THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY

HOLDEN AT ABUJA

THIS WEDNESDAY, THE 19TH DAY OF APRIL 2023

BEFORE: HON. JUSTICE ABUBAKAR IDRIS KUTIGI – JUDGE

SUIT NO: FCT/HC/CR/310/18
MOTION NO: M/2873/2022

BETWEEN:

THE FEDERAL REPUBLIC OF NIGERIA .....COMPLAINANT

AND

MUHAMMAD DANGANA .....DEFENDANT

RULING

By a Notice of Preliminary Objection dated 11th March, 2022, the Defendant/Applicant prays for the following Reliefs:

a. **An order that this Honourable Court lacks the requisite jurisdiction to arraign and try the Applicant for the offences alleged in the 16 count charge or any charge in respect thereof before this Honourable Court.**
b. **An order that the Economic and Financial Crimes Commission has no powers to investigate and prosecute the Applicant over funds belonging to the Economic Community of West African States (ECOWAS) Commission.**
c. **An order that the filling of this charge No: CR/310/18 against the Applicant before this Honourable Court is an abuse of court process.**
d. **And for such further orders as this Honourable Court may deem it fit to make in the circumstances.**

The Grounds of the objection as streamlined on the objection are as follows:

1. **That at all material time to the filing of this charges, the Applicant was a staff of the ECOWAS Commission.**
2. **When acts constituting infractions under Article 70 of the ECOWAS Staff Regulation are brought to the attention of the President of the ECOWAS Commission (sic) shall set up a Disciplinary Advisory Board in accordance with the provisions of Article 67 of the ECOWAS Staff Regulation with the responsibility to investigate most serious cases in the event of embezzlement, theft, breach of trust prejudicial to the interests of the ECOWAS, fraud or corruption.**
3. **In this instant case of the Applicant, the procedural steps laid down in Articles 67-71 of the ECOWAS Staff Regulation was not adhered to. No query was issued to the Applicant, he was not given opportunity to make written statements in respect thereof, no relevant committee or disciplinary board was set up to evaluate the allegations for the Applicant to respond before filing the charges before this Honourable Court.**
4. **The law is trite that where a law or rule expressly provides for certain actions to be carried out as a precondition before reaching any conclusion or action in court, failure to adhere to such stipulated preconditions renders that act void and of no effect.**
5. **Thus, the unilateral referral of the alleged infractions of the Applicant to the EFCC constitutes a gross violation of the extant rules and Regulations governing ECOWAS Staff.**
6. **By paragraph 4 of Article 60 of the ECOWAS TREATY and the Preamble to the Protocol Relating to the General Convention on Privileges and Immunities of ECOWAS, the Applicant, as an official of the Community and in a Member State as at the time of the alleged offence, enjoins (sic) the privileges and immunities accorded to diplomatic persons at the Headquarters of the Community in the Member State. Thus, the actions carried out by the EFCC prior to and in bringing these charges against the Applicant are in clear violation of the ECOWAS Treaty and the Protocol**

Relating to the General Convention on Privileges and Immunities of ECOWAS as it affects the Applicant.

7. **The funds allegedly constituting the offences stated in the charge No: CR/310/18 belongs to the ECOWAS Commission and not the Federal Government of Nigeria, therefore, the alleged infractions did not violate any existing legislation governing economic activities of the government and its administration or constitutes any form of corrupt malpractices to entitle the EFCC to investigate and prosecute the alleged offenders.**
8. **The filing of this case in Charge No: CR/310/18 against the Applicant, which involves alleged diversion for personal use of the funds belonging to ECOWAS Commission, constitutes abuse of court process because of the earlier and subsisting case filed against the Applicant in Charge No: FHC/ABJ/CR/139/2018 which also involves alleged money laundry (sic) of the same funds belonging to ECOWAS which arose from the same facts and circumstances."**

The application is supported by a 10 paragraphs affidavit with 4 annexures marked as **Exhibits A, B, B1 and C.** The application was also supported by a written address in which one issue was raised as arising for determination:

"Whether having regard to the entire circumstances of this Charge No: CR/310/18, this Honourable Court has the requisite jurisdiction to arraign and try the Defendant of the offences alleged in the charge."

Submissions were then made under **four subheads** which forms part of the Record of Court. I will highlight in summary the essence of the submissions as made out. **Firstly**, the Defendant contends that there is non-compliance with a condition precedent to filing of the extant charge. It was submitted that at the time of the filing of the charge, the Defendant was the Executive Assistant of the ECOWAS Financial Controller and that by the ECOWAS staff Regulations, applicable to the Defendant, the President of the ECOWAS Commission shall set up a Disciplinary Advisory Board in accordance with the provision of **Article 67 of the ECOWAS Staff Regulations** with the responsibility to investigate most serious cases in the event of embezzlement, theft, breach of trust prejudicial to the interest of ECOWAS, Fraud or Corruption which are the categories of the offences alleged

against the Defendant in the extant charge. The Court was referred to **Articles 67-71 of the Staff Regulations** vide **Exhibit B** particularly **Article 69(e)-(n)** which specifically provides for steps to be taken where allegations of serious offences are made against a staff of ECOWAS as in this case which was not observed before the filing of this charge.

The court was equally referred to **Exhibit B1,** the decision of the **Community Court of Justice of ECOWAS** in OPINION NO: ECN/CCJ/ADV.ODN/01/16 delivered on 6th December, 2016 in Abuja which emphasised on the need for the commission to set up a Disciplinary Advisory Board to investigate most serious offences in the event of embezzlement, theft, breach of trust prejudicial to the interest of the community, fraud or corruption before taking any further steps against the staff. It was submitted that this decision of the ECOWAS Court support the contention that the condition precedent before the filing of this charge was not met and thus robbed the court of jurisdiction to entertain the case.

It was further submitted that the law is settled that where a law or rule expressly provides for certain actions to be carried out as a precondition before an action is taken, that failure to adhere to such stipulated precondition(s) renders the act void and of no effect. The cases of **Garba V. Nigerian Army & Ors (2019)LPELR-4390(CA); Okafo-Onyilo V. NYSC & Ors (2020)LPELR-5182 and Sowemimo & Anor V. The State (2004) LPELR-3158(SC)** were cited.

The **second subhead** dealt with Defendant's diplomatic immunity. It was contended that **paragraph 4 of Article 60 of the ECOWAS Treaty and the Preamble of the Protocol** relating to the General Convention on priviledges and immunities of ECOWAS provides to the effect that the Applicant as an official of the community and a member state as at the time of the alleged offence enjoys the priviledges and immunities accorded to diplomatic persons at the Headquarters of the community in the member state.

It was submitted that the actions carried out by EFCC prior to and in bringing these charges against the Applicant are in clear violation of the ECOWAS Treaty and Protocol relating to the General Convention on Priviledges and Immunities of ECOWAS as it affects Applicant, making the charges against him incompetent.

The court was referred to **Article 7(3) (a) and (b) of the ECOWAS Protocol to the General Convention on Priviledges and Immunities of ECOWAS** and it was contended relying on this provision that the Counts/Charges or allegations against the Applicant in the extant charge concern offences against the funds of ECOWAS Commission by the Defendant, been then an Executive Assistant of the Financial Controller of ECOWAS and accordingly that the actions of EFCC in investigation, interrogating and bringing these charges violates the Defendant/Applicant's Priviledges and Immunities accorded to him in a member state at the time of filing the charge. The cases of **African Reinsurance Corp V. Fantaye (1986) LPELR-214 (SC) and President of the Commission of ECOWAS V. Ndiaye (2021)LPELR-53523 (CA)** were cited.

The **third sub-head** is that the EFCC lacks the powers to investigate and prosecute offences relating to the funds of the **ECOWAS Commission**. It was submitted that the funds constituting the offences stated in the extant charge belongs to the ECOWAS Commission and not the Federal Government of Nigeria, therefore the alleged infractions did not violate any existing legislation governing economic activities of the Government and its administration or constitutes any form of corrupt malpractices to entitle EFCC to investigate and prosecute the alleged offender.

It was further submitted that by **Section 46 of the EFCC Act, 2004, the Financial Crimes that the EFCC** can investigate is not at large as to include every conceivable criminal offence. That on the basis of **Section 46 of the EFCC Act,** the funds belonging to ECOWAS Commission is not the funds of the Nigerian Government for which EFCC is an agent and offences committed against such ECOWAS funds cannot be said to violate any legislation governing economic activities of the government and its administration. That the ECOWAS Commission is not a Department of government of any member state or its administration. The case of **Dr. Joseph Nwobike SAN V. FRN SC/CR/161/2020** was referred to.

That following this decision of the **Apex Court**, it was submitted that the funds of the ECOWAS Commission allegedly misappropriated or diverted is clearly not the funds of the Government or its administration and there is nothing in the 16 counts charge to suggest that the alleged actions of the Defendant violates any existing

legislation governing the activities of the Government or its administration. That the economic activities of the ECOWAS Commission cannot be said to be the same with the economic activities of the government to entitle the EFCC to investigate and prosecute its breach.

The **fourth and final sub-head** is that the extant charge is an abuse of the process of court. It was contended that the filing of the present charge which involves alleged diversion for personal use of the funds belonging to ECOWAS Commission, constitutes an abuse of process because of the earlier and subsisting case filed against Applicant at the Federal High Court in charge **No: FHC/ABU/CR/139/2018** which also involves alleged money laundering of the same funds belonging to ECOWAS Commission which arose from the same facts and circumstances. That filing both charges by the same institution against the **same Defendant** about the same funds, facts and circumstances constitutes an abuse of process and liable to be struck out. The cases of **Tonga V. State (2017)LPELR-43327 (CA), and Nweke V. FRN (2019)LPELR-46946 (SC); Olakehinde V. EFCC (2020)LPELR-50246 (CA)** were cited.

The court was then on the basis of the above submissions urged to grant the application and hold that it lacks the requisite jurisdiction to arraign and try the Defendant of the offences in the charge.

The **Complainant/Respondent** in opposition filed a 5 paragraphs counter-affidavit with three (3) annexures marked as **Exhibits A, B and C.** The counter-affidavit is supported by a written address in which 4 issues were raised as arising for determination as follows:

"

1. **Whether the Federal Republic of Nigeria has the jurisdiction to prosecute offences committed in Nigeria.**
2. **Whether the Defendant is immune from prosecution for offences committed in Nigeria.**
3. **Whether by virtue of the provisions of the ECOWAS treaty and staff regulations, ECOWAS must first internally deal with any criminal complaint against any of its staff before it can refer to an external body for investigation.**

4. **Whether the filing of this charge against the Defendant before this court amounts to an abuse of Court process."**

The submissions on the above issues equally form part of the Record of Court. I will here too highlight in summary the essence of submissions as made out on the above issues.

On **issue 1,** it was submitted that a fundamental principle in criminal law and criminal prosecution is that trial of offences are territorial and that Courts in jurisdictions where offences or part of offences complained of are committed are vested with jurisdiction to try the alleged offences. The case of **James O. Ibori & Anor V. FRN & Ors (2008) LPELR-8370 (CA)** was cited.

That the A.G. of the Federation under **Section 174 and 211 of the 1999 Constitution** has the powers to institute criminal proceedings against a Nigerian citizen at all times in Nigerian Courts except under a few exceptions under **Section 308 of the 1999 Constitution.**

The address then dealt at length with the remit of the powers of the EFCC to investigate economic and financial crimes and it was contended that on the authorities of our courts, the charge the Applicant is facing relates to economic and financial crimes over which the EFCC has powers to investigate and prosecute such crimes pursuant to **Section 46 of the EFCC Act.** The cases of **Emmanuel Ahmed V. FRN (2009)LPELR-8895(CA); Dr. Aloysius Ozah V. EFCC & Ors (2017)LPELR 43386 (CA) and Orji Uzor Kalu V. FRN & Ors (2012)LPELR 9287 (CA)** were cited.

It was further submitted that the Economic Crimes for which the Defendant is being tried for were perpetrated through a channel, Nigerian Banks which are under the exclusive control and supervision of the Federal Government of Nigeria through the Central Bank of Nigeria. The Respondent argued that the case of **Joseph Nwobike SAN V. FRN (supra)** relied on by Applicant must be distinguished with the present case. That in the case of the SAN, the Supreme Court tried to make a distinction between an economic crime and a non-economic crime for which the EFCC will have no jurisdiction to prosecute and held that an attempt to pervert the cause of justice under **Section 97(3) of the Criminal Law of**

Lagos does not amount to an Economic Crime for which EFCC will have jurisdiction to investigate and prosecute.

It was finally submitted that the Economic crimes the Defendant is standing trial in this court were committed in Nigerian soil through channels under the exclusive control of the Federal Government and as such the Federal Government through the EFCC has the requisite jurisdiction to prosecute Defendant for the alleged offences.

On **issue 2** relating to diplomatic immunity, the address commenced with a general background and applicability of Diplomatic Immunity. That Diplomatic Immunity basically covers foreign Diplomats who are in the soil of another country on official or national assignment which could result from membership of an international organization. That the protected diplomats are immune from any court action in the host country's state.

It was submitted that the Diplomatic Immunities and Priviledges Act 1962, vide **Section 11** makes clear provisions for persons, authorities, organizations and bodies who are entitled to immunity in Nigeria and that under **Section 11(3) of the same Act,** the Defendant being a Nigerian citizen enjoys no such immunity. The court was referred to **Section 18 of the Act** which provides that in any proceedings where any question arises as to whether or not any organization is entitled to immunity from suit and legal process under any provision of this Act, or any regulations made under this Act, a certificate issued by the Minister stating any fact relevant to that question shall be conclusive evidence of that fact. That in the case of **President of the Commission of Economic Community of West African States V. Babacar Ndiaye (2021) LPELR-53523 (CA),** the ministry of foreign affairs issued a certificate reaffirming the status of the ECOWAS commission as an international organization and the immunity and Priviledges of the commission and its staff members with the exception of Nigerians and holders of Nigerian permanent residency who do not enjoy immunity from criminal, civil and administrative proceeding.

It was submitted that the Defendant did not furnish any certificate as proof that he enjoys immunity.

It was also contended that if at all, there was any immunity, **Section 15 of the Act** allows any organization or person to waive the immunity. That the immunity applicant claims to enjoy derives from his association with ECOWAS who are the nominal complainant in this case. That the petition written by ECOWAS to investigate some of the irregular transactions by some of its staff including Applicant amounts to a waiver of any such immunity, if at all it even exists.

On **issue 3,** it was contended that there is no condition precedent that must be fulfilled under any ECOWAS law before actions of this nature can be filed. It was contended that **Article 69 of the ECOWAS Staff Regulations** provide for disciplinary procedure within the community. However that **Article 68** of the same Regulations provides for situations where criminal charges are initiated against staff members of ECOWAS. That Article 68(c) specifically provides that **"where a staff member is accused or charged to court for a serious offence, he shall be suspended with half pay."**

It was contended that the distinction between the provisions of **Articles 68 and 69** which the Defendant/Applicant relies on to support his argument that a supposed condition precedent has not been followed before instituting this action does not support his argument.

Firstly, it was submitted that **Article 68** envisages where a staff member is charged with a criminal offence whereas **Article 69** envisages the condition precedent before a staff member is summoned before the disciplinary committe established under **Article 67**. That the instant charge is before a court of law and not the disciplinary committee of ECOWAS.

It was further submitted that there is no ECOWAS law that precludes the community from referring criminal activities within the community to another competent authority for investigation and possible prosecution. That the wordings of **Article 68** is not restrictive and does not provide for any steps to be taken by the ECOWAS community before criminal proceedings can be instituted against a staff member in court.

It was further contended that the reference to the opinion of the community court of justice on the need for the commission to set up a disciplinary advisory board is only an opinion which does not amount to law or a judgment of the court which

could be clothed with the force of law. Finally on this point, it was submitted that no condition precedent exists to prevent the investigation and prosecution of the Defendant.

On the final **issue 4,** it was submitted that the extant charge does not constitute or amount to abuse of process. That the charge preferred at the Federal High Court and the extant charge shows a clear difference in the offences. That the Federal High Court is clothed with exclusive jurisdiction to try offences relating to money laundering and as such the charge could not have been filed here. The court was referred to **Section 20 of the Money Laundering Act, 2011** and the cases of **FRN V. Nasir Yahaya (2015) LPELR-24269(CA).** The court was urged to dismiss the preliminary objection.

The Defendant/Applicant filed a 9 paragraph further affidavit with two annexures marked as **Exhibits FA1 and FA2.** A Reply on points of law was also filed which essentially sought to accentuate the points earlier made. No purpose will be served repeating the points or submissions. The address however forms part of the Record of Court and I shall, where necessary, in the course of this Ruling, refer to the submissions made.

At the hearing of the **preliminary objection**, Mohammed Ndayako SAN of counsel for the Defendant/Applicant relied on the paragraphs of the two affidavits Applicant deposed to and the annexures and adopted the submissions in the written address and Reply on points of law in urging the court to decline jurisdiction to entertain the extant charge; whilst on behalf of the Complainant/Respondent, Itienbong Usoro of counsel relied on the paragraphs of the counter-affidavit together with the annexures and adopted the submissions in the written address in urging the court to discountenance the preliminary objection and assume jurisdiction.

I have carefully read the processes filed on both sides of the aisle along with the oral submissions made in addition. The important issue raised has to do with whether this court has the requisite competence to entertain the extant charge against the Defendant. In resolving the question, I will treat each of the subheads identified by the Applicant which, even if differently worded, forms the substance of the issues streamlined or identified by Complainant/Respondent as arising for determination.

Now, the pre-eminent status or stature of jurisdiction in the scheme of legal proceedings is well ingrained in our jurisprudence. Jurisdiction is very important and indispensable in the administration of justice. It is the hub of all judicial processes so much that the validity or otherwise of any proceedings turns on its existence or non existence. It cannot be toyed with by either the party or the court because without jurisdiction which is a threshold issue, the entire proceedings and whatever the final order(s) of such proceeding will be futile, invalid, null and void, however brilliantly and excellently they may have been conducted. See **Elugbe V. Omokhafe (2004)18 NWLR (pt.905)319; Okoro V. Egbuoh (2006)15 NWLR (pt.1001) 1 at 23-24; Uti V. Onoyiwe (1991)1 SCNJ 25 at 49.** It is therefore fair and indeed imperative for this court to be reasonably assured that it has jurisdiction to entertain and determine this charge and that its jurisdiction is not impaired in any way before going further in the proceedings, if at all it will go further.

What constitutes the critical components of jurisdiction and when a court is competent was long captured in the celebrated case of **Madukolu V. Nkemdilim (1962)1 AII NLR 587 at 595** as follows:

"A Court is competent to adjudicate when –

(a) It is properly constituted as regards numbers and qualifications of the members of the bench, and no member is disqualified for one reason or another; and

(b) The subject matter of the case is within its jurisdiction and there is no feature which prevents the court from exercising its jurisdiction; and

(c) The case comes before the court initiated by due process of law and upon fulfillment of any condition precedent to the exercise of jurisdiction.

Any defect in the competence of the court is fatal and the proceedings however well conducted and decided are a nullity as such defect is extrinsic to the adjudication.

I had earlier set out the **sub-heads** on which the preliminary objection is predicated. The first ground has to do with the alleged non-compliance with the condition precedent to filing the charge. I need not repeat the submissions but this essentially calls for an interpretation, application and remit of the **ECOWAS Staff**

Regulations. The case of Applicant is that the Complainant failed to fulfill a condition precedent in the regulations or abide by defined delineated parameters before the charge was filed which is a feauture preventing the court from exercising jurisdiction. Here, it would appear that the second and third limbs of the **Madukolu V. Nkemdilim** tripod that are of immediate relevance here.

In evaluating this complaint, we must take our bearing from the **Regulations** which appears to be the pivot on which this ground is based. Now one of the accepted canons of interpretation which we can conveniently make use of in the circumstances is that where words of a statute are clear, plain and unambiguous, the courts usually give effect to their literal meaning. Therefore it is the duty of the court to ascertain the meaning of words used by reading them in their ordinary grammatical sence and to give effect to them unless such construction would lead to some absurdity or would be repugnant to the intention to be collected from parts of the statute.

It is also an accepted canon of interpretation that the enactment must be read as a whole. In seeking the interpretation of a particular section of a statute, the court does not take the section in isolation but as part of a greater whole. Therefore the court has no jurisdiction to interpret the clear and unambiguous words of a statute beyond their clear and unambiguous meaning or place onerous weight or burden on the otherwise clear and unambiguous provision. See **Ifekwe V. Madu (2000)14 NWLR (pt.688)459 at 479F; A.G. Lagos V. A.G Federation (2003)14 NWLR (pt.833)1 at 186-187H-B.**

In this case, it is common ground that the **Defendant** was the **Executive Assistant of the ECOWAS Financial Controller** at the time the extant charge was filed. The ECOWAS Staff Regulations annexed as **Exhibit B** to the affidavit in support, provides generally for principles of staff employment and lays down **"general conditions of employment and set forth the rights, obligations and Priviledges of its staff"** vide Article 1**.** It is safe to say that these regulations forms part of the basis for the mutual reciprocity of legal obligations between **ECOWAS** and its **staff** and they are all bound by the terms.

Now **Chapter X111 of the Regulations** provides for **discipline**. We must give close scrutiny to this chapter. **Article 67(a)** provides that each Institution shall appoint disciplinary board to consider infractions by staff under **Article 70(a)** and

(b) and also situates the membership of the board under **Article 67(c)-(e).** Under **Article 70(a)** and (b) the Regulations then streamlines or defines the nature of the **infractions** for which a disciplinary board must be set up. We are not concerned with the offences under **Article 70(a) and (b).**

Article 67(b) then provides that a **Joint Disciplinary Board** shall be set up by the Executive Secretary for the whole community in consultation with the other heads to hear all **infractions** under **Article 70(c)** of these Regulations.

Article 70(c) then situates the offences for which a **Joint Disciplinary Board** shall be set up. The offences under **70(c) (i-iv)** are as follows:

(c)The following offences shall attract the sanctions set out in Article 71(c) of these Regulations (third degree):

(i) Embezzlement, theft, abuse of trust detrimental to the interests of the Community;

(ii) Fraud, bribery;

(iii)Assault and battery on the person of a colleague or superior officer;

(iv)Fighting within the premises of the Institution.

When the above **offences** are juxtaposed with the **offences** in the **extant 16 counts** charge against Defendant, it is obvious that they undoubtedly come within the purview of the offences under **Article 70(c) (i)** and **(ii)** above: if that is the position as found, it follows that as a logical corollary, a Joint Disciplinary Board **shall**, be set up, in consultation with other heads of institutions to hear the infractions under **Article 70 (c)** and by implication, the offences forming the crux of the extant charge in this court.

Article 67(b)-(f) provides for membership of this Joint Disciplinary Board and the operational remit of the Board. The word **"shall"** appears in each of **Article 67(a),(b), (c), (d), (e)** and **(f)** to convey the distinct message that the actions to be taken in respect of this Article 67 must obey or fulfill the mandate exactly. The repeated use of the word **"shall"** in each of the sub clauses of **Article 67** does not situate that the word was used in a directory sence or that discretion could be exercised.

In law, the word "**shall"** is a word of command or a mandatory word. It denotes obligation and gives no room to discretion. It imposes a duty. See **Environmental Dev. Construction & Anor V. Umara Associates Nig. (2000)4 NWLR (pt.652)293 at 303.**

There is no doubt that it is not always that a court of law would interpret the word **"shall" or "must"** as mandatory. The court must look at the context in which the word is used to arrive at an interpretation which best meets the intention of the legislature or law maker. See **Chief Andrew Monye V. Presidential Task Force on Trade Malpractice (2002)15 NWLR (pt.789)209 at 222**

Reading the entire **Article 67(a)-(f)** and reading the whole regulations especially on matters of discipline, the construction to be gathered from construing the word **"shall"** which was repeatedly used in the Article and within the context of their intendment and import within the enactment implies that it be used in a mandatory sence. As stated earlier, I incline to the view that the action to be taken must obey or fulfill the mandate of the Regulations exactly which is the setting up of a Joint Disciplinary Advisory Board to look into the infractions under **Article 70(c)** which are also infractions forming the very foundation of the extant charge. It is thus obvious that in the extant case, there was absolutely no compliance with **Article 67(b)-(f) of the Regulations.**

Article 69 of the Regulations then provides in great details the parameters of the Disciplinary Procedure. For purpose of the offences covered by **Article 70(c),** the disciplinary parameters are streamlined under **Article 69(e)-(n)** as follows:

e. **Where the Head of Institution is of the opinion that a serious offence has been committed, including those enumerated in Article 70(c) of these Regulations, and that the continued maintenance of the staff member in situ may be inimical to the interests of the Community or the investigation of the case, the Head of Institution may suspend the staff member, pending such time as a final decision is taken. The suspension shall not normally occasion cessation of salary, nor shall the action affect the staff member's rights, or be considered to be a disciplinary measure. Suspension with half pay may be imposed if the offence is grave and if there is reasonable evidence of guilt in the opinion of the Head of Institution. Where the evidence of an offence is irrefutable, the Head of Institution may**

summarily dismiss a staff member. The staff member shall not leave the region of his/her duty station throughout the period of any suspension, without approval from the Head of Institution.

f. The Head of Institution shall notify the Committee of the matter and a meeting of the Committee shall be convened by its chair.

g. The accusation leveled against the staff member and his/her reply, as well as all other relevant papers shall be communicated to the members of the Committee and to the staff member concerned. All parties shall be given adequate time to acquaint themselves therewith, bearing in mind however the need for the Committee to act with utmost dispatch. Confidential papers shall be communicated to the Chair of the Committee.

h. The deliberations of the Committee shall be considered valid in respect of disciplinary matters only where all of its members, including the Staff Representative, are present.

i. The procedure shall consist in a presentation of the accusations, the facts of the matter, denials, regulations, either written or oral, or both.

j. The staff member may use the services of a lawyer, at his/her own expense, or may be assisted by another staff member of his/her choice who shall not be a member of the committee.

k. The committee may hear the deposition of the staff member concerned, his/her lawyer or the staff member she/he chooses to assist him/her. The Committee may also listen to all other persons whose contributions may help to uncover the truth.

l. The Committee in each institution shall take decisions by a simple majority of its members. Where there is a tie, the Chairperson shall have a casting vote. The Committee report shall be signed by all members present, and shall contain its conclusions and recommendations to the Head of Institution as to which disciplinary measure should be applied, if necessary. The Committee shall also justify its decision in the report which shall also contain any dissenting opinions.

m. All members of the Committee shall observe strict confidentiality with regard to the deliberations, both during and outside meetings.

n. The staff member concerned and the members of the Committee shall be notified of the Head of Institution's decision within fourteen (14) days of his/her submission of the report. The staff member may exercise his/her right of recourse, and contest the decision of the Head of Institution.

It is again clear that there was nil observance of these clear, explicit and precise disciplinary parameters or they were observed more in breach. The **Head of ECOWAS** in bypassing these regulations for whatever reasons and going straight to the EFCC appeared not to prioritize full compliance and adherence to rules pertaining to rights of staff, the circumstances and staff categories to which the disciplinary rules apply.

The question here is why the hurry to jettison clear rules of engagement? Why not subject those who allegedly abused trust to due process? Is there something to hide by not subjecting them to the process? There are so many unanswered questions here. I am not sure the president of the ECOWAS Commission has an election or choice to make in matters where the rules provide clearly for what must be done where there are infractions covered by **Article 70(c).** The Rules demand expressly for internal procedures and mechanisms for investigation of these irregularities to have first been exhausted before resorting to institutions like the EFCC in the host member state. There appears here by the actions of the President of ECOWAS Commission a clear attempt to **undermine** the very institutions the community has set up to look into infractions of the nature complained of.

I have read **Article 68** which provides for criminal charges against staff members but it is clear that **Article 68** deals with a different factual and legal scenario not immediately related to infractions detrimental to the interest of the community. One procedure is internal and the processes driven internally by organs of the ECOWAS. The other is completely external and has nothing to do with ECOWAS. **Article 68(a)** makes this abundantly clear thus:

"A staff member charged with any criminal offence other than a minor traffic violation or similar offence shall immediately report the case to the Head of Institution, in accordance with the provisions of these Regulations.

The above is clear and unambiguous. Here **"a staff member charged with any criminal offence other than a minor traffic violation or similar offence shall immediately report the case to the Head of Institution, in accordance with the provisions of these regulations."**

It is clear here that a staff may on his own have committed a criminal act and is charged and this may even have nothing to do with the community or ECOWAS. The responsibility is now on the staff **"to report the case to the Head of Institution."**

The scenario covered by **Articles 67, 69, 70** are infractions committed against or detrimental to the interest of the community for which the community must take action within the confines of the regulations highlighted and as allowed or mandated by the Regulations. The Regulations prescribes a clear legal line of action for the determination of such infractions. As stated earlier, the commission cannot bypass these decidedly clear rules of engagement.

Article 68 totally deals with a scenario where the staff himself has to, as it were, report himself to the Head of Institution where he has been charged with a criminal offence. Where he **"reports himself,"** the procedure under **Article 68(b)-(e)** then kicks in or becomes applicable as follows:

"

(b) Where a staff member has been charged with a serious offence, and where the maintenance of such staff member at his/her post may be prejudicial to the interests of the Community or the investigation of the case, the Head of Institution may suspend such a staff member from his/her duties with full pay until the results of the investigation are known.

(c) A staff member who is accused of a criminal offence, or who has been charged to court for a serious offence, shall be suspended with half pay. Such staff member shall desist from the exercise of his/her functions and keep away from his/her place of work. The staff member shall not leave his/her duty station without the written authorisation of the Head of Institution for the duration of the investigations or the trial.

(d) If the staff member is acquitted at the end of the trial, she/he shall be allowed to resume work and shall be paid the withheld salary and allowances (b and c above).

(e) If, however, a staff member is convicted and sentenced, she/he forfeits his/her employment."

Under this **procedure,** there is no **Disciplinary Advisory Board** to be set up under **Article 67** and there is no defined disciplinary procedure to be adhered to as provided for under **Article 69**. A **charge** completely outside the purview of the commission has already been filed and logically there is nothing they can do beyond the normal diplomatic advise and secretarial support for the staff charged and they await the outcome. No more.

Article 68, therefore is only a general provision dealing with when any member of staff of the community is charged with a criminal offence. The commission has nothing in real terms to do with this charge.

Articles 67, 69 and 70 however specifically deals with infractions against the interests of the community. This is a specific provision with clear specific delineated rules. The other provision of **Article 68** is a general provision and cannot override these specific provisions of the Regulation.

In law where there is a special provision in a statute and a general provision in the statute, the general provision cannot be interpreted as derogating from what has been specially provided for unless an intention to do so is unambiguously declared. See **Madumere V Okwara (2013) 12 NWLR (pt.1368) 303; A-G Kwara State V Abolaji (2009) 7 NWLR (pt.1139) 199 at 216; P.D.P V Umeh (2017) 12 NWLR (pt.1579) 272 and Schroder V Major (1989) 2 NWLR (pt.101) 1.**

Yes there may be nothing precluding the community from referring criminal infractions against its staff to institutions in their host member state, but in doing so they must comply with the laws they themselves have passed to guide their relationship with their staff. Respect for the Regulations and indeed keeping strict fidelity to the Regulations is a clear indication of an institution subject to the Rule of Law as opposed to an institution subject to the unwieldy whims of the president or indeed any official of the commission. It would seem that there is considerable merit in the ground of objection alleging that this action or charge as presently

constituted is incompetent for being premature in that the community, as it were jumped the gun, in approaching EFCC directly without first taking advantage or ensuring that the internal procedures and mechanisms for investigating these infractions have been exhausted as provided in the Regulations before resorting to the EFCC.

The legal position on issues like these in our jurisprudence is fairly settled. Where a statute prescribes a legal line of action for the determination of an issue, the aggrieved party must exhaust all the remedies in that law before going to court. See **Eguamwense V. Amghizemwen (1993)9 N.W.LR (pt.315)1 at 27; Owoseni V. Faloye (2005)14 NWLR (pt.949)719 at 740.**

The ECOWAS Commission has here clearly failed to comply with certain procedural safeguards in their Regulations and there is therefore a breach of duty imposed on it and its decision to ignore its Regulations is ultra-vires. See **Mangit V. University of Agriculture Makurdi (2005)19 NWLR (pt.959)211 at 257AD.**

In rounding up on this issue, it may be relevant to refer to two important exhibits attached to the processes which clearly supported the need for adherence to these Regulations. These may be opinions, and not binding as argued by the Respondent but they are certainly persuasive. I will refer to excerpts of the documents. Interestingly **Exhibit B1,** OPINON NO: ECW/CCJ/ADV.OON/01/16 was based on a request by the President of the ECOWAS Commission. The facts of the case from the decision of the ECOWAS court are as follows:

"In letters dated 10 and 20 November, 2016 respectively, the President of the ECOWAS Commission filed an application to this Court for the purpose of setting up a committee of enquiry that will be responsible for carrying out investigations on facts constituting an offence allegedly committed by the officials of the Community.

The facts in question are related to the production of an act which may be fraudulent as well as illegal banking practices that might have been carried out by the officials of the Finance Department of the Commission."

The ECOWAS court instructively then held as follows:

"…the analysis of the request shows that the President of the Commission filed an application to the Court with a view to setting up an independent

committee of enquiry that would be responsible for conducting investigations and hearings on offences of forgery and use of forged document as well as misappropriation of funds.

If should be noted here that in accordance with the applicable texts, the Court has no jurisdiction to set up a committee of enquiry as requested by the President of the Commission much less to conduct investigations of the facts reported.

However, when acts constituting infractions under Article 70(c) of the ECOWAS Staff Regulation are brought to his attention, the President of the Commission shall set up a Disciplinary Advisory Board in accordance with the provisions of Article 67 of the same Regulation and in consultation with the other Heads of Institution.

The board, whose composition is determined by the provisions of Article 67 (c and e), is vested with the responsibility to investigate most serious cases in the event of embezzlement, theft, breach of trust prejudicial to the interests of the Community, fraud or corruption.

An Advisory Board shall take all the actions it deems necessary to ascertain the truth and shall make its recommendations to the Head of Institution concerned.

In this case, the submission of a case before the Advisory Board may be recommended considering the seriousness of the suspected offenses of misappropriation of monies to the detriment of the Community as well as falsification of a Community regulatory act."

The above **decision** is clear and self-explanatory. If the President of the ECOWAS Commission was in any doubt with respect of what steps to take where acts constituting infractions under **Article 70(c) of the ECOWAS Staff Regulations** are brought to his attention, the ECOWAS court has in no uncertain terms demonstrated above what he should do.

The above position of the ECOWAS Court was clearly reechoed, again in clear terms, by the letter of the then President of Liberia, Ellen Johnson Sirleaf to the President of the ECOWAS Commission vide **Exhibit FA1** dated 17th March, 2017.

Interestingly the letter was also in respect of the **Report on Irregular Financial Transactions at the commission transmitted by the President of the commission to her**. This is what she instructively stated:

"Now to the Report itself, I have observed that these alleged irregular transactions were uncovered as far back as December 2016 and you were communicating with the Nigerian intelligence apparatus even in January 2017. Had I been informed then, the opportunity of our presence in Abuja could have been used to devise strategies, in a consultative manner, to address these challenging issues. I would have been keen to ensure that all internal procedures and mechanisms for investigating these irregularities would have been exhausted before resorting to institutions of our host member state.

In taking note of the actions which you have already initiated, I urge you to priorities full compliance with and adherence to rules pertaining to the rights of staff and the circumstances and staff categories to which disciplinary rules apply. This is to safe guard against a barrage of legal actions against the organization in the future."

The above letter is unambiguous and indeed self explanatory. Her letter emphasised on the imperatives of prioritizing full compliance with and adherence to rules pertaining to the rights of staff and the circumstances and staff categories to which disciplinary rules apply.

The moral in these exhibits is that a key institution in ECOWAS, the judicial arm and an important member of the community, the President of Liberia, recognized the self evident and binding reality of the regulations and the provisions dealing with infractions by staff and how they are to be dealt with and called or drew attention to it, which clearly was ignored.

If the argument is that the opinion of the President of Liberia can be jettisoned, that argument will not fly with respect to an opinion given by the ECOWAS Court. I incline to the view that in the circumstances, the President, ECOWAS Commission must defer to the Court on the issue. I am not sure it was open to the President to choose or elect when or when not to adhere to the provisions of the Regulations. He was bound by the provisions.

On the whole, I take the view that the charge as presently constituted is premature and incompetent. There is a clear feauture preventing this court from exercising its jurisdiction to entertain the extant criminal charge.

Having held that the action is premature and incompetent, would there be any need to determine the other issues? Out of abundance of caution, and in the event, there is an appeal, it appears reasonable that I give an opinion on all issues.

The next issue is whether the Defendant is immune from prosecution for offences committed in Nigeria. I must state immediately that this is an area that continues to generate debates in legal circles. Happily there is a recent pronouncement by our superior Court of Appeal which has some bearing on this issue. I will simply rely on it. Let me however before doing so briefly say that in Nigeria, generally, the applicable law in respect of diplomatic immunities and Priviledges is the **Diplomatic Immunities and Priviledges Act** which implements aspects of the **Vienna Convention on Diplomatic Relations 1961(the Vienna Convention).** Under the provisions of **Sections 1, 3-6 of the Diplomatic Immunities and Priviledges Act,** foreign envoys, consular officers, members of their families and members of their official and domestic staff are generally entitled to immunity from suit and legal process. By **Sections 11 and 12 of the Act,** such immunities may also apply to organizations declared by the Minister of External Affairs to be organizations, the members of which are sovereign powers (whether foreign powers or commonwealth countries) or the Governments thereof.

By **Section 18 of the Act,** where a dispute arises as to whether any organization or any person is entitled to immunity from suit and legal process, under any provision of the Act or of any regulations made under this Act, a certificate issued by the Minister stating any fact relevant to that question shall be conclusive evidence of that fact. As stated earlier, the remit of the relevant provisions of this Act and in particular **Section 18** was pronounced upon by the Court of Appeal in a case involving ECOWAS in the **President of the Commission of Economic Community of West African States V. Babacar Ndaye (2021)LPELR-53523(CA).** Let me quickly say that the question of whether a staff of ECOWAS is immuned from criminal prosecution was not directly in issue, but the court dealt with aspects of immunity that has resonance and bearing with this case. The Court of Appeal equally applied the provisions of the **Diplomatic Immunities and**

Priviledges Act in the case involving ECOWAS, which learned counsel to the Applicant contends in this case has no application to ECOWAS. Let me briefly **state the facts**. In that case, the Claimant/Respondent, a staff of ECOWAS sued the Defendant/Appellant for certain Reliefs at the Industrial Court. The Defendant/Appellant responded to the suit by filing a defence and objecting to the jurisdiction of the National Industrial Court to entertain the case on grounds of diplomatic immunity he enjoys from proceedings in municipal courts of Nigeria by virtue of the revised treaty of ECOWAS, general convention on Priviledges and Immunities of ECOWAS and the Headquarters agreement between ECOWAS and the Government of the Federal Republic of Nigeria. He placed reliance also on principles of staff employment and ECOWAS staff Regulations and in addition, he attached a **certificate from the Nigeria's Minister of Foreign Affairs which acknowledged his diplomatic immunity**.

The trial court held it had jurisdiction and dismissed the objection but on appeal, the superior **Court of Appeal** allowed the appeal. In the leading judgment, **Ugo J.C.A** stated thus:

"…so the certificate of the Minister of Foreign Affairs of Nigeria attached to the affidavit of Chika Onyewuchi in support of appellants application/objection before the trial National Industrial Court for the striking out of the suit is sufficient and in fact conclusive evidence of the immunity claimed by appellant…"

In the supporting judgment of **Adah J.C.A**, he stated as follows:

"The Appellant being an international organization enjoys immunity from suit and legal process, both by virtue of Section 11 and 18 of the 1962 Act and Certificate issued by the Minister of External Affairs…In the instant case, the appellant from the record before the court is an international organization. The foreign Affairs Minister of Nigeria has given a Certificate to indicate the immunity of the appellant. Exhibit CA issued by the Ministry of Foreign Affairs on 16th January 2020 in paragraphs 2 and 3 thereof state as follows:

"2: The ministry of Foreign Affairs wishes to re-affirm the status of the ECOWAS Commission as an international organization and the immunity and priviledges of the commission and its staff members with exception of

Nigerians and holders of Nigerian permanent residency from criminal, civil and administrative proceedings by virtue of ECOWAS Revised Treaty of 1993, which was ratified by the Federal Republic of Nigeria on 1st July 1994.

3: The Headquarters Agreement between the ECOWAS Commission and the Federal Republic of Nigeria also confers immunity on officials and other employees of ECOWAS by virtue of Article VII (3)(c) of the Agreement..."

I have referred to this decision to situate the clear fact that the Applicant, a Nigerian citizen, on the basis of this decision does not enjoy any immunity and is amenable and subject to the jurisdiction of the Municipal Courts, and it is immaterial whether it is a **civil or criminal proceeding**. The pronouncement of the Superior Court of Appeal on application of the extant provisions of the Diplomatic, Immunities and Priviledges Act to ECOWAS and the clear case of the direction of the Minister of External Affairs on matters of immunity are binding on this court under the doctrine of judicial precedent, commonly referred to as the principle of stare decisis.

The **doctrine postulates** that where the facts in a subsequent case are similar or close as facts in an earlier case that had been decided upon, judicial pronouncements in the earlier case are subsequently utilized to govern and determine the decision in the subsequent case. See **Nwangwu V. Ukachukwu (2000)6 NWLR (pt.662)) 674.** Similarly, where the provisions of a statute or section of a statute are the same or similar, and the purport, meaning and effect of such similar provisions of the statue or section had been considered in a previous decision of a competent court higher up in the judicial hierarchy, then such previous decision becomes a matter of judicial precedent and is binding on the courts lower in the hierarchy where they are called upon a consider a provision similar to that earlier considered. See **Nwobodo V. Onoh (1984)1 SCNLR 1, University of Lagos V. Olaniyan (1985)1 NWLR (pt. 1)156 and Ngige V. Obi (2006)14 NWLR (pt.999)1.**

It may be argued that the **certificate** issued in the said case can be said to be specific to the case, but if that were the case, the Minister of External Affairs would have just indicated that the ECOWAS Commission and its staff members as an international organization enjoy immunity from being impleaded in our courts. No more. The fact that he went ahead to delineate the exception, to wit: That

Nigerians and holders of Nigerian permanent residence do not enjoy such immunity therefore unequivocally situates that there are exceptions to the general rule on immunity applicable to international organizations such as ECOWAS.

The position of the **Ministry of External Affairs on 16th January, 2020** in that case in the absence of any **counter-evidence**, represents, in my opinion, the present status of Nigerians regarding whether they enjoy immunity in organizations such as ECOWAS where they work in the host country, here in Nigeria.

Again reading **Section 18 of the Act,** the present Applicant could have equally sought a similar **certificate** to be issued by the Minister with respect to whether he enjoys any immunity. If he had taken such step, the response by the minister would have been conclusive evidence on the question of whether he enjoys immunity. The bottom line here is that there is nothing from the **Minister Foreign Affairs of Nigeria** in terms of a certificate to indicate that the Applicant enjoys any immunity. The fact that ECOWAS is an international organization and the base of ECOWAS is Nigeria or that Nigeria is a Host country does not therefore clothe Applicant with the same immunity toga other staff members from other countries in ECOWAS enjoy in Nigeria.

The present situation or case is therefore not one of impleading a diplomat or foreign sovereign before the Nigerian Courts. We have a weight of authorities from the Supreme Court and Court of Appeal on the concept of diplomatic immunities in Nigeria. This case is simply one involving a Nigerian citizen working in ECOWAS and allegedly involved in criminal infractions in Nigeria, the host country using local or Nigerian institutions. I am not sure the Applicant enjoys any immunity in the circumstances.

As stated earlier, a Court is Competent when, amount others, the subject matter of the case is within its jurisdiction and that there is no feauture which prevents the Court from exercising jurisdiction. The applicants diplomatic status, as demonstrated above, is not a feauture preventing the court from exercising jurisdiction over him. This issue thus fails.

The **next issue has to do with whether the EFCC has powers to investigate and prosecute offences relating to the funds of the ECOWAS Commission**. The

submissions of Applicant here is that the funds allegedly constituting the offences in the extant charge belongs to the **ECOWAS Commission** and not the **Federal Government of Nigeria,** therefore that the alleged infractions did not violate any existing legislation governing economic activities of the Government or constitutes any form of corrupt malpractice to entitle EFCC to investigate and prosecute the alleged offender. The Respondent argued to the contrary.

This issue essentially calls for a proper situation and evaluation of the legal limits, if any, with respect to the powers of EFCC to investigate and prosecute criminal offences. We must thus take our bearing from the **enabling Act**. There is no argument that the EFCC Act (hereinafter referred to as the Act) situates the EFCC with very broad and extensive powers over different forms of corrupt malpractices. The provisions of **Sections 6, 7, 14-18 of the Act,** particularly **Sections 6(b), 7(1)(a), 7(2)(f), and 13(2)** gives the EFC powers to investigate and prosecute offenders for any offence, whether under the act or any statute in so far as the offence relates to the commission of economic and financial crimes. The provisions are reproduced below to demonstrate the enormous powers of EFCC.

Section 6(b):

The investigation of all financial crimes including advance fee fraud, money laundering, counterfeiting, illegal charge transfers, futures market fraud, fraudulent encashment of negotiable instruments, computer credit card fraud, contract scam, etc.

Section 7(1):

The commission has power to:

(a) Cause investigations to be conducted as to whether any person, corporate body or organization has committed any offence under this Act or other law relating to economic and financial crimes.

Section 7(2)

(f) Any other laws or regulations relating to economic and financial crimes, including the Criminal and Penal Code.

Section 13(2)

The Legal and Prosecution Unit shall be charged with responsibility for: (a) Prosecuting offenders under this Act;

(b) Supporting the general and assets investigation unit by providing the unit with legal advice and assistance whenever it is required;

(c) Conducting such proceedings as may be necessary towards the recovery of any assets or property forfeited under this act;

(d) Performing such other legal duties as the commission may refer to it from time to time.

The powers of the EFCC to investigate and prosecute corrupt malpractices are further widened by Section 46 of the Act which defines economic and financial crimes as follows:

"…the non-violent criminal and illegal activity committed with the objectives of earning wealth illegally or in a group or organized manner thereby violating existing legislation governing the economic activities of government and its administration and includes any form of fraud, narcotic drug trafficking, money laundering, embezzlement, bribery, looting and any form of corrupt malpractices, illegal arms dealing, smuggling, human trafficking and child labour, illegal oil bunkering and illegal mining, tax evasion, foreign exchange malpractice including counterfeiting of currency, theft of intellectual property and piracy, open market abuse, dumping of toxic waste and prohibited goods, etc."

Our superior courts have interpreted the ambit of these provisions. In the case of **Dr. Aloysius Ozah V. EFCC & Ors (2017)LPELR 43388 (CA). T**he Court of Appeal stated as follows:

"By virtue of the EFCC Act 2004, the 1st Respondent is assigned the responsibility of investigating all financial crimes. Section 6(h) of the EFCC Act provides that the Commission shall be responsible for the examination and investigation of all reported cases of economic and financial crimes with a view of identifying individuals or groups involved. Therefore, by the combined effect of Section 6(h) set out above and Sections 7, 8, 13, 38 and 41

of the EFCC Act, the 1st Respondent is amply empowered to investigate all cases of economic and financial crimes reported to it."

Also in **Orji Kalu V FRN & Ors (2012) LPELR 9287 (CA),** the Court of Appeal held thus:

"The combined reading of Sections 6(m) and 46 of the Economic and Financial Crimes Commission (Establishment) Act, 2004 clearly shows that the EFCC has powers to investigate and prosecute all crimes connected with or related to economic and financial crimes, which include various forms of fraud, money laundering, corrupt practices, and drug related offences."

The narrow issue here is whether the extant charge relates to Economic and Financial Crimes within the purview of **Section 46 of the EFCC Act?** As stated earlier, the Applicant contends that the infractions complained of here relate to funds belonging to ECOWAS Commission and not funds of the Nigerian Government for which EFCC is an agent and that offences committed against such ECOWAS funds cannot be said to violate any legislation governing economic activities of the government and its administration. That ECOWAS Commission is not a department of government or any member state or its administration. I had earlier reproduced the provision of **Section 46 of the EFCC Act.** I am not really enthused by the rather severely restrictive interpretation placed on the provision of **Section 46 by Applicant** which appear to me to have been made outside the context of the facts of this case.

Exhibit "A", the petition written by the President of the Commission to the chairman of EFCC situating the infractions provide as follows, and I will here reproduce the petition at length:

"IRREGULAR FINANCIAL TRANSACTIONS:

Following two reports I received from my services, I feel the need to bring to your attention the following transactions that occurred and may be linked to corruption, fraud and embezzlement of funds.

1. **An amount of fifteen (15) Million Dollar has been divested on 10th August, 2016 from the ECOWAS Staff Joint Pension Scheme's deposit in ECOBANK that was producing 3% interest to be put into the following account:**

a. **ECOBANK Account Number 1043001091 5Million**

b. **UBA Account Number 3002131594 5Million**

c. **Zenith Bank Account Number 5070541785 5 Million**

The ECOBANK and Zenith Bank Accounts have not produced interest for the three elapsed months while the UBA account shows an interest of 1,133.86 for the period meaning a maximum annual interest rate of 0,14%.

2. **In processing the payment of Community Levy Allowance in favour of the Ministry of Foreign Affairs (ECOWAS National Unit), 2.4 Million US Dollars have been transferred to a Bureau de Change named Rite Option for currency exchange (dollar to naira) at a rate of 313 that is 20% lower than the common rate offered by the other Bureaux de Change (375), in violation of the CBN Rules requesting constitutions like ECOWAS to process by auction in the financial market.**
3. **The Nigerian Government's contribution to the ECOWAS 40th Anniversary Celebration was deposited in cash in an ECOWAS account opened in ECOBANK 1043006515 to the tune of 116,550,000 Naira by an ECOWAS staff on the 8th May 2015. There is no document proving the origin and quantum of this sum.**
4. **ECOWAS residential property located at Katampe District (Abuja) was given back to the Government of Nigeria and there is suspicion that the transaction was triggered and managed by some ECOWAS officials who benefited from the operation and were granted some plots.**
5. **It is obvious from these operations processed by the same individuals in ECOWAS that the transactions are irregular and need to be investigated thoroughly.**
6. **I will be personally interested on the outcome of your investigation in case it indicated ECOWAS staff or official.**
7. **Please accept, Dear Executive Chairman, my best regards."**

The **narrative and complaints** here were alleged to have been committed in Nigeria by Nigerians; the funds also form part of the contributions by the Nigerian

Government to ECOWAS and equally no less important Nigerian Financial Institutions were alleged to have been utilized or used to perpetuate the corrupt practices complained of. These institutions are bound and governed by Nigerian Banking Laws and extant legislations.

It is really difficult to accept that these infractions do not violate existing legislations governing the economic activities of government and its administration and or that it does not involve fraud, embezzlement looting and any form of corrupt malpractices as contemplated under **Section 46 of the EFCC Act.**

These alleged actions or infractions committed in Nigeria and using Nigerian Institutions violates legislation governing economic activities of Government and its administration and no doubt impacts negatively on the economy of the country. It is settled principle of general application that in the interpretation of a statute, where its interpretation will result in defeating its object, the court will not lend its weight to such an interpretation that will result in defeating its objective. The language of a statute must not be stretched to defeat the aim of the statute. In other words, the interpretation which appears to defeat the intention of the legislature should be bypassed in favour of that which would favour the object of the Act. **See Onochie V. Odogwu (2006)6 NWLR (pt.975)65 at 88-89 E-A.**

Furthermore, as stated earlier, one of the accepted canons of interpretation is that in seeking the interpretation of a particular section of a statute; the court does not take the section in isolation but as a part of a greater whole. The courts in construction of statutes take into consideration the totality of the statute and not pockets of it and arrive at the intention of the law maker. The court cannot pick and choose as the Applicant has done here in the construction of **Section 46 of the EFCC Act. See N.P.A Plc V. Lotus Plastics Ltd (2005)19 NWLR (pt.959)158 at 182 F-H.**

Learned senior advocate has contended that the decision by the Supreme Court in **Dr. Joseph Nwobike SAN V F.R.N (Supra)** supports the position taken that the EFCC cannot investigate and prosecute any or all forms of corrupt practices as prescribed by **Section 46 of the Act** including the extant charge. The question to ask is this: Is that really the position advanced in the case?

As stated earlier, all lower courts are bound by the decisions of our superior courts especially here the decision of the Apex Court under the doctrine of judicial

precedent. Let me quickly add that the doctrine however recognizes that decisions of court draw their inspiration and strength from the facts which framed the issues for decision and once such decisions are made, they control future judgment in like or similar cases, hence the facts of two cases must either be the same or at least similar before a decision in the earlier case can be used in a later case **Anaedobe V. Ofodile (2001)5 NWLR (pt.706)365, Abubakar V. Nasumu (No.2)(2012)17 NWLR (pt.1330)523.** It postulates that what is binding on a lower court in the decision of a higher court is the principle or principles decided and not the rules and that where the facts and circumstances in both cases are not similar or the same, the inferior court is not bound by the principle decided in the case before the higher court. See **Clement V. Iwuanyanwu (1989)3 NWLR (pt.107)39, Elebule V. Faleke (1995)2 NWLR (pt.375)82, 7UP Bottling Co. Ltd V. Abiola & Sons Ltd (1995)3 NWLR (pt.383)257, Olafisoye V. FRN (2004)4 NWLR (pt.864)580, Emeka V. Okadigbo (2012)18 NWLR (pt1331)55**

In **Ugwuanyi V. NICON Insurance Plc (2013)11 NWLR (pt.1366)546,** the Supreme Court made the point thus:

"…cases remain authorities only for what they decided. Thus an earlier decision of this Court will only bind the Court and subordinate Courts in a subsequent case if the facts and the law which inform the earlier decision are the same or similar to those in the subsequent case. Where, therefore the facts and/or the legislation which are to inform the decision in the subsequent case differ from those which informed the Court's earlier decision, the earlier decision cannot serve as a precedent to the subsequent one."

What the above decisions postulate is that a lower court should not just apply the decision of a higher court to the facts and circumstances of the case before it. It has an obligation to interrogate the decision to ensure that the facts, circumstances and the legislation relied on in that decision are the same or similar to those of the case before it. It is only when it is satisfied that the facts, circumstances and legislations are the same or similar that it should apply it, otherwise he should distinguish it from its present case. See **Uwaokop V. United Bank for Africa Plc (2013)LPELR 22622, Attorney General of Lagos State V. Eko Hotels Ltd (2017)LPELR 43713(SC), State V. Gbahabo (2019)14 NWLR (pt.1693)522.**

Now in the **Nwobike case (Supra)** the Apex Court interpreted **Section 46 of the Act** in relation to the powers of the EFCC's powers to investigate and prosecute the offence of attempting to pervert the course of justice as provided in **Section 97(3) of the Criminal Law of Lagos No.11 of 2011.** It was the contention of the Appellant that the offence of attempting to pervert the course of justice was not an economic and financial crime and as a result, EFCC lacked the powers to investigate and prosecute the offence. The submission of the Respondent was that to the extent that the offence of perverting the course of justice is a form of corruption malpractice, it is an economic and financial crime which the EFCC can prosecute.

The Supreme Court held that having regard to the provisions of **Sections 6, 7, 14-18 of the EFCC Establishment Act,** particularly in **Sections 6(b), 7(1) (a), 2(f), 13(2),** the EFCC has powers to investigate, enforce and prosecute offenders for any offence, whether under the At or any statue in so far as the offence relates to the commission of economic and financial crimes. The Apex Court, however, held that the issue of whether or not the offence of attempting to pervert the cause of justice falls within the ambit of **Section 46** particularly with respect to the wording **"any form of corrupt malpractices"** which was not defined by the Act required a thorough examination of the section. The Court gave careful scrutiny over the provision of **Section 46 of the Act** which defined economic and financial crimes. I had earlier stated the provision, I need not repeat it.

After giving a careful consideration to the natural, ordinary and plain interpretation of the expression **"all form of corrupt malpractices"** in the provision of **Section 46,** the Supreme Court held that:

"To this extent therefore, I have given a careful consideration to the natural, ordinary, and plain interpretation of the expression "corrupt malpractices", which is not defined under the EFCC (Establishment) Act, and with all due respect, find it difficult to accept that the literal interpretation is effective in discovering the intention of the legislature with respect to ascertaining the scope of the expression "any form of corrupt malpractices" used in section 46 of the EFCC (Establishment) Act. If the literal meaning is adopted, it means that the powers of the EFCC will be at large and open ended, because by that interpretation, every criminal and illicit activity committed will fall within the

scope of "corrupt malpractices" and consequently be regarded as an economic and financial crime, which the EFCC will be empowered to investigate and by so doing will make a pigmy of other legislations and render them barren and sterile, this is certainly not the intention of the legislature necessitating the establishment of the EFCC and enacting the Act"

Consequently, the Apex Court adopted the ***ejusdem generis*** rule and held as follows:

An application of the *ejusdem generis* rule to the interpretation of the words "any form of corrupt malpractices" does not lend credence to the position taken by the Respondent. Indeed, the words "any form of corrupt malpractices" must be construed within the context of the specific class which if follows, and must be confined to the particular class. In my humble view therefore, the legislature thought it proper and for right and good reasons, to place the general expression "any other form of corrupt practices" to come after the offences "embezzlement", "bribery" and "looting" and same must be confined to such specific words and not to expand, extend or elongate it to accommodate any corrupt malpractices at large. A fortiori, it must be pointed out, as the Learned Senior Counsel for the Appellant rightly argued and as conceded by the Respondent, that the test for ascertaining if a criminal conduct can be regarded as an economic and financial crime is such that must be a nonviolent criminal and illicit activity committed with the objective of earning wealth. I do not think it will be safe to regard the offence of attempt to pervert the course of justice which the Appellant was convicted for, where it has not been shown that it was committed with the objective of earning wealth, can be regarded as an economic and financial crime, thereby vesting the power to investigate and prosecute in the Economic and Financial Crimes Commission."

The Apex Court here sought to make a distinction between an Economic Crime and a non Economic Crime for which the EFCC will have no jurisdiction to prosecute and then advanced the clear position that **an attempt to pervert the cause of justice under Section 97(3) of the Criminal Law of Lagos State** does not amount to an economic crime for which the EFCC will have jurisdiction to investigate and prosecute. It is now very clear that the powers of EFCC to

investigate and prosecute corrupt malpractices are not at large. The EFCC powers to investigate and prosecute corrupt malpractices are circumscribed by the criteria set out in **Section 46.** The first test is that the corrupt malpractice must be an economic and financial crime. To be an economic and financial crime, it must be a nonviolent criminal and illicit activity committed with the objective of earning wealth in violation of existing legislation governing the economic activities of government and its administration.

As already demonstrated, I am not sure the Applicant is on firm ground to argue that the facts of the extant charge falls outside the purview of **Section 46 of the Act.** At the risk of prolixity, the alleged offences were committed in Nigeria by people including Nigerians, involving moneys of the Nigerian State and using institutions governed by Nigerian Laws. **This issue is also resolved against Applicant.**

The final issue has to do with **abuse of process**. The contention of Applicant is that the filing of this charge which involves alleged diversion for personal use of funds belonging to ECOWAS Commission constitutes on abuse of court process because of the earlier and subsisting case filed against the Applicant in charge No: **FHC/ABJ//CR/139/2018** which involves alleged money laundering of the same funds belonging to ECOWAS Commission and which allegedly arose from the same facts and circumstances. That the filing of multiplicity of charges relating to the same funds, facts and circumstances in different courts constitutes an abuse of process.

Now as with most legal concepts, abuse of process is a term which is not capable of precise definition and may be more easily recognised than defined. But it is a term generally applied to a proceeding which is wanting in bona fides and is frivolous, vexatious or oppressive. It means the abuse of legal procedure or the improper use or misuse of the legal process (to vex or oppress the adverse party). See **Amaefule V. The State (1988)2 N.W.L.R (pt.75)156 at 177 (**per Oputa, JSC); **Arubo V. Aiyeleru (1993)3 N.W.L.R (pt.280)126 at 142.** The court has the duty under its inherent jurisdiction to ensure that the machinery of justice is duly lubricated and that it is not abused. In **Saraki V. Kotoye (1992)9 N.W.L.R (pt.264)156 at 188 E-G** the Supreme Court (per Karibi-Whyte, JSC) opined that:

"The concept of abuse of judicial process is imprecise. It involves circumstances and situations of infinite variety and conditions. It's one common feature is the improper use of the judicial process by a party in litigation to interfere with the due administration of justice. It is recognized that the abuse of the process may lie in both a proper or improper use of the judicial process in litigation. But the employment of judicial process is only regarded generally as an abuse when a party improperly uses the issue of the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. This will arise in instituting a multiplicity of actions on the same subject matter against the same opponent on the same issues. See Okorodudu V. Okorodudu (1977)3 SC 21; Oyagbola V. Esso West African Inc (1966)1 AII NLR 170. Thus the multiplicity of actions on the same matter between the same parties even where there exists a right to bring the action is regarded as an abuse. The abuse lies in the multiplicity and manner of the exercise of the right, rather than the exercise of the right per se."

See also the cases of **Akinnole V. Vice Chancellor University of Ilorin (2004)35 WRN 79; Agwasim V. Ojichie (2004)10 N.W.L.R (pt.882)613 at 624-625; Kolawole V. A.G. of Oyo State (2006)3 N.W.L.R (pt.966)50 at 76; Usman V Baba (2004)48 WRN 47.**

I have carefully considered the charge filed against Defendant in this court vis-à-vis the charge at the Federal High Court and it is clear that the offences in the two charges are different. The entire 15 counts charge at the **Federal High Court** border on money laundering contrary to the **Money Laundering (prohibition) Act 2011**. By the clear provision of the Act, it is the Federal High Court that has exclusive jurisdiction to entertain the matter.

What constitutes money laundering offences under the **Act** is situated under **Section 14(1)(a)** which provides that **any person who converts or transfer resources or properties derived directly or indirectly from illicit traffic in narcotic drugs or psychotropic substances or any illegal act, with the aim of either concealing or disguising the illicit origin of the resources or property, or aiding any person involved in the illicit traffic in narcotic drugs or psychotropic substances or any other crime or illegal act to evade the legal**

consequences of his action, commits an offence under the section and is liable on conviction to imprisonment for a term of not less than two years or more than three years.

The ingredients of the offence of money laundering under **Section 14(1)(a) of the Money Laundering (prohibition) Act 2003** are that:

(a) The accused converted or transferred resources or property;

(b) The resources or property must have been derived directly or indirectly from drug related offences or any other crime or illegal acts;

(c) The conversion or transfer of the resources or property must be with the aim of

(d) Concealing or disguising the origin of the resources or property, or

(e) Aiding any person involved in any of the acts of drug related offences or any other crime or illegal act so as to evade legal consequences of his action.

The proof of offences of money laundering and concealment can be by either direct or circumstantial evidence. See **Kalu V. F.R.N. (2014)1 NWLR 479 (CA).**

I have at length situated above what money laundering entails and the constituent elements or ingredients of the offence to show **explicitly** that the charge and or the offences at the Federal High Court are different clearly from the extant charge in this court which are infractions offending the provisions of the Penal Code with different elements constituting threshold of proof. In view of the distinct nature of the offences in the two charges and with the **subject matter jurisdictional issue** that necessarily arises with the money laundering infractions, can the argument be really made that the court process is being abused here or that the charges are frivolous or vexatious and or that there is multiplicity of actions in the circumstances? I don't think so. Each case where there is a complaint of abuse of process has to be examined on its merits because different conditions would affect the conclusion that could be reached as to whether or not an abuse exists. See **Waziri V. Gumel (2012)9NWLR (pt.185)(SC); Saraki V. Kotoye (supra).**

The **facts** in the **two cases** may over lap but the offences are essentially distinct with different elements. It cannot also be argued with any conviction that there is

absence of *bona-fides* in the circumstances that situated the filing of the two(2) charges. I am not sure that the allegation that there has been an improper use and perversion of the process will fly in the circumstances. The jurisdictional element and the **exclusive powers of the Federal High Court** to entertain **money laundering cases** alters the dynamics here. The Money laundering elements of the alleged infractions could not have been filed in this court. The legal option for the prosecution to file that particular action at the Federal High Court remained extant. Where the **complainant by law** has been given the option to exercise a right in different ways, the opponent or adversary cannot prescribe the particular method which the party must exercise the right and the opponent cannot complain that there was an abuse of process if the exercise of the right is in legally permitted ways. See **R. Ben Key (Nig) Ltd V. Cadbury (Nig)Ltd Plc (2012)9 NWLR (pt.1306)596 (SC); Agwasin V. Ojichie (2004)10 NWLR (pt.882)613.**

The term abuse of process also **intrinsically has an element of malice**. It must be a malicious perversion of a regularly issued process, civil or criminal, for a purpose and to obtain a result not lawfully warranted or properly attainable thereby. As much as I have sought to be persuaded, I have not been so persuaded that these elements exist in this case. These elements are completely lacking. The complaint of abuse, I am afraid is not availing, and this fails.

On the whole, it is clear that out of the **four(4) issues raised**, only **one** of the complaints was found to have merit and be availing. The issue that succeeded clearly then presents a feauture that would prevent the court from proceeding with the hearing of the charge against Defendant. According, I take the considered view that the suit as presently constituted is premature and incompetent.

On the authorities, it has been held by a long line of cases that where a court finds that an action as constituted is incompetent and the Court lacks the requisite competence and vires to entertain an action, for one reason or the other, the proper order to make is to **strike out the charge** or **more appropriately discharge** the Defendant. In **Nigerian Air Force V. Kamaldeen (2007)7 NWLR (pt.1032)164 at 184, Musdaphar J.S.C** (as he then was and of blessed memory) stated thus:

"On the question of whether the Court Appeal, having held the trial a nullity because the General Court Martial was illegally constituted, was right to proceed to acquit the respondent of all charges, it is elementary law that an

acquittal of an accused person in a verdict can only be returned on the consideration of the case on the merits. Where a trial has been declared a nullity because the trial court or tribunal has no jurisdiction to adjudicate on the matter, the proper verdict to return is only to discharge the accused. The Court of Appeal was wrong to have returned a verdict of acquittal on the Respondent."

Accordingly, I will and do hereby record an order discharging the Defendant.

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Hon. Justice A.I. Kutigi

<u>Appearances</u>:

1. ***Itieubong Usoroh, Esq., for the Complainant/Respondent***
2. ***Mohammed Ndayako SAN for the Defendant/Applicant with A.Z Abdulsalam, Esq., and M. Mohammed, Esq.***