**DR. H.M.G. EZENWAJI [CHAIRMAN, ASUU-UNN]**

**V**

**UNIVERSITY OF NIGERIA (UNN) AND OTHERS**

SUPREME COURT OF NIGERIA

12TH DAY OF MAY 2017

SC. 75/2006

**LEX (2017) - SC.75/2006**

OTHER CITATIONS

2PLR/2017/121 (SC)

**BEFORE THEIR LORDSHIP**

MUSA DATTIJO MUHAMMAD JSC (Presided)

CLARA BATA OGUNBIYI JSC

KUDIRAT MOTONMORI KEKERE-EKUN JSC

EJEMBI EKO JSC (Read the Lead Judgment)

SIDI DAUDA BAGE JSC

**BETWEEN**

DR. H.M.G. EZENWAJI [Chairman, ASUU-UNN] (for himself for and or behalf of the Academic Staff Union of Universities, University of Nigeria Nsukko Branch ASUUUNN) – Appellant

AND

1. UNIVERSITY OF NIGERIA (UNN)

2. PROF. F.N.C. OSUJI [Pro-Chancellor, UNN]

3. BARRISTER K. M. MAGAJI

4. PRO. G. F. MBANEFOH [Vice-Chancellor, UNN]

5. MRS. G. I. ADICHIE [Ag. Registrar, UNN] – Respondents

**ORIGINATING COURT**

COURT OF APPEAL, ENUGU DIVISION (Judgment of the Court delivered on 24 November 2005).

FEDERAL HIGH COURT, ENUGU JUDICIAL DIVISION (striking out the suit of the Appellants for judicial review of the administrative actions of the respondents.)

**REPRESENTATION/LAWYERS**

EJIKE EZENWO Esq. with JACINTA OKAFOR – for the Appellant.

NWACHUKWU IBEGBU Esq. - for the Respondents.

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

ADMINISTRATIVE AND GOVERNMENT LAW – ADMINISTRATIVE PANEL:- Where an administrative panel of a a statutory body is judicial restrained from proceeding with its proceedings – Attempt by that statutory body to continue those proceedings through another administrative panel – Suit brought in relation thereto – Whether constitutes an abuse of court process

EDUCATION AND LAW – STUDENTS’ UNREST:- Matters arising from students unrest in a university – Panel set up to investigate same – When judicially restrained – Whether open to university to use other vehicles to sidestep the order – Suit brought challenging same – How treated by court

EMPLOYMENT AND LABOUR LAW – PRE-EMPTIVE ACTION AGAINST ADMINISTRATIVE REVIEW AFFECTING THE RIGHTS OF EMPLOYEES:- Action taking out to pre-emptively restrain an employer from proceedings with the administrative review of alleged conduct of certain employees – Efforts to render the order nugatory through the setting up of other differently named panels – Options available to employees – Multiple legal process - When will not constitute abuse of court of process

CONSTITUTIONAL LAW - CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA 1999 (AS AMENDED), SECTION 36(1):- Purport of – Procedural and fundamental nature of – Legal implications for any judicial proceedings found to have conducted in breach thereof

CONSTITUTIONAL LAW – JUDICIARY - SECTION 233(2), CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA 1999 (AS AMENDED):- Appeals from Court of Appeal to Supreme Court - When would lie as of right - When would require leave – What the Court should consider in coming to just determination in relation thereto

**PRACTICE AND PROCEDURE ISSUES**

ACTION - FAIR HEARING:- Elements of - Test for – Proceedings vitiated on ground of fair hearing - Legal effect for jurisdiction of court to make further orders in relation thereto

APPEAL - APPEALS FROM COURT OF APPEAL TO SUPREME COURT:- When would lie as of right - When would require leave - Section 233(2) and (3), 1999 Constitution considered.

APPEAL - GROUND OF APPEAL - Nature of - Determination of - Proper approach of an appellate court thereto.

APPEAL - PRELIMINARY OBJECTION - Purport of - Where competent grounds exist in appeal - Inapplicability of.

APPEAL – GROUNDS OF APPEAL - QUESTION OF LAW:- What constitutes – How determined by court – Implication for competency of appeal

COURT - COMPETENCE OF:- Essence and purports of – How determined

COURT:- Appeals from the Court of Appeal to the Supreme Court – When would lie as of right – When would require leave.

JUDGMENT AND ORDER - NULLITY IN LAW:- What constitutes - Effect of for jurisdiction and functus officio status of court

JUDGMENT AND ORDER - JUDICIAL PRECEDENT - STARE DECISIS:- Doctrine of - Applicability of.

JURISDICTION - COMPETENCE OF COURT:- Nature of – Implication for jurisdiction of court

JURISDICTION:- Fundamental nature of – How determined - Guiding principles - Whether may be conferred by parties or court.

**CASE SUMMARY**

ORIGINATING FACTS AND CLAIMS

Following a violent demonstration by the students of University of Nigeria (UNN) and shutting down of the school, the governing council set up an ad hoc committee to look into the crisis. The Academic Staff Union of Universities (ASUU) of the school represented by the appellant, were not comfortable with the composition of the committee, perceiving that it was set up to do a hatchet job against some of their members and therefor commenced an action in the Federal High Court, Enugu State for judicial review.

The trial court granted an interim order in their favour, pending determination of their action, restraining the authorities of UNN from further action on the matter of the violent students’ demonstration.

When the appellant found that the university authorities subsequently set up a joint committee to carry out activities the ad hoc committee was restrained from performing, it instituted committal and disciplinary proceedings against the Pro-Chancellor and chairman of the Governing Council for alleged contempt of court and flouting the extant restraining order. The appellant thereafter filed another action in the trial court seeking declaratory reliefs that until the restraint order made in the earlier suit was discharged or varied, the action of the joint committee was contemptuous and ultra vires and that the invitation sent to the appellant with notice of allegation attached thereto violated the provisions of the University of Nigeria Act. The appellant also sought orders prohibiting and/or restraining further proceedings of the joint committee. The respondents filed a preliminary objection to the suit. The trial court struck out appellant’s action for constituting an abuse of court process.

Dissatisfied, the appellant appealed to the Court of Appeal where the appeal was dismissed. Aggrieved still, the appellant appealed to the Supreme Court, contending that the lower court reached its decision without affording the appellant the opportunity of being heard. The respondents filed preliminary objection to the appeal.

**DECISION(S) APPEALED AGAINST**

DECISION APPEALED AGAINST

The senior advocate had not even concluded the formalities of moving his motion before the trial judge, proceeded to his ruling on it. In the bench ruling, the learned trial judge struck out the suit No. FHC/EN/CP/201/2000 for being an abuse of courts process in view of the pendency of the suit No. FHC/EN/CP/149/2000 between the same parties and precisely on the same subject matter holding inter alia -

“The action was filed while the other suit is still pending. I have gone through the papers in this case and it relates substantially to the same matter as the other suit. The crux of the complainant appears to be that the defendants were or are flouting this court’s order made on 25 July 2000. As a matter of facts, if the allegations are true and well founded, the aces complained of would have flouted the order of 25 July 2000.

Even if that were so, what is to be done is not bringing a new action or another action. Our courts frown at duplicity or multiplicity of suits. In an aggravated form, it amounts to abuse of the court’s processes. This instance may not be an abuse of the court’s process because, from the papers filed, they may have a good case if well founded.

They have however taken a wrong procedure. The mode and procedure of this latest action is to my mind, wrong. What ought to have been done would have been to institute or initiate a contempt proceeding.

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The learned counsel to the plaintiff is still free to bring the action through the proper procedure. I must appeal to the eminent Senior Advocate, on the other side, to advise his clients against acts contrary or intended or calculated to undermine this court’s order of 25 July 2000. To that extent, this action is struck out”.

On appeal to the Court of Appeal, the court held that if lack of fair hearing is established by the appellant, the resultant effect is to vitiate the proceedings affected, while the decision reached by that court, in the circumstance, shall be rendered null and void. The court below further held that hearing cannot be said to be fair if any of the parties is refused a hearing or denied the opportunity to be heard, or to present his witnesses or call evidence. However, the Court then veered off the established templates, when it held:

“There cannot be a breach of fair hearing where a litigant has adopted the wrong procedure in the pursuit of justice. The learned trial judge exercised a discretionary power as a master of his own court, which he exercised judiciously and without occasioning a miscarriage of justice. All the remedies sought in suit No. FHC/EN/CP/201/2000 which he struck out are still pending in the suit No. FHC/EN/CP/149/2000”.

**ISSUE(S) FOR DETERMINATION ON APPEAL**

*BY APPELLANTS:*

“1. In view of the controlling Supreme Court authorities to the contrary, did the honourable Court of Appeal have the option of not nullifying the Federal High Court’s decision of 20 November 2000 after finding that the trial judge had reached the decision without affording the appellants an opportunity of being heard?

2. Had the honourable Court of Appeal not misdirected itself on the law and breached the rules of fair hearing by -

(a) inaccurately interpreting the judgment of the Federal High Court on abuse of process in this case;

(b) failing, neglecting or refusing to consider the uncontradicted case of the appellants; and

(c) failing, neglecting or refusing to apply the binding Supreme Court decision that shows that there is no abuse of court process in a case such as this where the new suit is from a fresh cause of action that has resulted from respondents’ breach of an earlier order? [from grounds 3 and 4].

3. Had the honourable Court of Appeal not misdirected itself on the law and breached the spirit and intendment of the constitutional guarantee for judicial access and fair hearing, when, without reference to the contrary but applicable law and uncontradicted evidence on the records it yet held the appeal to be on academic exercise with no live-issue in it anymore? [from grounds 5 and 6]”.

*AS FORMULATED BY COURT:*

Whether the court below was right in affirming the decision of the trial court which it held had breached the right of the appellant to fair hearing?

DECISIONS OF THE SUPREME COURT

1. It is not from the appellation or tagging as error of law, but the substance of the ground of appeal, that raises the ground of appeal to the level of one raising a question of law alone. In other words, a ground of appeal is not a ground of law simply because the appellant so calls it. The Court is duty bound, to analyse each ground of appeal in order to determine if it is a ground of law alone, one of fact or of mixed law and fact.

2. Section 233 (3) of the 1999 Constitution is made “subject to the provisions of sub-section (2)” of the 1999 Constitution. In practical terms, any ground of appeal that does not come within the parameters of section 233(2) of the Constitution falls within the operation or application of section 233(3) and such ground of appeal require leave first sought and granted to be valid.

3. There are five circumstances in respect of which appeal from the Court of Appeal to the Supreme Court shall lie as of right by virtue of section 233(2) of the Constitution. They are:

(a) Where the ground of appeal involves questions of law alone;

(b) Decisions in any civil or criminal proceedings on questions as to the interpretation or application of the 1999 Constitution;

(c) Decisions in any civil or criminal proceedings on questions as to whether any of the provisions of Chapter IV of the 1999 Constitution has, is being or is likely to be contravened in relation to anybody;

(d) decisions in, any criminal proceedings on questions in which any person has been sentenced to death by the Court of Appeal or in which the Court of Appeal has affirmed a sentence of death imposed by any other court.

(e) decisions on any question whether any person has been validly elected to the office of President or Vice-President; or whether the office of the President or Vice-President has become vacant, or has ceased; and,

(f) other cases as may be prescribed by an act of the National Assembly.

4. Complaints involving question about violation of the right to fair hearing guaranteed by section 36, under Chapter IV of the 1999 Constitution are therefore questions of law coming specifically under section 233(2)(c) of the Constitution, and generally under section 233(2)(b) of the Constitution. They require no leave of court to be valid.

5. A question of stare decisis, is a cardinal principle of law or doctrine that enjoins the inferior court to be bound by the decision of a superior court on the same point, however sure the inferior court may feel that the superior court was wrong. It therefore raises a question of law alone, not of mixed law and facts in respect of which no leave is required to bring an appeal thereon.

6. A ground of appeal alleging that the court below had misinterpreted the judgment of the court of first instance relates to interpretation of documents which is always a question of law and therefore come under section 233(2)(a) of Constitution in respect of which no leave is required.

7. The correct test for determining whether a ground of appeal is one that is on a question of law encompasses the following:

“a. An issue to be decided by the judge, concerning the application or interpretation of the law;

b. A question that the law itself has authoritatively answered, so that the court may not answer it as a matter of discretion;

c. An issue about what the law is on a particular point; on issue in which parties argue about, and the court must decide, what the true rule of law is;

d. An issue that, although it may turn on factual point, is reserved for the court and excluded from the jury; on issue that is exclusively within the province of the judge and not the jury”.

8. The rules of fair hearing are not intended to achieve another rule that says that the end justifies the means. On the contrary, the rules of fair hearing are procedural, but fundamental rules which every court established by law is enjoined to observe in the determination of the civil rights and obligations of every person appearing before it in litigation. The judge or court is enjoined, before coming to his/its decision in every dispute inter parties to observe the rules of fair hearing. In that way and by that means, justice is not only said to have been done, it is also seen to have been done fairly.

9. Section 36(1) of the 1999 Constitution provides the procedure or means to attaining the ends of justice by obligating the court to follow due process or procedure. The requirement of audi alteram partem which enjoins the decision maker, the judex, to hear both sides before he comes to a decision means that he must not come to a decision after hearing only one of the parties, or that he must not take a decision that will affect a party without first giving such a person an opportunity to be heard.

10. The test as to whether the parties, or any of them, had received fair hearing is objective and it demands the presence of a fair trial which consists of the whole hearing. The test of a fair hearing is the impression of a reasonable person who was present at the trial whether, from his observation, justice has not only been done but also seen to have been done in the case.

11. The core issue in this appeal is, whether the court below was right in affirming the decision of the trial court which it held had breached the right of the appellant to fair hearing? The narrow question is, what is the appropriate order to make, or to be made, when it is indubitably clear that the proceedings of a court or tribunal established by law were conducted in gross violation of the rules of fair hearing? Where the fact of breach of fair hearing is established, the live issue is no longer whether the trial court has or has no power to interfere to stop alleged abuse of its process. Rather, the issue is, even where a party is by his conduct, in an abuse of court’s process and the defendant has raised preliminary objection seeking the interference of the court to stop the abuse of process, whether the court in the circumstance is obligated to give the applicant or the plaintiff an opportunity to be heard before coming to the decision to dismiss or strike out the action for abuse of court’s process? For where the court failed to give the party affected an opportunity to be heard before striking out the action, any order arising therefrom is null and void.

12. In the circumstance, the order striking out suit No. FHC/EN/CP/201/2000, which was part of the proceedings of 20 November 2000, declared null and void by the court below was incapable of being sustained or affirmed, as the court below did. From the moment the court below declared the proceedings of the trial court of 20 November 2000 null and void, having been conducted in violation of the rules of fair hearing, the said proceedings are deemed to have been discharged and wiped out rendering the court functus officio and incapable in law to render opinion or orders to the contrary in the same judgment.

**MAIN JUDGMENT**

EKO JSC (DELIVERING THE LEAD JUDGMENT):

The Court of Appeal, Enugu Division (the court below) delivered its judgment in the appeal No. CA/E/119/2001 on 24 November 2005. It refused to set aside the decision of the Federal High Court striking out the suit No. FHC/EN/CP/201/2000 instituted by the appellants, as applicants for judicial review of some administrative actions of the respondents. The grouse of the appellants, expressed in their appeal to the court below, was that the trial court did not hear, or failed to hear, them before the suit No. FHC/EN/CP/201/2000 was struck out for being an abuse of court process on account of the subsistence of an earlier suit No. FHC/CP/149/2000. The court below agreed with the appellants that they were not heard or given an opportunity to be heard before their latter suit was struck out. It nonetheless dismissed the appeal of the appellants for lacking in merits and awarded against them, N5,000,000.00 (five million naira) as costs. This further appeal is against the decision of the court below delivered on 24 November 2005.

The notice of appeal filed on 23 February 2006 has six (6) grounds of appeal which, shorn of their particulars of error, are:

1. Having held that the applicant/appellant was not given a hearing and that there was thus a breach of the Chapter IV constitutional requirements of a fair hearing, the honourable Court of Appeal erred in law by failing to conclude that the effected proceedings and decisions were null and void and consequently to order fresh hearing of the application.

2. The honourable Court of Appeal misdirected itself on law and thereby came to a wrong conclusion when it failed or refused to follow controlling decisions of the Supreme Court cited on the issues before it.

3. The honourable Court of Appeal misdirected itself on the law by inaccurately interpreting the decision of the court of first instance and thereby occasioned a grave miscarriage of justice.

4. The honourable Court of Appeal misdirected itself on the law and breached the fair hearing provisions in Chapter IV of the 1999 Constitution by failing or neglecting to consider the uncontested case put forward by the applicant/appellant to the effect that fresh suit instituted to address a fresh cause of action that has arisen from an opponent’s disobedience or contempt of a pre-existing court order does not amount to an abuse of court’s process.

5. The honourable Court of Appeal misdirected itself on the law and breached Chapter IV of the 1999 Constitution when, without reference to its records of appeal, the briefs of both sets of the parties, and the announcements/records of counsel appearances throughout the appeal and even up to the date it was heard, it nevertheless held that: “There is actually no live-issue in the appeal itself. Most of the personae dramatis are no longer in the University, while peace and quiet have returned to the campus with everybody going about their normal business. This appeal in effect has become a mere academic exercise.”

6. The honourable Court of Appeal erred in law by failing to properly interpret and apply the letter, spirit and intendment of section 36(1) of the Constitution of the Federal Republic of Nigeria 1999, when it found an absence of any live issues in the appeal and allowed itself to appear as if predetermined to dismiss the applicant/appellant’s appeal regardless of any superior merits of his case”.

On 27 July 2006 and 21 August 2006 the respondents filed, respectively, notice of preliminary objection and further notice of preliminary objection.

It is only the preliminary objection contained in the notice of 27 July 2006 that was argued in the respondents’ brief filed on 15 September 2016 but deemed filed and served on 21 February 2017. The further notice of preliminary objection filed on 21 August 2006, having been abandoned, is hereby struck out.

The respondents anchored their objection on section 233(3) of the Constitution of the Federal Republic of Nigeria, 1999 and the dicta of this court in Chief Abu Momodu v. H. H. Alhaji Chief A.G. Momoh (1991) 1 NWLR (Pt. 169) 608 at 618; Chief Dominic Onuorah Ifezue v. Livinus Mbadugha (1984) 5 SC 79 at 168 and 178 to the effect that from the words “shall lie” in section 233(3) of the Constitution of the Federal Republic of Nigeria, it is mandatory that the appellant appealing from the Court of Appeal to this court, subject to the provisions of sub-section (2) of section 233 of the Constitution must obtain leave of either the Court of Appeal or this court. In other words, that the condition precedent for the competence of the six (6) grounds of appeal in this appeal is leave duly sought and obtained for their filing. All the six (6) grounds of appeal in the instant appeal are said “to involve questions of fact or mixed law and fact” in respect of which leave must be first sought and granted before they are competent, and failure to obtain the said leave operates to deprive this court of the jurisdiction to hear the appeal. Madukolu v. Nkemdilim (1962) 1 All NLR (Pt.4) 587 at 595 was cited.

The appellant had tagged the six (6) grounds of appeal as grounds complaining of errors of law. It is not from the appellation or tagging as error of law, but the substance of the ground of appeal, that raises the ground of appeal to the level of one raising a question of law alone. In other words, a ground of appeal is not a ground of law simply because the appellant so calls it. See Akaaer Jov v. Kutuku Dom (1999) 9 NWLR (Pt.620) 535 at 546-547, (2001) FWLR (Pt. 62) 2026. Each ground of appeal will be examined in order that it be determined it is a ground of law alone. See Ojemen & Ors. v. Momodu II & Ors. (1983) 3 SC 173 at 211-213, (2001) FWLR (Pt. 37) 1138. In the light of this objection therefore, I am bound, dutifully, to analyse each ground of appeal flaunted in this appeal in order to determine if it is a ground of law alone, one of fact or of mixed law and fact. The respondents posit that all the six (6) grounds of appeal are all of mixed law and fact. Section 233 (2) of the 1999 Constitution is made “subject to the provisions of sub-section (2) of this section”. Sub-section (3) of section 233 of the Constitution has therefore been made subordinate, subservient and inferior to the provisions of section 233(3) of the same Constitution. See Oke v. Oke (1974) 1 All NLR (Pt.1) 443 at 450; N.D.I.C. v. Okem Enterprises Ltd & Anor. (2004) All FWLR (Pt. 210) 1176, (2004) 18 NSCQR 42, (2004) 10 NWLR (Pt.880) 107. In practical terms, any ground of appeal that does not come within the parameters of section 233(2) of the Constitution falls within the operation or application of section 233(3) such ground of appeal require leave first sought and granted to be valid.

There are five circumstances in respect of which appeal from the Court of Appeal to the Supreme Court shall lie as of right by virtue of section 233(2) of the Constitution. They are:

(a) Where the ground of appeal involves questions of law alone;

(b) Decisions in any civil or criminal proceedings on questions as to the interpretation or application of the 1999 Constitution;

(c) Decisions in any civil or criminal proceedings on questions as to whether any of the provisions of Chapter IV of the 1999 Constitution has, is being or is likely to be contravened in relation to anybody;

(d) decisions in, any criminal proceedings on questions in which any person has been sentenced to death by the Court of Appeal or in which the Court of Appeal has affirmed a sentence of death imposed by any other court.

(e) decisions on any question whether any person has been validly elected to the office of President or Vice-President; or whether the office of the President or Vice-President has become vacant, or has ceased; and,

(f) other cases as may be prescribed by an act of the National Assembly.

As can be seen or observed from the six (6) grounds of appeal, earlier reproduced, grounds 1, 4, 5 and 6 are complaints involving question about violation of the right to fair hearing guaranteed by section 36, under Chapter IV of the 1999 Constitution. Those questions come specifically under section 233(2)(c) of the Constitution, and generally under section 233(2)(b) of the Constitution. They require no leave of court to be valid. A ground of appeal coming under section 233(2)(b) & (c) of the Constitution is one as of right, or in respect of which no leave is required.

Ground 2 raises a question of stare decisis, a cardinal principle of law or doctrine that enjoins the inferior court to be bound by the decision of a superior court on the same point, however sure the inferior court may feel that the superior court was wrong. See N.E.P.A. v. Onah (1997) 1 SCNJ 220, (1997) 1 NWLR (Pt. 484) 680. Of this doctrine of stare decisis in law, lord Denning, in his book: The Discipline of Law, says it means:

“stand by your decisions of your predecessors, however wrong they are and whatever injustice they inflict”.

This is the cardinal principle of law allegedly violated by the court below as can be seen from ground 2 of the ground of appeal. Ground 2, in my view, raises a question of law alone, not of mixed law and facts.

Ground 3, of the grounds of appeal, alleges that the court below had misinterpreted the judgment of the court of first instance. I find in the dicta of Karibi-Whyte JSC and Oputa JSC in Metal Construction (West Africa) Ltd v. Migliore (1990) 1 NWLR (Pt. 126) 299, (1990) 2 SCNJ 20 respectively at pages 26 and 33 of the report that, the interpretation of documents is always a question of law. It follows, therefore, that the complaint that the court below misinterpreted the decision of the court below is a question of law. Grounds 2 and 3 of the grounds of appeal, are, or raise, questions of pure law, and not questions of mixed law and facts. Grounds 2 and 3 therefore come under section 233(2)(a) of Constitution in respect of which no leave is required.

I observe that in arguing the preliminary objection, the learned counsel for the respondents was very much fixated on the grounds being of mixed law and facts, and not of law alone. That fixation on section 233(2)(a) and (3) of the Constitution completely blighted him and he failed to see if the grounds could be accommodated under section 233(2)(b) and (c) of the Constitution. Even on whether or not the grounds were not questions of pure law, or the law alone, the respondents did not apply the correct test for determining whether a ground of appeal is one that is on question of law. For this, I adopt Black’s Law Dictionary 9th Edition definition of “question of law” which at page 1366 thereof means:

“1. An issue to be decided by the judge, concerning the application or interpretation of the law;

2. A question that the law itself has authoritatively answered, so that the court may not answer it as a matter of discretion;

3. An issue about what the law is on a particular point; on issue in which parties argue about, and the court must decide, what the true rule of law is;

4. An issue that, although it may turn on factual point, is reserved for the court and excluded from the jury; on issue that is exclusively within the province of the judge and not the jury”.

Anyone of these is also termed a legal question or law question.

The preliminary objection in my view lacks substance. It is accordingly overruled.

On the merits, the appellant has formulated three (3) issues for the determination of the appeal. They are

“1. In view of the controlling Supreme Court authorities to the contrary, did the honourable Court of Appeal have the option of not nullifying the Federal High Court’s decision of 20 November 2000 after finding that the trial judge had reached the decision without affording the appellants an opportunity of being heard?

2. Had the honourable Court of Appeal not misdirected itself on the law and breached the rules of fair hearing by -

(a) inaccurately interpreting the judgment of the Federal High Court on abuse of process in this case;

(b) failing, neglecting or refusing to consider the uncontradicted case of the appellants; and

(c) failing, neglecting or refusing to apply the binding Supreme Court decision that shows that there is no abuse of court process in a case such as this where the new suit is from a fresh cause of action that has resulted from respondents’ breach of an earlier order? [from grounds 3 and 4].

3. Had the honourable Court of Appeal not misdirected itself on the law and breached the spirit and intendment of the constitutional guarantee for judicial access and fair hearing, when, without reference to the contrary but applicable law and uncontradicted evidence on the records it yet held the appeal to be an academic exercise with no live issue in it anymore? [from grounds 5 and 6]”.

This case has a history, which I shall summarise for proper appreciation of the case. On 17 July 2000, the students of University of Nigeria (UNN), Nsukka campus embarked on violent demonstration. The University was, in consequence, shut down.

Thereafter, the Governing Council promptly set up an ad hoc committee to look into the crisis with the terms of reference including:

i. the ascertainment of the immediate and remote causes of the demonstration;

ii. the assessment of the damage done to the University and personal property;

iii. the identification of the persons involved in the demonstration;

iv. recommendation of appropriate measures to forestall reoccurrence of such violent demonstrations in future.

The Academic Staff Union of Universities (ASUU), represented by the appellant herein as the Chairman of ASUU of UNN, Nsukka campus, were not comfortable with the composition of the ad hoc committee. They perceived that it was set up to do a hatchet job against some of their members, particularly the appellant and members of the Executive of ASUU. ASUU represented by the appellant promptly, thereafter, took out suit No. FHC/EN/CP/149/2000 for judicial review. The Federal High Court granted in their favour an interim order, pending the determination of their action, restraining the authorities of UNN from further action on the matter of the violent students’ demonstration.

ASUU represented by the named appellant herein later found out that the university authorities were ingeniously flouting the order for restraint made by the court. The university authorities had set up a joint council/senate committee of investigation to investigate the roles allegedly played by some staff of the university in the violent students’ demonstration. The joint committee was to perform some of the functions of the ad hoc committee, whose activities were equally restrained for the purpose of the pending suit No. FHC/EN/CP/149/2000. In reaction, the appellant instituted committal and disciplinary proceedings on 11 September 2000 against Prof. F.N.C. Osuji, the Pro-Chancellor and Chairman of the Governing Council of UNN, for alleged contempt of court for flouting the extant restraint order.

In the meantime, Barr. K.M. Magaji, 3rd respondent herein, was made the Chairman of the Joint Council/Senate Committee to investigate the causes and perpetrators of the violent demonstrations. The purport of this joint committee, in the perception of ASUU, was to flout the restraining order and continue to, do what the ad hoc committee was restrained from doing. The said Barr. K.M. Magaji, who was not a named party in the suit No. FHC/EN/CP/149/2000, allegedly was conducting proceedings in clandestine manner and doing so in flagrant breach of all known rules of natural justice. The activities of the joint committee prompted the appellant, on behalf of ASUU, to initiate the extant suit No. FHC/EN/CP/201/2000, wherein a number of reliefs are claimed including a declaration that until the restraint order made in suit No. FHC/EN/CP/149/2000 was discharged or varied, the joint committee was bound to submit to it, and that the activities of the joint committee flouting the extant restraint order was contemptuous, ultra vires, null and void. It also sought a declaration that the invitation extended to the appellant, with notice of allegation attached thereto by the joint committee, violated the provisions of section 15(1) of the University of Nigeria Act.

Orders were also sought prohibiting and/or restraining further proceedings of the joint committee headed by the 3rd respondent.

On 2 November 2000, I should mention, the respondents through Chief Ejike Ume SAN, filed a motion on notice with prayers for orders dismissing or striking out the instant suit at the Federal High Court, and discharging or varying the ex parte order made on 23 October 2000. The grounds for this application are inter alia that the action was an abuse of courts process and the court has no jurisdiction to entertain it. The motion, albeit, notice of preliminary objection, came up for hearing on 20 November 2000.

The brief proceeding of 20 November 2000, forming part of the minutes of the trial court that day, runs thus:

“Applicant is present in court. 3rd respondent in court. Others not in court.

Dr. Ejike Ume (with him, M. A. Onyejekwe Esq.) for the defendants/respondents.

Dr. Ejike Ume SAN: We have a motion on notice dated 30 October 2000.

Dr. Ejike Ume SAN: I have a preliminary objection to this present suit. It is founded on incompetency and lack of jurisdiction”.

The learned senior advocate had not even concluded the formalities of moving his motion before the learned trial judge, pronto, proceeded to his ruling on it. In the bench ruling, the learned trial judge struck out the suit No. FHC/EN/CP/201/2000 for being an abuse of courts process in view of the pendency of the suit No. FHC/EN/CP/149/2000 between the same parties and precisely on the same subject matter. The ruling continues with the statement of facts:

“The action was filed while the other suit is still pending. I have gone through the papers in this case and it relates substantially to the same matter as the other suit. The crux of the complainant appears to be that the defendants were or are flouting this court’s order made on 25 July 2000. As a matter of facts, if the allegations are true and well founded, the aces complained of would have flouted the order of 25 July 2000.

Even if that were so, what is to be done is not bringing a new action or another action. Our courts frown at duplicity or multiplicity of suits. In an aggravated form, it amounts to abuse of the court’s processes. This instance may not be an abuse of the court’s process because, from the papers filed, they may have a good case if well founded.

They have however taken a wrong procedure. The mode and procedure of this latest action is to my mind, wrong. What ought to have been done would have been to institute or initiate a contempt proceeding.

My order of 25 July 2000 is in fact wide enough to cover the situation complained of by the plaintiff.

The interim order made ex parte on 23 October 2000 is no more than a surplusage and in fact unnecessary.

The order is therefore discharged but that of 25 July 2000 is still operative.

The learned counsel to the plaintiff is still free to bring the action through the proper procedure. I must appeal to the eminent Senior Advocate, on the other side, to advise his clients against acts contrary or intended or calculated to undermine this court’s order of 25 July 2000. To that extent, this action is struck out”.

The appeal of the appellant herein against these decision and orders therein was heard by the Court of Appeal. In the judgment delivered on 20 November 2005, that court quite correctly, in my view, held that if lack of fair hearing is established by the appellant, the resultant effect is to vitiate the proceedings affected, while the decision reached by that court, in the circumstance, shall be rendered null and void. The court below, in this conclusion, was reinforced by the earlier decisions in Saleh v. Monguno (2002) FWLR (Pt. 87) 671, (2003) 1 NWLR (Pt. 801) 221; Okafor v. Attorney-General, Anambra State (1991) 6 NWLR (Pt. 200) 659 at 678; Bamgboye v. University of Ilorin (1999) 10 NWLR (Pt. 622) 290, (2001) FWLR (Pt. 32) 12.

The court below further held at page 255 of the record, and I agree in toto, that it has been settled in a plethora of cases that hearing cannot be said to be fair if any of the parties is refused a hearing or denied the opportunity to be heard, or to present his witnesses or call evidence: R. A. Salu v. Egeibon (1994) 6 SCNJ 223, (1994) 6 NWLR (Pt. 348) 23; Otapo v. Sunmonu & Ors. (1987) 2 NWLR (Pt. 58) 587, (1987) 5 SCNJ 57; Adigun & Ors. v. Attorney-General of Oyo State (1987) 1 NWLR (Pt. 53) 678, (1987) 3 SCNJ 118. The court below having correctly re-stated the law on the consequences for breaching the rules of fair hearing by any court of law was to later, in the same judgment, veer off the established templates, when at page 259 of the record it held:

“There cannot be a breach of fair hearing where a litigant has adopted the wrong procedure in the pursuit of justice. The learned trial judge exercised a discretionary power as a master of his own court, which he exercised judiciously and without occasioning a miscarriage of justice. All the remedies sought in suit No. FHC/EN/CP/201/2000 which he struck out are still pending in the suit No. FHC/EN/CP/149/2000”.

The rules of fair hearing are not intended to achieve another rule that says that the end justifies the means. On the contrary, the rules of fair hearing are procedural, but fundamental rules which every court established by law is enjoined to observe in the determination of the civil rights and obligations of every person appearing before it in litigation. The judge or court is enjoined, before coming to his/its decision in every dispute inter parties to observe the rules of fair hearing. In that way and by that means, justice is not only said to have been done, it is also seen to have been done fairly. Section 36(1) of the 1999 Constitution unambiguously provides -

“36.(1) In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such a manner as to secure its independence and impartiality”.

My understanding of the provisions of section 36(1) of the Constitution is that it provides the procedure or means to attaining the ends of justice that is, the resultant decision upon the judex following due process or procedure. The requirement of audi alteram partem which enjoins the decision maker, the judex, to hear both sides before he comes to a decision means that he must not come to a decision after hearing only one of the parties, or that he must not take a decision that will affect a party without first giving such a person an opportunity to be heard. This I must say, is an aspect of the rule of law applicable in every democracy, like ours.

The test as to whether the parties, or any of them, had received fair hearing is objective and is, as stated by this court in Isiyaku Mohammed v. Kano N. A. (1969) All NLR 424 at 426 (per Ademola CJN), that a fair hearing must involve a fair trial and a fair trial of a case consists of the whole hearing; and that the test of a fair hearing is the impression of a reasonable person who was present at the trial whether, from his observation, justice has not only been done but also seen to have been done in the case.

The core issue in this appeal is, whether the court below was right in affirming the decision of the trial court which it held had breached the right of the appellant to fair hearing? The narrow question is, what is the appropriate order to make, or to be made, when it is indubitably clear that the proceedings of a court or tribunal established by law were conducted in gross violation of the rules of fair hearing? The learned justices of the court below had found that “the action of the learned trial judge on the face of the record has all the attributes of lack of fair hearing”. The issue, therefore, is no longer whether the proceedings of the trial court on 20 November 2000 had the attributes of lack of fair hearing. That fact is established. There is no further dispute that by the said proceedings and the orders made on that date by the trial court, the parties, particularly the appellant herein, were denied fair hearing.

Under issue 1, the appellants submit that the proceedings conducted in breach of fair hearing rules, contained in the mandatory provisions of section 36(1) of the Constitution, are null and void. They maintain that, that is the position of this court as exemplified by its decisions in Ogundoyin v. Adeyemi (2001) FWLR (Pt. 71) 1741, (2001) 13 NWLR (Pt. 730) 403, (2001) 89 LRCN 2585; Otapo v. Sunmonu (1987) 2 NWLR (Pt. 58) 587; Ekiyor v. Bomor (1997) 9 NWLR (Pt. 519) 1, (1997) 17 SCNJ 479 at page 485; Saliu v. Egeibon (1994) 6 NWLR (Pt. 348) 23 at page 44; Ndukauba v. Kolomo (2005) All FWLR (Pt. 248) 1602, (2005) 14 NWLR (Pt. 915) 411, (2005) 124 LRCN 479 at 502.

The respondents, like the two lower courts, seem to miss the point or the complaint of the appellants in this appeal. The issue is not whether the trial court has or has no power to interfere to stop the abuse of its process. That is not the issue. Rather, the issue is, even where a party is by his conduct, in an abuse of court’s process and the defendant has raised preliminary objection seeking the interference of the court to stop the abuse of process, whether the court in the circumstance is obligated to give the applicant or the plaintiff an opportunity to be heard before coming to the decision to dismiss or strike out the action for abuse of court’s process? And where the court failed to give the party affected an opportunity to be heard before striking out the action; whether, in spite of the court’s order lacking all attributes of fair hearing the said offensive order can still be affirmed by the appeal court?

I have no difficulty resolving this issue in favour of the appellants. The court below, in its judgment at page 255 of the record had, held correctly in my view, that if lack of fair hearing is established beyond any doubt; the resultant effect is that it vitiates the affected proceedings, and the decision reached in such circumstance is null and void. See Saleh v. Monguno (supra); Okafor v. Attorney-General Anambra State; Bamgboye v. University of Ilorin (supra). If the proceedings were null and void, as declared by the court below, it means that they bind no one. They were incapable of giving rise to any rights or obligations under any circumstance. See Adefulu v. Okulaja (1996) 9 NWLR (Pt. 475) 668, (1995 - 1996) All NLR 318. In the circumstance, the order striking out suit No. FHC/EN/CP/201/2000, which was part of the proceedings of 20 November 2000, declared null and void by the court below was incapable of being sustained or affirmed, as the court below did. From the moment the court below declared the proceedings of the trial court of 20 November 2000 null and void, having been conducted in violation of the rules of fair hearing, the said proceedings are deemed to have been discharged and wiped out. See Adefulu v. Okulaja (supra). The poignant statement on this point by the Court of Appeal (per Uwani Abba-Aji JCA) in Igwe v. I.N.E.C. (2012) LPELR - 9834 CA, is worth re-stating. She says it all as follows -

“A nullity in law is defined as a void act or an act that has no legal consequence. It is an act that is not only bad but incurably bad. It is as if nothing happened.

When a thing is a nullity, it is as if it never existed.

The position of the law, therefore, is that every proceeding which is founded on a void act is also bad and incurably bad. One cannot put something on nothing and expect it to stay there. See Oduko v. Government of Ebonyi State (2004) 13 NWLR (Pt.891) 487; Okafor v. Attorney-General, Anambra State (No. 1) (1991) 6 NWLR (Pt. 200) 659; Saleh v. Monguno (2006) All FWLR (Pt. 332) 1411, (2006) 15 NWLR (Pt.1001) 26; Amaechi v. I.N.E.C. (2007) 9 NWLR (Pt.1040) 54, (2008) All FWLR (Pt. 407) 1; Inakoju v. Adeleke (2007) All FWLR (Pt. 353) 3, (2007) 4 NWLR (Pt.1025) 423; Labour Party v. I.N.E.C. (2009) All FWLR (Pt. 478) 233 (2009) 6 NWLR (Pt.1137) 315; I.N.E.C. v. Nyako (2011) 12 NWLR (Pt.1262) 439 at 513 - 514”.

There was no cross-appeal or appeal against the decision of the trial court of 20 November 2000, to warrant the contrary posture of the court below at page 259 of the record to the effect that “there cannot be a breach of fair hearing where a litigant has adopted the wrong procedure in the pursuit of justice”. Even if there was, the stance of the court below cannot be justified in law in the peculiar circumstance of this case. The court below having nullified the proceedings of the trial court on 20 November 2000, had become functus officio and incapable in law to render opinion or orders to the contrary in the same judgment. From the moment the proceedings of 20 November 2000, were nullified, the proceedings of the trial court, including its orders striking out the suit No. FHC/EN/CP/201/2000, had been wiped out. From that moment the court below lacked jurisdiction to hold contrariwise that because the appellant had adopted a wrong procedure, amounting to abuse of process, they could not be heard to complain that their right to fair hearing had been violated. The court below in this regard was wrong in law. Even the Creator of humanity submitted to the rule of audi alteram partem before He punished Adam and Eve for flouting His injunctions or prohibitions. He decreed their forfeiture of the paradise after hearing them.

I resolve this issue 1, as formulated by the appellants, in favour of the appellants. I allow the appeal on this issue. Since this issue resolves the appeal, I find no further need to consider the remaining issues formulated by the appellants.

The proceedings of the trial court on November 2000 including all orders made in the suit No. FHC/EN/CP/201/2000 are hereby set aside. The status quo existing immediately before the said proceedings and orders therein made on 20 November 2000 is hereby restored. The suit is remitted to the Federal High Court, Enugu to be heard by a judge other than Justice A.O. Ajakaiye, if he is still sitting in Enugu Division of the Federal High Court.

Parties shall bear their respective costs.

**MUHAMMED JSC:**

I had the privilege of reading now, the lead judgment of my learned brother Ejembi Eko JSC just delivered. I entirely agree with his reasoning and conclusion thereon that the appeal is meritorious. I adopt the lead judgment as mine in allowing the appeal. I abide by the consequential orders made in the judgment including the order on costs.

**OGUNBIYI JSC:**

Absence of fair hearing vitiates a proceeding no matter how well conducted, The court in the circumstance would have acted without authority. Without jurisdiction, the court acts in futility. Parties on their own, or a court on its accord cannot confer jurisdiction. It is conferred specifically by the Constitution. See Skenconsult (Nig.) Ltd v. Secondy Ukey (1981) 1 SC 6, (1981) 1 NSSC 1; N.E.P.A. v. Onah (1997) 1 SCNJ 220, (1997) 1 NWLR (Pt. 484) 680 and Emeje v. Positive and others (2010) 1 NWLR (Pt. 1174) 48, 76; Mbadinuju v. Ezuka (1994) 8 NWLR (Pt. 364) 335 at 353, (1994) 10 SCNJ 109.

The absence of fair hearing presupposes that there is a denial of a right and it is very fundamental and substantive. It cannot be trivialized or condoned. The effect of such proceeding thereof is a nullity. See section 36(1) of the 1999 Constitution (as amended).

The resultant effect is to defeat the ends of justice and renders a court impotent. Jurisdiction is a life-wire of a proceeding, see Madukolu v. Nkemdilim (1992) 1 All NLR 587 at 595.

There was no trial of this case and the justice of the suit will be met, only if a proper trial is conducted. I agree with my learned brother Ejembi Eko JSC, that the suit should be remitted to the Federal High Court, Enugu for trial to be conducted and should be done expeditiously.

I also abide by all other orders made in the lead judgment inclusive of costs.

**KEKERE-EKUN JSC:-**

This is an appeal against the judgment of the Court of Appeal Enugu Division, delivered on 24 November 2005 upholding the ruling of the Federal High Court Enugu delivered on 20 November 2000 discharging the interim order made ex parte on 23 October 2000 for being surplussage in view of an earlier restraining order granted on 25 July 2000 in suit No. FHC/EN/CP/149/2000 which was also pending before the learned trial judge. The court below also upheld the order of the trial court striking out the said suit No. FHC/EN/CP/201/2000.

The respondents raised and argued a preliminary objection in their brief of argument challenging the 6 grounds of appeal contained in the notice of appeal on the ground that they all raise issues of fact or of mixed law and facts in respect of which leave ought to have been obtained either from this court or from the court below having regard to the provision of section 233(3) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended).

The purpose of a preliminary objection to the hearing of an appeal is to terminate the hearing of the appeal in limine for incompetence or for being fundamentally defective, thereby robbing the court of jurisdiction to entertain it. See Gen. Electric Co. v. Akande (2010) 18 NWLR (1225) 596 (SC), (2012) All FWLR (Pt. 631) 1474 ; S.P.D.C. (Nig.) Ltd v. Amadi & Ors. (2010) 13 NWLR (Pt. 1210) 82, (2011) All FWLR (Pt. 604) 80, (2011) LPELR -3240 (SC).

Where there are competent grounds that can sustain the appeal, the procedure of filing a notice of preliminary objection would be inappropriate See N.N.P.C. v. Famfa Oil Ltd (2012) All FWLR (Pt. 635) 204, (2012) 17 NWLR (Pt. 1328) 148, (2012) LPELR -7812 (SC); Gen Electric Co. v. Akande supra. A careful examination of the grounds of appeal reveals that grounds 1, 4, 5, and 6 thereof specifically raise the issue of fair hearing under Chapter IV of the 1999 Constitution. The right to fair hearing is guaranteed under section 36 of the Constitution. Fair hearing is an essential requirement for the just determination of disputes between parties. A breach of the right to fair hearing renders the proceedings and any judgment reached therein a nullity. It therefore goes to the root of the court’s jurisdiction, which is an issue of law. The appellant does not require leave to raise an issue of fair hearing. See Ndukauba v. Kolomo (2005) 4 NWLR (Pt. 915) 411 at 428; Gen Electric v. Akande (supra).

Thus, there are competent grounds capable of sustaining the appeal. I agree with my learned brother, Ejembi Eko JSC in the lead judgment just delivered, with which I wholly agree, having had the benefit of reading same before now, that grounds 2 and 3 raise issues of law for which no leave is required. I agree that the preliminary objection is without merit. It is accordingly overruled.

With respect to the substantive appeal, there is no doubt that once the court below had found that “the action of the learned trial judge on the face of the record has all the attributes of lack of fair hearing”, it had no further jurisdiction to determine any other matter in the appeal. The lack of fair hearing rendered the proceedings before the learned trial judge null and void and of no effect. There was therefore no valid judgment in respect of which the court below could exercise its jurisdiction. It follows therefore that decision of the trial court striking out suit No. FHC/EN/CP/201/2000 was made without jurisdiction. The court below lacked jurisdiction to sustain it.

It is for these and the more elaborate reasons advanced in the lead judgment that I also find merit in the appeal. I allow it and abide by the consequential orders made in the lead judgment including the order for costs.

**BAGE JSC:**

My learned brother, Ejembi Eko JSC, availed me with copy of the judgment just delivered in draft form. I agree with the reasoning and conclusion therein. Let me add a few words on the competence of a court to entertain a case, and the guiding principles in determination of courts jurisdiction.

The unique aspect of jurisdiction is that courts are set up by the Constitution, Decrees, Laws, Acts, and Edicts. They cloak the courts with the powers and their jurisdiction of adjudication. If the Constitution, Decrees Acts, Laws and Edicts do not grant jurisdiction to a court or tribunal, the court and the parties cannot by agreement endow themselves, with jurisdiction. The jurisdiction of the court is confined, limited and circumscribed by the statute creating it. In view of that fact, that jurisdiction is a threshold matter, it is very fundamental as it goes to the competence of the court to hear and determine a suit.

That jurisdiction on a broad perception encompasses legal capacity, power or authority of a court. Competence of a court is the handmaid of jurisdiction of a court. A court must have both jurisdiction and competence to be properly seized of a cause or matter. Jurisdiction in that sense means the legal capacity, power or authority vested in it by the Constitution or statute creating the court. A court is competent to entertain a case.

“(a) When the subject matters of the case is within the courts jurisdiction.

(b) When there is no feature in the case which prevents the court from exercising its jurisdiction.

(c) When it is properly constituted as regards members and qualifications of the members of the bench and no member is disqualified for one reason or another. See Madukolu v. Nkemdilim (1962) 2 SCNLR 341; Galadima v. Tambai (2000) FWLR (Pt. 14) 2369, (2000) 11 NWLR (Pt 677) 1, (2000) 6 SC (Pt. 1) 196; Araka v. Ejeagwu (2000) 15 NWLR (Pt. 692) 684, (2000) 12 SC (Pt. 1) 99, (2001) FWLR (Pt. 36) 830.”

That when dealing with the issue of jurisdiction or lack of it, the courts are guided by some principles which are:-

“(a) Jurisdiction is a matter of substantive law no litigant can confer jurisdiction on the court where the Constitution or statute or any provision of the common law says that the court does not have jurisdiction.

(b) Jurisdiction cannot be assumed in the interest of justice.

(c) Nothing shall be intended to be outside the jurisdiction of the superior court but that which specifically appears to be so and on the contrary nothing shall be intended to be within their jurisdiction of an inferior court but that which is expressly alleged.

(d) Although courts have great powers yet their powers are not unlimited. Their jurisdiction is confined, limited and circumscribed by the statute creating it.

(e) The court is not hungry after jurisdiction.

(f) Judges have a duty to expound the jurisdiction of the court and not expand it as by so doing the court will be usurping the functions of the legislature.

(g) A court cannot give itself jurisdiction by misconstruing a statute:- Dangana & Anor v. Usman & 4 Ors. (2012) All FWLR (Pt. 627) 612, (2012) 2 SC (Pt.111) 103, (2013) 6 NWLR (Pt.1349) 50; Braithwaite v. Skye Bank Plc (2013) All FWLR (Pt. 664) 39, (2013) 5 NWLR (Pt. 1346) 1, (2012) 12 SC (Pt.1) 1; Amale v. Sokoto Local Government & 2 Ors. (2012) All FWLR (Pt. 618) 833, (2012) 5 NWLR (Pt 1292) 181, (2012) 1 SC (Pt. IV) 45”.

In the present case, the court below lost its jurisdiction and competence when it nullified the proceeding of the trial court on 20 November 2000. By that act therefore, the proceedings of the trial court including all orders made had been wiped out. The court below cannot therefore go any step further, it is stopped for lack of jurisdiction. For the more detailed reasoning contained in the lead judgment, the proceedings of the trial court on 20 November 2000 including all orders made in the suit are hereby set aside by me. I abide by all the orders made in the lead judgment, including order as to costs.

Appeal allowed