

**EMERGING MARKETS TELECOMMUNICATION
SERVICES LTD v. ENEYE**

CITATION: (2018) LPELR-46193(CA)



**In the Court of Appeal
In the Abuja Judicial Division
Holden at Abuja**

ON WEDNESDAY, 23RD MAY, 2018

Suit No: CA/A/724/2014

Before Their Lordships:

ABUBAKAR DATTI YAHAYA
PETER OLABISI IGE
TANI YUSUF HASSAN

Justice, Court of Appeal
Justice, Court of Appeal
Justice, Court of Appeal

Between

EMERGING MARKETS TELECOMMUNICATION
SERVICES LIMITED

- Appellant(s)

And

BARR. GODFREY NYA ENEYE

- Respondent(s)

RATIO DECIDENDI

1. **APPEAL - INTERFERENCE WITH AWARD OF DAMAGES:** Principles upon which an appellate court acts when interfering with an award of damages

"Damages are awarded at the discretion of the trial Court, and so an appeal Court is reluctant to interfere with how the trial Court exercises its discretion unless:

- a) The exercise is tainted within illegality or substantial irregularity.
- b) If it is in the interest of justice of interfere.
- c) The discretion is wrongly exercised. See C.B.N vs. Okojie (supra) and University of Lagos vs. Aigoro (1985) 1 NWLR (part 1) 43 and Salu Vs Egeibon (1994) 6 NWLR (part 349) 23.

An appellate Court would also interfere when it is satisfied

That:

- a) The trial Court acted under a mistake of law; or
 - b) The trial Court acted in disregard to some principles of law;
- or
- c) The trial Court acted under a misapprehension of facts; or
 - d) The trial Court took into account irrelevant matters or failed to take into account relevant matters, or
 - e) Injustice would result if the appellate Court does not interfere, or
 - f) The amount awarded is either ridiculously low or ridiculously high, that it must have been a wholly erroneous estimate of the damages - British Airways vs. Atoyebi (2014) 13 NWLR (part 1424) 253 at 265 - 266; African Newspapers (Nig.) Plc vs. Useni (2015) 3 NWLR (part 1447) 464 at 475 - 476 and Guardian Newspapers Ltd vs. Ajeh (2011) 10 NWLR (part 1256) 574."Per HASSAN, J.C.A. (Pp. 34-35, Paras. A-B) - [read in context](#)

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2. **CONSTITUTIONAL LAW - RIGHT TO PRIVACY:** Instance(s) where the right to privacy of an individual can be said to have been violated

"Section 37 of the Constitution under which the respondent instituted the action at the lower Court provides: "The privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications is hereby guaranteed and protected."

Contrary to the submissions of the appellant, the respondent suit was properly initiated before the trial Court under Sections 37 and 39 of the Constitution.

The respondent in his affidavit in support of the application deposited in the following paragraphs as follows:

Paragraph 5: "That I am a customer to the Respondent by virtue of my subscription in 2010 to an Etisalat GMS Mobile prepaid phone line with account number 08194927963 which was subsequently registered in my name sometime in 2011 and is also in daily use."

Paragraph 7: "That I, within the duration of my use of the above Etisalat GSM Mobile prepaid phone line with number 08184921963, began to and continue to receive text messages from strange bodies and organizations sending commercial adverts and other similar messages, Computer print-out of the remaining, undeleted such text messages are hereto attached and marked Exhibits B1 - 67."

Paragraph 8: "That on the 17th day of August, 2013 at 04:28 am text message from sort code 30046 telling me that my subscription to FOOTBALL NEWS was successfully renewed. The said message is already attached and marked as Exhibit B46."

Paragraph 9: "That I never subscribed to any said sort code 30046 for any sports news and live, till date, never subscribed to anyone nor sort code to receive any sports news whatsoever through any medium of communication."

Paragraph 10: "That on the same 17th day of August, 2013 at 07.35 am when I was fully awake I sent an angry message to sort code 30046 to stop sending me unsolicited messages on football.

The said message is hereto attached and marked as Exhibit C."

Paragraph 11: "That minutes later and thenceforth, I have received a total of 32 sports adverts and messages including from sort cord 90046 itself. The said messages are already attached and marked according to their dates from thence as Exhibits B45, 43, 42, 41, 40, 39, 38, 35, 34, 33, 31, 30, 29, 28, 26, 25, 24, 22, 21, 19, 16, 14, 13, 11, 10, 9, 8, 7, 3, 2 and 1."

Learned counsel for the appellant submitted that the unsolicited messages do not constitute an infringement of the respondent's right to privacy to entitle the respondent commence an action under the Fundamental Rights Enforcement Procedure Rules. The appellant in paragraph 3 of its counter affidavit deposed:

"I have reviewed the Applicant's affidavit sworn on 28th October, 2013, in support of the application for the enforcement of his fundamental rights and know as of fact that the respondent is not in a position to deny or admit paragraphs 1, 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14 of the said affidavit." In paragraph 8 of the affidavit in support reproduced above, it is only the appellant that is in a position to renew the subscription for football news. The appellant's deposition in paragraph 3 of its counter affidavit which is not a denial or admission recognized by law, it is my view that renewal of the subscription for football news can only be referred to the appellant as having renewed same.

The affidavit of the respondent and the documentary evidence emanating from the appellant had clearly shown that despite the angry message sent by the respondent to sort code 30046 to stop sending him unsolicited messages, it continues to send unsolicited text messages to the respondent.

The Consumer Code of Practice Regulations, 2007 and the General Consumer Code of Practice Rules, particularly Rule 14(1) (b) (2) and (3) require the appellant to maintain a Directory enquiry facility containing information of all its subscribers in Nigeria and allow access to same by 3rd parties subject to the prior notification of the subscriber. The appellant did not produce any evidence to show that the respondent subscribed to the unsolicited text messages nor show that it notified the respondent before giving access to his line to the senders of text the messages.

In essence, paragraph 3 of the counter affidavit of the appellant avoided answering specific deposition in the respondent's affidavit concerning its provision of Bulk SMS service to organizations and persons by which they have entry into the phone line of a subscriber without first notifying the subscriber or obtaining his consent. It is my view that by giving those unknown persons and organizations access to the respondent's Etisalat GSM phone number to send unsolicited text messages into it, amount to violation of the respondent's right to privacy guaranteed by Section 37 of the Constitution, which includes the right to the privacy of a personal's telephone line. See *Nwali vs. EBSIEC & ors* (2015) 2 CAR 477 at 508 - 510."Per HASSAN, J.C.A. (Pp. 25-29, Paras. C-C) - [read in context](#)

3. CONSTITUTIONAL LAW - ENFORCEMENT OF FUNDAMENTAL HUMAN RIGHT(S): Whether the jurisdiction of the High Court to entertain matters bordering on fundamental rights can be ousted

"...The contention of the appellant is that the case of the respondent was not properly instituted under the Fundamental Rights Enforcement Procedure Rules as the respondent had no cause of action, and his case was rooted in contract and/or tort.

It is also the contention of the appellant that since the respondent believed that the use of the appellant's communication services and network violated his fundamental right to privacy, the High Court has no jurisdiction to determine the dispute. That the Nigerian Communication Act, 2003 provides that the resolution of disputes arising therefrom must be in accordance with the procedure prescribed thereon.

The respondent argued that the provision of the Nigerian Communication Act is strictly for suits founded on breaches of contract for services and torts under the Act, while Section 46 of the 1999 Constitution conferred jurisdiction on the High Court on violation of fundamental rights. That the right conferred by the Constitution cannot be taken away except by the Constitution. He referred to Section 1(i) and (3) of the Constitution.

In considering this appeal, it will not be out of place to reproduce the provisions of Sections 1(1) and (3) and 46 of the Constitution. Section 1(1) provides:

"This Constitution is supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria."

Section 1(3) reads:

"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 the inconsistency be void".

Section 46(1) reads

"Any person who alleges that any of the provisions of this chapter has been, is being or is likely to be contravened in any state in relation to him may apply to the High Court for redress".

Section 46(2) provides:

"Subject to the provisions of the Constitution, a High Court shall have Original jurisdiction to hear and determine any application made in pursuance of the provisions of this section and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement within that state of any right which the person who makes the application may be entitled under this chapter."

The argument of the learned counsel for the appellant that in the circumstance of this case, the application for enforcement of fundamental right cannot lie directly to the High Court without exhausting the procedure as laid down in the Nigerian Communication Act will not hold. This is because of the supremacy of the constitution over the Nigerian Communication Act, the provisions of the Act cannot apply to defeat the original jurisdiction of the High Court under Section 46(2) of the 1999 Constitution or to prevent an application to enforce fundamental right brought in the exercise of the right given to a person under Section 46(1) of the 1999 Constitution.

As rightly submitted by the respondent, a right vested on a person by the Constitution cannot be taken away by an Act of National Assembly or any other Law. See *Aqua Ltd Vs Ondo State Sports Council* (supra). A jurisdiction vested by the Constitution cannot be curtailed or ousted by any other law. See *Western Steel Works Ltd & Anor Vs Iron & Steel Workers Union of Nigeria & Ors* (1982) 2 SCN 1 and *Nigerian Army Vs Yakubu* (2013) 2 SCNJ 268 where the Supreme Court held that where jurisdiction is conferred on Court by the Constitution, such jurisdiction is not subject to the whims of any other quasi-judicial body or outfit.

It follows therefore the right vested by Section 46 (1) of the 1999 Constitution can be exercised to seek redress for violation of any fundamental rights guaranteed by Chapter IV of the 1999 Constitution. The trial Court therefore rightly exercised its special jurisdiction conferred on it by Section 46(2) of the 1999 Constitution when it entertained and determined the matter. See *Denton - West Vs Jack and Ors* (2013) 5 SCNJ 748 where the Supreme Court held that the jurisdiction of the High Court under Section 46 to enforce fundamental human rights can be exercised irrespective of where the contravention or threat of contravention arose.

The case of *Nationwide Action against Corruption & Anor vs. Econet Wireless Ltd & Ors* (supra) relied by the appellant is inapplicable in this case as the provision of Section 46 of the 1999 Constitution which conferred special jurisdiction on the High Court was not invoked and the relationship between Section 46 of the 1999 Constitution and the Nigerian Communication Act was not considered by the Court.

However by the provision of Section 75(1) of the Nigerian Communication Act No. 13 of 2003 it is not mandatory for a party to a dispute from the use of communication

services and network to refer to the commission. The party has a choice to refer to the commission or pursue another means. As the appellant did not choose to have the dispute resolved by the commission, Sections 86, 87 and 89 of the Nigerian Commission Act made specifically for disputes resolution by the commission are inapplicable to this case. So the submission of the appellant that the respondent did not resort to dispute resolution before approaching the Court will also not hold."Per HASSAN, J.C.A. (Pp. 20-25, Paras. E-B) - [read in context](#)

4. **DAMAGES - EXEMPLARY DAMAGES:** Guiding principles for award of exemplary damages

"Exemplary damages are awarded with the object of punishing the defendant for his conduct in inflicting injury on the plaintiff. They can be made in addition to normal compensatory damages and should be made only:

- a) In a case of oppressive, arbitrary or unconstitutional acts by government, servants;
- b) Where the defendant's conduct had been calculated by him to make a profit for himself, which might well exceed the compensation payable to the plaintiff, and
- c) Where expressly authorized by statute - CBN Vs Okojie (2015) 14 NWLR (part 1479) 231 at 242 - 243. See also Lagos State Vs Ojukwu (1986) 1 NWLR (part 18) 621 and Alele - Williams Vs. Sagay (1995) 5 NWLR (part 396) 441.

For exemplary damages to be awarded, it need not be specifically claimed, but facts to justify it must be pleaded and proved. Thus, once facts in the pleadings support the award of exemplary damages, the Court should award it since the adverse party is in no way taken by surprise. See Calabar East C.T.C.S Vs Ikot (1999) 14 NWLR (part 633) 225."Per HASSAN, J.C.A. (P. 32, Paras. A-F) - [read in context](#)

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TANI YUSUF HASSAN, J.C.A. (Delivering the Leading Judgment): The Respondent as applicant at the lower Court, by an Amended Application for the enforcement of his fundamental right commenced Suit No. **FHC/ABJ/CS/717/2013** seeking against the appellant the following reliefs.

1. A declaration that the Respondent's unauthorized revealing and/or permitting of the applicant's registered, private GSM mobile phone account with the respondent to be accessed by third party strangers and made target of unsolicited text messages from these third - party strangers with whom the applicant has no relationship or contact and without the applicant's prior consent and/or option to decline such consent respectively amount to violation of his fundamental human right to privacy of his person and correspondence under Sections 37 and 39(3)(a) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended), Section 1 and Articles 14 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Cap A9, LFN 2004 and the African Charter on Human and Peoples' Rights 1981.

2. An order of perpetual injunction compelling the respondent to cease their unauthorized revealing and/or permitting of the applicant's registered, private GSM Mobile phone account with the respondent to be accessed by third - party strange organization, bodies and/or persons and made target of unsolicited text messages from these strange organizations, bodies and persons with whom the applicant has no relationship or contact and without the applicant's prior consent and/or option to decline such consent.

3. An order compelling the Respondent to pay the Applicant the sum of N1,000,000.00k (One million naira) per unsolicited text message as exemplary and aggravated damages for the respondent's respective, numerous breaches of the applicant's fundamental human right to privacy of his person and correspondence guaranteed under the Constitution of the Federal Republic of Nigeria, 1999 (as amended), the African charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Cap A9, LFN 2004 and the African Charter on Human and Peoples, Rights 1981.

4. An order compelling the respondent to pay the interest on (3) above at 10% per annum from the date of

judgment until the resulting judgment sum is fully and finally paid.

The grounds upon which the reliefs are sought read:

i) That the applicant is donated a Constitutional and Fundamental human right to privacy of his person and correspondence under Section 37 and 39(3)(a) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended), section 7 and Article 14 of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act, Cap A9, LFN 2004.

ii) That the Respondent is under duty by the 1999 Constitution to protect all Fundamental rights and further under duty by Consumer Code of practice Regulations 2007 General Consumer Code of Practice, sections 14(7)(b), (2) (3) (c), 35(1) (2) (3), 36, 37(1)(2) (3) pursuant to the Nigerian Communications Act, 2003 to protect the privacy of persons and their correspondences in the use of the respondent's telecommunication services.

iii) That a flood of SMS/Text messages have been and are being sent to the applicant's phone inbox and phone lines/accounts through their respondent's network.

iv) It is a notorious fact in the Information Technology world that short

message service/text messaging sprang from, and is an offshoot of 'radio telegraph's' a form of telegraphic communication.

v) That the Application does not have direct dealings with the organization and bodies in any way whatsoever who are the senders of the unsolicited text messages, nor do they have his consent to be sent such messages.

vi) The unsolicited messages are sent to the Applicant through the respondent's Network.

vii) The respondent is aware of these unsolicited messages being sent through and over its Network to the applicant and facilitates same.

viii) The respondent offers and provides bulk massaging solutions service to and permits the sending of bulk campaign and/or single messages by individuals, organizations and other bodies through their Network.

ix) The respondent profits from these unsolicited text messages sent through their Network.

x) That there is nothing in the disclosed terms and conditions between the applicant and the respondent authorizing, allowing or permitting the revelation, transfer of, her permitting his private GSM telephone line to be accessed by strangers, nor to receive unsolicited

text messages from strangers through the respondent's Network and business practice.

xi) That the respondent violated the above provisions of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) Law and Consumer Code of Practice Regulations 2007, General Consumer Code of Practice pursuant to the Nigerian Communications Act, 2003.

xii) That the respondent maintains a directory/register enquiry facility containing information on all subscribers in Nigeria and is further required to ensure that any person can access same except for those subscribers who have exercised their right to have their directory information suppressed or removed.

xiii) That no such right, nor information informing the applicant of the said option was ever disclosed to him in the terms and conditions of use of his phone line/account at the point of purchase nor so soon after.

xiv) That the applicant was denied the option, means and/or ability to freely unsubscribe from these messages sent to their phone lines/accounts.

xv) The respondent has further engaged in unfair business practices under the Consumer Protection Council Act, LFN Cap C25, 2007 under the circumstances of this Suit.

xvi) The above complained unsolicited messages are continuing as at the date of filing of this Suit.

The application is supported by sixty three (63) paragraphs affidavit deposed to by the applicant, a legal practitioner. Attached to the affidavit are annexures of text messages marked as Exhibits B1 - 67 and there is a written address in support of the application.

The appellant as respondent therein filed a Notice of Preliminary objection challenging the jurisdiction of the Court, and a counter affidavit in opposition to the applicant's application. The respondent filed a Further Affidavit. The trial judge, Hon. Justice E.S. Chukwu, considered the preliminary objection and the Application together. He dismissed the preliminary objection and entered judgment in favour of the respondent in the sum of N8 million for sending unsolicited text messages to his phone and the sum of N100,000.00 only being the costs of the action.

Aggrieved with the judgment of the trial Court, the appellant appealed to this Court by an Amended Notice of Appeal dated 27th May, 2015 and filed on the 1st of June, 2015.

There are eight grounds of appeal with their particulars and reliefs sought.

The grounds shorn of their particulars are:

GROUND ONE

The lower Court erred in law when in dismissing the Appellant's Preliminary objection held as follows:

"So having held that the plaintiff has a cause of action against the Applicant/Respondent I don't want to waste my time to hold that the mode of commencing this action is equally proper before the court."

GROUND TWO

The lower Court erred in law when in dismissing the Appellant's preliminary objection it held as follows:

"Well for now, I have perused the NCC Act it did not lay down a particular procedure that must be followed before coming to Court".

GROUND THREE

"The lower Court erred in law when it held that the Respondent's Fundamental Rights Application on the basis of receipt of unsolicited text messages from third parties on the Respondent's mobile phone number 08194321963 disclosed a cause of action."

GROUND FOUR

The lower Court erred in law when it held as follows:

"What is more, my learned Brother Ademola J. in the unreported case of Barn Godfrey Nya Eneye Vs MTN"

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Communications Ltd Suit No. FHC/ABJ/CS/43/2012 held that the suit which is in all fours with this one that the Federal High Court has the jurisdiction to entertain the suit commenced by way of enforcement of fundamental right and placed reliance on the provisions of Section 46(1) and Order 1 Rule 2 of the Fundamental Rights Enforcement Procedure Rules, I have no reason not to abide and adopt the same reasoning of my Learned Brother in the instant case, for the umpteenth time this Suit is properly constituted before this Court and I have the jurisdiction to entertain same."

GROUND FIVE

"The lower Court erred in law when it ordered the Appellant to pay the Respondent the sum of N8,000,000.00 (Eight Million Naira) for purportedly sending unsolicited text messages to the respondent's line without first seeking his consent.

GROUND SIX

"The lower Court erred in law when it failed and or neglected to consider the arguments proffered by the Appellant in opposition to the Respondent's Originating Application in the Ruling/Judgment delivered in this Suit and thereby occasioned a miscarriage of justice."

GROUND SEVEN

The lower Court misdirected itself when it held as follows:

"Submission of counsel also shows that they send bulk SMS which the Applicant in his submission must take tike other Nigerians or keep quite. This submission to say the least may be an obvious display of impunity accepting liability and I so hold. What is more there was no specific denials of the Applicant's affidavit and Further Affidavit."

GROUND EIGHT

The judgment is against the weight of evidence.

The appellant's brief settled by Mrs. Ogechi Abu was dated 27th May, 2015 and filed on 1st of June, 2015 but deemed filed on the 17th of November, 2016, with the following issues for determination as follows:

1. "Whether the existence of a cause of action alone conferred jurisdiction on the lower Court to entertain the Respondent's action irrespective of whether the said action was initiated and or commenced by due process." (Ground 1).

2. "Whether considering the clear provisions of Section 37 and 39(3) of the 1999 Constitution, Section 1 Article 14 of the African Charter on Human and People Rights and the entire facts and circumstances of this case, the Respondent's alleged receipt of

unsolicited text messages via the Appellant's network constitute an infringement of the Respondent's right to privacy so as to entitle the Respondent to commence an action under the Fundamental Rights Enforcement Procedure Rules."

(Ground 3).

3. "Whether assuming without any means conceding that the Respondent had a cause of action, whether same was not premature before the lower Court when the dispute resolution mechanism stipulated under the Nigeria Communications Act 2003 ("The Act") and General Code of Practice made pursuant to the Act had not been invoked and exhausted by the respondent before proceeding to Court." (Ground 2).

4. "Whether the evidence adduced by the Respondent supported the findings and conclusions made by the learned trial judge." (Grounds 4, 7 and 8).

5. "Whether in the entire facts and circumstances of this case, the sum of N8,000,000.00 (Eight Million Naira) awarded in favour of the Respondent as damages is justifiable." (Ground 5).

The Respondent's Notice of Preliminary objection is deemed abandoned, having not been argued.

The Respondent's brief settled by G. N. Eneye Esq., was dated and filed on the

16th of December, 2016. In it, two issues were identified as follows:

1. "Whether the Honourable Trial Court had jurisdiction to entertain this suit's cause of action under the fundamental rights enforcement procedure." (Grounds 1, 2, 3, 4 and 6).

2. "Whether the Honourable Trial Court property determined this suit and awarded damages and costs against the Appellant in accordance with the weight of evidence before it." (Ground 5, 7 and 8).

I shall utilize the issues distilled by the appellant in resolving this appeal.

Issues 1, 2 and 3 to be taken together.

ISSUE ONE

"Whether the existence of a cause of action alone conferred jurisdiction on the lower Court to entertain the Respondent's action irrespective of whether the said action was initiated and or commenced by due process."

ISSUE TWO

"Whether considering the clear provisions of Section 37 and 39(3) (a) of the 1999 Constitution, Section 1 Article 14 of the African Charter on Human and Peoples Rights and the entire facts and circumstances of this case, the Respondent's alleged receipt of unsolicited text messages via the Appellants network constitute an infringement of

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the Respondent's right to privacy so as to entitle the Respondent to commence action under Fundamental Rights Enforcement Procedure Rules."

ISSUE THREE

"Whether assuming without any means conceding that the Respondent had a cause of action, whether same was not premature before the lower Court when the dispute resolution mechanism stipulated under the Nigeria Communications Act 2003 ("The Act") and General Code of Practice made pursuant to the Act had not been invoked and exhausted by the Respondent before proceeding to Court."

In arguing that the existence of a cause of action alone was not sufficient to confer jurisdiction on the lower Court to entertain the respondent's suit as constituted under the Fundamental Rights Enforcement Procedure Rules, 2009, Learned Counsel for the appellant contended that the respondent had no cause of action and even if it had any, it was rooted in contract and/or tort. That the respondent's action initiated under the Fundamental Rights Enforcement Procedure Rules was wrongly commenced without due process which robbed the learned trial Judge of jurisdiction and competence to entertain the Suit -

Madukolu Vs. Nkemdilim (1962) 2 SCLR 341 and Sea Trucks Ltd Vs Anigboro (2001) FWLR (part 37) 1000 at 1021 paragraphs C-G.

Relying on the case of **Attorney Leventis (Nig.) Plc Vs Akpu (2007) 17 NWLR (part 1063) 443 at 436**, it is submitted that the trial Court had a legal duty to consider all issues placed before it. He argued that the trial Court's failure to determine whether the action was properly commenced before it, has occasioned a miscarriage of justice.

On Section 37 and 39(3) (a) of the 1999 Constitution, Section 1 Article 14 of the African Charter on Human and Peoples Rights and the entire facts and circumstances of this case, it is submitted for the appellant that the alleged receipt of unsolicited text messages via the appellant's network does not constitute an infringement of the respondent's right to privacy to entitle him to commence an action under the Fundamental Rights Enforcement Procedure Rules 2009.

The appellant's counsel said that the main complaint of the respondent at the lower Court was that he receives unsolicited text messages from unknown strangers through the appellant's mobile network. That the respondent also alleges that since

the senders of the unsolicited text messages are unknown to him and the messages are received via the appellant's network, the appellant is responsible for disclosing his telephone number to these persons without this consent which is a violation of his fundamental right to privacy of his person and correspondence under Sections 37 and 39(3)(a) of Constitution of Nigeria, 1999 (as amended) and Section 1 of Article 14 of the African Charter on Human and Peoples Rights. In considering Sections 37 and 39 of the Constitution and Article 17 of the African Charter, it is submitted that the Constitution did not specifically define what amounts to privacy, and the receipts of the unsolicited text messages does not constitute an infringement of the respondent's right to privacy as contemplated by Section 37 of the Constitution of Nigeria and that Section 37 of the Constitution does not guarantee that a citizen shall not receive unsolicited messages from communication Companies. That the respondent did not identify the nature of injury suffered by the receipt of such unsolicited messages. Also that the respondent need not respond or act on the messages, since he is at liberty to delete the said messages as soon as he received them.

Referring to the consumer code of practice regulations 2007 and the General Consumer Code of Practice which were made pursuant to the NCC Act, 2013, the appellant argued that the respondent was at liberty to request that his directory information should be excluded from the register of subscribers maintained by the appellant.

The appellant went further to submit that the trial Court did not give any consideration to the appellant's arguments that the respondent's complaints did not belong to fundamental rights enforcement procedure rules but contractual or tortuous action. That the trial Court's finding that the appellant infringed on the respondent's right to privacy is most erroneous as no such right is guaranteed under Sections 37 and 39(3) of the Constitution. He relied on **Adisa Vs Oyinwola (2000) 10 NWLR (part 674) 116 at 203 - 204; Peterside Vs I. M. B. (Nig.) Ltd (1993) 2 NWLR (part 278) 712 at 731 - 732; Alhaji Ibrahim Abdul Hamid Vs Tala Akar & Major G. Ofochie (2006) 13 NWLR (part 996) 127 and Unilorin Vs Oluwadare (2006) 14 NWLR (part 1000) 751 at 768.**

It is finally submitted on this issue that the right to freedom from receiving unsolicited text messages from 3rd parties is not among the rights guaranteed under chapter IV of the 1999 Constitution to allow the respondent maintain his claim as constituted before the lower Court under Fundamental Rights Procedure Rules.

On resolution mechanism stipulated under the Nigeria Communications Act, 2003, learned counsel for appellant submitted that the trial Court in dismissing the appellant's preliminary objection held that the Act did not lay down a particular procedure that the respondent must follow before coming to Court. He argued that the trial Judge did not categorically answer the question of whether or not the respondent's action was premature and did not also determine whether the Act stipulated certain conditions precedent to be fulfilled. He went on to submit that this failure of the trial Judge to determine has occasioned a miscarriage of justice. That the NCC Act requires exhaustion of grievances before recourse to Court. He referred to **Sections 104 and 105 of the NCC Act and Unilorin Vs Oluwadare (supra)** and argued that the submissions of the

appellant from the foregoing were completely disregarded by the learned trial judge as he did not make any pronouncement thereupon. Also referred is Section 41(1) of the General Consumer Code of Practice which he said required the respondent to make a written complaint to the appellant for resolution, but the respondent refused or neglected to invoke the clear dispute resolution mechanism stipulated therein which are all statutory conditions precedent to the institution of the action.

He said that failure of the respondent to invoke the statutory conditions rendered the action premature and robbed the Court of jurisdiction to entertain the matter. The Court was referred to **Adesola Vs Abidoiye (1999) 144 NWLR (part 637) 28 at 59; Madukolu Vs Nkemdilim (supra) and Nationwide Action Against Corruption & Anor Vs Econet Wireless Ltd & ors (Unreported) CA/A/10/2005.**

We are urged to resolve the issues in favour of the appellant.

In response to these submissions, the respondent submitted that it is trite, that in determining jurisdiction a Court looks exclusively at the originating processes of the Plaintiff or Applicant - **Mafimisebi Vs Ehuwa**

(2007) 2 NWLR (part 1018) 385 at 428 and Sokoto L. G. Vs Amale (2001) 8 NWLR (part 714) 224 at 240 - 241.

That the sole cause of action was identified in the respondent's main reliefs and the statement set out pursuant to Order 11 Rule 3 of the Fundamental Rights Rules and particularly paragraphs 16-24 of the Amended Affidavit in support of the application at pages 213-215 and 217 to 224 of the record which the appellant admitted in paragraphs 2.5, 4.2.2, 4.3.7 and 4.4.3 as the sole cause of action in its brief of argument.

It is submitted that the Constitution provided a special procedure for determining fundamental rights disputes pursuant to Section 37 of the 1999 Constitution and the enforcement of same. He referred to Section 46 of the 1999 Constitution which conferred special jurisdiction on the High Court, for anybody to seek redress in cases of violation of any of the provisions of his fundamental rights. That NCC not being a Court of Law lacks the jurisdiction to determine breaches of fundamental right to privacy in the use of telecommunications services - **N. U. T. Vs C. O. S. S. T. (2006) 5 NWLR (part 974) 590 at 610; Udene Vs. Ugwu**

(1997) 3 NWLR (part 491) 57 and Jim Jaja Vs C.O.P Rivers State and Ors (2013) 6 NWLR (part 1350) 225 at 244.

Referring to Consumer Code of Practice Regulations 2007, General Consumer Code of Practice Rules and the Nigerian Communication Act, it is submitted that the General Consumer Code recognizes right to privacy and on no ground service provider or have others send on their behalf unsolicited telecommunications messages. That the appellants violation is no excuse and contrary to the appellant's submission, the trial Court indeed read the entire NCC Act to come to a conclusion that the suit was properly commenced before it, thus conferring the Court with requisite jurisdiction on cause of action on the appellant's breach of the fundamental right to privacy of the respondent.

Submitting further, the respondent said the provisions of NCC Act relied upon by the appellant are strictly for suits founded on breaches of contract for services and torts under the Act in which case an aggrieved party would consider Sections 73, 74 and 75(1) of the NCC Act before going to Court. That a right conferred by the Constitution cannot be taken away except by the same

constitution. He relied on Section 1(1) and (3) of the 1999 Constitution and the case of **Aqua Ltd vs. Ondo State Sport Council (1988) NWLR (part 91) 622.**

The Court is urged to resolve in favour of the respondent.

The case of the respondent was that his private GSM Mobile Phone account with the appellant was flooded with unsolicited text messages by third party strangers with whom he has no relationship which amount to violation of his fundamental human right to privacy to his person and correspondence contrary to Sections 37 and 39(3)(a) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) and Section 1 and Articles 14 of the African Charter on Human and Peoples Right The respondent alleges that since the senders of the unsolicited text messages are unknown to him and the messages were received through the appellant's network, the appellant is responsible for disclosing his telephone number to these people without his consent.

The contention of the appellant is that the case of the respondent was not properly instituted under the Fundamental Rights Enforcement Procedure Rules as the respondent had no cause of action, and his case was rooted in contract and/or tort.

It is also the contention of the appellant that since the respondent believed that the use of the appellant's communication services and network violated his fundamental right to privacy, the High Court has no jurisdiction to determine the dispute. That the Nigerian Communication Act, 2003 provides that the resolution of disputes arising therefrom must be in accordance with the procedure prescribed thereon.

The respondent argued that the provision of the Nigerian Communication Act is strictly for suits founded on breaches of contract for services and torts under the Act, while Section 46 of the 1999 Constitution conferred jurisdiction on the High Court on violation of fundamental rights. That the right conferred by the Constitution cannot be taken away except by the Constitution. He referred to Section 1(i) and (3) of the Constitution.

In considering this appeal, it will not be out of place to reproduce the provisions of Sections 1(1) and (3) and 46 of the Constitution. Section 1(1) provides:

"This Constitution is supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria."

Section 1(3) reads:

"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 the inconsistency be void".

Section 46(1) reads

"Any person who alleges that any of the provisions of this chapter has been, is being or is likely to be contravened in any state in relation to him may apply to the High Court for redress".

Section 46(2) provides:

"Subject to the provisions of the Constitution, a High Court shall have Original jurisdiction to hear and determine any application made in pursuance of the provisions of this section and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement within that state of any right which the person who makes the application may be entitled under this chapter."

The argument of the learned counsel for the appellant that in the circumstance of this case, the application for enforcement of fundamental right cannot lie directly to the High Court without exhausting the

procedure as laid down in the Nigerian Communication Act will not hold. This is because of the supremacy of the constitution over the Nigerian Communication Act, the provisions of the Act cannot apply to defeat the original jurisdiction of the High Court under Section 46(2) of the 1999 Constitution or to prevent an application to enforce fundamental right brought in the exercise of the right given to a person under Section 46(1) of the 1999 Constitution.

As rightly submitted by the respondent, a right vested on a person by the Constitution cannot be taken away by an Act of National Assembly or any other Law. See **Aqua Ltd Vs Ondo State Sports Council (supra)**. A jurisdiction vested by the Constitution cannot be curtailed or ousted by any other law. See **Western Steel Works Ltd & Anor Vs Iron & Steel Workers Union of Nigeria & Ors (1982) 2 SCN 1 and Nigerian Army Vs Yakubu (2013) 2 SCNJ 268** where the Supreme Court held that where jurisdiction is conferred on Court by the Constitution, such jurisdiction is not subject to the whims of any other quasi-judicial body or outfit.

It follows therefore the right vested by Section 46 (1) of the 1999 Constitution can be exercised to seek redress for violation of any fundamental rights guaranteed by Chapter IV of the 1999 Constitution. The trial Court therefore rightly exercised its special jurisdiction conferred on it by Section 46(2) of the 1999 Constitution when it entertained and determined the matter. See **Denton - West Vs Jack and Ors (2013) 5 SCNJ 748** where the Supreme Court held that the jurisdiction of the High Court under Section 46 to enforce fundamental human rights can be exercised irrespective of where the contravention or threat of contravention arose.

The case of Nationwide Action against Corruption & Anor vs. Econet Wireless Ltd & Ors (supra) relied by the appellant is inapplicable in this case as the provision of Section 46 of the 1999 Constitution which conferred special jurisdiction on the High Court was not invoked and the relationship between Section 46 of the 1999 Constitution and the Nigerian Communication Act was not considered by the Court.

However by the provision of Section 75(1) of the Nigerian Communication Act No. 13 of 2003 it is not mandatory for a party to a dispute from the use of communication

services and network to refer to the commission. The party has a choice to refer to the commission or pursue another means. As the appellant did not choose to have the dispute resolved by the commission, Sections 86, 87 and 89 of the Nigerian Communication Act made specifically for disputes resolution by the commission are inapplicable to this case. So the submission of the appellant that the respondent did not resort to dispute resolution before approaching the Court will also not hold.

Section 37 of the Constitution under which the respondent instituted the action at the lower Court provides:

"The privacy of citizens, their homes, correspondence, telephone conversations and telegraphic communications is hereby guaranteed and protected."

Contrary to the submissions of the appellant, the respondent suit was properly initiated before the trial Court under Sections 37 and 39 of the Constitution.

The respondent in his affidavit in support of the application deposed in the following paragraphs as follows:

Paragraph 5: ***"That I am a customer to the Respondent by virtue of my subscription in 2010 to an Etisalat GMS Mobile prepaid phone line with***

account number 08194927963 which was subsequently registered in my name sometime in 2011 and is also in daily use."

Paragraph 7: "That I, within the duration of my use of the above Etisalat GSM Mobile prepaid phone line with number 08184921963, began to and continue to receive text messages from strange bodies and organizations sending commercial adverts and other similar messages, Computer print-out of the remaining, undeleted such text messages are hereto attached and marked Exhibits B1 - 67."

Paragraph 8: "That on the 17th day of August, 2013 at 04:28 am text message from sort code 30046 telling me that my subscription to FOOTBALL NEWS was successfully renewed. The said message is already attached and marked as Exhibit B46."

Paragraph 9: "That I never subscribed to any said sort code 30046 for any sports news and live, till date, never subscribed to anyone nor sort code to receive any sports news whatsoever through any medium of communication."

Paragraph 10: "That on the same 17th day of August, 2013 at 07.35 am when I was fully awake I sent an angry message to sort code 30046 to stop sending me unsolicited messages on football."

The said message is hereto attached and marked as Exhibit C."

Paragraph 11: ***"That minutes later and thenceforth, I have received a total of 32 sports adverts and messages including from sort cord 90046 itself. The said messages are already attached and marked according to their dates from thence as Exhibits B45, 43, 42, 41, 40, 39, 38, 35, 34, 33, 31, 30, 29, 28, 26, 25, 24, 22, 21, 19, 16, 14, 13, 11, 10, 9, 8, 7, 3, 2 and 1."***

Learned counsel for the appellant submitted that the unsolicited messages do not constitute an infringement of the respondent's right to privacy to entitle the respondent commence an action under the Fundamental Rights Enforcement Procedure Rules. The appellant in paragraph 3 of its counter affidavit deposed:

"I have reviewed the Applicant's affidavit sworn on 28th October, 2013, in support of the application for the enforcement of his fundamental rights and know as of fact that the respondent is not in a position to deny or admit paragraphs 1, 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 and 14 of the said affidavit."

In paragraph 8 of the affidavit in support reproduced above, it is only the appellant that is in a position to renew

the subscription for football news. The appellant's deposition in paragraph 3 of its counter affidavit which is not a denial or admission recognized by law, it is my view that renewal of the subscription for football news can only be referred to the appellant as having renewed same.

The affidavit of the respondent and the documentary evidence emanating from the appellant had clearly shown that despite the angry message sent by the respondent to sort code 30046 to stop sending him unsolicited messages, it continues to send unsolicited text messages to the respondent.

The Consumer Code of Practice Regulations, 2007 and the General Consumer Code of Practice Rules, particularly Rule 14(1) (b) (2) and (3) require the appellant to maintain a Directory enquiry facility containing information of all its subscribers in Nigeria and allow access to same by 3rd parties subject to the prior notification of the subscriber.

The appellant did not produce any evidence to show that the respondent subscribed to the unsolicited text messages nor show that it notified the respondent before giving access to his line to the senders of text the messages.

In essence, paragraph 3 of the counter affidavit of the appellant avoided answering specific deposition in the respondent's affidavit concerning its provision of Bulk SMS service to organizations and persons by which they have entry into the phone line of a subscriber without first notifying the subscriber or obtaining his consent.

It is my view that by giving those unknown persons and organizations access to the respondent's Etisalat GSM phone number to send unsolicited text messages into it, amount to violation of the respondent's right to privacy guaranteed by Section 37 of the Constitution, which includes the right to the privacy of a personal's telephone line. See **Nwali vs. EBSIEC & ors (2015) 2 CAR 477 at 508 - 510.**

In the light of all that has been said above, issues 1, 2, and 3 are resolved in favour of the respondent and against the appellant.

ISSUE FOUR

"Whether the evidence adduced by the Respondent supported the findings and conclusions made by the learned trial judge."

This issue has become academic in view of the foregoing.

However I will only add by saying that I am in agreement with the learned trial judge when

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he stated in his judgment at page 610 of the record thus:

"Similarly on the issue of proof, uncontroverted averments of the applicant's paragraphs, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22 and 23 respectively shows that the applicant has proved his claim against the respondent."

Issue four is also resolved in favour of the respondent and against the appellant.

ISSUE FIVE

"Whether in the entire facts and circumstances of this case, the sum of N8,000,000.00 (Eight Million Naira) awarded in favour of the Respondent as damages is justifiable."

The submission of the appellant was that given the entire facts and circumstances of this case, the sum of N8,000,000.00 (Eight Million Naira) awarded to the Respondent was absolutely unjustifiable as the respondent did not prove his case before the lower Court and the trial Court racked jurisdiction to have entertained it. That even if the respondent had proved his case the sum of N8,000,000.00 awarded as damages was excessive and arbitrary.

It is argued for the appellant that the respondent did not adduce evidence of damages suffered, to warrant the grant of an enormous

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amount in damages. Relying on **Benson vs Ashiru (1967) 1 All LR 184 and Agbanelo Vs U.B.N Ltd (2000) 7 NWLR (part 666) 534 and Nikon Hotels Vs N.D.C Ltd (2007) 13 NWLR (part 1051) 271 - 272**, it is submitted that in the award of damages, the Court cannot afford to be a father Christmas and base awards of general damages on sentiments.

That the N8,000,000.00 awarded as damages in favour of the respondent was arbitrary, excessive erroneous and unjustifiable.

We are urged to so hold and allow the appeal.

For his part, the respondent, relying on **Akinde Anor Vs. Access Bank Plc & Anor (2014) LPELR - 22857**, submitted that under the fundamental rights rules, once an applicant proves that his right to liberty had for instance being infringed, the Court is entitled to award compensation on liberal terms to the injured party against the party at fault without recourse to common law principles on award of damages. Also referred is the case of **Jim Jaja Vs C.O.P Rivers State & Ors (supra) at 244**.

It is finally submitted that the damages awarded to him are justified under the common law principles.

The respondent did not raise any new issue for appellant to file a reply brief. The reply brief is discountenanced for being repetitive of what has been canvassed in the main brief.

Exemplary damages are awarded with the object of punishing the defendant for his conduct in inflicting injury on the plaintiff. They can be made in addition to normal compensatory damages and should be made only:

- a) In a case of oppressive, arbitrary or unconstitutional acts by government, servants;
- b) Where the defendant's conduct had been calculated by him to make a profit for himself, which might well exceed the compensation payable to the plaintiff, and
- c) Where expressly authorized by statute -**CBN Vs Okojie (2015) 14 NWLR (part 1479) 231 at 242 - 243. See also Lagos State Vs Ojukwu (1986) 1 NWLR (part 18) 621 and Alele - Williams Vs. Sagay (1995) 5 NWLR (part 396) 441.**

For exemplary damages to be awarded, it need not be specifically claimed, but facts to justify it must be pleaded and proved. Thus, once facts in the pleadings support the award of exemplary damages, the Court should award it since the adverse party is in no way taken by surprise. See **Calabar East C.T.C.S Vs Ikot (1999) 14 NWLR (part 633) 225.**

In the instant case, notwithstanding that the exemplary damages was claimed, it arose from the action of the appellant accessing the respondent's mobile number to strangers to be sending unsolicited text messages to the respondent and also through the appellant's sort code number 30046 where the respondent's subscription to Foot Bail news was texed to have been successfully renewed when the respondent said he never subscribed to Foot bail news. The respondent pleaded and proved facts, for example Exhibit B1-B67 are the unsolicited text messages sent to the respondent by strangers that are unknown to him. Exhibit B46 is the text message from sort code 30046 sent at 4.28 am telling him that his subscription to Football news was renewed.

A text message sent to sort code 30046 by the respondent to stop sending him unsolicited messages on football did not stop but was rather responded by sending him 32 sports adverts and messages within minutes after he had sent the message. These facts pleaded and proved by the respondent were not controverted by the appellant.

It is my view the act of the appellant constitute a violation of the respondent's fundamental rights to privacy and to the privacy of his telephone line which entitled him to the award of damages.

Damages are awarded at the discretion of the trial Court, and so an appeal Court is reluctant to interfere with how the trial Court exercises its discretion unless:

- a) The exercise is tainted within illegality or substantial irregularity.
- b) If it is in the interest of justice of interfere.
- c) The discretion is wrongly exercised. See **C.B.N vs. Okojie (supra) and University of Lagos vs. Aigoro (1985) 1 NWLR (part 1) 43 and Salu Vs Egeibon (1994) 6 NWLR (part 349) 23.**

An appellate Court would also interfere when it is satisfied That:

- a) The trial Court acted under a mistake of law; or
- b) The trial Court acted in disregard to some principles of law;
- or
- c) The trial Court acted under a misapprehension of facts;
- or
- d) The trial Court took into account irrelevant matters or failed to take into account relevant matters, or
- e) Injustice would result if the appellate Court does not interfere, or
- f) The amount awarded is either ridiculously low or ridiculously high, that it must

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have been a wholly erroneous estimate of the damages - **British Airways vs. Atoyebi (2014) 13 NWLR (part 1424) 253 at 265 - 266; African Newspapers (Nig.) Plc vs. Useni (2015) 3 NWLR (part 1447) 464 at 475 - 476 and Guardian Newspapers Ltd vs. Ajeh (2011) 10 NWLR (part 1256) 574.**

I agree with the respondent that his right to privacy and for the privacy of his telephone has been infringed. However the award of N8,000,000.00k damages is too high. In that view, we feel obliged to interfere. The award should be reasonable having regard to the circumstances of the case.

In our considered view, the amount respondent is entitled to by way of exemplary damages is assessed at N1,000,000.00k (One Million Naira) only. The cost of litigation in the sum of N100,000.00 awarded by the trial Court for the respondent is affirmed.

Issue five is resolved in favour of the appellant.

In conclusion, the appeal succeeds in part by way of reduction of the award of N8,000,000.00k as exemplary damages for sending unsolicited text messages to the respondent's phone line without his consent. The award of N8,000,000.00 is hereby set aside.

The appellant shall pay the respondent the sum of N1,000,000.00k (One Million Naira) for violation of his fundamental right to privacy as guaranteed by Section 37 of the Constitution of the Federal Republic of Nigeria.

Parties to bear their costs.

ABUBAKAR DATTI YAHAYA, J.C.A.: I have read in advance the leading judgment of my learned brother Hasan JCA just delivered. The Issues have been well resolved and I entirely agree.

PETER OLABISI IGE, J.C.A.: I agree.

Appearances:

Ogechi Abu with him, Peace Adeoye **For Appellant(s)**

G.N. Eenyee **For Respondent(s)**

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