

**HIS EXCELLENCY CHIEF DIEPRIYE S.P. ALAMIEYESEIGHA THE EXECUTIVE
GOVERNOR OF BAYELSA STATE**

V.

- 1. THE HONOURABLE CHIEF JUDGE OF BAYELSA STATE, HON. JUSTICE
EMMANUEL IGONIWARI**
- 2. THE DEPUTY GOVERNOR OF BAYELSA STATE, DR. GOODLUCK
JONATHAN**
- 3. THE HONOURABLE SPEAKER OF BAYELSA STATE HOUSE OF
ASSEMBLY (For himself and on behalf of the entire members of the Bayelsa
State House of Assembly)**
- 4. MR. DAVID SERENA-DOKUBO SPIFF**
- 5. MRS. MERCY ALAGOA**
- 6. MR. COFLINS BOFIEIGHA**
- 7. COFONEL RUFUS APUFU (RID.)**
- 8. MR. BENSON AGADAGA**
- 9. DR. (MRS) BOFERE KETEBU-N WOK A FOR**
- 10. WING COMMANDER GLADYS BRISIBE (RTD.)**
- 11. THE COMMISSIONER OF POLICE BAYELSA STATE**

COURT OF APPEAL

(PORT HARCOURT DIVISION)

CA/PH/124/2006

SULRIMAN GALADIMA, J.C.A. (resided and Read the Majority Judgment)

ISTIFANUS THOMAS. J.C.A.

BODE RHODES-XT VOUR. J.C.A.

GEORGE OFADEINDE SHORP.MI. J.C.A.

IBRAHIM MOHAMMED MUSA SAULAWA. J.C.A. (Dissented)

THURSDAY. 8TH MARCH. 2007

**APPEAL - Appeal against interlocutory - Where appeal is against striking out of suit for lack
of jurisdiction - When appeal court can determine substantive appeal.**

**APPEAL - Brief writing - Issues for determination relating to particular ground of appeal •-
Need for counsel to indicate to court - Desirability of- Failure to so indicate - Whether fatal.**

**APPEAL - Court of Appeal - Powers thereof under section 16, Court of Appeal Act - Extent
and limits of- Whether court of Appeal empowered there under to hear oral evidence as a
retrial court.**

A PPEAL - Ground of appeal - Need to set out concisely under distinct heads - Particulars thereof- How framed.

APPEAL - Issue for determination - Formulation of- Need to arise from grounds of appeal.

APPEAL, - Notice of appeal - Amendment of - Leave to amend -Where granted before hearing of appeal - Amended notice of appeal filed after hearing of appeal and adjournment of appeal for judgment - Attitude of court thereto.

APPEAL. - Relief sought in an appeal - Binding/less of on appellant.

CONSTITUTIONAL LAW - Commissioner of Police of a State -Status of- Whether an agent of Federal Government of Nigeria.

CONSTITUTIONAL LAW- Constitution - Infringement of – Duty on court to prevent.

CONSTITUTIONAL LAW- Constitutional issue - Court dealing with - Duty thereon.

CONSTITUTIONAL LA W - Constitutional provision - interpretation of - Principles guiding - Duty on court with respect thereto.

CONSTITUTIONAL LAW - impeachment - Removal of Governor or Duty Governor of a State - Procedure therefore - Panel to investigate allegations - Composition of- Power of Chief Judge in respect thereof- Exercise of- Nature of- Whether can be challenged in court.

CONSTITUTIONAL LAW - Impeachment - Removal of Governor or Deputy Governor of a State - Procedure therefore -Jurisdiction of court to inquire into - Whether and when exists.

CONSTITUTIONAL LAW - Police matters - Legislative list therefore - Item No. 45, Second Schedule, 1999 Constitution.

COURT - Competence of court - Conditions precedent thereto. COURT - Constitutional issue - Court dealing with - Duty thereon.

COURT - Court of Appeal - Powers thereof under section 16, Court of Appeal Act - Latent and limits of- Whether Court of Appeal empowered there under to hear oral evidence as a retrial court.

COURT- Federal High Court - Exclusive jurisdiction of over matters invofving the Federal Government and its agencies - When applicable.

COURT - Judicial power - Constitution - Infringement of- Duty on court to prevent.

COURT - Jurisdiction - Impeachment - Removal of Governor or Deputy (Governor of a State - Procedure therefore- Jurisdiction of court to inquire into - Whether and when exists.

COURT - Jurisdiction of court - Issue of' - Fundamental nature of.

COURT - Jurisdiction of court - Issue of - Where raised - What court considers in determining.

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INTERPRETATION OF STATUTES - Ouster clause - Statute ousting jurisdiction of court or restricting access to court - How

INTERPRETATION OF STATUTES - Section of statute - Where has sub-sections - How construed.

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JURISDICTION - Jurisdiction of court - Issue of - Where raised - What court considers in determining,

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PRACTICE AND PROCEDURE - Affidavit - Depositions in affidavit in support of originating summons - Averments in pleadings - Nature of - Distinction between.

PRACTICE AND PROCEDURE - Appeal - Ground of appeal - Meed to set out concisely under distinct heads - Particulars thereof - How framed.

PRACTICE AND PROCEDURE - Appeal - Issue for determination Formulation of - Need to arise front grounds of appeal.

PRACTICE AND PROCEDURE - Appeal against interlocutors,' decision - Where appeal is against striking out of suit for lack of jurisdiction - When appeal court can determine substantive appeal.

PRACTICE AND PROCEDURE - Commencement of action - Originating summons - Use of - When appropriate - When inappropriate.

PRACTICE AND PROCEDURE - Court of Appeal - Powers thereof under section 16, Court of Appeal Act - Extent and limits of - Whether Court of Appeal empowered thereunder to hear oral evidence as a retrial court.

PRACTICE AND PROCEDURE - Jurisdiction - Federal High Court Exclusive jurisdiction of over matters involving the Federal Government and its agencies - When applicable.

PRACTICE AND PROCEDURE – Jurisdiction Court – Duty on court to guard.

PRACTICE AND PROCEDURE - Jurisdiction of court - Issue of - Fundamental nature of.

PRACTICE AND PROCEDURE - Jurisdiction of court - Issue of -Where raised - What court considers in determining.

PRACTICE AND PROCEDURE - Parties to an action - Governor of a State sworn in upon removal of predecessor - Whether can he joined as a party in an action challenging removal of predecessor.

PRACTICE AND PROCEDURE - Relief sought in appeal court -Hindingness of on appellant.

PRACTICE AND PROCEDURE - Trial of case - Where based on pleadings - How conducted - Duty on parties to adduce evidence in support of averments in pleadings - Failure of plaintiff to adduce evidence - Effect.

PRINCIPLES OF INTERPRETATION - Interpretation of statutes: -Constitutional provision- Interpretation of- Principles guiding - Duty on court in respect thereto.

PRINCIPLES OF INTERPRETATION - Interpretation of statutes -Statute ousting jurisdiction of court or restricting access to court - How construed - Need to construe strictly.

PRINCIPLES OF INTERPRETATION - Interpretation of statutes -Section of a statute - Where has sub-sections - How construed.

STATUTE- Constitutional provisions - Interpretation of- Principles guiding - Duty on court with respect thereto.

STATUTE, - Interpretation of statute - Section of statute - Where has sub-sections - How construed.

STATUTE - Ouster clause - Statute misting jurisdiction of court or restricting access to court - How construed - Need to construe strictly

Issues:

1.

Whether the trial court had jurisdiction to entertain the appellant's suit alleging non-compliance with any or all of the provisions of section 188 of the 1999 Constitution in relation to proceedings for removal of the appellant from the office of Governor of Bayelsa State, having regard to the provision in section I 88(10) of the 1999 Constitution.

Whether the trial court had jurisdiction to entertain the appellant's suit challenging the exercise of the powers vested in the respondent, the Chief Judge of Bayelsa State, under section 188(5) of the 1999 Constitution in relation to the appointment of the panel that investigated the allegations against the appellant in respect of his office as Governor of Bayelsa State, as pan of the process of the removal of the appellant from that office. Whether, having regard to the reliefs sought by the appellant against the 2nd respondent, the trial court was right when it held that the 2nd respondent could not he sued or made a party to the appellant's action because of the immunity provided for the 2nd respondent under section 308 of the 1999 Constitution. Whether the trial court was right when it held that the State High Court had no jurisdiction in respect of the appellant's claims against the 11th respondent because he was an agent of the Federal Republic of Nigeria.

Facts:

The appellant was the Governor of Bayelsa State, while the 2nd respondent was his Deputy. In December 2005, the process to remove the appellant from office was commenced by a notice of impeachment, which was served on the appellant and the 1st respondent respectively by the 3rd respondent.

The 1st respondent acted on the notice and appointed the 4th - 10th respondents as the Chairman and members of the panel to investigate the allegations in the notice. The panel was inaugurated on 5/12/2005. On 9/12/2005, the appellant was removed from the office of Governor of Bayelsa State by the Bayelsa State House of Assembly on the basis of the report of the 4th - 10th respondents. The appellant was thereafter arrested by officers of the Nigerian Police Force in Bayelsa State.

The appellant was aggrieved by the process which culminated in his removal from office of Governor of Bayelsa State, and his arrest. Consequently, he commenced a suit at the High Court of Bayelsa State by writ of summons and Statement of claim in which he claimed against the respondents jointly and severally as follows:

A DECLARATION that the 1st defendant is constitutionally obliged to appoint only such persons as are not disqualified under section 188 (5) of the Constitution of the Federal Republic of Nigeria, 1999 as members of the panel to investigate allegations of impeachable offences leveled against the plaintiff as contained in the impeachment notice dated 18th November, 2005.

A DECLARATION that the 1st defendant has failed in the performance by him of his constitutional duty under section 188(5) of the 1999 Constitution by his appointment of the 4th, 5th, and/or 8th defendants as members of the investigation Panel inaugurated by the 1st defendant to investigate the allegations contained in the impeachment notice dated 18th November, 2005.

A DECLARATION that the subjection of the plaintiff to house arrest at the behest and direction of the 11th defendant from 5th December, 2005 till midday on 9th December, 2005 is in violation of the plaintiff's constitutional rights to freedom of movement and constitutional immunity afforded him under sections 41 and 308 of the 1999 Constitution.

A DECLARATION that the failure and/or refusal of the impeachment investigation panel constituted by the 1st defendant, and comprising 4th - 10th defendants to commence sittings and invite the plaintiff to defend himself either personally or through his counsel amounts to abandonment of their mandatory constitutional duties under section 188(7) of the Constitution of the Federal Republic of Nigeria, 1999.

A DECLARATION that the 2nd defendant cannot be lawfully approved by the Bayelsa State House of Assembly and sworn-in by 1st defendant as the Substantive Governor of Bayelsa State unless and until the plaintiff exhausts his term, voluntarily resigns, or is otherwise impeached in accordance with the provisions of section 188 of the 1999 Constitution,

6. A DECLARATION that the forceful removal of plaintiff from his office as Governor of Bayelsa State on the 9th day of December, 2005 by the 11th defendant and his armed operatives, as well as the plaintiff subsequent arrest and continued detention amounts to an unconstitutional takeover of the Government of Bayelsa State through a Police-aided civilian coup contrary to section 1(2) of the Constitution of the Federal Republic of Nigeria, 1999.

7. In alternative to prayer 6 A DECLARATION that the purported report of the panel headed by 4th defendant upon which report the purported impeachment of the plaintiff was carried without notice to or hearing from the plaintiff, and which report was submitted to the 3rd defendant on or about 9th December, 2005 is illegal, unconstitutional, null, void and of no effect whatsoever.
8. A DECLARATION that the office of the Governor of Bayelsa State, and Deputy Governor of Bayelsa State into which the, plaintiff and 2nd defendant were respectively sworn on 20th May, 2003 as having been duly elected for a four year term ending on 28th May, 2007 have not become vacant to warrant the swearing in of new incumbents in place of the plaintiff and 2nd defendant - as Governor and Deputy Governor of Bayelsa State respectively.
9. AN ORDER setting aside the purported swearing in by the 1st defendant of the 2nd defendant as the substantive Governor of Bayelsa, on the 12th day of December 2005 in place of the plaintiff who remains the legitimate and duly elected Governor of Bayelsa State pursuant to the gubernatorial election held on the day of April, 2003.
10. AN ORDER OF INJUNCTION restraining the 2nd defendant from parading himself as or acting in the capacity of the substantive Governor of Bayelsa State in place of the plaintiff to whom 2nd defendant is the Deputy Governor.
11. AN ORDER OF INJUNCTION restraining the 3rd and 11th defendants from according any further recognition to the 2nd defendant as the substantive Governor of Bayelsa State in place of the plaintiff to whom 2nd defendant is the Deputy Governor.
12. AN ORDER directing the 1st defendant to reconstitute the Investigation Panel which he inaugurated on 5th December, 2005 by removing there from the 4th, 5th and 8th defendants, who are disqualified under section 188(5) of the 1999 Constitution from acting thereon by reason of their political affiliations.
13. AN ORDER OF MANDATORY INJUNCTION directing the Investigation Panel inaugurated or to be re-constituted by the 1st defendant in respect of the allegation of impeachable offences contained in a notice dated 18th November, 2005 against plaintiff, to resume and or commence sitting and afford the plaintiff an opportunity to defend himself, whether personally or through a counsel of his choice as enjoined in section 188(6) of the Constitution of the Federal Republic of Nigeria, 1999.
14. Cost of this action."

The thrust of the appellant's case was that the 4th - 10th respondents should not have been appointed by the 1st respondent to investigate the allegations against him as Stated in the notice of impeachment having regard to the provision of section 188(5) of the 1999 Constitution: that he was not invited to defend himself before the 4th - 10th respondents; and that there was no hearing of the allegations in the notice of impeachment served on him by the 3rd respondent.

The respondents entered appearance to the appellant's suit and filed notices of preliminary objection to the suit. The grounds on which the various objections were based were Stated as follows:

- " 1. That the court lacked jurisdiction to entertain the action because of the provisions of section 188 (10) of the Constitution of the Federal Republic of Nigeria, 1999.

2. That the 2nd defendant was immuned from civil proceedings by virtue of the provision of section 308 (1) (a) of the Constitution and consequently the court lacked jurisdiction to entertain the suit as against him.
3. That the 1st defendant being the Chief. Judge of Bayelsa State enjoyed immunity from civil proceedings in respect of the performance of the duty of appointing members of the panel; and
4. That the 11th defendant being the Commissioner of Police of Bayelsa State is a Federal agent and consequently the appropriate court in which he can be sued for his actions is the Federal High Court."

In its considered ruling, after hearing arguments of counsel on the objections, the trial court acceded to the prayers of the respondents and struck out the appellant's suit.

The appellant was dissatisfied with the ruling of the trial court and appealed to the court of Appeal.

In response, the 4th to 10th respondents filed a preliminary objection to the competence of the appeal on the ground that the appellant's grounds of appeal did not relate to the ruling of the trial court appealed against by the appellant.

At the hearing of the appeal, the appellant urged the Court of Appeal to exercise its powers under section 16 of the court Appeal Act. and determine the substantive claims of the appellant on their merits. However, a prayer for the exercise of the power of the Court of Appeal under section 16 of the Court of Appeal Act was not stated in his original notice of appeal. It was included in his amended notice of appeal, which he filed after the appeal had been heard though he was granted leave to amend his notice of appeal prior to the hearing of the appeal.

In determining the appeal, the Court of Appeal considered the following statutory provisions and rules of court.

Section 188 of the Constitution of the Federal Republic of Nigeria, 1999 which provides:

- " 188 (1) The Governor or Deputy Governor of a State may be removed from office in accordance with the provisions of this section.
- (2) Whenever a notice of any allegation in writing signed by not less than one third of the members of the House of Assembly -
 - (a) is presented to the Speaker of the House of Assembly of the State;
 - (b) stating that the holder of such office is guilty of gross misconduct in the performance of the functions of his office, detailed particulars of which shall be specified.

The speaker of the House of Assembly shall, within seven days of the receipt of the notice, cause a copy of the notice to be served on the holder of the office and on each member of the House of Assembly, and shall also cause any Statement made in reply to the allegation by the holder of the office. to be served on each member of the House of Assembly.

3. Within fourteen days of the presentation of the notice to the Speaker of the House of Assembly (whether or not any Statement was made by the holder of the office in reply to the allegation contained in the notice), the House of Assembly shall

resolve by motion, without any debate whether or not the allegation shall be investigated.

4. A motion of the House of Assembly that the allegation be investigated shall not be declared as having been passed unless it is supported by the votes of not less than two-thirds majority of all the members of the House of Assembly.
5. Within seven days of the passing of a motion under the foregoing provisions of this section, the Chief Judge of the State shall at the request of the Speaker of the House of Assembly, appoint a Panel of seven persons who in his opinion are of unquestionable integrity, not being members of any public service, legislative house or political party, to investigate the allegation as provided in this section.
6. The holder of an office whose conduct is being investigated under this section shall have the right to defend himself in person or be represented before the Panel by a legal practitioner of his own choice.
7. A Panel appointed under this section shall -
 - (a) have such powers and exercise its functions in accordance with such procedure as may be prescribed by the House of Assembly, and
 - (b) within three months of its appointment, report this findings to the House of Assembly.
8. Where the Panel reports to the House of Assembly that the allegation has not been proved, no further proceedings shall be taken in respect of the matter.
- (9) Where the report of the panel is that the allegation against the holder of the office has been proved, then within fourteen days of the receipt of the report, the House of Assembly shall consider the report, and if by a resolution of the House of Assembly supported by not less than two-thirds majority of all its members, the report of the Panel is adopted, then the holder of the office shall stand removed from office as from the date of the adoption of the report.
- (10) No proceedings or determination of the Panel or of the House of Assembly or any matter relating to such proceedings or determination shall be entertained or questioned in any court.
- (11) In this section -

"gross misconduct" means a grave violation or breach of the provisions of this Constitution or a misconduct of such nature as amounts in the opinion of the House of Assembly to gross misconduct.

Section 16 of the Court of Appeal Act States:

"16. The Court of Appeal may, from time to time, make any order necessary for determining the real questions in controversy in the appeal, and may amend any defect or error in the record of appeal, and may direct the court below to inquire into and certify its findings on any question which the Court of Appeal thinks fit to determine before final judgment in the appeal and may make an interim order or grant any injunction which the court below is authorized to make or grant and may direct any necessary inquiries or accounts to be made or taken and generally shall have full jurisdiction over the whole proceedings as if the proceedings had been instituted in the Court of Appeal as court of first instance and may re-hear the case in whole or in part or may remit it to the court below for the purpose of such re-hearing or may give such other directions as to the manner in which the court below shall deal with the case in accordance with the powers of that court, or, in the case of an appeal from the court below in that court's appellate jurisdiction, order the case to be re-heard by a court of competent jurisdiction."

Order 3 rule 3(2) and (3) of the Court of Appeal Rules 2002 provides:

- "(2) If the grounds of appeal allege misdirection or error in law, the particulars and the nature of the misdirection or error shall be clearly Stated.
- (3) The notice of appeal shall set forth concisely and under distinct heads the grounds upon which the appellant intends to rely at the hearing of the appeal without any argument or narrative and shall be numbered consecutively."

Held (Allowing the appeal in party by majority decision, Saulawa J.C.A. dissenting on proper order to make in the case):

1. On Whether court has jurisdiction to enquire into removal from office of Governor or Deputy Governor of State -

A court has jurisdiction to entertain a suit challenging the process of removal of a Governor of a State or his deputy from office in order to confirm whether or not the process was in compliance with sections 188(1) - (9) of the 1999 Constitution, and if it is satisfied that the process was not in compliance with the constitutional provisions, it has the jurisdiction to intervene and to ensure due compliance. However, if there was due compliance with the constitutional provisions, the court would have no jurisdiction to intervene. In other words, the jurisdiction of court to inquire into the removal of a Governor of a State or his deputy is ousted only where there was strict compliance with the procedure provided in section 188(1)-(9) of the 1999 Constitution. In the instant case, the appellant's case was that the provisions of section 188(5) and (6) of the 1999 Constitution were not complied with in the process that culminated in his removal from the office of Governor of Bayelsa State. In the circumstance, the trial court had jurisdiction to entertain the appellant's suit; and it erred when it held that it lacked jurisdiction to hear the suit.

[Adeleke v. Oyo State House of Assembly (2006) 16 NWLR (PL 1006) 608 referred to.] (Pp.577, paras. F-H 584, para H. 595. Paras. C-F)

(2) On Condition precedent to application of section 188(10) of the 1999 Constitution ousting jurisdiction of court to enquire into removal from office of Governor or Deputy Governor -

A section of a statute having subsections must be read as a whole, and related sections must be read together. Accordingly, in interpreting the provision of section 188(10) of the 1999 Constitution, the subsection cannot be read in isolation from subsections (1) - (9) of the section, the whole section ought to be read together. Otherwise, the circumstance surrounding the coming into play of the ouster clause would never be comprehended. In other words, the provisions of section 188(1) - (9) of the 1999 Constitution cannot be totally ignored in determining suits relating to the removal from office of Governor or Deputy Governor of a State. [Ekpo v. Calabar Local Government (1993) 3 NWLR (Pt 281) 324 referred to.] (Pp. 577, paras. -B C, 617, paras. F-H)

(3) On Whether Chief Judge of State, immuned from suit challenging exercise of power to appoint panel to investigate allegations against Governor or Deputy Governor of a State -

The Chief Judge of a State does not carry out a strictly judicial function in exercising the powers vested in him under section 188(5) of the 1999

Constitution. Thus, his action can be challenged by a law suit if the persons appointed by him ought not to have been appointed. In the instant case, the trial court erred when it held that the 1st respondent had constitutional immunity from suits relating to his exercise of the powers vested in him under section 188(5) of the 1999 Constitution. (Pp. 578, paras. A-C, 618, paras. G-H)

4. *On Parties to an action removal from office of a Governor of a State -*

A Governor sworn in on the removal of his predecessor from office under section 188 of the 1999 Constitution, can be joined as a nominal party to a suit challenging the removal of his predecessor from office. In the instant case, the trial court erred when it held that the 2nd respondent could not be joined as a party to the appellant's suit on the ground that the 2nd respondent has constitutional immunity from suit under section 308 of the 1999 Constitution. [Adeleke v. Oyo State House of Assembly (2006) 10 NWLR (Pt.987) 50 referred to.] (Pp.578-579 paras. G-A 620, paras. E-F')

Per SAHLAWA, J.C.A. at page 620, paras. B-F:

"There is no iota of doubt that the learned trial Judge was in error by holding that the 2nd respondent was sued in the instant case in his personal capacity. This is so because, it's rather obvious that the 2nd respondent was sued not in his personal but official capacity as a nominal party. He is merely a beneficiary, albeit unwittingly, of removal of the appellant from office as Governor of Bayelsa State, he was not alleged to have in any way participated in or aided the removing of the appellant from office. He was not accused of having committed an offence either. The predicament in which the 2nd respondent found himself in the present case is no more than that of a bank joined in application for a *mareva* injunction. A bank is joined as a nominal party in a *mareva* injunction action so that it may be bound by the order of injunction [to be] made against it. It's trite that parties are bound by the decisions of a court of law. As such, where a court passes a judgment in favour of a party, he can initiate enforcement procedure to obtain the real fruits of the judgment. See *SPDC v. X.M. Federal Ltd.* [2006] 16 NWLR (Pt. 1004) 189 paragraphs E-F. Hence, there is no doubt that the 2nd respondent is a necessary party to the present action.

5. *On Duty of court to prevent infringement of the Constitution -*

The court is the primary custodian of the constitution. It must therefore guard jealously all the provisions of Constitution and cannot close its eyes to the infringement of the Constitution. Consequently, if any arm of the government, or legislature acts unconstitutionally, the court itself acts unconstitutionally, the court has inherent power under section 6(6)(a)(b) of the 1999 Constitution to intervene. (P. 577, paras. C-D)

6. *On Duty of court determining Constitutional issue -*

When a constitutional issue is present before a court of record, the same should not be lightly treated. In the instant case, the in constitutional duty to determine which raised the issue of an alleged non-compliance with section 188(5) and (6) of the 1999 Constitution in the process that culminated in the removal of the appellant from office as Governor of Bayelsa State [*Yusufu v. Obasanjo* (2003) 16 NWLR (Pt. 847) 532 referred to. (P.583, paras. F-G

7. On Duty on court when interpreting constitutional provisions -

When the court interprets a provision of the Constitution, it has a duty to ensure that the intentions of the Constitution are preserved. [*Abaribe v. Speaker, Abia State House* (2002) NWLR (Pt. 788) 466 referred to] (Pt.572, para. H)

8. *On Extent of powers of Court of appeal under section 16 of the Court of Appeal Act-*

By virtue of section 16 of the Court of Appeal Act, the court of Appeal has power to do what the trial court ought to have done. That is to say, the court of appeal can make an order or give such judgment which the trial court ought to have made or given. However, the provisions of the section does not empower the Court of Appeal to take oral evidence as if it is trial court. Consequently, the section cannot be invoked where it is necessary to adduce evidence in support of the facts in issue in a suit as the instance case where the appellant is required to adduce evidence in support of the averments in his pleading. In the circumstance, the Court of Appeal cannot invoke its power under section 16 of the Court of Appeal Act.[*Ndoma-Egba v. Gov. of Cross River State* (1991) 4 NWLR (Pt. 188) 773; *Nteogwuija v. Ikuru* (1998) 10 NWLR (Pt. 569) 267; *U.B.N. Plc v. Sparking Breweries Ltd.* (1997) 3 NWLR (Pt. 1013) 146 referred to; *Adeleke v. Oyo State House of Assembly* (2006) 16 NWLR (Pt. 1006) 608; *Balonwu v. Obi* (2007) 5 NWLR (Pt. 1028) 488 referred to, explained and distinguished.](Pp. 582, paras.A-D,585-586, paras. H-C; 589, paras. A-D, 590, para. C)

Per RHODES-VIVOUR, J.C.A. at pages 589-590, paras. G-C

Can this court convert a Statement of claim to an originating summons and proceed to hear the matter under the powers of vested in this court by the provisions of section 16 of the Court of Appeal Act, 1976.

Apart from the fact that the option would entail taking over the plaintiff's case, it would be impossible to make a pronouncement on the very weighty allegations to wit: denial of fair hearing, breach of impeachment procedure, objection to membership of the panel; without hearing evidence in proof of the truth of these allegations. My lords the case of *Adeleke v. Oyo State House of Assembly* (supra). The *Ladofa* case, and *Hon. Mike Balonsu 5 Ors v. Mr. Peter Obi & Anor* (supra) are similar with this case in that they are all on the issue of the removal of the Governor of a State, but that is where the similarity ends.

In both cases, the originating process was originating summons supported by affidavit. There is no need to adduce evidence.

In this case, the originating process is a writ of summons supported by the claim. Evidence must be led in support of the Statement claim.

Section 16 of the court of Appeal Act, 1976 cannot be invoked where it is necessary to adduce evidence in support of pleaded facts.”

9. *On limits of powers of Court of Appeal under section 16 of the Court of Appeal Act –*

Section 16 of the Court of Appeal Act is neither a carte blanche nor a blank cheque for the exercise of the power of the Court of Appeal. [*Oyebadejo v. Ofaniyi* (2000) 5 NWLR(Pt. 657) 485 referred to.] (P. 622, para. D)

10. *On when court is competent –*

Before a court can exercise jurisdiction in respect of any matter, the following conditions must exist:

- a) The court must be properly constituted by the right members of the bench and no member must be disqualified for one reason or the other;
- b) The subject matter of the case must be within the jurisdiction of the court and there must be no feature in the case which prevents the court from exercising its jurisdiction; and
- c) The case must come before the court by due process of any law and upon fulfillment of any condition precedent to the exercise of jurisdiction.

[*Madukofu v. Nkemdilim* (1962) 2 SCNLR 341; *Western Steel Works Ltd. v. Iron and Steel Workers Union (No. 1)* (1986) 3 NWLR (Pt. 30) 617 referred to.] (Pp. 594, paras. B-D, 613, paras. C-D)

11. *On fundamental nature of issue of jurisdiction of court –*

The issue of jurisdiction of court in adjudicating on the claims of a party is very fundamental under Nigerian jurisprudence. (P.572, paras. G)

12. *On duty on court to guard its jurisdiction –*

A court of law has a duty to cherish and guard its jurisdiction jealously and courageously. Consequently, it ought not to be cowed by an ouster clause in a statute. (P. 617, paras. G)

13. *On Interpretation of statute ousting jurisdiction of court or restricting accessing to court –*

Any statute that seeks to oust the jurisdiction of the court or restrict the right of access to court must be strictly construed.[*Bello v. Diocesan Synod of Lagos* (1973) 1 All NLR (Pt.1) 247; *Peenock Investment Ltd. v. Hotel Presidential Ltd.* (1983) 4 NCLR 122; *Din v. A.-G. Federation* (1988) 4 NWLR (Pt. 87) at 147; *Dasuki v. Muazu* (2002) 16 NWLR (Pt. 793) 319 referred to.] (P.594, paras. E)

14. *On when Federal High Court has exclusive jurisdiction over matters involving Federal Government and its agencies –*

Section 251 of the 1999 Constitution, which provides that actions against the Federal Government or its agencies are only maintainable in the Federal Government or its agency is the principal or only party sued. So, where the Federal Government or its agency is only a defendant among numerous defenses being used in respect of matter over which the State High Court is vested with jurisdiction; the suit is properly constituted as to parties. In the instant case, there were en other defendants apart from the 11th respondent who is an agent of the Federal Government, and the trial court was the competent court with jurisdiction in respect of the subject matter of the suit. In the circumstance, the 11th respondent was properly sued at the trial court. (P.579, paras. B-F)

16. On Bindingness of relief sought by appellant -

An appellant is bound by the relief he seeks in his notice and grounds of appeal. (P.581, para. F)

17. On Altitude of Court of Appeal to amended notice of appeal filed after appeal had been heard -Where an appellant is granted leave to amend a notice of appeal before an appeal is heard, but files the amended notice of appeal after the appeal has been heard and reserved for judgment, the amended notice of appeal filed would be discountenanced by the court. In the instant case, the Court of Appeal discountenanced the appellant's amended notice of appeal filed after the appeal had been heard. (P.581. paras. D-E)

18. On How to frame grounds of appeal -By virtue of Order 3 rule 2(2) and (3) of the Court of Appeal Rules, if a ground of appeal alleges misdirection or error in law, the particulars and the nature of the misdirection or error shall be clearly Stated. Furthermore, a notice of appeal shall set forth concisely and under distinct heads the grounds upon which the appellant intends to rely at the hearing of the appeal without any argument or narrative, and shall be numbered consecutively. In the instant case, the appellant's grounds of appeal related to the ruling of the trial court. In the circumstance, the preliminary objection of the respondents to the same was baseless. (P.581, paras. F-H)

19. On Need for issues for determination to arise from grounds of appeal - An issue for determination must relate to the grounds of appeal filed. Thus, any issue for determination, which is not related or has no reference to any ground of appeal goes to no issue and ought to be discountenanced by the court. [Uzoewulu v. Ezeaka (2000) 14 NWLR (Pt.688) 629 referred to.] (P.610, para. E)

20. On whether failure of counsel to indicate grounds of appeal to which issues are related is fatal - While it is desirable for an appellant to indicate the grounds of appeal to which an issue for determination in his brief of argument is related, there is no legal sanction that an appellant's brief of argument will be fatally flawed if an appellant fails to do so as in the instant case. [Adegoke v. Savannah Bank (Unreported) suit No CA/I7399/96 referred to] (P.578, paras. D-H)

21. On whom lies onus of proof in civil cases -A plaintiff has the burden to prove the reliefs sought in his Statement of claim in order to obtain judgment. (P.581, para. F)

22. On Nature of and distinction between depositions in affidavit and averments in pleadings

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A deposition in an affidavit in support of originating summons is evidence. On the other hand, an averment in a pleading is not evidence but mere allegation that becomes evidence, only after the court hears witnesses in proof thereof. (P.589, paras. F-G)

23. On flow trial on pleadings is conducted - Where a trial is conducted on the basis of pleadings, all relevant allegations in the pleading must be proved by evidence and such evidence must be in line with the pleading. In other words, the plaintiff has to prove his case as pleaded, and must prove the truth of the contents of the paragraph of the pleading Nigerian Weekly Law Reports in support of the reliefs sought in order to obtain judgment. If the plaintiff fails to prove his case on the pleading to the satisfaction of the court, his case crumbles. In the instant case, the appellant who asserted that he was denied fair hearing in the process that culminated in his removal from the office of Governor has the duty to lead evidence to prove his assertions, otherwise the assertions would remain as mere allegations. (P.588, paras. C-E)

On When appropriate to commence action by originating summons and when inappropriate -Originating summons is appropriate in commencing a suit where there is no dispute on questions of fact or the likelihood of such dispute. Where it is obvious from the State of the affidavits that there would be dispute in the proceedings, originating summons is no longer appropriate. In such circumstance, a writ of summons ought to be filed. [Osugwn v. Emetic (1998) 12 NWLR (Pt. 579) 640; N.B.N. lid. v. Alakija (1978) 9-10 SC 59; Ajagunbade HI v. AdeyeMi II (2001) 16 NWLR (Pt. 738) 126; Bahnwu v. Obi (2007) 5 NWLR (Pt.1028) 488 referred to.] (Pp. 589, paras. D-F, 622, paras. G-H)

25. On Legislative list for Police mailers -Police matters fall under the Exclusive Legislative List No. 45 in the 2nd Schedule to the 1999 Constitution. (P. 579, para. B)

26. On Whether Commissioner of Police of a State is an agent of the Federal Government of Nigeria -The powers of the Governor of a State to issue lawful directives to the State Commissioner of Police does not whittle down the status of the latter's office as a Federal agent, because a State Commissioner of Police is subject to the directives of the Governor of a State, who is the Chief Security Officer of a State, for only security purposes. Furthermore, by virtue of the proviso to section 215(4) of the 1999 Constitution, a State Commissioner of Police may before carrying out directions given to him by the Governor of a State, request that the matter be referred to the President of the Federation of Nigeria or the appropriate Minister for further directions.

27. On Meaning and application of "Audi alteram partem" - The maxim: "Audi alteram partem" hear the oilier side. It requires that the courts and am panel must ensure fair hearing to all persons that come before them. [L.P.D.C. v. Fawehinmi (1985) 2 NWL (Pt. 7) 300; Akande v. State (1988) 3 NWLR (Pt. 85) 68 referred to.] (P.588, paras. F-G)

DISSENTING OPINIONS OF SAULAWA, J.C.A.

1. On Power of Court of Appeal to determine merit of Substantive suit after deciding interlocutory appeal -Per SAULAWA, J.C.A. at page 623, paras. A-F: "It was the contention of the learned senior counsel to the appellant that the application of section 16 of the Court of Appeal Act depends on the circumstances of each case. He Stated that the features in

Ladofa's and Obi's cases (supra) were also available in the instant case. That, the Statement of claim was filed since on 17/12/05 but the respondents failed to file their Statement of defence. He postulated that the relevant issue in (his case is that of fair hearing. I uphold the contention of the learned senior-counsel to the appellant that the issue is that of fair hearing. It's common knowledge that the respondents, right from the inception of the. Case in the lower court employed all sorts of tactic at their disposal to deliberately frustrate the trial and the hearing of the appeal, lawyers were surreptitiously changed in the eleventh hour even to the visible embarrassment of the various learned counsel to the respondents. I think this court has a duty not to allow the respondents" to overreach themselves. They certainly cannot as the popular adage goes, eat their cake and have it.

Considering the nature and circumstances surrounding this case, time is obviously of the essence. The *res* i.e. the term of office of Governor, the appellant has been struggling to regain after his impeachment and removal from that office, is bound to be extinguished by the 29th day of May, 2007, that is just a period of only eleven weeks from today. Thus, remitting this case back to the Bayelsa State High Court for trial by another Judge would have rendered the *res* of the subject matter of the suit nugatory. See *Inakofu v. Ladofa* (supra) at 670 paras. A-D Thus, I hold that this court has a duty to instantly determine the case of the parties on the basis of the appellant's Statement of claim and exhibit A."

2. On whether the appellant proved the claim made before the trial court -

Per SAULAWA, J.C.A. at pages 623-624, paras. F-H

"It's trite that he who claims must prove his claim, otherwise he will not be entitled to judgment in his favour. He must also rely on the strength of the case thereof and not on' the weakness of the defence. The appellant has insisted that by the Statement of claim, the verifying affidavit thereof, and exhibit A, there is no need to call for any witness or evidence. However, having accorded a critical but rather dispassionate consideration upon the Statement of claim, the verifying affidavit and *vis-a-vis* exhibit A, I am unable to appreciate, let alone uphold the learned senior counsel's contention that the appellant has established a case of breach of fair hearing. There is no doubt, that regard to the nature of the reliefs sought which are declaratory, it is fallacious for the appellant to merely rely on a purported admission. This is obviously so because, declaratory reliefs are not granted merely as a matter of course. The claimant has an onerous duty to proffer evidence in proof of his claim. See *Bello r. Eweka* (supra) at 102-103. This, the appellant has failed to do. What's more, the impeachment and subsequent removal of the appellant from office as Governor of Bayelsa State was an official act which is and ought to be presumed to be legal and constitutional unless otherwise proved by cogent and reliable evidence. This, the appellant has definitely failed to do. See section 150(1) of the Evidence Act supra thus: ' 150(1) when any judicial or official act is shown to have been done in a manner substantially regular, it is presumed that formal requisites for its validity were complied with' See *Ogbuayinya v. Okudo* (No.2) (1990) 4 NWLR (part. 146)551.

It is my view that on the face of exhibit A, there is nothing to establish that the appellant was denied fair hearing. It was not proved that the appellant was not invited. The most credible evidence that could have established the fact of whether or not the investigation panel had sat

was the record of silting proceedings thereof which was never exhibited. It is rather evident as per page 2 of exhibit A that the panel did indeed sit contrary to the appellant's allegation in paragraph 13 of the Statement of claim thereof. It is also evident as per page 4 of exhibit A, that the appellant did as a matter of fact file his defence. The sum total of the above analysis is that the allegation that the appellant was denied fair hearing was not established. On the face of exhibit A he chose to desperately, albeit perously, rely upon. I uphold the contention of the respondents' learned senior counsel that the provisions of section 149(d) of the Evidence Act (supra) comes into play against the appellant. In the light of the above postulations, I have come to the most inevitable conclusion that the appellant has failed to prove the allegation of breach of fair hearing. His case therefore fails. Consequently, I hereby without any further hesitation dismisses the suit in its entirety."

3. On whether the appellant's amended notice of appeal was competent -

Per SALAJI WA, J.C.A. at pages 610-612,622, paras. H-I), D-F:

"It's a common knowledge that as at the time of the hearing of this appeal on 22/02/07, the appellant had not filed any application for leave to amend the original grounds of appeal filed along with the notice of appeal at the lower court on 24/4/06. The appeal was thus argued on those grounds alone. However, our attention had been drawn to an "AMENDED NOTICE OEAPPEAL BROUGHT PURSUANT TO ORDER OF COURT DATED 8 III FEBRUARY 2007 dated 09/02/2007 but filed on 27/02/2007... The pertinent question which ought to be posed at this point in time is whether the filing of the said amended notice of appeal is valid in law in spite of the fact that it was filed after the appeal had been heard and reserved for judgment. I think the answer to that pertinent question is not farfetched. It's obvious that the order of the court of OS/02/07 granting leave to the appellant to file the amended notice of appeal regarding the relief set out at page 118 of the record in question did not lie down the appellant (o any time limit within which to file the application. I have deemed it expedient to reproduce, the said Order thus:

'On a calm view of the facts and circumstances in this case and taking in to consideration the affidavit in support of the application, and documents exhibited, my obvious conclusion is to allow the application of the appellant it is so allowed. I make no Order as to costs.'

In my view, the fact that the amended notice of appeal was filed after the hearing of the appeal has not amounted to a denial of fair hearing to the respondents.

The amended relief contained in the amended notice of appeal in question is exactly the same with the one incorporated in the prayers of the appellant's motion on notice. Thus, there is no basis whatsoever for the respondents claim to have been taken by surprise, by the filing of the amended notice of appeal in the eleventh hour. It's trite that justice demands that a party to a suit must be accorded an ample opportunity to present his case....

I have alluded earlier to the fact that the amended notice of appeal filed on 26/02/07 was in compliance with the earlier order of this court of 08/02/07 granting leave to the appellant to do so. He was not tied down to any time limit within which to comply with that order. Thus,

in my view, the fact that it was filed before the delivery of judgment makes it imperative for this court to act there upon."

4. On Exclusive jurisdiction of Federal High Court over matters involving Federal Government and its agencies -

Per SAULAWA, J.C.A. at pages 621-622, paras. D-B: "In my considered view, the reliefs being sought by the appellant against the 11th respondent, especially as per paragraphs [18] [20] and [21] of the Statement of claim relate to allegations of 'arrest, 'detention', 'restraints' and "constraints" that most undoubtedly fall within the ambit of the exercise of the executive action or power of the 11th respondent. These powers are exercised by the Police including the 11th respondent, under the provisions of sections 24 and 29 of the Police Act, Cap 359, Laws of the Federation of Nigeria, 1990. See *LITE (Nig.) Ltd v. Ukpabia* (2000) 8 NWLR (Pt. 670) 570 at 579 per FABIYI, JCA thus:

'It should be Stated that if the Police arrest and detain a suspect such is an exercise of executive action as imbued by the Police Act. In contra distinction if the Police dismiss one of their men in line with their Regulation, such can be described an administrative action.'

See also sections 214 and 215 of the 1999 Constitution and item No. 45 on the exclusive list second schedule part 1 thereof. Thus, I have no hesitation whatsoever in upholding the argument of the learned senior counsel to the 4th 10th respondent, Mr. Yusuf Ali SAN, that the 11th respondent the learned trial Judge on the above and other plethora of authorities and the law was patently right in declining jurisdiction upon the 11th respondent in the circumstances of the case. The answer to issue No. 4 is therefore most inevitably in the affirmative. And I so hold. In the light of the above postulations, I am of the considered view that the appeal succeeds regarding the 1st -10th respondents and it's hereby allowed. Consequent', the ruling of the learned trial judge is hereby set aside in respect of the 1st- 10th respondents. Also for the reasons adumbrated above, I hereby' hold that the appeal fails in respect of the 11th respondent and its accordingly hereby dismissed. The aspect of the ruling of the trial court regarding the 11th respondent is thus hereby affirmed."

Nigerian Cases Referred to in the Judgment:

Abaribe v. Speaker, Abia State House of Assembly (2002) 14 NWLR (Pt.788) 466

Adegbenro v. Akinlofa (1963) 1 All NLR 299

Adegoke Motors Ltd. v. Adesanya (1989) 3 NWLR (Pt.109) 250"

Adeleke v. Oyo State House of Assembly (2006) 10 NWLR (Pt.987) 50

Adeleke v. Oyo State House of Assembly (2006) 16 NWLR (Pt. 1006) 608

Adeyemi v. Ikeofuwa (1993) 8 NWLR (Pt.309) 27

Ajagunbade v. Adeyelu 11 (2001) 16 NWLR (Pt.738) 126

Adeyemi v. Opeyori (1976) 9-10 SC 31

Akande v. State (1988) 3 NWLR (Pt. 85) 68

Akhiwu v. The Principal Lotteries Officer Midwestern State (1972) All NLR 229

Anason Ibeto Int'l Limited v. Vim ex Imp-Exp (2001) 10 NWLR (Pt.720)231
Aqua Ltd. v. Ondo State Sports Council (1988) 4 NWLR (Pt.91) 622
Balonwu v. Obi (2007) 5 NWLR (Pt.1028) 488
Bella v. Diocesan Synod of Logos (1973) 1 All NLR (Pt. 1) 247
Bello v. Ewekd (1981)1 SC 101
Kwnik Motors Ltd. v. We ma Bank Ltd. (1983) 1 SCNLR 296
Comm. for Works, Benue State v. Devcon Construction Coy. Ltd. (1988) 3 NWLR (Pt.83) 407
Commerce Assurance Lid. v. Alli (1986) 3 NWLR (Pt. 9) 404
Ddlhatu v. Turaki (2003) 15 NWLR (Pt. 843) 310
Dasuki u Mua-u (2002) 16 NWLR (Pt. 793) 319
Din v. A.-G., Fed. (1988) 4 NWLR (Pt. 87) 147
Ejowhomu v. Edok-EterMandilas Ltd. (1986) 5 NWLR (Pt. 39) 1
Ekpo v. Calabar Local Government (1993) 3 NWLR (Pt. 281) 324
Enekwe v. LM.B. Ltd. (2006) 19 NWLR (Pt. 1013) 146
Falofa v. Union Bank of Nigeria Pie (2005) 7 NWLR (Pt.924)405
Govt. of Gondofa State v. Turkur (1989) 4 NWLR (Pt. 117) 592
GTB CIB plc v. Tabik Investments (2005) 13 WLR 37
Igboho L.G. v. Boundary Commissioner (1988) 1 NWLR (Pt. 69)189
Jadesimi v. Okotie-Eboh (No. 2) (1986) 1 NWLR (Pt. 16) 264
Jimoh v. Ofawoye (2003) 10 NWLR (Pt. 828)307
Kode v. Yussuf (2001)4 NWLR (Pt. 703) 392
Koiki v. Magnusson (1999) NWLR 8 NWLR (Pt.615) 492
Kokoro-Owo v. Ogimliambi (1993)8 NWLR (Pt.313)627
L.I.D.C. v. Fawehinmi (1985) 2 NWLR (Pt.7) 300
Madukofn v. Nkeimlilim (1962) 2 SCNLR 341
INEC v. Musa (2003) 3 NWLR (Pt.806) 72
Musa v. Hamza (1982)3 NCLR 229
N.B.N. Ltd. v. Alakija (1978) 9-10 SC 59
N.I.P.C. v. Thomson Organisation (1969) All NLR 138
Ndoma-Egba v. Gov., Cross River State (1991) 4 NWLR (Pt. 188) 773
NEPA v. Edegbem (2002) 18 NWLR (Pt.798) 79
Nwabueze v. Okoye (1988) 4 NWLR (Pt.91) 664

Nteogwuija v. Ikuru (1998) 10 NWLR (Pt. 569) 267
Okoya v. Santali (1990) 2 NWLR (Pt. 130) 172
Ovebadejo v. Ofaniyi (2000) 5 NWLR (Pt.657) 485
Osuagwu v. Emezie (1998) 12 NWLR (Pt.579) 640
Oyediran v. Alebiosu I (1992) 6 NWLR (Pt.249) 550
Oyeyipo v. Oyinloye (1987) 1 NWLR (Pt.50) 356
Peenock Investment Ltd. V Hotel Presidential Ltd. (1983) 4 NCLR 122
Rossek v. A.C.B. Ltd. (1993) 8 NWLR (Pt.3 12) 382
Salami v. Chairman. L.E.D.B. (1989) 5 NWLR (Pt.123) 539
Sodipo v. Lemminkainen Oy (No.2) (1986) 1 NWLR (Pt. 15) 220
SPDC V. X.M. Federal Ltd. (2006) 16 NWLR (Pt. 1004) 189
Soyanwo v. Akinyemi (2001) 8 NWLR (Pt.7 14) 95
Tinubu v. I. M. B. Securities Plc (2001) 16 NWLR (Pt.740) 670
Tukur v. Government of Gondofa State (1989) 4 NWLR (Pt. 117)517
Union Bank Ltd. v. Fajobe Foods (1994)5 NWLR (Pt. 344) 345
Union Bank of Nigeria Plc. v. Sparkling Breweries Ltd. (1997) 3 NWLR (Pt. 491)29
U.T.B. (Nig.) Ltd. v. Ukpabia (2000) 8 NWLR (Pt.670) 570
Uzoewulu v. Ezeaka (2000) 14 NWLR (Pt.688) 629
Western Steel Works Ltd. v. Iron & Steel Workers Union (1986) 3 NWLR (Pt.30)617
Yusufu v. Obasanjo (2003) 16 NWLR (Pt.847) 532
Zangina v. Comm for Works A Housing, Borno State (2001) 9 NWLR (Pt.718) 460

Foreign Case Referred to in the Judgment:

Taylor r. National Assistance Board (1957) 1 All ER 183

Nigerian Statutes Referred to in the Judgment:

Constitution of Federal Republic of Nigeria, 1979, S. 170(2) (b), (5), (6) and (10)

Constitution of the Federal Republic of Nigeria. 1999, Ss. 1(2), 6(6) (a) & (b), 188; 198(10), 251. 308(1) (a) Court of Appeal Act. 1976, S. 16 Court of Appeal Rules, 2002, O. 6 r. 3. O. 3(1) Evidence Act, Cap. 112, Laws of the Federation of Nigeria, 1990, Ss. 111. 150

Exclusive Legislative list in the Second Schedule to the 1999 Constitution, Item 45 Kwara State Local Government laws, 1999. S. 26, (1-9) Local Government (Basic Constitutional and Transitional Provisions) Decree, No. 15, 1999, S.I 1

Appeal: This was an appeal against the ruling of the High Court which upheld the respondents' preliminary objection to its jurisdiction and struck out the appellant's suit. The

Court of Appeal, in a majority decision of 4 to 1, allowed the appeal in part and remitted the case for trial.

History of the Case:

Court of Appeal:

Division of the Court of Appeal to which the appeal was brought: Court of Appeal. Port Harcourt

Names of Justices that sat on the appeal: Suleiman Galadima, J.C.A. (Presided and Read the Majority Judgment); Istifanus Thomas. J.C.A.; Bode Rhodes Vivour, J.C.A.; George Ofadeinde Shoremi, J.C.A.;

Ibrahim Mohammed Musa Saulawa. J.C.A. (Dissented)

Appeal No.: CA/PH/1 24/2006

Date of Judgment: Thursday. 8th March. 2007

Names of Counsel: Prof. A. B. Kasunmn, SAN (with him, Chief T. I. O. Okpoko. SAN: Chief Wofe Ofanipekun, SAN; Chief Mike Ozekhome Esq.. Chief Mike Okoye; Peace Akpabio (Mrs); Orome Okodiya, Esq.; Tunde Osadare, Esq. Eubena Amedu, Esq. Nkeiruka Okorie (Miss); Ronke Ofadimeji (Miss); Amede Opula (Miss) and Sonny Abere, Esq.) -for the Appellant. Anthony George Okofi (SAN) (with him, Abiodun A. Ofaleru, Esq. Patrick Opara, Esq., and P.O. Ogun. Esq.) -for 1st and 3rd Respondents Tayo Oyetibo, SAN (with him, Ofaniran Obele, Esq.) - for the 2nd Respondent Yusuf O. Ali, SAN (with him. T. Ahmed. Esq. and Y. Dauda, Esq.) - for the 4th-10th Respondents P.O. Affen, Esq. (with him, P.O. Omemu Esq. S.B. Egberipou, Esq. and E.K. Bribena, Esq. -for the 11th

Respondent

High Court:

Name of the High Court: High Court of Bayelsa State, Yenagoa Name of the Judge: Akpomiemie, .J. Suit No.: YHC/173/2005 Date of Ruling: Friday, Id"1 December, 2005

Counsel:

Prof. A. B. Kasunmu, SAN (with him, Chief T. O. Okpoko, SAN; Chief Wofe Ofanipekun, SAN; Chief Mike Ozekhome Esq., Chief Mike Okoye; Peace Akpabio (Mrs); Orome Okodiya, Esq; Tunde Osadare, Esq.; Eubena Amedu. Esq.; Nkeiruka Okorie (Miss); Ronke Ofadimeji (Miss); Amede Opula (Miss) and Sonny Abere, Esq.) -for the appellant.

Anthony George Okofi (SAN) with him, Abiodun A. Ofaleru, Esq., Patrick Opara, Esq., and P.O. Ogun, Esq.) -for 1st and 3rd Respondents; Tayo Oyelibo, SAN (with him, Ofaniran Obele, Esq.) -for the 2nd Respondents; Yusuf O. Ali, SAN (with him, T. Ahmed, Esq. and Y. Dauda, Esq.) - for the 4th-10th Respondents; P.O. Affen, Esq (with him, P.O. Omemu Esq., S.B. Egberipou, Esq. and E.K. Bribena, Esq. -for the II'1' Respondent;

GALADIMA, J.C.A. (Delivering the Leading Judgment): The plaintiff before the lower court now appellant in this appeal commenced his action by a writ of summons and Statement of claim against the defendants now the respondents jointly and severally before

the High Court of Bayelsa State on 6/12/2005 in suit No. YHC/173/2005. He sought for the following declarations and reliefs:

- "1. A DECLARATION that the 1st defendant is constitutionally obliged to appoint only such persons as are not disqualified under section 188 (5) of the Constitution of the Federal Republic of Nigeria, 1999 as members of the panel to investigate allegations of impeachable offences leveled against the plaintiff as contained in the impeachment notice dated 18th November, 2005.
2. A DECLARATION that the 1st defendant has failed in the performance by him of his constitutional duty under section 188(5) of the 1999 Constitution by his appointment of the 4th, 5th, and/or 8th defendants as members of the investigation Panel inaugurated by the 1st defendant to investigate the allegations contained in the impeachment notice dated 18th November, 2005.
3. A DECLARATION that the subjection of the plaintiff to house arrest at the behest and direction of the 1st defendant from 5th December, 2005 till midday on 9th December, 2005 is in violation of the plaintiff's constitutional rights to freedom of movement and constitutional immunity afforded him under sections 41 and 308 of the 1999 Constitution.
4. A DECLARATION that the failure and/or refusal of the impeachment investigation panel constituted by the 1st defendant, and comprising 4th-10th defendants to commence sittings and invite the plaintiff to defend himself either personally or through his counsel amounts to abandonment of their mandatory constitutional duties under section 188(7) of the Constitution of the Federal Republic of Nigeria, 1999.
5. A DECLARATION that the 2nd defendant cannot be lawfully approved by the Bayelsa State House of Assembly and sworn-in by 1st defendant as the Substantive Governor of Bayelsa State unless and until the plaintiff exhausts his term, voluntarily resigns, or is otherwise impeached in accordance with the provisions of section 188 of the 1999 Constitution.
6. A DECLARATION that the forceful removal of plaintiff from his office as Governor of Bayelsa State on the 9th day of December, 2005 by the 11th defendant and his armed operatives, as well as the plaintiff's subsequent arrest and continued detention amounts to an unconstitutional takeover of the Government of Bayelsa State through a Police-aided civilian coup contrary to section 1(2) of the Constitution of the Federal Republic of Nigeria, 1999.
7. In alternative to prayer 6 A DECLARATION that the purported report of the panel headed by 4th defendant upon which report the purported impeachment of the plaintiff was carried without notice to or hearing from the plaintiff, and which report was submitted to the 3rd defendant on or about 9th December, 2005 is illegal, unconstitutional, null, void and of no effect whatsoever.
8. A DECLARATION that the office of the Governor of Bayelsa State, and Deputy Governor of Bayelsa State into which the plaintiff and 2nd defendant were respectively sworn in on 29th May, 2003 as having been duly elected for a four year term ending on 28th May, 2007 have

not become vacant to warrant the swearing in of new incumbents in place of the plaintiff and 2nd defendant as Governor and Deputy Governor of Bayelsa State respectively.

9. AN ORDER setting aside the purported swearing in by the 1st defendant of the 2nd defendant as the Substantive Governor of Bayelsa, on the 12th day of December 2005 in place of the plaintiff who remains the legitimate and duly elected Governor of Bayelsa State pursuant to the gubernatorial election held on the 19th day of April, 2003.

10. AN ORDER OF INJUNCTION restraining the 2nd defendant from parading himself as or acting in the capacity of the substantive Governor of Bayelsa State in place of the plaintiff to whom 2nd defendant is the Deputy Governor.

11. AN ORDER OF INJUNCTION restraining the 1st, 3rd and 11th defendants from according any further recognition to the 2nd defendant as the substantive Governor of Bayelsa State in place of the plaintiff to whom 2nd defendant is the Deputy Governor.

12. AN ORDER directing the 1st defendant to reconstitute the Investigation Panel which he inaugurated on 5th December, 2005 by removing therefrom the 4th, 5th and 8th defendants, who are disqualified under section 188(5) of the 1999 Constitution from acting thereon by reason of their political affiliations.

13. AN ORDER OF MANDATORY INJUNCTION directing the Investigation Panel inaugurated or to be re-constituted by the 1st defendant in respect of the allegation of impeachable offences contained in a notice dated 18th November, 2005 against plaintiff, to resume and or commence sitting and afford the plaintiff an opportunity to defend himself, whether personally or through a counsel of his choice as enjoined in section 188(6) of the Constitution of the Federal Republic of Nigeria, 1999.

14. Cost of this action. "The writ of summons was supported by a verifying affidavit of 8 paragraphs.

All the respondents after entering appearance filed notice of preliminary objections. The grounds on which the various objections were based were, Stated as follows:

"1. That the court lacked jurisdiction to entertain the action because of the provisions of section 1.88 (10) of the Constitution of the Federal Republic of Nigeria, 1999.

2. That the 2nd defendant was immuned from civil proceedings by virtue of the provision of section 308 (1) (a) Of the Constitution and consequently the court Lacked jurisdiction to entertain the suit as against him.

3. That the 1st defendant being the Chief Judge of Bayelsa State enjoyed immunity from civil proceedings in respect of the performance of the duty of appointing members of the panel; and

4. That the 11st defendant being the Commissioner of Police of Bayelsa State is a Federal agent and 562 Nigerian Weekly Law Reports 21 May 2007 (Galadima, J.C.A.)

(10) Of the Constitution in declining jurisdiction to hear the case of the appellant having regard to the peculiar facts and circumstances of this case and the way it was initiated.

2. Whether the learned trial court having regard to the facts and circumstances of this case, was not correct in the view it took on the invocation of the provisions of section 308 of the 1999 Constitution in favour of the 2nd respondent.
3. Whether the learned trial Judge was not right to have invoked the provisions of section 251 of the 1999 Constitution to decline jurisdiction in adjudicating on the 11th respondent which is a Federal Agency.

The 11th respondent on the oilier hand formulated THREE issues for determination, in the following Terms:

1. Whether the lower court was right in holding that the court lacked jurisdiction to adjudicate on the appellant's claims having regard to the mandatory provisions of 188 (10) of the Constitution of the Federal Republic of Nigeria, 1999: Grounds I, 2, 3, 4 and 6."
2. Whether having regard to the provisions of section 308 (I) of the 1999 Constitution of the Federal Republic of Nigeria the lower court was right in holding that the 2nd respondent ought not to be joined as a party in the suit: Ground 7.
3. Whether the lower court was right in holding that the 1st respondent is an agent/agency of the Federal Government and the High Court of Bayelsa State consequently lacked jurisdiction in respect of the appellant's claims against him. Ground 9."

On 22/2/2007, this appeal came up for hearing, at long last, after hurdles and labyrinth of intrigues were placed on the path of the court to hear and determine this appeal expeditiously, lime being of the essence. Series of motions were filed regularly. Counsel for the respondents were changed and debriefed at shortest notice even as they appeared in the court room. However, this court patiently and cautiously was able to weather the storm and trod through complicated network of these difficult and winding passages. The Appeal was heard. I .earned senior eon use I Professor A. 15. Kasunmu, SAN leading, oilier team of senior counsel identified appellant's brief of argument filed on 19/7/2006. And the reply brief filed on 1/11/ 2006 which he said was his response to the briefs filed on behalf of the learned senior counsel for the 1st respondent. Chief A.S. Awomofe, SAN who has now withdrawn appearance for 1st, 4th and IInd respondents and Chief Ladi Rotimi Williams, SAN who has now withdrawn appearance, for the 4th-10th respondents. It is contended that the appellant's brief's arc still relevant and applicable to the new briefs of argument filed by the new counsel now engaged by these respondents. He explained that issue No. 1 is tied to grounds 1-6; issue No. 2 is tied to ground 7; issue No. 3 to ground 8, and issue No. 4 to ground 9. He adopted both briefs.

He argued issues 1 and 2 together. He referred to paragraphs 6. 8. 11, 12, 13. 14 and 15 of the appellant's Statement of claim and the case of Hon. Abraham Adeleke & 2 Ors. v. Oyo State House (if I Assembly & 17 Ors (2006) 16 NWLR (Pt. 1006) 608 and unreported case of Hon. Mike Haloruru & 5 Ors. v. Mr. Peter Obi (Governor of Anambra State) & Anor. - Appeal No. CA/E/3/2007 delivered on 9/ 2/2007. Now reported in (2007) 5 NWLR (Pt.1028) 488.

Learned senior counsel submitted that the instant case is on all fours with the; two decisions of this court, and the affirmation of the decision of the ADFJLLKE or LADOFA'S case by the Supreme Court. That these cases have answered the questions raised in issue are I and 2.

In the brief, learned senior counsel citing the provisions of S. 188 (10) of the 1999 Constitution submitted that the preceding sections to: subsection 10 of section 188 spelt out what has to be done by the House of Assembly panel set up by the Chief Judge in mailers relating to the impeachment of the Governor or Deputy Governor of a State. That the appellant's case is that the provisions of section 188 (5) and (6) of the Constitution have not been complied with. It is contended that the gravamen of the complaint is that the persons appointed by the Chief Judge ought not have been appointed having regard to the qualification set out in section 188 (5) and secondly that there was no hearing of the allegations contained in the impeachment notice and that the appellant was not invited to defend himself before the investigation panel. Learned senior counsel examined and reviewed the cases of *Balarabe Musa v. Auta Hamza & 6 Ors* (1982) 3 NCLR 229 and *Abaribe v. Speaker, Abia State House of Assembly & Ors* (2002) 14 NWLR (Pt.788) 466 (relied upon by the trial Judge) and submitted that the decision in *Abaribe's case* (supra) is a clear pointer that there are circumstances and situations in which the court would assume jurisdiction notwithstanding, the provision in section 188 of the Constitution. Relying on the case of *Ekpo v. Calabar Local Government* (1993) 3 NWLR (Pt. 281) p. 324, learned senior counsel urged this court to hold that the trial court was in error in declining jurisdiction to entertain the appellant's complaint.

The second issue formulated by the appellant is whether in view of Section 308 of the Constitution, the 2nd respondent who was the Deputy Governor enjoys immunity from legal proceedings. It is submitted that there is nothing in the Statement of claim where any allegation of wrong doing was made against the 2nd respondent. That he was sued merely in his official capacity as a nominal defendant. That the only reason why he is made a party is that he is bound by any judgment made by the court.

On the third issue, learned senior counsel for the appellant submitted that the Chief Judge in exercising the powers vested in him under section 188 (5) of the Constitution was not exercising a judicial function and that his action can be challenged by the persons appointed by him ought not to have been appointed.

On the fourth issue, it is submitted by the learned senior counsel that surely it cannot be the intention of the Constitution that in a case like the instant one, where there are defendants and the State Court is the competent court of jurisdiction in respect of the subject matter and the case the plaintiff has to sue the 10 defendants in the High Court, whilst he has to bring the action against the 11th defendant in the Federal High Court. That that was not the purpose for which section 251 of the Constitution was enacted.

Learned senior counsel has now drawn our attention to exhibit A on which this court order was sought on 8/2/2007 to the effect that the court should exercise its powers to hear and determine the suit as constituted in the High Court of Bayelsa State by construing the said document. He urged us to discountenance an earlier deposition of the 10th respondent that the exhibit was a forgery. He contended that the objection now being raised is belated and afterthought as none of the respondents had raised this allegation when they were served. He submitted that the instant case is a proper case where this court can exercise its powers under section 16 of the (on 11 of Appeal Act to determine the appeal rather than

remitting it to the lower court for determination. He conceded that Adeleke or Ladofa's cases (supra) were commenced by originating summons, but that in none of the case can one find (hat section 16 is only applicable to where action was commenced by originating summons. That the section cannot be foreclosed. He argued that appellant filed and served his writ of summons and Statement of claim on the respondents who only filed memorandum of appearance but failed to file any defence until when lime to file their defence elapsed and nothing was done. When the learned counsel for the 2nd respondent raised an objection to this line of argument proffered by the learned senior counsel, he conceded that since the counsel for the 2nd respondent did not oppose the application of 8/2/2007, he would only be given the opportunity to address the issue. That it was on the strength of this, the court considered appellant's application of 8/2/2007. Continuing his submission, learned senior counsel cited the cases of Jadesimi v. Okotie-Eboh (No. 2) (1986) 1 NWLR (Pt. 16) 264; Okoya v. Santali (1990) 2 NWLR (Pi.131) p. 172 at 207; Union Bank Lid. V. Fnjebe Foods (1994)5 NWLR (Pt. 344) at p. 345. Referring further to exhibit A, learned counsel contended that nothing in that exhibit shows when hearing notice was served on the appellant. He was neither heard nor given opportunity of getting a counsel of his choice to represent him. Referring to page 2 of the Report, learned senior counsel has contended that the decision to impeach the appellant was based on the interim report of the panel. That on the face of exhibit A, it is clear that there is a breach of the right of the appellant to warrant setting aside his impeachment based p on the documentary evidence before this court. Reference was made to the case of Adeyemi Ikeohnvu (1993) 8 NWLR (Pt.309) 27 at 41. That from the decided cases, the court should make consequential order reinstating the appellant as the Governor of Bayelsa State.

Learned senior counsel for the 1st and 3rd respondents referred to their brief filed on 22/2/2007. Having adopted same, he raised a preliminary point which he extracted from a counter-affidavit of Elder Kuro George, a Clerk of the Bayelsa State 1 louse of Assembly in which he alleged that exhibit A which did not emanate from his office, and bears no signature of his, was a forgery. He denied also, that he certified exhibit BYHA 1. Learned senior counsel has therefore asked for full investigation into this document that was criminally introduced. Learned senior counsel has submitted that since this action was not commenced by originating summons, therefore the cases of ADLLEKL E and OBI (supra) do not apply to the fads of the present case. He contended that the cases of BALARABE MUSA and ABARIBL still remain good authorities to followed.

Learned senior counsel, however, made some submissions from the brief of argument. He argued the three issues presented for determination, one after the other. On the first issue, it is the submission of the 1st and 3rd respondents that having regard to the provisions of section 188 (10) of the 1999 Constitution, the lower court has no jurisdiction to hear and determine the case of the appellant. It is submitted that the issue of jurisdiction of courts in adjudicating on the claims of a party is very fundamental to our jurisprudence. That it has been decided on a plethora of cases that it is the plaintiff's claims that determine jurisdiction of a court. Reliance was placed on the cases of Anason Ibeto Int'l Limited v. Vimex Imp-Exp (2001) 10 NWLR (Pt.720) p. 224; Soyawo v. Akinyemi (2001) 8 NWLR (Pt.7 14) p. 95 at 116 Ekpe, v. Calabar Local Government (supra). That the entire provisions of Section 11 of

the Decree considered in this case are the same with section 188 of the Constitution. That the court went on to hold that the object of section 11(10) of the Decree (Section 188(10)) of the Constitution is oust the jurisdiction of the court in respect of the proceedings of the Local Government Council or any matter relating thereto.

On his part, the learned senior counsel for the 2nd respondent, Tayo Oyetibo, SAN, identified his brief filed on 2/2/2007. He associated himself entirely with the allegation made by the 1st and 3rd respondents that exhibit A was a forgery. That the court has a reason to investigate the genuineness of the documents before it is made use of. He relied on the case of *Shodipo v. Lemminkainen-OY* (No.2) (1986) 1 NWLR (Pt. 15) p. 220 at 238. However arguing the appeal, he adopted and relied on the 2nd respondent's brief. He submitted that the case of *Tinubu v. I.M.I Securities plc* (2001) 16 NWLR (Pt.740) 670 at 672 is still a good decision. He contended that most of the reliefs sought in paragraphs 5, 8, 9 and 11 of the writ were targeted against the 2nd respondent and as a sitting Governor, his immunities are still intact. He argued that the appellant in his application of 8/2/2007 sought leave of this court to amend the relief set out on page I 18 of the Record of Appeal but till date, no such amendment has been made after the application. The reason is that the briefs have been settled. Learned counsel contended that appellant's brief was filed since 19/7/2006 whereas the application was filed on 21/12/2006. It is submitted that the appellant needed leave of this court to amend. That the court and the parties are bound by the reliefs sought in the motion paper. That up till now no amended notice of appeal is before the court. He has urged that this appeal can only be confined to the reliefs originally sought on page 11 8 of the Record. Reliance was placed on the cases of *Government of Gongofa State v. Abbtu Tukur* (1989)4 NWLR (Pt.117) 592 at 693; *Commissioner for Works, Benue v. Devcon Construction Co. Ltd.* (1988) 3 NWLR (Pt.83)407 at 421.

Learned senior counsel submitted that if the court is mindful of considering exhibit A, two alternatives are open to it on the authority of *Igboho Local Govt. v. Boundary Settlement Com.* (1988) 1 NWLR (Pt. 69) 189 at 191. These are either :

1. To grant the appellant leave as, in this case, to remit the case to the lower court for the determination of the case to take place.
2. To grant the application for leave to hear the parties.

It is submitted that the invitation to parties to be heard was necessary. That it is a fundamental principle of justice that all the parties should be heard. In that case, to prove all the allegations made by the appellant, evidence will be required and that exhibit A which is tainted with illegality cannot be used as part of that evidence, because it is not part of the document from the record of appeal as it has not been formally received as further evidence in the appeal. That assuming exhibit A is documentary evidence, it does not satisfy the appellant's claims made in paragraphs I LI 7 of the Statement of claim which are germane to the complaint of impeachment. It will be highly speculative for the court to accept those allegations as facts proved in evidence and then act upon. Reliance was placed on the case of *Kode v. Yussuf* (2001)4 NWLR (Pt.703) 392 at 419. Reference was made to the case of *Eiteke v. Int. Merchant Bank* (2006) 11-12 SC; (2006) 19 NWLR (Pt.1013) 146; *Ndoma-*

Egba v. Gov. of Cross River State (199 1) 4 NWLR (Pt. 1 88) 773 at 791. It is urged that the cases of *Balarabe Musa* (supra) and *Aburibe* are still good decisions to be followed.

Learned senior counsel for the 4th – 10th respondents, YUSUF ALI SAN identified their brief of argument which was by leave of court deemed filed on 22/2/2007. He referred to the respondents' notice of preliminary objection on pages 3-6 of the brief of argument. It is submitted that having regard to the declaratory reliefs sought by the appellant, he must proffer evidence to support his claim before he is entitled to the declarations. Reliance was placed on cases of *Bella v. Eweka* (1981)1 SC p. 101 at 102-103; *Kokoro-Owo v. Ogunbambi* (1993)8 NWLR (Pt: 313) 627 at 637-638. It is further submitted that a thorough reading and understanding of the claims of the appellant, reveals that his complaint in this matter is limited to the provisions of subsections 5 and 6 of section 188 of 1999 Constitution. That where there are allegations of breaches of sections 188 (5) and (6) of the Constitution there must be evidence either oral or documentary before the trial court. If the appellant fails then there must be presumption of regularity under section 150 of the Evidence Act which will inure to the benefit of the respondent and will not save the removal of the appellant. It is submitted that the appellant failed woefully to proffer evidence of his illegal removal. Learned senior counsel further adopted the submission of learned counsel for the 1st and 3rd respondents.

On exhibit A, learned senior counsel submitted that for the document to be admissible it must not only be pleaded but it must also be relevant. Reliance was placed on the ease of *Oyediran v. Alebiosu II* (1992) 6 NWLR (Pt. 249) 550 at 559. It is submitted that exhibit A docs not in any way prove that appellant was not given fair hearing or was not given opportunity of being represented by a counsel of his choice. That no case has been made by the appellant that S. 188 (5) and (6) of the Constitution has been breached. It is finally submitted that no common features in this case and LADOFA'S Case, (supra). That in that case, there were ample evidence of irregularities. Lack of quorum of the members of the State Assembly was obvious. In OBI'S case, learned senior counsel contended the notice of impeachment was not served as required by law. That this is not the proper case to invoke section 16 of the Court of Appeal Act, 1976.

Learned counsel for the IIIrd respondent, PETER O. AFFEN Esq., identified his respondent's brief of argument filed on 21/2/ 2007, but deemed filed on 22/7/2007. Having adopted the brief, he placed reliance on the authority of *NEPA v. Edegbem & 16 Ors* (2003) 9 WRN 1, and submitted that paragraphs (q), (r), (s) of Section 251 of 1999 Constitution reveals that the intention of the lawmakers was to take away from the jurisdiction of the State High Court and confer same exclusively on the Federal High Court actions in which the Federal Government or any of its agencies is a party.

It is contended that the lower court had held that the impeachment matter is a political matter and the only valid decision is that given by the House of Assembly, as the legislature. That none of the appellant's nine grounds of appeal attacks or complains against the decision of the lower court. It is submitted that this court should consider the issue of jurisdiction on the basis of lower court's decision that the impeachment is a political matter, which decision the appellant is content with. That the decision therefore stands whether rightly or wrongly

for purposes of the appeal. Reliance was placed on the case of *Nwabueze v. Okoye* (1988) -1 NWLR (Pt. 91) 664 at 679.

In his brief, 11th respondent having adopted the arguments canvassed under issue No. 1 set out at pages 7-17 of the 2nd respondent's brief, then urged this court to resolve the issue in the affirmative. He referred to the cases of *Dalhatu v. Turaki* (2003) 42 WRN 15, (2003) 15 NWLR (Pt.843) 310; *Balarabe Musa v. Anta Hamza* (1982)3 NCLR 229 at 230 and *Abaribe v. Speaker Abia State House of Assembly* (2002) 14 NWLR (Pi.788) 466.

On exhibit A, learned counsel has contended that it does not meet the mandatory requirements of Section 111 of the Evidence Act to allow its admissibility and consideration by this court. He referred to the cases of *GTB Plc v. Tabik Investments* (2005) 13 WLRN p. 37 38. It is urged that this appeal be dismissed.

T.J.O. OKPOKO, SAN for the appellant made brief response on point of law based on submission of the learned counsel for the respective respondents. On the allegation that exhibit A is a forgery, he submitted that this is a criminal charge which must be pleaded specifically and proved by the respondents. He contended that the respondents have waited for three months before raising this allegation which must be proved beyond reasonable doubt. He referred to *Koiki & 2 Ors v. B.P. Magnusson* (2001) EWER (Pt.63) p. 167, (1999) 8 NWLR (Pt.615) 492. He drew the court's attention that the counter-affidavit in which this allegation was made was in respect of a motion by 2nd respondent for an order for stay of proceedings of this court which has been disposed of. He submitted that all the processes filed for the purpose of that application ought to be discountenanced. He referred to *Akhiwu v. The Principal Lotteries Officer Midwestern State & Anor* (1972] 1 All NLR (Pt. 1) p. 229. On the exhibit A, learned senior counsel submitted that the document was pleaded in paragraphs 11 -25 of the Statement of claim and there was notice to produce same.

Before I go on to consider the issues raised by the parties, I shall first of all deal briefly with the preliminary objections raised by counsel for the respondents in this appeal. In appellant's reply brief, some of these objections were dealt with. First, the preliminary objection of the 4th to 10th) respondents.

The 4th - 10th respondents' grounds of objection are that:

- "1. The grounds did not in any way relate to the ruling Appealed against.
2. The grounds did not arise from the ruling nor related to it."

To my mind, the two grounds of objection as couched is quite misleading. The court is always observant of two things in an appeal. First, whether' the issues raised are covered by the grounds of appeal; Secondly, whether the issues raised do not specifically make reference to the grounds of appeal. The case of *Falofa v. Union Bank of Nigeria Plc* (2005) 7 NWLR (Pt.924) 405 relates to issues being argued that are not related to the grounds of appeal. In the appellant's brief, the only complaint that could be raised is that there is no specific reference to the grounds of appeal in the issues. It is clear from a number of decisions of the apex court and this court that whilst it is desirable to do so. There is no such legal requirement that a brief of argument will be fatal for not doing so. In the unreported case of *Adegoke. v.*

Savannah Bunk Appeal No: CA/L/ 399/96, observations of O. K. AYOOF A, JCA (as he then was) is instructive. He observed as follows:

"Learned counsel for the plaintiff, Chief Afe Babalofa SAN, look the preliminary point in relation to the issues formulated by the defendant, that the defendant should have Stated to which grounds of appeal the issues related. It, no doubt, helps counsel and the court easily to see how the issues for determination arise from the grounds of appeal if the grounds to which each of the issues relates are specified in the brief. Beyond stating that it is desirable that they should be so Stated, I do not think there will be justification, as our rules stand at present, to say that failure so to State amounts to a defect in the brief or should lead to the striking out of the issues. Order 6 rule 3 of the Court of Appeal Rules which prescribe the form and contents of a brief did not go on to provide that the grounds to which issues relate should be specified in the brief."

In the course of hearing this appeal, learned Senior Advocate, Prof. A. B. Kasunmu clearly showed the court that issue 1 is covered by grounds 1-6 of the grounds of appeal; issue 2 is covered by ground 8 of the grounds of appeal; issue 3 is covered by, ground 7 and issue 4 by ground 9.

Learned senior counsel for the 4th – 10th respondents has not I shown that the issues raised are at variance with As to the objection that ground be struck o the particulars, I agree with the learned counsel for the appellants that the particulars are subsumed in that ground of appeal

Now to recapitulate the background facts of this case I he appellant was the former Executive Governor of Bayelsa State whilst the 2nd respondent was then his Deputy. In the month of December 2005, the appellant was impeached and removed from office of the Governor of Bayelsa State, whilst 2nd respondent was sworn-in as the Governor of the State. The impeachment process was commenced by the transmission by the 3rd respondent of the impeachment notice to the appellant as well as the 1st respondent. The 1st respondent then appointed the 4th- 10th respondents as the Chairman and members of the panel to investigate the allegations complained in the impeachment notice, the 4th respondent being the Chairman of the panel. The panel was inaugurated on 5/12/2005. On 9/12/2005 the appellant was removed from office by the House of Assembly and arrested by the 11th respondent. The appellant alleged that he raised objections to the membership of the panel but that the 1st respondent did not respond thereto before his removal from office. Hence he instituted the present action in the com 1 below. Now to the issues. To my mind the most apt and appropriate issues which call for determination in this case are those postulated by the appellant and the 2nd- 10th respondents. Combination of these issues extracted from these briefs can be presented in this order:

- "1. Whether the jurisdiction of the court is excluded from inquiries into allegations or complaint of non-compliance with any or all of the provisions of section 188 of the Constitution in relation to proceedings for impeachment of the Governor of a State having regard to provisions of section 188 (10) of the 1999 Constitution: Grounds 1, 2, 3, 4, 6.

2. Whether the court has jurisdiction to entertain an action challenging the exercise of the Chief Judge of a State of his power under section 188 (5) of the 1999 Constitution of appointment of the panel to investigate the allegations contained in an impeachment notice issued under section 188(2) of the Constitution by the : House of Assembly of a State: Grounds 5, 8.
3. Whether having regard to the reliefs sought by the plaintiff against the 2nd defendant, the learned trial Judge was right in holding that the 2nd defendant could not be sued or made a party to the plaintiff's action having regard to the provisions of section 308 of the Constitution: Ground 7.
4. Whether the learned trial Judge was right in holding that the State court had no jurisdiction in respect of the claims made against the 1st the defendant because the 11th defendant was an agent of the Federal Government having been posted to Bayelsa State by the Inspector General of Police and mailers being an item (45) on the Exclusive Legislative List in the Second Schedule to the 1999 Constitution: Ground 9."

There have been developments, since the filing of the appellant's brief of argument on 19/7/2006. His counsel had on his behalf filed a motion to amend the relief he had earlier on set out on page 118 of the record of appeal. He sought leave of this court to amend the reliefs. I must observe no amendment has been made. Hence the issues formulated above are from the appellant's brief of 19/7/2006. His initial relief set out in paragraph 1 18 of the Record of Appeal remains intact. I shall come to this issue anon in the course of consideration of this appeal.

I will now consider the issues. The first issue is all about jurisdiction of the court. The issue of jurisdiction of court in adjudicating on the claims of a party is very fundamental to our jurisprudence. In the instant case, it is all about this very important constitutional mailer bordering on interpretation of section 188 of the 1999 Constitution of the Federal Republic of Nigeria in respect of impeachment of a Governor or his Deputy. When the court interprets a provision of the Constitution, it has a duty to ensure that the intendment of the Constitution are preserved. See *Abaribe v. The Speaker, Abia State House of Assembly* (2002) 14 NWLR (Pt.788) 466.

In determining whether a court has jurisdiction to entertain an action or not, it is the plaintiff's claims that determine the jurisdiction of court. See *Adeyemi v. Opeyori* (1976) 9-10 SC 3 1. The question is, regarding the claims that have been submitted for adjudication before the lower court by the appellant, could that court have granted the reliefs sought on the face of the claims of the appellant? It is the submissions of all the respondents that having regard to the provisions of section 188(10) of the 1999 Constitution, the lower court has no jurisdiction to hear and determine the case of the appellant.

Section 188 (10) of the Constitution provides as follows:

"No proceedings or determination of the panel of the House of Assembly or any mailer relating to such proceedings or determination shall be entertained or questioned in any court."

The appellant's case is that the provisions of sections 188 (5) and (6) of the 1999 Constitution have not been complied with. Put straight, the gravamen of the complaint is that the persons appointed by the Chief Judge ought not to have been appointed having regard ^ to the qualification set out in section 188 (5). Secondly, appellant also complained that there was NO HEARING of the allegations contained in the impeachment notice and that the plaintiff was NOT INVITED to DEFEND himself before the investigation panel. (Emphasis mine).

Reliance was placed by the trial Judge on two decisions of this court, namely, *Bearable Musa v. Auta Hamza & 6 Ors* (supra) and *Abarabe v. Speaker, Abia State House of Assembly & Ors* (supra).

My understanding of BALARABE MUSA'S case is this. That case was interpreting and giving effect to the Impeachment Clause in Section 170 (10) of the 1979 Constitution. Although the objective of that section is the same as Section 188 (10) of the 1999 Constitution, there are significant changes in the provisions of the two sections. I note them as follows: Section 170 (5) 1979 Constitution as opposed to section 188 (5) of the 1999 Constitution. I Under Section 170 (5), the Panel to investigate is nominated by the Speaker of the House of Assembly which nomination is approved by the House of Assembly. However, under the provisions of Section 188 (5), the appointment of the Investigating Panel is completely removed from the House and vested in an independent person, to wit; the Chief Judge of the State. Section 170(10) of the 1979

Constitution on which BALARABEMUSA'S case was based provides as follows:

"No proceedings or determination of the Committee or of I louse of Assembly or any mailer relating thereto shall be entertained or questioned in any court."

The appellant's complaint on the impeachment proceedings in the BALARABE MUSA'S case are as follows:

"Conditions precedent lo the investigations of the allegation against the applicant have not been complied with and on the same premise the respondents have no jurisdiction to embark on an investigation pursuant to section 170 of the Constitution of the Federal Republic of Nigeria, 1979.

Particulars

- (1) The notice of allegations of misconduct now sought to be investigated was not signed by any member of Kaduna State House of Assembly.
- (ii) Detailed particulars of alleged gross misconduct was not given in the Notice of allegations of misconduct stipulated by Section 170 (2) (b) of the Constitution.
- (iii) The allegations contained in the said notice were not investigated by the respondents within the time limit stipulated by Section 170(6) of the Constitution."

In declining jurisdiction to look into this complaint, the Court of Appeal in the lead judgment delivered by Ademofa, JCA observed as follows:

"...the obvious end that Section 170 of the Constitution was designed to serve is that the Governor or his Deputy could only be removed by the act and doings of the legislature and subsection (10) of it is put in to stop any interference with any proceedings in the House or Any determination by the House or Committee. It follows from the premise of this court that no court can entertain any proceedings or question the determination of the House Committee. It is a political matter for court to enter into..."

However, KARIISI-WIITYE, JCA (as he then was) in his contribution at page 25 of the report had this to say:

"We have been invited to determine whether the preconditions for the exercise, of the jurisdiction have been satisfied, and if they have not, to exercise our inherent powers under section 6 (6) of the Constitution. I decline to express opinion on our inherent powers because in my view it does not arise."

In the case of ABARIBE (*supra*), the Abia House, of Assembly commenced impeachment proceedings against the Deputy who then went to court to seek the enforcement of his fundamental right because the House decided to send the allegation against him for investigation before the period given to him to reply. The trial court raised the issue of jurisdiction *suo motu* and held that it had no jurisdiction by virtue of section 188 (1.0) of the Constitution of 1999. On appeal, this court affirmed the decision of the trial court. The question of non-compliance with subsections 1-9 did not arise in both of these cases.

In both of these cases the impeachment proceedings were started by the State Houses of Assembly with the Speakers playing the roles given them by the Constitution. Unlike the present case in which the Speaker had no hand in the impeachment proceedings despite the mandatory roles given to him by Section 188 (2) of the 1999 Constitution.

I now have cause to resort to the case of Ekpo v. Calabar lineal Government Council (1993) 3 NWLR (Pt.281) p.324. At page 324 of the report, the Court of Appeal was called upon to look at a provision of a statute, section 11 of the Local Government (Basic Constitutional and Transitional Provisions) Decree No. 15 of 1989. It has identical words with section 188 of the 1999 Constitution. The plaintiff in that case complained about non-compliance with provisions of some of the subsections of section 11 of the Decree to which the defendant filed preliminary objections challenging the jurisdiction of the court based on section 11 (10) which ousts the jurisdiction of the court.

UWAIFO, JCA (as he then was) reacting to the submission of counsel, in his lead judgment observed on pages 337-338 paragraphs D-F of the report as follows:

"Section 11 (10) above is an ouster clause. In interpreting it, the whole section must be taken into account. This will assist in understanding the circumstances in which the ouster comes into play. I cannot conceive that a subsection of a section of a statute standing alone can be read with full comprehension. A subsection will usually have a connecting relationship with other subsections of a section. A result contemplated by one subsection may not have occurred at all upon a true consideration of the available facts if other subsections create certain conditions for the result. Not to recognise this is not only to read that particular subsection in the abstract but also to disregard the preceding or subsequent conditions for a

better and cohesive understanding of the intention of the law giver. Hence a section of a statute having a subsection must be read as a whole and related sections must be read together. See *Aqua Ltd. v. Ondo State Sports Council* (1988) 4 NWLR (Pt.91) 622 at 641-642; *Tukur v. Government of Gongofa State* (1989) 4 NWLR (Ft. 117) 592 at 579; *Salami v. Chairman, L.E.D.B.* (1989) 5 NWLR (Ft. 123) 539 at 550-551."

In his own contribution, AKINTAN, JCA (as he then was) at page 347 Stated as follows:

"If the above quoted subsection 10 is given literal effect, it means that the proceedings or determination of the panel or Local Government Council or any matter relating thereto cannot be reviewed by the Courts of Law, no matter how wrong in law or otherwise. In other words, they were not to be removed by certiorari. This of course is not the position in law. The stand of the courts in such cases is Stated by Denning, M.R. in *Taylor v. National Assistance Board* ([1951] p. 101 at I 11 (1957) All LR 183 as follows:

"The remedy (of Ouster clause) is not excluded by the fact that the determination of the Board is by statute made "final". Parliament only gives the impression of finality to the decision of the Board on the condition that they are reached in accordance with the law and the Queen's Courts can issue a declaration to see that condition is fulfilled."

In *Adeleke v. Oyo State House of Assembly* (supra) the case of *Jimoh v. Ofawoye* (2003) 10 NWLR (Ft.828) 307 was considered.

In that case, the Court of Appeal in considering the removal of a Chairman of a Local Government Council in an identical provision as section 188 of the 1999 Constitution, followed EKPO'S case to hold that before ouster clause can apply, the preconditions in subsections 1 -9 of section 26 of the Kwara State Local Government Laws, 1999 must be satisfied.

Section 188(10) cannot be read in isolation from subsections 1-9. These subsections are not meant to guide the House of Assembly in impeachment proceedings only. They cannot be totally ignored in impeachment proceedings. No court of law can close its eyes to the infringement of the Constitution. The court is the primary custodian of Constitution. It must guard jealously, all the provisions of the Constitution. If any arm of the government or legislature and the court itself acts unconstitutionally, the court has inherent power under section 6(6) of the 1999 Constitution to intervene. Section 6(6) of the 1999 Constitution reads:

"The judicial powers vested in accordance with the foregoing provisions of this section:

- (a) Shall extend, notwithstanding anything to the contrary in the Constitution, to all inherent powers and sanctions of a court of law;
- (b) Shall extend to all matters between persons or between government or authority and to any person in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person."

I am of the firm view that the trial court had some questions bordering the complaints of the appellant to consider. He was wrong in declining jurisdiction. He had jurisdiction to examine the appellant's claims in the light of section 188 subsections 1-9 of the 1999 Constitution and if he was not satisfied that impeachment proceedings were instituted in compliance thereof, he has the jurisdiction to intervene and to ensure due compliance. However, on the other hand, if there was compliance with pre-impeachment process then what happened thereafter become the internal affairs of the State House of Assembly. He would then have no jurisdiction to intervene.

The second issue formulated above has to do with the question of immunity of a State Chief Judge in the performance of his function in the impeachment exercise under Section 188 (5) of the 1999 Constitution.

I am of the view that the Chief Judge, in exercising the powers vested in him under Section 188 (5) of the Constitution was not exercising strictly a judicial function. His action can be challenged if the persons appointed by him ought not to have been appointed. For the learned trial Judge to hold that the Chief Judge was performing a constitutional duty can mean no more than that, it is the Constitution that imposes the duty to appoint the members of the investigation panel consequent upon a reference to him by the Speaker. I do not see how this can clothe the Chief Judge with a constitutional immunity in the sense that the expression is used by the trial Judge. With due respect, I do not agree with the learned trial Judge the suggestion that whether the Chief Judge acts outside, the provisions of section 188(5) of the constitution, his actions cannot be challenged. Section 188(10) cannot be used to oust the jurisdiction of the court if the actions of the Chief Judge contravene the provisions of section 188(5).

I will now consider the third issue which deals with the question of immunity of the 2nd respondent in view of Section 308 of the 1999 Constitution.

In holding that the 2nd respondent is constitutionally immuned from legal proceedings having regard to section 308 of the Constitution, the trial Judge turned to relief 10 of the Statement of claim. In this relief, the appellant prays for an order of injunction restraining the 2nd respondent from parading himself as or acting in the capacity of the substantive Governor of Bayelsa State in place of the appellant to whom the 2nd respondent is the Deputy Governor. It was held that from this relief, the 2nd respondent was sued in his personal capacity. He then struck out the suit against him.

I agree with the learned senior advocate for the appellant that this is an issue that can only be resolved by reference to the averment in the Statement of claim and not necessarily by reference to the reliefs being sought against the 2nd respondent. He was not involved in the impeachment process and there is nothing in the appellant's Statement of claim linking him with any breach of the provisions of the Constitution. Pleadings show he is only a beneficiary of the unlawful processor impeachment which the appellant is challenging. 2nd respondent is a party who will be bound by any decision made by the court. He is therefore no more than a passive defendant in the case against whom injunction is being sought. He is no more than a nominal party to the case.

The fourth issue is whether the Commissioner of Police is a Federal Agent (having regard to the claims made by the appellant) against whom the State High Court has no jurisdiction to entertain the suit.

It is not in doubt that the Police matters come under the Exclusive Legislative List No. 45 in the 2nd Schedule to the 1999 Constitution. Section 25 L of the Constitution provides Unit actions against the Federal Government or Agencies are only maintainable at the Federal High Court. I pose a question: That is, whether or not the constitutional provision should only apply where the Federal Government Agency is the principal and or only party sued? I also share the reasoning of the learned senior counsel for the appellant :j} that it does make sense if the constitutional provision is so limited where an action is sought against any Federal Agency or the Federal Government as the main and or only defendant the action must be commenced at the Federal High Court. I have seen an absurd and ridiculous situation to apply the constitutional limitation to where the Federal Government and or any of its agencies is only a defendant among numerous defendants being sued in respect of matters in which the State High Court is vested with jurisdiction. This cannot be said to be the intention of our Constitution. In the instant case, there are eleven defendants and the State High Court is the competent court with jurisdiction in respect of the subject matter. Should the plaintiff sue the 10 defendants in the State High Court whilst he has to bring the action against the 11th defendant in the Federal High Court? I do not think that that is the purpose for which section 251 of the Constitution was enacted.

With due respect to the learned counsel for the appellant, I do not agree with him that the powers of the Governor to issue lawful directives to the State Commissioner of Police will whittle down the status of his office as a Federal Agent. To subject a State Commissioner of Police to the directives of the State Governor (the Chief Security Officer of a State) is for security purposes. The Commissioner of Police (by virtue of the proviso to Section 215(4) may, before carrying out directions given to him by the Governor of a State, request that the matter be referred to the President or Minister for further directions, that does not stop the appellant to join him in this action. However, there is no need to ventilate the complaints against him in a separate action in the Federal High Court.

Having held that the learned trial Judge has jurisdiction to hear the appellant's complaints as ventilated in his writ of summons and the Statement of claim, it is left for me to decide whether I shall send the case back to the Bayelsa State High Court for fresh trial.

The appellant has no doubt urged me to decide the case. In his application filed on 21/12/2006 to which I have earlier alluded in the course of this judgment, appellant's motion reads thus:

"TAKE NOTICE that at the hearing of the appeal the appellant shall seek leave of this Honourable Court to amend the relief set out on page 118 of the Record of Appeal to read the following:

(i) An order that this Honourable Court allow the appeal and rather than remitting the case back to the lower court to exercise powers vested in it under section 16 of the

Court of Appeal Act and determine the Appellant's case as constituted as if this Honourable Court is sitting as the trial court,

(ii) An order of this Honourable court exercising its powers to hear and determine the suit as constituted in the High Court of Bayelsa State by construing the attached documents - Exhibit A in support of this application."

On 8/2/2007. In my considered ruling allowing the application I had this to say:

"I am yet to come across any such law which does not allow a Court to grant leave to amend in order to regularise or remedy claim in a writ of summons or oilier court processes so as to do substantial justice. This is the only way the court will be in a position to determine the real questions or issues raised by 01 pending in the proceedings."

(Italics for emphasis)

Facts and circumstances of this matter as deposed to in the affidavit in support of the application weighed heavily in our granting the application. The appellant was granted leave to amend. Parties have been given ample opportunity to address this court on 22/2/ 2007. We have carefully presented their view above.

The original REEIEF SOUGHT by the appellant at P. 118 of the Record of Appeal in his notice and grounds of appeal reads:

"To allow the appeal and remit the case for trial before another Judge of the Yenagoa High Court Bayelsa." In his brief of argument filed on 19/7/2006, before the application of 21/12/2006 at page 25 the appellant prayed thus:

"For the reasons given above, we submit that the trial Judge was wrong to have struck out the plaintiff's case. We urge the court to set aside the decision of the trial Judge and to remit the case back/or trial on its merit." (Italics mine for emphasis)

It was on 22/2/2006, in response to the arguments of the learned senior counsel for the appellant, that the learned senior counsel for the 2"d and 4th-10th respondents particularly, and the 1st, 3rd and 11th respondents (associating themselves with the 2nd and 4th – 10th senior counsel) draws the attention of the said learned senior counsel for the appellant that he had sought from the court to use and construe exhibit A when it has not been introduced and admitted into the court. They also argued that the appellant having sought for the leave of the court to amend his relief but failed or neglected to amend it. They urged that I should discountenance any argument on exhibit A as it was not part of the documents in the record of Appeal.

I have taken a considerate view of this matter. The underlining weakness of the appellant argument stemmed from the facts that he failed to amend his relief in his notice and grounds of appeal and in his brief of argument although he was granted leave to do so.

At a trial, the plaintiff has the burden to prove the reliefs sought in the Statement of claim to obtain judgment. It must be borne in mind also that the appellant is bound by the relief he seeks in his notice and grounds of appeal.

Appellant's counsel's prayer is to send back the case for trial. He, made u-turn urging us to exercise power vested in this court under section 16 to decide the appeal by construing exhibit A but for reasons I have given, that is never to be. However, I am not mindful of the fact that the appellant filed an "Amended Notice of Appeal..." only on 26/2/2007 to which attention of court was drawn after this appeal was adjourned for judgment. I am of respectful view that this is not a motion seeking for the court's discretionary power under Order 3(1) of the Court of Appeal Rules, 2002. The appellant has clearly demonstrated an intention to over-reach himself in the circumstance. I must therefore discountenance this amendment at this stage.

Learned senior counsels for the respondents have urged the court not to decide the case based on the pleadings of the appellant alone because this appeal has arisen only from the ruling on the preliminary objection on jurisdiction. This is not a proper case for this court to exercise its power under section 16 of the Court of Appeal Act, 1976. The appellants did not come to court by originating summons amply supported by copious affidavit of facts not disputed by the respondents. This case is not on all fours with the two cases of *Adeleke v. Oyo State House of Assembly* (supra) and *Hon. Mike Balonwu & 5 Ors v. Mr. Peter Obi & Anor* (supra). In the first case, the action had been commenced by originating summons and the evidence required to determine the case was already filed in the court and the main concern of the court was to interpret section 188 of the Constitution dealing with the removal of Governor or Deputy Governor from office as it affects Governor Ladofa. In the second case, the action was also commenced by originating summons and no evidence was required to interpret section 188(2) of the 1999 Constitution regarding the requirement of service of a notice of allegation of gross misconduct.

Consequently, this appeal only succeeds partly. I set aside the ruling of the learned trial Judge upholding the preliminary objection, dismissing the suit. I remit the case for expeditious trial before another Judge of the High Court of Bayelsa State. Clearly there is an urgent need to dispose of this matter as time is of the essence. I do not consider it necessary to make any order on costs in the circumstance of this case.

THOMAS, J.C.A.: I have had the privilege of reading in draft the lead judgment of my learned brother GALADIMA JCA, just delivered. I entirely agree that the appeal should be allowed and I do so.

By way of emphasis, the claim before the High Court at Bayelsa State Judiciary was by way of writ of summons and Statement of claim against the defendants, and now respondent jointly and severally. The claim was for declaration and the resultant orders and mandatory injunctions. The writ was supported by verifying affidavits. After service of the writ on all the respondents, they later filed a notice of preliminary objection on the ground that the trial court had no right to hear the plaintiff/appellant's action. In other words, that there is ouster clause of jurisdiction as contained under section 188(10) of the Constitution of Nigeria, 1999; and that the 1st and 2nd respondents namely, the current Chief Judge and Governor of Bayelsa State respectively enjoy immunity, and that, the 11th respondent; being the Commissioner of Police Bayelsa State is a Federal Government's Officer and could only

be tried in a Federal High Court in accordance with Section 251 of the same Constitution of Nigeria, 1999.

After hearing arguments of all counsel in respect of the preliminary objection, learned trial judge delivered his ruling sustaining the preliminary objection that the court has no jurisdiction to hear and determine the claims, and hence the appeal to this court. The main issue at the trial court and also at this appellate court is specifically on court's jurisdiction.

There is no doubt; the gravaman of the plaintiff/appellant at the lower court was specifically to ventilate his grievances on his impeachment. Once a case is before a court of law, it means the complainant or claimant has a strong belief that the trial court will decide his grievances. Section 6 (6) (a) & (b) of the 1999 Constitution has given the court the exclusive duty to hear the party, and get an opportunity to ventilate his grievances. These grievances come to court through criminal, civil, election petitions and even impeachment complaints as in the instant appeal matter before this court.

In the case of Yusuf v. Obasanjo (2003) 16 NWLR (Pt. 847) 554 this court has maintained that when a constitutional issue is presented before a court of record, same should not be lightly treated.

In the instant appeal, the appellant had raised that his impeachment was not in accordance with section 188(5) and (6) of the Constitution of Nigeria, 1999. Since it was a constitutional matter, it is expected, that the trial court should have looked at same, but when the respondents filed their preliminary objection and argued on the same Section 188 (10), the trial Judge rushed to accept the ouster clause and accepted that he had no jurisdiction to hear the complaints of the appellant. There is no doubt the trial Judge relied on the decisions of this court in Balurobe Musa v. Auta Hamza & Ors (1982) 3 NCLR 229 and Abaribe v. Speaker Abia State House of Assembly & Ors (2002) 14 NWLR (Pt. 788)466.

I am of the view that it was a misconception for the trial judge to rely on the authority of Balarabe Musa (supra) and Aberibe case (supra) that he has no jurisdiction to hear the complaints of the appellant because section 188(10) of the constitution has excluded a high court of justice. The decision of the same *Abaribe's* case is a clear authority that there are circumstances and situations in which a competent court can assume jurisdiction, notwithstanding the clear provisions stated in section 188(10) of the Grand Norm - His Lordship of blessed memory - Pats-Achofonu, JCA (as he then was) at page 486 of paragraph D-H said as follows: -

"In trying to interpret the words of the '*Constitution*', I am of the view that it should be understood that a constitution is not a mere common legal document. It is essentially a document relating to and regulating the affairs of the nation and State and stating the functions and powers of the different *apparati* of the Government as well as regulating the relationship between the citizen and the State. It equally makes provisions for the Right of the citizen within the compass of the State. In so far as it concerns the issue of impeachment, it is a political matter. However the court at the same time may not close its eyes to serious injustice relating to the manner the impeachment procedure is being carried. That is to say it is within the province of the court to ensure strict adherence to the spirit of the constitution for the endurance of a democratic regime."

If a court of competent jurisdiction will subvert the Grand Norm by shutting its eyes to complaints that impeachment processes were not complied with section 188 of the Constitution, then section 1(1) of the same Constitution of Nigeria, 1999 would have been abused because it reads thus:-

"Section 1(1)

This Constitution is supreme and its provision shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria."

The above reasoning is not to say that the appellant had established his innocence against his impeachment. All he raised was that there was no compliance with sections 188 (5) and (6) respectively. The trial court had the constitutional duty and had the jurisdiction to determine specifically, what was placed before him. I am therefore of the considered view that section 188(10) cannot stop the jurisdiction of a court from hearing a declaration that some subsection of section 188 have not been complied with.

Based on the little contribution and more detailed and fuller reasons made in the leading judgment, I also order that the appellant's writ of summons be sent back to Bayelsa State Judiciary; to be heard on merit before another Judge for determination.

RHODES-VIVOUR, J.C.A.: I had read before now the draft of the leading judgment of my learned brother, Galadima, JCA. I agree entirely with the reasons Stated therein which I adopt as mine.

To avoid being repetitive, I shall restrict myself to the scope of the powers of the Court of Appeal under section 16 of the Court of Appeal Act, 1976 and why this court is reluctant to follow the procedure adopted in *Adeleke v. Oyo State House of Assembly (supra)*, *Hon. M. Balonwu & 5 Or.s v. Mr. Peter Obi (supra)*, Section

16 of the Court of Appeal Act, 1976 States that:

"16 The Court of Appeal may, from time to time, make any order necessary for determining the real questions in controversy in the appeal, and may amend any defect or error in the record of appeal, and may direct the court below to inquire into and certify its findings on any question which the Court of Appeal thinks fit to determine before final judgment in the appeal and may make an interim order or grant any injunction which the court below is authorized to make or grant and may direct any necessary inquiries or accounts to be made or taken and generally shall have full jurisdiction over the whole proceedings as if the proceedings had been instituted in the Court of Appeal as court of first instance and may re-hear the case in whole or in part or may remit it to the court below for the purpose of such re-hearing or may give such other directions as to the manner in which the court below shall deal with the case in accordance with the powers of that court, or, in the case of an appeal from the court below in that court's appellate jurisdiction, order the case to be re-heard by a court of competent jurisdiction."

The above Stated provision has been interpreted by our courts. In *Ndonm Ee,ba v. Govt of Cross River State* (1991) 4 NWLR (Pt. 188) p773. It was held that section 16 of the Court of Appeal Act 1976 does not allow the Court of Appeal to take oral evidence as if it is a court of first instance. Reference was also made to *Jadcsimi v. Okotie Eboh* (1986)1 NWLR (Pt. 16) p 264.; *Ejowhomu v. Edok Eier Ltd.* (1986) 5 NWLR (Pt. 39) p 1. *Commerce Assurance lid. v. Alli* (1986) 3 NWLR (Pt. 29) p 404.

My lords, under section 16 of the Court of Appeal Act 2002 the Court of Appeal has power to do what the trial court ought to have done. That is to say, this court can make an order or give such judgment which the court below ought to have made or given. See: *Nteogwitija v. Ikuru* (1998) 10 NWLR (Pt. 569) p 267; *Union Bank of Nigeria Plc. v. Sparkling Breweries Ltd.* (1997) 3 NWLR (Pt, 491) p. 29,

Now, the appellant, as plaintiff commenced the suit in the court below by writ of summons accompanied by Statement of claim.

The complaint of the appellant, the former Governor of Bayelsa State is about his removal as the Governor of the State. The appellant is challenging the procedure of the Investigating Panel.

Paragraphs 10, 11, 12, 13, 14, 15, 16 and 17 of his pleadings are instructive. They read:

" 10. During this period and up until Monday 12th December, 2005 all bank accounts maintained by the State were unlawfully frozen under orders by persons unknown to the Government of the State but from whom 1st defendant took instructions.

In consequence, the activities of the State Government were brought to a complete stand still while the freezing order continued in operation at the behest of the 1st defendant.

11. It was in the above State of affairs that plaintiff received a notice of impeachment dated 18th November, 2005 from the 3rd defendant which impeachment notice the plaintiff reacted to on the 2nd of December 2005.
12. Consequent upon the notice of impeachment and plaintiff's reply thereto, the 1st defendant inaugurated a panel of seven persons to investigate the allegations contained in the impeachment notice on Monday 5th December, 2005.
13. The plaintiff avers that since inauguration of the said seven man panel, the panel has not sat and is yet to issue any summons to the plaintiff for the appearance before it to defend the allegations against him.
14. upon becoming aware of the inaugurated panel, the plaintiff raised an objection to the panel on the grounds that three of the members did not meet the strict criteria defined under the provisions of the Constitution. This objection was directed to the office of the 1st defendant.
15. The said members of the panel is consisting which the 1st defendant admitted that he was under severe pressure and influence and to whom plaintiff objected to for being his patent adversaries and the reasons for objecting to their nomination are:
 - (a) MRS. ALAOGA, the 5th defendant was a card carrying member of the Peoples Democratic Party (PDP) whom the plaintiff had earlier appointed Pro-chancellor of Niger Delta University, but who, he later replaced with Professor Kinse Okoko.
 - (b) MR. AYADAGHA, the 8th defendant, also a card carrying member of the (PDP), whom the plaintiff had appointed Commissioner for Information, but who was removed from the State Cabinet in 2004 and replaced with MR. ORONTO DOUGLAS, as a result of irreconcilable differences with the plaintiff,
 - (c) MR. DAVID SEZENA -DOKUBO SPIFF, the 4th defendant who was designated as Chairman of the panel, was the lead counsel prosecuting some communal cases instituted against the plaintiff government between 2003 and 2004, and had led several emissaries to the Federal Government to plead for the removal of the plaintiff as Governor,

16. The plaintiff pleads and shall rely on his written objections of the plaintiff to the above panel members, to which objections the 1st defendant is yet to respond or countenance, as is his duty under section 188(6) of the 1999 Constitution, in furtherance of which he had announced the appointment.
17. In the meantime, while awaiting the reaction of 1st defendant to his objections, to the improper constitution of the Panel, the plaintiff assembled his team of lawyers to defend him if and when the Panel was to be convened. The plaintiff avers that till date his counsel has been kept in the dark as to the activities of the Panel and have also been denied access to the plaintiff by the Police and Soldiers who had by this time cordoned off the Government House, and placed plaintiff under house arrest since inauguration of the Panel on Monday 5th December, 2005."

Paragraphs 11-17 reproduced are very important allegations/averments in the plaintiff/appellants pleadings. It is very well settled that where a trial is conducted on the basis of pleadings all, or relevant allegations in the pleadings must be proved by evidence and such evidence must be in line with the pleading. *See N.I.P.C. v. Thompson Organisation* (1969) 1 All NLR 138. Put in another way, the plaintiff has to prove his case as pleaded, and prove the truth of the contents of the paragraphs (*supra*) in order to succeed in the action. If he fails to prove his case on the pleadings to the satisfaction of the court, his case crumbles. Proof is by calling oral evidence. Where, as in this case, no evidence has been called to prove the plaintiff's case, paragraphs 11-17 (*supra*) and indeed the entire Statement of claim of the plaintiff remain mere allegations.

In paragraphs 11-17 (*supra*), the appellant raised objection to membership of the panel, and denial of fair hearing, or breach of impeachment procedure, and where there is breach of impeachment procedure the court has the right to investigate. *Audi Alteram Partem* simply means please hear the other side. The Panel should hear both sides, especially the appellant before recommending his removal from office as Governor of Bayelsa State. The courts and indeed any Panel must ensure fair hearing to all persons that come before it. *See L.P.D.C. v. Fawehmmi* (1985) 2 NWLR (Pt. 7) p 300; *Akamle v. State* (1988) 3 NWLR (Pt. 85) 681.

It is the appellant who asserts that he was denied fair hearing, there was breach of impeachment procedure, raised objection to the membership of the Panel. These assertions remain mere allegations, speculative. No court will accept these allegations. He has to lead evidence to prove them.

Section 16 of the Court of Appeal Act cannot be invoked where it is necessary to adduce evidence in support of the facts in issue, in this case paragraphs 11 - 17 of the Statement of claim filed by the appellant in the court below. See further on this point *Enekwe v. IMB Ltd.* (2006) 19 NWLR (Pt.1013) 146, (2006) 11-12 SC p. 3.

Why then did the Court of Appeal invoke the provisions of section 16 of the Court of Appeal Act in *Adeleke v. Oyo State House of Assembly* (*supra*) also known as the *LADOFA* case?

The case was commenced by originating summons supported by uncontroverted affidavit evidence. The issue was not the same to interpret section 188 of the Constitution on the removal of the Governor from office.

No evidence was required. All the Court of Appeal did was to do what the court below ought to have done.

In *Hon. Mike Balomvu & 5 Ors v. Mr. Peter Obi & Anor* (*supra*) a similar case on the removal of the Governor of Anambra State from office.

The case was commenced by originating summons supported by affidavit. No evidence was required to interpret section 188(2) of the Constitution as regards the

non service of notice of impeachment. I must say a thing or two about originating summons. They are applicable where there is no dispute on questions of fact or the likelihood of such dispute. When it is obvious from the State of the affidavits that there would be an air of friction in the proceedings then an originating summons is no longer appropriate. A writ of summons would suffice in the circumstances. See *Osuagwu v. Emezie* (1998) 12 NWLR (Pt. 579) p 640; *N.B.N. Ltd. v. Alakija* (1978)9- 10 SCp 59.

Depositions in affidavits in support of originating summons is evidence. On the other hand, averments in pleadings is not evidence. They are mere allegations, averments. They only become evidence after the court hears witnesses in proof of the allegations.

Can this court convert a Statement of claim to an originating summons and proceed to hear the matter under the powers vested in this court by the provisions of section 16 of the Court of Appeal Act, 1976.

Apart from the fact that the option would entail taking over the plaintiff's case, it would be impossible to make a pronouncement on the very weighty allegations to wit: denial of fair hearing, Breach of impeachment procedure, objection to membership of The Panel; without hearing evidence in proof of the truth of these allegations.

My lords the case of *Adeleke v. Oyo State House of Assembly* (supra). The Ladofa case, and *Hon. Mike Balonwu 5 Ors v. Mr. Peter Obi & Anor* (supra) are similar with this case in that they are all on the issue of the removal of the Governor of a State, but that is where the similarity ends.

In both cases, the originating process was originating summons supported by affidavit. There is no need to adduce evidence

In this case, the originating process is a writ of summons supported by Statement of claim. Evidence must be led in support of the Statement of claim.

Section 16 of the Court of Appeal Act, 1976 cannot be invoked where is necessary to adduce evidence in support of pleaded facts,

In conclusion, the concluding part of the appellants brief filed on 9/7/06 reads as follows:

"For the reasons given above, we submit that the trial Judge was wrong to have struck out the plaintiff's case. We urge the court to set aside the decision of the trial Judge and to remit the case back for trial on its merits."

I agree with learned senior counsel Prof. Kasumu, SAN that his case ought to be remitted back for trial on its merit. I am firmly of the view after a diligent scrutiny of the pleadings that the course of justice would be better served if the case is heard on its merits by other Judge of the Bayelsa State High Court.

For this and the more detailed reasons in the leading judgment, I agree with the conclusion of my learned brother Galadima, JCA.

SHOREM1, J.C.A.: I have had the privilege of reading before now the lead judgment of my learned brother GALADIMA, J.C.A. and I agree with the reasoning and conclusion as my learned brother has adequately treated the facts and history of the case in a comprehensive manner. I adopt his finding and reasoning and conclusion as mine.

By way of emphasis, I want to touch on issue I as formulated by the appellant thus:

"Whether the jurisdiction of the court is excluded from inquiry into allegation or complaint of noncompliance with any of all the provisions of S.188of the Constitution in relations to proceeding for the impeachment (removal) of the Governor of a State because of the provision of S. 188 (10)"

The decision of the trial court is that S.I 88 (10) completely excluded the jurisdiction of the Court in matters relating to the removal regardless of the nature of the complaint since the provisions on removal is political and is therefore not subject to any intervention by the court. Reliance was placed by the trial Judge on the decisions of the Court of Appeal in *Balarabe Musa v. Auka Hamz. & 6 Ors.* (1982) 23 NLR 229 and *Abaribe v. Speaker, Abia State House of Assembly & Ors.* (2002) 14 NWLR (Pt.788) page 466. Part of the complaint of the appellant can be seen at paragraphs 12-16 of the Statement of claim. I set them out here for case of reference.

- “(12) Consequent upon the notice of impeachment and plaintiff's reply thereto, the 1st defendant inaugurated a panel of seven persons to investigate the allegations contained in the impeachment notice on Monday 5th December, 2005.
- (13) The plaintiff avers that since the inauguration of the said seven-man panel, the panel has not sat and is yet to issue any summons to the plaintiff for the appearance before it to defend the allegations against him.
- (14) Upon becoming of the inaugurated panel, the plaintiff raised an objection to the panel on the grounds that three of the members did not meet the strict criteria defined under the provisions of the Constitution. This objection was directed to the office of the 1st defendant.
- (15) The said members of the Panel in consisting which the 1st defendant admitted that he was under severe pressure and influence, and to whom plaintiff objected to for being his patent adversaries and the reasons for objecting to their nomination are:
- Mrs. Alaoga (the 5th defendant) was a card carrying member of the Peoples Democratic Party(PDP) whom the plaintiff had earlier appointed Pro-Chancellor of Niger Delta University, but who he later replaced with Professor Kimse Okoko.
- (a) Mr. Agadagha (8th defendant), also a card carrying member of the PDP, whom the plaintiff had appointed Commissioner for Information, but who was removed from the State Cabinet in 2004 and replaced with Mr. Oronto Douglas, as a result of irreconcilable differences with the plaintiff.
- (b) MR. SERENA DOKUBO SPIFF, (4th defendant) who was designated as chairman of the panel, was the lead counsel prosecuting some communal cases instituted against the plaintiff's government between 2003 and 2004 and had led several emissaries to the Federal Government to plead for the removal of the plaintiff as Governor.
- (16) The plaintiff pleads and shall rely on his written objections of the plaintiff to the above panel members, to which objections the 1st defendant is yet to respond or countenance, as is his duty under section 188(6) of the 1999 Constitution, in furtherance of which he had announced the appointment.”

Section 188 provides for the Removal of the Governor or the Deputy Governor as follows:

- "(1) The Governor or Deputy Governor of a State may be removed from office in accordance with the provision of this section.
- (2) Whenever a notice of any allegation in writing signed by not less than one-third of the members of the House of Assembly -
- (a) is presented to the Speaker of the House of Assembly of the State.

- (b) stating that the holder of such office is guilty of gross misconduct in the performance of the functions of his office, detailed particulars of which shall be specified.

The Speaker of the House of Assembly shall, within seven days of the receipt of the notice, cause a copy of the notice to be served on the holder of the office and on each member of the House of Assembly, and shall also cause any Statement made in reply to the allegation by the holder of the office, to be served on each member of the House of Assembly.

- (3) Within fourteen days of presentation of the notice to the Speaker of the House of Assembly (whether or not any Statement was made by the holder of the office in reply to the allegation contained in the notice), the House of Assembly shall resolve by motion, without any debate whether or not the allegation shall be investigated.
- (4) A motion of the House of Assembly that the allegation be investigated shall not be declared as having been passed unless it is supported by the votes of not less than two third majority of all the members of the House of Assembly,
- (5) Within seven days of the passing of a motion under the foregoing provisions of this section, the Chief Judge of the State shall at the request of the Speaker of the House of Assembly, appoint a Panel of seven persons who in his opinion are of unquestionable integrity, not being members of any public service, legislative house or political party, to investigate the allegation as provided in this section.
- (6) The holder of an office whose conduct is being investigated under this section shall have the right to defend himself in person or be represented before the Panel by a legal practitioner of his own choice.
- (7) A Panel appointed under this section shall -
- (a) have such powers and exercise its functions in accordance with such procedure as may be prescribed by the House of Assembly; and
 - (b) within three months of its appointment report its findings to the House of Assembly.
- (8) Where the Panel reports to the House of Assembly that the allegation has not been proved, no further proceedings shall be taken in respect of the matter.
- (9) Where the report of Panel is that the allegation against the holder of the office has been proved, then within fourteen days of the receipt of the report, the House of Assembly shall consider the report, and if by a resolution of the House of Assembly supported by not less than two-third majority of all its members, the report of the Panel is adopted. Then the holder of the office shall stand removed from office as from the date of the adoption of the report.
- (10) No proceedings or determination of the panel or of the House of Assembly or any matter relating to such. The respondents vehemently argued that the court lacks jurisdiction on the ground that it was a political matter and cases are cited by them in that removal or impeachment matter are political matter not subject to litigation.

Before a court can exercise jurisdiction in respect of any matter, it must

- (i) Be properly constituted by right members of the bench and no member is disqualified for one reason or the other.
- (ii) The subject-matter of the case is within the jurisdiction of the court and there is no feature in the case which prevents the court from exercising its jurisdiction and
- (iii) The case came by due process of law and upon fulfillment of any condition precedent to the exercise of jurisdiction.

See *Maditkofu v. Nkemdilim* (1962) 2 SCNLR page 34 J.

It is the law that any statute that seeks to oust the jurisdiction of the court or restrict the right of access to court must be strictly considered.

See *Bello v. Diocesan Synod of Lagos & Ors.* (1973) 1 All NLR Pt. I at 247;

Peennek Investwnt Ltd. v. Hotel Presidential Ltd. (1983)4 NCLR page 122

Din v. A.-G., of The Federation (1988) 4 NWLR (Pt. 87) at 147; *Dasuki v. Munzti* (2002) 16 NWLR (Pt.793) page 319 at 240.

The implication of the respondents objection is that section 188(10) of the Constitution had ousted the power of the court to investigate notwithstanding the nature of the complaint of the appellant. Part of his complaint was that his fundamental right to fair hearing was infringed by the Mouse of Assembly. In this case, I seem to agree and adopt the reasoning of PAT-ACHOFONU, J.C.A. as lie then was in *Aharthe's* case (*supra*) that:

"In trying to interprete the words of the Constitution I am of the view that it should be understood that a Constitution is not a mere common legal document. It is essentially a document relating to and regulating the affairs of the nation. State and stating the functions and power of the different components of the Government as regulating the relationship between the citizen and the State.

It equally makes provision for the right of the citizen within the composes of the State. In so far as it concerns the issue of impeachment, it is a political matter. However, the court at the same time may not close its eyes to serious injustice relating to the manner of impeachment procedures is being carried. That is to say it is within the province of the court to ensure strict adherent to the spirit of the Constitution for the endurance of a democratic regime."

There arc circumstances in which the court would assume jurisdiction notwithstanding the provisions of section 188(10) of the Constitution. Strict compliance with clue process of section 188(1) - (10) will definitely oust the jurisdiction of the court.

For the act of the respondents to be (political to oust the jurisdiction of the court) in an act where in the process of, it must strictly comply with the procedure prescribed by section 188(1) to (9) of the 1999 Constitution of the Federal Republic of Nigeria.

See *Adeleke v. Oyo State House of Assembly* (2006) 16 NWLR (Pt. 1006) page 608.

Sub-section (10) of section 188 of the Constitution is not a magic wand that could be waved at the lace of the court to prevent a complaint of breach of fundamental human right or due process of law.

A careful perusal of the writ of summons and Statement of claim appellants deserves to call for the intervention of the court.

On this and on other grounds and issues considered by my learned brother GALADIMA, J.C.A. in the lead judgment, I also resolve all issues in favour of the appellant. Appeal therefore partly succeeds. I also order an expeditions retrial.

I abide by other consequential orders made in the lead judgment.

SAULAWA, J.C.A.: (Dissenting): This is an appeal against the ruling of the High Court of Bayelsa State holdcn at Yenagoa in suit No YHC/173/2005 coram M. I. AKPOMIEMIE J., delivered on 23/ 3/2006,

On the 16th clay of December 2005, the appellant caused a writ of summons, a verifying affidavit and Statement of claim to be filed in the court below against the eleven respondents (jointly and severally) challenging *inter alia*, his removal from office as Governor of Bayesla State. The 14 reliefs sought by the appellant as contained in the writ of summons and Statement of claim thereof are hereby reproduced for ease of reference thus:

- (1) *A DECLARATION that the 1st defendant is constitutionally obliged to appoint only such persons as are not disqualified under section 188(5) of the Constitution of the Federal Republic of Nigeria, 1999 as members of the Panel to investigate allegations of impeachable offences leveled against the plaintiff as contained in the impeachment notice dated 18th. November, 2005.*
- (2) *A DECLARATION that the 1st defendant has failed in the performance by him of his constitutional duly under section 188(5) of the 1999 Constitution by his appointment of the 4th, 5th and/or 8th defendants as members of the Investigation Panel inaugurated by the defendant to investigate the allegations contained in the impeachment notice dated 18th November, 2000*
A DECLARATION that the subsection of the plaintiff to house arrest at the behest and direction of the 11th. defendant from 5th December, 2005 till midday on 9th December, 2005 is in ADECLARATION that the failure and/or refusal of the impeachment investigation panel constituted by the 1st defendant, and comprising 4th - 10th defendants to commence sitting and invite the plaintiff to defend himself either personally or through his counsel amounts to abandonment of their mandatory constitutional duties under section 188(7) of the Republic of Nigeria, 1999.
- (5) *A DECLARATION that the 2nd defendant cannot be lawfully approved by the Bayelsa State House of Assembly and sworn-in by 1st defendant as the Substantive Governor of Bayelsa State unless and until the plaintiff exhausts his term, voluntarily resigns, or is otherwise, impeached in accordance with the provisions of section 188 of the 1999 Constitution.*
- (6) *A DECLARATION that the forceful removal of plaintiff from his office as Governor of Bayelsa State on the 9th day of December, 2005 by the 11th defendant and his armed operatives as well as the plaintiff's subsequent arrest and continued detention amounts to an unconstitutional take over of the Government of Bayesla State through a Police-aided civilian coup contrary to section 1(2) of the Constitution of the Federal Republic of Nigeria, 1999.*
- (7) *In alternative to prayer 6 A DECLARATION that the purported report of the panel headed by 4th defendant upon which report the purported impeachment of the plaintiff was carried without notice to or hearing from the plaintiff and which report was submitted to the 3rd defendant on or about 9th December, 2005 is illegal, unconstitutional, null void and of no effect whatsoever.*
- (8) *A DECLARATION that the offices of the Governor of Bayelsa State, and Deputy Governor of Bayelsa State into which the plaintiff and 2nd defendant were respectively sworn on 29th May, 2003 as having been duly*

elected for a four year term ending on 28th May, 2007 have not become vacant to warrant the swearing- in of new incumbents in place of the plaintiff and 2nd defendant as Governor and Deputy Governor of Bayelsa State respectively.

- (9) *AN ORDER setting aside the purported swearing in by the 1st defendant of the 2nd defendant as the substantive Governor of Bayelsa State, on the 12th day of December, 2005 in place of the plaintiff who remains the legitimate and duly elected Governor of Bayelsa State pursuant to the gubernatorial election held on the 19th day April, 2003.*
- (10) *. AN ORDER OF INJUNCTION restraining the 2nd defendant from parading himself as or acting in the capacity of the substantive Governor of Bayelsa State in place of the plaintiff to whom 2nd defendant is the Deputy Governor.*
- (11) *AN ORDER OF INJUNCTION restraining the 1st, 3rd and 11th defendant from according any further recognition to the defendant as the substantive Governor of Bayelsa State in place of the plaintiff to whom 2nd defendant is the Deputy Governor.*
- (12) *AN ORDER directing the 1st defendant to reconstitute the Investigation Panel which he inaugurated on 5th December, 2005 by removing therefore the 4th, 5th and 8th defendants who are disqualified under, section 188(5) of the 1999 Constitution from acting thereon by reason of their political affiliations.*
- (13) *AN ORDER OR MANDATORY INJUNCTION directing the Investigation Panel or to be re-constituted by the 1st defendant in respect of the allegation of impeachable offences contained in a notice dated 18th November, 2005 against plaintiff, to resume and or commence sitting and afford the plaintiff an opportunity to defend himself whether personally or through a counsel of his choice as enjoined in section 188(6) of the Constitution of the Federal Republic of Nigeria, 1999.*
- (14) *Cost of this action.*

However, in the course of the trial of the said suit, two notices of preliminary objection were filed in the lower court on 25th and 26th January, 2006 on behalf of the 1st, 2nd and 4th- 11th respondents and 3rd respondent, respectively challenging the competence of the suit on the following grounds:

- (i) *that the subject matter of this suit being the proceedings or determination relating to the impeachment or removal of the plaintiff as a Governor of a State in Nigeria under the Constitution of the Federal Republic of Nigeria, 1999 is has the provisions of section 188(1) of the Constitution of the Federal Republic of Nigeria 1999 not justifiable or amenable to the jurisdiction of this Honourable Court or any other Court of Ltd v. (3rd respondent). And*
- (ii) *that by the provisions of section 188(1) of the Constitution of Federal Republic of Nigeria, 1999 the jurisdiction of this Honourable Court is expressly excluded from the subject matter of this suit which is predicated on proceedings or action relating to or based on the impeachment or the removal of the plaintiff from office as a Governor of a State in Nigeria under the Constitution of the Federal Republic of Nigeria 1999. (1st, 2nd and 4th - 11th defendants),*

As evident from the records, on 07/4/06, the appellant's learned senior counsel Professor A. B. Kasunmu SAN, filed a notice pursuant to section 295 (2) of the 1999 Constitution (*supra*) seeking the trial

court -

"To refer the constitutional issues raised in the two preliminary objections dated 23rd and 26th of January 2006 by the respondents to the Court of Appeal for determination."

Consequent upon the submissions of the parties' learned counsel on whether or not to deal with the issue of jurisdiction first and foremost, the trial court delivered its ruling on 21/02/06 to the effect, *inter alia* that -

"Ruling delivered. Court ruled that the issue of jurisdiction (i.e. the preliminary objections) be determined first. That along with it, reference application be argued. Also granted order of consideration of the 2 objection called on counsel to move the P. O. dated and filed on the 20 of January 2006. "

It's instructive that the learned counsel made their respective submissions thereupon the preliminary objection in question, in consequence of which the learned trial Judge in the considered ruling thereof dated 23/3/2006 arrived at the following conclusion

"Finally, I hold that this court has no jurisdiction to entertain this suit. Case struck out. "

Thus, as alluded to above, being dissatisfied with the said ruling of the trial court, the appellant filed in the trial court, the notice of appeal thereof along with a total of nine (9) Grounds of Appeal on 24/4/06.

The appellant applied for and was duly granted leave to depart from the rules of this court and complied the record of appeal, Con-sequent upon which briefs of argument were filed by the parties. However, on 21/12/06, the appellant applied for leave to amend the sofe relief sought in the notice of appeal as set out at page 118 of the record. That application was not surprisingly, vehemently objected to by the respondents.

It's trite that in consequence of the submissions of parties' counsel upon the appellant's application in question, this court delivered a ruling on 08/02/07 to the effect, *inter alia*, thus:

"On a calm view of the facts and circumstances in this case and taking into consideration the affidavit in support of the application, and documents exhibited, my obvious conclusion is to allow the application of the appellant and it is so allowed. "

Briefs of argument have been filed and exchanged by the respective learned counsel. The briefs were accordingly adopted by the counsel on 25/02/07 when the appeal last came up for hearing, The appellant's brief was dated 18/7/06 and filed on 19/7/06. The reply brief thereof was dated 03/11/06 and filed on the same date. Four issues have been formulated at pages 6 and 7 of the appellant's brief thus:

- "(1) whether the jurisdiction of the court is excluded from inquiries into allegations or complaint of non-compliance with any or all of the provisions of section 188 of the Constitution in relation to proceedings for impeachment of the Governor of a State because of the provisions of section 188(10).*
- (2) whether or not tlie powers vested in the. chief Judge of a State pursuant not to .section 188(5) of the Constitution can be challenged in the persons so appointed by him are disqualified for appointment under the provisions of that subsection.*
- (3) whether the trial Judge was right in holding that the 2nd defendant can not be sued or made a parly to the plaintiff's action because of section 308 of the Constitution even when as it was claimed in this case that he has been*

joined as a nominal defendant

- (4) *whether the trial Judge was right in holding that the 11th defendant the Commissioner of Police can not be sued in a State court having regards to section 251 of the Constitution in (sic) the Federal Republic of Nigeria.*

On the other hand, the 1st and 3rd respondents have formulated three issues in the joint brief thereof filed on 21/02/07 thus:

- (I) *whether having regard to the mandatory provisions of section 188 (10) of the 1999 Constitution, the learned trial Judge was right in holding that the lower court lacked jurisdiction to adjudicate on the appellant's claims. (flowing from Ground I of the appellant notice, and grounds of appeal).*
- (ii) *whether the appointment of the Panel by the chief Judge of the State pursuant to section 188 (5) of the 1999 Constitution is not part of the impeachment proceedings or a matter relating to such proceeding as contemplated by the 1999 Constitution (flowing from grounds 2, 5 and 8 of appellant's notice and grounds of appeal).*
- (iii) *whether the application of members of the impeachment panel relative to the impeachment of the appellant herein can be questioned in a court of law.*

The 2nd respondent's brief was filed on 09/11/06 but deemed properly filed and served on 22/02/07. Four issues have been formulated therein thus:

- "1. *whether the court below was right in holding that the court lacked jurisdiction to entertain the plaintiffs complaints against the impeachment proceedings against him leaving regard to the provisions of section 188 (10) of the 1999 Constitution. Grounds 1, 2, 3, 4, 6.*
2. *whether the court has jurisdiction to entertain an action challenging the exercise by the chief Judge of a State of his power under section 188(5) of the 1999 Constitution of appointment of the panel to investigate the allegations contained in an impeachment notice issued under section 188(2) of the Constitution by the House of Assembly of a State Grounds .5, 8.*
3. *whether having regard to the reliefs sought by the plaintiff against the 2nd defendant the learned trial Judge was right in holding that the 2nd defendant could not be sued or made a party to the plaintiff's action because of section 308 of the Constitution Ground 7. whether the learned trial Judge was right in holding that the State (sic) court had no jurisdiction in respect of the claims made against the 11th defendant because the 11th defendant was an agent of the Federal Government having been posted to Bayelsa State by the Inspector General of Police and Police matters being an item (45) on the Exclusive Legislative list in the Second Schedule to the 1999 Constitution Ground 9.*
- The 4th -10th respondents' brief was dated 19/02/07 and filed the same date but deemed properly filed and served on 22/02/07. A notice of objection has been raised therein praying the court to strike out ground 5 of the notice of appeal on the following grounds:

- "(i) *I he ground (Ground 5) did not in any way relate to the ruling appealed against,*
- (ii) *The ground did not arise from the ruling nor related to it. "*

A total of three issues have also been formulated in the brief in question thus:

- "(1). *Whether the trial court was not right on the interpretation it placed on the provisions of Section 188 (10) of the Constitution in declining jurisdiction to hear the case of the appellant having regard to the peculiar facts and circumstances of this case and the way it was initiated.*

- (2) *whether the learned trial court having regard to the facts and circumstances of this case, was not correct in the view it took on the invocation of the provisions of section 308 of the 1999 Constitution in favour of the 2nd respondent.*
- (3) *whether the learned trial Judge was not right to have invoked the provisions of section 25] of the 1999 Constitution to decline jurisdiction in adjudicating on the 11th respondent which is a Federal Agency.*

The last, but by no means the least, was the 11th respondents' brief filed on 21/02/07 but deemed properly filed and served on 22/02/07. A total of three issues have equally been raised therein for determination, to wit -

- (i) *whether the lower court was right in holding that the court lacked jurisdiction to adjudicate the appellant's claims having regard to the mandatory provisions of Section 188 (10) of the Constitution of the Federal Republic of Nigeria, 1999. Ground 1, 2, 3, 4 and 6.*
- (ii) *whether having regard to the provisions of Section 308 (1) of the 1999 Constitution of the Federal Republic of Nigeria the lower court was right in holding that the 2nd respondent ought to be joined as a party in the suit: Ground 7.*
- (iv) *whether the lower court was right in holding that the 11th respondent is an agent/agency of the Federal Government and the High Court of Bayelsa State consequently lacked jurisdiction in respect of the appellants claims against him: Ground 9.*

It is instructive that the appellant has, in addition to the brief thereof alluded to above, also filed a reply brief on 03/11/06. The reply brief in question was supposedly a response -

"TO THE BRIEF OF THE 1ST, 4TH AND 11TH RESPONDENTS AND THE BRIEF OF THE 4TH -10TH RESPONDENTS."

However, it is a notorious fact that in the course of the pendency of the instant appeal, this court was inundated with applications for change of counsel by the 1st - 11th respondents. Some of the respondents' counsel were changed rather at the eleventh hour. Thus, resulting in the withdrawal and striking out of the briefs filed by the respondents' former counsel. Two briefs had so far been filed by different counsel on behalf of the 4th - 10th respondents. The first was filed by Chief Ladi Williams SAIN on 05/10/06. The second one was filed by Chief A. S. AWOMOFO SAN on 13/02/07. All former counsel were debriefed by the respondents. The new sets of counsel for the respondents did not deem it expedient to adopt the briefs filed by the former counsel. The 1st and 3rd respondents brief was filed by M. George Ikofi SAN on 21/02/07, while those of 2nd, 4th - 10th and 11th respondents were filed by their new counsel in the persons of Tayo Oyetibo SAN, Yusul Ah SAN and Peter O. Affcn Esq; respectively. Thus, the brief filed by Chief A. S. Awomofa SAN upon which the purported reply brief of the appellant was predicated had been withdrawn and accordingly struck out on 22/02/07.

What's more, of the four sets of respondents' briefs adopted on 22/02/07, only that of 4th - 10th respondents raised a preliminary objection as alluded to above. That being the case therefore, the appellant's purported reply brief which was filed since on 03/11/06 could not have possibly alluded to the issues raised in the 4th - 10th respondents' brief in

question filed only on 19/02/07. The purported reply brief having been overtaken by events, therefore goes to no issue and its thus hereby struck out.

ARGUMENTS IN SUPPORT OF ISSUES RAISED:

I have deemed it expedient to at this stage, allude to the fact that the appellant's brief of argument was to say the least inelegantly drafted with due respect to the learned senior counsel. The argument, especially on issues 2 and 3 serially itemised above, were unforgivably mixed up. Issue No. 3 was erroneously argued under issue 2 and vice versa. The learned senior counsel alluded to the fact that (i) issue No. 1 was tied to Grounds I - 6 of the Grounds of Appeal; (ii) issue No. 2 to Ground 8; (iii) issue No. 3 to Ground No. 7; and (iv) issue No. 4 to Ground No.9 respectively.

According to the senior counsel, all the four issues raised in the appellant's brief relate to issue of jurisdiction of the trial court. Submitting on both issues 1 and 2, the learned silk contended that the two main claims are as contained in paragraphs 6, 10, 11, 12, 13, 15, and 16 of the Statement of claim (contained at pages 1 -11 of the Record). That, the gravamen of the two issues raised therein is whether the trial court has no jurisdiction and whether the appellant was given a fair hearing. It was argued that (i) the persons appointed as members of the impeachment panel by the 1st respondent ought not to have been so appointed having regard to the qualifications set out in sections 188 (5) of the 1999 Constitution (supra); (ii) there was no hearing of the allegations contained in the impeachment notice; and (iii) that the appellant was not invited to defend himself before the investigation panel.

It was alluded that the trial court relied upon the cases of *Balarabe Musa v. Auta Hamza & Ors* (1982) 3 NCLR 229 and *Abaribe v. Speaker Abia State House Of Assembly & Ors* (2002) 1 NWLR (Pt. 788) 466 to arrive at the decision that section 188 (10) of the 1999 Constitution completely excluded the jurisdiction of the, court in matters relating to impeachment.

The case of *Adegoke Motors Lid. v. Adesanya* (1989) 3 NWLR (Pt. 109) 250 at 265 - 266 paragraph It was however cited to the effect, inter alia, that Judges and lawyers have been admonished on the use of pronouncements of court as authorities. *Balarabe Musa's* and *Abaribe's* cases (supra) were distinguished from the instant case thus; (i) that *Balarabe Musa's* case was predicated on section 170 (10) of the 1979 Constitution as against the Section 188 (10) of the 1999 Constitution applicable to the instant case; (ii) that under section 170(5) of the 1979 Constitution, the impeachment panel of investigation was nominated by the Speaker of the House of Assembly; as against section 188 (5) of the 1999 Constitution which vests that power in the Chief Judge of a State: (iii) that, the court of Appeal rejected any argument for intervention on the ground that the fair hearing provisions applied only to judicial proceedings and not to impeachment proceeding which is political.

Abaribe's case (supra), on the other hand, was predicated on section 188 (10) of the 1999 Constitution. However, the court came to a similar conclusion as in *Balarabe Musa's* case that courts should be wary of assuming jurisdiction to interfere with such proceedings. However, it was contended by the learned silk that

"The, decision of the *Abaribe* case clearly is a pointer that there are circumstances and situations in which the court would assume jurisdiction notwithstanding, the clear provision of per in (sic) section .188 (10) the Constitution."

It's argued that the court should not suit its eyes to a complaint that the investigating panel set up by the Chief judge never summoned the complainant to appear before it; never sat but yet submitted its report to the Speaker upon which the House equally acted; or that only 10 out of 60 members of a House of Assembly supported a motion for impeachment when the Constitution requires 2/3 majority. See section I(i) 1999 Constitution; *Ekpo Calabar Local Government* (1993) 3 NWLR (Pt. 281) 324; *Adeleke v. Oyo State House of Assembly* (2006) 16 NWLR (Pt.1006) 608; *Muyiwa v. Adeleke & Or.s* SC 272/2006 elated 12/01/07 (unreported); now reported in (2007) 4 NWLR (Pt. 1025) 423, *Balonwu & Ors r. Obi & Anor*; CA/E/3/2007, (2007) 5 NWLR (Pt. 1028)

488 dated 09/02/2007. The appellant thus urged the court to allow the appeal on issues 1 and 2.

On the 3rd issue, it was argued inter alia that by virtue of section 308 of the 1999 Constitution, there's nothing in the Statement of claim an allegation of wrong doing was made against the 2nd respondent. That, he was the beneficiary of the act of removal of the appellant by the 3rd respondent. That, he is sued as a nominal party so that he be bound by any judgment that may possibly be made by the court.

On the 4th issue, the learned silk contended inter alia, that it will be absurd to apply the constitutional limitation to jurisdiction as the respondent is only a defendant amongst numerous defendants being sued in a matter in which the trial court had jurisdiction. That, that's not the intention of S. 251 of the 1999 Constitution. The court was thus urged to so hold.

On the other hand, the learned senior counsel to the 1st and 3rd respondents prefaced his submission by alleging that exhibit was a forged document. He alluded to a supposed counter affidavit of the 3rd respondent on the respondents' motion for stay of proceedings filed on 22/02/07. He thus urged the court to conduct an investigation to determine the veracity of the allegation of exhibit, being a forged document.

On issue No. 1, the learned senior counsel submitted inter alia, that the issue of jurisdiction of courts adjudicating on claims of a party is fundamental. See *Anason Ibeto Int'l Ltd. v. Vimex Imp-Exp* (2001) 10 NWLR (Pt. 720) 224 at 231 paragraph *Soyanwo v. Akinyemi* (2001) 8 NWLR (Ft. 714) 95 at 116 paragraph E; *Onyeanusu v. Misc. Offences Tribunal* (2002) 12 NWLR (Pt. 781) 227 at 252 paragraph A - C; D-E; *Ekpo v. Calabar Local Govt.* (supra) at 341 paragraphs A-B.

It was argued that by virtue of section 18(3) of the interpretation Act Cap 192, Laws of the Federation of Nigeria, 1990, the word 'or' used in section 188(10) of the 1999 Constitution should be "construed disjunctively and as implying similarity." See *Oyeyipu v. Oyinloye* (1987) 1 NWLR (Ft. 50) 356; *INEC 10 Ors v. Musa & 4 ORS* (2003) 3 NWLR (Ft. 806) 72 at 157. That, the decisions in *Abaribe v. Abia State House of Assembly* (supra) represents the full interpretation of section 188 (10) of the 1999 Constitution of which by virtue of the principle of *stare decisis*, the lower court is bound by that judgment. See also *Bahirabe Musa v. Hamza.* (supra); *Dalhatu v. Turaki* (supra); *Adegbenro v. Akintofa* (1963) 3 All ER 544; (1963) 1 ANLR 299, 551 -552; *Bronik Motors Ltd. v. Wema Bank Ltd.* (1983) 1 SCNLR 296. The court is thus urged to answer issue No. 1 in the positive and dismiss the appeal.

On issue No. 2, the learned silk inter alia alluded to section 188 (5) 1999 Constitution: *Zangina And Anor v. Comm for Works Housing; Land Survey Homo State & 3 Ors* (2001) FWLR (Pt. 79) 1368; (2001) 9 NWLR (Ft.7 I 8)-460, *Ekpo v. Calabar Local Gov't. Council* (supra) and contended that the lower court was right in holding that the appointment of the seven panel members by the respondent that a mailer relating to the proceedings or determination of the House of Assembly the court cannot therefore look in to it.

On issue No. 3, the learned silk submitted, inter alia, that the impeachment process is essentially political and the legislature is the judge and that section 188 (10) was provided in order to ward off interference from the court. See *Abaribe v. Abia State House of Assembly* (supra). The conclusively urged on the court to dismiss the appeal-On his own part, the 2nd respondent's learned senior counsel submitted from out set that he associated himself with the 1st and 3rd respondents counsel's allegation that exhibit was a forced document for which this court has a duty to investigate there upon. See *Sodipo v. Lemminkainen OY* (1986) 1 NWLR (Pt. 15) 220 at 238 -239.

With regard to the 2nd respondent, it was contended that most of the reliefs were against him and that the case of *Tinubu v. J.M.B. Securities Plc* (2001) 16 NWLR (Pt.740) 670 is still good law. That, there is distinction between the respondent's position and *Ladofa's case* (supra) in that the 2nd respondent is a sitting Governor or Deputy Governor

thus the immunity attached to him at the time of the proceeding. Where as in Ladoja's case the impeachment had already taken place.

- (i) On the court's order dated 08/02/07 granting leave to the appellant to amend reliefs set out at page of the record, it was contended that such leave was sought or granted after that leave. That no amendment has so been made. That, it's trite that an applicant is bound by the prayer in his motion paper; so also is the court bound. *Sec Govt. of Gondofa State v. Tukur* (1989) 4 NWLR (Pt. 117) 592; 603; *Comm. for Works Benne State Devcon Construction Coy. Ltd.* (1988) 3 NWLR (Pi.83) 407 at 42.
- (ii) On Jurisdiction –
- (iii) It was contended that the jurisdiction of the court must be based on the notice of appeal involving the power of the court. At the moment there's not been any amendment to the original notice of appeal, (iii) That the prayers granted by the court on the said 08/02/ 07 are of two legs or rights (a) granting the leave (b) silting to hear the case afresh like the trial court. See *Igboho E.G. v. Boundary Settlement Commission* (1988) 1 NWLR(Pt. 69) 189a 191.

It was Stated that exhibit A is not part of the Record of Appeal. Thus, having not been received as a further evidence in this appeal pursuant to Order rule 19(2) CA Rules, it is not an exhibit in the appeal. Alternatively, its contended that it would be speculative for the court to rely on exhibit A. See *Kode. v. Yussuf* (2001) 4 NWLR (Pt. 703) 392 at 413.

The learned counsel, thus urged on the court to dismiss the appeal.

The learned senior counsel to the 4th - 10th respondents prefaced his submission by moving the notice of objection at pages 3 - 4 of the brief thereof. He then alluded to the 3 issues formulated at pages 6 -5: the points on jurisdiction and accordingly adopted the entire brief urging that the appeal be dismissed.

Regarding the declaratory reliefs being sought by the appellant, the learned senior counsel contended that a declaration cannot be made on an admission.

Evidence must be preferred to support the claim. See *Bella v. Eweka* (1981) I SC 101 at 102- 103; Section 150(1) Evidence Act, Cap 112 Laws of the Federation of Nigeria, 1990.

On exhibit A - the learned senior counsel alluded to various paragraphs of the appellant's pleadings, especially paragraphs 2, 3, 4, 10, 13 and 19, and contended inter alia, that the said exhibit had not proved lack of fair hearing. That it's not shown on the face of exhibit A that the appellant was not invited as alleged.

That, paragraph 2 of exhibit A destroys paragraph 13 which alleged that the panel never sat. The learned silk urged the court to invoke section 149(d) of the Evidence Act in favour of the Respondents. See *Rossek v. AC'B Ltd* (1993) 8 NWLR (Pt.312) 382 at 392 - 393.

It was also contended that apart from the issue of removal, there is no common feature between Ladoja's case (supra) and the present case. That, in Ladoja case, originating summons was the procedure adopted, supported by affidavit. That, in Ladoja's case, the quarrel was between two factions of the House of Assembly; one of which sat in a hotel room in Ibadan to remove the Governor. While in Obi's case (supra), (the main issue) was the failure to serve notice of impeachment. It's contended (that this is not a proper case to invoke section 16 of the Court of Appeal Act (supra), on the ground that the trial court could not have given judgment on exhibit A alone with out taking evidence.

The submission of the learned counsel to the 11th respondents is to the effect inter alia, that the decision of the supreme court in *NEPA v. Edegbem* (2002) 9 WRN 1, (2002) 18 NWLR (Pt.798) 79 to the effect that an agent of the Federal Govt. can only be sued in the Federal High court is still good law. That, the appellant has not appealed against the finding of the lower court on the finding that impeachment is a political matter. See *Nwanbuezo v. Okoye* (1988) 4 NWLR (Pt. 91) 664 at 679.

That, the power of the court under section 16 of the Court of Appeal Act can not be invoked due to the fact that the action was commenced by a writ of summons. That, exhibit A is not admissible, because the certification thereof has not met the requirement of section 111 of the Evidence Act. See *GTI1CLR v. Tabik Inv.* (2005) 13 WLR 37 - 38; *NIPC v. Thompson Organisation* (1969) 1 NMLR 99. The learned counsel associated himself with the submissions of the respondents' senior counsel and thus urged that the appeal be dismissed.

The appellant's learned senior counsel's reply on points of law is to the effect, inter cilia, that -

(i) On exhibit A - a charge of forgery is a criminal charge which must be pleaded and proved beyond reasonable doubt: *Koiki & 2 Ors v. BB Magnusson* (2001) FWLR (Ft. 63) 167; (1999) 8 NWLR (Ft.615) 492, (ii) the counter affidavit was for the application for stay of proceedings; that the deponent therein did not say that exhibit A is not the report but merely Stated that its forged, (iii) that 4th -10th respondents were the authors of exhibit A but none of them denied it. (iv) that the appellants gave notice to the respondents to produce exhibit A, which they failed to do. See paragraphs 19 and 25 of the Statement of claim, (v) that the evidence in this case is as contained in the Statement of claim and verifying affidavit of fact contained in the record, (vi) on need for investigation - that the Respondents have failed to produce any other document to show that's what they have. See *Chief G. A. Akhiwu v. The Principal Lotteries Officer Midwestern State of Nigeria & Anor* (1972) 1 All NLR (Ft. 1_) 229; 241 -242. (vii) that exhibit A is an evidence, (viii) on fair hearing - that section 188 (6) of the 1999 Constitution deals with the appellant's right to defend himself in person before the panel. The learned senior counsel thus urged that the appeal be allowed.

It's instructive that in the 4th - 10th respondents' brief, the learned senior counsel has raised a preliminary objection at pages 3-4 urging the court to strike out ground 5 of the original grounds of appeal on the grounds that -

"I The ground did not in any way relate to the ruling appealed against,

(i) The, ground did not arise from the ruling nor related to it"

See *Egbe v. Alhaji* (1990) 1 NWLR (Pi. 128) 546 at 590 paragraph A. The said ground 5 of the grounds of appeal is to the effect that -"GROUND FIVE

The learned trial Judge erred in law in holding that an Order cannot be made to direct the 1 st defendant to reconstitute a panel lie has already set up contrary to the provisions of section 188 (5) of the 1999 Constitution. That the original request for the setting up of the panel was made by the speaker when the plaintiff as the person affected busy the costs of the 1st defendant clearly has a right to ask for the reconstitution of the said panel, which is the basis of the claim in relief 12."

It's trite as alluded to above, that issues for determination must be relevant to the grounds of appeal. Thus, any issue for determination which is not related or has no reference to any ground of appeal goes to no issue and ought to be discountenanced. See *IJioewulu v. Ezeaku* (2001) FWLR (Pt. 46) 932 at 946, (2000) 14 NWLR (Pl.688) 629.

In my view, it is rather obvious that the above ground does indeed specifically relate to the ruling of the lower-court. See Order 3 rule 2(2) and (3) of the Court of Appeal Rules (supra) thus -

"(2 'the grounds of appeal allege misdirection or error in law, the particulars and the nature of the misdirection or error shall be clearly Stated.

(3) The notice of appeal shall set forth concisely and under distinct heads the grounds upon which the appellant intends to rely at the hearing of the appeal without any argument or narrative and shall be numbered consecutively.

Thus, the preliminary objection of the 4th - 10th respondents is hereby discountenanced. It's a common knowledge that as at the time of the hearing of this appeal on 22/02/07, the appellant had not filed any application for leave to amend the original grounds of appeal filed along with the notice of appeal at the lower court on 24/4/06. The appeal

was-thus argued on those grounds alone. However, our attention had been drawn to an "AMENDED NOTICE OF APPEAL BROUGHT PURSUANT TO ORDER OF COURT DATED 8TH FEBRUARY 2007 dated 09/02/2007 but filed on 27/02/2007. It was filed at this eleventh hour supposedly in response to the respondents' learned counsel's observation that after the court's order of 08/02/07 to amend chiefs set out at page 118 of the Record. Unfortunately, however the learned senior counsel for the appellant, for reasons best known thereto, perilously failed to respond to that observation in his response on point of law. He limited his response to the issue of whether or not exhibit A is a forged document, evidence and fair hearing.

As alluded to above, this court had on 08/02/07 granted leave to the appellant to amend the relief set out on page 11.8 of the record of appeal. The said relief set out at page 118 of the record sought

[and for which the leave was duly granted by the court], to be amended was to the following effect: "4. RELIEF SOUGHT

To allow the appeal and remit the case for trial before another Judge of the Yenagoa High. Court, Bayelsa".

As it would appear, the amended notice of appeal filed on 27/ 02/07 in question is specifically regarding the amendment to the relief referred to above which is to the following effect -"4. RELIEF SOUGHT

An Order that this Honourable Court allow the. appeal and rather than remitting the case back to the lower court to exercise powers vested on it under Section 16 of the court of Appeal Act and determine the appellants case as constituted as in this Honourable court is sitting as the trial court.

The pertinent question which ought to be posed at this point in time, is whether the filing of the said amended notice of appeal is valid in law in spite of the fact that it was filed after the appeal had been heard and reserved for judgment. I think the answer to that pertinent question is not far fetched. It's obvious that the order of the court of 08/02/07 granting leave to the appellant to file the amended notice of appeal regarding the relief set out at page 118 of the Record in question did not tie down the appellant to any time limit within which to file the application.

I have deemed it expedient to reproduce the said Order thus: "On a calm view of the facts and circumstances in this case and taking into consideration the affidavit in support of the application, and documents exhibited, my obvious conclusion is to allow the application of the appellant it is so allowed. I make no Order as to costs."

In my view, the fact that the amended notice of appeal was filed after the hearing of the appeal has not amounted to denial of fair hearing to the respondents.

The amended relief contained in the amended notice of appeal in question is exactly the same with the one incorporated in the prayers of the appellant's motion on notice. Thus, there is no basis whatsoever for the respondents claim to have been taken by surprise by the filing of the amended notice of appeal in the eleventh hour. It's trite that justice demands that a party to a suit must be accorded an ample opportunity to present his case.

Having accorded a very critical albeit dispassionate consideration upon the nature and circumstances surrounding the case as a whole, the record of appeal, the briefs and oral submissions of the learned counsel, and vis-a-vis the various illuminative authorities referred to therein, I am of the considered view that four issues call for determination in the instant appeal. The four issues are as follows:

- "1. Whether the jurisdiction of the trial court is excluded or ousted from inquiring into allegations or complaints regarding non-compliance with any or all of the subsections (1) - (9) of section 188 of the Constitution of the federal Republic of Nigeria. 1999 in relation to proceedings for impeachment of the Governor of a State because of the provisions of subsection (10) of section 188 in question (This issue is predicated on Grounds 1, 2, 3, 4, 5 and 6.

2. Whether the powers vested in the Chief Judge of a State pursuant to section 188(5) of the 1999 Constitution can be challenged if the persons so appointed by him are disqualified to be appointed as members of the investigation panel under the provisions of that subsection (Ground No. 8).

3. Whether the learned trial Judge was right in holding that the 2nd respondent can not be sued as a party to the appellant's action because of the provisions of section 308 of the 1999 Constitution. (Ground No 7).

4. Whether the learned trial Judge was right in holding that the 11 respondent cannot be sued in the trial court being a State High Court in view of the provisions of section 251 of the 1999 Constitution. (Ground No 9). The four issues formulated above no doubtfully represent, mutatis matandi, raised in the respective briefs of the parties.

The learned senior counsel to the appellant has at the outset of the oral submission thereof alluded to the fact that all the four issues above relate to the question of jurisdiction.

It's trite principle of law that the competence of any court of law, be it the trial or appellate, inferior court or superior court of record, depends entirely upon whether the subject matter of the case before it is within its jurisdictional powers and the fact that there is no any feature therein which is likely to prevent it from duly exercising the jurisdiction thereof See *Madukofu v. Nkemdilim* (1962) 1 All NLR 587, (1962) 2 SCNLR 341; *Western Steel Work Ltd. v. Iron and Steel Workers Union* (1986) 3 NWLR (Pi. 30) 617. ON ISSUE NO. 1

It's instructive that issue No. 1 is essentially predicated on the provisions of section 188 of the 1999 Constitution (supra). I have deemed it expedient to reproduce hereunder the entire provisions of subsections (1) - (11) of section 188 for ease of reference thus:

" 188.- (1) The Governor or Deputy Governor of a State may be removed from office in accordance with the provisions of this section.

(2) Whenever a notice of any allegation in writing signed by not less than one-third of the members of the House of Assembly

a) is presented to the Speaker of the House of Assembly of the State:

stating that the holder of such office is guilty of gross misconduct in the performance of the functions of his office, detailed particulars of which shall be specified the speaker of the House of Assembly shall, within seven days of the receipt of the notice, cause a copy of the notice to be served on the holder of the office and on each member of the House of Assembly, and shall also cause any Statement made in reply to the allegation by the holder of the office, to be served on each member of the House of Assembly.

{3} Within fourteen days of the presentation of the notice to the Speaker of the House of Assembly (whether or not any Statement was made by the holder of the office in reply to the allegation contained in the notice), the House of Assembly shall resolve by motion, without any debate whether or not the allegation shall be investigated.

(4) A motion of the House of Assembly that the allegation be investigated shall not be declared as having been passed unless it is supported by the votes of not less than two-thirds majority of all the members of the House of Assembly.

(5) Within seven days of the passing of a motion under the foregoing provisions of this section, the chief Judge of the State shall at the request of the Speaker of the House of Assembly, appoint a Panel of seven persons who in his opinion are of unquestionable integrity, not being members of any public service, legislative house or political party, to investigate the allegation as provided, in this section.

(6) The holder of an office whose conduct is being investigated under this

section shall have the right to defend himself in person or be represented before the Panel by a legal practitioner of his own choice.

- (7) A Panel appointed under this section shall -
 - (a) have such powers and exercise its functions in accordance with such procedure as may be prescribed by the House of Assembly, and
 - (b) within three months of its appointment, report its findings to the House of Assembly.
- (8) Where the Panel reports to the House of Assembly that the allegation has not been proved, no further proceedings shall be taken in respect of the matter.
- (9) Where the report of the panel is that the allegation against the holder of the office has been proved, then within fourteen days of the receipt of the report, the House of Assembly shall consider the report, and if by a resolution of the House of Assembly supported by not less than two-thirds majority of all its members, the report of the Panel is adopted, then the holder of the office shall stand removed from office as from the date of the adoption of the report.
- (10) No proceedings or determination of the Panel or of the House of Assembly or any matter relating to such proceedings or determination shall be entertained or questioned in any court. In this section - "gross misconduct" means a grave violation or breach of the provision of this Constitution or a misconduct of such nature as amounts in the opinion in the House of Assembly to gross misconduct.

I have alluded above, the arguments of the appellant on the one hand, and the respondents on the other regarding this issue. The gravamen of the complaint of the appellant under this issue (pages 7 - 16 of the appellant's brief) are that; (i) the 1st respondent did not comply with subsections (5) and (6) of section 188 of the 1999 Constitution in appointing the members of the impeachment investigation panel.

(ii) that there was no hearing of the allegations contained in the impeachment notice; and that (iii) the appellant was not invited to defend himself before the Investigation Panel. Most important, however, on the issue of jurisdiction, a reference was made particularly to section 188 [110] of the Constitution to the effect that

"The decision of the trial court is that section 188(10) completely excluded the jurisdiction of the court in matters relating to impeachment regardless of the nature of the complaint since the process of impeachment is political and is therefore not subject to any intervention by court. See page 8 of the appellants brief.

As it were, the relevant finding of the trial court on this issue could be found at pages 103 - 104 of the Record thus:

"As I Stated above, the House of Assembly in the impeachment proceedings performs judicial function. And to prevent any interference with their function, the jurisdiction of the court was expressly excluded by subsection JO of the section 188 It is clear from the above that this court has no jurisdiction to grant the reliefs set out above and they are accordingly struck out. "

As alluded to above, the authorities relied upon by the learned trial Judge to arrive at the above findings especially those of *Balarabe Musa v. An/a Hamza (supra)* and *Abaribe v. Speaker Abia State of Assembly & Ors (supra)* have been alluded to above by the appellant and respondents alike in the respective briefs thereof.

It's trite that Balarabe Musa's case (supra) was decided upon the provisions of most particularly section 170 (10) of the Constitution of the Federal Republic of Nigeria, 1979 (a precursor of the 1999 Constitution). It may well be Stated that the provisions of section 170(10) 1979 Constitution and section 188(10) 1999 Constitution share a common objective - i.e. Impeachment of a Governor of a State or Deputy thereof by State House of Assembly. However, there are some distinguishing features that characterise each of the two Constitutions.

- (i) Under section 170(5) of the 1979 Constitution the members of the investigation panel were nominated p by the Speaker of the State House of Assembly which nomination was however subject to the approval of the I louse of Assembly, (ii) Contrariwise, under the 1999 Constitution especially section 183(5), the power to appoint the members of Q the investigation panel is duly vested in the State Chief Judge. Balarabe Musa's complaint was predicated on the facts that:
 - (i) The notice of allegation of misconduct was not signed by any of the members;
 - (ii) Detailed particulars of the alleged gross misconduct was not given in the notice as stipulated under section 170(2)(b) of the Constitution,
 - (iii) The allegations contained in the notice were not investigated within the time stipulated by section 170 (6) of the Constitution.

The court of Appeal, per ADEMOFA, JCA, in declining jurisdiction to look into the complaint in question held, inter alia, that -

"It follows from the premise of this that no court can entertain any proceedings or question the determination of the I louse of the committee. It is a political matter. "

ABARIBE'S case (supra) on the other hand was decided on the basis of section 188 (10) of the 1999 Constitution. The same conclusion as in Balarabe's case was reached by this court to the effect that impeachment proceedings are political and that the courts should be wary of assuming jurisdiction to delve into such proceedings. However, as against Balarabe's case, the court of Appeal in Abaribe's case had made afar reaching pronouncement which served as a pointer that there are situations and circumstances that could warrant the court to assume jurisdiction, the clear ouster provisions in section 188(10) of the Constitution notwithstanding. Thus, the court of Appeal per Pats-Achofonu, JCA (of remarkable memory, as he then) held inter alia thus -

"In so far as it concerns the issue of impeachment it is a political matter. However, the court at the same time may not close its eyes to serious injustice relation to the manner the impeachment procedure is being carried. That is to say it is within the province of the court to ensure strict adherence to the spirit of the constitution for the endurance of a democratic regime. " I think, I can not agree more with that philosophical and rather authoritative assertion of the late courageous and eminently erudite jurist. There is no doubt that the provision of subsection 188(10) of the 1999 Constitution is for all intent and purposes, an ouster clause. However, it's trite that a court of law ought not to be frightened or cowed down by an austere clause. It has a duty to cherish and guard its jurisdiction not only jealously, but also courageously.

Thus, in the course of interpreting the provision of section 1 88(10) of the 1999 Constitution (supra) the whole section must betaken into account otherwise, the circumstances surrounding the coming into play of the ouster clause would never be comprehended, let alone appreciated.

It is rather inconceivable that a subsection of a whole section of a statute standing in isolation can be read in full comprehension.

It's trite that a subsection normally has an affinitive relationship with other subsections of a given section. See Ekpo v. Calabar Local Government (1 993) 3 NWLR (Pi, 28 1) 324 per UWAIFO, JCA (as he then was) thus:

"Hence a section of a statute having subsections must be read as a whole and related sections must be read together. "

In the light of the above postulations, I have no hesitation whatsoever in up-holding the appellants learned senior counsel's contention that the trial court was indeed in error in declining jurisdiction to entertain the plaintiff/appellant's complaint. Thus, my answer to issue No. 1 is most undoubtedly in the negative. And I so hold. ON ISSUE NO. 2:

The present issue no doubt has a direct bearing on the provision of subsection (5) of the section 188 of the 1999 Constitution. A reference was made to the holding of the trial court at page 106 of the Record to the effect, inter alia, that -

"it is also my considered view that the appointment by the Chief Judge of a State of the members of the impeachment panel is part of the impeachment process. The appointment of the 7 persons by the Chief Judge at the request of the speaker of the House of Assembly is a matter relating to the proceedings or determination of 'the House of Assembly. The court can not therefore look into it.

It is rather obvious that the learned trial Judge merely took a cover under the ubiquitous albeit not unlimited ouster clause provided in subsection (10) of section 188 of the 1999 Constitution. As alluded to above under issue No 1, the learned trial Judge had undoubtedly erred in law by holding that by virtue of subsection (10) of section 188 of the 1999 Constitution, the appointment of the 7 members of the investigation panel by the 1st respondent can not be questioned. The 1st respondent does not enjoy any immunity against the exercise of the power thereof under the said section. Thus, my answer to issue No. 2 is most certainly in the affirmative. And I so hold. ON ISSUE NO. 3

The 3rd issue relates specifically to the 2nd respondent. It raises the question of whether the 2nd respondent is immune from being sued by virtue of the provisions of section 308 of the 1999 Constitution. I have deemed it expedient to reproduce in verbatim the provisions of the section 308 of the 1999 Constitution, thus:

"308. - Notwithstanding anything to the contrary in this Constitution, but subject to subsection (2) of this section

- (a) no civil or criminal proceedings shall be instituted or continued against a person to whom this section applies during his period of office;
- (c) a person to whom this section applies shall not be arrested or imprisoned during that period either in pursuance of the process of any court or otherwise; and
- (c) no process of any court requiring or compelling the appearance of a person to whom this section applies, shall be applied for or issued:

Provided that in ascertaining whether any period of limitation has expired for the purposes of any proceedings against a person to whom this section applies, no account shall be taken of his period of office.

- (2) The provisions of subsection (1) of this section shall not apply to civil proceedings against a person to whom this section applies in his official capacity or to civil or criminal proceedings in which such a person is only a nominal party.
- (3) This section applies to a person holding the office of President or Vice

President, Governor or Deputy Governor; and the reference in this section to "period of office" is a reference to the period during which the person holding such office is required to perform the functions of the office.

As per the appellant's brief, paragraphs 5, 8,9, 10 and 11 of the Statement of claim have direct bearing upon the 2nd respondent. It's instructive that the learned trial Judge raised the issue in the judgment thereof as to whether the 2nd respondent was sued in his personal capacity or as a nominal party. The learned trial Judge then copiously reproduced paragraph 10 of the Statement of claim and came to the conclusion that the 2nd respondent was sued in his personal capacity and not as a nominal party. According to the learned trial Judge –

"By virtue of the election to office of the 2nd defendant as the Deputy Governor. and the constitutional provision governing his office and in addition to the constitutional protection of his person, in section 308 of the 1999 Constitution he enjoys a privilege position immuned from civil and criminal process in his private capacity. The 2nd defendant can not therefore be (sic) sued. The suit against him is hereby struck out. "

There is no iota of doubt that the learned trial Judge was in error by holding that the 2nd respondent was sued in the instant case in his personal capacity. This is so because, it's rather obvious that. the 2nd respondent was sued not in his personal but official capacity as a nominal party. He is merely a beneficiary, albeit unwittingly, of removal of the appellant from office as Governor of Bayelsa State. He was not alleged to have in any way participated in or aided the removing of the appellant from office. He was not accused of having committed any offence either. The predicament in which the 2nd respondent found himself in the present case is no more than that of a bank joined in application for a mareva injunction. A bank is joined as a nominal party in a marevea injunction action so that it may be bound by the order of injunction [to be] made against it. It's trite that parties are bound by the decisions of a court of law. As such, where a court passes a judgment in favour of a party, he can initiate enforcement procedure to obtain the real fruits of the judgment. See *SPDC v. X.M. Federal Ltd.* [2006] All FWLR (Pt. 339) 822 at 833 paragraphs E-F, (2006) 16 NWLR (Pt. 1004) 189. Hence, there is no doubt that the 2nd respondent is a necessary party to the present action and was rightly sued; the provisions of section 308 of the 1999 Constitution notwithstanding. See *Adeleke v. Oyo State House of Assembly* (2006) 10 NWLR (Pt.987) 50 at 81 paragraphs B -D.

Thus, my answer to issue No. 3 is most undoubtedly in the negative. And I so hold.

ON THE ISSUE NO. 4

This issue is predicated on the finding of the trial court at page 108 of the record to the effect inter alia, that the 11th respondent is a Federal Government agent and thus can only be sued in the Federal High Court. According to the learned trial Judge -

"By section 251(1) of the 1999 Constitution, the Federal High Court has exclusive jurisdiction to entertain the matter... I hold that this court being a State High Court has no jurisdiction to entertain the suit, f hereby strike out the action against the 11th Defendant. " It's pertinent to reiterate that under the defunct 1979 Constitution (the precursor of the current 1999 Constitution) the jurisdiction of the Federal High Court was rather restrictive and grossly limited. See section 230(1) of the 1979 Constitution limited the jurisdiction of the Federal High Court to matters connected with or pertaining to revenue and such other matter as may be prescribed by the National Assembly.

However, it's a notorious fact that ever since the legendary case of *Alhaji Zanna Dakar Umoru Mandara v. Attorney-General of the Federation* (1984) 1 SCNLR 311,

the agitation by the Federal Government Executive to increase the hitherto to grossly limited jurisdiction of the Federal High Court became rather intensified.

It's trite that Jurisdiction is never conferred on a court in obscurity. It's a power that is so crustily visible lo ail beholders of the Constitution and the law that confers it. Microscopic eyes are not at all needed to unearth it. See *Mandara v. A. – G.* Federal (supra)

Per OBASEKIJSC.

In my considered view, the reliefs being sought by the appellant against the 11th respondent, especially as per paragraphs [18] [20] and [21] of the Statement of claim relate to allegations of "arrest", "detention", "restraints" and "constraints" that most undoubtedly fall within the ambit of the exercise of the executive action or power of the 11th respondent. These powers are exercised by the Police including the 11th respondent, under the provisions of sections 24 and 29 of the Police Act. Cap 359, Laws of the Federation of Nigeria, 1990. See *HTB (Nig.) Ltd v. Ukpabia* (2000) 8 NWLR (Pt. 670) 570 at 579 per FAB1YF.1CA thus:

"// should be Stated that if the Police arrest and detain a suspect, such is an exercise of executive action as immune by the Police Act. In contra distinction, if the Police dismiss one of their men in line with their Regulation, such can be described as an administrative, action. "

See also sections 214 and 2.15 of the 1999 Constitution and item No. 45 on the exclusive list second schedule part thereof.

Thus, I have no hesitation whatsoever in upholding the argument of the learned senior counsel to the 4th - 10th respondent, Mr. Yusuf Ali SAN, that the 11th respondent the learned trial Judge on the above and other plethora of authorities and the law was patently right in declining jurisdiction upon the 11th respondent in the circumstances of the case. The answer to issue No. 4 is therefore most inevitably in the affirmative. And I so hold.

In the light of the above postulations. I am of the considered view that the appeal succeed regarding the 1st - 10th respondents and its hereby allowed. Consequently, the ruling of the learned trial judge is hereby set aside in respect of the 1st - 10th respondents.

Also for the reasons adumbrated above, I hereby hold that the appeal fails in respect of the 11th respondent and its accordingly hereby dismissed. The aspect of the ruling of the trial court regarding the 11th respondent is thus hereby affirmed.

Hence the appeal having succeeded regarding the 1st – 10th respondents, it now behoves upon me to consider what appropriate order to make under the provisions of section 16 of the Court of Appeal Act Cap 75, Laws of the Federation of Nigeria, 1990. However, I have deemed it pertinent to reiterate at this stage that section 16 of the Court of Appeal Act (supra) is neither a carte blanche nor a blank cheque for the exercise of the power of this court. It is not thus exercised or granted as a matter of course. See *Oyebade. jo u Ofaniyi* (2001) NWLR (Pt. 5) at 829-853, (2005) 5 NWLR (Pt.657) 485.

I have alluded earlier to the fact that the amended notice of appeal filed on 26/02/07 was in compliance with the earlier order of this court of 08/02/07 granting leave to the appellant to do so. He was not tied down to any time limit within which to comply with that order. Thus, in my view, the fact that it was filed before the delivery of judgment makes it imperative for this court to act there upon.

It is not doubtful that one of the salient differences between this case and *Ladofa's* case (supra) and *Obi's* case (supra), is that while the former was commenced by writ of summons, the latter two cases were commenced by originating summons. It's trite that the general principle of law regarding originating summons procedure is employed

especially where the question to be determined is or is likely to be one of the construction of a statutory provision or any instrument made under a written law, deed, will, contract etc. It is also employed in cases where there is no likelihood of any substantial dispute as to facts. See Order 5 rule 3 of the Bayelsa State High Court (Civil Procedure) Rules, 1997.; A. J. Ajogungbade 111 v. Adeyelu II (2001) 16 NWLR (Pt. 738) 126; Hon. Mike Balonwu & 5 Ors v. Peter Obi & Anor. Appeal No. CA/E/3/2007, dated 09/02/2007 page 44 (unreported) (now reported in (2007) 5 NWLR(pt. 1028) 488.

It was the contention of the learned senior counsel to the appellant that the application of section 16 of the Court of Appeal Act depends on the circumstances of each case. He Stated that the features in Ladofa's and Obi's cases (supra) were also available in the instant case. That, the Statement of claim was filed since on 17/12/05 but the respondents failed to file their Statement of defence. I le postulated that the relevant issue in this case is that of fair hearing.

I uphold the contention of the learned senior counsel to the appellant that the issue is that of fair hearing. It's common knowledge that the respondents right from the inception of the case in the lower court employed all sorts of tactic at their disposal to deliberately frustrate the trial and the hearing of the appeal, lawyers were surreptitiously changed in the eleventh hour even to the visible embarrassment of the various learned counsel to the respondents. I think this court has a duty not to allow the respondents to overreach themselves. They certainly cannot, as the popular adage goes, eat their cake and have it.

Considering the nature and circumstances surrounding this case, time is obviously of the essence. The res i.e. the term of office of Governor, the appellant has been struggling to regain after his impeachment and removal from that office, is bound to be extinguished by the 29th day of May, 2007, that is just a period of only eleven weeks from today. Thus, remitting this case back to the Bayelsa State High Court for trial by another Judge would have rendered the res of the subject matter of the suit nugatory. See *Inakofu v. Ladofa* (supra) at 670 paras. A-D. Thus, I hold that this court has a duty to instantly determine the case of the parties on the basis of the appellant's Statement of claim and exhibit A.

It's trite that he who claims must prove his claim, otherwise he will not be entitled to judgment in his favour. He must also rely on the strength of the case thereof and not on the weakness of the defence. The appellant has insisted that by the Statement of claim, the verifying affidavit thereof, and exhibit A, there is no need to call for any witness or evidence. However, having accorded a critical but rather dispassionate consideration upon the Statement of claim, the verifying affidavit and vis-a-vis exhibit A, I am unable to appreciate, let alone uphold the learned senior counsel's contention that the appellant has established a case of breach of fair hearing. There is no doubt, that having regard to the nature of the relief's sought which are declaratory, it is fallacious for the appellant to merely rely on a purported admission. This is obviously so because, declaratory reliefs are not granted merely as a matter of course. The claimant has an onerous duty to proffer evidence in proof of his claim. See *Bella v. Eweka* (supra) at 102-103. This, the appellant has failed to do.

What's more, the impeachment and subsequent removal of the appellant from office as Governor of Bayelsa State was an official act which is and ought to be presumed to be legal and constitutional unless otherwise proved by a cogent and reliable evidence. This, the appellant has definitely failed to do. Sec section 150 (1) of the Evidence Act (supra) thus:

" 150(1) When any judicial or official act is shown to have been done in a manner substantially regular, it is presumed that formal requisites for its validity were complied with" See *Oghnanyinya v. Okudo* (No.2) (1990) 4 NWLR (Pt. 146) 551.

It is my view that on the face of exhibit A, there is nothing to establish that the appellant was denied fair hearing. It was not proved that the appellant was not invited. The most credible evidence that could have established the fact of whether or not the investigation panel had sat was the record of sitting proceedings thereof which was never

exhibited. It is rather evident as per page 2 of exhibit A that the panel did indeed sit contrary to the appellant's allegation in paragraph 13 of the Statement of claim thereof,

It is also evident as per page 4 of exhibit A, that the appellant did as a matter of fact file his defence. The sum total of the above analysis is that the allegation that the appellant was denied fair hearing was not established. On the face of exhibit A he chose to desperately, albeit porously, rely upon. I uphold the contention of the respondents' learned senior counsel that the provisions of section 149(d) of the Evidence Act (supra) comes into play against the appellant.

In the light of the above postulations, I have come to the most inevitable conclusion that the appellant has failed to prove the allegation of breach of fair hearing. His case therefore fails. Consequently, I hereby without any further hesitation dismiss the suit in its entirety. I make no Order as to costs.

Appeal allowed in part