**OKWARA AGWU AND OTHERS**

**V.**

**JULIUS BERGER (NIGERIA) PLC**

IN THE COURT OF APPEAL OF NIGERIA

THE 9TH DAY OF MAY, 2011

CA/K/250/2003 (CONSOLIDATED)

**LEX (2011) - CA/K/250/2003**

OTHER CITATIONS

2PLR/2012/11 (CA)

**BEFORE THEIR LORDSHIPS**

MARY PETER- ODILI, JSC

JOSEPH TINE TUR, JSC

OBANDE F. OGBUINYA, JSC

**BETWEEN**

1. OKWARA AGWU

2. INNOCENT OBINNA

3. CHARLES ONUMARA

4. OPARAOCHA LUIZ GARBA

5. OBIAKOR EDWIN

6. EKEH SPEAR (Suing for themselves and on behalf of all Julius Berger (Nig) Plc workers affected by the purported redundancy as contained in Julius Berger (Nig) Plc circular of June 28th, 1999) Appellant(s)

AND

JULIUS BERGER (NIGERIA) PLC Respondent(s)

**ORIGINATING COURT(S)**

1. Appeal filed originally at COURT OF APPEAL, ABUJA JUDICIAL DIVISION but transferred to KADUNA JUDICIAL DIVISION due to congestion at the former appellate division

2. HIGH COURT OF THE FEDERAL CAPITAL TERRITORY ABUJA

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**REPRESENTATION**

PETERS S.C, Esq For Appellant

AND

EMMANUEL J.J. TORO, Esq (SAN) For Respondent

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

EMPLOYMENT AND LABOUR LAW:- Redundancy of staff – How determined – Duty of court to resolve same by reference to contract and evidence

COMMERCIAL LAW - CONTRACT - EXPRESS TERMS:- Settled law that it is the express terms in the contract document governing the relationship of the parties that should be construed to determine the rights of the parties – Duty of court where a contract has been reduced to writing

**PRACTICE AND PROCEDURE ISSUES**

ACTION - AWARD OF RELIEF:- Duty of trial court not to grant a relief not asked for by a party – Failure thereto – Legal effect – Rule that a court of law may award less and not more than what the parties have claimed – Legal implication

ACTION - PRELIMINARY OBJECTION:- When a preliminary objection should be raised – Examples of – Legal effect of properly made preliminary objection – Where there are facts in dispute – Whether not proper to bring a preliminary objection

ACTION - PROCEEDINGS AT INTERLOCUTORY STAGE:- Duty of court when considering interlocutory applications relating to injunctive reliefs care should be taken not to comment on issues that are to be determined in the substantive suit – Effect of failure thereto

ACTION - REPRESENTATIVE ACTION:- Distinction between named and unnamed parties – Legal implications – Liability for costs of action – On whom lies - When the named plaintiff decides to withdraw – Whether open to any one of those whom she represents to come forward and take the place of the named plaintiff

ACTION - REPRESENTATIVE ACTION:- Order 11 rule 8 of the High Court of the Federal Capital Territory, Abuja (Civil Procedure) Rules 1990 – How to designate named and unnamed parties to a suit – Forms of Writs of Summons and affidavits required

ACTION - REPRESENTATIVE ACTION:- Parties to a representative action - Named plaintiff who is a party to the action and others who are not named but whom the plaintiff purports to represent – Duty of court to recognise them as parties in the making of orders, reliefs as they are also bound by the result

ACTION - REPRESENTATIVE ACTION:- Parties to a representative action - Named plaintiff – Whether is not free to take any step that might prejudice the rights of the other unnamed plaintiff - The rights, status and limits of the liability of named and unnamed parties – Rule in Okonji & Ors vs Njokanma & ors sc (1989) 4 NWLR (Pt.114) 161 at .167 paragraph "C" per Eso JSC

ACTION - SUBSTANTIVE RELIEF:- Claim for a substantive relief - Whether should be supported by pleadings

APPEAL - GROUNDS OF APPEAL:- Meaning and basis of a ground(s) of appeal – Question of competence of the grounds of appeal or the jurisdiction of the court – Duty of court to determine same before the court considers the merit of the appeal – Justification for

COURT - POWER OF A TRIAL COURT:- Where trial Judge limits his orders to only the named plaintiffs on the writ of summons contrary to the fact that those named on the writ of summons had obtained leave from another judge to represent the unnamed plaintiffs – Legal effect of - Whether amounts to a trial Judge reviewing the interlocutory ruling of another Judge of concurrent jurisdiction

COURT – POWER OF TRIAL COURT:- Where trial court makes ruling which reverses an interlocutory ruing of another judge on same matter – Validity of where trial court not sitting as an appellate judge – Whether no trial Court is competent to sit in judgment over the decision or order made by a brother judge – Evidence that prior order was made without jurisdiction – Whether constitutes an exception

EVIDENCE - CONFLICT IN AFFIDAVIT EVIDENCE:- Settled law that when a Court is faced with affidavits which are irreconcilably in conflict, the Judge hearing the case, in order to resolve the conflict properly, should first hear oral evidence from the deponents or such other witnesses as the parties may be advised to call – Whether does not matter if none of the parties asked to be allowed to cross-examine any of the deponents or to call any witness – Whether such omission by the parties should not be taken to amount to consent that affidavit evidence should be used in such circumstances

EVIDENCE - CONFLICT IN AFFIDAVIT OR DOCUMENTARY EVIDENCE:-Suit commenced by Writ of Summons – Where the trial Judge considered the affidavits and documentary exhibits so as to give a ruling without hearing oral evidence – Challenge of ruling on ground that there were conflicting affidavits and documentary exhibits put forward by the parties - Settled law that where there is a conflict of affidavit evidence called by both sides, it is necessary to call oral evidence to resolve the conflict – Exception thereto – Where there is authentic documentary evidence which supports one of the affidavits in conflict with another – Whether open to the court to prefer that document over its rival(s) so as to tilt the balance in favour of the affidavit which agrees with it – Justification for

JUDGMENT AND ORDER - BASIS OF JUDGMENT OF A TRIAL COURT:- Stipulation that a trial court’s judge must be based only on matters canvassed before the learned trial Judge – Implication for reliefs a court may grant

JUDGMENT AND ORDER - ERRONEOUS JUDGMENT:- Decisions of court at the interlocutory stage - When pleadings have been ordered, filed and exchanged and evidence is adduced showing that any of the interlocutory decisions were wrongly given – Duty of trial Judge thereto

WORDS AND PHRASES:- “Representative Action” – “Preliminary Objection” – Meaning of

WORDS AND PHRASES:- "Interlocutory" - Meaning of

**CASE SUMMARY**

ORIGINATING FACTS AND CLAIMS

The facts are that the plaintiffs/appellants are employees of Julius Berger (Nig) Plc. They were declared redundant and paid their entitlements which they collected on or about the 2nd and 3rd July, 1999. But aggrieved with the declaration of redundancy, page 1-2 of the supplementary records filed before this Court on 19-06 -2007 in Appeal number CA/A/260/2003 shows that they obtained ex parte leave to sue the Defendant/Appellant, namely, their employer, Julius Berger Nigeria Plc. The named plaintiffs/appellants instituted the substantive suit on 01-07-1999. The writ of Summons shows the named plaintiffs as "suing for themselves and on behalf of all Julius Berger (Nig) Plc Workers affected by the purported redundancy as contained in Julius Berger (Nig) plc circular of June 28th, 1999."

The plaintiffs/appellants claimed, inter alia, the following reliefs against Julius Berger (Nig) Plc:

"(a) AN ORDER of perpetual injunction restraining the defendant, their agents, servants, privies howsoever described from forcefully ejecting the plaintiffs and members of their families from any of their official quarters/residence.

(b) AN ORDER of perpetual injunction restraining the defendant, their agents, servants, privies howsoever described from declaring any of the plaintiff redundant without first of alt following the due process of the law as stipulated in the various Acts and also the constitution of the Federal Republic of Nigeria, 1999.”

Additionally, the plaintiff filed an interlocutory application seeking interlocutory orders preserving their possession and occupation of the named properties as well as “n order of interlocutory injunction restraining the defendant, their agents, servants and/or any person howsoever described from unlawfully declaring any of the Plaintiff/Applicants redundant pending the final determination of the substantive suit before this Honourable Court.”

DECISION APPEALED AGAINST

The trial court, inter alia, ordered the plaintiffs/appellants to refund to the defendant/respondent the terminal benefits paid to them, even though the parties did not claim for those reliefs. The Court made some findings at the interlocutory stage which properly should have been resolved after hearing all the evidence.

ISSUES FOR DETERMINATION OF APPEAL

BY APPELLANTS/CROSS-RESPONDENT

*FOR APPEAL*

"1. Whether the learned trial Court Judge's decision to limit the parties in this suit to only the six persons named on the Appellants' Writ of Summons and not to all those represented by the six named Plaintiff/Appellants is valid in law. See Ground 1-7 of the Notice of Appeal.

2. Whether the learned trial Judge was correct in law to have ordered the plaintiff/Appellants to refund terminal benefits to the Respondent when His Lordship neither found that the Appellants took terminal benefits nor did the Respondent made such prayer and again when there is an implied agreement between the parties that whatever the Respondent pays the Appellants in view of Exhibit "C" in this appeal shall be deemed to be the June salaries of the Appellants. See Ground No.8, 9 and 10 of the Notice of Appeal."

[*FOR CROSS-APPEAL*: Adopted issue as formulated by appellants for the Appeal]

BY RESPONDENTS/CROSS-APPELLANTS

[*FOR CROSS-APPEAL:* "Whether or not the trial Court in granting the order of interlocutory injunction exercised its judicial discretion properly or acted on wrong principles."]

DECISION OF COURT OF APPEAL

1. A preliminary objection should be raised which, if upheld, would render further proceedings before this Court or any other Court or tribunal for that matter impossible or unnecessary, example, where the objection is anchored on the jurisdiction of the Court to entertain the appeal. An objection to the jurisdiction of the court is a good example of a preliminary objection which, if upheld, will render it unnecessary to consider the appeal on merit. The appeal would be struck out.

2. A preliminary objection should also be taken where there is a point of law which, if decided in one way, is going to be decisive of the litigation or appeal. The court declines jurisdiction to entertain a cause or matter or an appeal where it is clear that the action or appeal will not succeed, or it is frivolous, and vexatious.

3. A court should not go into the merits and demerits of the substantive appeal at the interlocutory stage. The competence of the grounds of appeal or the jurisdiction of the court has to be determined before the court considers the merit of the appeal. For without jurisdiction the Court cannot entertain this appeal and make valid orders.

4. The parties are agreed that the substantive suit is still pending at the trial Court. Moreover, pleadings have not been filed and exchanged between the parties. The Courts have advised time without number that when considering interlocutory applications relating to injunctive reliefs care should be taken not to comment on issues that are to be determined in the substantive suit.

5. Threat of declaration of redundancy relating to employment is not a given once no list of the workers affected accompany the company declaration announcing same. The law is that in a situation like this it is the express terms in the contract document governing the relationship of the parties that should be construed to determine the rights of the parties. For when a contract is reduced into writing, the writing gives the terms agreed upon.

6. Evidence by affidavit is a form of evidence. The law is settled that where there is a conflict of affidavit evidence called by both sides, it is necessary to call oral evidence to resolve the conflict.

7. However, it is not only by calling oral evidence that such a conflict could be resolved. Where there is authentic documentary evidence which supports one of the affidavits in conflict with another, the court is entitled, in a trial by affidavit, to prefer that document thereby tilting the balance in favour of the affidavit which agrees with it. After all, even if oral testimony had been called, such a documentary evidence would be a yardstick with which to assess oral testimony.

**MAIN JUDGMENT**

JOSEPH TINE TUR, J.C.A. (DELIVERING THE LEADING JUDGMENT):

Hon. Justice HUSSEIN MUKTAR J., of the High Court of the Federal Capital Territory Abuja, delivered a ruling on 30-05-2001 against which the plaintiffs and the defendants aggrieved, filed separate appeals before the Court of Appeal Abuja. Each appeal contained seven grounds of appeal.

They bore the numbers CA/A/22/2002 and CA/A/37/2001 respectively.

Due to congestion the appeals were transferred to the Court of Appeal Kaduna Division and with leave of this court, renumbered as CA/A/250/2003 (plaintiffs) and CA/A/260/2003 (defendants) respectively.

The facts are that the plaintiffs/appellants are employees of Julius Berger (Nig) Plc. They were declared redundant and paid their entitlements which they collected on or about the 2nd and 3rd July, 1999. But aggrieved with the declaration of redundancy, page 1-2 of the supplementary records filed before this Court on 19-06 -2007 in Appeal number CA/A/260/2003 shows that they obtained ex parte leave to sue the Defendant/Appellant, namely, their employer, Julius Berger Nigeria Plc. The named plaintiffs/appellants instituted the substantive suit on 01-07-1999. They were (1) Okwara Agwu; (2) Innocent Obinna; (3) Charles Onumara; (4) Oparaocha Luiz Garba; (5), Obiakor Edwin; (6) Ekeh Spear. The writ of Summons shows the named plaintiffs as "suing for themselves and on behalf of all Julius Berger (Nig) Plc Workers affected by the purported redundancy as contained in Julius Berger (Nig) plc circular of June 28th, 1999."

The plaintiffs/appellants claimed the following reliefs against Julius Berger (Nig) Plc:

"(a) AN ORDER of perpetual injunction restraining the defendant, their agents, servants, privies howsoever described from forcefully ejecting the plaintiffs and members of their families from any of their official quarters/residence.

(b) AN ORDER of perpetual injunction restraining the defendant, their agents, servants, privies howsoever described from declaring any of the plaintiff redundant without first of all following the due process of the law as stipulated in the various Acts and also the constitution of the Federal Republic of Nigeria, 1999.

(c) AN ORDER compelling the defendant company to pay to the plaintiff the sum of Ten Million (N10,000,000,00) only being the cost of hiring the service of a solicitor to pursue this matter consequent upon the threat to illegally declare the defendants redundant and to illegally force them out of their residence/official quarters."

On 01-07 -1999 the learned counsel appearing for the named and unnamed plaintiffs also filed an application supported by the affidavit of Moses Onyilokwu, a Legal Assistant in the chambers of God's People's Freedom Legal Consult praying for the following interlocutory reliefs against Julius Berger (Nig) Plc:

"(a) An interlocutory order restraining the Defendant/Respondent, either by themselves, servants, agents, privies, assigns howsoever described from unlawfully ejecting or in any other way interfering with the quite possession, occupation and use of plaintiff/applicants' official quarters located in the Federal Capital Territory and Suleja pending the final determination of the Substantive Suit before this Honourable Court.

(b) An order of interlocutory injunction restraining the defendant, their agents, servants and/or any person howsoever described from unlawfully declaring any of the Plaintiff/Applicants redundant pending the final determination of the substantive suit before this Honourable Court.

(c) An order of interlocutory injunction restraining the defendant, its servants, agents, privies howsoever described from interfering with any of the rights and privileges due to the plaintiff/applicants us workers/servants of the defendant company pending the final determination of the substantive' suit pending before this Honourable Court.

(d) For such further order or orders as the Court may deem fit, to make in the circumstances and in the interest of justice."

The Writ of Summons and the interlocutory application was brought by the learned Counsel without filing and serving Julius Berger (Nig) Plc any Statement of Claim. The plaintiffs' contention in the interlocutory application was that the circular (Exhibit "A") which subsequently gave rise to the suit was yet to come into effect hence the reliefs sought by the named and unnamed plaintiffs in the Writ of Summons and interlocutory application.

On 05-07 -1999 Julius Berger (Nig) Plc filed a counter affidavit deposed to by Alhaji Ahmed Rufai Ibrahim, her Personnel Manager, wherein the following facts were deposed to:

"(5) That I do further know the following as facts;

(a) That Exhibit "A" was issued by the Respondent and effect given thereto on 3rd day of June, 1999 as per such payments stated therein and equally offering and providing the Applicants with transport to their respective areas of domicile and or abode.

(b) That facts contained in paragraph 3(c), (f) (g) (h) (i) (k) and (l) of the sworn affidavit of Moses Onyilokwu are not true.

(c) That the Respondent's relationship with its workers is contractual and individually.

(d) That the Respondent's contract works as recently awarded by the Federal Government of Nigeria has been suspended and being reviewed through Christopher Kolade's panel.

(e) That the Respondent has not much work going on now and does not require the present work force.

(f) That the grant of the applicants prayer will prevent the Respondent offering accommodation to its unaccommodated remaining staff as well as new staff who need to be employ and will cost it untold hardship and finance."

Julius Berger (Nig) Plc alleged that the circular had been effected by the 30- 06-1999 followed by the payment of redundancy entitlements to the plaintiffs who collected same on 2nd and 3rd July, 1999. Therefore the named and unnamed plaintiffs having been declared redundant and paid their entitlements before the suit was instituted on 01-07-1999 were not entitled to the interlocutory injunctions claimed in the application. On 04-10-2000 the plaintiffs filed Motion No. M/1593/2000 praying for the following reliefs:

"(a) An order of the Honourable Court re-instating the Plaintiff/applicants to the employment of the Defendant/Respondent pending the final determination of the substantive suit pending before the Honourable Court.

(b) An order of the Honourable Court deeming the plaintiff/applicants as due employers of the Defendant/Respondent at all times material to the commencement of this action.

(c) And for such further or other order(s) as the Honourable Court may deem fit to make in the circumstances".

The application was filed after an attempt to commit Julius Berger (Nig) Plc for contempt for declaring the plaintiffs redundant during the pendency of the substantive suit though it failed on the grounds of procedural errors.   
In the application seeking that the named and unnamed plaintiffs should be reinstated Alhaji Ahmed Rufai Ibrahim, Personnel Manager to Julius Berger (Nig) Plc once again countered by an affidavit that the declaration of some workers, inclusive the named plaintiffs, was done after due consultation with their Union before this suit was filed on 01-07- 1999. The learned trial Judge delivered ruling on 30-05-2001 in favour of the plaintiffs/appellants against which both parties have appealed.

The plaintiffs/appellants sought and were granted leave on 27 -06-2001 by the learned trial Judge to appeal against the ruling on seven grounds of appeal. The appeal presently bears No. CA/K/250/2003.

The plaintiffs/appellants with leave of this Court, twice amended the Notice of Appeal. On 07-02-2011 when this appeal came up for hearing Counsel relied on a "Further Amended Notice of Appeal" filed on 04-01-2001, and an "Amended Appellants' Brief of Argument" followed by an "Amended Appellants' Reply Brief' all filed on 22-03-2010. The Respondent/Defendant's Brief was subsequently amended with leave of Court. By the time the appeal came up for hearing on 07-02-2011 Counsel to the Respondent relied on a "Further Amended Respondent's Brief of Argument" dated 28-08-2006 filed on 29-08-2006 but deemed filed on 02-11-2006. Both Counsels adopted their respective briefs of argument. Learned Counsel to the Respondent/Defendant drew this Court's attention to the Notice of Preliminary Objection at pages 5-7 of the "Further Amended Respondent's Brief' proffering reasons why this Court should decline jurisdiction in entertaining this appeal.

APPEAL NO. CA/K/260/2003

Julius Berger (Nig) Plc also felt aggrieved and on 13-06-2001 filed Notice of Appeal containing seven grounds in Appeal No. CA/K260/2003. The Respondents/Plaintiffs also filed Notice of Preliminary Objection to the hearing of the appeal couched as follows:

"NOTICE BY RESPONDENTS OF THEIR INTENTION TO REPLY UPON PRELIMINARY OBJECTION PURSUANT TO ORDER 10 RULE OF THE COURT OF APPEAL RULES, 2007.

TAKE NOTICE that the Respondents herein named intend at the hearing of this appeal to rely upon the following PRELIMINARY OBJECTION notice whereof is hereby given to the Appellants.

THE GROUNDS OF OBJECTION IS:

(a) That this Honourable Court lacks the jurisdiction to entertain the present appeal on the ground that the appeal is incompetent and the Court of Appeal lacks the jurisdiction to entertain the same as it (appeal) is purely academic, hypothetical, speculative and also that all the grounds of appeal upon which the Appellant formulated its sole issue for determination are incompetent as they never flowed from issues decided by the trial Court, and further that the Grounds are vague, argumentative and abandoned.

AND TAKE FURTHER NOTICE that at the hearing of this application Respondents shall rely on their submissions on the Notice of Preliminary Objection contained in their already filed and served Further Amended Brief of Argument."

When the appeal came up for hearing on 07-02-2011, the appellants/defendant was represented by S. Atung Esq of Counsel. Learned counsel appearing for Julius Berger (Nig) Plc relied on an Amended Notice of Appeal deemed filed with leave of Court on 29-08-2006. S. Atung Esq adopted the Amended Appellants' Brief prepared by Emmanuel Toro (SAN) and filed on 29-08-2006.

The learned Counsel to the Respondent also adopted the Further Amended Respondent's Brief filed on 08-10 -2007. Counsel referred to the Notice of preliminary objection set out at page 3-18 of the "Further Amended Respondent's Brief of Argument."

Paragraph 1 1.1 of the "Further Amended Respondent's Brief of Argument" in CA/K/250/2003 shows that the two appeals were with the order of the Court of Appeal consolidated, to be heard and disposed of in one proceeding. This is not disputed by the learned Counsel to the Appellants  in Appeal No. CA/K/250/2003 nor in Appeal No. CA/K/260/2003. What is not disputed is to be believed and acted upon since that is supported by the records of this Court.  
APPEAL NO. CA/K/260/2003.

I shall begin by considering the preliminary objection in Appeal No.CA/K/260/2003 followed by CA/K/250/2003. My reason for so doing is that in Appeal No. CA/K/250/2003 where Julius Berger (Nig) Plc is the Appellant/Defendant, the Amended Notice of Appeal filed on 29-08 -2006 shows that the complaint is against the whole decision of the learned trial Judge. But the plaintiffs/appellants are in Appeal No. CA/K/250/2003 challenging only part of the judgment.

I shall first consider the reasons proffered by the learned Counsel to the plaintiffs/Respondents in Appeal No. CA/K/250/2003 as to why the appeal is incompetent and that this Court lacks jurisdiction to entertain same as set out in paragraphs 3.01 to 4.38 of the "Further Amended Respondents' Brief of Argument."

Learned Counsel's Argument is that the appeal is purely academic, hypothetical, and speculative. Furthermore, that the grounds of appeal upon which the appellant formulated a sole issue for determination are incompetent as they never flowed from issues decided by the trial Court

That the grounds of appeal should be deemed abandoned.

The second argument is that the Court of Appeal is a creation of the constitution and its jurisdiction is as prescribed under the constitution, namely to hear and determine appeals from the High Courts under Section 240 and 241 of the Constitution of the Federal Republic of Nigeria, 1999. Except for election petitions the Court of Appeal has no original jurisdiction over causes and matters. Any cause or matter can only come before the Court by way of an appeal against decisions of the trial Court or tribunals. Where such is not the case, it will not matter whether the appellant filed a Notice of Appeal or not.  
Learned Counsel drew this Court's attention to the fact that out of the seven grounds of appeal filed by the appellant, grounds 4, 5 and 7 of the original Notice of Appeal were withdrawn in the Brief of Argument leaving only grounds 1, 2, 3 and 6 from which only a sole issue for determination was distilled.

Counsel argued that grounds 1-3 and 6 of the appeal do not relate to any issues decided by the learned trial Judge. Furthermore, the grounds are argumentative, vague or non existent. Counsel referred to ground 1 which complains that the learned trial Judge pre-judged the merit of the substantive case in his ruling by making far-reaching findings and conclusions that prejudicially determined the very issues or questions to be eventually adjudicated in the substantive suit. But that the learned Senior Advocate of Nigeria did not mention the far reaching findings and conclusions which left ground one of the appeal vague, and therefore, abandoned. Learned Counsel cited Oyadeji vs Adenle (1993) 9 NWLR (Pt.316) 224 at 239 paragraphs "E-F".

Counsel further contended that ground one had no relationship with the arguments in the Appellants' Brief. That the argument that the trial Judge resolved the contentious issue of when the plaintiffs/Respondents were declared redundant on the strength of mere affidavit evidence is not part of the complaint in ground one. Besides, there was no quarrel that affidavit evidence was used to resolve the controversy as to whether the declaration of redundancy was carried out during the pendency of the suit. Therefore, the complaint in the Appellant's Brief that the learned trial Judge should have resolved the conflict in the affidavit by oral evidence was academic opinion that had no legal consequences since the argument is founded on no ground of appeal.

Counsel argued that it was of no legal consequence that the learned trial Judge construed Exhibit "A" in the light of conflicting affidavit evidence as there is no appeal against the act of the learned trial Judge. Counsel contended that the learned trial Judge did not delve into the provisions of the Labour Act, Cap.198 Laws of the Federation of Nigeria, 1990 since his Lordship held that doing so would infringe on the substantive suit. The consequence of the foregoing is that ground One should be struck out, citing Ojoh vs. Amalu (2005) 18 NWLR (Pt.958) 523 at 551 paragraph "B-E".

Learned Counsel took objection to grounds 2, 3 and 6 together, contending that the issues raised in these grounds of appeal were never canvassed at the trial. That no evidence was proffered by the parties to support the applicability or otherwise of the principles for granting interlocutory or mandatory injunction at the Court below.

Counsel reproduced excerpts from the motion on notice from pages 57-82 of the printed record to show why these grounds were incompetent, citing Governor of Lagos state vs Ojukwu (1980) 1 NWLR (Pt.18) 621 and Attorney-General of Anambra State vs Okafor (1992) NWLR (Pt.224) at 428 paragraph "E-G". That these authorities indicate the principles upon which an interlocutory injunction is usually granted. counsel then submitted that the Court of Appeal should not sit on appeal over matters that were never canvassed at the trial Court, citing Oredoyin vs Arowolo (1989) 4 NWLR (pt.114) 172 at 192 paragraphs "E-G" Thus the submission of the learned Senior Advocate of Nigeria in the brief on these grounds was of no moment and should be discountenanced, citing Akapo vs Hakeem-Habeeb (1992) NWLR (Pt.247) 266 at 303-304 paragraph "H-A". Learned Counsel urged that this appeal should be struck out.

The learned senior Advocate of Nigeria representing the Appellant replied to the arguments in the Amended Appellant's Reply Brief by drawing attention to the provisions of Section 241(1) (f) (iii) of the Constitution of the Federal Republic of Nigeria, 1999 as authority that the appeal was brought as of right and could be argued on any grounds be they of law alone, mixed law and facts, or purely on facts, citing UBA Plc vs Coker (1996) 4 NWLR (Pt.441) 239 at 248 paragraphs"F-F";Inter-Bar construction co. Ltd vs Ike (1993) 7 NWLR (Pt.304) 151 at 166-167 paragraph "C-H"; Etobisi vs Onyeonwu (1939) 5 NWLR (Pt.120) 224 at 231-232 paragraphs "D-A" and Aqua Ltd vs Ondo State Sports Council (1988) 4 NWLR (Pt.91) 622 at 639-643 paragraphs "C-H".

Learned Senior Counsel referred to the reliefs in the motion paper to show there was no clearly defined prayer for mandatory or interlocutory injunction. Reference was made to Halsbury's Laws of England, 3rd edition, Vol. 21 page 343 paragraph 713 as to the meaning of injunction and Attorney-General of Anambra State vs Okafor supra at p.426-427 paragraphs "E-D" which required clarity when a party prays for mandatory injunction, citing Abubakar vs J.M.D.B. (1997) 10 NWLR (Pt. 524) 242 at 251-252 paragraphs "G-H". Counsel submitted that a party is bound by the prayers he seeks in the motion paper, citing Ayanboye vs Balogun (1990) 5 NWLR (Pt.151) 392 at 413 paragraphs "E-F". Counsel argued that whether the applicant sought interlocutory or mandatory injunction the issue of damages must be considered, citing Halsbury's Laws of England, 3rd edition, paragraph 758 page 362 and Orji vs Z.I.L (1992) 1 NWLR (Pt.216) 124. Order 33 rule 1 of the High Court of the Federal Capital Territory Abuja (Civil Procedure) Rules, 1991; The Supreme Court Practice, 1988 of England (The White Book) Vol.1 pgs.472-474 paragraphs 29/1/1-29/1/5 to 29/1/5 and the learned authors of Odgers On Civil Court Actions, 24th edition (1996) pages 90-97 were referred to as treating the equitable remedy of injunction under the general title of "Interlocutory Injunction." Counsel submitted that the principles enunciated in Governor of Lagos State vs Ojukwu (1986) 1 NWLR (Pt.18) 621 had no application to the facts of this appeal. That Exhibit "A" was issued on 28-06-1999 before the suit was filed on 01-7-1999. The exhibit should be given its plain and ordinary meaning, citing Ogbonna vs Imo State (1989) 5 NWLR (Pt.121) 312 at 325 paragraph "D-F". That the court below should not have held Exhibit "A" to be "a mere threat to declare the plaintiffs' redundant" on the premise that no list of names accompanied the document. Therefore, the act having been completed before filing of the suit the plaintiffs/Respondents were not entitled to the remedy of interlocutory injunction, citing commissioner of works Benue state v. Devcon Development consultants Ltd (1988) 3 NWLR (Pt.83) 407 at 421-423 paragraphs "F-D". Learned Senior Advocate urged this court to discountenance the argument by the learned counsel to the Respondent regarding ground one but to dismiss same as devoid of merit.

On grounds 2, 3 and 6 the Learned Senor Advocate of Nigeria submitted that they were neither argumentative, narrative or vague since the complaints relate to the errors committed by the learned trial Judge in the course of adjudication. Reference was made to Ipadeola vs Oshowale (1987) 3 NWLR (Pt.59) 18; Attorney-General Enugu State ve Arop Plc (1995) 6 NWLR (Pt.399) 90 at 123-124 paragraphs "H-F".

The learned Senior counsel argued that the formulation of a single issue for determination was in line with decided authorities, citing Ita vs Nyong (1994) 1 NWLR (Pt.318) 56 at 69-71; Ezebilo vs chinwuba (1997) 7 NWLR (Pt.511) 108 at 129 paragraph 66D-G" and Lafferi (Nig) Ltd & Anor vs Nal Merchant Bank Plc & ors (2002) 1 NWLR (Pt.748) 333 at 344-345 paragraphs "E-E". That the Respondents did not cross-appeal in Appeal No. CA/K/260/2003, neither did they file a Respondents' Notice under order 3 rule 14 of the court of Appeal Rules, 1981. Though consolidation of the two appeals was effected by this Court the Respondents cannot raise issues for determination not predicated on a ground of appeal filed by the appellants/defendants. Where they do, the issues will be struck out. Reference was made to CBN vs Amika (2000) 13 NWLR (pt.683) 21 at 31 paragraph "G-H". That the court has to pronounce on each of the appeals though consolidated, citing Sawuta vs Ngah (1998) 93 NWLR (Pt. 550) 39 at 49 paragraph "A-C" and Diab Nasr vs Complete Home Enterprises (Nig) Ltd (1977) 5 SC 1 at 11. Learned Senior counsel urged this Court to strike out the extraneous issues raised by the learned counsel to the Respondents/Plaintiffs and allow the appeal.

A preliminary objection should be raised which, if upheld, would render further proceedings before this Court or any other Court or tribunal for that matter impossible or unnecessary, example, where the objection is anchored on the jurisdiction of the Court to entertain the appeal. An objection to the jurisdiction of the court is a good example of a preliminary objection which, if upheld, will render it unnecessary to consider the appeal on merit. The appeal would be struck out.

A preliminary objection should also be taken where there is a point of law which, if decided in one way, is going to be decisive of the litigation or appeal. The court declines jurisdiction to entertain a cause or matter or an appeal where it is clear that the action or appeal will not succeed, or it is frivolous, and vexatious. See Everett vs Ribbands (1952) 1 All ER 823 at 827; Radstock Co-op vs Norton Radstock UDC (1968) 1 All ER 59 at 65 and Roberts vs charing cross etc (1900-1903) All E'R Rep.157.

However, preliminary objection should not be made if there are facts in dispute. See Nwajuebo vs Alabua (1974) 1 Alt NLR (Pt 2) 445; Nnama Lines Ltd vs Elder Dempster Agencies Ltd & ors (1966-1967) 10 ENLR 15 and Misini vs Balogun (1968) 1 All NLR 318.

In the course of arguing the competence of grounds 1, 2, 3 and 6 of the Amended Notice of Appeal, and reply by the learned senior Advocate of Nigeria, each counsel did not confine their arguments to the question of the competency of, or the jurisdiction of this court to adjudicate over the appeal.

They went into the merits and demerits of the substantive appeal which should not be the case. The competence of the grounds of appeal or the jurisdiction of the court has to be determined before the court considers the merit of the appeal. Without jurisdiction the Court cannot entertain this appeal and make valid orders. See Kalu vs odili (1992) 6 SCNJ (Pt.1) 76; Nyarkwo vs Akowuah 14 WACA 426 and Ede vs commissioner for works and Housing (1980) 1 PLR 318 at 326.

The parties are agreed that the substantive suit is still pending at the trial Court, Moreover, pleadings have not been filed and exchanged between the parties, I shall endeavour not to make comments that may prejudice the pending suit at the trial Court. To determine the question of the competency and a fortiori, the jurisdiction of this court, I hereby reproduce grounds 1, 2, 3 and 6 of the Amended Notice of Appeal filed on 29-08-2006. They run thus:

"GROUND ONE

The learned trial Judge erred in law when he delved into and determined issues or matters in the substantive suit when considering an interlocutory matter before him and thereby prejudged the merits of the substantive action.

PARTICULARS:

(i) The principal relief claimed by the Respondents in their Writ of Summons was for an injunction restraining the Appellant from declaring the Respondents redundant without following the due legal process for doing so.

(ii) The interlocutory injunction prayed for by the Respondents was for their reinstatement as employees of the appellant pending the determination of substantive suit.

(iii) The first 3 of the 5 questions for determination posed by the learned trial Judge in his Ruling upon which he made far-reaching findings and conclusions pre-empted and determined prejudicially the very issues or questions to be eventually determined by him in the substantive suit.

(iv) The trial Judge went to the extent of also making findings and conclusions that there was no valid declaration of redundancy because no list of those affected was prepared and published and thereby substantially prejudged the issues to be determined by him in the substantive suit.

GROUND TWO:

The learned trial Judge erred in law when he granted an order of interlocutory injunction in respect of an act which had already been completed or carried out and as a result there was no status quo to be maintained by such Court Order.

PARTICULARS:

The main order of interlocutory injunction sought by the Respondents was for their re-instatement as employees of the appellant pending the determination of the substantive suit thereby presupposing that they were not at the material time in the employment of the Appellant.

(ii) The Respondents sued as the employees of the appellant affected by the redundancy and the document exhibited by them as Exhibit "A" to their motion clearly and unambiguously disclosed that the act of redundancy had already taken place.

(iii)   The payment of terminal benefits to the employees which the court enjoined the appellant's employees to refund to it also signifies that the act of redundancy had already been complied.

(iv) In any event, all the foregoing, inter alia' amply show that the appellant had effectively repudiated the contract of employment and it was not open for the trial Court to impose the Respondents on the Appellant an unwilling master.

GROUND THREE:

That the learned trial Judge erred in law in granting the order of interlocutory injunction in the circumstances of this case when whatever damage the Respondents might have suffered from a refusal to grant the injunction could have been adequately compensated by an award of damages at the conclusion of the substantive case.

PARTICULARS:

(i) The relationship between the Appellant and the Respondents was that of a contractual relationship of master and servant at common law since the Respondents, employment did not enjoy any constitutional or statutory protection or flavour.

(ii) There was abundant affidavit evidence showing that the Appellant had sufficiently and effectively repudiated the contract of employment between her and the Respondents.

(iii) The Respondents has accepted payment of their  terminal benefits thereby signifying their acceptance of the redundancy or waiver of any subsisting rights under their contract of employment, with the Appellant.

(iv) In any event, where as in the instant case, damages will be adequate remedy and the defendant would be in a financial position to pay same, the interlocutory injunction should have been refused even if there were triable issues and even if the Respondents had a legal right which needed to be protected.

(v) The aforementioned payment of terminal benefits by the appellant to the Respondents is indicative of the financial ability by her to pay any damages which might eventually be awarded against her in the substantive suit.

GROUND SIX:

The learned trial Judge erred in law when he found and concluded in his Ruling as follows:

"It follows therefore that the Plaintiff/Applicants were not declared redundant before 2nd July, 1999 while their matter was filed on the 01-07-1999 and the Defendant/Respondents sewed on the same day. To declare them redundant during the pendency of the matter before a Court of law amounts to overreaching the plaintiff/Applicants by the Defendant/Respondent and thereby pre-empting the proper determination of the matter of which the Court is seized".

PARTICULARS:

(i) The instant suit was instituted after the redundancy had been effected by the Appellant and so was not effected during the Pendency of this suit.

(ii) At the time when the court processes filed in this suit were served on the Appellant the act of redundancy had been completed and there was no status quo to be restored by an order of interlocutory injunction.

(iii) The Appellant therefore did not overreach the Respondents and did not pre-empt the trial Court'."

I am of the humble view that these grounds of Appeal stem, emanate or are a direct attack on the entire ruling of the learned trial Judge' The ruling was based on conflicting affidavit evidence as to when Exhibit "A" of 28-06-1999 was effected, before or after 01-07-1999. Yet on the 30th day of May, 2001 the learned trial Judge ruled as follows at page 103 lines 19 to 56 and page 104 lines 1 -4 of the printed record:

"There are lots of arguments for and against the pending application but from the totality of the evidence and arguments placed before the court the following questions arise for determination:

1. whether there was a declaration of redundancy by the plaintiff/applicants and when?

2. whether the declaration of redundancy, if any was made, precedes the filing of this action.

3. whether the Plaintiffs/Applicants were affected by the declaration, if any, of redundancy.

4. Who are the plaintiffs to this action?

5. what orders are necessary and expedient, if any, in the circumstances?

The first question as to whether there was a declaration of redundancy is answered only by reference to Exhibit "A"  
attached to the motion on notice especially the words "those declared redundant". The question here is whether these words suffice as declaration of redundancy. I think it is not the tense of the sentence that make the declaration of redundancy a completed or merely threaten act of declaration but the content of the document alleged to amount to declaration of redundancy while the tense used that is past tense signifies a completed act, the absence of names of the workers declared redundant reduce Exhibit "A" to mere threat of declaration of redundancy. No worker can be said to have been declared redundant except when his name is specifically mentioned and his terminal benefits paid to him. Exhibit "A" which was issued on 28/06/1999 was therefore, at best a mere threat because the names of those declared redundant was not published' There is even no evidence that such list for workers declared redundant was prepared at all as at 28th of June, 1999 when the declaration was purportedly said to have been made. If there was any list at an it was the one for payment of June salaries und terminal benefits that the plaintiff/applicants said they collected on the 2nd and 3rd July, 1999. Not until that list was prepared and same communicated to the plaintiffs/applicants there was no declaration of redundancy. It follows therefore that the Plaintiff/Applicants were not declared redundant before 2nd of July, 1999 while their matter was filed on the 01-07-1999 and the defendant/respondent served on the same day. To declare, them redundant during the tendency of the matter before a court of law amounts to over reaching the Plaintiff/Applicants by the defendant and thereby preempting the proper determination of the matter which the Court is sized."

My humble view is that ground 1, 2, 3, and 6 are not argumentative, vague nor academic. They are not hypothetical but are borne out of genuine complaints against the ruling of the learned trial Judge. The grounds of appeal constitute a challenge to the learned trial Judges reasoning, findings and conclusions in an interlocutory application when the substantive suit is pending. See Egbe vs Adeforasin (1990) 3 SCNJ 41; Saraki vs Kotoye (1992) 11-12 SCNJ (Pt.1) 26 at 43. I find no merit in this preliminary objection which is dismissed.

The learned Senior Advocate formulated one issue for determination in respect of grounds 1, 2, 3 and 6 to wit:

"Whether or not the trial Court in granting the order of interlocutory injunction exercised its judicial discretion properly or acted on wrong principles."

Learned Counsel referred to Oduntan vs General Oil Ltd (1995) 4 NWLR (Pt. 387) 1 at 18 paragraph "A-D" and a host of other authorities already cited in the course of arguing the preliminary objection as showing that the learned trial Judge did not take into consideration the principles for granting interlocutory injunction hence a retrial should be ordered. Learned Senior Counsel referred to the multiple affidavits used in the Court below, namely, the affidavit in support of the motion (p. 58-60); Further affidavit in support of motion (p. 63-64). Further affidavit in Reply to Counter-affidavit (p. 65-67); and Further and Better affidavit in support of motion (No.3 - p.70) all to be found in the printed record relied upon by the plaintiffs/Respondents as against the Counter-affidavit (p.61-62) and Counter-affidavit (p.68-69) in the printed record, employed by the defendant/appellant. Nevertheless, the learned trial Judge made declarations on matters that should have been pleaded and proved at the trial.

The learned Senior Advocate of Nigeria argued that the relationship of the parties was contractual hence the plaintiffs/Respondents were not entitled to the remedy of interlocutory injunction nor re-instating them when there was clear evidence they had been declared redundant and paid their entitlements before the suit was instituted on 01-07-1999. The learned Senior Advocate contended that in the absence of evidence that the relationship of the plaintiffs/Respondents is governed by statute but was based purely on master and servant they were not entitled to the reliefs of interlocutory injunction, citing Ajayi vs Texaco Ltd. (1987) 3 NWLR (pt.62) s77 at page 404 paragraphs "C-F"; Lafferi (Nig) Ltd vs Nai Merchant Bank plc & ors (2002) 1 NWLR (Pt.748) 333 at p.349 paragraphs. F-G.

Learned Senior Counsel referred to Commissioner of Works Benue State & Anor vs Devcon, (1988) 3 NWLR (pt.83) 407 at 421-422 paragraphs "F-E" and John Holt Nigeria Ltd & Anor vs Holts African Workers Union of Nigeria and Cameroon (1963) 2 SCNLR 383 as authorities that no interlocutory injunction is to be granted a party after the act has been completed. Besides, the balance of convenience should be taken into consideration. If damages would be adequate, the remedy should not be granted. Other authorities cited were Hon. Justice T.A.A. Ayorinde vs Attorney-General, Commissioner for Justice oyo State & Ors (1996) 3 NWLR (Pt.434) 20 at 35 paragraph '68"' Ajewole vs Adetimo (1996) 2 NWLR (Pt.43) 391 at 400-401 paragraphs "H-K" relied on Shell Petroleum Development Company Ltd vs Lawson-Jack (1998) 4 NWLR (Pt.545) 249; Iwuchukwu vs Nwizu (1994) 7 NWLR (Pt.357) 379 at p.411 paragraphs "F-G"; orji vs Zaria Industries Ltd (1998) 1 NWLR (Pt.2l6) 124; Agoma vs Guinness (Nig) Ltd (1995) 2 NWLR (pt.380) 672 and New Nigeria Bank Plc vs Udobi (2001) 14 NWLR (Pt.732) 1 at 10 paragraphs "E-F". That if the plaintiffs/Respondents should succeed at the trial, they are only entitled to damages. Learned Senior Advocate urged that this appeal be allowed and a retrial ordered before another Judge.

The Respondents/plaintiffs' learned Counsel adopted the sole issue formulated by the Senior Advocate of Nigeria in his Appellant's Amended Brief of Argument. Counsel submitted that the learned Senior Advocate did not point out the orders the learned trial Judge made in the ruling which decided the substantive suit. Counsel referred to the reliefs granted by the learned trial Judge as not different from what was claimed in the substantive suit. But Counsel did not contest that the learned trial Judge relied on the affidavit evidence to resolve the matters in controversy, citing Nwosu vs Imo State Environmental sanitation Board (1990) NWLR (pt.135) 178 paragraphs "D-F" as authority that controversial issues can be resolved on affidavit using documentary exhibits. That his Lordship had before him Exhibits "A" "B"  and "C" which he used to resolve the conflicts. Learned Counsel contended that the submissions of the learned Senior Advocate of Nigeria were not borne out of the record, citing Ibikunle vs The State (2007) 2 NWLR (Pt.1019) 546 atp.572 paragraph "A-B" and Agagairaga vs FRN (2004) 2 NWLR (Pt.1019) 586 at 599 paragraphs "E-G". That a careful examination of Exhibit "A" of 28-06-1999 does not show on its face that the Respondents/plaintiffs had been declared redundant. He referred to the contents of Exhibit "A" to show that no where was any worker declared redundant without an accompanying list as held by the learned trial Judge.

Furthermore, there was no challenge by way of appeal against the finding, citing Ekpuk Vokan (2002) 5 NWLR (pt.760) 445 at p.478 paragraphs "A-C"; Ibikunle vs State (2007) 2 NWLR (pt.1019) 546 at p.567 paragraphs "E-H".  
Amachi vs commissioner for Education Imo state (2000) NWLR (Pt-717) 17 at 26 paragraphs "F-H" was cited by learned counsel as authority that even if the plaintiffs/Respondents were declared redundant by Exhibit "A" of 28-06-1999 that was not communicated to them by the time they set in motion the law suit against the appellant/defendant on 01-07-1999. That once the appellant/defendant received notices of the pendency of the suit they should not have taken the law into their hands by giving effect to the circular in question. Counsel referred to the contents of Exhibit "A"  which he argued were speculative and not reliable for forming an award, citing Archibong vs Ita (2004) 2 NWLR (pr.858) 590 at 624-625 paragraphs "H-A". That is why the learned trial Judge held that at the time these Exhibits were written the Respondents/plaintiffs had not been declared redundant. Counsel cited Utteh vs The State (1992) 2 SCNJ 193 at 196-197 and Vaswani vs Johnson (2000) 11 NWLR (Pt.G79) 582 at 103.

Learned Counsel further argued that the appellant/defendant did not honour Counsel's letters - Exhibits "B" and "C" or refrain from effecting Exhibit "A" during the pendency of the law suit, citing Shaibu vs Mnazu (2007) 7 NWLR (Pt.1033) 271; Ndayaku vs Dantoro (2004) 13 NWLR (Pt.889) 187 at 214 paragraphs "G-H".

Learned Counsel repeated his argument in Appeal No. CA/K/250/2003 under consideration on the issue of the Writ of summons when the matter was before Inyang J., hence I shall refrain from commenting on it till I consider Appeal No. CA/K/250/2003. The same applies to the issue of whether the plaintiffs/Respondents took their terminal benefits on or about 2nd and 3rd July, 1999. See paragraphs 6.63-6.101 of the Further Amended Respondent's Brief of Argument of 08-10-2007.

It was further argued that whether the relationship between the plaintiffs/Respondents was contractual was a debatable piece of evidence supplied by the learned Senior Advocate not raised before the learned trial Judge. That no such evidence was ever given in the lower Court. The result was that fresh issues were being raised for the first, time on appeal without leave of this Court. Besides, this Court should not decide a matter that should be resolved in the substantive suit.

Learned Counsel referred to the meaning of "redundancy" and the effect on workers and cited P.A.N. vs Ojeh (1997) 1 NWLR (pr.530) 625 at 635 paragraphs "A-B". That there should be rule of law in that the defendant/appellant should not have effected Exhibit '64" during the pendency of this suit, citing Amadi vs Commissioner for Education Imo State (2000) NWLR (Pt.717) 178 at 27 paragraph "E" and Mobil Oil (Nig) Ltd vs Assan (1999) 8 NWLR (Pt.412) 129 at 141 paragraphs "E-G".

For the learned trial Judge to have refused the application was tantamount to sanctioning the contemptuous conduct of the defendant/appellant, argued learned Counsel to the Respondents/plaintiffs.

The plaintiffs/respondents therefore had legal rights to be protected by the trial Judge pending the determination of the substantive suit. It was then argued that in the absence of the audited accounts of the defendant/appellant, there was no evidence of her wealth to be able to determine if she could pay damages, citing Livestock Feeds Plc vs Igbino Farms Ltd (2002) 5 MNWLR (Pt.759) 118 at p.130 paragraph "A". ACB vs Dominic's Builders Co. Ltd (1992) 2 NWLR (pt.223) 296 at 304; Guinness plc vs Monarch Holdings Ltd (1996) 3 NWLR (pt.436) 36s at 371. However, if the defendant/appellant can pay damages they should not be allowed to insult the Court by committing illegality, citing Odutan vs General Oil Ltd (1995) 4 NWLR (Pt.387) 1 at 13 paragraph. "E" and Akapo vs Hekeem-Habeeb (1992) 4 NWLR (Pt.247) 266 at p.304 paragraph "A". Learned Counsel contended that the learned trial Judge was right to have ruled in favour of the plaintiffs/Respondents, citing F.A.T.B vs Ezegbu (1993) 6 NWLR (Pt.297) at p.25 paragraphs "c-E". counsel urged the dismissal of this appeal.

The Courts have advised time without number that when considering interlocutory applications relating to injunctive reliefs care should be taken not to comment on issues that are to be determined in the substantive suit. See Motune vs Gambo (1993) NCLR 273 at 242; Iweka vs SCOA (2000) 3 SC 21/24-25: University Press Ltd vs I.K Martins Ltd (2000) FWLR 722 at 732.

The learned authors of Black's Law Dictionary, 8th edition, p.832 define the word "interlocutory" as "(of an order, judgment, appeal, etc) interim or temporary, not constituting a final resolution of the whole controversy." Since the substantive suit was still pending, in my humble view, his Lordship at the trial Court should have refrained from determining the five questions he posed and answered in the ruling which I have already reproduced.

The suit commenced by a Writ of Summons without pleadings. His Lordship decided the merits of the suit by interpreting Exhibit "A" in an interlocutory application, a procedure unknown to law, thereby arriving at the decision that it was a mere threat of declaration of redundancy since no list of the workers accompanied the exhibit. But where is the evidence that whenever a declaration of redundancy is made it must be accompanied with a list of the workers to be affected? I see none.

The law is that in a situation like this it is the express terms in the contract document governing the relationship of the parties that should be construed to determine the rights of the parties. See Ihezukwu vs University of Jos (1990) 7 SCNJ 95. In Mandilas & Karaberis Ltd vs Otikiti (1963) 1 All NLR 22 Bairamian F.J., held at p.26 that:

"...When a contract is reduced into writing, the writing gives the terms agreed upon."

Moreover, if the learned trial Judge construed the contents of Exhibit "A" at this stage by making far-reaching findings and conclusions, what will he determine when the substantive suit is heard after pleadings are filed and exchanged? I am of the humble view there will be no use proceeding with the substantive suit.

Having interpreted Exhibit "A" in the interlocutory application his Lordship came to the following conclusions at page 104 lines 7-49 of the printed record as follows:

"...The defendant/respondent had no right to take the matter into their own hands when the Court is seized of it i.e. after filing and serving the respondent with the writ of summons and notice of motion on 01-07-1999.

There is no doubt that the plaintiff filed this matter in a representative action, the names of persons presented in the suit must be disclosed. No one can be a party to proceedings before a Court except if he is disclosed as such. There is no room for hiding behind the mask in litigation so that if the end result is good and fruitful an undeterminable and unidentified persons will freely join the victorious group to share in the enjoyment of the success, but when the outcome is bitter these unidentifiable persons will choose to hide behind their masks so that they are not affected by the outcome. A list of those represented must be disclosed and filed before the Court so as to make it clear which persons or parties are being represented.

In this case only six plaintiff/applicants were disclosed as follows:

1. Okwara Agwu

2. Innocent Obinna

3. Charles Onumara

4. Oparaocha Viz Garba

5. Obiakor Edwin

6. Ekeh Spear

These are the only known plaintiff/applicants and the class action therefore is for and or behalf of these six persons only.

There is no room for any unknown and unidentifiable party to come in as a party.

In the circumstances therefore, the declaration of redundancy against these plaintiff/applicants which was made on the 2nd and 3rd July, 1999 after the filing of this action on the 01-07-1999 amounts to the Respondents taking into their hands a matter which is subjudice.

They are therefore deemed to be in service of the defendant/respondent Julius Berger Plc until the final determination of the substantive suit. The application therefore succeeds on this ground and the Respondent is to afford the Applicants all rights, duties, responsibilities and privileges of their offices to which they are entitled or responsible prior to the commencement of this suit. The plaintiffs/applicants shall, if they collected any terminal benefit refund same forth with to the respondent und let the status quo ante bellum be maintained pending the determination of the substantive suit.

The balance of convenience and interest of justice are accordingly granted and the objection overruled."

After pleadings have been ordered, filed and exchanged and evidence is adduced would the learned trial Judge depart from his ruling if evidence show that his findings and conclusions were erroneous in law or would his hands be tied? See Lawal vs Dawodu (1972) 8-9 SC 83 at 107; Nnajiofor vs Ukonu (1935) 2 NWLR (Pt.9) 686 and Amos vs shell BP (1974) 4 U.I.L.R (pt.3) 345 at 347. It is to forestall this kind of situations that the Superior Courts of record have warned trial Courts not to delve into controversial issues to be determined by evidence at the trial. They should not employ interlocutory applications to determine substantive matters by their rulings without evidence. In most cases such findings and conclusions arrived at during interlocutory proceedings prejudice the substantive trial giving the other party the notion that the learned trial Judge had already made up his mind or taken sides with the opponent. No confidence is then reposed in the learned trial Judge no matter how well the trial was conducted.

Moreover, the issue was whether Exhibit "A" of 28-06-1999 was effected during the pendency of the suit filed on 01-07-1999 or not. This was a contentious dispute that could only be resolved by oral evidence. The issue could not have been resolved by conflicting affidavit evidence. In Falobi vs Falobi (1969) 1 NMLR 169 Fatay-Williams JSC held at page 169 that:

"We have pointed out on numerous occasions that when a Court is faced with affidavits which are irreconcilably in conflict, the Judge hearing the case, in order to resolve the conflict properly, should first hear oral evidence from the deponents or such other witnesses as the parties may be advised to call. It does not matter whether none of the parties asked to be allowed to cross-examine any of the deponents or to call any witness. Such omission by the parties should not be taken to amount to consent that affidavit evidence should be used in such circumstances. (See Akinsete vs Akindutere (1966) 1 All NLR 147 at p.118; Eboh & Ors vs Oki & Ors (1974) 1 SC 179 at pp.189-190; Olu-Ibukun & Anor vs Olu-Ibukun (1974) 2 SC 41, 48; and Uku & Ors vs Okumagba & Three Ors (1974) 3 SC 35, 56, 64-65).

Since the decision of both the High Court and the former Western State Court of Appeal were based on these conflicting affidavits, we do not think they should be allowed to stand. The appeal is reluctantly allowed. It is accordingly ordered that the ruling of the High Court in Suit No. M/49/71 delivered on March 14, 1973, and the decision of the Western State Court of Appeal in Appeal No. CAW22/74delivered on November 14, 1974, confirming the said ruling, including all orders as to costs in both decisions, be and are hereby set aside. It is further ordered that the application of Elizabeth O. Falobi (the plaintiff/respondent) be reheard by another Judge''.

The suit was commenced not by originating summons but by Writ of summons. Therefore the substantive issues in dispute were to be tried not by affidavit evidence but by pleadings supported by oral and documentary evidence. The case of Nwosu vs Imo State Environmental Sanitation Board (1990) NWLR (Pt.135) 688 cited by learned counsel to the Respondents/Plaintiffs was commenced by Writ of Summons. After exchange of pleadings the defendants brought an application supported by affidavits and documentary exhibits that the learned trial Judge should strike out the suit for want of jurisdiction. The learned trial Judge considered the affidavits and documentary exhibits before striking out the suit on grounds of lack of jurisdiction. The Plaintiffs' appeal to the Court of Appeal, Enugu Division was dismissed. The matter came to the Supreme Court. The argument was whether without hearing evidence Decree No.17 of 1984 could be invoked to prove that the appellant had been dismissed from the service of the Respondent/Defendant notwithstanding the copious conflicting affidavits and documentary exhibits put forward by the parties.

Nnaemeka-Agu JSC held at page 718 paragraphs "C-G" as follows :

"Evidence by affidavit is, it must be noted, a form of evidence.

It is entitled to be given weight where there is no conflict, after the conflict has been resolved from appropriate oral or documentary evidence. For, true, it is the law that where there is a conflict of affidavit evidence called by both sides, it is necessary to call oral evidence to resolve the conflict. See Falobi vs Falobi (1976) 9 & 10 SC 1, p.15; Akinsete vs Akinduture (1966)1 All NLR 147.

But I believe that it is not only by calling oral evidence that such a conflict could be resolved. There may be authentic documentary evidence which supports one of the affidavits in conflict with another. In a trial by affidavit evidence such as this, that document is capable of tilting the balance in favour of the affidavit which agrees with it. After all, even if oral testimony had been called, such a documentary evidence would be a yardstick with which to assess oral testimony: See Fushanu vs Adekoya (1974) 1 All NLR 35, at p.48. In the instant appeal,for an example, I feel entitled to resolve the conflict as to whether or not the appellant was dismissed by or at the direction of the Military Governor of Imo State, a conflict that arose from paragraphs 6, 9, 10, 11, and 12 of the respondents' affidavit in support of the motion, on the one hand, and paragraphs 2, 3, and 9 of the appellant's counter-affidavit, on the other. In view of this, it may not be quite correct to say that I am limiting myself only to such facts in the affidavits which are not in conflict. By the above approach I shall be able to examine the issue of jurisdiction judicially and determine it one way or the other, according to Order 40 rule 2 und the rules of evidence. It was therefore in error for learned Counsel for the appellant in this case to argue that the issue of jurisdiction was not tried".

Thus where there is conflict in the affidavit evidence, oral evidence should be called but if there are documents that can be used to resolve the conflicts, oral evidence may not be called.

Therefore, the case cited by learned Counsel to the Respondents/plaintiffs is not applicable to the facts before Court.

Since the substantive suit is still pending I also refrain from commenting on the controversial issues raised by the appellant/defendant's SAN and Respondents/plaintiffs' learned Counsel so as not to tie the hands of the learned Judge who shall eventually retry this case. I consider this an interlocutory appeal pending the determination of the substantive suit in the lower Court. However, his Lordship went beyond the reliefs sought on the motion paper thereby becoming a Father Christmas contrary to the admonition that a party is only entitled to the reliefs he seeks and proves. See Ekpenyong vs. Nyong (1975) 2 SC 71 at 80; Ochionma vs Unosi (1965) NMLR 321 at 323; Onibudo vs Akibu (1932) 7 SC 60 and Atolagbe vs Shorun (1935) 4 SC 250 at 256.

The errors committed by his Lordship are enough to allow this appeal and order a retrial by another judge.

APPEAL NO. CA/K/250/2003

Having allowed the appeal in Appeal No.CA/K/260/2003 I shall now consider Appeal No. CA/K/250/2003.

The Amended Appellants' Notice of Appeal filed on 22-03-2010 contained ten grounds praying for the following reliefs:

"(a) An order setting aside the part of the decision of Husseni Muktar J., delivered on the 30th of May, 2001 as specifically shown in the grounds of appeal as stated in paragraph 3 of this Notice of Appeal.

(b) An order compelling the defendant/Respondent to also reinstate all the unnamed plaintiff/appellants and deem them to have been due employees of the defendant/Respondent as ordered by the learned trial Court Judge in respect of the named plaintiff.

(c) An order compelling the respondent to pay the cost of prosecuting this appeal to the plaintiff/appellants."

"1. Whether the learned trial Court Judge's decision to limit the parties in this suit to only the six persons named on the Appellants' Writ of Summons and not to all those represented by the six named Plaintiff/Appellants is valid in law. See Ground 1-7 of the Notice of Appeal.

2. Whether the learned trial Judge was correct in law to have ordered the plaintiff/Appellants to refund terminal benefits to the Respondent when His Lordship neither found that the Appellants took terminal benefits nor did the Respondent made such prayer and again when there is an implied agreement between the parties that whatever the Respondent pays the Appellants in view of Exhibit "C" in this appeal shall be deemed to be the June salaries of the Appellants. See Ground No.8, 9 and 10 of the Notice of Appeal."

ISSUE ONE:

Learned Counsel identified two issues for determination as follows:

Learned Counsel to the appellants/plaintiffs' submission on issue one is that the learned trial Judge erred to have limited the reliefs claimed to only the named plaintiffs on the writ thereby altering the ruling of U.A. Inyang J., delivered on 04-10 -1999 granting leave to the named plaintiffs to prosecute the claims on behalf of unnamed plaintiffs' Counsel argued that Hon' Husseni Muktar J., lacked the jurisdiction to have reviewed the ruling of Inyang J., in the manner he did, citing Nnaji vs Ede (1990 8 NWLR (Pt.466) 332 at 342 paragraphs "B-E''; Nigeria Ports Authority superannuation Fund & Ors vs Fasel services Ltd & ors (2001) 17 NWLR (Pt.742) 261 at 291 paragraphs "C-D''; Nnajiofor vs Ukonu (1985) 2 NWLR (Pt.9) 686 at 706 paragraph "G"; That there was no dispute as to the issue of representation. The learned trial Judge erred to have held that the suit was only for the benefit of the named plaintiffs/appellants, citing Otapo vs Sunmumu & ors (1937) 7 SCNJ 57 at 95.

Counsel cited the English cases of Adair vs New River Co. (1805) 11 ves.321; Cook Burn vs Thompson (1809) 16 Ves.321; Beeching vs Lloyd (1355) 3 Drew 227: order 11 rule 8 of the High court of the Federal capital Territory, Abuja (civil Procedure) Rules 1990; Mozu vs Mbamalu (2006) 15 NWLR (Pt.1003) 466 at 497-498 paragraphs "F-H"; Lediju vs odulaya 17 NLR 15 and Oke vs Gonsallo 4 NLR 111.

Counsel contended that representative proceedings ale for convenience which requires a flexible and broad approach by Courts such that even when it is not expressly so stated, where there is evidence showing that the action is prosecuted in a representative capactty, the Court enters judgment in that capacity, citing Re vs Adeosun (2001) 8 NWLR (Pt.714) 200 at 221 paragraph "E"; Folabi vs Adekunle (1983) 2 SCNLR 141 at 149 and 154. Counsel further argued that those not named on the writ are unnamed plaintiffs and they could be legion, citing Okonji v. Njokanma (1989) 4 NWLR (Pt.114) 161 at 166-167 paragraph "G-A"; Atanda v. olanrewaji (1988) 4 NWLR (Pt.89) 39a Okafor vs Nwude (2001) 3 WLR 106 at 121 and Akanbi u. vs Durosaro (1998) 12 NWLR (Pt.577) 284 pt 291 paragraphs ..A.8. Thus the unnamed parties cannot be debarred by the learned trial judge without a hearing, citing Ogundoyin vs Adeyemi (2001) 13 NWLR (Pt.730) 403 at 421 paragraphs "F-G".

ISSUE TWO:

Counsel's grievance under issue two is whether the learned trial Judge was right to have ordered any terminal benefits paid the plaintiffs/Appellants to be refunded when no such relief was claimed nor was it proved that the same had been paid to the plaintiffs/appellants, citing Adeleke vs Iyande (2001) 13 NWLR (Pt.729) 1 at 20 paragraph "B-E"; Menakaya vs Menakaya (2001) 16 NWLR (Pt.738) 203 at 253 paragraphs "A-B"' That none of the parties asked for such orders, citing Akeem vs University of Ibadan (2001) 15 NWLR (Pt.73 6) 352 at 372 to the effect that the learned trial Judge lacked the jurisdiction to make gratuitous awards to parties. Moreover, the order to refund the alleged terminal benefits if collected was imprecise and incapable of enforcement especially as the learned Counsel had forewarned the defendant/Respondent through Exhibit "B" and "C?' which were not replied.

The trial Judge made a case for the Respondent/Defendant. Counsel cited Enigwe vs Akaigwe (1992) 2 NWLR (Pt.225) 505 at 531 as authority that the learned trial Judge should not have descended into the arena of the battle else his vision be obscured by the smoke emanating from the conflict.

Reference was further made to sodipo vs Lemminkainen OY & Anor (1986) All NLR (Pt.11) 67 at 78 and Hon. Justice Ademola vs Sodipo (1992) 7 SCNJ 446 for that argument Agbai & Ors vs Okogbu (1991) 6 LRCN 1748 at 1787. That since Exhibits "B" and "C" had not been replied, the defendant/Respondent had consented that the terminal payments received on 2nd and 3rd July, 1999 by the plaintiffs/appellants be regarded as their June, 1999 salaries, citing Utteh vs The State (1992) 2 SCNJ 183 at 196-197 and Vasmani vs Johnson (2000) 1 NWLR (Pt.677) 582 at 589; Gwani vs Ebule (1990) 5 NWLR (Pt.149) 201; Johnson Triangle Ltd vs C.M & Partners Ltd (1999) 1 NWLR (Pt.588) 555 at 570 paragraph "G" Sea View Investments Ltd vs Munis (1991) 6 NWLR (Pt. 195) 67 at 88 paragraph "C"; Agbai vs Okogbu (1991) 6 LRCN 1748 at 1787; Bakare vs Lagos State Civil Service Commission (1992) 10 SCNJ 173 at 229.

Learned Counsel contended that the order made by the learned trial Judge concerning the refund of the terminal benefits was speculative, citing Olalekan vs Wema Bank Plc (2006) 13 NWLR (Pt.998) 617 at 625-626 paragraphs "G-E". The case of Joe Iga & Ors vs Ezekiel Amakiri & Ors (1976) 11 SC 1 at 12-13 was cited as showing there was irrebutable evidence before the trial Court that the parties had agreed that nothing but the June Salaries should be paid as the suit was pending in Court. Counsel prayed that the appeal should be allowed.

Learned Senior Advocate of Nigeria responded by reliance on the Further Amended Respondent's Brief of Argument of 29-08-2006 deemed filed by the order of this Court on 02-11-2006 wherein Counsel raised a preliminary objection to the hearing of this appeal at page 5 paragraph 3.1 of the Brief as follows:

"3.1 Without prejudice to the formal Notice to be filed by Respondent before the hearing of this appeal as required by the Court of Appeal Rules, the Respondent hereby also gives NOTICE OF PRELIMINARY OBJECTION to the very jurisdiction and competence of the Court of Appeal to entertain this appeal on the following ground:

"That since the decision of the trial High Court was given in favour of the Appellants who were granted all the interlocutory reliefs they applied for, the Court of Appeal lacks jurisdiction to entertain this appeal which is against THE WHOLE DECISION of the Court below in respect of which the Appellants are not in anyway aggrieved and consequently there is no actual controversy or existing lis inter partes for the Court of Appeal to determine as a live issue and therefore the Court is only being invited to indulge in a purely academic or moot exercise which is outside it constitutionally endowed function."

The Senior Advocate of Nigeria drew this Court's attention to all the reliefs sought by the appellants/plaintiffs. That they were granted and learned Counsel expressed gratitude to the learned Judge hence the appellants/plaintiffs could not be grieved as to file this appeal; there is thus no live issue before the Appeal Court for determination. For this Court to exercise judicial powers there must exist an actual controversy, a live issue or a lis inter partes requiring resolution by the Court. The Court should not adjudicate on academic issues, citing Ogbonna & 50 Ors vs The President, Federal Republic of Nigeria & 14 Ors (1994) 5 NWLR (Pt.504) 281 at 287 paragraph "F-G"; Ashafa Foods Factory Ltd vs Alraine Nig. Ltd (2002) 12 NWLR (Pt.781) 353 at 368-369 paragraphs "B-C"; Badejo vs Federal Minister of Education & Ors (1996) 8 NWLR (Pt. 464) 15 at 50 paragraph "B-E"; LPDC vs Gani Fawehinmi (1985) 2 NWLR (Pt.7) 300 at 364 paragraphs "E-F". This Court was urged upon to decline jurisdiction.

Learned SAN further submitted in the alternative that should this Court become charitable, the hearing of the appeal should be restricted to the 3rd issue formulated at page 3 of the Appellants' Brief of Argument covering grounds 4, 5, 6, and 7 in the Notice of Appeal filed on 08-02-2002. consequently, issues 1, 2, 3, 4, 5 and 6 and grounds 1, 2, 3, 8-14 should be struck out and the aspect of the appeal relating to them dismissed.

The third preliminary objection relates to the competence of grounds 1, 2, 3, 8, 9, 10, 11, 12, 13, and 14 of the Grounds of Appeal. Learned SAN referred to Order 3 rules 3 and 4 of the Court of Appeal Rules, 1981 (as amended) to show that the Notice of Appeal did not set forth concisely and under distinct heads the grounds upon which the appellants intended to rely at the hearing of the appeal. That they are argumentative or narrative not numbered consecutively. That no ground shall be vague or appear general in terms or disclose no reasonable ground of appeal. The Court was urged to strikeout these grounds of appeal. It was then submitted that any issue relating to these grounds should also be struck out.

The learned SAN again drew the attention of the court to issue 6 which is not related to any of the 14 grounds of appeal. Learned SAN argued that the appellants did not canvass ground one in any of the six issues formulated in the brief of argument and this should be deemed abandoned, citing Tukur vs Government of Taraba State (1997) 6 NWLR (Pt.510) 549 at p.569 paragraph "B" and Odutola vs Kayode (1994) 2 NWLR (Pt.324) 1 at 20 paragraphs "E-H".

In regard to the main appeal the learned SAN submitted that in view of the fact that the applicants were granted all the reliefs they sought by the learned trial Judge there was no substantial miscarriage of justice to warrant the sustenance of these grounds of appeal. That what the appellants were complaining about was the reasoning of the learned trial Judge in arriving at his ultimate decision. Mere passing remarks by the learned trial Judge which do not affect the real issues in controversy between the parties are usually not appealable and should be ignored, citing Boothia Maritime Inc & Or vs Far East Mercantile co. Ltd (2001) 4 SCNJ 178 and Bello vs Aruwa (1999) 8 NWLR (Pt.615) 454 at 468 paragraphs "D-H". That not every error by the Court below will result into the judgment being disturbed if it did not lead to a miscarriage of justice. Senior Counsel referred to Odunsi vs Bamgbala (1995) 1 NWLR (Pt.374) 641 at 656 paragraphs "F-G"; Spasco Vehicle & plant Hire Co. vs Alranie (Nig) Ltd (1995) 8 NWLR (Pt.416) 655 at 675 paragraphs "B-D" and chinabee Abayol v. Iorkighir Ahemba (1999) 10 NWLR (pt.623) 351 and 397 paragraphs "E-F".

Learned SAN further argued that once the Court has no jurisdiction she cannot hear the appeal, citing Madukolu & ors vs Nkemdilim (1962) 2 SCNLR 341 at 348 and Western Steel Works Ltd vs Iron & Steel Workers Union (1986) 3 NWLR (Pt.30) 617 at 625. Counsel drew this Court's attention to the fact that the learned Counsel to the appellants/plaintiffs had formulated grounds and issues touching matters in controversy in the substantive suit. The learned trial Judge also fell into the same grievous error of adjudicating at the interlocutory stage on the merits of the very live issues which should have been pleaded, ventilated or articulated at the trial of the action. This was contrary to University Press Ltd vs I.K Martins Nig. Ltd (2000) 4 NWLR (pt.654) 584 at 395 paragraphs "E-F" and Societe Generale Bank (Nig) Ltd vs Buraimoh (1991) 1 NWLR (Pt.168) 428 at 436 paragraphs "C-H" and page 437 paragraphs "G-H". The learned SAN contended that the learned trial Judge should not at the stage of the interlocutory application have embarked on the interpretation of the Labour Act and its bearing on the affidavit evidence before him. Neither should he make an ultimate order re-instating the plaintiffs/appellants thereby imposing him on the Respondent/defendant when their relationship was governed by ordinary contract, namely, master and servant.

That the learned trial Judge ought not to have ordered the appellants to refund payments of Terminal benefits paid to the appellants/plaintiffs, citing Pretrojessica Enterprises Ltd & ors vs Leventis Technical co. Ltd (1992) 5 NWLR (Pt. 244) 675 as authority that this Court can suo motu raise these issues on appeal since they affected the jurisdiction of the learned trial Judge to grant relief to the appellants/plaintiffs. Counsel referred to grounds 11, 12, 13 and 14 in the Notice of Appeal and issue 6 derived therefrom as quite extraneous to the ruling of the trial court; they are academic, hypothetical, a product of learned Counsel's ingenuity or imagination, citing Saraki vs Kotoye (1992) 9 NWLR (pt. 264) 156 at 185 paragraph "B". The learned Senior Advocate referred to Madueke vs Madueke (2000) 5 NWLR (Pt. 655) 130 at 135 where Ogebe JCA (as he then was) deprecated a situation where an appellant would proliferate many grounds of appeals and issues for determination from a relatively simple ruling of a trial Court.

This was more so, when the grounds did not arise from the decision of the trial court. counsel cited stirling civil Engineering Nig Ltd vs yahaya (2002) 2 NWLR (Pt.750) 1 at 15 paragraph "B" and p.16 paragraphs "E-F"; Ofosu vs Osolu (1998) 1 NWLR (pt. 535) 532 at 552-553 paragraphs "H-A" and Ishola vs Ajiboye (199s) 1 NWLR (pt. 532) 71 at 79 paragraphs "F-G".

Learned SAN urged that these grounds of appeal and issues related thereto should be struckout. That no leave was sought and obtained to raise these fresh or new issues. Reference was made to Popoolu vs Adeyemo (1992) 8 NWLR (Pt. 257) 1 at 22 paragraphs "C-D" and Bello vs Aruwa (1999) 8 NWLR (Pt. 615) 454 at 468-469 paragraphs "D-B". Senior Counsel argued that the success of the preliminary objection will have the effect of the whole appeal being dismissed for lack of merit or for incompetence.

The learned SAN drew this Court's attention in his brief to the fact that though the appeals were consolidated appellants Counsel cannot be seen to argue at variance with his submissions in Appeal No.CA/K/260/2003 hence he did not formulate any issues for determination in this appeal. Counsel argued that the only aspect of the decision of the learned trial Judge that went against the appellants/plaintiffs was the issue of suo motu striking out the unnamed plaintiffs at the interlocutory stage of the proceedings without affording the parties' a hearing. Senior Counsel referred to this as "one of the monumental vices afflicting the entire Ruling of the Court below". But the Senior Advocate of Nigeria was not desirous of making an issue out of the matter at this stage as any such controversy should be tackled in the substantive suit after pleadings shall have been settled at the trial.

The learned SAN then concluded his submission as follows:

"Consequently, with this mutual and corresponding manifestation of dissatisfaction by both parties with the Ruling, of the Court below, we humbly implore this Honourable Court to set aside the entire Ruling of the learned trial High Court Judge."

The above submission prompted the learned Counsel to the appellants/plaintiffs to file an "Amended Appellants' Reply Brief" on 22-03-2010. Counsel submitted that the Amended Appellants' Notice of Appeal filed on 22-03-2010 made it clear that the appellants/plaintiffs were appealing only as regards part of the decision of the trial Judge. In the consideration of the appeal the appellate Court is circumscribed by the issues formulated from the grounds of appeal and not whether the appellants stated in the Notice of Appeal that it is the whole or part of the ruling that was being challenged.

Learned Counsel argued that appellate Courts are only bound by the grounds of appeal read together with the issues formulated there from, citing Pamole vs Akinfele (2006) 15 NWLR (Pt.1002) 375 at 383 paragraphs "E-G"; Abdul-Raheem vs Oloruntoba-Oju (2006) 15 NWLR (Pt.1003) 581 at 610-611 paragraphs "E-A"; Apatira vs L.T.L.G.C. (2006) 17 NWLR (pt.1007) 46 at 60 paragraphs "F-H". Counsel contended that it is usual for lawyers to be polite by saying "thank you" to a Judge who has laboured to hear, write and deliver judgment. But that should not be a factor for debarring one from pursuing an appeal in a court of Appeal. Counsel submitted that the appeal raised fundamental issues that are of practical benefit to the appellants/plaintiffs if the issues are determined in their favour. Thus the appeal is not academic, hypothetical nor moot. That even the SAN pointed at some flaws in the ruling of the learned trial Judge. These issues prompted the appellants/plaintiffs to appeal. Counsel pointed out the areas they had grievances which led to this appeal, example, the decision that the appellants should refund what they regarded as their June, 1999 salaries when there was no prayers by any of the parties to that effect' This was a fit and proper issue for determination by the Appeal Court.

Counsel next argued that since the learned SAN had pointed to the monumental vice afflicting the ruling of the learned trial Judge was enough to appeal to this Court on the ground that the decision was hostile to the appellants/plaintiffs. Counsel urged that the preliminary objection be struckout, citing Okoro vs Egbuoh (2006) 15 NWLR (Pt.1001) 21.  

Learned Counsel contended that only the aspect of the ruling of the learned trial Judge appealed against should be set aside and not the entire appeal. The common practice is for learned counsel to sit in court and listen as the learned trial judge pronounces judgment or reads a ruling. Whether the decision is favourable or not, most counsel with cherished etiquette or manners rise and say "thank you my Lord for a well researched judgment." counsel then bows, picks his wig, gown and books, if any, and walks out of the court room. The next day or soon after counsel prepares a Notice of Appeal against the ruling or judgment. The first ground in most cases is "The decision is unreasonable, unwarranted, and cannot be supported having regard to the weight of evidence." At the appellate court the learned trial Judge is not there to defend his "unreasonable and unwarranted" judgment or ruling.

My humble view is the fact that a counsel said "thank you my Lord" upon listening to the judgment or ruling should not be ground for debarring a party from challenging the ruling or judgment if one is aggrieved' For example, the appellants/plaintiffs in this case were aggrieved that the learned trial Judge limited his orders to only the named plaintiffs on the writ of summons contrary to the fact that those named on the writ of summons had obtained leave from Inyang J., on 04-10-1999 to represent the unnamed plaintiffs. This order was set aside without hearing the parties or their respective counsel. The legal effect is that the learned trial Judge reviewed the interlocutory ruling of a brother judge.  His Lordship lacked the jurisdiction of doing so since he was not sitting as an appellate judge. No trial Court is competent to sit in judgment over the decision or order made by a brother judge. See Akporue vs Ohwoka (1973) 1 All WLR (Pt.2) 255 at 2611 Orewere vs Abiegbe (1973) 9 & 10 sc 1 at 6; Okafor vs Attorney-General of Imo State (1991) 7 SCNJ 345 at 361 and Commissioner of Lands vs Edo -Osagie (1973) 6 SC 155. The exception to this general rule is where it is very clear that the orders were made without jurisdiction. See obimonike vs Erinosho (1965) 1 All NLR 250; okoli vs Ojiako (1962) 1 All NLR 58; Leventis vs Mbonu (1961) 1 All NLR 539.

Furthermore, the learned trial Judge directed that if the appellants/plaintiffs had received their terminal benefits they should be refunded to the defendant/Respondent when none of the parties had prayed for such an order.  
A judgment should be based only on matters canvassed before the learned trial Judge. See Q vs Wilcox (1961) 1 All NLR 631; Tadabe vs Bornu Native Authority (1968-1969) SCOPE 80; Kuti vs Batogun (1978) 1 LRN 353; Ibanga vs Usanga (1992) 5 SC 103 at 124-125 and Aboko vs Igala Native Authority Police (1960) NMLR 57. It is not within the province of a learned trial judge to grant a relief when none has been asked for by any of the parties in litigation since no learned trial Judge is a Father Christmas. See Ekpenyong vs Nyong (1975) 2 sc 71 at 80; Orizu vs Anyaegbulam (1978) 1 LRN 216 and, Atolagbe vs shorun (1985) 4 SC 250 at 256.

Then comes the issue of the named and unnamed plaintiffs on the writ of Summons. In Alhaji Yekini Otapo vs Chief R.O. Sunmonu & Ors (1987) 7 SCNJ 57 Oputa JSC held at page 95 that:

"In a representative action it is not only the named plaintiff who is a party to the action. No. The others who are not named but whom the plaintiff purports to represent are also parties to the action. See Price vs Rhodu Urban District Council (1923) W.N 228. They are parties because they are also bound by the result. That is why the named plaintiff is not free to take any step that might prejudice the rights of the other unnamed plaintiff."

The rights, status and limits of the liability of named and unnamed parties were clearly set out in the Supreme Court judgment in Okonji & Ors vs Njokanma & ors sc (1989) 4 NWLR (Pt.114) 161 at .167 paragraph "C" per Eso JSC:

"Now it has to be noted that a named party in a representative action is dominus litis. It is for this reason that care is always taken in choosing the representative. The named party, dominus litis as he is, remains so until judgment and in that case, he could discontinue, compromise, submit to dismissal just as he pleases. But where several people sue, they have like 'powers and if they are not satisfied with the conduct of the representative that may seek an order of the Court to add or substitute any other person even though he has not been named in the representative action. In Moon vs Atherton (1972) 2 Q.B. 435, this was done even where it prevented the action from being statute barred."

Also at page 170 paragraph "E" to page 171 paragraphs "A-B" appears the following statement of the law by Agbaje JSC:

"In this regard too, I would like to refer to the following passage in the judgment of Lord Denning, M.R., in Moon vs Atherton (1972) 2 Q.B. 435 at 441 which has something to say about representative action and the amendment of its title:

"In a representative action, the one person who is named as plaintiff is, of course, a full party to the action. The others, who are not named, but whom she represents, are also parties to the action. They are all bound by the eventual decision in the case.

They are not full parties because they are not liable individually for the costs. That was held by Eve, J., in price vs Rhondda Urban District Council (1923) W.N. 228. But that are parties because they are bound by the result.

What then is to happen when the named plaintiff decides to withdraw? It seems to me that then it is open to any one of those whom she represents to come forward and take the place of the named plaintiff. The case comes within Order 15, rule 6, which enable a party to be added whose presence is necessary. It also comes within Order 20 rule 5(1) which says:

"...the  Court may at any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct."

In those rules the word "party" is used in the same sense as it is in the definition in Section 225 of the Supreme Court of Judicature (Consolidation) Act 1925, which was that:

"Party includes every person served with notice of or attending any proceeding, although not named on the record."

So it includes one of the persons represented, even though not named in the writ.

In my opinion, those rules enable the Court to amend these proceedings by inserting the name of Mrs. Art instead of the named plaintiff. This is necessary in order to do justice. If it were not so, the named plaintiff might discontinue, or the defendant might settle with the named plaintiff and then leave the other unnamed plaintiff out in the cold. It might be too late for them to issue a new writ because of the statutes of Limitation. That cannot be right. It seems to me that if, in a representative action, the named party falls out for any reason, the Court has ample power to substitute one of the unnamed parties as the plaintiff, and to bring him in as at the date of the issue of original writ."

Thus there was no legal requirement to list the names of the persons to be affected and who might benefit from the judgment of the learned trial Judge once it is proved at the trial that they were unnamed parties in the action.   
The named parties on the writ of summons usually champion the cause of the unnamed. If the action succeeds they reap the fruits of litigation. If the action fails, the unnamed parties also take the consequences. This was clearly stated in Nana Oforia Ita 11, Omahene of Akyem Abuakwvu & Anor vs Nana Abu Bunsra 11, Privy Council Judgments 1841-1973 page 656 by Lord Denning at page 660 to wit:

"...It seems to be the recognized thing in this part of West Africa for all persons with the same interest in a land dispute to range themselves on one side or the other. Sometimes they apply to be joined as parties, on other occasions they regard the named party as their champion and support him by giving evidence. If he wins, they reap the fruits of victory. If he fails, they fall with him and must take the consequences."

The ruling of the learned trial Judge was also a flagrant violation of the provisions of Order 11 rule 8 of the High Court of the Federal Capital Territory, Abuja (Civil Procedure) Rules 1990 which reads as follows:

"Where more persons than one have the same interest in one suit, one or more of them may, with the approval of the Court, be authorized by the other persons interested to sue or to defend the suit for the benefit of or on behalf of all parties so interested."

Order 11 rule 8 of the High Court (Civil Procedure) Rules 1990 supra is authority that there can be named and unnamed parties in a law suit. The named parties will be expressed on the Writ of Summons. But at least, two affidavits would be needed, one from the persons whose names appears on the Writ of Summons and another from those to be represented authorizing the named plaintiffs to represent them. See Wiri vs Wuche (1980) FNLR 45 at 54. see also Mozie vs Mbamalu (2006) 15 NLR (Pt.1003) 466.

With all these monumental vices afflicting the ruling of the learned trial Judge, it baffles me that the learned SAN appearing for the respondent/defendant would be heard to argue, and he has indeed argued that this appeal is academic or hypothetical. I do not think so. I hold that the ruling of the learned trial Judge has foisted upon the appellants/plaintiffs the necessity of appealing to this Court. In that wise I over-rule the preliminary objection.

Furthermore, when the appeal came up for hearing on 07-02-2011 S.C. Peters Esq appeared for the appellants/plaintiffs and adopted an Amended Appellants' Brief and Further Amended Notice of Appeal all filed on 22-03-2010. Next Counsel referred to the Amended Appellants' Reply Brief also filed on 22-03-2010. S. Atung Esq appeared for the Respondent/Defendant and adopted the "Further Amended Respondent's Brief of Argument" dated 28-08-2006 but filed on 29-08 -2006. Same was deemed filed by the orders of this Court on 02-11-2006 and adopted. Learned Counsel to the appellants/plaintiffs formulated only two issues for determination. Issue one covers grounds 1-7 in the Further Amended Notice of Appeal filed on 22- 03-2010. Issue two covers grounds 8, 9 and 10. I am therefore at a loss to find that the learned Senior Advocate took objection to grounds 1, 2, 3, 8, 9, 10, 11, 12, 13 and 14 of grounds of appeal more than what was filed and canvassed by the appellants/plaintiffs. The objections are set out from paragraphs 5 to 5.3 page 7-8 of the "Further Amended Respondent's Brief of Argument". I am further at a loss when the learned SAN referred to issue 3 and 6 for determination as encompassing grounds 1, 4, 5, 6 and 7 of the Appellants' . Further Amended Notice of Appeal from pages 7 to 9 paragraphs 4.5 to 7.2 of the "Further Amended Respondent's Brief of Argument."

The Notice of preliminary objection in respect of grounds 1, 2, 3, 8, 9, 10, 11, 12, 13 and 14 in the Appellants' Further Amended Notice of Appeal did not take into consideration the Further Amended Notice of Appeal. The preliminary arguments have no correlation with the Further Amended Appellants' Notice of Appeal and Brief of Argument. For all these sundry reasons I see no merit in this preliminary objection which is dismissed.

From all the vices that have bedevilled the ruling of the learned trial Judge, the justice of this appeal demands that the appeal be allowed to enable the matters in dispute to be tried by another judge. A substantive relief claimed should be supported by pleadings. See Ishola vs UBN Ltd (2005) All FWLR (Pt.258) 1202 at 1213 paragraphs "A-D".

Accordingly, both appeals are allowed. The ruling and orders of the learned trial Judge are set aside. The suit is to be transferred to another judge for hearing and determination by the learned Hon. Chief Judge of the High Court of Justice, Federal Capital Territory Abuja. Parties to bear their costs.

**MARY U. PETER-ODILI, J.C.A.:**

I agree.

**OBANDE F. OGBUINYA, J.C.A.:**

I have had the opportunity of reading, in draft, the judgment delivered by my learned brother, J.T. TUR, JCA, in the two consolidated appeals. I agree with his reasons and conclusions. My learned brother had amply articulated the facts, issues and arguments in the two consolidated appeals. I will not, needlessly duplicate his concerted efforts by replicating them. In the Appeal No. CA/K/260/2003, the plaintiffs appellants' substantive claims, as encapsulated in their writ of summons, were, in substance, on all fours with their prayers in the interlocutory application. By the learned trial Judge granting those reliefs in their application for interlocutory injunction, he had, with due reverence, unwittingly foisted upon himself a fait accompli vis-a-vis the pending substantive matter that was yet to see the light of the day. By that singular act, the court below determined the substantive claims without observing the inviolable right of parties to fair hearing as entrenched in section 36(1) of the 1999 Constitution. Interestingly, the law, seriously, frown upon courts, inclusive of the court below, to delve into and determine substantive matters at interlocutory stages. The Supreme Court has given its blessing to this hallowed principle of law in a litany of cases, Falowo vs Banigbe (1993) 6 SCN J 42; E.F.P. co. Ltd. vs NDIC (2007) 9 NWLR (Pt.1039) 216; Agip (Nig.) Ltd. vs Agip Petroli Int'l (2010) 5 NWLR (Pt.1187) 348; Nwankwo vs Yar'Adua (2010) 12 NWLR (Pt.1209) 518.

It is for this reason, and detailed reasons advanced in the leading judgment, that I too allow the appeal. I abide by the orders made in the leading judgment.

For the Appeal No. CA/K/250/2003, the court below ordered the plaintiffs/appellants to refund to the defendant/respondent the terminal benefits paid to them. The plaintiffs/appellants' application for interlocutory injunction and even their writ of summons were completely void of that prayer. It follows that it was an unsolicited claim. Generally, a court of law is not a Santa Claus or a donor agency to dish out to a party an unasked claim.

The apparent magnanimity exhibited by the court below, in granting a relief without supplication, flies in the face of the law. It was done without jurisdiction and, de jure, marooned in the intractable web of nullity. In the case of Agu vs Odofin (1992) 3 SCNJ 161 at 173, Karibi-Whyte, JSC, stated:

"Our adjudicatory system has severely circumscribed and restricted the awards to be made by the court within the scope of the claims made and reliefs sought by the parties before the court. The view of this court is that it is without power to award to a claimant or grant a relief that which he did not claim ... A court of law may award less and not more than what the parties have claimed ... A fortiori the court should never award that which was not claimed or pleaded by other party."

See, also, Agbi vs Ogbe (2006) 11 NWLR (Pt.990) 65; Veepee Ind. Ltd. vs Cocoa Ind. Ltd. (2008) 13 NWLR (Pt.1105) 486. Eagle Super Pack (Nig.) Ltd. vs ACB Plc. (2006) 19 NWLR (Pt.1013) 20; Agip (Nig.) Ltd. vs Agip Petroli Int'l (supra); Oduwole vs West (2010) 10 NWLR (Pt.1203) 598.

On account of the above reason, coupled with other reasons advanced in the leading judgment, I too allow the appeal. I abide by the orders made in the leading judgment.