**JIDDA TOM HASSAN AND 177 OTHERS**

**V.**

**BORNO STATE GOVERNMENT**

COURT OF APPEAL (KADUNA DIVISION)

11TH DAY OF MARCH 2016

CA/K/153/2015

**LEX (2016) - CA/K/153/2015**

OTHER CITATIONS

2PLR/2017/147 (CA)

**BEFORE THIEIR LORDSHIP**

UWANI MUSA ABBA AJI, JCA (Presided and Read the Lead Judgment)

IBRAHIM SHATA BDLIYA, JCA

OLUDOTUN A. ADEFOPE-OKOJIE, JCA

**BETWEEN**

JIDDA TOM HASSAN & 177 OTHERS – Appellant

AND

BORNO STATE GOVT & 11 OTHERS – Respondent

**ORIGINATING COURT**

NATIONAL INDUSTRIAL COURT, HOLDEN AT KANO (Lawal Mani, j., Presiding)

**REPRESENTATION/LAWYERS**

A. J. IGOCHE Esq. - for the Appellants.

B. ADAMU Esq., D. DCL, Ministry of Justice Borno State - for the Respondents.

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

ADMINISTRATIVE AND GOVERNMENT LAW - PUBLIC OFFICERS - PROTECTION OF PUBLIC OFFICERS FROM SUIT - Limitation period for - Exceptions to as guaranteed by the Public Officers Protection Act, Cap. 379, Laws of the Federation of Nigeria, 1990, section 2(a) - Protection guaranteed thereby - Rationale and scope thereof.

EMPLOYMENT AND LABOUR LAW:- Claim for outstanding severance payment and gratuity owed ex-political office holders – Transference of suit to the National Industrial Court from a State High Court of Borno State – Challenge on ground that suit was caught by section 2(a) of the Public Officers Protection Law of Borno State and thus statute-barred – How treated

**PRACTICE AND PROCEDURE ISSUES**

ACTION - AGGRIEVED PARTY IN AN ACTION - Who qualifies to be so referred.

ACTION - PRELIMINARY OBJECTION – Purport of - Need to raise timeously.

ACTION – LIIMITATION - PUBLIC OFFICERS PROTECTION ACT, CAP. 379, LAWS OF THE FEDERATION OF NIGERIA, 1990, SECTION 2(a):– Limitation period in respect of actions against public officers - Exceptions thereto.

ACTION – LIIMITATION - PUBLIC OFFICERS PROTECTION ACT, CAP. 379, LAWS OF THE FEDERATION OF NIGERIA, 1990, SECTION 2(a):– Protection guaranteed thereby - Rationale and scope thereof.

ACTION - LIMITATION OF ACTION - TIME BAR:- Determination of – Writ of summons and statement of claim as source of.

ACTION - PARTIES - AGGRIEVED PARTY IN AN ACTION:- Who qualifies to be so regarded.

APPEAL - PRELIMINARY OBJECTION - Purport of - Need to raise timeously.

JUDGMENT AND ORDERS - ERRORS CAPABLE OF VITIATING JUDGMENT - Nature of.

JUDGMENT AND ORDERS - INCOMPETENCE OF COURT – When court finds itself incompetent to entertain a suit – Proper order to make.

JUDGMENT AND ORDERS - MOTION BEFORE COURT - Duty on court to determine before judgment.

JURISDICTION - ISSUE OF:- Fundamental nature of - Lack of jurisdiction - Effect on adjudication - When raised - Need to give priority to its resolution

JUDGMENT AND ORDER - INCOMPETENCE OF COURT:– When court finds itself incompetent to entertain a suit – Proper order to make.

JUDGMENT AND ORDER - INTERLOCUTORY APPLICATIONS:- Court determining the merit of a case at interlocutory stage - Impropriety of.

**CASE SUMMARY**

ORIGINATING FACTS AND CLAIMS

The appellants, ex-political office holders in the Borno State Government, the respondents served between the year 2008 and 2010. They instituted an action at the Borno State High Court, where they claimed one year severance gratuity which had remained unpaid. The respondents upon entering their defence, filed an application wherein they sought the order of court to strike out the suit on the grounds that the Borno State High Court lacked jurisdiction to entertain the matter. They contended that the issue of severance gratuity between employer and employees constituted an industrial matter. The trial court in its ruling on the application, transferred the matter to the National Industrial Court, which court assigned it to the Kano Division of the Industrial Court.

The respondents filed a notice of preliminary objection while the matter was pending, challenging the jurisdiction of the court to determine the matter on grounds that the matter was caught by section 2(a) of the Public Officers Protection Law of Borno State, and was statute-barred.

The trial judge in its ruling on the matter, without determining the competence of the preliminary objection, dismissed the suit as statute-barred.

Aggrieved, the appellants appealed to the Court of Appeal.

**DECISION(S) APPEALED AGAINST**

The trial Court made a Ruling, striking out the suit for want of jurisdiction, in the light of a preliminary objection citing section 2(a) of the Public Officers Protection Law of Borno State that the suit was statute barred. Dissatisfied, the Appellant appealed to the Court of Appeal.

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

*BY APPELLANTS:*

a. Whether the learned trial judge was not wrong when he failed or neglected to resolve the issue of the competency of the respondents’ preliminary objection before hearing and determining same.

b. Considering the facts and circumstances of the case, whether the learned trial judge was right when he held that the appellants’ case is statute-barred.

c. Whether the learned trial judge was right when he delved into the merit of the case at the stage of preliminary objection.

d. Whether the learned trial judge was not wrong to have gone outside the pleadings of the appellants in deciding the respondents’ notice of preliminary objection.

*AS FORMULATED BY COURT*

Whether by the preliminary objection of the respondents, the trial court was right to hold that the appellants’ case was statute-barred.

**MAIN JUDGMENT**

AJI JCA (DELIVERING THE LEAD JUDGMENT):

This is an appeal against the judgment of the National Industrial Court, holden at Kano in suit No. NICN/ABJ/53/2014, delivered on 9 July 2014 by Hon. Justice Lawal Mani, wherein the claims of the appellants were dismissed in limine for being statute-barred.

The appellants’ claims at the lower court against the respondents jointly and severally vide the writ of summons and statement of claim dated and filed on 6 August 2013 contained at pages 8 - 26 of the records were as follows:

a. Maiduguri Metropolitan Council N22,109,240.00 aa. Mafa Local Government Council N18, 688, 898.00

b. Marte Local Government Council N20,969,126.00 bb. Gubio Local Government Council N15, 268, 556.08

c. Chibok Local Government Council N18,688,898.00 cc. Damboa Local Government Council N16, 408, 670.00

d. Hawul Local Government Council N17,548,784.00 dd. Konduga Local Government Council N18, 686, 890.00

e. Mobbar Local Government Council N16,408,670.00 ee. Nganzai Local Government Council N19, 829, 012.28

f. Bama Local Government Council N20,969,118.00 Grand Total 205, 577, 862.36

The facts of the case are that the appellants claim against the respondents jointly and severally the sum of N205,577,862.36 (two hundred and five million, five hundred and seventy-seven thousand, eight hundred and sixty-two naira, thirty-six kobo) being their outstanding one year severance gratuity owed by the respondents. The appellants who were ex-political office holders served the respondents in positions of vice-chairmen, leaders, deputy leaders, councilors and supervisory councillors between 2008 and 2010. The remuneration and all other allowances of the appellants were determined by the revenue mobilization, allocation and fiscal commission. After leaving office in 2010, the appellants had to institute an action before the High Court of Borno State against the respondents in 2011 wherein they claimed the outstanding balance of their entitlements, to wit, arrears of salary, balance of accommodation and furniture allowance and severance gratuity. While the arrears of salary and furniture and accommodation allowances were paid by the respondents to the appellants, their severance gratuity was not paid due to paucity of funds then but on the understanding that same would be paid whenever the financial position of the respondents improved.

While it is asserted by the appellants that the respondents failed to pay them their severance gratuity, the respondents alleged that the severance gratuity of the appellants was cancelled by the revenue mobilization allocation and fiscal commission in 2009 when the appellants were in office. It was the above that prompted their instituting an action before the High Court of Borno State in 2013 to recover same. After service of the court processes in the matter was effected on the respondents, they defaulted in filing their appearance and defence within time and had to seek and obtain leave of the court to do so out of time. Thereafter, by way of an application, the respondents prayed the court to strike out the appellants’ suit on the ground that the Borno State High Court had no jurisdiction to hear same since the matter involved payment of severance gratuity between employers and employees and thus more of an industrial matter. In his ruling, the learned judge of the High Court of Borno State transferred the matter to the National Industrial Court which by law has the jurisdiction to hear the matter and the suit was subsequently assigned to the Kano Division of the National Industrial Court of Nigeria by the president of that court for hearing. While the matter was pending for hearing, the respondents by their counsel filed a notice of preliminary objection challenging the jurisdiction of the court below to hear same on the ground that the suit was caught up by section 2(a) of the Public Officers Protection Law of Borno State and thus statute-barred. The learned judge of the court below without first resolving the issue of the validity and competency of the respondents’ preliminary objection, went ahead to deliver his ruling in the matter which he captioned “ruling/judgment” wherein he dismissed the appellants’ suit that it was statute-barred.

The appellants, dissatisfied with the said judgment, appealed vide a notice of appeal dated 7 May 2015 and filed on 22 May 2015, wherein 6 grounds of appeal were raised as hereinunder reproduced without their particulars:

Grounds of appeal:

Ground One:

The learned trial judge erred in law when he failed, refused or neglected to resolve the issue of whether (sic) not the respondents’ application was competent before determining same.

Ground two:

The learned trial judge erred in law when he held thus in his ruling:

“I therefore hold that this suit does not fall under the exceptions to section 2(a) of the Public Officers Protection Law of Borno State - Based on the above authorities and submissions, I find and hold that this suit is caught up by the provisions of section 2(a) of the Borno State Public Officers (Protection) Law, Cap. 115 and section 145 of the Borno State Local Government Law, 2000 and therefore statute-barred.”

Ground three:

The learned trial judge erred in law when he held, to wit:

“Going by the above observations, to my mind, the terms of settlement were deemed to have settled all the issues between the parties in which they agreed among themselves”

Ground four:

The learned trial judge erred in law when he dismissed the appellants’ suit in limine when same has not been heard on merit.

Ground five:

The learned trial erred in law when he resorted to the defence filed by the respondents as the basis of his decision in the application.

Ground six:

The learned trial judge erred in law when he held that the suit is caught up by the provisions of section 2(a) of the Borno State Public Officers (Protection) Law, Cap. 115 and therefore statute-barred.

In accordance with the rules of this court, the appellants filed their brief of argument dated and filed on 11 June 2015, settled by A. J. Igoche, Esq., wherein he formulated 4 issues for the determination of the appeal to wit:

a. Whether the learned trial judge was not wrong when he failed or neglected to resolve the issue of the competency of the respondents’ preliminary objection before hearing and determining same.

b. Considering the facts and circumstances of the case, whether the learned trial judge was right when he held that the appellants’ case is statute-barred.

c. Whether the learned trial judge was right when he delved into the merit of the case at the stage of preliminary objection.

d. Whether the learned trial judge was not wrong to have gone outside the pleadings of the appellants in deciding the respondents’ notice of preliminary objection.

The respondents filed their brief of argument dated 8 July 2015 and filed on 10 July 2015; settled by B. Adamu, Esq., (D.D.C.L.), Ministry of Justice, Borno State, wherein he adopted the 4 issues of the appellants. At the hearing of the appeal on 4 February 2016, counsel to the appellants adopted his brief of argument and prayed this court to allow the appeal while the learned counsel to the respondents adopted his brief and urged the court to dismiss the appeal. I shall bundle the 4 issues thus:

Whether by the preliminary objection of the respondents, the trial court was right to hold that the appellants’ case was statute-barred.

It is the submission of the learned counsel to the appellants that it was wrong for the trial court to neglect to resolve the issue of the competence of the respondents’ preliminary objection before hearing same. He submitted that the respondents having sought leave to enter appearance and defence out of time, had waived their right to challenge the case on any ground. On what amounts to taking a fresh step, he cited Obembe v. Wemabod Estates Limited (1977) 5 SC 115, (1977) All NLR 136, (1977) 11 NSCC 264. That the ruling/judgment of the trial court at pages 296 - 307 is silent on the competence of the preliminary objection whereas courts are bound to pronounce on every issue put forth by a party otherwise there maybe injustice. He cited Emeje v. Positive (2009) All FWLR (Pt. 452) 1056 at page 1076, paragraph B; Brawal Shipping (Nig.) Limited v. F. I. Onwadike Co. Ltd (2000) FWLR (Pt. 23) 1254, (2000) 11 NWLR (Pt. 678) 387 at page 403, paragraphs D - F, (2000) 6 SCNJ 508; Orji v. P.D.P. (2009) 14 NWLR (Pt. 1161) 310 at pages 407 - 407, paragraphs H - D; Kokoorin v. Patigi Local Government (2009) 15 NWLR (Pt. 1164) 205, (2010) All FWLR (Pt. 533) 1977 at page 1988, paragraphs D - E.

It was further contended that it was not right for the trial court to hold that the appellants’ case was statute-barred by section 2(a) of the Public Officers Protection Law of Borno State as the case of the appellants is founded on contract of service. He relied on Michael Effiong v. Federal Housing Authority (2005) 2 NLLR (Pt. 5) 250 at pages 264 - 265, paragraphs H - C. Similarly, that the non-payment of the entitlements of the appellants has been a recurring decimal and enjoys the exceptions of the law. He relied on Attorney-General, Rivers State v. Attorney-General, Bayelsa State (2012) LPELR 9336, (2013) All FWLR (Pt. 699) 1087, (2013) 3 NWLR (Pt. 1340) 123 at pages 148 - 150, paragraphs F - H; Aremo II v. Adekanye (2004) All FWLR (Pt. 224) 2113 at page 2132, paragraphs H - B, (2004) 13 NWLR (Pt. 891) 572. It is again contended that the trial court was wrong to delve into the merit of the case at the stage of preliminary objection as it did as same amounted to prejudging the matter on an interlocutory application. He quoted Osunbor v. Oshiomole (2009) All FWLR (Pt. 463) 1363 at page 1425, paragraph D; Nwankwo v. Yar’Adua (2010) All FWLR (Pt. 534) 1 at page 47, paragraphs A - G, (2010) 12 NWLR (Pt. 1209) 518, (2010) 3 SCNJ (Pt. 1) 244, (2010) 45 WRN 1; Agip (Nig.) Ltd v. Agip Petroleum Int’l. & Ors. (2010) All FWLR (Pt. 520) 1198 at page 1248, paragraphs A - D, (2010) 5 NWLR (Pt. 1187) 348, (2010) LPELR-250. Also, that aside delving into the merit of the case, the trial court instead of striking the suit for lack of jurisdiction for being statute-barred, went ahead to dismiss the suit. He relied on Lakanmi v. Adene (2003) FWLR (Pt. 163) 24, (2003) 10 NWLR (Pt. 828) 353; Emuze v. Vice-Chancellor, University of Benin (2003) FWLR (Pt.170) 1411, (2003) 10 NWLR (Pt.828) 378.

Additionally, it is submitted that the trial court was wrong to have gone outside the pleadings of the appellants in deciding the preliminary objection. He argued that it is the plaintiffs’ action that should determine whether the matter is statute-barred or not. He relied on Moyosore v. The Governor, Kwara State & Ors. (2012) 5 NWLR (Pt. 1293) 242 at page 284, paragraphs B - E and page 285, paragraphs A - B; Ethiopian Airlines v. Afribank (Nig.) Plc (2006) 17 NWLR (Pt. 1008) 245 at page 258, paragraphs B - D, (2007) All FWLR (Pt. 373) 185; Egbe v Adefarasin (1987) 1 SC 1, (1987) 1 NWLR (Pt. 47) 1, (1987) 1 NSCC (Vol. 18) 1; Abdul-Raheem v. Oloruntoba-Oju (2006) 15 NWLR (Pt. 1003) 581 at page 620, paragraphs B - F, (2007) All FWLR (Pt. 334) 267; Onuorah v. Kaduna Refinery & Petrochemical Co. Ltd (2005) All FWLR (Pt. 256) 1356, (2005) 6 NWLR (Pt. 921) 393, (2005) 6 MJSC 137, (2005) 2 SC (Pt.) 1; Federal College of Education v. Akinyemi (2009) All FWLR (Pt. 465) 1785 at page 1806, paragraphs A - E; N.B.N. Ltd v. A.T. Eng. Co. Ltd (2006) 16 NWLR (Pt. 1005) 210 at page 222, paragraphs D - E. He prayed this court to resolve the issue in favour of the appellants.

The learned counsel to the respondents contrariwise has submitted that the trial court was not wrong when it neglected to resolve the issue of the competency of the respondents’ preliminary objection before hearing same since the issue of statute of limitation is a matter of jurisdiction which can be raised at any stage of litigation. He submitted that Order 5 rule 2(1) of the National Industrial Court cannot override a statutory provision. He relied on Nasir v. Civil Service Commission, Kano State & 2 Ors. (2007) 5 NWLR (Pt. 1190) 253 at page 276, (2010) All FWLR (Pt. 515) 195. It is settled that if the neglect to consider the preliminary objection has occasioned a miscarriage of justice, this court is called by section 15 of the Court of Appeal Act, 2010, to consider the preliminary objection of the respondent.

The counsel has maintained that the trial court was right to hold that the case was statute-barred. That suit No. NICN/ABJ/53/2014 was filed after the expiration of 3 months as it relates to the 1st respondent and 6 months as it relates to the 2nd - 12th respondents. Thus, that by the provisions of section 2(a) of the Public Officers Protection Law of Borno State, the action is statute-barred. He submitted that cause of action occurs when time begins to run as determined by the statement of claim. He relied on Faroly Establishment v. N.N.P.C (2011) 5 NWLR (Pt. 1241) 457 at page 479; Dantata v. Mohammed (2000) FWLR (Pt. 21) 889, (2000) 7 NWLR (Pt. 664) 176, (2000) 78 LRCN 1422, (2000) 3 WRN 32; Owie v. Ighiwi (2005) All FWLR (Pt. 248) 1762, (2005) 1 SC (Pt. II) 16, (2005) 5 NWLR (Pt. 917) 184 at page 214. It is concluded that the case of the appellants is not founded on a breach of contract but on statutory duty. He relied on N.P.A. Plc v. Lotus Plastics Ltd (2005) 12 SC (Pt. I) 19, (2005) 19 NWLR (Pt. 959) 158, (2005) 12 SCNJ 165 at page 195; Shamsideen Aboloke Bakare v. Nigerian Railway Corporation (2007) All FWLR (Pt. 391) 1579, (2007) 17 NWLR (Pt. 1064) 606, (2008) Vol. 6 SCLR (Pt. 6) 32; Nigerian Broadcasting Corporation v. Bankole (1972) NSCC 220, (1972) 4 SC 94, (1972) 1 All NLR 327. It is argued that the case of the appellants is not a continuous one since after leaving office in 2010 when they were paid their severance gratuity; the respondents defaulted in paying the amount while other entitlements were paid and that this default continued for the past 3 years.

It is conceded by the respondents that although the trial court delved into the merit of the case, it is not enough to overturn its ruling as there are sufficient materials or evidence before this court to consider the motion without going into the merit of the case. Again, that the fact that the trial court dismissed the suit instead of striking it out does not render his ruling wrong. He relied on N.P.A. Plc v. Lotus Plastics Ltd (2005) 12 SC (Pt. I) 19, (2005) 19 NWLR (Pt. 959) 158, (2005) 12 SCNJ 165 at page 183; Egbe v Adefarasin (1987) 1 SC 1, (1987) 1 NWLR (Pt. 47) 1 at page 15, (1987) 1 NSCC (Vol. 18) 1; Eboigbe v. N.N.P.C (1994) 5 NWLR (Pt. 347) 649 at page 666, (1994) 6 SCNJ 71; Unity Bank Plc. v. Nwadike (2008) All FWLR (Pt. 444) 1571, (2009) 4 NWLR (Pt. 1131) 352 at page 381, paragraphs C - D; Order 4 rules 3 and 4, Court of Appeal Rules, 2011.

It is equally conceded by the learned counsel to the respondents that it was wrong for the trial court to have gone outside the pleadings of the appellants to decide the preliminary objection as the trial court had sufficient materials placed before it. He however urged this court to discountenance the erroneous approach of the trial judge and decide on the merit of the respondents’ preliminary objection. He relied on Agi v. Eno (2010) 5 NWLR (Pt. 1188) 626 at page 641, paragraphs G - H; Establishment v. N.N.P.C (supra). He urged this court to dismiss the appeal.

In the instant appeal, it is not in issue that the trial court closed its eyes to the “motion on notice” filed by the respondents dated 15 May 2014, contained at page 235 of the records and went ahead to deliver a ruling/judgment on 9 July 2014, wherein the claims of the appellants were dismissed for being statute barred. The said motion was that the suit of the appellants was caught up with the statute of limitation, particularly section 2(a) of the Public Officers Protection Law of Borno State, hence should be struck out.

A court must hear a motion or process before it however unmeritorious. See News watch Communications Limited v. Atta (2006) All FWLR (Pt. 318) 580, (25006) 12 NWLR (Pt. 993) 144 at page 168; Mrs. Evangeline Fombo v. Rivers State Housing & Property Development Authority (2005) 5 SCNJ 213. In the instant appeal, it is obvious from the records and the ruling/judgment of the trial court that the trial court did not pronounce on the competence of the preliminary objection, it nonetheless at the judgment considered it in full before it declined jurisdiction in the last paragraph of page 306 of the record. In the judgment of the trial court at pages 296 - 307, the trial court did consider the issues canvassed by the respondents and gave its judgment. This was approved by the Supreme Court in New swatch Communications Limited v. Atta (supra), where it held that it was proper so long as he considered the motion and took a decision on it before delivery of the judgment.

A preliminary objection seeks to determine a bad process in limine upon grounds of law and thereby saves all the parties involved in engaging in a futile exercise. It follows therefore that the earlier it is raised, the better. See Manson v. Halliburton Energy Services Ltd (2007) All FWLR (Pt. 358) 1067 at page 1094, paragraphs E - G, (2007) 2 NWLR (Pt. 1018) 211. Nevertheless, it is trite that where a jurisdictional issue is raised, it must be considered first. This is because jurisdiction is a radical and crucial question of competence. See Lawal v. Oke (2001) 7 NWLR (Pt. 711) 88, (2002) FWLR (Pt. 114) 582; Attorney-General, Lagos State v. Dosunmu (1989) 3 NWLR (Pt. 111) 552 at page 566; Fumudoh v. Aboro (1991) 9 NWLR (Pt. 214) 210. It is settled law that the issue of jurisdiction is of such a fundamental nature that must be considered and disposed of first since any adjudication without jurisdiction would amount to a nullity. See A.N.P.P. v. P.D.P (2006) 17 NWLR (Pt.1009) 467, (2006) LPELR - 7588; Moyosore v. Governor, Kwara State & Ors. (2011) LPELR - 8813 (CA). The trial court in its wisdom and in order not to dissipate energy and time considered this first as jurisdictional issue. It must be noted that this can be raised anytime but since it has come so early, the better.

In pages 4 - 8 of the appellants’ brief, it has been so hotly argued that the trial court failed to consider and pronounce on the competence of the preliminary objection filed by the respondents.

I wonder how this has become a grievance to the appellants in this appeal to become an issue for determination. More so, I had patiently waited to see what injustice or wrong this has occasioned the appellants, yet I see none. I think the counsel to the appellants has done well to cry more for the bereaved! In Omotesho v. Abdullahi (2008) All FWLR (Pt. 402) 1114, (2008) 2 NWLR (Pt. 1072) 526 at page 545, paragraphs B - D, it was held that the mere consequence of a decision does not vest a person with the status of an aggrieved party. Thus, where a party is not clearly aggrieved by the order of a trial court itself but by the consequence which arises from it, such a party is not entitled to appeal having not shown his legal grievance. See also Mobil Producing (Nig.) Unlimited v. Monokpo (2003)18 NWLR (Pt. 852) 346, (2003) 12 SC (Pt.11) 50, (2004) All FWLR (Pt. 195) 575; U.B.A. Plc v. A.C.B. (Nig.) Ltd (2005) 12 NWLR (Pt. 939) 232. A party aggrieved, as stated by the Supreme Court in Nwaogu v. Atuma (2013) 9 NWLR (Pt. 1358) 113 at page 129, is a party who has suffered legal grievances or a party against whom a decision has been pronounced which has wrongfully deprived him of something or wrongly refused him something or wrongly affected his right or title to something. See University of Ilorin v. Akinyanju (2008) All FWLR (Pt. 406) 1989 at pages 2005 - 2006, paragraphs G – A (CA); Mobil Producing (Nig.) Unlimited v. Monokpo (2003)18 NWLR (Pt. 852) 346, (2003) 12 SC (Pt.11) 50, (2003) 12 SCNJ 206,(2004) All FWLR (Pt. 195) 575, (2004) 115 LRCN 3016. I sincerely do not think that the appellants have any inch of right to formulate any ground of appeal or issue on the competence or otherwise of the motion filed by the respondents at the trial court.

Another issue I am called to consider is whether the trial court delved into the merit of the case at the stage of preliminary objection and went outside the pleadings of the appellants. This has been conceded even by the respondents’ counsel at paragraphs 2.28 and 2.34 of pages 10 and 11 respectively of his brief. It must be observed with disdain that the law forbids what the trial court did and this court cannot give its approval. See Globe Fishing Ind. Ltd v. Coker (1990) 7 NWLR (Pt. 162) 265, (1990) 11 SCNJ 56; Akapo v. Hakeem-Habbeb & Ors. (1992) 6 NWLR (Pt. 247) 266, (1992) 7 SCNJ 119. See also Woherem J.P. v. Emereuwa & Ors. (2004) MJSC 108 at page 122, (2004) All FWLR (Pt. 221) 1570, (2004) 13 NWLR (Pt. 890) 398, (2004) 8 SCM 185, (2004) 35 WRN 23, where the court frowns at going outside the pleadings of the claimant to decide on the issue of period of limitation. The apex court in D.P.C.C. Ltd v. B.P.C. Ltd (2008) All FWLR (Pt. 414) 1420, (2008) 4 NWLR (Pt. 1077) 376, (2008) Vol. 4 M.J.S.C 161 at pages 178 - 179, paragraphs E - A, stated that the law is trite that at the stage of interlocutory application, the court should not attempt to go into the merit of the matter in controversy else it is tempted to determine the case at that stage and leave nothing for the just and proper determination of the suit after the hearing. However, I have not seen where the appellants have suffered any miscarriage of justice thereof. Thus, the law has been over-flogged that it is not every mistake, slip or error in a judgment that will result in an appeal being allowed since it is only where the error is substantial that it can be seen that it has occasioned a miscarriage of justice which makes it mandatory for the appellate court to interfere and have the judgment upset. See Tsokwa Motors (Nig.) Ltd v. U.B.A. Plc (2008) All FWLR (Pt. 403) 1240, (2008) 2 NWLR (Pt. 1071) 347; Alli v. Alesinloye (2000) FWLR (Pt. 15) 2610, (2000) 6 NWLR (Pt. 660) 177 at page 213, (2000) 4 SCNJ 264; Ezeoke v. Nwagbo (1988) 1 NWLR (Pt. 72) 616.

I shall now consider whether the case of the appellants is statute-barred or not. It is foremost to note that in determining the limitation period, it is advisable to look at the processes filed by the claimants herein the appellants. In Military Administrator, Ekiti State v. Aladeyelu (2007) All FWLR (Pt. 369) 1195, (2007) 14 NWLR (Pt. 1055) 619, (2007) 4-5 SC 201, (2007) 5 SCNJ 1, it was held by the Supreme Court:

“... for the purpose of determining whether or not an action is statute barred, the period of limitation is determined by looking at the writ of summons and the statement of claim only. I will however add, where one has been filed. It is from either or both of these processes that one can ascertain the alleged date when the wrong in question is said to have occured or been committed, thereby giving rise to the plaintiffs’ cause of action. When that ascertained date is compared with the date the writ of summons or originating process was filed in court, it can then be determined whether the action was instituted within the period allowed by law or outside it. When it is found that the action was instituted within the period allowed by law, the action is said to be competent and the court has the jurisdiction to entertain same but where it is found to have been instituted outside the period allowed by law, the action is said to be statute barred and consequently, the court is without jurisdiction to entertain same.”

See also Woherem v. Emereuwa (2004) 6 - 7 SC 161, (2004) MJSC 108, (2004) All FWLR (Pt. 221) 1570, (2004) 13 NWLR (Pt. 890) 398 at page 417, (2004) 8 SCM 185, (2004) 35 WRN 23. By the pleadings of the appellants particularly their statement of claim dated 6 August 2013 contained at pages 10 - 26, they asserted especially at paragraphs 12 and 31 thus:

12. “The claimants plead that all of them served their respective local government councils between 2008 and 2010 when their tenure lapsed.”

31. “The claimants state that while the defendants have paid their other allowances, payment of their severance gratuity is yet to be effected almost three years since they left office.”

It is apparent and beyond dispute that the cause of action arose in 2010 when the tenure of the appellants lapsed and by virtue of sections 2(a) of the Public Officers Protection Law of Borno State, and 145 of the Borno State Public Officers (Protection) Law, 2000, they were to institute their case 3 months as against the 1st respondent and 6 months against the 2nd to 12th respondents. It is observable nevertheless that the appellants placed in paragraph 47 at page 25 of the records thus:

47. “The claimants plead that by a letter dated 5 May 2010, referenced number MLGA/S/A/1A/666 addressed to all the local government and chieftaincy affairs, the 1st defendant acknowledged the fact of the defendants’ indebtedness to the claimants and directed payment of same. The said letter is pleaded and a copy of same is attached as “Document number 3”.

By virtue of “Document number 3” at page 77 of the records, the permanent secretary, one Zanna Ali Garga, on behalf of the honourable commissioner acknowledged the indebtedness of the respondents to the appellants and directed that 35% amounting to N22,861,087.00 (twenty two million eight hundred and sixty one thousand eighty seven naira) be paid to the appellants while undertaking in paragraph 3 therein thus:

“In the same vein, you are hereby requested to pay the remaining balances based on the council’s financial capability in the subsequent months, please.”

In compliance with the said section 2(a) of the Public Officers Protection Law of Borno State, and 145 of the Borno State Public Officers (Protection) Law, 2000, the appellants served on all the respondents “notice of intention to commence legal action” although variously dated July 2013, as contained at pages 78 - 88 of the records.

I do not think that there will be justice to political office holders and other persons who have dealings with the government, either of the federation, the state or the local government, to be denied their entitlements, monies for contracts, salaries, allowances, gratuities, pensions, etc, under the guise that they instituted the action after either 3 or 6 months as the case may be.

The end of the law is justice. Obviously, the spirit and intent of the Public Officers Protection Act or law is not to work out injustice or deny people their hard earned rights. Thus, a person or authority cannot be in a breach of a law or contract and hide under the umbrella of the law. He who comes to equity must come with clean hands. It is the law therefore that for every general rule, there must be exceptions thereto. By “Document number 3” dated 17 December 2009, the respondents refused to pay the appellants their allowances and were in breach of their duty, undertaking and commitment to pay them in compliance with the approved remuneration package in respect of political office holders by the revenue mobilization, allocation and fiscal commission. Besides, it must be noted that the claims of the appellants is for “work and labour done” during their tenure from 2008 - 2010, as political office holders, which cannot be affected by section 2(a) of the Public Officers Protection Law of Borno State, and 145 of the Borno State Public Officers (Protection) Law, 2000, although it was instituted after 3 or 6 months thereafter. In Energy Marine & Industrial Ltd v. Minister of the Federal Capiatal Territory & Anor. (2010) LPELR - 19774 (CA), it was held thus:

“Even though section 2(a) of the Public Officers Protection Act stipulates that actions against Public Officers ought to be instituted within 3 months of the act, neglect or default complained of by an aggrieved plaintiff, but there are some exceptions to that general position of law, for example the law is not applicable in cases of recovery of land, breaches of contract and claims for work and labour done. The above view is fortified by the decision of the Supreme Court in Nigerian Ports Authority v. Construczioni Generali Farsura Cogefar SPA (1974) NSCC 622, (1974) 1 All NLR 463, part 2, or (1974) All NLR 945 at 957 where Ibekwe JSC stated as follows: “... We agree that the section applies to everything done or omitted or neglected to be done under the powers granted by the act, but we are not prepared to give to the section the stress which it does not possess. We take the view that the section does not apply to cases of contract.

The learned chief justice, in deciding this point, made reference to the case of Salako v. L.E.D.B. (1953) 20 NLR 169 where De commarmond S. P. J. as he then was, construed the provisions of section 2 of the Public Officers Protection Ordinance which is almost identical with section 97 of the Ports Act, and thereafter stated the law as follows: “I am of the opinion that section 2 of the Public Officers Protection Ordinance does not apply in cases of recovery of land, breaches of contract, claims for work and labour done etc.” See also Federal Government of Nigeria v. Zebra Energy Ltd (2002) 18 NWLR (Pt. 798) 162, (2003) FWLR (Pt. 142) 154. Again, on this, the court held in Akwa Ibom State Civil Service Commission v. Akpan (2013) LPELR- 22105 (CA): “On the purport and scope of section 2 (a) of the Public Officers Protection Act, it is well established that the act given full protection or cover to all public officers or persons engaged in the execution of public duties who at all material times acted within the confines of their public authority and are not acting outside their statutory or constitutional duty. A public officer can be sued outside the limitation period of three months if, at all material times to the commission of the act complained of, he was acting outside the colour or scope of his office or outside his statutory or constitutional duty. Where he acted within the colour or scope of his office, he can only lose protection of the limitation laws if he issued within three months. Ibrahim v. Judicial Service Commission, Kaduna State (1998) 12 SCNJ 255, (1998) 14 NWLR (Pt. 584) 1. “ The provisions of section 2(a) of the Act considered in the case are the same with the provisions of section 1(1) of Cap. 40, applicable to the respondent’s case before the High Court. Dealing with the same provisions of the Act, the apex court in the more recent case of Attorney-General, Rivers State v. Attorney-General, Bayelsa State (2012) 6 - 7 MJSC (Pt. III) 149 at pages 181 and 182, (2012) LPELR 9336, (2013) All FWLR (Pt. 699) 1087, (2013) 3 NWLR (Pt. 1340) 123 had said: “The Act is intended as much as within the ambit of the law to protect a public officer from detraction and unnecessary litigation, but never intended to deprive a party legal capacity to ventilate his grievance on the fact of stark injustice. That is why public officers or heads of the agencies of the federation or state are protected; two most important exceptions are prescribed by the Act. Firstly, in cases of continuance of damage or injury, the Act permits actions to be brought on the cessation thereof outside three months. The second exception to the application of the Act as a defence is that it does not cover a situation where the person relying on it acted outside his statutory or constitutional duty.”

See also Nwankwere v. Adewunmi (1967) NMLR 45; Anozie v. Attorney-General of Federation (2008) 10 NWLR (Pt. 1095) 278 at pages 290 - 291; Nigeria Stored Products Research Institute v. Board of Internal Revenue, Kwara State (2013) LPELR - 22073 (CA). In the last paragraph of page 306 which contains the judgment of the trial court, the trial judge “dismissed” the appellants’ case for lack of jurisdiction. The court cannot dismiss a claim the merit of which it is not competent to enquire into. See Adesokan v. Adetunji (1994) 5 NWLR (Pt.346) 540, (1994) 6 SCNJ 123. In Okwu & Anor. v. Umeh & Ors. (2015) LPELR - 26042 (SC), it was held that the correct position of the law therefore is that where the finding goes to the jurisdiction of the court and denies it jurisdiction to determine the action, the proper order, in such a situation therefore, is to strike out the claim. See Okoye v. Nigerian Construction & Furniture Co. Ltd (1991) 6 NWLR (Pt. 199) 501, (1991) 7 SCNJ (Pt. 11) 365; Herbert Ohuabunwa Emezi v. Akujobi David Osuagwu & Ors. (2005) All FWLR (Pt. 259) 1891, (2005) 12 NWLR (Pt. 939) 340; Thomas v. Olufosoye (1986) 1 NWLR (Pt. 18) 669, (1986) 1 NSCC 323.

It follows therefore that the appellants’ case falls within the exceptions of the statute of limitation, particularly sections 2(a) of the Public Officers Protection Law of Borno State, and 145 of the Borno State Public Officers (Protection) Law, 2000, which is pari materia with section 2(a) of the Public Protection Act. This issue is therefore resolved in favour of the appellants. The ruling/judgment of the National Industrial Court, holden at Kano in suit No. NICN/ABJ/53/2014, delivered on 9 July 2014 by Hon. Justice Lawal Mani, is set aside and the case is hereby remitted to the president, National Industrial Court of Nigeria for retrial by another judge of the court. I make no order as to costs.

**BDLIYA JCA:** I was opportuned to read in draft, the lead judgment of my learned brother, Uwani Musa Abba Aji JCA. I agree with the reasoning and conclusions contained therein. I have nothing useful to add thereto, than to allow the appeal. The appeal is accordingly allowed. I abide by the order made therein, inclusive of that on costs.

**ADEFOPE-OKOJIE JCA:** I am in agreement with the judgment just delivered by my learned brother, Uwani Musa Abba Aji JCA that the appellants’ appeal is meritorious. I also set aside the discretion of the lower court and remit this case to the president, national industrial court for retrial by another judge of the court, with no order as to costs.

Appeal allowed