**BRITISH AMERICAN TOBACCO PLC**

**V.**

**ATTORNEY-GENERAL OF OGUN STATE & ORS.**

**IN THE COURT OF APPEAL OF NIGERIA**

ON THURSDAY, THE 16TH DAY OF MAY, 2013

CA/I/254/2010

**LEX (2013) - CA/I/254/2010**

**OTHER CITATIONS**

3PLR/2013/25

(2011) LPELR-11960(CA)

**BEFORE THEIR LORDSHIPS**

MONICA BOLNA'AN DONGBAN-MENSEM, JCA

CHIDI NWAOMA UWA, JCA

ADAMU JAURO, JCA

**BETWEEN**

BRITISH AMERICAN TOBACCO PLC - Appellant(s)

**AND**

1. ATTORNEY-GENERAL OF OGUN STATE

2. BRITISH AMERICAN TOBACCO (NIGERIA) LIMITED

3. INTERNATIONAL TOBACCO COMPANY LIMITED

4. BRITISH AMERICAN TOBACCO (INVESTMENTS) LIMITED - Respondent(s)

***ORIGINATING STATE***

Ogun State: High Court (O, O. OLOPADE J- Presiding)

**REPRESENTATION**

Mr. FRED ONUOBIA with FIDELIS ADEWOLE Esq., - For Appellant

**AND**

Prof. YEMI OSIBAJO (SAN) with Mr. BABATUNDE IRUKERA, Mr DAPO AKINOSUN, Mrs. V.O.M. ALONGE, Miss FUNMILOLA MESAIYETE, Mr. BASHIR A. RAMONI and Mr. SEUN LAWAL – for 1st Respondents

Mr. ADENIYI ADEGBONMIRE with PETERS O. AGBOOLA Esq. and JOSHUA ABE Esq. - for the 2nd Respondent;

Mr. C. EZEALA - for the 3rd Respondent.

Mrs. OLUFUNKE OLUKOYA (SAN) with Miss PERENAMI ABAH - for the 4th Respondent. For Respondent

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

ADMINSTRATIVE AND GOVERNMENT LAW - PUBLIC INTEREST LITIGATION:- Claim for declaratory and injunctive reliefs, special and general damages for the manufacture and marketing of tobacco related products which pose health challenges to a sizeable population of the citizens – Preliminary objection raised against same – How resolved

HEALTHCARE AND LAW –TOBACCO AND RELATED PRODUCTS: - Claim against big tobacco – Claim for declaratory and injunctive reliefs, special and general damages for the manufacture and marketing of tobacco related products which pose health challenges to a sizeable population of the citizens who smoke cigarettes in a State – Relevant considerations

CHILDREN AND WOMEN LAW: Women and public health - Public Health and Cigarette manufacturers – Public interest litigation against cigarette manufacturer due to its negative effect on families and communities – Relevant preliminary legal hurdles2.

**PRACTICE AND PROCEDURE ISSUES**

COURT - POWERS OF COURT:- Powers of court to determine controversy in an appeal - Section 15 of the Court of Appeal Act – Power to make any order necessary for determining the real question in controversy in the appeal – Power to amend any defect or error in the record of appeal – Power to direct the court below to inquire into and certify the findings on any question which the Court of appeal thinks fit to determine before final judgment in the appeal – Power to make an interim order or grant any injunction which the court below is authorized to make or grant – Power to direct any necessary inquiries or accounts to be made or taken – Power to assume full jurisdiction over the whole proceedings as if the proceedings had been instituted in the Court of Appeal as a court of first instance and to hear the case in whole or in part or remit it to the court below for the purpose of such re-hearing or give since other directions as to the manner in which the court below shall deal with the case in accordance with the powers of that court

COURT - RULES OF COURT: - Where no specific provision is made in the Rules of the Court below for the filing of written submissions - Whether court may opt for written submissions in place of oral submission – Whether parties cannot waive compliance with or whittle down the requirement of statutory provisions, which are clear and unambiguous

COURT – RULES OF PROCEDURE:- Applicability of English Rules and Practice in interpreting Nigerian Laws – Whether where a local statute or local rules of court is available and applies to a particular local situation, courts of law have no jurisdiction to go all the way to England to search for an English statute

EVIDENCE: - Material facts – Meaning and significance

JUDGMENT: - Dissenting judgment – Whether a dissenting judgment however powerful, learned and articulate, is not the judgment of the court and therefore not binding

SERVICE OF COURT PROCESSES: - Grant of leave for service out of jurisdiction

INTERPRETATION OF STATUTES: -Order 12 of the Ogun State High Court Rules 1987

WORD AND PHRASES: - Material facts – Meaning of

**MAIN JUDGMENT**

**ADAMU JAURO, J.C.A. (Delivering the Leading Judgment):**

The appeal herein is against the ruling of the Ogun State High Court, Abeokuta delivered on 20th May, 2010 by Hon. Justice O, O. Olopade in respect of notices of preliminary objection filed by the appellant (as 3rd defendant) and 2nd, 3rd, and 4th respondents as 1st, 2nd and 4th defendants in Suit No. AB/61/2008.

A synopsis of the facts giving rise to this appeal is hereby made as follows: The 1st respondent as plaintiff by a concurrent writ of summons and statement of claim dated and filed 26th February, 2008 instituted an action in the lower court against the appellant the 2nd, 3rd, 4th respondents and Phillip Morris International as defendants. The plaintiff's claim against the defendants included inter alia declaratory and injunctive reliefs, special and general damages in billions of Naira for the manufacture and marketing of tobacco related products which posed health challenges to a sizeable population of the citizens who smoke cigarettes in Ogun State. The court below by a motion ex parte dated 23rd April, 2008 granted the 1st respondent leave to issue and serve the concurrent writ of summon and the statement of claim on the appellant and other defendants now 2nd, 3rd and 4th respondents outside jurisdiction.

Upon being served the originating processes, the appellant entered a conditional appearance for the purpose of challenging the jurisdiction of the court. By a notice of preliminary objection dated 6th April, 2009, the appellant challenged the service of the originating processes upon it on the basis that leave to serve the originating processes outside the court's jurisdiction ought not to have been granted. The appellant sought for an order setting aside the service of the writ of summons and statement of claim on it and striking out the suit against the appellant. The appellant and the 1st respondent filed written submissions for and against the notice of preliminary objection and same adopted in court on 14th December, 2009.

By a ruling delivered on 20th May, 2010 the lower court dismissed the appellant's notice of preliminary objection in its entirety.

Aggrieved by the aforementioned ruling, the appellant challenged same vide a notice of appeal dated and filed 3rd June, 2010. The notice of appeal is anchored upon five grounds of appeal. In compliance with the Rules of court, the appellant and the 1st respondent filed and exchanged their respective briefs of argument. The appellant's brief is dated 3rd November, 2010 and filed on 4th November, 2010 but deemed properly filed and served on 26th January, 2011. The appellants reply brief is dated 11th June, 2012 and filed on 13th June, 2012 though deemed properly filed and served on 20th December, 2012. The 1st respondent's brief dated 5th May, 2011 and filed on 9th May, 2011 and deemed properly filed and served on 8th May, 2011.

Mr. Fred Onuobia leading Fidelis Adewole Esq., for the appellant, adopted the appellant's brief and the reply brief in urging the court to allow the appeal and set aside the ruling of the lower court. Prof. Yemi Osinbajo, SAN leading Mr. Babatunde Irukera, Mr. Dapo Akinosun, Mrs. V.O.M. Alonge, Miss Funmilola Mesaiyete, Mr. Bashir Ramoni and Mr. Seun Lawal appeared for the 1st respondent. Mr. Babatunde Irukera argued the appeal on behalf of the 1st respondent by adopting the 1st respondents brief and urging the Court to dismiss the appeal.

The Appellant formulated five issues for determination on pages 6 and 7 of the appellant's brief of argument as follows:

"1. Was the court below correct not to consider or determine the issue submitted to it by the Appellant in its Notice of Preliminary Objection with respect to the 1st Respondent's failure to disclose material facts on its Ex Parte Motion? (This Issue is distilled from Ground One of the Notice of Appeal.)

2. Was the Court below correct to hold that the Appellant's objection to the Court granting leave to serve the Appellant out of the jurisdiction involved the argument that no cause of action had been disclosed against the Appellant? (This issue is distilled from Ground Two of the Notice of Appeal.)

3. Was the Court below correct to hold that the Court's order granting leave to serve the Appellant out of the jurisdiction could not be set aside unless the Appellant were to show that the Court below exercised its discretion arbitrarily or illegally, gave weight to irrelevant matters, omitted to take cognizance of relevant matters, and/or exercised its discretion on wrong on inadequate materials? (The Issue is distilled from Ground Three of the Notice of Appeal.)

4. Was the Court below correct not to consider the materials put forward by the Appellant in support of its Notice of Preliminary Objection when considering whether Order 12 Rule 13(6) or (7) and Order 12 Rule 15 of the High Court Rules were satisfied? (This issue is distilled from Ground Four of the Notice of Appeal.)

5. Was the Court below correct to reject the Appellant's argument that the 1st Respondent had failed to demonstrate a "good arguable case" that Order 12 Rule 13(6) or (7) was satisfied on the basis that this would require the Court to consider whether the 1st Respondent's claims would succeed and thus delve into the substantive issues in the case?   
(This Issue is distilled from Ground Five of the Notice of Appeal.)"

The 1st respondent also, nominated five issues for determination, on pages 6 and 7 of the 1st respondent's brief of argument, namely:

"i. Whether the Trial Court considered and determined the Appellant's Objection on the ground of failure to disclose material facts on the 1st Respondent's Ex parte Motion?

ii. Whether the Trial Court was right to have held that order 12 Rule 13(6)(7) and Order 12 Rule 15 of the High Court of Ogun State (Civil) Procedure Rules 7987 laid the standard for granting leave to serve the Appellant with the writ outside jurisdiction and that "good arguable case test"

iii. Was the Trial Court right to have refused to set aside the Ex parte Order granting leave to the 1st Respondent on the ground that the Appellant failed to show that the Trial Court exercised its discretion arbitrarily, illegally or on irrelevant and wrong materials?

iv. Whether the Trial Court limited its consideration only to the materials placed before it by the 1st Respondent (Affidavit in Support of the Motion Ex parte & Statement of Claim) in refusing to set aside its earlier Ex parte Order granting leave to issue and serve outside jurisdiction of Court in view of its findings contained in the Ruling of May 20th 2010?

v. Was the Trial Court right to have refrained from determining whether the Appellant committed any toft within the jurisdiction when it was called upon to review its discretionary power in granting leave to issue and serve the Writ outside jurisdiction?"

The issues for determination postulated by both parties to this appeal are virtually identical, hence the issues as submitted by the appellant will be adopted in the resolution of this appeal. Issue one will be considered first, while issue two to five will be treated together.

Issue One.

The appellant stated that it is settled law that an applicant who seeks an ex parte order from court must disclose all facts material to the ex parte application. The appellant contended that the 1st respondent did not disclose material facts relevant to its ex parte motion for leave to serve out of jurisdiction, thereby breaching its obligation to make full and frank disclosure. The appellant stated that the 1st respondent failed to disclose that the appellant was registered in 1997 and commenced business in  1998, that it is purely a holding company and not an operating company/ that it is a foreign company with no presence in Nigeria and that it is not a legal successor of BAT Industries Plc. The appellant argued that it raised the issue of material non disclosure as a ground of its preliminary objection but the lower court failed to consider same, let alone make any pronouncement or render a decision upon that ground of preliminary objection.

The appellant contended that the lower court has a duty to pronounce on all issues presented to it for determination, having failed to pronounce on the 1st respondents material non disclosure, this court has the power to consider and determine same. In support of the submissions on this issue, reference was made to the following cases: Odu'a Investment Co. Ltd v. Joseph Taiwo Talabi (1997) 10 NWLR (Pt.523) 1 at 59, R. v. Kensington Income tax Commissioners, exp. Princess Edmond de Polignac (1917) 1 KB 486 at 514: Okeke v. Okoli (2000) 10 NWLR (pt.624) 641 at 652, Bank Mellat v. Nikpour (1985) FSR 87, Columbia Picture Ind. Inc. V. Robinson (1986) 3 All ER 188, XS (Nig) Ltd v. Taisel (WA) Ltd (2008) 15 NWLR (Pt.1003) 533, Abalaka v. Ministry of Health (2006) 2 NWLR (Pt.953) 105, NNPC v. Tijjani (2006) 17 NWLR (Pt.1007) 29, Ideozu v. Ochonu (2006) 4 NWLR (Pt.970) 364 at 387 - 388, Musa v. Ehidiamen (1994) 3 NWLR (Pt.334) 554, RTNACHPN v. M & HWUN (2008) 2 NWLR (Pt.1072) 575, A.G. (Plateau) v. A.G. (Nasarawa) (2005) 9 NWLR (Pt.930) 420.  

The appellant contended that the lower court erred in failing to consider and pronounce upon the appellants ground of preliminary objection based on non disclosure of material facts by the 1st respondent.

Based on the foregoing submissions, the appellant urged the court to grant the reliefs sought in the notice of appeal.

By way of introduction, the 1st respondent stated that the Apex Court has established the principle of law, to the effect that a trial court is bound to consider all issues presented to it by the parties, In support, reference was made to the case of FMH v. CSA Ltd (2009) 9 NWLR (Pt.1145) 193 at 221. The 1st respondent contended that the learned trial judge duly considered and determined the appellant's objection on material non disclosure. In support of this contention the 1st respondent made reference to page 464 of Volume 2 of the record, where the appellant through its counsel summarised its grievances. Further reference was made to page 399 of the same volume of the record where the lower court captured the grouse of the appellant. The 1st respondent made reference to page 430 and submitted that the trial court cautioned itself, when it held that all that is required is whether there has been disclosed sufficient facts/materials to warrant bringing the defendants before it. The 1st respondent made reference to the pronouncement of the lower court to the effect that there were sufficient materials to make it necessary to get the defendants to court, to react to the allegations made against them. Based on the foregoing submissions, the 1st respondent posited that the lower court considered the preliminary objection based on the ground of failure to disclose material facts. The 1st respondent submitted that the case of Abalaka v. Ministry of Health (supra) is not apposite to this appeal. Arguing in the alternative, the 1st respondent contended that assuming without conceding that the issue of material non disclosure was not considered by the lower court, the law is that where a court considers one or more issues capable of disposing a case, it needs not to consider all other issues. It was contended that the case of Xs (Nig) Ltd v. Taisel (WA) Ltd (2008) 15 NWLR (Pt.1003) 533 does not represent the correct and current position of the law. The 1st respondent urged the court to follow the Supreme Court decision in FMH v. CSA Ltd (supra) and not reconsider the issue of material non disclosure. The 1st respondent argued that whether the appellant existed before 1997 or committed any tort against the 1st respondent are questions to be examined at the trial not at interlocutory stage. The 1st respondent urged the court to discountenance the submissions of the appellant on issue one and resolve same in favour of the 1st respondent. In a short reply, the appellant contended that the 1st respondent has not countered the submissions on material non disclosure and on failure to consider all issues raised before a court, reference was made to the case of Adah v. NYSC (2004) 13 NWLR (Pt.891) 639. The appellant urged that the issue be resolved in favour of the appellant.

The substance of the complaint of the appellant under this issue is that the lower court failed to consider a ground of its preliminary objection based on non disclosure of material facts by the 1st respondent. The appellant argued that based on the failure of the 1st respondent to disclose material fads in its motion for leave to serve out of jurisdiction, the said leave should be set aside and the name of the appellant be struck out. The complaint now being marshalled through this issue, is that the lower court failed to consider or make pronouncement on that ground of objection. The contention of the appellant is that the 1st respondent failed to disclose to the court several key facts regarding the appellant which were relevant to the issue of whether order 12 Rule 13(6) or (7) of the High court Rules was satisfied. The facts which the appellant considered material and have not been disclosed, have earlier been captured under this issue.

In its ruling on page 399 of volume 2 of the record, the lower court captured the grouse of the appellant, against the grant of leave to serve out of jurisdiction. In the aforementioned page, the grant of leave to serve out of jurisdiction. In the aforementioned page, the lower court, stated thus:

"The 3rd and 4th Defendants argued that to justify such service outside jurisdiction, the claimant was required to demonstrate a good and arguable case that the Defendants engaged in some tortuous conduct within Ogun State. George Monro Ltd. v. American Cyanamied & Chemical Corporation (1944) KB 432.

They said the Claimant failed to disclose all factual circumstances which were known to him or which should have been known to him and relevant to the Court's consideration on whether the Defendants had committed a tort within the jurisdiction, whether they had occasioned any threat or nuisance within the jurisdiction which this Court can properly enjoin and/or whether the Defendants are proper or necessary parties to the action."

In view of the above pronouncement of the court, I do not think it is correct to say that the lower court did not consider the ground as to non disclosure of material facts.

The facts which the appellant contended are material and have not been disclosed, are facts which go to the substance and the root of the case. The lower court, rightly cautioned itself about on page 430 about the dangers of going into these matters at an interlocutory stage as follows:

"At that stage, the Court should be cautions as it cannot delve into the merit of the case before it. It should not concern itself with this. All that is required is whether there has been disclosed, sufficient facts/materials to warrant bringing the Defendants before it."

The lower court also made the following pronouncement on pages 431 to 432 to justify its refusal to set aside the order to serve out of jurisdiction.

The materials available reveal that the 5 Defendants are engaged in tobacco manufacturing and selling; that there is great consumption of tobacco within the area of jurisdiction, There is that allegation that the 3rd Defendant and 4th and other Defendants market their products within jurisdiction and underage children partake in the consumption... Paragraph 9 and 10 contain some facts and particularly is the allegation that the Defendants have intentionally interfered with the Public's right to be free from unwarranted injury, disease and sickness and have caused damage to the public health, the public safety and the general welfare of the Nigerian Citizens in Ogun State..."

The court proceeded further on page 433 as follows:

"I believe there was, before me sufficient materials to make it necessary to get the Defendants to Court to actively react to the various allegations and decide the issues on their merit. Whether the Claimant will succeed or rather whether the issues have been well founded should not come in then.

I do not find before me, any facts to make me set aside my Order of 15/05/2010."

Consequent upon the foregoing, I do not think it is correct as contended by the appellant, that the lower court did not consider the ground of objection relating to non disclosure of facts. Issue number one accordingly fails and is hereby resolved against the appellant in favour of the 1st respondent.

Issues 2 to 5.

As earlier indicated issues 2 to 5 will be treated together because they are interrelated and intertwined. They are indeed a repetition as they were all hammering and danced around the issue as to whether "good and arguable case" had been established in relation to the heads of jurisdiction relied upon by the 1st respondent. Basically the said four issues are mainly a complaint against failure of the trial court to apply the "good and arguable case" test, to the preliminary objection of the appellant.

The contention of the appellant is that Order 12 Rules 13 and 15 of the Ogun State High Court Rules 1987 are in pari materia with Order 11 Rules 1 and 4 of the old English Rules of the Supreme Court. Consequent upon the similarity between the local Rules and the English Rules, the appellant argued that English authorities are of great relevance in interpreting the Rules. In support, reference was made to the case of Iwuchukwu v. Nwizu (1994) 7 NWLR (Pt.357) 379. The appellant stated that an applicant seeking to serve a defendant out of jurisdiction is seeking for an extra ordinary thing, as it is an interference with exclusive jurisdiction of the sovereignty of any foreign country where service is effected. In support, reference was made to the case of George Monro Ltd v. The American Cyanamid and Chemical Corporation (1944) 1 All ER 386 at 388 A.  
The appellant further stated that Order 12 Rule 13(1) to (10) listed circumstances under which a court can claim jurisdiction, over a foreign defendant and these circumstances are known as 'heads of jurisdiction'.   
The appellant posited that by Order 12 Rule 15, the 1st respondent had to show to the court below that the case was a proper one for service outside jurisdiction under the High Court Rules. On when a case will be a proper one for service outside jurisdiction, reference was made to the following cases: Seaconsar Far East Ltd v. Bank Markazi (1993) 4 All ER 456 (HL), Vitkovice Horni a Hutni Tezirstuo v. Korner (1951) 2 All ER 334, George Monro Ltd v. American Cyanamid and Chemical Corporation [1944] 1 All ER 385 (CA).

The appellant, based on the aforementioned cases cited, submitted that the applicant (1st respondent) must establish 'good and arguable case' over the heads of jurisdiction relied upon by the applicant. In the instant case, the applicant relied upon the two heads of jurisdiction in Order 12 Rule 13(6) and (7). The appellant stated that the other ground of its preliminary objection, is the inability of the 1st respondent to demonstrate a 'good and arguable case' in respect of any of the head of jurisdiction it relied upon. In support, reference was made to the case of Odu'aInvestment Ltd v. Talabi (supra) and the following book: 'Practice and Procedure of the Supreme Court, Court of Appeal and High Coutts of Nigeria", 2nd edition (1995) by Dr. A. Aguda at 13.60 and "The Federal High Court Law and Practice" by A, Karibi-Whyte (1984) at page 133.

The appellant submitted that the court below concluded that the claimant has disclosed a cause of action against the defendants and rejected the appellant's preliminary objection without regard to whether 'good and arguable case' standard has been met. The appellant argued that mere disclosure of cause of action by 1st respondent would not discharge the 1st respondent the burden of demonstrating a good and arguable case that the appellant committed tort within Ogun State or that the appellant was subject to injunctive relief for any nuisance or any other thing done within Ogun State. The appellant posited that it must be shown by the applicant that there is a good and arguable case for the cause of action alleged. In support, reference was made to Kalman & Another v. P.C.L. Packaging (U.K.) Ltd (1982) FSR 406 (HC). The appellant argued that the lower court erred in applying the wrong legal test to the preliminary objection by holding that the 1st respondent's disclosure of a cause of action would satisfy the good and arguable case, The appellant further argued that if the lower had applied the good and arguable case test to the heads of jurisdiction under Order 12 Rule 13(6) and (7), it would have found that the 1st respondent would have failed the test to both heads of jurisdiction.

The appellant stated that its preliminary objection based on inability of 1st respondent to demonstrate a good and arguable case under Order 12 Rule 13(6) and (7), did not constitute a challenge to the manner the court below exercised its discretion. The appellant posited that the preliminary objection was rather a challenge that certain legal conditions for the exercise of discretion were not satisfied by the 1st respondent. In support, reference was made to the following cases: Madukolu v. Nkemdilim (1962) 1 All NLR 581 at 589 - 590, Dyktrade Ltd v. Omnia (Nig) Ltd (2000) 12 NWLR (pt.680) 1 at 9, Ibok v. Honesty 11 (2007) 6 NWLR (pt.1029) 55 at 69 - 70, Odofin v. Agu (1992) 3 NWLR (Pt.229) 350 at 375, Becker v. Noel (1971) 1 WLR 803 (CA), Wea Records Ltd v. Visions Channel 4 Ltd (1983) 1 WLR 721 at 727 (CA).

The appellant contended that the court below erred in failing to consider the materials placed before it by appellant, in determining whether the requirements of Order 12 Rule 13(6) (7) and Order 12 Rule 15 were satisfied in the context of good and arguable case. The appellant posited that the lower court stated that only the statement of claim and the affidavit of the claimant were what the law requires the court to consider in order to grant leave. The appellant stated that the aforementioned position adopted by the court is only correct in relation to the time of granting the leave. The appellant however argued that where there is a preliminary objection challenging the leave granted, it is incumbent on the court to reconsider whether good and arguable case has been made out in view of the materials received from both parties. The appellant contended that by the failure of the lower court to consider the materials placed by it the court has breached its right to fair hearing and committed an appealable error. In support, reference was made to Wea Records Ltd v. Visions Channel 4 Ltd (supra) and the following cases: Gov. of Imo State v. Ameze (2009) 13 NWLR (Pt.1157) 34, Tsokwa Motors (Nig) Ltd v. UBA (2008) 2 NWLR (Pt.1071) 347 at 368.

The appellant submitted that the lower court erred when it rejected the preliminary objection based on good and arguable case/ on the basis that applying the test will result into delving into substantive issues of the case, The appellant posited that the posture adopted by the court demonstrated a failure to appreciate the nature of the good and arguable case test. The appellant argued that what the court was required to do was to weigh the relative strength of the parties arguments to see if the good and arguable case test was satisfied. In support, reference was made to the case of Canada Trust Co. v. Stolzenberg (No.2) (1988) 1 WLR 547, 555 which was affirmed on appeal in (2002) 1 AC 1 (HL). Based on the foregoing submissions, the appellant urged the court to allow the appeal.

By way of introduction, the 1st respondent stated that by Section 3(1) of the Civil Procedure Rules Edict of Ogun State 1987, the Ogun State High Court is empowered to apply the provisions of Ogun State High Court Civil Procedure Rules 1987. Consequently, it was contended that in determining the preliminary objection of the appellant, the trial court is to be guided by the 1987 Rules and nothing else. In support, reference was made to the case of Abia State Transport Corporation v. Quorum Consortium Ltd (2009) 9 NWLR (Pt.1145) 1 at 21. The 1s respondent posited that a community reading of the provisions of Order 12 Rule 13(6) (7) of the 1987 Rules of Court, shows that "good and arguable case" test is not part of the requirement for granting leave to issue and serve writ out of jurisdiction. It was argued that Order 12 Rule 13 and 15 did not import the "good and arguable case" test, a foreign standard as a condition for granting leave to serve out of jurisdiction. It was submitted that the trial court need not to consider any foreign principle of "good and arguable case" test, when its own Rules have made provisions for such circumstances. It was argued that the case of Odu'a Investment Co. Ltd v. Talabi (1997) 10 NWLR (Pt.523) 1 at 59, is not apposite and the reasoning of Kutigi, JSC, in the case in support of 'good and arguable case' does not represent the correct position of the law and it is a dissenting judgment. It was contended that it is trite law that judgment of court is found in the lead and concurring judgment. In support, reference was made to the case of Orugbo v. Una (2002) 16 NWLR (Pt.792) 175 at 208.

It was submitted that the appellant's argument on 'good and arguable case' test does not form part of the requirements prescribed under Order 12 Rule 13(6) (7) and Order 12 Rule 15 of the 1987 Rules. The 1st respondent urged that the contention of the appellant on the failure of the 1st respondent to meet such an alien requirement should be dismissed. It was further contended that the Supreme Court frowns on the application of English practice in interpreting Nigerian Laws. In support, reference was made to the following cases: UTC Ltd v. Pamotei& Ors. (1989) 2 NWLR (Pt.103) 244 at 301 - 302, Chigbu v. Tonimas Nig. Ltd (2006) 9 NWLR (Pt.984) 189 at 213. It was argued that the trial court was not bound by the English "good and arguable case" doctrine in exercising its discretion to grant leave for service out of jurisdiction. The 1st respondent, urged that the argument of the appellant on this issue be dismissed.

The 1st respondent contended that the preliminary objection was a challenge to the exercise of discretion by the lower court. It was argued that a challenge to exercise of discretion, could either be that the court acted without jurisdiction it acted ultra vires or the non existence of state of affairs to exercise the discretion. In support, reference was made to the case of Echaka Cattle Ranch Ltd v. NACB Ltd (1998) 4 NWLR (Pt.547) 526 and Order 12 Rule 15 of the Ogun State High Court Rules 1987, Adegbenro v. Akintola & Aderemi (1962) 1 All NLR 452 at 472. It was argued that the requirement for leave to serve out of jurisdiction have been spelt out in Order 12 Rule 13 and 15 and the appellant did not show that the Rules were wrongly applied or that the court was wrong in relying on the statement of claim and the affidavit in support of the ex parte application. It was further contended that all that the appellant submitted was that the trial court ought to have considered a foreign requirement of "good and arguable case" test, when in fact the Rules of court have itemized factors to be considered. It was submitted that the cases of Wea Records ltd v. Visions Channel 4 LTD (1983) 1 WLR 721- at 727 and Seaconsar Far East Ltd v. Bank Markazi [1993] 4 All ER 456, were cited out of context.  
On the contention of failure of the lower court to consider materials placed by the appellant, the 1st respondent stated that the court in its ruling considered the affidavit and further affidavit in support of the preliminary objection.

Consequently, it was contended that the appellant's complaint on fair hearing is misplaced. In support, reference was made to the following cases: Ogundoyin v. Adeyemi (2001) 13 NWLR (pt.730) 403, Kotoye v. CBN (1989) 1 NWLR (Pt.98) 419 at 448, A.G. Kwara State v. Abolaji (2009) 7 NWLR (Pt.1139) 199 at 219. It was submitted that the appellant has not complained of being denied a hearing or its preliminary objection not determined one way or the other, hence the case of Tsokwa Motors (Nig) Ltd v. UBA (2008) 2 NWLR (Pt.1071) 347 at 368 is misplaced. This court was urged to discountenance the submission of the appellant as there was no denial of fair hearing to the appellant.

The 1st respondent stated that it is settled principle of law that no court should determine substantive issues at interlocutory stage. In support, reference was made to the following cases: United Spinners Ltd v. C.B. Ltd (2001) 14 NWLR (Pt.732) 195 at 220, Odutola Holdings Ltd v. Ladejobi (2006) 12 NWLR (pt.994) 321 at 326 - 327. It was argued that the appellant in its affidavit denied the allegations in the statement of claim hence joining issues the 1st respondent as to the fact in issue of whether it committed toft within Ogun State. On the definition of fact in issue, reference was made to Section 2(1) of the Evidence Act and the following cases: Lewis & Peat (NRI) Ltd v. A.E. Akhimien (1975) 1 All NLR (Pt.1) 460, Obi v. Ozor (1991) 9 NWLR (Pt.213) 94 at 106 - 107. It was submitted that the trial court was right in its decision to have refrained from determining whether appellant committed tort within jurisdiction, at an interlocutory stage. The 1st respondent, urged that the appeal be dismissed. The appellant filed a reply brief but there is virtually nothing new in the reply brief.  
The general complaint of the appellant in the issues under consideration, is that the trial court while considering the preliminary objection failed to adopt the "good and arguable case" test. As a consequence of failure to adopt the test, the court could not apply same to determine whether the 1st respondent had established good and arguable case to warrant the grant of leave to serve out of jurisdiction. The applicable Rules of court as of the time the leave to serve out of jurisdiction was granted was the Ogun State High Court Civil Procedure Rules 1987.

Hence in arguing the preliminary objection of the appellant resort was made to the same 1987 Rules of court. Section 3(1) of the Civil Procedure Rules Edict of Ogun State 1987, provides thus:

"3(1) The provisions contained in the rules set out in the Schedule to this Edict (hereinafter called the Rules) shall be the rules of civil procedure to be followed in the High Court of the state."

Consequent upon the foregoing provision cited above, the lower court in determining the preliminary objection is supposed to be guided by the Ogun State High Court Civil Procedure Rules 1987. See Abia State Transport Corporation v. Quorum Consortium Ltd (2009) 9 NWLR (pt.1145) 1 at at 21.  
A good starting point is by a consideration of the relevant provisions of the Rules regulating the grant of leave for service out of jurisdiction. Order 12 of the Ogun State High Court Rules 1987, generally deals with service of processes within and outside jurisdiction. The second part of Order 12, commencing from Rule 13, titled "B. service out of Jurisdiction" made provisions for service out of jurisdiction. Order 12 Rule 14 defined out of jurisdiction to mean out of the Federal Republic of Nigeria. Order 12 Rule 13 of the 1987 Rules listed ten instances where service of a writ of summons or notice of a writ of summons may be allowed by the court or a judge in chambers. The ten instances listed in Order 12 Rule 13 are referred to as the "heads of jurisdiction". Order 12 Rule 15 made provision for theprocedure of making the application.

In granting the leave to serve out of jurisdiction, the lower court relied on Order 12 Rule 13(6) and (7) and Order 12 Rule 15 of the aforementioned 1987 Rules of court. For ease of reference the said provisions are hereby reproduced, thus:

**"Order 12 Rule 13**: Service out of jurisdiction of a writ of summons or notice of a writ of summons MAY be allowed by the court or a Judge in chambers whenever- ...

(6) the action is founded on a tort or other civil wrong committed within the jurisdiction; OR

(7) any injunction is sought as to anything to be done within the jurisdiction is sought to be prevented or removed, whether damages are or are not also sought in respect thereof; OR..."

**"Order 12 Rule 15**: Every application for leave to serve such notice or writ on a defendant out of the jurisdiction shall be supported by affidavit or other evidence stating that in the belief of the deponent the plaintiff has a good cause of action, and showing in what place or country such defendant is or probably may be found, and whether such defendant is a Commonwealth citizen or not, and the grounds upon which the application is made, and no such leave shall be granted unless it shall be made sufficiently to appear to the Court or a judge in chambers that the case is a proper one for service out of the jurisdiction under these rules."

(underlining mine).

The stand of the appellant in relation to the issues now under consideration, is that leave to serve out of jurisdiction ought not to have been granted to the 1st respondent for failure to establish a good and arguable case in respect of the heads of jurisdiction relied upon. In a way the preliminary objection of the appellant in the lower court was anchored on the failure of the 1st respondent to establish good and arguable case in relation to the heads of jurisdiction relied upon, namely Order 12 Rule 13(6) and (7). The appellant argued that 'good and arguable case' test, though an English doctrine must be applied in determining the preliminary objection, In support of this contention, appellant relied on the dissenting judgment of Kutigi, JSC, in Odu'a Investment Co. Ltd v. Talabi (supra), The appellant argued that though the view expressed by Kutigi, JSC was a dissenting judgment, it was a pronouncement made by a future Chief Justice of Nigeria, See page 8 of the appellants reply brief. On the position of a dissenting judgment, the Supreme Court in Orugbo v. Una (2012) 16 NWLR (pt.992) 175 at 205, paragraphs B - C stated thus:

"A dissenting judgment however powerful, learned and articulate, is not the judgment of the court and therefore not binding. The judgment of the court is the majority judgment which is the binding judgment."

The above statement of the Apex Court represents the law on dissenting judgments, and I say no more.

The provisions of Order 12 Rule 13 and 15, itemized factors to be considered in granting leave to serve out of jurisdiction. The trial court considered the materials placed by the appellant and the 1st respondent in the preliminary objection vis-a-vis the requirement of the law for the grant of leave. The lower court on page 429 of the record held thus:

"I have read Or 12 r 13 very well and I do not find it saying that the conditions in all the sub-rules must co-exist before leave could be granted. They are alternatives... They say that it is required for the Claimant, at the stage he was applying for leave to issue and serve, to prove to the Court that the action is founded on a tort or wrong committed within the jurisdiction or that the injunctions sought are in respect of anything done within the jurisdiction is sought to be prevented or removed, or that they are necessary and proper parties to the action. Those are really matters for the Court to look for and be satisfied upon before proceeding to grant the leave asked for."

The lower court further continued on page 431 to 432 of the record as follows:

"Or. 12 r.15 throws some light on the duty or what is expected of the Court at that stage. All that is required is that it should sufficiently appear to the Court that the case is a proper one for service outside jurisdiction.

The materials available reveal that the 5 Defendants are engaged in Tobacco manufacturing and selling. That there is great consumption of tobacco within the area of jurisdiction. There is the allegation that the 3d and 4th and other Defendants market their products within jurisdiction and underage children partake in the consumption. The Affidavit of Adebimpe F. Obienu deposed to on 23/04/08 is relevant here. Paragraph 9 and 10 contains some facts and particularly is the allegation that the Defendants have intentionally interfered with the Public's right to be free from unwarranted injury, disease and sickness and have caused damage to the public health, the public safety and the general welfare of the Nigerian Citizens in Ogun State in particular, especially through the prevalence of ETS or second hand smoke, and have thereby wrongfully caused the State to expend substantial sums in support of the public health and welfare."

The 'good and arguable case' test championed by the appellant does not form part of order 12 Rule 13(6) (7) and Order 12 Rule 15 of the 1987 Rules of court. It is trite law, that where there are provisions in the local Rules, resort cannot be made to English Rules. The English Rules of court or of practice and procedure are only resorted to by Nigerian courts on issues where the local Rules, if unclear and ambigious, have not been interpreted or applied by Nigerian courts. See Ademola 11 v. Thomas 12 WACA 81, Paul v. George (1959) SC NLR 510, Odume v. Nnachi  (1964) 1 All NLR 329, Bank of the North Ltd v. Intra Bank S.A. (1959) 1 All NLR 91 at 95 - 96. In the instant case, the provisions of Order 12 Rule 13(6) (7) and Order 12 Rule 15 are very clear and unambiguous, thereby making resort to English Rules or principles unnecessary.

On the applicability of English Rules and Practice in interpreting Nigerian Laws, the Apex Court per Nnaemeka - Agu, JSC in U.T.C. Ltd v. Pamotei & Ors. (1989) 2 NWLR (Pt.103) 244 at 301 to 302, held Thus:

"...What approach should I adopt? I must confess that I do not intend to construe the meaning of this provision by reference to the decision in Spira v. Spira or Order 27 rule 15 of the R.S.C 1958 under which it was decided. This is not only because upsets my sense of justice to have to rely on decisions of the Court of Appeal in England as though they were binding authorities even in this Court... Now it has since been settled, in the interpretations of provisions in other laws that are similar to the above provisions that where there are provisions in the local rules of court resort cannot be made to English Rules." (Emphasis underlined).

The same position was reiterated by Niki Tobi, JSC, in Chigbu v. Tonimas Nig. Ltd (2006) 9 NWLR (Pt.984) 189 at 213 paragraphs A - C as follows:

"Where a local statute is available and applies to a particular local situation, courts of law have no jurisdiction to go all the way to England to search for an English statute. This is because by the local statute, the law makers intend it to apply in the locality and not any English statute which is foreign and inapplicable.

Much as I appreciate the colonial tie between England and Nigeria, it will seriously hamper and compromise our sovereignty if we continue to go on a borrowing 'spree', if I may so unguardedly call it, to England for the laws of that country without any justifiable reason. Nigeria is Nigeria and England is England. Statutes of England cannot apply to Nigeria as a matter of course..."

In view of the existence of Order 12 Rule 13(6) (7) and Order 12 Rule 15, both local Rules and the requirements of which do not include the 'good and arguable case' test, I think it will be improper to import same. We should rather confine ourselves to the requirements of the local Rules which are clear and unambiguous. The disclosure of cause of action in respect of the heads of jurisdiction relied upon satisfies the requirement for the grant of leave, Under the Rules. The appellant in its preliminary objection has not placed any material that has negative bearing on the facts supplied by the 1st respondent for the grant of the leave, all that the appellant did was to insist that good and arguable case has not been established in relation to the heads of jurisdiction. On this score, the lower court was right in throwing away the preliminary objection. Having resolved this issue in the aforementioned manner, the contention that the requirements for the exercise of discretion have not been established, does not arise for consideration.

On the issue of fair hearing, the lower court considered the materials placed by the appellant. The lower court reflected this fact in its ruling on page 399 of volume two of the record as follows:

"Reference was made to Exhibits TL1 and TL2 to the Claimant's Affidavit in support of the Ex parte Application but the Applicants argued that they provide no evidence sufficient to ground the Ex parte Application. The 3rd Defendant claimed it was not incorporated until 1997, did not commence business until 1998 and cannot be affixed with responsibility for the alleged actions of the 1st Defendant/Applicant, or any Tobacco industry including BAT Industries Plc or any other company.

That it is not enough to show that harm was suffered or other consequences ensued within the jurisdiction.

They said it must be shown that 3rd Defendant's act complained of were done within jurisdiction."

In view of the above reproduced paragraph from the ruling, the complaint of the appellant on fair hearing is of no moment. The issues under consideration are hereby resolved against the appellant and in favour of the 1st respondent.  
Consequent upon the resolution of all issues against the appellant, in favour of the 1st respondent, the appeal is grossly lacking in merit and substance. It is hereby dismissed in its entirety. The ruling of the Ogun State High Court delivered on 20th May, 2010 by Hon. Justice O. O. Olopade in suit No. AB/61/2008 is hereby affirmed.

There will be no order as to costs.

**MONICA BOLNA'AN DONGBAN-MENSEM, J.C.A.:**

I agree with the lead Judgment prepared by my learned brother Jauro, JCA and I too hereby dismiss the appeal as lacking in merit.

I adopt the order as to cost made in the lead Judgment.

**CHIDI NWAOMA UWA, J.C.A.:**

I read before now the draft of the judgment just delivered by my learned brother ADAMU JAURO, JCA. I agree with his detailed reasoning and conclusions arrived at which I adopt as mine in holding that the appeal lacks merit, same is also dismissed by me.

The Ruling of O.O. Olopade, J. in Suit No. AB/61/2008 delivered on 20th May, 2010 is also affirmed by me. I abide by the order made as to costs.