AN ABUSE OF THE POWER OF DISSENT HON. JUSTICE KERIBI-WHYTE J.S.C. IN TUKUR VS. GOVERNMENT OF GONGOLA STATE.

BY
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Introduction

It is in the highest tradition of Courts of Appeal, especially the intermediate and apex Courts of Appeal of many common-law countries[1] including our own Court of Appeal and the Supreme Court, to deliver on occasions, a majority judgment and a dissenting agree to a unanimous decision, due to differences on the application of the facts of a particular case to the law or vice-versa.

This practice is not only commendable but also desirable. There are cases too numerous to recount, of dissenting judgments rendered by dissenting judge, especially of the intermediate appeal court, becoming the decision of the apex Court of Appeal on further appeal to that Court[2].

Lord Denning M.R., as he then was, made the act of dissenting a noble cause. While in the House of Lords his inability to agree most times with his other colleagues in many cases, forced him, on his own volition to relinquish his House of Lords seat in 1962[3].

There is no gain saying today, that in all common-law countries, most of the dissenting pronouncements of his Lordship, Denning M.R., have become the law, followed by many apex courts in many countries of the commonwealth or other countries practicing the common law system. What is more, our appeal Court has had and is still having its own crop of potential Lord Dennings especially in the area of writing sound and highly intellectual dissenting judgments[4].

As a rule, a judge of justice on appeal does not dissent for the fun of it. Many reasons, of sound law and logic, always inform and at times force a judge to take the path of dissenting form the majority stand or decision in a case on appeal. The provision in the laws setting up appeal courts by allowing not less than 3 judges of justices to sit on an appeal in the Court of Appeal and the Supreme Court envisaged the right of one of the presiding justices to dissent[5].

This is why the law goes further to provide that in case of a split when deciding

a case the majority decision shall be the decision of the Court[6].

The phrase "I have had the advantage of reading in draft the leading judgment of my learned brother but I find it difficult to agree with his reasoning and conclusions" is now a hallowed and well-known opening sentence in many dissenting at both the Court of Appeal and Supreme Court.

It is with the antecedent and importance of dissenting judgment at the back of our mind, especially its prime of place in our jurisprudential exposition, that has prompted this paper on the new but celebrated case f Tukur v. Government of Gongola State[7] decided by the Supreme Court on Thursday 5th September, 1989.

TUKUR VS. GOVERNMENT OF GONGOLA STATE.

The brief facts of this case is relevant to this paper are as follows-

The Appellant/Plaintiff was a first class Emir, and Emir of Muri and he was in addition the Chairman of the Muri Emirate Council.

By an order dated 12th August, 1986, Colonel Yohanna A. Madaki then the Military Governor of Gongola State, removed the Plaintiff Alhaji Umaru Tukur, as Emir of Muri and Ipso facto as the Chairman of the Muri Emirate Council, in addition, the appellant was ordered to be detained in Mubi.

Sequel to this appellant caused to be filed under Fundamental Rights (Enforcement Procedure) Rules 1979 an action at the Federal High Court, Kano seeking the following reliefs.

(1) Quashing the deposition order of 12/8/86 on the ground that it violates the Fundamental Rights of the applicant, guaranteed by section 33(1) of the Constitution of Nigeria, 1979, in that the appellant was never given the opportunity of being heard before the order was made and that the order should be quashed and declared null and void and of no legal effect.

(2) A declaration that by virtue of paragraph 1(Supra) the applicant is still the Emir of Muri.

(3) A further declaration that the applicant's detention at Mubi by the military Governor of Gongola State is a violation of his fundamental rights as enshrined in Section 32(1) of the Constitution.

(4) Another declaration that being an Emir or a traditional ruler does not derogate from the applicant's rights to freedom of movement as

guaranteed by Section 38(1) of the Constitution aforesaid.

(5) A perpetual injunction restraining Col. Y.A. Madaki, the Governor of Gongola state, his servants, agents, from interfering with the liberty and rights of the applicant as guaranteed in Chapter 4 of the said Constitution.

(6) Aggravated and exemplary damages against the said Military Governor for wrongfully infringing applicant's fundamental rights as aforesaid".

On the 5th September, 1996, the Respondent the Gongola State Government challenged the jurisdiction of the Federal High Court to hear the application.

The fulcrum of the Respondent's objection was that since the suit of the Appellant particularly claims 1 and 2 to Chieftaincy matters, the Federal High Court had no jurisdiction under Section 7 of the Federal Revenue Court Act 1973 to hear the whole case because according to the Respondent, the Respondent other reliefs are inextricably intertwined with the first two reliefs and equally outside the jurisdiction of the Federal High Court.

The second point of the objection, was that for the purpose of Section 42 of the 1979 Constitution, the Federal High Court Sitting in Kano is not proper High Court to adjudicate upon the alleged infringement of the Fundamental Right of the Appellant allegedly breached in Gongola State; that is the Federal High Court, lacks the territorial jurisdiction, to hear the matter. The Trial judge, Belgore J. (as he then was) relying on Section 42 (1) of the Constitution, dismissed the preliminary objection as to jurisdiction. He held that the provision of section 42(1) of the Constitution has expanded the jurisdiction of the Fundamental rights and it did not matter nor relevant whether the decision arising from the issue of breach of the rights decides the issue finally.

The respondent appealed to the Court of Appeal. That Court allowed the appeal in part, holding among other things that the Federal High Court has no jurisdiction to adjudicate on claims 1 and 2 of the reliefs of the Respondent but held on the claim.

The appellant being dissatisfied with the Court of Appeal's decision, appealed to the Supreme Court against the decision of the Court of Appeal that the Federal High Court has no jurisdiction to entertain determine or grant the reliefs claimed in paragraph 1 and 2 of his claim either separately or in combination with other aspects of the claim in other paragraphs, notwithstanding the alleged violation of the

fundamental rights guaranteed by Section 33(1) of the 1979 Constitution.

Respondent cross-appealed against the part of the Court of Appeal's decision where that court held the Federal High Court has jurisdiction to determine and grant the reliefs claimed in paragraphs 3,4,5 and 6 of the appellant's claim.

The appellant at the Supreme Court, contented that Section 23(1) of the 1979 Constitution vested the Federal High Court with the same jurisdiction as the States' High Court and that by virtue of Section 33(1) of the Constitution, the Federal High Court as well as the State High Courts have unlimited jurisdiction in determining allegations of breach of fundamental rights to fair hearing of the citizen.

Per Contra, the respondent\cross-appellant argued that the Federal High Court has no jurisdiction to entertain Chieftaincy matters and that reliefs 1 and 2 of the appellant's claim raised a Chieftaincy question and consequently the Federal High Court has no jurisdiction to entertain those claims. And by extension, all the claims, that is, claims 3, 4, 5 and 6 having arisen from a Chieftaincy dispute and inextricably interwoven therewith, none of the reliefs claimed can be entertained by the Federal High Court.

The Supreme Court by a majority of 6 to 1 with Karibi-Whyte J.S.C. dissenting held among other things:

i. The jurisdiction conferred on the Federal High Court is circumscribed within the provisions of section 7 of the federal Revenue Act 1973.
ii. Section 42, 1979 Constitution does not extend nor enlarge the jurisdiction of the Federal High Court.
iii. The jurisdiction of the Federal High Court is limited with the jurisdiction of State High Courts is unlimited.
iv. Territorially, the Federal High Court sitting in Kano is not the "High Court of the State" envisaged by Section 42 of the 1979 Constitution.
v. The Federal High Court lack jurisdiction to entertain and determine the claims of the appellant in paragraphs 3, 4, 5 and 6 of his prayers.
vi. The courts can only expound their jurisdiction but cannot expand same.

It is against these weighty findings and pronouncements of the majority of the justices that presided over the case, that His Lordship Karibi-Whyte J.S.C. found himself unable to agree and wrote the dissenting judgment the subject of this paper[8].

THE DISSENTING JUDGMENT:

The dissenting judgment of his Lordship runs from pages 582 to591 of the report[9].

His Lordship laid the legal basis of his dissension when he said.

> "I have read the lead judgment of my brother, Obaseki J.S.C. in this appeal and I am unable with the Construction therein of Section 42(2) of the Constitution 1979 with respect to the enforcement of the provisions of Fundamental Rights. I have therefore been unable to agree with the conclusion" 10.

With the above, as his Pedestal for the dissenting judgment. His Lordship went on a recast of the facts including the ruling of the trial Federal Court Judge and the Court of Appeal[11].

Our grouse with his Lordship's dissenting judgment is twofold. We are of the firm view that there was no actual or legal basis for the dissenting judgment. Also his Lordship made some wide propositions of the law, especially concerning the enforcement of chapter IV of the 1979 constitution by all the High Court that is the Federal and state High Courts.

His Lordship after disagreeing with submission of the appellant's counsel to the effect that:

"The submission by Mr. Brown Peterside that Section 231 of the Constitution 1979 which vests in the Federal High Court the powers of the States' high Court also vests in them their jurisdiction erroneous"[12].

Has no legal or factual basis to have held that any of the provisions of Chapter IV of the 1979 Constitution could be enforced by either the Federal High Court or State High Court notwithstanding the genesis or the cause of action that gives rise to the action. It is therefore with respect to his Lordship that it is submitted that his holding that:

"…Any claim outside Chapter IV will not be within the purview of Chapter IV, and will accordingly be outside the jurisdiction of the court. *This is whether the applicant is brought before the State High Court with its unlimited jurisdiction or the Federal High Court with its limited jurisdiction.* Thus the amplitude of the jurisdiction of the High Courts Constitution. This cannot be expanded to include subject matters not within Chapter IV. Hence for the purpose of the exercise of jurisdiction under Chapter Iv, *both the Federal High Court and the State High Courts enjoy the same jurisdiction"*[13] (Underlined by me).

Is totally non sequitur and not in accord with the now accepted locus classicus on the jurisdiction of the Federal and State High Courts, that is, the case of Bronik Motors Ltd & Anor vs. Wema Bank Ltd[14]. Moreover, the last part of the above holding is too widely stated with respect. Can it be true in view of the Bronik's case, that the jurisdiction of the Federal High Court is unlimited under Chapter IV of the 1979 Constitution? This we submit cannot be the correct exposition of the law.

The most astonishing of his Lordship's holding was at page 589 of the report when His Lordship said:

"The issue in appeal before us is completely different. Each of the fundamental rights sought to be enforced, although arising from the issue of the deposition of the applicant, as the emir of Muri, a status governed by the Chiefs Law, confer rights distinct and enforceable proprio vigore. Neither the determination of the violation of Section 32(1), the right to personal liberty, nor the denial of a hearing which is a violation of Section 33(1) necessarily involves determination whether the applicant is the Emir of Muri at the time of the violation of the rights. They are therefore not depended on the question whether applicant was removed as an Emir" [15].

The question that readily comes to mind is, given the peculiar circumstances of this cases and its antecedent, how is the court to divorce the issue of violation on rights to liberty and fair hearing from factual situation of the appellant's deposition as Emir of Mur?

It is undoubted that the supposed violation of the appellant's rights to liberty and fair hearing arose by virtue of his deposition as the Emir of Muri.

In fact his complaint in ordinary language will translate thus:

(a) The governor did not hear me before he purported to depose me as the Emir of Muri and;

(b) Having removed me, the Governor denied me my right to liberty by detaining me. The question is, if the appellant had not been deposed was it likely he would have been detained? One can safely hazard a guess, that the appellant's subsequent detention after his opposition was a pre-emptive step of the government to forestall any breach of peace, were the appellant free to rally his supporters.

How then can one say in all honesty that the determination of the issues of denial of right to fair hearing and liberty are not inextricably

intertwined with the deposition of the appellant as the Emir of Muri and albeit involves a chieftaincy issue? The Supreme Court in the lead judgment at page 547[16] would appear to have supplied a valid reason why the holding of Hon. Justice Karibi-Whyte quoted above cannot pass factual test of this case when the court said:

"In the instant appeal, all the breaches of the Fundamental rights alleged flow from the deposition of the appellant from the office of Emir of Muri by the Military Governor of the State. The office of Emir of Muri is a Chieftaincy question which only a State high Court has jurisdiction to determine. The appellant in my opinion, is directly complaining by his claimed and affidavit evidence, that his civil rights as a chief has been breached and that in the process, his fundamental rights of fair hearing, liberty and freedom of movement have also been breached. His claim for an order to quash the order deposition and jurisdiction to entertain. It is only the High Court of Gongola State that has jurisdiction to grant the relief. Since the Federal High Court does not have jurisdiction to quash the order of deposition and order of restoration of the appellant to his office of Emir of Muri, the jurisdiction to enforce the fundamental rights of fair hearing, liberty and movement of appellant vests only in the High Court of Gongola State in the matter"

This position in the lead judgment was concurred to by the other five justices excepting His Lordship Karibi-Whyte JSC.

Hon. Justice Oputa JSC[17] (as he then was) put the matter beyond doubt by his forceful contributing, concurring, when he said:

"In the case on appeal, the complaint of the appellant is that, he was deposed as an Emir without first hearing him. No one doubts that given those facts he cannot sue for the reliefs he is now claiming. His only hurdle is that his deposition as an Emir is a Chieftaincy question. And such questions do not pertain to the revenue of the Federal Government or to taxation customs and excise, banking or foreign exchange – being issues over which the Federal High Court was granted civil jurisdiction by Section 7 of Act No. 13 of 1973. The *fons et origo* of his complaint in the determination of which he ought to have been accorded a fair hearing is not one over which the Federal High Court has jurisdiction. In this respect, the appellant's right to a fair hearing is merely an accessory right. The principal right is his tight not to be unjustly deposed. His right to a fair hearing before that deposition is an accessory right. The maxim here is

accessory sequitur principale – an accessory thing goes with the thing to which it is an accessory. Now if the principal right can only be litigated upon and maintained in the State High Court of unlimited jurisdiction, then the accessory right to fair hearing will follow the principal right to its forum competent – the State High Court" [18].

It is therefore submitted, that the position of the majority judgment on reliefs 3, 4, 5 and 6 claimed by the appellant is the correct one. With the greatest respect, the Kernel of the dissenting judgment having been on a faulty premise, it led his Lordship to hold that:

"I have already held in this judgment that rights under Chapter IV are independent rights standing on their own and enforceable by means of procedure provided for their enforcement. They are not dependent on/or subordinate to any other right. They are themselves causes of action enforceable in the courts – ubi jus ibi remedian"[19]. (Underline by me).

It is our submission that the above holding is not too wide but is capable of misleading the unwary. While it is conceded that rights enshrined in Chapter IV of the Constitution are 'self executory' in the sense that they are cohate rights, nevertheless, the events or acts that leads to their breach must or necessity go with them if a Civil Servant is retired or dismissed for an alleged act contrary to the rules of fair hearing, can B, a Student rusticated for unruly behaviour without hearing on facts of the case of A to succeed? Can A also rely on the facts of B's case to succeed even though both A's and B's case will have roots in breach of the rules of fair hearing? It must be remembered that any breach of the provisions of Chapter IV of the constitution or any law for that matter, must have a factual foundation to ground a complete cause of action, the rights cannot exist in vacuo.

It is the fact leading to the breach that will determine whether the supposed breach is in fact a breach in law, since it is not all breaches of Chapter IV properly so called that can ground a cause of action.

Anyone lawfully sentenced to a term imprisonment by a competent Court for an offence, cannot succeed in an application for breach of the rule of right to liberty and freedom based solely on the facts of his lawful conviction. This is inspite of the fact that he has been denied his right to liberty and freedom even though lawfully.

On the other hand, a man who is suspected by a mob as being a thief and unlawfully detained by the mob has the right to ask that detention be cleared a nullity

having been affected contrary to his right to freedom and liberty.

The maxim ubi jus ibi remedium should be used as a carte balance weapon for extracting a remedy from the courts even if the suit discloses no cause of action.

The noble Lord Justice Karibi-Whyte as if to complete a circle said:

"It cannot be disputed that the determination whether applicant is an Emir is not a relevant consideration in the determination whether the applicant was heard or denied. There was a violation of his freedom of movement. These are independent rights giving rise to independent causes of action. A cause of action has always been taken to mean every fact or circumstance which enable a plaintiff to have a right of action. There is no doubt each of the facts and circumstances relied upon in claims 3,4,5 in this case were sufficient to enable applicant to seek relief in the court. None of them is dependent upon the fact that applicant is the Emir of Muri for its existence"[20].

It is our submission that the above holding lost sight of the fact that a cause of action cannot exist in vacuo. There must be facts or circumstance on which it will be hinged. One is a bit taken back by His Lordship's conclusion that claims 3,4 and 5 can exist independently of the deposition of the appellant in defining a cause of action has held that "A cause of action has always been taken to mean every fact or circumstance which enables a plaintiff to have a right of action".

If one may respectfully ask His Lordship: what then are facts and/ or circumstances or the factual basis on which claims 3,4 and 5 will be based and considered?

The consideration of the deposition of the appellant is not only relevant to claims 3 and 5, that fact is the life line of those claims and once it is found that the trial court lacked the jurisdiction to determine and pronounce upon the appellant's deposition, the sail is therefore taken off the ship of the other reliefs in the suit. It may be necessary in determining reliefs 3,4 and 5 to look into the Chiefs Law and enquire whether the Governor acted ultra or intra vires on all the actions he took concerning the appellant. The situation can be aptly described by the Yoruba adage of "Baba jona enbere irugbon", freely translated 'you cannot ask for a man's beard if he (the owner of the beard) is burnt in an inferno'.

It is therefore our view that the majority judgment ought to be preferred to the dissenting judgment.

To do otherwise will foist a situation of intellectual helplessness on one's ability to

reconcile the dissenting judgment with other authorities[21] and the peculiar facts of the case in hand.

CONCLUSION:

We have seen that it is in the highest tradition of appellate courts for dissenting judgments to be delivered whenever a member or more of the presiding justices feel unable to abide by the majority decision in any particular case.

Given the development of the law in England, due in large part to the numerous dissenting judgments of Hon. Justice Denining M.R., (as he then was), n o one, including this writer, will deny the appellate courts' the right to deliver majority and minority judgments whenever occasion demands. To deny them that right will be a serious stifling of the court' intellectual development of our laws.

The attempt we have tried to make in this paper is to highlight the majority judgment and the dissenting judgment in the case of Tukur vs. Govt. of Gongola State and show that the reasoning in the majority judgment is to be preferred to the dissenting judgment because:

1. The majority judgment is more consistent with the facts of the case.
2. It is easier to follow the reasoning and conclusions in the majority judgment.
3. Many principles of law were too widely stated in the dissenting judgment.
4. Dissenting judgment should be for it own sake but for a deep elucidation of the law.
5. Dissenting opinions in the highest court of the land must be rendered with utmost care and circumspection.

REFERENCES

1. See for example: (a) The Court of Appeal and House of Lords in England.
(b) The Supreme Court of Ontario Canada.

2. See: (a) Central London Property Trust Ltd v. High Tress House Ltd. (1947) KB 130.
(b) Wood House Ltd. Nigerian Produce Lt (1972) AC.741.
(c) Kammins Co. v. Zenith Investments (1971) AC 850.

3. The Discipline of Law by Lord Denning PP 287 – 296. At page 287 His Lordship said: