

COURT'S POWER OF TRANSFER VERSUS POWER TO STRIKE OUT FOR WANT OF JURISDICTION: AN EXAMINATION OF NICO OLIVER V. DANGOTE INDUSTRIES LIMITED IN SEARCH OF SUBSTANTIAL JUSTICE

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ABSTRACT

The issue of a court's jurisdiction to hear and determine a matter before it is as important as the court itself. Jurisdiction of the court is a threshold issue that can be raised at any stage of the case, even on appeal. Therefore, the all-important issue of court jurisdiction cannot be overemphasized. Over the years, courts at various levels have been battling with this issue. Any decision reached by a court without jurisdiction is a nullity that is liable to be set aside on appeal. Hence, the court guards its jurisdiction jealously, and when it discovers that it has no jurisdiction to try a case, it strikes it out. This position has generated a lot of controversy in view of certain statutory provisions that confer powers on certain courts, especially the Federal High Court, to transfer cases to the State High Court rather than striking out for lack of jurisdiction and vice versa. This work therefore examines the issue of a court's jurisdiction as a threshold issue. It further examines the power of courts to strike out cases for want of jurisdiction and juxtaposes it with the power of courts to transfer rather than strike out with a view to determining whether the two powers are not at a crossroads. The focus of this paper is the case of NICO Oliver v. Dangote Industries Limited, and the power to transfer examined in this research is that of the Federal High Court and the State High Court. Based on its findings, the study concluded that transferring cases to the appropriate court is better than striking out for lack of jurisdiction for the proper and effective administration of justice. It also recommended an amendment to all statutes creating courts to accommodate the transfer of power rather than strike out for want of jurisdiction.

Keywords: Court's Power of Transfer, Court's Power to strike out Case, Jurisdiction, State High Court, Federal High Court

I. INTRODUCTION

The issue of court's jurisdiction to hear and determine a matter before it is as important as the court itself. Jurisdiction of court is a threshold issue which can be raised at any stage of the case, even on appeal. The all-important issue of jurisdiction of court therefore cannot be over-emphasized. Over the years, courts at various levels have been battling with this issue. The reason is, of course, obvious. Where a court lacks jurisdiction to entertain a matter, any decision arrived at without jurisdiction is a nullity which is liable to be set aside on appeal. Hence the court guides its jurisdiction jealously and when it discovers that it has no jurisdiction to try a case, it strikes out the case. This position has generated a lot of controversy in view of certain statutory provisions

which confer powers on certain courts, especially the Federal High Court, to transfer cases to the State High Court, rather than striking out for want of jurisdiction and *vice versa*.

This work therefore examines the issue of court's jurisdiction as a threshold issue. It further examines the power of court to strike out cases for want of jurisdiction and juxtapose it with the power of courts to transfer rather than strike out with a view to determining whether the two powers are not at crossroads. The focus of this paper is the case of *NICO Oliver v. Dangote Industries Limited*¹ which exposes the judicial activism of His Lordship, Honourable Justice Issa Ayo Salami (PCA) while exercising the power vested in the Court of Appeal to exercise the power of the trial court. The power to transfer examined in this paper is that of the Federal High Court and the State High Court. The paper concludes by recommending transferring cases to the appropriate court rather than striking out for want of jurisdiction for the proper and effective administration of justice. It also recommended an amendment to all statutes creating courts to accommodate power to transfer rather than strike out for want of jurisdiction.

II. JURISDICTION OF COURT AS A THRESHOLD ISSUE

Jurisdiction of court is the court's power to decide a case or issue a decree.² It is now settled beyond peradventure that the question of court's jurisdiction is a threshold issue which can be raised at any stage of the proceedings,³ hence issue of jurisdiction can be raised by either parties to the proceedings and can be raised by the court *suo motu*⁴, even for the first time at the court of last resort.⁵ And *a fortiori*, it can be raised *viva voce*.⁶

¹ (2010) ALLFWLR (Pt 506) 1858.

² Bryan A. Garner, *Black's Law Dictionary* (8th Ed., West Publishing Co. 2004) 867.

³ *Nigeria Deposit Insurance Corporation v. Central Bank of Nigeria* (2002) 3 SCNJ 75, 88; *Nika Fishing Co. Ltd v. Laving Corporation* (2008) ALLFWLR (Pt 437) 1, 15; *Nasir v. Civil Service Commission, Kano State* (2010) 1-2 SC 65.

⁴ Where the court raises issue of jurisdiction *suo motu*, just like any other issue, the court must give the parties opportunity of addressing it on it otherwise it would amount to breach of fair hearing and any decision arrived thereat is liable to be set aside on appeal. See *Rock Shell International Limited v. Best Quality Service Limited* (2010) ALLFWLR (Pt 508) 234, 254; *Ibrahim v. Fulani* (2010) ALLFWLR (Pt 508) 261, 292; *Egunjobi v. FRN* (2012) 12 SC (Pt IV) 148, 184.

⁵ That is the Supreme Court. See generally *Babalola v. Osogbo Local Government* (2003) 10 NWLR (PT 529) 465, 480 -481; *Daniel v. Amosun* (2009) ALLFWLR (pt 473) 1339, 1373; *Nwude v. Chairman Economic and Financial Crimes Commission* (2005) ALLFWLR (Pt 276) 740, 756; *Adebiyi v. Kolawole* (2008) ALFWLR (pt 428) 234, 244; *Limited Parcel Services Ltd v. Asuquo* (2013) ALLFWLR (Pt 666) 582, 590.

⁶ See *Petrojessical Enterprises Ltd & Anor v. Leventis Technical Company Ltd* (1992) 6 SCNJ 154, 167; (1992) 5 NWLR (Pt 244) 675, 693; *Comfort Olaosun v. Ogunsemi* (Unreported) Appeal No. CA/IL/EP/SA/4/2003 delivered

The unique issue of jurisdiction is that it is the statute that cloaks the court with the powers and jurisdiction to adjudicate⁷, and if the law does not grant jurisdiction to a court or tribunal, the court (and the parties) cannot by agreement or conduct endow the court with jurisdiction. The jurisdiction of the court is therefore confined, limited and circumscribed by the statute creating it. In view of the fact that jurisdiction is a threshold matter, it is very fundamental as it goes to the competence of the court to hear and determine a suit. It has been held that where a court does not have jurisdiction to hear a matter, the entire proceedings, no matter how well conducted and decided would amount to a nullity. On a broad perception, jurisdiction of court encompasses legal capacity, power or authority of a court. Competence of a court is the handmaid of jurisdiction of a court and a court must have both jurisdiction and competence to be properly seised of a cause or matter. In that sense, therefore, jurisdiction means the legal capacity, power or authority vested in a court by the Constitution or statute creating the court⁸. The celebrated case of *Gabriel Madukolu & ors v. Johnson Nkemdilim*⁹ has been the *locus classicus* on the issue of competence of a court and its jurisdiction to entertain the matter before it. In that case, the Supreme Court, per Bairaman F.J, delivering the leading judgment held thus:

...a court is competent when:

- (i) It is properly constituted as regards members and qualification of the member of the bench and no member is disqualified for one reason or another;
- (ii) The subject matter of the case is within its jurisdiction and there is no feature in the case which prevents the court from exercising its jurisdiction; and
- (iii) The case comes before the court initiated by due process of law and upon fulfillment of any condition precedent to the exercise of jurisdiction.

Any defect in competence is fatal for the proceedings are a nullity however well conducted and decided. The defect is intrinsic to the adjudication

The above quoted voice of the learned jurist has gained tremendous applause in our juridical terrain. It has become a watchword in determining the competence of suits and the jurisdiction of the court to entertain same.¹⁰

on 3rd December 2003; Owners of the *MV "Arabela"* v. *N.A.I.C.* (2008) ALLFWLR (Pt 443) 1208, 1232-1233; *Nwude v. Chairman E.F.C.C* (Supra); *Adebiyi v. Kolawole* (Supra) .

⁷ See *Dangana v. Usman* (2012) 2 SC (pt III) 103, 129, Per Adekeye JSC.

⁸ *Dangana v. Usman* (Supra).

⁹ (1962) 1 ALLNLR 586, 595; (1962) SCNLR 341, 348.

¹⁰ See the following cases: *Babalola v. Osogbo Local Government* (Supra); *Enyibros Foods Processing Company Ltd & Anor v. NDIC & Anor* (2007) ALLFWLR (Pt 387) 793, 816; *Odu'a Investment v. Talabi* (1997) 10 NWLR (Pt 523)

It is trite that jurisdiction is the life blood of any adjudication and that is why issues of jurisdiction is crucial and fundamental in adjudication and has to be dealt with first and determined to avoid an exercise in futility, hence it is treated as a threshold issue. It is fundamental principle of law that it is the claim of the plaintiff which determines the jurisdiction of a court entertaining same.¹¹ In fact, it has been held that it is not the status of the parties that determines whether a court has jurisdiction, rather it is the cause of action as can be garnered from the originating process.¹²

III. POWER OF COURT TO STRIKE OUT FOR WANT OF JURISDICTION

The notoriety of the trite law that the proper order to make by the court once it holds that it lacks the requisite jurisdiction to entertain the matter before it is that of striking out has made citation of legal authorities almost otiose. It suffices to say that the court must put an end to its proceedings if it holds that it lacks jurisdiction. That is, where an objection to the jurisdiction of court succeeds and upheld by the court, that would bring the proceedings in which it was raised to an end, as there would no longer be any other competent live issue in the case. In *Orofin v. Cheroon Nigeria Ltd*¹³ it was held, per Shoremi JCA that:

The question of jurisdiction strikes at the root of any cause or matter and consequently raises the issue of the competence of the court to adjudicate in the particular proceedings. Any defect in competence is fatal and such proceedings must be null and void. See *Madukolu v. Nkemdilim* (1962) SCNLR 314 and *Skenconsult (Nig) Ltd v. Ukey* (1981) 1 SC 6. Likewise, where a court has no jurisdiction to try a suit before it, it lacks the competence to transfer that suit to a court of competent jurisdiction to try the matter. What the court should do in such circumstances is to strike out the matter before it for want of jurisdiction.

Sanctioning the above clear position of the law, the Supreme Court in *Peter Obi v. Independent National Electoral Commission & Ors*¹⁴ held unequivocally that:

1, 58-59; *Ishola v. Ajiboye* (1994) 6 NWLR (Pt 352) 506; *Tuoyo Holding Ltd v. Niger-Benue Transport Co. Ltd* (2007) All FWLR (pt 356) 800, 809, *Kalu Mark & Anor v. Gabriel Eke* (2004) 1 SC (Pt II) 1, 26. See also Ariyoosu D.A.; 'Demurrer and Proceedings in Lieu of Demurrer: A Conceptual Discourse in a Continuing Controversy' (2010) Vol. 3(1) *Confluence Journal of Jurisprudence and International Law* (A Publication of the Department of Jurisprudence and International Law, Faculty of Law, Kogi State University, (Anyigba) p. 80.

¹¹ See *Chief Numogun Sam Adeyemi V. Emmanuel Opeyori* (1976) 1 FNL 149, 158; *Jimoh Akinfolarin & 2 Ors v. Akinola* (1994) (Pt I) SCNJ 30, 43; *Continental Industrial Gases Ltd v. Onafeko* (2003) 7 NWLR (Pt 820) 479, 492; *Edjerode v. Ikin* (2001) 12 SC (Pt II) 94, 124.

¹² See *Continental Industrial Gases v. Onafeko* (Supra) 494.

¹³ (2007) ALLFWLR (Pt 374) 383, 394.

¹⁴ (2007) 7 SC 268, 295. See also *Fasakin Foods Nigeria Ltd v. Shosanya* (2006) 4 SC (Pt II) 204, 215.

One a court declines jurisdiction to entertain a suit, the only other step it could take in the matter is to make an order striking out the suit. Any other order or pronouncement made by the court after declaring that it lacks jurisdiction to entertain a suit is null and void and of no effect.

Without any modicum of doubt, the above quoted portion of the decision at the Supreme Court clearly re-establishes the position of the law that the proper order to make where a court lacks jurisdiction to entertain a case is that of striking out and nothing else. One can discern full force in this position of the law; where a court declares that it lacks jurisdiction and still makes any order other than striking out the case, such order is an exercise of jurisdiction which the court had already declined.

The matter however does not end here. The interpretation of relevant provisions of the statute makes the position looks dicey. Certain statutory provisions, which shall be shown *anon*, empowers certain courts to transfer a cause to appropriate court that has jurisdiction and this therefore forms the basis of this paper and the genesis of the interface between the power of the court to strike out a case for want of jurisdiction and the power to transfer when such is conferred by the statute.

IV. POWER OF COURT TO TRANSFER RATHER THAN STRIKE OUT

It has earlier been stated that once a court declines jurisdiction to entertain a matter before it, the proper order to make is that of striking out. However, certain developments evolve which whittle down the proposition of striking out order. The developments are to the effect that a court has the power to transfer a case to appropriate court where it lacks jurisdiction to entertain the case, rather than strike out the case. Thus, in *Mokelu v. Federal Commissioner of Housing and Land*¹⁵ the judge of the Federal High Court struck out the originating summons but the Supreme Court held on appeal that the proper course the judge should have taken was to transfer the suit to the appropriate State High Court.¹⁶ It is pertinent to quickly add that the power to so transfer can only be exercised where the statute establishing the court so confer. Section 22 (2) of the Federal High Court Act¹⁷ provides in clear terms that:

No cause or matter shall be struck out by the court merely on the ground that such cause or matter was taken in the court instead of the High Court of a state or of the Federal Capital Territory, Abuja in which it ought to have been brought, and the judge of the court before whom such cause or matter is brought may cause such cause or matter to be transferred to the appropriate High Court of a state or of the

¹⁵ (1976) 3 SC 35.

¹⁶ See Fidelis Nwadialo, *Civil Procedure in Nigeria* (2nd Ed, University of Lagos Press, Lagos) 68.

¹⁷ Cap F 12 Laws of the Federation of Nigeria 2004.

Federal Capital Territory, Abuja in accordance with Rules of court to be made under section 44 of this Act.

The above quoted provision of the Federal High Court Act is clear and unambiguous. It vests the Federal High Court with powers to transfer a cause or matter before it to the State High Court on the ground that such cause or matter was instituted before it rather than the state High Court. This established that where the Federal High Court holds that it lacks jurisdiction to entertain a matter it has power to transfer such matter to the State High Court rather than strike out the matter.¹⁸ This is a clear contradistinction with the earlier stated position that the proper order is that of striking out for want of jurisdiction. Aside section 22(2) of the Federal High Court Act, Section 24(3) of the National Industrial Court Act, 2006 makes similar provision for transfer of case rather than striking it out for want of jurisdiction. Although the statutes, in both section 22(2) of the Federal High Court Act and section 24(3) of the National Industrial Court Act, empower the Federal High Court or the National Industrial Court, as the case may be, to transfer the case to the appropriate court rather than strike out, a corresponding power is also conferred on a State High Court to transfer a cause or matter to the Federal High Court where the state High Court holds that it lacks jurisdiction.¹⁹ This corresponding power of transfer has, however, generated series of controversies in the judicial circle.

V. *NICO OLIVER V. DANGOTE INDUSTRIES LIMITED*:²⁰THE FACTS AND FINDINGS

The rationale behind the decision of the court of Appeal in *NICO Oliver v. Dangote Industries Ltd*²¹ may not be really understood without the earlier discussion on the power of court to either strike out or transfer a case for want of jurisdiction. Similarly, the juridical and philosophical basis of the need to do substantial justice as exhibited by his lordship, Honourable Justice Isa Ayo Salami in *NICO Oliver v. Dangote Industries Ltd* may not be appreciated unless the foundation already laid on the interface between the court's power of transfer and striking out is laid and properly laid.

VI. THE RELEVANT FACTS OF THE CASE

The plaintiff, Dangote Industries Limited, took out a writ of summons seeking the following reliefs before the Federal High Court:

- i. A declaration that the second and third defendants acted *ultra vires* in granting leave to the first defendant, to enter Nigeria by granting him to wit

¹⁸ See also Afolayan A. F. and Okorie P. C. *Modern Civil Procedure Law* (Dee-Sage Nigeria Limited, Lagos) 34.

¹⁹ Section 22 (3) of the Federal High Court Act.

²⁰ (2010) All FWLR (Pt 506) 1858.

²¹ *Supra*.

- a visa/work permit and residence permit and the said immigration privileges granted to the first defendant are consequently unlawful, null and void.
- ii. A declaration that the first defendant's entry into Nigeria was obtained by fraud, to wit non-disclosure of material facts underlying his previous contract with the plaintiff company.
- iii. Specific performance of employment contract of the first defendant with the plaintiff.
- iv. ₦20,000,000.00 as damages against the first defendant for a breach of contract.²²

The first defendant/appellant filed a notice of preliminary objection, challenging the jurisdiction of the Federal High Court to entertain the suit, as constituted against him and also praying that the suit be struck out on the grounds that:

- i. The substance of the cause of action in this case is the alleged breach of a contract of employment between the applicant and the plaintiff/respondent.
- ii. By virtue of section 251 of the Constitution of the Federal Republic of Nigeria 1999, this Honourable Court does not have jurisdiction to entertain such claims.
- iii. By virtue of section 272(1) of the Constitution of the Federal Republic of Nigeria, 1999, the State High Court has jurisdiction in matters arising from master and servant relationships.
- iv. The main cause of action in this suit relates to the alleged breach of a contract of employment between the defendant/applicant and the plaintiff/respondent.²³

The preliminary objection was heard and dismissed by the trial court, consequent upon which the first defendant/ appellant was dissatisfied and brought an appeal to the Court of Appeal. The main issue identified by the Court of Appeal, per Ayo Salami (PCA) presiding and delivering the leading judgment, for consideration and determination of the appeal is whether the Federal High Court had jurisdiction to entertain the respondent's suit.

VII. THE FINDINGS OF THE COURT

In determining the main issue for determination in the appeal, the Court of Appeal, per Salami (PCA), re-echoed the settled position of the law that:

²² *NICO Oliver v. Dangote Industries Ltd* (Supra) 1872.

²³ *NICO Oliver v. Dangote Industries Ltd* (Supra) 1872

It is trite that jurisdiction of a court is decided on the plaintiff's claim as endorsed in his writ of summons and statement of claim.²⁴

Considering the plaintiff's claim, it was held that the claims are essentially in alleged breach of contract of employment and therefore the joinder of the second and third defendants who are agencies of the Federal government cannot bring the case within the jurisdiction of the Federal High Court. The court found further that:

It is obvious that none of the parties is making a claim against the Federal Government of Nigeria or any of its agent or parastatal. The subject matter of this litigation is a breach of contract of service between a firm and its former employee neither of whom has a relationship with the Federal Government. There is no proceedings for a declaration or injunction affecting the validity of any executive or administrative action or decision of the Federal Government or any of its agency.²⁵

Citing section 251 (1) of the Constitution of the Federal Republic of Nigeria 1999 and a host of judicial authorities, it was further held that:

The Federal High Court has exclusive jurisdiction in matters listed in section 251 (1) of the Constitution. All other items not set out in the section would still be within the competence of the State High Court. But the court is not conferred with the jurisdiction to entertain claims in contract. Since contract is not included in the additional jurisdiction vested in the Federal High Court, that court wrongly usurped the jurisdiction which rightly belongs to a State High Court.²⁶

Allowing the appeal and setting aside the decision of the Federal High Court, Salami (PCA) held:

The facts which were pleaded in the statement of claim abundantly clearly demonstrate that the subject matter of this action stands in master and servant relationship which is a matter in contract. Contract of service is not one of the matters placed exclusively within the jurisdiction of the Federal High Court. The joinder of the immigration service and its comptroller is a mere subterfuge or ruse specifically contrived to give a semblance of jurisdiction to the Federal High Court which stratagem the court swallowed hook, line and sinker.²⁷

²⁴ *NICO Oliver v. Dangote Industries Ltd* (Supra) 1874.

²⁵ At page 1876.

²⁶ At page 1877.

²⁷ See page 1879 of the report

VIII. THE CRUX OF DISCUSSION ON *NICO OLIVER'S* CASE

In view of the decision/ findings of the Court of Appeal as stated above, coupled with the earlier discussing on power of court to either strike out or transfer for want of jurisdiction, the related issue is: what should have been the proper order of the Court of Appeal in *NICO Oliver's* case?

Unanimously allowing the appellant's appeal the court of Appeal, per Salami (PCA) held that:

*The trial court lacks jurisdiction to hear the suit which is substantially a claim in contract. The trial court, the Federal High Court, could properly transfer the matter to the court competent to hear and determine the action under section 22(2) of the Federal High Court Act, Cap F 12 Laws of the Federation of Nigeria, 2004..... This court, like any other appellate court, is vested with the power of the trial court. By virtue of section 15 of the Court of Appeal Act, the matter is transferred to the Lagos State High Court for determination.*²⁸

Other justices of the court, Mshelia and Nwodo (JJCA) concurred with Salami (PCA).

The propriety or otherwise of the consequential order of transfer rather than strike out needs adequate consideration, and a host of judicial authorities will necessarily involve in the consideration, for there appears to be conflicting decisions.

In *Omisade v. Akande*,²⁹ the Supreme Court held that by reason of the provision of section 22 (3) of the Federal Revenue Court (Amendment) Act 1975,³⁰ the State High Court has the power to transfer a case over which it has no jurisdiction to the Federal High Court. The Supreme Court therefore invoked the provisions of section 22 of the then Supreme Court Act and ordered the transfer of the case to the Federal Revenue Court.

In *Aluminum Manufacturing Co. (Nig) Ltd v. Nigeria Ports Authority*³¹ which came earlier than *Omisade v. Akande*,³² the same Supreme Court held that a State High Court has no power of transfer of a case over which it has no jurisdiction to the Federal High Court and the only order that could be validly made is that of striking out.³³ It is observed that in *Omisade v. Akande*,³⁴ the attention of the Supreme Court was not drawn to its earlier decision in *Aluminum Manufacturing Co. (Nig) Ltd v. Nigeria Port Authority*.³⁵

²⁸ See page 1881.

²⁹ (1987) 2 NWLR (PT 55) 158; (1987) 1 NSCC 486.

³⁰ Which is *pari materia* with Section 22(3) of the Federal High Court Act.

³¹ (1987) 1 NWLR (Pt 51) 475; (1987) 1 NSCC 224.

³² *Supra*.

³³ See also *Awoleye v. Board of Customer & Excise* (1990) 1 SC 146, (1990) 2 NWLR (Pt 133) 490; *Fashakin Foods Nigeria Ltd v. Shosanya* (2006) 4 SC (Pt II) 204.

³⁴ *Supra*.

³⁵ *Supra*.

Similarly, in *Aluminum Manufacturing Company (Nig) Ltd*, section 22 (3) of the Federal High Court never arose for consideration while in *Omisade's case*, it was the Supreme Court that involved the provision of section 22 (3) of the Federal Revenue Court (Amendment) Act and transferred the matter to the Federal Revenue Court.³⁶ Another case that came for consideration is *Awoleye v. Board of Customs and Exercise*³⁷ where the Supreme Court held that by the effect of section 236 of the Constitution of the Federal Republic of Nigeria 1979³⁸ conferring unlimited jurisdiction on the State High Court, the State High Court can no longer exercise the power hitherto conferred by section 22 (3) of the Federal High Court Act, 1973 to transfer a matter before it in which it had no jurisdiction to the Federal High Court. Still, unlike the Aluminum case, Awoleye dealt directly with section 22 (3) of the Federal High Court Act.

In *Fashakin Foods Nig. Ltd v. Shosanya*,³⁹ the Supreme Court had another opportunity of considering the provision of section 22(2) and (3) of the Federal High Court Act. It was held that while the Federal High Court can transfer a cause or matter to a state High Court, by virtue of section 22 (2) of the Federal High Court Act, section 22(3) and (4) of the Act is legislating for the State High Court when it has no power to so legislate. It suffices to say that the power of court to transfer rather than striking out for want of jurisdiction is guided by statute but the statute must be valid and constitutional. The matter however did not end. Barely 7 days after the decision in *Fashakin*,⁴⁰ the Supreme Court in *Associated Discount House Ltd v. Amalgamated Trustees Ltd*⁴¹ in what appears to be a departure from *Fashakin's case* held after quoting section 22 (3) of the Federal High Court that: The term and intendment of this subsection is that the State High Court can validly make an order for a transfer of a case from itself to a court of different jurisdiction.

Reacting to the above position of the Supreme Court, the president of the National Industrial Court of Nigeria, Hon. Justice Babatunde Adeniran Adejumo⁴² posited that the position of the Supreme Court is a welcome development because it is in accord with modern trends globally. However, the matter still did not end there. His Lordship, the President of the National Industrial Court of Nigeria did not consider the latter case of *Associated Discount House Ltd. V. Amalgamated*

³⁶ Now Federal High Court.

³⁷ (1990) 1 SC 146; (1990) 2 NWLR (Pt 133) 490.

³⁸ Now section 272 of the Constitution of the Federal Republic of Nigeria 1999(as amended), save that the unlimited jurisdiction of the State High Court is now limited by the provisions of section 251 of the Constitution.

³⁹ (2006) 4 SC (Pt II) 204.

⁴⁰ *Fashakin's case* was decided on 28th April 2006 while *Associated Discount* was decided on 5th May, 2006

⁴¹ (2006) 5 SC (Pt I) 32.

⁴² In his paper, 'The relevance of the National Industrial Court of Nigeria in the scheme of things in contemporary Nigeria: what is the further for litigation and adversely in the court?' (Being paper presented at the 2013 retreat organized by the Nigeria Bar Association, Ilorin Branch of April campus, Near Ilorin Kwara State, between 2nd – 4th April, 2013) .

*Trustees Limited*⁴³ where the Supreme Court, reviewing its earlier position in *Associated discount House Ltd*,⁴⁴ held that in *Associated Discount House Ltd*,⁴⁵ the Supreme Court nevertheless expressed the opinion that the High Court of a state can, under the provision of section 22(3) of the Federal High Court Act, transfer a case in respect of which it has no jurisdiction to the Federal High Court but that opinion was clearly the court's passing remark which is clearly an *obiter dictum*.⁴⁶

The conclusion one can reasonably reach in view of all the above authorities is that while the Federal High Court can validly transfer a cause or matter to the appropriate court for want of jurisdiction pursuant to section 22 (2) of the Federal High Court Act, the State High Court cannot so transfer by invoking the provision of section 22(3) of the Federal Act court Act. The State High Court can only so transfer if the statute establishing the High Court provides for power to transfer and until the statute so provide, the only option open to the State High court is to abide by the common law position by striking out the case for want of jurisdiction rather than transfer.

The position of Salami (PCA) in *NICO Oliver's case* is therefore an exposition of judicial activism in the sense that section 22(2) of the Federal High Court Act presumably gives the Federal High Court discretion to transfer the case to the appropriate High Court of a State. For clarity of purpose, the relevant portion of the section 22(2) of the Federal High Court says:

...the Judge of the court before whom such cause or matter is brought may cause such cause or matter to be transferred to the appropriate High Court of a State...

(Underlining mine for emphasis)

The word employed above is 'may', suggesting that the judge of the Federal High Court has a choice either to transfer or do otherwise at his discretion. However, when one considers the full intendment and purport of section 22 (2) of the Federal High Court, one would reasonably conclude that on a proper appreciation and application of judicial activism in the interpretation of statutory provision, the proper order to be made by the judge of the Federal High Court is that of transfer and not otherwise, and which power to so transfer must be exercised mandatorily and not as a matter of discretion.

The very context in which the word 'may' is used, with due regard to convenience and justice, would show that the intention of the legislature is to make the use of 'may' mandatory which will be most consistent with reason. The exercise of the general power of the court of Appeal in *NICO*

⁴³ (2007) 7 SC 168; (2007) ALLFWLR (Pt 392) 1781.

⁴⁴ (2006) 5 SC (Pt I) 32.

⁴⁵ (2006) 5 SC (Pt I) 32.

⁴⁶ See particularly page 186 of *Associated Discount House's Case* (2007) 7 SC 168.

Oliver's case is a welcome development, considering the effect of striking out rather than transfer which may extinguish the right of action of the claimant when he has a reasonable cause of action.

This view can gain support from the opening paragraph of section 22(2) of the Federal High Court Act, which says:

No cause or matter shall be struck out by the court merely on the ground that such cause or matter was taken in the court instead of the High Court of a State or of the Federal Capital Territory, Abuja in which it ought to have been brought. It is humbly submitted that by use of the word 'shall' in the above quoted provision, no cause or matter is liable to be struck out by the judge of the Federal High Court on the ground of want of jurisdiction, the corollary of which is that the proper order for the judge to make is to transfer the cause or matter to the appropriate State High Court. This would certainly accord with common sense and global best practices for a proper and effective administration of justice.

IX. CONCLUSION

The power of the High Court to either transfer or strike out a case for want of jurisdiction has been examined. The Court of Appeal in *NICO Oliver's* case exercised its general power and transferred the case under review to the State High Court rather than striking out the case. The rationale for this may not be far-fetched. The practice and procedure of the State High court is regulated by the state law under section 274 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) while the practice and procedure of the Federal High Court is, by the effect of section 254 of the same constitution, regulated by an Act of the National Assembly. Hence the dictates of the golden rule of interpretation imposed the duty on the court to construe statutes in such a manner that would liberate and expound the horizon of the law and make it a living law that would cater for the future. It is recommended, therefore, that individual state law establishing state courts should make corresponding provisions conferring power of transfer on the State High Court in the desire to do substantial justice to the parties and not to shut a party due to inadequacy in the law. This can be done by amendment of the relevant laws.

The position of the Court of Appeal in *NICO Oliver's* case will prevent injustices that normally result from striking out of cases where the Federal High Court holds that it lacks jurisdiction. Section 22 (20) of the Federal High Court Act is a good law which must be used as a shield to prevent cases from being struck out and should therefore not be used as a sword to shut out a party with reasonable cause of action. A corresponding but valid provision in the various State High Court laws is a necessity to engender a more effective administration of justice.