

SUPREME COURT OF NIGERIA
15TH APRIL, 2011. SC. 140/2004
CORAM:- A. M. MUKHTAR, W. S. N. ONNOGHEN, F. F.
TABAI, J. A. FABIYI, B. RHODES-VIVOUR, JJSC

1. WILLIAM O. OLAGUNJU
2. TITUS O. K. POPOOLA APPELLANTS
AND
POWER HOLDING CO. OF NIG. PLC RESPONDENT

APPEALS - Reply brief - Fresh points on appeal - Leave must be obtained - Failure to file reply brief in answer to respondent's brief - Means appellant will have nothing to say in court (H1)

ACTIONS - Jurisdiction - Where an action is found to be statute barred - It means that court has no jurisdiction to entertain it (H2)

PLEADINGS - Purpose - Defence of statute of limitation - Purpose of pleading is to give opponent notice of the case - He is going to meet at trial (H3)

JURISDICTION - Determination of - Statement of claim - It is the case presented by plaintiff in statement of claim - That determines jurisdiction of court (H4)

PRACTICE & PROCEDURE - Actions - Statute of limitation - Defendant who pleads defence of same - Need not adduce evidence - If the facts needed to establish the defence - Are apparent in the case presented by plaintiff (H5)

FACTS

Plaintiffs/appellants were dismissed from the service of defendant/respondent for misconduct vide a letter dated 14th March, 1997. The letter was served on each appellant. Appellants instituted this action at High Court of Oyo State Holden at Ibadan on 9th September, 1999 to challenged their dismissal. Respondent file a statement of defence which was later amended and in paragraph 12, it was pleaded that the action was statute barred. Respondent stated that

appellants ought to have instituted their action three (3) months immediately after the receipt of their letters of dismissal. Thus, appellants' action was contrary to the provisions of section 2 (a) of Public Officers Protection Act, Cap. 379 Laws of Federation of Nigeria 1990.

Besides, 2nd appellant admitted under cross-examination that they were both served the letter of dismissal on 14th March, 1997. Respondent who did not adduce any evidence relied on appellant's evidence to address Court. The court entered judgment in favour of appellants. Dissatisfied, respondent appealed to Court of Appeal, Ibadan. The court reversed the judgment of the trial court and maintained that the trial court should have declined jurisdiction as the action was statute barred. Aggrieved, appellants appealed to Supreme Court.

ISSUE FOR DETERMINATION

"1. Whether the defence under section 2(a) of the Pubic Officers (Protection) Act, Cap 379 Laws of the Federation was properly and adequately raised in the pleadings of the defence.

HELD (Unanimously dismissing the appeal per **ONNOGHEN JSC**)

Reply brief - Fresh points on appeal - Leave must be obtained

1. It should be noted that appellants did not file a reply brief to challenge the contention of learned counsel for the respondent that the present issue as formulated by the appellants is a fresh issue. It is settled law that whereby party intends to raise a fresh issue on appeal, he has to seek and obtain the leave of the appellate court for the issue to be validly raised and entertained. I have gone through the record and have not seen where appellants sought the leave of this court to raise the issue in question. As the appellants failed to file a reply there is nothing to urge on this court in the contrary. (p. 1075 F)

Jurisdiction - Where an action is found to be statute barred

2. It should be noted that when a defendant contends that the action of the plaintiff is statute barred, he is raising an issue of jurisdiction of the court concerned on points of law because where an action is found to be statute barred it means that the court has no jurisdiction to entertain it however meritorious the case may be. The success of that point of law takes away the right of action from the plaintiff leaving him with an empty unenforceable cause of action.

(p. 1076 A)

Purpose of pleadings

3. Returning to the issue under consideration, I hold the considered view that paragraph 12 of the Amended Statement of Defence contains sufficient materials for the raising of the special defence of statute of limitation as required by law. The purpose of pleading is to give the opponent notice of the case he is going to meet at trial: Where, however, a defendant desires more particulars of facts/defence pleaded he is at liberty, under the rules of court, to demand same from his opponent who is by law; compellable to oblige him. In the instant case, the appellants never complained of insufficient particulars rather their contention was that the statute of limitation does not apply to the facts of the case - they were therefore not taken by surprise as they knew what was at stake.

(p. 1076 C)

JURISDICTION - Determination of - Statement of claim

4. Apart from the above, it is settled law that it is the case presented by the plaintiff in his statement of claim that determines the issue of the jurisdiction of the court. In the instant case the date the appellants' cause of action arose has been stated in paragraph 9 of the Statement of Claim as the 14th day of March, 1997, while from page 2 of the record of appeal, the writ of summons in the case is dated 9th September, 1999.

The above being the case I hold the view that all the necessary facts needed to determine the applicability of section 2 (a) of Public Officers (Protected) Act in the case have been provided in the Statement of Claim and the defendant can raise a point of law in limine on the matter without first filing a defence on the authority of *Texaco Panam Inc. v. Shell Petroleum Devt. Corp. of Nig.* (2000) 4 NWLR (pt.653) 480 at 490. In the instant case, however, the respondent filed a Statement of Defence and specifically pleaded the defence in paragraph 12 thereof. (p. 1076 F)

PRACTICE & PROCEDURE - Actions - Statute of limitation

5. I hold the considered view that a defendant who pleads the defence of statute of limitation need not call or adduce evidence if the facts needed to establish the defence can be gleaned or are con-

tained or apparent in the case presented by the plaintiff as the defendant can rely on the plaintiffs' case to successfully establish the defence, as in the instant case.

From the above, it is clear that Issue 1 should be and is hereby resolved against the appellants. (p. 1077 A)

B

NOTABLE POINTS OF INTEREST

ONNOGHENJSC

1. Defence of limitation law must be specifically pleaded

C Both counsel agree, however, that a defendant/party intending to raise/rely on the defence of limitation law/statute of limitation must first of all specifically plead same otherwise the defence, being a special one, will not avail the party concerned. The rationale for the above principle is to be found within the rules of pleadings, the particular intent of which is to
D give notice to the other party so as not to take him by surprise.
(p. 1075 A)

2. Danger in counsel changing case from court to court

E I have to point out a trend I have noticed emerging in legal appellate practice which is that some learned counsel keep on changing their case from one court to the other. While there is nothing wrong with that where there is evidence on the printed record to support each version of the case, the law remain; that where a party wants/desires to raise a fresh
F point on appeal - a point not considered and determined by the lower court (s) - he must seek and obtain the leave of the appellate court. It is trite law. (p. 1075 H)

REPRESENTATION

G Oluwakemi Balogun Esq Obiora Ezike Esq. For the Appellants
E. Abiodun Esq For the Respondents.

CASES REFERRED TO

Ketu v. Onikoro (1984) 10 S.C. 265 at 267
H Olutola v. Unilorin 2004 18 NWLR part 905 pages 416
Ebhodaghe v. Okoye 2004 18 NWLR part 905 page 472
Elugbe v. Omokhafa 2004 18 NWLR part 905 pages 319
PN. Udoh Trading Co. Ltd. v. Abere (2001) FWLR (Pt. 57) 900 at 918

Nigerian National Shipping Line Ltd. v. Emenka (1987) 4 NWLR (Pt. 63) 77 at 79

Ajayi v. Military Administrator of Ondo State (1997) 5 NWLR (Pt. 504) 237 at 254

Texaco Panama Inc. v. Shell Petroleum Devt. Corp of Nigeria (2000) 4 NWLR (Pt.653) 480 at 490 B

STATUTE REFERRED TO

Public Officers Protection Act, Cap. 379 Laws of Federation of Nigeria 1990: s. 2 (a) C

LEAD JUDGMENT BY ONNOGHEN JSC

This is an appeal against the judgment of the Court of Appeal Holden at Ibadan in appeal CA/1/191/2001 delivered on the 21st day of July, 2003 in which the court allowed the appeal of the defendant/respondent, against the judgment of the High Court Holden at Ibadan in Suit No. FHC/IB/CS/89/99 delivered on the 1st day of November, 2000 granting all the reliefs of the plaintiffs/appellants. D

By a writ of summons dated 9th September, 1999, the appellants as plaintiffs claimed against the respondent, then defendant the following reliefs:- E

“(1) A declaration that the purported dismissal of the plaintiffs by the defendant from the service of the defendant with effect from 14th March, 1997 while serving under Molete District of National Electric Power Authority, Ibadan is irregular and or in bad faith and or in breach of natural justice and therefore null and void. F

(2) An order directing the defendant to reinstate the plaintiffs back (sic) to their respective posts and duties forthwith.

(3) An order directing the defendant to pay to the plaintiffs all their outstanding salaries and allowances with effect from 14th March, 1997”. G

Pleadings were exchanged between the parties. In paragraph 12 of the Amended Statement of Defence the defendant/respondent pleaded as follows:- H

“12. The defendant will contend at the trial of this action that the action of the plaintiffs is statute barred.

INHEREOF the defendant says that the plaintiffs’ claim is vexations, trivial and a gross abuse of the process of court and should be dismissed”.

The case of the plaintiffs, as can be gleaned from the record, is that they were former employees of the defendant in its Molete District Store at Jericho, Ibadan and worked under Mr. Adebola Adenuga, who was the District Store Officer.

B It is the case of the 1st plaintiff that on 1st January, 1997, a public holiday, he, in the company and on instruction of the said Mr. Adebola Adenuga went to Eleyele NEPA Stores to collect goods/materials intended for the Jericho Stores, but without written authority. The goods/materials were later loaded in a vehicle but the security men on duty refused to allow the 1st plaintiff and one Titilayo Asawale to leave the stores with the goods. Later on, the General Manager of the defendant ordered that the goods be returned to Eleyele stores while the 1st plaintiff was queried, arrested and charged to court for conspiracy and stealing.

D On the other hand, the 2nd plaintiff who was a manual worker/labourer also in the employ (sic) of the defendant testified that on the 20th January, 1996 he accompanied Mr. Adebola Adenuga, his superior officer, to the defendant's store at Eleyele to load a vehicle with electrical materials for delivery at Jericho stores. The vehicle for the job was driven by a driver who was not a staff of the defendant; that Mr. Adenuga was later arrested by the police but he jumped bail on his release; that he was not arrested but was queried and he appeared before a panel.

F The plaintiffs were dismissed by a letter of 13th March, 1997 issued during the pendency of the trial of the 1st plaintiff in the Magistrate Court, Ibadan. The plaintiffs filed the action sometime in September, 1999. At the trial the defendant did not testify but rested its case on that of the plaintiffs.

G As stated earlier in this judgment, at the conclusion of the trial the learned trial judge entered judgment in favour of the plaintiffs/appellants resulting in an appeal which was decided against the present appellants hence the instant further appeal.

H The issues formulated by learned counsel for the appellants CHIEF BISI ADEGUNLE in the appellants' brief of argument filed on 16th July, 2005 are as follows:-

"1. Whether the defence under section 2(a) of the Public Officers (Protection) Act, Cap 379 Laws of the Federation was properly and adequately raised in the pleadings of the defence.

2. If the answer to 1 above is in the negative, whether the Court of Appeal was not in error when it held that "paragraph 12 of

the Amended Statement of Defence pleaded in essence that the respondent's case is statute barred. This in effect gave the trial court notices of the sort of defence put up by the appellant; it was sufficient enough for the trial court to warn itself of the need to give priority to the consideration of that averment"

Looking at the above issue, it is clear that only one issue calls for determination, that is, Issue 1 because whichever way the issue is decided the decision would render the second issue, though allegedly in the alternative, irrelevant. This is so because a positive resolution of Issue 1 will dispose of the appeal and would result in the setting aside of the judgment of the lower court with a consequent reinstatement of the judgment of the trial court earlier set aside by the lower court.

On the other hand, if the issue is resolved in the negative, then the appeal also ends there as there would be no need to consider the second issue as this court would consequently affirm the decision of the lower court setting aside the judgment of the trial court on the ground that the action by the appellants was statute barred. The above being the true state of affairs, I proceed to consider the appeal accordingly.

In arguing Issue 1, learned counsel for the appellants submitted that the defence under limitation law is a special defence and must be pleaded, relying on *Malomo v. Olushola* (1955) XV (15) WACA 12; *Akwei v. Akwei* (1943) 9 WACA III; that where the statute of limitation or limitation law is not so pleaded the defendant cannot take refuge thereunder, relying on *Ketu v. Onikoro* (1984) 10 S.C. 265 at 267; that the pleading in paragraph 12 of the Amended Statement of Defence, earlier reproduced in this judgment, does not meet the standard required as it does not contain the particulars of the statute of limitation being relied upon, the date the cause of action accrued and the date the cause of action became barred, relying on *Nigerian National Shipping Line Ltd. v. Emenka* (1987) 4 NWLR (Pt. 63) 77 at 79; that the case of the respondent is made worse as it did not lead evidence on the matter. It is the further submission of learned counsel that the lower court was therefore in error in holding that the defence availed the respondent and urged the court to resolve the issue in favour of the appellants particularly as the respondent, is clear by not calling evidence is deemed to have abandoned its Statement of Defence.

On his part, learned counsel for the respondent Emmanuel

Abiodun Esq in the respondent brief filed on 27th May, 2008 formulated one issue for determination which is as follows:-

“Whether or not the appellants have sufficient notice that the issue of Limitation Law was raised in the defence of the respondent?”

B From what I have discussed earlier in this judgment I hold the view that the above issue is sufficient for the purpose of determining the appeal and is, in substance the same as appellants’ Issue 1 though couched differently.

C In arguing the issue, however, learned counsel for the respondent referred to the writ of summons filed in September, 1999 challenging the letter of dismissal issued, on 14th March, 1997 as pleaded in paragraph 9 of the Statement of Claim; that the above data was sufficient, without filing a defence, for the respondent to have raised a point of law to the effect that the action was statute barred which point would have been D taken in limine, relying on *Texaco Panama Inc. v. Shell Petroleum Devt. Corp of Nigeria* (2000) 4 NWLR (Pt.653) 480 at 490; that the respondent raised the issue of limitation law in paragraph 12 of the Amended Statement of Defence supra and that the respondent did not call evidence but addressed the court on the point of law so raised but was overruled by E the trial court, though it found that the law applied but that the respondent acted ultra vires their power to dismiss the appellants; that the lower court also agreed that the law applied; that the appellants at no time contended that the defence was not specially pleaded neither did they ask for particulars, if in doubt; that the issue of specific pleading of the defence F was being raised for the first time in this court as the lower courts were not given the opportunity to consider and determine the issue.

G It is the further contention of learned counsel that the defence raised by the respondent in the said paragraph 12 is an issue of jurisdiction of the trial court; that a defendant is not to rely on a defence which is not based on facts pleaded in the statement of claim unless he alleges those facts specifically in the statement of defence by way of special defence, relying on *NIPC Ltd v. Bank of West Africa* (1962) 1 ALL NLR 556; that appellants were given sufficient notice of the defence relied H upon and were consequently not taken by surprise. Learned counsel urged the court to resolve the issue against the appellants and dismiss the appeal.

It should be noted that learned counsel for the appellant did not file a reply brief in reaction to the respondent brief neither was

our attention drawn by counsel for the appellants to the existence, in the court file, of any such reply brief.

Both counsel agree, however, that a defendant/party intending to raise/rely on the defence of limitation law/statute of limitation must first of all specifically plead same otherwise the defence, being a special one, will not avail the party concerned. The rationale for the above principle is to be found within the rules of pleadings, the particular intent of which is to give notice to the other party so as not to take him by surprise see Ketu v. Onikoro (1984) 10 S.C 265 at 267. B

I had earlier in this judgment reproduced paragraph 12 of the Amended Statement of Defence. The question is whether what is pleaded therein satisfies the requirement of the rules of pleadings with regards to the pleading of special defences such as statute of limitation. C

Before proceeding to answer the question, it is important to note that I agree with learned counsel for the respondent that the issue of sufficiency or otherwise of the pleading of the statute of limitation or limitation law is being raised for the first time in this court, the same not haven been raised in either of the lower courts. From the record, the case in the lower courts on the question of limitation law was simply whether section 2(a) of the Public Officers Protection Act applied to the facts of this case which issue was resolved in both courts, in the affirmative. The said issue which was duly considered by the lower courts and decided upon clearly shows that the appellants were fully aware of the defence being relied upon as pleaded in paragraph 12 supra and were therefore not taken by surprise. D E F

It should be noted that appellants did not file a reply brief to challenge the contention of learned counsel for the respondent that the present issue as formulated by the appellants is a fresh issue. It is settled law that whereby party intends to raise a fresh issue on appeal, he has to seek and obtain the leave of the appellate court for the issue to be validly raised and entertained. I have gone through the record and have not seen where appellants sought the leave of this court to raise the issue in question. As the appellants failed to file a reply there is nothing to urge on this court in the contrary. G H

I have to point out a trend I have noticed emerging in legal appellate practice which is that some learned counsel keep on changing their case from one court to the other. While there is nothing wrong with that where there is evidence on the printed record to support each ver-

sion of the case, the law remain; that where a party wants/desires to raise a fresh point on appeal - a point not considered and determined by the lower court (s) - he must seek and obtain the leave of the appellate court. It is trite law.

It should be noted that when a defendant contends that the action of the plaintiff is statute barred, he is raising an issue of jurisdiction of the court concerned on points of law because where an action is found to be statute barred it means that the court has no jurisdiction to entertain it however meritorious the case may be. The success of that point of law takes away the right of action from the plaintiff leaving him with an empty unenforceable cause of action.

Returning to the issue under consideration, I hold the considered view that paragraph 12 of the Amended Statement of Defence contains sufficient materials for the raising of the special defence of statute of limitation as required by law. The purpose of pleading is to give the opponent notice of the case he is going to meet at trial: Where, however, a defendant desires more particulars of facts/defence pleaded he is at liberty, under the rules of court, to demand same from his opponent who is by law; compellable to oblige him. In the instant case, the appellants never complained of insufficient particulars rather their contention was that the statute of limitation does not apply to the facts of the case - they were therefore not taken by surprise as they knew what was at stake.

Apart from the above, it is settled law that it is the case presented by the plaintiff in his statement of claim that determines the issue of the jurisdiction of the court. In the instant case the date the appellants' cause of action arose has been stated in paragraph 9 of the Statement of Claim as the 14th day of March, 1997, while from page 2 of the record of appeal, the writ of summons in the case is dated 9th September, 1999.

The above being the case I hold the view that all the necessary facts needed to determine the applicability of section 2 (a) of Public Officers (Protected) Act in the case have been provided in the Statement of Claim and the defendant can raise a point of law in limine on the matter without first filing a defence on the authority of *Texaco Panam Inc. v. Shell Petroleum Devt. Corp.* of

Nig. (2000) 4 NWLR (pt.653) 480 at 490. In the instant case, however, the respondent filed a Statement of Defence and specifically pleaded the defence in paragraph 12 thereof.

I hold the considered view that a defendant who pleads the defence of statute of limitation need not call or adduce evidence if the facts needed to establish the defence can be gleaned or are contained or apparent in the case presented by the plaintiff as the defendant can rely on the plaintiffs' case to successfully establish the defence, as in the instant case.

From the above, it is clear that Issue 1 should be and is hereby resolved against the appellants.

Haven resolved the only relevant issue for consideration against the appellants, it follows that the appeal is without merit and is accordingly dismissed. The judgment of the lower court delivered on the 21st day of July, 2003 is hereby affirmed with N50, 000.00 (Fifty Thousand Naira) costs to the respondents.

Appeal dismissed.

MUKHTAR JSC

As per their joint statement of claim, the appellants who were plaintiffs in the Federal High Court holden at Ibadan claimed the following reliefs against the respondent:-

“(1) A declaration that the purported dismissal of the plaintiffs by the Defendant from the service of the Defendant with effect from 14th March 1997 whilst serving under Molet District of National Electric Power Authority Ibadan is irregular, and or in breach of natural justice and is therefore null and void.

(2) An order directing the defendant to reinstate the plaintiffs back to their respective posts and duties forthwith.

(3) An order directing the Defendant to pay to the Plaintiffs all their outstanding salaries and allowances with effect from 14th March 1997.”

The defendant filed a statement of defence which was amended, but in spite of the pleadings, it rested its case on the plaintiff's case. The learned trial judge after the appraisal of the evidence gave judgment in favour of the plaintiffs thus:-

“From the above comments, it is my view and I hold that the

dismissal of the plaintiffs by the defendant from the service of the defendant with effect from 14/3/1997 while serving under Molete District of NEPA Ibadan is wrong irregular and or in bad faith and in breach of natural justice and is therefore of no effect. ”

The defendant appealed to the Court of Appeal against the above decision, and this was set aside. The plaintiffs were aggrieved by the judgment of the Court of Appeal and have appealed to this court on three grounds of appeal from which the following issues were formulated for determination:-

“1. *Whether a defence under Section 2(a) of the Public Officers (Protection) Act Cap 379 Laws of the Federation was properly and adequately raised in the pleadings of the defence.*

2. *If the answer to 1 above is in the negative, whether the Court of Appeal was not in error when it held that “paragraph 12 of the Amended Statement of Defence pleaded in essence that the respondents’ case is statute barred. This in effect gave the trial Court notice of the sort of defence put up by the appellants. It was sufficient enough for the trial Court to warn itself of the need to give priority to the consideration of that averment.”*

The thrust of this appeal is the propriety of the suit in the court of first instances i.e. its validity, which of course borders on the jurisdiction of the court to hear and determine the suit. It is elementary law that the issue of jurisdiction can be raised at any stage of proceedings, either at the earliest opportunity or even in this court. See *Olutola v. Unilorin* 2004 18 NWLR part 905 pages 416, *Ebhodaghe v. Okoye* 2004 18 NWLR part 905 page 472 and *Elugbe v. Omokhale* 2004 18 NWLR part 905 pages 319.

Now, what was the position of this case vis-a-vis the issue of jurisdiction in the trial court? In paragraph 12 of the amended statement of defence, the defendant averred thus:-

“12. The defendant will contend at the trial of this action that the action of the plaintiff is statute barred.”

This of course, is an issue of jurisdiction, for it raises the staleness of the cause of action, which the defendant/respondent asserts was beyond the time allowed by a law to institute. If a statute provides a time limit for the initiation of an action in court, and that time has elapsed, such action becomes otiose with the effluxion of time. The law in this case is section 2(a) of the Public Officers (Protection) Act Cap. 379

Laws of the Federation of Nigeria 1990, which stipulates as follows:-

“2. Where any action, prosecution, or other proceeding is commenced against any person for an act done in pursuance or execution or intended execution of any Act or Law or of any Public Duty or Authority or in respect of any alleged neglect or default, in the execution of any such Act, Law, duty or authority, the following provisions shall have effect:

(a) the action, prosecution or proceeding shall not lie or be instituted unless it is commenced within three months next after the act, neglect or default complained of, or in the case of a continuance of damage or injury, within three months next after the ceasing thereof:

Provided that if the action, prosecution or proceeding be at the instance of any person for cause arising while such person was a convict prisoner, it may be commenced within three months after the discharge of such...”

It is a fact that the defendants did not give specific particulars of the defence they raised in paragraph (12) of their amended statement of defence, which the learned counsel for the appellants has made heavy weather on. The fact still remains that it was a matter of jurisdiction which could have been raised even in this court for the first time. It is a fact that evidence was not adduced by the defendants, but it is also a fact that the plaintiffs (sic) the materials required to determine the issue of limitation have already been supplied by the plaintiffs in their statement of claim and other court processes.

The lower court, as per Ibiyeye JCA considered the above provision of the Public Officers Protection Law supra, and found as follows:-

“Paragraph 12 of the Amended Statement of Defence pleaded in essence that the respondents’ case is statute barred. This, in effect, gave the trial court notice of the sort of defence put up by the appellant. It was sufficient enough for the trial court to warn itself of the need to give priority to the consideration of that averment. The trial court should have, in the circumstance, declined jurisdiction. It is settled that a defence found on statute of limitation is a defence that the plaintiff has no cause of action. It is a defence of law which can be raised in limine and without any evidence in support. It is sufficient if, prima facie, the date of taking the cause of action outside the prescribed period is disclosed in the Writ of Summons and Statement of claim. See P. W. UDOH TRADING CO. LTD. V. ABERE (supra) at 922; EGBE V.

ADEFARASIN (SUPRA).

"It is clear from the principles enunciated in the cases referred to above that this invocation of the limitation period is spontaneous on the establishment from the statement of claim and the Writ of Summons that the stipulated period has elapsed. In the instant case, both statement of claim with particular reference to its paragraph 17(1) and the Writ of Summons' dated 9/9/99. Simple computation of time between those two dates is a period the respondents ought to have instituted action against the appellant for the alleged wrong.

They failed to do so...

In view of the principles enunciated in the foregoing cases and many more the trial court lacked jurisdiction to go into the merit of the instant case when it was faced with the naked averments that the respondents' action was brought about thirty months after the cause of action arose. The trial of the instant case in those circumstances was a nullity and liable to be struck out..."

I subscribe to the above findings of the lower court, and hold that they cannot be faulted in any way. To appeal against the decision of the Court of Appeal, most especially on this crucial issue of the defence under Section 2(a) of the Public Officers (Protection) Act supra, the invocation of which led to the limitation of the action in dispute, is not proper, as the law is very clear on this matter of jurisdiction. The lower court was right to have struck out the case, as it did above.

I have had the opportunity of reading in advance, the lead judgment delivered by my learned brother Onnoghen JSC, and I agree entirely with his reasoning and conclusion that the appeal lacks merit and ought to be dismissed. I also dismiss the appeal and affirm the judgment of the Court of Appeal. I abide by the order as to costs.

FABIYI JSC

I have read before now the judgment just delivered by my learned brother - Onnoghen, JSC. I agree with the reasons therein advanced to arrive at the conclusion that the appeal lacks merit and deserves to be dismissed.

The appellants were dismissed from the service of the respondent for misconduct vide a letter dated 14th March, 1997 and served on each of the appellants. They sued on 9th September, 1999 to

challenge their dismissal. The respondent filed a Statement of Defence which was later amended and in paragraph 12, it was pleaded that the action was statute barred. The 2nd appellant admitted under cross-examination that they were both served the letter of dismissal on 14th March, 1997. The respondent who did not adduce any evidence relied on the appellants' evidence to address the trial court. B

The trial court found in favour of the appellants. The court below reversed same and maintained that the trial court should have declined jurisdiction as the action was statute-barred.

This is a further appeal to this court. On behalf of the appellants, C two issues were formulated in their brief of argument.

Issue 1 which is in point in this appeal reads as follows:-

"1. Whether a defence under section 2(a) of the Public Officers (Protection) Act Cap 379. Laws of the Federation was properly and adequately raised in the pleadings of the defence." D

On behalf of the respondent, the vital issue couched in its brief of argument reads as follows:-

"Whether or not the appellants had sufficient notice that the issue of limitation law was raised in the defence of the respondent."

As extant in the Statement of Claim, letter of dismissal for misconduct was served on the appellants on 14th March, 1997. They sued on 9th September, 1999 to challenge their dismissal. The time lag is a period of thirty (30) months. It is clear that the respondent could raise a point of law that the action is statute barred and same would be taken in limine without the filing of any statement of defence. See: *Texaco Panama Inc. v. Shell Petroleum Development Corporation of Nigeria* (2000) 4 NWLR (Pt. 653) 480 at 490, *Egbe v. Adefarasin* (1985) 1 NWLR (Pt. 3) 549. F

The respondent, in paragraph 12 of the amended Statement of Defence, pleaded that the claim of the appellants was statute barred. The respondent thereby put the appellants on notice to prepare them for anticipated arguments that may arise so as to obviate any element of surprise. See: *George v. Dominion Flour Mills* (1963) 1 All NLR 71 at 77. The appellants' counsel carefully argued the point of law at the court below. The new stance relating to pleadings not being specific in respect of the Statute of Limitation raised in this court can hardly be noticed. The appellants had notice of same. They were not taken by surprise and they can hardly be heard to complain. G H

As found by the court below it is clear that the appellants met the brick wall of instituting their action outside the period of three months stipulated by the law. Since the action was statute-barred the appellants lost their right to enforce the cause of action by judicial process. Their action was no longer maintainable as it becomes a mere shell. Such action must be struck out as not being properly instituted before the court. See: PN. Udoh Trading Co. Ltd. v. Abere (2001) FWLR (Pt. 57) 900 at 918, Ajayi v. Military Administrator of Ondo State (1997) 5 NWLR (Pt. 504) 237 at 254.

The issue is resolved against the appellants.

For the above reasons and the fuller reasons set out in the lead judgment, I too, feel that the appeal is devoid of merit and should be dismissed. I order accordingly and endorse the order relating to costs in the lead judgment.

RHODES-VIVOUR JSC

This is an appeal from the judgment of the Ibadan Division of the Court of Appeal in Appeal No.CA/1/191/2001 delivered on the 21st day of July, 2003.

The appellants as plaintiffs sued the respondent as defendant for:

1. A declaration that the purported dismissal of the plaintiffs by the defendant from the service of the defendant with effect from the 14th day of March, 1997 while serving under Molete District of National Electric Power Authority, Ibadan is irregular and in bad faith and or in breach of natural justice and therefore null and void.

2. An order directing the defendant to reinstate the plaintiff back to their respective posts and duties forthwith.

3. An order directing the defendant to pay to the plaintiffs all their outstanding salaries and allowances with effect from 14/3/97.

Onnoghien, JSC has set out in the leading judgment how the trial proceeded to conclusion in the trial court. It was so well done; that I do not think there is any need to restate the obvious.

Judgment was entered in favour of the plaintiffs. The defendant filed an appeal and as appellant formulated two issues for determination of the appeal, the appeal was resolved on issue No.2. It reads:

Whether or not the Lower court was right to look into the merits of this case when it was obvious that the respondents sued more than

three months after the appellant dismissed them.

In allowing the appeal the Court of Appeal said:

In view of the principles enumerated in the foregoing cases and many more the trial court lacked jurisdiction to go into the merit of the instant case when it was faced with naked averments that the respondent's action was brought about thirty months after the cause of action arose. B

The Court of Appeal found merit in the appeal and allowed it. The decision of the trial court was set aside with costs of N10, 000 in favour of the respondents.

The issue which settles this matter is whether the provisions of section 2(a) of the Public Officers (Protection) Act, Cap 379 Laws of the Federation applies to this case, and whether it was adequately raised in the pleadings of the defence. C

In paragraph 12 of the amended statement of defence the defendant averred as follows: D

12. The defendant will contend at the trial of this action that the action of the plaintiff is statute barred.

In *Sanni v Okene* L.G. 2005 14 NWLR Pt 944 p. 60

I explained statute barred actions as follows:

"The main purpose of the Limitation period is to protect a defendant from the injustice of having to face a stale claim. Put in another way a claim which he never expected to have to deal with. For example, if a claim is brought a long time after the events in question, there is a strong likelihood that evidence which was available earlier may have been lost, and the memories of witnesses may have faded" E F

The appellants were employees of the Respondent. They had a cause of action on the 14th day of March 1997 when they were dismissed by the respondent. The issue is whether their suit was statute barred. The dismissal of the appellant was an act done by a Public officer, and so Section 2(a) of the Public officers (Protection) Act Cap 379 Laws of the Federation of Nigeria 1990 is applicable. It reads: G

"2. where any action, prosecution, or other proceeding is commenced against any person for an act done in pursuance or execution or intended execution of any Act or Law or of any public duty or authority or in respect of any public duty or authority or in respect of any alleged neglect or default, in the execution of any such Act, Law, duty or authority, the following provisions shall have effect: H

(a) the action, prosecution or proceeding shall not lie or be

instituted unless it is commenced within three months next after the act, neglect or default complained of, or in the case of a continuance of damage or injury, within three months next after the ceasing thereof.”

B It is clear from the pleadings that the appellants had a cause of
action on 14/3/97 and they filed their suit against the respondent on
9/9/99. By the provisions of Section 2(a) of the Public officers (Pro-
tection) Law, the appellant was expected to file its suit on or before
the 14/6/97, but in this case the action was filed on 9/9/99. Two years
C and six months out of time. The appellants had a cause of action but
sadly one that cannot be enforced.

In the light of the above I agree with the leading judgment. The
judgment of the Court of Appeal is affirmed with costs of N50, 000 to
the respondent.

D Appeal dismissed.

E

F

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