

IN THE SUPREME COURT OF NIGERIA

Suit No: SC70/2004

Petitioner: Attorney-General of Lagos State

And

Respondent: Attorney-General of the Federation

Date Delivered: 2004-12-10

Judge(s): Idris Legbo Kutigi, Anthony Ikechukwu Iguh, Niki Tobi, Dennis Onyejife Edozie , Sunday Akinola Akintan

Judgment Delivered

THE dispute between the parties in this suit arose from circular letter addressed to all the governors of the states and all the Local Government Chairmen in the states by the Minister of State in the Federal Ministry of Finance. The circular letter reads as follows:-

Circular Ref. No.F. 12090/VI/T2/322

Office of the Honourable Minister of State for Finance,
Ahmadu Bello Way, Abuja,
April 19, 2004.

All State Governors,
All Local Government Chairmen

RE: Local Government Elections and Allocation of Funds from the Federation Account to LGAs.

I wish to draw your attention to the attached letter from Mr. President in which he raised some constitutional issues concerning the allocations to Local Government Councils from the Federation Account.

Kindly ensure compliance, please.

Sgd.
Mrs. Nenadi E. Usman
Honourable Minister of State.

The letter in question so attached, which was addressed to the Minister of Finance by President of the Federal Republic of Nigeria, Chief Olusegun Obasanjo, reads:

President,
Federal Republic of Nigeria

PRES/87

April 8, 2004

The Hon. Minister,
Federal Ministry of Finance,
Headquarters
Abuja

Dear Hon. Minister,

Local Government Elections and Allocations of Funds from the Federation Account to LGAs.

Available information indicates that some states namely: Ebonyi, Katsina, Lagos, Nasarawa and Niger conducted the last Local Government election in the new Local Government Areas created by their respective State Assemblies.

While State Houses of Assembly are empowered by the 1999 Constitution to create new Local Government Areas, the National Assembly, is however, required under Section 8 -(5) of the Constitution, to make consequential provisions by an Act with respect to the names and Headquarters of the new Local Government Areas for any such new Local Government to have constitutional recognition.

As the National Assembly is yet to make the necessary consequential provisions in respect of any of the newly created Local Government Areas in the country, conducting election under or funding any of them from the Federation Account would clearly be a violation of the constitution. Consequently, no allocation from the Federation Account should henceforth be released to the Local Government Councils of the above-mentioned States and any other State that may fall into that category, until they revert to their constituent Local Government Areas specified in Part I of the First Schedule to the Constitution.

In addition, you are aware that under Section 162 - (6) of the Constitution, each state is required to maintain a special account to be called "State Joint Local Government Account" into which shall be paid all allocations to the Local Government Council of the State from the Federation Account and from the Government of the State. Likewise, each state is required under section 162(7) of the constitution to pay to Local Government Councils in its area of jurisdiction such proportion of its total revenue on such terms and in such manner as may be prescribed by the National Assembly. This notwithstanding, reports have indicated that some States are yet to comply with these constitutional requirements.

In view of the above, all states should be requested to submit evidence that they have established State Joint Local Government Account in compliance with Section 162-(6) of the Constitution and also determined the basis for sharing allocations from the Federation Account due to their constituent Local Government Councils. In addition, they should also submit evidence of payment of State allocation into the State Joint Local Government Account, to enable payment of allocation to the Local Government Area Councils of each State from the Federation Account to the Joint Account.

You are to bring the contents of this letter to the attention of all States and Local Government Area Councils listed in the Constitution.

Yours sincerely

Sgd.
Olusegun Obasanjo"

On April 19, 2004 the plaintiff took out an originating summons on behalf of the Government of Lagos State in which he asked for reliefs against the defendant, as representative of the Federal Government. The reliefs sought, as were later amended, and further amended read as follows:-

"1. A determination of the question whether or not there is power vested in the President of the Federal Republic of Nigeria (by executive or administrative action) to suspend or withhold for any period whatsoever that Statutory Allocation due and payable to Lagos State Government pursuant to the provisions of Section 162(5) of the Constitution of the Federal Republic of Nigeria 1999.

2. A declaration that the present intention or proposal of the Federal Government to suspend or withhold for any period whatsoever the statutory allocation due and payable to the Lagos State Government pursuant to the provisions of Section 162(5) of the Constitution of the Federal Republic of Nigeria 1999 will, if carried out be unlawful and contrary to

the provisions of the said Constitution.

3. A consequential order of this honourable Court compelling the Defendant to pay immediately all outstanding arrears of statutory allocation due and payable to the Lagos State Government pursuant to the provisions of section 165(5) of the Constitution of the Federal Republic of Nigeria 1999.

4. An order of perpetual injunction restraining the President of the Federal Republic of Nigeria, or any functionaries or agencies of Executive arm of the Federal Government from doing anything whatsoever to suspend, withhold, for any period whatsoever or calculated to suspend or so to withhold any monies due and payable to the Lagos State government pursuant to the provisions of Section 162(5) of the Constitution of the Federal Republic of Nigeria.

The defendant after entering appearance, filed a counterclaim, which was later amended and further amended following the enactment of the Creation of New Local Government Areas (Amendment) Law, 2004, early in the month of October, 2004, that is, during the pendency of this case. The further amended counterclaim reads:-

1. A declaration that the Plaintiff/Defendant to the Counter claims has no power or right under the 1999 Constitution to abolish Local Government Area created under the 1999 Constitution by altering their names, adjusting their boundaries and dividing them into smaller units until the National Assembly has acted pursuant to the Provisions of S. 8(5) of the 1999 Constitution.

2. A declaration that the Plaintiff/Defendant to the Counter claim has no power or right under the 1999 Constitution to create new local governments without recourse to the National Assembly as provided for under the constitution.

3. A declaration that the alteration of the names of local governments, the alteration of the boundaries of the local governments and the creation of new local governments done by the Lagos State Government and the operation of the new local governments before and or without an Act of National Assembly to that effect, is illegal unconstitutional, null and void.

4. A declaration that the following local government areas are the local governments established under the 1999 Constitution in Lagos State, Agege, Ajeromi-Ifelodun, Alimosho, Amuwo Odofin, Apapa, Badagry, Epe, Eti-Osa, Ibeju-Lekki, Ifako-Ijaiye, Ikeja, Ikorodu, Kosofe, Lagos Island, Lagos Mainland, Mushin Ojo, Oshodi-Isol, Shomolu, Surulere.

5. A declaration that sections 1, 2 and 3 of the Local Government Areas Law No. 5 of 2002 of Lagos State are in contravention of section 3 (6) and Part 1 of the first schedule to the Constitution of the Federal Republic of Nigeria, 1999 and therefore are unconstitutional, null and void in so far as they purport to alter the provisions of the said section 3 (6) and part 1 of the First Schedule to the 1999 Constitution with respect to Lagos State of Nigeria.

6. A declaration that the 57 Local Government Areas established the by the Local Government Area Law No. 5 of the Lagos State are not entitled to benefit from the Federation Account.

7. A declaration that the elections conducted by the Lagos State Government on Saturday, March 27, 2004 into the 57 local government areas created by the Local Government Areas Law No. 5 of 2002 of Lagos State are inchoate and cannot take effect as presently established in that the 57 local government areas are not known to the constitution.

8. An order nullifying and setting aside the elections conducted by the Lagos State Government on Saturday, March 27, 2004 into the 57 local government councils established by the Local Government Areas Law No. 5 of 2002 of Lagos State.

9. An order of injunction restraining the Lagos State Governor, the Lagos State House of Assembly or any functionaries or agencies of the Lagos State Government from maintaining, financing and recognising any local government in Lagos State apart from the ones created under Schedule 1 of the 1999 Constitution.

Briefs of arguments have been exchanged by the parties on both the main claim by the plaintiff and the counter claim by the defendant. The plaintiff also filed defence to the defendants counter claim. A brief of argument was also filed by the amicus curiae.

Plaintiff's Claim

Arguing the plaintiff's case, Professor Osinbajo (SAN) learned Attorney-General of Lagos State, adopted the plaintiff's brief of argument and contended that the President of the Federal Republic of Nigeria has no right to withhold the payment of fund due to the Local Government Councils from the Federation Account under Section 162 subsection (5) of the 1999 Constitution of the Federal Republic of Nigeria. He submitted that the powers exercisable by the President under section 162 of the Constitution are purely executive in nature and are neither legislative nor judicial. He referred to Section 162 subsection (4) of the Constitution and argued that the provisions thereof did not give the President any discretion.

He argued further that the word "shall" in Section 162 subsections (4) (5) and (9) of the 1999 Constitution, qualified the action to be taken by the President as mandatory and not discretionary. He emphasised that nowhere in the 1999 Constitution is the President given the power to withhold funds due to states or local government councils or even the National Judicial Council by virtue of the provision of Section 162 subsection (9) thereof. He submitted, in other words, that the President has no supervisory power over the states, the local government councils or the National Judicial Council. Nor can the President be a judge in his own cause. He cited in support the cases of *Eshugbayi Eleko v Officer Administering the Government of Nigeria*, (1931) AC 662 at p. 670 and *Military Governor of Lagos v Ojukwu*, (1986) 1 NSCC Vol. 17, 302 at p. 309 line - p. 310 line 9, per Eso, JSC and p. 313 lines 43 - 51, per Obaseki, JSC.

On the question whether the President was a constitutional trustee of the Federation Account, learned Attorney-General argued that neither the Federal Government nor the President is a trustee of the fund due to local government councils, but on the contrary, it is the state governments, by virtue of the provisions of section 162 subsection (5) of the constitution, that are trustees to the fund allocated to the local government councils from the Federation Account. Relying on the provisions of Section 162 subsections (5) to (8) of the constitution, he submitted that a state government is not merely a channel for passing funds allocated to local governments. He referred to pp. 231 - 232 of the book *Injunctions and Enforcement of Orders* by Afe Babalola in support of the plaintiff's claim for perpetual injunction.

Alhaj Abdullahi Ibrahim, SAN, as amicus curiae, adopted his brief of argument. He referred to the provisions of Section 162 subsections (1), (3) and (5) of the 1999 constitution and submitted that states government and local government councils are entitled to share in the Federation Account and that the right cannot be tampered with by any authority. He submitted that the word "shall" in section 162 subsection (3) is mandatory and that there was no way in which the President can suspend or withhold amount due to Local Government Councils.

On the creation of local government councils, learned Senior Advocate referred to Section 8 subsections (5) and (6) of the Constitution and contended that the power of the National Assembly to amend Parts I and II of the First Schedule to the Constitution is merely consequential. He submitted that it was the State House of Assembly that has the power to create new Local Government Councils and that once this is done the creation stands. He argued that the President could not take it upon himself to withhold the funds due to the Local Governments and where the President is in doubt as to what action to take he must ask the courts for interpretation of the provisions of the Constitution in doubt. In support of the argument, he cited the case of *A-G of the Federation v A-G of Abia State & 35 Ors.* (2002) 6 NWLR (Part 764) 524.

Replying, Chief Afe Babalola (SAN) adopted the brief of argument which he filed opposing the plaintiff's claim. In the brief, section 3 subsection (6) of the Constitution is referred to. It is argued that the Local Governments referred to in section 162 of the Constitution are those created under Section 3 subsection (6) and Part I of the First Schedule to the Constitution. It is contended that statutory allocation of funds to Local Government is not intended to be the property of State Governments. Therefore, no State Government has proprietary right over the statutory allocation meant for Local Government Areas. It is argued that where a Local Government Council, as recognised under the Constitution ceases to

exist, it would be irregular, wrongful and unconstitutional for the Federal Government to pay statutory allocation meant for Local Governments created under the Constitution to entities that are not recognised by the Constitution. He emphasised that the plaintiff had conceded that the 20 Local Government Councils provided for by the Constitution had been replaced with 57 Local Government Councils created by the plaintiff. It is argued that the effect of creating 57 new Local Government Councils out of the 20 is the same as creating new States out of old States, which is the situation dealt with by this Court in the case of *A-G of Ondo State v A-G of Ekiti State*, (2001) 17 N.W.L.R. (Part 743) 786 at p. 787G; pp. 787-788 C-D. Thus by creating 57 Local Government Councils, the plaintiff abolished the 20 that had been established by the Constitution. It is canvassed that the Constitution made provision for the allocation of funds from the Federation Account to 20 Local Government Councils in Lagos State and not the 57 created by the plaintiff. Therefore the defendant had no obligation to the 57 Local Government Councils. It is submitted that since the 20 Local Government Councils have been brought into extinction, the defendant has no obligation under the Constitution to pay the statutory allocation to the plaintiff. The defendant's brief of argument contends that by the Oath of Allegiance in the Schedule to the Constitution, to which the President subscribed, he is obliged to "preserve, protect and defend the Constitution of the Federal Republic of Nigeria." By Section 5(a) of the Constitution the executive powers of the Federal Republic of Nigeria are vested in the President, and by Section 5(6) of the Constitution "the executive powers extend to the execution and maintenance of the Constitution." It is, therefore, argued that the claim by the plaintiff against the defendant is an invitation to the defendant to commit a breach of the provisions of the Constitution which the latter had sworn to uphold.

On the interpretation to be placed on Section 162 subsection (5) it is submitted that the interpretation placed on the subsection by the plaintiff is too restrictive and does not take into consideration other relevant provisions of the Constitution. It is, therefore, submitted that the cardinal principle of interpreting the Constitution is that the provisions of the Constitution must be read together and not disjointly. To support the submission the decisions in the cases of *Ifezue v Mbadugha*, (1984) 5 S.C. 79 at p.101 and *A-G of Ogun State v Aberuagba*, (2002) 2 WRN 52 at p. 88 were cited. So also the cases of *Kalu v State* (1998) 13 N.W.L.R. (Part 583) 531 at pp. 586-587 and *Mohammed v Olawumi*, (1990) 2 NWLR (Part 133) 458 at p.484.

On the argument that State Governments are trustees for the Local Governments in their State vis-a-vis allocations from the Federation Account to the Local Governments, the defendant contends that on the contrary, it is the Federal Government that is the trustee to the Local Governments as well as the State Governments. It is argued that the State Governments are not trustees to the Local Governments but serve only as conduit pipes as they acquire no interest in funds allocated for the benefit of the Local Governments. Reference is made to the cases of *A-G of the Federation v A-G of Abia State & Ors.* (2002) WRN 1 at pp. 96-97 and *A-G of Bendel State v A-G of the Federation, & Ors.*, (1982) 1-2 S.C. 13 at p 220 and it is stressed that fund allocated to Local Governments is the property of the Local Governments and not a joint property of the State Government and the Local Governments. That in the circumstances of this case, if the plaintiff were to be held to be a trustee such a trust will be invalid for uncertainty of the object of the trust because the 20 Local Government Areas known to the 1999 Constitution have been "eliminated, obliterated or subsumed" by the creation of 57 new Local Governments by the plaintiff. The case of *Knight v Knight*, (1840) beau 148 on the certainties of trust and the Source Book on the Law of Trust by Ramjohn at Page 72 are referred to.

Now, Section 162 subsection (1), (3) and (5) of the 1999 Constitution provides as follows:-

162. (1) The Federation shall maintain a special account to be called "the Federation Account" into which shall be paid all revenues collected by the Government of the Federation, except the proceeds from the personal income tax of the personnel of the armed forces of the Federation, the Nigeria Police Force, the Ministry or department of government charged with responsibility for Foreign Affairs and the residents of the Federal Capital Territory, Abuja.

.....

(3) Any amount standing to the credit of the Federation Account shall be distributed among the Federal and State Governments and the local government councils in each State on such terms and in such manner as may be prescribed by the National Assembly.

(5) The amount standing to the credit of local government councils in the Federation Account shall also be allocated to

the State for the benefit of their local government councils on such terms and in such manner as may be prescribed by the National Assembly.

It is significant that in both subsections (3) and (5) thereof reference is made to "Local Government Areas." The phrase "local government councils" has not been defined as such by the Constitution. However Section 318 of the Constitution provides that both the phrases "local government area" and "local government council" include an area council. In other words both the phrases "local government area" and "local government council" are interchangeable with regard to the meaning of "area council."

The letter by the President of the Federal Republic of Nigeria to the Minister of Finance, which is quoted above makes references to "Local Government Areas," "Local Government Councils" and "Local Government Area Councils." This is somewhat confusing. The letter states that funding of any "new Local Government Area from the Federation Account would clearly be a violation of the Constitution." However, Subsection (3) and (5) of Section 162 of the Constitution have not made any reference to payment to Local Government Areas but "local government councils." In the third paragraph of the letter, the President directs that "no allocation from the Federation Account should henceforth be released to the Local Government Councils until they revert to their constituent Local Government Areas specified in Part I of the First Schedule to the Constitution. Again in the last paragraph of the letter, the President directs the Minister to bring the contents of this letter to the attention of all the state and local government area councils listed in the constitution.

In his originating summons, the plaintiff ingeniously avoided mentioning either local government areas or local government councils or local government area councils, but premised his claim on the payment of statutory allocation due and payable to the Lagos State government pursuant to section 162(5) of the constitution of the Federal Republic of Nigeria. This simply means the amount standing to the credit of the local government councils of Lagos State in the Federation Account as provided in section 162 (5) of the Constitution.

If we are to go by technicality it will be seen that the controversy between the plaintiff and the defendant is not exactly over the directive given by the President to the Minister of Finance, as the directive relates to local government areas, local government councils and local government area councils while the plaintiffs claim is shown to concern Lagos State Government. Be that as it may, it should be borne in mind that we are in this case concerned with the interpretation of the Constitution. The inconsistency and confusion notwithstanding, this court has since laid down that in interpreting the constitution we should avoid technicalities - see the case of *Nafiu Rabi v Kano State*, (1980) 8 - S.C. 130 where Sir Udo Udoma stated on pp. 148 - 149 thus (see also (1981) 2 NCLR. 293 at p.236).

"... the function of the Constitution is to establish a frame work and principles of government, broad and general in terms, intended to apply to the varying conditions which the development of our several society, and therefore mere technical rules of interpretation of statutes are to some extent inadmissible in a way so as to defeat the principles of government enshrined in the constitution."

Also in the case of *A-G of Bendel State v A-G, of the Federation & Ors* (1981) 12 NSCC 314 at p. 395 lines 4 - 223 Eso, JSC observed as follows:

"It is the primary aim of this court to do substantial justice, and this should, indeed, be more pronounced in constitutional matters... The jurisdiction conferred upon the Supreme Court in regard to the interpretation and adjudication on the constitution is a special jurisdiction. The court cannot justify its usefulness in regard to this peculiar jurisdiction, by being inhibited with technicalities. Such inhibition will only serve to destroy the entire constitutional purpose of the court."

Notwithstanding the references made in the letter in question by the President to local government area or local government council or local government area councils it is clear to me that the dispute between the parties relates to the payment of funds from the Federation Account to the states of Nigeria, that is to say. Abia, Adamawa, Akwa Ibom, Anambra, Bauchi, Bayelsa, Benue, Borno, Cross River, Delta, Ebonyi, Edo, Ekiti, Enugu, Gombe, Imo, Jigawa, Kaduna, Kano, Katsina, Kebbi, Kogi, Kwara, Lagos, Nasarawa, Niger, Ogun, Ondo, Osun, Oyo, Plateau, Rivers, Sokoto, Taraba, Yobe and Zamfara.

Each state of Nigeria named in the first column of Part 1 of the First Schedule to this Constitution shall consist of the area shown opposite thereto to the second column of that schedule.

There shall be seven hundred and sixty- eight local government areas in Nigeria as shown in the second column of Part 1 of the First Schedule to this Constitution and six area councils as shown in Part II of that schedule.

Subsection (6) thereof clearly shows that there are 768 local government areas in Nigeria. It seems to me, as a matter of common sense, that a local government area is supposed to represent the area of a given local government council, for I cannot imagine how there can be two local government councils in one local government area. That will certainly lead to confusion. I am not aware of any local government area that consists of two or more local government councils. At the inception of the 1999 Constitution, it was matter of judicial notice that there were 768 local government councils throughout the country which corresponded with the 768 local government areas mentioned in section 3 (6). So that the councils were equated or synonymous with the areas. This was the position before some states of the Federation, including the plaintiff, decided to follow the provisions of section 8 of the 1999 Constitution in attempt to create new or additional local government areas and councils. Subsection (3) of section 8 provides:

(3) A bill for a Law of a House of Assembly for the purpose of creating a new local government area shall only be passed if -

(a) a request supported by at least two-thirds majority of members (representing the area demanding the creation of the new local government area) in each of the following, namely -

- (i) the House of Assembly in respect of the area, and
 - (ii) the local government councils in respect of the area,
- is received by the House of Assembly;

(b) a proposal for the creation of the local government area is thereafter approved in a referendum by at least two-thirds majority of the people of the local government area where the demand for the proposed local government area originated;

(c) the result of the referendum is then approved by a simple majority of the members in each local government council in a majority of all the local government councils in the State; and

(d) the result of the referendum is approved by a resolution passed by two-thirds majority of members of the House of Assembly.

The import of these provisions is that a new local government area, and therefore a new local government council, could only be created by a state after the steps enumerated there in have been complied with before a bill to that effect could validly be passed by the House of Assembly of the State. In the present case, it is not in dispute that those steps had been taken by the plaintiff.

Subsection (6) of section 8 provides:

(6) For the purpose of enabling the National Assembly to exercise the powers conferred upon it by subsection (5) of this section, each House of Assembly shall, after the creation of more local government areas pursuant to subsection (3) of this section, make adequate returns to each House of the National Assembly

These provisions show that after the Law mentioned in subsection (3) of section 8 is passed by the House of Assembly returns must be submitted by the State concerned to the National Assembly to enable the National Assembly pass an Act which will amend section 3 of the Constitution and Parts 1 of the First Schedule thereof to accommodate the new local government area created by the State. The subsection reads:

(5) An Act of the National Assembly passed in accordance with this section shall make consequential provisions with respect to the names and headquarters of State or Local government areas as provided in section 3 of this Constitution and in Parts I and II of the First Schedule to this Constitution.

Now for the purpose of creating new local government it is necessary to read together and interpret all the provisions of

the Constitution mentioned above, namely section 3 subsections (1), (2) and (6) together with part I of the first schedule, section 8 subsections (3) (5) and (6) of the constitution. This is the canon of interpretation of Constitution as laid down in, *Ifezue v Mbadugha*, (1984) 5 S.C. 79 at p. 101, *A.G. of Ogun State v Aberuagba*, (1985) 1 NWLR (Part 3) 395 at p. 414 and *Senate of National Assembly v Momoh*, (1983) 4 NCLR 269 at p. 282. When those sections are read together what emerges is that the passing of a bill by a House of Assembly creating a local government area or local government council in accordance with section 8 subsection (3) of the Constitution is not enough, the state will have to go a step further by submitting returns to the National Assembly which in turn will have to amend section 3 (6) of the Constitution for the local government area to be accommodated by the Constitution. In other words, the exercise by the state House of Assembly in passing the necessary bill creating a new local government or local government area is inchoate as submitted by Chief Afe Babalola, SAN.

I, therefore, come to the conclusion that the passing of the Local Government Areas Law, No. 5 of 2002 by the Lagos State House of Assembly was not sufficient to give life to the new local government areas until the National Assembly passes the consequential Act amending the section (3) subsection (6) and Part I of the First Schedule to the constitution. Similarly, the enactment of new Local Government Areas (Amendment) Law, 2004 by the Lagos State House of Assembly, which was assented by the Governor of Lagos state on October 6, 2004, when this case was pending before us, is of no effect and cannot be operative until the National Assembly passes the appropriate Act under section 8 subsection (5) of the constitution appropriately amending Part I of the first schedule to the constitution to accommodate the new local government areas.

Let me now return to the provisions of section 162 subsections (3) and (5) of the Constitution. I have already held that the phrase "local government council" is synonymous with "local government area" as shown in the constitution. I am aware that Prof. Ben Nwabueze, SAN holds a different view for he stated as follows in his book *Federation in Nigeria under the Presidential Constitution* at pp. 131 to 132 -

"It is contended on the other hand that a state government has no power at all to create local government areas. The reasoning behind this contention is that since the area of each state is defined in the constitution by reference to named local areas which happen to be the same as the existing local government areas, the creation of local government areas will necessarily involve a constitutional amendment by means of legislation enacted by the National Assembly, with the approving resolution of the Houses of Assembly of not less than two-thirds of all the states."

The argument is untenable.

With regard to the third question for determination, it is stated that both the argument to be presented and the preceding argument in respect of the second question for determination are in the alternative to the argument in respect of the first question for determination. It is submitted that the intention of the Constitution on the creation of local government areas is to do two things, namely - to regulate the legislative power of the House of Assembly of a State to create local government areas in the State and to describe the territorial extent of each state. It is therefore argued that it is apparent that a State Assembly is to have the power to pass a bill for a law for the purpose of creating new local government areas in the State. Once it exercises this power the number of local government areas in the country ceases to be the number mentioned in the Constitution, that is 768. It is submitted that it cannot truly be said that a law duly enacted pursuant to Section 8(3) is inconsistent with the Constitution, since it is a Law duly enacted in accordance with the provisions of the Constitution itself. It is, however, obvious that Section 3 subsection (6) of the Constitution, which provides that there shall be 768 local government areas in Nigeria must be reconciled with the provision contained in Section 8(3) which permits the creation of new local government areas by the House of Assembly of a State. It is contended that in interpreting the meaning of Section 3(6) of the Constitution we should do so in its historical context and should not extend its meaning beyond the purpose it was intended to serve, which is to describe the territorial extent of Lagos State and not to limit the number of local government areas in Lagos State. The case of *Holme v Guy*, (1877) 5 Ch.D. 901 at p. 905 was cited to buttress the point.

It is argued, in conclusion, that it is not the intention of the Constitution, by the provisions contained in Section 3(6) thereof to limit the number of local government areas in Nigeria but rather to make use of the names of the local government areas in use at the time the Constitution was written. In the alternative, if we think otherwise, that is that

Section 3(6) must be treated as laying down that the number of local government areas in Nigeria must be limited to 768, then there arises a need for harmonisation and reconciliation of the various provisions contained in Sections 3(6) and 8(3). It is further argued that we should resolve the conflict by treating the provision of section 8(3) as a qualification of section 3(6) as this is the only way, it is submitted, in which both provisions can be made to stand and give effect to the obvious intention of the Constitution. The case of *R v Zik's Press* 12 WACA 202 at pp. 205-206 is cited in support of the contention. It is also argued that we should accordingly conclude that the failure or delay of the National Assembly to pass an Act pursuant to Section 8(5) of the Constitution is of no legal consequence to the legality or constitutionality of Law No. 5 of 2002.

With regard to the remedies sought by the defendant in his counter-claim, it is submitted that the counter-claim in its entirety is not cognisable under Section 232 of the 1999 Constitution since Section 232 subsection (1) limits the jurisdiction of this Court to a dispute between the Federation and a State or between States in so far as the dispute involves any question (whether of law or fact) on which the existence or extent of a legal right depends. It is canvassed that none of the reliefs in the counter-claim, even if there is any dispute properly so called between the Federal Government and the Lagos State (which is not conceded) involves the existence or extent of any legal right of the Federal Government in controversy in the counter-claim as none of the claims raises any question as to any legal right of the defendant let alone showing that such right is being violated or threatened. The case of *A-G. of Bendel State v A-G of the Federation*, (1981) 12 NSCC 314 at p. 406 lines 13-30 and p. 407 lines 27-31 per Eso JSC and p. 352 lines 21-25 per Idigbe, JSC were cited. It is, therefore, urged that We should in the circumstance hold that the counter claim fails for lack of jurisdiction and strike it out.

Alhaji Abdullahi Ibrahim, learned Senior Advocate of Nigeria, on his part as *amicus curiae* argues in his brief of argument that the constitutional provisions applicable to local government areas or councils are found in section 3(1), 7 8(3) and (6), (7) and (8), Parts I and II of the Third Schedule and the Fourth Schedule to the 1999 Constitution. It is argued that a close examination of all the provisions in question shows that the supervision of local government councils is the responsibility of the state government. The Federal Government and the National Assembly have very minimal interaction with local government councils. Reference is made to section 8(3) and it is submitted that there are dissimilarities in the provisions of the Constitution relating to the creation of new states and those relating to the creation of new local government areas. It is explained that to create a new state an Act of the National Assembly is necessary while to create a new local government area a law of the House of Assembly of a state is what is needed. It therefore follows that the House of Assembly is the overriding authority for the creation of a new local government area in a state. The National Assembly has no role to play in that regard and the power to pass an Act conferred on it by section 8 subsection (5) is not for the purpose of giving constitutional recognition to the new local government area.

Reference is made to section 7(1) and 8(5) of the Constitution and it is argued that what is required of the National Assembly is a mere formality to update Parts I and II of the First Schedule of the Constitution to reflect the changes that have been made to the number and names of the local government areas existing in the state. It is stated that this is why section 9 subsection (2) of the Constitution clearly exempts the making of consequential provisions (stated in section 8) from the rigour of a normal constitutional amendment.

It is argued that the words after the creation of more local government areas, in section 8 (6) of the Constitution presuppose that the Constitution recognises and acknowledges that upon the passage of the bill into Law by the House of Assembly in accordance with the provisions of section 8(3), the local government area so created comes into existence. It is therefore, futile to argue that even though the new local government area has been created, an Act of the National Assembly is required to give it constitutional recognition. The case of *A-G of Abia State & Ors. V. A-G of the Federation* (2002) 6 NWLR (Part 762) 264 and *Honds & Ors. v. R.* (1975) 24 WLR 326 are cited. Consequently, we are called upon to hold that the newly created Local Government Area of Lagos State having been created in accordance with the provisions of section 8(3) of the Constitution, are constitutionally created and therefore do not need an Act of the National Assembly to give them constitutional recognition. The National Assembly has no role whatsoever to play in the creation of new Local Government Areas under the Constitution. The only role assigned to the National Assembly is that of updating the Constitution to reflect the newly created local government area. This role, it is stated, is played by the National Assembly after the creation of the new local government areas by the state government.

It is argued, in conclusion, that the President of the Federal Republic of Nigeria has no power to suspend, withhold or direct the suspension or withholding (whether by way of administrative action or executive fiat) for any period, the statutory allocations due and payable to the Local Government Councils in accordance with the provisions of the Constitution. This Argument is based on the ground that the States have a constitutional right to the funds standing to the credit of the Local Government Councils in the Federation Account for the benefit of the Local Government Councils in their states and this constitutional right cannot be taken away except by the express provision of the Constitution.

It is important to mention that the defendant had filed a reply brief on 5th July 2004 to the plaintiff's brief on the counter-claim. However, at the hearing of the case on 7th October, 2004, they abandoned the reply brief. Consequently, the reply brief is hereby struck out.

Now, it is necessary to deal first with the issue of jurisdiction raised by the plaintiff, for if it succeeds that will be the end of the counterclaim raised by the defendant.

As I stated earlier the basis of the dispute in this case is the directive given by the President that funds from the Federation Account due to Local Government Councils of a State where new Local Government Areas have been created but no step has yet been taken by the National Assembly to consequentially amend section 3 (6) of the Constitution to accommodate such new Local Government Councils should be withheld. The letter makes reference to not only the creation of new Local Government Areas but also the holding of elections into the Local Government Councils of the new Local Government Areas as well as the opening of State Joint Local Government Account by the States concerned. It follows therefore that the area of the dispute between the parties is not limited only to payment of funds from the Federation Account to the Local Government Councils through the State Governments.

In the light of the foregoing, on close examination of the reliefs sought in the counterclaim, it will be seen that reliefs Nos. 1, 2,3,4, 5 and 6 are all akin to the payment of funds by the defendants from the Federation Account to the new local government councils created by Law No. 5 of 2002. For which there is real controversy between the parties since the plaintiff's originating summons is also based on the payment of funds due to the local government councils in Lagos State. Similarly, reliefs Nos. 7 and 8 concern the elections held into the new Local Government Councils created by Law No. 5 of 2002 which has been mentioned in the letter by the President to the Minister of Finance which is the source of the controversy in this case. Relief No. 9 touches on the creation of the new Local Government Areas created by Act No. 5 of 2002. On the whole I am of the view that all the reliefs sought in the counter claim touch on the constitutional responsibility of the defendants as perceived by the President. Therefore the dispute between the parties, in my opinion, involves question, of law on which the extent of the constitutional (i.e. legal) rights of both the plaintiff and the defendant depend. I, therefore, hold that there is a proper dispute under section 232 sub-section (1) of the 1999 Constitution between the parties and this court has the jurisdiction to determine the dispute. Besides, it is a general principle of law that the court will not readily deny itself jurisdiction unless the jurisdiction is expressly ousted by legislation. Again a counter-claim can properly be raised by a defendant when the counter-claim is directly related to the principal claim - see *Nigerian Ports Authority v Construzioni General Farsura Cogefar SpA & Anor.*, (1972) 12 S.C. 81 at pp.94 - 98.

The provisions of the constitution pertaining to Local Government will be found in section 3 subsection (6), 4 subsections (6) and (7) 7, 8 subsection (3) (5) and (6), 9 and 162 (3) (5) (6) - (8) of the 1999 Constitution. All these provisions must be read together in order to interpret the provisions of section 162(3) and (5) - see the cases of *Ifezue*, A-G. of Ogun State, and *Senate of National Assembly* (supra). If this is done, what emerges is that for a new local government area (and therefore new local government council) to be created the provisions of section 8 subsection (3) must be complied with by the House of Assembly of the State where the local government areas or councils are to be created. Section 4 subsection (6) and (7) give the House of Assembly the powers to legislate for the state for the peace, order and good government of the state. Section 7 subsection (1) guarantees the existence of democratically elected local government councils and every state is directed to ensure that they exist under a State Law which provides for their establishment, structure, composition, finance and functions. Section 8 subsection (3) specifically vests the State House of Assembly with the power to pass a bill creating a new local government area. When this is done, a return is to be made by the House of Assembly to the National Assembly for the purpose of enabling the latter to exercise its powers under section 8 subsection 1(5) of the constitution. This power entails the making of consequential provisions with respect to the names and headquarters of the local government areas provided in section 4 and part 1 of the First Schedule to the

Constitution. The procedure for passing the Act is different from the procedure for passing other Acts for the purpose of amending the Constitution, as it is not necessary for the other Houses of Assembly to approve the amendment to the constitution.

It is clear, therefore, that the provision of 768 local government areas in section 3 subsection (6) could be altered to either a higher number or even a lower number. Having read all the provisions of the constitution aforementioned, I am satisfied that the House of Assembly of Lagos State has the right to pass the Creation of Local Government Areas Law No. 5 of 2002 and to amend it by passing the Creation of Local Government Areas (Amendment) Law, 2004. It is very clear to me, however, that for the Plaintiff to receive funds from the Federation Account under section 162(3) and (5) there must be local government councils which have legally or constitutionally come into existence. It seems to me for this to happen the remaining or consequential action must be taken by the National Assembly to amend section 3 subsection (6) and Part 1 of the First Schedule to the Constitution. This is so, because the references made in section 162 to local government councils must be with a view to the local government areas specified in section 3(6), which I have earlier held to be equal to or synonymous with local government councils.

What follows from this is that the laws enacted by Lagos State that is Law No. 5 of 2002 and the 2004 Law are both valid Laws since the House of Assembly of Lagos State has the power under sections 4 subsections (6) and (7), sections 7 subsection (1) and 8 subsection (3) of the Constitution to legislate in respect of the creation of new local government areas and local government councils which are one and the same for the purpose of section 162 subsections (3) and (5) of the Constitution. However, in the context of section 8 subsection (5) and section 3 subsection (6) such laws cannot be operative or have full effective until the National Assembly makes the necessary amendment to section 3 subsection (6) and Part 1 of the First Schedule to the Constitution. The effect of this is that the laws are valid but inchoate until the necessary steps as provided by the constitution are taken by the National Assembly.

Next is the question whether the President of the Federal Republic of Nigeria was right to direct the Minister of Finance not to release statutory allocations from the Federation Account to the states which created new local government areas or held elections into the new local government councils or failed to maintain a special account called "State Joint Local Government Account" as provided by section 162 subsection (6) of the constitution. It has been argued that the president by virtue of the "Oath of Office," which he took on assumption of office, he is bound "to protect and defend the constitution". In addition, the "executive powers of the Federation," is vested in the President by section 5 sub-section (1) (a) of the constitution and such powers extend to the execution and maintenance of the constitution. This is certainly so, but the question is, does such power extend to the President committing an 'Illegality' Certainly the Constitution does not and could not have intended that. As I have already shown, the creation of new local government areas or councils is supported by the provisions of the constitution. In other words the taking of such a step or act by Lagos State is not unconstitutional as thought by the President. The constitution fully recognises the step taken that there is still one more step or hurdle to be taken or crossed by the National Assembly for the Plaintiff to actualise the creation of the new local government areas. Our attention has not been drawn to any other provision of the constitution which empowers the President to exercise the power of withholding or suspending any payment of allocation from the Federation Account to Local government Council or to state Government on behalf of the Local Government Councils as provided by section 162 subsections (3) and (5) of the Constitution.

With respect, whenever there is any disagreement or dispute between the Federation and the States, the avenue provided by the constitution for the settlement are, according to section 6 of the constitution the superior courts of record created by the Constitution whose judicial powers in the words of subsection (6) (b) thereof -

"shall extend to all matters between persons, or between government or authority and to any person in Nigeria and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person."

In other words the obligation of the President which is said to protect and defend the constitution can be exercise through the courts as provided by the constitution itself.

Conclusion.

It now remains to determine which relief claimed by the plaintiff and the defendant could be granted in the light of the foregoing.

In the claim by the Plaintiff -

Relief No.1

The president has no power vested in him (by executive or administrative action) to suspend or withhold for any period whatsoever the statutory allocation due and payable to Lagos State Government pursuant to the provision of section 162 (5) of the 1999 Constitution but in respect of the 20 Local Government Areas for the time being provided by section 3 subsection (6) of the Constitution and not the new Local Government Areas created which are not yet operative.

Relief No.2

The "declaration that the intention or proposal of the Federal Government to suspend or withhold for any period whatsoever the statutory allocation due and payable to the Lagos State Government pursuant to the provisions of section 162 (5) of the Federal Republic of Nigeria 1999 will if carried out be unlawful and contrary to the provisions of the said Constitution" is granted subject to the statutory allocation relating to the 20 Local Government Councils for the time being recognised by section 3 subsection (6) and Part I of the First Schedule to the Constitution.

Relief No.3

"A consequential order of this Honourable court compelling the defendant to pay immediately all outstanding statutory allocation due and payable to the Lagos State Government pursuant to the provisions of section 165(5) of the Constitution of the Federal Republic of Nigeria, 1999," This is granted in so far as it relates to the 20 Local Government Councils for the time being recognised by section 3 subsection (6) and Part I of the First Schedule to the Constitution.

Relief No. 4

"An order of perpetual injunction restraining the President of the Federal Republic of Nigeria, or any functionaries or agencies of Executive Branch of the Federal Government from doing any thing whatsoever to suspend, withhold, for any period whatsoever or calculated to suspend or withhold any monies due and payable to the Lagos State government pursuant to the provisions of section 162 (5) of the Constitution of the Federal Republic of Nigeria." This is granted in so far as it applies to the 20 Local Government councils for the time being recognised by section 3 subsection (6) and Part I of the First Schedule to the Constitution.

In the counter -claim by the defendants:-

Relief No.1

The plaintiff has the power under Section 7(1) and 8(3) of the Constitution to create new Local Government areas as done in Law NO.5 and the 2004 Law. The declaration sought is therefore refused.

Relief No.2

The Plaintiff has the power under the Constitution to create new local government but the local governments so created will not take effect or come into operation until the National Assembly passes an Act to amend section 3 (6) and Part of the First Schedule to the Constitution. The declaration sought is therefore refused.

Relief No.3

The plaintiff has the power under the constitution to enact Law No. 5 of 2002 and the 2004 Law but the new Local Government Area so crated cannot take effect or come into operation until the National Assembly accordingly amends section 3 (6) and Part of the First Schedule to the Constitution. Therefore, the declaration sought can only be granted in part. That is to the extend that the new Local Government Areas cannot take effect until the National Assembly passes the consequential Act under section 8 subsection (5) of the Constitution.

Relief. No.4

So far the Local Government Areas recognised by the Constitution are those contained in Part I of the First Schedule to

the Constitution. The declaration sought is therefore granted.

Relief No.5

Section 1, 2 and 3 of the New Local Government Areas law No. 5 of 2002 in fact constitute the law which was enacted by the plaintiff in accordance with the provisions of section 7(1) and 8(3) of the Constitution. The Law is therefore valid even though it is not yet operative. Consequently, the declaration sought cannot be granted and is hereby refused.

Relief No. 6

The 57 Local Government Areas established by Law No. 5 are inchoate until the National Assembly passes the Act necessary under section 8(3) of the Constitution. Therefore the new 57 Local Government Councils are not entitled to receive fund from the Federation Account. Accordingly the declaration sought is granted.

Relief No. 7

The declaration being sought to the effect that the elections conducted by the plaintiff on 27th March 2004 cannot take effect since they are inchoate cannot be granted because not all the parties interested in the elections, namely the chairman-elect as well as the Lagos State Independent Electoral Commission have been joined in this case - see - *Oloriode v Oyebi*, (1984) 1 SCNLR 390 at pp. 400 and 407.

Relief No. 8

The order required to nullify the elections held on 27th new March 2004 into the councils of the 57 new Local Governments cannot be granted for the same reason give under relief No. 7.

Relief No. 9

The order to restrain the Lagos State Government, the Lagos State House of Assembly or any functionaries or agencies of the plaintiff not to maintain, finance and recognise any Local Government in Lagos State apart from those created under Part 1 of the First Schedule of the 1999 Constitution is vague since the National Assembly could at any time it deems fit exercise its powers under Section 8(5) of the Constitution to amend section 3(6) and Part 1 of the First Schedule to the Constitution. Therefore the order cannot be granted and it is here by refused.

To sum up the plaintiff's action succeeds, all the reliefs sought are granted but applicable only to the 20 Local Government Areas specified in Part 1 of the first Schedule to the Constitution. The counter-claim by the defendant succeeds in part. Reliefs Nos. 3 (as modified), 4 and 6 are granted while reliefs Nos. 1,2,5,7, 8 and 9 are refused.

There is no order as to costs. Each party is to bear its costs.

I wish to express our profound gratitude to all the counsel in the case for the tremendous assistance given to us in reaching this decision.