JUDICIAL ATTITUDE TO LEGISLATIVE ACTIONS WHICH TEND TO RESTRICT ACCESS TO COURT THROUGH CONSTITUTIONAL AND STATUTORY PROVISIONS

By:

UWAKWE ABUGU,Ph.D*

AND

NDUKAUBA C. NWAGBO ESQ*

ABSTRACT

The right of access to court cannot be attenuated by a futuristic legislation as contemplated by either a statute, constitutional provision or even the National Assembly or any Legislature. The Courts guard right of access to court by the citizenry as they guard their own jurisdiction. The Courts are willing to apply the cannons of interpretation of constitutional and statutory provisions to favour the right of access to court with due deference to the derogations as contained in the substantive derogation provisions of the Constitution. This judicial prowess and sagacity have been aptly demonstrated by Valie Bairam Vahe FJ in S.A.L. FAJIMI -VS- WESTERN STATE HOUSE OF ASSEMBLY (2011) Vol.5 WRN 1 in general and in particular C.C. Nweze JSC in SKYE BANK PLC -VS- IWU (2017) 16 N.W.L.R. (Pt. 1590)24 in respect of the right of access to Court of Appeal by litigants to appeal against the decisions of the National Industrial Court in civil matters to the Court of Appeal with Leave of the Court of Appeal. It all means that the National Industrial Court is no longer the final court in respect of the decisions in the civil jurisdiction of the National Industrial Court. Again, it is incumbent on the Legislature, that is to say, the National Assembly and the State Houses of Assembly to avoid inserting clauses in the Constitution and Statutes that make right of access to court dependent on non-existent or futuristic legislations or insert the causes of action and the procedure in subsidiary Legislation at the same time and pass it. Subsidiary legislations have the force of law by the provisions of Section 18 of the Interpretation Act, LFN 2004. This is because the judicial attitude to such legislations are unfavorable to the Legislature as the courts will not lend credence to putting citizens right of access to court in abeyance when the substantive provisions of the Constitution have given them right of access to court.

PREFATORY

Oftentimes, a statutory or constitutional provision that passed through the crucible of legislative action will contain provisions that intentionally or unintentionally tend to restrict right of access to court by the citizenry. Noteworthy is the process of legislation or constitutional amendment that passes through the scrutiny of legal minds, legal draftsmen, legal officers in the National or State

* Director, Sullan Maccido Institute of Peace , Leadership and Development Studies, University of Abuja and Associate Professor, Department of Public and International Law, Faculty of Law, University of Abuja Nigeria.

* Lecturer Department of Public and International Law, Faculty of Law, University of Abuja, Nigeria

Assemblies, the executive, legislative aides and the offices of the Attorneys-General of the States or the Attorney-General of the Federation in the case of Nigeria. In any legislative drafting lecture or institution, the lecturer or the chief executive would insist on three things when reviewing a legislative bill or drafting one from the scratch to wit:

(a) Bring the Constitution of the country and place on your legal drafting table to ensure that the new piece of legislation or constitutional amendment is not unconstitutional or in breach of any provisions of the Constitution.

(b) Bring your Law Dictionary and English Dictionary to ensure that your words are understandable by both legal and non-legal minds.

(c) Bring similar legislations to ensure there is no double legislation on similar issues or an Act of the National Assembly has covered the field on the bill a State Assembly is working on.

In advanced democracies such as the United States of America, there must by involvement of the people who will be impacted by the legislation to get their in-puts. The legislature and their research consultants usually legal, economic, political or social and often technocrats and technical experts and non-governmental organisations in that particular area that piece of legislative covers must interface with the local communities.

A peer review of outcomes of meetings, interviews and views of the communities and inputs of the professionals, consultants and non-governmental organizations will have to be undertaken and agreements reached on key issues in the proposed legislation that is distilled from a commonality of consensus especially those to be impacted by the legislation. This is however, absent in the Nigerian legislative system where the public hearing is at Abuja and there are no community participations for fashioning out a legislation that will impact the communities and at State Capitals where the State Houses of Assembly are quartered. Legislation becomes more of a political instrument of vendetta that widens the rift between either the executive and the legislature or the government as a whole and the ordinary citizenry in their various communities trying to irk a livelihood. This is prevalent in oil and natural resources legislations in Nigeria and the impending legislations in grazing reserves. Involving the groups of experts above will remove politics from legislations and ensure that politics become part of the solution instead of exacerbating the crisis or mischief legislation is trying to solve.

The judicial attitude to legislations in statutes and constitutional amendments that curtail right of access to court are viewed strictly as those provisions that oust the jurisdiction of courts and the courts without fear or favour will act in defence or right of access to court but in deference

with overriding binding provisions of the Constitutions such as Section 1(1) and (3) of the Constitution[1].

1. PECENT HISTORICAL ANTECEDENTS OF JUDICIAL ATTITUDE IN NIGERIA ON CONSTITUTIONAL AND STATUTORY PROVISIONS THAT TEND TO RESTRICT RIGHT TO ACCESS TO COURT

The first and recent judicial attitude on this subject was discovered by some researchers, one of whom has contributed to this article when the Nigerian judiciary below the Supreme Court was thrown into a quagmire in respect of the interpretation of the provisions of Section 243(3) and its proviso of the Third Alteration of the Constitution[2]. It is pertinent to state the said provisions and proviso to Section 243(3) of the Constitution[3] verbatim thus:

> **An Appeal shall only lie from the decision of the National Industrial Court to the Court of Appeal as may be prescribed by an Act of the National Assembly: Provided that where an Act or Law prescribes that an appeal shall lie from decisions of the National Industrial Court to the Court of Appeal, such appeal shall be with the leave of the Court of Appeal**

2.1 THE ERSTWHILE POSITION OF THE COURT OF APPEAL ON THE INTERPRETATION OF SECTION 243 (2) AND (3) AND PROVISO TO SECTION 243 (3) OF THE CONSTITUTION AS ALTERED.

Before the decision of the Supreme Court in SKYE BANK PLC.v. IWU[4] the following were the dominant position of the Court of Appeal:

i) Any party who is aggrieved by the decision of the National Industrial Court can appeal against such decision to the Court of Appeal as of right, which means that he does not require leave of either the National Industrial Court or the Court of Appeal to do so, PROVIDED however, that the decision he seeks to appeal against must arise from questions on fundamental right as contained in chapter IV of the Constitution as altered in so far as it relates to a matter upon which the National Industrial has jurisdiction to entertain or any other jurisdiction as may be conferred upon the National Industrial Court by an Act of the National Assembly. In other words, the only decisions of the National Industrial Court from which a party can exercise a right of appeal without much ado is where it emanates from questions of fundamental rights but limited to those contained in Chapter

[1] The Constitution of the Federal Republic of Nigeria 1999 as altered
[2] ibid
[3] opcit
[4] (2017) 16 N.W.L.R. (Pt. 1590)24

IV of the Constitution as altered as contained in Section 243(2) of the Third alteration in the Constitution.

ii) The above restriction does not extend to the right of appeal against the decision of the National Industrial Court in Criminal matters pursuant to Section 254 (C) (5) and (6) which is also as of right.

iii) Any other appeal apart from (i) and (ii) above from the decision of the National Industrial Court and pertaining to any cause or matter in which jurisdiction is conferred on the National Industrial Court shall only be as prescribed by an Act of the National Assembly PROVIDED however that where such an Act or Law prescribes that an appeal shall lie from the decisions of the National Industrial Court to the Court of Appeal on any other matter, such appeal shall be with the LEAVE of the Court of Appeal and not even first with the leave of the Lower Court (National Industrial Court). That is to say:

a) Any other subject matter shall be as prescribed by an Act of the National Assembly.

b) Such appeal shall only be with the leave of the Court of Appeal.

iv) As at then, no such Act of the National Assembly has been enacted prescribing what other causes and matters in which an appeal shall lie against the decision of the National Industrial Court and until such Law is made, the decision of National Industrial Court from which a party can appeal to the Court of Appeal remains circumscribed to only appeals in questions of fundamental rights and criminal matters within the Constitutional subject matter jurisdiction of the National Industrial Court and nothing more.

v) The Honourable President of the Court of Appeal constituted a full panel of five justices of the Court of Appeal to entertain an application for leave to appeal and to appeal against the decisions of the National Industrial Court not based on fundamental rights or criminal matters in the case of COCA-COLA (NIG) LTD & 2ORS v. AKINSANYA[5]. One of the issues for determination in this case was whether the absence of a specific Act of the National Assembly vesting appellate jurisdiction on the Court of Appeal, the appellate jurisdiction of the Court of Appeal from decisions of the National Industrial Court as provided for under the Constitution as altered is only limited to questions of fundamental rights and criminal causes or matters.

The full panel of the Court of Appeal sitting in Lagos Division held at pages 58 to 59 of the Law Report inter alia that:

> **It would therefore appear incontrovertible that given the provisions of Section 243 of the amended Constitution the only right of appeal to this Court (Court of Appeal) against the decision of the lower Court (National Industrial Court)**

[5] (2013)1 ACCELR 28

as presently donated by the Constitution is solely that of right on questions of fundamental right as contained in Chapter IV of the Constitution as it relates to matters upon which the lower court has jurisdiction[6]

The same Court of Appeal sitting in Lagos extended the above position to criminal matters arising out of matter for which jurisdiction is conferred on the National Industrial Court as it is covered by Section 254 (C) (5) and (6) of the Constitution as altered in the case of LAGOS SHERATON HOTELS & TOWERS v. HOTEL & PERSONAL SERVICES SENIOR STAFF ASSOCIATION[7] where it held at P.363 thus:

As presently constituted therefore, the law is that a litigant who is not satisfied with the decision of the National Industrial Court can only appeal as of right where such decision relates to questions of fundamental rights as contained in chapter IV of the Constitution of the Federal Republic of Nigeria 1999 as amended, or in criminal cases as they relate to matters upon which the National Industrial Court has jurisdiction as to other causes or matters not so specified, appeal shall only lie from decisions of the National Industrial Court to this Court as may be prescribed by an Act of the National Assembly and such appeal shall be with leave of this court only.

There is presently no such Act of the National Assembly and until there is an enactment to that effect or subsequent amendment of sections 243 of the Constitution, the National Industrial Court remains the final and ultimate court in all causes or matters upon which it has jurisdiction except in decisions relating to questions of fundamental rights connected with Chapter IV of the Constitution or in criminal cases[8].

The Court of Appeal did not stop there. It envisaged a situation where parties will weave the issue of fair hearing into just any subject matter in order to bring the subject matter of their appeal from final decisions of the National Industrial Court within the ambit of Section 243(2) of the Constitution even where issue of fundamental right is not there. It proceeded in this Lagos Sheraton's case to admonish litigants who make such attempt per Oseji JCA in the following words:

I will add here that litigants who seek to circumvent or evade the provisions of Section 243(2) and (3) of the Constitution by seemingly waving the magic wand of fair hearing or breach of fundamental right with the main motive of having access to appeal against a decision of the National Industrial Court on matters falling outside the allowed scope should be advised not to underestimate the sharp sense of perception and wisdom of the appellate courts to sift the wheat from the chaff. Undoubtedly in discerning cases, the Court will not relent in

[6] Cited with approval at page 362 of Lagos Sheraton Hotels & Towers v. Hotel & Personal Services Senior Staff Association
[7] (2015) ALL FWLR (Part 765)340
[8] Lagos Sheraton Hotels & Towers v. Hotel & Personal Services Senior Staff Association (2015) ALL FWLR (pt. 765)340 at 363

defending the course of justice given its status as the dynamic agency for the protection of the rule of law[9].

The Court of Appeal adopted the literal rule of interpretation of Section 243(3) of the Constitution as altered. It held that the wordings of Section 243(2) and (3) of the Constitution as altered are quite clear and unambiguous and gave them their ordinary plain meaning in order and with a view to avoid reading into the provisions, meaning not intended by the lawmakers (in this case framer of the Third Alteration to the Constitution). It relied on a number of Supreme Court decisions including AMAECHI v. INEC (2008) ALL FWLR (Pt. 407) 1. Where it held that the fundamental duty of the judge is to expound the law and not to expand it. He must decide what the law is not what the law might be.

2.2 THE NEED FOR A BETTER INTERPRETATION OF SECTION 243(3) OF THE CONSTITUTION AS ALTERED (SECTION 5(3) OF THE THIRD ALTERACT ACT)[10].

It is submitted that the constitution as altered is made by the people of Nigeria for themselves. The preamble to the Constitution states partly thus:

WE THE PEOPLE of the Federal Republic of Nigeria: HAVING firmly and solemnly resolved:

DO HEREBY MAKE, ENACT AND GIVE TO OURSELVES the following Constitution:

It is submitted that as a people, Nigerians could not by any stretch of imagination have expected that the access to the Court of Appeal by aggrieved litigants they gave to themselves by Sections 1(1), 6(5), 6(b), 243 (1) (3), 254C(5) and (6) of the Constitution as altered would be whittled down, obliterated or removed entirely by the fact that the National Assembly has not enacted any law prescribing which other causes or matters in which an appeal shall lie against the decision of the National Industrial Court other than in questions of fundamental rights and criminal matter upon which appeals lie as of right from the decisions of the National Industrial Court to the Court of Appeal.

Even the Court of Appeal was people minded enough to opine and identify the apparent lacuna in Cola-Cola's case[11] per Ikyegh JCA where he stated inter alia thus:

As the position stands now, there is no enactment of the National Assembly conferring a right of Appeal from any decision of the National Industrial

[9] Lagos Sheraton Hotels & Towers v. Hotel & Personal Services Senior Staff Association (2015) ALL FWLR (pt. 765)340 at 364

[10] 2010

[11] op cit

> **Court outside the fundamental rights relating to matters within its civil jurisdiction to the Court of Appeal while the lacuna may help to reduce the work load of the Court of Appeal, it is doubtful whether leaving the National Industrial Court as the final or Supreme Court in such civil matter of mega jurisdiction would augur well for aggrieved litigants especially as anything to do with employment affects the livelihood of members of the work force; and invariably, their dependents**[12]

Hon. Justice Ikyegh JCA is right on point with the conscience and mind of Nigerians who gave themselves the Constitution. They are not content to contend with not being able to appeal to the Supreme Court from decisions of the Court of Appeal by virtue of the provisions of Section 243(4) of the Constitution as altered which states thus:

> **Without prejudice to the 254 (C) (5) of the Act, the decision of the Court of Appeal in respect of any appeal arising from any civil jurisdiction of the National Industrial Court shall be final.**

The foisting upon Nigerians a *fait accompli* by their own framers of their own Constitution as altered and the judicial interpretation of Section 243(3) and its proviso require a second and deeper search for Supreme Court decisions to release the access to Court of Appeal. This has become necessary in view of the importance of employment to livelihoods of Nigerians. There is a popular saying by fundamental rights lawyers that right to life is meaningless without means of livelihood to sustain it. Ikyegh JCA alluded to this above when he referred to the decision of the National Industrial Court as being final by Section 243 (4) and National Industrial Court being the Supreme Court of matters that are not on questions of fundamental right or criminal matters.

The National Assembly was then not even aware or conscious of the decisions of the Court of Appeal Lagos in Cola-Cola and Lagos Sheraton cases otherwise they would have taken a proactive step as they did when the Supreme Court rendered its decision in N.U.E.E. v. B.P.E[13] declaring the National Industrial Court Act, 2006 by implication null and void because the National Assembly had no Constitutional vires to create a court with the jurisdiction of a superior court of record. The National Assembly rallied round the National Industrial Court and altered the Constitution as in the third alteration making the National Industrial Court a creation of the Constitution albeit with the controversy surrounding Section 243(3) and its proviso.

2.3 THE NEED FOR SENSIBILITY AND REASONABILITY IN THE CONSTRUCTION OF CONSTITUTIONAL PROVISIONS

[12] Cited with approval at page 362 of Lagos Sheraton Hotels & Towers v. Hotel & Personal Services Senior Staff Association

[13] (Jan – March 2010) 41 NSCQR 811

It is submitted that the Constitution is made for the people of Nigeria not that the people of Nigeria are made for the Constitution in accord with the popular aphorism that the law is made for man not that man is made for the law.

Sometimes, in the interpretation of the Constitution, the literal rule may work hardship and the word "shall" used ought to be interpreted as directory not mandatory to discern the intention of the legislature.

The Supreme Court interpreted the third use of the word "shall" in Section 11(2) of the NNPC Act[14] as being directory and permissive not mandatory. We submit that this could be applied by the Courts in interpreting the "shall" in Section 243(3) to make it permissive and directory that whether or not the National Assembly has enacted a law or not prescribing what other causes and matters in which appeals shall lie against the decisions of the National Industrial Court, litigants do not have to wait for National Assembly to enact any law before exercising their constitutional right of appeal or right of access to Court of Appeal when they are aggrieved by decisions of the National Industrial Court not based on questions of fundamental right and criminal matters.

The Court of Appeal in Lagos Sheraton's case alluded to the sensibility and reasonability factors in the construction of constitutional provisions by quoting in *extenso* the decision of the Supreme Court per Chukwuma Eneh JSC as he then was in MARWA v. NYAKO[15]

> **It is crucial to adopt a more sensible and reasonable construction so that where there are two possible constructions of a provision or enactment as in this matter, the more reasonable and sensible construction of it should prevail as preferred and avoid incongruous results and absurd situations. See Central London Rly Co v. Inland Revenue Commissioners (1937) AC 77. To achieve that purpose the Court has further to adopt the basic approach of liberal interpretation as enunciated in such cases as Rabiu v. The State (1980) 8 - 11 SC 130 by giving the words used in the Constitution their simple literal and natural meaning. In other words, as an aid to achieving a broad or liberal construction against the narrow interpretation and where the context dictates as used in their popular senses and so get to the true meaning of the words intended by framers of the Constitution in this way get to the true intendment of the constitution which is the most primary goal of constitutional interpretation[16].**

It is submitted that the more reasonable and sensible construction of Section 243(3) and its proviso of the Constitution as altered is to interpret the "shall" used therein as directory not mandatory.

[14] Captain C.C. Amadi –vs- N.N.P.C. (2000)6 SCNJ 1
[15] (2012) 6 NWLR (Pt. 1296) 299 AT 306
[16] Cited with approval at page 361

2.4 THE SUPREME COURT'S DECISION ON 30TH DAY OF MARCH, 1962 IN SALAWU LASUPO ADEDAYO FAJIMI v. THE SPEAKER OF WESTERN STATE HOUSE OF ASSEMBLY[17]

It is apposite to state here that this case was in the law reports while the Court of Appeal was of the opinion that since there was then no Act of the National Assembly prescribing what other causes or matters in which an appeal shall lie against decisions of National Industrial Court and until such law is made, the decision of the National Industrial Court from which a party could appeal remain circumscribed to only appeals in questions of fundamental rights and criminal matters which are within the constitutional subject matter jurisdiction of the National Industrial Court and nothing more. This excluded right of access to appeal to the Court of Appeal from decisions of the National Industrial Court in civil matters. It meant as was held by the Court of Appeal that the National Industrial Court was the final court in civil matters[18].

2.5 THE FACTS AND HISTORY OF FAJIMI'S CASE[19]

The facts and history of this case are that the Plaintiff/Appellant S.L.A. Fajinmi sued the Speaker, House of Assembly, Western Region, Federation of Nigeria for a declaration that he is entitled to take his seat as a validly elected member in the House of Assembly of the legislature of the Western Region of the Federation of Nigeria and in the alternative a declaration that his seat therein is not vacant and an injunction restraining the Defendant/Respondent from preventing him from taking his seat as a validly elected member in the said House of Assembly. Pleadings were ordered, filed and exchanged in which the Plaintiff/Appellant stated how he had been elected to the House of Assembly as a member for a particular constituency on 8th of August, 1960 and sworn in.

The Defendant/Respondent contended that the Plaintiff/Respondent was not entitled to the reliefs sought in his Writ of Summons and statement of claim and that the suit be dismissed as:

(1) Being not properly before the Court

(2) Frivolous and vexatious

The Learned trial judge heard argument on the preliminary points of law set down for hearing before the trial and delivered judgment on the 13th July, 1961 stating towards the end of the judgment that ***"the matter in issue is, whether the seat is vacant or not"*** pointing out that the parliamentary Electoral Regulations of 1960 dated 15th July, 1960 (to be found at page B317 of

[17] (2011)Vol.5WRN1

[18] Lagos Sheraton Hotel & Towers v. Hotel & Personnel Service Senior Staff Association (2015) ALL FWLR (Pt.765)340

[19] ibid

the 1960 volume of Legislation of Western Region) contain no provisions on the said matter and goes on to pose this question:

> **Is there any provision in existence which the court can follow to enable it to exercise the jurisdiction conferred upon it by Section 16(1)?**

The trial judge cited two English Court decisions which the Supreme Court held not to be applicable to facts of the case and proceeded to dismiss Plaintiff's/Appellant's action in limine by holding thus at page 9 lines 28 – 44 of the Law Report:

> **In my judgment, the jurisdiction conferred upon the High Court by Section 16(1) of the Constitution of Western Nigeria to determine the question whether the seat of a member of the Western House of Assembly has become vacant is a special jurisdiction governed not by the ordinary rules of the court but to be exercised according to such provisions as the legislature itself may lay down in accordance with section 16(2) of the Constitution of the Region as was done by the Governor by the provision of Regulation 117 of the 1955 Constitution. For this reason, I rule that this action is not properly, before the court and dismiss it.**
>
> **Dissatisfied with the judgment of the High Court, the Plaintiff/Respondent appealed to the Supreme Court. The issue determined by the Supreme Court was: "whether the High Court of the Western Region has jurisdiction to hear and determine whether a seat in the Legislative House of the Region is vacant or not[20].**

The Supreme Court unanimously allowed the appeal and remitted the matter back to the High Court of the Western Region for trial. VAHE BAIRAMIAN FJ (delivered the leading judgment) held partly thus among others at pages 8 – 13 of the law report;

> **The present appeal is from the decision which Morgan J then Acting C.J. gave on the 13th of July, 1961 dismissing the Plaintiff's action on the ground that it was not properly before the court[21].**

The question in this appeal turns on Section 16 of the Constitution of Western Nigeria in the 8th Schedule to the Nigeria (Constitution) Order-in-Council, 1960. That Section provides as follows:

16 (1) the High Court of the Region shall have original jurisdiction to hear and determine any question whether:

- **a) Any person has been validly selected or elected as a member of a Legislative House of the Region; or**
- **b) The Seat in a Legislative House of any member of that house has become vacant**

(2) the Legislature of the Region may make provision with respect to:

- **a) The persons who may apply to the High Court of the Region for the determination of any question under this section;**

[20] Fajimi v. the Speaker of Western State House of Assembly (2011)Vol.5WRN1 Page 9

[21] Fajimi v. the Speaker of Western State House of Assembly (2011)Vol.5WRN1 Pages 8 - 13

b) The circumstances and manner in which, and the conditions upon which any such application may be made; and

c) The powers, practice and procedure of the High Court in relation to any such application.

Vahe Bairannia FJ at page 9 of the Law report continued thus:

> **The effect of that view (the view of Morgan J) is that the Constitution of the Region confers by subsection (1) of Section 16 a jurisdiction on the High Court to hear and determine any question whether:**
>
> ***(a)*** **A person has been validly elected or**
>
> ***(b)*** **A seat has become vacant and by sub-section (2) empowers the Legislature of the Region to DISABLE THE COURT from exercising that jurisdiction by omitting to make provision under subsection (2): in other words, subsection (1) can be made a DEAD LETTER by the Legislature which with respect CANNOT BE RIGHT.**
>
> **On that view presumably if the Legislature made no provision in regard to the hearing of a question whether a person had been validly elected, the High Court would not be able to entertain an election petition either. The REASONABLE course is for the legislature to make provision under subsection (2) for the matters in both (a) and (b) of subsection (1); and if it so happens that the legislature THROUGH INADVENTENCE has not made any provision on the question in (b) a member who asks the High Court to determine such a question, as it is within the court's jurisdiction OUGHT NOT TO BE DRIVEN FROM THE JUDGMENT SEAT BUT SHOULD BE HEARD**
>
> **Those 1960 Regulations provide in Regulation 70 to 127 for election petitions; they do not provide for the hearing and determination of a question whether the seat of an elected members has become vacant and the lacuna should be drawn to the notice of the Attorney General of the Region.**
>
> **IN THE MEANTIME, THE HIGH COURT HAS A DUTY TO HEAR AND DETERMINE THE CASE IN HAND AND RESOLVE THE QUESTION RAISED. THE PLAINTIFF HAS, IN THE ABSENCE OF OTHER PROVISIONS, BROUGHT HIS CASE IN THE FORM OF AN ACTION, WHICH IS THE ORDINARY WAY OF APPROACHING THE COURT FOR MAKING A REQUEST TO HAVE A MATTER IN DIFFERENCE DECIDED AND RELIEF GRANTED AND THE ACTION SHOULD NOW PROCEED. I would ALLOW THE APPEAL AND SET ASIDE THE DECISION DISMISSING THE ACTION[22].** Lionel Brett FJ and Adetokumbo Ademola CJF concurred (*underlining and capitalisation for emphasis*).

The location of this decision of the Supreme Court of Nigeria delivered on the 30th of March, 1962 restores the hope for the Litigant employees and employers to ventilate their grievances up to at least the Court of Appeal whether the decision of NICN appealed against is based on question of fundamental right, criminal matter or not.

The constitutional provisions in Section 243(3) and its proviso are not meant to grant a constitutional right of appeal and make the application of the Third Alteration which had commenced being in operation to depend on the whims, caprices, disposition or inadvertence of

[22] Fajimi v. the Speaker of Western State House of Assembly (2011)Vol.5WRN1 Page 9

the Legislature for its enforcement. That is to say, the Legislature can by omission or commission prevent access to court to ventilate or enforce a constitutionally granted right. The Supreme Court does not agree that the Right of Appeal constitutionally granted litigants should be made a DEAD LETTER because the National Assembly (Legislature) has not enacted a law pursuant to Section 243(3) of the Constitution as altered.

2.6 APPLICATION OF THE SUPREME COUTR'S DECISION IN FAJINMI'S CASE TO SECTION 243(3) AND ITS PROVISO AND THE CURRENT POSITION OF THE COURT OF APPEAL.

Section 243(3) of the Constitution as altered bears repetition here with its proviso and it states thus:

> **An appeal shall ONLY lie from the decision of the National Industrial Court to the Court of Appeal as may be prescribed by an Act of the National Assembly: PROVIDED that where an Act or Law prescribes that an appeal shall lie from the decisions of the National Industrial Court to the Court of Appeal, such appeal shall be with leave of the Court of Appeal**.

It is submitted that the Proviso to Section 243(3) is not a problem to both Court of Appeal and the litigants or intending appellants. The Court of Appeal ought to feel able to exercise its constitutional jurisdiction to entertain applications for leave to appeal against the decisions of the National Industrial Court not based on fundamental right or crucial matters. The Court of Appeal surprisingly feels hamstrung by the main provision of Section 243(3) of the Constitution as altered. From the decisions in Coca-Cola's and Lagos Sheraton Hotels cases, the Court of Appeal has treated the main provision of the said Section 243(3) as an albatross to exercising its jurisdiction to entertain such applications for leave to appeal against the decisions of the National Industrial Court not based on fundamental right or criminal matters. In other words, it feels that a condition precedent to the exercise of its jurisdiction to entertain applications for leave to appeal and appeal against the decisions of the National Industrial Court which is the enactment of a law by the National Assembly, prescribing those causes or matters as are within the exclusive jurisdiction or special jurisdiction of the National Industrial Court as contained in Sections 254(C) and D of the Constitution as altered is absent since the National Assembly has not enacted such law.

It is therefore submitted with utmost respect and due deference to the Court of Appeal that these decisions which it has rendered in two judgments in Coca-Cola's case and Lagos Sheraton's case are not, cannot, and no longer be good law. What these decisions portend is that the inadvertence, failure or even refusal of the National Assembly to perform its Constitutional function of making laws for the Federation of Nigeria is capable of extinguishing or denying litigant appellants access

to Court of Appeal to exercise their Constitutional Right of Appeal even though it is with leave of the Court of Appeal. The decisions of the Court of Appeal in those two cases by implication say that as long as the litigant is not appealing against the decision of the National Industrial Court as of right as in fundamental right or criminal matters, he does not have a Constitutional right to apply for leave to Court of Appeal to appeal against the decision of the National Industrial Court on causes or matters within the exclusive and special jurisdiction of the National Industrial Court even though the Constitution so provides in Section 243(3) and its proviso.

Incidentally, as a result of dearth of research, none of the Counsel representing the Applicants in those two cases at the Court of Appeal, Lagos Division adverted themselves to the 1961 decision of the Supreme Court in FAJINMI'S case, if they did, it is submitted that perhaps, the Court of Appeal, Lagos Division and indeed, all the divisions would have to come to a different opinion on the interpretation of Section 243(3) of the Constitution as altered and its proviso in the following terms to wit:

i) That the Court of Appeal has unfettered constitutional jurisdiction to entertain applications for leave to appeal and grant same or refuse same to litigants who apply to it to appeal against decisions of the National Industrial Court not based on questions of fundamental right or criminal matters provided the subject matter of the appeal is within the exclusive constitutional jurisdiction or special jurisdiction conferred upon the National Industrial Court by an Act of the National Assembly pursuant to Sections 254(C) and 254(1) of the Constitution as altered.
ii) That the jurisdiction of the Court of Appeal to hear such applications and Appeals cannot be fettered by the inability or inadvertence of the National Assembly to enact a law prescribing the causes or matters in which an appeal shall lie against the decision of the National Industrial Court with leave of the Court of Appeal.
iii) That access to Court of Appeal and the exercise of the constitutional right of appeal donated by Section 243(3) and its proviso cannot be denied litigants on the ground that the National Assembly has not enacted a law to prescribe those causes or matters in which an appeal shall lie against the decision of the National Industrial Court with leave of the Court of Appeal.
iv) There is nothing in the Constitution as amended that empowers the Legislature (National Assembly) to disable the Court of Appeal from exercising jurisdiction to entertain applications for leave to appeal and appeal against the decision of the National Industrial Court not based on questions of fundamental right or criminal matters as long as the subject matter of the appeal is within the exclusive and special jurisdiction of the National Industrial Court as provided by Section s 254(C) and 254(D) of the Constitution as altered.

v) That in the absence of such enactment, the litigants are not to be driven from the judgment seat.

vi) That it cannot be right in law for the Legislature to make Section 243(3) and its proviso a dead letter by omitting to enact a law prescribing those causes or matters in which appeals shall lie against the decisions of the National Industrial Court which are not questions of fundamental right or based on criminal matters with leave of the Court of Appeal.

vii) It is submitted that in in the meantime, before the National Assembly enacts such law prescribing the causes or matters in which Appeals shall lie against decisions of the National Industrial Court to the Court of Appeal, the Court of Appeal has a constitutional duty to hear and determine applications for leave to appeal and appeals against such causes, or matters not based on questions of fundamental rights or criminal matters brought before the Court of Appeal in the ordinary way of approaching the Court of Appeal for leave to Appeal and to appeal against the decisions of the National Industrial Court or High Court or Federal High Court to have a matter in difference decided and relief granted.

This is the application of the Supreme Court's decision in FAJINMI'S case which interpreted analogous words and provisions in Section 16 of the Constitution of Western Nigeria in the 4th Schedule to the Nigeria (Constitution) Order-in-Council 1960 quoted above to Section 243(3) and its proviso to the Constitution of the Federal Republic of Nigeria 1999 as altered (Third Alteration).

With the discovery of FAJINMI'S case, it is submitted that the decisions of the Court of Appeal in Coca-Cola's and Lagos Sheraton's cases are no longer good law or the law in respect of the Interpretation of Section 243(3) of the Constitution and its proviso. It is taken that these decisions had been rendered in ignorance of a binding decision of the Supreme Court which interpreted a similar provision in Fajinmi's case. The law is that any judgment of the Court of Appeal which ignores the binding decision of the Supreme Court is given per *incuriam*, that is to say, in error. See the decision of the Supreme Court in ALL PROGRESSIVE GRAND ALLIANCE (A.P.G.A.) v. ALMAKURA[23] per Nweze JSC where he stated thus:

> **Suffice it to say this is a sacrilegious affront to the doctrine of stare decisis … In effect any decision of that Court (Court of Appeal) that ignores the binding decisions of this Court (Supreme Court) is given per incuriam, that is given in error[24].**

[23] (2016)5 N.W.L.R. (Pt. 1505) 316,346 (paras E – G)
[24] Ibid page 346 (paras E – G)

2. THE SUPREME COURT OF NIGERIA AGAIN PUTS PAID TO RIGHT OF ACCESS TO COURT OF APPEAL FROM DECISIONS OF THE NATIONAL INDUSTRIAL COURT IN CIVIL MATTERS IN SKYE BANK PLC v. VICTOR ANAEMEM IWU[25]

In a lead judgment delivered by the eminent distinguished jurist and a Professor of Law Chima Centus Nweze JSC on the 30th of June, 2017 in the case of SKYE BANK PLC v. VICTOR ANAEMEM IWU[26] his Lordship applied the LIVING TREE canon of interpretation of Constitutional and Statutory instruments to hold that the Court of Appeal has the jurisdiction to entertain appeals in all civil causes emanating from the National Industrial Court. The implication of this judgment is that the decisions of the Court of Appeal in Coca-Cola Nigeria Ltd[27] and Lagos Sheraton Hotel & Towers v. HSPSS supra inter alia that the Court of Appeal has no jurisdiction to entertain appeals against decisions of the National Industrial Court in all civil matters or causes and other causes not based on questions of fundamental right or criminal matters are no longer good law including the holding that the decisions of the National Industrial Court is final in all civil matters.

By the same decision, the long availed bill at the National Assembly which has passed second reading to prescribe those causes or matters for which appeals could lie with leave of the Court of Appeal from National Industrial Court to the Court of Appeal may be necessary but its absence can no longer prevent the litigants from having right of access to the Court of Appeal by way of appealing decisions of the National Industrial Court to the Court of Appeal with leave of the Court of Appeal in matters within the subject matter jurisdiction of the National Industrial Court in civil matters.

Furthermore, the rest of similar cases before the Supreme Court on the same issues stand resolved in favour of litigants' right of appeal and access to Court of Appeal when aggrieved by the decisions of the National Industrial Court in all civil matters that it has the constitutional and statutory jurisdiction to entertain.

3.1 THE TRAJECTORY OF SKYE BANK PLC v. IWU

In the beginning, the Third Alteration to the Constitution of the Federal Republic of Nigeria 1999 as altered[28] by Section 5 states that:

[25] (2017) NWLR (Pt. 1590)24 Note: This discourse is taken from the raw and certified true copy of the judgment to avoid the opinions of Law Report editors
[26] ibid
[27] op cit
[28] Third Alteration Act No. 3, 2010

1) "Section 243 of the Principal Act is altered by
   (a) Inserting immediately after the words "Federal High Court" in the marginal rate, the words "National Industrial Court", and
   (b) Inserting immediately after the existing Section 243, new subsection "(2) – (4)"
2) An appeal shall lie from the decision of the National Industrial Court as of right to the Court of Appeal on questions of fundamental rights as contained in Chapter IV of this Constitution as it relates to the matters upon which the National Industrial Court has jurisdiction;
3) An appeal shall only lie from the decision of the National Industrial Court to the Court of Appeal as may by prescribed by an Act of the National Assembly; (*underlining for emphasis).*

Provided that where an Act or law prescribed that an appeal shall lie from the decisions of the National Industrial Court to the Court of Appeal, such appeal shall be with the leave of the Court of Appeal.

The underlined portion of Section 5 of the Third Alteration Act is what threw up conflicting decisions of the Court of Appeal, Ekiti Division on the one hand and the Court of Appeal Lagos Division.

The Court of Appeal, Ekiti Division had held in four cases that litigants have a right to appeal to the Court of Appeal in all civil matters whether the National Assembly had by a legislation (Act) prescribed such causes or not as there is no provision in the Constitution preventing such exercise of vested right of appeal with leave of the Court of Appeal by the proviso to Section 243(3) of the Constitution as altered in the Third Alteration on the one hand. The Ekiti Local Government cases" as termed by His Lordship C. C. Nweze JSC are as follows:

i) LOCAL GOVERNMENT SERVICE COMMISSION EKITI STATE & ANOR v. JEGEDE[29]
ii) LOCAL GOVERNMENT SERVICE COMMISSION EKITI STATE & ANOR v. BRAMISAYE[30]
iii) LOCAL GOVERNMENT SERVICE COMMISSION; EKITI STATE & ANOR v. OLAMIJU[31]
iv) LOCAL GOVERNMENT SERVICE COMMISSION & EKITI STATE & ANOR v. ASUBIOJO[32]

[29] (2013) LPELR – 12231(CA)
[30] (2013) LPELR – 20407(CA)
[31] (2013) LPELR – 20409(CA)
[32] (2013) LPELR – 20403(CA)

The Court of Appeal Lagos Division in more recent decision held that the National Industrial Court's decisions in all civil matters other than decisions based on questions of fundamental rights and criminal matters are final since the National Assembly has not prescribed by an Act that such civil appeals shall lie from the decisions of the National Industrial Court to the Court of Appeal by way of Constitutional interpretation of Section 243(3) of the Constitution as altered on the other hand.

The Court of Appeal, Lagos cases are:

i) Coca-cola Nig. Ltd v. Akinsanya[33]

ii) Lagos Sheraton Hotels & Towers v. Hotel Personnel Senior Staff Association (HPSSA)[34].

The onus fell on the Apex Court to resolve the above divergent constitutional interpretations of two divisions of the same Court of Appeal. Section 237(1) of the Constitution as altered provides that there shall be a Court of Appeal. It is trite that there is only one Court of Appeal and its decisions on the same subject matter shall by the same and not divergent. The Apex Court was already saddled with over five appeals relating to the divergent views of the Court of Appeal and braced and live up to its constitutional responsibility of ensuring certainty in the law in a judgment in a case stated to it by the Court of Appeal, Abuja in SKYE BANK PLC v. VICTOR ANAEMEM IWU[35] per C.C. Nweze JSC who delivered the lead judgment.

Since the issue in contention was on a constitutional matter by way of interpretation, a full panel of seven Justices of the Supreme Court was empanelled namely:

Honourable Justices Mary Ukaego Peter-Odili JSC, Musa Dattijo Muhammad JSC, Clara Bata Ogunbiyi JSC, Kumai M.O. Kekere-Ekun JSC, China Centus Nweze JSC and Ejembi Eko JSC.

The reasoning of the Court of Appeal, Lagos Division, it is submitted, is the main plank upon which the Counsel to the Appellant in SKYE BANK PLC v. VICTOR ANAEMEM IWU[36] applied for a case to be stated by the Court of Appeal, Abuja Division to the Supreme Court which application was granted on November 11, 2014.

His Lordship C.C. Nweze, in the lead judgment summed up the three issues formulated by the Court of Appeal, Abuja Division for the determination of the Supreme Court thus:

> **Whether the Court of Appeal as an appellate court, created by the Constitution of the Federal Republic of Nigeria, 1999 (as amended) has the jurisdiction to the exclusion of any other court of law in Nigeria to hear and**

[33] (2013) 18NWLR (Pt. 1386)225
[34] (2014) 14 NWLR (Pt. 1426)45
[35] SC. 885/2014 unreported, delivered on the 30th of June 2017 now reported in (2017) 16 N.W.L.R. (Pt. 1590)24
[36] ibid

determine all appeals arising from the decisions of the National Industrial Court of Nigeria[37].

This singular issue was disaggregated by his Lordship beginning with the treatment and elucidation of the established principles for interpretation of constitutional provisions applicable to the corpus juris of Nigeria and elsewhere which the same approaches to constitutional interpretation have been espoused with titles of the cannons submitted and supplied for dearth of nomenclature to wit:

a) BROADER CANNON - There is the very fundamental prescription that in interpreting the Constitution which is the supreme law of the land, mere technical rules of interpretation of statutes are to some extent, inadmissible in a way so as to defeat the principles of government enshrined therein, NAFIU RABIU v. STATE (1980)[38]. Therefore, where the question is whether the Constitution "has used an expression in the wider or in the narrower sense…… this court (Supreme Court) should whenever possible and in response to the demands of justice, lean to the broader interpretation, unless there is something in the text or in the rest of the Constitution to indicate that the narrower interpretation will best carryout the objects and purpose of the Constitution.
b) AGGREGATION CANNON – All Sections of the Constitution are to be construed together and hence, it is impermissible to construe sections in isolation, see A-G, FEDERAION v. ABUBAKAR[39] and ELELU-HABEEB –VS - AG, FEDERATION (2012) LPELR (SC) 281/210.
c) THE LITERAL CANNON – Where the words of the Constitution are clear and unambiguous, a literal interpretation will be applied, that is, they will be accorded their plain ordinary grammatical meaning. See A – G. FEDERATION v. A-G. LAGOS STATE[40].
d) RULE AGAINST AMBIGUITY CANNON – However, where there is inherent ambiguity in any section of the Constitution, a holistic interpretation would be resorted to in order to arrive at the intention of its framers, see INEC v. MUSA[41].
e) RULE AGAINST REDUNDANCY CANNON – Since the draftsperson of the Constitution is not known to extravagate words or provisions, it is anathematic to construe a section in such a manner as to render other sections redundant or superfluous, N.U.R.T. v. R.T.E.A.N[42].
f) MISCHIEF RULE CANNON - The rule against ambiguity states that if the words of the Constitution or a statute are ambiguous, then the lawmaker's intention must be sought, first in

[37] Skye Bank Plc v. Iwu (2017)16 NWLR (Pt. 1590)24 at 74
[38] N.S.CC. 292,300
[39] 2007 ALL FWLR (Pt. 389) 1264, 1289 - 1291
[40] (2013) 16NWLR (Pt. 1380) 249302
[41] (20003) 3 NWLR (pt. 806) 72, 102
[42] (2012) 10 NWLR (Pt. 1307)170

the Constitution or Statute itself, then in other legislations and contemporary circumstances by resort to the mischief rule; see the A-G of EKITI STATE & ORS v. ADEWUNMI[43].

g) LIBERAL CANNON – The liberal cannon of interpretation of the Constitution "should be … one of liberalism, in other words, that it would be improper to construe any of the provisions of the Constitution as to defeat the obvious ends the Constitution was designed to serve where another Constitution, equally in accord and consistent with the words and sense of such provisions will serve to enforce and protect such ends" see NAFIU RABIU v. STATE[44].

h) PURPOSE CANNON – His Lordship C.C. Nweze JSC held that the Supreme Court recently summed up the foregoing seven prescriptions on constitutional interpretation in SARAKI v. FRN[45] quoting himself (per C.C. Nweze JSC) thus:

> **One of the guiding posts in the interpretation of the provisions of the Nigerian Constitution is that the principles upon which its (the Constitution) was established rather than the direct operation or literal meaning of the words used, measure the purpose and scope of its provisions, Global Excellence Communications Ltd. v. Duke (2007)16 NWLR (Pt. 1059) 22[46].**

i) REGULATION CANNON C.C. Nweze JSC further stated that the rationale of all binding authorities is that a narrow interpretation that would do violence to the provisions of the constitution must be avoided. In other words, where alternative constructions are equally open, the construction that is consistent with the smooth working of the system which the Constitution read as a whole has set out to regulate is to be preferred see DIAPIONG v. DARIYE[47].

j) EFFECTIVE RESULT CANNON – He further stated that the principle that underlies this construction technique is that the legislature should legislate only for the purpose of bringing about an effective result, see IMB v. TINUBU[48].

k) LIVING TREE CANNON – He held further that the liberal cannon of interpretation of the Constitution is consistent with the LIVING TREE doctrine of constitutional interpretation enunciated in EDWARD v. CANADA[49] which postulates that "the Constitution must be capable of growth to meet the future".

l) HOLISTIC CANNON – His Lordship endorsed that position that the construction of any document and this includes the construction of the precious and organic document known as

[43] (2002) 1 SC 45, 51 see also UGWU v. ARARUME (2007) 12 NWLR (Pt. 1048) 365
[44] ibid
[45] (2016) 3NWLR (Pt. 1500 531, 631 - 632
[46] Skye Bank Plc v. Iwu (2017)16 NWLR (Pt. 1590) 24 at 88
[47] (2007) 8 NWLR (Pt. 1036)
[48] (2000) 16 NWLR 9Pt. 740690) see also NAFIU RABIU v. STATE (1980) 8 – 9 SC 130
[49] 1932 AC 124

the 1999 Constitution is a holistic endeavor see ABEGUNDE v. THE ONDO STATE HOUSE OF ASSEMBLY[50]

3.2 KEY DECISIONS IN THE RESOLUTION OF THE DIVERGENT VIEWS OF THE COURT OF APPEAL BY HON. C.C. NWEZE JSC.

After a review of the cannons of interpretation of the Constitution,

i) His Lordship found and held that on a harmonious construction of Sections 240, 242(1), 243(1)(a) and 243(4) of the 1999 Constitution as altered, a litigant who is aggrieved by a decision of the trial court in other civil matters can exercise a right of appeal with the leave of the lower court. the only snag in this regard is that it makes the Court of Appeal the final court with respect to all civil appeals arising from the National Industrial Court of Nigeria to the Court of Appeal[51] His Lordship called in aid the meaning of "any" used in Section 243(4) of the Constitution as altered which states thus:

> **Without prejudice to the provisions of Section 254C(5) of this Act the decision of the Court of Appeal in respect of any appeal arising from any civil jurisdiction of the National Industrial Court shall be final to hold that "any" in Section 243(4) meaning any appeal in respect of the exercise of the civil jurisdiction of the National Industrial Court. Hence, a litigant who is aggrieved by a decision of the National Industrial Court in other civil matters can exercise a right of appeal with the leave of the Court of Appeal.**

ii) It cannot be that the provision of Section 243(3) makes a right of appeal in civil matters arising from decisions of National Industrial Court with leave of the Court of Appeal to be contingent on a futuristic exercise of the powers of the National Assembly.

iii) There is no procedural lacuna in the Constitution on the mode of exercise of a right of appeal with leave of the Court of Appeal against the decisions of the National Industrial Court.

iv) The litigant's exercise of his right of appeal against all decisions of the National Industrial Court to the Court of Appeal bequeathed to him by Section 240 and with respect to Section 243(4) of the 1999 Constitution as altered "any appeal from any civil jurisdiction", all a prospective Appellant needs to do is to amble within the compass of Section 24(1) of the Court of Appeal Act[52] an extant enactment by the National Assembly which provides thus:

> **Where a person desires to appeal to the Court of Appeal, he shall give notice of appeal or notice of his application for leave to appeal in such manner as may be directed by rules of court within the period prescribed by the provision of subsection (2) of this section that is applicable to the case.**

[50] (2015) Vol. 244 LRCN 1374
[51] Section 243(4) of the 1999 Constitution as amended
[52] Cap C36 LFN, 2004

v) The appellant needs equally to rely on and comply with the provisions of Order 6 Rules 1,2,5,7 and 10 of the Court of Appeal Rules 2016, a subsidiary legislation whose potency traces its pedigree to the constitutive Act, Section 18(1) of the Interpretation Act [53] see DIN v. A-G. FEDERATION[54], see also OLAREWAJU v. OYEYEM [55]

vi) These two enactments set out the procedure of appeals in civil matters from the National Industrial Court to Court of Appeal either as of right or with leave of the Court of Appeal.

vii) A holistic interpretation of Sections 240 and 243(1) of the 1999 Constitution as altered, appeals lie from the National Industrial Court to the Court of Appeal.

viii) All decisions of the National Industrial Court are appealable to the Court of Appeal as of right in criminal matters (Section 254C (5) and (6) and fundamental rights cases (Section 243(2) and with the leave of the Court of Appeal in all other Civil matters where the National Industrial Court has exercised its jurisdiction (Section 240 and Section 243(1) and (4) of the Constitution read conjunctively).

ix) The following therefore are the answers to the questions posed to the Supreme Court in the case stated in SKYE BANK PLC v. VICTOR ANAEMEM IWU[56]

a) The Court of Appeal has the jurisdiction to the exclusion of any other Court in Nigeria to hear and determine all appeals arising from the decisions of the National Industrial Court of Nigeria.

b) There is no constitutional provision that expressly divest the Court of Appeal of its appellate jurisdiction over all decisions on civil matters emanating from the National Industrial Court.

c) The jurisdiction of the Court of Appeal to hear and determine civil appeals from the decisions of the National Industrial Court is not limited only to fundamental right matters and it is submitted criminal matters but includes civil matters too.

3.3 THE IMPLICATIONS OF THE SUPREME COURTS DECISION IN SKYE BANK PLC v. VICTOR ANAEMEM IWU[57]

i) The National Assembly that has prepared a bill which has scaled second reading may still go on to complete the process of complying with Section 243(3) of the Constitution but litigants

[53] Cap 123 LFN, 2004
[54] OLAREWAJU –VS- OYEYEM
[55] (1986) 1 NWLR (Pt. 17) 471, (2001) 2 NWLR (Pt. 697) 229
[56] Op cit
[57] ibid

or prospective Appellants who wish to appeal decisions of the National Industrial Court can do so without waiting for the bill to be passed.

ii) By the tenor of this judgment it is submitted subject to further interpretation by the Apex Court that if the ground of Appeal in a Civil Interlocutory Appeal to the Court of Appeal from the National Industrial Court is on ground of law, leave is still required by virtue of the provision of Section 243(3) of the Constitution.

iii) All Civil Appeals lie to the Court of Appeal from the National Industrial Court with the leave of the Court of Appeal sought first and obtained.

iv) Since the civil Appeal is not as of right, the Court of Appeal still has to exercise the discretion whether to grant the Application or leave or not and if leave is refused, Section 243(4) holds that refusal as a final decision which we submit still amounts to a denial of right to appeal as the Applicant cannot go to the Supreme Court by way of appeal.

It is submitted that decongestion of courts is not a legal reason to deny prospective applicants leave to appeal decisions of National Industrial Court to Court of Appeal in civil matters. A consideration of the Notice and Grounds of Appeal especially in cases of employer-employee relationships and trade disputes which have to do with lives and livelihoods should not be taken lightly and leave ought to be readily granted upon minimal interest and grievance shown.

4. CONCLUSION

Although their Lordships did not make reference to the much earlier decision of the Supreme Court in FAJIMI v. SPEAKER OF WESTERN STATE HOUSE OF ASSEMBLY[58] which was the first in time, the decision in SKYE BANK PLC v. IWU[59] does not derogate from FAJIMI'S case as both yield the same result that the prospective Appellant does not need to wait for a futuristic legislation of the National Assembly before exercising his right to appeal a decision of the National Industrial Court in a civil case to the Court of Appeal with leave of the Court of Appeal.

However, the decision in FAJIMI'S case is wider in scope in that it covers all situations where a Constitution or statute states that a right of access to court shall be dependent upon a futuristic legislation on the causes and procedure for exercising such right of access to court.

[58] Op cit
[59] Op cit

The prospective Appellants against decisions of the National Industrial Court in a civil matters can now appeal such decisions to the Court of Appeal albeit with leave of the Court of Appeal.

In all other matters, right of access to court is guaranteed and litigants will not be restricted from exercising such right based on a futuristic legislation.

Therefore, the judicial attitude of courts in respect of legislative actions which restrict access to court through Constitutional and Statutory provisions both old as in FAJIMI'S case and new as in IWU's case is in favour of the exercise of right of access to court barring substantive provisions of the Constitution.

5. RECOMMENDATION AND CONCLUSION

It can now be seen from the foregoing submissions that it is better not to include a clause in a Constitution or statute that makes it contingent upon a futuristic or further legislation before litigants can exercise their right of access to court. The courts frown at such impediments as it tantamount to suspending existing provision of the Constitution on right of access of court in Sections 6, 36, 241, 251, 277 among others.

It also behooves the Legislature to use both private or public professional legislative research consultants and draftsmen to instantly draft and pass subsidiary legislations to provide for those causes of action and procedures for institution of those actions or appealing such decisions.

This is because the courts will not lend their judicial support to constitutional and statutory provisions that put citizens' right of access to court in abeyance when the substantive provisions of the Constitution have given them right of access to court.

Again, it is incumbent on the Legislature, that is to say, the National Assembly and the State Houses of Assembly to avoid inserting clauses in the Constitution and Statutes that make right of access to court dependent on non-existent or futuristic legislations or insert the causes of action and the procedure in subsidiary Legislation at the same time and pass it. Subsidiary legislations have the force of law by the provisions of Section 18 of the Interpretation Act[60].

It is submitted that Fajinmi's case supra is a Supreme Court's decision and final authority that when a matter arises at any level of the judicial system and hierarchy affecting a person's right of access to all levels of Court and the Constitutional or statutory impediment is that, the right of access to

[60] Interpretation Act, LFN 2004

such level of court is curtailed or obliterated because the Legislature at any tier of government has not made a law, the person can approach the particular level of Court in the ordinary manner of approaching the court under existing laws and the provisions of the Constitution until such a law is validly enacted

It is therefore submitted that the Court of Appeal has jurisdiction to hear appeals from decisions of the National Industrial Court of Nigeria in causes or matters not based on Fundamental Rights or criminal matters, that is to say non-fundamental Rights matters and non-criminal matters such as civil causes or matters based on Supreme Court's decision in SKYE BANK PLC v. VICTOR ANAEMEM IWU[61].

The summation of the foregoing submissions is that when the Legislature, in a Constitution or Statute makes provisions that the right of access to court is dependent upon a futuristic legislation, the attitude of the Courts will be that the provisions of the Constitution or Statute granting right of access to court are not made dead letters. The litigants are allowed to exercise their right of access to court by the extant provisions in the Constitution and Statutes enabling such access to court and the litigant is not to be driven from the judgment seat but his claim must be heard and decided upon. The legislature is therefore advised.

[61] op cit