appeal, I feel it will

be futile to consider it in view of my decision that the entire proceeding at the trial court is a nullity. It is accordingly dismissed too.

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