Educational Administration: Theory and Practice
2024, 30(11), 2141-2155
ISSN: 2148-2403
https://kuey.net/
Research Article

The Nigerian Courts On Foreign Participation In Business Sector, The Need For Conformity With International Best Practices.

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Citation: Olusegun, DUROTOLU (2024), The Nigerian Courts On Foreign Participation In Business Sector, The Need For Conformity With International Best Practices, *Educational Administration: Theory and Practice*, 30(11) 2141-2155
Doi: 10.53555/kuey.v30i11.10315

ARTICLE INFO | **ABSTRACT**

Since no nation in the world can be self-sufficing, the need for countries to engage in trading with one another becomes inevitable. Also, the effect of engaging foreign firms in contractual relation to execute highly technical works in foreign nations imply the inevitability of a robust legal regime to guide the execution of such contracts, to legitimize the activities of such outfit, and to provide legal guidelines to make such exercise lawful. Also, with the effect of globalization, there is tendency for increase in global investment and trading activities across border. The enforcement of duties and obligations necessitate the intervention of the courts and legislative guides in course of actions. Meanwhile, under the Nigerian law, a foreign company doing business in Nigeria must first be incorporated. Also, foreign companies transacting business in Nigeria is subject to payment of Value Added Tax (VAT) Act. Meanwhile, with due respect, it is here submitted that it is necessary to add the rider that, as a guide for course of action, the adjectival clause 'doing business or transacting business in Nigeria' is to serve as the guide for decision making by the courts. This paper examined the need to observe international best practices in corporate governance in handing down decisions by the courts concerning noncompliance with local legislation, the attitude of Nigerian courts to the extant law that makes registration of such foreign companies a condition precedent for such companies doing business in Nigeria, where such foreign companies did businesses in Nigeria, with its attendants consequential illegality, whether theFederal Inland Revenue Services of Nigeria has the legal rights to demand for tax on the transaction, and the question; on whose lie the onus to proofnon registration of business outfit as to whether there could be a shift of the well-known evidential principle that he who alleges must proof ? These are the issues addressed in this paper with a reminder that the best practices for corporate governance are based on the objective that companies must exist to maximize values for shareholders by ensuring good social and economic performances.

Keywords: Nigerian, Courts, Foreign, Participation, Businness, Sector, Conformity, International, Best, Practices.

1.0. Introduction

An alien or foreign company, may join in forming a company in Nigeria.The right of such alien or foreign company is subject to the provisions of Nigeria Law regulating the rights and Capacity of such alien or company to engage in business in Nigeria. First, any alien or foreign company wishing to engage in business in Nigeria must take steps to incorporate his business as a separate legal entity in Nigeria.Any foreign company or alien without incorporation can hold, have a place for business in Nigeria for any purpose, except;receipt of notices and other documents as matters of preliminaries to incorporation. Meanwhile, a foreign company may apply to the Federal Executive council to be exempted from incorporation such as where:

a. a foreign Company is invited to execute any specialproject by the Federal Government,
b. a foreign company is invited to Nigeria for the execution ofSpecified Loan Project on behalf of a donor Country or an international organization,
c. a foreign government owned company in Nigeria is engagingin exportpromotion business, and where

d. a foreign engineering consultants and technical experts engaged on a contract with the Federal Government agencies and any other person with the approval of the Federal Government. The application must set out the required particulars for the exemption.

2.0 Literature Review

Peprah defines corporate governance as a system for directing and controlling an institution, which institution in this respect is the corporate body. He identified three theories of corporate governance as: Agency theory, transaction theory, and stakeholdertheory. According to him, the foundational basis of the agency theory is built onthe word 'Trust'. This centers on the trust between the directors and the shareholder. The transaction theory is the cost incurred due to internal orexternal transaction. Such cost should be incurred productively in a mannerism that would not bring untold hardship to the company. He viewed the stakeholders as someone who could influence the company. The stakeholders like directors must act in the best interest of the shareholders. This could be done by striving to enhance the profit that could accrue to the shareholders by embarking on projects at minimal agency cost. The reputation of the company must be enhanced based on the fundamental principles of integrity, fairness, transparency, judgement based on requisite information for decision making, probity or honesty,objectivity, and accountability.
Borles, and Achim advanced further on theories, and thus, identified Agency Theory, Hazard Moral Theory, Stewardship Theory, Stakeholders Theory, Transaction Cost Theory, Resource Dependency Theory, Political Theory, Ethics Theory, Theory of Information Asymmetry, and Theory of Efficient Markets. The Authors traced the Agency Theory to 1930 authors and to later easily 70s America Literature. They stated that the theory highlighted the relationship between the owner of companies who are the shareholders, and the agent of the owner as the company director through a mandate contract where the directors are obliged to act on behalf of the shareholders. The authors quoting Adam Smith's Statement in 1976 that "You cannot expect those who managed other people's money to be as careful and caring as it would belong to them, discovered that waste and negligent are often present in the management of every business handled by some directors. They further stated that, first, under the agency theory, the shareholder as the principal are expecting the directors as agent to act in their ultimate best interest, and second, is the realization that the directors as agent cannot only adopt the decision best suited to the principal's interest alone.
This leads the author to the essence of the Agency theory that there is the need for harmonization between the interest of its principal as shareholders, and the management as agent and crucial to this harmonization is the objective of maximizing the company's value, which value should not be affected by these competing interest. The second theory considered is the Hazard moral theory based on the conflict of interest between the shareholders that wielded control vis-à-vis the Directors or management exercise of power. The point here is that the opportunistic behavior of the managers does not necessarily converge with the shareholder's interest of maximizing their wealth. Thus,the managers are reputed to prone to moral hazard via their opportunistic behavior prompted by their selfish interests. Most importantly, the hazard moral code theory is said to be strongly connected with the remuneration packages for Director which corporate governance regulators felt should be neglected to the Annual General Meeting's approval in order not put the interest of the shareholders in jeopardy. Stewardship theory on the other hand assumes that managers as administrators are faithfully responsive and effective in their assigned role with their main focus as maximizing wealth for the shareholders, considering the survival of the company as uppermost. The stakeholder's theory accordingly refers to all persons, groups, organizations that have impacts in the activities of the company. This considers the owners, shareholders, investors, employees, customers, supplies, business partners, competitors, governments, local government, N.G.O.S, pressure groups, and community etc. Essentially, stakeholder's theory was said to have charged the shareholder's paradigm of Milton Friedman who felt that maximizing the financial interest for the shareholders is the highest concern of a company.
In essence the stakeholder's theory is based on the concept that the management should maximize and act not to avoid the interest of their social partners. Even the need to protect the desirable interest of the company's culture and the need to protect the environment forms parts of the company's social responsibilities. The transition cost theory involves the thesis that the company as hierarchically structured involves itself in different contractual transactions that involves consideration of alternatives costs. This involves identifying, explaining, combating all types of risky contracts. This involves the cost from different areas of transactions, and weighing alternative costs and go for the less risky but beneficial cost, to avoid loss to the company.
The resource dependency theory emphasized the organizational behavior of companies as inevitably linked with the environmental conditions in which they operate. This relaters to complex relations within the environment of operation which Abdoullar and Valentine classified into four: insiders, like past and present managers, business experts, like managers of larger business units who provides expert advices on strategy, decision making, proffer solution to intricate problems, supportive specialists, represented by lawyer, bankers, insurance experts, and community influential, like political leaders, academic leaders, religious leaders, and social and community leaders.

The political theory explains the influence of political activities and law on corporate governance. This might take the form of government participation in the capital of companies, or regulatory framework of government through the instrumentality of law that explains how a corporate organization should be organized. This theory in corporate governance relates to the consideration of myriad of different ethical consideration in corporate governance which include business ethics, virtue ethics, feminist consideration etc.
Theory of information assymentry is based on the study of the behavior of sellers and buyers of goods by abandoning the hypothesis of perfect information, where each of these actors in the market have different ideas of the quality of goods on the market. The conclusion of Akerdof is to show that hypothetical information difficulties can lead to either the collapse of the market or the transformation of the market, and sometimes, buyer might have preference for the poor quality products rather than products of higher quality. The theory of efficient market focusses on the investors, as the main stakeholders.
The authors of these theories did not dwell so much on the reasons for studying these theories, and neglects the roles of the legislature, and the courts in enhancing the purpose of these theories. It is always a celebration for the economy for corperate bodies to exist in perpetuity to assist the developmental goals of the government in sustaining its developmental growth by promoting investments, contribute to employment generation, promoting marginal propensity to consume, enhance industrial growth and the overall development of the economy. The legislative backup of these corporate bodies is essential through the provision of robust legislation. Likewise, the judiciary as the chief supervisor of the entire corporate body must be alive to prevent corporate failure and be wary of the fact that there are human worms within the economy with modus operandi of planning for post-incorporation failure of foreign companies for their selfish gains. Hence, this paper emphasized on the role of the courts as adjunct administrators in corporate governance and the need to observe international best practices by the observation of theories in that direction. This paper, further, identifiedtwo other important theories yet to be considered in the discussion of theories of international best practices in corporate governance as: the indirect beneficiary theory. The general economic theory, and the international economic theory.

3.0. A. Non Nigerian or Alien Participation in Enterprises

i. A Non Nigeria may freely invest and participate in the operation of any enterprise in Nigeria. No alien can participate in the Negative List such as: production of arms and ammunition, production of some uniforms and dealing in drugs, andproduction and dealing in drugs.
ii. The alien may operate alone or may have a joint venture with Nigerians.
iii. But, such business must first be registered with the corporate Affairs Commission and also register with the Nigeria Investment Promotion Commission. An alien not wishing to form business may buy shares in a Nigeria company. Investment could be effected with foreign currency. Such Foreign currencies are allowed to be imported freely into Nigeria and converted through authorized dealer. Such foreign currencies are converted into Nigeria Naira at the official foreign exchange rate in the foreign exchange marked.The authorized dealer will issue a certificate of capital importation. Imported capital inform of foreign currency is guaranteed unconditional transferability under the law of repatriation of profit and capital.
iii. Where there is a dispute between the investor and the Federal Government as per the method of dispute settlement to be adopted, The International Centre for Settlement of Investment Dispute Rule will be applicable.
iv. The Nigeria Investment Promotion Commission will act as liaison between the foreign investor and sthe government on the issuance of permits

The mode of participation by aliens in business in Nigeria take the following forms:

A. **Foreign Direct Investment**(FDI) is a purchase of an interest in a company by a company or an investor located outside its border.Generally, the term is used to describe a business decision to acquire a substantial stake in a foreign business or to buy it outright in order to expand its operation to a new region
B. **Foreign Portfolio Investment (FPI)** refers to the purchase of securities or other financial assets by investors from another Country.Examples of FPI include: stocks, bonds, mutual found exchange traded fund; American depositary receipts, etc.
C. **Foreign Exempted Company** -Generally, any foreign company intended to invest or do business in Nigeria must be incorporated as a separate legal entity. Failure to register implies that such company cannot have a registered office in Nigeria. In *Edicomasat Inc. v.C.I.E. Ltd*[1], the court held that a foreign company not incorporated in Nigeria cannot carry on business in Nigeria.Otherapplicable laws for the participation of aliens in Nigerian business include:
    i. Companies and Allied Matters Act, 2004 and 2020.
    ii. Nigerian Investment Promotion Commission Act, 2004.

[1](2005) LPELR 5584 (CA).

iii. Foreign Exchange, Act 2004.
iv. Investment and Security Act, 2007.
v. Immigration Act, 2004.
vi. National Officer for Technology Acquisition and Promotion Act, 2004.
vii. Industrial Inspectorate Act, 2004.
viii. Industrial Development (Income Tax Relief Act) Act, 2004.
ix. Pioneer Status Incentive Regulations, 2004.

4.0. The Courts in Nigeria and Foreigners Participation in Businness

The Supreme Court decision in *Citec International Estates Ltd v. Edicomsa International Inc.&Associates*[2], is apposite while establishingthe principle that it is an act of Illegality for a foreign company to do business in Nigeria without been incorporated**.**This is in line with Sections 54 and 55 of the Companies And Allied Matters Act[3],now Sections 78 and 79 of CAMA, 2020 which stipulates that without registration, a foreign company is prohibited from doing business in Nigeria except it falls within any of the exceptions stated in that sections. Section 54 (1) provides:

> *(1) Subject to sections 56 to 59 of this Act, every foreign company which before or after the commencement of this Act was incorporated outside Nigeria, and having the intention of carrying on business in Nigeria, shall take all steps necessary to obtain incorporation as a separate entity in Nigeria for that purpose, but until so incorporated, the foreign company shall not carry on business in Nigeria or exercise any of the powers of a registered company and shall not have a place of business or an address for service of documents or processes in Nigeria for any purpose other than the receipt of notices and other documents, as matters preliminary to incorporation under this Act*[4].

The Drafter of the law shows a clear intention to criminalize any business activity of unregistered foreign companies in Nigeria under Section 55 of CAMA which stipulate that:

> *If any foreign company fails to comply with the requirements of section 54 of this Act in so far as they may apply to the company, the company shall be guilty of an offence and liable on conviction to a fine of not less than ₦2,500; and every officer or agent of the company who knowingly and willfully authorizes or permits the default or failure to comply shall, whether or not the company is also convicted of any offence, be liable on conviction to a fine of not less than N250 and where the offence is a continuing one to a further fine of N25 for every day during which the default continues.*

It is,therefore,settled by the provision of this statute that any business activities embarked upon by unregistered foreign companies in Nigeria is null and void and the canon of expression *ex dolo malo non oritur action, meaning no action could be sustained where it arose from fraud; and ex turpi causa non oritur action, meaning no action could arise from an illegal act* applies.Where in addition, a piece of legislation prescribes penalties for a particular act, it is illegal, intended to be punitive,and an indication that defaulters would be held criminally culpable.

In the case of *Citec International Estates Ltd v. Edicomsa International Inc & Associates*[5]the Supreme Court of Nigeria was invited to interpret the above cited provisions of the Nigeria Companies And Allied Matters Act. The facts of the case succinctly put are that the Appellant employed the Respondent (a company registered under the laws of the United States of America, with its principal business address in Madrid, Spain) as consultants to supply some machinery, equipment, and vehicles to some factories it was building at Nbera District of Abuja, Federal Capital City of Nigeria. Dispute arose when it was alleged that the Respondent supplied second-hand and fairly-used equipment contrary to the terms of the agreement. Consequently, the Appellant terminated the contract. Dissatisfied by the termination, the Respondent commenced an action at the trial court seeking mandatory order of injunction, special, and general damages. By way of a preliminary objection, the Appellant challenged the jurisdiction of the trial court on many grounds including the ground that the contract was a nullity having been entered into by the Respondent who was not incorporated under the Nigerian Companies and Allied Matters Act.

The trial court upheld the objection holding that the Respondent having not been incorporated in Nigeria lacked legal capacity to enforce the contract. On appeal to the Court of Appeal, the decision of the trial court was reversed on the ground that evidence ought to be allowed to be led before Respondent's legal capacity could be determined.

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[2](2018) 3 NWLR (Pt.1606) 332 at 341.
[3]Cap. C20, Laws of the Federation of Nigeria 2004.
[4]Now Sections 78 and 79 of CAMA 2020.
[5] See *Citec Int'l Estates Ltv. v. Edicomsa Int'l Inc & Associates* (2018) 3 NWLR (Pt.1606) 332 at 355, paras C-D; 367 para C-D.

On further appeal to the Supreme Court, the decision of the Court of Appeal was set aside and the trial court's decision was affirmed. Kekere-Ekun, JSC in interpreting sections 54 and 55 of CAMA held thus[6]:

> *I have had a careful look at the provisions of sections 54 and 55 of CAMA[7] reproduced above. The language employed therein is clear and unambiguous. Section 54(1) clearly states that every foreign company incorporated outside Nigeria before or after the commencement of the Act must take steps to obtain incorporation in Nigeria. Until the process is complete and certificate of incorporation issued, the company is not entitled to carry on business in Nigeria nor can it exercise any of the powers of a registered company. It is forbidden from having a place of business or an address for service of processes in Nigeria for any purpose other than the receipt of notice and other documents, as matters preliminary to incorporation... I am of the considered view that the findings of the trial court, reproduced earlier, is a correct statement of the law on this issue. There is no doubt that the respondent is carrying on business in Nigeria without being incorporated under CAMA and therefore, was in breach of section 54(1) of the Act. The consequence of the non-compliance is clearly spelt out in subsection (2). The agreement is null and void.*

Eko, JSC, further stressing on the illegality of foreign companies doing business in Nigeria without incorporation equally held as follows:

> *Where a foreign company, not registered in Nigeria, purports to carry on business in Nigeria in defiance of section 54(1) of the Companies and Allied Matters Act, such a business is not only void, it is illegal and a crime to do so. That is the legislative intent or purpose of section 54(2) and 55 of the Companies and Allied Matters Act. It is the interpretational responsibility or function of the Court to construe statutory provisions to bring out and promote its purpose. The legislature enacted sections 54 and 55 not to allow a foreign company without being first duly registered in Nigeria in accordance with the provisions of the Companies and Allied Matters Act. That is why the conduct is expressly criminalized by section 55 of the Act.[8].*

From the above pronouncements of the apex court, it is not in any dispute that the law as at today is that a foreign company cannot legally do business in Nigeria without first acquiring the garment of incorporation. The illegality of the transaction/business so done by an unregistered foreign company would stand as a bar from the enforceability of the contract. This bar, it should be noted, is limited to enforceability of the contract, and does not generally extend to the legal capacity of a foreign company to sue and be sued in Nigeria[9]. This distinction is necessary in view of the provisions of Section 60(b) of CAMA which provides: *"nothing in this Chapter shall be construed as affecting the rights or liability of a foreign company to sue or be sued in its name or in the name of its agent."* As such, a foreign company can validly sue or be sued in Nigeria on a contract it entered outside Nigeria where, for instance, it is merely to enforce a claim against a person resident in Nigeria.

The decision in CITEC has thus reaffirmed the belief that any foreign company that "carries on business" in Nigeria without registration is engaged in an illegality and such contracts would be null and void, as out of an illegal transaction, no enforceable rights and liabilities, and no action lies. The Court of Appeal, in the case of *Vodacom Business (Nigeria) Ltd v. FIRS*[10]represents a further development from the decision of the Supreme Court in CITEC[11]. The court while interpreting the provisions of section 10 of the Value Added Tax Act held that a non-resident company that supplies satellite network bandwidth services to a Nigerian company from its satellite in the orbit falls within the definition of "carrying on business in Nigeria" and as such the transaction is VATable even if the foreign company is not incorporated. The court held:

> *"... The service to the Appellant by the non-resident foreign company was provided for a consideration, so it is a supply of service within the VAT Act. 'Imported service' is defined as service rendered in Nigeria by a non-resident person to a person inside Nigeria. Again, the foreign company is a non-resident person. The Appellant is a person inside Nigeria. The crucial question is whether Satellite network bandwidth capacities service which is the transaction between them is a service rendered in Nigeria. The key to unlocking this poser lies in recognizing the fact that the satellite network is in the orbit. It is neither in the residence of the foreign company nor is it in Nigeria. In order for the bandwidth capacities afforded by the Satellite network to be*

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[6] 8 Pages 366-367, paras G-H.
[7] Now Sections 78 and 79, of CAMA, 2020.
[8]. 9 Pages 356 – 357, paras E-G.
[9]See *Saeby Jernstoberi Maskinfabric A/S v. Olaogun Enterprises Ltd. (1999) 14 NWLR (Pt. 637) 128; Bank Of Baroda v. Iyalabani Co. Ltd* (2002) LPELR 743 (SC) per OGUNDARE, J.S.C (pp. 38-39, paras. G-C).
[10]*Vodacom Business (Nig) Ltd v. FIRS* (2019) LPELR 47865 (CA) per Ogakwu JCA (pp. 24-32, paras E-D).
[11]*Supra.*

supplied for use, transmission goes to and fro the Satellite by signals, using the Appellant's transponders which are located in Nigeria… The reasoning and conclusion of the lower Court in this regard is unassailable. The integral construction of the stipulations of Sections 2, 10 and 46 of the VAT Act leads to the indubitable conclusion that the transaction between the Appellant and the non-resident foreign 6 of 9*company is one for which the services were supplied in Nigeria. It is therefore VATable.*[12]

From the VODACOM case, it is clear that central to the reasoning of the court is the fact that the transaction falls within the definition of services "supplied in Nigeria", and as such subject to VAT. First, Adulkabir,[13]commenting on the judgement of the court in this case opined that the settled position of the law that the burden to pay VAT is usually borne by the consumer of the goods and services, the Nigerian company in this case, and that under the VAT Act, it is the Nigerian company that is required to remit the tax in the currency of the transaction.[14] He expressed the view that, since it is the Nigerian company that bears the liability, it was not surprising that they flew the kite of the defense of illegality of the contract before the Court. However, he observed that when the Court of Appeal was confronted with the provisions of section 54 of CAMA vis-à-vis section 10(1) VAT Act, it made a distinction largely as to the purpose of the two legislations. OGAKWU JCA held:

"Without a doubt, Section 54 (1) of the Companies and Allied Matters Act stipulates that a foreign company shall not carry on business in Nigeria and shall not have a place of business or address for service of documents or processes in Nigeria for any purpose other than the receipt of notices and other documents as matters preliminary to incorporation in Nigeria under the Companies and Allied Matters Act. The said provision can however not be used as the basis upon which to construe "carries on business" as employed in Section 10 (1) of the VAT Act. This is because the thrust and purpose of the two legislations are not the same. The stipulation of the Companies and Allied Matters [sic] expressly forbids a foreign company from having a correspondence address in Nigeria except for purpose of preliminaries for incorporation in Nigeria. Contrariwise, the VAT Act recognizes that there could be intangible business transactions, as in the circumstances of this matter where a non-resident company carries on business in Nigeria, and expressly provides that in such circumstances the non-resident company is to use the address of the person with whom it has a subsisting contract as its address for purposes of correspondence relating to tax.[15]"

The Court of Appeal further found as follows:

"The bandwidth capacities are supplied in and are continuously utilized in Nigeria. So, by the nature of the transaction, the non-resident company has not merely done business with a Nigerian company, it continues doing something and therefore carries on business in Nigeria.[16]*"*

The question that then arises is whether the finding of the Court that the non-resident company carries on business in Nigeria, which is hitherto illegal, is capable of conferring the FIRS with legal rights to demand for tax on the transaction? EKO, JSC answers this poser in CITEC[17]where he held that:

"An illegal act, that is a void act, does not confer any legal right whatsoever. In the instant case, the transaction or contract the Respondent wanted to enforce against the appellant was, by statute, an illegal and void contract or transaction. The respondent had no right in law to enforce such an illegality. The combined effect of sections 54(1) & (2) and 55 of CAMA which made it illegal for a foreign company to carry on business in Nigeria without first being duly registered to do so was that the transaction or the contract a foreign company, had with the appellant was an unenforceable transaction or contract.[18]"

Abdulkadir stated that it is clear from the above that the Supreme Court has created no exceptions to the illegality of transactions entered into by unregistered foreign companies. Just like the CITEC, the Supreme

[12]Ibid., (pp. 10 -17, paras F-A).

[13] Abdulkabir, B. (2022) Foreign Companies Doing Business in Nigeria: Has the decision in Citec Int'l Estates Ltd v. Int'l Inc & Associates Sounded A Final Death Knell?

[14]Section 10 (2) VAT Act.

[15]Pages 25-26, paras D-A.

[16]Pages 355, para E 356, paras C-E.

[17]Supra.

[18]Supra.

Court did not bat an eyelid in jettisoning the emotive argument that a beneficiary of a contract cannot set up illegality as a defense to its enforcement.[19]

Abdulkadir was of the opinion that although it is unclear right now whether the VODACOM case is on further appeal to the Supreme Court, the apex court ought to have another look at the VODACOM's case. He expressed the view that it accords with the principle of *stare decisis* for legal practitioners to be able to advise clients with a level of certainty on the law regarding any subject[20]. He further expressed the view that one might argue that the pronouncements in VODACOM regarding this subject are mere *obiter dicta*, it is the responsibility of the apex court to pronounce on the issue with a measure of finality. He expressed the view that the exception of transactions involving foreign companies engaged in satellite services unconsciously created by the Court of Appeal in VODACOM solely to bring them within the tax net, is one that needs revisiting. He threw the vexing question; what makes transactions involving unregistered foreign companies susceptible to tax but are legally restricted from conducting businesses locally?

Meanwhile, Abdulkabir conceded that the principle of tax neutrality presupposes that the illegality of a transaction has no interest on its taxability and once the transaction meets the requirement for it to be taxed, it should be subject to VAT. In other words, income generated from an illegal activity should be taxed irrespective of any other consideration.

It is also noteworthy that many charging provisions of taxing statutes do not take into account the legality of the transactions. However, he correctly observed that the Court in VODACOM's case did not reference the principle of tax neutrality in reaching its decision as it did. Abdulkabir opinioned that, in view of strict rules that relates to taxation in many commonwealth countries, there is an obvious need for clarity if indeed there is now a judicial amendment to sections 78 and 79 of CAMA. He suggested that, there ought to be a further amendment to sections 78 and 79 of the newly gazetted Companies and Allied Matters Act 2020, which essentially retain the provisions of sections *54(1) & (2) and 55 of the now repealed CAMA, 2004,* to reflect these "judicial amendments in VODACM's case" as it is settled law that courts do not make law but interpret laws.[21] This view is based on the assumption that the Supreme Court later agrees with the VODACOM decision, if it goes on further appeal.

Though the arguments of Abdulkabir are plausible, but, we felt that the distinction could be drawn between the CITEC's case and the Vodacom's case. The point been that if doing business in Nigeria is the watch words, the Vodacom's case involves a specialized contract that does not involved the physical presence of the respondent in Nigeria. The mere fact that the company is not domiciled in Nigeria, puts the company, Vodacom, outside the ambit of the application of S. 54 of the Nigeria Company and Allied Matters Act.

In conclusion, until the Supreme Court intervenes in the VODACOM decision or until we have a different legislative intervention, the last has not been heard of the legality of transactions entered into by a foreign company which is not registered in Nigeria.

The next question is whether a Foreign Company that is not incorporated in Nigeria can maintain an action before the Nigerian Courts in a petition for winding up?This matter came to the fore before the Courts in Nigeria in the case of*Companhia Brasifeira De Infraestrutura (Infaz) v. Companhia Brasileira De Entrepostos E Commercio (Cobec) Nigeria Limited)*[22]In this case, the rights of foreign companies to sue and enforce contracts in Nigeria courts have come to the fore . Put differently, the question before the courts centres on the ability of a foreign company not registered in Nigeria to pursue a claim against a Nigerian registered company before Nigerian courts.

To answer this question, the Nigeria Supreme Court considered section 60 of CAMA, which protects the rights of access of foreign companies to Nigerian courts under the extant law for the enforcement of their rights. The Supreme Court has also confirmed the position of foreign companies seeking to sue in Nigeria when it held in the case under review that the Petitioner has the *locus standi* to bring the Winding-Up petition against its Nigerian partner.

The Appellant was a company formerly registered in Brazil under the Brazilian law with the name Companhia Brasileira De Entrepostos E Commercio ("COBEC of Brazil") but it later changed its name to Companhia Brasifeira De Infraestrutura ("INFAZ of Brazil"). The Respondent, Companhia Brasileira De Entrepostos E Commercio (COBEC Nigeria Limited) was the appellant Nigerian partner. The Appellant, Companhia Brasifeira De Infraestrutura (INFAZ) had filed a Winding-Up Petition before the Federal High Court, Lagos, Nigeria, on the ground that the business relationship between the Appellant/Petitioner, and the Respondent's had broken down. The Petitioner, therefore brought a winding-up petition underRule 10 of the Companies Winding-Up Rules, 1983. The Appellant/Petitioner had consequently, brought a motion on notice seeking an order of court to advertise the Petition in the Newspaper which is a fundamental requirement before the petition can be heard. The Respondent however opposed the Petitioner's application by filing a counter affidavit. The Respondent also filed a Motion on Notice seeking an order of Court dismissing the Petition on the grounds that: the Petitioner was neither a creditor nor a contributory andthey are not one of the persons

[19]Ibid., p. 361, paras A-B.

[20]SP Van Zyl: "The Value Added Tax Implications of Illegal Transactions", P.E.R. 2011 Volume 14 No. 4, available electronically at http://dx.doi.org/10.4314/pelj.v14i4.11 accessed on 2nd December 2020.

[21]See I.G.P. v. A.N.P.P. (2007) 18 NWLR (Pt.1066) 457 at 496 -497, paras G-E.

[22] [2018] 12 NWLR (Pt. 1632) 127 at 132

allowed to present a Petition under Section 407 of the Companies and Allied Matters Act 1990;and that the Petitioner was not a party to the Joint Venture Agreement (JVA) entered into with Companhia Brosileira De Entrepostos E Commercio and itself as Nigeria partner;the Petitioner is not a known legal entity having not been registered in Nigeria andthat Companhia Brasieira De Entrepostos E Commercio of Brazil, the former company before the change of name was effected, was the only foreign shareholder known to the Respondent.
In the learned trial judge's held dismissing the Petition that for the change of name of the Petitioner Company in Brazil from Companhia Brasileira De Entrepostos E Commercio ("COBEC of Brazil") to Companhia Brasifeira De Infraestrutura ("INFAZ of Brazil") to be legally valid in Nigeria, it must conform with Section 31(3),(5),(6)(7) and (8) of the Companies and Allied Matters Act, LFN 1990 which requires the approval of the Corporate Affairs Commission when such change of name is effected[23].
The court further held that the Petitioner was not a company registered in Nigeria as a corporate personality in Nigeria, and as a none entity in law, it cannot be a creditor or shareholder in the Respondent's Company, and lacked the right to bring a Winding-Up petition against the company. The Petitioner dissatisfied with the decision of the trial court, appealed to the Court of Appeal. The Court of Appeal dismissed the appeal.
Challenging the decision of the Court of Appeal,the Petitioner appealed to the Supreme Court. The Supreme Court allowed the appeal and set aside the decision of the Court of Appeal. The Apex court held that the Petitioner has the *locus standi* to bring the Winding-Up petition against its Nigerian partners (the Respondent). The Court was of the view that "If COBEC in Brazil was changed to INFAZ it follows that INFAZ is a contributory shareholder of the Respondent company and therefore has the locus standi to apply for the winding up of COBEC (Nigeria) Limited."The basis of the Supreme Court's decision was premised on its earlier decision in Saeby Jernstoberi Maskinfabric A/S v. Olaogun Enterprises Ltd.[24] , where it had held that "The principle of law that a foreign corporation, duly created according to the laws of a foreign state recognized by Nigeria, may sue or be sued in its corporate name in our Courts is part of the common law."
The Court quite interestingly also noted that both the trial court and the Court of Appeal despite their decision which went against the Petitioner admitted to the following facts:

a) that the Petitioner was duly incorporated under Brazilian laws;
b) that the Petitioner has indeed changed its name;
c) that going by the facts of the case as agreed by both parties Companhia Brasileira De Entrepostos E Commercio is a contributory; and
d) that it can justifiably bring the winding-up petition.

The court noted that the Respondent did not file a cross-appeal against the above findings at the Court of Appeal nor did they file any cross-appeal at the Supreme Court which invariably presupposes that the points are uncontroverted as evidence was led to prove the facts by the Petitioner which was never disputed by the Respondent.
The Supreme Court based on the above findings further held that since there was evidence, that is, documents showing the change of name by the Petitioner, there was a presumption under Section 149 of the Evidence Act that until the contrary is proved by the Respondent who did not challenge the authenticity of the said documents. According to the Court, "In view of the finding of the trial Court that exhibits AA-AA2 accorded with Brazilian law on the change of name, it was wrong for the Court of Appeal to embark on a futile exercise seeking evidence of compliance with the Brazilian law governing change of name of the company..."
This judgment of the Supreme Court affirms the position that foreign companies can indeed pursue a claim against a Nigerian entity before Nigerian courts without necessarily being registered under Nigerian law.
The recent decision of theNigerian Supreme Court in *BCE Consulting Engineers v Nigerian National Petroleum Corporation*[25]bothers on the issue of a foreign company that is not registered in Nigeria having the capacity to sue in Nigeria.Generally, Section 78 of the Companies and Allied Matters Act, 2020 requires that a foreign company must be registered in Nigeria before it can carry on business in Nigeria. This provision is a carryover of the former Section 54 of the Companies and Allied Matters Act, 1990, which contains a similar provision.However, Section 84(b) of the Companies and Allied Matters Act, 2020, makes express provisions for a foreign company to sue and be sued in its corporate name or that of its agent (despite the fact that it is not a registered or incorporated company in Nigeria) for the purpose of carrying on business (under Section

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[23]31. (3) Any company may, by special resolution and with the approval of the Commission signified in writing, change its name:Provide that no such approval shall be required where the only change in the name of a company is the substitution of the words "Public Limited Company" for the word "Limited' or vice versa on the conversion of a private company into a public company or a public company into a private company is in accordance with the provisions of this Act.
(5) Where a company changes its name, the Commission shall enter the new name on the register in place of the former name, and issue a certificate of incorporation altered to meet the circumstances of the case.
(6) The change of name shall not affect any rights or obligations of the company, or render defective any legal proceedings by or against the company, and any legal proceedings that could have been continued or commenced against it or by it in its former name may be continued or commenced against or by it in its new name.
(7) Any alteration made in the name under this section shall be published by the Commission in the Gazette.
(8) A certificate or publication in the Gazette under this section shall be evidence of the alteration to which it relates.
[24] (1999) 14 NWLR (Pt.637). p.128
[25](2018) 3 NWLR (Pt.1606) 332 at 341.

78). The same provision was previously enacted in Section 60(b) of the Company and Allied Matters Act 1990. Section 60(b) of the Company and Allied Matters Act 1990 has been applied by Nigerian courts in some cases prior to the enactment of the Companies and Allied Matters Act, 2020.

In *Edicomsa International Inc and Associates v CITEC International Estates Ltd*,[26] the plaintiff-appellant was a foreign company incorporated in the United States of America. However, it was not registered in Nigeria. The plaintiff-appellant was engaged by the defendant-respondent to provide some services. Subsequently, there was a disagreement between the parties on payments due to the plaintiff-appellant, which led to the action before the court. The defendant-respondent, *inter alia*, challenged the jurisdiction of the trial court on the basis that the plaintiff-appellant was not registered in Nigeria. The trial court upheld the submission of the defendant-respondent. The plaintiff-appellant appealed to the Court of Appeal, which unanimously allowed the appeal. The majority of the Court of Appeal rightly applied Section 60(b) of the Companies and Allied Matters Act 1990 to the effect that the plaintiff-appellant, though not registered in Nigeria, could sue in Nigeria.[27]

In the recent case of *BCE Consulting Engineers v Nigerian National Petroleum Corporation*[28]the Nigerian Supreme Court did not consider Section 60(b) of the Companies and Allied Matters Act 1990 (now Section 84(b) of the Companies and Allied Matters Act 2020), though its final decision was correct. In that case, the claimant/1st appellant claimed that it entered into a consultancy service agreement with the defendant/respondent which the latter unlawfully terminated. The plaintiff/appellant, therefore, filed an action via originating summons in the Federal High Court, Lagos State Judicial Division, seeking declaratory reliefs to that effect. It further claimed the total value of outstanding claims on invoices submitted by it, special and general damages. One of the issues canvassed at the Supreme Court was whether the Court of Appeal was right when it held that the contract entered into by the claimant-1st appellant a foreign company without incorporation in Nigeria was illegal and unenforceable? The Supreme Court Justices unanimously agreed with Peter-Odilli JSC who held as follows in her leading judgment:

"I agree with learned counsel for the appellants that section 54 of the Companies and Allied Matters Act[29] does not apply to the facts of this case because the situation before the court in this case is one of a firm registered in Nigeria and entering into contract with the respondent but subsequently to the execution of the contract incorporating itself outside Nigeria as a limited liability company".

It is submitted that the Supreme Court should also have had regard to Article 60(b) of the Companies and Allied Matters Act 1990 (now Section 84(b) of the Companies and Allied Matters Act, 2020) in holding that assuming the claimant-1st appellant was a foreign company that was not registered in Nigeria, it was capable of maintaining an action in Nigeria. This would have put to rest any question as to the capacity of a foreign company that is not registered in Nigeria to sue or be sued in Nigeria. It would also have made the Supreme Court's decision exhaustive in this regard.

The case of *Compact Manifold & Energy Services Ltd v. Arco Pipeline Solutions Ltd*[30]is apposite on some important legal issues, first, that where a defendant has no defence against the plaintiff's claim, the plaintiff is entitled to summary judgement on application for same; second, summary judgement could be delivered even where the defendant disputed the corporate existence of the plaintiff/creditor; third, issue as per corporate nonexistent of the plaintiff could be ordered to be resolved on retrial as judgment is given from the plaintiff in part on summary judgment, fourth; where the defendant brought an allegation on corporate nonexistent of the plaintiff, and the plaintiff brought a photocopy of its certificate of incorporation in rebuttal instead of the certified true copy of same, being a public document, it does not lying in the mouth of the plaintiff to invoke the common evidential principle against the defendant that he who alleges must proof, in this situation, there is a shift in the evidentiary onus, such that it is incumbent on the plaintiff to establish its corporate existence by putting forward in evidence the Certified True Copy of its certificate of incorporation. The facts of the above case are as stated by Tijjani Abubakar, J.C.A.(Delivering the Leading Judgment): Compact Manifold & Energy Services is an offshoot of Compact Manifold Incorporated (CMI) in Lafayette, the United States of America. This is an appeal against the Ruling of the Lagos State High Court, sitting in the Lagos Division, delivered by A. O. Williams J. on the 3rd day of July, 2015 in Suit No: LF/ADR/194/2014 wherein the Respondent's Application for Final/Summary Judgment was granted and its claims against the Appellant as per the Writ of Summons was granted on the ground that the Defendant had no defense to the action. Aggrieved by the decision of the Lower Court, the Appellant filed the Notice of Appeal on the 15th day of July, 2016 premised on four (4) grounds. The Appellant's, learned counsel distilled two issues for determination, first, whether the Court was right when it proceeded to enter summary judgment without first resolving the issue raised by the defense on the corporate nonexistent of the claimant and the material documents as per the corporate existence not pleaded, and, secondly, whether on the pleadings and document that were uploaded as constituted, no reasonable defense was disclosed in the statement of defense

[26] (2005) LPELR 5584 (CA).

[27] Cap. C20, Laws of the Federation of Nigeria 2004.

[28] See CITEC INT'L ESTATES LTV. v. EDICOMSA INT'L INC & ASSOCIATES (2018) 3 NWLR (Pt.1606) 332 at 355, paras C-D; 367 para C-D.

[29][Cap C20 LFN 2004]

[30](2018) LCN/11841 (CA).

upon which the Court disallowed the Defendant on the merit, and third, whether the Lower Court was right to have relied on the new document attached to the counter affidavit not attached or frontloaded with pleadings to enter summary judgment for the claimant which is against the clear provisions of the rules of the High Court.

The Respondent also crafted corresponding 2 (two) issues for determination as follows: first, whether the additional documents filed by the Respondents were properly pleaded to entitle the lower Court to rely on same; second, whether the onus is not on the Appellant to prove that the Respondent is not a legal entity as to maintain this action. The Respondent attached an uncertified photocopy of its Certificate of Incorporation. Learned counsel submitted that the Lower Court's attention was drawn to the said photocopy of the Certificate of Incorporation which being a public document ought to have been certified as required by the Evidence Act and that since it was not certified, it should not be relied on as evidence of due Registration of the Respondent as a corporate legal entity that could sue and be sued. Learned counsel argued that in the instant case, the photocopy of the Certificate of Incorporation tendered by the Respondent is not certified by the Corporate Affairs Commission and therefore inadmissible and should not have been relied on or given any probative value whatsoever by the Lower Court. Learned counsel contended that since the Appellant had denied the existence or registration of the Respondent, the legal existence of the Respondent had been put in issue and by virtue of Sections 109-112 of the Evidence Act, only a certified copy of its Certificate of Incorporation will serve as a legally sustainable and valid answer. Counsel submitted that this issue constitutes a legally triable issue which the learned trial Judge ought to have ordered a trial for the case to be heard and determined on the merit. Relying on the case of *Macgregor Associatesv. N.M.B. Ltd*[31] the counsel submited that there were triable issues between the parties and that the Lower Court relied on the same set of documents it had earlier struck out to enter summary judgment against the Appellant. Learned counsel urged this Court to resolve this issue in favour of the Appellant, allow this appeal; set aside the judgment of the Lower Court, and order a trial of the case on its merit

On the second issue, learned counsel for the Respondent referred to Section 131(1) of the Evidence Act, 2011 to submit that whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove those facts. Counsel submitted that the Respondent was not expected to file its original Certificate of Incorporation and that it is for the Appellant to apply for a copy to satisfy itself that the Respondent is not a legal entity. Counsel submitted that the onus is on the Appellant to prove that the Respondent is not a legal entity and it does not matter whether or not the Respondent filed a Certificate of Incorporation. Learned counsel submitted that the objection that the Respondent is not a legal entity and that the Respondent did obtain authorization of its Board are not genuine defense but were intended to prevent the Appellant from meeting its obligation to the Respondent. Counsel referred to pages 338-340 of the Records of Appeal to submit that the Appellant does not have any defense on the basis of which trial should be ordered. Learned counsel urged this Court to discountenance the submissions of the Appellant that trial ought to be ordered in this suit dismiss the appeal in its entirety; and affirm the Ruling of the Lower Court.

The court per Tijani Abubakar, J.C.A with whom Ugochukwu Anthony Ogakwu, J.C.A. and Abimbola Osarugue, Obaseki-Adejumo, J.C.A. concurred held that, first, it is important to state that the Ruling of the 6th day of March, 2015 wherein the Appellant's Notice of Preliminary Objection was dismissed is not a subject matter of appeal in this Court. From the foregoing therefore, the court contented itself with answering three questions that would be considered seriatim:

4.1 Whether the Appellant's Amended Statement of Defence Discloses a good Defence?

The first question which the court attempted to answer was whether the appellant amended statement of defense discloses a good defense to the action for which the trial Court would have ordered trial." The court felt that the processes to be considered in answering this question are; the Writ of Summons, the Statement of Claim, accompanying processes and the Motion on Notice for Final Judgment all dated 8th of April, 2014, the Affidavit of Ifeanyi Amali and the documents attached as well as the Written Address in support of the Application filed on the same 8th of April, 2014; the Reply to the Appellant's Counter-Affidavit to the Motion for Final Judgment; the Further and Better Affidavit in Support of the Motion for Final Judgment, the Affidavit and the attached Exhibits, and the Written Submission in support of the Further and better counter affidavit.From the above, the Court reasoned that "the claimant has made out a prima facie case by the affidavit evidence it furnished. It has established that it had a relationship with the defendant whereby it provided equipment and services to the defendant as requested, for which the defendant has not paid.

The court also considered the defendant's amended pleadings where the defendant has denied the legal capacity of the claimant and contends that the consent of its members to the institution of this suit was not obtained, and where it also denied the contract and the debt as well as the demands alleged by the claimant. The court observed that the claimants addressed these facts in its further affidavit, and has deposed that it was incorporated on 24/09/03 and stated its incorporation number. It also tendered its board resolution that authorized the institution of the suit, and further tendered documents that establish the fact that the

[31] [1996] 35 LRCN 197 at 210, Paras. G – H

defendant requested for its services. The Court agreed with the claimant that the defendant has no real defense to this suit, and that the defense presented is a sham aimed at delaying this suit and postponing the fulfillment of its obligation to the claimant."

The Court was in tandem with the Lower Court and held that in determining an Application for Summary Judgment, the Applicable rule which the Lower Court at page 338 of The Records rightly referred to is Order 11 Rule 5 (1) & (2) of the High Court of Lagos State Civil Procedure Rules, 2012 which provides that:

1. Where it appears to a judge that the Defendant has a good defense and ought to be permitted to defend the claim he may be granted leave to defend the claim.
2. Where it appears to a judge that the Defendant has no good defense the judge may thereupon enter judgment for a Claimant."

In this regard, the court considered many authorities like the decision in *Umeche v. Citibank Nigeria Ltd & Anor*[32]where it was held that: "...the essence of proceedings for summary judgment under Order 11 is to give judgment for admitted claims or claims that are not met with a viable or arguable defense. According to the court, the purport of the provisions of Order 11 Rule 5 (1) & (2) of the High Court of Lagos State Civil Procedure Rules, 2012, is that in deciding an application for Summary Judgment, the learned trial Judge has unfettered discretion to determine whether it appears to him that the Defendant has a good defense or that the Defendant has no good defense. At this stage, in determining whether or not the Defense of the Defendant is" good", the trial Court, is expected to only grant the application for summary judgment where assuming all the facts in favour of the defendant, they do not amount to a defense in law. The court referenced the case of *Macaulay v. NAL Merchant Bank Ltd*[33] and pinpointed that from the pleadings of the Appellant contesting the Application for summary judgment, instead of stating the particulars of defense it has to the Respondent's claims, the Appellant denied that it had any contract with the Respondent or that it owed the Respondent at all and further in the Amended Statement of Defensechallenged the legal entity of the Respondent and its authority to institute the action. In this respect, the court considered the decision in *U.B.A & Anor v. Jargaba*[34]where the Supreme Court of Nigeria held as follows:

> *"...the defendant's affidavit must condescend uponparticulars and should, as far as possible, dealspecifically with the plaintiffs claim and affidavit andstate clearly and concisely what the defense is andwhat facts and documents are relied on to support it.The affidavit...must of necessity disclose facts whichwill, at least, throw some doubt on the case of theplaintiff. A mere denial of the plaintiff's claim andaffidavit is devoid of any evidential value and as suchwould not have disclosed any defense which will, ofleast, throw some doubt plaintiffs claim... Adefendant's affidavit...raises a triable issue where theaffidavit is such that the plaintiff will be required toexplain certain matters with regards to his claim orwhere the affidavit throws a doubt on the plaintiff'sclaim."*

The court also cited*Digital Securities Technology Ltd & Anor v. Faustinus Andi Esq* [35] where the Supreme Court held that "...

> *what the trial Court must do whenfaced with any response to an application forsummary judgment is to look at the proposed defense and determine whether thereliefs sought by the plaintiff would still succeed if the averments in the defense are found to be true, provided full particulars of the averments are shown for instance with the documents and not a meredenial of the claims of the plaintiffs.*

4.2 Would the Court Interfere with the Discretion of the Lower Court?

The Court guided by the Supreme Court'sdecision in *Obitunde v. Onyesom Community Bank Ltd*[36] per Kekere-Ekun, JSC where it was stated that the Court will not normally interfere with the exercise of discretion by the Lower Court unless it is shown that the trial Court acted against the law or that a miscarriage of justice has occurred in these words:

> *"...Where the defense is that the defendant is notindebted to the plaintiff, state the grounds on which the defendant relies as showing that he is not indebted. A mere general denial that the defendant is not indebted will not suffice..."This Court will not normally interfere with the exercise of discretion by the Lower Court unless it is shown that the trial Court acted against the law or that a miscarriage of justice has occurred as a result of the discretion exercised by the trial Court. In the instant case, it cannot be said that the learned trial Judge's exercise of discretion has occasioned any miscarriage of justice.*

[32] (2013) LPELR-20722 (CA) Pg. 17, Paras. D - F,

[33] (1990) LPELR-1801 (SC)

[34] [2007] 11 NWLR (Pt.1045) 247; LPELR-3399 (SC) Pg.29, Paras. A- E

[35] 2017) LPELR-43446 (CA) Pg. 15-17, Paras. C – B

[36] (2014) LPELR-22693 (SC) Pg.50-51, Paras. C- D

Also, the court cited *Anyah v. African Newspaper of Nig. Ltd.*[37] where the Supreme Court held that:

> *"It is not in all cases that an Appeal Court willinterfere with the exercise of discretion by a trial judge, simply because it did not favour one of the parties litigating before him. The Court will not interfere with the exercise of discretion in the absence of proof that it was wrongly exercised. You cannot lay down hard and fast rules as to the exercise of judicial discretion by a Court, for the moment you do that, the discretion is fettered."*

The court also cited the case of *Olatunbosun v. Texaco Nig. Plc*[38]where the Supreme Court also held that

> *an appellate Court like ourswill not interfere with the exercise of discretion of the Court below merely because this Court would have acted differently. ...this Court will only interfere where the discretion exercised is manifestly wrong, arbitrary, reckless and injudicious."*

The court felt that, on authorities, it would be improper to tinker with the exercise of discretion by the Lower Court in the instant case having regard to the materials relied on by the Lower Court to arrive at a decision, and resolved against the Appellant in favour of the Respondent.

4.3 Where the Corporate Existence of a Party is Denied on Whose lies the Onus to Proof?

The Appellant contended on issue number two that the Respondent is not an incorporated legal entity; and that in the Reply to the Appellant's Amended Statement of Defense, the Respondent attached an uncertified photocopy of its Certificate of Incorporation; that the said photocopy of the Certificate of Incorporation being a public document ought to have been certified as prescribed by the Evidence Act and that since it was not so certified, it must not be relied on as evidence of incorporation of the Respondent as a corporate legal entity who could sue and be sued. The Appellant further contended that since the Appellant had denied the existence or registration of the Respondent, the legal existence of the Respondent had been put in issue and by virtue of Sections 109-112 of the Evidence Act, only a certified copy of its Certificate of Incorporation will suffice as a legally sustainable and valid answer; and that this issue constitutes a legally triable issue on which the learned trial Judge ought to have ordered a trial of the case on its merit.

On its part, the Respondent's contention is that by the provisions of Section 131(1) of the Evidence Act, 2011, whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove those facts; and that the onus is on the Appellant to apply for a copy of the Certificate of Incorporation to satisfy itself that the Respondent is not a legal entity, and it does not matter whether or not the Respondent filed a Certificate of Incorporation. The Respondent submitted that the objection that the Respondent is not a legal entity and that the Respondent did not obtain authorization of its Board are not genuine defense but were intended to prevent the Appellant from meeting its obligation to the Respondent and that the Appellant does not have any defense on the basis for which trial should be ordered.

The court observed that where the legal status of a company is denied, it is deemed to have been made an issue and the Claimant has the onus to prove that it is a registered company. According to the court, the plaintiff to an action must be competent to institute an action, as the Supreme Court also held that the true status of the Plaintiff or the Defendant is more likely to be known during trial when the status of either party is challenged by the opposing party. Referring to the Supreme Court's decision in *Bank of Baroda v. Iyalabani Co. Ltd*[39] where the Court reiterates that while it may be open to defendant to challenge the legal capacity of a plaintiff to sue, the Plaintiff should not be deprived, on the basis of a mere assumption, of the opportunity of proving his or its capacity to such and that the law has been aptly put in *Aguda Practice & Procedure etc. 1980 Edn, At para. 10-04* that a plaintiff to an action must be competent to institute an action and that the onus of proving thecompetence to institute the action lies on him.."[40]

On the basis of the above, the court observed that in the instant case, the Respondent filed a copy of its Certificate of Incorporation and the Appellant objected to same on the ground that it was not certified. According to the court, the law is settled that a certificate of incorporation qualifies as a public document and therefore, only the original or a certified true copy of the photocopy thereof will be admissible in evidence. The court refers to Sections 85-90 & 102-106 of the Evidence Act, 2011 and the decisionin *Solid Unit Nig. Ltd & Anor v. Geotess Nig. Ltd*[41]where the legal status of the Respondent was made an issue at the Court below, which according to the court goes down to the jurisdiction of the Court, in that, if the Respondent is found to be incapable of instituting an action or being sued, then, the jurisdiction of the Court would not have been

[37] [1992] NWLR (Pt.247) pg. 319; (1992) LPELR-511 (SC) Pg.20-21, Paras. G - A
[38] (2012) LPELR-7805 (SC) Pg. 18, Paras. C - D
[39] [2002] 13 NWLR (Pt.785) 551; [2002] LPELR-743 (SC) Pg. 19-20, Paras. E - G.
[40] See: also REPTICO S.A. GENEVA v. AFRIBANK NIG. PLC (2013) LPELR-20662 (SC) Pg. 44-45, Paras. E – B and TSOKWA & ORS v. MIJINYAWA & ORS [2014]
LPELR-24200 (CA) Pg.42-44, Paras. F - C.
[41] (2013) LPELR-20724 (CA) Pg.40-43, Paras. D - G.

properly activated. The court cited the decision in *Reptico S.A. Geneva v. Afribank Nig. Plc*[42]*The Registered Trustees of Airline Operators of Nigeria v. N.A.M.A.*[43]*and Njoku v. Jonathan & Ors*[44] where itwas held that:

> *"The phrase "locus standi" or "standing" refers to theright of a party to appear and be heard on thequestion before the Court. It denotes legal capacity toinstitute legal proceedings in a Court of law. In otherwords, the right to or competence to institute proceedings in Court for redress or assertion of right enforceable at law. It is the bulwark or the framework which entitles a litigant to bring another party before the altar of adjudication... The concept focuses not on the merit of the case, but on the merit of the person seeking to approach the Court..."*

The court concluded that in sum therefore, this issue would obviously require further inquiry having regard to the facts and the settled position of the law, and the Lower Court must proceed to conduct further inquiry into the capacity of the Plaintiff to commence the action. The court reiterates that, the issue raised touches on the capacity of the Respondent and it is not an issue that might be resolved on the strength of the materials already before the Court. The court felt that the Appellant had raised a triable issue deserving of consideration in the circumstance, and on which ground the trial Court ought to have proceeded on trial and give the Respondent the opportunity to prove its juristic personality to determine whether it has the capacity to institute the action and invoke the jurisdiction of the Court. The Court concluded that it could not brush aside the issue with a wave of the hand as it might constitute a valid defense. In the circumstance therefore, the court resolved the issue in favour of the Appellant against the Respondent, and held that the Appellants appeal is therefore partly meritorious and is allowed in part.

Nevertheless, having found that the Appellant has no defense to the substantive claim of the Respondent, and with the only triable issue, being in relation to the Respondent's capacity, the court disregarded the technicality issue of corporate nonexistent of the respondent which ought to deny the claimant of its pecuniary benefit from the equipment supplied to the Appellant. Meanwhile, going by the provisions of Order 11 Rule 5(3) of the High Court of Lagos State (Civil Procedures) Rules, 2012, the court held that the trial Court ought to have directed that the issue as to the Respondent's legal capacity should be left for trial. In the circumstance, therefore, this issuethe court resolved in favour of the Appellant against the Respondent. On the whole, Appellants appeal is therefore partly meritorious and is allowed in part. The Ruling of the Lower Court delivered on the 3rd day of July 2015, by LF/ADR/L94/2014 was remitted via this judgment to the Hon Chief Judge of the High Court of Lagos State, to be assigned to another Judge to be heard and determined specifically and solely on issue relating to the Respondent's legal capacity.

5.0. Legal Framework, Concepts, and International Best Practices in Corporate Governance

This refers to the mechanize on or ways of internal and external controls of the actions and in actions of the organs of companion in a manner that ensures compliance with public policy, so that the interests of all the stakeholders are not put into penury.This is to avoid corporate failure and abuse. This paper emphasized that the court is the first formidable institution of external control to ensure compliance with international best practices in corporate governance, since the court has the power of life and death over corporate bodies. The court in adjudicating dispute between domestic company inter-se, and between domestic companies and foreign companies registered outside Nigeria or within Nigeria apart from ensuring compliance with statutory provisions, the court must do substantial equity to ensure compliance with international best practices in ensuring that substantial justice to all stakeholders. The paper further stressed the fact that theories aid practice in that the theories of best practices in corporate governance is aim at ensuring formidable corporate bodies with unwavering ability to ensure continuity in satisfaction of the interests of all stakeholders who wish perpetual corporate survival. In ensuring corporate survival, the court should be quick to realize the activities of the Locust and moles whose interest lies to see corporate failure to mop up whatever remains of the company for their personal aggrandizement. For example, a company registered in Nigeria with substantial contracts at hand might be organized for doom by an application for winding-up by those who camouflage as stakeholders but who unknown to the courts are the wolf who stands to benefit by looting the account of the company been wound-up. Therefore, while the courts should note the commonly accepted principles of corporate governance which include: rights and equitable treatment of shareholders,interest of other stakeholders,integrity and ethical behaviours, disclosure and transparency; the court should also note that adjudication to ensure best practice in corporate governance must aim at building and strengthening corporate transparency, accountability, credibility, integrity, and trust.

The court should also note those entities to adopt and comply with the best practice in corporate governance which include:all public companies, all Private Companies that are holding companies of Public Companies or other regulated entities, all concessioner or privatized companies, all regulated private companies i.e. Private companies under the supervision of Federal Inland Revenue Services and Corporate Affairs

[42] (Supra) at Pg. 40-41, Paras. F - D;
[43] (2014) LPELR-22372 (SC) Pg. 18-19, Paras. E - B
[44] (2015) LPELR-24496 (CA) Pg. 39-44, Paras. A- B

Commission. In order to provide a strong benchmark in matters of theory, this paper added two theories of ensuring international best practice in corporate governance which the courts should consider on matters of corporate body proceedings.

5.1 The Indirect Beneficiary Theory :

This theory posits that there exist other indirect beneficiaries, that profits from the survival of the companies.These include:

a. The issuing Houses who receives brokerages and commissions forthe issuance of shares on behalf of the companies
b. The Banking sector also profits from the marketing of shares and the presentation of prospectus to the public for prospective investors in the companies.The survival of the banking sector is based on the principle of profitability and liquidity as they have to make profit for their shareholders through lending. Majorly such lending includes lending to corporate bodies. Also they must have a strong liquidity base to fortify themselves against demands for money or liquid cash by its numerous customers. The ability to balance liquidity with profitability therefore marked the hallmark of a successfulbanking business. Hence, the survival of corporate bodies is crucial for the banking sector and therefore, the necessity for a grand breaking legal framework to ensure the ultimate of best practices in corporate Governance.

5.2 The General Economy and International Integrity Theory

These are two theories in one.The development of the general economy determines partly the popularity and prestige that a nation enjoys at the international political area. The development of the general economy is determined by the volume of a Nation's National Income. The volumes of a Nation National Income and the circular flow of income and the general population of its citizens, with equitable distribution of its wealth determines the level of its aggregate demands.The General progress and development of a nation is closely intertwined with the progressive development of corporate bodies.An enduring corporate bodies depends largely on the level of financial discipline of its management and the kind of policy pursuit of the government to ensure their growth. This dictates the volume of employment, the volume of income of employees, the volume of savings, the volume of further investment,which determine the pace of the overall development of the economy. To this extent therefore, the western world never plays with the volumes of aggregate demand. For this reason, advance governance allows debit financing and bailouts during economic depression.These theories explain the *raison deter* for effective code to ensure best practices in corporate Governance.Effective code is not enough to ensure these best practices. Hence a vibrant court is necessary. The implication is that, not the interest of the interested parties who are themselves part of the company's apparatus per se worth protection, but the interest of a larger populace who benefits from the continual existence of the company. In the case of *Companhia Brasifeira De Infraestrutura (Infaz) v. Companhia Brasileira De Entrepostos E Commercio (Cobec)*[45] *Nigeria Limited,* perhaps our court considered the interest of the larger outsiders who benefits from the contracts being handled by COBEC, the winding-up proceedings might not sail through without the consideration of other beneficial interest. Why we advocate for a robust legal regime to protect these larger interest, we also advocate a more circumspect judiciary, so that the court might not unknowingly plays to the galleries of the swindlers who already planned the failure of the company from inception in line with their evil conceived plan to defraud.

Conclusion:

The law in Nigeria is that a foreign company doing business in Nigeria must be incorporated in Nigeria. The adjectival clause are the words 'doing business in Nigeria'. This words are construed strictly by the courts. However, a foreign company that entered into a contract with a Nigerian company could enforce the obligations imposed by the terms of such contracts in Nigeria without been incorporated. This is in strict accord with the principle that the court would not allow a statute to be used as an instrument to promote fraud. In line with this equitable maxim, the courts in Nigeria should be alive to their responsibilities when dealing with an action involving foreign companies in Nigeria. Some fraudulent government officials in connivance with certain fraudulent foreigners might partner to commit fraud on the government by doing heavy business involving huge sum. After receiving substantial part of this sum, a foreign partner would just apply for the winding up of the company because *ab initio* it was not incorporated. The fact is that the company was planned not to survive in order to defraud. In such situation, the courts should invite all interested parties, and go wider step further by taking inventories of the contracts at hand, those who were involved, the contract sum, and ordered such contracts to be concluded before the winding-up. This is the reason why we opined that a case like that of *COBEC* ought to be viewed in this regard. There is also the need for a very robust legislation which calls for a proper parliamentary intervention in this regard.There is also the need that the courts should observe the rules relating to international best practices in corporate

[45][2018] 12 NWLR (Pt. 1632) 127 at 132.

governance before handling down their decisions. Hence, it should not be a celebration for the economy, government, shareholder, promoters, and even law that a corporate body should die prematurely.