IN THE HIGH COURT OF JUSTICE, EDO STATE OF NIGERIA
IN THE BENIN JUDICIAL DIVISION
HOLDEN AT BENIN CITY

BEFORE HIS LORDSHIP, THE HONOURABLE JUSTICE V.O. EBOREIME, JUDGE
SITTING IN HIGH COURT NO. 10 BENIN CITY
ON FRIDAY THE 31ST DAY OF OCTOBER, 2014

SUIT NO: ORACC/593R/2011
APPEAL NO. B/1A/2014

B E T W E E N:-

EMMANUEL AIBANGBE é PLAINTIFF/APPELLANT
(Suing by A. O. Otamere Esq.)

AND

MR. FRED OSOLASE é DEFENDANT/RESPONDENT

J U D G M E N T

This Judgment is in respect of the Notice of Appeal filed by the Plaintiff/Appellant against the Judgment of the trial Court, the Customary Court of Edo State, in the Oredo Area Customary Court No.3 presided over by D. O. Elogie, Esq. (President GD II) with Osagie Aiwerioghene and Pius Edokpolor as members. The Judgment was delivered on the 11th day of April, 2013. The nine (9) Grounds of Appeal without their particulars are as follows:

ñ**GROUND 1**

The Learned Trial president erred in Law when he failed to give effect to the interpretation of the definition of A TENANT as

provided for in Section 2 of the Edict No.4 of 1977 of the Defunct Bendel State of Nigeria, also applicable in Edo State.

GROUND 2

The Learned Trial President misapplied the facts in this case in arriving in His decision based on the celebrated case of AFRICAN PETROLEUM VS J.K. OWODUNI.

GROUND 3

The Decision of the Learned Trial President means or can be interpreted to mean that a Landlord must not make recourse to the Court in evicting a person in occupation of his premises if a 3rd party who is not in occupation pays his rent a scenario capable of encouraging the use of self help in the recovery of premises.

GROUND 4

The Learned Trial President erred in law when He overruled the submission of the Plaintiffôs Counsel that the non joinder of the company FREE LAND NIGERIA LIMITED should not defeat the cause of action.

GROUND 5

The Decision of the Learned Trial President means or can be interpreted to mean that a Landlord of a demised premises cannot maintain an action against a sub tenant at the Tribunal for the recovery of his demised premises.

GROUND 6

The Learned Trial President erred in Law when He gave probative value to a Document which was not tendered through the maker.

GROUND 7

The Learned Trial President erred in Law when the held that the Plaintiffôs Representative, PW1 did not state in evidence who he took over the management of the House from.

GROUND 8

The Learned Trial President erred in Law when he awarded the cost of N3,000 (Three Thousand Naira) (sic)

GROUND 9

The judgment of the Learned Trial President is altogether unwarranted, unreasonable and cannot be supported, having regard to the evidence adduced before him.ò

Based on the above Notice of Appeal, the Plaintiff/Appellant subsequently filed his Appellantôs Brief of Argument through his Learned Counsel, A. O. Otamere, Esq. on the 5th day of March, 2014. On being served with this process, the Defendant/Respondent, through his Learned Counsel, S. E. Akhiele, Esq. filed his Respondentôs Written Address on the 11th day of April, 2014. On being served with this process, the Appellant further filed his Appellantôs Reply on Point of Law on the 27th day of May, 2014.

On the 25th day of June, 2014 when the matter came up, only S. E. Akhiele Esq. Counsel to the Defendant/Respondent was in Court as all parties and the Learned Counsel to the Plaintiff/Appellant were absent. On this day, the Learned Counsel to the Respondent adopted his written address dated and filed on the 11th day of April, 2014 as his submission in this Appeal and urged this Court to uphold his submission.

Having done all that are required of him under the Rules of Court in bringing this Appeal, the Appellant and his Counsel have failed to appear on the day of hearing of the case. Appearance of parties before an appellate Court, as this one, is governed by the Rules of that Court. In the Supreme Court, such failure to appear has been held to be insignificant as long as the Counsel to the parties filed their respective brief of argument. See the reasoning of Kalgo, JSC (as he then was) in the case of UNION BANK OF NIGERIA PLC V ROMANUS C. UMEODUAGU (2004) NSQLR Vol. 19 page 158 at 165 where he held thus:

> ñAt the hearing of this appeal in this Court, neither the Appellantôs nor the Respondentôs Counsel was in Court, but both of them have filed their respective briefs, those briefs were deemed to be argued in this case by virtue of the provisions of Order 6, Rule 8(6) of the Supreme Court Rules 1985 as amended.ò

The above is quite clear on what the Supreme Court would do when parties and their Counsel who have filed briefs fail to appear to present Oral argument when the appeal is called. These provisions of the Supreme Court Rules are quite fundamentally different from the position of the Edo State

High Court (Civil Procedure) Rules, 2012 which is the extant Rules of this Court. Under these Rules, Order 55 Covers Appeals from Magistrateôs Courts, etc which this appeal falls within. The provisions of Rule 10(1) and (2) are quite unique. It says:

ñOrder 55

10 (1) If, on the day of hearing or at any adjournment of the case, the Appellant does not appear, the appeal shall be struck out and the decision shall be affirmed, unless the Court thinks fit, for sufficient cause, to order otherwise.

(2) If in any such case, the Respondent appears, the judgment shall be with cost of the Appeal against the Appellant, unless the Court expressly orders otherwise; but if the Respondent does not appear, the cost of the Appeal shall be in the discretion of the Court.ò

It should be borne in mind that Rules of Court are meant to be obeyed as held by Adekeye (JSC) in **THE NIGERIAN NAVY AND 10 ORS V LABINJO** (2012) NSCQLR Vol. 50 page 236 particularly at page 259 thus:

ñThe Rules of Court are meant to be obeyed. The purpose of the Rules of Court is to regulate matters in Court, and assist parties to any suit or appeal to present their cases for the purposes of a fair and quick trial, or hearing. Where the Rules are quickly complied with, there will be quick dispensation of justice.ò

In the case of CAPITAL BANCORP LIMITED VS SHELTER SAVINGS AND LOANS LIMITED AND ANOR (2007) NSCQLR Vol. 29 page 1754 Mukhtar, JSC held at page 1770 that:

ñEach State of Nigeria has its High Court Rules of practice and procedure, which must be adhered to, and the constitution having given each State that power to make its Rules, such Rules which may differ from state to state will govern the stateôs High Court exercise of its jurisdiction.ò

The above decision of the Supreme Court was based on Section 239 of the 1979 Constitution. Under the extant 1999 Constitution of the Federal Republic of Nigeria, this subject matter of Rules of Court (Practice and Procedure) was covered under Section 274 which is reproduced below:

ñ274 subject to the provisions of any law made by the House of Assembly of a State, the Chief Judge of a state may make rules

for regulating the practice and procedure of the High Court of the State.ò

Our case law is however replete with cases in support of doing substantial justice. See the case of SAôEED AND ANOR VS YAKOWA AND ANOR. (2012) NSCQLR Vol. 49 page 453 where Fabiyi, JSC held at page 490 that:

> ñIt is the paramount duty of Courts to do justice and not to cling to technicalities inherent in Rules of Court so long as same have been substantially complied with and the object of the rules is not defeated and failure to comply has not occasioned a miscarriage of justice. The view of the Court should be that non-compliance with any Rules of Court or any Rule of practice does not generally render proceedings voidò

I fully align myself with the above *ratio decidendi* of the apex Court of this land.

Having said the above, I feel it is pertinent to summarize the history of this appeal in this Court. On the 6th day of February, 2014 two copies of this Civil Appeal were issued out for service against the Respondent. On the 12th day of February, 2014, the Respondent, vide his Counsel, S. E Akhiele was

served the Record of Appeal. On the 5th day of March, 2014, the Appellant filed his Appellantôs Brief of Argument which was served on the Respondentôs Counsel by the bailiff of this Court on the 13th day of March, 2014. (Proof of service is at page 89 of the case file). On the 17th day of March, 2014 when the matter came up for hearing, I. H. Salami (Miss) appeared for Claimant/Appellant. The case was further adjourned to 3rd day of April, 2014 for hearing while Court ordered a fresh hearing notice to be issued and served on the Defendant/Respondent which was effected on the 24th day of March, 2014 by the bailiff of this Court on the Counsel to the Defendant/Respondent. The case could not proceed on the 3rd day of April, 2014 but was further adjourned to the 19th day of May, 2014 for hearing. On the 11th day of April, 2014, however, the Defendant/Respondent filed his Respondentôs Written Address for the Appeal which the Learned Counsel to the Appellant received on the 19th day of May, 2014. (Proof of his acknowledgement of receipt is at page 108 (a) of case file). On the 19th of May, 2014, the case could not go on while it was further adjourned to the 25th of June, 2014 for hearing. On the 27th day of May, 2014, the Appellantôs Counsel filed his Appellantôs Reply on Point of Law which was served on the Defendantôs/Respondentôs Counsel on the 27th day of June, 2014. (Proof of

service is at page 116 of case file). When the case now came up for hearing on the 25th day of June, 2014, only the Defendantôs/Respondentôs Counsel was in Court to adopt his written address.

From the foregoing, it is quite clear that the Plaintiff/Appellant has been diligent in filing all his processes before this Court but was unfortunately absent on the last adjourned date for hearing. This is quite unfortunate. Would it meet the end of justice for this Court to strike out the case of the Appellant for the failure of the Appellant (or/and his Counsel) to appear before this Court on the day of hearing of this Suit? I strongly believe that would be sacrificing justice on the altar of technicality which this Court as a Court of equity and justice would not do.

I am of the strong opinion therefore that the diligence of the Appellant from the time he filed his notice of appeal until he unfortunately failed to turn up on the day of hearing of the appeal is ñsufficient causeò for me to deem the Brief he filed as properly argued in this Court. And I so hold.

Having said all I have said so far, it is now pertinent to review the argument of the various Counsel in their briefs for and against the appeal respectively. In the Appellantôs Brief of Argument, the Learned Counsel, A.

O. Otamere, Esq. canvassed four issues for the determination of this appeal which are reproduced below:

ña. Whether having regard to the provisions of Section 2 of the Edict No. 4 of 1977 of the Defunct Bendel State of Nigeria, also applicable in Edo State and the Supreme Court decision in the celebrated case of AFRICAN PETROLEUM VS J. K. OWODUNI the Learned President was right in striking out the Suit on the ground that the Respondent was not the tenant of the Appellant. (Grounds 1, 2 and 5).

b. Whether the non joinder of Freeland Nigeria Ltd was sufficient to defeat the cause of action. (Ground 4).

c. Whether the Learned Trial President properly evaluated the evidence before him in arriving at his decision of striking out this Suit (Ground 6 and 7).

d. Whether the award of cost against the Appellant and in favour of the Respondent by the Trial President was warranted having regard to the fact that the Respondent never asked for cost. (Ground 8).ò

In arguing his ISSUE ONE above, the Learned Counsel to the Appellant submitted that Section 2 of the Edict No.4 of 1977 of the Defunct Bendel State of Nigeria defines a tenant to include any person occupying premises whether paying rent or otherwise but excludes a person occupying premises under a bona fide Claim to be the owner of the premises. He cited the following cases:

1. UDUSEGBE VS TUGBA AFWLR (Part 599) page 1194 at pages 1203 ï 1204 paragraphes H ï a.
2. AFRICAN PETROLEUM LTD VS OWODUNNI, AFWLR (part 208) page 775.

Learned Counsel thus submitted that the Trial President misinterpreted the provisions of the statute when he held thus:

> ñIn the case at hand, we have held that the contractual relationship is between the Plaintiff and Freeland International Company Ltd and therefore can the Defendant who is in physical occupation of the promises in issue be regarded as a tenant of the Plaintiff? We think not.ò Page 46 Lines 7 ï 11.

Learned Counsel also submitted that the Learned Trial President misapplied the Supreme Courtôs decision in **AP VS OWODUNI'S** case

when he held that the party in possession cannot be regarded as a tenant (page 46, Lines 15 ï 20); that such misinterpretation has led to the perverse judgment of the lower Court.

On his ISSUE TWO, Learned Counsel submitted that the trite position of the law is that non-joinder of parties cannot defeat the cause of action and referred this Court to the case of **BELLO VS INEC** (2011) AFWLR (Part 526, page 406 ï 407 ratio 11. Learned Counsel further submitted that when the Leaned Trial President held at page 47 Lines 1 ï 5 that the Suit was not properly constituted as proper parties were not before the Court and thus renders the whole suit incompetent was contrary to the Supreme Courtôs decisions to the effect that non-joinder of a party does not make an action incompetent.

On his ISSUE THREE, the Learned Counsel submitted that the trial Court failed to properly evaluate the evidence adduced before it; that the trial Court was in error when it held that P.W.1 did not disclose whom he took over the management of the house from (page 44 Lines 27 ï 28) as Exhibit A and page 11 Lines 17 - 21 showed the contrary. Learned Counsel further submitted that the Trial President erroneously gave probative value to Exhibit F contrary to the decision of the Court of Appeal in AREGBESOLA VS

OYINLOLA (2011) ALLFWLR 570 (CA) page 1305, Ration 10. Learned Counsel further submitted that the name of the officer who certified Exhibit F was not stated contrary to the provision of Section 111 of the Evidence Act and the case of GIWA VS YARBUN (2011) ALL FWLR Part 565 (CA) page 263, Ratio 7; that the payment of legal fee on an application for a certified true copy is only a condition which must be fulfilled before the officer certifies the document. He cited the case of DAGGAH VS BULANA (2004) ALL FWLR (part 212) 1666 at page 279 paragraphs D ï F. He submitted that this Court is in the same position with the trial Court to examine the documents tendered.

On his ISSUE FOUR, Learned Counsel submitted that the trial Court adjudicated on the Claim of the Plaintiff as there was no Counter-Claim before it; that the award of cost by the trial Court *suo motu* was erroneous. On the impropriety of Court granting relief not claimed, he cited the cases of STOWE VS BENSTOWE (2012) ALL AWLR (part 620(sic) page 1249 Ratio 5; AKPELU VS CHUKWU (2005) part 269 page 1863 Ratio 21 (CA).

Finally, the Learned Counsel to the Appellant prayed that the entire judgment of the Lower Court be set aside and judgment entered in favour of the Plaintiff/Appellant as per his amended Claim dated 6th January, 2012.

The Respondent on his own part canvassed three issues for the determination of this Suit in his Respondentôs written address filed by S. E. Akhiele, Esq. which are reproduced below:

ñ(1) Whether from the evidence adduced before the trial Area Customary Court, the Area Customary Court was right in holding that the suit was incompetent and therefore lacked jurisdiction to entertain it. (Grounds 1, 2, 4, 5, 9).

(2) Whether Exhibit ñFò was properly received in evidence being a receipt in acknowledgment of payment of money (Ground 6).

(3) Whether the Court was right to award costs to the Defendant/Respondent.ò

On his ISSUE ONE, Learned Counsel submitted that the evidence adduced at the trial Court justified the conclusion reached; that the evidence of P.W.1 that the Defendant on record was the tenant of the Appellant was the mere *ipse dixit* of the P.W.1 which required concrete proof that was not met. He cited the case of DEBS VS CENICO (1986) 3 NWLR 846 AT 853; that the evidence of D.W.1 was that Freeland International Co. Ltd. was the tenant NOT Fred Osolase on record. Learned Counsel submitted further that

Exhibit ñEò was in proof of the above assertion; that P.W.1 at page 13 Lines 1 ï 3 testified that one James Etim not Fred Osolase received Exhibit C ï the 7 days Notice; that even Exhibit B - Notice to quit - was invalid. On the mode of proving service, the Learned Counsel referred this Court to the case of ISAAC O. NLEWEDION VS NDUMA (1995) 30 LRCN 113 at 124 paragraphs B ï D; that the 7 days notice requires personal service under Section 20 of the Rent Control and Recovery of Premises Edict, 1997; that failure to serve the 7 days Notice on the Respondent or the tenant robbed the Lower Court of its jurisdiction and rendered the suit incompetent. He cited the cases of OKARIKA VS SAMUEL (2013) ALL FWLR (part 706) 484 at 506; OSAGWU VS STATE (2013) ALL FWLR (part 672) 1605 at 1624 paragraphs E ï G; Learned Counsel submitted that the case of AFRICAN PETROLEUM LTD VS J. K. OWODUNNI (2004) ALL FWLR (Part 280) 771 is distinguishable from the case at hand. On Section 2 of the Rent Control and Recovery of Premises Edict No. 4 of 1977, Learned Counsel submitted that Court should not give pedestrian interpretation to it, otherwise a tenantôs wife, children, house helps, parents, indeed all members of a tenantôs household, would be tenants; that the Supreme Courtôs case in African Petroleumôs case talked about ñLawful Occupation.ò On guide to the

interpretation of statute, Learned Counsel referred this Court to the case of AROWOLO VS AKAPO (2004) ALL FWLR (Part 208) 807 at 862 paragraphs F ï G; that the relationship of Landlord and tenant is a contract. He cited MARYAM ISIYAKU VS DR. J. S. ZWINGINA (2001) FWLR (Part 72) 2096 at 2105 paragraph F; that only parties to a contract can take benefits from and suffer liability under the trite principle of privity of contract. He cited OJO VS OGBE (2008) ALL FWLR (Part 433) 1344 at 1347 (CA).

On his ISSUE TWO, the Leaned Counsel to the Defendant/Respondent submitted that the trial Area Customary Court was right to have admitted the receipt of payment of rent issued by Uloho & Co. in evidence as acknowledgment of payment of money as Exhibit F. He submitted that having testified that the original was missing at page 17 lines 20 ï 25, the trial Court was right to have admitted Exhibit ñFò as secondary evidence whether or not certified or improperly certified. He relied on Sections 89 (c) and 91 (1) (a) of the Evidence Act, 2011; that Exhibit ñFò was made in the course of business by a Professional contemporaneously with the payment of the rent in accordance with Section 41 of the Evidence Act and thus admissible.

On his ISSUE THREE, Learned Counsel submitted that the Learned trial Court was perfectly right to have awarded costs having held that the Court lacked jurisdiction to entertain the suit and the same was incompetent. He submitted that the Defendant/Respondent was represented; that no law or rule of Court requires that Defendant must physically be present in Court; that the Court has power to make consequential orders as justice of the case demands whether formally asked for or not by Counsel or litigant. He cited the Case of COMPTOUR COMMERCIAL VS OGUN STATE (2002) 97 LRCN 903 at 913 EE.

On the relief claimed before the trial Area Court, Learned Counsel submitted that the Appellant failed to establish his Claim even if this Court should hold that the Court below was wrong to have declined jurisdiction. Learned Counsel also submitted that Appellant did not prove his claim before the Court below; that Mesne profits was not proved being a special claim which must be specifically proved. He cited again AFRICAN PETROLEUM LTD. VS OWODUNNI (2004) ALL FWLR (Part 208) 771 at 799 paragraphs G ï H. Learned Counsel also submitted that the Claim for electricity bill must not be awarded as no evidence was led before the Court to show what was owed for it.

In his Appellantôs Reply on Point of Law, Learned Counsel to the Appellant submitted that the issue of non service of 7 days Notice or direct service was not raised either in the defence of the Respondent or in the final address of the Respondentôs Counsel; that this was a fresh issue raised by the Respondent for the first time without the leave of this Court which should not be allowed by this Court. He cited the cases of AGBOOLA VS U.B.A. PLC (2011) ALL FWLR (Part 574) page 77; UDUSEGBE VS TUGBA (2011) ALL FWLR (Part 599) page 1192 Ratio 1. Learned Counsel further submitted that the issue of non-service cannot be raised by the Respondent as he did not cross-appeal. He relied on the above case of UDUSEGBE VS. TUGBA (Supra) Ratio 3. On how a notice can be delivered, Learned Counsel submitted that it can be delivered on person found in the premises or on some conspicuous part of the premises. He referred this Court to Section 44 (e) of the Land Use Act, Laws of the Federation 2004 and Section 33 of Rent Control and Recovery of Residential Premises Edict, 1977.

Learned Counsel further submitted that Section 2 of the Residential Premises Edict should be given its literal interpretation as the statute was clear and unambiguous. He cited the case of YUSUF VS OBASANJO ALWLR (sic) (part 212) page 1886 Ratio 15.

Other aspects of the Appellantôs Reply on Point of Law will not be reviewed by me as they are mere repetition or re-argument of Learned Counselôs submission in his Appellantôs brief. The trite position of the law is that the Appellant is not allowed to re-argue his submissions in the disguise of a reply brief. See FEDERAL REPUBLIC OF NIGERIA VS ANACHE AND 3 ORS (2004) NSCQLR Vol.17 page 140 particularly at page 178, per Niki Tobi, JSC; HONE ORS VS EDJERODE AND 5 ORS (2001) NSCQLR Vol. 8 page 341 at 352, per Ejiwunmi, JSC.

COURT:

I have painstakingly gone through the record of appeal, the brief of the Appellant and the Respondent and the various authorities cited by each of them. I am of the strong belief that the only issues to be decided in this appeal are as follows:

ñ1. Whether from the evidence adduced before the trial Area Customary Court, it was right in holding that the Suit was incompetent and therefore lacked jurisdiction to entertain it.

2. Whether the trial Court was right in awarding costs against the Plaintiff Appellant.ò

ISSUE ONE

In arriving at its conclusion that it had no jurisdiction to entertain the Suit, the Learned President of the Area Customary Court (Lower Court hereinafter) held that the proper parties were not before it and that the Defendant (Respondent) on record could not have been a tenant under Section 2 of the Rent control and Recovery of Premises Law.

The Lower Court cited the case of AFRICAN PETROLEUM VS OWODUNNI (Supra) and also held that the issue of landlord/tenancy was one of contract and not statutory. The Appellant has now come to the Court vehemently arguing that the Lower Court was wrong in law and that it misapplied the fact in the case of AFRICAN PETROLEUM VS OWODUNNI (Supra).

Without much ado, Section 2 of Edict No.4 of 1977, Bendel State of Nigeria (now Chapter R1 Recovery of Premises Law, 1977 Edo State of Nigeria Law No.4 of 1977) defines a tenant in the following words:

> ñ ñTenantò includes a sub-tenant or any person occupying any premises whether on payment of rent or otherwise but does not include a person occupying a premises under a

bona fide claim of rights the owner of the premises.ò

(Underline supplied by me for emphasis)

The Appellantôs Learned Counsel argued that the Respondent fell under the above underlined words as a tenant in the Premises of the Appellant. The Learned Counsel to the Respondent argued that such interpretation would be absurd as it could not have been the intendment of the framers of that Section of the Law. The Lower Court disagreed with the Appellant and ruled against him. Was the Lower Court wrong in law? Before answering this question, it will be apposite to see the facts and holding of the case of AFRICAN PETROLUEM LTD VS OWODUNNI (Supra) which the Lower Court relied on. In that case, the Plaintiff filed a Claim against the Defendant in the High Court of Lagos claiming recovery of premises from the Defendant of the promises which was put in possession by the Plaintiff as service tenant at the time of his employment with the Plaintiff. The Plaintiff also asked for injunction against the Defendant from continuing to occupy the said promises and mesne profit. The pleading was that the Defendant was a chartered accountant employee and a Director of the Defendant at the material time. The Plaintiff allowed him to occupy the premises ñfor as long as he held his appointment as Department Manager or Executive Senior Official and

Director with the Plaintiff/Company and on the terms and conditions contained in the letter dated 23rd May, 1973 from the then managing Director, R. B. Lyaskey to the Defendant.ò The Defendant was to pay rent to the Plaintiff which rent was reduced subsequently.

The purpose of the allocation of the premises was to enable the Defendant do his work for the Plaintiff. About a year later before the determination of the Defendantôs employment, the parties went before the Rent Tribunal which fixed the rent at a given figure per annum; the tribunal further allowed the Defendant two more years on the premises. After those years, the Defendant still held unto the premises, in spite of several notices to quit and intention to go to Court. The Learned trial Judge held that the tenancy of the Defendant was not properly determined as a result of insufficient and invalid notice to quit. He however made alternative finding that the Defendant was a tenant at sufferance and therefore ordered him to vacate the premises immediately. On appeal to the Court of Appeal, it was held that the Defendant was a statutory tenant and was entitled to the necessary notices prescribed under the Rent Control and Recovery of Residential Premises Law of Lagos State and the Plaintiff having failed to give the adequate notice, the Defendant was entitled to remain in possession

until the tenancy is determined according to law. The Court of appeal however awarded mesne profits against the Defendant for use and occupation of the premises. Both parties appealed to the Supreme Court and the Court unanimously dismissed the appeal and cross appeal.

The Lower Court herein in the case before me has, on this point, held thus:

> ñIt is uncontroverted the Defendant of record uses that(sic) the premises in issue as a director of the company and one who occupies a premises for his convenience and comfort because of his employment or service being rendered to that another person who is de jure the tenant in possession cannot be regarded as a tenant for he holds no estate in the property though he is in physical occupation, See: AFRICAN PETROLEUM VS OWODUNNI (Supra) at 772. We hold the view therefore, that the Defendant of record is not a tenant of the Plaintiff with respect to the premises in issue.ò (See page 46 of the Record of Appeal, paragraphs 10 ï 20).

Who is the Defendant (Respondent herein) to the Plaintiff (Appellant herein)? Is he a tenant or an agent or a servant who is allowed to occupy

premises belonging to his principal for the more convenient performance of his duties? What evidence was led on this? The P.W.1 at pages 11 and 12 of the Record of Appeal testified at paragraphs 25 ï 10 thus:

> ñI know the Defendant. He is a tenant in the house known as No.6, Guobadia Street, Off Etete Road, G. R. A, Benin City. He occupies a four bedroom duplex and a two bedroom domestic staff quarters. He is a yearly tenant. He pays the sum of N500,000.00. He was not paying his rents regularly, the Defendant last paid his rent up to April, 2010. He owes arrears of rents since May, 2010. We gave him six months notice to quit because of the arrears of rent é . The Defendant did not vacate at the expiration of Exhibit ñBò (Notice to quit) so I gave him a seven days notice of ownerôs intention to apply to recover possession é the Defendant did not vacate the premises at the expiration of Exhibit ñCò (7 days notice), so l filed this suit against him.ò

Under cross examination on the above evidence at pages 12 ï 13, paragraphs 30 ï 5 of the record of appeal, the P.W.1 said:

ñThe Defendant received Exhibit B and Exhibit C, but he refused to sign for them. In the case of the seven days notice, Exhibit C, somebody called James Etim signed for the Defendant. The name of the tenant is Fred Osolase and it is so stated in Exhibit B and Exhibit C .é .we inherited the Defendant as our tenant. When I took over the management of the house, the owner told me that the Defendant paid two years rent in advance with effect from April 2008 and he did not pay any other rent thereafter.ò

The D. W. 1 testified on how they got the occupation of the premises at pages 17 ï 19 of the record of appeal. In reviewing the evidence of the P. W. 1 and D. W. 1, the Learned President of the Lower Court held at pages 44 ï 45 paragraphs 15 ï 25 of the Record of Appeal thus:

ñP.W.1 in his testimony said the Defendant is the tenant of the Plaintiff and he occupies the house known as No.6 Guobadia Street, Off Etete quarters, G.R.A, Benin City. On the other hand, D. W. 1 gave a vivid account of how they negotiated for the house on behalf of Freeland International Company Limited with Uloho & Company then agents of the Plaintiff and eventually they made payment which is evidenced by Exhibit F. Even under

cross-examination, he maintained that the house was let by the company for its use and that of the directors inclusive of the present Defendant on record. D.W.1 was unshaken under cross examination and he even wanted to produce his identity card when Learned Counsel for the Plaintiff asked for it. Moreover, P.W. 1 testified that he took over the Management of the premises in issue and he was told that the Defendant paid two years rent in advance. P. W. 1 did not state from whom he took over the property and he did not know if any receipt was issued for the first payment made by the Defendant.

Learned Counsel for the Plaintiff asked Court not to attach any probative value or weight to Exhibit F because it was not tendered through the maker who then could be cross-examined on it. We are inclined to hold the view which is well adumbrated by Learned Counsel for the Defendant that a mere receipt is not strictu sensu such a document that requires tendering through the (sic) its maker for weight to be attached to it. See Elemaôs case (Supra).

What more? Exhibit D was issued by the same Freeland International Company Limited to the P.W.1 who never asked or inquired into the relationship between that company and the Defendant of record. He raised the issue that Exhibit G was transaction done by another and therefore Exhibit D could have been issued by anybody to cover the rents of the Defendant of record. We are not persuaded by his logic because Exhibit G covered cash transaction of payment into a bank account and the usual practice is for the person making the payment to state his particulars as in Exhibit G.

In the light of the unshaken testimony of D. W. 1 which is corroborated by Exhibit E, Exhibit F and Exhibit D which was tendered by P.W.1, we hold the view that it is Freeland International Company Limited that let the premises in issue from the Plaintiff and not the Defendant of record.

Learned Counsel for the Plaintiff submitted that the Defendant of record is the alter ego of Freeland International Company Limited. However, the submission is of no moment

because there is no evidence on record at all to sustain the assertion.ò

I am in agreement with the Learned President of the Lower Court that the Defendant of record (the Respondent herein) was not the person who entered the contractual agreement with the Plaintiff (Appellant herein). His reasoning cannot be faulted by me on this point.

The above, notwithstanding, it did not answer the question posed earlier whether the Defendant, possessing the premises of the Plaintiff (Appellant herein) is a tenant under Section 2 of the Rent Control and Recovery of Residential Premises Law of Bendel State, 1977. The Appellant said he is but the Respondent said otherwise while the Court disagreed with the Appellant. At page 46 of the record of appeal, paragraphs 5 ï 10, the Learned President of the Lower Court held that:

ñA tenancy is born out of a contractual relationship and not of a statutory relationship. In the case in hand, we have held that the contractual relationship is between the plaintiff and Freeland International Company Limited and therefore can the Defendant who is in physical occupation of the premises in issue be regarded as a tenant of the Plaintiff? We think not.ò

At page 342 of Owodunnôs case cited above in NSCQLR, Karibi-Whyte, JSC (as he then was held) thus:

> ñIt is now well settled, by decided cases of this Court that for the purposes of the Rent Control and Recovery of Premises, the law recognizes only two classes of tenant. These are the contractual tenancies, and the statutory tenancies.ò

At page 333 of the Owodunniôs case (Supra) Nnaemeka-Agu, JSC threw light on the relationship between the above two types of contract when he held thus:

> ñA tenant who enters upon premises by reason of a contract with the landlord is a contractual tenant. Such a tenant holds an estate which is subject to the terms and conditions of the grant. Once that tenancy comes to an end by effluxion of time or otherwise and the tenant holds over without the will or agreement of the landlord, he becomes a tenant-at-sufferance. This is strictly a common law concept. <u>But sometimes there is a statute which gives security of tenure to such a tenant after his contractual tenancy has expired. Where such a statute exists he now holds the premises no longer as a contractual tenant because there no</u>

longer exists a contract between him and the landlord. But he none-the-less retains possession by virtue of provisions of the statute and is entitled to all the benefits and is subject to all the terms and conditions of the original tenancy.ò (Underlining supplied for emphasis).

What is clear from the case herein as rightly held by the Lower Court is that one Freeland International Company Ltd was the contractual tenant of the Plaintiff (Appellant herein). The statute which would give him a security of tenure is undoubtedly the Rent control and Recovery of Residential Premises Law, 1977 of Bendel State. I am of the view however that the Lower Court was wrong in rejecting the submission that the Respondent was the tenant of the Appellant because the Appellant did not prove it.

The Learned President of the Lower Court thereafter held that the Suit was not properly constituted in that the proper parties were not before the Court; that the defect did not make it an issue of non-joinder of a necessary party, thereafter declined jurisdiction and struck out the case with cost against the Plaintiff. How do you determine a proper party in a Suit? Adekeye, JSC in the case of BELLO VS INEC AND 2 ORS (2010) NSCQLR Vol.41 page 627 at 702 answered it when he held that:

ñIt is the prerogative of the Plaintiff to determine the Defendants in a Suit. The liability of each of the parties in the Suit would be determined having regards to the pleadings and evidence led by the Claimant in the light of the applicable laws. Therefore in order to determine whether a party is a proper Defendant to a Suit, all the Court needs to do is to examine the Claim of the Plaintiff before the Court. It is the Plaintiffôs Claim that gives him the right to initiate the action for the alleged wrongful act.ò

From the totality of the evidence led at the Lower Court, it is not in doubt that the Plaintiffôs Claim gave him the right to initiate the action. It is not in doubt that the Plaintiff is the landlord of the property of which the Defendant is in possession. It is also not in doubt that the Plaintiff entered into a contractual tenancy agreement for which the tenure is in doubt. The bone of contention is that while the Plaintiff argues that the Defendant was his tenant as a result of being in possession, the Defendant argued that it was another party who is the tenant of the Plaintiff.

The Plaintiff has urged the Lower Court to hold that the Defendant was his tenant by virtue of Section 2 of the Rent Control law of Bendel State. The Lower Court disagreed. I am of the view that the lower Court is wrong. It is

trite that a Court cannot deal with a matter without jurisdiction as any exercise without it is a nullity. See Chukwuma-Eneh, JSC at page 210 in the case of ALAWIYE VS OGUNSANYA (2012) NSCQLR Vol.52 page 186 where he said:

> ñIt is settled law, all the same that a Court cannot deal with a matter without jurisdiction being the enabling power of a Court to entertain a matter before it as no matter however brilliantly a matter is conducted without jurisdiction it is a nullity and a sheer waste of time of the Court.ò

Still on the Ogunsanyaôs case (Supra), Rhodes-Vivour, JSC held at page 229 that:

> ñNow a Court is competent when:
>
> (a) It is properly constituted as regards the members and qualifications of its members of the bench, and no member is disqualified for one reason or another; and
>
> (b) The subject matter of the case is within its jurisdiction and there is no feature in the case which prevents the Court from exercising its jurisdiction; and

(c) The case coming up before the Court was initiated by due process of law, and upon fulfillment of any condition precedent to the exercise of jurisdiction.ò

The Lower Court has held at pages 46 ï 47 of the record of appeal that:

ñé having held that the defendant is not a tenant of the Plaintiff we hold that this Suit is not properly constituted in that the proper parties are not before this Court. We hold that the defect does not make it an issue of non-joinder of a necessary party, it renders the whole Suit incomplete.ò (Underlining mine for emphasis)

I believe the Lower Court erred in holding that the Defendant (Respondent herein) was not the tenant of the Plaintiff (Appellant herein) in spite of the evidence led that the former was in lawful occupation of the demised premises. In the recent Supreme Court case of ABEKE VS ODUNSI AND ANOR (2013) Vol.224 LRCN (part 2), page 181, Ariwoola, JSC, while delivering the lead judgment held at page 206, paragraphs P ï EE that:

ñWho then is a tenant? Under the Rent Control and Recovery of Residential Premises Law ï Section 40 (i) provides thus:

ñUnless the content otherwise requires ótenantô includes a sub-tenant or any person occupying any premises whether on payment of rent or otherwise but does not include a person occupying premises under a bona fide claim to be the owner of the premises.ò

The qualification therefore, for becoming a tenant under the law is lawful occupation.ò (Underline supplied by me for emphasis)

Section 40 (i) of the Rent Control and Recovery of Residential Premises Law referred above is *in pari materia* with Section 2 of the Recovery of Premises Law, Bendel State upon which this case is being fought. If lawful occupation as held by the Supreme Court in Abekeôs case (Supra) is the qualification to be a tenant, then the Defendant (Respondent herein) who is in lawful occupation is the tenant of the Plaintiff (Appellant). I so hold. Nothing from the law suggests that one who pays the rent is ultimately the tenant as the Learned Counsel to the Defendant argued before the Lower Court and also before this Court.

Having held that the Defendant is the tenant to the Plaintiff, could that have invoked the jurisdiction of the Lower Court? This can only be answered by going through the evidence led at the Lower Court plus the exhibits

tendered. Of most importance in answering this question is unraveling the issues surrounding Exhibits ñBò and ñCò ï Six months Notice to Quit and Seven Days Notice of Ownerôs Intention to Apply to Court for possession. (See pages 60 and 61 of the record of appeal). These two exhibits were issued against the Defendant, whom I have held was the tenant of the Plaintiff. The Defendant has however denied ever receiving these Exhibits through the P.W.1, who incidentally was not the Defendant but a staff to Freeland International Company Limited. The Plaintiff through P.W.1 however said under cross-examination at pages 16 -17 of the record of appeal thus:

> ñThe defendant received EXHIBIT B and EXHIBIT C, but he refused to sign for them. In the case of the seven days notice EXHIBIT C, somebody called James Etim signed for the defendant. The name of the tenant is Fred Osolase and it is so stated in EXHIBIT B and EXHIBIT C.ò

The Learned Counsel to the Appellant in his reply on point of law has contended strenuously that the issue of service of Seven Days Notice was a fresh issue raised for the first time on appeal without leave of this Court.

This contention cannot be true on the face of the evidence on record as the D.W.1 testified in his examination-in-chief at page 19, paragraphs 10 of the record of appeal thus:

> ñAs a Staff of Freeland International Company Limited, I did not receive any notice from the landlord, Uloho and Company or any other person. Freeland International Company Limited was never served any notice by the landlord, or Uloho and Company or any other person.ò

Under cross-examination, the D.W.1 said at page 20 paragraph 20 of record of appeal that:

> ñI am not aware that a notice was given to the defendant of record.ò

The authority of AGBOOLA VS U.B.A PLC (Supra) cited for the contention by the Appellantôs Counsel is therefore discountenanced by me.

Service of these statutory notices is condition precedent which must be complied with to invoke the jurisdiction of the Court. IN SOCIETE GENERALE BANK (NIG.) LTD. VS ADEWUMI (2003) NSCQLR Vol.14 page 119, Katsina-Alu, J.S.C (as he then was) held at page 129 that:

ñIt is now trite law that failure to serve process, where service of process is required, is a failure which goes to the root of the case. See *Craig v. Kanseen (1943) K.B. 256 at 262.* Service of process on a party to a proceeding is fundamental. It is service that confers competence and jurisdiction on the Court seized of the matter. Clearly, due service of process of Court is a condition *sine qua non* to the hearing of any Suit. Therefore if there is a failure to serve process where service of process is required, the person affected by the order but not served with the process is entitled *ex debito justiciae* to have the order set aside as a nullity.ò (Underlines for emphasis by me).

See also FBN PLC VS T.S.A. IND. LTD (2010) Vol. 187 LRCN page 1 at page 70 paragraphs EEJJ and 71A, per Muntake-Coomassie, J.S.C.

As rightly submitted by the Learned Counsel to the Defendant (Respondent), service has to be proved as held in NLEWEDIM VS NDUMA (1995) 30 LRCN 113 at 124, paragraphs B ï D thus:

ñThe law is clear as to admissibility of a contentions document in the face of denial of having received it by the defendant. The procedure for tendering such document is after the statement of

defence had clearly traverse the averment of having sent it to the defendant and in the absence of a dispatch book indicating its receipt, or evidence of having sent it by registered post the probative value of such document will be worthless unless there are witnesses, credible enough that the defendant was served with it.ò

From the above authority, it is clear that the requirements for proof of service of Exhibits B and C on the Defendant, which was not met by the Plaintiff, were as follows:

(1) Absence of dispatch note.

(2) No registered post

(3) No credible witnesses to testify on it.

I have held supra that one of the three conditions which can invoke the competent and jurisdiction of the Court is that the case comes before the Court initiated by the due process of law and upon fulfillment of any condition precedent to the exercise of jurisdiction. See ALAWIYE VS OGUNSANYA (Supra) per Rhodes-Vivour, page 229.

Having failed to fulfill the condition precedent for service of Exhibits B and C on the Defendant, the Lower Court ought to have declined jurisdiction on this ground alone. But having held that it has no jurisdiction to entertain the Suit, to that extent it was right. And I so hold.

ISSUE TWO

THIS ISSUE TWO is on whether the trial Court was right in awarding costs against the Plaintiff/Appellant. Without much ado, I have held on ISSUE ONE that the Lower Court had no jurisdiction which it equally earlier accepted. The submission of the Learned Appellantôs Counsel on the strength of STOWE VS BENSTOWE (2012) ALL FWLR (Part 62) (S.C) page 1249 is to the effect that cost was not claimed by the Defendant as a relief. The Learned Counsel to the Respondent, on this point relied on COMPTOUR COMMERCIAL VS OGUN STATE (2002) 97 LRCN 903 at 913 EE to the effect that the Court has discretion to make consequential order as the justice of the case demands.

It is trite that costs follow the events and it is within the discretion of the court to be exercised judiciously. See GKF INV. LTD VS NIG.

TELECOM. PLC (2009) Vol. 174 LRCN at 40 paragraphs KP, per Ogbuagu, JSC where he held that:

> ñThe general practice is that costs follow the event and a successful party is entitled to costsé . The award of costs is within the discretion of the court and it must be exercised judiciously . . . By way of emphasis, like the award of general damages, the award of costs involves the exercise of judicial discretion which is based on settled principles. Award of costs is not meant or designed to be a bonus to a successful party.ò

See also OLUSANYA VS OSINEYE (2001) 13 NWLR 298 at 332 paragraphs. D ï E where Onalaja, J.C. A held that:

> > ñThe basis for award of costs under our adversarial system of jurisprudence is to compensate the successful party and not to punish the unsuccessful party. It is this compensatory attitude that gave rise to the statement that costs follow the event.ò

Furthermore, an appellate court should not upset an award of damages except where the lower court acted upon wrong principle or the amount

awarded is extremely low or high or the amount was an erroneous estimate. See the case of A-G. LEVENTIS NIG. PLC VS CHIEF CHRISTIAN AKPU (2007) NSCQLR Vol. 30 page 631 where Ogbuagu, JSC said at page 657 that:

> ñAn Appellant court (sic) ought not to upset an award of damages by a trial court merely because, if it had tried the matter, it might have awarded a different figure. An award of damages can only be upset or interfered with by an Appellate court if it is shown by the Appellant either that:
>
> (a) The trial court acted or proceeded upon wrong principles of law, or
>
> (b) The amount awarded by the trial court is manifestly and extremely high or low or
>
> (c) The amount was on an entirely erroneous estimate which no reasonable tribunal will make.ò

The cost awarded by the lower court was a consequential order. It is trite that a court can make consequential order even where it is not specifically claimed but appears incidentally necessary to protect

established rights. See the case of AMAECHI VS INEC & 2 ORS (2008) NSCQLR vol. 33 page 332 where Musdapher, JSC held at page 465 that:

> ñThe relief granted to the appellant even if not asked could under the circumstances of the fact of this case amount to a consequential relief. It is the law even where a person has not specifically asked for a relief as a consequential relief.
>
> A consequential order must be one made giving effect to the judgment which it follows. It is not an order made subsequent to a judgment, which derails from the judgment or contains extraneous matters. It is settled law that court can order an injunction even where it is not specifically claimed but appears incidentally necessary to protect established rights.ò

The award of ₦3,000.00 (Three Thousand Naira only) against the Appellant for his incompetent claim in favour of the Respondent is right in the eyes of the law. The Respondent need not file a counter claim or specifically ask for it as it is purely under the discretion of the trial court. I am of the belief that the learned trial President has exercised that discretion judiciously. I so hold.

In the final analysis, I answer the first issue formulated for determination in the affirmative and hold that the learned trial President was right in holding that the suit was incompetent and therefore lacked jurisdiction to entertain it. I answer the second issue formulated for determination in the affirmative also as the cost awarded against the Appellant was right. I therefore dismiss this appeal for want of merit. I award ₦10,000.00 (Ten Thousand Naira) as cost of this appeal against the Appellant.

HON. JUSTICE V. O. EBOREIME
JUDGE
31st October, 2014

COUNSEL:

A. O. OTAMERE, ESQ. FOR APPELLANT