

1. HIS ROYAL HIGHNESS ALHAJI IBRAHIM SULU GAMBARI
2. ILORIN EMIRATE COUNCIL

V

1. ALHAJI SHUAIB ADIO MAHMUD (BALOGUN ALANAMU OF ILORIN)
2. ALHAJI ABUBAKAR AKANBI JOS

COURT OF APPEAL

(ILORIN DIVISION)

CAL/IL/38/2006

HAUMMAI HANNATU SANKEY.K.C.A. (President)

IGNATIUS IGWE AGUBE,J.C.A.

CHIMA CENTUS NWEZE, J.C.A. (Read the Leading Judgement)

MONDAY, 11TH MAY, 2009

ACTION – Commencement of action – Rules of court guiding commencement of action – Non compliance therewith - Effect of – Order 4 rule 1 High Court of Kwara State (Civil Procedure) Rules, 2005 considered.

APPEAL – Court of Appeal – Power of under section 15 Court of Appeal Act – Exercise of – Condition presentent to invocation of.

COURT – Issue before the Duty on court to consider and determine all issues properly raised.

PRACTISE AND PROCEDURE – Commencement of action – Failure to accompany writ of summon with document itemized in Order 2 rule 2(2) High Court Kwara State (Civil Procedure) Rules, 2005 – Effect.

PRACTICE AND PROCEDURE – Frontloading requirement – Failure to comply therewith – Effect on proceedings – Order 5 rule High Court of Lagos State (Civil Procedure) Rules, 2004 construed.

PRACTICE AND PROCEDURE – Order 2 rule 2(2) of the High Court of High Kwara State (Civil Procedure) Rules, 2005 Non- compliance therewith – Effect – Whether a mere irregularity.

PRACTICE AND PROCEDURE – Requirement or frontloading – Codification of – Rationale.

STATUE – “Shall” in order 2 rule High Court of Kwara state (Civil Procedure) Rules 2005 – How construed.

WORDS AND PHRASES – “Shall” in Order 2 rule 2 High Court of Kwara state (Civil Procedure) Rules 2005 – How construed.

Issues:

1. Whether the trial court failed to pronounce on all the issues raised by the preliminary objection and whether the alleged failure (if any) has occasioned a miscarriage of justice.
2. Whether a failure of comply with Order 2 Rule 2(2) of the Kwara State High Court (Civil Procedure) Rules 2005 at the time of filling a writ of summons is fatal to the action.

Facts:

At the Kwara State High Court, the 1st respondent by writ of summons against the defendant/appellants challenged his removal from office as the Balogun Alanamu of Ilorin and Kingmaker.

Upon been served with the writ, the appellants brought a notice of preliminary objection to the competence action. The grounds of the objection were that the honourable court lacked the vires and jurisdiction to entertain the suit, conditions precedent having not satisfied; the case was not duly and properly initiated and was incurably defective; the procedure adopted in initiating the suit was appropriate; and that the court process purportedly served on the 2nd respondent was liable to be set aside having not been done in compliance with the law.

After hearing argument for and against the preliminary objection, the trial court struck out the said preliminary objection.

Dissatisfied with the decision, the appellant appealed to the Court of Appeal. It was submitted on behalf of the appellant that, non compliance with Order 2 rule 2(2) of the High Court of Kwara State (Civil Procedure) Rules, 2005 at the time of filing the action was fatal to the action.

In resolving the appeal, the Court of Appeal considered the provisions of Order 4 rule 1 of the High Court of Kwara State (Civil Procedure) Rules, 2005 which provides:

“4(1) Wherein beginning or purporting to begin any proceedings, or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these rules, whether in respect of time, place, manner, form or content or in any order respect, the failure may be treated as an irregularity and if so treated will not nullify the proceedings, or any document; judgement order therein.”

Held (Unanimously dismissing the appeal):

1. On Duty on court to consider all issues raised by parties –

It is always right to consider all the issues raised except for compelling reasons where those other issues have been obviously overridden by a fundamental defect. In the instant case the trial court appreciated the crux of the complaint of the appellants as encapsulated in the preliminary objection. Above all the court dealt with the issues. [*Balogun v Labiran* (1989) 3 N@LR (Pt. 396) 385 referred to.] (P.289, paras. D-H)

2. On Rationale for codification of frontloading requirement –

Per Nweze, JCA at page 295, paras. C-H:

“Mallam Yusuf Ali, learned Senior Advocate for the appellant, had observed that the provisions of Order 2 Rule 2(2) (a)-(d), of the 2005 Rules

of High Court of Kwara State are innovations introduced by the 2005 Rules.

True, indeed, Order 2 rule 2(2) paragraphs (a)-(d) codify the requirements of “frontloading”, a term which made its first appearance in the lexicon of contemporary Civil Procedure through the Woolf Reforms in England and Wales.

The rationale for statutory endorsement of this concept is that through its espousal the configuration and delineating of the contours of forensic contests may be attained with considerable facility such that their resolution could be achieved at the earliest opportunity and with minimal costs. The ultimate objectives of this technique, and the other equally innovative features of the rules, are for the evolution of a user-friendly trial procedure in which the Judge and effectively and efficiently manage the flow of cases in the court.

Although, the frontloading requirements feature in the new rules of such jurisdictions like Lagos (2004) Rules, Order 3 rule 21; Anambra State (2006) Rules, Order 2 rule 21; Benue State (2007) Rules, Order 2 rule 21; Rivers State (2006) Rules, Order 3 rule 21; considerable circumspection is called for in the construction of the grammar, syntax and prescriptions of the respective Rules. This must be so because there are slight variations in their provisions.”

3. On Effect of failure to comply with the frontloading requirement of the High Court of Lagos State (Civil Procedure) Rules 2004 –

By virtue of Order 5 rule 1 of the High Court of Lagos State (Civil Procedure) Rule, 2004, a claimant, who does not comply with the frontloading requirement, is visited with consequences ordained therein, namely the nullification of the proceedings. (P. 296, para. A)

4. On effect of failure to comply with the frontloading requirement of the High Court of Kwara State (Civil Procedure) Rules, 2005

By virtue of Order 4 rule 1 of the High Court of Kwara State (Civil Procedure) Rules, 2005 where in beginning or purporting to begin any proceedings, or at any stage in the course of or in connection with any proceeding, there has by reason of anything done or left undone, been a failure to comply with the requirements of the rules, whether in respect of time, place, manner, form or content or in any other respect, the failure may be treated as an irregularity and if so treated will not nullify the proceeding, or any document, judgement or order therein, in effect, Order 4 rule 1 empowers the court to alternate the effect of non-compliance. Thus, Order 2 rule 2(2) is subject to the overriding and mitigating effect of Order 4 rules 1(1) & (3) and Order 10 rules 2 & 5 of the Kwara State High Court Rules, 2005. (P. 296, paras, A-E)

5. On Construction of the word “Shall” under Order 2 rule 2(2) of the Kwara State High Court (Civil Procedure) Rules, 2005 -

The word “Shall” under Order 2 rule 2(2) of the Kwara State High Court Rules in merely directory and subject to the overriding and mitigating effects of Order 10 rules 2 and 5 of the said High Court of Kwara State (Civil Procedure) Rules. [Olaniyan v. Oyewole (2008) 5 NWLR (Pt. 1079) 114 referred to and relied upon.] (P. 296, paras D-F)

6. On Condition precedent to invocation of power of the Court of Appeal under Section 15 of the Court of Appeal Act-

Section 15 of the Court of Appeal Act empowers the Court of Appeal to make any order that will enable it resolve the real bone of contention as set out in the order. It is a dependent or contingent order. It is an order that can only be made when a ground of appeal has donated a question for condition precedent to the invocation of section 15 is that the ground of appeal must evince a question or dispute yearning for resolution by the Court of Appeal. Therefore, the opening section merely empowers the court to make such orders that could assist it in broking a firm resolution thrown up by the ground of appeal. [N.C.C v. M.T.N. (Nig) Ltd. (2008) 7 NWLR (Pt. 1086) 229;

C.G.G (Nig) Ltd.) v. Ogu (2005) 14 WRN 1; Uwaifo v. A.-G., Bendel State (1982) 7 SC 124 referred to.] (Pp. 300-301, paras. H-C)

Nigerian Cases Referred to in the Judgement:

A.-G., Anambra v. Okeke(2002) 12 NWLR (Pt. 782) 575

A.-G., Fed. V. A.I.C. Ltd. (1995) 2 NWLR (Pt. 378) 388

Abubakar Joseph (2008) 13 NWLR (Pt. 1104) 307

Adewunmi v. A.-G., Ekiti State (2002) 2 NWLR (Pt. 751) 474

Ajewole v. Adetimo (1996) 2 NWLR (P.t 431) 391

Amadi v. N.NP.C. (200) 10 NWLR (Pt. 674) 76

Anyaduba v. N.R.T.C. Ltd (1992) 5 NWLR (Pt. 243) 535

Babayagi v. N.R.T.C. (1982) 2 NWLR (Pt. 538) 367

Balogun v. Labiran (1988) 3 NWLR (Pt. 90) 66

Broad Bank of (Nig) Ltd. v. Alhaji S. Olayiwola & Sons Ltd. (2005) 3 NWLR (Pt. 912) 434

C.G.G. (Nig.) Ltd. v. Ogu (2005) 8 NWLR (Pt. 927) 366

Coker v. Adetayo (1992) 6 NWLR (Pt. 249) 612

Duke v. Akpabuyo L.G. (2005) 19 NWLR (Pt. 959) 130

Faleye v. Otapo (1995) 3 NWLR (Pt. 381) 1

I.N.E.C. v. Iniama (2008) 8NWLR (Pt. 1008) 182

Ifezue v. Mbadugha (1984) 1 SCNLR 427

Inakoju v. Adeleke (2007) 4 NWLR (Pt. 1025) 423

Johnson v. Osaye (2001) 9 NWLR (Pt. 719) 729

Kalu v. Odili (1992) 5 NWLR (Pt. 240) 130

Mobil Prod. (Nig.) Unlimited v. Monokpo (2003) 18 NWLR (Pt. 852) 346

Madukolu v. Nkemdilim (1962) 2 SCNLR 341

N.C.C v. M.T.N (Nig) Comm. Ltd. (2008) 7 NWLR (Pt. 1086) 229

Ochonma v. Unosi (1965) NMLR 321

Oforkire v. Maduiké (2003) 5 NWLR (Pt. 812) 166

Okonji v. Njokanma (1991) 7 NWLR (Pt. 202) 1301

Olaniyan v. Oyewole (2008) 5 NWLR (Pt. 1079) 114

Olujimi v. Ekiti State House of Assembly (2008) 11 NWLR (Pt. 1153) 464

Oni v. Feyemi (2008) 8 NWLR (Pt. 1089) 400

Oro v. Falade (1995) 5 NWLR (Pt. 396) 385

Saleh v. Monguno (2006) 15 NWLR (Pt. 1001) 26

Saude v. Abdullahi (1989) 4 NWLR (Pt. 116) 387

U.B.A Ltd. v. Achoru (1990) 6 NWLR (Pt. 156) 254

Uwaifo v. A.-G., Bendel State (1982) 7 SC 124

Foreign Case Referred to in the Judgment:

Howard v. Bodington (1877) 2 P.D. 203, 210

Nigerian Statute Referred to in the Judgment:

Court of Appeal Act, S. 15

Nigerian Rules of Court Referred to in the judgment

High Court of Kwara State (Civil Procedure) Rules, 2005, 0.2 r 2(2) (a-d); 0.3 r 21; 0.4 r 1 (20 O.10. rr 2 and ; 0.27 r. 1(1))

1. Book Referred to in the Judgment:

Halsbury's Laws (4th ed.) Vol. 44 para. 933.

2. Appeal:

This was an appeal against the ruling of the High Court of Kwara State which struck out the appellant's preliminary objection. The Court of Appeal, in a unanimous decision, dismissed the appeal.

3. History of the Case:

Court of Appeal:

Division of the Court of Appeal to which the appeal was brought:
Court of Appeal, Ilorin.

Names of Justices that sat on the appeal: Jummai Hannatu Sankey, J.C.A. (Presided); Ignatus Igwe Agube, J.C.A.; Chima Centus Nweze J.C.A. (Read the Leading Judgment)

4. Appeal No.: CA/IL/38/2006

Date of Judgment: Monday, 11th May, 2009

Names of Counsel; Mallam Yusuf Ali. SAN (with him K.K. Eleja and O.F. Obadiaru) – for the Appellants A.O. Muhammed (with him, I.K. Imam – Eleshinla, Rotimi

Oyegbola, O.A. Balogun and Ismail Jatto) – for the 1st Respondent. Raheem Ismail (for Dele Belgore SAN,) – for the 2nd Respondent.

5. Counsel:

Mallam Yusuf Ali, SAN (with him, I.K Imam – Eleshinla, Rotimi Oyegbola, O.A. Balogun and Ismail Jatto) – for the 1st Respondent.

6. Raheem Ismail (for Dele Belgore, SAN,) – for the 2nd Respondent

7. NWEZE, J.C.: (Delivering the Leading Judgment): By writ of summons filed at the lower court, the first respondent, as plaintiff, challenged his removal from office as the Balogun Alanamu of Ilorin and Kingmaker. The Appellants' reaction to the said writ was very swift: by notice of preliminary objection, they impugned the competence of the action. In consequence, they entreated the court with a supplication to dismiss or strike out the entire suit.

After hearing the arguments or counsel, the lower court, in its ruling, *inter alia* rather struck out the notice of preliminary objection. The appellants' dissatisfaction with the outcome of their objection found expression in this appeal.

They formulated two issues for the determination of this court. They are:

1. Whether the trial court was not in error in failing to pronounce on issues submitted for its adjudication and whether the failure has not occasioned a grave miscarriage of justice.
2. Whether the failure of the 1st respondent to comply with the mandatory provision of the enabling law in commencing the action is not fatal to the suit and whether the trial court was not in error in refusing to strike out the suit for incompetence and lack of jurisdiction.

On his part, the first respondent couched the two issues for determination in these terms:

1. Whether the trial court failed to pronounce on all the issues raised by the preliminary objection and whether the alleged failure (if any) has occasioned a miscarriage of justice.
2. Whether a failure to comply with Order 2 rule 2(2) of the Kwara State High Court (Civil Procedure) Rules 2005 at the time of filing a writ summons is fatal to the action.

I am enamoured of the phraseology of the first respondents' formulation of the issues for determination due to its concision. I shall, therefore, adopt them as the issues that call for determination in this appeal.

ISSUE 1

1. Whether the trial court failed to pronounce on all the issues raised by the preliminary objection and whether the alleged failure (if any) has occasioned a miscarriage of justice.
 - A. Learned Senior Advocate for the appellants contended that their main grouse here centers on the propriety or otherwise of the trial court's refusal to consider and pronounce on the issue of improper which was properly raised before the trial court.
 - B. He maintained that the lower court, in its ruling, never adverted to grounds 1,2 and 3 of the grounds of objection. According to him, the court rather confined itself to ground 4 which dealt with the failure to effect service as prescribed by the rules. In his view, the lower court only pronounced upon this ground.
 - C. He submitted that a court of law has a mandatory duty to consider all issues properly and legitimately submitted for its adjudication. In effect, unless where an issue has been withdrawn or abandoned, a court has an obligation to pronounce upon it.
 - D. He submitted further that a court would be abdicating its duty where it fails to consider or resolve an issue submitted to it, *Balogun v. Labiran* (1988) 3 NWLR (Pt. 80) 66; *Oro v. Falade* (1995) 5 NWLR (Pt. 396) 385, 402.
 - E. He entreated this court to hold that the lower court erred when it refused to consider grounds 1,2 and 3 of the objection. What is more, its failure had led to miscarriage of justice against the appellants.
 - F. Mohammed, learned counsel for the first respondent, submitted that the ruling in question made pronouncement on all the issues raised in the appellant's preliminary objection. He reproduced the notice of preliminary objection together with the grounds of the objection. Learned counsel cited Order 2 rule 2 (2) of the rules of the lower court. He equally set out portion of the ruling of the lower court to demonstrate that the said court considered all the issues.
 - G. He further submitted that no miscarriage of justice was occasioned because non-compliance with the said Order 2 rule 2(2) of the court rules

cannot result in the striking-out of validity filed and issued writ of summons. He noted that the writ was validity issued.

H. Above all, he observed that since there was a compelling reason before the court, namely, the motion of December 12, 2005 in which with Order 2 rule 2(2), the issue of non-compliance had been overtaken by events and was no longer an issue to be pronounced upon, *Oro v. Falade* (1995) 5 NWLR (Pt. 396) 385, 402.

He contended that with the first respondent's motion to comply with Order Rule 2 (2) before the trial, the said motion took precedence over the preliminary objection and ought to have been heard first, citing, *A-G., Federation v. A.I.C. Ltd*, (1995) 2 NWLR (Pt. 378) 388 (1995) 2 SCNJ 133, 199; *Mobil Prod. (Nig) Unlimited v. Monokp* (2003) 12 SCNJ 206, 237, (2003) 18 NWLR (Pt. 852) 346.

He, finally, submitted that even if the lower court failed to pronounce on the entire issues raised in the preliminary objection, no miscarriage of justice was occasioned as the writ of summons could still not be, and was not liable to be, struck –out. Raheem Ismail, for the second respondent, noted that they were not contesting the ruling, hence, they did not file any brief.

In their reply brief, the appellants contended that the first respondent misconceived the appellants contended that the first respondent misconceived the appellants' case. They cited a host of authorities to buttress their contention.

Now, the objection that prompted the ruling, the subject of this appeal was framed thus:

Notice of Preliminary Objection

Take notice that the 2nd and 3rd respondents shall at or before the hearing of this suit inclusive of application dated 6th September, 2005 raised an objection to its competence and shall on the premises pray the honourable court to dismiss/or strike-out the entire suit.

Take further notice that the grounds of objection are as adumbrated hereunder.

GROUND OF THE OBJECTION

1. The honourable court lacks the vires and jurisdiction to entertain the suit, conditions precedent having not been satisfied.
2. The case is not duly and properly initiated and is incurably defective.
3. The procedure adopted in initiating the suit was inappropriate.
4. The court process purportedly served on the 2nd defendant/respondent is liable to be set aside having not been done in compliance with the law.

The lower court, in its ruling, stated inter alia:

- A. Finally, from totally of the facts before the court, the summary of the complaints of the defendant against the claimant in this objection is that the claimant has not complied with the requirements of the High Court *(Civil Procedure) Rules, 2005. The remedy available to the defendants in such situation is provided for under Order 4 (italics supplied)*
- B. Although expressed in very laconic terms, there is no doubt that the above excerpt demonstrates that the lower court attended to the complaint of the appellant in the grounds of their objection. The net effect is that notwithstanding the profound arguments offered by the learned senior counsel for the appellants, the truth is that the lower court's ruling cannot be impugned on the ground of eliding the consideration of issues placed before it.
- C. For the avoidance of doubt, I entirely endorse the very brilliant submission of leaned counsel for the appellant as exemplified in his reference to *Balogun v. Labiran (supra); Oro v. Falada (supra)*. For instance, in at page 402 of *Oro v. Falade (supra)*, Belgore JSC (as he then was) expressed the position thus:

...it is always right to consider all the issues raised except for compelling reasons where those other issues have been obviously overridden by a fundamental defect in one of the issues raised by the trial court's decision cannot be allowed to stand, *Anyaduba & Anor v. Nigerian Renowned Trading Co. Ltd. (1992) 5 NWLR (Pr. 243) 535; Okonji v. Njokanma (1991) 7 NWLR (Pt. 202) 131; Balogun v. Labiran (1988) 3 NWLR (Pt. 80) 66 at 80*. It was also an error by the court of Appeal to over look the issues raised by the parties and formulate its

own issues to replace those made by the parties. The parties should be confined to their field of battle to avoid juridical mismanagement, for to shy away from the issues the parties desire to fight and formulate a new one for them which they never addressed may result in miscarriage of justice, *U.B.A Ltd. v. Achoru* (1990) SCNJ 17; *Ochonma v. Unosi* (1965) NMLR 321.

However, that was not the situation at the lower court. That court appreciated the crux of the complaint of the appellants as encapsulated in the preliminary objection. Above all, the court dealt with the issue. For instance, it held inter alia “from the totality of the facts before the court, the summary of complaints of the defendant against the claimant in this objection is that the claimant has not complied with the requirements of the High Court (*Civil Procedure*) Rules, 2005”.

Whether or not the court was correct in the reasons it adduced for striking out the objection which challenged the suit on the ground of non compliance with said requirements of the rules need not delay us now as that is the main question to be addressed in relations to issue two. It suffices to observe for now that the court dealt with the complaint of non-compliance with the requirements of the High Court (*Civil Procedure*) Rules. I find no merit in the complaint in this issue. I, therefore, resolve it against the appellants.

ISSUE 2

Whether a failure to comply with Order 2 rule 2(2) of the Kwara State High Court (*Civil Procedure*) Rules 2005 at the time of filling a writ of summons is fatal to the action.

On this issue, Learned Senior Advocate for the appellants submitted that what the first respondent filed in initiating this action was just the writ of summons and the motion on notice for injunction and its annexures which were contemporaneously filed on 26th October, 2005, [Pages 1-3 of the record]. In other words, the statement on oath of the witnesses and copies of every document to be relied on at the trial were not filed contemporaneously with the

writs of summons as mandatorily required by Order 2 rule 2(2) 2a)-(d) of the Kwara State High Court (Civil Procedure) Rules, 2005.

He pointed out that the trial court found at page 268 of the record that the claimant did not comply with the requirements of the High Court (Civil Procedure) Rules 2005 though, at page 269 of the record, it refused to strike out the suit as urged by the appellants acting under Order 4 rules 1 and 2 of the said rules.

He submitted that rules of court are meant to be obeyed, *Oforkire v. Maduiké* (2003) 5 NWLR (Pt. 812) 166; (223) FWLR (Pt.147) 1090 at 100; *Kalu v. Odili* (1992) 5 NWLR (Pt. 240) 130 (1992) 5 NWLR (Pt. 240) 130, 169.

Citing the provision of Order 2 rule 2(2) (a)-(d), learned senior counsel contended that from the rules, a mandatory intentions can be inferred since the word “shall” was used instead of the word may. Placing reliance on *Adewumi v. A.-G. , Ekiti State* (2002) 2 NWLR (Pt. 751) 474 , 516 counsel submitted that the world shall, in the context of the rules, connotes compulsion.

He further submitted that the provision of Order 2 rule 2(2) (a)-(d), of the 2005 Rules of High Court of Kwara State form part of the innovations introduced by the said 2005 rules. He referred to the equally innovative Order 27 rule 1(1) of the same 2005 rules which also provides that the originating process and the company documents shall be simultaneously filed for service on the defendant(s).

In his view, this again underscores the fact that it is compulsory for the writ of summons to be accompanied with those documents listed in Order 2 rules 2(2) (a)-(d).

Learned Senior Counsel submitted that where rules of court are mandatory the litigants have no choice than to bow to the mandatory language of the rules, *Ajewole v. Adetimo* (1996) 2 NWLR (Pt. 431) 391, 757.

Counsel further submitted that the lower court’s treatment of the first respondent’s non-compliance with rules as a mere irregularity is contrary to the spirit and intendment of the 2005 rules of the court below. He maintained that though Order 4 rule 1(2) empowered the lower court to accede to the first

respondents' entreaty, however, as he did not file an address in opposition, he could not be favoured with the court's discretion.

In the view of counsel, therefore, what the trial court did in the circumstances was to interpret the provisions of High Court rules with sympathy. However, sympathy cannot override the clear provision of rules of court *Babayagi v. Bida* (1998) 2 NWLR (Pt. 538) 367, 379; *Coker v. Adetayo* (1992) 6 NWLR (Pt. 249) 612, 625.

He further submitted that the provision of Order 4 rule 3, under which the trial court claimed it acted, in overruling the objection, was most inappropriate. The provision deals with a situation where wrong process is used in initiating an action. The position in the case at hand was quite different.

He submitted that non compliance with the provisions of Order 2 rule 2(2) (a)-(d) is fatal to the first respondent's case. This is so for it goes to the root of the case itself. It is an affliction on the very foundation on which the suit was based. It fixed the case squarely within the description of cases that are not initiated by the due process of law. The case has no foundation to stand on. The defect manifested in the mode of commencement of the case affected its competence and renders the proceeding a nullity, *Madukolu v. Nkemdilim* (1962) NSCC 374, 379-380, (1962) 2 SCNLR 341.

In his further submission, where there is non-compliance with the prescribed mode for commencing an action as in this case, the non compliance will rob the court of the requisite jurisdiction to entertain the case, *Saude v. Abdullahi* (1989) 4 NWLR (Pt. 116) 387, 422; *Johnson v. Osaye* (2001) 9 NWLR (Pt. 719) 729, 750.

Counsel prayed the court to hold that the non compliance with the mandatory provisions of Order 2 rule 2(2) (a)-(d) of the 2005 rules of Kwara State is fatal and that the trial court was in error in treating it as a mere irregularity and in refusing to strike out the case.

According to him, this court, acting under section 15 of the Court of Appeal Act, is well placed to consider the materials on record and make an order striking

out the first respondent's case for incompetence, *Inakoju v. Adeleke* (2007) ALL FWLR (Pt. 353) 3, 104-105, (2007) 4 NWRL (Pt. 1025) 423.

In this reply, learned counsel for the first respondent took the view that the lower court's refusal to strike-out the suit accords with the current attitude towards doing substantial justice as opposed to technical justice. He contended that the court correctly invoked Order 4 rules 1 and 2 of the rules of the lower court as what was involved was a mere irregularity, *Duke v. Akpabuyo Local Government* (2005) 12 SCNJ 280, 293, (2005) 19 NWLR (Pt. 959) 130.

He submitted that failure to accompany a writ of summons with the documents itemized in Order 2(2) does not invalidate the writ. Furthermore, he debunked the contention that compliance with Order view, that contention does not enjoy the support of statute, rules of court, or case law. On the contrary, he argues that the provisions of Order 2 rule 1 and 2(1) draw dichotomy between commencement State High Court Rules 2005.

He maintained that the requirement of the provisions of Order 2 rule 2(2) is a condition subsequent: hence, the validity of a writ duly filed is not dependent on the said Order 2 rule 2(2).

The combined effect of the above two rules is that proceedings are commenced by a writ and not by the documents specified under Order 2(2). The documents, therefore, cannot be a condition precedent for filing a writ.

What is more, the provisions of Order 2 rules 1 and 2(1) are neither to the effect that the writ should be filed with any document nor does Order 2 rule 2(2) provide that the documents must accompany the writ at the time of filing it. The rule merely provides that the writ must be accompanied by."In his view, the writ must first exist before it can be accompanied by documents.

On whether Order 2 rule 2 (supra) implies an imperative duty, counsel submit that the said Order 2 rule 2(2) is subject to the overriding and mitigating effects of Order 4 rules 1(1) and (3) and Order 10 rules 2 and 5 of the said Kwara State High Court Rules 2005. In other words, the provisions of Order 2 rule 2(2) and render the sub-rule permissive and merely directory.

Against this background, it will be manifestly absurd to interpret Order 2 rule 2(2) as being imperative/mandatory and rigid as such interpretation will render the provisions of Order 4 and Order 10 ineffectual and useless.

What is more, the mere use of the word “shall” in a statute or rules or court does not always connote a peremptory mandate, *Ifezue v. Mbadugha* (1984) 1 SCNLR 427, 456; *Amadu v. N.N.P.C.* (2000) 6 SCNJ 1, 16, (2000) 10 NWLR (Pt. 674) 76. Above all, nowhere in the penalty imposed for failure to comply with Order 2 rule 2(2).

Thus, Order 2 rule 2(2) cannot be interpreted in isolation of Order 4 and Order 10 rules 4 and 5 which play general supervisory and mitigating roles over the whole rules.

He emphasized the need to do substantial justice as against slavish compliance with the rules of court, *Broad Bank of Nig. Ltd. v. Alhaji. S. Olayiwola & Sons Ltd. & Anor*: 1 SCNJ 51, 60, (2005) 3 NWLR (Pt. 912) 434; *Duke v. Akpabuyo Local Government* (2005) 12 SCNJ 280, 2005) 19 NWLR (Pt. 959) 130; *Saleh v. Alhaji Shetima Monguno & Ors.* (2006) 7 SCNJ 236, 255-256, (2006) 15 NWLR (Pt. 100) 26 and the unreported case of *Oni v. Fayemi & 16 Ors.* [Appeal No. CA/IL/EPT/GOV/1/2007, a Judgment delivered on 8th day of November, 2007], (2008) 8 NWLR (Pt. 1089) 400.

Consideration by the arguments

By way of preliminary remarks, I would like to react to a very insightful revelation which counsel for the first respondent made in the course of his arguments.

According to Mohammed, before the preliminary objection was heard, the first respondent filed an application before the lower court for extension of time within which to file the documents stipulated under Order 2(2) of the court rules. That motion was heard and granted on 16/2/2006, [pages 255-257 of record].

The effect then, he noted, is that the main issue for determination in this appeal that is, failure to comply with Order 2 rule 2(2) has been overtaken by the

proceedings of 16/2/2006, wherein, the lower court granted leave to the first respondent with an order extending the time within which to file and serve the documents required under Order 2 rule 2(2).

It would be, perhaps, appropriate to invite the court to state what transpired in court on February 2, 2006. At page 257, the court held thus:

This application brought by way of a motion on notice is to enable the claimant/applicant to comply with the requirement of Order 2 rules 2(2) of the High Court (Civil Procedure) Rules, 2005. The application is to enable the claimant/applicant to have an extension on to (sic) the time within which he is to file the statement of claim, list of witnesses, and copies of documents which could have been filed with the writ of summon. There is no counter affidavit against the application. After I have listened to A. O. Mohammed of learned counsel to the claimant/applicant, the court is satisfied that the application has merit. It is to be granted as prayed.

In the result, the period within which the claimant is to file the aforesaid documents is enlarged accordingly. The documents are deemed duly and properly filed and served on the defendants/respondents.

I shall be very cautious here in making comments about the said order since its propriety is not an issue in this appeal before this court.

However, there can be no gainsaying the fact that there is considerable force in the observation of Mohammed, counsel for the respondent, on the effect of that order on this issue. I am in agreement with him that with the effectuation of that order, the second issue in this appeal would appear hypothetical. However, out of the abundance of caution, I shall still attend to the submissions of counsel on the issue.

Mallam Yusuf Ali, Learned Senior Advocate for the appellant, had observed that the provisions of Order 2 rule 2(2) (a)-(d), of the 2005 rules of High Court of Kwara State are innovations introduced by the 2005 rules.

True, indeed, Order 2 rule 2(2) paragraphs (a)-(d) codify the requirements of “frontloading”, a term which made its first appearance in the lexicon of contemporary Civil Procedure through the Woolf Reforms in England and Wales.

The rationale for the statutory endorsement of this concepts is that through its espousal the configuration and delineation o the contours of forensic contests may be attained with considerable facility such that their resolution could be achieved at the earliest opportunity and with minimal costs. The ultimate objectives of this technique, and the other equally innovative features of the rules, are for the evolution or a user-friendly trial procedure in which the Judge can effectively and efficiently manage the flow of cases in the court.

Although, the frontloading requirements feature in the new rules of such jurisdictions like Lagos 2004 rules, Order 3 rule 2; Anambra State2006 Rules, Order 2 rule 2; Benue State 2007 Rules, Order 2 rules 2; Rivers State 2006 Rules, Order 3 rule 2, considerable circumspection is called for in the construction of the grammar, syntax and prescriptions of the respective Rules. This must be so because there are slight variations in their provisions.

The provisions of the operative rules on frontloading in Lagos and Kwara States may be cited here to illustrate the cogency of this approach to the various rules. In the Lagos Rules, the frontloading requirement can be found in Order 3 rule 2 (1). In the Kwara State Rules, provisions are made for these requirement in Order 2 rule 2(2) (a)-(d).

Interestingly, whereas by the operation of Order 5 rule 1 of the Lagos Rules, a claimant who does not comply with the frontloading requirement is visited with the dire consequences ordained therein, namely, the nullification of the proceedings, there is no such corresponding punitive prescription in the Kwara State rules. Instead, Order 4 rule 1 of the Kwara rules empowers the court to attenuate the effect of non-compliance. It provides:

Order 4 Rule 1 provides:

- 1) Where in beginning or purporting to begin any proceedings, or at any stage in the course or in connection with any proceedings, there has,

by reason or anything done or left undone, been failure to comply with the requirements of these Rules, whether in respect of time, place, manner, form or content or in any other respect, the failure may be treated as an irregularity and if so treated will not nullify the proceedings, or any document, judgment or order therein.

In this connection, find immense merit in Mohammed submission that Order 2 rule 2(2) is subject to the overriding and mitigating affects of Order 4 rules 1(1) and (3) and Order 10 rules 2 and 5 of the said Kwara State High Court Rules 2005.

In other words, the provisions of Order 4 rules 1(1) and (3) and Order 10 rules 4 and 5 are intended to whittle down the effect of “shall” as used in Order 2 rule 2(2) and render the sub-rule permissive and merely directory. I agree with him that it will be manifestly absurd to interpret Order 2 rule 2(2) as being imperative/mandatory and rigid as such interpretation will render the provisions of Order 4 and Order 10 ineffectual and useless.

In point of fact, case law on the frontloading requirement is gradually building up. Interestingly, this division of the Court would appear to have had the earliest opportunity of interpreting the rules in question. Specifically, Order 2 rule 2(2) (supra) fell for interpretation in *Olaniyan v. Oyewole* (2008) All FWLR (Pt. 399) 503, (2008) 5 NWLR (Pt. 1079) 144. This court held that the word “shall” in the said order of the Kwara State rules is merely directory.

Like Order 4 rule 2(2) (a) –(d) of the Kwara State rules (supra), paragraphs 1 and 2 of the Election Tribunal and Court Practice Directions No. 1 of 2007 codified the frontloading requirement thus:

1. All petitions to be presented before the tribunal or court shall be accompanied by:
 - a. List of all the witnesses that the petitioner intends to call in proof of the petition;
 - b. Written statement on oath of the practitioner intends to call In proof of the petition;

- c. Written statement on oath of the witnesses; and
 - d. Copies or list of every document to be relied on at the hearing of the petition.
2. Petition which fails to comply with sub-paragraph(1) of this paragraph shall not be accepted for filing by the secretary.

These provisions fell for interpretation in *I.N.E.C. v. Iniama* (2008) 8 NWLR (Pt. 1088) 182. In that case, the petitioner elided the inclusion of the aforesaid documents. Expectedly, this omission provoked the mechanistic contention that the petition was void. In what must rank as the most erudite riposte in legislative exegesis, Owoade J.C.A. at page 200-201, paras, B-A intoned with profound sagacity:

...the consequences of the word “shall” both in paragraphs 1(1) (a) and 1(1) (c) of the Practice Direction are to be in paragraphs themselves. Thus, the word “shall” in paragraph 1(1) (a) for example was deliberately watered down by the subjective requirement of:

“the number of witnesses...the petitioner intends to call in proof the petition”

and paragraph 1(1)(c) also by the subjective expression: list of every document to be relied on at the hearing of the petition.’ The meaning of the word ‘shall’ in paragraph 1(1)(c) of the practice Direction is clearly provided in the expression ‘to be relied on the at the hearing of the petition.’ The negative consequence of the disobedience of the petitioner to the expression of command ‘shall’ in paragraph 1(1)(c) is that he would not be able to rely on any such document not so listed at the hearing .

Sub-paragraph 2 of paragraph 1 of the Practice Direction gave the Secretary to the tribunal statutory and ministerial duty not to accepted a ‘defective petition’... the consequence is still as contemplated by the wordings of paragraph 1(1)(c) itself. That is, that the petitioner would be taken not to have intended to rely on such document not so listed. As against the argument put forward by the learned SAN for the appellants,

the...determination of the competence or incompetence of the petition stops at the table of the Secretary to the tribunal. The only 'punishment' for disobedience being the inability of the petitioner to rely on documents not to attached or listed as required by the provision.

The erudite jurist also agreed that the word 'shall' in the above provisions does not import any command. The suave and urbane Ngwuta J.C.A, in his contribution, also addressed the effect of non-compliance with the frontloading requirements with admirable clarity. Listen to this:

I do not subscribe to the idea that failure to file a copy of a document pleaded in the statement of claim renders the suit incompetent. By implication, the consequence of such failure is that the plaintiff will not be allowed to use the document in evidence even though it is pleaded. In effect, the omission to annex a copy of documents pleaded does not amount to such non-compliance with the rules as to affect the validity of the suit but has only the effect of depriving the plaintiff of the use of the document...even though he pleaded same [pages 205-206]

These redoubtable pronouncements reinforce my position that considerable circumspection is called for in the construction of the grammar, syntax and prescriptions of the respective rules. This is in consonance with the ancient prescription that each statute must be considered according to its tenor. We shall call in aid the authority of the illustrious editors of Halsbury's Laws (4th ed.) Vol 44, paragraph 933. According to them:

Where a statute requires an act to be done at or within a particular time or in particular manner, the question arises whether the validity of the act is affected by a failure to comply with what is prescribed. If it appears that Parliament provision in question is described as mandatory 'absolute', 'imperative' or 'obligatory', if on the other hand compliance was not intended to govern the validity of what is done, the provision is said to be directory'

The legendary lord Penzance put the imperatives of this approach into bold relief in these words:

The real question in all these cases is this: A thing has been ordered by the legislature to be done. What is the consequence if it is not done? In the case of statutes that are said to be imperative, the courts have decided that if it is not done, the whole thing fails and the proceedings, that follow upon it are all void. On the other hand, when courts hold a provision to be mandatory or directory, they say that, although such provision may not have complied with, the subsequent proceedings do not fail.'

Howard v. Bodington (1877) 2 P.D. 203, 210

With profound respect, therefore, the submissions of the Learned Senior Advocate of Nigeria for the appellants, as scintillating and effervescent as they are, did not factor in this crucial element in his entreaty to this court to hold that the omission of the said documents stipulated Order 2 rule 2 (2) of the Kwara rules amounted to such non-compliance with the rules as to affect the validity of the suit. Surely, if the draftsman of the Kwara rules intended the sort of drastic consequence he canvassed in his address, she/he would have said so.

As shown above, the draftsman of the Lagos rules intended such a consequence. That explains why provisions were made in Order 5 requirements shall nullify the proceedings. Put simply, therefore, from its tenor, the draftsman of Order 2 rule 2(2) (a)(d) (supra), did not intend to make the validity of the suit contingent upon the presence of copies of the documents referred to therein. Thus, the omission of such document cannot vitiate or invalidate suit.

Against this background, therefore, I take the view that contrary to the submission of the appellants' counsel, the facts of this case cannot be pitched into any of the inveterate prescriptions which Bairamian JSC laid down in the cause célèbre, Madukolu v. Nkemdilim (supra), which he relied on.

Again, with profound respect, I equally take the view that from the antecedents of this case, there is no warrant for his invitation to this court to invoke section 15 of the Court of Appeal Act. Let me elaborate.

In my leading judgment in *Biodun Olujimi v. Ekiti State House of Assembly and Anor* [Appeal No CA/IL/29/2008, delivered on November 21, 2008]. I had occasion to voice my appreciation of the intendment of the provisions of the said section 15. For their bearing on this point, I take liberty to adopt those views as my views in the instant appeal.

Section 15(supra) is a woolly sentence of two hundred and four words! In all, ten general powers are exercisable by the Court of Appeal under the said section. They are enumerated in one long, clumsy, inelegantly-couched sentence of ten clauses with nine conjunctions!

What learned counsel actually wants this court to invoke is the sixth clause in that section, that is, the clause which provides that the court "... generally shall full jurisdiction over the whole proceedings....."

However, I take the view that the clause merely confers on the court "general powers": general powers over the whole appeal proceedings as if they had been instituted in the court as the court of first instance. Even then, the exercise of those general powers is subject to certain limits, *A.-G. v. Anambra v. Okeke*(2002) 12 NWLR (Pt. 782) 575, 606-607; *Abubakar v. Joseph* (2008) All FWLR (Pt. 432) 1065, 1087, (2008) 13 NWLR (Pt. 1104) 307. For instance, the section does not allow this court to make any order which the trial court could not have made in resolving the real controversy between the parties in a particular case, *Faleye v. Otapo* (1995) 3 NWLR (Pt. 381) 1; *N.C.C. v. M.T.N (Nig) Comm. Ltd* (2008) 7 NWLR (Pt. 1086) 229,270

What is more, even the power to facilitate the determination of the real issue in controversy in an appeal before it, *C.G.G. (Nig) Ltd v. Ogu* (2005) 14 QRN 1, (2005) 8 NWLR (Pt. 927) 366 is also subject to an important condition: they must be real issues arising out of, and concreted from, the notice and grounds of appeal, *Uwaifo v. A.-G, Bendel State* (1982) 7 SC 124, 188.

For a clear appreciation of the *raison d'être* of this power of the court, it is necessary to set out the chapeau or opening sentence of the section:

The court of Appeal may, from time to time, make any order necessary for determining the real question in controversy in the appeal.

The order envisaged by this sentence is not at large. It is a dependent or contingent order. That is, it is an order that can only be made when a ground of appeal has donated a question for resolution by the Court of Appeal. In effect, the section empowers the court to make any order that will enable it resolve the real bone of contention as set out in the ground of appeal.

Put differently, a condition precedent to the invocation of this section 15 power is that the ground of appeal must evince a question or dispute yearning for resolution by the Court of Appeal. Therefore, the opening section merely empowers the court to make such orders that could assist it in brokering a firm resolution of the real or main issue in that question thrown up by the ground of appeal.

Unfortunately, this is not the position in this appeal. As noted above, on February 2, 2006, the lower court obliged the applicant [now, the first respondent] with and order for the extension of time within which to file the statement of claim, list of witnesses and copies of documents etc. In addition, by the said order, the court deemed the documents as duly filed and properly filed and served.

Mohammed had argued, and we agreed with him, that with the hypothetical, as it has been overtaken by that order. We have had to consider the said issue out of the abundance of caution only as an intermediate court which is under obligation to consider all issues raised for its consideration. Even then from the above exposition, it is not in doubt that this is not an appropriate occasion for the invocation of the section 15 powers of this court. We shall, therefore, with all polites, decline this invitation.

In all, I find no merit in this issue. I hereby resolve it against the appellant. The consequence is that this appeal lacks merit. I hereby dismiss it.

SANKEY, J.C.: I agree.

AGUBE. J.C.A.: I agree.

