

IN THE COURT OF APPEAL
HOLDEN AT LAGOS JUDICIAL DIVISION
ON MONDAY THE 11TH DAY OF DECEMBER, 2017
BEFORE THEIR LORDSHIPS

MOHAMMED LAWAL GARBA

YARGATA BYENCHIT NIMPAR

ABIMBOLA OSARUGUE OBASEKI-ADEJUMO

JUSTICE, COURT OF APPEAL

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APPEAL NO: CA/L/969^c/2017

BETWEEN

HON. JUSTICE HYELADZIRA AJIYA NGANJIWA

APPELLANT

AND

FEDERAL REPUBLIC OF NIGERIA

RESPONDENT

JUDGMENT

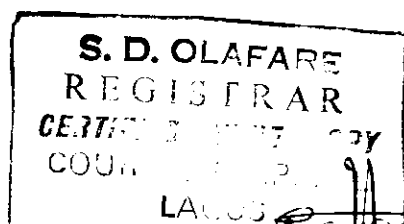
(DELIVERED BY ABIMBOLA OSARUGUE OBASEKI-ADEJUMO, JCA)

This is an appeal against the decision of the High Court of Lagos State; *coram* **AKINTOYE, J.**, delivered on 23rd June, 2017, against the Appellant's Notice of Preliminary Objection dated and filed on the 13th June, 2017 challenging the jurisdiction of the court to entertain and determine the instant information against the Appellant.

The facts relevant to the determination of this appeal are that, the Appellant was by a 14 Count information dated 8th June, 2017 charged for offences ranging from unlawful enrichment by a public officer to making false information contrary to Section 82(a) of the Criminal Law of Lagos State, No. 11, 2011 and Section 39(2) (a) of

CA/L/969^c/2017

Page 1 of 35



2. **Whether in view of the constitutionally guaranteed doctrine of independence of the Judiciary, the lower court is right in reaching the conclusion that the executive arm of government (acting through the EFCC or any other authority) can directly prosecute a sitting judicial officer without first following due process as provided for in the Constitution by first referring the matter by way of petition to the National Judicial Council.”**

The Respondent’s brief dated 3rd October, 2017 was filed 9th October, 2017 but deemed 24th October, 2017 and same was settled by Rotimi Oyedepo Iseoluwa, Esq; Nnaemeka Owewa, Esq and I.A. Mohammed, Esq., of the Economic and Financial Crimes Commission (EFCC). A sole issue was formulated thus:

“Whether in view of the facts and circumstances of this case, it can be said that the learned trial judge lack the requisite jurisdiction to hear and determine the information dated and filed on the 8th day of June, 2017.”

Having set out the preliminaries, I shall proceed to summarize the argument canvassed by the parties before considering and determining the issues based on the position of the law applicable herein.

SUBMISSIONS OF COUNSEL

On the first issue, the Appellant’s Counsel submitted that they are **not** contending that the Appellant or any other judicial officer are

not subject to criminal prosecution **rather** they are contending that the Appellant like any other judicial officer must first be subjected to the disciplinary jurisdiction of his or her employer which is the National Judicial Council before such officer can **now** be arraigned for criminal prosecution if his or her situation warrants so doing. That due process must be followed in order to maintain respect and sanctity of the rule of law. Learned Counsel cited Section 158(1) and paragraph 21(B) third schedule to the Constitution of the Federal Republic of Nigeria, 1999 (as amended) to submit that, the National Judicial Council has the first right to exercise disciplinary control over any allegation of misconduct levied against any judicial officer and that in exercising its constitutional powers, the National Judicial Council shall be supreme as it is not subject to the direction of any other authority. Learned Counsel submitted that this in effect means that neither the Executive nor the Legislature or the Judiciary can interfere with the constitutional powers of the National Judicial Council hence the constitutionally guaranteed principle of separation of powers.

Learned Counsel submitted that the Complainant before the trial court in Charge No. LD/4769^c/2017 did not satisfy the condition above and could not be held to have validly invoked the jurisdiction of the trial court and that the trial court misdirected itself when it assumed jurisdiction despite the fact that the Appellant drew the attention of the court to this fact. He relied on the cases of **U.A.C v MACFOY (1961) 3 WLR 1405 at 1409; MADUKOLU v NKEMDILIM (1962) 1 ANLR 583; TUKUR v TARABA STATE (1997) 6 SCNJ 81; AG KANO v AG FEDERATION [2007] 6 NWLR (PT 1029) 164; WAEC v ADEYANJU [2008] 9 NWLR (PT 1092) 270; OJO v INEC [2008] 13 NWLR (PT 1105) 577** and urged this court to find merit in the appeal and allow same.

On the Appellant's second issue, learned Counsel for the Appellant submitted that the Constitution of Nigeria guarantees separation of powers among the three arms of government and the National Judicial Council is a creation of the Constitution and as such its power to discipline persons within its control cannot be interfered with by any authority including the EFCC and the Attorney general of Lagos State. He relied on Sections 4-6, 153, 158, 160, 292,

paragraph 21(B) & 318 of the 1999 Constitution Federal Republic of Nigeria (as amended); as well as case law in the following cases.

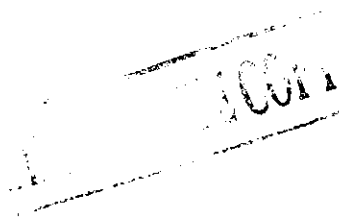
SAMUEL L EKEOCHA v CIVIL SERVICE COMMISSION, IMO STATE (1981) 1 NCLR 155; SENATOR BC OKWU v SENATOR WAYAS & ORS (1981) 2 NCLR 522.

Learned Counsel submitted further that the removal of a judicial officer is what the Constitution contemplated and not conviction, because such conviction is not capable of removing the toga given to judicial officers. Counsel contended that because of this, it is important for such judicial officers to be appropriately removed or suspended first by the NJC. He relied on the cases of **JUSTICE OPENE v NJC & ORS (2011) LPELR-CA/A/324/07; ELELU HABEEB v AG FEDERATION [2012] 13 NWLR (PT 1318) 423; ABDULLAHI v GOV. KANO STATE [2014] 16 NWLR (PT 1433) 213 at 256, para A.**

Learned Counsel contended that the conclusion of the learned trial judge that the powers of NJC to discipline and punish wrongdoing by judicial officers do not include powers to determine criminal liability is erroneous. He contended also that the learned trial Judge

missed the point when he held in its Ruling that the Charge against the Appellant can be sustained independently or concurrently with any administrative disciplinary procedure that may be initiated by the NJC. He submitted that the offences brought against the Appellant is one that constitutes misconduct, which is as defined by **Blacks Law Dictionary 8th edition at page 1019 and paragraph 19 of the fifth schedule to the 1999 Constitution (as amended) and as** such the NJC has power to determine the misconduct/breach of code of conduct which may be criminal in nature.

Learned Counsel urged this court to apply the mischief rule of interpretation to the facts of this case where the literal interpretation of the sections of the Constitution relied upon by the Appellant will not lead to a clear and unambiguous interpretation/conclusion as suggested by the Appellant. He relied on Section 15 of the Court of Appeal Act and the cases of **IFEZUE v MBADUGHA (1984) NSCL 14; WILSON v AN. GEN. FOR BENDEL STATE [1985] 1 NWLR (PT 4) 572; SAVANAH BANK OF NIG LTD v AJILO [1989] 1 NWLR (PT 97) 305; UWAIFO v AG. BENDEL**



STATE & ORS (1982) NSCC (VOL. 13) 221; ADEYEMI-BERO v LSDPC [2013] 8 NWLR (PT 1356) 238 at 301 paras B-C, 304 paras F-G, 310 paras C-E for the purpose of mischief rule and when to apply same. He submitted that the mischief the 1999 Constitution was made to cure is the interference by the Executive arm of government in the Judiciary. He relied on Section 256 of the 1979 Constitution to buttress his point.

Learned Counsel submitted that the use of **'shall'** in paragraph 21(B) of the third schedule to the 1999 Constitution (as amended) gives no room for the court's discretion. He relied on the cases of **AGBITI v NIGERIAN NAVY [2011] 4 NWLR (PT 1236) 175 at 210, per ADEKEYE, JSC; NATIONAL ASSEMBLY v C.C.I CO LTD [2008] 5 NWLR (PT 1081) 519 at 540, per OMOLEYE, JCA, paras D-G**; Section 10(2) of the Interpretation Act; Section 318(4) of the 1999 Constitution (as amended). He submitted that the power of NJC to discipline judicial officers cannot be interfered with until after NJC determines such cases, and where found guilty; NJC can recommend such judicial officers for removal and trial in a proper court. He submitted further that Section 272 of the 1999

Constitution relied upon by the learned trial Judge to assume jurisdiction is subject to other provisions of the Constitution cited by the Appellant's Counsel and that same was not considered by the trial court in giving its Ruling. He relied on the cases of **LABIYI v ANRETIOLA [1992] 8 NWLR (PT 258) 139 at 163, per EJIWUNMI, JSC; EBHOTA v PLATEAU INVESTMENT & PROPERTY DEV. CO. LTD [2005] 15 NWLR (PT 948) 266 at 283, paras B-E.**

The Respondent's Counsel on its sole issue submitted that the doctrine of judicial immunity does not protect a serving judicial officer against criminal proceedings when he is reasonably suspected to have committed a criminal offence. He submitted that the Information preferred against the Appellant ensued as a result of the Appellant's extra-judicial acts which contravene the provisions of the law under which the Appellant is charged. He relied on the cases of **SBM SERVICES NIG LTD & ORS v OKON & ORS (2003) LPELR-7292 (CA), per EKPE, JCA, 30-33, paras B-A); CANDIDE-JOHNSON v EDIGIN (1990) LPELR-20108 (CA), per ACHIKE, JCA, 28-30, paras G-D; EGBE v ADEFARASIN & ANOR**

(1985) 16 NSCC (PT 1) 643; NDEFO v OBIESIE [2000] 15 NWLR (PT 692) 820; ONITIRI v OJOMO 21 NLR 19 at 23.

Learned Counsel submitted that Section 158 of the Constitution relied upon by the Appellant does not grant him immunity from criminal prosecution and did not also create any condition precedent for the prosecution of a judicial officer and that to imply same will be tantamount to urging this court to embark on a voyage of discovery to destroy the true meaning and effect of Section 158 of the Constitution. He relied on the cases of **UWAZURUIKE v NWACHUKWU & ORS (2012) LPELR-15353 (CA), 51, paras C-E, per ABBA AJI, JCA; AG OGUN STATE v ALHAJI A ABERNAGBA & ORS (1985) 4 SC (PT 1) 288 at 383; OYEYEMI v COMMISSIONER FOR LOCAL GOVERNMENT KWARA STATE (1992) SCJN 266 at 280; ARTRA IND. NIG LTD v NBCI (1998) 13 SCJN 97 at 115; BAKARE v NRC [2007] 17 NWLR (PT 1064) 639; ODUTOLA HOLDINGS LTD v LADEJOB I [2006] 12 NWLR (PT 994) 321 at 358; UNIPETROL v E.S.B.I.R. [2006] 8 NWLR (PT 983] 624 at 641; RIVERS STATE GOVERNMENT v SPECIALIST KONSOLT [2005] 7 NWLR (PT 923) 145 at 179;**

TARZOOR v AVINE & ORS (2011) LPELR-5029 (CA) 15, per GUMEL, JCA, paras D-F. Learned Counsel further submitted that paragraph 21(B) of the third schedule to the 1999 Constitution relied upon by the Appellant was to empower NJC to recommend to the President the removal of judicial officers and to exercise disciplinary control over such officers. He contended that both the criminal proceedings and the disciplinary proceeding of the NJC can go on simultaneously and that even where one should be suspended pending the conclusion of the other, it is the NJC's proceeding that should wait. He relied on the cases of **VERITAS INSURANCE CO LTD v CITI TRUST INVESTMENT [1993] 3 NWLR (PT 281) 348; OKAFOR v MADUBUKO [2000] 1 NWLR (PT 641) 473; EKERETE v UBA [2005] 9 NWLR (PT 930) 401; FRN v VIJAY LALWANI APPEAL (2013) LPELR-20376 (CA).**

On the application of the mischief rule, learned Counsel submitted that this court cannot resort to same until it has established that the intention of the legislature was unclear or ambiguous. He relied on the cases of **FAGBOLA & ANOR v KOGI CHAMBERS OF COMMERCE INDUSTRY, MINES & AGRICULTURE & ANOR**

(2006) LPELR-5392 (CA) 18-19, per RHODES-VIVOUR, JCA, paras F-C.

Learned Counsel submitted that the Appellant is not covered under the provisions of Section 308 of the Constitution and that a specific provision of the law prevails over and above that which is general. He relied on the case of **IBORI v OGBORU [2004] 15 NWLR (PT 895) 154 at 194 – 195; CAC v DAVIS (2006) LPELR-11411 (CA) 15-16, per OWOADE, JCA, paras F-C.**

In reply to the contention of the Respondent, learned Counsel for the Appellant submitted that their argument borders on due process with respect to institution of criminal proceedings against a judicial officer and not absolute shield from criminal proceedings as argued by the Respondent. Counsel also contended that NJC's proceeding is quasi-criminal in nature that can either lead to removal, suspension and/or further proper criminal proceeding and not a civil one that can be commenced distinctively or simultaneously with criminal proceeding as argued by the Respondent. Furthermore, learned Counsel for the Appellant cited **MANCHESTER CITY COUNCIL v MCCANN (1999) 2 WLR 590,**

CA; The Construction of Statutes (2nd edition) Toronto: Butterworths 1983, pg. 75; **FAGBOLA & ANOR V KOGI CHAMBERS OF COMMERCE INDUSTRY, MINES AND AGRICULTURE & ANOR (2006) LPELR-5392 (CA) at 19, para C per RHODES VIVOUR, JCA** to contend that the Respondent cannot blow hot and cold on the application of the mischief rule and urged this court to resolve the issues in their favour.

RESOLUTION

I observe that the two issues formulated by the Appellant can be subsumed under the Respondent's sole issue and it is even my firm view that those issues can be determined in one sweep, as it appears, issue two is dependent upon the resolution of issue one. Therefore, this appeal shall be determined by considering the two issues together.

Now, the National Judicial Council (NJC) was established pursuant to the provisions of Section 153 (1) of the 1999 Constitution (as amended) and by subsection 2 thereof, the composition and powers of the Council are as contained in Part 1 of the Third Schedule to

the Constitution. Pursuant to this, paragraph 21 of the Third Schedule states:

21. The National Judicial Council shall have power to

(a) ...

(b) recommend to the President the removal from the office of the judicial officers specified in sub-paragraph (a) of this paragraph and to exercise disciplinary control over such officers....”

On the other hand, Section 158 clearly spells out the independence of the National Judicial Council in the following terms:

(1) In exercising its power to make or to exercise disciplinary control over persons, the Code of conduct Bureau, the National Judicial Council, the Federal Civil Service Commission, the Federal Judicial Service Commission, the Revenue Mobilization and Fiscal Commission, the Federal Character Commission, and the Independent National Electoral Commission shall not be subject to the direction or control of any other authority or person.”

A cumulative reading of these relevant provisions of Section 153(1), 158(1), paragraph 21 (b) of Part 1 of the Third schedule of the 1999 Constitution (as amended) is to the effect that the National Judicial Council (NJC) is the **sole body** with authority to recommend to the President for the appointment and removal of any Judicial Officer at

the federal level and also exercise disciplinary control over Judicial Officers.

In line with Paragraph 21 (h) & (i) thereof, the NJC which has the power to collect, control and disburse all monies for the judiciary and to deal with all other matters relating to policy and administration, and it is in this regard that **National Judicial Policy of April, 2016; Judicial Discipline Regulations of 9th March, 2017; Revised Code of Conduct for Judicial Officers of the Federal Republic of Nigeria of February, 2016; Revised NJC Guidelines & Procedural Rules for the appointment of Judicial Officers of all Superior Courts of Record in Nigeria of 3rd November, 2014** were all formulated.

It is relevant to note that the Revised Code of Conduct for Judicial Officers of February, 2016 at page 2 thereof states:

- “1. The code applies to all categories of Judicial Officers throughout the Federation as defined in this Code.
2. Violation of any Rules contained in this code shall **constitute judicial misconduct** and or, misbehavior and shall attract disciplinary action.”

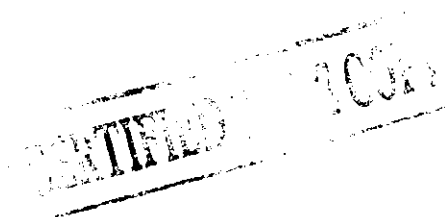
Rule 3 makes provision in relation to fidelity to the Constitution and the Law

“3.1 A Judicial Officer should be true and faithful to the Constitution and the Law, uphold the course of justice by abiding with the provisions of the Constitution and the Law and should acquire and maintain professional competence.”

Rule 10 prohibits the acceptance of gift, bequest, loan, favour, benefit, advantage, bribe etc. It provides:

1. iii. A Judge shall not give or take and shall not encourage or condone the giving or taking of any benefit, advantage, bribe however disguised for anything done or to be done in the discharge of a judicial duty.

The Appellant, presently a Judge of the Federal High Court, was charged *vide* a Criminal Information for conduct/acts which are tantamount to a breach of his Oath of office and breaches contained in the **Revised Code of Conduct of February, 2016** and which are at the same time offences under the **Criminal Law**. The Judicial Oath is administered at the swearing in of a Judicial Officer as contained in the 7th schedule of the Constitution. As a serving judge, the Appellant is under the management, control and disciplinary ‘jurisdiction’ of the National Judicial Council as envisaged under Paragraph 21(b) Part 1 of the Third Schedule to the 1999 Constitution (as amended). The foregoing has been affirmed in a host of judicial authorities including **ELELU – HABEEB & ANOR v A.G. FEDERATION (supra); OPENE v NJC**



(supra); ABDULLAHI v GOVERNOR, KANO STATE (supra). The allegations against the Appellant are purportedly committed against the guidelines contained in the Revised Code of Conduct. See Rule 7 and 10 thereof.

Misconduct has been defined by the Black's Law Dictionary, 9th Edition at page 1089, thus:

(1) “
Dereliction of duty or improper behavior, official misconduct has also been defined by the same dictionary and on the same page. A public Officer's corrupt violation of assumed duties by misconduct in office or official corruption, also corruption in office, when a judicial officer is said to have misconducted himself/herself in office it means he has corruptly violated his duties.”

Whenever a breach of judicial oath occurs, it is a misconduct itself, then the NJC is the appropriate body to investigate such breaches by the judicial officer and if found to be so, such judicial officer shall face disciplinary action and the NJC may recommend the removal of such a judicial officer to the appropriate authority which is either the President in the case of a Federal Judicial Officer or the Governor of the State in the case of a State Judicial Officer and/or take other actions appropriately. When this is done and accepted by the appropriate authority in compliance with the provisions of the

Constitution, then the relevant law enforcement Agent or Agency is at liberty to make the said judicial officer face the wrath of the law.

Any act done by the law enforcement Agent or Agency in violation of the above is tantamount to denying the NJC its powers to discipline Judges in accordance with the provisions of Section 153(1) and paragraph 21 part 1 of the Third Schedule, of the 1999 Constitution (as amended). See paragraph 21 (a) & (b) of the Third Schedule, Part 1 of the 1999 Constitution (as amended) respectively. Whenever there is an allegation of official misconduct against a judicial officer and the above stated process is not adhered to, it amounts to jumping the gun and *ipso facto* a direct violation of the Constitution. Recourse to the National Judicial Council is a condition precedent as clearly set out by the Constitution, and any attempt by any Agency of Government to by-pass the Council will amount to failure to observe condition precedent thereby leading to flagrant violation of the Constitution.

I have examined the Charge which is mainly made up of 13 allegations of corruption allegedly committed by the Appellant as a sitting Judge of the Federal High Court and the last count relates to

statements made to the EFCC during investigation. It is obvious from the various counts that the Appellant is purportedly being charged with “*unlawful enrichment by Public Officer...*” while being a Judge of the Federal High Court.

It must be expressly stated that if a judicial officer commits theft, fraud, murder or manslaughter, arson and the likes, which are crimes committed outside the scope of the performance of his official functions, he may be arrested, interrogated and prosecuted accordingly by the State **DIRECTLY** without recourse to the NJC. These classes of criminal acts are not envisaged and captured by the provisions of paragraph 21, part 1 of the Third Schedule. On the other hand, if any Judicial Officer commits a professional misconduct within the scope of his duty and is investigated, arrested and subsequently prosecuted by security agents without a formal complaint/report to the NJC, it will be a usurpation of the latter’s constitutionally guaranteed powers under Section 158 and paragraph 21 Part 1 of the Third Schedule, thereby inhibiting, and interfering with and obstructing the NJC from carrying out its disciplinary control over erring judicial officers as clearly provided

by the Constitution. This will thus amount to a violation of the constitutionally guaranteed independence of (a fundamental component) of the judiciary. See **ELELU – HABEEB & ANOR v A.G. FEDERATION** (*supra*).

I need to emphasize that the Constitution of this Country, being the *grund norm*, and fundamental legal order of the state clearly recognizes and guarantees the doctrine of separation of powers and checks and balances. Sections 4, 5 and 6 thereof contain provisions relating to the legislative, executive and judicial arms of the Government. In most known democracy, the judiciary is always accorded the freedom to conduct its affairs without fear of interference, intimation, threat, ill-will from any other arm of Government. It is in order to ensure that this is done that the NJC was established under the Constitution and specifically given the power to discipline any of its Judicial officer who misconducts himself in accordance with the provision of paragraph 21 (b) part 1 of the 3rd Schedule of the 1999 Constitution (as amended) of the Federal Republic of Nigeria. See **EZE v FRN [1987] NWLR (PT 51) 506**.

The Supreme Court of Nigeria Court aptly captured the principle behind separation of powers in **A.G. ABIA STATE & ORS v A.G. FEDERATION (2003) LPELR – 610 (SC) 23 – 24, paras E – A, per BELGORE, JSC** where the court held:

“The principle behind the concept of separation of powers is that none of the three Arms of Government under the Constitution should encroach into the powers of the other. Each arm – the Executive, Legislative and Judicial - is separate, equal and of coordinate department and no arm can constitutionally take over the functions clearly assigned to the other. Thus the powers and functions constitutionally entrusted to each arm cannot be encroached upon by the other. The doctrine is to promote efficiency in governance by precluding the exercise of arbitrary power by all the arms and thus prevent friction.”

See **GLOBAL TRANSPORT OCEANICO S. A. & ANOR v FREE ENTERPRISES NIG. LTD (2001) LPELR 1324 (SC).**

Whereas in the instant case, the Constitution has stipulated steps that must be taken before an action can proceed; omitting to do so would render such act a nullity. See **ONYEDEBELU v NWANERI & ORS (2008) LPELR - 4793 (CA); GTB PLC v TANK INVESTMENT LTD & ANOR (2005) VOL 13 WRN 25 AT 31; AINA v JINADU [1992] 4 NWLR (PT 233) 91 AT 109, para B; ALHAJI ABUBAKAR AHMED & ANOR v CROWN MERCHANT BANK LTD (2005) 41**

WRN 117 AT 126, para 4. KALGO, JSC in ELELU HABEEB & ANOR v A.G FEDERATION (supra) at page 20 paras C – E held:

“There is no doubt however that under our Constitution, the three arms of Government in both the Federation and the States are distinct and separate, and each has its functions and powers clearly set out...”

Likewise in **A.G. FEDERATION v GUARDIAN NEWSPAPERS LTD (1999) LPELR 3162 (SC), per KARIBI-WHYTE, JSC at page 71, paras A – C, it was held thus:**

“A notable feature of the amended Constitution of 1979 is the distribution of the exercise of governmental function among the three principal and separate departments of the Legislature, the Executive and the Judiciary. The Constitution also prescribed the scope and limits for each department and that within its jurisdiction; the exercise of power is supreme. Accordingly, implicit in the powers so vested, the one was not to interfere in the exercise of the powers of the other, except to the extent to which the constitution confers such power of interference.”

OGUNBIYI, JSC in GOYANG KAYILI v ESLY YILBUK & ORS (2015) LPELR 24323 (SC) at page 32 para B also on whether the Executive can usurp the powers of the Judiciary and *vice versa* stated:

“The Constitution is very clear and specific on separation of the powers between the arms of government to wit the Executive, Legislation and the Judiciary at both Federal and State levels; thus the Executive cannot exercise or usurp the powers of the Judiciary and vice versa.”

Therefore, as it relates to the instant case, and with specific reference to the powers of NJC to exercise disciplinary control over the Appellant, a Judicial Officer, it is quite plain that the Constitution endows the NJC the responsibility of recommendation for appointment and disciplinary control over judicial officers and not the Executive through its agents. See **ELELU – HABEEB & ANOR v A.G. FEDRATION** (*supra*) where the incumbent Chief Justice of Nigeria, **ONNOGHEN, JSC** held that the exercise of the powers conferred upon the NJC under Section 153 (1) brooks no interference. **MOHAMMED, JSC** also stated in that case, thus:

“It is in the spirit of the Constitution in ensuring checks and balances between the three arms of Government that the role of the Governor in appointing and exercising disciplinary control over the Chief Judge of his state is subjected to the participation of the National Judicial Council and the House of Assembly of the State in the exercise to ensure transparency and observance of the rule of law.”

As a matter of fact, I draw strength from the twelve (12) guidelines laid down in **A.G. BENDEL STATE v A.G. FEDERATION (1981) LPELR 605 SC per OBASEKI, JSC** at page 123 - 124, paras A – B, which the Apex Court admonishes every court to considered

when construing the provisions of Statutes, especially the Constitution. The relevant guidelines are as follows:

- (1) **Effect should be given to every word**
- (2) **A construction nullifying a specific clause will not be given to the Constitution unless absolutely required by the context.**
- (3) ...
- (4) ...
- (5) ...
- (6) ...
- (7) ...
- (8) ...
- (9) ...
- (10) ...
- (11) **The principles upon which the Constitution was established rather than the direct operation or literal meaning of the words used, measure the purpose and scope of its provisions.**
- (12) ...

It is elementary principle in the interpretation of statute that the words used in a provision must *prima facie* be given their natural and ordinary meaning where such words are not ambiguous. The words used in the constitution must also be given the liberal and purposeful interpretation. In **NIGERAN ARMY v BRIGADIER GENERAL AMINUN – KANO [2010] 5 NWLR (PT 1188) 429 at 463** approved the purposive interpretation. **MOHAMMED, JSC** in the leading judgment held that *“the provisions of any law made by legislative are not made for mere form of it or for the purposes of merely the whims and caprices of the interpreter. They must be*

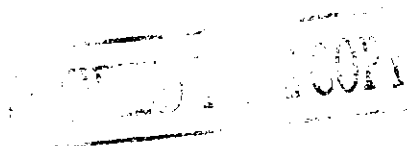
interpreted and applied to meet the circumstances issuing conditions for which they were made.”

See also **LAFIA LOCAL GOVERNMENT v THE EXECUTIVE GOV., NASARAWA STATE (2012) LPLER - 20602 (SC) 16 to 17 paras F – B**, where **RHODES-VIVOUR, JSC** held thus:

“Interpretation of sections of the Constitution reveals the intention of the Legislature and so sections of the Constitution are never to be read in isolation. They should be interpreted in a way that on no account should one section defeat the intent of another section...”

As earlier observed, Section 158(1) of the Constitution clearly says that the powers of the NJC shall not be subject to the direction or control of another authority or person. The use of the word “shall” show that the independence of the NJC is imperatively guaranteed. See **UGBA & ORS v SUSWAM & ORS (2012) LPELR - 9726 (SC)** where it was held that the word “*shall*” signifies a command and the act commanded must be complied with.

The NJC in furtherance of its powers published the NATIONAL JUDICIAL POLICY in APRIL 2016 as well as the JUDICIAL DISCIPLINE REGULATIONS on 9th March, 2017 wherein clause 2.2.9 spells out the judicial discipline regulations as to complaint



made, time, format of a complaint, circumstances permitting consideration of information regarding incidents that may amount to breach of code of conduct without investigation; reference of complaints for investigation etc. It also provides for step by step procedure in its discipline. The preamble with respect to its scope states that *“these regulations govern allegations and conduct against judicial officers and proceedings initiated in exercise of the powers of the national Judicial Council pursuant to Part 1 of the Third Schedule of the 1999 Constitution of the Federal Republic of Nigeria as amended to exercise disciplinary control over judicial officers against whom allegations of misconduct has been made.”*

Though it is a subsidiary legislation, they nonetheless have statutory flavor as confirmed by the court in **SHITTA-BEY v FEDERAL PUBLIC SERVICE COMMISSION (1981) LPELR - 3056 (SC)**. The NJC Regulations must be complied with.

For the avoidance of doubt, may I state clearly that no judicial Officer is covered by immunity from prosecution under the Constitution as the Constitution only grants the powers to discipline judicial officers for official misconduct to the NJC.

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The Judicial Discipline Regulation of May, 2017 contains steps to regarding the making of a formal complaint to the NJC, who after due consideration shall recommend the appropriate action to be taken and if need be, hand such matter over to the security agencies. This underscores the point that the NJC is not a court trying criminal matters. Far from it! In **OPENE v NJC (supra)**, this court, *per* **GALINJE, JCA** said at **pages 40 – 50 paras A – F** made it clear on whether the NJC had powers to investigate and prove criminal allegations against judicial Officers that:

“...The word misconduct used as a reason for removal of Judicial Officer is known to those who framed the Constitution to be a criminal offence and yet the responsibility to recommend to the President, the removal of such officer is given to the National Judicial Council. If the Constitution intended that such misconduct must be subject to trial by court it would have said so...rather the Constitution gave the court power to try criminal offences also gave the NJC power to investigate allegations of misconduct against Judicial Officers and make recommendations for their removal. It is my firm view that the procedure adopted by the NJC is sustainable...The Appellant has constitutional power to investigate the criminal allegations made against the Appellant and to make a finding that the allegations are proved...”

Any act or action by any agency or the Executive Arm of Government that any part of the Federation which tends to or may be seen as an attempt to cow a vital component of the Judiciary

allegations of misconduct against judicial officers even on criminal allegations of bribery and corruption made against its officers. The NJC is created by the Constitution to solely regulate affairs of the appointed judicial officer without interference from any authority.

It is only and only when, the NJC has given a verdict and handed over such judicial officer (removing his toga of judicial powers) to the prosecuting authority that he may then be investigated and prosecuted by the appropriate security agencies. The NJC does not have to wait for a court to finish before exercising its disciplinary powers, I think the wisdom behind the Constitutional Provision is to ensure that, the erring Judicial officer does not carry along with him the dignity, and respect accorded the office of a Judicial officer, I also think the Society today is replete with such instances, where even public officers occupying highly responsible positions are subjected to investigation by administrative committees, and are relieved of their appointments, after the Committees submit their reports, and recommended for prosecution. I am convinced that the lower court did not consider the purport of section 158(1) of the constitution.

As noted in the **OPENE'S CASE**, this is the first time in the constitutional history of Nigeria that the provisions of Section 158 and paragraph 21 of the Constitution are made part of our laws. They were not in the 1963 and 1979 Constitution and this shows the intention of the framers of the Constitution to put the NJC in a special position of supremacy over the affairs of the judiciary. Not even the powers granted to the EFCC under the enabling Act or case law can supersede these provisions and I so hold. As it relates to this case, this merely means that the powers of the EFCC have been invoked prematurely and this amounts to absolute nullity. See **ELELU-HABEEB v A. G. FEDERATION & ORS (supra)**. The lower court therefore misconstrued the effect of the relevant provisions of the constitution under consideration, when it held at page 70 of the records thus:

“The Economic and Financial Crime Commission (EFCC) presenting this one in an agent of the Federal Government of Nigeria and clearly part of the Executive Arm of Government.

The Economic and Financial Crime Commission by virtue of the Economic and Financial Crime Commission (establishment) Act 2004 specifically Section 6, 7, 13 and 14 has a wide range of powers to investigate and prosecute financial crime he refer to the case of HASSAN v EFCC (2014) 1 NWLR (PT 1389) page 607 at 63 para 9 which states;



“No court having the power to stop the investigation power of the police or the EFCC where there is reasonable suspicious of the commission of a crime.”

The issue is not whether judges possess immunity for non-judicial acts but whether there are laid down procedures to be followed and complied with before arresting & prosecuting a serving Judge?. The Doctrine of separation of powers and its administration must be carefully understood by all levels and organs/agencies of Government so as not to create anarchy. Both the criminal and administrative disciplinary proceedings cannot go together as contended.

I take judicial notice by virtue of section 74 of the Evidence Act, 2011 of the recent event in this country wherein the Presidency setting up a panel of investigation in-house of allegations made against the Director General of the National Intelligence Agency and the Secretary to Government. It was after accepting the report that security agencies took over the investigation and potential prosecution of the matter arising. Another analogy is in relation to Armed Forces, wherein orderly room trial is conducted before an officer is made to face the Court marshal and even the Civil Service has similar procedures from them. I also take judicial notice of that

similar process was followed in the case of *Auta, J.* of the Kano State Judiciary, at the end of the investigation and his dismissal, the matter was handed over to the prosecuting agency. This is also akin to the situation adopted in Ghana wherein the judicial officers were first disciplined by the body saddled with that responsibility before the State subsequently prosecuted them. The correct procedure is that the NJC should be allowed to carry out its constitutional duty of exercising its disciplinary powers over its judicial officers as set out under the Constitution before any information is filed.

Permit me to say at this juncture, to press home the point that the Constitution supersedes any Act of Assembly. See section 1 of the 1999 Constitution; **OLUFISOYE v FRN (2004) LPELR -2553 (SC); MADUMERE & ANOR v OKWARA & ANOR (2013) LPELR - 20752 (SC); FBN PLC v T.S.A. INDUSTRIES LTD (2010) LPELR - 12283 (SC)**. The judiciary has no lesser power. It is the Third arm and ought to be treated as such. A bird that flies with one arm will experience the difficulty and the folly of embarking on that cause. The Almighty God in his wisdom created those unique animals with

two wings to maintain a balance. It is in this wisdom that scientist assembled the airplane. A nation is like that – the three arms are needed for a smooth administration of Government. To disregard an arm will on the long run erode checks and balances demanded in a society, and so doing will potent imminent danger to our emerging democracy.

Needless to remind the Respondent that time does not run against the State in criminal matters, prosecution can always be done at any time but due process must be followed. It is not the norm to rush to prosecution when all the bolts are still out. I am firmly of the opinion that if at the end of the measures taken by the NJC, anyone is aggrieved, such a person who feels dissatisfied may apply to court for judicial review in accordance with laid down provisions of the law.

I respectfully hold in the light of the foregoing that the condition precedent for the filing of the charge in the instant case has not been fulfilled; and the lower court lacked jurisdiction to try the case. All proceedings therein amount to a nullity. See **UAC LTD v MACFOY (1962) A.C. 152; MADUKOLU v NKEMDILIM (supra);**

LAFIA LOCAL GOVT v EXECUTIVE GOV., OF NASARAWA STATE
(supra).

I hereby resolve the two issues in favor of the Appellant.

In the result, the appeal has merit and is hereby allowed. The Ruling of the Lagos State High Court delivered on 23rd June 2017, is hereby set aside. The preliminary objection filed on 13th June, 2017 by the Appellant is hereby upheld and Charge No. LD/4769^c/2017 is hereby struck out.

ABIMBOLA OSARUGUE OBASEKI-ADEJUMO
JUSTICE, COURT OF APPEAL

S. D. O.
LAGOS
12/12/17

APPEARANCES

ROBERT CLARKE, SAN with O. OLADELE, I. S. MATESUN and OMONIYI ONABULE for the Appellant.

ROTIMI OYEDEPO with I. A. MOHAMMED for the Respondent.

CA/L/969^c/2017

HON. JUSTICE MOHAMMED LA WAL GARBA, JCA

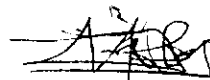
My learned brother, *Abimbola Osarugue Obaseki-Adejumo, JCA*, has comprehensively considered the crucial issue which calls for decision by the Court in this appeal, in the lead judgement, a draft of which I read before now. I agree with the reasoning and conclusion that the provisions of the EFCC Act empowering the Respondent to investigate and prosecute the named offences in the Act, are subject to the provisions of the Constitution, the grund norm and the supreme law of the land, see **PDP v. CPC (2011) 10 MJSC, 1; NPA v. Eyamba (2006) ALLFWLR (320) 1022; A. G., Abia State v. A. G. F. (2006) ALLFWLR (338) 604**, which empower the National Judicial Council to discipline serving judicial officers in the country for misconduct which may involve some form of the offences the Respondent may investigate and prosecute. In the case of **HDP v. Obi & Ors. (2011) 12 MJSC (Special Edition) 67 @ 100**, the Supreme Court, per Adekaye, JSC had warned that: -

“The Constitution is the supreme law of the land; therefore the provisions are superior to every provision embodied in any Act or law and are binding on all persons and authorities in Nigeria. The failure to follow any of the provisions renders the steps taken unconstitutional, null and void. Such Act must be set aside by the Court.”

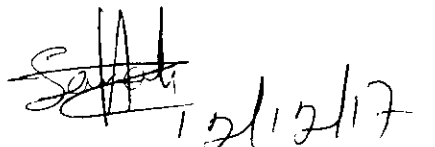
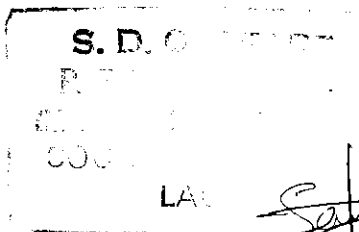
In the exercise of the powers vested in it by the EFCC Act, the EFCC has a mandatory legal duty and constitutional obligation to comply with and do so in accordance with the provisions of the Constitution because, as a public institution and authority, it is bound by the Constitution.

In the exercise of its powers in respect of serving judicial officers in Nigeria, the specific procedure provided for in the Constitution for the discipline of such officers, cannot be ignored, but should be respected and complied with. Perhaps, I should emphasize that the Constitution does not exempt, by way of immunity, serving judicial officers from investigations and possible prosecution for offences which the EFCC is vested with the requisite authority and power to investigate and prosecute. The Constitution only provides for the procedure to be followed and complied with in the investigation and before possible prosecution of serving judicial officers.

For the above and more detailed reasons in the lead judgement, I join in allowing the appeal in the terms set out the rein.



**MOHAMMED LAWAL GARBA
JUSTICE, COURT OF APPEAL**



12/12/17

CA/L/969C/2017

YARGATA BYENCHIT NIMPAR

My learned brother, **ABIMBOLA OSARUGUE OBASEKI-ADEJUMO, JCA** gave me the opportunity of reading in advance the judgment just delivered. I agree with the reasoning and conclusion arrived in the lead judgment.

The main issue to be determined is whether or not the lower court had the jurisdiction to sit over the prosecution of the Appellant prior to all necessary and constitutional steps by the National Judicial Council (NJC). The Appellant, a serving judicial officer was charged for offences ranging from unlawful enrichment by a judicial officer to giving false information. These are criminal allegations and which are in breach of the Judicial Code of Conduct. These have nothing to do with judicial codes which only arises with respect to anything said or done by a Judge in the exercise of a jurisdiction which belongs to him, see **EGBE V ADEFARASIN & ANOR (1985) NWLR (PT 3) 549**. See also the case of **NDEFO V OBIESIE (2000) 15 NWLR (PT 692) 820** where the court held thus:

"In Sirros v Moore (1974) 3 All ER 776, Lord Denning M.R. dealing with the liability of the judge for acts within jurisdiction said at pages 781 – 782:

'It has been accepted in our law that no action is maintainable against a judge for anything said or done by him in the exercise of a jurisdiction which belongs to him. The words which he speaks are protected by an absolute privilege. The orders which he gives, and the sentences which he imposes, cannot be made the subject of civil proceedings against him. No matter that the Judge was under some gross error or ignorance, or was actuated by

envy, hatred and malice, and all uncharitableness, he is not liable to an action..."

The Appellant therefore is not covered by judicial immunity with respect to the allegations leveled against him. But that is not the case of the Appellant.

Now, the Criminal Laws of Lagos State and the Economic and Financial Crimes Commission (EFCC) Act, 2004 provides for the prosecution of any person suspected to have committed the offences brought against the Appellant. However, the Appellant being a serving judicial officer is primarily under the Constitutional disciplinary powers of the National Judicial Council. This is a body specifically created under the Constitution with strictly specified responsibilities, which include the discipline of judges. Paragraph 21(b) Part 1 of the Third Schedule to the 1999 Constitution of the Federal Republic of Nigeria (as amended) provides as follows:

21. The National Judicial Council shall have power to—

b) recommend to the President the removal from office of the judicial officers specified in sub-paragraph (a) of this paragraph, and to exercise disciplinary control over such officers;

See also Section 158 (1) of the 1999 Constitution which provides as follows:

*"158 (1) In exercising its power to make appointments or to exercise disciplinary control over persons, the Code of Conduct Bureau, **the National Judicial Council**, the Federal Civil Service Commission, the Federal Judicial Service Commission, the Revenue Mobilisation and Fiscal Commission, the Federal Character Commission and the Independent National Electoral Commission shall not be subject to the direction or control of any other authority or person."*

The implication of above provisions particularly paragraph 21(b) Part 1 of the Third Schedule to the 1999 Constitution is that the Constitution gives the NJC the power to exercise disciplinary control over erring judicial officers where there is breach of the code of conduct. The Judicial code of conduct made pursuant to a Constitutional power is subsidiary legislation and therefore has the power of law. The appointment and removal of the judicial officers by the President is based on the recommendation of the NJC. In between, the administration and disciplinary actions to be leveled against serving judges are also subject to the NJC. Judicial officers are under the covering and control of the NJC and there is procedure set out for dealing with such issues which are provided for by the subsidiary legislations. If there is any allegation of misconduct therefore brought against a Judge in the execution of his official duties, which is a breach of the Code of Conduct, it must first go through and be dealt with by the NJC before any other step is taken by anybody or person with other powers and who still desires to proceed against such a judicial officer.

In the administration of justice, it is extremely important that due process is followed. Due process has been defined to mean the conduct of legal proceedings in accordance with laid down rules and principles for the protection and enforcement of the right of an individual, see **OKOREAFFIA V AGWU (2008) LPELR – 4724 (CA)**. One of the conditions for the Court to exercise jurisdiction in a given case is that the suit must have been commenced by due process of law and upon fulfillment of any condition precedent to assumption of jurisdiction, see **MADUKOLU V NKEMDILIM (1962) 2 SCNLR 341**. Thus, when the constitution bestowed on NJC the process of carrying out an act or disciplining an erring judicial officer, the process must first be complied with before any other action is taken in the matter. Though not explicitly stated but by implication NJC must be the first point of contact before proceeding against such a judicial officer.

The question one will then ask is whether due process was followed in this case? Absolutely not. The Respondent without first complaining to the NJC, the body primarily responsible for the discipline of judicial officers who breach their oath of office, proceeded to the court instituting criminal proceedings against the Appellant. It is a breach of due process that the Respondent would avoid the NJC in the prosecution of acts which principally borders on misconduct of a judicial officer perpetrated in the course of the Appellant's duty as a judicial officer. This ought not to be. It is settled and trite that time does not run out for the State in the prosecution of crimes. If due investigations are conducted and a case made out, there is no reason precluding the Respondent from making a formal complaint to the NJC and attaching such a report to guide NJC in its constitutional duties.

The role of the NJC is synonymous to being the glory or cover for judicial officers. How then does one intend to attack its members without first going through it? A standard procedure has been set for the discipline of judicial officers which should be strictly complied with, else, the gates will be open for all sorts of intimidation and threats against judicial officers who refuse to bow to the whims and caprices of those who believe they have authority to also deal with judicial officer. There has to be checks and balances in the conduct of statutory duties bestowed by law on any agency. This is to check abuse and respect provisions of the Constitution. Perhaps, that is why the drafters of the constitution deemed it fit to include paragraph 21(b) Part 1 of the Third Schedule to the 1999 Constitution (as amended).

See the case of **ELELU-HABEEB & ANOR V AG FEDERATION & ORS (2012) 13 NWLR (PT 1318) 423** where the apex court per **MOHAMMED, J.S.C.** said thus:

"It is for the foregoing reasons that I hold the view that in the resolution of the issue at hand, the entire provisions of the 1999 Constitution in Sections 153(1)(i)(2), 271(1),

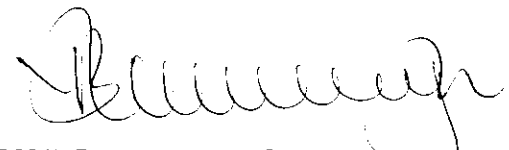
292(1)(a)(ii) and paragraph 21 of Part 1 of the Third Schedule to the Constitution of the Federal Republic of Nigeria 1999 dealing with the appointments removal and exercise of disciplinary control over Judicial Officers, must be read) interpreted and applied together in resolving the issue of whether or not the Governor of a State and the House of Assembly of a State can remove a Chief Judge of a State in Nigeria without any input of the National Judicial Council. This is because the combined effect of these provisions of the Constitution has revealed very clear intention of the framers of the Constitution to give the National Judicial Council a vital role to play in the appointment and removal of Judicial Officers by the Governors and Houses of Assembly of the State.”

See also the case of **OPENE V NJC & ORS (2011) LPELR – 4795 (CA)**.

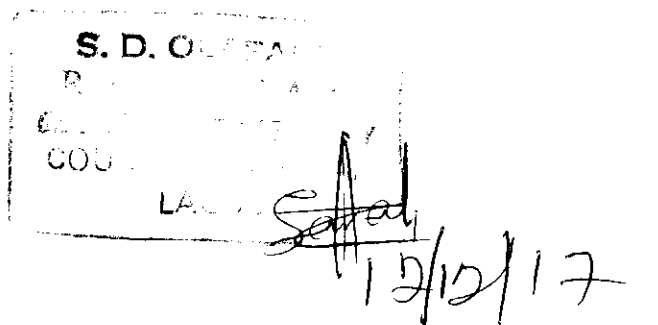
Although the above authority deals with the removal of a judicial officer, the principles raised are also applicable to the discipline of a serving judicial officer. That is not to say that the Appellant or judicial officials are precluded from prosecution for offences committed. No! The point I am trying to make is that the Respondent must first report any infractions to the NJC to carry out its Constitutional and disciplinary control over the Appellant, to establish a case before criminal proceedings. The Constitution is the grundnorm and supersedes any Act of the National Assembly, see **ADISA V OYINWOLA (2000) LPELR – 186 (SC)**. The EFCC Act being a creation of the National Assembly is subject to the dictates of the constitution. Surely, where there is controversy as to which provision is to be complied with, recourse must first be had to the Constitution, see Section 1 (3) of the 1999 Constitution. The EFCC, Department of State Security (DSS) or any other enforcement agency have powers over all persons but when a constitutional provision has set out what to be done before

the exercise of such powers, it must be complied with or else, the procedure would be flawed. The powers of NJC are a condition precedent to the exercise of any other power over judicial officers who breach the code of conduct. These law enforcement agencies are not above the law and therefore must also comply with specific provisions of the law (Constitution). The aim is not to shield any judicial officer but to ensure that there is a ground to proceed against such person before their prosecution. This is also to ensure that there is no abuse by these agencies.

In view of this and the detailed reasoning in the lead judgment, I too see merit in the appeal. It is allowed by me. I abide by the consequential orders made therein.



YARGATA BYENCHIT NIMPUR
JUSTICE, COURT OF APPEAL



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