IN THE FEDERAL HIGH COURT OF NIGERIA
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT ABUJA
ON MONDAY THE 24TH DAY OF APRIL, 2017
BEFORE HIS LORDSHIP HON. JUSTICE G.O. KOLAWOLE
JUDGE

SUIT NO.: FHC/ABJ/CS/889/2015

BETWEEN:

DR. A.C.B. AGBAZUERE ::::::::: ::::::::: PLAINTIFF

AND

1. **ATTORNEY GENERAL OF THE FEDERATION AND MINISTER OF JUSTICE**
2. **NATIONAL ASSEMBLY, FEDERAL REPUBLIC OF NIGERIA**

DEFENDANTS

JUDGMENT

By virtue of the provisions of Section 122(2)(j) of the **Evidence Act, 2011**, I take *judicial notice* of the fact that the Plaintiff who instituted the instant action is a legal practitioner and who by the "*Affidavit in Support of the Originating Summons dated 30/10/15 and filed on 2/11/15*", described himself as a "*public interest lawyer*" and "*a holder of Doctor of Philosophy (Ph.d) degree of Law majoring in human rights and constitutional law*". As I had remarked, the suit was commenced by an "Originating Summons" wherein the Plaintiff challenged the *constitutionality* of the provision of Section 165(2) of the **Administration of Criminal Justice Act (ACJA),**

2015. The said Act came into operation at the *twilight* of the former administration of President Goodluck E. Jonathan on 15/5/15 and by its Section 493, it *repeals* the hitherto **Criminal Procedure Act**, Cap.C.41, LFN 2004 which was the applicable Act to criminal trials in the Federal High Court and also *repeals* the **Criminal Procedure (Northern States) Act**, Cap.C.42 LFN 2004 and the **Administration of Justice Commission Act**, Cap.A3, LFN 2004". The said Act was *enacted* by the National Assembly to "*promote efficient management of criminal justice institutions, speedy dispensation of justice, protection of the society from crime and protection of the rights and interests of the suspect, the Defendant, and the victim*". It is debatable as to what extent, the *interpretation* and *application* of this Act, has achieved its purpose as is stated in Section 1(1) of the Act, but in view of the fact that it is barely two (2) years of its operation, it may be too early for this Court to come to a *verdict* as to whether or not its "purpose" as stated in Section 1(1) of the Act has been achieved. I have no doubt, that it's a rather *ambitious legislative instrument* which attempts to overcome some of the lapses or weaknesses in the former Act and which by the assessments of the National Assembly, may have *impeded* the attainment of the "purpose" for which **ACJA, 2015** was *promulgated*. It is not a *perfect legislation* as no law, being the product of human efforts, can be *perfect*. As the months and years draw by, the Courts and legal practitioners, such as the Plaintiff in this suit, will begin to see and highlight its areas of *deficiencies* which may require further *legislative tinkering* in order to make it more efficient in the administration of criminal justice and to achieve *substantially* if not *wholly*,

the primary "purpose" for which it was enacted as stated in its Section 1(1).

By the "Originating Summons" dated 30/10/15, the Plaintiff sets down only one question for the Court's resolution, and this is:

1. *"Whether the provision of Section 165(2) of the* ***Administration of Criminal Justice Act, 2015*** *to the effect that Court may require the deposit of a sum of money or other security as the Court may specify from the Defendant or his surety before bail is approved, is not inconsistent with the provisions of Section 36(5) of the* ***Constitution of the Federal Republic of Nigeria, 1999 as amended****, to the effect that every person who is charged with a criminal offence shall be presumed innocent until he is proved guilty?"*

In the event that the said question is answered in the way and manner which the Plaintiff expects, the Plaintiff seeks two (2) *declaratory reliefs*. I am surprised, that he did not seek any specific relief by which the Court can be urged to *nullify* the said provision in Section 165(2) of **ACJA**, supra. This is because, merely granting the two (2) *declaratory reliefs* will leave the *applicability* and or *validity* of the said Section, to *needless* and *avoidable conjunctures* and *speculations*. I am not in any doubt, that this Court is vested with the jurisdiction to make such order where it is *proved*, that the provision of any Act of the National Assembly is *inconsistent* with a *clear* and *specific* provisions of the **Constitution** or with the general

philosophy of the **Constitution** as it has been *clearly* espoused and encapsulated by a community reading of the provisions of Sections 14(1), (2), (3) and (4); Section 15(1) – (5); Section 16(1) – (3); Section 17(1) – (3) and Section 18(1) and (2) of the **Constitution**. The National Assembly, by my understanding of the **Constitution** being the *grundnorm* on which the Nigerian State is founded (Section 1(1) and (2) and Section 2(1) and (2) of the **Constitution**) shall not have the *legislative jurisdiction* to enact any Act which when read vis-à-vis the **Constitution**, will be *inconsistent* with any of its provisions or will on its application, operate to *subvert* or *undermine* any of its prescribed *philosophy*. This is a truth which is established by the provision of Section 1(3) of the **Constitution** which in *constitutional jurisprudence*, is often called the "*inconsistency provision*".

The reliefs which the Plaintiff seeks in the event that the lone question which was set down is answered in a manner that is favourable to his *cause of action* and *expectation* are:

1. *"A Declaration that Section 165(2) of the **Administration of Criminal Justice Act, 2015** for providing that Court may require the deposit of a sum of money or other security as the Court may specify from the Defendant or his surety before bail is approved is inconsistent with Section 36(5) of the **Constitution of the Federal Republic of Nigeria, 1999 as amended**, to the effect that every person who is charged with a criminal offence shall be presumed to be innocent until he*

is proved guilty and is therefore unconstitutional, null and void."

2. *"A Declaration that Section 165(2) of the **Administration of Criminal Justice Act, 2015** being inconsistent with the **Constitution of the Federal Republic of Nigeria, 1999 as amended** and consequently unconstitutional, null and void, be and is therefore expunged from the **Administration of Criminal Justice Act, 2015**."*

These reliefs are based on four (4) grounds which are highlighted on the face of the "Originating Summons". These are:

1. *"That Section 165(2) of the **Administration of Criminal Justice Act, 2015** which provides that Court may require the deposit of a sum of money or other security as the Court may specify from the Defendant or his surety before bail is approved to that effect is inconsistent with Section 36(5) of the **Constitution of the Federal Republic of Nigeria, 1999 as amended**."*

2. *"The Law is settled that the provisions of the Constitution of the Federal Republic of Nigeria is supreme and if any other law is inconsistent with the provisions of this **Constitution**, this **Constitution** shall prevail and that other Law shall to the extent of its inconsistency be void by virtue of Section 1(1) and (3) of the **Constitution of***

the Federal Republic of Nigeria, 1999 as amended."

3. *"That applicability of Section 165(2) of the* ***Administration of Criminal Justice Act, 2015*** *will deprive Nigerian citizens of their liberty, freedom and fair hearing."*

4. *"That Lawyers and Courts have a responsibility to protect the Rule of Law and are expected to be on guard not to allow anything that will deprive a citizen of his Liberty and fair hearing."*

The "Originating Summons" was supported by a 17 paragraphed Affidavit which the Plaintiff personally deposed to, and as if the Plaintiff had already anticipated that the Defendants may likely challenge his *locus standi* to seek the reliefs which I have just reproduced, in paragraphs 2 and 3 of his Affidavit, he endeavoured to state such facts as by his own estimation, should be materially strong enough to *disclose* a "*sufficient interest*" in order to establish his *locus standi* to bring the instant action. In paragraphs 2 and 3 of the Affidavit, the Plaintiff deposed thus:

2. *"That being a legal practitioner, a holder of Doctor of Philosophy (Ph.d) degree in Law majoring in human rights and constitutional law and a public interest litigation Lawyer, I am conversant with and have read the* ***Constitution of the Federal Republic of Nigeria, 1999*** *as amended vis-à-vis the* ***Administration of***

Criminal Justice Act, 2015 *and made serious discoveries deserving the intervention of this Court."*

3. *"That by virtue of my status in Nigeria, I am also a stakeholder in the administration of justice and a custodian of liberty who shall always be on guard to defend the Rule of Law; Liberty and Freedom of citizens."*

The Plaintiff, "*strangely*" produced the **Constitution of the Federal Republic of Nigeria (CFRN), 1999 As Amended** and the **Administration of Criminal Justice Act, 2015** as exhibits "A" and "B". I have used the word "*strangely*" because, if the Plaintiff had adverted his attention to the provision of Section 122(2)(a) and (b) of the **Evidence Act, 2011**, he would have realized that the contents of both Exhibits "A" and "B" are such that the Court is required to take *judicial notice* of. The **Constitution**, i.e. Exhibit "A" is the authority that established this Court and it is the *instrument* which prescribes its jurisdiction and the powers it can exercise as one of the superior Courts of record it has created by Section 6(5)(c) of the **CFRN, 1999 As Amended**. But, the moment I realized that the Plaintiff already has a Ph.D. in Law, I was no longer surprised because, "*academic law*" is quite different in its *perspectives* and *approach* to Court room litigations. It tends to be more of *theoretical postulations than practical* where *core* legal issues are dealt with in a *pragmatic* manner that avoid *needless sophistry*.

The Plaintiff as his own Counsel, filed a "written address in Support of Originating Summons". It's dated 30/10/15 and was filed on 2/11/15.

In its paragraph 3.0, the Plaintiff set down one issue for determination. It is: "*Whether Section 165(2) of the **Administration of Criminal Justice Act, 2015** is not inconsistent with Section 36(5) of the **Constitution of the Federal Republic of Nigeria, 1999 as amended**?*"

The Plaintiff who having reproduced the provision of Section 165(2) of the **ACJA**, supra, argued that "*this means that a Nigerian citizen who has no money or other security shall be deprived his right to bail and shall not have his bail approved and will therefore be sent to prison until he pays the money when he is yet to be tried for the offence*". It was contended by the Plaintiff, having reproduced the provision of Section 36(5) of the **CFRN, 1999 As Amended**, that "*by the provision of Section 165(2) of the **Administration of Criminal Justice Act** which provides that every person should pay money or other security before his bail is approved, the presumption of innocence provided by Section 36(5) of the **Constitution** has been challenged as every person is now presumed guilty without trial by the said Section 165(2) of the Act*". It was submitted that by the said provision "*the accused is to pay money before his bail can be approved when the prosecution has neither proved the essential ingredients of the case nor has the accused been found guilty*". The Plaintiff argued that Section 165(2) of the **ACJA** "*is copiously inconsistent with Section 36(5) of the **Constitution of the Federal Republic of Nigeria, 1999 as amended***".

It was further argued that "*the mandatory payment of money before bail is approved, Section 165(2) of the Act has now presumed every person guilty when he has not been tried and found guilty*" and it was contended that

"*Section 165(2) of the Act is an aberration*" and that it constitutes "*an ambush against the people and should not be allowed to stand*". The Court's attention was drawn to Sections 1(1) and (3) of the **Constitution** and the Court was urged to declare the provision of Section 165(2) of the **ACJA**, supra as being *inconsistent* with Section 36(5) of the **Constitution** and that it should be declared "*unconstitutional, null and void from the time of its making thereof*". I had earlier noted, that the Plaintiff did not by his "Originating Summons", seek any such positive order which the Court may grant in the event that the *declaratory reliefs sought* are found proved to be granted. The Plaintiff cited a few of the appellate Courts' decisions on the *supremacy* of the **Constitution** and where an Act or its provisions are found to be *inconsistent* with the **Constitution** or any of its provisions. The Supreme Court's decisions in **NATIONAL UNION OF ELECTRICITY EMPLOYEES & ANOR. v. B.P.E. (2010) 7 NWLR (pt.1194)** and **INEC v. MUSA (2003) 3 NWLR (pt.306) 72** are two of the cases cited.

The Court was urged in the conclusion, to "*protect the Nigerian people and the Nigerian Constitution by granting our reliefs*".

When the Defendants were served with the Plaintiff's "Originating Summons" and the written address which I have just reviewed, the 1st Defendant through its Counsel, Mrs. Maimuna Lami Shiru on 10/12/15 filed a "*Memorandum of Conditional Appearance*" and followed it on the same date, with the "*1st Defendant's Counter-Affidavit in Reply to Plaintiff's Affidavit in Support of his Originating Summons dated 30/10/15*". The "Counter-Affidavit" was deposed to by one Mrs. Elizabeth Egboja who in paragraph 1 says that she is a "*litigation officer in the Chambers of the*

Attorney General of the Federation". It's a five (5) paragraphed "Counter-Affidavit" with its paragraph 4 having 12 sub-paragraphs listed as (a) – (l). I seem to found the depositions in paragraph 4 of the "Counter-Affidavit" of some interest, and I will reproduce its paragraph 4(b) – (l) and they read thus:

> 4. *"As a matter of fact, I was informed by Olatunji Ayodele Coker, Esq., Counsel handling this matter at 12.00p.m in his office on 26th November, 2015 of the following facts:*
>
> *(b) That paragraphs 7 and 16 are untrue and are hereby expressly denied.*
>
> *(c) That Section 165(2) of the Administration of Criminal Justice Act, 2015 cannot be inconsistent with Section 36(5) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended).*
>
> *(d) That the request for payment of money or other security as the Court may specify from the Defendant or his surety before bail is approved does not in any way erode the presumption of innocence provided for in Section 36(5) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended).*
>
> *(e) That the money to be deposited by an accused provided by the Act is meant to be returned to the accused person or his surety or sureties as a mandatory requirement at*

the conclusion of the trial on an application by the surety or sureties.

(f) That the Court is empowered to take necessary actions within the law to ensure that an accused person attends trial and answer to the case against him or her.

(g) That the contested subsection merely empowers Judges to impose pecuniary conditions for bail.

(h) That the National Assembly has received widespread commendation for the enactment of the Administration of Criminal Justice Act, 2015 as being progressive.

(i) That the requirement of bail bond is the practice in all mature and progressive Criminal Justice Systems in the World over including the United Kingdom and the United States of America.

(j) That a similar provision to Section 165(2) of the Administration Criminal Justice Act, 2015 was contained in the Criminal Procedure Code (now repealed).

(k) That the 1st Defendant intends to challenge the jurisdiction of this Honourable Court to grant the reliefs the Applicant is seeking.

(l) That it is in the interest of justice that the reliefs the Applicant is seeking in this suit be refused by the Honourable Court."

The 1st Defendant filed a "written address in Support of 1st Defendant's Counter-Affidavit". The 1st Defendant's Counsel having reproduced the *reliefs being sought* by the Plaintiff, also in paragraphs 2.1 – 2.3 of the address, did a summary of what she titled the "*Material Facts*". In paragraph 3.0, the 1st Defendant's Counsel set down only one issue for determination. It is: "*Whether Section 165(2) of the* ***Administration of Criminal Justice Act*** *is inconsistent with Section 36(5) of the* ***Constitution of the Federal Republic of Nigeria (As Amended)***."

This issue was argued by the 1st Defendant's Counsel from the perspective of the Court's jurisdiction which must be ascertained from the Plaintiff's claims. It was argued that whilst the Act gives the Court a *discretionary power* to exercise in the granting of bail pending trial, it was argued that the "*Plaintiff in this suit has not shown to this Court that he is an accused person before any Court and is being compelled to fulfill any monetary condition in order to secure bail*". It was argued that "*the failure of the Plaintiff to show that he is in conflict with Section 165(2) of the* ***Administration of Criminal Justice Act, 2015*** *leading to a breach of his fundamental rights as enshrined in Section 36(5) of the* ***Constitution of the Federal Republic of Nigeria, 1999 (As Amended)*** *is fatal*". The 1st Defendant's Counsel then proceeded to citing the Supreme Court's decision in **NIGERCARE DEVELOPMENT CO. LTD. v. ADAMAWA STATE WATER BOARD (2008) All FWLR (pt.422) 1052 @ 1082** to underscore the *fundamental importance* of suits instituted to *challenge* the *constitutionality* of Acts of the National Assembly.

The 1st Defendant's Counsel, relying on the Supreme Court's decision by which "*inconsistent*" was defined, argued that Section 165(2) of **ACJA** "*is not inconsistent with Section 36(5) of the* ***Constitution of the Federal Republic of Nigeria, 1999 (as amended)*** *in view of the fact that there is nothing in that Section which is contrary to the provisions of Section 36(5) of the* ***Constitution of the Federal Republic of Nigeria, 1999 (as amended)***". The 1st Defendant's Counsel submitted that "*the provisions of that Section do not in any way pronounce an accused person guilty in any way whatsoever*". The learned Counsel for the 1st Defendant further submitted, that "*the requirement of a bail bond in monetary form is not an aberration to the provisions of the Section 36(5) of the* ***Constitution of the Federal Republic of Nigeria 1999 (as amended)***", rather, it was contended by the 1st Defendant's Counsel, "*it is the practice in all developed and proactive criminal justice systems in the world*". The Court was urged to "*refuse all the reliefs the Applicant is seeking from this Court*". The 1st Defendant's Counsel then reproduced the provision of Section 165(1), (2) and (3) of **ACJA**, supra. and argued that "*a proper examination of the above Sections will reveal that the deposit of the money for bail is not mandatory for all accused persons but is left at the discretion of the Judge being seised of all the facts of the case and also privy to examining the demeanour of the accused person*". The 1st Defendant's Counsel further submitted that Section 165(2) of **ACJA**, supra, "*uses the word MAY meaning it is only in necessary or special cases that the deposit of money or other security may be demanded*".

In paragraph 4.11 of the address filed, the 1st Defendant's Counsel argued that "*nowhere is shown by the Plaintiff that he is presently an accused person who is in conflict with Section 165(2) which he purports to be inconsistent with Section 36(5) of the* ***Constitution of the Federal Republic of Nigeria (as amended)***" and that "*the Plaintiff instituted this action and is seeking declaratory reliefs for the benefit of the Nigerians who are not parties to this suit or are even aware of the pendency of this action*". It was submitted that "*the inability of the Applicant to show that he is legally entitled to benefit from the declaratory reliefs he is seeking from this Honourable Court is fatal*". The Court was referred to the decision in **SHIBKAU v. A.G. ZAMFARA STATE (2010) NWLR (pt.1202) 1648**.

It was contended in paragraph 4.13 of the address, that the Plaintiff "*is asking for reliefs based on benefits accruing to other persons who are not parties to this suit*", and that the Applicant "*has failed to convince this Court that he stands to benefit directly from the reliefs he is seeking from this Court*". It was also argued that "*there is no reasonable cause of action against the 1st Defendant, thereby rendering this suit as presently constituted incompetent and a waste of the Court's time*". The Court was urged to dismiss the Plaintiff's suit and or strike out the name of the 1st Defendant.

The 1st Defendant, consistent with its "*Conditional Memorandum of Appearance*", also filed a "Notice of Preliminary Objection" undated but filed on 10/12/15. The said objection *challenged* the competence of the Plaintiff's suit and urged the Court to strike it out on the three (3) grounds stated on the face of the "Preliminary Objection". The grounds are:

1. *"The Plaintiff lacks the locus standi to institute and maintain this action against the Defendants;"*

2. *"The Plaintiff's suit discloses no reasonable cause of action against the 1st Defendant."*

3. *"The Plaintiff's suit is incompetent."*

A written address was filed "in Support of Notice of Preliminary Objection". It's also undated but was filed on 10/12/15.

The written address followed the same pattern as the written address filed to argue the "Counter-Affidavit filed in Opposition to the Originating Summons". In paragraph 3.0 of the address, the 1st Defendant's Counsel sets down two (2) issues for determination. These are: (1) "*Whether the Plaintiff has the locus standi to commence and prosecute this action against the Defendants;" (2) "Whether the Plaintiff's suit discloses any reasonable cause of action against the 1st Defendant."*

In arguing issue one, the 1st Defendant's Counsel submitted that "*the basic question*" the Court "*should ask itself with, is whether or not there has been a breach of the civil rights and obligations of the Plaintiff by including Section 165(2) of the* ***ACJA, 2015*** *being an ordinary citizen and nothing more, approaching this Honourable Court for redress on behalf of the generality of Nigerians*". It was argued that the Plaintiff "*can only invoke the judicial power of Courts to entertain a matter if he has locus standi to maintain the action*". The Court's attention was drawn to the provision of Section 6(6)(b) of the **Constitution**.

It was argued that this provision "*ensures that any one going to Court for the redress of a wrong must show that his civil rights and obligations and not that of others have been infringed or that their infringement is being threatened*". The 1st Defendant's Counsel referred to the Supreme Court's decision in **SENATOR ABRAHAM ADESANYA v. PRESIDENT OF NIGERIA (1981) 2 NCLR 358 and A.G. OF KADUNA STATE v. HASSAN (1985) 2 NWLR (pt.8) 483**. It was contended that "*in the present suit, no civil right or obligation of the Plaintiff has been breached by the Defendants to warrant his filing of the present suit*". The 1st Defendant's Counsel further submitted that when this Court looks at the "Originating Summons" and "Affidavit filed in its Support", that the "*Plaintiff has not placed sufficient facts or material evidence before the Court capable of convincing this Honourable Court that he has any legal right or any interest cognizable in law which he seeks to protect with regard to the inclusion of Section 165(2) into the **ACJA, 2015***" and that he has not shown "*that he is an accused person being presently affected by the provisions of Section 165(2) of the **ACJA, 2015***". The 1st Defendant's Counsel even remarked that the Plaintiff "*has failed to show any evidence of being a taxpayer*" which was argued, was not "*sufficient to clothe the Plaintiff with locus standi*". The 1st Defendant's Counsel cited and quoted *excerpts* of the Supreme Court's decision in **OWODUNNI v. REGISTERED TRUSTEES, CELESTIAL CHURCH (2000) FWLR (pt.1456)**. The Court was urged to uphold issue one as argued, and to strike out the Plaintiff's suit.

On issue two, the 1st Defendant's Counsel in paragraphs 4.10 – 4.15 of the address filed, *canvassed legal submissions* to the effect that the Plaintiff's suit does not *disclose* any *reasonable cause of action* against the 1st Defendant.

The 1st Defendant's Counsel argued that "*there is no mention in any of the processes filed in this Court of any wrongful act by the Federal Government of Nigeria directly or the Attorney General in his official capacity which has caused any form of damage to the Plaintiff, or to give rise to a cause of action or a substantive right which can be claimed against the 1st Defendant*".

It was also contended, that the Plaintiff has "*failed to show that he is an accused person presently being prosecuted before a Court or affected by the provisions of Section 165(2) of the* ***ACJA, 2015***". When I read this aspect of the 1st Defendant's submissions, I do not seem to agree with her because, when she reads the provision of Section 150(1) of the **Constitution**, she will readily understand why the 1st Defendant by virtue of being "*the Chief Law Officer of the Federation*", must necessarily be a "Defendant" in all suits in which the *constitutionality* of any Act or provisions of any Act of the 2nd Defendant is or are being *challenged*. A Plaintiff to such suit needs not have any claim against the 1st Defendant as it is the primary *constitutional duty* of the 1st Defendant as the "*Chief Law Officer of the Federation*" and *ipso facto*, as the "*Chief Legal Adviser of the Government of the Federation*" to defend such suits. This is especially so, in a suit such as in this instance, where all the Plaintiff seeks are *declaratory reliefs*. In *constitutional law*, the 1st Defendant is, and remains

an *effective contradictor to declaratory reliefs* in which the *constitutionality* or otherwise of any Act or provision of any Act of the National Assembly is being *challenged*.

It was further argued by the 1st Defendant's Counsel that the inability of the Plaintiff to establish that he is an accused person "*presently being prosecuted*", and that by that fact, the "*Plaintiff has no reasonable cause of action against the 1st Defendant*" and this renders "*the Plaintiff's action against the 1st Defendant incompetent*". The Court was urged to strike out the 1st Defendant's name as there is no "*material allegation or any reliefs sought against the Federal Government or the Hon. Attorney General directly*". The Supreme Court's decision in **A.G. OF KANO STATE v. A.G. OF THE FEDERATION (2007) All FWLR (pt.364) 238** was cited.

The Court was urged to uphold the 1st Defendant's "Notice of Preliminary Objection" and to strike out the 1st Defendant's name as a "party" to this suit.

When the Plaintiff was served with the 1st Defendant's "Notice of Preliminary Objection" – which by my assessment, was used to re-argue *substantial chunk* of the issues which had been *canvassed* in the written address filed "in Opposition to the Originating Summons", the Plaintiff as his own Counsel, filed a "*Plaintiff's Written Address in Opposition to 1st Defendant's Preliminary Objection*". It's dated 5/2/16 and was filed on 8/2/16.

In paragraph 3.0 of the address filed, the Plaintiff adopts the two (2) issues for determination as were set down by the 1st Defendant's Counsel.

On issue one which deals with the *locus standi* of the Plaintiff, it was submitted that "*the 1st Defendant has misconstrued the issue of locus standi when it has to do with the interpretation of the Constitution and the contravention or likely contravention of any of the provisions of Chapter 4 of the 1999* ***Constitution of the Federal Republic of Nigeria, 1999 as amended***".

The Plaintiff asked a rhetorical question that: "*Who is qualified to invoke the powers of the Court for constitutional interpretation or what is the position of the law on locus standi over constitutional interpretations?*" In paragraph 4.04 of the address, this question was answered to the effect "*that the Plaintiff has the locus standi to bring this action for constitutional interpretation*". The Plaintiff relied on the provision of Section 1 of the **Rules of Professional Conduct for Legal Practitioners, 2007** by which a "*lawyer shall uphold and observe the rule of law, promote and foster the cause of justice...*". The Plaintiff submitted that "*the Rule of Law connotes*": (a) *"Supremacy of the Constitution"; (b) "Equality before the Law"* and *(c) "Respect for fundamental rights."* The Plaintiff submitted that "*it is the law that a lawyer should defend the Constitution and its Supremacy and this confers locus standi on a lawyer to approach this Court for a determination of whether or not any law is inconsistent with the* ***Constitution***".

The Plaintiff also submitted that the particular provision of the **Constitution** which is in issue is its Section 36(5) which deals with "*fundamental rights of Nigerians*". This was used to link up with the

provision of Paragraph 3(e) of the **Fundamental Rights (Enforcement Procedure) Rules, 2009**. The said provision reads thus:

> *"The Court shall encourage and welcome public interest litigations in the human rights field and no human rights case may be dismissed or struckout for want of locus standi; in particular, human rights activists, advocates or groups as well as any non-governmental organizations, may institute human rights litigations."*

This provision, it was contended, that "*the Plaintiff is clothed with locus standi to commence and prosecute this case*".

In paragraph 4.19 of the address, the Plaintiff submitted that as a "*Nigerian citizen*", he is subject to any law made in Nigeria "*including the **ACJA, 2015***". It was submitted that by the provision of Section 165(2) of the **ACJA, 2015**, "*the Plaintiff's fundamental right to personal liberty, freedom of movement and presumption of innocence until proved guilty are likely to be infringed upon and contravened since a Defendant is to deposit a sum of money or other security as the Court may specify before his bail will be approved*".

In paragraph 4.22 of the written address filed, the Plaintiff relied on the provision of Section 46(1) of the **CFRN, 1999 As Amended** and submitted that the provision of Section 36(5) of the **Constitution** is "*a provision in the chapter under reference in Section 46(1) of the **Constitution** which is Chapter IV*". It was argued that the "*Plaintiff as a*

Nigerian citizen who is to be affected by the said Section 165(2) has the locus standi to commence and prosecute this action".

The Plaintiff argued that the Supreme Court's decision in **SENATOR ABRAHAM ADESANYA v. PRESIDENT OF NIGERIA**, supra. "*cited by the 1st Defendant is clearly in favour of the Plaintiff and against the 1st Defendant*". The Plaintiff endeavoured to distinguish certain crucial issues which makes the Supreme Court's decision in **ADESANYA's** case to be what it is, and that relying on particular dictum of Fatayi-Williams, CJN (Rtd.) and now late, that the said decision imposes an *obligation* on every citizen to see that "*he is governed by a law which is consistent with the provisions of the Nigerian* ***Constitution***".

In relation to the decisions in **OWODUNNI v. REGISTERED TRUSTEES, C.C.** and **SHIBKAU v. A.G. ZAMFARA STATE**, supra. both cited by the 1st Defendant's Counsel, it was submitted that they "*are misconceived*".

On issue two, which relates to whether the Plaintiff's suit *discloses* any *reasonable cause of action* against the 1st Defendant, it was argued that "*breach of the provisions of the Constitution is a reasonable cause of action*". I had in the course of this Judgment, expressed the view, that the 1st Defendant's submissions on this issue, do not seem to carry weight having regard to the special, perhaps the *peculiar constitutional status* of the 1st Defendant vis-à-vis the provision of Section 150(1) of the **Constitution** which makes the 1st Defendant, the "*Chief Law Officer of the Federation*", and *ipso facto*, the "*Chief Legal Adviser to the Government of the Federation*". Every legal proceedings in which the *constitutionality* of

any Act or the provision of any Act of the National Assembly – the 2nd Defendant is in issue, automatically makes the 1st Defendant, even if not a "*necessary party*", as a "*proper or nominal party*" but it is always in *constitutional law* and *jurisprudence*, an *effective contradictor* to such *declaratory relief* as the Plaintiff seeks by this action.

In paragraph 4.36 of the address filed, it was submitted that "*while locus standi beams searchlight on the party, cause of action focuses on the grievance for which the Plaintiff has approached the Court*". The Court was indulged as it were, with a "*cocktail*" of *excerpts* of ratios of the Supreme Court's decisions in which the legal term, "*cause of action*" was defined.

The Plaintiff argued that a breach of the **Constitution** or *inconsistency* of Section 165(2) of the Act with Section 36(5) of the **Constitution** and the *fundamental right of the Plaintiff to freedom of movement, personal liberty and presumption of innocence* are likely be contravened by the operation of Section 165(2) of the **ACJA**, supra and these are the two *causes of action* which the Plaintiff's suit has complained of.

The Plaintiff with reference to the provision of Section 150(1) of the **Constitution**, submitted that the 1st Defendant "*is a proper and necessary party in this case*". The Supreme Court's decision in **A.G. FEDERATION v. A.N.P.P. (2003) 18 NWLR (pt.851) 182** was cited to buttress this submission.

The Plaintiff urged this Court to dismiss the 1st Defendant's "Notice of Preliminary Objection" because, the case law cited to buttress its arguments were inappropriate and they rather support the Plaintiff's suit

which is to challenge the provision of the **ACJA, 2015** on the ground that it is *inconsistent* with Section 36(5) of the **Constitution**. The Plaintiff, it was urged, has the *locus standi*, to bring this action.

The Plaintiff also filed a "*Reply on Points of Law to the 1st Defendant's Written Address in Opposition to the Originating Summons*". It's dated 5/2/16 and was filed on 8/2/16.

In the said Reply, it was argued that "*the authorities cited by the 1st Defendant and his arguments clearly show that the 1st Defendant does not fully appreciate the case of the Plaintiff*".

It was submitted that this Court has jurisdiction to entertain and determine the Plaintiff's suit and that the Plaintiff's suit "*bother on two issues*". The first is "*breach of the **Constitution***" and secondly, that Section 165(2) of the **ACJA** which prescribes "*the deposit of money before bail is approved is likely to contravene my fundamental rights to freedom of movement, personal liberty and presumption of innocence*".

The Plaintiff once again cited the provision of Section 46(1) of the **Constitution** to argue that he has the *locus standi* to bring this action.

In paragraph 2.20 of the address, it was submitted "*that bail is granted as a right because the law presumes everyone to be innocent until he is proved guilty*" and that any law "*that will deny an accused person, a defendant or a citizens (sic) of Nigeria bail by placing a mandatory condition of cash deposit or deposit of money before bail is approved is*

*repugnant, inconsistent with Section 36(5) of the **Constitution** and therefore unconstitutional*".

On the 1st Defendant's Counsel's argument that similar provision to Section 165(2) of **ACJA**, supra had been part of the **Criminal Procedure Code** which **ACJA**, supra has now *repealed*, the Plaintiff argued that that statement was not true and he cited the provisions of Sections 340, 341 and 342 of the **Criminal Procedure Code** and submitted, that these provisions "*without inhibitions authorized the granting of bail to accused persons*". In relation to Section 347 of the **Criminal Procedure Code**, it was submitted that it was "*misconstrued*" by the 1st Defendant. The Plaintiff submitted that the provisions of **Criminal Procedure Code** which relate to bail are "*therefore clearly different from the provisions of Section 165(2) of the **ACJA, 2015** which requires the deposit of a sum of money before bail is approved*".

The Plaintiff concluded his submission by arguing that "*as a legal practitioner, public interest lawyer and Nigeria citizen who resides in Nigeria and is subject to the laws in force in Nigeria including the provisions of Section 165(2) of the **ACJA, 2015**, has the locus standi to commence and prosecute this action to determine whether the provisions of Section 165(2) of the **ACJA, 2015** is not inconsistent with Section 36(5) of the **Constitution***". The Court was urged to "*discountenance the Defendants and grant the reliefs sought by the Plaintiff*".

The Plaintiff filed a "*Further Affidavit of Plaintiff in Support of His Originating Summons in Reply to 1st Defendant's Counter-Affidavit*". It was

deposed to by the Plaintiff personally and was filed on 5/2/16. The "Reply on Points of Law to the 1st Defendant's Written Address", was the address filed to support and argue the said "Further Affidavit".

On its part, the 2nd Defendant when served with the Plaintiff's "Originating Summons" and the written address filed therein, reacted by filing a "2nd Defendant's Counter-Affidavit to the Originating Summons". It was deposed to by Gideon Terseer Iorver of Counsel on 12/4/16. It's an 11 paragraphed "Counter-Affidavit".

The 2nd Defendant's Counsel, Terlumun Azoon, Esq. filed a "*Written Address in Support of the 2nd Defendant's Counter-Affidavit in Opposition to the Originating Summons*". It's dated and was filed on 12/4/16.

The said address incorporates submissions on a "Notice of Preliminary Objection" which is founed on three (3) grounds: (1) "*The question for determination in the Originating Summons has been abandoned in the written address of the Plaintiff*," (2) "*The Plaintiff lacks locus standi and none has been disclosed in the Originating Summons*;" and (3) "*The suit is premature, speculative and constitutes an abuse of Court process*."

In paragraph 2.2 of the address, the 2nd Defendant's Counsel made submissions to the effect that the Plaintiff, having set down questions to be determined by the Court, in his written address, have formulated issues which he argued, are not the same questions which were set down in the "Originating Summons". It was his submission, that the question set down has been abandoned and that the "Originating Summons" "*is consequently incompetent and should be struckout without much ado*".

When I read this submission, to which no case law authority was cited, I was unclear as to what the 2nd Defendant's Counsel intended as there is no *"hard and fast rule"* on whether a Plaintiff who has set down questions for determination in an "Originating Summons" is barred from being able to *distill* issues which the said questions have raised and to argue the said issues rather than the questions. Once the submissions *canvassed* have addressed the substance of the Plaintiff's *cause of action* as may have been *disclosed* in the *reliefs being sought*, I am not certain if any judicial decision exists that says that once a Plaintiff formulate issues arising from his "Originating Summons" and possibly, were *distilled* from the questions he has set down for resolution, that the "Originating Summons" is for that reasons deemed abandoned and has become incompetent. I will be interested in reading any of the appellate Courts' decisions which establish such *principle of law* which I regard as rather "*strange*", perhaps *novel*.

On the issue of *locus standi*, it was submitted that "*Section 6(6)(c) (sic) of the **1999 Constitution** does not ordinarily confer locus standi over alleged breach of public right*". The 2nd Defendant's Counsel cited the decision in **SHIBKAU v. A.G. ZAMFARA STATE**, supra. The Court was urged "*to dismiss the "Originating Summons" for want of sufficient interest disclosed therein in the interest of justice*".

In paragraph 3.1 of the address filed, the 2nd Defendant's Counsel *canvassed legal submissions* on the Plaintiff's suit on its merit. The 2nd Defendant's Counsel submitted that "*bail is not part of trial*" because, a "*person who is not even charged to Court can be granted bail*". The 2nd Defendant's Counsel seems to overlook the issue that the specific provision

in issue, i.e. Section 165(2) of **ACJA**, supra is one which deals with *judicial bail* to be granted pending trial. Secondly, he seems to also overlook the issue that trial of a Defendant in criminal law begins when his plea is taken upon his arraignment which is an event that vests in the Court, the jurisdiction to entertain applications for *judicial bail* pending the trial of the Defendant. The Plaintiff's suit was not concerned with what is generally described as "*Administrative Bail*" which investigatory executive bodies can grant pending when the Charge is filed in Court and arraignment of a suspect as a "Defendant" before a Court of competent jurisdiction in the context of the general provisions of Section 35(4)(a) and (b) and (5)(a) and (b) of the **Constitution** when read with Sections 157 – 161 of the **ACJA**, supra. The submissions which he made were too *general*, perhaps too *casual* that he did not pay any attention to these issues vis-à-vis these provisions. The 2nd Defendant's Counsel argued that "*it is a misconception of law for the Plaintiff to argue that Section 165(2) is in conflict with Section 36(5) of the* ***Constitution*** *because Sections 158 – 164 of the Act have made sufficient provisions for bail respecting various offences*". It was argued that **ACJA, 2015** "*is not a penal law and has no penal provisions; hence Section 36(5) cannot be alleged to have been breached*". The 2nd Defendant argued that "*until the discretion is wrongly exercised any challenge to Section 165 of the Act would be premature; hence the Plaintiff's suit discloses no reasonable cause of action*". The Court's attention was drawn to Section 165(3) of **ACJA** which makes the refund of money deposited pursuant to Section 165(2) of the Act when Bail is granted, to be refunded. It was submitted that a "*holistic reading of the*

provisions of the Act would show that the provisions of Section 165(2) are not unconstitutional".

The 2nd Defendant's Counsel having illustrated cases in which certain pre-conditions are to be fulfilled by an intending Plaintiff or parties and that such pre-conditions some of which entail deposit of money have been *affirmed* by the apex Court that it is not *unconstitutional*, it was submitted that *the reliefs being sought* by the Plaintiff are *ungrantable*. When I read the 2nd Defendant's Counsel's submission in paragraph 3.15 of the address filed to the effect that the Court lacks jurisdiction to declare an Act or provision of an Act *unconstitutional*, I entertained fears as to the level of the 2nd Defendant's Counsel's understanding of the **Constitution** and more importantly, of its Section 4(8) of the **CFRN, 1999 As Amended**. The 2nd Defendant's Counsel, perhaps in his ignorance, declared the request of the Plaintiff to *expunge* Section 165(2) of the **ACJA** as being *inconsistent* with the provision of Section 36(5) of the **Constitution** as "*unfounded and aimed at dragging this Honourable Court to the corridors of unconstitutionality*". He further argued that "*it would be a clear usurpation of the powers of the National Assembly which is constitutionally frowned at for the Court to expunge subsection (2) of Section 165 of the Act*". I have no doubt, that he got it all wrong, and must have read his own **Constitution** upside down or was working with a different **Constitution** other than the one which established this Court and vests it with jurisdiction to *judicially* review Acts of the National Assembly in order to vindicate its own supremacy by a communal reading of Section 1(1) and (3) with Section 4(8) of the **Constitution**.

The Court was urged to dismiss the Plaintiff's "Originating Summons" for want of *competence, lack of merit, premature and for constituting an abuse of Court process*.

When the Plaintiff was served with the 2nd Defendant's written address in which it argued a "Preliminary Objection", the Plaintiff filed a "Written Address in Opposition to 2nd Defendants Preliminary Objection". It's dated 19/4/16 and was filed on 20/4/16.

In the said address, the Plaintiff adopted the issues which the 2nd Defendant's Counsel argued in his written address.

The Plaintiff *challenged* the competence of the 2nd Defendant's "Preliminary Objection", "Counter-Affidavit" and the "Written Address" filed on the ground that "*no leave or order of Court was obtained by the 2nd Defendant before filing their processes*". It was submitted that the 2nd Defendant's processes were filed five months and two days after it was served with the Plaintiff's "Originating Summons". It was contended that the 2nd Defendant "*did not ask for and did not obtain leave or order of Court before filing and serving the processes*".

The Plaintiff also adverted to the provision of Order 48 Rule 4 of the **Federal High Court (Civil Procedure) Rules, 2009** to argue the issue, that the 2nd Defendant did not pay the prescribed penalty fee for late filing.

On the issue that the Plaintiff in his written address, having formulated the issues for determination, has abandoned the question he sets down for resolution, and has therefore, abandoned the "Originating Summons". This

issue, the Plaintiff argued, was *misconceived* because, the only difference between the question which he sets down for resolution in the "Originating summons" and the issue set down for determination in the written address was the omission of the word "not" which he argued, can be orally corrected at the stage of adoption of the addresses filed. I had in the course of reviewing the 2nd Defendant's address, dismissed this issue as *lame* and *misconceived* in our *adjectival law and practice*.

On the issue of *locus standi*, the Plaintiff adopted the submissions which he had *canvassed* in relation to the same issue raised by the 1st Defendant.

The Plaintiff submitted that he is not just "*any litigant*" but that the Plaintiff "*is a lawyer/legal practitioner who has the locus standi to approach the Court to challenge any law or Act that is inconsistent with the Constitution or seek the determination as to whether any law or Act is not inconsistent with the Constitution*". It was argued that the words "*likely to be infringed upon*" or "*likely to be contravened*" do not make it *speculative* as it is a *creation of law*" and referred to the provision of Section 46(1) of the **Constitution of the Federal Republic of Nigeria, 1999 (As Amended)**. The Plaintiff submitted that the Supreme Court's decision in **ADESANYA v. PRESIDENT OF NIGERIA**, supra. supports his "*standing*" to bring this suit.

On the 2nd Defendant's written address based on its "Counter-Affidavit to the Plaintiff's Originating Summons", the Plaintiff filed a "Reply on Points of Law to 2nd Defendant's Written Address". It's dated and was filed on 19/4/16.

Whilst referring to Section 35(4)(b) of the **Constitution** which the 2nd Defendant's Counsel had cited, the Plaintiff submitted that "*a mandatory deposit of a sum of money or other security prescribed by the Court before the bail is approved cannot be a reasonable condition as envisaged by Section 35(4)(b)*". A "*Reasonable Condition*", the Plaintiff argued, "*cannot go beyond the signing of bond or undertaking by the Defendant and/or his surety*". Section 165(2) of the **ACJA**, the Plaintiff argued, was "*an additional condition for bail*" and that the provision of Section 165(1) "*is enough to sustain conditions for bail*".

Whilst replying to the 2nd Defendant's Counsel's submissions that deposit of sums of money as a *condition precedent* to filing suits in chieftaincy matters, the Plaintiff argued it is "*absurd to liken deposit of money before suits in relation to chieftaincy stools are filed or filing fees in Courts or security before filing election petitions as the same thing with requiring the deposit of a sum of money or other security as the Court may specify from the defendant or his surety before bail is approved*". The "Reply on Points of Law" was concluded by the Plaintiff submitting that "*this Court has the powers to declare any Law/Act that is inconsistent with the **Constitution** as null and void*".

When the 2nd Defendant's Counsel was served with the Plaintiff's "Reply to the address filed to argue the 2nd Defendant's Preliminary Objection", the 2nd Defendant through its Counsel, filed a "*Reply on Points of Law to the Plaintiff's Written Address in Opposition to 2nd Defendant's Preliminary Objection*".

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In relation to the Plaintiff's submissions that the 2nd Defendant's processes were filed out of the prescribed period by the Rules, and that the 2nd Defendant did not obtain *an order* or *leave of Court to file them out of time*, the 2nd Defendant's Counsel conceded to the submissions, but state that the "*2nd Defendant will file a Motion for Regularization or move the Court orally to regularize same at the hearing in the interest of justice*".

On the issue of default fees which the 2nd Defendant had not paid, it was submitted that "*non-payment of prescribed fees does not ipso facto make the process filed by the 2nd Defendant incompetent*". It was argued that "*it is an irregularity that can be waived*". The 2nd Defendant's Counsel submitted that the "*provisions of Order 48 Rule 4 cited by the Plaintiff requiring the payment of N1000 naira is not part of the extant Rules of this Court" and that "the said N1000 does not also form part of the schedule of fees in appendix 2 of the 2009, Rules*". The 2nd Defendant argued that the applicable rule is Order 55 Rule 2 of the **Federal High Court (Civil Procedure) Rules, 2009** which relate to *waiver* of payment of filing fees by government's ministries and departments, and he contended, again, ignorantly, that Order 48 Rule 4 of the Rules, "*could not have overridden Order 55 of the Rules, Order 55 being the later provision*". I am amazed at the level of the "*ingenuity*" if it can be so *politely* described, if not specious as the 2nd Defendant's Counsel's submission, because both provisions relate to two (2) *different* and *distinct* incidents. One is about filing fees which the Chief Judge as the maker of the Rules, *waived* for processes being filed for Government and any of its Agencies or Department. Order 48 Rule 4 relates to late filing and in this, there was no *waiver* in respect of

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the penalty prescribed. A government ministry or body that wants to file its processes without any form of payment, is encouraged to do so within the prescribed period by the Rules. Once the process was not filed within the period prescribed, the Government body or Agency will still enjoy the *waiver* prescribed by Order 55 Rule 2 of the Rules in terms of non-payment of filing fees, but will be required to pay the penalty fee for default of late filing. The payments are different and distinct, and I really cannot understand how the 2nd Defendant's Counsel arrived at his own analysis which as far as this Court is concerned, is a *jaundiced perception* of the application of both provisions.

The 2nd Defendant's Counsel again, shifted his ground by arguing that the lateness of the filing, was not the fault of the 2nd Defendant but that of his Counsel who was otherwise engaged with election petitions' matters. I am amazed at the 2nd Defendant's Counsel's *audacity* by this submission which *led* him to the concept of the principle that "*the sins of Counsel*" be not visited on the litigant. A Counsel who having been briefed, abandoned his client's matter in order to prosecute some other more lucrative matters in the election tribunals which is even a body that is inferior to the Federal High Court – it not being one of the superior Courts of record created pursuant to Section 6(5)(a) – (k) of the **Constitution**, cannot turn round, to *canvass* arguments based on the principle of "*sins of Counsel*". A Counsel who "*sinned*" by abandoning the brief of his client in order to pursue other more *lucrative briefs*, should either take up the *gauntlet* and pay the *penalty fees* for his own *default*, or persuade his "*innocent client*" to cough out the fees for his own *delinquent professional conduct or*

default. The privilege created by the provision of Order 22 of the **Federal High Court (Civil Procedure) Rules, 2009** which requires filing of written address are being *abused* and *grossly bastardized* by a few Counsel who use the occasion to make *scurrilous* and atimes, *scandalous* submissions in their written addresses which they dare not utter in open Court were the submissions which the 2nd Defendant's Counsel *canvassed* in this regard, is for want of better words to qualify it, an *unpardonable disservice* to the course of administration of justice the objective of which as is stated in the provision of Order 1 Rule 4 of the **Federal High Court (Civil Procedure) Rules, 2009**, is for a "*just and expeditious determination of cases*".

On 14/11/16, I began to listen to the oral submissions of the Plaintiff who appeared as his own Counsel in relation to the "Originating Summons" filed. The Plaintiff, Dr. A.C.B. Agbazuere adverted the Court's attention to the processes filed in relation to the "Originating Summons" by which this action was commenced and he adopted the written address filed "in Support of the Originating Summons". In rounding up his submissions and in relation to the *strange legal proposition* which the 2nd Defendant's Counsel has *canvassed* to the effect, that this Court lacks the jurisdiction to grant the *reliefs being sought* by the Plaintiff as the Court can only *interpret* Acts of the National Assembly but lacks the power to declare any such Act or its provision *unconstitutional* and to *expunge* it, the Plaintiff reminded this Court of its earlier decision in Suit FHC/ABJ/CS/399/2011: LABOUR PARTY v. INEC in which Judgment was delivered on 21/7/11. The Court was urged, even no such specific relief is sought by the Plaintiff in his

"Originating Summons" to *nullify* the provision of Section 165(2) of the **ACJA**.

After the Plaintiff was heard, I listened to the oral submissions of the 1st Defendant's Counsel, Mrs. M.L. Shiru. She began by adverting the Court's attention to the "Notice of Preliminary Objection" which was argued in the written address filed to argue the 1st Defendant's "Counter-Affidavit". The 1st Defendant's Counsel adopted the written address filed, and submitted that Section 165(2) of the **ACJA** is not *inconsistent* with Section 36(5) of the **Constitution** because, the said provision is *discretionary*.

The 2nd Defendant's Counsel, Chief S.T. Yenge was heard next. The 2nd Defendant's Counsel adverted the Court's attention to the 2nd Defendant's "Counter-Affidavit" and "Preliminary Objection" filed, and adopted the addresses filed. In relation to the issue that the 2nd Defendant's processes were filed outside the period prescribed by the Rules of Court and without any *order for extension of time*, all that the 2nd Defendant's Counsel said at the hearing was that: "*We urge the Court to deem these processes as having been properly filed and served.*" He failed to file any application even after he was served with the Plaintiff's Reply on Points of Law to raise the issue of the 2nd Defendant's processes filed out time, in order to seek for *an extension of time* to do so, and secondly, even at the oral hearing on 14/11/16, the 2nd Defendant's Counsel failed to adduce any reasons (if he can legitimately do so as Counsel) why the Court should grant the 2nd Defendant its indulgence to file its processes late and or to deem its processes filed late as having been properly filed and served. He did not say a word on the penalty fee which he has not paid even as a condition to

have the 2nd Defendant's processes deemed to have been properly filed. It seems that the 2nd Defendant's Counsel, may either have a *megalomaniac* idea of himself or of the client he represents or he does not have any regard for the Court, and may have taken the grant of the Court's indulgence as a matter of course and which the Court will exercise in favour of any *delinquent litigant* and its Counsel even when no proper facts or reasons have been adduced. It is an *elementary judicial proposition* that in terms of the exercise of its *discretionary powers*, that where no excuse or reason is proffered, no indulgence will be granted because, the Rules of the Court, which by the tenor of the submissions of Chief S.T. Yenge are meant to be obeyed by all the parties, are in my view, being held in derision or contempt by the 2nd Defendant's Counsel. The 2nd Defendant's processes are consequently struckout as they were filed in utter disregard of the Rules of the Federal High Court and no penalty for late filing was paid nor was a genuinely founded application made to extend the time for the 2nd Defendant to file its processes out of time as prescribed by the Rules of Court.

The Reply of the Plaintiff on Points of Law was adjourned to 25/1/17.

At the resumed proceedings on 25/1/17, I listened to the submissions of the Plaintiff as his own Counsel on the "Reply on Points of Law" which he had filed to the Defendants' Written Addresses. In view of the fact that I have struckout the 2nd Defendant's processes, the adoption of the Plaintiff's "Reply on Points of Law" will be confined to the 1st Defendant's processes.

The Plaintiff adopted the "Reply on Points of Law" which he has filed to the 1st Defendant's Preliminary Objection and again, cited the Supreme Court's decision in **ABRAHAM ADESANYA v. PRESIDENT OF NIGERIA** in order to establish that he has the *locus standi* to bring this action. The Plaintiff refers to the provision of Section 46(1) of the **Constitution** to establish his locus standi.

After both parties have been heard through their respective Counsel, I reserved the Judgment till 30/3/17. The Judgment could not be delivered on that day as I was attending a Workshop in Abuja organized by the European Union (EU) in collaboration with the Nigerian Judicial Institute (NJI) on issues relating to anti-corruption. I consequently advised the Registrar to re-schedule the Judgment till today.

Reading through the addresses filed and exchanged by the Plaintiff and the 1st Defendant, it seems that the issues which call for determination are quite simple even though both parties engaged in a "*running battle*" as to the number and volume of processes to be filed. It is as simple as the Court in the exercise of its *interpretative jurisdiction*, to ascertain if the provision of Section 165(2) of the **ACJA, 2015** is *inconsistent* or in any way *derogates* from the provision of Section 36(5) of the **Constitution** which raises a *presumption of innocence* in favour of anyone charged with having committed a criminal offence. This simple issue cannot be resolved unless the Court reproduces both provisions. Let me start with the provision of the **Constitution** as it is the *alpha legislation* and the *grundnorm* of the State which defines the *legal validity* and *efficacy* of any

legislation made by the National Assembly including the **ACJA, 2015** which came into effect on 15/5/15.

Section 36(5) of the **Constitution** reads:

> *"Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved guilty:*
>
> *Provided that nothing in this section shall invalidate any law by reason only that the law imposes upon any such person the burden of proving particular facts." (Underline is mine)*

The preceding provisions, i.e. Section 35 of the **Constitution** deal with the *legal regime* and *protocols* which prescribe the *timeline* that operates prior to the institution of a criminal charge in respect of a suspect who has been arrested and detained in custody upon a *reasonable suspicion* that an offence known to law (see Section 36(12) of the **Constitution**) has been committed. The provisions of Section 35(4) and (5) are in my view, *constitutional protocols* which are designed to protect *suspects* who are yet to be charged before a Court of *competent jurisdiction*. They are safeguards to prevent *wanton* abuse of detention powers by the State or by any of its Agencies *vested* with the power to effect arrest and prosecute offenders. Section 35(7) of the **Constitution** in my view, sort of creates an exception to the *liberal terms* and *regime* in relation to the provision of Section 35(4)(a) and (b) and (5)(a) and (b) of the **Constitution** that concern a *suspect* who has been arrested and detained in connection with having "*committed a capital offence*". In all of these provisions, one *golden thread* that runs through the *constitutional protocols*, is to leave the Court

with a *discretionary powers* to exercise even in respect of capital offences where committed and the Defendant is charged to Court. See: **OLADELE v. STATE (1993) NWLR (pt.259) 294 @ 308**.

The provision of Section 165(2) of **ACJA, 2015** which in this suit is in the "*eye of the storm*" relates to bail applications made to the Court pending trial. Let me reproduce the whole of Section 165(1) – (3) of **ACJA** in order to aid a comprehensive understanding of this Judgment. It needs to be stated that the issues of bail by the new Act is covered by the provisions of Sections 158 – 188 of the Act. Its Sections 162 – 188 of the **ACJA** are to be administered by the Court in respect of a Defendant who has been charged to Court, while Sections 158 – 161 of the Act, generally provide for *suspects* arrested in connection with any offence known to law. Section 165(1) – (3) of **ACJA** reads:

(1) "The conditions for bail in any case shall be at the discretion of the Court with due regard to the circumstances of the case and shall not be excessive."

(2) "The Court may require the deposit of a sum of money or other security as the Court may specify from the Defendant or his surety before the bail is approved."

(3) "The money or security deposited shall be returned to the Defendant or his surety or sureties, as the case may be, at the conclusion of the trial or on an application by the surety to the Court to discharge his recognizance."
(Underline is mine for emphasis)

When one reads Sections 162(a) – (f), 163 and 164 of **ACJA**, what the National Assembly did, was in my view to *codify* a body of hitherto existing *judicial principles in relation to the jurisprudence of bail in common law countries* which the Appellate Courts by their decisions over the decades, had worked out. This is a reflection of the *adversarial* in contrast to the *inquisitorial* or *accusatorial system* of the French Legal System in the administration of criminal justice by which the burden to prove the guilt of a Defendant rests on the State. This, in my view, does not exclude the provision of Section 165(2) of **ACJA** which is in issue. Section 165(2) must be read in conjunction with its subsections (1) and (3) and all of these must be read in conjunction with Sections 162 and 163 of **ACJA**, whereby the National Assembly seems to have shifted the "burden" (in relation to such offences as are not conceived by Section 36(7) of the **Constitution** which are bailable, why bail should not be granted) on the State. It is the State, by Section 162(a) – (f) of **ACJA**, that is required to prove within the prescribed parameters therein, why a Defendant who has been charged on an indictable felony not punishable with death, should not be admitted to bail. The "table" as it were under the defunct provision of Section 118(2) of the **Criminal procedure Act**, Cap.C.41, LFN 2004 has turned in favour of a Defendant and against the State who must show why a Defendant charged before the Court should not be admitted to bail. It will be reading into Section 165(2) of **ACJA** what was never intended by the National Assembly to state that it was meant to take away a *fundamental right to presumption of innocence* by the Court ordering a Defendant to "*deposit a sum of money or other security as the Court may specify from the*

Defendant or his surety before bail is approved". The use of the word "*may*" twice within that provision is to underscore that the National Assembly recognizes and respects the *discretionary powers* which the Court exercises in the grant or refusal of bail and this as I had earlier observed, must be read in conjunction with Sections 162, 163 and 165(1) where the National Assembly in relation to the issue of bail, deliberately used the word "*shall*". There is no jurisdiction where bail is entirely free, and let me state this proposition by way of *obiter*, that even when a Defendant is released on bail on self *recognizance*, it is a decision which a Court of law would have necessarily based on the *peculiar status* of such a Defendant (having regard to the nature of the offence alleged) whom in the eyes of the law, can be described *proverbially* as the "*golden fish*". This is because, the whole essence of bail, is to ensure that the Defendant will be available to stand his trial. See the Supreme Court's decision in **ABACHA v. STATE (2002) 5 NWLR (pt.761) S.C. 638 @ 676** and this fact can be *gleaned* from the provision of Section 165(3) of **ACJA** which also used the word "shall". The *overriding objective* is to secure the attendance of the Defendant at his trial.

It is my view, that bail granted on *self recognizance* is not entirely free, but one which was granted based on what can at best be described as a "*personality burden*" which the particular Defendant has borne over the years either by his *official, social* or *global status* as a citizen and which the Court regards as one who is most unlikely to escape from the Court in order to face his trial, and that even if he does as a *fugitive*, it will be so relatively easy, having regard to the "*golden*" nature of his personality to

be tracked down by law enforcement agents or agencies, even if it will involve the engagement of *Interpol* and *extradiction* processes. See Section 164 of the **ACJA**. The legal "consideration" which the Court may have exacted without expressly saying so for bail granted on *self-recognizance* is in my view, the "*personality burden*" borne by the Defendant over the years by his acknowledged *recognition* in the society or in the country and of his contributions to its development prior to his being charged to Court.

It is reading Section 165(2) of **ACJA** in isolation which has *inevitably* leads the Plaintiff to the view that it is inconsistent with the provision of Section 36(5) of the **Constitution**. It would not have been so, if the said provision was read and *contextualized* with the other provisions under Part 19 of the **ACJA**, supra and particular attention paid to the specific use of the word "*may*" twice in Section 165(2) in contrast to the word "*shall*" generously and repeatedly used in Sections 162, 163 and 165(1) of the same Act. See the Court of Appeal's decision in **MELAYE v. TAJUDEEN (2002) 15 NWLR (pt.1323) 315 @ 337 – 338**.

I have no doubt, judicially speaking, that the separate use of these two (2) words "*may*" and "*shall*" in the provisions under consideration, was a *deliberate intention* of the National Assembly, to ensure that as far as *judicial interpretation* of Section 165(2) of **ACJA** is concerned, it is intended in its application by the Courts to be construed as an *exception* to the *general liberal tenor* of the provisions of sections 162, 163 and 165(1) of the **ACJA**, supra. which *literarily* make the grant of bail in *indictable felonies* that are punishable only by terms of imprisonment and bailable, virtually *automatic*, if not *mandatory* having regard to the *burden* which

the State when it opposes bail application pending trial is required to bear and discharge as prescribed in Section 162(a) – (f) of the Act.

Let me conclude this Judgment by saying that I have advisedly refrained from dealing with the issues of preliminary objection raised by the 1st Defendant as to the competence of the Plaintiff's suit because, I have no doubt that in relation to suits which challenge the *constitutionality* of Acts of the National Assembly, it will be a *misconception* of the provision of Section 6(6)(b) of the **Constitution** to adopt a narrow perspective and construction of the said provision because, the question remains as to who will *challenge* the alleged *unconstitutionality* of such Acts? The 1st Defendant who is the *"Chief Law Officer of the Federation"* and *"Chief Legal Adviser of the Government of the Federation"* will not likely do so for *"political"* or for *professional* reasons because, he is part of the government as an Officer of the Executive Arm which through the President assented to such Bills to become Acts duly passed. A proceeding instituted by the 1st Defendant in similar circumstance such as this, will be a *self indictment* of the competence of the Attorney General in professional respect because, it will be assumed that he should have advised the President to withhold its *assent* to a Bill which he is well aware or should be aware as the Chief Legal Adviser to the Government of the Federation, that has provisions which are *inconsistent* with the **Constitution**. But a legal practitioner in the context of the facts produced by the Plaintiff in his Affidavit, should in my view, be accorded the standing to test the *constitutionality* of such a provision which he as a Counsel, will most probably face on every day basis in the course of his legal *advocacy*. It is my view, that the concept of

locus standi when defined by a *narrow consideration* of the provision of Section 6(6)(b) of the **Constitution** in relation to *private legal interests* as was decided in the case of **THOMAS v. OLUFOSOYE (1986) 1 NWLR (pt.18) 669** or in the **OWODUNNI v. REGISTERED TRUSTEES OF C.C.C. (2000) 10 NWLR (pt.675) 315 @ 338** should not be applied to such cases such as this which involves the question as to the *constitutionality* of an Act of the National Assembly or its provisions. To adopt such a narrow and restrictive construction of Section 6(6)(b) of the Constitution will only render the application of the provisions of Section 1(1) and (3) and Section 4(8) of the **Constitution** rather *idle* and *incapable* of being *judicially enforced*. This is to be the case, when the Supreme Court's decision in **ABRAHAM ADESANYA v. PRESIDENT OF NIGERIA**, supra. is carefully read, the facts of which can be distinguished from the instant case in which the Appellant, having lost his argument on the floor of the Senate, sought to use the Court by its decision to *substitute legislative decision* duly taken by majority of the Senate which was not shown to be *unconstitutional* and or *inconsistent* with any of the provisions of the **1979 Constitution**. The instant suit is not one which was filed by the Plaintiff in order to seek for or *vindicate* a *private legal right* or *personal interests*, but one which in the long run, was intended to *vindicate* the authority of the Supremacy of the **Constitution** by virtue of its Section 1(1) and (3) of the **CFRN, 1999 As Amended**. By the ratio of the Supreme Court's decision in **ABRAHAM ADESANYA v. PRESIDENT OF NIGERIA**, supra. it is the "*civil right and obligations*" of every citizen of Nigeria to initiate proceedings to challenge Acts or any Law or Regulations

made by any person or authority, when properly construed, that will likely *undermine* or *subvert* the authority and Supremacy of the **Constitution** on the ground of its *inconsistency* with any of its provisions or with the general philosophy of the **Constitution** which a global reading of its provisions *affirms* and that such Acts or Laws are not allowed to stand or remain as extant laws or provisions in the Statute books.

It is in this regard, that the 1st Defendant's objection to the Plaintiff's *locus standi* or that the Plaintiff's suit *discloses no reasonable cause of action* against the 1st Defendant are objections which I am unable to uphold because, I was unable to find any *reasonable* answer to a question which kept on tasking my thoughts as to who will or can *challenge* alleged *unconstitutionality* of an Act of the National Assembly or any of its provisions? In so far as the Plaintiff's *cause of action* on the alleged *inconsistency* of the provision of Section 165(2) of **ACJA** is founded on the provision of Section 36(5) of the **Constitution** which falls within the Chapter IV provisions on the *Fundamental Rights guaranteed* by the **Constitution**, it is to that extent, that the Plaintiff can or should be accorded a "*standing*" by virtue of the provision of Section 46(1) of the same **Constitution** in which the Plaintiff does not need show or prove an immediate or extant *infraction* of his right under Section 36(5) of the **Constitution** merely because, he is not "*standing*" trial as a "Defendant" to be accorded the "standing" to institute this action or to show that he has suffered greater injury over and above other lawyers or the generality of the citizens. The two (2) grounds of

the 1st Defendant's objection fails, and they are dismissed. It is my view, that every citizen bound by the **CFRN, 1999 (As Amended)** (see Section 1(1) and (2) of the **Constitution**) has a *duty* and *obligation* as a civil right, to *challenge* any Act of the National Assembly and even, by extension, any decision or action of the Executive Arm of Government which runs contrary to the provisions of the **Constitution** as the **Constitution** by its Section 1(1) asserts its own Supremacy. I think that the Plaintiff should be accorded a "*standing*" to test the *constitutionality* or otherwise of the provision of Section 165(2) of the **ACJA** which I have declared *valid* and as not being *inconsistent* with the provision of Section 36(5) of the **Constitution**. This, in my view is still within and *consistent* with the provisions of Section 6(6)(b) when read in conjunction with Sections 1(1) and (3); 4(8) and 46(1) of the **Constitution** as the Court has a duty in the exercise of its *interpretative jurisdiction*, and in particular in relation to the provisions of the **Constitution**, to adopt such *liberal*, perhaps broad approach that will *avoid* or *bypass restrictive judicial doctrines* such as *locus standi*, in order to permit responsible citizens, in clear contrast to "*meddlesome interlopers*" and "*busy bodies*" to *challenge* Acts of the National Assembly or any provision of any Law or Regulations which has the effect of *undermining* the authority and Supremacy of the **Constitution** as the "*grundnorm*" on which the Nigerian State, by virtue of Section 2(1) of the **Constitution** is established.

The Plaintiff's suit fails and its dismissed. There shall be no order as to costs. This shall be the Judgment of this Court.

HON. JUSTICE G.O. KOLAWOLE
JUDGE
24/4/2017

COUNSEL'S REPRESENTATION:

1. **DR. A.C.B. AGBAZUERE appears in person as the PLAINTIFF.**
2. **MRS. M.L. SHIRU with her is MRS. O.M. AKANLE for the 1ST DEFENDANT.**
3. **CHIEF S.T. YENGE for the 2ND DEFENDANT.**

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FEDERAL HIGH COURT
ABUJA