

SUPREME COURT OF NIGERIA

14TH MAY, SC. 147/1991

**CORAM:- M. L. UWAIS, S. M. A. BELGORE, A. B. WALI,
O. OLATAWURA, M. E. OGUNDARE, JJSC**

1. ALHAJI SULAIMAN MOHAMMED) APPELLANTS
2. SAMINU SALIU)
(For themselves and the entire)
members of Ado family))

AND

LASISI SANUSI OLAWUNMI & 9 ORS(A) RESPONDENTS

CIVIL PROCEDURE - Contempt of court - application for stay
of proceedings - whether there is anything
to stay - when conviction and sentence has
been passed

CIVIL PROCEDURE - Committal for contempt of court -
application for bail pending appeal in the
court of Appeal - whether it must first be
made to High Court

ESTOPPEL - Issue estoppel - when applicable - different
Questions under consideration - whether
decision is on merit or not

FACTS

The plaintiffs/Appellants filed an action before the Lagos high Court against the Defendants/Respondents over a piece of Land. Judgment was given in favour of the Plaintiffs up to the Supreme Court. The Defendants stepped into the Plaintiffs' said land contrary to Supreme Court Judgment. Proceedings were commenced against the Defendants for committal on contempt of court at the High Court. The trial Judge found them guilty but suspended the sentence for 14 days within which he required the Defendants to purge themselves of the contempt.

2 MOHAMMED V. OLAWUNMI (A) (1993) 5 KLR 1; (1993) 4

Defendants filed successive motions and appeals in the same case against the contempt proceedings pending at the High Court most of which did not succeed because of irregularities. In one of such applications the Court of Appeal refused to grant stay of the contempt proceedings before the High Court.

But whilst a fresh application of the Defendants for stay of the High Court proceedings was pending before the Court of Appeal, the trial Judge went ahead and sentenced the defendants to prison for contempt of court. Defendants' application for stay of proceedings was subsequently granted and their application for bail pending appeal was also granted by the Court of Appeal. Being dissatisfied, the plaintiffs appealed to the Supreme Court, raising the question of issue estoppel, against the court of appeal for granting the stay of proceedings it had previously rejected.

Plaintiffs contended that there was nothing to stay since sentence has been passed by the trial Judge who became *functus officio*. They also urged that the grant of bail by the Court of Appeal was wrong since the application for bail was not first made at the high Court.

HELD (unanimously dismissing the Appeal)

1. Although provisions of the Evidence Act deal with the principle governing estoppel, it does not provide for all the rules of estoppel known to equity. In the present case, issue estoppel is in question. (p.13)
2. For estoppel to be established, determination made in the first proceedings must be the same question arising in the latter. (p.15)
3. Where the question in the second proceedings is not the same (not *eadem questio*) as that decided in the first, there can be no estoppel. Thus a party can sue another in various representative characters that do not raise the same question. (p.15)
4. From decided cases, refusal of an application for extension of time within which to appeal not being a decision on the merits, does not constitute in law an absolute bar to further application. (p. 16)

5. Where it is clear from the provisions of a law that a decision on a particular issue is not meant to bar further proceedings on the issue, the doctrine of estoppel will not apply. (p. 16)
6. In the present case, the doctrine of issue estoppel cannot and did not apply to the Defendants'/Respondents' second application for stay of proceedings in the High Court. (p. 16)
- 7 Submission that the High Court having pronounced a sentence for contempt of court, there were no further proceedings to be stayed is not correct since the sentence passed on the affected Defendants was not final by its nature. (p.17)
8. The fact that if the Defendants purge themselves of the contempt, notice thereof must be given to the High Court for their release as contemnors will be a continuation of proceedings that could technically be stayed by the Court of Appeal. (p. 17)
9. The Court of Appeal was right in granting the application for stay of proceedings in the High Court pending the determination of Respondents' appeal to the Supreme Court against a different Court of Appeal ruling, irrespective of the High Court's passing of sentence. (p. 17)
10. From the facts of this case and by the provision of s. 29 (1) of Court of Appeal Act 1976, the Court of Appeal has the discretion to grant bail as it did, provided that an application for bail pending the determination of the Appeal was made. (p.18)
- 11 Under the Rules, an applicant will only be required to first apply for bail in the High Court before applying to the Court of Appeal, if the Law under which the application was brought so provides. (P. 19)

12. There is nothing in section 29 of the Court of Appeal Act, 1976 which requires that an application for bail pending appeal must be made in the High Court first before being made in the Court of Appeal. (p.19)

5 **PER OGUNDARE JSC** “By the definition of decision in section 277 (1) of the constitution, it is possible for an appellant to appeal against his conviction without appealing against the sentence imposed on him where he intends to contest the determination of his guilt without wanting the sentence interfered with in case he loses on the
10 issue of guilt. Similarly, it is possible for a convicted person to appeal against the sentence imposed on him without contesting the correctness of his conviction”. (p. 36)

15 **REPRESENTATION**

M.A. Bashua Esq., B.A. Bashua, K.O. Dawodu, M.A. Bashua Jr., for the Appellants

H.A. Lardner, SAN, T. A. Oyagbola, N.N. Uche (Miss), for the Respondents

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CASES REFERRED TO

1. Bowoje v. Adediwura (1976) 6 S.C. 143
- 25 2. Amudipe v. Arijodi (1978) 9 and 10 SC 27
3. Iyowuawi v. Iyowuawi (1987) 4 NWLR 61
4. Ogbesusi v. Fabolude (1983) 2 SC 72
5. Odjevuwedge v. Echanokpe (1987) 1 NWLR (pt 52) 633
6. Overton v. Harvey (1850) 9 CB 324
- 30 7. Burman v. Wood (1948) 1 KB 111
8. Ugwajiofo & anor v. Onyekagbu & ors (1964) NSCC 94, (1964) 1 ALL NLR 124
9. Alhaji Sulaiman Mohammed & anor v. Lasisi Sanusi Olawunmi & ors (unreported) suit No SC. 135/1991
- 35 10. Olawoyin v. Commissioner of police (1961) ALL NLR 130, (1961) NRNLR 23

11. Mobil Oil (Nig) Ltd v. J.O. Agadaigho (1988) 4 SCNJ 174

12. Ojosi v. Ikabala & ors (1972) 3 SC 1
13. Hart v. Hart (1990) 1 NWLR 297
14. Military Governor of Lagos State v. Ojukwu (1986) 1 NWLR (pt.18) 621
15. Mohammed & ors v. Olawunmi & ors (1990) 2 NSCC 36
16. Vaswani v. savalakh (1972) 1 ALL NLR 922 **5**
17. Metropolitan Bank Ltd. v. Pooley (1885) 10 App. Cases 210
18. Logan v. The Bank of Scotland No 2 (1906) 1 KB 141
19. Sanni v. Otesainya SC 8/1970 (Unreported)
20. Ojora v. Odunsi (1964) 1 ALL N.L.R. 55 **10**
21. R v. Tunwashe (1935) 2 WACA 236
22. Fynn & anor v. The Republic of Ghana (1971) 1 GLR 433
23. R v. Warman (1931) 22 C.A.R. 81
24. R.V. London County Quarter Sessions Appeals Committee
Exparte Metropolitan Commissioner (1948) 1 KB 670 **15**

STATUTES & RULES

1. Court of Appeal Act 1976. ss. 25 (2) (a), 3, and 29 (1)
2. Constitution of The Federal Republic of Nigeria 1979 ss. 220
(1) (g) (i), 277 (1) **20**
3. Court of Appeal Rules, 1981 order 3 rules 3(iv), 22, rule 4 (4)
5. Court of Appeal Rule 1981, order 4 Rules 14 (i)
6. Supreme Court Act s. 24
7. Supreme Court rules Order 8 Rule 17 **25**

LEAD JUDGMENT BY UWAIS JSC

The genesis of this case began with suit No. LD/1213/76 which was filed in the High Court of Lagos in 1976. The High Court decision in that case went on appeal to the Court of Appeal as suit No. FCA/L/95/78 and then to this court as Suit No. SC61/1980. This court while dismissing that appeal remarked as follows:- **30**

"Mr B.A. Augusto for the appellants did not object to a suggestion by Mr. Abraham Adesanya learned counsel for the respondents **35**

that a plan ought to be filed. We therefore ordered a plan to be filed. Mr. Augusto also agreed that the injunction granted by the court

should be tied to the plan.

It was upon this concession that in dismissing the appeal of the appellants it is ordered that the injunction granted by the trial court be tied to the area edged red in Plan No. GP/1150 made by G.P. Okusanya as a certified true 'copy of Plan No. AB 1381 which was originally made by one A.B. Apatira licensed surveyor on 13th August, 1962. With this order incorporated as part of the judgment of the trial court, the appeal of the appellants is hereby dismissed."

10 It was alleged that the defendants flagrantly disregarded the order made by the Supreme Court. An application for their committal on contempt of the order was therefore brought in the High Court of Lagos State before Fernandez J. After hearing the parties, the learned trial Judge ruled thus:-

15 *"This order was made in suit No. LD/1213/76 Appeal No. FCAL/ 95/78 SC/61/1980. It follows therefore that there is a valid order of injunction which is enforceable by committal proceedings. What then are the interference of the respondents? Paragraphs 4-10 of the affidavit in support give the details of the interference by the respondents and the reaction of the applicants. These interferences varies (sic). While some are institution of legal proceedings in court, others are selling and building on the applicants' land. In proof of these allegations, the plaintiffs' only Exhibits 7, 8 and 9 attached to the further affidavit speak directly by showing interference of the respondents. There is no evidence of any selling or building any part of the plaintiffs' land before me. The respondents did not offer any reasonable explanation to Exhibits 7, 8 and 9. Exhibit 7 is a letter from the Lagos State Government in which the state Government informed the Ado Family that the families of Emiabata, Gejere and Gashinbaki on behalf of Odan Family through a solicitor requested the Government not to pay any compensation to the Ado Family. The letter was dated 25th June, 1984. Exhibit 8 is the letter informing the Badagry Local Government of the appointment and recognition as Bale of Abule Ado village. Exhibit 9 was a letter asking for similar appointment and recognition of Alhaji Rufai Jubril as Bale of Gejere Town. Gejere Town is within the land of the applicants. Exhibits 8 and 9 were written on the 12th and 19th December, 1985*

respectively. These steps as I have earlier said are conclusive acts of contempt and (before and after Forms 48 and 49 were issued and served) which the applicants put forward without any answer from the respondents. Though this is a civil contempt nonetheless the breach of the order must be proved beyond all reasonable doubt as in criminal prosecution. Thus apart from the affidavit of both parties there must be further evidence to incriminate him. Conversely, the slightest interference once proved is punishable for the requirement is not the gravity of the act but the actual commission of the act. The respondents therefore committed an act of contempt as regards Exhibits 7, 8 and 9. I therefore found (sic) the respondents guilty of contempt of the order of this court confirmed by Court of Appeal and the Supreme Court in suit NO. LD/1213/76; FCA/L/95/78 and S.C. 61/1980."

Instead of sentencing the defendants, the learned Judge stated as follows:-

"I will suspend sentence until the respondents were able to purge themselves of the following within fourteen (14) days:

1. That the respondents and their agents move away from the land of Ado Family as shown in Exhibit' 1 (i.e.) the plan).

2. The respondents are hereby ordered to withdraw the letters Exhibits 7, 8 and 9 attached to the affidavit in support dated 20th June, 1986.

3. That the respondents do produce in court copies of letters of withdrawal of the said Exhibits 7, 8 and 9 attached to the said affidavit, and also to confirm to the recipient of these letters that they have no authority to do what they did in accordance with the Supreme Court Order as aforesaid.

In default of this purge within the time stipulated, I will pronounce my sentence in accordance with the law taking into consideration the gravity of the offences.

In the meantime, the 1st - 11th respondents are to be on Bail in the sum of N1,000.00 (One thousand Naira) and one surety in like sum. Each surety is to undertake to produce the respondents bailed, by 9 a.m. on the 3rd October, 1988. The Chief Registrar shall have power to approve the sureties. A surety can take two of the

accused persons on Bail."

The ruling in question was given on 21st September, 1988 but there was an earlier ruling given by the same Judge on 30th June, 1988. With regard to the latter ruling, the defendants obtained
5 from the High Court leave to appeal to the Court of Appeal and they filed appeal to that effect. The defendants filed a notice of appeal against the ruling delivered on 21st September, 1988 without first obtaining leave to do so.

10 The defendants subsequently filed an application in the Court of Appeal to regularise the omission by seeking an extension of time within which to seek leave to appeal and for leave to appeal against the ruling of 21st September, 1988. This application was followed yet by another application in the Court of Appeal by the defendants
15 asking for a stay of further proceedings before Fernandez, J. pending the determination of the appeal filed against the High Court rulings of 30th June, 1988 and 21st September, 1988 and a stay of the execution of the latter ruling. The plaintiffs by a motion raised a preliminary objection in the Court of Appeal in respect of the appeal
20 against the ruling of 30th June, 1988 on the grounds inter alia that the notice of appeal filed was in breach of section 25 subsections 2(a) and (3) of the Court of Appeal Act, 1976 and that the leave to appeal granted by Fernandez, J. was invalid since the learned Judge
25 lacked the jurisdiction to grant it out of time on the authority of *Bowaje v. Adediwura*, (1976) 6 S.C. 143 and *Amudipe v. Arijodi*, (1978) 9-10 SC. 27. The preliminary objection was upheld by the Court of Appeal and the notice of appeal against the ruling of Fernandez J. of 30th June, 1988 was struck out.

30 The application to the Court of Appeal asking for enlargement of time within which to seek leave to appeal and for leave to appeal was heard by the Court of Appeal which held that the appeal was properly filed as no leave was necessary for an appeal under section 220(1)(g)(i) of the 1979 Constitution under which the appeal
35 against the ruling of 21st September, 1988 fell. The application for stay of further proceedings and stay of execution was also heard by the Court of Appeal and both prayers were granted.

The defendants appealed to this court in Suit No. S.C.42/1989 against the rulings of the Court of Appeal. This court held that the

Court of Appeal was right in striking out the notice of appeal against the ruling of Fernandez, J. of 30th June 1988. With regard to the notice of appeal against the ruling of 21st September, 1988. The court held that that appeal was interlocutory in nature; therefore, leave to appeal was necessary and since it was not obtained, the appeal was incompetent and it was struck out. The orders of the Court of Appeal granting the stay of further proceedings and execution were also set aside by this court. In effect the status quo was maintained, namely that rulings made by Fernandez J on 30th June, 1988 and 21st September, 1988 remained extant following the decision of the Supreme Court. What remained before the Court of Appeal was an application by the defendants filed on 2nd November 1988 in which the defendants sought an extension of time within which to seek leave to appeal and for leave to appeal against the ruling of Fernandez, J. of 21st September, 1988 and to deem the notice of appeal against the ruling, which was filed on 26th September 1988, as properly filed.

On 10th April, 1990 another application was filed by the defendants in the Court of Appeal praying as follows:-

"(1) To move their motion dated 3rd (sic 2nd) November, 1988 for leave to apply for extension of time within which to seek leave to appeal against the ruling of Honourable Justice E. Akin Fernandez of the Lagos High Court No.6 dated 21st September 1988 and for leave to appeal.

(2) An ORDER for stay of any further proceedings in this matter at the Lagos High Court No.6 by Hon. Justice E. Akin Fernandez pending the determination of appellant's motion dated 3/11/88 and also pending the determination of the appeal for which leave to appeal is being sought.

(3) Pending the determination of the motion dated 3/11/88 and also pending the determination of the appeal for which leave is being sought, an ORDER for stay of the ruling/orders dated 21/9/88 of Hon. Justice E. Akin Fernandez."

Next the plaintiffs filed a notice of preliminary objection. The motions together with the notice of preliminary objection were heard by the Court of Appeal and the following ruling was delivered (per

Babalakin, J.CA. as he then was):

" There is therefore no Notice of Appeal bearing the No. CA/L/341/M/88 in this court to which an extension of time can be moved as contained in the prayer of the motion objected to. Nor could the
5 orders asked for in prayers 2 and 3 of the motion be granted because they are to be granted pending the determination of the appeal whose Notice has been struck out."

In the absence of any appeal in the Court Appeal against the
10 rulings by Fernandez, J. on 30th June, 1988 and 21st September, 1988, the defendants brought an application in the Court of Appeal which was dated 27th April, 1990. In the application they prayed for enlargement of time to apply for leave to appeal against the ruling of
15 21st September, 1988, leave to appeal, enlargement of time to file the appeal, stay of further proceedings in the case in the High Court pending the hearing of the application and stay of further proceedings in the High Court pending the determination of the appeal being sought.

The plaintiffs filed two counter-affidavits to the application
20 and a notice of preliminary objection. Both the application and the preliminary objection were heard together by the Court of Appeal.

The application was granted and the following orders were made (per Kalgo, J.C.A.) on 4th April, 1991.

25 *"(1) Time within which to apply for leave to appeal to this court is hereby extended;*

*(2) Leave to appeal against the decision of Fernandez J. of the High
30 Court of Lagos State on 20th and 21st September, 1988, is hereby granted;*

*(3) The applicants shall file their notice of appeal in this court and the
lower court within 14 days from today;*

35 *(4) Stay of further proceedings in the High Court is hereby refused."*

The defendants complied with the order by filing a notice of appeal within the time granted. On 8th May, 1991 the defendants filed an application in the Court of Appeal praying for:-

"(1) the determination of the appeal lodged by the respondents against the ruling of this Honourable Court made on the 4th April, 1991 and

(2) the hearing and determination of the appeal now pending in this Honourable Court against the rulings/orders of the Hon. Justice E. Akin Fernandez made on the 20th and 21st September, 1988 and for such further and/or other order or orders as may seem fit in the circumstances of this case."

They followed this with another application filed on 10th May, 1991 in which they asked for:-

"(a) an order admitting them to bail pending (i) the hearing and determination by this Honourable Court of their motion for stay of further proceedings in the High Court filed herein on the 8th May, 1991 (ii) the determination of their appeal already entered in this Honourable Court against their conviction by the Hon. Justice Fernandez;

(b) an Order setting aside the Warrants of Committal signed by the learned Judge in respect of each of the appellants/applicants herein;

(c) such further and/or other order or orders as may seem fit to this Honourable Court."

As was done before, the plaintiffs filed a counter affidavit and a notice of preliminary objection against the latter application.

On 16th May, 1991 the defendants filed a further affidavit to which they exhibited the ruling of Fernandez J. which was delivered subsequently on 9th May, 1991. In the ruling, the 1st to 7th defendants inclusive and 11th, 12th and 19th defendants were "committed to prison until each and everyone purge himself as directed in my order made on the 21st September, 1988."

The two applications by the defendants as well as the plaintiffs' notice of preliminary objection were heard together by the Court of Appeal (Awogu, Kalgo and Tobi JJ.C.A.) on 23rd May, 1991. The ruling of the Court of Appeal granting both applications was deliv-

ered on 27th May, 1991. The preliminary objection was rejected.

The plaintiffs were dissatisfied with the ruling. Hence this appeal. They filed 6 grounds of appeal and formulated 6 issues for determination in their brief of argument. The issues read thus:-

- 5 *"1. Whether the respondents are not estopped from filing the motion dated 10th May 1991, praying for a stay of further proceedings in the High Court, when exactly the same prayer was earlier argued and refused on the merit by the same Court of Appeal on 4th April, 1991.*
- 10
- 2. Were the Justices of the Court of Appeal right in granting a stay of further proceedings in the High Court in view of the proceedings of the High Court on 9th May, 1991 by which the Judge put finality to*
- 15 *the trial before him.*
- 3. (a) Whether the learned Justices of the Court of Appeal were right in contravention of Order 3 Rule 3(iv) of the rules of the Court of Appeal, to have heard the application for bail without ordering it to*
- 20 *be first heard at the High Court.*
- (b) And whether the mere fact that the High Court will refuse the application for bail because he (sic) had sentenced the respondents to prison. Constitutes "special circumstances which make it impos-*
- 25 *sible or impracticable to apply to the Court below" within Order 3 rule 3 (iv) Court of Appeal Rules, and particularly when the appli-*
- cants did not give any evidence supporting special circumstances.*
- 4. Whether there being no appeal filed by the respondents*
- 30 *against the sentence of 9th May, 1991 the respondents hence cannot ask for bail.*
- 5. Were the Justices of the Court of Appeal right in listening to the respondents on their application dated 10th May, 1991 while*
- 35 *the respondents were definitely in contempt of the orders of the Supreme Court in suit S.C. 61/81 and the order of the High Court?*
- 6. Did the Justices of the Court of Appeal exercise their discretion in granting bail to the respondents, judicially and judiciously*

without proper notice of appeal filed against the ruling of 9th May, 1991?"

The defendants also filed a joint brief of argument. They submitted in the brief that the issues contained in the plaintiffs' brief do not arise in the appeal but canvassed in the alternative that if the issues arise, the appeal lacked merit and that adequate consideration to the issues raised was given by the Court of Appeal.

The contention of the plaintiffs under issues nos. 1 and 2 is that the application for Stay of further proceedings having been made by the defendants to and refused by Ademola, Awogu and Kalgo JJ.C.A, on 4th April, 1991, the defendants could not make the same application on 23rd May, 1991 before Awogu, Kalgo and Tobi JJ.C.A. because the subject matter was the same and the ruling of 4th April 1991 constituted an issue estoppel between the parties. The case of *Iyowuawi v. Iyowuawi*. (1987) 4 NWLR (pt. 63) 61 at p.63 and *Ogbesusi v. Fabolude*, (1983) 2 S.C. 75 were cited in support of the submission.

The defendants' reply, in their brief, to the above argument is that there is a difference between their applications dated 27th April, 1990 and 8th May, 1991. They argue that an appeal to this court had been filed against the ruling of the Court of Appeal delivered on 4th April, 1991 and therefore the necessity to apply for a stay of further proceedings as per the application dated 8th May, 1991 arose.

They rely on Order 3 rule 22 of the Court of Appeal Rules, 1981 as authority for making the application. Order 3 rule 22 provides:- *"No interlocutory judgment or order from which there has been no appeal shall operate so as to bar or prejudice the Court from giving such decision upon the appeal as may seem just."*

The defendants submitted that the subject matters of the applications are different and so also the facts of the applications. Furthermore, both applications being interlocutory in character, if refused, could be repeated in the same court.

Although Part VIII of the Evidence Act, that is Sections 150 to 153 thereof deals with the principle governing estoppel, the Evidence Act does not provide for all the rules of estoppel known to equity. The estoppel in question in this case is issue estoppel which has been defined by this court in *Odjevwedje v. Echanokpe*, (1987)

1 NWLR (Pt.52) 633 at p.643 H to be thus:-

".....Issue of estoppel is an extension of the same rule of public policy. There are many causes of action which can only be established by proving that two or more different conditions are fulfilled. Such causes of action involve as many separate issues... as there are
5 conditions (which the plaintiff must fulfill to establish his case); and there may be cases where the fulfillment of an identical condition is a requirement common to two or more different causes of action. If, in litigation upon one such cause of action any of such separate issues
10 as to whether a particular condition has been fulfilled is determined by a court of competent jurisdiction, either upon evidence or upon admission by party to the litigation, neither party can, in subsequent litigation between one another upon any cause of action which depends upon the fulfillment of the identical condition, assert that the
15 condition was fulfilled if the court has in the first litigation determined that it was not, or deny that it was fulfilled if the court in the first litigation determined that it was."

It follows that on a simplistic view of the fact that the defendants had earlier applied to the Court of Appeal for stay of further
20 proceedings in the High Court and the application was refused on 4th April, 1991, then any further application in the same case for the same remedy will be caught by a plea of issue estoppel; for the parties and the subject matter are the same. This is the stance taken by
25 the plaintiffs.

The position of the Court of Appeal (Per Awogu, J.C.A.) is as follows:-

"On the application for stay of further proceedings, the earlier refusal of same cannot, in my view, constitute *res judicata*. Indeed,
30 with notices of appeal yet to be filed within 14 days, it would have been inappropriate to grant a stay of further proceedings on 4th April, 1991. The present application cannot therefore be regarded as an abuse of process. In addition, the appeal now filed by the respondents against the ruling of 4th April, 1991, supports the present
35 application for a stay of further proceedings at the High Court. In other words, if the respondents are dissatisfied with the leave to appeal granted to the applicants, the applicants are entitled to ask for a stay of the proceedings at the High Court. In addition there is the fact that by the order of 4th April, 1991, and of 18th April, 1991, ordering

briefs in the appeal, the applicants were entitled to a stay of further proceedings at the lower court, since all that was left at the lower court was to pass sentence. Bashua for the respondents contends that the sentence having been passed, there was nothing to stay. This, with respect, is misconceived, as the appeal of the applicants against their conviction is still pending in this court. Accordingly, it is my view that the application succeeds and stay of further proceedings of the suit at the High Court before Fernandez J. is hereby granted."

With respect, there are more cogent reasons for which the principle of issue of estoppel would not apply to the application of 8th May, 1991 than have been given by the Court of Appeal. There is no doubt that in substance the application considered in the Court of Appeal ruling of 4th April, 1991 is the same as the application before the court on 8th May, 1991, that is the stay of further proceedings in the High Court. However, a number of events had since intervened to make the circumstances of the first and the second applications different. On 4th April, 1991 when the court refused the first application there was no appeal pending in the Supreme Court whilst in the case of the second application of 8th May, 1991 there was an appeal against the ruling of 4th April, 1991 entered in the Supreme Court as Suit No.SC.135/1991. Secondly, when the first application was refused on 4th April, 1991 the sentence for the contempt was yet to be passed by the High Court. However, when the second application came before the Court of Appeal some of the defendants had been committed to prison custody until they purged themselves of the contempt.

Now for an estoppel to be established whatever determination is made in the first proceedings must be the same question arising in the latter proceedings. Where the question in the second proceedings is not the same (i.e not eadem quaestio) as that decided in the first, there can be no estoppel. Thus a party against whom judgment has been given, when suing in a particular representative character, is not estopped from afterwards, in a different representative character, suing the same person because the two proceedings do not raise the same question - *Overton v. Harvey*. (1850) 9 C.B. 324 per *Creswell J.* at p.336. A further example is a decision declining an order for possession of premises, which is protected by rent restric-

tion legislation, on the ground that the balance of hardship does not warrant the making of an order will not bar further proceedings between the same parties in respect of the same premises at a later date: for the factors which contribute to the hardship may change - *Burman v. Wood*, (1948) 1 K.B 111.

5 In *Ugwajiofo & anor v. Onyekagbu & ors.* (1964) NSCC 94 at p.95; (1964) 1 All NLR 124 it was held by this court that where an application for extension of time within which to appeal has been refused, such refusal is not a decision on the merits and does not, therefore, constitute in "law an absolute bar to further application. See also *Alhaji Sulaiman Mohammed & anor v. Lasisi Sanusi Olawuumi & 11 ors.* (unreported) Suit No. S.C. 135/1991 judgment delivered today (per Olatawura, J.S.C.). See (1993) 4 NWLR (Pt.288) 384.

10 Furthermore, where it is clear from the provisions of a law that a decision of a particular issue is not meant to bar further proceedings on the issue, then the doctrine of estoppel will not apply- *Olawoyin v. Commissioner of Police*, (1961) All NLR 130, 196 1 NRNLR 23. See also section 25(3) of the Court of Appeal Act. 1976.

20 The second application for Stay of proceedings brought on 8th May, 1991 was based on the provisions of sections 16 and 18 of the Court of Appeal Act, 1976 and the inherent powers of the Court of Appeal. By section 16 of the Court of Appeal Act, 1976 which relates to the general powers of the court "*The Court of Appeal may from time to time make an order necessary for determining the real question in controversy in the appeal, and may make an interim order or grant any injunction which the court below is authorised to make.*" Furthermore, section 6 subsection (6)(a) of the 1979 Constitution invests the Court of Appeal with all the inherent powers and 25 sanctions of a court of law.

30 It follows from all the foregoing that the doctrine of issue estoppel cannot and did not apply to the defendants' second application for stay of the proceedings in the High Court. The only obstacle seemingly before the Court of Appeal was the fact brought to its notice 35 that the High Court had sentenced some of the defendants to prison custody until they purged themselves of the contempt of court. In the case of those so sentenced, it was argued that there were no further proceedings to be stayed and that the High Court had become *functus Officio*.

I am not, however, satisfied that that is the correct position. The sentence passed on the defendants so affected was not by its nature final. If at any time any or all of the defendants sentenced desired to purge himself or themselves of the contempt at least notice of the purge must be given to the High Court before an order of release of the contemptnor could be made. That in itself is a continuation of the proceedings before the High Court and could technically, therefore, be stayed by the Court of Appeal. The case of the defendants who were not yet sentenced by the High Court is even clearer.

I am therefore, satisfied that the Court of Appeal was right in granting the application for stay of proceedings in the High Court pending the determination of the appeal to this court against the ruling of the Court of Appeal delivered on 4th April, 1991, the passing of the sentence by the High Court notwithstanding.

I now come to issues nos. 3 to 6 inclusive which touch on the application of 10th May, 1991 seeking bail for the defendants pending the determination of the application filed on 8th May, 1991 and the appeal entered in the Court of Appeal against their conviction by Fernandez, J. The plaintiffs refer in their brief to the provisions of Order 3 rule 3 (4) of the Court of Appeal Rules, 1981 and the case of Mobil Oil (Nig) Ltd v. J. O. Agadaigho (1988) 2 NWLR (Pt.77) 383; (1988) 4 SCNJ 174 and argued that the defendants should have applied to the High Court for bail in the first place before applying to the Court of Appeal and that the latter should have rejected the application on that ground on the authority of Ojosipe v. Ikabala & Ors., (1972) 3 S.C. 1. The plaintiffs submitted by referring to Order 4 rule 14 (i) of the Court of Appeal Rules, 1981 that all applications for bail are brought first in the trial court and it is only when bail is refused by the trial court that the same application can be made to the Court of Appeal. It is further argued that since the defendants had defiantly refused to obey the order of injunction restraining them from interfering with the plaintiffs' land, the Court of Appeal should not have granted their application for bail. The cases of Ezekiel-Hart v. Ezekiel-Hart, (1990) 1 NWLR (Pt. 126) 297 and Military Governor of Lagos State v. Ojukwu, (1986) 1 NWLR (Pt. 18) 621 were cited in support.

In his oral argument expatiating on the brief of argument, Mr. Bashua, learned counsel to the plaintiffs, stated that at the time the defendants applied to the Court of Appeal for bail, there was no

sentence passed by the High Court from which the defendant could have appealed. He referred to section 29 subsections (1) and (2) of the Court of Appeal Act, 1976 and submitted that there must be a sentence passed as provided by subsection (2) thereof before there can be an application for bail pending appeal.

5 The defendants reply in their brief that there were special circumstances which made it impossible and impracticable for the defendants to apply to the High Court first for bail before applying to the Court of Appeal. They rely on the ruling of the latter Court to show the special circumstances.

10 In his oral reply, Mr. Lardner, learned Senior Advocate for the defendants, submitted that the Court of Appeal has the jurisdiction to grant bail where a sentence is passed and this is irrespective of whether there is an appeal or not against the sentence. He referred
15 to section 29 subsection (1) of the Court of Appeal Act, 1976, which he submitted applies to all cases of bail whether on criminal conviction or civil contempt and distinguished it from the provisions of the Court of Appeal Rules, 1981 which apply to bail only in cases of conviction of a criminal offence.

20 The application for bail pending the appeal in the Court of Appeal against the ruling of Fernandez, J. of 21st September, 1988 was brought inter alia under section 29 subsection (1) of the Court of Appeal Act, 1976 which provides:-

25 *"29 - (1) The Court of Appeal may, if it thinks fit, on the application of an appellant, admit the appellant to bail pending the determination of his appeal."*

What is clear from the foregoing is that the grant of bail by the Court of Appeal is discretionary. The provisions of the subsection
30 do not state whether there has to be a conviction and sentence before such bail could be granted. What the subsection requires is that there must be an application for bail by an appellant and that the bail to be granted should be pending the determination of the appeal brought.

35 There is no doubt that the defendants had an appeal pending before the Court of Appeal, and that they had applied for bail pending the determination of the appeal. The only requirement of the subsection that remains to be determined is whether the Court of Appeal had exercised its discretion properly. In granting the applica-

tion Awogu, J.C.A., who read the lead ruling stated as follows:-

"Bashua for the respondents also suggests that in accordance with our rules of court this application ought to have been made first to the trial Judge. I pause to ask what purpose the application would serve when the Judge had passed a sentence for contempt. In my view the entire proceedings create the special circumstances envisaged in Order 3 Rule 3(iv) of the Rules of this Court and the present application is properly before us. We are of course yet to enquire into the merits of the sentence and so cannot presently set aside the warrants of Committal. However, in view of the sentence flying in the face of an appeal pending in this court, the applicants are hereby granted bail, each in the sum of N1,000.00 plus a surety in the like sum, and the bail shall continue until the determination of the appeal now pending in this court. I also make no order as to costs."

Now, Order 3 rule 3(4) of the Court of Appeal Rules 1981, which was referred to in the ruling reads:-

"(4) Wherever under these Rules an application may be made either to the Court below or the Court it shall not be made in the first instance to the Court except where there are special circumstances which make it ,impossible or impracticable to apply to the court below."

For these provisions of the Rules to apply it must be shown that the law under which the application for bail was made by the defendants stipulates that the application may be made to the High Court or the Court of Appeal. For example section 221 subsection (1) of the 1979 Constitution provides:-

"221 (1) Subject to the provisions of section 220 of this Constitution, an appeal shall lie from decisions of a High Court to the Court of Appeal with the leave of that High Court or the Court of Appeal."

There is nothing in section 29 of the Court of Appeal Act, 1976 which indicates or requires that an application for bail pending appeal to the Court of Appeal must be made in the High Court first before being made in the Court of Appeal. So that when it was submitted by Mr. Bashua in the lower court that the application had to be made to the High Court first there was a misconception on his

part and the Court of Appeal allowed itself to be so misdirected when it considered the issue of special circumstances under Order 3 rule 3(4) of the Court of Appeal Rules. Therefore, all the argument in that respect went to no issue and issues nos. 3 to 6 in the appellants' brief of argument are simply misdirections arising from
5 miscomprehension of the provisions of section 29 subsection (1) of the Court of Appeal Act, 1976 under which the application for bail was brought.

On the whole, this appeal has no merit and it is hereby dismissed with N1,000.00 costs to the defendants.
10

BELGORE JSC

I read in advance the judgment of my brother Uwais, J.S.C I
15 agree with him entirely before hand and I adopt his reasons as mine for dismissing the appeal on 15th day of February, 1993. I had made the same consequential orders as he did on that day.

WALI JSC

I have read before now the lead judgment of my learned brother Uwais, J.S.C. I entirely agree with the reasons given by my learned brother for dismissing the appeal and I adopt same as mine.
25 The appeal lacks merit and same is dismissed with N1,000.00 costs to the defendants.

OLATAWURA JSC

I had a preview of the judgment of my learned brother Uwais, J.S.C. just delivered. My learned brother has set out in great details the facts which led to this appeal. I need not go over them. I entirely agree with his reasoning and conclusions. My contribution will be limited to issues 2, 4 and 5 of the issues raised by the appellants.
35 These issues read thus:

"2. Were the Justices of the Court of Appeal right in granting a stay of further proceedings in the High Court in view of the proceedings of the High Court on 9th May 1991 by which the Judge put finality to the trial before him?"

4. *Whether there being no appeal filed by the respondents against the sentence of 9th May 1991 the respondents hence cannot ask for bail?*

5. *Were the Justices of the Court of Appeal right in listening to the respondents on their application dated 10th May 1991 while the respondents were definitely in contempt of the Orders of the Supreme Court in suit S.C. 61/81 and the Order of the High Court?"* Issues 2:

Mr. Bashua the learned counsel for the appellants in his brief of argument posed a question: With the passing of sentence on the respondents on 9th May, has the judge got anything more to do with the trial for contempt of the respondents? He quickly provided an answer. Learned counsel submitted that the learned trial Judge had nothing more to do in so far as the trial was concerned, once there had been conviction and sentence, there was nothing more for the Judge to stay. The rush to sentence notwithstanding the application in the Court of Appeal was a clear case of *fait accompli*. The record of proceedings shows that the learned trial Judge was aware of the application dated 8th May 1991 filed in the Court of Appeal a day before he delivered his ruling of 9th May 1991, the substance of that application was to stay all the proceedings which include the issue of sentence before him pending the determination of the appeal. The learned Judge left nobody in doubt about his awareness of the application filed in the Court of Appeal, because in his ruling of 9th May 1991 the learned trial Judge said *inter alia*:

"What the defendants/respondents were asked to do were spelt out and are 3 in number. I went further on the same page: In default of the purge within the time stipulated, will pronounce my sentence in accordance with the law taking into consideration the gravity of offence."

Within the stipulated days, the defendants/respondents went to the Court of Appeal and since then the legal battle started. Today however, the court is possessed with the order of the Court of Appeal dated 4th April, 1991, refusing Order for Stay of further proceedings. A new motion has again been filed at the Court of Appeal asking for another Order for Stay of Proceedings. It appears to me that although the motion has just been filed there, this court can proceed with the sentence as no interim order is made or obtained from the

Court of Appeal. I therefore proceed to sentence."

The respondents' counsel in their brief argued and this was not re-
butted before us that the attention of the learned trial Judge was
drawn to the case of Vaswani Trading Co. v. Savalakh & Co. (1972)
All NLR 922 or (1972) 12 S.C. 77. In that case, this court in a clear
5 language frowned at the attitude of a lower court that will render the
order being sought nugatory. The court said:-

*"We think also that it is idle for the respondents to argue, as
learned counsel on their behalf has attempted to do, that they were
10 not aware of the pending proceedings in this court."*

No argument was advanced before him that that authority
should not be followed. In this appeal, the Judge from the passage
quoted above from his ruling was aware of the application but deliber-
ately chose to ignore the process. This unfortunate attitude in dis-
15 regarding the process of the Court of Appeal borders on judicial im-
pertinence. It is an affront to the authority of the Court of Appeal. All
the courts established under our Constitution derive their powers
and authority from the Constitution. The hierarchy of courts show
the limit and powers of each of each court. To deft the authority and
20 powers of a higher court appears to me undesirable and distasteful.
Even without the ratio of the Vaswani's case, the best and reasonable
course of action was to have adjourned the matter before him pend-
ing the determination of the application before the Court of Appeal.

It was the argument of the appellants that since sentence had
25 not been passed, after the conviction, the proceeding was interlocu-
tory requiring leave to appeal. There cannot be a sentence without a
conviction. Once a conviction is set aside it follows that any sentence
passed cannot stand. Where a sentence was passed in utter and fla-
30 grant disregard of the application pending before the Court of Ap-
peal for a stay of the proceedings a bail should be granted. Once the
subject matter of the contempt, which invariably are the orders made
as a result of the contempt, is still on appeal and until the Court of
Appeal affirms the orders made, the Court of Appeal was right in
35 granting the application for stay. A litigant that only appeals against
sentence agrees with the judgment which led up to his conviction.

The rules of court are made for the orderly conduct of trials.
A litigant will be allowed to pursue his rights in so far as he acts within
the law and the rules. To deny him that right will be to deny him

justice. It is better to await the decision of a higher court in respect of matter pending in the lower court so as to avoid embarking on an exercise in futility. What is of considerable importance is that there must be respect for the authority of each court. Even if a Judge disagrees with the decision of a higher court, he is constitutionally bound to accord it respect until it is set aside. A lower court should try to avoid defiance of the order or process of a superior court.

Issue 4.-

The respondents were convicted on 9th May 1991 notwithstanding their application for stay of proceedings filed on 8th May 1991 asking for stay of further proceedings pending their appeal against the ruling of the High Court of 4th April, 1991. It was part of the prayers of their application that the orders of the High Court made on 20th and 21st September 1988 be stayed. The order of this court in S.C. 61/80 of 1981 declared the appellants to be the owners of the land in dispute. That much is clear and it is no longer challengeable. But their conviction for contempt of court led to the application before the lower court. Whilst the application for the contempt of court in the High Court is a follow-up of the order of this court in S.C./61/80, their application for a stay of the proceedings before the Court of Appeal cannot be a justifiable reason for the High Court to shut its eyes to the application in the Court of Appeal. It is true the conduct of Fernandez, J. was not an issue before the lower court, it was the learned judge's disregard of the proceedings before the Court of Appeal that led to the comment of the Court of Appeal. Fernandez, J. had already sentenced them. Where there is an application before a higher court for a stay of proceedings in the lower court, a decision by the lower court which will render the result of such application nugatory should be avoided. It will amount to a mere speculation for the trial court to come to the conclusion that an appeal or application before the higher court or Appellate Court will fail. An appeal against a judgment or ruling is a complaint against the decision. The lower court should not by any means silence the complaint or force a party to abandon or renounce his right.

Issue 5:

A party convicted of an offence has the right of appeal. It is a constitutional right. A man whose appeal is pending in a higher court can apply for bail. Under section 29 of the Court of Appeal Act 1976.

the Justices of the Court of Appeal have a discretion to grant or refuse bail. Mr. Bashua has predicated his objection on the failure of the appellants to apply first to the lower court. This submission has read into section 29 of the Court of Appeal Act a provision not within contemplation of the Legislature. What is important under section 29 of the Court of Appeal Act is the way and manner the court exercises its discretion. Mr. Bashua's attack on the exercise of discretion is a general statement that the court must exercise its discretion on established criteria without setting out these criteria. I find it difficult to fault the basis of the decision of the lower court without stating the grounds why the decision to grant the bail should be set aside. We cannot as a result of this generalisation substitute our own discretion for that of the lower court. The invocation of Order 8 rule 17 of the Supreme Court Rules is misconceived and irrelevant to the matter before the lower court. The judicial and judicious exercise of the lower Court's discretion was based on the sum total of the events that led to the respondents' conviction and sentence and the harm they will suffer if bail was refused. However suffice it to say that I will refrain from making any pronouncements on the ethics of the profession raised in the respondents' brief. I will, for these reasons and the fuller reasons set out in the lead judgment of my learned brother Uwais. J.S.C., dismiss the appeal. I abide by the order for costs in the lead judgment.

25 _____

OGUNDARE JSC

I have had the advantage of reading in draft the judgment of my learned brother Uwais J.S.C just read. I agree with his conclusion that this appeal be dismissed. I however, wish to say a few words of my own.

My learned brother has set out in his judgment the chequered history of the dispute between the parties herein leading to the appeal now before us. I do not wish to go over it again except to refer in the course of this judgment. Where necessary, to any event in the said history. Six questions have been set out in the appellants' brief as calling for determination in this appeal. The questions are:-

1. Whether the respondents are not estopped from filing the motion

dated 10th May, 1991. praying for a stay of further proceedings in the High Court, when exactly the same prayer was earlier argued and refused on the merit by the same Court of Appeal on 4th April, 1991.

2. *Were the Justices of the Court of Appeal right in granting a stay of further proceedings in the High Court in view of the proceedings of the High Court on 9th May 1991 by which the Judge put finality to the trial before him.*

3. (a) *Whether the learned Justices of the Court of Appeal were right in contravention of Order 3 Rule 3(iv) of the Rules of the Court of Appeal, to have heard the application for bail without ordering it to be first heard at the High Court.*

(b) *And whether the mere fact that the High Court will refuse the application for bail because he had sentenced the respondents to prison constitutes "special circumstances which make it impossible or impracticable to apply to the court below" within Order 3 Rule 3(iv) Court of Appeal rules, and particularly when the applicants did not give any evidence supporting special circumstances.*

4. *Whether there being no appeal filed by the respondents against the sentence of 9th May 1991 the respondents hence cannot ask for bail?*

5. *Were the justices of the Court of Appeal right in listening to the respondents on their application dated 10th May 1991 while the respondents were definitely in contempt of the Orders of the Supreme Court in suit SC61/81 and the Orders of the High Court"*

6. *Did the Justices of the Court of Appeal exercise their discretion in granting bail to the respondents, judicially and judiciously without proper notice of appeal filed against the ruling of 9th May 1991?*

I shall now proceed to consider these questions as they are set out above.

QUESTION 1. The thrust of the learned counsel for the appellant'

argument, both in his brief and in oral argument at the hearing of this appeal, is to the effect that the order made by the Court of Appeal on the 4th of April 1991 refusing the application for a stay of proceedings pending appeal was based on the merits and as such the refusal in the circumstance amounted to a dismissal; that being so the respondents are estopped from bringing their later application dated 8th May 1991 as this would amount to re-opening the same issue. With respect to learned counsel however, I find myself unable to agree with him that the order of 4th April 1991 was made on the merits. In his lead ruling of the 4th April, 1991 on the respondents' motion dated 27th April 1990 (with which Ademola and Awogu, JJCA, agreed), Kalgo J,CA, observed:-

"In respect of the stay of all further proceedings in the case now pending in the High Court. I entirely agree with the learned respondent" counsel that there is no basis upon which it should be granted. There is no appeal yet pending in the matter and the application for leave to appeal has now been heard." (See pages 66-67 of the record)

Thus the reason for refusing the application for stay of proceedings was because there was no appeal then pending before the Court of Appeal. Whether it is necessary for an appeal to be pending before an order for stay of proceedings or stay of execution is granted is beyond the issue before us now as the correctness of the learned Justices pronouncement is not being challenged in this appeal. However, one point is clear, and that is, that the refusal of the application for stay was not made on its merits as was erroneously, with profound respect to learned counsel for the appellants, contended, I do not think that the refusal of the application for stay by the court below on 4th April 1991 for the reason given by that court would be a bar to fresh application for the same prayer if an appeal is subsequently lodged in the matter. Consequently therefore, I will answer Question 1 in the negative. All the authorities cited in the brief are not, in my respective view, relevant to the facts of the matter now before us.

QUESTION 2. The respondents filed an application on 8th May 1991, The learned trial Judge on 9th May, 1991, with full knowledge of the application made to the Court of Appeal dated 8th May, proceeded to pass sentence on the respondents. The Court of Appeal, notwith-

standing that sentence was passed on 9th May, proceeded to hear the respondents' application for stay of further proceedings in the High Court. It is contended by learned counsel for the appellants that as the learned trial Judge had nothing more to do with the trial of the respondent for contempt, the court below, that is, the Court of Appeal was wrong to have entertained and granted the application for stay of proceedings in the High Court. Learned counsel referred us to a number of authorities including the judgment of this court in Mohammed & Ors v. Olawumi and Ors (1990) 2 NWLR (Pt. 133)458; (1990) 2 NSCC 361.

It is not in dispute that the latest application of the respondents leading to this appeal was filed on the 8th of May, 1991. It is equally not in dispute that on 21st September 1988 the learned trial Judge found the respondents guilty of contempt of court but suspended sentence for 14 days to give room to the respondents to purge themselves of their contempt. Passing of sentence was not proceeded with at the time stipulated by the learned Judge because of intervening applications by the respondents for stay of further proceedings in his court which the respondents finally lost on 4th April, 1990 as heretofore mentioned. In passing sentence however, on 9th May 1991 the learned trial Judge observed as follows:-

"Within the stipulated days, the defendants/respondents went to the Court of Appeal and since then the legal battle started. Today however, the court is possessed with the order of the Court of Appeal dated 4th April, 1991, refusing Order for Stay of further proceedings. A new motion has again been filed at the Court of Appeal asking for another Order for Stay of Proceedings. It appears to me that although the motion has just been filed there, this court can proceed with the sentence as no interim order is made or obtained from the Court of Appeal. It therefore proceed to sentence."

(See pages 87-88 of the record)

Being aware of the motion dated 8th May 1991, and unless the learned trial Judge wanted to pre-empt the Court of Appeal, one would expect that having waited almost three years to pass sentence, he would have waited a little longer to have the application of the 8th of May 1991 disposed off by the Court of Appeal more so that his attention was drawn to it before passing sentence. The question arises-

was the Court of Appeal justified in the circumstance, in proceeding to hear and determine the application before it dated 8th May 1991 for stay of further proceedings? I rather think so. Indeed I would also say that the Court of Appeal would be justified in setting aside the order of sentence made by the learned trial Judge on 9th May 1991.

5 What the learned trial Judge did on 9th May 1991 was to foist on the Court of Appeal a fait accompli thereby rendering it impossible for that court to arrive at a decision one way or the other on the merits of the application before it or render any decision it might
10 lake on the application nugatory or futile. The courts have always frowned on such conduct. See *Vaswani v. Savalakh* (1972) 1 All NLR 922, where G.B.A. Coker J.S.C., in circumstances not dissimilar observed at pages 927-930 of the report:-

15 *"In the present case there is no doubt that the writ was executed and possession wrested from the applicants whilst their motion to this court for a stay of execution was pending and awaiting a date to be assigned by this court for the hearing of the application. It is true and correct to observe that the notice of appeal filed would*
20 *not operate as a stay of execution and section 24 of the Supreme Court Act makes this more clear; but, it is equally correct to point out that the section does not prescribe in favour of any execution being carried out during the pendency of an appeal. Indeed, by its provisions it postulates that during the pendency of an appeal the Su-*
25 *preme Court has got the jurisdiction to accede to an application for stay of execution conditionally or otherwise. The section does not give any licence, directly or indirectly, for the issue and execution of any processes which may ultimately be offensive. The section simply*
30 *de-limits the scope of the statutory position for the parties after the filing of a notice of appeal. Clearly therefore to employ this section as a spring-board for the issue and process of an inopportune execution would be an abuse of the process of the court. Speaking of the attitude of the courts to an abuse of process, Lord Blackburn said in*
35 *The Metropolitan Bank Ltd. v. Pooley (1885) 10 App. Cas. 210. at page 220:-*

'But from early times (I rather think, though I have not looked at it enough to say, from the earliest times) the court had inherently

in its power the right to see that its process was not abused by a proceeding without reasonable grounds, so as to be vexatious and harassing - the court had the right to protect itself against such an abuse (See also Logan v. The Bank of Scotland No.2 (1906) 1 KB 141.

5

We think that in the circumstances of the present case, the action of the respondents constitutes an abuse of the process of the court

10

More important, however, it is the duty of this court, as indeed that of other courts, to ensure that its orders are not nugatory. The applicants are exercising their undoubted right of appeal. The respondents are well aware of this and the applicants are certainly entitled so to exercise that right as long as they do so in accordance with the provisions of the statute conferring the right. If they in transgression of these terms go outside them or anyone of them, they are not exercising an undoubted right for all rights of appeal are statutory and no question of abuse can arise. There has been no suggestion before us that the present applicants were acting outside their scope or terms of the statute and it is manifestly the duty of the court to protect the exercise of that right and to ensure that its own orders in that connection at any stage of the lawful and regular proceedings are not rendered useless by the action or conduct of either of the parties.

20

25

Thus, although section 24 of the Supreme Court Act states that an appeal shall not operate as a stay of execution it does not interfere with proceedings or an application for a stay of execution and by the same token any action or conduct of one or the other of the parties to the action taken whilst an application for a stay of execution is pending in this court, for the obvious or subtle purpose of stultifying the exercise by this court of its jurisdiction, and indeed its duty to consider the application on its merits, must not be countenanced by this court. Section 24 concerns the filing of an appeal and the effect in law of such an act on the execution of the judgment under appeal; the section also concerns the application for a stay of execution of the judgment appealed against for it gives the court the power to grant such an application. But the section, perhaps deliber-

35

ately, does not say anything concerning the effect on such application to this court for a stay of execution of the judgment. Whilst by virtue of the provisions of the section, an appeal or the filing thereof could not ipso operate as a stay of execution, clearly in practice, the position should be different where apart from filing an appeal, the prospective appellant also files an application in this court, by which a stay of execution of the same judgment is sought. In such circumstances, a general appraisal of the whole situation is absolutely necessary and it is most desirable that the court should ensure that, at that stage of the proceedings, it is not possible for any party to present it with a fait accompli...

We still observe, however, that despite this, this court will interfere in a case involving an abuse of the process of the court and we propose to do so here. We will set aside the writ of possession which was executed in this case with such manifestly irregular design and purpose."

See also Sanni v. Otesanya S.C. 8/1970 decided by the Supreme Court on the 3rd February 1970 (unreported).

Furthermore, the learned trial Judge in passing sentence ruled:-
"In default of the purge and the order of this court made on the 21st September, 1988, the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 19th, 11th, 12th defendants are now committed to prison until each and every one purge himself as directed in my Order made on the 21st September 1988."

(See page 88 of the record)

That sentence is apparently indefinite and it will need further reference to the learned trial Judge to put an end to it when the respondents have purged their contempt. It would therefore, not be correct to say that the learned trial Judge has nothing more to do after passing sentence. Of course he has yet to entertain an application by any or all of the respondents for release from prison and has to determine on such an application whether or not the respondents are purged of their contempt.

For the reasons I have given above therefore, I would answer Question 2 in the affirmative.

Question 3: Both the trial High Court and the Court of Appeal have concurrent jurisdiction to grant bail where there has been a conviction. It would appear to me that by the correct interpretation of Order 3 Rule 3(4) Court of Appeal Rules which provides:-

"Where under these Rules an application may be made either to the court below or to the Court, it shall not be made in the first instance to the Court except where there are special circumstances which make it impossible or impracticable to apply to the court below"

an application for bail ought to be made first to the court of trial. Special circumstances will have to be shown for bringing an application in the first instance to the Court of Appeal. The words "where under these Rules" can only be interpreted by ignoring "under these Rules" since the Rules, in my respectful view, have not provided for the bringing of applications both in the court below and in the Court of Appeal. Applications for bail, stay of execution, stay of proceedings, e.t.c. are provided for either in specific Acts or Laws or under the inherent jurisdiction of the courts. In my respectful view, therefore, in order to avoid absurdity, I would interpret Order 3 Rule 3(4) as meaning: *"Wherever an application may be made either to the court below or to the Court of Appeal it shall not be made in the first instance to the Court of Appeal except there are some special circumstances which make it impossible or impracticable to apply to the court below."*

It is the contention of learned counsel for the appellants that the application for bail dated 10th May, 1991 and taken along with the respondents' application for stay of proceedings dated 8/5/1991 ought not to have been entertained by the Court of Appeal as a similar application was not first made to the court of trial. Learned counsel further submitted that the respondents failed to show special circumstances which would make it impossible or impracticable to apply for bail, first to the High Court. Learned counsel placed reliance on *Ojosipe v. Ikalaba* (1972) 3 S.C. 1.

The Court of Appeal, per Awogu J.C.A., in its ruling observed:-

"On the second application, the applicants seek bail pending the decision just delivered for stay of further proceedings. It would

appear that between the ruling of 4th April, 1991, and the order for briefs of 18th April, 1991, this matter came up before Fernandez, J. on 9th May, 1991. His attention was drawn to the motion for stay of further proceedings pending in this court. In the ruling of 9th May, he said:- "Today, however, the court is possessed with the order of
 5 the Court of Appeal dated 4th April, 1991, refusing order for stay of further proceedings. A new motion has again been filed at the Court of Appeal asking for another order for stay of proceedings. It appears to me that although the motion has just been filed there, this court
 10 can proceed with the sentence as no interim order is made or obtained from the Court of Appeal. I therefore proceed to sentence."

Having said so he committed the applicants to prison until each one of them purged himself as directed in the order he made on 21st September, 1988. In other words, in spite of his knowledge
 15 that a fresh application for stay of proceedings was pending in this court, Fernandez, J. proceeded to sentence the applicants in respect of the order he made on 21st September, 1988, now on appeal before this court. Bashua for the respondents suggests in the course of his argument that the applicants being in contempt should not be
 20 heard by us. In my view, it was Fernandez J. who would appear to be in contempt for disregarding an application pending in this court in accordance with the now accepted principle in *Vaswani v Savalakh* (*supra*). This is rather unfortunate. Bashua for the respondents also
 25 suggests that in accordance with our rules of court this application ought to have been made first to the trial Judge, I pause to ask what purpose the application would serve when the Judge has passed a sentence for contempt. In my view the entire proceedings create the special circumstances envisage in Order 3 Rule 3(iv) (*sic*) of the Rules
 30 of this court and the present application is properly before us:'

(See pages 101-103 of the record)

Learned counsel for the respondents in his brief lists the circumstances which according to counsel, cumulatively make it impossible or im-
 35 practicable to apply for bail to the High Court in the first instance.

I have given careful consideration to the submissions made by learned counsel for the parties and the views expressed by the Court of Appeal particularly in the lead judgment of Awogu J.C.A. I think the Court of Appeal was right to have considered the applica-

tion for bail before them having regard to the circumstances of this case. While I do not agree that the trial Judge from his disposition might refuse an application for bail, as a special circumstance, I however, take into consideration the totality of the facts in this case. I have referred earlier in this judgment to portions of the ruling of the learned trial Judge when imposing sentence on the respondents and I have remarked that by so doing the learned trial Judge. rather innocently. I dare say, was foisting on the Court of Appeal a fait accompli. I also take into consideration that fact as disclosed in the proceedings before the Court of Appeal that that court was already seised of the appeal against the respondents' conviction for contempt. I am satisfied from all the surrounding circumstances of the case that special circumstances existed why it was impossible or impracticable for the respondents to apply in the first instance to the trial High Court. Such special circumstances were not shown in *Ojosipe v. Ikalaba* (supra) but they existed in *Ojora v. Odunsi* (1964) 1 All NLR 55 as time for appeal had elapsed. I am of the view that in the circumstances of the present case the Court of Appeal was justified and entitled to authorise a departure from a strict adherence to Order 3 rule 3(4) Court of Appeal Rules 1981. I therefore answer the first limb of Question 3 in the affirmative.

QUESTION 4: Would appear to have been argued along with Question 6.

QUESTION 5: It is the contention of learned counsel for the appellants that the respondents having defied and were in contempt of the judgment of the Supreme Court in the main suit. Their application for bail made on 10th of May 1991 ought not to have been entertained by the Court of Appeal. In 1988 the learned trial Judge found the respondents guilty of contempt of the judgment of this court. The respondents are on appeal to the Court of Appeal against that conviction and have applied for bail pending the determination of that appeal. I cannot see anything wrong in the Court of Appeal entertaining the application for bail. The respondents' posture seems to me to be this. We agree there is a judgment by the Supreme Court awarding an injunction against us but we are not doing anything in contravention of that injunction: what the trial Judge sees as a contravention does not amount to such a contravention as may make us

to be in contempt. This is different from a posture where the respondents admit the existence of the injunction but maintain that notwithstanding it they are entitled to maintain a conduct in defiance of the injunction. In my respectful view, it is not perpetrating contempt, to appeal against the finding of the trial Judge in the case of the first posture and I can see no justification in the circumstances of this case why the application for bail should not be entertained. In conclusion I answer Question 5 in the affirmative.

10 QUESTION 6: Learned counsel for the appellants contends that as there was no appeal against the ruling of the learned trial Judge of 9th May, 1991 imposing sentence on respondents, it was wrong of the Court of Appeal to have granted them bail on their application dated 10th May, 1991. In exercising his discretion to grant bail, the
15 Court of Appeal, per Awogu, J.C.A. said:-

"However, in view of the sentence flying in the face of an appeal pending in this court, the applicants are hereby granted bail...
(page 103 of the record)

Tobi J.C.A. in his own judgment observes:-

20 *"In the case of bail pending appeal, the courts consider some other criteria, including likelihood of the appeal succeeding, the need for the appellant to assist counsel in post trial preparation of the appeal and the probable duration of the appeal. See generally R. v. Tunwashe (1935) 2WACA 236, Fynn and Another v. The Republic of Ghana (1971) 1 GLR 433 R v. Warman (1931) 22 CAR 81. I would like to note here that the imprisonment of the applicants is timeless. By the 9/5/91 order of the learned trial Judge, they have to be in prison until they purge themselves.*

30 *After a very careful examination the criteria for granting bail in the circumstances of this case, I am also inclined to granting bail and. I hereby grant the applicants bail." (Pages 109-110 of the record). Kalgo J.C.A. in his own contribution said:-*

35 *"I however agree with the respondents' counsel that the appellants did not appeal against sentence. But there is an appeal against conviction and in view of the fact that the sentence in this case was not specified (i.e. until the appellants purge their contempt) there is no need in the circumstances of this case to file any appeal on sentence." (Pages 112-113 of the record)*

True enough, there is no appeal against the order of sentence made by the learned trial Judge on 9th May, 1991, but there is an appeal against the conviction of the respondents for contempt. The application for bail, predicated as it would appear to be on the respondents' conviction for contempt, the Court of Appeal was in order to entertain it. I have considered the reasons given by the learned Justices of the Court of Appeal for exercising their discretion to grant bail in favour of the respondents. Having regard to the totality of the reasons given by learned Justices, more particularly that the duration of the sentence subsequently passed by the learned trial Judge was unlimited, I am not prepared to interfere or disturb the exercise of their discretion to grant bail.

It is the contention of learned counsel for the appellants that as there was no appeal against sentence the Court of Appeal would have no jurisdiction to grant bail. In my view, as there has been a conviction in this matter the Court of Appeal would have jurisdiction to grant bail. A conviction is a finding of guilt. This the learned trial Judge did in 1988. Our attention was drawn to portions of the judgment of Nnaemeka-Agu and Wali J.J.S.C. in Mohammed & ors v. Olawunmi & ors. (supra) which would suggest that there could be no conviction until there had been sentence, in my respectful view, these would be obiter dicta as that was not the basis of the judgment of this court in that case. Section 220(1) of the Constitution gives a right of appeal from decisions of the High Court to the Court of Appeal. "Decision" is defined, in section 277(1) as meaning, in relation to a court:-

"Any determination of that court and includes judgment, decree, order, conviction, sentence or recommendation."

I agree with the definition of the word "conviction" given by Atkinson J. in R v. London County Quarter Sessions Appeals Committee Ex p Metropolitan Police Commissioner (1948) 1 KB 670, 679-680 wherein the learned judge said:-

"...a conviction is an act of a court of competent jurisdiction adjudging a person to be guilty of a punishable offence. The sentence or resulting order is something distinct from the conviction..."

A conviction is nonetheless a conviction because an ensuring penalty is not imprisonments, nor fine, but the finding of sureties for good behaviour."

In my respectful view to speak of a conviction, there must be a
5 determination of guilty by an act of a competent court and this is
irrespective of whether or not a sentence is imposed even though the
sentence normally follows such a determination. By the definition of
"decision" in section 277(1) of the Constitution, it is possible for an
10 appellant to appeal against his conviction without appealing against
the sentence imposed on him where he intends to contest the deter-
mination of his guilt without wanting the sentence interfered with in
case he loses on the issue of guilt. Similarly, it is possible for a con-
victed person to appeal against the sentence imposed on him with-
15 out contesting the correctness of his conviction. I do not therefore,
agree with learned counsel for the appellants that bail could be granted
by an appellate court only where there was an appeal against sen-
tence. Section 29(1) of the Court of Appeal Act empowers the Court
of Appeal to admit an appellant to bail pending the determination of
20 his appeal. The section does not provide that bail can only be granted
where there is an appeal against sentence.

All the issues canvassed having been disposed off, I find no
25 merit in this appeal which I too accordingly dismiss. I affirm the judg-
ment of the Court of Appeal and abide by the order for costs made
in the lead judgment of my learned brother Uwais, J.S.C.

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