**REGISTERED TRUSTEES OF AUTO SPARE PARTS AND MACHINERY DEALERS ASSOCIATION & ANOR**

**V.**

**MR. OBOJIOFOR OBINNA JOHN & ORS**

IN THE COURT OF APPEAL OF NIGERIA

ON WEDNESDAY, THE 18TH DAY OF MARCH, 2020

CA/L/1513/2018

**LEX (2020) - CA/L/1513/2018**

**OTHER CITATIONS**

3PLR/2020/49 (CA)

(2020) LPELR-49541 (CA)

**BEFORE THEIR LORDSHIPS**

MOHAMMED LAWAL GARBA, JCA

UGOCHUKWU ANTHONY OGAKWU, JCA

JAMILU YAMMAMA TUKUR, JCA

**BETWEEN**

1. REGISTERED TRUSTEES OF AUTO SPARE PARTS AND MACHINERY DEALERS ASSOCIATION

2. MR. DANIEL OFORKANSI - Appellant(s)

AND

1. MR. OBOJIOFOR OBINNA JOHN

2. MR. JAMES C. ONWUGAMBA

3. MR. PHILIP N. EZEABASILI

4. MR. NWADIMKA NATHANIEL - Respondent(s)

**ORIGINATING COURT**

HIGH COURT OF LAGOS STATE [Ogunjobi, J., Presiding]

**REPRESENTATION**

Appellants present; Appellants' Counsel absent. - For Appellant

AND

Chief Olalekan Yusuf, SAN with him, Victor Ozoude, Esq., Oluwole Awogbade, Esq., Olanrewaju Akinola, Esq., Ms. Hakeemat Ijaiye & Ms. Zainab Koiki - For Respondent

**ISSUES FROM THE CAUSE(S) OF ACTION**

ADMINISTRATIVE AND GOVERNMENT LAW – PRE-ACTION NOTICE:- Purpose of as a notice on a defendant is to give him the opportunity to settle the dispute amicably without resort to litigation – Need for same not be used to deny a claimant the right to seek redress in Court or to be equated with processes that are an integral part of the proceedings – Duty of court thereto

EMPLOYMENT AND LABLOUR LAW – ASSOCIATION:- Constitution of the Association– Principle that the Constitution is a contract between the members and binding inter se - Where provides for the issuance of a pre-action notice before the commencement of action against the association – Validity of provision and implication for the right of access to court guaranteed under the Constitution of the Federal Republic of Nigeria

COMPANY LAW – INCORPORATED TRUSTEES:- Constitution of the Association– Principle that the constitution of an association is a contract between the members of the association and binding inter se - Where constitution provides for the issuance of a pre-action notice before the commencement of action against the association – Validity of provision

NONPROFIT LAW – ASSOCIATION:- Rights of members – Assertion of – Question of locus standi – How determined – Provision of Constitution of association requiring pre-action notice – Attitude of court thereto – When will be deemed waived

**PRACTICE AND PROCEDURE ISSUES**

ACTION - LOCUS STANDI:- Meaning of Locus Standi - Fundamental aspect and focus of –When locus standi can either be deemed a matter of law only or matter of fact only – What a person must show to have locus standi or standing to sue

ACTION - LOCUS STANDI:- How to determine the locus standi of a plaintiff – Duty of court to review the cause of action of the plaintiff – Elements that must be established in the cause of action – Whether in establishing a claimant’s locus standi, a court need to restrict itself to the statement of claim or other originating process filed by the claimant

ACTION - LOCUS STANDI: Chances of success of an action - Whether a material consideration for the court in determining the locus standi of a party

ACTION - PRE-ACTION NOTICE:- Meaning and connotations of - Whether the issuance of pre-action notice is restricted to statutory bodies only

ACTION - PRE-ACTION NOTICE:- Purpose of a pre-action notice - Validity of requirement thereto – Whether extends to stipulation of a non-State body - Effect of non-compliance therewith -When would be deemed waived

APPEAL - PROLIFERATION OF ISSUES:- What constitutes – Attitude of court thereto

APPEAL - REPLY BRIEF:- Essence and purpose of – When used to re-argue of submissions already placed before court – Attitude of court hereto -

APPEAL - UNAPPEALED FINDING(S)/DECISION(S): Failure of an appellant to challenged a finding in their Notice of Appeal – Legal effect

COURT - ABUSE OF COURT/JUDICIAL PROCESS(ES):- Meaning – What amounts – Imprecise character of - Duty of Court under its inherent jurisdiction or power to ensure that the machinery of justice is not abused – How exercised

COURT - ABUSE OF COURT/JUDICIAL PROCESS(ES):- Abuse of Court processes based on multiplicity of action – How determined – Congruence of parties, subject matters, issues and reliefs – Whether required in all cases

COURT - ABUSE OF COURT/JUDICIAL PROCESS(ES):- Abuse of Court processes based on multiplicity of action - Dictum of Rhodes-Vivour, JSC in PDP vs. SHERRIF – Allegation of multiplicity of actions indirectly maintained by proxy through allies – How rebutted

JUDGMENT AND ORDER - WRITING OF JUDGMENT: Essential component of a good judgment – Stylist freedom of every judge in the writing of judgments – Grounds upon which a judgment may be attacked

JUDGMENT AND ORDER - ERROR/MISTAKE IN JUDGMENT:- Principle that it is not every error/mistake in a judgment that will result in a judgment being set aside - Circumstance when an appellate court will interfere therewith

PLEADINGS - ORIGINATING SUMMONS PROCEDURE:-Rule that the originating summons procedure is intended to be used in limited circumstances in matters involving the construction and interpretation of enactments and documents or for obtaining the declarations of a court – Legal effect of - Whether only applicable to suits where there is no dispute on question of facts or the likelihood of such dispute

**CASE SUMMARY**

ORIGINATING FACTS AND CLAIMS

The suit was initiated against the Executive Officers of the Auto Spare Parts and Machinery Dealers Association (ASPMDA) [hereinafter referred to as ASPDMDA]. Respondents, as Claimants at the lower Court asserted that the ASPMDA Constitution under which the Executive Officers were elected stipulated a tenure of two years, but that the Executive Officers were seeking to elongate their tenure by claiming a four year tenure subsequently provided in the Amended Constitution of the Association which was adopted after they were elected. They claimed, among othes the following reliefs:-

“(i) AN ORDER directing the 2nd Defendant and other members of the executive committee to vacate their respective offices at the expiration of their tenure of office on 7th, August 2018.

(ii) AN ORDER of perpetual injunction restraining the 2nd Defendant from further contesting for the position of the executive chairman of ASPMDA having successfully contested and won two terms in office, the maximum terms stipulated in the old 1986 Constitution of ASPMDA.

(iii) AN ORDER directing the 2nd Defendant led executive committee members or the interim government of ASPMDA, as the case may be, to conduct a fresh election for the positions on the executive committee specified under the new 2016 ASMDA Constitution.”

The Appellants filed a preliminary objection challenging the jurisdiction of the lower Court to entertain the action, predicated, among others, on the following grounds:

“1. This Honourable Court lacks the requisite jurisdiction to entertain this suit.

2. The Claimants/Respondents lack the locus standi to institute the suit, by virtue of the ASPMDA Constitution (as amended in 2016) they are neither Registered nor Honorary members of the 1st Defendant.

3. This suit as currently constituted is an abuse of Court process, as same is the subject matter of litigation in Suit No: LD/5010GCMW/208 by some purported members of the association representing the members of the 1st Defendant/Applicant’s, including the Claimants/Respondents.

The preliminary objection and the Originating Summons were heard together by the lower Court and in its judgment dismissed the preliminary objection and entered judgment for the Respondents on their Originating Summons.

DECISION(S) APPEALED AGAINST

1. “...The defendants in the further addition affidavits in support of the Notice of Preliminary Objection raised deposed that the Claimant failed to give 3 months pre-action notice prior to institution of this suit as provided under Article 21A of the ASPMDA Constitution 2016 as amended. Firstly, depositions in an affidavit are meant to support the prayers in the application. There is no prayer or ground of objection that the Claimant fails to give 3 months pre action notice. Further having participated by filing a Counter affidavit to the Originating Summons, the Defendant is deem to have waived the requirement of pre action notice under Article 21A of the ASPMDA 2016 Constitution as amended.”

2. Issue 2 in the Defendant Notice of Preliminary Objection is whether having regard for the existence and pendency and suit no LD/1510/GCMW/2018, this suit does not constitute an abuse of Court process and in the circumstances liable to be struck out. It is settled law that a suit is an abuse of Court process where the parties, subject matters, issues and reliefs are the same or substantially similar to an earlier suit.

ISSUE(S) FOR DETERMINATION ON APPEAL

*BY APPELLANT:*

“1. Whether in the light of Article 21(A) of the ASPMDA Constitution (as amended in 2016), the trial Court possessed the requisite jurisdiction to entertain the suit ab initio? (Distilled from Grounds 1and 2)

2. Whether the lower Court was right when it held that, in spite of the pendency of Suit No: LD/5010GCMW/2018, the instant suit was not an abuse of Court process? (Distilled from Ground 4)

3. Whether the Learned Trial Judge was right in placing sole and heavy reliance on the conditions stated in B.B Apugo & Sons v. OHMB (2016) LPELR 40598 (SC) in holding that the Respondents possess the requisite standing to institute the action, even in the face of the positive facts placed before it suggesting otherwise? (Distilled from Ground 3)

4. Whether the dust raised as to the time the Amended Constitution became operative viz-a-viz [sic] the tenure of the members of the Executive Council as well as the dispute as to membership of the association duly raised are not sufficient hostile facts to warrant calling of evidence? (Distilled from Ground 3 of the Notice of Appeal)

5. Whether it can be said that the lower court adequately considered all the issues raised for determination before it by the Appellants in its decision? (Distilled from Ground 5).”

In the submissions in the Appellants’ Brief, a sixth issue was argued by the Appellants which was not one of the issues they distilled for determination. The said issue reads thus:

“If any of the issues raised above is resolved in favour of the Appellants, whether it can be said that the lower Court was right to have assumed jurisdiction to determine the matter (Distilled from Grounds 1, 2, 3, 4 and 5 of the Notice of Appeal).”

This issue which appeared to the Court of Appeal to be an encapsulation of the submissions in the five issues raised by the Appellants from the five grounds of appeal was deemed a proliferation of issues, incompetent and therefore liable to be struck out.

*BY RESPONDENTS*

“1. Whether the non-service of a notice to commence this instant suit on the appellants deprives the lower Court of the jurisdiction to entertain this suit. (Distilled from ground one of the amended notice of appeal.)

2. Whether the lower Court rightly held that the respondents had the locus standi to institute this action and the action need not be converted to a writ of summons. (Distilled from ground two of the amended notice of appeal).

3. Whether the lower Court adequately considered and resolved all issues raised for determination before it. (Distilled from ground four of the amended notice of appeal).

4. Whether the lower Court was right when it held that, in spite of the pendency of Suit No: LD/5010GCMW/2018, the instant suit was not an abuse of Court process. (Distilled from ground four of the amended notice of appeal).”

*AS ADOPTED BY COURT*

[Court adopted the issues as nominated by the Appellants but treated issue numbers one, two and three together since they deal with the same genus of want of jurisdiction based on failure to give pre-action notice, abuse of process and lack of locus standi.]

DECISION OF THE COURT OF APPEAL

All the issues resolved against the Appellant. The decision of the lower Court, Coram Judice: Ogunjobi, J. delivered on 28th November 2018 affirmed.

**MAIN JUDGMENT**

UGOCHUKWU ANTHONY OGAKWU, J.C.A. (Delivering the Leading Judgment):

The contest in this appeal is all about tenure of office and alleged elongation of tenure. It is with respect to the Executive Officers of the Auto Spare Parts and Machinery Dealers Association (ASPMDA) [hereinafter referred to as ASPDMDA]. It is the case of the Respondents, as Claimants at the lower Court; that the ASPMDA Constitution under which the Executive Officers were elected stipulated a tenure of two years, but that the Executive Officers were seeking to elongate their tenure by claiming the four year tenure provided in the Amended Constitution which was adopted after they were elected. Au contraire, the Appellants contend that the Executive Officers took their oath of office under the Amended Constitution and that the tenure was for the four years provided thereunder.

The Respondents commenced an action by Originating Summons before the High Court of Lagos State in SUIT NO. LD/2588GCM/2018: MR. OBOJIOFOR OBINNA JOHN & ORS. vs. THE REGISTERED TURSTEES OF AUTO SPARE PARTS & MACHINERIES DEALERS ASSOCIATION & ANOR. for the determination of the following questions:

“1. Whether or not the 2nd Defendant led executive committee members of the 1st Defendant, the Auto Spare Part (hereinafter referred to as “ASPMDA”) are not bound by the tenure of office stipulated in 1986 ASPMDA Constitution under which they took their respective oaths of office.

2. Whether or not the 2nd Defendant led executive committee members can by executive fiat validly take advantage of the provisions of the new 2016 ASPMDA Constitution on tenure of office of executive committee members.

3. If the answers to 1 and 2 are in the positive and negative respectively, whether or not the 2nd Defendant led executive committee members of ASPMDA can remain in office beyond the stipulated 2- year term of office.”

Upon the determination of the said questions, the following reliefs were claimed:

“(i) AN ORDER directing the 2nd Defendant and other members of the executive committee to vacate their respective offices at the expiration of their tenure of office on 7th, August 2018.

(ii) AN ORDER of perpetual injunction restraining the 2nd Defendant from further contesting for the position of the executive chairman of ASPMDA having successfully contested and won two terms in office, the maximum terms stipulated in the old 1986 Constitution of ASPMDA.

(iii) AN ORDER directing the 2nd Defendant led executive committee members or the interim government of ASPMDA, as the case may be, to conduct a fresh election for the positions on the executive committee specified under the new 2016 ASMDA Constitution.

(iv) The Cost of this action.”

The Appellants filed a preliminary objection challenging the jurisdiction of the lower Court to entertain the action. The preliminary objection was predicated on the following grounds:

“1. This Honourable Court lacks the requisite jurisdiction to entertain this suit.

2. The Claimants/Respondents lack the locus standi to institute the suit, by virtue of the ASPMDA Constitution (as amended in 2016) they are neither Registered nor Honorary members of the 1st Defendant.

3. This suit as currently constituted is an abuse of Court process, as same is the subject matter of litigation in Suit No: LD/5010GCMW/208 by some purported members of the association representing the members of the 1st Defendant/Applicant’s, including the Claimants/Respondents.

4. The 2nd Defendant/Applicant is not a necessary party to the suit.

5. That the facts of this case, as presented in the Affidavit in Support of the Originating Summon for which the Defendants/Applicants are willing to join issues, is laden with hostile and very contentious facts, in other words, this suit should not have been brought by way of an Originating Summons.

6. The suit is wholly incompetent as the Claimants/Respondents are merely seeking orders of the Court as against declarations for which an Originating Summons is used.

7. The suit, though instituted in individual capacities, clearly shows that the claims of the Claimants/Respondents are in respect of supposed wrong to be committed against the general members as a whole.

8. Having regard to the facts contained in the Affidavit in support, the present suit discloses no reasonable cause of action, it is speculative and wholly incompetent.”

The parties filed several affidavits in respect of the substantive Originating Summons and the preliminary objection. The preliminary objection and the Originating Summons were heard together by the lower Court and in its judgment delivered on 28th November 2018, it dismissed the preliminary objection and entered judgment for the Respondents on their Originating Summons. The judgment of the lower Court is at pages 556-565 of the Records. The Appellants being dissatisfied with the judgment, appealed against the same by Notice of Appeal filed on 28th November 2018. However, the extant Notice of Appeal on which the appeal was argued is the Amended Notice of Appeal filed on 14th May 2019, but deemed as duly filed on 3rd July 2019.

The Records of Appeal were compiled and transmitted and briefs of argument were filed and exchanged by the parties. The Appellants Brief was filed on 14th May 2019. The Appellants further filed a Reply Brief on 17th January 2020, but deemed as properly filed on 21st January 2020; while the Respondents’ Brief was filed on 10th July 2019. At the hearing of the appeal, the Appellants’ counsel was absent, but he wrote a letter requesting for an adjournment; however, not having proffered convincing reasons for an adjournment to be granted, the Court proceeded to hearing and treated the appeal as having been argued by the Appellants pursuant to the provisions of Order 19 Rule 9 (4) of the Court of Appeal Rules, 2016. Consequent upon this, the learned senior counsel for the Respondents relied on the Respondents’ Brief in urging the Court to dismiss the appeal.

I have already stated that the Appellants filed a Reply Brief. By Order 19 Rule 5 (2) of the Court of Appeal Rules, 2016, a Reply Brief shall not exceed fifteen (15) pages, except where the Court otherwise directs. Even though the Reply Brief exceeds fifteen (15) pages and there was no directive from the Court giving the Appellant leave to exceed fifteen (15) pages, I will overlook this breach of the Rules by the Appellants.

Furthermore, the said Reply Brief, which like the Appellants’ Brief is 25 pages of actual submission, was largely a re-argument of the submissions already made in the Appellants’ Brief. This is not the purpose of a Reply Brief as provided for in Order 19 Rule 5 (1) of the Court of Appeal Rules, 2016. It is not proper to use a reply brief to extend the scope of argument and submissions in the Appellants’ Brief vide YANATY PETROCHEMICAL LTD vs. EFCC (2017) LPELR (43473) 1 at 27-28, ABDULLAHI vs. MILITARY ADMINISTRATOR (2009) LPELR (27) 1 at 13 and ECOBANK NIGERIA LTD vs. HONEYWELL FLOUR MILLS PLC (2018) LPELR (45124) 1 at 9-11. The reiteration of a submission already made in an Appellants’ Brief in the Reply Brief will not improve the quality of the argument or make it acceptable, if it were ordinarily unacceptable: FSB INTERNATIONAL BANK vs. IMANO NIG LTD (2000) 7 SCNJ 65 at 70 and MAGIT vs. UNIVERSITY OF AGRICULTURE, MAKURDI (2005) LPELR (1916) 1 at 13. In the circumstances, bearing the purpose of a Reply Brief in mind, I will only make reference to the submissions in the Reply Brief where it is in fact a response to a new issue or argument in the Respondents’ Brief. See VODACOM BUSINESS NIGERIA LTD vs. FEDERAL INLAND REVENUE SERVICE (2019) LPELR (47865) 1 at 2-3.

Five issues were distilled for determination in the Appellants’ Brief, namely:

“1. Whether in the light of Article 21(A) of the ASPMDA Constitution (as amended in 2016), the trial Court possessed the requisite jurisdiction to entertain the suit ab initio? (Distilled from Grounds 1and 2)

2. Whether the lower Court was right when it held that, in spite of the pendency of Suit No: LD/5010GCMW/2018, the instant suit was not an abuse of Court process? (Distilled from Ground 4)

3. Whether the Learned Trial Judge was right in placing sole and heavy reliance on the conditions stated in B.B Apugo & Sons v. OHMB (2016) LPELR 40598 (SC) in holding that the Respondents possess the requisite standing to institute the action, even in the face of the positive facts placed before it suggesting otherwise? (Distilled from Ground 3)

4. Whether the dust raised as to the time the Amended Constitution became operative viz-a-viz [sic] the tenure of the members of the Executive Council as well as the dispute as to membership of the association duly raised are not sufficient hostile facts to warrant calling of evidence? (Distilled from Ground 3 of the Notice of Appeal)

5. Whether it can be said that the lower court adequately considered all the issues raised for determination before it by the Appellants in its decision? (Distilled from Ground 5).”

In the submissions in the Appellants’ Brief, a sixth issue was argued by the Appellants which was not one of the issues they distilled for determination. The said issue reads thus:

“If any of the issues raised above is resolved in favour of the Appellants, whether it can be said that the lower Court was right to have assumed jurisdiction to determine the matter (Distilled from Grounds 1, 2, 3, 4 and 5 of the Notice of Appeal).”

This issue appears to be an encapsulation of the submissions in the five issues raised by the Appellants from the five grounds of appeal and since issues have been distilled from the said grounds by the Appellants, this sixth issue which was not formally stated as one of the issues distilled, amounts to a proliferation of issues. Accordingly, the said sixth issue and the submissions thereon are hereby struck out: NWAIGWE vs OKERE (2008) LPELR (2095) 1 at 12, ROE LTD vs. UNIVERSITY OF NIGERIA (2018) LPELR (43855) 1 at 6-7 and NWANKWO vs. YAR’ADUA (2010) LPELR (2109) 1 at 75.

The Respondents on their part crafted four issues for determination as follows:

“1. Whether the non-service of a notice to commence this instant suit on the appellants deprives the lower Court of the jurisdiction to entertain this suit. (Distilled from ground one of the amended notice of appeal.)

2. Whether the lower Court rightly held that the respondents had the locus standi to institute this action and the action need not be converted to a writ of summons. (Distilled from ground two of the amended notice of appeal).

3. Whether the lower Court adequately considered and resolved all issues raised for determination before it. (Distilled from ground four of the amended notice of appeal).

4. Whether the lower Court was right when it held that, in spite of the pendency of Suit No: LD/5010GCMW/2018, the instant suit was not an abuse of Court process. (Distilled from ground four of the amended notice of appeal).”

I have insightfully considered the issues formulated by the parties and except for the difference in the words employed, the said issues are the same two and tuppence. The Respondents issue number two is an amalgamation of issue numbers three and four distilled by the Appellants. The issue number one distilled by the parties are the same. The Respondents’ issue number four is the same as the Appellants’ issue number two, while the Appellants’ issue number five is the same as the Respondents’ issue number three. In the circumstances, it is based on the issues as nominated by the Appellants that I will presently consider the submissions of learned counsel and resolve this appeal. I will take issue numbers one, two and three together since they deal with the same genus of want of jurisdiction based on failure to give pre-action notice, abuse of process and lack of locus standi.

ISSUE NUMBERS ONE, TWO AND THREE

1. Whether in the light of Article 21(A) of the ASPMDA Constitution (as amended in 2016), the trial Court possessed the requisite jurisdiction to entertain the suit ab initio?

2. Whether the lower Court was right when it held that, in spite of the pendency of Suit No: LD/5010GCMW/2018, the instant suit was not an abuse of Court process?

3. Whether the Learned Trial Judge was right in placing sole and heavy reliance on the conditions stated in B.B Apugo & Sons v. OHMB (2016) LPELR 40598 (SC) in holding that the Respondents possess the requisite standing to institute the action, even in the face of the positive facts placed before it suggesting otherwise?

SUBMISSIONS OF THE APPELLANTS’ COUNSEL

The quiddity of the Appellants’ contention is that Article 21A of the Amended Constitution of ASPMDA stipulates for pre-action notice to be issued before an action can be instituted against the 1st Appellant. It was opined that it was a condition precedent and that the Respondents, not having issued the pre-action notice before commencing the action, the lower Court did not have jurisdiction to entertain the action.

It was contended that the non-issuance of a pre-action notice was an issue of jurisdiction which can be raised orally and that the failure to include the same as one of the grounds on which the preliminary objection was predicated did not preclude the Court from considering the same. The cases of OLOBA vs. AKEREJA (1988) 7 SCNJ (PT I) 56 at 63, PETROJESSICA ENTERPRISES LTD vs. LEVENTIS TECHNICAL CO. LTD (1992) 5 NWLR (PT 244) 675 at 693, NDIC vs. CBN (2002) 3 SC at 10 and WURO BOGGA NIG LTD vs. HON MIN. OF THE FCT (2009) LPELR - 20032 (CA) were referred to. It was posited that the lower Court wrongly held that the filing of a counter affidavit to the Originating Summons amounted to a waiver of the failure to issue a pre-action notice. It was submitted that in an action commenced by Originating Summons, any preliminary objection is heard with the substantive Originating Summons, therefore the filing of a counter affidavit did not amount to a waiver. The cases of A-G LAGOS STATE vs. A-G FEDERATION (2014) 9 NWLR (PT 1412) 217, DAPIANLONG vs. DARIYE (2007) 8 NWLR (PT 1036) 332, MATO vs. HEMBER (2017) LPELR - 42765 (SC) among other cases were relied upon.

The Appellants submission on their second issue is that the lower court was wrong to hold that the suit was not an abuse of process in the light of the earlier pending action vide LOKPOBIRI vs. OGOLA (2016) 3 NWLR (PT 1499) 328, SARAKI vs. KOTOYE (1992) 9 NWLR (PT 264) 156, PDP vs. SHERRIF (2017) 15 NWLR (PT 1588) 219, FBN PLC vs. T.S.A. INDUSTRIES LTD (NO. 1) (2012) 14 NWLR (PT 1320) 326, DINGYADI vs. INEC(NO. 2) (2010) 18 NWLR (PT 1224) 154 among other cases. It was maintained that the main issue in both suits was on the alleged purported plan by the Executive Officers to elongate their tenure.

The Appellants submission on the locus standi of the Respondents is that the Respondents did not show sufficient legal interest to be imbued with locus standi as they were not registered members of the 1st Appellant as stipulated in Article 6A of the ASPMDA Constitution (as amended). The cases of NYAME vs. FRN (2010) 7 NWLR (PT 1193) 344, ABACHA vs. A-G FEDERATION (2014) 18 NWLR (PT 1438) 47 D-G, DANIEL vs. INEC (2015) LPELR - 24566 (SC) and UWAZURUONYE vs. GOVERNOR, IMO STATE (2013) 8 NWLR (PT 1355) 28 were cited in support.

SUBMISSIONS OF THE RESPONDENTS’ COUNSEL

The Respondents submit that pre-action notice is meant to be issued to statutory bodies and that the 1st Appellant was not a statutory body and did not enjoy such as a statutory privilege. It was opined that there was no mandatory requirement to issue a pre-action notice on the 1st Appellant before commencing an action against it. It was further asserted that the issuance of a pre-action notice can be waived and that the Appellants had waived the consequences of any failure to issue a pre-action notice on the 1st Appellant. The cases of NTIERO vs. NPA (2008) LPELR - SC.39/2001, MOBIL PRODUCING NIG UNLTD vs. LASEPA (2002) LPELR-SC. 136/2001 and ETUK vs. UDO (2017) LPELR - CA/L/241/2012 were called in aid.

On the vexed issue of locus standi, it was submitted that the Respondents have locus standi since they were members of the 1st Appellant as provided in Article 6A of the ASPMDA Constitution (as amended) and that they have sufficient legal interest to seek redress in Court as they want to contest for posts in the Executive of the 1st Appellant. The cases of UZOHO vs. NCP (2007) 10 NWLR (PT 1042) 331, ASUU vs. BPE (2013) 14 NWLR (PT 1374) 401, ABACHA vs. A-G FEDERATION (supra) at 35 among other cases were referred to. It was stated that the locus standi of the 1st and 4th Respondents was not challenged, such that even if the 2nd and 3rd Respondents are held not to have locus standi, the 1st and 4th Respondents can still maintain the action.

The Respondents submission on their issue number four which is on abuse of process is that the Appellants misdirected themselves when they argued that abuse of process occurs when matters are aimed at achieving the same result. It was stated that for there to be abuse of process, the parties, reliefs claimed and subject matter must be the same. The cases of DINGYADI vs. INEC (2010) LPELR - SC.32/2010 (R2), PDP vs. SHERRIF (supra) at 225, OSOJA vs. ODU (2015) 5 NWLR (PT 1453) 597 and UMEH vs. IWU (2008) 8 NWLR (PT 1089) [no page stated] were relied upon. It was maintained that the parties, subject matter, issues, claims and reliefs in this matter and earlier action were not the same.

APPELLANTS’ REPLY ON LAW

In the Reply Brief, the Appellants argue that the failure to issue pre-action notice goes to the competence of the action and is a substantial technicality which cannot be waived. It was maintained that the filing of a counter affidavit to the originating summons is not a waiver since the Supreme Court counselled in MATO vs. HEMBER (supra) that it is a bad strategy to file only a preliminary objection to an originating summons.

The Appellants assert that for there to be abuse of process, the reliefs claimed need not be exactly the same since it is the end result that is geared towards achieving the same goal that shows that it is an abuse of process vide MOMOH vs. ADEDOYIN (2018) 12 NWR (PT 1633) 345 at 373. It was conclusively submitted that the fact that there was no positive fact challenging the membership of the 1st and 4th Respondents specifically was not enough for the lower Court to shut its eyes to the issue entirely and thereby refused to consider the issue of challenge to the membership of the Respondents.

RESOLUTION OF ISSUE NUMBERS ONE, TWO AND THREE

The crux of the contention in these three issues is that the lower Court lacked the jurisdictional competence to entertain the Respondents’ action on the grounds that the Respondents failed to issue a pre-action notice before commencing the action, that the action was an abuse of process and that the Respondent do not have the locus standi to maintain the action.

PRE-ACTION NOTICE

The starting point in this discourse will be to ascertain the purpose of a pre-action notice. The authorities seem to be settled that the purpose of serving a pre-action notice on a defendant is to give him the opportunity to settle the dispute amicably without resort to litigation. The requirement would not deny a claimant the right to seek redress in Court. In AMADI vs. NNPC (2000) 10 NWLR (PT 674) 76, it was held that the purpose of giving notice of claim is so that the defendant is not taken by surprise but have adequate time to prepare to deal with the claim in its defence. The purpose of the notice is not to put hazards in the way of bringing litigation. See also KATSINA vs. MAKUDAWA (1971) NMLR 100.

In MOBIL PRODUCING NIG UNLTD vs. LASEPA (2002) 18 NWLR (PT 798) 1 at 36, the Apex Court held that:

“A pre-action notice, which is for the benefit of the person or agency on whom or which it should be served, is not to be equated with processes that are an integral part of the proceedings ‘ initiating process. Rather, its purpose is to enable that person or agency to decide what to do in the matter, to negotiate or reach a compromise or have another hard look at the matter in relation to the issues and decide whether it is more expedient to submit to jurisdiction and have a pronouncement on the point in controversy.”

See also ETI-OSA LOCAL GOVT. vs. JEGEDE (2007) LPELR (8464) 1 at 8, MEKAOWULU vs. UKWA WEST LOCAL GOVT. COUNCIL (2018) LPELR (43807) 1 at 17-19 and EZE vs. OKECHUKWU (2002) LPELR (1194) 1 at 13.

The Respondents contend that the 1st Appellant, not being a statutory body, is not entitled to the issuance of a pre-action notice. I am not enthused by this contention. The issuance of pre-action notice is not restricted to statutory bodies only. In NTIERO vs. NPA (2008) 10 NWLR (PT 1094) 129, the Supreme Court held that a pre-action notice connotes some form of legal notification or information required by law or imparted by operation of law, contained in an enactment, agreement or contract, which requires compliance by the person who is under legal duty to put on notice the person to be notified before the commencement of any legal action against such a person.

The requirement for pre-action notice in this matter is provided for in the Amended Constitution of ASPMDA. The Constitution is a contract between the members inter se. So the provision, even if it would not be binding on non-members of ASPMDA, is binding on the Respondents who profess to be members of ASPMDA. As held by the Apex Court, the requirement for pre-action notice may be contained in an enactment, agreement or contract. So even though the 1st Respondent is not a statutory body, it is entitled to insist that the Respondents, who profess to be its members, comply with the stipulations of the Constitution on the issuance of pre-action notice.

It has not been confuted that the Respondents did not issue a pre-action notice before commencing the action. It seems abecedarian that unless waived or condoned by the beneficiary, the effect of non-compliance with the requirement to issue a pre-action notice would be to debar a Court from entertaining the suit: NGELALA vs. TRIBAL AUTHORITY NONGOWA CHIEFDOM (1953) 14 WACA 325 at 327, NIGERCARE DEVELOPMENT CO LTD vs. ADAMAWA STATE WATER BOARD (2008) LPELR (1997) 1 at 13-14, MOBIL PRODUCING (NIG) UNLTD vs. LASEPA (supra), NNONYE vs. ANYICHIE (2005) LPELR (2061) 1 at 17 and FAWEHINMI CONSTRUCTION CO. LTD vs. OAU (1998) LPELR (1256) 1 at 27.

In holding that the Appellants were not entitled to the benefit of the consequences of the failure of the Respondents to issue a pre-action notice before commencing the action, the lower Court held that the Appellants did not make it a ground of their preliminary objection and that by filing a counter affidavit, they had waived the non-compliance. Hear the lower Court at page 562 of the Records:

“...The defendants in the further addition affidavits in support of the Notice of Preliminary Objection raised deposed that the Claimant failed to give 3 months pre-action notice prior to institution of this suit as provided under Article 21A of the ASPMDA Constitution 2016 as amended.

Firstly, depositions in an affidavit are meant to support the prayers in the application. There is no prayer or ground of objection that the Claimant fails to give 3 months pre action notice. Further having participated by filing a Counter affidavit to the Originating Summons, the Defendant is deem to have waived the requirement of pre action notice under Article 21A of the ASPMDA 2016 Constitution as amended.”

The Appellants have forcefully argued that the issue of jurisdiction can be raised viva voce and that they properly raised the question of non-compliance with the requirement to issue a pre-action notice in the facts deposed to in the Further Additional Affidavit in support of the preliminary objection. Without a doubt, the Appellants are correct in their contention that an issue of jurisdiction can be raised viva voce vide PETROJESSICA ENTERPRISES LTD vs. LEVENTIS TECHNICAL CO LTD (supra). But the diacritical circumstance of this matter was not one where the objection to jurisdiction was raised viva voce. No! The Appellants filed a formal notice of preliminary objection, setting out the grounds on which the objection to the jurisdiction of the lower Court was predicted (see pages 172-189 of the Records). The issuance vel non of a pre-action notice was not made one of the grounds of the objection. The Appellants would have been on a strong wicket as to an issue of jurisdiction being raised viva voce if they had not filed a formal notice of preliminary objection. But having filed a notice of preliminary objection, they become bound by the grounds therein stated. The lower Court was therefore correct when it held that depositions in an affidavit support the prayers in the application and that there was no prayer or ground of objection that the Respondents failed to give pre-action notice. It is because the Appellants failed to make it a ground of their objection, not necessarily because they filed a counter affidavit per se, that they waived their right to insist on the effect of non-compliance with the requirement. In NTIERO vs. NPA (2008) 10 NWLR (PT 1094) 129, the Supreme Court held that the effect of non-service of a pre-action notice where it is required is only an irregularity which renders an action incompetent but that the irregularity can be waived by a defendant who fails to raise it either by motion or plead it in the statement of defence. The failure by the Appellants to raise the issue as a ground of their preliminary objection amounted to a waiver of the irregularity. See also FEED AND FOOD FARMS (NIG) LTD vs. NNPC (2009) 12 NWLR (PT 1155) 387 at 401, NNONYE vs. ANYICHIE (supra) at 660, OWOSENI vs. FALOYE (2005) 14 NWLR (PT 946) 719 and MOBIL PRODUCING (NIG) UNLTD vs. LASEPA (supra). The decision of the lower Court that the Appellants had waived their right on the consequences of non-compliance with the issuance of a pre-action notice is the correct decision. An appellate Court is concerned with whether the decision appealed against is the correct decision and not whether the reasons given are correct: NDAYAKO vs. DANTORO (2004) 13 NWLR (PT 889) 187 at 220, DAIRO vs. UBN PLC (2007) 16 NWLR (PT 1059) 99 at 161 and POATSON GRAPHIC ARTS TRADE LTD vs. NDIC (2017) LPELR (42567) 1 at 36.

ABUSE OF PROCESS

The term abuse of process of a Court is a term generally applied to a proceeding which is wanting in bona fides and is frivolous, vexatious or oppressive. Abuse of process can only mean the abuse of legal procedure or the improper use or misuse of the legal process. See AMAEFULE vs. THE STATE (1988) 2 NWLR (PT 75) 156 at 177. The Court under its inherent jurisdiction or power has the duty to ensure that the machinery of justice is duly lubricated and that it is not abused. Abuse of process simply means that the process of Court must be used bona fide and properly and must not be abused: ARUBO vs. AIYELERU (1993) 3 NWLR (PT 280) 126 at 142. In SARAKI vs. KOTOYE (1992) 9 NWLR (PT 264) 156 at 188 Karibi-Whyte, JSC stated:

“The concept of abuse of judicial process is imprecise. It involves circumstances and situations of infinite variety and conditions. Its one common feature is the improper use of the judicial process by a party in litigation to interfere with the due administration of justice. It is recognized that the abuse of the process may lie in both a proper or improper use of the judicial process in litigation. But the employment of judicial process is only regarded generally as an abuse when a party improperly uses the issue of the judicial process to the irritation and annoyance of his opponent, and the efficient and effective administration of justice. This will arise in instituting a multiplicity of actions on the same subject matter against same opponent on the same issues. See OKORODUDU vs. OKOROMADU (1977) 3 SC 21; OYEGBOLA vs. ESSO WEST AFRICA INC. (1966) 1 AII NLR 170. Thus the multiplicity of actions on the same matter between the same parties even where there exists a right to bring the action is regarded as an abuse. The abuse lies in the multiplicity and manner of the exercise of the right, rather than the exercise of the right, per se”.(Emphasis supplied)

See also the cases of OKAFOR vs. A-G (1991) 6 NWLR (PT 200) 659 at 681; CBN vs. AHMED (2001) 28 WRN 38 at 60-61 and MOGAJI vs. NEPA (2003) 8 WRN 42 at 53.

As stated by Edozie, JSC in AGWASIM vs. OJICHIE (2004) 18 NSCQR (PT 1) 359 at 367:

“It is trite law that the abuse of judicial process is the improper use of the judicial process by a party in litigation. It may occur in various ways, such as instituting a multiplicity of action on the same subject matter against the same opponent on the same issue or a multiplicity of action on the same matter between the same parties. It also occurs by instituting different actions between the same parties simultaneously in different Courts even though on different grounds, where two similar processes are used in exercise of the same right.”

In his own contribution, Niki Tobi, JSC (of blessed memory) at page 369 put the legal position as follows:

“The above factual position creates a scenario of the appellant pursuing the same matter by two processes. In other words, the appellants, by the two processes, are involved in some gamble or game of chance to get the best in the judicial process. A litigant has no right to pursue pari passu two processes which will have the same effect in two Courts at the same time with a view to obtaining victory in one of the processes or in both. Litigation is not a game of chess where players outsmart themselves by dexterity of purpose and traps. On the contrary, litigation is a contest by judicial process where the parties place on the table of justice their different positions clearly, plainly and without tricks.”

It is hornbook law that instituting several actions on the same subject matter against the same opponent on the same issues even when there is a right to bring the action is an abuse of process of Court: OKORODUDU vs. OKOROMADU (1977) 3 SC 21 and OYEGBOLA vs. ESSO WEST AFRICA INC. (1966) 1 ALL NLR 170. Where there is an abuse of process, it is the action which is later in time that constitutes the abuse of Court process. See NWEKE vs. UDOBI (2001) 5 NWLR (PT 706) 445 at 461-462 and AFRICAN REINSURANCE CORPORATION vs. JDP CONSTRUCTION NIG. LTD (2003) FWLR 251 at 270. While it is inherent in the power of a Court to put an end to an action which is an abuse of process, the Court must exercise its power judicially and judiciously and with great circumspection: FASAKIN FOODS NIG CO. LTD vs. SHOSANYA (2003) 17 NWLR (PT 849) 237 at 247-248.

The Appellants contention that the Respondents’ action is an abuse of process is based on multiplicity of actions. In resolving the issue, the lower Court held as follows at page 560 of the Records:

Issue 2 in the Defendant Notice of Preliminary Objection is whether having regard for the existence and pendency and suit no LD/1510/GCMW/2018, this suit does not constitute an abuse of Court process and in the circumstances liable to be struck out. It is settled law that a suit is an abuse of Court process where the parties, subject matters, issues and reliefs are the same or substantially similar to an earlier suit. The Supreme Court in HON. JUSTICE TITUS ADEWUYI OYEYEMI & ORS V. HON. TIMOTHY OWOEYE & ANOR per Onnoghen JSC (as he then was) stated the position of the law on the above Court process thus:

It is settled law that an abuse of Court process contemplate multiplicity of suit between the same parties in regard to the same subject and on the same issue.

The trinity of sameness in parties, subject matters and issues must thus exist in the subsequent suit as in earlier suit for the subsequent suit to be an abuse of Court process.

The Claimant in Suit No: ID/1510GCMW/2018 sue in representative capacity for themselves and on behalf of all other registered members of Auto Spare Parts and Machinery Dealer Association. The Claimants in this suit sue as financial members and aspirant for position in the Executive Committee of ASPMDA. The Claimants also assert in the paragraph 3 of the affidavits in support of the Originating Summons that they are all duly registered and financial members of ASPMDA. I therefore find that the Claimant in Suit No ID/1510GCMW/2018 are the same as the Claimant in this suit. The 1st and 2nd Defendant in this suit ID/1510GCMW/2018 are also the 1st and 2nd defendant in this suit. However, the Suit No ID/1510GCMW/2018 has Corporate Affairs Commission as the 3rd Defendant and the C.A.C is not a nominal party since the Claimant in this suit are claiming specific relief against the 3rd Defendant. Thus the parties in the Suit No ID/1510GCMW/2018 are not the same as in this suit.

Going by the reliefs sought in Suit No ID/1510GCMW/2018 and in the instant suit respectively, the issue for determination in both suit are not the same.

I find therefore that having regard to the existence of Suit No ID/1510GCMW/2018 this suit is not an abuse of Court process. The Appellants have relied on the dictum of Rhodes-Vivour, JSC in PDP vs. SHERRIF (supra) to contend that if a case involves the allies of the parties in a different action, then it is an abuse of process. The lower Court in holding that the parties were not the same used the presence of the Corporate Affairs Commission in the other action as the basis for holding that the parties were not the same. I have closely examined the parties in the matter and I am unable to see how the Corporate Affairs Commission can be said to be the ally of any of the parties in order to make applicable the decision in PDP vs. SHERRIF. I am therefore not swayed by the Appellants’ contention in this regard. I have insightfully considered the writ of summons in the earlier action (See page 179 of the Records) and there is no basis to interfere with the conclusion of the lower Court that the parties are not the same, and that the reliefs sought are not the same. This being so, the lower Court rightly held that the action was not an abuse of process on grounds of multiplicity of actions. See APC vs. JOHN (2019) LPELR (47003) 1 at 44-45.

LOCUS STANDI

Now, the term locus standi denotes the legal capacity to institute proceedings in a Court of law. It is often used interchangeably with terms like standing, or title to sue. The fundamental aspect of locus standi is that it focuses on the party seeking to get his complaint before a Court and not on the issues he wants to have adjudicated. See ADESANYA vs. PRESIDENT OF NIGERIA (1981) 5 SC 112 or (1981) 2 NCLR 358.

In order for a person to have locus standi, he must show that his civil rights and obligations have been or are in danger of being infringed and that he has sufficient legal interest in seeking redress in Court. See ADENUGA vs. ODUMERU (2003) 8 NWLR (PT 821) 163 and ETALUKU vs. NBC PLC (2004) 15 NWLR (PT 896) 370 at 398. The fact that a person may not succeed in the action does not have anything to do with whether or not they have the standing to sue. See LAWAL vs. SALAMI (2002) 2 NWLR (PT 752) 687 and DANIYAN vs. IYAGIN (2002) 7 NWLR (PT 766) 346.

Given the fact that locus standi denotes the capacity to institute proceedings in a Court of law, it can be a matter of law only or a question of fact only. It is a matter of law when a statute specifically and mandatorily provides for the category of person or persons who can commence a particular action. It is a question of fact only when the law does not specifically provide for the category of person or persons who can sue. In this latter situation, the claimant in his pleadings avers to facts (or deposes to the facts in an affidavit, like in this matter which was commenced by originating summons) which show that he has the standing to sue. See ALBIN CONSTRUCTION vs. RAO INV. AND PROPERTIES LTD (1992) 1 NWLR (PT 219) 583 at 594. The claimant need not state that he has locus standi, all he needs to do is to proffer facts establishing his rights and obligations in respect of the subject matter of the suit. See OROGAN vs. SOREMEKUN (1986) 2 NSCC 1231 at 1240.

In determining whether a claimant has locus standi, it is the cause of action that has to be examined: OLORIODE vs. OYEBI (1984) 5 SC 1 at 28; a cause of action being the entire set of circumstances giving rise to an enforceable claim. It is in effect the fact or combination of facts giving rise to the right to sue and it consists of two elements:

(a) The wrongful act of the defendant which gives the claimant his cause of complaint and;

(b) The consequent damage.

See THOMAS vs. OLUFOSOYE (1986) 1 NWLR (PT 18) 669, EGBE vs. ADEFARASIN (1987) 1 NWLR (PT 47) 1 and SAVAGE vs. UWECHIA (1972) 3 SC 214. In establishing whether a claimant has locus standi, it is only the statement of claim or other originating process filed by the claimant that a Court can look at. See BUSARI vs. OSENI (1992) 4 NWLR (PT 235) 557 and GLOBAL TRANSPORT vs. FREE ENTERPRISES (2001) 2 SCNJ 224. Locus standi is determinable from a consideration of the totality of the facts proffered by the claimant in his processes, which facts have to be carefully scrutinized with a view to ascertaining whether it has disclosed sufficient interest to give the claimant standing and title to sue. See OWODUNNI vs. CELESTIAL CHURCH OF CHRIST (2000) 6 SC (PT III) 60 at 97, 101-102.

The learned counsel on both sides of the divide, both before this Court and at the lower Court raked up matters based on the affidavits in support of the Appellants preliminary objection in a bid to ascertain the locus standi of the Respondents. They succeeded in inveigling the lower Court to accompany them on this odyssey into matters outside the Respondents’ processes in order to ascertain whether the Respondents had locus standi. This should not be so since it is rudimentary law that the issue of locus standi of a claimant is resolved by a perusal of the claimant’s processes which defines the confines of the cause of action and the claimant’s interest in respect of the said cause of action. See IGBINEDION vs. OBASEKI (2014) LPELR (23208) 1 at 7-11 and EZE vs. PDP (2018) LPELR (44907) 1 at 22-23.

As the law demands, it is based on the depositions in the affidavit in support of the Originating Summons alone that the issue of the Respondents locus standi is to be resolved.

It is pertinent to iterate that the fact that a person may not succeed in an action does not have anything to do with whether or not they have the standing to sue: LAWAL vs. SALAMI (supra) and DANIYAN vs. IYAGIN (supra).

From the Respondents affidavit, it is deposed that they are members of the 1st Appellant and that they are interested in vying for posts in the Executive of the 1st Appellant. It is effulgent that the alleged elongation of the tenure of the Executive Officers affects the interest of the Respondents who as members have indicated that they want to contest for elective positions in the 1st Appellant. By all odds, the deposition in the affidavit in support of the Originating Summons clearly shows that the Respondents have the requisite standing, title to sue or locus standi to maintain the action. Even though the lower Court was wrong in considering materials outside the affidavit in support of the Originating Summons, it arrived at the correct decision when it held that the Respondents have the locus standi to maintain the action. It is trite law that it is not every error in the judgment of a Court that will lead to the decision being set aside. For an error to have that effect, it must be substantial so as to lead to a miscarriage of justice. See AKOMOLAFE vs. GUARDIAN PRESS LTD (2010) LPELR (366) 1 at 14 and MOBIL PRODUCING (NIG) UNLTD vs. JOHNSON (2018) LPELR (44359) 1 at 42.

The matter does not end there. The lower Court held that the Appellants did not challenge that the 1st & 4th Respondents were bona fide members of ASPMDA. The Appellants have not challenged this finding in their Notice of Appeal. The concomitance is that the said finding remains unassailable and binding on the parties: NNADIKE vs. NWACHUKWU (2019) LPELR (48131) 1 at 27-28, ANYANWU vs. OGUNEWE (2014) LPELR (22184) 1 at 47 and DURBAR HOTEL PLC vs. ITYOUGH (2016) LPELR (42560) 1 at 7-8. Arguendo, even if the Appellants contention that the 2nd & 3rd Respondents do not have locus standi is correct, the action can still be maintained by the 1st & 4th Respondents whose membership of ASPMDA by the unchallenged finding of the lower Court was not questioned.

The concatenation and conflating of the foregoing is that these issues numbers one, two and three are resolved against the Appellants.

ISSUE NUMBER FOUR

Whether the dust raised as to the time the Amended Constitution became operative vis-a-vis the tenure of the members of the Executive Council as well as the dispute as to membership of the association duly raised are not sufficient hostile facts to warrant calling of evidence?

SUBMISSIONS OF THE APPELANTS’ COUNSEL

The Appellants argue that the facts of the matter were disputed and that the proceedings were hostile and not suited to be heard and determined under the originating summons procedure. The cases of INAKOJU vs. ADELEKE (2007) 4 NWLR (PT 1025) 423, OLLEY vs. TUNJI (2013) 10 NWLR (PT 1362) 275 and F.G.P. LTD vs. DURU (2017) 14 NWLR (PT 1586) 483 were cited in support. It was maintained that the contested facts as to the operative constitution and whether the Respondents were members of ASPMDA required evidence to be led.

SUBMISSIONS OF THE APPELANTS’ COUNSEL

The Respondents argued this issue as part of their issue number two. It is their submission that the facts are not contentious and that the lower Court arrived at the correct decision when it heard the matter under the originating summons procedure. It was asserted that there was no need to decide when the Amended Constitution (2016) became operative, the Appellants tenure being determined by when they took the oath of office. The cases of FAMFA OIL LTD vs. A-G FEDERATION (2003) LPELR-SC. 305/2002, F.G.P. LTD vs. DURU (supra) at 490 and ZAKIRAI vs. MUHAMMAD (2017) LPELR-SC 433/2015 were called in aid.

APPELLANTS’ REPLY ON LAW

In the Reply Brief, the Appellants doubled down on the submission that there were contested facts as to the Respondents’ membership of ASPMDA. It was opined that the fact that there was no positive fact challenging the membership of the 1st & 4th Respondents specifically, was not enough for the lower Court to shut its eyes to the issue entirely thereby refusing to consider the issue.

RESOLUTION OF ISSUE NUMBER FOUR

It is hornbook law that the originating summons procedure is intended to be used in limited circumstances in matters involving the construction and interpretation of enactments and documents. In NATIONAL BANK OF NIGERIA vs. ALAKIJA (1978) 9-10 SC 39 at 71, Eso, JSC stated:

“In other words, it is our considered view that Originating Summons should only be applicable in such circumstances as where there is no dispute on question of facts or the likelihood of such dispute. Where for instance, the issue is to determine short questions of construction and not matters of such controversy that the justice of the case would demand the settling of pleadings, Originating Summons could be applicable.”

See also DOHERTY vs. DOHERTY (1964) 1 ALL NLR 299, OLUMIDE vs. AJAYI (1997) 8 NWLR (PT 517) 433 at 442- 443, ANATOGU vs. ANATOGU (1997) 9 NWLR (PT 519) 49 at 70-71 and EZEIGWE vs. NWAWULU (2010) 4 NWLR (PT 1183) 159 at 191.

The underlying principle in all these decisions is that Originating Summons may only be used in initiating proceedings to obtain declarations or decisions of Court on the construction or interpretation of documents, instruments or statutory provisions in circumstances where there is no dispute on question of facts or the likelihood of such dispute. In other words, where the facts in issue between the parties involve matters of serious controversy that the justice of the case would demand the settling of pleadings, Originating Summons cannot be applicable: PAM vs. MOHAMMED (2008) 16 NWLR (PT 1112) 1 at 15, MICHAEL vs. MIMA PROJECTS VENTURES LTD (2002) 24 WRN 71 at 81 and OSSAI vs. WAKWAH (2006) ALL FWLR (PT 303) 239 at 254-255.

I have already set out the questions which the Respondents presented to the lower Court for determination. It is lucent that the said questions are in respect of the interpretation of the Constitution of ASPMDA. The Appellants filed affidavits wherein they raised questions of facts as to whether some of the Respondents were members of ASPMDA and when the Amended Constitution of ASPMDA came into force. It is on the strength of this that they contend that the proceedings were hostile and not suited for hearing under the originating summons procedure.

Now, the fact that the defendant in an action commenced by originating summons filed a counter affidavit is not tantamount to the matter being contentious and hostile: EDEH vs. OKORIE (2018) LPELR (43769) 1 at 31. The dispute on facts, which will necessitate the conversion of an action commenced by originating summons to a writ of summons, must be substantial, material and affecting the live issues in the matter. Where the disputes are peripheral and not material to the live issues, an action can be sustained by originating summons. See PAM vs. MOHAMMED (supra) at 88-89, LSDPC vs. ADOLD/STAMM INTERNATIONAL NIG LTD (2005) 2 NWLR (PT 910) 603 at 621, BALONWU vs. OBI (2007) LPELR (4255) 1 at 25-29 and SANI vs. KOGI STATE HOUSE OF ASSEMBLY (2019) LPELR (46404) 1 at 13-16. In the instant case, the Appellants make a kerfuffle of the fact that they deposed that the Respondents were not members of ASPMDA. This however pales into insignificance when it is remembered that the membership of ASPMDA by the 1st & 4th Respondents was not challenged by the Appellants. It thus became a moot point which did not affect the live issues in the action as the action could be sustained by the 1st & 4th Respondents, even if arguendo, the 2nd & 3rd Respondents were not members. It therefore became entirely academic as any such dispute raised was peripheral and did not affect the substance of the material and live issues in the action.

The same is equally true of the Appellants’ contention that the facts as to the operative Constitution was contested. Against the background of the questions presented for determination in the Originating Summons and the reliefs sought, the contrived contest as to the operative Constitution is a mere farce and is neither substantial nor material to the determination of the live issues in the case. In deciding that the action was rightly commenced under the originating summons procedure, the lower Court reasoned and held as follows at page 561 of the Records:

“An Originating Summons will not be suitable for commencement of an action if the dispute is relevant to the determination of the Originating Summons and without taking oral evidence in resolution thereof, the Originating Summons cannot be effectively determined. The response [sic] are contending that Originating Summons is not suitable for commencement of this action since there is a dispute as to the fact regarding when the ASPMDA Constitution 2016 which provide for a 4 years tenure of its executive committee became operative. There is however no dispute that the current executive of ASPMDA contested and won the election that brought them into office under the ASPMDA 1986. The deposition in paragraph 13 of the Originating Summons that the current members of the executive committee contested and won the election under the ASPMDA constitution 1986 was not denied by the Respondent.

The Claimant in the Originating Summon are seeking an order that the tenure of the current executives of ASPMDA expired on 7th of August, 2018 having occupied their offices for 2 years as provided under the ASPMDA Constitution 1986 and an order directing the current executive to conduct an election. The Originating Summons can be determined by reference to the tenure provided under the ASPMDA Constitution 1986 without recourse to the date when the ASPMDA Constitution 2016 become operative and whether or not the current executive constitution [sic] took their oath after the ASPMDA 2016 become operative. The date of oath of office determined the commencement of tenure and not the tenure in itself.

In the circumstances I find that the Originating Summons is appropriate to the commencement of this action and I so hold.”

The above reasoning is unassailable and cannot be faulted. The finding of the lower Court that “The deposition in paragraph 13 of the Originating Summons that the current members of the executive committee contested and won the election under the ASPMDA Constitution 1986 was not denied by the Respondent” lays to rest and renders otiose any contention as to the date when the Amended Constitution of 2016 became operative since the unchallenged finding of the lower Court is that the Executive Committee was elected under the 1986 Constitution. This issue number four is therefore resolved in favour of the Respondents. There were no contested facts on the material and live issues in the matter to warrant the conversion of the action to a writ of summons in order for witnesses to be called.

ISSUE NUMBER FIVE

Whether it can be said that the lower Court adequately considered all the issues raised for determination before it by the Appellants in its decision?

SUBMISSIONS OF THE APPELLANTS’ COUNSEL

The Appellants submit that the lower Court ignored the germane issues raised before it and therefore did not properly discharge its judicial duty, especially with respect to when the Amended Constitution became effective and the locus standi of the Respondents. The cases of SAGAY vs. SAJERE (2000) NWLR [no volume stated] (PT 661) 360 at 371 and PEMU vs. NDIC (2016) 6 NWLR (PT 1507) 175 were referred to. It was conclusively contended that the failure of the lower Court to properly discharge its judicial function occasioned a miscarriage of justice as a result of which the judgment should be set aside vide GBADAMOSI vs. DAIRO (2007) 3 NWLR (PT 1021) 282 and FALOWO vs. BANIGBE (2007) LPELR - 11850 at 43-44.

SUBMISSIONS OF THE RESPONDENTS’ COUNSEL

The Respondents argued this issue as their issue number three. It is their contention that the lower Court discharged its duty by dispassionately considering all the issues raised in the action. The cases ofHONEYWELL FLOUR MILLS PLC vs. ECOBANK (NIG) LTD (2016) 16 NWLR (PT 1539) at 400-401 and WILLIAMS vs. OGUNDIPE (2006) 11 NWLR (PT 990) at 163 were relied upon. The Respondents then set out the several issues raised in the action and the manner in which the lower Court resolved the said issues.

APPELLANTS’ REPLY ON LAW

In the Reply Brief, the Appellants reiterated their submission that the lower Court did not dispassionately consider the affidavit evidence and submissions of the parties consequent upon which it arrived at a perverse judgment. The cases of EDILCON (NIG) LTD vs. UBA PLC (2017) 18 NWLR (PT 1596) 74, UGBOJI vs. THE STATE (2018) 10 NWLR (PT 1627) 346 OLUJINLE vs. ADEAGBO (1988) 2 NWLR [no part stated] 238 at 254, among other cases were relied upon.

RESOLUTION OF ISSUE NUMBER FIVE

Prefatorily, the crux of this issue is whether the lower Court properly and fairly discharged its duties in arriving at the conclusions it arrived at in the judgment. Without a doubt, a Court has the duty to be even-handed in the review of evidence, evaluation of the same and ascription of probative thereto. It is however pertinent to emphasise that judgment writing is an art and there are as many variants to judgment writing as there are judges. What is however essential is for the judgment to capture the issues in controversy in the matter, the evidence placed before the Court on the issues, demonstrate a full and dispassionate consideration of the issues and how the Court arrived at its verdict based on materials before it. See IGWE vs. A.I.C.E OWERRI (1994) 8 NWLR (PT 363) 459 at 480-481.

It is important to underscore that every judge has his own peculiar style and method and there is no particular form a judgment should take. The important thing is for the judgment to contain the well-known constituent parts of a good judgment. For a Court of trial, like the lower Court, these include -

1. the issues or questions to be decided in the case;

2. the essential facts of the case of each party and the evidence led in support;

3. the resolution of the issues of fact and law raised in the case;

4. the conclusion or general inference drawn from facts and the law as resolved; and

5. the verdict and orders made by the Court.

The above elements need not be stated expressly in every judgment as they may not be present in every case. See GARUBA vs. YAHAYA (2007) 3 NWLR (PT 1021) 390, A-G FEDERATION vs. ABUBAKAR (2007) LPELR (3) 1 at 40-41 and OGBA vs. ONWUZO (2005) 14 NWLR (PT 945) 331.

Notwithstanding the peculiarity in style, what is important is that the judge should dispassionately and adequately consider and resolve the relative cases made out by the parties. The paramount complaint of the Appellants in this issue is that in a clear failure to properly discharge its duties, the lower Court failed to consider and resolve all the issues raised in the action especially as it relates to when the Amended Constitution of ASPMDA became operative.

I have gone through the judgment of the lower Court at pages 556-565 of the Records with the finery of a toothcomb and I am not in any doubt whatsoever that the lower Court adequately and dispassionately considered and resolved the issues canvassed by the parties. On the chafed issue of when the Amended ASPMA Constitution became operative, the lower Court reasoned and held as follows at pate 561 of the Records:

“The deposition in paragraph 13 of the Originating Summons that the current members of the executive committee contested and won the election under the ASPMDA Constitution 1986 was not denied by the Respondent.

The Claimant in the Originating Summons are seeking an order that the tenure of the current executives of ASPMDA expired on 7th of August, 2018 having occupied their offices for 2 years as provided under the ASPMDA Constitution 1986 and an order directing the current executive to conduct an election. The Originating Summons can be determined by reference to the tenure provided under the ASPMDA Constitution 1986 without recourse to the date when the ASPMDA Constitution 2016 become operative and whether or not the current executive constitution [sic] took their oath after the ASPMDA 2016 become operative. The date of oath of office determined the commencement of tenure and not the tenure in itself.”

The Appellants may be dissatisfied with the reasoning but the remedy is not in contending that the issue was not considered, the remedy lies in challenging the finding, reasoning and decision that they did not challenge the deposition that the current executive was elected under the 1986 Constitution, and therefore that the action can be determined without recourse to the date when the ASPMDA Constitution 2016 became operative. The Appellants have not challenged this specific holding so it remains binding.

Furthermore, on the issue of whether the Respondents are members of ASPMDA, the lower Court comprehensively considered the issue of whether the Respondents had locus standi to maintain the action on pages 558-560 of the Records and clearly held that the Respondents had the requisite locus standi to maintain the action. It is therefore not correct for the Appellants to contend that the lower Court ignored the germane issues raised before it. It is one thing to be dissatisfied with the decision on an issue, but a totally different matter to contend that the issue was not considered. In ground two of the Amended Notice of Appeal, the Appellants challenged the finding of the lower Court that the Respondents had locus standi to institute the action. It seems to me to be a contradiction in terms for the Appellants to now urge in another breath that the issue was not considered. Indubitably, this issue number five must be resolved against the Appellants.

CONCLUSION

It now remains to put a wrap on this judgment. All the issues for determination have been resolved against the Appellants. This signposts that the appeal is devoid of merit in its entirety. The appeal accordingly fails and it is hereby dismissed. The decision of the lower Court, Coram Judice: Ogunjobi, J. delivered on 28th November 2018 is hereby affirmed. There shall be costs of N350,000.00 in favour of the Respondents.

**MOHAMMED LAWAL GARBA, J.C.A.:**

I have read a draft of the lead judgment written by my Learned Brother Anthony Ogakwu, JCA, in this appeal and I agree with the views expressed on and the comprehensive resolution of the five (5) issues raised in the appeal.

I do not wish to say more than that I wholly agree that the appeal is bereft of merit and deserves to fail for all the reasons set out in the lead judgment. I join in dismissing it for those reasons.

**JAMILU YAMMAMA TUKUR, J.C.A.:**

My learned brother UGOCHUKWU ANTHONY OGAKWU JCA afforded me the opportunity of reading before today a draft copy of the lead judgment just delivered.

I adopt the judgment as mine with nothing further to add.