

SUPREME COURT OF NIGERIA

11TH JUNE, 1993. SC. 225/1992

**CORAM: A. G. KARIBI-WHYTE, O. OLATAWURA,
U. OMO, M.E. OGUNDARE, E.O. OGWUEGBU, JJSC.**

AFRICAN CONTINENTAL BANK PLC APPLICANT
AND
OBMIAMIA BRICK & STONE (NIG.) LTD RESPONDENT

APPEALS -Grounds of appeal - mixed facts and law
alleged to have been raised - whether
appeal is properly pending or not

APPEALS -Supreme Court's jurisdiction - application
that seeks to bypass the Court of Appeal
whether the Supreme Court has jurisdiction

JUDGMENT -Judgment debt - uncertain averments and
impression in respect of - whether applicant's
prayer can be granted

INTERLOCUTORY APPLICATIONS - Application to stay Supreme Court's earlier
judgment pending determination of a new
claim -possible denial of a successful party's
right to its victory - whether such application
will be granted

FACTS

In an action that arose between the parties before the High Court, Enugu, the Respondent eventually had some damages awarded in its favour by the Supreme Court. Thereafter, the Applicant filed a new action against the Respondent in respect of a different subject matter. Whilst the new action is pending, the Respondent levied execution and sought to have Applicant's move-able property auctioned.

Applicant's application for stay of execution, inter alia, pending the determination of its new claim was refused by both the High Court and Court of Appeal. It appealed to the Supreme Court against the Court of Appeal's decision. During the pendency of Applicant's said appeal, it

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now filed this application, which is the subject matter of this ruling.

The Applicant via uncertain averments and impressions, sought for stay of execution of the Supreme Court's earlier judgment pending the determination of its appeal. Or in the alternative, that the judgment debt or any other sum found adjudged be paid into an interest yielding account. The Respondent unsuccessfully contended that mixed facts and law were raised and since leave was not obtained, there was no appeal properly pending.

HELD (Unanimously dismissing the application)

1. The grounds of appeal in this matter raise issues of law and not of mixed facts and law. Appeal of the Applicant is therefore, competent under constitutional provisions. (P154 L11)
2. Since the Applicant averred that it has paid the judgment debt there is nothing left which this Court could order that it be paid into an interest yielding account. As such Applicant's prayer to that effect must be refused. (P.154 L31)
3. Where the Applicant gives the impression that it does not know the actual amount of the judgment-debt to be paid by it, Applicant's prayer in that respect must fail. Moreover, it is not for this Court to find out what amount the Applicant is to pay as judgment-debt. (P.155L6)
4. The Supreme Court has no jurisdiction to entertain an appeal directly from the High Court, thereby bypassing the Court of Appeal. This being the purport of the Applicant's prayer, it will be refused. (P. 155 L28)
5. The Supreme Court will not grant a prayer for stay of execution of its judgment pending the determination of a new claim where it will amount to frustrating the successful party in the enjoyment of its victory. (P.156 L3)

REPRESENTATION:

E.G. Ibe Esq. for the Applicant.

A.N. Anyamene SAN, with A. Akpangbo for the Respondent

CASES REFERRED TO:

1. Nwadike v. Ibekwe (1987) 4 NWLR (Pt 67) 718
2. Obikoya v. Wema Bank Ltd (1989) 1 NWLR (Pt 96) 157
3. Ifediorah v. time (1988) 2 NWLR (Pt 74) 19
4. Ogbechie v. Onochie (1986) 2 NWLR 486; (1986) 3 SC 54
5. Mills v. Renner (1940) 6 WACA 145
6. Metal Construction (W.A.) Ltd v. Migliore & Ors. (1990) SCNJ 20

STATUTES & RULES

1. Judgments (Enforcement) Rules of Eastern Nigeria 1963, 2 Rules 10 & 14
2. Constitution of the Federal Republic of Nigeria 1979 ss. 213 2(a) & (e), 213 (3).

LEAD JUDGMENT BY OGUNDARE JSC

This case has a long and chequered history. This is the second time the parties will be before this Court. The applicant was at one time banker to the respondent. A dispute arose between the parties which led to the respondent suing the applicant in suit no. E/ 280/87 in the Enugu judicial Division of the High Court of the former Anambra State claiming N13 million as “special and general damages” The applicant counter claimed for the sum of N2,276,620.61 being overdraft granted the respondent and the compound interest at the rate of 15% per annum until judgment is given.

At the conclusion of trial in the High Court, judgment was on 24/4/89 entered in favour of the respondent in the sum of N10,827,305,25; the counter claim was dismissed. The applicant appealed to the Court of Appeal (Enugu Division) and applied for a stay of execution of the judgment, 5 of the High Court. Stay was granted by Ononiba J. on 29/6/89 on the following terms:

- “(1) *The costs of N4,000.00 awarded against the applicant are to be paid to the Respondent within 7 days from (29/6/89).*
- 10 (ii) *The judgment debt of N10,827,305,25 to be paid into a fixed deposit account in the applicant’s bank i.e. 3 Ogui road Main Branch of A.C.B. Ltd., Enugu in the name of the respondent judgment creditor within 30 days from (29/6/89) and at the prevailing interest rate.*
- 15 (iii) *The money so placed in fixed deposit is not to be withdrawn either by the plaintiff/judgment creditor or the defendant judgment/debtor until the determination of the appeal now pending in this cause.*
- 20 (iv) *that the said deposit with the accrued interest shall remain with the said bank and shall abide the decision of the said Court of Appeal.*
- (v) *Subject to Orders (1) - (4) above, the execution of judgment in this suit*
25 *is hereby stayed.”*

The applicant’s appeal to the Court of Appeal was allowed on 13/5/90 and the judgment of the trial High Court was set aside; the counter claim was put back on the cause list for trial. see: (1990) 5 NWLR (Part 30 149) 230. Respondent’s appeal to this Court was allowed in part and the judgment of the trial High Court was restored but the damages awarded by that court were reduced to N1,697,800.00; applicant’s counter claim was struck out - see: (1992) 3 NWLR (Pt. 229) 260.

35 Following the above mentioned judgment of this Court, the applicant in April 1992 instituted a fresh action against the respondent -suit No. E/125/92, in the sum of N5,642,892.07 being “the outstanding debit balance on the defendant’s current account and compound interest at the rate of 25%

per annum with monthly rests from 2/4/92 until judgment and thereafter at the rate of 5% per annum until final liquidation of the judgment debt and costs.” The claim was dated 21st April 1992. Meanwhile, however, the respondent had caused a Notice of Attachment dated 10th April, 1992 to be issued in the sum of N3,001,835.70 attaching the goods and chattels of the appellant in satisfaction of the judgment-debt in the action leading to this Court’s judgment in the earlier suit. Attachment was carried out by the High Court bailiff on 13/4/92 and an inventory of the applicant’s goods and chattels attached was taken. The applicant’s officials disputed the amount on the Notice of attachment. On 16/4/92, the Deputy Sheriff for Enugu State Published a public notice (and served a copy on the applicant) of the sale by public auction of the applicant’s attached movables. The applicant promptly filed an application in the High Court seeking the following orders:

- “(1) *To set aside the writ of fieri facia and or execution issued herein on the day of 1992 and directed to the Sheriff of Enugu High Court and all actions taken thereunder as being irregular, malicious and without reasonable cause on the ground that the sum which is by the endorsement of the said writ directed to be levied was not at the time of the issue, of the writ due and owing on the said judgment;* 15 20
- “(2) *To stay the judgment herein and or suspend execution thereof levied on 13/4/92 on the movable property of the applicant until the determination of the applicant’s claim for N5,642,892.07 against the respondent which claim is now pending in the Enugu High Court;* 25
- “(3) *To release from attachment the movable property of the applicant attached by the Sheriff on 13/4/92”* 30

The application was later withdrawn and substituted with another application filed on 22/4/92 praying the Court -

- “(1) *To set aside the writ of fieri facias and/or execution issued herein and directed to the Sheriff of Enugu High Court and all actions taken thereunder as being irregular malicious and without reasonable cause on the ground, that the sum which is by* 35

the endorsement of the said writ directed to be levied was not at the time of the issue of the writ due and owing on the said judgment.

- 5 (2) *To stay the judgment herein and/or suspend execution thereof levied on 13/4/92 on the movable property of the applicant until the determination of the applicant's claim for N5,642,892.07 against the respondent which claim is now pending in the Enugu High Court.*
- 10 (3) *To release from attachment the movable property of the applicant attached by the Sheriff on 13/4/92."*

This latter application was, however, in a ruling dismissed by Achi-Kanu J on 18/6/92.

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The applicant being dissatisfied with the dismissal of the application, applied to the High Court for leave to appeal against the ruling and for continued suspension of the execution earlier levied on its movables, pending the hearing of the new application. This new application was again refused by the High Court. The applicant thereupon applied to the Court of appeal for the following orders:

- 25 "(a) *Extension of time within which to apply for leave to appeal.*
- (b) *Granting the applicant leave of this court to appeal to this Honourable Court against the Ruling of the High Court delivered on the 18/6/92.*
- (c) *Extension of time within which to appeal.*
- 30 (d) *Stay of the judgment herein and or suspend execution of the said judgment until the determination of the applicant's prayer for leave to appeal against the Ruling is granted and if leave is granted until the appeal is determined."*

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On 24/11/92, that Court, by a majority decision (Awogu and Akintan JJCA, Uwaifo JCA dissenting) dismissed the application. The applicant being dissatisfied with the Court of Appeal's decision appealed to this Court. While this 'appeal is still pending the applicant has now applied to us for

an order.

“(1) For stay of execution of the judgment delivered in this court on 27/3/92 in Appeal No. SC/186/1990 between the parties pending the determination of the appeal filed against the Ruling of the Enugu Division of the Court of Appeal on 24/11/92 or

(2) In the alternative for an order directing that the judgment debt of N1,697,800.00 or any other sum found adjudged against the appellant in favour of the respondent be paid into an interest yielding account pending the determination of the said appeal”

This ruling is in respect of that application.

The application is supported by an affidavit and a reply to Counter Affidavit both of which were sworn to by one Obiozo Ikechukwu Victor, a Senior Staff of the applicant bank. Both affidavits have exhibited to them a number of documents. There is counter - affidavit sworn to by Victor Kanayo Obiekwe, the managing director of the respondent's company and has annexed thereto a number of documents. At the hearing of the application learned counsel for the parties argued strenuously in support of their respective positions. Needless to say, of course, that the respondent's counsel resisted the application.

Moving the Court, Mr. Ibe for the applicant argues that there is an appeal to this Court pending in the matter of the ruling of the Court of Appeal. He refers to Exhibits A4 and A5 to the affidavit in support of his motion and submits that the grounds of appeal raised issues of law and there is therefore no need to seek leave either of the Court of appeal or of this Court to appeal. He relies on *Nwadike v. Ibekwe* (1987) 4 NWLR (Pt.67) 718 in support of his submission. Learned counsel further submits that where the grounds of appeal are substantial, this Court should grant a stay. He observes that the relief sought in the appeal to this Court is an order granting leave to appeal to the Court of Appeal against the ruling of the High Court Enugu refusing stay of execution. Referring to page 5 of the ruling of the High Court (Exhibit A2). learned counsel argues that it is unnecessary to show that the appeal should be heard. He relied on *Obikoya v. Wema Bank Ltd* (1989) 1 NWLR (Pt.96) 157, 178, per Obaseki JSC. Mr. Ibe contends that the motion was brought under order 2 rule 14 of the judgments (Enforcement) Rules of Eastern Nigeria applicable to Enugu State.

He urges the Court to grant the application as prayed.

Mr. Anyamene, SAN for the respondent, draws the attention of the Court to the relief sought in the notice of appeal to this Court and submits that there is no appeal pending upon which an order for stay could be predicated. Learned Senior Advocate observes that the applicant's appeal to this Court is against the exercise of discretion by the Court of Appeal and submits, relying on *Ifediorah v. Ume* (1988) 2 NWLR (Pt. 74) 19, that an appeal against an exercise of discretion involves questions of mixed law and fact. He submits that alternative prayer (2) on the motion paper presupposes that the judgment debt remain unpaid but that this stance contradicts the affidavit in support of the motion to the effect that the judgment debt has been paid to the judgment creditor, that is the respondent company. Learned Senior Advocate, relying on the counter-affidavit and paragraph 28 of Exhibit A2, contends that the judgment debt has not been paid to the respondent. He contends that applicant's new action in the High Court is based on an alleged debt secured by a mortgage deed and observes that the security is available to the applicant if it wins its new action; he adds that the mortgaged property is worth N20 million. Learned Senior Advocate also refers to page 14 of Exhibit A2 and observes that there was no appeal against the finding of the High Court on that page. He finally urges the Court to dismiss the application.

I will consider first the question whether there is an appeal before this Court on which the prayer for stay of execution can be predicated. Following the refusal of the High Court to grant leave to the applicant to appeal to the Court of Appeal against the High Court's refusal of the applicant's prayer for stay, the applicant applied to the Court of Appeal for a similar order. The Court of Appeal, by majority decision, refused it leave to appeal. It is against the Court of Appeal's refusal of leave to appeal that the applicant has appealed to this Court upon the following grounds of appeal:

“(1) Error in Law

The learned justices of the Court of appeal misconceived the application before the court which misconception led to a gross error in law when they held at pages 5 and 6 of the lead ruling of Awogu JCA as follows:-

The Question that arises however is what judgment is being appealed against? The judgment of the Supreme Court is final and there can be no further appeal against it. It also dismissed the counterclaim. There is therefore nothing to stay. If the stay is in respect of the new suit filed thereafter and yet to be heard, it is impossible to stay the final judgment which became effective as from the date it was delivered in March 1992 and it is difficult to understand how such a stay can relate to a new suit filed a month later.

PARTICULARS OF ERROR

- (a) *The application before the court of first instance is not one for a stay of the judgment of the Supreme Court pending an appeal against the judgment but a stay, of that judgment until the determination of the applicant's claim for N5,642,892.07 against the respondent which is pending in the Enugu High Court 'and which was struck out by the Supreme Court and not' dismissed by that Court as wrongly stated by the Court of Appeal. See the Supreme Court judgment reported in (1992) 3 NWLR (Pt.229) 260.* 10 15
- (b) *following the refusal of the Court of first instance to stay that judgment on that ground, the applicant then brought an application to the Court of Appeal for leave of (that) Court to appeal to the Court of Appeal against that refusal.* 20
- (c) *The learned Justices of the Court of Appeal did not confine themselves to the merits and or demerits of the application to wit: granting or refusing leave to appeal against the ruling of Achi Kanu J. but instead careered into the substantive judgment as Ozobu C.J. which judgment was not in any way an issue before them.* 25 30
- (d) *It is settled in Obikoya v. Wema Bank Ltd. (1989) NWLR 157 that the duty of the court in an application of such a nature is to confine itself within respectable limits confine of the scope of the enquiry before the court. It is a duty to be exercised both judicially and judiciously since it is a very important constitutional right and its exercise ought not to be unduly fettered.'* 35

It is the duty of the Court to examine the grounds of appeal for which leave is sought in order to determine the materiality of those grounds. This the learned Justices of the Court of Appeal failed to do.

5 *(2) Error in Law*

The learned Justices of the Court of Appeal erred in law and misconceived the application before them when at page 7 of the lead judgment they held as follows and so dismissed the application:-

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'Accordingly, the leave to appeal sought here cannot be granted as no question of fact or law has arisen from the final judgment of the Supreme Court. The Application is refused.'

15 PARTICULARS OF ERROR

(a) The ruling for which leave to appeal is sought is the Ruling of Achi Kanu J. dated 18/6/92 and not the final judgment of the Supreme Court.

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(b) Before the learned Justices of the court of Appeal would refuse to grant leave, they must advert to the rulings of Achi Kanu J. dated 18/6/92 and 21/7/91 refusing applicant leave, and scrutinizing meticulously the proposed grounds of appeal. This the learned justices of the Court of appeal failed to do but instead adverted to the Supreme Court judgment which has little or no relevance to the application before them.

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(3) Error in Law

30 *The learned Justices of the Court of Appeal erred in law when they held as follows which error led to their dismissal of the application:*

35 *'Coming to the question of stay of execution, in law a judgment may be stayed if another suit pending between the parties is yet to be disposed of This is usually so in counter-claim and set offs in which the claim may have been disposed off before the other. It does not apply where the suit has been finally concluded and the debtor refused to pay because he wants to hold on to the fruit of that judgment until the suit which he filed*

thereafter was determined.

Of course where a new suit is commenced, the applicants may come by way of Mareva order but would have to fulfil the conditions for obtaining same. Accordingly, the application for stay of execution is also hereby refused.'

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PARTICULARS OF ERROR

(a) Order 2 rule 10 & 14 of the Judgment (Enforcement) Rules of Eastern Nigeria 1963 applicable to Enugu State states:-

"10 Subject to any provision to the contrary, any application by a party for an order or direction of a court in relation to any judgment, execution, or process shall be made in the same manner as an application for an interlocutory order in that court.

14 Whenever any proceeding shall be pending in the court against the holder of previous judgment of the court by the persons against whom the judgment was given the court may, if it appears just and reasonable to do so, stay execution of the judgment either absolutely or on such terms as it may think just until a judgment shall be given in the pending proceeding.'

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(b) It is respectfully submitted that this is not the true legal position in view of the combined effect of Rules 10 & 14 of order 2 of the Judgments Enforcement Rules of Eastern Nigeria 1963 applicable to Enugu State above cited."

The Court of Appeal had a discretion whether or not to grant to applicant leave to appeal. It exercised that discretion against the applicant. It would therefore appear that the appeal to this Court relates to the exercise by the court below of its undoubted discretionary power to grant or refuse leave to appeal. Since the exercise of a discretion involves a consideration of the competing facts relied on by each party, it follows that an examination of the manner in which a discretion is exercised must necessarily involve at least questions of mixed law and fact. But is the applicant questioning the manner of the exercise of the discretion of the court below? Or what is the applicant really questioning in his appeal? The answers to these questions are to be found in the grounds of appeal. It is not disputed that the applicant would only have a right of appeal to this Court as of right only if his grounds of appeal raise questions of law alone. See section 213 (2)(e) of the 1979 Constitution.

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What constitutes a ground of law or of mixed law and fact or of facts only has been the subject of judicial decisions by this court in a number of cases, notably, in recent times, Ogbechie v. Onochie (1986) 2 NWLR 484, (1986) 3 SC 54; Nwadike v. Ibekwe (supra) 5 and Ifediorah v. Ume (supra). Bearing in mind the principles laid down in these cases and other similar cases, I now proceed to consider the nature of the ground of appeal filed by the applicant in its notice of appeal to this Court against the decision of the 10 Court of Appeal. The grounds are already set out. I need to point out that it is not how a ground is christened that matters but what it complains about. I have examined carefully the three grounds of appeal and in my respectful view, they all raise issues of law. They do not relate to an examination of the manner in which the court 15 below exercised its discretion to grant or refuse leave to appeal, but rather complain of a misconception of the application before it. This, in my respectful view, would amount to an error of law. The appeal of the applicant to this Court is therefore, competent 20 under section 213(2) (a) of the Constitution of the Federal Republic of Nigeria, 1979.

This conclusion disposes of the submissions of learned Senior Advocate, for the respondent on the competence of the appeal.

I will now proceed to deal with the merits of the application before 25 us. In doing so, however, I shall refrain from making pronouncements that may prejudice the appeal now pending in this Court and, should that appeal succeed and leave to appeal to the Court of Appeal granted, the issues that may subsequently arise in the appeal to the Court of Appeal. Care will, therefore, be taken to avoid resolving in this application some of the 30 issues raised in arguments by learned counsel for the parties before us except in so far as they are relevant to deciding the application before us.

I agree with Mr. Anyamene, SAN that on the applicant's showing, the alternative prayer (2) must be refused. First, in paragraph 9 of the affidavit of Obiozo Okechukwu Victor in support of the application, the 35 deponent deposed as follows:

"We further paid the exact amount i.e. N1,697,800.00 adjudged against us by the Supreme Court into the applicant's live current account in their Ogui Enugu Main Branch with a copy of the credit advice remitted to the Sheriff and the respondent."

If this averment is true, what sum is this Court then to order to be paid into an interest yielding account? I am not unaware of the denial by the respondent of this averment. But one is here concerned with applicant's case. If the applicant said it had paid the judgment-debt then there is nothing left 5 which this Court could order that it be paid into an interest yielding account. Secondly, by the phrase "*or any other sum found adjudged against the appellant in favour of the respondent,*" the applicant gives the impression it does not know the actual amount of the judgment-debt to be paid by it to the respondent. It is not for this Court to find out what amount the 10 applicant is to pay to the respondent; it is for the applicant to state what amount it would require this Court to order to be paid into an interest yielding account. For these reasons, prayer (2) is refused.

Prayer (1) prays, in effect, that the judgment of this Court in Ap- 15
 peal No. SC. 186/1990 between the parties be stayed until the Court after the conclusion of the said appeal, is disposed of. I say this because, although the stay prayed for is to last until the determination of the appeal lodged by the applicant to this Court, the relief sought from this Court as disclosed in the Notice of Appeal is to grant leave to appeal from the High 20
 Court to the Court of Appeal. If that appeal succeeds and the relief is granted the applicant will still have to move the Court of Appeal in terms similar to its original application in the High Court. The applicant is thus seeking by its present application to by pass the Court of Appeal in obtain- 25
 ing that which has been refused it by the High Court but which the Court of Appeal has not yet had an opportunity to express an opinion on. This Court has no jurisdiction to entertain an appeal direct from the High Court. The applicant would, therefore not have a right to apply direct to the Supreme court for a prayer for stay that has been refused by High Court. As 30
 this is, in effect, the purport of the prayer (1) now before us, it will be refused.

It is in evidence before us that the applicant's new action is in respect of a debt secured by a deed of mortgage over the immovable property of the respondent company. It has not been shown to my satisfaction that 35
 this security would be inadequate to meet whatever judgment may be entered in favour of the applicant in the action.

If the respondent has claimed in the writ of fieri facias more money than it is entitled to, the applicant has remedies which he can pursue. It will not be justice to have the respondent deprived of the fruits of the judgment entered in its favour by the highest court in the land merely because the applicant is claiming in an action filed after the judgment of this Court a sum far in that judgment. To grant the prayer (1) sought is to allow the applicant to use the judicial process to frustrate the respondent, a successful party, in the enjoyment of its victory achieved after climbing the judicial ladder to the highest court. This Court will not allow that to happen.

For these reasons, therefore I will refuse prayer (1). In the net result, the application fails and it is dismissed with N100.00 to that respondent company.

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KARIBI-WHYTE JSC

On the 24th April 1989, the Enugu High Court gave judgment in favour of the Respondent in an action instituted by the Respondent, as Plaintiff. Applicant was the Defendant. The Court awarded the sum of N10,827,305.25. Applicant's counterclaim was dismissed. Applicant appealed to the Court of Appeal Enugu. The Court of Appeal set aside the judgment, and restored the counterclaim for trial. Respondent dissatisfied with the judgment of the Court of Appeal, appealed to this Court. This Court allowed the appeal in part and awarded the Respondent the sum of N1,697,800 damages and N1.000 as costs. The Applicant's counterclaim was struck out.

On the delivery of the judgment of the Supreme Court, Respondent took out a writ of fieri facias against the judgment debtor for the sum of N3,001,877.70 to enforce the judgment, Applicant brought a motion in the High Court to set aside the writ of fieri facias. They asked for stay of execution or to suspend the judgment until the determination of a suit by Applicant as the Plaintiff claiming the sum of N5,642,897.70. There was an application to release from attachment the moveable property of the Appellant, on the ground that the Appellant had paid the sum of N1.6 million and costs adjudged against it by the Supreme Court, into the live account of

Respondent kept by the Appellant.

The application was dismissed in its entirety by the High Court. An appeal to the Court of Appeal was dismissed. Applicant has now come to this Court.

After the judgment in this Court, the Applicant instituted a fresh action against the Respondent in the High Court Enugu, claiming the sum of N5,642,892.07 being the outstanding debt balance on the defendant's current account and compound interest at the rate of 25% per annum with monthly rests from 2.4.92 until judgment and thereafter at the rate of 5% per annum until final liquidation of the judgment debt and costs. Notice of Attachment of the goods and chattels of the Applicant dated 10th April, 1992 relying on the non-satisfaction of the Supreme Court judgment was carried out by the Bailiff of the High Court on 13/4/92.

The Deputy Sheriff for Enugu State advertised by public notice, the sale by public auction of the Applicant's moveables. Applicant is disputing the amount indicated due as stated in the notice of attachment. They promptly filed an application in the High Court seeking to set aside the writ of attachment, stay the judgment and or suspend execution thereof, and to release from attachment the moveable property of the Applicant. The application was dismissed. The appeal to the Court of Appeal against the dismissal, was also dismissed by that Court. Hence the appeal to this Court. Applicant has brought this application for an order:-

- (1) *For stay of execution of the judgment delivered in this Court on 27/3/92 in appeal NO. SC 186/1990 between the parties pending the determination of the appeal filed against the Ruling of the Enugu Division of the Court of Appeal on 24/11/92 or*
- (2) *In the alternative for an order directing that the judgment debt of N1,697,800.00 or any other sum found adjudged against the Appellant in favour of the respondent be paid into an interest yielding account pending the determination of the said appeal."*

This application is made in the appeal against the ruling by the Enugu High Court refusing the application for stay of execution etc. which was affirmed by the Court of Appeal.

Mr. Ibe learned Counsel to the Applicant moving his motion sub-

mitted that there is an appeal pending in this matter and referred to the

ruling of the Court of Appeal. He cited and relied on Nwadike v. Ibekwe (1987) 4 NWLR (pt.67) 718 for his submission; He argued that because the grounds of appeal are substantial, this court should grant the stay. He
5 pointed out that the relief sought in the appeal before this Court is for an order granting leave to appeal to the Court of Appeal against the ruling of the High Court, Enugu, refusing stay of execution in that Court. It was submitted that it is unnecessary to show that appeal would succeed. It is only sufficient to show why the appeal should be heard. Learned Counsel
10 relied on Obikoya v. Wema Bank Ltd. (1989) 1 NWLR (pt.96) 157. It was contended that the motion was brought under Order 2 rule 14 of the judgments (Enforcement) Rules of Eastern Nigeria applicable to Enugu State. He urged the Court to grant the application as prayed.

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Learned Counsel, Mr. A.N. Anyamene S.A.N. opposed the application. He drew the attention of the Court to the relief sought in the notice of appeal and submitted that there was no appeal pending upon which an Order for stay of execution could be predicated. It was his contention,
20 relying on Ifediorah v. Ume (1988) 2 NWLR (pt.74) 19, that the appeal before this court is against the exercise of discretion by the Court below which necessarily involves a question of mixed law and fact.

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He referred to the alternative prayer, on the motion paper and submitted that it was based on the supposition that the judgment debt has remained unpaid. This position, it was submitted, is in sharp contradiction with the averment in the affidavit in support that the judgment debt had been paid to the judgment creditor, that is, the respondent company. Rely-
30 ing on the counter-affidavit and paragraph 28 of Exhibit A2, Mr. Anyamene submitted that the judgment debt has not been paid to the Respondent.

Learned Counsel to the Respondents submitted that Applicants
35 new action in the High Court was based on an alleged debt secured by a mortgage deed and observed that the security is available to the Applicant if and when it gets judgment in that action. He added that the security for the mortgage is worth N20,000.000. He finally referred to page 14 of Exhibit A2 and observed that there was no appeal against the finding of the

High Court on that page. He urged us to dismiss the application.

It is useful to begin with the first submission of learned Counsel to the Respondent, that there was no appeal properly before the Court on which an application for a stay of execution can be predicated. There is no doubt and it is common ground that if that contention succeeds, *cassus* 5 *cadit*; the application fails *in limine*. Hence it is better and common practice to consider such a contention first. As was pointed out in *Mills v Renner* (1940) 16 WACA 145-

"It would be manifestly absurd to suggest that a Court was bound 10 to proceed with the taking of lengthy evidence of the parties to a suit where it appeared that the whole suit could be decided upon the pleadings without any evidence being called."

The principle is that where on the material before the Court a case 15 can be determined without going further, *interest rei publicae ut sit finis litium*.

In the instant case, if it could be shown that there was no valid appeal before the Court, then the basis for considering an application for a 20 stay of execution does not exist. Before arriving at the decision whether there is an appeal or not, it is relevant to consider the reasons on which the submission is based. Concisely put, the contention is that the appeal before the court is against the exercise of discretion by the Court below. It was argued that this is invariably an issue of mixed law and fact. Since grounds 25 of appeal on questions of mixed law and fact can only be filed with leave of Court, and leave having not been obtained, in accordance with section 213(3) of the Constitution of 1979, the appeal was incompetent.

I have already stated that it was the contention of Mr. Ibe for the 30 Applicant, that the appeal is based on grounds of law and is therefore competent.

It is useful and for ease of reference to reproduce the grounds of appeal before this court. They are as follows:

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"GROUNDS OF APPEAL:

(1) Error in Law

The learned justices of the Court of Appeal misconceived the application before the court which misconception led to a gross error in law

when they held at pages 5 and 6 of the lead Ruling of Awogu J.C.A. as follows:-

*“The question that arises however is what judgment is being appealed against? The judgment of the Supreme Court is final and there can be no further appeal against it. It also dismissed the counterclaim. There is therefore nothing to stay. If the stay is in respect of the new suit filed there-
after and yet to be heard, it is impossible to stay the final judgment which became effective as from the date it was delivered in March 1992 and it is difficult to understand how such a stay can relate to a new suit filed a month later”.*

10 PARTICULARS OF ERROR

(a) *The application before the court of first instance is not one for a stay of the judgment of the Supreme Court pending an appeal against that judgment but for a stay of that judgment “until the determination of the applicant’s claim for N5,042,892.07 against the respondent which is pending in the Enugu High Court” and which was struck out by the Supreme Court, and not “dismissed” by that court as wrongly stated by the Court Judgment reported in (1992) 3 NWLR (Pt.229) 260.*

20 (b) *Following the refusal of the Court of first instance to stay that judgment on that ground, the applicant then brought an application to the Court of Appeal for leave of (that) court to appeal to the Court of Appeal against that refusal.*

25 (c) *The learned Justices of the Court of Appeal did not confine themselves to the merits and or demerits of the application to wit: granting or refusing leave to appeal against the Ruling of Achi Kanu J. but instead carried into the substantive judgment of Ozobui C.J. which judgment was
30 not in any way an issue before, them.*

(d) *It is settled in Obikoya v. Wema Bank Ltd. 1989 NWLR 157 that the duty of the court in an application of such a nature is to confine itself
35 within respectable limits of the scope of the enquiry before the court. It is a duty to be exercised both judicially and judiciously since it is “a very important constitutional right and its exercise ought not to be unduly fettered”.*

It is the duty of the Court to examine the grounds of appeal for which

leave is sought in order to determine the materiality of those grounds. This the learned Justices of the Court of Appeal failed to do.

(2) Error in Law

The learned justices of the Court of Appeal erred in law and misconceived the application before them when at page 7 of the lead judgment they held as follows and so dismissed the application:-

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“Accordingly, the leave to appeal sought here cannot be granted as no question of law or fact has arisen from the final judgment of the Supreme Court. The application is refused”.

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PARTICULARS OF ERROR

(a) The Ruling for which leave to appeal is sought is the Ruling of Achi Kanu J. dated 18/6/82 not the final judgment of the Supreme Court.

(b) Before the learned justices of the Court of Appeal would refuse to grant leave, they must advert to the Rulings of Achi Kanu J. dated 18/6/92 and 21/7/91 refusing applicant leave, and is scrutinising meticulously the proposed grounds of appeal. This the learned justices of the Court of Appeal failed to do but instead adverted to the Supreme Court judgment which has little or no relevance to the application before them,

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(3) Error in Law

The learned justices of the Court of Appeal erred in law when they held as follows which error led to their dismissal of the application:

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“Coming to the question of stay of execution, in law a judgment may be stayed if another suit pending between the parties is yet to be disposed of..... This is usually so in counter claim and set off in which the claim may have been disposed of before the other. It does not apply where the suit has been finally concluded and the debtor refused to pay because he wants to hold on to the fruit of that judgment until the suit which he filed thereafter was determined. Of course where a new suit is commenced, the applicants may come by way of Mareva Order but would have to fulfill the conditions for obtaining same. Accordingly the application for stay of execution is also hereby refused”.

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PARTICULARS OF ERROR

(a) Order 2 Rule 10 & 14 of the judgment (Enforcement) Rules of Eastern Nigeria 1963 applicable to Enugu State states:-

“10. Subject to any provision to the contrary, any application by a party for an order or direction of a court in relation to any judgment, execution, or process shall be made in the same manner as an application for an inter-
5 locutory order in that court”.

“14. Whenever any proceeding shall be pending in the court against the holder of previous judgment of the court by the persons against whom the judgment was given, the court may, if it appears just and reasonable to do
10 so, stay execution of the judgment either absolutely or on such terms as it may think just until a judgment shall be given in the pending proceeding.

(b) It is respectfully submitted that this is not the true legal position in view of the combined effect of Rules 10 & 14 or Order 2 of the Judgments
15 Enforcement Rules of Eastern Nigeria 1963 applicable to Enugu State above cited’

It is not disputed that the Court below had a discretion whether or not to grant leave to appeal to the Applicant. It exercised its discretion against
20 granting leave. The appeal to this Court is to consider this exercise of discretion. But that is not the issue in the grounds of appeal before us. The issue concisely stated is whether the reasons for challenging the exercise of discretion are based on law alone, in which case leave of the Court will not be necessary, and an appeal lies as of right. Or leave is necessary if it is
25 based on reasons of mixed law and fact, or facts simpliciter. It must be noted this is an Interlocutory and not a final decision.

This determination of this question has come before our Courts on several occasions, and this Court has made notable pronouncements which
30 have been applied in the determination of the issue-see Ogbechie & Onachie (1986) 2 NWLR 484; Nwadike v. Ibekwe (1987) 4 NWLR (pt.67) 118, see particularly Metal Construction (West Africa) Ltd. v. Migliore & Ors. (1990)2 SCNJ 20.

35 It is now generally accepted that where the ground of appeal is based on an allegation of error deduced from conclusion on undisputed facts, it is a ground of law. Where on the other hand, the error of law is found on disputed facts calling into question the correctness of the facts determined, it is invariably a question of mixed law and fact. This is be-

cause in this latter case it is a conclusion of law coupled with the exercise of discretion.

It is accepted that all questions of law are supported by inferences of facts. This distinction as I have pointed out above, is that whereas the facts in questions of law are accepted and undisputed, in questions of mixed law and fact, the facts are disputed, and have to be determined on the exercise of discretion before the conclusion of law is drawn.

With the above principles as guide, and applying them to the grounds of appeal before us, it appears to me that on a careful reading of each of the grounds of appeal filed, and the particulars of error alleged, in none of them are the constitutive factual situations disputed. They do not question findings of facts, or the manner of the exercise of discretion in the Court below, relating to the refusal of the grant of leave to appeal. All the errors alleged are against the conclusions of the Court below based on admitted facts. In my considered opinion, and on the principles in the decided cases, all the grounds of appeal filed raise issues of law and are therefore competent under section 213 (2) (a) of the Constitution 1979. This conclusion disposes of the first objection.

Mr. Anyamene S.A.N. has submitted that on Applicant's own argument, prayer must be refused. It is difficult to disagree with that submission. This is clearly supported by the claim that Applicant had paid the judgment debt. The averment in paragraph 9 of the affidavit in support of Applicant's application states as follows

"We further paid the exact amount i.e. N1,697,800.00 adjudged against us by the Supreme Court into the Applicant's live current account in their Ogui Main Branch with a copy of the credit advice remitted to the Sheriff and the Respondent."

The Respondent has not positively denied this averment. But the averment raises some puzzle if related to Applicant's claim. If it is true as averred, it is difficult to conceive why this Court is being called upon to order payment into an interest yielding account. Hence since this is an averment by the Applicant that the judgment debt had been paid, there is

nothing left to stay, or to pay into an interest yielding account.

There is a second issue equally puzzling. The Applicant ought to know the amount of the judgment debt due. Yet there is the alternative prayer for “*or any other sum found adjudged against the Appellant in favour of the Respondent*” This raises the irresistible conclusion that Applicant does not know the actual amount of the judgment debt due to the Respondent. Surely, it is not for the Court to discover the amount due to the Respondent. The Court having decided the judgment debt is functus officio as to the claim. It is for the Applicant to state what amount it would require this Court to Order to be paid into an interest yielding account. This prayer is also refused.

Prayer I seeks staying the judgment of this Court in Appeal No. SC 186/1990 between the parties until the Applicant’s action in Suit No. EE/125/92, filed in the Enugu High Court after the conclusion of the said appeal is disposed of.

This is a curious application. Applicant is seeking a stay of execution until the determination of the appeal by the applicant against the decision of the Court of Appeal in different matter. It is also interesting that the relief sought in the Notice of Appeal to this Court is to grant leave to appeal from the High Court to the Court of Appeal. It is obvious that even if that appeal succeeded and the relief, granted, applicant will still have to move the Court in terms similar to its original application in the High Court. The present application appears to me a stratagem to circumvent the Court of Appeal and to attempt to obtain what has been refused by the High Court, and in respect of which no application has been made to the Court of Appeal.

This Court cannot hear appeals direct from the High Court. It can only hear appeals decided by the Court of Appeal. The Applicant therefore has neither constitutional nor statutory right to apply direct to this Court for a prayer for a stay of execution refused by the High Court. This prayer is also refused.

For the above reasons, and the fuller reasons in the ruling of my learned brother Ogundare JSC, the appeal fails and it is dismissed with N100.00 costs to Respondents.

OLATAWURA JSC

I had a preview of the ruling of my learned brother Ogundare, JSC just delivered I find no merit in the application which appears, to me designed to deprive the respondent's fruits of the judgment in this Court SC. 186/1990 between the same parties. The contradictions in the prayers and the affidavits are enough to refuse the application. It is not for us to speculate the success of a case yet to be tried in a trial court, and also the time the appeal will take to reach this Court. Once there is a security for the loan as evidenced by Exhibit A6 attached to the affidavit in support of the application, and which security is said to be valid, I think I cannot ignore or close my eyes to paragraph 33 of the Counter-affidavit filed by the respondent to wit:

"The damages awarded in 1989 (sic) as the judgment of the Supreme Court has depreciated in value by more than 50% following the inflationary trends in the economy and unless the judgment debt is paid now the value of the said damages will depreciate further and defeat the purpose of the compensation awarded.

It is for these reasons and for the fuller reasons in the lead ruling of my learned brother Ogundare, JSC that I have to dismiss the application. I abide by the order for costs.

OMO JSC

The facts of this case leading to the application before us have been succinctly set out in the lead ruling of my learned brother, Ogundare JSC., a draft of which I have had a preview. I therefore do not intend to set them out here.

I will begin by stating that the appeal to this Court is against the majority judgment of the Court of Appeal refusing to grant the appellant/applicant leave to appeal against the decision of the High Court (Ozobu CJ) refusing it extension of time within which to appeal for leave, and leave to appeal against the ruling of the High Court (Achi-Kanu J.) dismissing its application to, inter alia, set aside the writ of fifa taken out by respondent against it, suspend the execution levied, and release the properties from

attachment. It is on the foundation of this appeal that the Plaintiff/Applicant had filed a motion in this Court seeking an order -

- “(1) For stay of execution of the judgment delivered in this Court on 27/3/92 in Appeal No.SC/186/1990 between the parties pending the determination of the appeal filed against the Ruling of the Enugu Division of the Court of Appeal on 24/11/92 or*
- (2) In the alternative for an order directing that the judgment debt of N1,697,800.00 or any other sum found adjudged against the appellant in favour of the respondent be paid into an interest yielding account pending the determination of the said appeal”*

It has been contended by respondent’s counsel that this application cannot be entertained because there is in fact no competent appeal before this Court. The grounds filed, it is submitted must be ones of mixed law and fact since they challenge the exercise of the discretion of the Court of Appeal to grant the prayers sought before it. I entirely agree with my learned brother, Ogundare, JSC. that discretion of the Court is being challenged, the decision whether grounds of appeal are of law, mixed law and fact or facts alone, can only be determined by a look at the grounds themselves; not on the basis of the nature of the prayers before the Court. For the reasons set out in the aforesaid judgment I also hold that all the grounds of appeal filed against the decision of the Court of Appeal are grounds of law, and therefore that no leave is required by the appellant/ applicant to appeal on them from the Court of Appeal to this Court. Consequently the submission of respondent’s counsel is wrong and there is a competent appeal properly grounded on an appeal, and can therefore be considered.

The second and alternative prayer of the applicant seeks an order of this Court for the applicant to pay the judgment debt of N1,692,800 or any other sum found adjudged against the appellant (applicant) in favour of the respondent into an interest yielding account pending the determination of the appeal to this Courts The second half of the prayer cannot certainly be entertained by this Court because it is not the duty of the court to ascertain what amount is now due to the respondent pursuant to its judgment delivered on 27/3/92 and thereafter proceed to make an order for disposal of such an amount. The order sought must be tied to a specific and definite sum of money. As to the first half, it appears the applicant is

prepared to pay another sum of N1,697,800 in satisfaction of the original judgment - debt set out in the judgment of this Court; so long as it achieves the objective of suspending the execution of the *fifa* attaching its properties to satisfy that original debt. I say “another sum” because, as has been rightly pointed out in the lead ruling, it has been averred in its affidavit in support of the application that the judgment of this Court was satisfied 5 long ago by the payment of the exact sum stated in this Court’s judgment into the respondent’s live current account in applicant’s Ogui Enugu Main Branch. If that is so, then no further execution can be levied, and/or stayed. The truth of course is that the alleged “payment” into the respondent’s live current account was not made in good faith. It was designed to prevent the respondent from enjoying the fruits of his judgment. There is also no merit whatsoever in this application because *firstly*, special circumstances have not been shown to justify the respondent’s enforcement of the fruits of his judgment being further postponed. *Secondly*, the second prayer “hangs in the air” since it does not seek a stay of execution, being expressed merely as 15 an “alternative” order to the first prayer.

With regard to the first prayer, one of the orders sought in the High Court, leave to appeal against which was refused, is to stay suspend execution levied *until* the determination of the applicant’s 145,642,820.00 claim 20 against the respondent in the Enugu High Court. If the present prayer had been confined to staying execution of the writ of *fifa* until its property of otherwise is determined, I would have seriously considered it. To seek to stay execution of the judgment of this Court on the ground of a pending claim in the High Court cannot be entertained. This is much more the case 25 where whatever High Court judgment is obtained has been secured by a mortgage, which has not been shown to be inadequate so.

For the above reasons, and the fuller ones set out in the lead ruling of Ogundare, JSC, I also dismiss this application with N100 costs to the respondent. 30

OGWUEGBU JSC

I have had a preview of the lead ruling of my learned brother Ogundare, with which I entirely agree, for the same reasons contained in the ruling which I adopt as mine, I dismiss the application with N100.00 35 costs to the respondent company.