

**MICROSOFT CORPORATION
V
FRANIKE ASSOCIATES LTD
(CA/LI573/2008)(COPYRIGHT ON
SOFTWAREPROGRAMS); A REVIEW***
***Charles Chudi Nwabachili**
****Noel Nwabueze Udeoji**

1.0 Introduction

In practice, the distinction between demurrer and issue of jurisdiction of courts in Nigeria exist. Though there exists a similarity between the old demurrer proceedings and a preliminary objection, as the aim of both is to terminate a matter without a full trial. It must be noted that a preliminary objection to the institution or continuation of a suit is different from a demurrer proceeding and may be so different even when it is brought without the filing of a statement of defence by the defendant in a matter. The position of the law is that demurrer proceedings in its original form is no longer allowed. What is permitted is a modified form, referred to as proceedings in lieu of demurrer, which is to the effect that before a party can seek to terminate proceedings in circumstances that would constitute demurrer, such a party must file pleadings. A preliminary objection however is an application usually brought on the grounds that the Court should not hear a matter at all or continue hearing the matter, on the basis that the Court lacks the requisite jurisdiction to do so. This work therefore seeks to review the Court of Appeal decision in *Microsoft Corporation v. Franike Associates Ltd*, Suit No. CA/LI573/2008, delivered on July 14, 2011, and ascertain the reason behind terminating the matter, which bothers on allegation of infringement of copyright in

software programs and products particularly "Windows" operating system/software for computers, and whether rightly or wrongly, without allowing the matter go through a full trial.

2.0 The Facts of the Case¹

This is an Appeal² against the ruling of the Hon. Justice S.I. Shuiabu of the Federal High Court (FHC),³ striking out the entire suit on the ground that the Court lacked the jurisdiction to entertain and determine the Plaintiff's claim. The Plaintiff/ (now Appellant) claims against the Defendant (now Respondent). The circumstances necessitating this Appeal can be aptly put as follows:

By writ of summons dated 23rd June 2005, the Appellant initiated a suit against the Respondent at the FHC, Lagos, which writ of summons was filed along with a motion ex- parte as well as a Motion on Notice. A statement of claim was also filed on that date; and in its paragraph 27, the Plaintiff (now Appellant) had sought the following reliefs inter alia:

- i. A Declaration that the Plaintiff as owner of the copyright stated herein is the only person (either by itself or by its licensees' and or agents) authorized by law to

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¹Cited as 54 NIPJD [CA.2011] 573/2008, Court of Appeal Judgement delivered on Thursday, July 14, 2011; visit <<https://nlipw.com/cases-principles/microsoft-corporation-v-franike-associates-ltd/>> Accessed on July 18, 2020.

²Presided over by Olukayode Ariwoola JCA, Ibrahim Mohammed Musa Saulawa JCA, Rita Nosakhare Pemu JCA.

³Lagos Division, Suit No.FHC/UCS/610/05, delivered on the 7th of June 2006.

exercise copyright on the wide range of Microsoft Software, Programs and Products.

- ii. A Declaration that the Defendants by its/their acts complained herein have infringed the copyright of the Plaintiff in the Microsoft Software, Programs and Products copies into the hardware they offered for sale to the public.
- iii. A Perpetual Injunction restating the Defendant and all those on whose behalf they are sued, whether acting by themselves, their directors, officers, servants, agents or privies or otherwise or howsoever from doing the following acts or any of them, that is to say:
 - a. Selling by way of trade expressing or offering for sale or distributing for the purposes of trade without licence of the plaintiff any copies of the said Microsoft and or windows software or any reproductions of the Plaintiffs said software, Programs or product and from authorizing any of the acts aforesaid.
 - b. Converting to their own use infringed copies of the Plaintiff's software, programs and or products.
 - c. Installing or loading unto any hardware, hard disc/DVD or otherwise infringing by any other means howsoever or causing enabling and otherwise assisting howsoever others to infringe the Plaintiff's copyright Microsoft software programs and or products.⁴

The writ of summons in the main was for a restraining order that the Respondents, their servants, agents, privies or otherwise whosoever stop infringing the Appellant's copyright in its software programs and products particularly the "Windows"

⁴Among other reliefs listed as contained in paragraph iv to ix.

operating system/software for computers⁵ shows that an ex-parte application as well as a motion on notice were filed simultaneously and both applications dated 23rd June 2005 sought several orders but principally to restrain the Respondents, their servants, agents and privies or otherwise whosoever from infringing the Appellant's copyright. On the 4th of July 2005, the FHC granted all the orders sought on the motion ex-parte- page 75 of the Record of Appeal. The Respondents subsequently filed a motion on notice dated 20th July 2005⁶ seeking various orders, one of which was for an order striking out the suit for lack of jurisdiction, and for an order vacating and/or discharged the ex-parte orders of the Court made on the 8th of July 2005.⁷ The applications were taken on the 16th of February 2006 and on the 7th of June 2006, the Court discharged its ex-parte orders made on the 4th of July 2005 and struck out the entire suit on the Grounds that the FHC lacked jurisdiction to entertain the Appellant's claims.⁸

Dissatisfied with this Ruling, the Appellants have now approached this Court appealing the said Ruling and that same should be set aside.⁹ In line with the practice Directions of this Court, the Appellant filed its Notice of Appeal dated 21st of June 2006 and filed on same date.¹⁰ The Notice of Appeal encapsulates four (4) Grounds of Appeal. In his amended Brief of Argument filed on the 12th of February 2011, the Appellant had distilled just one issue for determination. To wit; "*whether*

⁵Pp 12-24 of the Record of Appeal.

⁶At pages 46-53 of the Record of Appeal.

⁷Pages 46-53 of the Record of Appeal.

⁸Pages 84-100 of the Record of Appeal

⁹The Ruling is at pages 94-100 of the Record of Appeal

¹⁰Pp 101-107 of the Record of Appeal.

the trial judge was right in entertaining the Respondents objection to the jurisdiction of the FHC and consequently striking out the suit on the Ground of lack of proof of reciprocal protection of copyright laws between Nigeria and the United States of America."

In the Respondent's Amended Brief of Argument, filed on the 20th of January 2011, he had raised two issues for determination and they are:

(1) Whether the learned trial judge was right to have declined jurisdiction having regard to sections 251 (1)(f) and 12 (1) of the 1999 Constitution of the Federal Republic of Nigeria (CFRN), section 5(1) (b) and 41 of the copyright Act Cap C28 Laws of the Federation of Nigeria (LFN), 2004.

(2) Whether the filing of a preliminary objection by the Respondent at the lower court challenging the Courts jurisdiction without filing a defence amounted to a demurer.

I deem it pertinent, to reproduce the Grounds of Appeal shorn of its particulars filed by the Appellant for a proper appreciation of the issues in this Appeal.¹¹

¹¹Of note, he Appellant in the course of the filing of this Appeal had on the 14th of May 2010 filed a Notice of Change of Counsel from Festus Keyamo of Festus Keyamo Chambers to Anthony Omaghomi of George Etomi and partners.

Ground 1: *"The trial judge erred in law when he held that it has no jurisdiction to entertain the suit of the Appellant herein contrary to the clear provisions of sections 1, 5, 42, 49, and 57 of the Copyright Act, CAP C28 LFN, 2004."*

Ground 2: *"The trial Judge erred in Law when he held that the objection to the jurisdiction of the lower court to entertain the suit raised by the Respondent herein is competent."*

Ground 3: *"The trial judge misdirected himself in law when he placed reliance on section 33 of the Copyright Act, CAP 68, LFN, 1990 (now section 41, of the copyright Act CAP on, LFN, 2004) to hold that it lacked jurisdiction to entertain the Suit."*

Ground 4: *"The trial judge erred in law when he failed to consider the provisions of the copyright (Amended) Decree No. 42 of 1999 in applying, considering and or interpreting the provisions of the Copyright Act CAP D8 LFN, 1990."*

The Appellant had not in his brief said whether his sole issue is tied to this Grounds of Appeal, but at page 4 of the Respondent's amended brief of argument filed on the 20th of January 2011, learned counsel had in arguing Issue No. 1 on behalf of the Respondent submitted that Issue No. 1 is distilled from Grounds 1, 3 and 4 of the Appellants' Notice of Appeal while at page 9 of his amended brief, in arguing Issue No. 2, he submitted that Issue No. 2 is distilled from Ground 2 of the Appellant's Notice of Appeal.

Let me take the view that the Appellant's sole issue for determination is tied to the four Grounds of Appeal, as I find

they do. In my view, the issues for determination can aptly be three. They are:

1. *Whether the learned trial Judge was right in entertaining the objection to jurisdiction of the FHC as he did.*
2. *Whether the filing of a Notice of preliminary objection by the Respondent amounted to DEMURER- and*
3. *Whether the provisions of the Copyright Amended Decree No. 42 of 1999 and any other relevant provisions of the copyright Act for that matter is applicable to this case."*

The law is settled that jurisdiction is assumed where inter alia,¹² that the person bringing the action is properly before the Court, and the subject matter of the action is properly before the Court. It is the claim of the Plaintiff and not the defence that determines jurisdiction.¹³ Therefore, it is necessary to look at the Statement of Claim of the Appellant.¹⁴Section 251 (1)(f) of the

¹²These listed are only properly before the Court when by the enabling statute or by its inherent jurisdiction the Court can exercise jurisdiction over the parties.

¹³*Onuorah v. Kaduna Refinery & Petroleum Co. Ltd.* (2005) 6 NWLR Pt. 921 p 393 at 904; *UBA Plc v. Bit Ind. Ltd* (2006) 12 SCN Part 2394 at pp. 419-420; *Balogun & Ors v. Shifawu Ode & Ors.* (2007) NWLR Pt.1023 p.1 at 14; *Tukur v. Gov of Gongola State* (1989) 1989 SCN 1; *Senate President v. Nzeribe*(2004) 42 WRN 39 at 60; *Alphonsus Nk Uma v. Joseph O. Odili*(2006) 4 SCN 127 at 143; *Oba Aremo II v. Adekanye & 2 Ors*(2004) 8 SMG. 2004.

¹⁴As gleaned from pp 4-9 of the Record of Appeal.

CFRN provides (1) *"Notwithstanding anything to the contrary contained in this Constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly, the FHC shall have and exercise jurisdiction to the exclusion of any other Court in civil causes and matters."*

(f) *"Any Federal enactment relating to copyright patent, designs, trademarks and passing-off. industrial designs and merchandise marks, banners names, commercial and industrial monopolies, combines and trusts, standards of goods and commodities and industrial standards"*.

Therefore, it is trite to say that FHC has jurisdiction on issues of any Federal enactment¹⁵ relating to copyright, patent designs, trademarks... A cursory look at the Statement of Claim shows that it all borders on allegation of the Defendants' infringement of the Plaintiff's copyright. The trial judge, in my view was right in entertaining the Application ex-parte, objecting to the jurisdiction of the Court.¹⁶

3.0 On what Grounds did the lower Court strike out the suit?

Appellant counsel¹⁷ had pointed that the court did so on the ground of lack of proof of reciprocal protection of Copyright

¹⁵"Enactment" according to the Black's Law Dictionary Eight edn. p. 567 means; *"The action or process of making into law.... enactment of a legislative bill; a statute."*

¹⁶The motion ex-parte is at pages 12-22 of the Record of Appeal. By virtue of section 251 (1) of the CFRN, it brought the subject matter of this case within the jurisdiction of the FHC.

¹⁷C.F. Agbu Esq.

Laws between Nigeria and the United State of America,¹⁸ and the trial Judge's stand is that it had jurisdiction to entertain the matter, by virtue of section 251(1)(f).

At pages 13-14 of the Ruling,¹⁹ he had this to say inter alia:

..... I have already set out the Grounds upon which the Defendant is challenging the competence of the action and the jurisdiction of this court. The Defendants' main contention respecting issue of jurisdiction is that having registered the copyright in USA, its application has to be extended by a Minister in the Federal Gazette which has not been done. On behalf of the plaintiff it was contended that a foreign company can assert its copyright in Nigeria by virtue of section 15 and 16 of the Copyright Act, and that the question as to the requirements of gazeting the contention is a matter of evidence at trial, it is imperative to note that the subject matter allegedly infringed is a software for computer popularly known as "Window". By virtue of Section 7(a) of the Act, a literary work is eligible for copyright. And subsection (2) of the Act specifically provides: -

¹⁸The Ruling is at Pages 84-100 of the Record of Appeal in relation to, inter-alia an order to vacate and/or discharge the ex-parte order granted on the 8th of July 2005 in favour of the plaintiff.

¹⁹Pp 96-97 of the Record of Appeal

Section 39 (1) (d) of the Act²⁰ defines 'Literary work' to include computer Programmes. The FHC pursuant to established provisions²¹ is vested with jurisdiction to entertain any action for infringement of copyright at the suit of the owner, assignee or exclusive licensee, and by the cumulative averments in paras 4-8 of the Plaintiff's supporting affidavit, it emphatically averred that the Plaintiff is the owner of several software programs particularly the popular "windows operating system/software computers, the ownership of which is nowhere controverted or denied by the Defendant. The only area of disagreement is the extent of the application of this copyright same having been registered in the United States of America. Unlike in Trade Mark; the jurisdiction of this Court is not dependent on registration, on effect there is no provision of registration of a Copyright under the Act, but what the Act did is the establishment of the Nigeria Copyright Council under Section 30 and charge the Council with inter-alia the responsibility of monitoring and supervising Nigeria's position in relation to International Convention and advising the Government thereon...Page 16 of the Judgment of the learned trial judge is instructive, in declining jurisdiction over the subject matter.²² He observed thus-

The averments in paragraph 1 of the plaintiffs Statement of Claim and paragraph 4 of the Plaintiff/Applicant's supporting affidavit leave no one in doubt that the plaintiff/applicant company is a reputable software Company

²⁰Copyright Act, Cap 68 LFN 1990.

²¹Section 251(1) (f) of the CFRN and section 15 of Copyright Act.

²²P. 99 of the Record of Appeal.

registered according to American Laws with its Head office situated at 7 Microsoft Drive; Redmond; Washington D.C; United State of American. That being the the application of the said foreign copyright in Nigeria is subject to a reciprocal extension of protection in accordance with section 33 of the copyright Act. And in the absence of which this court will not in my view, exercise the requisite jurisdiction over the matter.

This is premised on the fact that the exclusive jurisdiction of this court²³ is only limited to the listed Federal enactments and does not extend beyond copyright etc., other than those listed therein, in the instant case, the copyright sought to be protected is as established pursuant to law other than the Federal Enactments listed in Section 251(1) (f) of CFRN. There is also nothing before the Court to show that there is any reciprocal extension of protection of the Copyright in question...”

It is my view that the procedure adopted by the Defendant is preferably in order. On the strength of the above, the Ex-parte Order of 9th July, 2005, was made without jurisdiction and is accordingly set aside. The entire suit is struck out on

²³Pursuant to section 251 (1)(f) CFRN 1999.

the ground of lack of jurisdiction by this court."²⁴

4.0 Does Application to set aside an Order made ex-parte or Preliminary Objection filed with no Statement of Defence amounts to Demurer?

An application to set aside an order made ex-parte does not amount to Demurer neither does a party filing a Preliminary Objection only with no Statement of Defence, amount to Demurer. Jurisdiction of a validly constituted court connotes the limits which are imposed upon its powers to hear and determine issues between persons seeking to avail themselves of its process.²⁵

The Respondent has argued²⁶ that there is nothing from the records of the Court to show any certificate which was either presented to or exhibited by the Appellant. Nor was any certificate pleaded to show that a certificate must be presented from the Nigeria Copyright Commission²⁷ for the purpose of conferring it with the status of eligibility. Therefore, the Respondent's counsel A.T. Omaghomi Esq. contends that failure on the part of the Appellant to show proof of the existence of such certificate clearly robbed the lower court of the jurisdiction to entertain the matter. He argues that by virtue

²⁴As concluded by the trial judge at p. 17 of the judgment, and p.100 of the Record of Appeal. It is evident that "subject matter" jurisdiction is what the Court based on and not "legal standing".

²⁵By reference to the subject matter of the issue, or the persons between whom the issue is joined, or the kind of relief sought or to any combination of these factors.

²⁶ Rightly in my view.

²⁷ As required by s. 5(2) of the Copyright Act.

of section 41(3) of the Act, the Minister can only order extension to the Appellant through a Federal Gazette as required by section 41 of the Act, which has not been done in this case. He argues that under Section 113 of the Evidence Act 1990, all official Communications of the Government of the Federation and of a State may be proved by the production of such Gazette. All that the Appellant needed to do was to bring before the Court a copy of the Federal Gazette, if indeed it exists. The law is elementary that in granting ex-parte applications for Injunction all the Facts must be laid before the Court and nothing suppressed.

It therefore becomes necessary, indeed imperative for the necessary "extension" to be extended to the Appellant via a Federal Gazette. In the absence of this, the learned trial judge was wrong in entertaining the matter and *ipso facto* Shuaibu J. was right in discharging the order of injunction made ex-parte and dismissing the entire suit for want of jurisdiction as he did. Issue No. 1 is therefore answered in the affirmative and same is hereby resolved in favour of the Respondent.

5.0 The filing of a Preliminary Objection by the Respondent at the lower court challenging the Court's jurisdiction without filing a defence does not amount to a demurrer.

In *NDIC v. CBN*,²⁸ it was held inter alia that; "*there is a distinction between objection to jurisdiction and demurrer. It is misleading to equate demurrer with objection to jurisdiction...*"²⁹In putting forward a Preliminary Objection it can be done *in limine*, particularly when it has to do with the

²⁸(2002) 7 NWLR Pt.766 page 272 at 297 paras a-f.

²⁹*Usman v. Baba* (2005) 5 NWLR Pt. 977, 775 at 773 paras d-g; *NDIC v. CBN* (2002) 7 NWLR Pt:766, 272 at 297.

issue of jurisdiction. No Statement of Defence need be filed. It can even be raised *suo motu* by the Court. But in demurer Proceedings which invariably has been abolished in the High Court, there must be pleadings. The issue of jurisdiction does not require or depend as such on what a Plaintiff may plead as facts to prove the reliefs he seeks. Jurisdiction is fundamental to any action. It is the springboard of which an action bounces forward in the positive or bounces backward in the negative. It is the visa that enables a court to be empowered to entertain the subject matter before it. The argument that the Preliminary objection amounts to demurrer is therefore misconceived and same is hereby discountenanced.

On final determination, the result is that this court finds no reason to interfere with the Ruling of Justice M.L Shuaibu delivered on the 7th of June 2006 at the FHC, Lagos discharging the orders made ex-Parte and dismissing the entire suit on the ground that the court lacked the jurisdiction to entertain and determine the plaintiff's Respondent claims against the Respondent. The result is that the Appeal lacks merit, while the Ruling of the learned trial Judge made on the 7th of June 2006 is hereby affirmed; with N30, 000.00 costs in favour of the Respondent.³⁰

³⁰It was a unanimous decision. Olukayode Ariwoola, JCA and Ibrahim Mohammed Musa Saulawa, JCA concurred with the reasoning and conclusion of the lead judgment of Rita Nosakhare Pemu, JCA. C.F. Agbu (with P.C. Achunine & M. Lawal) appeared for the Appellant, while A.T Omaghomi (with T. Yeri) appeared for the Respondent.

6.0 On Nature of Demurrer Proceedings; Distinction between a Demurrer Proceeding and a Preliminary Objection to the Jurisdiction of Court

In the case of *Ancomarine Services Co. Ltd v. The M/V. Sam Purpose (EX-TAPTI) & Ors*³¹ the distinction was successfully and succinctly captured thus: “*The pertinent question that arises from this issue is whether the application filed by the 3rd and 4th Respondents which led to this appeal was properly brought or if it falls foul of the rules against demurrer.*”³² Order 16 of the *FHC Civil Procedure Rules 2009* provides thus:

1. No demurrer shall be allowed.
2. (1) A party shall be entitled to raise by his pleading any point of law, and any point so raised shall be disposed of by the Judge who tries the cause at or after the trial. (2) A point of law so raised may, by consent of the parties, or by order of the Court or a Judge in Chambers on the application of either party, be set down for hearing and disposed of at any time before the trial.³³

Demurrer was an old form of defending an action, whereby a Defendant who believes that the truth or otherwise of the Plaintiff's claim would not affect the final determination of the matter because there is a point of law which can validly terminate the matter without the need for trial, would not file pleadings but would upon an application call upon the court to determine the point of law. In *Ukaegbu & Ors v.*

³¹(2018) LPELR-46763(CA).

³²There is no doubt that demurrer is outlawed in the lower Court.

³³Per Tukur, J.C.A at pp. 19-27, paras. E-B.

*Nwanuforo & Ors*³⁴ this Court gave comprehensive review of the concept thus:

Now what is "Demurrer"? Demurrer has been defined in numerous cases. In the case of *Tijani Bambe & Ors v. Alhaji A. Aderinola & Ors* (1977) 1 SC 5 - 6, the Supreme Court per Madarikan, J.S.C. said: "The word "demurrer" came from the Latin word "dimorari" meaning to "wait" or "stay". Before demurrer was abolished, one of the methods of fighting opponent's pleading was by demurrer. The party who demurred would not proceed with his pleading but having raised point of law as to whether any case had been made out in his opponent's pleading for him to answer, awaited the decision on that point.³⁵

In the case *Mobil Oil Nig. Plc v. IAL 36 INC*³⁶, demurrer was said of as follows: -

A demurrer is a known and well accepted common law procedure which enables a Defendant who contends that even if the allegations of facts as stated in the pleading to which objection is taken are true, yet their legal consequences are not such as to put the Defendant (the

³⁴(2015) LPELR-24571(CA).

³⁵Per Ige, J.C.A., pp. 41-42, paras. B-D.

³⁶(2000) 6 NWLR (Part 659) 146 at 167 G – H.

demurring party) to the necessity of answering them or proceeding further with the cause. This, concisely stated, is the concept of the rules as formulated. As has often been pointed out in several decided cases including those decided by this Court, the whole basis of a demurrer is in effect to short circuit the action and by a preliminary point of law to show that the action founded on the writ and statement of claim cannot be maintained.³⁷

7.0 On Demurrer proceedings the Position as it is

Demurrer proceedings in its original form is no longer allowed. What is permitted is a modified form, referred to as "proceedings in lieu of demurrer", which is to the effect that before a party can seek to terminate proceedings in circumstances that would constitute demurrer, such a party must file pleadings.³⁸ As now described, it is quite glaring that there exists a similarity between the old demurrer proceedings and a preliminary objection, as the aim of both is to terminate a matter without a full trial. It must however be clearly noted that a preliminary objection to the institution or continuation of a suit is different from a demurrer proceeding and may be so different even when it is brought without the filing of a Statement of Defence by the Defendant in a trial.

³⁷Karibi-Whyte J.S.C. (as he then was).

³⁸*Interdrill (Nig) Ltd & Anor v. Uba Plc* (2017) LPELR-41907(SC); *Onokomma v. Union Bank* (2017) LPELR-42748(CA); *Akinyemi & Anor v. Banjoko*(2017) LPELR-42377(CA); *JFS Investment Ltd. v. Brawal Line Ltd.* (2010) LPELR-1610(SC).

A preliminary objection is an application usually brought on the grounds that the Court should not hear a matter at all or continue hearing the matter, on the basis that the Court lacks the requisite jurisdiction to do so. In *Hassan v. Aliyu & Ors.*³⁹ the purpose of preliminary objection was pointed out thus: "*the preliminary objection is meant to consider the issue of jurisdiction or competence of the Court to entertain this suit.*"⁴⁰ In *APC & Ors v. In Re: CPC & Ors*⁴¹ the Apex Court gave a comprehensive exposition of the concept thus:

Anything "Preliminary", denotes anything coming and usually leading up to the main part of that thing or something else. Thus, a Preliminary Objection in a case/suit before a Court of law or Tribunal is that objection which if upheld would render further proceedings before that Court or Tribunal impossible or unnecessary. An example which readily comes to mind is an objection to the Court's or Tribunal's jurisdiction to entertain a matter placed or raised before it by any of the parties. It is the duty of the Court to consider that objection and give a ruling on it without much ado. The importance of such an approach has been re-stated severally by this Court. At the risk of being immodest, permit me, my Lords, to quote what I said in

³⁹(2010) LPELR-1357(SC) p. 90, para. D.

⁴⁰Per Adekeye, J.S.C.

⁴¹(2014) LPELR-24036 (SC) pp. 18-19, paras. C-B.

the case of *Efet v. INEC* (2011) 1 SCNJ, 179 at 194: "The aim/essence of a Preliminary Objection is to terminate at infancy, or as it were, to nip in the bud, without dissipating unnecessary energies in considering an unworthy or fruitless matter in a Court's proceedings. It, in other words, forecloses hearing of the matter in order to save time⁴²

The Apex Court in differentiating between a preliminary objection and demurrer proceedings, in the case of *Ajayiv. Adebisi & Ors*⁴³ held as follows:

It is therefore noteworthy that an application or preliminary objection seeking an order to strike out a suit for being incompetent on the ground of absence of jurisdiction is not a demurrer and therefore can be filed and taken even before the defendant files his statement of defence or without the defendant filing a statement of defence. The reason being that the issue of jurisdiction can be raised at any time.⁴⁴

⁴²Per Muhammad, J.S.C. See also *Yaro v. Arewa Construction Ltd & Ors* (2007) 6 SCNJ 418; *Sani v. Okene* (2008) 5 SCNJ 246. See further, *Bank of Industry Ltdv. Awojugbagbe Light Industries Ltd* (2018) LPELR-43812(SC); *Adejoh v. Olofu&Ors* (2014) LPELR-22347(CA); and *Kentev .Ishaku & Ors* (2016) LPELR-40788(CA).

⁴³(2012) LPELR-7811 (SC).

⁴⁴per Adekeye, J.S.C, pp 49-50, Paras E-G

In the case of *National Deposit Insurance Corporation v. Central Bank of Nigeria*⁴⁵, this Court identified the difference between demurrer and objection to jurisdiction by holding that –

There is distinction between objection to Jurisdiction and demurrer. It is misleading to equate demurrer with objection to jurisdiction. It is a standing principle that in demurrer, the plaintiff must plead and it is upon that pleading that the defendant will contend that accepting all the facts pleaded to be true, the plaintiff has no cause of action or where appropriate no *locus standi*. The issue of jurisdiction is not a matter for demurrer proceedings. It is much more fundamental than that and does not entirely depend as such on what a plaintiff may plead as facts to prove the relief he seeks. What it involves is what will enable the plaintiff to seek a hearing in Court over his grievance and get it resolved because he is able to show that the Court is empowered to entertain the subject matter. It does not always follow that he must plead first in order to raise the issue of jurisdiction.⁴⁶

⁴⁵(2002) 7 NWLR (Pt. 766) p. 272 at 296-297.

⁴⁶See also *NDIC v. CBN & ANOR* (2002) LPELR-2000(SC); *Akinyemi & Anor v. Banjoko* (2017) LPELR-42377(CA); and *Whetto&Ors v. Awode&Ors* (2011) LPELR-5100(CA).

A calm look at the application in question reveals that same was not a demurrer. The aim of the application was to protest the jurisdiction of the lower Court on the basis of cause of action and locus standi and as such was properly brought. It should also be noted that there was nothing untoward about the timing of the application, as matters of jurisdiction are of such a nature that they may be brought at any stage of the proceedings and when so brought, ought to be determined at the earliest opportunity.⁴⁷

8.0 Why *Microsoft Corporation v Franike Associates Ltd* was not heard on the merit by Court

In the extant case of *Microsoft Corporation v Franike Associates Ltd*⁴⁸, it was contended on behalf of the plaintiff that a foreign company can assert its copyright in Nigeria,⁴⁹ and that the question as to the requirements of gazeting the contention, to cloth the trial court with requisite jurisdiction, is a matter of evidence at trial. Therefore, *was the trial judge right in entertaining the Respondent's objection to the jurisdiction of the FHC and consequently striking out the suit on the Ground of lack of proof of reciprocal protection of copyright laws between Nigeria and United States of America?* The reviewer will answer in the affirmation, however, let us see the argument canvassed.

Considering the cases cited, including *Ancomarine Services Co. Ltd v. The M/V. Sam Purpose (EX-TAPTI) &Ors*,⁵⁰ on distinction between demurrer and issue of jurisdiction, it was

⁴⁷ See also *Garba v. Mohammed &Ors*(2016) LPELR-40612(SC); *Lumenzev. Govt of Ebonyi State* (2018) LPELR-44618(CA).

⁴⁸*Supra*

⁴⁹Sections 15 and 16 of the Copyright Act.

⁵⁰*Supra*

deposited and held in the case of *FCMB Plc & Anor. v. Choice Finishing & Furnishing & Anor*⁵¹ as follows:

*"Order 25 Rules 1, 2 and 3 of the FHC Civil Procedure Rules 2000*⁵² *provide:*

1. No demurrer shall be allowed. Points of law may be raised by pleadings 2. (1) Any party shall be entitled to raise by his pleading any point of law and any point so raised shall be disposed of by the Judge who tries the cause at or after the trial. (2) A point of law so raised may, by consent of the parties, or by order of the Court or a Judge in Chambers on the application of either party, be set down for hearing and disposed of at any time before the trial. Dismissal of action 3. If in the opinion of the Court or a Judge in chambers, the decision of such point of law substantially disposes of the whole action, or any distinct cause of action, ground of defence, set off, counterclaim, or reply therein, the Court or judge may thereupon dismiss the action or make such other order therein as may be just.⁵³

"It is very clear from the above provision that demurrers have been abolished in the FHC such that if a defendant desires to raise a point of law, he must do so in his statement of defence.

⁵¹(2015) LPELR-26004(CA) pp. 11-16, paras. E-B.

⁵²Now Order 16 2009 Rules.

⁵³Per Iyizoba, J.C.A.

This does not however apply to issues of jurisdiction. The Supreme Court in Elabanjo & Anor v. Dawodu⁵⁴ cited by both counsel dealt exhaustively with this point.”

In that case, the Plaintiff at the High Court of Lagos filed an action against the defendant claiming possession of certain plots of land, injunction and damages for trespass. On being served with the statement of claim, the defendant without filing a statement of defence, filed a notice of preliminary objection challenging the jurisdiction of the trial Court to entertain the suit and prayed for dismissal of the suit on the ground that it was statute barred. After hearing the parties on the preliminary objection, the judge struck out the objection for being incompetent on the ground that by Order 23 Rule 1 demurrer is not allowed and that in the absence of a statement of defence, the notice of preliminary objection was incompetent. On appeal to the Court of Appeal by the defendant, the decision of the High Court was overturned, the Court held inter alia that the failure to file a statement of defence did not disqualify an applicant from raising an issue as to jurisdiction. On further appeal to the Supreme Court by the Plaintiff, the apex Court held upholding the judgment of the Court of appeal that the objection was not a demurrer and that filing a defence was unnecessary as the objection related to an issue of jurisdiction. In the words of the court:

Jurisdiction is the very basis on which any Tribunal tries a case; it is the lifeline of all trials. A trial without jurisdiction is a nullity. This importance of jurisdiction is the reason why it can be raised at any stage of a case, be it at the trial, on

⁵⁴(2006) LPELR- 1106(SC)

appeal to the Court of Appeal or to this Court; *a fortiori* the Court can *suo motu* raise it. It is desirable that preliminary objection be raised early on issue of jurisdiction; but once it is apparent to any party that the Court may not have jurisdiction it can be raised even *viva voce* as in this case. It is always in the interest of justice to raise issue of jurisdiction so as to save time and costs to avoid a trial in nullity.⁵⁵

In the case of *Arjay Ltd. v. Airline Management Support Ltd.*⁵⁶ the Supreme Court drew a distinction between a demurrer application and a challenge of jurisdiction in the following words:

I agree with the Appellants to the effect that the preliminary objection in question challenged the jurisdiction of the trial Court to entertain the action. This is not a demurer application in which case there should be a statement of claim in place, the facts of which the Appellants would be required to admit before bringing their objection. I agree with the Appellants' submission that there is a difference between an objection to the jurisdiction and a demurer. I also agree with them that an objection to the jurisdiction of the Court can be raised at any time, even when there are no pleadings filed and

⁵⁵Per Mohammed, JSC.

⁵⁶(2003) 7 NWLR (Pt.820) 577.

that a party raising such an objection need not bring application under any rule of Court and that it can be brought under the inherent jurisdiction of the Court. Thus, for this reason, once the objection to the jurisdiction of the Court is raised, the Court has inherent power to consider the application even if the only process of Court that has been filed is the writ of summons and affidavits in support of an interlocutory application, as in the case in hand.⁵⁷

In *Elabanjo & Anor v. Dawodu*,⁵⁸ it was stated further on when objection to the jurisdiction of the court can be raised, he deposited as follows:

It is now beyond argument that because issue of jurisdiction is regarded as a threshold issue and a lifeline for continuing any proceedings, objection to it ought to be taken at the earliest opportunity as was done in the present case if there are sufficient materials before the court to consider it and a decision reached on it before any other step in the proceedings is taken because if there is no jurisdiction, the entire proceedings are a nullity no matter how well conducted. See *Ndaeyo v. Ogunaya* (1977) 1 SC 11; *Chacharos v. Ekimpex Ltd.* (1988) 1 NWLR (Pt.

⁵⁷Per Onu, JSC

⁵⁸*Supra.*

68) 88; *Oloba v. Akereja* (1988) 3 NWLR (Pt. 84) 508; *Bakare v. Attorney General of the Federation* (1990) 5 NWLR (Pt.152) 516 and *Jeric (Nigeria) Ltd. v. Union Bank of Nigeria Plc.* (2000) 15 NWLR (Pt.691) 447. It is quite clear from these decisions of this court that at any stage sufficient facts or materials are available to raise the issue of jurisdiction, or that it has become apparent to any party to the action that it can be canvassed, there is no reason why there should be any delay in raising it. In *Petrojessica Enterprises Ltd. v. Leventis Technical Co. Ltd.* (1992) 5 NWLR (Pt. 244) 675 at 693, Belgore JSC put it plainly thus: " Jurisdiction is the very basis on which any tribunal tries a case; it is the lifeline of all trials. A trial without jurisdiction is a nullity... This importance of jurisdiction is the reason why it can be raised at any stage of a case, be it at the trial, on appeal to Court of Appeal or to this court; a fortiori the court can *suo motu* raise it. It is desirable that preliminary objection be raised early on issue of jurisdiction; but once it is apparent to any party that the court may not have jurisdiction it can be raised even *viva voce* as in this case. It is always in the interest of justice to raise issue of jurisdiction so as to

save time and costs and to avoid a trial in nullity.⁵⁹

In *Aarti Steel (Nig) Ltd v. Otapo & Ors*⁶⁰

It is settled law, that there must be a cause of action before an intending litigant can initiate any legitimate proceedings. A suit is aimed at vindicating some legal right or claim and such legal right can only arise when certain material facts arise. It is only when facts establishing a civil right or obligation and facts establishing infraction or trespass on that right and obligation exist side by side that a cause of action is said to accrue. See these cases: - *Afolayan v. Ogunrinde* (1990) 1 NWLR PART 127 at 369. *Osigwe v. PSPLS Management Consortium Ltd* (2000) ALL FWLR Pt. 470 at 607. ⁶¹

⁵⁹Per Mohammed, J.S.C, pp. 16-17, paras. E-F.

⁶⁰ (2018) LPELR-45751(CA)

⁶¹ Per Bada, JCA pp. 14-25, paras. D-B. The decision of the lower court, as affirmed by the Court of Appeal, not to allow the matter under review, go through rigours of full trial, on point of law, is very much in order. However, it would have been a delight observing the gymnastics of full trial in such a cerebral case that will shape up Copyright.