

**PROFESSOR ALBERT F, OGUNSOLA**

**V.**

- 1. ALL PEOPLES PARTY (APP)**
- 2. ALHAJI YUSUF GARBA ALI  
(National Chairman, APP)**
- 3. CHIEF GEORGE .N. MUOGHALU  
(National Secretary, APP)**

*COURT OF APPEAL (ABUJA DIVISION)*

CA/A/65/M/2002

IBRAHIM TANKO MUHAMMAD. J.C.A. (*Presided*)

ZAINAB ADAMU BULKACHUWA, J.C.A.

ALBERT GBADEBO ODUYEMI, J.C.A. (*Read the Leading Judgment*)

WEDNESDAY, 26TH FEBRUARY, 2003

*CONFLICT OF LAWS - Venue - Venue for instituting action in a division of a court - Venue for instituting action in either of two courts - How determined - Principles governing.*

*COURT - Abuse of court process - What amounts to - Attitude of court thereto.*

*COURT - High Court of a State - General jurisdiction thereof -Section 272, 1999 Constitution.*

*COURT - High Court of a State - High Court of Federal Capital Territory - Concurrent jurisdiction thereof.*

*COURT - Issues before the court - Duty on court to pronounce thereon.*

*COURT- Jurisdiction of court - Discretion of court to assume jurisdiction over a matter - When may arise.*

*COURT - Jurisdiction of court - How determined - What court looks at.*

*JUDGMENT AND ORDER - Reliefs - Whether counsel can introduce fresh prayer at address stage.*

*JURISDICTION - High Court of a State - General jurisdiction thereof - Section 272, 1999 Constitution.*

*JURISDICTION - High Court of a State - High Court of Federal Capital Territory - Concurrent jurisdiction of.*

*JURISDICTION - Jurisdiction of court - Discretion of court to assume jurisdiction over a matter - When may arise.*

*JURISDICTION - Jurisdiction of court - How determined - What court looks at.*

*LEGAL PRACTITIONER - Addresses of counsel - Whether counsel can introduce fresh prayer at address stage.*

*PRACTICE AND PROCEDURE - Abuse of court process - What amounts to - Attitude of court thereto.*

*PRACTICE AND PROCEDURE - Addresses of counsel - Whether counsel can introduce fresh prayers at address stage.*

*PRACTICE AND PROCEDURE -Commencement of action - Originating summons - When proceedings can be commenced thereby - When it cannot.*

*PRACTICE AND PROCEDURE - Discontinuance of action - Right of plaintiff in respect of - Whether he needs consult plaintiff in another matter.*

*PRACTICE AND PROCEDURE - High Court of a State - General jurisdiction thereof- Section 272, 1999 Constitution.*

*PRACTICE AND PROCEDURE - Jurisdiction of court - Discretion of court to assume jurisdiction over a matter - When may arise.*

*PRACTICE AND PROCEDURE - Jurisdiction of court - How determined - What court looks*

*at.*

*PRACTICE AND PROCEDURE - Stay of proceedings pending appeal - Application therefor - When may be granted.*

*PRACTICE AND PROCEDURE - Venue - Venue for instituting action in a division of a court - Venue for instituting action in either of two courts - How determined - Principles governing.*

*PRACTICE AND PROCEDURE - Writ of summons - Issuance and service thereof outside jurisdiction - How done.*

**Issue:**

Whether, having regard to the circumstances of the case, the trial court was right in declining jurisdiction by striking out the case of the appellant on the ground that it has the same substratum with suit No. KWS/82/2001 pending before the High Court of Kwara State, Ilorin and that the appellant's claim will be better handled by that court.

**Facts:**

The appellant was the elected State Chairman of the Kwara State Executive Committee of the 1st respondent. The 1st respondent was one of Nigeria's political parties, while the 2nd and 3rd respondents were its National Chairman and National Secretary respectively.

The respondents removed the appellant from office and dissolved the Kwara State Executive Committee of the 1st respondent. The appellant was aggrieved with the action and he sued the respondents at the High Court of the Federal Capital Territory, Abuja praying the court for, among other reliefs, a declaration that the dissolution of the Kwara State Executive Council of the party was wrongful, and an order of injunction restraining the respondents from disturbing the appellant from lawful performance of his duties.

Upon service of the originating summons on the respondents, the respondents filed a motion on notice praying the court, in the main, for an order dismissing the suit for being an abuse of court process on the grounds, *inter alia*, that a similar suit was pending at the High Court of Kwara State, and that the suit did not disclose any reasonable cause of action.

At the conclusion of arguments on the respondents' motion, the trial court in its ruling found that a similar case was pending at the High Court of Kwara State as alleged. It therefore struck out the case.

The appellant was aggrieved by the decision and he appealed to the Court of Appeal. The respondents on their part felt dissatisfied with a part of the trial court's ruling which failed to make findings or decisions on the submission of the respondents that the appellant's suit is academic and that the suit is not one triable by originating summons. In resolving the appeal, the Court of Appeal considered the provision of section 272 of the Constitution of the Federal Republic of Nigeria, 1999, which states as follows:

"272(1) Subject to the provisions of section 251 and other provisions of this Constitution, the High Court of a State shall have jurisdiction to hear and determine any civil proceedings in which the existence or extent of a legal right, power, duty, liability, privilege, interest, obligation or claim is in issue or to hear and determine any criminal proceedings involving or relating to any penalty, forfeiture, punishment or other liability in respect of an offence committed by any person.

(2) The reference to civil or criminal proceedings in this section includes a reference to the proceedings which originate in the High Court of a State and those which are brought before the High Court to be dealt with by the court in the exercise of its appellate or supervisory jurisdiction."

Held (*Unanimously allowing the appeal and allowing the cross-appeal in part*):

1. *On General jurisdiction of the High Court of a State -*

By virtue of the provision of section 272 of the Constitution of the Federal Republic of Nigeria, 1999, subject to the provision of section 251 of the said Constitution and other provisions thereof the High Court of a State has jurisdiction to hear and determine any civil proceedings in which the existence or extent of a legal right, power, duty, liability, privilege, interest, obligation or claim is in issue or to hear and determine any criminal proceedings involving or relating to any penalty, forfeiture, punishment or other liability in respect of an offence committed by any person. The reference to civil or criminal proceedings in the section includes a reference to proceedings which originate in the court and those which are brought before it to be dealt with in the exercise of its appellate or supervisory jurisdiction. (*P. 481, paras. B-E*)

2. *On Concurrent jurisdiction of High Court of a State and High Court of the Federal Capital Territory -*

In respect of civil disputes each High Court of any State of the Federation or of the Federal Capital Territory, Abuja has co-ordinate jurisdiction over all matters between persons, or between government or authority and any person in Nigeria, as well as to all actions and proceedings relating thereto for the determination of any questions as to the civil rights and obligations of that person. In the instant case, it is common ground that the trial court [High Court FCT, Abuja] as well as the High Court of Kwara State both have jurisdiction to entertain the originating summons of the appellant. This was because the provision of section 257 of the 1999 Constitution which confers jurisdiction on the High Court, FCT, Abuja is in identical terms with the provision of section 272 of the 1999 Constitution which confers jurisdiction on the High Court of a State within the Federation except that instead of the words "of a State" where they appear in section 272 of the 1999 Constitution the words "of the Federal Capital Territory, Abuja" are substituted/Pp. 480-481, paras. G-A)

3. *On Principles governing proper venue for adjudication –*

Where the dispute as to venue is not one between one division or another of the High Court of a State or between one division or the other of the High Court of the Federal Capital Territory, Abuja, but as between the High Court of one State and the High Court of another State of the Federation of Nigeria, or between the High Court of one State in the Federation and the High Court of the Federal Capital Territory, Abuja, as in the present case, then the issue of the appropriate or more convenient forum is one to be determined under the rules of private international law formulated by courts within the Federation. Therefore, Order 10 of the High Court of the Federal Capital Territory, Abuja, (Civil Procedure) Rules, 1990 which helps to determine which of the judicial divisions or districts of the High Court of the Federal Capital Territory, Abuja is the proper venue to try a case which the High Court of the FCT, Abuja is vested with jurisdiction to try, is not relevant to the instant case. (*P. 480, paras. E-G*) Per ODUYEMI, J.C.A. at page 482, paras. A-D: "However, in order to narrow down the area of conflict Ss. 259 and 274 respectively of the Constitution stipulate the source of the rules for regulating the practice and procedure of the respective High Courts. This is the context in which the cause of action of the plaintiff, the place of his residence, the place where the contract is to be performed, the place of residence or of business of a defendant, or where the cause of action arose e.t.c. play important roles. When having regard to the cause of action or the place of residence or business of the parties, the matter falls entirely to be

decided by the High Court of the Federal Capital Territory or of a State, one looks to the Civil Procedure Rules applicable to determine the venue in the State whose High Court or in the FCT, Abuja would exercise jurisdiction. However, as in this case where the place of residence of the plaintiff is the same as that in which the cause of action arose i.e. Kwara State but not the place of business of the defendants -Abuja - FCT, one has to look into the domestic private international law applicable in Nigeria." \

4. *On Issuance and service of writ of summons out of jurisdiction –*  
By virtue of the provisions of the Sheriffs and Civil Process Act, Cap. 407, Laws of the Federation of Nigeria, 1990, subject to appropriate endorsement on the writ as required by section 97 of the Act, a writ issued in one jurisdiction may be served in another jurisdiction within the Federation. However, because physical presence of a defendant is usually required to assume jurisdiction over a person, civil rules of procedure often require that a plaintiff issuing a writ, originating summons or petition to be served on a defendant or other party who does not have a physical, residential or business presence within the territorial jurisdiction of the court requires leave of that court before the writ or other process can validly issue. By this process, the court is able to satisfy itself before granting leave that the circumstances warranting the issuance of such writ or other process are not such as to be vexatious or oppressive to the defendant or other party. (P. 482, paras. E-H)
5. *On Relevant material in determining whether a court has jurisdiction or an action is competent –*  
It is the statement of claim or the affidavit in support of the originating summons that one needs to look at to find the competence of action of the plaintiff, as well as the competence of the court to assume jurisdiction. In the instant case, the cause of action of the appellant is not only reasonable and competent, also, *prima facie*, the appellant was entitled to invoke the jurisdiction of the High Court of the Federal Capital Territory, Abuja, just as he was equally entitled to have invoked the jurisdiction of the High Court of Kwara State had he so wished. [*Nigerian Bottling Co. Plc. v. Vitus Nwaneri* (2000) 14 NWLR (Pt. 686) 30; *Akintunde v. Ojo* (2002) 4 NWLR (Pt. 757) 284; *Adeyemi v. Opeyori* (1976) NSCC Vol. 10, 455; *Okulate v. Awosanya* (2000) 2 NWLR (Pt. 646) 530; *Izenhve v. Nnadozie* (1953) 14 WACA 361; *Tukur v. Govt., Gondola State* (1989) 4 NWLR (Pt. 117) 517 referred to.] (Pp. 484-485, paras. E-A; G-H)
6. *On When action may or may not be commenced by originating summons -*  
The procedure of originating summons is intended for use in a friendly action between parties who are substantially *ad idem* on the facts and who, without the need for pleadings, merely want, for example, a directive of the court on the point of law involved, such as on the interpretation of a clause in a testator's will. The procedure is not intended for use in a hostile action between parties and in which the parties concerned need know before hand the issues which they are called upon to contend with from the pleadings. The instant case has all the peculiarities of a hostile action. [*N.B.N. Ltd. v. Alakija* (1978) 9-10 SC 59 referred to.] (P. 492, paras. B-D)
7. *On When court has discretion whether to assume jurisdiction in a matter —*  
In certain types of cases, courts have discretion whether or not to assume jurisdiction. Examples are:
  - (a) Where leave of the court is required for the service of process outside the jurisdiction;

- (b) Where proceedings in respect of the same subject-matter are pending outside the court's jurisdiction;
- (c) Where a contract provides that all disputes between the parties are to be referred to the exclusive jurisdiction of a foreign court;
- (d) Where the court is being asked to exercise its equitable jurisdiction *personam* in cases involving foreign land.

(P. 488, paras. A-C)

8. *On What amounts to an abuse of court process -*

An abuse of the process of the court is only possible by improper use of the issue of the judicial process or process already issued to the irritation and annoyance of the opponent. Actions which amount to abuse of process may vary. Thus, multiplicity of actions on the same matter may constitute an abuse of the process of the court, but this is so only where the action is between the same parties with respect to the same subject matter. The court has a duty in such a situation to interfere to stop an abuse of its process. Having regard to the facts of the instant case and the principles of law laid down for vexatious litigation in abuse of court process, the appellant could not be said to be liable of vexatious litigation or litigation in abuse of process of court. This is so because the issues, if any, involved in suit No. CV/ 353/2001 was not determined on the merit when he filed a notice of discontinuance. Also, the appellant was not a party to the action in Kwara State. [CBN u Ahmed (2001) 11 NWLR (Ft. 724) 369; Saraki v. Kotoye (1992) 9 NWLR (Ft. 624) 156 referred to.]

(Pp. 486-487, paras. D-E)

9. *On Attitude of court to abuse of its process -*

All courts take a firm stand against an established abuse of the process of court. However, before a party is admonished, it must be established that the erring party had abused the process of court by improper use of the process of court. [CBN v. Ahmed (2001) 11 NWLR (Pt. 724) 369 referred to.] (P. 486, paras. D-E).

10. *On Power of court to order stay of proceedings in abuse of its process and when exercisable* — Courts have inherent jurisdiction to stay proceedings which are in abuse of its powers. Such interference will take place to prevent possible injustice arising where two actions are pending both in a home court, and in a foreign court between the same parties and in respect of the same issues. In the instant case, though the same issues may be said to be involved, the parties were, however, not the same. (P. 488, paras. D-E)

11. *On Right of plaintiff to discontinue his action -*

Where there are two matters pending simultaneously in two different courts/jurisdictions, with proper leave, the plaintiff in one court is at all times at liberty to discontinue his case against the defendant in that court. He needs not consult the plaintiff in the other court. In the instant case, since the appellant was not a party in the suit before the High Court of Kwara State, it would have no *locus* to interfere with it. Accordingly, the trial court was wrong when it struck out the appellant's case pending before the High Court of the Federal Capital Territory (P. 488, paras. G-H)

12. *On the Duty on court to address all issues placed before it-*

A trial court has a duty to consider and make pro-I issue adumbrated before it by the parties. This is necessary to obviate the danger of a higher court holding a contrary view on the ; materiality of the issue if the lower court had confined i 1st<sup>1</sup> If lo only issues

which it considered necessary to dispose of the case. If, however, the trial court failed to do so, an appellate court is in the circumstance in as good a position as the lower court to make pronouncements on such issues. [*Warn Refining and Petro-Chemical Co. Ltd. (W.R.P.C) v. Onwo* (1999) 12 NWLR (Pt. 630) 312; *Okonji v. Njokanma* (1991) 7 NWLR (Pt. 202) 131; *Om v. Falade* (1995) 5 NWLR (Pt. 396) 385 referred to.](/' 490, paras .A-C)

13. *On Propriety of counsel seeking a prayer in his address -*

It is not proper for counsel to include a prayer for the first time in his address. In the instant case, since there was no prayer for stay of proceedings before the trial court, the relief cannot be sought for the first time on appeal as a matter of course. [*Warn Refining and Petro-Chemical Co. Ltd. v. E. Onwo* (1999) 12 NWLR (Pt. 630) 312; *Okubule v. Oyagbola* (1990) 4 NWLR (Pt. 147) 723; *Ekpenyong v. Nyong* (1975) 2 SC 71; *UBN Ltd. v. Ogbu* (1995) 2 NWLR (Pt. 380) -647 referred to.] (P. 489, paras. A-B)

**Nigerian Cases Referred to in the Judgment:**

*Adeyemi v. Opeyori* (1916) 9-10 SC 31  
*Akintunde v. Ojo* (2002) 4 NWLR (Pt.757) 284  
*C.B.N. v. Ahmed* (2001) 11 NWLR (Pt. 724) 369  
*Din v. A.-G., Federation* (1986) 1 NWLR (Pt.17) 471  
*Ekpenyong v. Nyong* (1975) 2 SC 71  
*Izenikwe v. Nnadozie* (1952) 14 WACA 361  
*Madukolu v. Nkemdilim* (1962) 1 SCNLR  
*N.B.N. v. Alakija* (1978) 9-10 SC 59  
*Nigerian Bottling Company Plc. v. Vitus Nwaneri* (2000) 14 NWLR (Pt.6860) 30  
*Okonji v. Njokanma* (1991) 7 NWLR (Pt. 202) 131  
*Okubule v. Oyagbola* (1990) 4 NWLR (Pt. 147) 723  
*Okulate v. Awosanya* (2000) 2 NWLR (Pt. 646) 530  
*Oro v. Falade* (1995) 5 NWLR (Pt. 396)  
*Pacers +*  
*Multi-Dynamic v. M.V. Dancing sister "* (2000) 3  
 NWLR (Pt.648) 241  
*Saraki v. Kotoye* (1992) 9 NWLR (Pt. 264) 156,  
*Tukur v. Government of Gondola State*(1980) 4 NWLR (Pt. 117)  
 517  
*U.B.N. Ltd. v. Ogboh* (1995) 2 NWLR (Pt.350) 647  
*Warri Refining and Petrochemical Co. Ltd. v. E. Onwo* (1999)  
 12NWLR(Pt.630)312

**Foreign Case Referred to in the Judgment:**

*Re: Powers. Lindsell v. Philips* (1885) 30 Ch.D 291

**Nigerian Statutes Referred to in the Judgment:**

Constitution of the Federal Republic of Nigeria, 1999, Ss.257, 6(6)(b); 272, 240  
 Sheriffs and Civil Process Act, Cap. 407, Laws of the Federation of Nigeria, 1990, 5.97.

**Nigerian Rules of Court Referred to in the Judgment:**

High Court of the Federal Capital Territory (Civil Procedure) Rules, 1990, O.10. r.4;  
 O.29, r.2

**Book Referred to in the Judgment:**

Halsbury's Laws of England, 4th Edn., Vol. 8, Art 407,787

**Appeal:**

These were an appeal and a cross-appeal against the ruling of the High Court striking out the appellant's case for, *inter alia* being in abuse of court process. The Court of Appeal, in a

unanimous decision, allowed the appeal and also allowed the cross-appeal in part.

### **History of the Case:**

#### *Court of Appeal:*

*Division of the Court of Appeal to which the appeal was brought:* Court of Appeal, Abuja *Names of the Justices that sat on the appeal:* Ibrahim Tanko Muhammad, J.C.A. (*Presided*); Zainab Adamu Bulkachuwa, J.C.A.; Albert Gbadebo Oduyemi, J.C.A. (*Read the Leading Judgment*)

*Appeal No:* CA/A/65/M/2002

*Date of Judgment:* Wednesday, 26th February, 2003

*Names of Counsel:* Yusuf O. Alli, SAN (*with him*, A. A. Kayode, SAN; A. O. Adelodum, Esq. and J. O. Adesina [Mrs.]) *-for the Appellant.* L. O. Fagbemi, SAN (*with him*; C. O. Okwusegu, Esq. and L. O. Fagbemi, Esq.) *-for the Respondents*

#### *High Court:*

*Name of the High Court:* High Court of the Federal Capital Territory, Abuja. *Name of the Judge:* S. E. Aladetoyinbo, J.

### **Counsel:**

Yusuf O. Alli, SAN (*with him*, A. A. Kayode, SAN, A. O. Adelodum, Esq. and J. O. Adesina [Mrs.]) *-for the Appellant.*

L. O. Fagbemi, SAN (*with him*, C. O. Okwusegu, Esq. and L. O. Fagbemi, Esq.) *-for the Respondents*

**ODUYEMI, J.C.A. (Delivering the Leading Judgment):** The appellant, as plaintiff on 7th June, 2001 filed at the High Court of Justice of the Federal Capital Territory, Abuja an originating summons in which he sought the following reliefs:

1. DECLARATION that the 1st-3rd defendants have no power, *vires* and or authority under the Constitution of the 1st defendant to dissolve the Kwara State Executive Committee of the APP of which the plaintiff was duly elected as chairman at a congress of the party in 1998.
2. DECLARATION that 1st - 3rd defendants have no power, *vires* and or authority under the Constitution of the 1st defendant to appoint, put in place or inaugurate anyone as members of a care-taker committee to usurp the legitimate duties and functions of the plaintiff as the elected state chairman of the Executive Committee of the APP in Kwara State.
3. DECLARATION that the 1st - 3rd defendants acted *ultra vires* their powers, in excess of their authority and in breach of the Constitution of the 1st defendant in purporting to remove the plaintiff as the chairman of the State Executive Committee of the APP in Kwara State and in appointing members of a caretaker committee of the party in Kwara State.
4. DECLARATION that the 1st - 3rd defendants in purporting to exercise their powers under the Constitution of the 1st defendant have duties to observe the rules of fair hearing and follow due process and that failure to do so renders their action in removing the plaintiff null and void and of no effect whatsoever.
5. ORDER setting aside the purported dissolution of the Kwara State Executive Committee of the 1st defendant and ORDER restoring the plaintiff to his position as the chairman of the Kwara State Executive Committee of the 1st defendant.
6. ORDER setting aside the purported appointment of anyone or body of persons as members of a caretaker committee for the 1st defendant in Kwara State and ORDER dissolving the said caretaker committee forthwith.
7. INJUNCTION restraining the 1st - 3rd defendants by themselves, their officers, servants, agents, privies or any other person howsoever described deriving author-

ity through them from disturbing or in any other manner tamper with the plaintiff from the lawful performance of his constitutional duties as the elected state chairman of the Kwara State Executive Committee of the 1st defendant.

8. ORDER setting aside any order, directives, instructions or other steps taken by the 1st - 3rd defendants on the running of the affairs of the 1st defendant since the purported dissolution of the Kwara State Executive Committee of the 1st defendant in March, 2001. AND any further or other reliefs the Honourable Court may deem fit to grant in the circumstances of the matter

Upon service of the originating summons together with the affidavit in support and other process connected therewith on the defendants, defendants caused to be served on the plaintiff/appellant a motion on notice together with a supporting affidavit seeking the following orders:-

1. AN ORDER dismissing or otherwise striking out this suit for being incompetent, vexatious and an abuse of court process.
2. AN ORDER transferring this suit into the general cause list and directing the filing of pleadings; that is, statement of claim and statement of defence etc."

The grounds of the application are stated as follows:-

- i. The case and/or claims of the plaintiffs are speculative and/or academic exercise which no court would entertain;
- ii. the case of the plaintiff relates to an intra-party dispute, which is not justiciable;
- iii. plaintiffs' suit is an abuse of court process;
- iv. there exists another suit No. KWS/82/2001 filed by the same counsel asking for the same or similar reliefs as those being sought in this case and same questions of law as in this case will arise in the said suit; the same witnesses as in KWS/82/2001 will give evidence and same documents all in Kwara State are needed for the present suit;
- v. plaintiff's case does not disclose any reasonable cause of action; no address was furnished by counsel;
- vi. plaintiff's suit cannot be adequately taken care of by originating summons as the facts are seriously disputed."

Thereafter, the defendants filed a counter-affidavit in opposition to that in support of the originating summons.

For his part, plaintiff also filed a counter-affidavit against the motion on notice by the defendants for dismissal of his action.

Arguments of counsel for and against the application of defendants for the dismissal of the plaintiff's originating summons were heard.

The learned trial Judge, in a considered ruling found as follows in respect of the undisputed facts:

1. That exhibit E attached to motion is suit No. KWS/82/ 2001 asking for the same or similar reliefs as those being sought in this case and same question of law are being asked the two courts for determination simultaneously.
2. If judgment is in favour of plaintiffs in suit No. KWS/ 82/2001 the present plaintiff in this court will benefit from the judgment and there may be no need for this case to go on, if judgment is in favour of the present plaintiff in this court, the plaintiff in suit No. KWS/82/ 2001 will benefit and there may be no need for the case to go on in Kwara State.
3. In the two cases same witnesses may be required to give evidence while same documents may be tendered in evidence.
4. That the plaintiffs in the two cases belong to Kwara State Executive Committee of

All People's Party, which was dissolved by the same letter from National Secretary of the party with the same allegations, the Chairman decided to come and sue in Abuja while 4 other members of executive filed their own case in Kwara State.

5. The defendants are the same in the two cases."

Based on those findings, the learned trial Judge concluded thus:

"In paragraphs 1-4 above this court has explained that these two cases are not only similar but they are the same, it is only the plaintiffs that are different but the defendants are the same, and the same questions are being asked and same relief sought; since the case in Kwara State No. KWS/82/2001 was the 1st in time, filed on the 24th day 2001, this court will decline jurisdiction to determine the present case and will allow the Judge presiding over case No. KWS/82/2001 to determine the matter before him, the two cases raised the same issue and questions for determination.

Furthermore there would be no real advantage to the plaintiff in continuing this proceeding in the High Court of Federal Capital Territory, while plaintiff resides in Kwara State, the subject-matter of this suit Chairmanship of APP is in Kwara State, his counsel resides in Kwara State. By paragraph 18 of the affidavit in support of the application the defendants said they have 30 witnesses residing in Kwara State, it would be unjust to make the defendants incur the substantial extra expenses and inconvenience which they would suffer if they were obliged to defend the action in FCT Abuja. See the case of *Maishannon v. Rockware Glass Ltd.* (1978) 1 AER at 625. The issues and questions raised in this case can be determined by the Judge hearing case No. KWS/82/2001 holding in Kwara State because the same question and issues are being raised in that court, the only option left for this court is for this matter to be struck out. This case is hereby struck out."

The plaintiff felt aggrieved by the ruling of the lower court and appealed to this court by a notice of appeal containing two grounds of appeal which, without their respective particulars read thus:

- "1. The learned trial Judge erred in law by declining jurisdiction to entertain the case of the appellant on the ground that the appellant's case has the same substratum with case No. KWS/82/2001 pending before the High Court of Justice of Kwara State and that the Judge handling case No. KWS/82/2001 should be allowed to handle the appellant's case.
2. The learned trial Judge erred in law by striking out the case of the appellant on the ground that the claim will be better handled before the High Court of Justice of Kwara State even when the trial court had held that the appellant has the right to file the action before the FCT High Court."

For their part, the defendants also felt dissatisfied with a part of the said ruling of the trial Judge which failed to make findings or decisions on the submissions of the defendants in the motion to dismiss the originating summons on the grounds that (i) the plaintiff's case is academic and (ii) that the plaintiff's case is not one triable by originating summons.

In this judgment, I shall deal first with the main appeal. Appellant distilled in his appeal only one issue as arising from the two grounds of appeal. That issue is formulated thus:

"Whether the learned trial Judge was right having regard to the circumstances of the case to have declined jurisdiction by striking out the case of the appellant on the grounds that it has the same substratum with suit No. KWS/82/2001 pending before Ilorin High Court and that the appellants claim will be better handled by that court."

Without expressly adopting the only issue formulated by the appellant, respondents in their own brief did not formulate a separate issue but re-acted to the issue formulated by the

appellant.

In the brief of appellant, reliance is placed on the decision of the Supreme Court as to the requirements of the competence of a court to exercise jurisdiction in the case of *Madukolu and Ors. v. Nkemdilim* (1962) 1 All NLR (Reprint) (Pt. 4) 581 at 589-90 and contends that the requirements for the competence of the lower court are as set out in that judgment i.e.

- 1) it is properly constituted as regards numbers and qualifications of the members of the bench, and no member is disqualified for one reason or another; and
- 2) the subject-matter of the case is within its jurisdiction, and there is no feature in the case which prevents the court from exercising its jurisdiction; and
- 3) the case comes before the court initiated by due process of law, and upon fulfillment of any condition precedent to the exercise of jurisdiction.

Appellant therefore submits that the lower court having earlier on in the ruling held that having regard to the provisions of the High Court of the Federal Capital Territory (Civil Procedure) Rules plaintiff's cause of action was within the jurisdiction of the lower court, the decision of the lower court to strike out the case of the plaintiff on the ground that the case could be better handled by the trial court in the suit No. KWS/82/2001 in the High Court of Kwara State Ilorin is perverse;

that the lower court took irrelevant matters into consideration in coming to his decision,

that the provisions of Order 10 rule 4(1) of the High Court (Civil Procedure) Rules of the Federal Capital Territory is a complete answer to the issue regarding the venue of trial; that there is no legal or factual basis for the trial Judge to have declined jurisdiction in the matter.

For the respondents, it is submitted in the respondents' brief as follows:

Respondents do not dispute that the lower court has the competence to exercise jurisdiction in this case having regard to the essentials necessary to found jurisdiction in a court as laid down in the *Madukolu* case (*supra*). It is however the contention of respondents that the issue submitted for determination in the motion on notice is as to the more convenient forum in which to file this action having regard to the circumstances and fact that both the Kwara State High Court and the F.C.T. High Court are equally competent to exercise jurisdiction if the present case was filed in Kwara State since other members of the Kwara State Executive Committee of the 1<sup>st</sup> defendant who were also affected by the complaint of the plaintiff in the originating summons took out their originating summons in the Kwara State High Court.

It is pertinent to point out in this judgment that learned Senior counsel for the appellant could not be correct in his submission in appellant's brief that the solution to the issue of venue of trial posed in this appeal is to be found in Order 10 rule 4 of the F.C.T. Abuja High Court (Civil Procedure) Rules, 1990.

Order 10 of those rules, in my respectful opinion help to determine which of the judicial divisions or districts of the High Court of the F.C.T. Abuja is the proper venue to try a case which the High Court of the F.C.T. Abuja is vested with jurisdiction to try.

Where the dispute as to venue is not one between one division or another of the same State High Court or between one division or the other of the F.C.T. Abuja High Court, but as between the High Court of one State and the High Court of another State of the Federation of Nigeria or between the High Court of one State in the Federation and the High Court of the F.C.T. then the issue of the appropriate or more convenient forum is one to be determined under the rules of Private International Law formulated by courts within the Federation.

In this case, it is common ground between both parties and the lower court that the lower court as well as the High Court of Kwara State have jurisdiction to entertain the originating

summons of plaintiff . This is because the provisions of section 257 of the Constitution of the Federal Republic of Nigeria, 1999 which confers jurisdiction on the High Court of the Federal Capital Territory Abuja is in identical terms with the provisions of s. 272 of the same Constitution which confers jurisdiction on State High Courts within the Federation except that instead of the words "of a State" where they appear in S. 272 of the Constitution the words "of the Federal Capital Territory Abuja" are substituted.

For convenience, I quote below section 272 of the Constitution. S. 257 should be read with the text appropriately modified. "272(1) Subject to the provisions of section 251 and other provisions of this Constitution, the High Court of a State shall have jurisdiction to hear and determine any civil proceedings in which the existence or extent of a legal right, power, duty, liability, privilege, interest, obligation or claim is in issue or to hear and determine any criminal proceedings involving or relating to any penalty, forfeiture, punishment or other liability in respect of an offence committed by any person. The reference to civil or criminal proceedings in this section includes a reference to the proceedings which originate in the High Court of a State and those which are brought before the High Court to be dealt with by the court in the exercise of its appellate or supervisory jurisdiction."

Now, when S. 257 or S. 272 as the case may be of the Constitution is read with S. 6(6)(b) of the same Constitution which provides:

"6(6) The judicial powers vested in accordance with the foregoing provisions of this section:

- a. ....
- 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."

It is clear that in respect of a civil dispute each High Court of any State of the Federal or of the Federal Capital Territory, Abuja has co-ordinate jurisdiction over all matters between person, or between government and authority and to any person in Nigeria as well as to all actions and proceedings relating thereto for the determination of any questions as to the civil rights and obligations of that person.

However, in order to narrow down the area of conflict Ss. 259 and 274 respectively of the Constitution stipulate the source of the rules for regulating the practice and procedure of the respective High Courts.

This is the context in which the cause of action of the plaintiff, the place of his residence, the place where the contract is to be performed, the place of residence or of business of a defendant, or where the cause of action arose etc. play important roles.

When having regard to the cause of action or the place of residence or business of the parties, the matter falls entirely to be decided by the High Court of the Federal Capital Territory or of a State, one looks to the civil procedure rules applicable to determine the venue in the State whose High Court or in the F.C.T. Abuja would exercise jurisdiction.

However, as in this case where the place of residence of the plaintiff is the same as that in which the cause of action arose i.e. Kwara State but not the place of business of the defendants - Abuja - F.C.T. one has to look into the domestic private international law applicable in Nigeria.

By virtue of the provisions of the Sheriffs and Civil Process Act, Cap. 407, LFN, 1990, subject to appropriate endorsement on the writ as required by S. 97 of the Act, a writ issued in one jurisdiction may be served in another jurisdiction within the Federation.

However, because physical presence of a defendant is usually required to assume jurisdiction over a person, civil rules of procedure often require that a plaintiff issuing a writ,

originating summons or petition to be served on a defendant or other party who does not have a physical, residential or business presence within the territorial jurisdiction of the court requires leave of that court before the writ or other process can validly issue. - See e.g. Order 5 rule 6 of the F.C.T. High Court (Civil Procedure) Rules.

By this process the court is able to satisfy itself before granting leave that the circumstances warranting the issue of such writ or other process are not such as to be vexatious or oppressive to the defendant or other party.

As indicated, the cause of action of the plaintiff in this case is most closely linked to Kwara State - the "home court".

But to issue process in that court, plaintiff would have required to obtain leave of the High Court of Kwara State for the process to be endorsed for service outside the territorial "jurisdiction" of Kwara State in Abuja, F.C.T.

Plaintiff sought to avoid the prayer for such leave by causing to be issued in Abuja F.C.T. where his defendants reside or have their place of business. He is deemed to have voluntarily subjected to jurisdiction of the Abuja F.C.T. Court "foreign court" by the act of causing process to issue in that court.

In consequence of the plaintiff having caused the originating summons to issue in the foreign court where two of the three defendants reside and the first has its headquarters or place of business. Defendants/respondents have prayed the trial court in the first prayer to dismiss or strike out plaintiffs/appellants' suit as being incompetent, vexatious or an abuse of the process of court. In the second prayer, presumably in the alternative, to order pleadings.

At the risk of repetition, I state hereunder the grounds for the two prayers. They are listed in the motion on notice thus:

- i. the case and/or claims of the plaintiffs are speculative and/or academic exercise which no court would entertain;
- ii. the case of the plaintiff relates to an intra-party dispute, which is not justiciable;
- iii. plaintiffs' suit is an abuse of court process;
- iv. there exists another suit No. KWS/82/2001 filed by the same counsel asking for the same or similar reliefs as those being sought in this case and same questions of law as in this case will arise in the said sui;
- v. the same witnesses as in KWS/82/2001 will give evidence and same documents all in Kwara State are needed for the present suit;
- vi. plaintiff's case does not disclose any reasonable cause of action;
- vii. no address was furnished by counsel,
- viii. plaintiff's suit cannot be adequately taken care of by originating summons as the facts are seriously disputed."

In the course of the arguments before the lower court. Mr. L. O- Fagbemi learned senior counsel for defendants/applicants/respondents abandoned grounds (ii) and (vii). He addressed on grounds (i), (iii), (iv), (v), (vi) and (viii).

Without expressly making findings on grounds (i), (iii) and (viii), the learned trial Judge conceded that he had jurisdiction.

This in my respectful view means that he impliedly ruled against ground (vi) which alleges that the plaintiff's case does not disclose any reasonable cause of action.

However, as seen in the extract of his judgment quoted very early in this judgment, learned trial court concentrating on grounds . (iv) and (v) declined jurisdiction and struck out plaintiff's case. Hence this appeal and cross appeal.

Having held in this judgment that considering the fact that the cause of action of plaintiff in this case and the parties are such as both the Kwara State High Court and also the F.C.T. Abuja High Court could exercise jurisdiction, I shall now consider the various grounds upon which the prayer of defendants for the dismissal or striking out of the plaintiff's action rest.

(i) Incompetence - I have looked into the affidavit in support of the motion for dismissal as well as the address of learned Senior Counsel at the lower court.

I have also looked into the respondents' brief in this court, I can find no argument to support the charge that the action of the plaintiff/appellant is incompetent or that the plaintiff's originating summons discloses no reasonable cause of action.

It is trite law that it is the statement of claim or the affidavit in support of the originating summons that one needs to look into to find the competence of cause of action of the plaintiff - as well as the competence of the courts to assume jurisdiction.

I have already held that sections 6(6), 257 and 272 of the Constitution confer jurisdiction on both the Kwara State High Court and the High Court of the F.C.T. Abuja in this case.

So also do the relevant provisions of the respective civil procedure rules regarding the residences of the parties as indicated in the plaintiff's originating summons.

Paragraphs 3, 5, 7, 8 which I shall quote as examples show clearly that plaintiff has a reasonable cause of action against the respondents.

See (i) Nigerian Bottling Company Pic. V. Vitus Nwaneri (2000)14 NWLR (Pt.686) 30

(ii) Akintunde v. Ojo (2002) 4 NWLR (Pt.757) 284;

(iii) Adeyemi v. Opeyori (1976) 9-10 SC 31; (1976) NSCC Vol. 10 p.455 at 463, 464 and 465;

(iv) Okulate v. Awosanya (2000) 2 NWLR (Pt.646) 530 at 534,555-556;

(V) Izenikwe v. Nnadozie (1952) 14 WACA 361 at 363;

(vi) Tukur v. Government of Gongola State (1989) 4 NWLR (Pt.117)517.

Now I shall quote paragraphs 3, 5, 7 and 8 of the reliefs sought R in the originating summons of plaintiff/appellant.

"3. DECLARATION that the 1st - 3rd defendants acted Ultra vires their powers, in excess of their authority and in breach of the Constitution of the 1st defendant in purporting to remove the plaintiff as the chairman of the State Executive Committee of the APP in Kwara State and in appointing members of a caretaker committee of the party in Kwara State. ORDER setting aside the purported dissolution of the Kwara State Executive Committee of the 1st defendant and ORDER restoring the plaintiff to his position as the chairman of the Kwara State Executive Committee of the 1st defendant.

7. INJUNCTION restraining the 1st - 3rd defendants by themselves, their officers, servants, agents, privies or any other person howsoever described deriving authority through them from disturbing or in any other manner tamper with the plaintiff from the lawful performance of his constitutional duties as the elected State Chairman of the Kwara State Executive Committee of the 1st defendant.

8. ORDER setting aside any order, directives, instructions or other steps taken by the 1st - 3rd defendants on the running of the affairs of the 1st defendant since the purported dissolution of the Kwara State Executive Committee of the 1st defendant in March, 2001. In the event, I am quite satisfied that the cause of action of Plaintiff is not only reasonable and competent, I am also satisfied H that prima facie plaintiff was entitled to invoke the jurisdiction of 'he F.C.T. Abuja High Court just as he was equally entitled to have invoked the jurisdiction of the High Court of Kwara State had he so wished.

(ii) Abuse of Process or Vexation

I now consider whether in view of grounds (iv) and (v) of the motion on notice of defendants/respondents the action of appellant was vexatious and abuse of process of court.

It is also indicated in the affidavit in support of the application at paragraphs 11, 12, 14, 15 that plaintiff had earlier instituted in the same court by writ of summons suit No. CV/353/2001; that he obtained an interim injunction against the present defendants that the interim injunction was discharged following which the plaintiff discontinued that action to

issue the present originating summons.

The plaintiff/appellant claims that he filed the said notice of discontinuance in respect of suit CV/353/2001 as of right and without the necessity for leave of court pursuant to Order 29 rule 2 of the Civil Procedure Rules of the court.

I have looked into the record of appeal in this case, there is no allegation or indication that the applicants had filed or served their defence in respect of the action before the plaintiff filed the notice of discontinuance and which under the rules automatically puts an end to that action.

Now all courts take a firm stand against an established abuse of the process of court.

However before a party is admonished, it must be established that the erring party had abused the process of court by improper use of the process of court - per Ejiwunmi, JSC in *Central Bank of Nigeria v. Saidu H. Ahmed & 2 Ors.* (2001) 11 NWLR (Pt.724) 369 at 390.

The learned law Lord went on thus:

"Action which amounts to an abuse of the process of court may vary but it ought to fall generally within the kind identified in the case of *Okafor v. A.* (i., *Anambra Slate* (1991) 6 NWLR (Pt.200) 659 at 681 wherein Karibi-Whyte J.S.C. said:

"I venture to state quite concisely and clearly that an abuse of the process of the court is only possible by improper use of the issue of the judicial process or process already issued to the irritation and annoyance of the opponent .... It is the law that multiplicity of actions on the same matter may constitute an abuse of the process of the court. But this is so only where the action is between the same parties with respect to the same subject matter. The court has a duty in such a situation to interfere to stop an abuse of its process. See *Okorodudu v. Okoromadu* (1991) 11 NWLR (Pt. 200) 659 at 681." See also *Saraki v. Kotoye* (1992) 9 NWLR (Pt. 264) p. 156.

It is to be observed in this case that the plaintiff in this suit is not a party to the Kwara State suit.

The argument of the learned trial Judge of the lower court quoted earlier in this judgment emphasized that although the plaintiffs in the two jurisdictions are different- the defendants are the same (there are in fact 9 defendants in the Kwara State action but the first three p Q therein are also defendants in this case) and that the same questions are being raised. It is for this reason that he declined jurisdiction and he struck out plaintiff's case.

I must say that having considered the factual situation in this case with the principles of law laid down for vexatious litigation and litigation in abuse of court process. I cannot find that the plaintiff in this case is in any way guilty of vexatious litigation or litigation in abuse of process of court. This is because -

- (a) The issues, if any, involved in suit CV/353/2001 had not been determined on merit when he filed a notice of discontinuance.
- (b) Plaintiff is not a party to the Kwara State action. In the event, I do not consider that the originating summons the subject of this appeal is either vexatious or an abuse of process of court.

That is not the end of the matter in respect of the first prayer.

Learned senior counsel - Mr. Fagbemi in his address to the lower court at p. 44 of the record urged the lower court to dismiss the action or strike it out or "in furtherance of justice sttiv proceed-and and tell them to go hack to Kwara ". (The quotation marks and G the italics by me for emphasis).

Furthermore in his brief for respondents in this court learned senior counsel has emphasized that the question in this case is -where is it more convenient to file this suit? - But I ask the question ~ Have the defendants/applicants sought in the application a relief relevant to the question of forum convenient

True a lot of argument was advanced in respect of locus convenient in the lower court and also in the briefs in this court.

If properly raised the relief of stay of proceedings which learned senior counsel sought in his address before the lower court might have been appropriately advocated. But no such relief has been prayed for.

As stated earlier in this judgment, this is a suit which contains some element of conflict of laws. It is known that in certain types of cases courts have discretion whether or not to take jurisdiction. Examples are:-

- (i) Where leave of the court is required for the service of process outside the jurisdiction;
- (ii) Where proceedings in respect of the same subject-matter are pending in a "foreign jurisdiction"; (iii) where a contract provides that all disputes between the parties are to be referred to the exclusive jurisdiction of a foreign tribunal;
- (iv) Where the court is being asked to exercise its equitable jurisdiction *in personam* in cases involving foreign land. In addition, the court has inherent jurisdiction to stay proceedings which are in abuse of its powers -See Halsbury's Laws of England 4th Edition, Vol. 8, and Art. 407.

Generally such interference will take place to prevent possible injustice arising where two actions are pending both in a home court and in a foreign court between the same parties and in respect of the same issues - see Halsbury's *Ibid*, Art 787.

In this case it is clear that though the same issues may be said to be involved, the parties are certainly not the same.

Learned senior counsel has argued in the respondent's brief at page 7 that the decision of the learned trial Judge has not necessarily occasioned any miscarriage of justice to the plaintiff. With respect, I do not share that view.

It is to be remembered that the appellant is not a party to the proceedings in the High Court of Kwara State.

It is trite that with proper leave, the plaintiffs in the Kwara State High Court suit are at all times at liberty to discontinue their case against the defendants in that court. They need not consult the plaintiff in the FCT case.

The appellant herein will have no locus to interfere with that decision. Yet the learned trial Judge has struck out his case. Certainly, this is prejudicial to the plaintiff. It would have been a different kettle offish if the applicant had included a prayer for stay of proceedings of the F.C.T. High Court in their reliefs leaving the plaintiff free in the meantime to take action in Kwara State, the "Home Court".

But I have observed that that was not a prayer in the lower court. It was not proper for counsel to include that prayer for the first time in his address - Hence the lower court could not have granted a stay of proceedings, (i) *Warri Refining and Petrochemical Co. Ltd. & Anor. v. E. Onwo* (1999) 12 NWLR (Pt.630) 312 at 329.

Also (ii) *Okubule v. Oyughohi* (1990) 4 NWLR (Pt.147) 723; (iii) *Ekpenyong v. Nyong* (1975) 2 SC 71 at 80; (iv) *Union Bank of Nigeria Ltd. v. Ogbob* (1995) 2 NWLR (Pt.380) 647.

In the event, I resolve the sole issue in this appeal in favour of the appellant.

The appeal succeeds.

I shall now proceed to deal with the cross appeal of the defendant.

The notice of cross appeal contained three grounds which without their respective particulars read thus:-

"The learned trial Judge erred in law when he refused to pronounce on whether the case has not become academic and whether in any event; originating summons is the appropriate procedure to be employed in this case.

2. The learned trial Judge erred in law when he failed to hold that the case brought by the plaintiff has become academic in view of the facts pleaded by the defendants/cross-

appellants an uncontroverted by the plaintiffs.

3. The learned trial Judge erred in law when he failed to hold that the case presented by the plaintiff via originating summons procedure is not appropriate when the facts in issue are in serious conflict and contention."

In his appellant's reply brief and cross-respondent's brief of argument, the appellant/cross-appellant has raised a preliminary objection against the cross appeal on two grounds.

The first ground is that since the judgment of the lower court did not make a pronouncement on the matter the subject of the cross H appeal, this being an appellate court should not deal with them without the benefit of the opinion of the lower court.

The error in this argument, in my humble view, is that each of the issues concerned were raised before the lower court and necessary arguments proffered thereon by counsel on either side. The lower court had a duty to consider and make pronouncements on every issue adumbrated before him by the parties. This is necessary to obviate the danger of a higher court holding a contrary view on the materiality of the issue if the lower court had confined itself to only issues which it considered necessary to dispose of the case. If the lower court failed to do so. an appellate court is, in the circumstance, in as good a position as the lower court was, to make pronouncements on such issues. See: (i) Warri Refining and Petrochemical Company Ltd. (W.R.P.C.) and Anor. v. E. Onwo (supra) 326; see also (ii) Okonji v. Njokanma (1991) 7 NWLR (Pt.202) 13 L; (iii) Oro v. Falade (1995) 5 NWLR (Pt.396) 385 at 402.

The second ground of objection is that appellant/respondent argues that the only duty of the respondents is to support the judgment or ruling of the lower trial court but that what the respondents to the appeal have done is not to file a cross-appeal but to ask that though they are not dissatisfied with the conclusion of the lower court with which they are satisfied nevertheless respondents argued other grounds upon which the conclusion of the trial court could be based - that in that event what respondent needed to do was to file a respondent's notice - relying upon *Pacers Multi-Dynamic v. M. V. "Dancing Sister"* (2000) 3 NWLR (Pt. 648) p. 241.

Again, I consider, with respect, that appellants are mistaken -cross-appellants have indicated clearly that they are dissatisfied with a part (not the whole) of the decision of the lower court which the have identified.

Respondents have a constitutional right by virtue of S. 240 of the Constitution of the Federal Republic of Nigeria, 1999 to appeal that part of the decision to this court. Since they have exercised that right, (he question of filing a respondent's notice under Order 3 rule 14 which only arises when an appellant chooses not to appeal from the decision of the lower court, does not arise. Respondents have made the primary right of appeal their choice.

In the event, the grounds of the appellants' objection are in-competent. I hereby strike them out.

However, I find that ground 2 of the grounds of cross-appeal as well as issue 2 emanating thereon is a repeat of the first part of Ground 1 of the notice of appeal while Ground 3 as well as Issue 3 formulated therefrom is a repeat of the second part of Ground

1. in the event, I need only deal with issues 2 and 3 in the cross/ appellant's brief, which read:

"2. Whether the case presented by the plaintiff/appellant/cross respondent has not become academic or abuse of court process or otiose? And

3. Whether the case can in view of the likelihood of the facts being in dispute, originating summons procedure is appropriate in this case."

It is the argument of cross appellant with regard to Issue No. 2 while relying upon paragraphs 6, 7, 8 of the affidavit in support of the motion for dismissal, paragraph 19 of

the affidavit in support of the plaintiff's originating summons as well as paragraph 18(2) and (3) of the Constitution of 1st defendant to contend that at the time of the alleged breach of plaintiff's right by the defendant, plaintiff had virtually served his entire tenure of office of 3 years and so the question submitted for adjudication in the originating summons becomes academic.

On the other hand appellant/cross respondent argued that this is a matter for evidence and has to await the trial of the action on the merit.

I quite agree with appellant/cross-respondent and resolve that issue in appellant/cross-respondent's favour.

I am now left to deal with issue No. 3 which complains that having regard to nature of the plaintiff/appellant's complaints, the facts are likely to be hotly disputed. That as such, originating summons procedure is not appropriate in this case.

In support of that argument, cross appellant refers to paragraphs 17, 18, 20, 21 and 25 of the counter-affidavit in opposition to paragraphs 8 and 16 of the affidavit in support of the originating summons and contend that the counter-affidavit put the complaint of appellant that he was not given a fair hearing in accordance with the provisions of the Constitution of the 1st defendant into serious contention.

Reliance is placed inter alia on (i) *Din v. Attorney-General of the Federation* (1986) 1 NWLR (Pt. 17) p. 471 and (ii) *National Bank (Nig.) Ltd. v. Alakija* (1978) 9-10 SC 59. On the other hand appellant/respondent contend in the reply brief and cross respondent brief that only substantially contested acts in the affidavits will make the procedure of originating summons to be inappropriate in a case, that the disputed facts in this case are not substantial.

A look at the affidavit evidence in this case both with regard to Originating summons and the preliminary objection to the action shows that there is dispute between the parties in respect of virtually every question of fact averred by either side every meter of the way. It is trite that the procedure of originating summons is intended for use in a friendly action between parties who are substantially ad idem on the facts and who, without the need for pleadings merely want, for an example, a directive of the court on the point of law involved; such as on the interpretation of a clause in a testator's will.

The procedure is not intended for use in a hostile action between parties and in which the parties concerned need know before-hand the issues which they are called upon to contend with from pleadings. This case has all the peculiarities of a hostile action.

(i) *National Bank (Nig.) Ltd. & Anor. v. Alakija and Anor.* (1978) 9-10 SC 59, (1978) NSCC 470 at 480 and 481;

(ii) *Re Powers. Lindsell v. Philips* (1885) 30 Ch.D 291.

In the event, I resolve issue No. 3 in favour of the cross appellant.

It is therefore my judgment in this appeal that the main appeal succeeds wholly and I allow it.

The cross appeal succeeds in part with regard to issue No. 3 only.

Accordingly, I make the following orders -

- (i) Prayer 1 in the preliminary objection of defendants fails while prayer 2 in the same objection succeeds.
- (ii) The order of the trial court striking out the case together with any order as to costs is hereby set aside. The case shall be remitted to the Chief Judge of the High Court of the Federal Capital Territory Abuja to be assigned to another Judge of the court other than S. E. Aladetoyinbo, J. for trial of the suit on its merit. The trial shall proceed as if it had been commenced by writ of summons and the parties shall file pleadings as they may be advised.
- (iv) Each party shall bear its own costs both in the lower court and in this court. I. T.

MUHAMMAD, J.C.A.: I read before now, the judgment of my learned brother, Oduyemi, JCA. I agree with him that the main appeal should succeed. I allow the main appeal. The cross-appeal succeeds in part only. I abide by the consequential orders made in both the main and the cross-appeals. I adopt my learned brother's reasoning process as mine. I order each party to bear its own costs both in this court and the lower court.

BULKACHUWA, J.C.A.: I have had the preview of the leading judgment just delivered by my learned brother. Oduyemi, JCA. He had admirably dealt with all the issues raised in the main appeal and the cross appeal. I agree with him in allowing the appeal and allowing partly the cross-appeal. I abide by the consequential orders made therein.

Appeal allowed,  
Cross-appeal allowed in part