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IN THE COURT OF APPEAL OF NIGERIA

IN THE LAGOS JUDICIAL DIVISION

HOLDEN AT LAGOS

ON WEDNESDAY, THE 29<sup>TH</sup> DAY OF SEPTEMBER, 2021

BEFORE THEIR LORDSHIPS:

<u>OBIETONBARA OWUPELE DANIEL-KALIO</u>	<u>JUSTICE, COURT OF APPEAL</u>
<u>MUHAMMAD IBRAHIM SIRAJO</u>	<u>JUSTICE, COURT OF APPEAL</u>
<u>ADEBUKOLA A.I. BANJOKO</u>	<u>JUSTICE, COURT OF APPEAL</u>

FUNMILOLA OPE ESQ  
 PRINCIPAL EXECUTIVE OFFICER  
 CERTIFIED TRUE COPY  
 COURT OF APPEAL  
 LAGOS

APPEAL NO. CA/L/1097/2018

BETWEEN:

1. OLUMIDE BABALOLA = = = = = APPELLANTS

2. VICTOR ADEYON

AND

1. EMERGING MARKETS TELECOMMUNICATION SERVICES.

2. AIRTEL NETWORKS LIMITED = = = = = RESPONDENTS

3. GLOBALCOM LIMITED

4. MTN NIGERIA TELECOMMUNICATIONS LTD

JUDGMENT

(DELIVERED BY MUHAMMAD IBRAHIM SIRAJO, JCA)

In a class action instituted for themselves and as representatives of other registered subscribers of the Respondents before the High Court of Lagos State, the Appellants, as Applicants, prayed the court for the following orders:

1. **A DECLARATION** that the respondents several unsolicited telephone calls and sms messages to the applicants' private and personal telephone numbers are illegal, unconstitutional and contrary to section 37 of the constitution of the Federal Republic of Nigeria, 1999 (As amended).
2. **A DECLARATION** that the Respondents have unconstitutionally invaded the Applicants' privacy and homes with unsolicited telephone calls and sms messages thereby violating the Applicants' right to private and family life as guaranteed by section 37 of the constitution of the Federal Republic of Nigeria, 1999 (As amended).
3. **A PERPETUAL INJUNCTION** restraining all the Respondents, their Agents, Representatives, Business Partners, Associates and/or Employees from further making unsolicited telephone calls and/or sms messages to the Applicants.
4. **AN ORDER** mandating all the Respondents to compensate the Applicants with ₦200,000 (Two hundred thousand Naira) worth of airtime on their respective telephone lines with the Respondents.
5. **AN ORDER** mandating each of the Respondents to publish in two national dailies, a letter of apology to the Applicants.
6. The sum of ₦10,000,000,000 (Ten Billion Naira) as general damages against each of the Respondents for invading the Applicants' privacy.
7. The sum of ₦10,000,000,000 (Ten Billion Naira) as punitive damages against each of the Respondents for invading the Applicants' privacy.
8. The cost of this action valued at ₦10,000,000 (Ten Million Naira) against each of the Respondents.
9. **AND SUCH OTHER ORDER(S)** as this honourable court may deem fit to grant in the circumstance.



The action was commenced by an amended originating motion on notice brought pursuant to Order 2 Rules 1,2,3,4 & 5 of the Fundamental Rights (Enforcement Procedure) Rules, 2009, Section 37 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) and under the inherent jurisdiction of the lower court.

The Applicants' grouse before the lower as captured in the affidavit of Olumide Babalola filed in support of the application is that the Respondents, who are mobile telephone service providers in Nigeria have, since 2014, been invading the privacy of the Applicants through unsolicited calls and sms messages to their registered telephone numbers, thereby violating their rights to privacy and family life as guaranteed by section 37 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended). The 1<sup>st</sup> Applicant's registered telephone numbers in which the said rights' violation occurred were given as follows: 08183645995 (Etisalat) and 08034887684 (MTN) belonging to the 1<sup>st</sup> and 4<sup>th</sup> Respondents respectively. For the 2<sup>nd</sup> Applicant, his affected registered telephone numbers are: 08022285597 (Airtel) and 0705527883 (Globacom);

The 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Respondents not only opposed the action by filing counter-affidavits, each of them also filed notice of preliminary objection to the competence of the action. In compliance with the provisions of the Fundamental Rights (Enforcement Procedure) Rules, the lower court took the preliminary objections and the substantive application together, and in a judgment delivered on 17<sup>th</sup> January, 2018, struck out the application for incompetence on the ground that the suit is not maintainable by way of Fundamental rights enforcement proceeding.

Aggrieved by that decision, the Applicants approached this court through a Notice of Appeal dated and filed on 2<sup>nd</sup> February, 2018, in which two grounds of appeal are incorporated. Below are the two grounds of appeal with their particulars:

### **"GROUND 1**

The trial court erred in law when it held that "upon a careful consideration of the said Notices of Preliminary Objection... and highly contentious affidavit evidence proffered by parties regarding the issues of persons actually responsible for the alleged infringements..., it is clear to me that this suit is not properly maintainable by way of fundamental enforcement proceedings."

### **PARTICULARS OF ERROR**

1. The trial court erroneously considered affidavit evidence in isolation of the reliefs claimed by the Appellants.
2. The trial court confused the issues of persons responsible for the infraction with the mode of commencement.
3. The trial court failed to recognize that fundamental rights enforcement are fought on affidavit evidence irrespective of how contentious.
4. The filing of further affidavit does not necessarily make a matter contentious.
5. Denial of liability by one of many Respondents ought not vitiate the Appellants' suit.
6. It is trite that the mere filing of a counter affidavit in response to affidavit in support of originating process does not make the matter



one which oral evidence need be adduced. See **Bob v. Akpan (2009) LPELR-8519 (CA)**.

7. The conflicts in the counter affidavit are not material to the allegation of invasion of privacy which would require oral evidence.
8. Only the 1<sup>st</sup> Respondent deposed to the fact that the unsolicited telephone calls were made by third parties, while the other Respondents deposed to facts that calls were short and could not have constituted invasion of privacy.
9. The Respondents admitted the unsolicited calls and text messages in their counter affidavit by trying to justify them on the ground of terms and conditions or regulatory guidelines.

## **GROUND 2**

The trial court erred in law when it held that "I have taken a careful look at the totality of affidavit evidence before the court regarding the Notices of Preliminary Objections and the Applicants suit and it is clear to me that in the circumstances of this case those declarative (sic) reliefs prayed for by the Applicants cannot be rightly granted by the court in the absence of cogent oral testimonies.

## **PARTICULARS OF ERROR**

1. It is trite that fundamental rights enforcement suits are fought on affidavit evidence.
2. The trial court failed to appreciate settled principles of law that declaratory reliefs can be granted without necessarily giving oral evidence.

3. Affidavit evidence is admissible documentary evidence of facts stated therein.
4. The trial court erroneously favoured oral evidence over documentary evidence even when it admitted that fundamental rights enforcement are sui generis.
5. Oral testimonies are unknown to the special procedure of fundamental rights enforcement but the trial court struck out the suit on that basis.
6. The trial court seemed to have punished the Appellants for what it perceived as deficiency in fundamental rights enforcement procedural rules."

The Appellants sought for an order allowing the appeal, setting aside the judgment of High Court of Lagos State (Coram: Hon. Justice S.A. Onigbanjo) delivered on 17<sup>th</sup> January, 2018, and invoking section 15 of the Court of Appeal Act, 2004 by granting the Appellants reliefs on the originating application against the 1<sup>st</sup> to 3<sup>rd</sup> Respondents only.

As required by the relevant Rules of this court, parties filed and exchanged briefs of argument. The Appellants' brief of argument dated 24<sup>th</sup> September, 2018 was filed on 8<sup>th</sup> October, 2018. The 1<sup>st</sup> Respondent's brief of argument is dated and filed on 6<sup>th</sup> July, 2021 while the brief of the 2<sup>nd</sup> Respondent dated 20<sup>th</sup> September, 2019 was filed on 23<sup>rd</sup> September, 2019. The 3<sup>rd</sup> and 4<sup>th</sup> Respondents filed their separate briefs of argument on 22<sup>nd</sup> June, 2021 and 9<sup>th</sup> October, 2020 respectively. The Appellant filed a Reply to the 2<sup>nd</sup> Respondent's brief of argument on 11<sup>th</sup> October, 2019. When the appeal was called up for hearing on 7<sup>th</sup> July, 2021, counsel representing the Appellants, moved an application seeking for leave to



compile and transmit record of appeal out of time as well as a deeming order with respect to the already transmitted record of appeal dated 6<sup>th</sup> August, 2018. That application was granted with a consequential order deeming the Appellants' and Respondents' briefs of argument as properly filed and served on 7<sup>th</sup> July, 2021. Counsel for the parties in persons of **Solomon Okedara Esq** for the Appellants, **Funke Onakoya** for the 1<sup>st</sup> Respondent, **Olayinka Sunmola** for the 2<sup>nd</sup> Respondent and **S.A. Kanabe** for the 3<sup>rd</sup> Respondent adopted their respective briefs while the brief of the 4<sup>th</sup> Respondent, who was not represented by counsel was deemed adopted by an order of this court.

In the Appellants' brief of argument settled by **Olumide Babalola Esq**, two issues were identified as calling for determination before this court, as follows:

1. "i. Whether or not the trial court was right to have considered the Respondents' Notices of Preliminary Objection in isolation of the Appellants' originating process. (Ground2).
2. ii. Whether or not the trial court was right when it held that that the reliefs being sought by the Appellants cannot be granted in the absence of oral testimonies. (Ground 1)."

In the 1<sup>st</sup> Respondent's brief of argument, **Opeyemi Thomas Esq** who settled the brief, formulated a lone issue for determination –

1. "Whether the lower court was right to hold that the suit was not appropriately constituted and sustainable by way of Fundamental Rights Enforcement Proceedings in light of the nature of the reliefs sought by the Appellants and the totality of the highly contentious affidavit evidence before the lower court."

For the 2<sup>nd</sup> Respondent two issues were formulated by Mr. Abiodun Olalere as follows:

1. "1. Whether the appellants have complied with condition precedent as provided by the NCC Act, 2003 and if such failure of the Appellants to comply with the condition precedent as provided by the NCC Act, 2003 robs the court of its jurisdiction.
2. Whether the court can speculate on facts in the absence of evidence."

Dr. S.A. Arlesanya who signed the 3<sup>rd</sup> Respondent's brief of argument formulated a lone issue for determination, couched thus:

1. "Whether the trial court was right to hold that this suit was not properly maintainable by way of Fundamental Rights Enforcement Proceedings in the light of Respondents' Preliminary Objections and the highly contentious affidavit evidence before the court."

Even though the 4<sup>th</sup> Respondent is made a party in this appeal in line with the principle of law that an appeal is a continuation of the same suit before the lower court, which means that parties shall remain the same unless altered by an order of court, I find that the Appellants did not seek any relief against the 4<sup>th</sup> Respondent. In the Notice of Appeal dated and filed on 2<sup>nd</sup> February, 2018, contained at pages 184 - 187 of the record of appeal, which has not been amended, the Appellants sought reliefs against the 1<sup>st</sup> - 3<sup>rd</sup> Respondents only. They did not seek any relief against the 4<sup>th</sup> Respondent. Therefore, there is, legally speaking, no appeal against the decision of the lower court as it concerns the 4<sup>th</sup> Respondent. The Appellants have, by implication of the reliefs sought in their Notice of Appeal, accepted the judgment of the lower court as it relates to the 4<sup>th</sup> Respondent. In this light, even though the brief of argument of the 4<sup>th</sup>



Respondent was deemed adopted by an order of this court in accordance with the Rules, I do not deem it imperative to consider the said brief of the 4<sup>th</sup> Respondent as there is no relief claimed against it in this appeal. If anything, the 4<sup>th</sup> Respondent's brief is just a surplusage. The 4<sup>th</sup> Respondent is not a necessary party for the purpose of this appeal and therefore there is no justification for the retention of its name. Accordingly, the name of the 4<sup>th</sup> Respondent is hereby struck out from this appeal in the absence of any relief claimed by the Appellants against it.

As a preliminary point, the Appellants in their Reply brief took a swipe at the 2<sup>nd</sup> Respondent's brief of argument and urged the court to discountenance same as the issues formulated therein do not arise from or relate to the grounds of appeal. Counsel for the Appellants placed reliance on **Akingboye vs. Salisu (1999) LPELR – 6712 (CA); Alao vs. State (2011) LPELR – 3700 (CA); Iliyasu vs. Shuwaki (2009) LPELR – 4305 (CA); Access Bank vs. Matsgal (Nig) Ltd (2019) LPELR – 47002 (CA).**

The issues formulated by the 2<sup>nd</sup> Respondent is whether the Appellants have complied with the condition precedent in the NCC Act before filing the action and whether the court can speculate without evidence. A cursory look at the two grounds of appeal will show that the issue of compliance or non-compliance with the NCC Act did not form part of any of the grounds of appeal or even the particulars of the grounds as provided by the Appellants. What is more, the conditions precedent in the provisions of the NCC Act referred to in the issues formulated by the 2<sup>nd</sup> Respondent was neither mentioned nor treated in the entire gamut of the judgment of the lower court.

The law is well settled that issues formulated in a brief of argument, be it that of an Appellant or a Respondent must be related to, arise from or based on the grounds of appeal, it cannot be at large. See **Akpan vs. Bob (2010) LPELR – 376 (SC)**; **Agbiti vs. Nigerian Navy (2011) LPELR – 2944 (SC)**; **Garuba & Ors vs. Omokhodion & Ors (2011) LPELR – 1309 (SC)**. In the same vein, issues not raised and determined by the lower court cannot be an issue for determination before the Court of Appeal. See **Omisore vs. Aregbesola (2015) LPELR – (24803)**. In the case of **Inakoju vs. Adeleke (2007) LPELR –1510 (SC)**, the Supreme Court sums up the position thus:

- *"In an appeal, only issues formulated within the parameters and context of the grounds of appeal and raising issues determined in the judgment appealed against can come within the purview of issues to be determined."*

The issues for determination in the 2<sup>nd</sup> Respondent's brief of argument, having not arisen from or based on the grounds of appeal, and having not been determined by the lower court in its judgment, are incompetent, consequently, the arguments proffered thereon are hereby discountenanced.

I will now proceed to the determination of the merits of this appeal on the briefs filed by the Appellants, the 1<sup>st</sup> Respondent and the 3<sup>rd</sup> Respondent. Proffering argument on the 1<sup>st</sup> issue formulated by him, counsel for the Appellants, Olumide Babalola submitted that the filing of counter affidavits does not necessarily makes the Appellants' case contentious and unfit for hearing under the fundamental rights procedure as held by the lower court at page 181 of the record. He referred to the case of **Senator**



**Effiong Bob vs. Chief Imeh Albert Akpan (2009) LPELR – 8519 (CA)** where this court held that it is not the filing of a counter affidavit to oppose the claims in an originating summons that makes such proceedings to be contentious. He submitted that the trial court ought to have considered that the Appellants' suit borders on enforcement of fundamental right which is regulated by a procedure that is sui generis and not subject to other rules of court. It is argued that since fundamental rights cases are fought on affidavit evidence, the trial court ought to have evaluated the affidavits filed by the parties, irrespective of their alleged contentious nature. Counsel referred the court to the following authorities: **Johnson vs. Udonsek (2017) LPELR – 43647 (CA); Dr. N.E. Okoye vs. Centre Point Merchant Bank (2008) 15 NWLR (Pt.1110) 335; Daniel vs E.F.C.C. (2016) LPELR – 41173 (CA); Mashingil vs. Akun (2013) LPELR – 21922 (CA).** it is the further submission of counsel that even though only the 1<sup>st</sup> Respondent deposed to facts that the violations of the Appellants' rights were done by third parties, yet the trial court erroneously held that the denial was raised by all the Respondents. He submitted that even in the face of the denial, the trial court ought to have considered and evaluated the opposing affidavits for and against both the main suit and the preliminary objections. He cited **Christopher Tanko vs. Garduga Nongha (2005) LPELR – 11405 (CA); Erinle vs. Aluko (2013) LPELR – 22157 (CA) and Yazza vs. Kwaga (2013) LPELR – 22154 (CA).** Counsel contended that the Appellants' allegation of unsolicited telephone calls from the Respondents' designated numbers has not been contradicted by documentary evidence, and that if there was any conflict at all in the affidavits, the conflict is not material or substantial. That the Respondents' counter affidavits did not contradict the



fundamental issue of ownership of the telephone lines with which the calls were made nor did they contradict the fact that the calls were made. Appellants' counsel further contended that the Respondents' refusal to adduce documentary evidence on the ownership of the telephone lines used for the unsolicited calls, which are given as **38233; 655; 38422; 7772; 251; 7770; 699; 775; 7779; 08099938299; 09094532224 and 08091205900** ought to be resolved against the Respondents. He cited **Abba vs. Jumare (1999) 5 NWLR (Pt.602); Habib Bank (Nig) Ltd vs. Kora (1992) 7 NWLR (Pt.251) 43.**

On issue 2 formulated by him, counsel for the Appellants reiterated the sui generis nature of suits founded on enforcement of fundamental rights and the fact that they are fought on affidavit evidence and proceeded to submit that the lower court was wrong to have held that the reliefs sought by the Appellants cannot be granted because oral evidence cannot be adduced. He submitted that the non-applicability of oral evidence to the Appellants' case ought not defeat the procedure, rather the trial court should have evaluated the affidavit evidence before it and come to a conclusion. On this submission, reliance is placed on **Afribank Nig. Plc vs. Muftau Adigun (2009) 11 NWLR (Pt.1152) 345; Jauro Ahmadu Ali vs. Ahmadu Adamu Dandogari (2013) LPELR – 21919 (CA); Magnusson vs. Koiko (1991) 4 NWLR (Pt.183) 119 @129; Lafia Local Government vs. The Executive Governor Nasarawa State (2012) 17 (Pt.1328) 94 @129**, where the courts held that applications for enforcement of fundamental rights are decided on the supporting affidavit and counter affidavit alone, and that there is no contemplation of the parties calling oral evidence to resolve conflicts in the affidavits as such



conflicts are resolved through documentary evidence annexed to the affidavits. The court is urged to resolve the two issues in favour of the Appellants, allow the appeal and grant all the reliefs sought in the application.

On the sole issue formulated by him, counsel for the 1<sup>st</sup> Respondent submitted that that the first two reliefs sought by the Appellant being declaratory reliefs, are not granted as a matter of course but on credible evidence led by them. He submitted on the authority of **Ogolo vs. Ogolo (2006) 5 NWLR (Pt.972) 173 @ 184** that it is trite that oral evidence must be called to prove declaratory reliefs. Counsel submitted that since the Appellants are seeking for declaratory reliefs, which cannot be granted without oral evidence, the appropriate procedure for them to adopt could not have been by way of fundamental rights proceedings which is determined by affidavit evidence alone. On the conflict in the affidavit of parties, counsel submitted that only oral evidence can resolve such conflicts in the affidavit. Cited in support of this argument are the following authorities: **D.P.C.C. Ltd vs. B.P.C. Ltd (2008) 4 NWLR (Pt.1017) @ 420; Falobi vs Falobi (1976) LPELR – 1236 (SC); Agbaso vs. Speaker, Imo State House of Assembly (2014) LPELR – 24298 (CA); Orker Jev vs Iyotyom (2014) 8 SCM 131 @ 157**. The court is urged to discountenance the argument of the Appellants to the effect that the lower court ought to have borne in mind that the suit bordered on the enforcement of fundamental rights, as baseless in that the lower court has recognized that fact in its judgment. It is further argued that the fact that fundamental rights proceedings is not subject to other rules of court does not imply that it is not subject to the principles of

law governing pleadings and evidence. Counsel submitted that the need for oral evidence as stated by the lower court was to clarify the identity of persons responsible for the alleged infringements of the Appellants' right. It is contended that the court can rely on conflicting affidavit evidence only where there are sufficient documents to resolve the conflict, which in this case is lacking. The court is urged to discountenance all the authorities cited by the Appellants in paragraphs 3.9 – 4.2 of the Appellants' brief of argument as they have no bearing with fundamental right proceedings, and to proceed to dismiss this appeal with substantial cost.

Like the 1<sup>st</sup> Respondent, the 3<sup>rd</sup> respondent also identified a sole issue for determination in this appeal which I repeat below:

"Whether the trial court was right to hold that this suit was not properly maintainable by way of Fundamental Rights Enforcement Proceedings in the light of the Respondent' Preliminary Objections and the highly contentious affidavit evidence before the court."

3<sup>rd</sup> Respondent's counsel submitted that the trial court was right when it held that this suit was not properly maintainable by way of fundamental rights enforcement proceedings in the light of the Respondents' Preliminary Objections and the highly contentious affidavit evidence before the court which requires oral evidence in proof. In aid of this submission, the court is referred to **Falobi vs Falobi (supra); Eze vs. Okweremuo (2010) LPELR – 4025 (CA)**. On the Appellants' argument that the trial court ought to have evaluated the affidavits filed by the parties irrespective of their alleged contentious nature, counsel submitted that this argument is flawed as the role of a Judge is to hear evidence,



evaluate and draw conclusions from concrete facts placed before him and not to speculate from hazy documentary evidence. On how to resolve conflict in affidavit evidence, counsel for the 3<sup>rd</sup> Respondent cited the case of *Agbaso vs. Speaker, Imo State House of Assembly (supra)* and quoted in extenso from the judgment of this court in ***Afribank Plc vs. Mufutau Adigun (supra) Per Ogunwumiju, JCA*** (as he then was), to the effect that oral evidence must be led to resolve the conflict in an affidavit unless there is documentary evidence that can tilt the contradictory evidence. It is further submitted that the main reliefs sought by the Appellants being declaratory, could not be granted without oral testimonies to resolve the conflicts in the affidavits. Reliance is placed on ***Adebiyi vs. Umar (2012) 9 NWLR (Pt.1305) 279; Ogolo vs. Ogolo (supra)***. He submitted that the trial court rightly held that by the nature and character of the reliefs sought by the Appellants, the suit was not determinable by affidavit evidence.

On the relief sought by the Appellant asking this court to invoke Section 15 of the Court of Appeal Act to re-hear the case and grant the Appellants' reliefs against the 1<sup>st</sup>- 3<sup>rd</sup> Respondents only, counsel submitted that section 15 of the Court of Appeal Act is inapplicable in the instant case as the 5 conditions for its invocation as stated in the cases of ***Obi vs. INEC (2007) 1 NWLR (Pt.1046) 465; Amaechi vs INEC (2008) 5 NWLR (Pt.1080) 227; Inakoju vs Adeleke (2007) 4 NWLR (Pt.1025) 423 and Agbakoba vs. INEC (2008) 18 NWLR (Pt.1119) 489*** have not been met, firstly, that the two grounds of appeal do not have any bearing whatsoever on the issue of infringement of the Appellants' right to privacy. Secondly, that not all necessary materials are available in the record of appeal to justify adjudicating on the claim of the Appellants in view of the



conflicts in the affidavits as found by the lower court. It is argued that the need for expeditious disposal of this case to meet the ends of justice is not apparent on the face of the materials presented before this court that would warrant the invocation of section 15 of the Court of Appeal Act. The court is urged not to invoke its powers under section 15 of the Court of Appeal Act, but to dismiss the appeal and affirm the judgment of the trial court.

The Appellants' action before the trial court was for enforcement of fundamental rights. It was filed pursuant to Order 2 Rules 1-5 of the Fundamental Rights (Enforcement Procedure) Rules, 2009 (as preserved by section 315 of the Constitution), section 37 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) and under the inherent jurisdiction of the trial court. Before the trial court, the Appellants sought for two declarations with respect to the infringement of their right to privacy by the Respondents' unsolicited telephone calls and sms messages to their registered telephone lines, perpetual injunction, compensation, general and punitive damages as well as the cost of the action. All the four Respondents filed counter affidavits in opposition to the claim. In addition to that, the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Respondents filed separate Notices of Preliminary Objections attacking the competence of the action. The jurisdiction of the Federal, State and FCT High Courts to entertain cases of breach of fundamental rights is not in dispute. It is also not in dispute that the two principal reliefs sought by the Appellants before the lower court are for enforcement of fundamental rights to private and family life. Recognizing his jurisdiction over the subject matter of the suit, the trial Judge heard the substantive action along with the preliminary objections.



After stating the kind of processes filed by the parties, i.e., Appellants' supporting affidavit, Respondents' counter affidavits, Appellants further and better affidavit, Notices of preliminary objections and the Appellants' counter affidavit to same, together with written addresses of counsel which were adopted by them, the trial Judge proceeded with his judgment *brevi manu* as follows:

*" I have taken a careful look at the totality of affidavit evidence before the court regarding the Notices of Preliminary Objections and Applicants' suit and it is clear to me that in the circumstances of this case those declaratory reliefs prayed for by the Applicants cannot be rightly granted by the court in the absence of cogent oral testimonies as well as convincing evidence in proof of those claims.*

*In my opinion, to do this, the Applicants being the parties bearing the initial onus of proving their case against the Respondents on the preponderance of evidence would not only have to call oral witness testimonies, they would also have to adduce cogent electronic and technical evidence in proof of their allegations against the Respondents and of course whatever testimony or evidence so adduced by the Applicants would most certainly be subject to cross-examination by Respondents' Counsel and the Respondents would have to do the same in rebuttal after which the court then evaluates*

*evidence and testimonies by parties before a clear finding as to the Respondents' liability for breaching Applicants' rights to privacy as claimed can Respondents' liability for breaching Applicants' rights to privacy as claimed can rightly be made by the court. Needless to say that it is only after that process is exhausted and the court being satisfied from the totality of evidence before it of the Applicants' entitlement to declaratory reliefs claimed against the Respondents that the court rightly grant those reliefs and thereafter other reliefs claimed by the Applicants against the Respondents if need be.*

*This is more so when the Respondents clearly deny any responsibility in their affidavit evidence thus throwing up the need for oral evidence on both sides to further clarify and corroborate the affidavit evidence adduced by parties so far.*

*Now because Fundamental Rights proceedings are sui generis in nature are conducted strictly in compliance with the provisions of the Fundamental Rights (Enforcement procedure) Rules 2009 which does not make any provision or allowance for the taking of oral testimony of witnesses even if just to clarify conflicting affidavit evidence adduced by parties then it must follow that the reliefs claimed by the Applicants' in this suit cannot be rightly*



*considered under the Fundamental Rights Enforcement procedure as sought to be done by the Applicants herein thus rendering the suit incompetent as initiated and liable to be struck out for that reason even without going into merits of the various Notices of Preliminary Objections files by Respondents.*

*Consequently, this suit is incompetent as filed and is ordered struck out in-limine for that reason."*

By his own conclusion above, the trial Judge has admitted that he has not considered and resolved any of the three preliminary objections filed by the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Respondents before striking out the suit *in limine* for incompetence. This omission is tantamount to abdication of his judicial duties and responsibilities as a Judge. A court of law, particularly lower court, has a statutory duty to consider and decide on all issues raised and submitted to it for determination. The duty of the trial court in the circumstances of this case was to consider and pronounce on all the three preliminary objections raised by the Respondents. Even where any or all of the preliminary objections succeeded and led to the striking out of the matter, as a court of first instance whose decision is subject to appeal, the trial court shall proceed with the substantive suit in the alternative and make pronouncement thereon without shirking its responsibility. This approach will not only save time and resources but it will enable an aggrieved party to file his substantive appeal without the apprehension of being sent back to the lower court for a re-hearing or re-trial. The essence of considering and determining all issues raised before a court, including pending applications, is to accord with the principle of fair hearing as



enshrined in our Constitution and to avoid the breach of a complaining party's right to fair hearing. It will amount to a serious lapse in the performance of his judicial duty for a Judge to shy away from determining issues properly raised before him as done by the trial Judge in the case now on appeal. In the case of **Brawal Shipping (Nig.) Ltd vs. F. I. Onwadike Co. Ltd & Anor (2000) LPELR – 802 (SC)**,

**Uwaifo, JSC** held as follows:

*"It is no longer in doubt that this court demands of, and admonishes the lower courts to pronounce, as a general rule, on all issues properly placed before them for determination, in order, apart from the issue of fair hearing, not to risk the possibility that the only issue or issues decided by them could be faulted on appeal."*

See also **Owodunni vs. Registered Trustees of Celestial Church of Christ & 3 Others (2006) 6 SC (Pt.2) 60; Samba Petroleum Ltd vs. U.B.A. Plc (2010) 6 NWLR 530; Dingyadi vs. INEC (2010) LPELR – 40142 (SC); Sule vs. State (2009) LPELR – 3125 (SC)**.

A deliberate failure by a court to consider all issues raised before it amounts to a miscarriage of justice and a failure to perform a statutory duty. See **Ovunwo vs. Woko (2011) 6 SCNJ 124**.

Now, all the parties to this appeal are agreed that actions filed under the Fundamental Rights (Enforcement Procedure) Rules, 2009 are heard and determined on affidavit evidence. That is of course the law. Parties are also at one that fundamental rights proceeding is *sui generis*, meaning that it is governed by its own distinct and unique rules. See **Skye Bank vs. Njoku (2016) LPELR – 40447(CA)**. It is also agreed by the parties that there are conflicts in the opposing affidavits filed by them. Where the parties differ is on how the conflicts in the affidavits are to be resolved. In



its judgment, the lower court held that the Appellants' reliefs are not grantable in the absence of oral testimonies in view of the conflicts in the affidavits with respect to the identity of persons responsible for the infringement of the Appellants' right to privacy. The Respondents naturally sided with the position taken by the lower court. The Appellants on the other hand held the view that there are documentary evidence annexed to their affidavit that can be used to resolve the conflicts. The Appellants also maintained that the special procedure of fundamental rights enforcement does not admit of calling oral evidence to resolve conflicts in affidavits. The law is well settled that in actions that are determined by affidavit evidence, material irreconcilable conflicts are resolved by authentic documentary evidence annexed to the affidavit which supports one of the affidavits in conflict with another. It is only when conflicts on material facts in the affidavits cannot be resolved in this manner that recourse would be had to calling oral evidence to resolve the conflict. Where the conflicting evidence can be resolved from documentary evidence the need to call oral evidence becomes unnecessary. See **Eimskip Ltd vs. Exquisite Ind. Ltd (2003) 4 NWLR (Pt.809); Oloyede vs. Oloyede (2014) LPELR – 24384 (CA)**. With respect to action founded on the enforcement of fundamental rights, this court has held that conflicts on material facts in the affidavit of parties can be resolved by documentary evidence which supports the deposition in one of the conflicting affidavits, and where the conflicts cannot be resolved by the documentary evidence, oral evidence shall be called to resolve it. That was the decision in the case of **Afribank Plc vs. Mufutau Adigun (supra)**, a case that was heavily relied upon by the parties to this appeal. In that case, the court held:



- *"However, applications for enforcement of fundamental human rights are peculiar and special in nature. The application should ordinarily be decided on the supporting affidavit and counter affidavit and if need be further affidavit alone. There is no contemplation of the parties calling oral evidence to resolve conflicts in the affidavit. The special procedure is to facilitate speedy release of citizens whose rights are being infringed and in such a case time is of essence in the determination of whether or not the executive infringement of a citizen's fundamental human rights is lawful or not. The whole purpose of the procedure would be defeated if parties are allowed to call oral evidence to resolve non-core questions of fact. Where there is conflicting affidavit evidence, the court is entitled especially in cases of the special procedure for enforcement of fundamental human rights to discount the areas of conflict and turn to the contents of exhibits attached to the affidavits filed by the parties. Where the party does not submit positive exhibit to prove his case, the burden of proof would not be discharged. See UPL vs. I.K. Martins (2000) 2 SCNJ 224. In this case exh. F dated 26<sup>th</sup> May 2000 attached to the Appellant's counter affidavit showed that the Appellant reported a case of fraud allegedly perpetrated by their Branch Manager to the police and listed the names of the customers with whom the Branch Manager allegedly connived. There is no direct evidence from the 1<sup>st</sup> Respondent to show that the Bank reported the 1<sup>st</sup> Respondent to the police for the purpose of his being arrested or detained. Oral evidence must be led to resolve the conflict unless there is documentary evidence that can tilt the*



*contradictory evidence. The proper approach is to refuse to prefer one deposition to the other."*

From the decision quoted above, what the trial court in the instant case ought to have done, having found that there are material conflicts in the opposing affidavits of the parties, was to consider the documentary exhibits annexed to the affidavit and try to resolve the conflicts. Where the trial court finds that the documentary exhibits cannot resolve the conflicts in the affidavits then it can call for oral evidence. Where on the other hand, the court finds that the documentary exhibits are not positive enough to prove the case of the Appellants, it can adjudge the case as having not been made out and proceed to dismiss same. Unfortunately, the trial court, having found that there are conflicts in the affidavits of parties necessitating the calling of oral evidence to unravel the persons allegedly responsible for the violations of the Appellants' right to privacy, proceeded to strike out the action on the ground that the reliefs claimed cannot be rightly considered under the fundamental rights enforcement procedure. He failed to take into consideration the fact that the case of *Afribank Plc vs. Mufutau Adigun (supra)* is an authority which permits trial courts handling cases of enforcement of fundamental rights to resolve conflicts in affidavit by either relying on documentary evidence or calling oral evidence. The trial court also failed to consider and determine the three preliminary objections filed before it.

This failure by the lower court to resolve the three preliminary objections one way or the other before striking out the Appellants' suit for incompetence has no doubt occasioned a failure of justice to the Appellants. Further to this, the failure by the lower court to, in the alternative, resolve the conflicts in the affidavits by using the available



documentary evidence before it or where there is no documentary evidence that can tilt the contradictory evidence, to call for oral evidence to resolve the conflicts in line with the authority of *Afribank Plc vs. Mufutau Adigun (supra)* cited and relied upon by both parties, has dented the judgment of the lower court for refusing to hearken to the admonition of the appellate courts as espoused in several judicial authorities quoted *supra*. That failure or omission has also exposed the parties to more suffering and inconvenience in terms of time and resources.

I must respectfully observe that the trial Judge has exhibited a *laissez-faire* attitude in the style adopted by him in this case. No matter what kind of style a Judge adopts in writing his judgment, there are universal and settled characteristics or attributes of a good judgment. One of such characteristics or attributes is that the judgment must have considered all issues raised in the course of the adjudication process. The instant judgment on appeal has not been exhaustive on the issues canvassed before the lower court. The trial court appeared to be in a hurry to dispose-off and dispense with the docket or file of this case thereby glossing over the issues raised in the preliminary objections and the substantive matter, which he owed a statutory duty to determine, one way or the other. The trial Judge has sacrificed the dispassionate consideration of the issues raised and canvassed before him at the altar of brevity. This should, under no circumstance, be so. Having failed the test of a good judgment, the decision of the lower court now on appeal cannot stand.

Now, at paragraph 4 of the Appellants' Notice of Appeal, the Appellants sought for, among other reliefs, an order invoking section 15 of the Court of Appeal Act, 2004 to grant their reliefs on the originating application



against the 1<sup>st</sup> to 3<sup>rd</sup> Respondents only. Other than the prayer for the grant of the reliefs, Appellants' counsel did not, in the Appellants' brief of argument, address the Court on why section 15 of the Court of Appeal Act should be invoked by this Court. Counsel for the 1<sup>st</sup> Respondent also did not address the issue of the invocation of section 15 of the Court of Appeal Act in the entire gamut of the 1<sup>st</sup> Respondent's brief of argument. Even the 2<sup>nd</sup> Respondent, whose brief of argument was discountenanced as the issues formulated therein have not arisen from or based on the grounds of appeal, did not address the issue of section 15 of the Court of Appeal Act. It is counsel for the 3<sup>rd</sup> Respondent that urged the court not to invoke section 15 of the Court of Appeal Act as the conditions for its application have not been satisfied in the instant appeal. That section provides:

*"The Court of Appeal may, from time to time, make any order necessary for determining the real question in controversy in the appeal, and may amend any defect or error in the record of appeal, and may direct the court below to inquire into and certify its findings on any question which the Court of Appeal thinks fit to determine before final judgment in the appeal, and may make an interim order or grant any injunction which the court below is authorized to make or grant and may direct any necessary inquiries or accounts to be made or taken, and generally shall have full jurisdiction over the whole proceedings as if the proceedings had been instituted in Court of Appeal as court of first*

*instance and may re-hear the case in whole or in part or may remit it to the court below for the purpose of such re-hearing or may give such other direction as to the manner in which the court below shall deal with the case in accordance with the powers of that court, or, in the case of an appeal from the court below, in that court's appellate jurisdiction, order the case to be re-heard by a court of competent jurisdiction."*

The above quoted provision empowers this court to make orders that a lower court could have made in appropriate cases towards the attainment of substantial justice to the parties in an appeal before it. The section is designed to facilitate speedy administration of justice thereby obviating the necessity of the parties returning to the lower court for re-hearing in the event an appeal succeeds. The application of the section is however subject to the fulfilment or existence of some conditions as laid down by the Supreme Court. The conditions are:

1. That the lower court or trial court must have the legal power to adjudicate in the matter before the appellate court can entertain it;
2. That the real issue raised by the claim of the Appellant at the lower court or trial court must be seen to be capable of being distilled from the grounds of appeal;
3. That all necessary materials must be available to the court for consideration;
4. That the need for expeditious disposal of the case or suit to meet the ends of justice must be apparent on the face of the materials presented; and



5. That the injustice or hardship that will follow if the case is remitted to the court below must be clearly manifest.

See **Ezeigwe vs. Nwawulu (2010) LPELR- 1201 (SC); Amaechi vs. INEC (supra); Agbakoba vs. INEC (supra); Obi vs INEC (supra); Inakoju vs. Adeleke (supra) & Dangombe vs. Lassanjang (2016) LPELR- 40791 (CA).**

It is not in doubt that the lower court has the requisite power and jurisdiction to adjudicate on suits founded on the breach of fundamental rights such as the instant one. My concern with the invocation of section 15 of the Court of Appeal Act for this court to determine the Appellants' case is that the materials upon which this court can act, as prayed for by the Appellants, are not before us. This has created an intractable hurdle in the way of a complete and effectual determination of the case by this court sitting in its appellate jurisdiction. The Appellants' action as Applicants before the lower court was instituted against four Respondents. After the judgment of the lower court striking out the action, the Appellants filed this appeal and sought for reliefs against the 1<sup>st</sup> to 3<sup>rd</sup> Respondents only. The Appellants transmitted to this court record of appeal of 190 pages, comprising of the processes filed by the Appellants at pages 1-32; 2<sup>nd</sup> Respondents notice of preliminary objection, counter affidavit against the originating motion and written addresses at pages 33-66; processes filed by the 1<sup>st</sup> Respondent at pages 67-100; Appellants' further and better affidavit and replies on points of law to the 1<sup>st</sup>, 2<sup>nd</sup>, and 4<sup>th</sup> Respondents' counter affidavits and written addresses at pages 101-178; Judgment of the lower court at pages 179-184 and Notice and grounds of Appeal at pages 184-190. No single process filed by the 3<sup>rd</sup> and



4<sup>th</sup> Respondents is contained in the record of appeal, even though the Appellants filed reply to the 4<sup>th</sup> Respondents counter affidavit at pages 159-178 of the record of appeal. In its judgment at page 181 of the record of appeal, the lower court also made reference to a counter affidavit and preliminary objection filed by the 3<sup>rd</sup> Respondent, yet none of these processes was transmitted to this court in the record of appeal. This court is therefore confronted with an incomplete record which makes it impossible for us to attempt to determine the Appellants' claim before the lower court. Condition number 3 for the invocation of section 15 of the Court of Appeal Act has therefore not been met as all the necessary materials for consideration by this court have not been made available by the Appellants. This failure or omission is fatal to the Appellants' supplication for this court to hear and determine their application before the lower court through the invocation of section 15 of the Court of Appeal Act. For all the reasons afore-stated, I find merit in this appeal and it is allowed. The judgment of the High Court of Lagos State in Suit Number LD/3981MFHR/2016, delivered on 17<sup>th</sup> January, 2018, is set aside. It is ordered that the suit be remitted back to the Chief Judge of Lagos State for re-hearing by another Judge. I order that parties shall bear their respective costs.

  
MUHAMMAD IBRAHIM SIRAJO  
JUSTICE, COURT OF APPEAL

FUNMILOLA OPE ESQ  
PRINCIPAL EXECUTIVE OFFICER  
CERTIFIED TRUE COPY  
COURT OF APPEAL





**APPEARANCES**

Solomon Okedara for the Appellant.

Funke Onakoya for the 1<sup>st</sup> Respondent

Olayinka Sunmola for the 2<sup>nd</sup> Respondent

S.A. Kanabe for the 3<sup>rd</sup> Respondent.

CA/L/1097/2018

OBIETONBARA O. DANIEL-KALIO, JCA

I have read the judgment of my learned brother **MUHAMMED IBRAHIM SIRAJO, JCA** and I agree with his reasoning in coming to the conclusion that Suit No. LD/398MFHR/2016 of the High court of Lagos State delivered on 17/1/2018, be remitted to the Chief Judge of Lagos State for re-trial by another judge. A trial judge has a duty to resolve all issues before it. This is important because an appellate court is in error correction court. Where a trial court fails to consider and resolve an issue, it is like a student that turns in a blank answer. Such an answer makes it impossible for the examiner to assess. The end result for the student is obvious: a repeat looms. I therefore agree that the matter on appeal be remitted to the Chief Judge of Lagos State High Court for trial by another Judge.



OBIETONBARA O. DANIEL-KALIO  
JUSTICE, COURT OF APPEAL

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CA/L/1097/2018

ADEBUKUNOLA A.A BANJOKO, JCA.

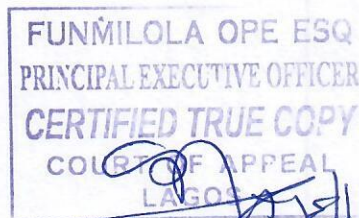
Before now, I had read the Judgement just delivered by my learned brother, MUHAMMAD IBRAHIM SIRAJO, JCA, in advance carefully. I agree with the reasoning and conclusion reached by my learned brother and adopt same as mine.

I hereby equally found this appeal meritorious and same is sustained.



ADEBUKUNOLA A.A BANJOKO  
JUSTICE, COURT OF APPEAL.

*CTC of judgment 1000.00*



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