IN THE COURT OF APPEAL
IN THE EKITI JUDICIAL DIVISION
HOLDEN AT ADO-EKITI

ON THURSDAY, THE 19TH DAY OF APRIL, 2018.

BEFORE THEIR LORDSHIPS:

JOSEPH SHAGBAOR IKYEGH	**----**	**JUSTICE, COURT OF APPEAL**
BOLOUKUROMO MOSES UGO	**----**	**JUSTICE, COURT OF APPEAL**
MUHAMMED MUSTAPHA	**----**	**JUSTICE, COURT OF APPEAL**

APPEAL NO: CA/EK/8C/2017

BETWEEN:

THE ECONOMIC AND FINANCIAL CRIMES COMMISSION ..... APPELLANT

AND

1. **MR. AYODELE FAYOSE (GOVERNOR OF EKITI STATE)**
2. **ZENITH BANK PLC**

} **RESPONDENTS**

JUDGMENT
(DELIVERED BY BOLOUKUROMO MOSES UGO J.C.A.)

By an originating summons filed on 24/06/2017 at the Ekiti Division of the Federal High Court, the first respondent as claimant raised the following questions for determination by that court:

1. Whether having regard to the provisions of section 308 of the 1999 constitution, as altered, and the entire circumstances of this case taken into consideration, the 1st respondent or any other security agency has the powers to attach the properties of and /or freeze the accounts of the applicant, a sitting governor for alleged offences purportedly committed under the Economic and Financial Crimes Commission Act and/or under other any other law or statute.

2. Whether the provisions of sections 6, 7, 34, and 38 of the Economic and Financial Crimes Commission Act, 2004 and any other provisions of the same are inconsistent with, supersede or override the express provisions of section 308 of the constitutions of the Federal Republic of Nigeria, 1999, as altered.

3. Whether having regard to the provisions of section 308 of the constitution of the Federal Republic of Nigeria, 1999, as altered, and in the peculiar circumstances of this case, the freezing, restricting, blocking or purported freezing, restricting or blocking of the accounts of the Appellant, a sitting governor while in office is illegal, unlawful, wrongful, unconstitutional and ultra vires the powers of the respondents.

4. Whether having regard to the provision of sections 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33 and 34 of the Economic and Financial Crimes Commission (Establishment) Act 2004, the 1st respondent can obtained an "interim order or forfeiture", trace, freeze or attach the assets, properties, or monies of the applicant without first arresting the applicant "for an offence under this Act" (EFCC Act) and without first applying for and obtaining interim order ex-parte from a court of competent jurisdiction.

5. Whether flowing from paragraph 4 above, the 1st respondent can arrest the applicant or apply for and obtain from the court an "interim order of forfeiture" against the applicant without committing a violent violation of the clear provisions of sections 1(1) and 308 of the 1999 constitution of the Federal Republic of Nigeria as altered.

6. If the answers to questions 4 and 5 are in negative, whether the 1st respondent can legally proceed to attach the assets, properties or monies belonging to the applicant, especially the applicant's monies

domiciled with the 2nd respondent in account numbers 1003126654 and 9013074033.

First respondent sought the following reliefs from the court by the same summons in the event that his questions are determined in his favour:

1. A declaration that having regard to the provisions of section 308 of the constitution of the Federal Republic of Nigeria, as altered, and the entire circumstances of this case taken into consideration, the 1st respondent or any other security agency is not legally empowered to attach the properties of and/or freeze, restrict or block the accounts of the applicant, a sitting governor, while still in office, for alleged offences purportedly committed under the Economic and Financial Crimes Commission Act, 2004, and/ or under any other law or statute.

2. A declaration that sections 6, 7, 27, 28, 34 and 38 of the Economic and Financial Crimes Commission Act, 2004 and any other provision of the same Act do not supersede or override the express provisions of sections 1(1) and 308 of the Constitution of the Federal Republic of Nigeria, 1999, as altered.

3. A declaration that attaching the property of, freezing, restricting, blocking or purportedly freezing, restricting or blocking of the accounts of the applicant, a sitting governor while still in office, and specifically Account No: 1003126654 and 9013074033, domiciled with the 2nd respondent is illegal, unlawful, wrongful, unconstitutional and ultra vires the powers of the respondents having regard to the clear and unambiguous provisions of sections 1(1) and 308 of the Constitution of the Federal Republic of Nigeria.

4. A declaration that having regard to the provisions of sections 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33 and 34 of the Economic and Financial Crimes Commission (Establishment) Act, 2004, 1st Respondent cannot issue nor obtain against the applicant an "interim order of forfeiture", or trace, freeze, or attach the assets, properties, or monies of the applicant without first arresting the applicant "for an offence under this act, (EFCC Act) and without first applying for an obtaining interim order *ex-parte* from a court of competent jurisdiction.

5. A declaration flowing from paragraph 4 above, the 1st respondent cannot issue or obtain against the applicant, an interim order of forfeiture, ex-parte, or obtain such ex-parte, or obtain such ex-parte order without first arresting the applicant for an offence and without committing a violent violation of the clear provisions of section 1(1) and 308 of the constitution of the Federal Republic of Nigeria, 1999 as altered, and sections 18, 19, 26, 27, 28, 29 and 34 of the Economic and Financial Crimes Commission (Establishment) Act, 2004.

6. A declaration flowing from paragraphs 4 and 5 above, the 1st respondent cannot legally proceed to attach assets, properties, or monies belonging to the applicant especially the applicant's monies domiciled with the 2nd defendant in account numbers 1003126654 and 9013074033.

7. A declaration that freezing by the 1st respondent of account numbers 1003126654 and 9013074033 belonging to the applicant and domiciled with the 2nd respondent, is illegal, unconstitutional, wrongful, unlawful, null and void and of no effect whatsoever.

8. A mandatory order directing the respondents to immediately defreeze and make operational, the frozen, restricted or blocked accounts of the

applicant domiciled with the 2nd respondent, to wit, account numbers 1003126654 and 9013074033.

9. An order or perpetual injunction restraining the respondents, whether by themselves, servants, agents and/or privies howsoever, from further attaching the properties of, or freezing or blocking account numbers 1003126654 and 9013074033, belonging to the applicant domiciled with the 2nd respondent as same constitute a blatant violation of the provisions of section 1(1) and 308 of the Constitution of the Federal Republic of Nigeria, 1999 as altered.

10. An order awarding the sum of 5 Billion Naira to the plaintiff/applicant against the 1st respondent, only representing punitive, aggravated and exemplary damages for the illegal and unconstitutional acts committed by the 1st respondent against the applicant.

11. Costs of the suit.

And for such further or other orders as this Honourable court may deem fit to take in the circumstances of this case.

Appellant opposed the action by filing a counter affidavit together with a written address. In opposition, he argued, among others, that that court cannot properly entertain the summons because it virtually sought the court to set aside the orders of Idris J, of the Lagos Division of the same Federal High Court, a court of coordinate jurisdiction, freezing the same accounts. Taiwo J. of the Federal High Court Ekiti Division to whom the case was assigned did not see with appellant. He dismissed all its arguments and entered judgment in favour of 1st respondent de-freezing his said accounts.

Appellant, being dissatisfied with that judgment, lodged the instant appeal on four grounds. From its said grounds it distilled the following three issues for determination by this court:

1. Whether having regards to the facts and circumstances of this case the court below has the requisite jurisdiction to order the appellant and the 2nd respondent to jointly or severally unblock and make operational account Numbers 100312665 and 9013074033 belonging to the 1st respondent notwithstanding an existing order of the Federal High Court, Lagos Judicial Division made by Hon. Justice M.B. Idris.

2. Whether having regards to the facts and circumstances of this case, the learned trial judge was not in error when he held that not hearing the 1st respondent was a breach of his constitutional right.

3. Whether the lower court was not in error when it held that having regard to the provisions of Section 308 of the Constitution and the circumstances of this case, the appellant has no power to freeze the account of the 1st respondent being a sitting Governor.

Taking on issue 1, Mr. Oyedepo Rotimi drew our attention to the fact that the account that was the subject of the litigation before Taiwo J. was an enrolled order made by M.B. Idris J. on 24/06/2017, Idris J. having been convinced and persuaded by the evidence adduced before him by appellant before

granting the interim order ex-parte directing the Manager of 2nd respondent to freeze or attach Account Numbers 1003126654 and 9013074033 pending the determination of the investigation and possible prosecution of the case. Idris J., counsel argued, is empowered by section 19 of the Economic and Financial Crimes Establishment (hereinafter called EFCC) Act to hear and determine cases instituted by appellant against any person as provided by section 46 of the same EFCC Act, he being a Judge of the Federal High Court. The order of attachment of Idris J., Mr. Rotimi further argued, is supported by the provisions of section 34 of the EFCC Act; that in the absence of any statutory inhibition or ouster clause, Idris J. alone had the inherent power or jurisdiction to set aside his order - not Taiwo J. Citing *Cole v. Jibunoh & Ors* (2016) LPELR-4066 (SC) 17 – 18 and *Adesigbin & Ors v. Military Gov. of Lagos State & Anor* (2017) LPELR-4166 counsel argued that judges of coordinate jurisdiction lack jurisdiction to set aside, review or sit on appeal over the orders of their colleagues so Taiwo J., being of coordinate jurisdiction with Idris J., lacked jurisdiction to set aside the order of the latter. Counsel noted that it was in the course of reviewing the decision of Idris, J. that Taiwo, J., found, erroneously, counsel submitted, that appellant suppressed the fact that the accounts attached belonged to 1st respondent. That finding, counsel argued, was not only wrong but perverse, because assuming, but without conceding, that Taiwo J. could even review the order of Idris J., it is on the record of proceedings and other processes filed by

appellant before Idris J. that he could make that finding and not on the oral submission of 1st respondent's counsel while arguing his motion. Mr. Rotimi said he protested the method employed by 1st respondent's counsel to raise the suppression of facts issue but he was overruled by Taiwo J. who went on in his judgment to use that oral argument to actually found suppression of facts by appellant. The golden of practice, he submitted, is that counsel should not spring surprise on their opponent. Counsel argued that in any case 1st respondent being the party asserting suppression of fact had the burden of proving his allegation as he who asserts must prove as provided by Section 132 of the Evidence Act. To prove that, first respondent, he contended, ought to have produced the record of proceedings of the case before Idris J. and his failure in that regard meant his assertion was unsupported by evidence so the finding of suppression of fact by Taiwo J. was not only perverse but breached appellant's Constitutional right to fair hearing which means his judgment ought to be set aside by this court, because it is a nullity as any decision rendered in breach of a person's right to fair hearing amounts to a nullity. Learned counsel cited *ANPP v. INEC* (2004) 7 NWLR (PT 87) 76 among others for this proposition.

Another flaw in the judgment of Taiwo J., Mr. Rotimi argued, was that the court lacks jurisdiction to set aside an interim order of attachment made pursuant to the provisions of the Economic and Financial Crimes

Establishment Act, 2004. Citing in support of this contention the decision of this court in *Felimon Enterprises Ltd v. The Chairman, EFCC & Anor* (2013) 1 BFLR 94, counsel argued that also added to the perversity of the order and judgment of Taiwo J. for which we ought to intervene. Counsel argued that the order of Idris J. was made to preserve the res which was reasonably suspected to be the proceeds of unlawful act. Taiwo J. closed his eyes, he argued, to what counsel called the undisputed documentary evidence establishing that the funds in issue were actually the proceeds of an unlawful act. Where a trial court fails to properly evaluate evidence before it, counsel submitted, the appellate court can intervene in the interest of justice. Taiwo J., he argued, failed to properly evaluate the evidence presented by appellant and it occasioned a miscarriage of justice for which his judgment must be set aside, counsel urged.

Coming to issue 2 – of Whether having regards to the facts and circumstances of this case Taiwo J. was not in error when he held that not hearing the 1st respondent was a breach of his constitutional right – counsel again referred us to the provisions of Section 34 of the EFCC Establishment Act 2004 which empowers appellant, if satisfied that the money in the account of any person is made through the commission of an offence, to apply to the court ex-parte for power to instruct the bank to issue an order as specified in Form B of the Schedule to the Act addressed to the Manager

of the bank where the account is believed to be to freeze such account. The Order as stipulated by section 34, counsel argued, is only directed to the manager of the bank and not to the account holder hence the filing of the ex-parte application by appellant against 2nd respondent. The order made by Idris J. of the Federal Lagos Division of the Federal High Court, counsel again argued was only a preservative interim order of attachment and it was not to deprive a suspect of his property or asset but to preserve the property from being wasted or dissipated by the suspect before the conclusion of the investigation and possible prosecution. The fact that it is an interim order means that there would be a final order so the interim order of attachment that was made by Idris J. cannot be correctly construed as a 'final forfeiture order' as the argument of 1st respondent he said suggested. For this and a further submission that an order of interim of attachment is not unconstitutional not even against section 44 of the 1999 Constitution which guarantees right to property, Mr. Rotimi referred us to the cases of *7UP Bottling Co Ltd v. Abiola & Sons Ltd* (1995) 3 NWLR (PT 383) 257 @ 258 (S.C); *Dangabar v. F.R.N.* (2014) 12 NWLR (PT 1442)575 @ 607 – 608 (Bada, JCA); *F.R.N. v. Ikedinwa* ((2013) 7 LPELR- 21120; *Akingbola v. Chairman EFCC* (2012) 9 NWLR (PT 1306) 475 @ 500-502; *Felimon Enterprises Ltd* v. Chairman, EFCC (2013) 1 BFLR 94 @ 105 -106; A.G. Ondo Sate v. A.G. Federation (2002) 9 NWLR (PT 772) **22** @ 308-309; Nwude v. Chairman, EFCC (2005) ALL FWLR (PT 276) 740.

An ex-parte motion for interim order of the type that was argued and granted by Idris J., counsel further argued, does not amount to denial of fair hearing to 1st respondent, because it is a hearing between the court and the applicant, that the respondent to such a hearing even if present in court can only be seen but not heard. For this counsel cited again *7UP Bottling Co Ltd v. Abiola & Sons Ltd* (1995) 3 NWLR (PT 383) 257 @ 258 (S.C) among other cases.

Citing *Green v. Green* (1995) 3 NWLR (PT 383) 257 @ 258 (S.C) counsel further argued that the failure to join 1st respondent to the application for interim attachment could not be fatal to the order of attachment of Idris J. Non-joinder or misjoinder of parties is by the rules of court not fatal to an application, the court, he submitted, being bound to decide the rights of the parties before it. Counsel again referenced his earlier argument that by section 34 of the EFCC Act the 1st respondent was not a necessary party more so when the order of Idris J. was only preservative in nature. Learned counsel pointed out that 1st respondent enjoyed Constitutional immunity and so cannot even be proceeded against; that second respondent who was in custody of the funds and the accounts in issue did not enjoy such immunity. Even 1st respondent's immunity while in office, he further argued, does not cover proceeds of unlawful activities. He submitted that even if 1st respondent is found to be a necessary party, his non-joinder at the

interlocutory stage of application for interim order should not be a ground for setting aside of the order of attachment of Idris J. as it had not caused any miscarriage of justice. Counsel finally urged us to resolve this issue too in favour of appellant.

On Issue 3 - of whether the lower court was not in error when it held that having regard to the provisions of Section 308 of the Constitution and the circumstances of this case, the appellant has no power to freeze the account of the 1st respondent being a sitting Governor - Mr. Rotimi started by conceding that by the provisions of section 308 of the Constitution of the Federal Republic of Nigeria 1999 no civil nor criminal proceeding can be brought against a sitting Governor. He added, however, that that immunity does not protect him person from investigation. He cited *Fawehinmi v. I.G.P.* (2007) 7 NWLR (PT 767) 606. Counsel argued that the interim order appellant secured from Idris J. was only intended to preserve the monetary exhibit traced to the two accounts in issue, which may be material evidence to be presented in court in the event that a criminal charge is preferred against appellant after he leaves office. The action was not against appellant and did not constitute an affront to section 308 of the Constitution, counsel argued and urged us to resolve this issue too against 1st respondent.

Responding, Chief Mike Ozekhome, S.A.N., for 1st respondent argued that Issue 1, which he asserted essentially challenges the jurisdiction of Taiwo

J., could be resolved against appellant on the ground that the order of Idris, J. directing freezing 1st respondent's accounts indefinitely was granted without making him (1st respondent) a party to the suit or giving him fair hearing. He said appellant even failed to disclose to Idris J. before the said order was granted the status of 1st respondent as a sitting Governor of Ekiti State who enjoyed immunity, all appellant did was to merely set out the 1st respondent's account numbers while carefully concealing from Idris J. the status of the owner of the said accounts - the sitting Governor of Ekiti State. Learned senior counsel submitted, and urged us to hold, that the fact that appellant suppressed and concealed material facts in not disclosing the identity of the person against whom the ex-parte order was sought amounts to suppression, concealment and non-disclosure of material fact and is sufficient ground for the trial court to set aside the order of attachment, in support of which counsel cited *Galleher Ltd & Ors v. British Tobacco Company & Ors* (2014) LPELR-24333 (C.A.). Counsel also submitted that appellant did not even serve the ex-parte order of interim attachment on 1st respondent after obtaining it, as he said is required by Order 26 Rule 11 of the Federal High Court (Civil Procedure) Rules 2009. Learned senior counsel urged us to discountenance the argument of appellant that 1st respondent only raised the issue of suppression of material facts orally during his address and same occasioned a miscarriage of justice, breached its right to fair hearing and was prejudicial to it as it did not have any right to

dislodge the oral submission. Where a party has been afforded the opportunity to present its case and actually took part in the proceedings, such as he argued was afforded appellant by Taiwo J., it cannot be heard to complain of lack of fair hearing.

Bank accounts, senior counsel further argued, are not operated by ghosts but by individuals so if anything is to be done on them the owner of the account must be informed either before or after attachment. On this occasion, he submitted, even after obtaining the said interim order from Idris J, appellant did not serve nor bring it to the attention of 1st respondent for him to take steps to vacate same if need be. Order 26 rule 11 of the Federal High Court (Civil Procedure) Rules, 2009 he said clearly state that a party obtaining an ex-parte order must bring it to the notice of the person against whom the order has been obtained by way of service of same on them so that they can take steps to vacate same if need be.

On appellant's reliance on the provisions of Section 34 of the EFCC Act as ground for freezing of the said accounts of 1st respondent, counsel submitted that where the property rights of are citizen are involved as in the instant case the court should lean in favour of an interpretation which would vindicate the constitutional rights of the citizen to the property. The courts in such cases, which includes the instant one, he argued, ought to insist on strict and rigid compliance and adherence to the formalities laid down by the

statute in issue. Counsel cited *Provost, Lagos State College of Education & Ors v. Edun & Ors* (2004) LPELR-2929 (SC). Appellant, counsel agued, did not comply strictly with the provisions of section 34 of the EFCC Act in the way it went about obtaining the interim order from Idris J. For one, learned silk argued, the 2nd respondent (Zenith Bank) is not the party to be sued, going by the provisions of section 34 (1) EFCC Act. The Act, he submitted, never contemplated that the bank in whose custody the money is kept be sued as a party, and appropriate its customers' funds without his consent or knowledge.

On the issue of whether the lower court had the power to set aside an order made by a court of competent jurisdiction, learned senior counsel submitted that what appellant stated is the general principle of law; but it is trite, he argued, that in situations such as the instant one, decisions of court of coordinate jurisdiction can be set aside where the circumstances so demand. He placed reliance on *ACB Ltd v. Elosiuba* (1994) LPELR-22967 (CA) Per IGE, JCA (p.26, paras C-F); *Skenconsult Nig. Ltd. v. Ukey* (1981) 1 SC 6, *Okoye v. N.C. & F. C. Ltd* (1991) NWLR (PT.199) 50; *Bello v. INEC & Anor* (2010) LPELR-767(SC). Learned counsel next referenced this court's decision in *I.C.S (Nig.) Ltd. V. Balton B.V.* (2003) 8 NWLR (Pt.822) p.223 at 235 where it was said that once one of the parties in a suit comes within the category of office holders defined in section 308 of the 1999

Constitution the proceedings must stop and the matter struck out only to be commenced when that office holder vacates his office. It is certainly not in doubt, he submitted, that the person whose accounts appellant sought to freeze is 1st respondent, the sitting Governor of Ekiti State, a fact he argued was deceitfully suppressed by appellant before Idris J. By the provision of the Constitution of the Federal Republic of Nigeria 1999 and the case of *I.C.S (Nig.) Ltd. V. Balton B.V.,* he submitted, it was clear that the order freezing the account is a nullity *ab initio*. He reproduced Section 34(1) of the Economic and Financial Crime Commission (Establishment) Act, 2004, provides thus:

> "34(1) Notwithstanding anything contained in any other enactment or law, the chairman of the Commission or any officer authorized by him may, if satisfied that the money in the account of a person is made through the commission of an offence under this Act and or any of the enactment specified under section 7(2)-(a)-(f) of the Act, apply to the Court ex-parte for power to issue or instruct a bank examiner or such other appropriate regulatory authority to issue an order as specified in FORM B of the Schedule to this Act, addressed to the manager of the bank of any person in control of a financial institution to freeze the account.

A close and careful inspection of the above provisions, counsel next argued, reveal that what the court is authorized to do is to grant power to the Chairman of the EFCC upon application made ex-parte to issue an order as specified in FORM B. It is clear, counsel submitted, that it is when, and only when this order has been obtained that EFCC can proceed to fill out and issue FORM B (Freezing Order) as contained in the schedule to the EFCC Act addressed to the manager of the bank or any person in control of the financial institution or designated non-financial institution where the account is or believed by him to be or the head office of the bank. What Idris J. and appellant did in issuing the order of attachment, counsel argued, was clearly against the above provisions; that there was nowhere *FORM B* (Freezing Order) was mentioned in the said ruling of Idris J. or even in the application for order ex-parte, instead it was the court that directly ordered the bank to freeze the said accounts. That omission, learned silk argued, rendered the order a nullity same according to him having been given in excess of its jurisdiction and thus liable to be set aside.

There was also no earlier conviction of appellant, a sitting Governor, based on concluded investigation showing that the monies in the accounts were actually proceeds of crime.

Learned senior counsel also argued that it is pertinent that appellant who was to be affected by the ex-parte order was never made a party, which he

said was necessary, relying on the decision of this court in *Gallaher Ltd & Anor V. British American Tobacco Nig. Ltd & Ors* (Supra) at p.39, paras C-F (Onyemenam, JCA). Learned silk finally submitted that all the foregoing were sufficient grounds for Taiwo J. to set aside the ruling of Idris J. of 24/6/2016, as it was according to counsel 'void *ab initio*'. Learned silk urged us to uphold the decision and resolve this issue in favour of the 1st respondent.

On issue 2, learned silk submitted that Taiwo J. was right when he held that Idris J. not hearing 1st respondent in the suit leading to the issuance of his order freezing the accounts in issue breached the 1st respondent's constitutional right. Counsel conceded that the grant of the prayers contained in an ex-parte application need not raise any issue as to whether the rights of the respondent to fair hearing has been violated where the conditions for its grant are met by the applicant. In such a case, learned silk submitted, the grant of an order ex parte would not amount to a violation of right to fair hearing. That was not the case in the instant case, learned silk argued, because, according to him, there was absolutely non-compliance with the necessary requirements and that occasioned infraction of the rights of 1st respondent. The order of Idris J. was faulty, learned silk argued, because 1st respondent against whom it was to be directed was not made a party to the suit. Counsel cited *Tanimowo V. Odewoye* (2008) ALL FWLR (Pt. 424) 1513, paras D-E, (*Muntaka-Coomassie, JCA as he then was)* on

the need to make a party to be affected by a court order a party to the proceedings. The name of the holder of the account was not specified by appellant in a matter where he is expected to make full disclosure to the court from whom the ex-parte order was sought; the interim ex-parte order granted was not time bound, as against the rules of the Federal High Court, supported by decisions of the appellate courts that such should be for a very short period, rather it was open-ended; 2nd respondent, Zenith Bank, is not the party to be sued, going by the provisions of section 34 (1) EFCC Act; the direct order of the court made to the Bank was never contemplated by the EFCC Act; the Federal High Court (Civil Procedure) rules 2009, under which the Appellant brought the ex-parte application provides in Order 26 Rule 7 (3) that "no application for an injunction shall be made ex-parte unless the applicant files with it a motion on notice in respect of the application."

In support of his contention of appellant's failure to follow the procedure set out by Section 34 of the EFCC Act, learned silk referred us to the case of *Ikpekhia v. F.R.N. & Ors.* (2015) ALL FWLR (Pt 771) 1697 where this Court (Oseji, *J.C.A.*) held that where a statute has prescribed the mode of performing a duty or taking a particular action, it will be an anomaly to condone or adopt any other method to the contrary, whether done deliberately or by inadvertence.

Learned silk harped repeatedly on his contention that since 1st respondent was the person to be affected by the ex-parte order of Idris J., he ought to have been joined as a party and the failure of appellant to so join him amounted to a denial of fair hearing even on an ex-parte application. Senior counsel relying on *Maxi Okwu v. Chief Victor Umeh* (2016) 1 LPELP 5 (SC) submitted that while a plaintiff is not bound to sue a particular party, where its outcome is likely to affect a party one way or the other it will be foolhardy not to join him in the suit. The court cannot make an order against a person who is neither a party nor privy to proceedings before it; that the failure to join 1st respondent amounted to a breach of his right to fair hearing, it was submitted.

On Issue 3, learned silk again contended that by the provisions of section 308 of the Constitution of the Federal Republic of Nigeria, 1999, as amended, appellant or any other security agency is legally divested of the power to attach the properties of and/or freeze the bank accounts of 1st respondent, a sitting Governor of Ekiti State. For a court to grant an application under Section 34 of the EFCC Act, it was again argued, there must be some cogent materials placed in favour of the applicant. This, it was argued, is because section 34 provides that the chairman shall apply ex-parte for an order of forfeiture if satisfied that the money is made through commission of an offence. It is not in doubt that the said provision gives the

chairman of appellant discretion to act in the circumstance, but to satisfy the court that this discretion has been rightly exercised; that the chairman must go beyond mere allegation and come before the court with concrete proof, counsel argued.

Learned silk then argued with passion that even if we assume that appellant had followed the procedure strictly as stated in section 34, that the provisions of Section 308 of the Constitution bars and forbids the appellant from exercising such powers or applying for and obtaining such order against the sitting Governor who is immune from any proceedings, whether civil or criminal. He cited the cases of *Global Excellance Communication Limited & Ors v. Donald Duke* (2007) LPELR-1323(SC); *Fabunmi v. I.G.P. & Anor* (2011) LPELR-3550(CA); *Attorney-General of the Federation v. Abubakar* (2007) ALL FWLR, (PT375) 1264 AT 1299, para A-B (CA); *Tinubu v. I.M.B. SECURITIES PLC* (2001) 8 NWLR (PT 714) 192, (2001) 16 WLR (PT. 740) 670; *I.C.S. (NIG.) LTD. v. BALTON B. V.* (2033) 8 NWLR (PT.822) 223, *Hassan v. Aliyu* (2010) 17 NWLR (PT 1223) 547 @ 624.

Section 34 of the EFCC Act is inferior to section 308 of the 1999 Constitution, counsel also submitted.

Learned silk conceded that 1st respondent can be "investigated", following the decision of the Supreme Court in the case of *Fawehinmi v. IGP to that effect*, but added that no proceedings whether civil or criminal can be

instituted against him nor can his accounts be attached by court processes. Counsel supported the reasoning of Taiwo J. that *Fawehinmi v. IGP* is distinguishable from the instant case. Due process he said was the key in any action that must be taken by the police. He submitted that every case is only authority for what it decides; that the facts of this case are in fact quite different from *Fawehinmi v. IGP*. Counsel cited to us *Abacha v. F.R.N.* (2014) LPELR-22014 (SC) where the apex court held that the purpose of the immunity is to allow the incumbent President or Head of State, or, Vice President, Governor or Deputy Governor, a completely free hand and mind to perform his or her duties and responsibilities while in office; to protect the incumbent from harassment. Having regards to the peculiar nature of this case vis-a-vis the provisions of section 308 of the Constitution, it was illegal and unconstitutional for appellant to have frozen, blocked, restricted or purportedly freeze, block or restrict 1st respondent's accounts, or prevent him from having access to the said accounts, he argued. Allowing such uncensored act, it was further submitted by learned senior counsel, negates the true essence of immunity as enshrined in section 308 of the Constitution. He further argued too that even this appeal is incompetent as it was also caught and barred by the same section 308 of the Constitution. Counsel finally urged us to strike out the appeal pursuant to section 308 of the Constitution or otherwise dismiss it on its merits.

Second respondent did not file any brief of argument, though it was represented by counsel at the hearing who did not also seek to canvass any oral argument.

RESOLUTION OF ISSUES

I note firstly, that the arguments of counsel all three issues are intertwined, even more so on the effect and extent of the immunity from civil and criminal prosecution/proceedings granted 1st respondent, a sitting Governor, by Section 308 of the 1999 Nigerian Constitution, its impact on the action before Idris J. and the orders made by him as well as the appeal before this court. I shall therefore consider the arguments on all three issues together as much as is possible. I shall however start with issues 1 and 2.

The principal argument of appellant on those two issues was that Taiwo J. of the Ekiti Division of the Federal High Court lacked jurisdiction to make the orders he made of unblocking and unfreezing Account Numbers 100312665 and 9013074033 of 1st respondent with 2nd respondent which his brother Idris J. of the Lagos Division of the same Court had ordered to be blocked and frozen. Incidentally, this same argument was put frontally before Taiwo J. by appellant's counsel during argument of the case, prompting Taiwo J. to retort as follows:

"Is this court not empowered to set aside the order of a court of coordinate jurisdiction for reasons that have been laid down by a plethora of cases?

His Lordship answered the question negatively, saying that there was 'no doubt' that he had jurisdiction to set aside the orders of his learned brother Idris J. in the circumstances of this case. His Lordship's reason for that position was that where a decision is a nullity it can be set aside by a judge of coordinate jurisdiction. He reasoned that the decision of Idris J. was a nullity and liable to be set aside, because:

(1) The court lacks jurisdiction to make an order against the interest of a person who is not a party to the case, as he said it was in the case of 1st respondent who was the holder of the two accounts frozen, and

(2) That 1st respondent, Ayodele Fayose, as a sitting Governor enjoys immunity from prosecution by reason of section 308 of the 1999 Constitution of Federal Republic of Nigeria, which immunity His Lordship reasoned extends to protect the said accounts from being frozen until he vacated office. That is even as he recognized that by the authority of *Fawehinmi v. I.G.P.* 1st respondent was not immune from criminal investigation by the authorities while in office. His Lordship reasoned that section 34 of Economic and Financial Crimes Establishment Act 2004 was subject to section 308 of the Constitution granting immunity to Governors et al and that

issue was not considered by the Supreme Court in *Fawehinmi's case*. His Lordship severally reasoned as follows on this issue in his judgment:

> "It is however noted that in the case of *Fawehinmi v. I.G.P.* supra which confirmed that these class of persons enumerated in section 308 (3) 1999 Constitution can be investigated, the Supreme Court did not consider the provisions of section 34 EFCC Act 2004. It therefore means that there is no way the 1st respondent can freeze the accounts of the applicant by applying to the court without making the applicant a party. The 1st respondent would have run foul of the constitutional provision."

In a manner suggestive of contradicting his finding above of 1st respondent enjoying immunity under section 308 of the Constitution - which means he cannot be joined even in civil proceedings as stated under that section – His lordship again went on to blame appellant for not joining the same immunity-enjoying 1st respondent to the proceedings, saying:

> "It is trite law that applicant [Governor Fayose] like all Nigerians is entitled to be heard before his property can be seized whether temporarily or in the long run. It is my view that without hearing him, his constitutional rights have been breached. There is no way the 1st respondent can convince the court that it has complied with the provisions of section 44(2) (k) and section 34 EFCC Act substantially.

I have not read in *Fawehinmi v. I.G.P.* that due process should not be followed by any institution even if it wants to preserve the res or whatever evidence is available."

His Lordship finally concluded on this magisterial note on the effect of Section 308 of the 1999 Constitution of this country on the orders of Idris J:

"For the avoidance of doubt, I hold that having regard to the provisions of section 308 of the 1999 Constitution and the entire circumstances of this case, the 1st respondent being the party actually before this court has no power to freeze the accounts of the applicant *being the sitting Governor* for alleged offences purportedly committed under the EFCC Act being the Act before the court for interpretation."

On that note, and after accepting 1st respondent's counsel's oral assertion that appellant concealed before Idris J. the fact that the account and funds sought to be frozen belonged to a sitting Governor, His Lordship held the order of his learned brother Idris J. freezing the said accounts as having been made without jurisdiction and so a nullity and liable to be set aside. The question is, was His Lordship right?

First, it must be realized that the jurisdiction of the court to set aside its judgment or orders or that of a court of coordinate jurisdiction is, as Nnaemeka-Agu J.S.C. put it in *Okoye v. Nigerian Construction & Furniture*

Co. Ltd (1991) 6 NWLR (PT 199) 501 at 540 paras A-B, 'not only rare but special'. It has to be so because the right to set aside orders of court is ordinarily the prerogative of an appellate court, which itself operates on the well-tested reasoning that two heads (sometimes even more) are better than one when it comes to deciding the wrongness of the decision of a judge. That is why even this court despite its superiority to the High Court and our assumed superior knowledge to the Judges of High Court, only sits in panels of at least three when hearing appeals from the one-man decisions of High Courts and other subordinate courts. The same thing applies to our senior brothers upstairs who must also sit in a panel of at least five Justices to hear appeals from our three-man decisions. The exception to this rule, that is, the 'rare and special jurisdiction' of a court to set aside the judgment and orders of a court of coordinate jurisdiction, rather runs on the footing that where a judgment is patently a nullity, it is as if it never existed in the first place so the same judge or even a brother Judge of the same court can make a declaration to that effect fact and an appeal is not necessary: (*Kpema v. The State* (1986) 1 NWLR (PT 17) 396 @ 405-406 (S.C.); *Lauwers Import-Export v. Jozebson Ind. Ltd* (1988) 3 NWLR (PT 83) 429 (S.C.); *In Re: Akinwunmi* (1988) 3 NWLR (PT 83) 483 (S.C.). There is a very long line of cases including *Okoye v. Nigerian Construction & Furniture Co. Ltd* supra, Skenconsult (Nig.) Ltd v. Ukey (1981) NSCC 1; *Emodi v. Kwentoh* (1996) 2 NWLR (PT 433) 656 @ 681 paras B – C (Onu J.S.C.); *Eke v. Ogbonda* (

2007) ALL FWLR (PT 351) 1456 @ 1473 (S.C.); *Oboroh v. Ughuvwu* (2000) 3 NWLR (PT 647) 120 @ 129 A-C, Akintan J.C.A. as he then was), which all confirm the power which inheres in every court to set aside not only its judgment and orders but also those of brother Judges of coordinate jurisdiction that are shown to be outright nullity. The invalidity/nullity of such a decision can even be raised viva voce: see *Wema Bank Plc v. NAIC* (2015) 16 NWLR (PT 1484) 93 @ 124 (S.C.). The difficulty however lies in ascertaining when the wrong complained of in a judgment or order is a fundamental defect that nullifies the decision making it liable to be set aside by the same court or court of coordinate jurisdiction, as opposed to when the wrong decision complained of is a mere irregularity, a mere defect in procedure or wrong decision of a court made within its jurisdiction, which does not nullify. This distinction was drawn and confirmed in the cases of *Okoye v. Nigerian Construction & Furniture Co. Ltd* supra p. 531 to 532, Uku & Ors v. Okumagba & Ors (1974) NSCC 128 @ 140 (lines 45 – 50); *Amanambu v. Okafor* (1966) NSCC 232 @ 234 (lines 10 - 15); *Skenconsult (Nig.) Ltd v. Ukey* (supra) at p. 16 -17. In *Okoye v. Nigerian Construction & Furniture Co. Ltd supra,* Akpata J.S.C. delivering lead judgment said as follows:

> "First, if the trial court had no jurisdiction in Ekpere's case because Jesse Clan was not made a party this court would not have "anxiously considered what

should be the order of this Court". It would have unhesitatingly declared the judgment null and void and of no effect whatsoever. Secondly, it would not have crossed the mind of this Court to think of remitting the action for a retrial.

As stated in the case of Madukolu and Ors v. Nkemdilim (1962) 2 SCNLR 341; (1962) 1 All NLR 587 at page 596:

> 'If a court is competent, the proceedings are not a nullity; but they may be attacked on the ground of irregularity in the conduct of the trial; the argument will be that the irregularity was so grave as to effect the fairness of the trial and the soundness of the adjudication. It may turn out that the party complaining was to blame, or had acquiesced in the irregularity; or that it was trivial; in which case the appeal court may not think fit to set aside the judgment. A defect in procedure is not always fatal.'

"In my view, failure to join a necessary party is an irregularity which does not affect the competence or jurisdiction of the court to adjudicate on the matter before it. However, the irregularity may lead to unfairness which may result in setting aside the judgment on appeal. Setting aside a judgment or making an order striking out the action or remitting the action for a retrial in such circumstance will not be for lack of jurisdiction or on the basis of the judgment being a

nullity. The trial court itself is incompetent to review the judgment; more so another court of co-ordinate jurisdiction.

I am therefore in agreement with the trial court and the Court of Appeal that the only avenue open to the plaintiffs/appellants in this case to challenge the order of Nwokedi, J. was by way of appeal." (Emphasis mine.)

In the same vein in it was also said in *Skenconsult (Nig.) Ltd v. Ukey* (supra) at p. 16 -17 (Nnamani, J.S.C.) as follows:

"It is my view that looking through the authorities, it would seem that the issue can be resolved depending on whether in the course of proceedings there has been a fundamental defect, such as we have in the instant case, which goes to the issue of jurisdiction and competence of the Court. In such a case, the proceedings are a nullity and any orders made would also be nullities. If of course the court is competent and the order is the result of exercise of the judge's discretion after hearing evidence, the decision will be appealable. In *Chief Uku's case*, (supra), the court that made the first order was competent and made its order after examining conflicting affidavits and taking arguments. *Amanambu's case* was a case of amendment and to interfere with the order made was tantamount to sitting on appeal over it. from the deduction u have made from the authorities, Warrignton, J. ought to have set aside the orders made by Romer J. which her found had been

made without jurisdiction and were treated as nullities. *The principle of fundamental defect is clearly the rationale of the decision* of the Court of Appeal in England in *Craig v. Kanssen* (supra) in which Lord Green, Master of the Rolls, *had drawn the distinction* ***'between proceedings or orders which are nullities and those in respect of which there has been nothing worse than an irregularity.'*** In the case of the former, it was his view that a person affected by such a decision is entitled *ex debito justiciae* to have it set aside. It could be set aside by the court which made it." (Emphasis mine.)

The Supreme Court (Nnamani, J.S.C) in *Skenconsult's case* at p. 17 also confirmed unequivocally the fact that the power to set aside a judgment or order that is a nullity can be exercised not only by the judge that made it but by any other judge of that court.

The question is, does any of the so-called defects identified by Taiwo J. as afflicting the orders of Idris J. amount to a defect let alone fundamental one as to nullify his orders and entitle Taiwo, J., to set them aside? Taiwo J.'s grounds for nullity of the order of Idris J. was that section 308 of the 1999 Constitution of this country conferring immunity on 1st respondent as a sitting Governor does not permit the attachment of his accounts under section 34 of the EFCC Act 2004; that in any case section 34 of EFCC Act conflicts with Section 308 of the Constitution and that point did not come up and was not decided in *Fawehinmi v. I.G.P.*; that the omission to join 1st respondent to

the suit before Idris J. before the attachment of the accounts of 1st respondent denied him fair hearing and invalidated the attachment order.

With due respect, I am unable to agree with His Lordship on any of these. The issue of the extent of the investigative powers of the police with respect to a sitting Governor and the immunity enjoyed by him under Section 308 of the Constitution was addressed by the Supreme Court in *Fawehinmi v. I.G.P.* (supra) to the effect that, while a sitting Governor cannot be arrested nor proceeded with in court either by civil or criminal proceedings, he can be investigated while in office and evidence gathered/assembled preparatory for use in impeachment proceedings against him or for prosecution when he vacates office. This is what Uwaifo, J.S.C., said in his lead judgment in *Fawehinmi v. I.G.P.* (2002) 7 NWLR (PT.767) 606 at 681 – 682:

> "That a person protected under section 308 of the 1999 Constitution, going by its provisions, can be investigated by the police for an alleged crime or offence is, in my view beyond dispute. To hold otherwise is to create a monstrous situation whose manifestation may not be fully appreciated until illustrated."

His Lordship then demonstrated his point thus:

> "I shall give three give there possible instances. ***Suppose it is alleged that a Governor*** in the course of driving his personal car recklessly ran over a man, killing him; he sends the car to workshop

for repairs of the dented or damaged part or parts. Or that he used a pistol to shoot a man dead and threw away the gun into a nearby bush. Or that he ***stole public money and kept it in a particular bank or used it to acquire property***. *Now if the police became aware, could it be suggested in an open and democratic society like ours that that they would be precluded by section 308 from investigating to* know the identity of the man killed, the cause of death from autopsy report, the owner of the car taken to the workshop and if there is any evidence from the inspection of the car that it hit an object recently, more particularly a human being; or take steps to recover the gun and test it for ballistic evidence; and generally to take statements from eyewitnesses of either incident of killing. Or ***to find out (if possible) about the money lodged in the bank for acquiring property, and to get particulars of the account and the source of the money; or of the property acquired***?

His Lordship answered these questions pungently thus:

"*The police clearly have a duty under section 4 of the Police Act to do all they can to investigate and preserve whatever evidence is available. The evidence or some aspect of it may be the type which might be lost forever if not preserved while it is available, and in the particular instances given it can be seen that the offences are very serious ones which the society would be unlikely to overlook if it had its way.* ***The evidence may be useful for*** impeachment purposes if the House of Assembly may have need of it. ***It may no doubt be used for prosecution of the said incumbent Governor after he***

has left office. But to do nothing under pretext that a Governor cannot be investigated is a disservice to the society. I therefore answer issue 1 in the affirmative."

(Emphasis all mine.)

Investigation and preservation of public funds amounting to billions of Naira allegedly corruptly acquired by 1st respondent and deposited with 2nd respondent by 1st respondent, pending prosecution of 1st respondent when he leaves office is exactly what appellant claims it did by approaching and securing from Idris J. the interim freezing/attachment order. As shown above, that is an issue that has been completely settled by the apex court in *Fawehinmi's case,* it was therefore not open to Taiwo J. to use specious arguments to reopen it or pretend he did not quite comprehend what the apex court said on it in *Fawehinmi v. I.G.P.* The rules of *stare decisis* do not permit Taiwo J. or any other Judge for that matter to ignore the decisions of the Supreme Court under any guise.

I do not also see any conflict between section 308 or 44 of the Constitution and Section 34 of the EFCC Act 2004 empowering appellant to apply for an interim order of attachment of suspected stolen public funds as Taiwo J. suggested in his judgment. Particularly on the alleged conflict between section 308 of the Constitution and section 34 of EFCC Act, I have already addressed it with reference to the dictum of the apex court (Uwaifo J.S.C) in

Fawehinmi's case. I can only add, in agreement with Mr. Oyedepo Rotimi of counsel for appellant, that the interim preservation order envisaged by section 34 of EFCC Act as well as the order made by Idris J. were only interim and did not amount to expropriation of the funds frozen as to conflict with section 44 of the Constitution. The order was only preservative for appellant to take possession and preserve the allegedly unlawfully acquired funds to be used for possible prosecution later. I note that even civil procedure has provision for similar useful preservative orders in the name of Anton Pillar Orders and so forth which are also usually granted ex-parte (without notice to the person affected) so that the evidence is not lost or destroyed and thereby frustrate its use in court. In any event this court has held, consistently, that the grant of interim attachment of property by ex-parte order under section 34 of the EFCC Act does not infringe on right to fair hearing: see *Esai Dangabar v. F.R.N.* (2014) 12 NWLR (PT 1422) 575 @ 607- 608 (Bada, J.C.A.); *F.R.N. v. Ikedinwa* (2013) LPELR-21120. The fact that forfeiting property in the interim under the EFCC Act is not unconstitutional has also been confirmed in *Akingbola v. Chairman, EFCC* (2102) 9 NWLR (PT 1306) 475 @ 500 – 502; *Felimon Enterprises Ltd. v. The Chairman, EFCC and Anor* (2013) 1 BFLR 94 @ 105-106. Not only am I in total agreement with those decisions, I again agree with Mr. Oyedepo Rotimi for appellant that the procedure of interim ex-parte applications, generally, and particularly under section 34 of the EFCC Act does not

envisage or permit service of or joining the party likely to be affected by ex-parte before its grant, a position settled beyond dispute by the apex court in *7UP Bottling Co Ltd v. Abiola & Sons Ltd* (1995) 3 NWLR (PT 383) 257 @ 287).

The argument about joining 1st respondent, a sitting Governor who enjoys absolute immunity under section 308 of the Constitution from legal proceedings against him, is in fact a complete non-sequitur. In fact that argument of Taiwo J., unfortunately supported by learned silk representing 1st respondent, seem to me one in circles given the main plank of their other argument that the same 1st respondent as someone covered by immunity under section 308 cannot even be sued. With that immunity from prosecution enjoyed by 1st respondent, how could he have been joined to the suit before Idris J? In what capacity would appellant have joined 1st respondent without infringing his immunity? As a co-applicant? This contention of Taiwo J. and 1st respondent's counsel and their reliance on the cases they cited on effect of non-joinder (including some on the peculiar terrain of election petitions), with due respect, confirms the wisdom in the advice of Nnaemeka-Agu J.S.C. in *Ojibah v. Ojibah* (1991) 5 NWLR (PT 191) 296 for counsel and the courts to be wary of 'deciding cases and issues on the established legal jingles and catch-phrases without fully asking one's self how well they fit into the particular facts of the case." None of the cases relied on by Taiwo J. in

his judgment which 1st respondent's counsel also cited related to or has any bearing on the purport of EFCC Act 2004 generally or its section 34, a special legislation enacted by our representatives in parliament to fight our hydra-headed national malaise of corruption. None of those cases also raised the peculiar issue here of whether a person who enjoys absolute immunity under section 380 of the Constitution should be joined when EFCC has cause to proceed against him pursuant to section 34 of EFCC Act, 2004. If 1st respondent was aggrieved with the order, it was open to him to exercise his right to challenge it and ask for its discharge before the same Idris J., and not as he did by suing afresh in another Division of the same Federal High Court before Taiwo J. The action of 1st respondent even smacks of abuse of process, which Taiwo J. ought to have struck down rather than grant the application and set aside the orders of Idris J. as he did. Taiwo J. had a duty to protect his process from abuse and strike down that case as the Supreme Court did in *Lokpobiri v. Ogola* (2016) 3 NWLR (PT 1499) 328 when a not too dissimilar thing happened when litigants approached two different Divisions of the same Federal High Court on the same issue.

In supporting his position, Taiwo J. as previously said further relied on 1st respondent's counsel's oral assertion that appellant suppressed facts in obtaining the order in question from Idris J.; that an order obtained ex-parte can be discharged if found to have been obtained by suppressing or

concealing important facts; that in this case the fact that the accounts belonged to the 1st respondent, a sitting Governor covered by section 308 immunity was suppressed so it was open to him to discharge it. Mr. Odedepo Rotimi for appellant and Chief Mike Ozekhome S.A.N. for 1st respondent devoted considerable portion of their briefs on proof and non-proof of that allegation of concealment and who between their clients bore the onus of such proof and needed to discharge it. I am of the view that it was unnecessary exercise counsel embarked on and Taiwo J. also placed undue premium. That is even as I have no doubt that the burden to prove that assertion of concealment of facts was on 1st respondent who raised it, albeit belatedly, in support of his case. It is of no moment that that assertion of first respondent may well have looked like a negative assertion. Where an assertion, even if a negative one, forms the major plank or element of a claimant's claim, the burden of its proof is on him. See *Phipson on Evidence*, 15th Edition, para 4.03 at page 56; Justice Niki Tobi's Article on *Burden and Standard of Proof* in Law and Practice of Evidence in Nigeria, edited by Chief Afe Babalola; and *Muraina & Ors v. Omolade & Ors* (1968) 359 @ 362. The law on this point was lucidly stated by Bowen L.J. in *Abrath v. N.E. Rly. Co* 11 QBD 440 at 457 thus:

> "Now in an action for malicious prosecution, the plaintiff has the burden throughout of establishing that the circumstances of the prosecution were such that a Judge can see no reasonable and probable cause for instituting

it. In one sense that is the assertion of a negative, and we have been pressed with the proposition that, when a negative is made out, the onus of proof shifts. That is not so. **If the assertion of a negative is an essential part of a plaintiff's case, the proof of the assertion still rests upon the plaintiff.** The terms 'negative and affirmative' are after all, relative, and not absolute." (Emphasis mine.)

In any event, this discourse, of who bore burden of proof of concealment of material facts is largely academic here given the fact that that issue does not by any means go to the jurisdiction of Idris J. to grant that order. It is rather at best one of irregularity which does not nullify his order nor entitle Taiwo J. to sit on and set it aside. The proper place for 1st respondent to agitate that issue, if he was truly aggrieved and there was substance in it, was to approach Idris J. himself, and not Taiwo J. in Ekiti to discharge his order because material facts were not disclosed to Idris J. And to successfully do that, 1st respondent would have no doubt filed affidavits to convince Idris J. of the facts concealed by appellant, which again reinforces my earlier argument that the burden of proof of concealment was on appellant who wanted the order discharged on that ground.

The long and short of what I have been laboring to say so far is that, contrary to the position of the Taiwo J. of the lower court, the order of his learned brother Idris J. of 24/06/2016 was not a nullity as to entitle him, Taiwo J., to set it aside from the Ado-Ekiti end of the same court.

I should also say that the arguments of Chief Ozekhome about appellant's and Idris J.'s alleged failure to comply with the proper procedure (note: procedure only) of making the interim order of attachment by straight order for attachment of 1st respondent's accounts instead of ordering issuance of Form B as stated in Section 34 of the EFCC Act is a complete non-sequitur. In the first place, and very importantly, the procedure by which appellant approached Idris J. and the fact that Idris J. instead of making an order for appellant to issue Form B to attach the accounts in issue made a straight order for attachment is not one of the grounds on which Taiwo J. set aside the order of Idris J. That being the case, 1st respondent, if he is desirous of pursuing that argument as a ground to sustain the judgment of Taiwo J., ought to have first complied with the provisions of Order 9 Rules 2 of the Rules of this court 2016 by filing a Respondent's Notice. That rule says:

> 2. A respondent who desires to contend on the appeal that the decision of the court below should be affirmed on grounds, *other than those relied upon by that court*, **must** give notice to that effect specifying the grounds of that contention.

Rule 3 of same Order 9 goes further to provide for the consequence of failure to comply with Rule 2, saying:

> R. 3. Except with the leave of he the Court, ***a Respondent shall not be entitled on the hearing of the appeal*** *to contend that* the decision of the court below should be varied upon grounds not

specified in a notice given under this Rule, to apply for any relief not so specified *or* ***to support the decision of the court below upon any grounds not relied upon by that court or specified in such a notice.***

In *Kayili v. Yilbuk* (2015) 7 NWLR (PT 1457) 26 @ 86, it was said (Kekere-Ekun, J.S.C.) that:

> "The traditional role of a respondent in an appeal is to support the judgment appealed against. If he wants to depart from this traditional role, he must file a cross appeal. ..... ***If he supports the judgment but wants it affirmed on grounds other than those relied upon by the court, he must file a respondent's notice as required by the rules of this court***.
> Emphasis mine.

In a similar vein, it was said in *Orji v. Zaria Ind. Ltd* (1992) 1 NWLR (PT 216) 124 @ 128, per Akpata J.S.C, that:

> "I am in agreement with the learned counsel for the appellant that the Court of Appeal was wrong in holding that should the appellant eventually succeed, he would be given a comparable alternative appointment, assuming that his position had been filled, and that he would also be given an alternative official residence and vehicle. I do not think it was open to the Court of Appeal in the circumstances of this case to give gratuitously additional reasons why the appellant was dismissed. **All that was open to the Court of Appeal was to consider whether the reasons given by the trial court could sustain the ruling**."

In any case, and without conceding that appellant's argument is competent and can be countenanced, this issue of Idris J. ordering attachment instead of merely ordering Form B to be issued on the Manager of 2nd respondent to attach the said accounts of 1st respondent is one that only goes to the procedure and *a fortiori* the regularity of the procedure for the attachment, which does not by any means nullify the order of Idris J. as to confer jurisdiction on Taiwo J. to set it aside. This argument founded on nothing in the appeal also smarks of mere technicality and nothing more.

In the final analysis, I resolve issues 1 and 2 in favour of the appellant.

The resolution of issues 1 and 2 and especially the issue of the extent of the immunity enjoyed by 1st respondent, which I have already resolved while treating issues 1 and 2 also largely resolves issue 3 of '**Whether the lower court was not in error when it held that having regard to the provisions of Section 308 of the Constitution and the circumstances of this case, the appellant has no power to freeze the account of the 1st respondent being a sitting Governor.**' I have held that appellant possessed such power. I only want to go further to answer the question raised by Chief Ozekhome to the effect that the immunity against prosecution enjoyed by 1st respondent under Section 308 of the 1999 Constitution was so absolute that even this appeal of appellant against the case 1st respondent himself instituted and obtained judgment against appellant at the lower court cannot

be proceeded with and or continued as it is incompetent. That argument, with due respect to the learned silk, is another non sequitur. First respondent having opened the mythical Pandora's Box, or better still sowed the wind, by exercising his right as confirmed in *Global Excellence Communications Ltd v. Donald Duke* (2007) 16 NWLR (PT 1059) 22 to file summons against appellant in court, must be ready for the consequences and the whirlwind in the form of this appeal. His immunity is not that absolute nor go that far. In *Tinubu v. I.M.B. Securites Plc.* (2001) 16 NWLR (PT 740) 670 @ 708 paras B-G, Karibi-Whyte, JSC, dismissed a similar argument, saying:

> "The interpretation of the provisions of the Constitution should be guided by the facts of the case. Appellant in the instant case was the defendant. The provisions of section 308 speaks of a civil action or criminal proceedings instituted or continued against a person to whom the section applies during his period of office. The provision goes on to preclude arrest or imprisonment, and issuance of process requiring or compelling appearance of such person. There is no suggestion that such persons can institute actions against other persons, who cannot apply for processes against them. The provision of section 308 is a policy legislation designed to confer immunity from civil suit or criminal process on the public officers named in section 308(3) and to insulate them from harassment in their personal matters

"The text of section 308 are explicit and conclusive. The liberal approach to the interpretation of our Constitution counselled in *Nafiu Rabiu v. The State* (1981) 2 NCLR 293, (1988) 12 NSCC 281, does not encourage reading the provisions to neutralize the public policy principle protected by the provision.

"*It has never been allowable and the sacred obligation of the courts is not to construe any of the provisions of the constitution to defeat the obvious ends the Constitution was designed to serve.* ***To construe the provisions of section 308 in the manner suggested and thereby enable the persons named in section 308 (3) to exercise the right to sue in addition to the absolute immunity conferred on them whilst in office by section 308 (1) (a) will defeat the immunity designed by the Constitution, and lead to manifest injustice.***" (Emphasis mine).

An appeal, it must also be realized, is a continuation of the initial action at the trial court. This, His Lordship Karibi-Whyte, J.S.C., also pointed out in *Tinubu v. I.M.B. Securites Plc.* supra, at p. 707 para B, saying that:

"It cannot be disputed that hearing an appeal arising out of an action is the continuation of the case."

In the event, this issue is also resolved in favour of appellant in its entirety.

Before signing off, let me remind all of us of the very timely advice of Galinje, J.C.A. (as he then was) in *F.R.N. v. Fani-Kayode* (2010) ALL FWLR (PT 534)

.181N @ 195 para F. His Lordship there admonished/set the roadmap for courts in the fight against corruption as follows:

> "If the Nigerian nation has taken a decision to fight and eradicate corruption, legal technicalities should not constitute a roadblock to that effort. For the essence of law is to protect and preserve the political and social wellbeing of the State and its citizenry. Any interpretation ascribed to any statute that fails to conform to this value must be ignored since that will suggest the enthronement of anarchy."

I am in complete agreement.

In the final analysis, I find the appeal meritorious and, having resolve all three issues agitated in the appeal in appellant's favour, I allow the appeal and hereby set aside the judgment delivered by Taiwo J. of the Federal High Court, Ekiti Judicial Division, on 13/12/2016 granting the claims of 1st respondent in Suit FHC/AD/CS/27/2016.

BOLOUKUROMO MOSES UGO
JUSTICE, COURT OF APPEAL.

Counsel

Oyedepo Rotimi Esq. for appellant.

Chief Mike Ozekhome S.A.N. (with him S.N. Asadu Esq. and Miss Oluchi Uche) for 1st respondent.

Oluwasegun Ayinde Esq. for 2nd respondent.

APPEAL NO. CA/EK/8C/2017

HON. JUSTICE JOSEPH SHAGBAOR IKYEGH

I agree with the comprehensive judgment prepared by my learned brother **Boloukoromo Moses Ugo, J.C.A.,** which I was privileged to read in draft and desire to add these few words by way of emphasis.

Section 308 (1) (a) of the Constitution of the Federal Republic of Nigeria 1999 (1999 Constitution) envisages civil or criminal proceedings instituted or continued against a person occupying the office of Governor of a state, for example, during his period of office.

Section 308 (1) (a) of the 1999 Constitution (immunity provision) would not apply to an action instituted by the occupier of the office against another person or persons as in this case. The continuation of any civil or criminal proceedings against the occupier of the office which section 308 (1) (a) of the 1999 Constitution prohibits would mean such proceedings instituted against the occupier of the office before he assumed office which proceedings became pending while he is in office. It does not apply to the continuation of civil or criminal proceedings instituted by the occupier of the officer by way of an appeal where his adversary lost and appealed against the loss. Such should be the

intendment of section 308 (1) (a) of the 1999 Constitution when given purposive construction with broad and liberal leaning/bent which I most respectfully accord to the said section 308 (1) (a) of the 1999 Constitution vide ***Nafiu Rabiu v. The State (1981) 2 NCLR Page 293, Skye Bank Plc v. Iwu (2017) 16 NWLR (Pt.1590) 24*** (per the illuminating lead judgment prepared by his Lordship, Nweze, J. S. C.) ***Nigerian Army V. Aminu Kano (2010) 5 NWLR (Pt.1188) 429.***

I agree with Mr. Rotimi for the appellant that an appeal is simply the continuation of the case put forward in the court of first instance vide ***International Messengers (Nig.) Ltd. v. Pegofor Industries Ltd. (2005) ALL FWLR (Pt. 270) 2018 at 2028*** *following* ***Oredoyin v. Arowolo (1989) 4 NWLR (Pt.114) 172*** *and* ***Edebiri v. Edebiri (1997) 4 NWLR (Pt. 498) 165 at 174.*** See also ***George v. Dominion Flour Mills Ltd (1963) 1 SCNLR 112, First Inland Bank V. Craft 2000 Ltd. & Anr (2011) LPELR 4167*** cited by the appellant.

The present appeal is therefore the continuation of the case filed by the 1st respondent at the court below. It is not a new case instituted by the appellant against the 1st respondent. It merely demonstrates that the appellant is exercising its constitutional right of appeal from the decision of the court below in an action brought by the 1st respondent against the appellant

at the court below vide section 241 (1) (a) of the 1999 Constitution. The appeal is therefore the offshoot of and/or stems from the action filed by the 1st respondent at the court below.

Consequently, the appeal is not an infringement of section 308 (1) (a) and (3) of the 1999 Constitution.

The grouse of the appellant, albeit in a nutshell, is that suppression of facts was not made a complaint in the action filed by the 1st respondent at the court below, therefore the parties (the Appellant and the 1st Respondent) did not join issues on it; that the 1st respondent raised the issue of suppression of facts or concealment of material facts by the appellant for the first time in the course of oral adumbration of the 1st respondent's address at the court below. Indeed, the 1st respondent did not raise the issue of suppression of facts or the concealment of material facts as one of the allegations against the appellant in applying and obtaining the ex-parte order freezing the 1st respondent's two accounts with the 2nd respondent vide pages 1-153 of the record of appeal (the record) containing the motion ex-parte, motion on notice for mandatory injunction and the application for originating summons together with the Exhibits and the written address.

Affidavit evidence in an action on originating summons constitutes pleadings vide ***Agbakoba v. INEC (2008) 18 NWLR (Pt. 1119) 489 at 549, N.N.P.C. and Ors. V. Famfa Oil Ltd. (2012) 17 NWLR (Pt.1328) 148 at 189, Uwazuruonye v. Governor of Imo State and Ors. (2013) 8 NWLR (Pt. 1355) 28 at 56.***

Since affidavit evidence in originating summons is treated as pleadings, the principle of law that parties and the court are bound by pleadings and would not be permitted to stray outside the pleadings equally applies to affidavit evidence in an originating summons. Nor is it permissible for a party to make a case contrary to his pleadings vide ***International Messengers (Nig.) Ltd. v. Pegofor Industries Limited (supra) at 2028*** following ***Cardoso v. Executors of the Estate of Doherty (1938) 4 WACA 78, George v. Dominion Flour Mills Ltd. (1963) 1 SC NLR 117, Orizu v. Anyaegbunam (1978) 5 SC 21.***

Address of counsel cannot replace pleadings or evidence in a case. It follows that the raising of the issue of suppression of facts or concealment of material facts in the oral address of the 1st respondent at the court below was of no moment to the case. The court below was, accordingly, wrong in relying on the oral address embodying the issue of suppression of facts by the appellant in obtaining the ex-parte order freezing the two

accounts of the 1st respondent with the 2nd respondent to hold that the appellant was culpable of suppressing facts in the application it made at the Federal High Court Lagos to obtain the ex-parte order freezing the two accounts of the 1st respondent with the 2nd respondent.

Pages 36 – 40 of the record contain the questions for determination and the reliefs sought in the substantive action on the originating summons which are predicated on section 308 of the 1999 Constitution. The judgment of the court below ended by de-freezing the two accounts of the 1st respondent frozen by the decision of the Federal High Court Lagos. The action was not for the setting aside of the decision of the Federal High Court Lagos for being a nullity or for want of jurisdiction or on the ground that it was obtained by fraud vide the reliefs sought in the action which are binding on the parties and the court vide ***Commissioner for Works, Benue State v. Devcon (1988) 3 NWLR (Pt.83) 407 at 420*** where the Supreme Court held that-

> ***"It is well settled that a plaintiff is bound by the case put forward in writ of summons, as in A. C. B Ltd. V. A.-G., Northern Nigeria (1969) NMLR 231."***

Instructively, there is the Supreme Court case of Nigeria ***International Merchant Bank Ltd. v. Union Bank of Nig. Ltd.***

(2004) 12 NWLR (Pt.888) 599 at 618-619 per the lead judgment prepared by Pats –Acholonu, J.S.C., which discussed, analyzed and observed on the nature and jurisdictional synergy that should be adhered to by courts of co-ordinate jurisdiction in these words-

> ***It is I believe inelegant and a matter that would go against the grain of our procedural law for courts of co-ordinate jurisdiction instead of endeavouring to shore up the jurisdiction of each other engage in a form of unsavoury competition. They ought necessarily to avoid a situation where the court by its being less cautious exposes itself by the nature of the order it makes to ridicule and the majesty and aura of its pronouncements are either compromised or treated with ignominy as a non-issue by the confused parties and I dare say with the common citizenry.....***
>
> ***Where a Federal Court is prayed to make an order that is diametrically or in conflict with a subsisting order of a State High Court in the context of the same subject matter and where equally identical or seeming identical prayers are sought, it should, in my view refuse to***

entertain..... To commence to make orders that strike violently at the heart of the order of the State High Court of well known co-ordinate jurisdiction is to lend a helping hand in causing confusion in our courts by purporting unwittingly to appear to sit on appeal on the decision of a State High Court.

Indeed the damning situation does not portend astuteness and exercise of caution on the part of the Federal High Court, which by its stance had made an order that did violence to the order of the Lagos State High Court.....I fail to see the exceptional circumstance that would warrant a court to naively appear to sit on appeal in a ruling of a court of the same co-ordinate jurisdiction."

See also ***Witt & Busch Ltd v. Dale Power Systems Plc (2007) 17 NWLR (Pt.106) 1 at 25, Per Ogbuagu, JSC***, thus-

"... in the absence of statutory authority or except where the judgment or order is a nullity, one Judge has no power to set aside or vary the order of another Judge of concurrent and co-ordinate jurisdiction ....."

See further ***Azuh v. Union Bank Plc (2014) 11 NWLR (Pt.1419) 580 at 609-610.***

The court below should have been slow in granting the order de-freezing the two accounts of the 1st respondent with the 2nd respondent which order had the direct effect of wiping out and has indeed wiped out the earlier order made by the Federal High Court Lagos, a court of co-ordinate jurisdiction with the court below (Federal High Court Ado-Ekiti), freezing the said accounts of the 1st respondent with the 2nd respondent.

I too would allow the appeal and set aside the decision of the court below de-freezing the two accounts of the 1st respondent with the 2nd respondent and abide by the consequential order(s) contained in the judgment of my learned brother, Ugo, J.C.A.

HON. JUSTICE JOSEPH SHAGBAOR IKYEGH
JUSTICE, COURT OF APPEAL

CA/EK/8C2017

HON. JUSTICE MOHAMMED MUSTAPHA, JCA.

I had the privilege of reading in its draft form the judgment just delivered by my learned brother Hon Justice **Boloukuromo Moses Ugo, J.C.A.**; I participated fully in the discussion leading up to the decision, and agree with the reasoning and the conclusions therein, and adopt same as mine.

I also hold that the trial Federal High Court presided by Hon Justice Taiwo O. Taiwo, sitting in Ado Ekiti division lacks the jurisdiction to review and set aside the interim order of the Federal High Court Lagos Division, presided by Hon Justice M.B. Idris freezing the account numbers 1003126654,9013074033,1010170969 and 1013835889.

It is indeed granted that a court of coordinate jurisdiction may, where an order of a Court is a nullity, ab initio, set aside such order without much ado; See **SKEN CONSULT NIG. LTD. V. UKEY (1981) 1 SC 6 AND OKOYE V. NC & F CO. LTD. (1991) NWLR (PT. 199) 501**; it has to be emphasized that that can only be done in clear cut cases like where it is patently clear that such order was granted without jurisdiction, not on wrongly perceived assumption of irregularity.

The general position of the law is that a court of coordinate jurisdiction has no jurisdiction to set aside the judgment of another court of similar jurisdiction, because that is the function of an Appellate Court; see **WITT AND BUSCH LIMITED v DALE POWER SYSTEMS PLC (2007) 5-6 S.C 121; SHELL PETROLEUM DEVELOPMENT COMPANY NIGERIA LIMITED V CHIEF TIGBARA EDAMKUE & ORS (2009) LPELR- 3048 (SC) and NIGERIA**

INTERCONTINENTAL MERCHANT BANK LTD v UNION BANK OF NIGERIA LTD & ORS (2004) 12 NWLR (PT. 888) 599.

A situation where Judges of coordinate jurisdiction make contradictory and inconsistent orders in respect of the same subject matter involving the same parties is a mockery of the law. When faced with such a challenging situation, a judge should instead resist any temptation no matter how grave, failing which his decision will surely be set aside, sometimes with dire consequences; see **SUBERU v AFRICAN CONTINENTAL BANK & ORS (2002) LPELR- 1207(CA).**

The trial court in this case was in grave error to have engaged in this perversity, on account of what it considered suppression of facts, raised in the course of moving an application before it; and choosing to file this action before the trial court on account only of suppression of facts itself smacks of forum shopping; see **MAILANTARKI V TANGPO & ORS (2017).**

The circumstances of this case did not demand the setting aside of the order of the Federal High Court Lagos by the Federal High Court Ado Ekiti, contrary to the submissions of learned senior counsel for the respondent, and the authority of **ACB LTD V ELOSIUBA (1994) LPELR-22967-CA** cited in support is clearly distinguishable, not least because the order of the Federal High is not a nullity ab initio as contended.

In any event, even if there was a need to set aside the said order one would have expected the respondent to apply to the same Federal High Court Lagos, to have it set aside. That would have been the proper thing to do, not file an entirely different suit in another division of the same court; it is for this reason that forum shopping readily comes to mind.

Exhibit EFCC O9, the ex parte order of the Lagos Division of the Federal High, presided by Hon Justice M.B Idris, directing the 2nd respondent, Zenith Bank to freeze or attach the accounts of the 1st respondent without joining the 1st respondent cannot be said to be in breach of his right to fair hearing, because if he is not pleased with the order made ex parte, provisions are provided in the Rules to apply for a variation or discharge of the order made. An ex parte order properly made is always provisional and for a limited period and does not decide the civil rights of the parties involved in the litigation; **SEE 7-UP BOTTLING CO. LTD. & ORS. V. ABIOLA & SONS NIGERIA LTD. (1995) 3 NWLR (PT.383) 257.**

Besides, the appellant could not have joined the 1st respondent in view of the immunity granted to him by section 308 of the constitution of the Federal Republic of Nigeria, 1999, as amended, in defense of which the 1st respondent is vehement, and rightly so.

The purport of exhibit EFCC 09 is to preserve the res, pending investigation, and possible prosecution if the need arises, it is definitely not intended to deprive the 1st respondent of his proprietary rights. Therefore I do not see how the ex-parte order granted by the lower Court could be said to have violated the Appellant's right to fair hearing. As a matter of both fact and law, the order is in my view in the interest of both parties, because at the end of the day, it will prevent dealing with the properties in such a way that could render the eventual final Judgment of the Court nugatory. It clearly operates until the determination of the rights and obligations of the parties with regard to the monies in the accounts under consideration; see **NWUDE V. CHAIRMAN EFCC (2005) ALL FWLR PART 276 PAGE 740 AND DANGABAR V FRN (2012) LPELR-19732-CA.**

After all, exhibit EFCC 09 was granted in substantial compliance, and pursuant to section 34 of the EFCC Act, which provides that:

"notwithstanding anything contained in any other enactment or law, the chairman of the commission or any officer authorized by him may, if satisfied that the money in the account of a person is made through the commission of an offence under this Act or any of the enactments specified under section 7 (2) (a)-(f) of this Act, apply to the court ex parte for power to issue or instruct a Bank examiner or such other appropriate regulatory authority to issue an order as specified in form B of the schedule to this Act, addressed to the manager of the Bank or any person in control of the financial institution where the account is believed by him to be or the head office of the Bank or other financial institution to freeze their account."

As earlier pointed out in passing, the right of the appellant to investigate the 1st respondent is not curtailed even by section 308 of the constitution, contrary to the contention of learned senior counsel to the 1st respondent, because while it is trite that by reason of the said section no criminal or civil proceedings shall be instituted against the 1st respondent, thus granting him immunity, during the tenure of the office he holds, the immunity ends with the tenure. And it is for this reason that it is necessary for the appellant to investigate the 1st respondent's accounts if it sees the need, with the objective of preserving the res or whatever evidence it may get, so that if need be he can be prosecuted on the basis of that, without waiting, and allowing such evidence to be lost; ee **IGP V FAWEHINI (2002) 7 NWLR part 767 page 606.**

Exhibit EFCC 09 is in my considered not an affront to the provisions of section 308 of the constitution, as sought to be portrayed, rather it is a compliment.

May I add also, that the argument of learned senior counsel to the effect that the 1st respondent's immunity bars not only every civil or criminal proceeding against him, by reason of section 308 of the constitution, but even proceedings on appeal, against a suit instituted, if he chooses to institute one, as in this case, untenable with all due respect. I say so because, if a person who enjoys absolute immunity chooses to throw it all, and files a suit against another lesser mortal, common sense, logic and especially law dictate that he cannot turn around and be heard to say that that other person has no option than 'to turn the other cheek'. It doesn't work like that. By filing a suit he has opened himself up, anyone he decides to sue is entitled to react by defending himself, or appealing against that suit if the need arises. I am fortified by the decision of the Supreme Court in **TINUBU V I.B.M SECURITIES PLC (2001) 16 NWLR part 740.**

It is for these reasons and the more elaborate elucidation by my learned brother that I also allow this appeal and set aside the judgment of the trial Federal High Court Ado Ekiti, of the 13th of December, 2016 presided by Hon Justice Taiwo O. Taiwo.

MOHAMMED MUSTAPHA
JUSTICE, COURT OF APPEAL