**FEDERAL UNIVERSITY OF TECHNOLOGY, MINNA & ORS**

**V.**

**DR. (MRS) ADAEZE G.N.C. OKOLI**

IN THE COURT OF APPEAL OF NIGERIA

THE 15TH DAY OF JUNE, 2011

CA/A/298/2010

**LEX (2011) - CA/A/298/2010**

**OTHER CITATIONS**

3PLR/2012/8 (CA)

**BEFORE THEIR LORDSHIPS**

MOHAMMED LAWAL GARBA, JCA

PAUL ADAMU GALINJE, JCA

REGINA OBIAGELI NWODO, JCA

**BETWEEN**

1. FEDERAL UNIVERSITY OF TECHNOLOGY, MINNA

2. PROF. M.S. AUDU, VICE CHANCELLOR, F.U.T. MINNA

3. DR. M.D. USMAN, REGISTRAR, F.U.T., MINNA - Appellant(s)

**AND**

DR. (MRS) ADAEZE G.N.C. OKOLI - Respondent(s)

**ORIGINATING COURT(S)**

FEDERAL HIGH COURT, HOLDEN AT MINNA

**REPRESENTATION**

PHILIP OLUSOLA - For Appellant

**AND**

ROTIMI OJO, ISAAC FOLORUNSO AND TAIWO ADABALE - For Respondent

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

EMPLOYMENT AND LABOUR LAW: Termination of statutory employment – staff of a federal university – Valid way of terminating such employment – Valid way of bringing suit challenging perceived wrongful termination – competent parties – Whether Attorney General of the Federation is a competent and necessary party to such suits - Need to observe statutory stipulations relating thereto– Effect of failure thereof – Relevant considerations

ADMINISTRATIVE AND GOVERNMENT LAW - UNIVERSITY:- – Suit against a Federal University – Whether the Attorney General is a necessary party – Joinder of University along with its principal officers as defendants of a suit against a university – Applicability of Section 2(a) of Cap 168 Public Officers Protection Act – Limitation period for bringing a suit against a public officer - Whether applicable to officers who acted in bad faith – Whether the Vice-Chancellor of a federal university or the Registrar possesses any power under the provisions of University’s Establishment Act to terminate the appointment of a teaching staff of the University without recourse to the Council

CHILDREN AND WOMEN LAW:- Women in Employment – Termination of employment by a statutory employee – Need to observe statutory stipulations applicable to suits against statutory employees – Limitation periods outside of which a suit may not be competently brought against a statutory body – need to observe same – Effect of failure thereof

COMMERCIAL LAW - AGENCY:- Disclosed principal and legal actions - Where a disclosed principal was sued along with his agent – Whether renders suit incompetent for the mis-joinder of the agent

CORPORATE AND COMPANY LAW – CAPACITY TO SUE OR BE SUED:- Legal personality – Capacity to sue or be sued – How conferred – Implication for an action against a statutorily established legal entity

CRIMINAL LAW – ABUSE OF OFFICE:- SULE v. ORISAJINMI (2006) ALL FWLR (343) 1686 at 1730 – Supreme Court definition of abuse of office - "Abuse of office is use of power to achieve ends other than those for which power was granted, for example gain, to show undue favour to another or to wreak (sic) vengeance on an opponent - Whether the burden is on the plaintiff to establish that the defendant had abused his position in that he acted with no semblance of legal justification whether evidence that he may have been overzealous in carrying out his duties, or that he acted in error of judgment or in honest excess of his responsibility, will not amount to bad faith or abuse of office

EDUCATION AND LAW:- Federal University – Proper way of bringing a suit against a federal university – Necessary parties – Nature of employment of a teaching staff of a university – Whether can be terminated by the Vice Chancellor of the University or the Registrar without recourse to the statutory body prescribed in the University Establishment Act

**PRACTICE AND PROCEDURE ISSUES**

ACTION - CAPACITY TO SUE: Rule of law that no action or suit can be brought by or against any party other than a natural person or persons unless such party has been given or vested by Statute, expressly or impliedly, or by the common law – Whether no action can be filed by or against any party other than a natural person or persons unless such party has been given by Statute, expressly or impliedly or by common law, either a legal personality under the name by which it sues or is sued or a right to sue or be sued by that name – Whether the law requires that both plaintiffs and the defendants should be juristic persons or natural persons existing, or living at the time the action is initiated - Where either of the parties is not a legal person capable of exercising legal rights and obligations under the law – Effect on competency of suit

ACTION - CAUSE OF ACTION: A cause of action in law as the fact or combination of facts which if proved would entitle a party to a judicial remedy against another – Whether implies the entire set of facts giving rise to an enforceable claim, a factual situation on which a party relies to support his claim recognised by law against another – Whether a cause of action is also said to arise and/or accrue when the fact or combination of acts had happened or come into being and would enable a party to make an enforceable claim in law based on such facts – relevant considerations

ACTION - COMPETENCE OF A SUIT: Factors deemed material in the determination of the competence of a suit - (a) the suit must have been initiated by the due process of law - (b) the parties must be competent to sue and be sued - (c) when the subject matter of the suit is within the jurisdiction of the court - (d) when the suit was initiated or commenced within the time prescribed by law (if any), etc – Whether those factors have to co-exist before a suit can be said to be competent in law and for a court to have the requisite power and authority to entertain and determine it

ACTION - JOINDER OF PARTIES AND COMPETENCE OF SUIT:- Whether once there are competent parties in a case, the non joinder of another party; whether desirable or necessary, or the misjoinder of an undesirable or unnecessary party to the case would not ipso facto, affect the competence of the case – Whether the fact that a necessary party to the action has not been joined will not render the action a nullity – Whether the proceedings of a court of law will not be a nullity on the ground of lack of competence of the court or lack of jurisdiction simply because a plaintiff fails to join a party who ought to have been joined

ACTION - JURISTIC PERSON: Juristic person as either a natural person in the sense of a human being of the requisite capacity or an entity created by the law which includes an incorporated body and special artificial being created by legislation and vested with the capacity to sue and be sued

ACTION - LIMITATION LAW - LIMITATION OF ACTION: When the right to bring an action for adjudication by a court of law is deemed taken away or extinguished by the limitation Statute and so is lost by the person who initially had and possessed it – Whether it is not the claim to the right of action that is lost but the right to seek remedy by the use of the judicial processes by the operation of the Statute of limitation - Whether such actions even if filed in court would be incompetent thereby robbing the court of the requisite jurisdiction to entertain them - Legal consequence of an action being statute barred – Whether means that the action is rendered incompetent thereby leaving a court without the power or authority to entertain it - how to determine whether an action is statute barred due to the limitation – When time is deemed to begin to run for the purpose of the period of limitation

ACTION - ORIGINATING SUMMONS: When the use of originating summons in initiating a suit generally, is appropriate and proper - Whether appropriate and to be used only when the issues in dispute relate to interpretation of laws or documents and where factual disputes are not likely to arise in the termination of the issues in contention - Where the facts are controversial or contentious and cannot be ascertained without evidence being adduced – Whether it follows therefore that cases in which claims are made on disputed facts from which the rights are claimed do not fall within the purview of the provisions and so originating summons cannot properly be used to initiate them in the Federal High Court

ACTION - PLEADINGS: A defence that an action is statute barred – whether a special defence like fraud, estoppel, res judicata, etc which must be pleaded specifically in either statement of defence or counter affidavit as the case may be, by a defendant before it can be relied upon in any proceedings - Public Officers (Protection) Act as a limitation statute acting as a special defence like fraud, estoppels, res judicata, and as such – Need for itto be specifically pleaded by a defendant before the defence can rely on it in any proceedings – Justification – Where such a defence is not pleaded by the defence in its statement of defence in the court of first instance – Whether the defendant can neither raise it nor rely on it on appeal

APPEAL - ISSUES FOR DETERMINATION - APPEALS:- Duty of an appellate court to determine issues for determination placed before it – Whether there are exceptions thereto – Whether a finding that an action was statute barred or the court lacked jurisdiction to entertain it subsumes other issues raised in the appeal – Dictum in COOKEY v. FOMBO (2005) 5 SC (II) 102 at 111 – Whether a finding that an issues has been subsumed by another consideration abates the duty to consider them

APPEAL - NEW POINTS: Legal consequence of failure by an Appellant to answer new points raised in the Respondent's brief of argument – Whether it means that the Appellant is deemed to have no answer to such points and to have admitted them as correct

APPEAL - NOTICE OF APPEAL: Section 24(2)(a) of the Court of Appeal Act – Whether a party can file more than one notice in an appeal as long as they were filed within the prescribed period of time for the filing of an appeal – Whether party is at liberty to file more than one notice of appeal - Where more than one such notices were filed – Duty of party thereto at the hearing of the appeal – Whether party cannot argue the appeal on more than one notice of appeal

COURT - DUTY OF COURT: Court of Appeal – duty to consider issues on its merit bearing in mind that being an intermediate court, the Supreme Court had said many times that it has a legal duty to decide all issues submitted by the parties for determination – Need for a judge of the Court of Appeal to dutifully discharge that obligation in respect of any relevant issue

COURT - JURISDICTION: The judicial power and authority of a court of law to undertake or conduct proceedings in disputes brought before it by parties - Whether jurisdiction of a court is intrinsic to such proceedings such that any defect therein would render them and any order, directive or step taken therein null and void ab initio – Legal requirement that once a genuine challenge to the jurisdiction of a court is raised or arises in any judicial proceeding, it should be considered and determined first at the stage it arises and before taking further steps in the case, in order to avoid what might turn out to be an exercise in futility – Need to observe same

EVIDENCE - BURDEN OF PROOF: Public Officer – Allegation of bad faith – Need for a plaintiff who alleges that a public officer acted in bad faith and abused his authority or office to discharge the burden of proving such allegations - Implications of ‘Abuse of office and bad faith’ as factors that deprive a party who would otherwise have been entitled to the protection of section 2(a) of the Public Officers Protection Law of such protection – Relevant considerations

INTERPRETATION OF STATUTE - SECTION 2(A) OF THEPUBLIC OFFICERS PROTECTION ACT:- Interpretation thereof

WORDS AND PHRASES - "ABUSE OF OFFICE":- Meaning thereof

**MAIN JUDGMENT**

**MOHAMMED LAWAL GARBA. J.C.A. (Delivering the Leading Judgment):**

This appeal is from the decision of the Federal High Court, sitting at Minna in Suit No. FHC/MN/CS/18/09 contained in the judgment delivered on 23/3/10. The Respondent herein had taken an originating summons against the Appellants herein and submitted questions to the Federal High Court for determination in respect of the termination of her appointment with the 1st Respondent. Due to the challenge on the use of the originating summons by the Appellants, it is expedient to set out the questions as well as the relief as they appear thereon. The questions submitted to the Federal High Court for decision are thus:-

"i. Whether the Vice-Chancellor of the Federal University of Technology Minna or the Registrar possesses any power under the provisions of Section 15 of Federal Universities of Technology Act CAP F23 LFN 2004, to terminate the appointment of the Plaintiff without recourse to the Council

ii. Whether the Council or Senate of the Federal University of Technology Minna Niger State is not the appropriate authority to employ, discipline and terminate the employment of its legally employed staff as provided under Section 15 of Federal Universities of Technology Act CAP F23 LFN 2004.

iii. Whether the Plaintiff in the circumstances above is not a teaching staff of the Federal University of Technology Minna - Niger State, by virtue of her employment having not been lawfully terminated Premised on the above questions, the Respondent claimed the following declaratory and other reliefs:-

"a. A declaration that the purported termination is illegal and therefore null and void

b. A declaration that the Plaintiff is still in the service of the 1st Defendant

c. A declaration mandating the Defendants to pay the Plaintiff all entitlements and arrears of salary due to the Plaintiff from January, 2008 till date.

d An order compelling the Defendants, to reinstate the Plaintiff to her former position as a lecturer in the service of the Federal University of Technology Minna, Niger State.

e. An order compelling the Defendants to pay to the Plaintiff the sum of N2,139,388.08 (Two Million, One Hundred and Thirty Nine Thousand, Three Hundred and Eighty Eight Naira and Eight Kobo) being the money due from January, 2008 to April, 2009 at the rate of N33,711.80 (Thirty Three Thousand, Seven Hundred and Eleven Naira and Eight Kobo) per month."

An eight (8) paragraph affidavit deposed to by Luka Noma; a Litigation Secretary in the chambers of the Respondent's Counsel to which were attached copies of documents marked as Exhibits A-M, was filed in support of the originating summons.

A four (4) paragraph counter affidavit sworn to by Eucharia Orya; Litigation Secretary of the Appellants' Counsel was filed in opposition to the originating summons. Copies of documents marked as Exhibits FUT 1-9 were annexed to the counter affidavit.

Written addresses were then filed and exchanged by the learned Counsel for the parties which were adopted when the initial effort at settlement of the case out of court was reported by Counsel to have failed.

In the judgment mentioned above, the Federal High Court granted the reliefs (a)-(d) as set out on the summons. However I have observed that even though the issue of the propriety of commencing the suit by way of originating summons was canvassed by the learned Counsel for the parties in their respective written addresses, the Federal High Court did not in its seven (7) page judgment consider or make any pronouncement on it.

The Appellants being dissatisfied with the judgment of the Federal High Court had filed two notices of appeal against it as follows:-

(1) notice of appeal dated the 22/4/10 and filed on 23/4/10 which appears at pages 116- 120 of the record of appeal, and

(2) the notice of appeal dated and filed on the 1/6/10 which is at pages 122-128 of the record of appeal.

Apparently, since the judgment of the Federal High Court was a final decision delivered on the 23/3/10, the two notices of appeal were filed by the Appellants within the period prescribed by law for the filing of the notice of appeal against the said judgment. Section 24(2)(a) of the Court of Appeal Act provides that a person who desires to appeal to this Court against a final decision of a court or tribunal from which appeals lie to this Court, shall give notice of the appeal within three (3) months from the date of the decision.

In practice, by virtue of the judicial authorities such as: TUKUR v. GOVERNMENT OF GONGOLA STATE (1988) 1 SCNJ, 54, (1988) 1 NWLR (68) 39,  
INYANG v. EBONG (2002) FWLR (125) 703, (2002) 2 NWLR (751) 284,  
ADELEKE v. OYO STATE HOUSE  OF ASSEMBLY (No.2) (2006) 11 NWLR (990) 136 and (2000 11 NWLR (990) 136 and DIAMOND BANK v. P.L.C. LTD. (2009) 18 NWLR (1172) 67 at 990 a party can file more than one notice in an appeal as long as they were filed within the prescribed period of time for the filing of an appeal. For the above reason, the two (2) notices of appeal filed for the Appellants herein are valid notices of appeal against the judgment of the Federal High Court. However, the principles of law on the procedure and practice in the court is that though a party is at liberty to file more than one notice of appeal in an appeal, where more than one such notices were filed, the party has to use and rely on only one of the notices at the hearing of the appeal and cannot argue the appeal on more than one notice of appeal. See:  
TUKUR v. GOVERNMENT OF GONGOLA STATE (supra).   
INTEGRATED DATA SERVICES v. ADEWUNMI (2006) ALL FWR (292) 145.

The learned Counsel for the Appellants at paragraph 2.05 on page 3 of the Appellant's brief has said inter alia,

"The Appellant's Notice of Appeal dated and filed on 1/6/2010 (replacing the Notice filed on 23/4/2010) is at page 122-128 of the Lower Court's Record. The said Notice of Appeal contains 8 grounds of appeal from which the 5 issuesfor determination in this appeal are distilled"

Although at the hearing of the appeal on the 5/5/11, the learned Counsel for the Appellants did not expressly abandon the notice of appeal filed on the 23/4/10 the purport of the above statement in the brief of argument is to do so as the said notice of appeal was said to have been replaced with the notice of appeal dated and filed on 1/6/11 containing the grounds from which the issues formulated for determination in the appeal were distilled.

The notice of appeal filed on the 23/4/10 for being abandoned in the above circumstances, is hereby stuck out.

The five (5) issues distilled from the notice of appeal dated and filed on the 1/6/10 by the learned Counsel for the Appellants in the Appellants' brief are as follows:-

"a. Whether or not the Plaintiff respondent's suit was competent before the Lower Court [see grounds (b) and (e) of the grounds of Appeal].

b. Whether or not the Plaintiff/respondent's suit was statute-barred thereby robbing the Lower Court of the jurisdiction to entertain it [see ground (c) of the grounds of Appeal].

c. Whether or not the trial Court's verdict was against the weight of evidence [see ground (a) of the grounds of appeal].

d. Whether or not there was any legal basis for holding the 2nd and 3rd Appellants liable to the Respondent [see grounds (d) and (g) of the grounds of appeal.

e. Whether or not the Lower Court failed to appreciate and properly treat the real issues before it thereby reaching wrong legal conclusions [see grounds (l) and (h) of the grounds of appeal].

At paragraph 2.1. on page 3 of the Respondent's brief the above issues were adopted for determination in the appeal by the learned Counsel for the Respondent.

A simple look at the issues raised by the learned Counsel would show that issues (a) and (b) are challenging the competence of the suit and therefore the jurisdiction of the Federal High Court to entertain it. Though the grounds of the challenge are different, yet they are all on the competence of the Respondent's suit which invariably are challenge to the competence of the Federal High Court to entertain the case. It is in the circumstances prudent to consider the two issues together and first because of the fundamental and crucial nature and effect of the issue of jurisdiction in judicial proceedings. The law is that because it is the judicial power and authority of a court of law to undertake or conduct proceedings in disputes brought before it by parties, jurisdiction of a court is intrinsic to such proceedings such that any defect therein would render them and any order, directive or step taken therein null and void ab initio. On that ground, the law requires that once a genuine challenge to the jurisdiction of a court is raised or arises in any judicial proceeding, it should be considered and determined first at the stage it arises and before taking further steps in the case, in order to avoid what might turn out to be an exercise in futility. Whenever I had cause to discuss the nature and effect of defect in the jurisdiction of a court of law in judicial proceedings, I was always tempted to consider authorities on them to be a matter of common knowledge in law such that citing them would purely be a formality in writing judgments. For completeness, I can afford to refer to the cases of UTI v. ONOYIVWE (1991) 1 NWLR (166) 166, TIZA v. BEGHA (2005) 5 SC (pt. II) 1. USMAN DAN FODIO UNIVERSITY SOKOTO v. BALOGUN (2006) ALL FWLR (325) 166. ODUKO v. GOVERNMENT OF EBONYI STATE (2009) 4 MJSC (Pt.I) 1 on the nature of jurisdiction and the effect of a defect therein in judicial proceedings.

I intend to review and consider the submissions of the learned Counsel on the two (2) issues together.

Learned Counsel for the Appellants had opened his submissions on Issue No. 1 at page 4 of the Appellants' brief of argument by saying that it is now well settled that the following factors determine the competency of an action before a court of law:-

(i) competency of the parties to the suit.

(ii) competency of the form of commencing the suit procedurally.

(iii) competency of the venue for instituting the legal action.

He then submitted that the Respondent's action did not satisfy conditions (i) and (ii) above and so is incompetent.

It was Appellants' submissions on the issue that parties to a case must be competent to sue or be sued, relying on the case of ABACHA v. EKE-SPIFF (10) 14 WRN, 1 at 24. It was submitted that the Appellants were not the proper persons to be sued because the power to appoint or re-instate any staff of the 1st Appellant invested in the Council, which should have been sued. Section 318(2) of the 1999 Constitution; Exhibits FUT3 and G were referred to and it was argued that the Attorney-General of the Federation was a necessary party because the 1st Appellant was an agency of the Federal Government. The case of NWANNA v. ATTORNEY-GENERAL OF THE FEDERATION (10) 15 WRN. 178 at 183 was cited and it was further argued that the 2nd and 3rd Appellants are not juristic persons who can sue or be sued under Exhibit FUT 5 and K and so the Respondent's case is flawed for the following:-

(i) material non-joinder/misjoinder

(ii) misnomer

(iii) no nexus between the claim and the 3rd Appellant.

(iv) suing 2nd 3rd Appellants as agents of 1st Appellant who had been sued.

The cases of:-

PENTON KEYNES FIN. LTD. V. TRANSPLY NIG. LTD. (2010) 13 WRN 143 at 143 and BELLO v. INEC (2010) 19 WRN, 1 at 35-6 were cited.

(v) wrong form of commencing the plaintiff's suit by originating summons instead of vide writ of summons. A number of cases were cited including NWOKO v. EKERETE (2010) 12 NWLR 179 at 181 after which what was titled "FACTUAL DISPUES" were argued at pages 7-9 of the Appellants' brief.

Learned Counsel for the Appellants then submitted that a careful perusal of the Respondent's processes would reveal that Exhibit "K" which was the notice of reform dated the 17/12/2007 was served on the Respondent on the "27/4/2009" (sic). He said the cause of action accrued on the 17/12/2007 while the Respondent filed her suit about 1 year and 4 months thereafter. Furthermore, it was the submission of Counsel that the Appellants are public officers and by the provisions of Section 2(a) of the Public Protection Act, Cap 168, laws of the Federation of Nigeria, the Respondent had three months within which to file her action against them from the date the cause of action accrued to her. He contended that the Respondent's action was statute barred. Cases on the definition of a public officer were cited and Section 2(a) of the Public Officers Protection Act, (hereafter to be called simply as Cap 168) were set out by learned Counsel for the Appellants who argued further that the onus is on the Respondent to show that the Appellants acted in bad faith or acted without authority in issuing Exhibit "K", which she failed to discharge. OFFOBOCHE v. OGOJA LOCAL GOVERNMENT (2001) 36 WRN.1 was relied on as authority for the submission. In further argument, it was said that the 1st Appellant has to act through human beings including the 2nd and 3rd Appellants and there is nothing in Exhibit "M" (the Federal Government Reforms Guidelines) which prevented the 1st Appellant from issuing Exhibit "K" to its staff. We were urged to hold that the question of the Appellants acting outside their legal confines of the reform did not arise, reliance being placed on inter alia, the cases of: BASSEY v. MINISTER OF DEFENCE (2006) 45 WRN. 190 at 201-2 and MALIKI v. INSTITUTE FOR LABORATORY STUDIES (2009) 21 WRN. 35 at 66. Lastly, it was the submission of learned Counsel that if an action is statute barred, no amount of resort to its merit can keep it in being, relying on:

OWNERS OF MOTOR VEHICLES v. NAIC (2008) 1 NWLR (997) 183 at 210. OLUMIDE v. ALIU (2009) 23 WRN, 13 at 378 among other cases. We were urged to allow the appeal on that ground and dismiss the Respondent's suit.   
For the Respondent, it was submitted on the issue (a) that it is the law that in considering whether a suit is competent or not so as to give jurisdiction to act to adjudicate on the matter, recourse should be had to the parties, the mode of instituting the action and whether the court is one of competent jurisdiction. Learned Counsel said what determines whether an action is properly constituted is whether the parties to the suit are necessary parties and then set out the three (3) classifications as follows:-

(a) proper parties

(b) desirable parties and

(c ) necessary parties.

He submitted that the parties in the case before the Federal High Court were necessary parties and so are competent parties because under Paragraph 2 of the Federal Universities of Technology Act, Cap F23, Laws of the Federation of Nigeria, 2004, each university is a body corporate which may sue or be sued. It was pointed out that the 1st Appellant is the University, that 2nd Appellant was the one who signed the Respondent's letter of appointment; Exhibit "A" while the 3rd Appellant signed the letter to the Respondent on the reform; Exhibit "K" and so the Appellants constituted the competent parties answerable to the Respondent's case. It was the contention of learned Counsel for the Respondent that an action cannot be rendered incompetent simply because all the necessary parties have not been joined in the suit and it suffices if the parties sued are competent. Among others, the cases of: DAPIALONG v. LALONG (2007) 5 NWLR (1026) 199 at 212 and NWITE v. MICHAEL (2008) 15 NWLR (1109) 149 at 162 were cited on the submission and was further argued that the Appellants were sued not necessarily as agents of a disclosed principal, but as necessary parties.  
On the use of the originating summons, relying on: W.A.C. LTD. v. YANKARA (2008) 8 NWLR (1077) 323 at 340-1 and OBIECHEFU v. GOVERNOR OF IMO STATE (2008) 14 NWLR (1106) 22 at 51, it was submitted that the Respondent's case only sought for the interpretation of Section 15 of Federal Universities of Technology Act, Cap F23 in line with the documents attached to her affidavit as they relate to her employment and termination thereof. Also citing PAM v. MOHAMMED (2008) 16 NWLR (1112) 1 at 50, it was said that the affidavits of the parties take the place of pleadings and the documents attached thereto as evidence in support of the case which the Federal High Court had considered before arriving at its decision.

Learned Counsel maintained that the originating summons was appropriate since the crux of the case bordered on the interpretation of the law to determine whether the termination of the Respondent's appointment was lawful or not.  
Next the learned Counsel for the Respondent argued that though Section 2(a) of Cap 168 forecloses a litigant from instituting an action against a public officer after the expiration of the limited time, it does not protect an officer who acted in bad faith and in abuse of office or authority. He said an aggrieved party can bring an action against a public officer even after the expiration of the limitation period when the public officer did not act within the scope of his duty, citing as authority the case of UNILORIN v. ADENIRAN (2007) 6 NWLR (1031) 498 at page 535-6.

It was the further submission by him that the issue of malice may arise in connection with Section 2(a) of Cap 168 in the following circumstances:-

"a) First, a public officer might have done an Act in pursuance of or execution of a law or his public duty with ulterior motive, such as helping himself or his friend or injuring the plaintiff; or

b) A public officer may, while a public officer and under cover of the office, do an act contrary to, or not authorized by the law, or not in accordance with his public duty.

If such acts result in any injury to a plaintiff, it may be that they were done maliciously. See Unilorin v. Adeniran (supra), Egbe v. Adefarasin (1985) 1 NWLR (pt 560) page 535 paras. E-G."

According to the learned Counsel, the acts of the Appellants on the face of the documents attached to the affidavits (a brief outline of which he set out in the brief of argument) clearly show that they acted in malice and outside the colour of their office. He then argued that the Respondent's appointment was one clothed with statutory flavor and by law, there is a procedure which must be followed in terminating it because it is protected by Statute or laid down regulations made to govern it. The cases of CBN v. IGWILO (2007) 14 NWLR (1054) 393. N.I.I.A v. AYANFALU (2007) 2 NWLR (1018) 246 and IDERIMA v. R.S.C.S.C. (2005) 10 NWLR (951) 378 at 403-4 were cited in support of the submission and it was argued that from the evidence before the Federal High Court, no doubt is left that the Appellants did not comply with law and regulations in terminating the Respondent's appointment. Finally, it was submitted that the Respondent's action was not statute barred as the Appellants cannot claim protection under Section 2(a) of Cap 168 having stepped outside the bounds of their public authority and colour of their office. We were urged to resolve the issue in favour of the Respondent and to dismiss the appeal. I would commence a consideration of the submissions by the learned Counsel on the issues by saying that many factors including the ones set out by them in their briefs of argument are relevant in the determination of whether an action or suit filed in a court of law was competent or not in law. Put together the underlisted factors are material in the determination of the competence of a suit:-

(a) the suit must have been initiated by the due process of law,

(b) the parties must be competent to sue and be sued.

(c) when the subject matter of the suit is within the jurisdiction of the court.

(d) when the suit was initiated or commenced within the time prescribed by law (if any), etc. These factors have to co-exist before a suit can be said to be competent in law and for a court to have the requisite power and authority to entertain and determine it. See:  
W.A.E.C. v. AKINKUNMI (2008) 9 NWLR (1091) 151.  
DOUGLAS v. SPDC LTD. (1999) 2 NWLR (591) 466.

The Appellants' complaints in this appeal are that the Appellants are not proper persons to be sued because the 2nd and 3rd are not juristic persons who can sue or be sued and that the Respondent's suit ought not to have been initiated or commenced by way of originating summons. Speaking generally, the law is that no action or suit can be brought by or against any party other than a natural person or persons unless such party has been given or vested by Statute, expressly or impliedly, or by the common law, either:-

(i) a legal person under the name by which it sues or is sued; or a right to sue or be sued by that name. See: FAWEHINMI v. NBA (NO.2) (1989) 2 NWLR (105) 558. NDOMA-EGBA v. GOVERNMENT OF CROSS RIVER STATE (1991) 4 NWLR (188) 773, GOVERNOR KWARA STATE v. LAWAL (2007) 13 NWLR (1057) 347, ADMINISTRATOR/EXECUTOR, ESTATE, ABACHA V. EKE-SPIFF (2009) 7 NWLR (19939) 97 AT 126. In other words, no action can be filed by or against any party other than a natural person or persons unless such party has been given by Statute, expressly or impliedly or by common law, either a legal personality under the name by which it sues or is sued or a right to sue or be sued by that name.

The law therefore requires that both plaintiffs and the defendants should be juristic persons or natural persons existing, or living at the time the action is initiated. Where either of the parties is not a legal person capable of exercising legal rights and obligations under the law, there may not be competent parties in the suit and the suit would be incompetent for not being properly constituted as to the parties therein.

Now, the originating summons taken by the Respondent as plaintiff in the Federal High Court, at pages 2-4 of the record of appeal, had the following as the persons against whom the reliefs set out therein were claimed; as Defendants

DR. (MRS.) ADAEZE G.N.C. OKO ............ PLAINTIFF

AND

1. FEDERAL UNIVERSITY OF TECHNOLOGY, MINNA

2. PROF. M.S. AUDU, VICE CHANCELLOR, FEDERAL UNIVERSITY OF TECHNOLOGY, MINNA

3. DR. M.D. USMAN, REGISTRAR, FEDERAL UNIVERSITY OF TECHNOLOGY, MINNA

I have observed that the learned Counsel for the Appellants had not throughout suggested that the 1st Appellant in particular is not juristic and cannot sue or be sued in law. In addition he has not responded to the submission by the learned Counsel for the Respondent that by virtue of paragraph 2 of the Federal Universities of Technology Act, Cap F23, Laws of the Federation of Nigeria, 2004, the 1st Appellant is a body corporate with perpetual succession, a common seal and may sue or be sued in its corporate name. The legal consequence of failure by an Appellant to answer new points raised in the Respondent's brief of argument is that the Appellant is deemed to have no answer to such points and to have admitted them as correct. See: OGBECHI v. ONOGHE (1988) 1 NWLR 370 at 402. OKOYE v. N.C.& F. CO. (1999) 501. OKONGWU v. NNPC (1989) 4 NWLR, 115. So if the appellants' counsel had admitted that the 1st Appellant can sue or be sued under the law creating it, does it lie in his mouth to say that all the Appellants lack the juristic personalities in law to be competent to sue or be sued. Can he be heard to challenge the competence of the Respondent's suit on the ground that the 1st Appellant in particular is not a competent party because it could not be sued? The answer by the admission of the learned Counsel could not be anything else but that the 1st Appellant is in law a juristic persona that can be sued and so was a competent party in the Respondent's suit. The learned Counsel had also rather weakly contended that the 2nd and 3rd Appellants are not juristic persons who can sue or be sued. As can easily be seen, the 2nd and 3rd Appellants were sued in their personal names along with the offices they hold (or held) respectively with the 1st Appellant  which were used to indicate their official positions.  

The offices they occupy with the 1st Appellant were only used in the summons to describe and specifically identify them for the purpose of the proper service of the processes in the suit on them as required by law. This Court in the case of AKAS v. MANAGER (2001) 8 NWLR (715) 436 at 444 had defined who a juristic person is in law, as follows:-

"A juristic person is either a natural person in the sense of a human being of the requisite capacity or an entity created by the law which includes an incorporated body and special artificial being created by legislation and vested with the capacity to sue and be sued"

See also: ABIA STATE UNIVERSITY v. ANYAIBE (1996) 3 NWLR (439) 649.  
OKAFOR v. ASOH (1999) 3 NWLR (593) 35.

Because the 1st Appellant is a legal personality under the name by which it was created by the relevant Statute, it is a body corporate for which the said Statute had created the offices of the 2nd and 3rd Appellants through which it could function. Section 1(1)(b) of the Federal Universities of Technology Act, Cap F23, Laws of the Federation of Nigeria, 2004 specifically established the 1st Appellant and in sub Section (2) Provides thus:-

"Each university shall be a body corporate with perpetual succession and a common seal and may sue or be sued in its corporate name."

In order for the functions of the 1st Appellant to be carried out and its objectives achieved, Section 2 of the Act created the offices of inter alia, the 2nd and 3rd Appellants. The office of the 2nd Appellant was created in Section 2(1) of the First Schedule to the Act. So the offices of the 2nd and 3rd Appellants were all creations of the enabling Statute which vested the legal persona on the 1st Appellant. However, I have said before now that the 2nd and 3rd Appellants were sued in their personal names as human beings and so their juristic persona is beyond dispute in that regard. But even if they were sued in the names of offices they occupy in the 1st Appellant which were used for the purposes of identification, since the offices were creations of Statute, they are for the purposes of challenging the performances or discharge of the functions provided for the offices under the Statute, they are competent parties who draw their juristic personalities from the 1st Appellant. See NKPORNWI v. ESIRE (2009) 9 NWLR (1145) 131 at 191. In addition, the memorandum of appearance filed by the learned Counsel for the Appellants as Defendants before the Federal High Court was not a conditional one but one for all the Defendants. The counter affidavit deposed to and filed in opposition to the Respondent's affidavit was for all the Defendants and without any indication that one of them was not juristic. By the submission that the 2nd and 3rd Respondents/Defendants are not juristic persons capable of being sued, is the learned Counsel now saying that he knowingly and so deliberately appeared for, represented and conducted the trial of the Respondent's summons for persons who did not have the legal capacity to be sued in law? I would rather not think so and assume that learned Counsel appeared and represented parties who he knew had the legal capacity to be sued and so be represented by Counsel. For these reasons I have no hesitation in holding that the Appellants are juristic persona who had the legal competence to be sued by the Respondent.

The learned Counsel had also said that merely because the 1st Appellant was a Federal Government agency, the Attorney-General of the Federation was a necessary party to the Respondent's suit but did not suggest in his submissions that failure or omission to join the Attorney-General of the Federation in the suit has rendered it incompetent. He merely set out what he considers as material flaws, which as seen earlier, includes; "material, non- joinder/misjoinder" without demonstrating how each had affected the competence of the suit. The law, as is common knowledge, is that once there are competent parties in a case, the non joinder of another party; whether desirable or necessary, or the misjoinder of an undesirable or unnecessary party to the case would not ipso facto, affect the competence of the case. Very recently, the Supreme Court had stated the position of the law in the case of IYERE v. R.F.F.M. LTD. (2008) 18 NWLR (1119) 300 at page 366-7 where it said that:-

"Ordinarily, non-joinder or misjoinder of a party, except where there are Statutory provisions to the contrary, cannot, by itself, defeat an action." See also: AYORINDE v. ONI (2000) 3 NWLR (649) 348. YUSUF v. ADEYEMI (2009) 15 NWLR (1165) 616.

It may be recalled that the general complaint by learned Counsel for the Appellant is that the Attorney-General of the Federation was a necessary party and that he was not joined by the Respondent in her suit. This Court in the case of OLUWANIYI v. ADEWUNMI (2008) 13 NWLR (1104) 387 at 411. had answered the complaint when it held, inter alia that:-

"The fact that a necessary party to the action has not been joined will not render the action a nullity. The proceedings of a court of law will not be a nullity on the ground of lack of competence of the court or lack of jurisdiction simply because a plaintiff fails to join a party who ought to have been joined" See also IFEANYI CHUKWU (OSONDU) LTD. v. SOLEH BONEH LTD. (2000) 5 NWLR (659) 322 at 367. ONIBUDO v. ABDULLAI (1991) 2 NWLR (172) 230. ATUEGBU v. AWKA SOUTH LOCAL GOVERNMENT (2002) 15 NWLR (791) 635.

In the premises of the principles of law enunciated above, non joinder of the Attorney-General of the Federation and/or the misjoinder of the 2nd and 3rd Appellants (if at all) simplciter do not affect the competence of the Respondent's suit or of the Federal High Court to entertain it since the 1st Appellant is undoubtedly a competent defendant in the suit.

This position has taken care of the submissions by the learned Counsel for the Appellants that the 2nd and 3rd Appellants are agents of the 1st Appellant; a disclosed principal and cannot be sued. Merely because both a disclosed principal was sued along with his agents in a suit does not render the suit incompetent for the mis joinder of the agents.

The point was also canvassed by the learned Counsel for the Appellants as seen earlier that the Respondent's suit ought not to have been initiated by way of originating summons but writ of summons. I have observed that the point arose from ground of appeal (b) of the Appellants' notice of appeal dated and filed on the 1/6/10. It may be remembered that I had pointed out that the Federal High Court did not make a pronouncement in the judgment appealed against even though the issue was raised and addressed by the learned Counsel for the parties in their respective written addresses before it. Since by Order 6 Rule 2(1) of the Court of Appeal Rules, 2011 all appeals shall be by way of re-hearing and under the provisions of Section 15 of the Court of Appeal Act 2004 this Court generally has full jurisdiction over the whole proceedings as if they had been initiated in the Court as a court of first instance, I intend to consider the issue although it did not arise from the decision appealed against. I consider the issue as one attacking or complaining about the omission or failure by the Federal High Court to decide and make a pronouncement on the propriety of the use of originating summons in the Respondent's case.

Learned Counsel for the parties have stated the extant position of the law on when the use of originating summons in initiating a suit generally, is appropriate and proper. The authorities cited by learned Counsel in their respective briefs of argument on the point all are to the effect that originating summons are appropriate and to be used only when the issues in dispute relate to interpretation of laws or documents and where factual disputes are not likely to arise in the termination of the issues in contention.

The above position of the law was restated recently in the case of NWOKO v. EKERETE (2010) 4 NWLR (1183) 78 at 88 where it was said that:- "Originating summons procedure deals mainly with interpretation of documents or laws where the facts ore not disputed Where the facts are controversial or contentious and cannot be ascertained without evidence being adduced, originating summons cannot appropriately be used."

The principle of law established in the judicial authorities has been made part of the Rules of the Federal High Court in the Federal High Court (Civil Procedure) Rules 2009, applicable to the appeal. Order 3, Rules 6 and 7 of the 2009 Rules make provisions as follows:-

"6. Any person claiming to be interested under a deed, will, enactment or other written instrument may apply by originating summons for the determination of any question of construction arising under the instrument and for a declaration of the rights of the persons interested

7. Any person claiming any legal or equitable right in a case where the determination of the question whether such a person is entitled to the right depends upon a question of construction of an enactment, may apply by originating summons for the determination of such question of construction and for a declaration as to the right claimed."

These provisions are clear on when a party or person may initiate a case by way of originating summons in the Federal High Court. The mode of commencing a case in the Federal High Court by way of originating summons under the provisions is limited to claims for legal or equitable right the determination of which depends on the construction or interpretation of laws or documents for a declaration to be made thereon by the court. It follows therefore that cases in which claims are made on disputed facts from which the rights are claimed do not fall within the purview of the provisions and so originating summons cannot properly be used to initiate them in the Federal High Court. The question that arises now is whether the Respondent's suit in the Federal High Court falls within the provisions of Order 3, Rules 6 and/or 7 of the 2009 Rules. The case put forward by the learned Counsel is that it does not because he said there are factual disputes in the affidavit evidence of the parties. The learned Counsel for the Respondent on his part had argued that the case of the Respondent only sought for the interpretation of the provisions of Section 15 of Federal Universities of Technology Act, Cap F23, Laws of the Federation of Nigeria 2004 In line with the documents attached to the affidavits of the parties as it relates to the termination of her employment with the 1st Appellant.

I have at the beginning of this judgment set out the questions submitted to the Federal High Court by the Respondent for determination.

On their face, questions i and ii sought for the interpretation of Section 15 of the Federal Universities of Technology Act, Cap F23, Laws of the Federation of Nigeria, 2004 simpliciter in relation to who, under the said Section, possesses the requisite power and authority to employ and terminate the employment of the Respondent.

The 3rd question which, also bears Number i on the summons, asks whether the Respondent was not a teaching staff of the 1st Appellant.

Although the drafting of the questions does not make it clear, the Respondent's questions are on the construction of Section 15 of the Federal Universities of Technology Act, Cap F23, 2004 along with the documents attached by the parties to their affidavits would determine whether the determination of her appointment with the 1st Appellant was illegal or unlawful. In that regard, declaration as to the legal right claimed by the Respondent depends on the construction or interpretation of the Federal Universities of Technology Act as well as the documents which have been placed before the Federal High Court by the parties as their respective evidence on the termination of the appointment. It must be pointed out that there is no dispute whatsoever about the employment, terms and conditions thereof and the termination of the appointment vide the letter dated the 17 /12/07. As such, there was no dispute as to facts on the employment and termination thereof which needed to be proved by other evidence outside the affidavits and documents attached thereto by the parties in the case. In the circumstances, I agree with the learned Counsel for the Respondent when he said that the procedure of an originating summons is appropriate since the crux of the Respondent's case is on the interpretation of the law along with the documents attached to the affidavits of the parties.

On the whole, I find no merit in the Appellants' issue 1 and is resolved in favour of the Respondent.

The next issue was whether the action of the Appellant was statute bared. A case or an action is said to be statute barred when or if it was commenced or initiated after the period of time limited by statute within which it can be brought, had expired or lapsed. So where a statute has prescribed and limited the period of time within which an action or case may be filed by a party or person in a court of law, any action or case filed outside or after the time prescribed had ended, such a case or action would be in contravention of the provisions of the statute and consequently be barred by the statute. That is when an action in law becomes statute barred and so lacks the competence to be determined by a court of law. See:

SPDC v. FARAH (1995) 3 NWLR (382) 148.  
IWEKA v. SCOA (2000) 7 NWLR (664) 325.  
AREMO II v. ADEKANYE (2004) AFWLR (224) 2113 at 2131.   
OWIE v. IGHIWI (2005) 1 SC (Pt. II) 16 at 11.

In the determination of whether an action is statute barred, the court looks at and considers the originating process used in initiating the case; i.e. writ of summons or originating summons, and/or the statement of claim filed by the plaintiff. The court would compare the date when the right of action arose or accrued to the plaintiff and the date on which the initiating process of the case was filed in the court to commence the case. If the date on which the case was initiated or filed is outside the period limited by the statute from the date the right or cause of action arose or accrued in the plaintiff, then the case would be in contravention of the statute of limitation and so becomes statute barred. For the purpose of the period of limitation, time begins to run from the day the cause of action accrues to the plaintiff. See:  SOSAN v. ADEMUYIWA (1986) 3 NWLR (27) 241. ODUBEKO v. FOWLER (1993) 7 NWLR (308) 637. OKAFOR v. ATTORNEY-GENERAL, ANAMBRA STATE (2005) ALL FWLR (274) 252. In such a situation, the right to bring the action for adjudication by a court of law is taken away or extinguished by the limitation Statute and so is lost by the person who initially had and possessed it. It is not the claim to the right of action that is lost but the right to seek remedy by the use of the judicial processes by the operation of the Statute of limitation. See: ELEBANJO v. DAWODU (2006) ALL FWLR (328) 604. NPA v. OBI (2006) 7 SC (Pt. 1) 23, (2006) 13 NWLR (998) 477. AMUSAN v. OBIDIDEYI (2005) 6 SC (Pt. 1) 147. Because the right to approach the court for remedy is lost by the operation of the law in Statute barred actions, such actions even if filed in court would be incompetent thereby robbing the court of the requisite jurisdiction to entertain them. See: ARABELLAH v. N.A.I.C. (2003) 32 WRN, 1 at 26 CORONA S.R.M.B.H. & CO. v. EMESPO (2002) 2 NWLR (753) 205 at 209. EMIATOR v. N.A. (2000) 24 WRN, 97, (2000) 9 SCNJ, 52, (1999) 9 SC, 89.

Before a consideration of the issue, I have observed that the issue was raised by the learned Counsel for the Appellant in his address before the Federal High Court in reaction to the address by the learned Counsel for the Respondent on the originating summons. The learned Counsel for the Respondent then responded to it in his Reply to the Appellants' address and the Federal High Court had decided the issue in this judgment appealed against.

The law however is that a defence that an action is statute barred is a special defence like fraud, estoppel, res judicata, etc which must be pleaded specifically in either statement of defence or counter affidavit as the case may be, by a defendant before it can be relied upon in any proceedings.

In the case of N.I.I.A. v. AYANFALU (supra) 154-5 Salami JCA (now Hon. PCA) had enunciated the law as follows:-

"The Public Officers (Protection) Act is a limitation statute.

It is a special defence like fraud, estoppels, res judicata, and as such, like those defences, it must be specifically pleaded by a defendant before the defence can rely on it in any proceedings. This is so to avoid taking the plaintiff by surprise, as a limitation statute is not to be used to ambush the other party. Where such a defence is not pleaded by the defence in its statement of defence in the court of first instance, the defendant can neither raise it nor rely on it on appeal. In the instant case, the appellant did not plead the defence of the limitation provisions of the Public Officers (Protection) Act at the trial court. It could not therefore rely on the defence at the Court of Appeal"   
See also: KETU v. OMKORO (1984) 10 SC.265 at 267. ANYAORAH v. ANYAORAH (2001) FWLR (73) 178. USMAN DANFODIO UNVERSITY, SOKOTO v. BALOGUN (2006) ALL FWLR (325) 166 at 183.

I have perused the 4 (actually 5) paragraphs counter affidavit filed in opposition to the Respondent's originating summons and found that the defence of Statute of limitation; Section 2(a) of Cap 168, was not mentioned at all, let alone being specifically raised therein.

In effect the Appellants did not specifically plead or raise the issue as a special defence in the counter affidavit which takes the place of pleadings in suits commenced by way of originating summons. By the above position of the judicial authorities, the Appellants cannot therefore properly raise and rely on it in the appeal and could not have done so even before the Federal High Court. However as has clearly been stated in the authorities, the underlying object of the requirement that the defence be specifically pleaded or raised in pleadings/counter affidavit is to avoid taking a Respondent by surprise at the hearing when the defence would be raised.

The record of this appeal have shown and the parties do not dispute the fact that though the issue was not raised by the Appellants in their counter affidavit, when it was raised by their learned Counsel in his address which was served on the learned Counsel for the Respondent, the latter did indicate or say he was taken by surprise or "ambushed" by the issue. Rather, he accepted the defence and responded to it in his Reply address having had the reasonable notice and adequate opportunity to do so or to have raised objection to it.

The element of surprise on the part of the Respondent is in the circumstances completely out of the way to make the strict application of the principle of law on the pleading of the defence, purely technical. In fairness to the learned Counsel for the Respondent, he has not even at this stage complained that he was/is surprised by the Appellants' raising the issue in the appeal.

As had happened at the Federal High Court, he had reacted and answered the defence in the Respondent's brief of argument. Both learned Counsel for the parties have Submitted the issue, raised from the grounds of appeal, for decision by this Court. In these peculiar circumstances, I am disposed to considering the issue on its merit bearing in mind that being an intermediate court, the Supreme Court had said many times that we have a legal duty to decide all issues submitted by the parties for determination, in cases such as:

ADAH v. NYSC (2004) ALL FWLR (223) 1850.  
OJOH v. KAMALU (2005) 18 NWLR (958) 523 at 556.  
F.M.H. v. C.S.A. LTD. (2009) 9 NWLR (1145) 193 at 220-1.

I would dutifully discharge that obligation in respect of the issue.

In the present appeal, the Respondent had based her action on the letter dated the 17/12/07 addressed to her from the office of the Registrar of the 1st Appellant and which was referred to in paragraph 4.(o) of the affidavit in support of the originating summons as Exhibit "K" attached thereto.

From the averment in paragraph 4(o), it is clear that the Respondent became aware of the said letter on the date it was written to her; i.e. the 17/12/07. The paragraph is as follows:-

"(o) That subsequently on the 17 of December 2007 another letter was written to her intimating her that with the effect from 31st December, 2007, she will cease to be a member of staff of the 1st Defendant (A copy of the said letter is hereby attached and marked as exhibit "K")."

It follows therefore that the cause of the Respondent's action was the said letter of 17/12/07 and because it was communicated to her on the same date, the cause of the action arose and accrued to the Respondent on the same date. Put briefly, the cause of the Respondent's action arose and accrued to her on the 17/12/07 when she received the letter dated that day and on the basis of which he filed her action against the Appellants at the Federal High Court.

A cause of action in law put simply, is the fact or combination of facts which if proved would entitle a party to a judicial remedy against another. A cause of action is the entire set of facts giving rise to an enforceable claim, a factual situation on which a party relies to support his claim recognised by law against another. See: BELLO v. ATTORNEY-GENERAL OYO STATE (1986) 5 NWLR (45) 828. TUKUR v. GOVERNMENT OF GONGOLA STATE (1989) 4 NWLR (117) 517,  RHEIN MASS UND. SEE GMBH V. RIVWAY LINES LTD. (1998) 5 NWLR (549) 205, W.A.P.C. PLC. v. ADEYERI (2003) 12 NWLR (835) 517 at 533.  
In addition, a cause of action is said to arise and/or accrue when the fact or combination of acts had happened or come into being and would enable a party to make an enforceable claim in law based on such facts. A cause of action accrues when the facts or combination thereof are complete for the party to be able to commence or initiate his action against another predicated on the facts. See: WEMA BANK LTD. V. INTERNATIONAL FISHING CO. LTD. (1998) NWLR (555) 557 at 569. UBA PLC. v. ABDULLAHI (2003) 3 NWLR (807) 359. OSIGWE v. PSPLS MGT. CO. (2009) 3 NWLR (1128) 378. I have stated before now that the cause of action in the Respondent's case arose and accrued to her when she received her letter dated the 17/12/07 on which she predicated her claims against the Appellants.

On the face of the originating summons which was used by the Respondent to imitate the action against the Appellants, it was filed on the 27/4/09. In other words, the Respondent filed her action based on the letter dated the 17/12/07, on the 27/4/09. By simple calculation, the Respondent filed her action sixteen (16) months after she received the letter dated the 17/12/07 giving rise to the cause of action. As seen above, the Appellants had relied on the provisions of Section 2(a) of Cap 168 to say that the Respondent's action is statute barred.  
There seems to be no dispute about the facts that the Appellants are public officers and that the provisions of the Section are applicable to them. The learned Counsel for the Respondent has not disputed the submissions of the Appellants on these facts in his brief of argument but had only argued that the Appellants cannot be availed of the protection under the provisions because they acted outside the authority of their offices. That the Appellants acted outside the scope of their duties, in abuse of their authority and in bad faith.

Section 2(a) of Cap 168 has the following provisions -

"Where any action, prosecution, or other proceeding is commenced against any person for any act done in pursuance or execution or intended execution of any Act or law or any public duty or authority, or in respect of any alleged neglect or default in the execution of any Act, Law, duty or authority, the following provisions shall have effect.

(a) the action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within three months next against any person after the act, neglect or default complained of or in case of a continuance of damage or injury within three months next after the ceasing thereof."

In the interpretation of these provisions, the authorities cited by the learned Counsel supra have held that they apply both, natural and artificial persons such as public bodies, institutions and corporations. In addition to the cases cited on the point, see also the case of N.I.I.A. v. AYANFALU (2006) ALL FWLR (325) 141 at 154 where the Court held that an artificial person set up by the State to perform functions of a public nature is a person within the contemplation of the provisions of the Public Officers Protection Act, relying on the case of IBRAHIM v. JUDICIAL SERVICE COMMISSION (1998) 14 NWLR (534) 1.

Learned Counsel are correct when they said that the provisions of Section 2(a) of Cap 168 apply to protect public officers who acted in good faith in the discharge of the duties of their offices or exercising the authority in the ordinary and usual course of performing the functions of the offices. In law, the provisions have been held not to apply or avail public officers to act in bad faith or abuse the authority of their offices by doing something clearly outside the colour of their duty or functions.

The case of OFFORBOCHE v. OGOJA LOCAL GOVERNMENT   (supra) also reported in (2001) 7 SCNNJ 499 and ABUBAKAR v. GOVERNOR OF GOMBE STATE (supra) are authorities on the position of the law.

The law is also that a plaintiff who alleges that a public officer acted in bad faith and abused his authority or office owes the burden of proving such allegations. At page 483 of the SCNJ report of OFFORBOCHE v. OGOJA L.G., the Supreme Court had stated the position when it said:-

"Abuse of office and bad faith are factors that deprive a party who would otherwise have been entitled to the protection of section 2(a) of the Public Officers Protection Law of such protection. The burden is on the plaintiff to establish that the defendant had abused his position in that he acted with no semblance of legal justification. Evidence that he may have been overzealous in carrying out his duties, or that he acted in error of judgment or in honest excess of his responsibility, will not amount to bad faith or abuse of office. Abuse of office is use of power to achieve ends other than those for which power was granted, for example gain, to show undue favour to another or to wreak vengeance on an opponent to mention but a few.

In the present appeal, has the Respondent established or proved that the Appellant abused their office or acted in bad faith in writing the letter dated the 17/12/07. The learned Counsel had in argument said that the Appellants acted in malice and outside the colour of their office on the faces of the documents referred to in paragraph 4 of the affidavit in support of the summons and annexed as Exhibits B,D,F,G,H,I, J, K,M  and FUT 3.

This Court in the case of SULE v. ORISAJINMI (2006) ALL FWLR (343) 1686 at 1730, had defined abuse of office as follows:-

"Abuse of office is use of power to achieve ends other than those for which power was granted, for example gain, to show undue favour to another or to wreak (sic) vengeance on an opponent."

Now, do the documents referred to by the learned Counsel for the Respondent prima facie, show that the Appellants used the power of their offices to achieve ends other than those for which it was granted or that they used it for personal gain, show undue favour to another person or wreak vengeance on the Respondent? All the documents except Exhibit 'D' which was written by the Respondent, were official correspondences written by the Appellants to the Respondent. Exhibit D itself was an official correspondence to the Appellants in the course of her employment with the 1st Appellant. There is no challenge whatsoever that any of the Appellants had no power or authority to write any of the correspondence in the course of their ordinary duties or discharge of the functions of their offices. In fact except for the letter dated the 17/12/07, the Respondent had acknowledged that the other correspondences between her and the Appellants were duly carried out by the Appellants in the discharge of the functions of their offices by replying or acting on the said correspondences.

Would the Respondent now turn round after accepting the said correspondences as having been properly issued by the Appellants in the discharge of the duties of their office, to say that the same correspondences on their faces show abuse of office or malice on the part of the Appellants by the mere fact that they were issued? To discharge the legal burden of establishing abuse of office as judicially defined above, the Respondent would require to do more than simply allege the abuse of office.

Writing of the letters in question, ipso facto does not show evidence of ether bad faith, malice or abuse of office on the part of the Appellants. No inference can properly be drawn from the documents alone without some evidence of facts which would justify such inference. As was stated in OFFORBOCHE v. OGOJA L.G., even evidence that an officer may have been overzealous in carrying out his duties or that he had acted in error of judgment or in honest excess of his responsibility, will not amount to bad faith or abuse of office.

The finding by the Federal High Court in its judgment at page 113 of the record of appeal that "mere looking at the circumstances of this case where a person in authority abuses his power by terminating the appointment of the plaintiff and recalling her is a clear case of malicious act. This is more so when he knows that he had no authority to do by virtue of Section 15 of the Federal University of Technology Act" is not supported by the facts before it. By this finding the Federal High Court clearly inferred malice on the part of the Appellants simply because the letters of termination of appointment of the Respondent and of recall were written by the Appellants. The Appellants were condemned to malice by the Federal High Court only because of the act of writing the said letters which the facts before it did not show that they were not written in the ordinary discharge of the functions of the Appellants' offices even if in error of judgment.  
There were no facts or evidence which justify the above inference by the Federal High Court on the issue of malice on the part of the Appellants in writing the letters in question.

Although the learned Counsel for the Respondent had set out circumstances in which he said the issue of malice may arise in connection with the provisions of Section 2(a) of Cap 168, he had not demonstrated which, if any, arose in respect of the documents he referred to as showing malice or abuse of office on the part of the Appellants. To be applicable to the Respondent's case, there must be evidence that any or all the Appellants had in fact acted in any of the circumstances listed by learned Counsel.

There is no such evidence here and so the Respondent can find no succour in the circumstances named by Counsel. Since there is no dispute that the Appellants are public officers, by the provisions of Section 2(a) Cap 168, any action in respect of any act done in pursuance, execution or intended execution of their public duty or authority, shall be commenced within three (3) months next after the act. In the words of the provisions "the action, prosecution, or proceeding, shall not lie or be instituted unless it is commenced within three months next against any person after the act ..." Unequivocally, the provisions prevent and direct that unless the action was filed within three (3) months after the act by the public(sic) against the action was taken or intended to be taken, the right to file the action is not there and cannot be exercised. Any such action not filed within the three months limited by the provisions cannot later or even for ever be commenced or instituted for a judicial remedy in a court of law. Under the provisions, a party should either commence his action within the limited period of three (3) months or forever, hold his peace, because the right to do so would be lost permanently after the expiration of the limited period.

I have elsewhere in the judgment stated that the Respondent's cause of action arose and accrued to her on the 17/12/10 when she acknowledged receipt the letter which formed the basis of her action against the Appellants. Since admittedly the Respondent's action sought to challenge the action of the Appellants done in the performance of their duty or exercise of their authority as public officers, the right to commence the action had to be exercised within the period of the three (3) months prescribed by the provisions of Section 2(a) of Cap 168, from the 17/12/10.

The Respondent's suit was commenced by the filing/taking out the originating summons on the 27/4/09 as indicated earlier in this judgment. I have also stated that the summons was filed sixteen (16) months after the receipt of the letter dated 17/12/10, from that date. It is clear as crystal, that the Respondent action was filed outside and well after the expiration the limited period of three (3) months under Section 2(a) of Cap 168. Undoubtedly, the suit is squarely caught up by the provisions and thereby rendered statute barred in the circumstances.

That is the inevitable and therefore unavoidable finding that I make on the issue.  
The legal consequence of an action being statute barred is that the action is rendered incompetent, and thereby leaving a court without the power or authority to entertain it. In other words, a court of law would lack the jurisdiction or competence to entertain an action adjudged to be Statute barred as was established by the cases cited on the principle supra.

The above finding that the action of the Respondent was statute barred and that the Federal High Court had no jurisdiction to entertain it, has apparently subsumed the other issues raised in the appeal. In the case of COOKEY v. FOMBO (2005) 5 SC (II) 102 at 111, the Supreme Court had stated that:-

"As a matter of general principle, a court should deal with and determine all the issues placed before it for determination.

There are however, some recognised exceptions, for example, where an issue is subsumed in another issue, see Obi Nwanze Okonji & 24 Ors v. Njokanma & Ors. (1991) 2 NWLR (Pt.202) 131 at 146; Balogun v. Labiran (1988) 3 NWLR (Pt.80) 66 at 80."

See also the case of UZUDA v. EBIGAH (2009) 15 NWLR (1163) 1 at 22 where the apex Court affirmed the above exception to the general principle.

Because the finding on the application of Section 2(a) of Cap 168, is one of the clearest of cases as required in the case of F.M.H. v. C.S.A. LTD. (supra), the other issues have practically been overtaken and subsumed by it thereby abating the duty to consider them here.

In the final result, I find merit in the ground of appeal No. 1 from which the issue No. 2 was distilled by the learned Counsel for the Appellants. The ground and the issue succeed and I allow the appeal thereon. Consequently, for being statute barred, the Respondent's suit filed by way of originating summons dated 27/4/09 is thereby struck out.

Parties shall bear the respective costs of prosecuting the appeal.  
  
  
**PAUL ADAMU GALINJE, J.C.A.:**

I have had the privilege of reading in advance the judgment just delivered by my learned brother, Garba JCA, and I agree with the reasoning contained therein and the conclusion arrived thereat.

I find nothing wrong with the procedure for initiating this action, since the crux of the Respondent's case is on the interpretation of the law along with the documents attached to the affidavit of parties.

The cause of action which culminated in this appeal accrued from the letter of termination of the Respondent's appointment which is dated 17/12/07 and served on her the same day. However the Respondent commenced this action on the 27/4/09, sixteen months after she received the letter. By Section 2(a) of the Public Officers Protection Act, the action at the lower court is barred.

For the Act provides three months within which a party who complains that an act of a public officer has affected him should initiate proceedings against such a public officer.

For this and the more elaborate reasons in the lead judgment, I allow the appeal on the ground that the action is statute barred. I abide by the consequential orders made in the lead judgment including order on cost.  
  
  
**REGINA OBIAGELI NWODO, J.C.A.:**

I had the privilege to read before now the Judgment of my learned brother GARBA, JCA just delivered. I agree with the reasonings contained therein, which I adopt as mine and the conclusion arrived thereat, allowing the appeal.

I also allow the appeal and abide by the consequential order made in the lead judgment.