

SUPREME COURT OF NIGERIA
11TH JUNE, 1993. SC. 317/1991
CORAM:- A. G. KARIBI-WHYTE, S. KAWU,
A. B. WALI, E. O. OGWUEGBU, S. U. MOHAMMED, JJSC
SUIT NO. FHC/L/M67/91

1. FIRST AFRICAN TRUST BANK LTD
2. CHIEF RALPH OBIOHA
(For himself and on behalf of other
shareholders who support the removal PLAINTIFFS/APPELLANTS
of the Managing Director from office)
AND
1. BASIL O. EZEGBU
2. MR. C. IBETO DEFENDANTS/RESPONDENTS

SUIT NO. FHC/L/M69/91

CLETUS M. IBETO & 21 ORS. PLAINTIFFS
AND
CHIEF RALPH OBIOHA & 4 ORS. DEFENDANTS

APPEALS - Application for substantially similar prayers as in a
pending appeal - whether Court of Appeal has
jurisdiction.

APPEALS - Appellate court - to refrain from commenting on a
matter pending before it - when non - prejudicial
comment is declared unavoidable.

CIVIL CAUSES - Fair hearing - alleged denial of - not substantiated
from the records.

COURTS - Grant of relief not sought - generally forbidden - where
a party is entitled to the relief in the circumstances -
different consideration to be made.

COURTS - Jurisdiction - disciplinary power to undo what has been
done - whether court had jurisdiction or not.

COURTS - Findings and holdings of court of Appeal on affidavit evidence - when to be upheld by the Supreme Court

EVIDENCE - Affidavit evidence - conflict therein - how properly resolved.

INTERLOCUTORY APPLICATIONS -Execution during the pendency of properly served motion for stay - refusal of trial court to exercise its disciplinary powers to set aside the execution - because application was oral - when appellate court will intervene.

FACTS

The parties were involved in consolidated suits over the true ownership of the 1st Plaintiff Bank. Whilst the Appellants claimed that the true owners of the Bank were the shareholders whose names appeared in the first register Exh. B, the Respondents maintained that the true owners were those who had actually been allotted shares fully paid for, whose names appeared in the second register Exh. L.

After hearing of the case, the trial Federal High Court Lagos found in favour of the Appellants. Respondents appealed against the judgment before the Court of Appeal and also filed a motion for stay of execution before the trial court, pending the determination of their appeal. Though the Appellants were served with Respondents' motion for stay, they held the extra-ordinary General Meeting sought to be stayed before the date fixed for hearing of the Application. Appellants took far reaching decisions including termination of some employees of the Bank.

At the hearing of Respondents' motion, they informed the court that they cannot move the motion in view of the developments and applied orally that the court exercises its disciplinary powers in setting aside everything done at the said extra-ordinary General Meeting, relying on Vaswani's case. The Court refused on the ground that the application was oral. Respondents then filed an interlocutory appeal against the trial Court's ruling and simultaneously filed an application in the Court of Appeal to restore the status quo ante and set aside the proceedings and decisions of the said General Meeting. The Respondents' application was granted by the Court of Appeal.

The Appellants being dissatisfied, appealed to the Supreme Court. The Appellants urged that the Court of Appeal lacked jurisdiction to hear the motion in view of the fact that the prayers therein are substantially the same prayers contained in the Respondents' appeal pending before that Court. Appellants further submitted that in view of the applicable law, the Court of Appeal should not have made the order it made. That whilst the Respondents prayed for restoration of the status quo ante as at the date of the judgment, the lower court granted restoration of the status quo before the judgment which was not prayed for.

HELD (unanimously dismissing the appeal)

1. The Court of Appeal has the jurisdiction to make the order suspending the decisions of the extra-ordinary General Meeting pending the determination of the appeal. The order being interlocutory cannot be said to have finally determined the appeal (p. 17 L 28)
2. Although generally, a court should not grant to a party a relief not claimed, there is nothing wrong where a court in the exercise of its inherent power, grants a relief which in the circumstances of the case that party is entitled to. (p. 18 L 10)
3. From the submission of counsel to both parties, though Respondents' prayer talk about restoring the status quo as at the date of the judgment, it is obvious that what was sought was the restoration of the status quo before the judgment, which the court of Appeal rightly granted. (p. 18 L 13)
4. The Court of Appeal had jurisdiction to entertain the prayers in the Respondents' motion granted by it when the only arguments considered by that court related to its disciplinary power only to undo what had been done. Whether by omitting to invite arguments on some other aspects of the application the court wrongly exercised that jurisdiction is an entirely different matter. (p. 18 L 24)
5. A perusal of the record of proceedings show that the Court of Appeal was right when it upheld Respondents' counsel's submission that Appellants' counsel made an oral application for the appointment of a Receiver/Manager. (p. 19 L 11)

6. Whilst an appellate court should generally refrain from commenting on a matter pending on appeal before it, in the instant case, the lower court could not avoid commenting on the circumstances relating to the appointment of a Receiver/Manager by the trial Judge after both counsel had made
5 submissions on that matter. In any case, the comments so made by the Court of Appeal have not been shown in any way to be prejudicial to fair hearing or likely to occasion a miscarriage of justice in the pending appeal. (p. 20 L 23)
- 10 7. Appellants' counsel's submission that they were denied fair hearing by the lower court in not being given an adequate time within which to file their counter-affidavit lacks substance as there is nothing on the record to show that the learned Senior Advocate applied for time to enable Appellants prepare their affidavit and such application was unreasonably re-
15 fused. (p. 22 L 24)
8. The Court of Appeal was correct in holding that there were special circumstances which made it impossible or impracticable for the Respondents to apply to the trial court for the reliefs prayed for in their motion, subject
20 matter of this present appeal. (p. 22 L 27)
9. There is no difficulty in concluding that counsel for the Respondents made an oral application before the trial court to exercise its disciplinary powers in setting aside the proceedings of the General Meeting and the oral
25 application was refused. (p. 23 L 25)
10. In the resolution of conflict in affidavit evidence as to what happened before the trial court on the date of motion for stay of execution, the lower court was justified in preferring Respondents' categorical averment on the
30 issue instead of Appellants' unspecified deposition. (p. 24 L 1)
11. The Court of Appeal was correct in holding that in the circumstances of this case, the Respondents were compelled by necessity to make an oral application since that court has found as fact on the affidavit evidence
35 before it that it was on the morning of the date of moving the motion for stay of execution before the trial court, that the Respondents knew the general meeting in question has been held. (p. 24 L 8)

12. The Lower Court was right in holding from the affidavit evidence before it, that the learned trial Judge failed to fix a date for motion Ex Parte and Motion on Notice filed by the Respondents, after refusal of their oral application to set aside proceedings of the said general meeting. (p. 24 L 14)

REPRESENTATION 5

Chief F.R.A. Williams, S.A.N. with Ladi Williams, T. E. Williams, A. Soetan, for the Appellants

Chief G. O. K. Ajayi, S.A.N. with Mrs. Ayo Obe, A.A. Oriola, A.E. Akpamgbo, Miss I. A. Ladejobi, E. N. Anoliefo, for the Respondents

CASES REFERRED TO

1. Akilu v. Fawehinmi (1989) 2 NWLR 122; (1989) NSCC (pt. 1) 461 15
2. Feathstone v. Cooke 16 L.R. Equity 298
3. Trade Auxiliary v. Civers 16 L.R. Equity 303
4. Automatic Self Cleansing Fitter Syndicate Co. v. Cuning (1906) 2 Ch. 20
5. Grammaghone and Typewriter Ltd. v. Stanley (1908) 2 KB 89
6. Edgewater Construction Co. Inc. v. Percy Wilson Mortg. and Finance Coops 2 Ill Dec. 864; 357 N.E. 2d 1307 25
7. Oba S.K. Adetona v. A.G. Ogun State & Ors (Unreported) Suit n FCA/ 1/110/82
8. Ekpenyong & Ors. v. Nyong & Ors. (1974-75) 9 NSCC 28 30

STATUTES AND RULES

1. Constitution of the Federal Republic of Nigeria 1979, ss 22, 33
2. Court of Appeal Rules Order 3 Rule 3 (4) 35
3. Federal High Court Rules Order 33 Rule 2

BOOK REFERRED TO

Blacks Law Dictionary, 5th Edition P. 1264 on "Status quo ante"

LEAD JUDGMENT BY KAWU JSC

This is an appeal from an interlocutory decision of the Court of Appeal, which arose out of an interlocutory decision of the Federal High Court presided over by Jinadu, J.

Originally there were two separate actions filed in the Federal High Court, Lagos - namely Suit No. FHC/L/M67/91 and FHC/L/M69/91. Both suits were consolidated, and throughout the trial the plaintiffs in Suit No. FHC/L/M67/91 who were also the defendants in Suit No. FHC/L/M69/91, were referred to as "the plaintiffs". Similarly the defendants in Suit No. FHC/L/M68/91 who were also the plaintiffs in Suit No. FHCIL/M69/91 were referred to as "the defendants". I will, in this judgment, simply refer to the appellants as "the plaintiffs" and the respondent as "the defendants".

The main issue is controversy between the two parties was as to the true ownership of the 1st plaintiff bank. While the plaintiffs maintained that the true members of the 1st plaintiff bank were the shareholders whose names appeared in the first register, Exh. B, the defendant's case was that the register Exh. B was not the true register of the true owners of the bank as it was prepared mainly for the artificial purpose of complying with the Central Bank time schedule for obtaining a banking license. It was their case that the true owners of the bank are the persons who had actually been allotted shares by the Board of Directors and who had actually paid their subscriptions in full, and whose names appeared in the second register: Exh. L.

At the trial, both parties called a number of witnesses and tendered a number of documentary exhibits in support of their respective claims. At the conclusion of the case, after due consideration of all the submissions made by each party in support of their respective claims, the learned trial judge, on the 1st day of November, 1991 gave judgment in favour of the plaintiffs. In that judgment he made a number of findings which, in fact are not relevant to the appeal before this court. He also made a number of consequential orders. The order which is relevant to this appeal, reads as follows:

"I therefore order in accordance with the order sought in the defendants originating summons that extraordinary general meeting of the members of the 1st plaintiff be called at which only the members mentioned in claim 3 of the plaintiff's amendment statement of claim who are the only members of the 1st plaintiff are attend including the five defendants adjudged to be members of the 1st plaintiff⁵ by this court and the meeting should be convened by the Company Secretary Miss Nkemenna and notices thereof must be served on all the 20 shareholders whose names appear in Exhibit B. The meeting should be held within 14 days from today with 3 days notices issued¹⁰ to all the 20 members including the five defendants."

Being dissatisfied with the judgment, the defendants appealed against that decision and simultaneously applied to the Federal High Court praying the court to suspend its order directing the holding of the extra-ordinary General Meeting until the determination of the appeal. That motion reads as follows:

"TAKE NOTICE that this Honourable Court will be moved on Monday the 11th day of November, 1991 at the hour of 9 O'clock in the forenoon or so soon thereafter as Counsel can be heard on behalf of the defendants/appellants in Suit No. FHC/L/M67/91 and plaintiff/appellants in Suit No. FHC/L/M69/91 for an Order that:

(i) The order made in the judgment of this Honourable Court²⁵ for the summoning of a meeting of the members of the 1st plaintiff bank on the basis of the register of members Exh. B consisting of 20 names be suspended until the determination of the appeal lodged herein.

(ii) The affairs of the bank should continue to be run by the existing signatories of the bank under the supervision of the Director of Banking Supervision of the Central Bank of Nigeria.

(iii) Restraining the 2nd plaintiff in FHCIL/M67/91 and the defendants in FHC/L/M69/91 their servants and/or agents from interfering in the day-to-day operations of the bank by its officers and employees or from retaining the keys of the bank (which they seized³⁵

on the 1st of November, 1991) until the determination of the appeal lodged herein.

(iv) Directing the 2nd plaintiff to cause the premises of the 1st plaintiff Bank to be re-opened for business and to hand over to the
5 Officers of the Bank the keys of the doors, offices and rooms of the Bank to the Officers from whom they were seized on Friday the 1st of November, 1991 until the determination of the appeal filed here-with.

10 And for such further or other order or orders as this Honourable Court may deem fit to make in the circumstances.
Dated this 4th day of November, 1991.”

The motion was fixed for hearing before Jinadu, J. on the
15 11th November, 1991. But before the application could be heard on the day fixed, the plaintiff had, on 9/5/91 held the meeting and had taken far reaching decisions notwithstanding the fact that they had been served with copies of the pending application for the stay of the Extraordinary General Meeting. When the defendants’ application
20 to suspend the Extraordinary General Meeting. Meeting came up for hearing on 11th November, 1991, the defendants’ counsel informed the court that he could not properly proceed with his application praying the court to suspend its order relating to the holding of the Extraordinary General Meeting because his application had been
25 overtaken by events as the said meeting has already been held on the 9th November, 1991. He therefore made an oral application to the court to exercise its disciplinary jurisdiction to set aside all the decisions taken at the General Meeting held on 9th November, 1991. After hearing arguments of both counsel on the matter he learned
30 trial Judge adjourned his ruling to 18th November, 1991 which he delivered on that day refusing the defendants’ application. The defendants there after filed an interlocutory appeal against the ruling of the Federal High Court and simultaneously filed an application in the
35 Court of Appeal dated 21st November, 1991. That motion reads as follows:

“MOTION ON NOTICE

TAKE NOTICE that this Honourable Court will be moved on

the day of November, 1991 at the hour of 9 O'clock in the forenoon or so soon thereafter as counsel can be heard on behalf of the defendants/appellants for an order pending the determination of the appeal filed herein:

(i) Setting aside the proceedings and decision of the General Meeting of the 1st plaintiff held on Saturday the 9th of November, 1991. 5

(ii) Nullifying any decisions taken or the implementation or any implementation thereof and in particular reinstating all employees of the bank whose appointments were terminated after the date of the said meeting. 10

(iii) Generally restoring the status quo ante, at the 1st plaintiff/respondent bank, as at the date of the judgment delivered on the 1st of November, 1991. 15

And for such further or other order or orders as this Honourable court may deem fit to make in the circumstances.

Dated this 21st day of November, 1991."

20

The Court of Appeal heard the application and in the lead ruling of Niki Tobi, J.C.A. (with which Sulu-Gambari and Kalgo, J.J.C.A. concurred), the learned Justice of Appeal granting the application concluded as follows:

"After a careful consideration of the application, I am of the view that the learned trial Judge was rather hesitant in the whole matter. In order to do justice in this matter, it is a very important part of this court's armoury to grant the application and it is hereby granted. For the avoidance of doubt, the following orders are made pending the determination of the appeal, if the appeal ever comes before us: 25 30

(1) An order setting aside the proceedings and decision of the General Meeting of the 1st plaintiff held on Saturday the 9th of November, 1991.

(2) An order nullifying any decisions taken or the implementation or any implementation thereof and in particular reinstating all employees of the bank whose appointments were terminated as enumerated in paragraph 26 of the affidavit in support sworn by 35

10 F.A.T.B.Ltd. v. Ezegbu (1993) 7 KLR Kawu JSC
Emmanuel Ejike.

(3) *An order generally restoring the status quo ante before the date of the delivery of the judgment on 1st November, 1991; I make no order as to costs.*"

5 This appeal, by the plaintiffs, is from that ruling.
Two Notices of Appeal were filed. The first Notice of Appeal consisting of 7 grounds of appeal deal with of law alone, and they are as follows:

10 *"Grounds of Appeal*

(i) *The Court of Appeal erred in law in entertaining the application of the defendants/appellants when it had no jurisdiction to do so, either under the Constitution or the Rules of Court or the Federal Court of Appeal Act.*

15 *Particulars of Error*

(a) *The defendants elected to appeal against the ruling of the Federal High Court delivered on 18/11/91, and thereby invoked the appellate jurisdiction conferred on the Court of Appeal by Section 220 of the 1979 Constitution.*

25 (b) *Notwithstanding the aforementioned appeal, the defendants also filed the motion dated 1/11/91 claiming the same reliefs or substantially the same reliefs as those claimed in their aforementioned appeal.*

30 (c) *The power of the Court of Appeal to grant the reliefs prayed for in the defendants' motion on notice dated 21/11/91 derives from the inherent jurisdiction of that court.*

35 (d) *By reason of the foregoing "it is not competent for the Court before which the motion seeking to invoke its inherent powers is brought to there and then decide the issue still pending in the Court of Appeal." See Akilu v. Fawehinmi (1989) 21 NWLR (Pt.122) at 199 G-H or (1989) NSCC (Pt. 1) 461 at p. 502 lines 11-13 per Nnaemeka-Agu, J.S.C.*

(e) The decision of the Court of Appeal to grant the reliefs prayed for by the defendants in the motion on notice dated 21/11/91 unjustly deprives the plaintiffs of their constitutional right to conrest the appeal mentioned in paragraph (a) hereof.

(ii) Court of Appeal erred in law in granting the prayers of the defendants/appellants when their decision pre-empted and determined the proceedings in another appeal not yet before them. The plaintiffs will rely on the particulars set out under ground (i) in support of this ground of appeal.

(iii) The Court of Appeal erred in law in failing to uphold the of the plaintiff/respondents to the effect that ground 3 of the grounds of appeal in support of the defendants/appellants appeal from the judgment of the court delivered on 1/11/91 is misconceived, frivolous and unsustainable. Accordingly there was absolutely no basis whatsoever for the prayer of the defendants/appellants in the court below for stay.

(iv) The court below erred in law failing to give the plaintiffs/respondents adequate time and opportunity to prepare for and file necessary papers to the affidavit evidence and to the application file on the behalf of the defendants/appellants.

(v) Even if it had jurisdiction to entertain the defendants' motion on notice dated 21/11/91, the court below erred in law in granting an order which the defendants never prayed for.

Particulars of Error

(a) In their motion on notice dated 21/11/91, one of the defendants' prayers was for an orderly generally restoring the status quo ante, "as at the date of the Judgment on the 1st of November, 1991."

(b) In its judgment in relation to the said prayer the court of Appeal granted an order generally restoring the status quo ante-

“before the date of the delivery of the judgment on the 1st November 1991.

(c) Moreover since a judgment is presumed to be correct until it is set aside by the order of a superior court on appeal, it can never be right (without first deciding that the judgment is wrong) to make
5 *an order “restoring the status quo ante” before the date of the delivery of the judgment”*

(iv) The court below erred in law in failing to observe that the defendants did not and could not have appealed against the order of
10 *the Federal High Court convening an Extraordinary General Meeting of the plaintiff bank and accordingly the question of stopping the meeting so convened for the purpose of ‘Preserving the res pending appeal can never arise”*

15 *Further Particulars of Error*

(a) The order to convene the meeting was made by the Federal High Court in accordance with the claim therefore by the defendants;

20 *(b) It is the case for both parties that the deadlock which had arisen in the Board can be resolved by trying the issue or controversy as to who were the members of the company so that they can meet to reconstitute the Board;*

25 *(c) In the premises, the order of court was virtually made with the consent of the parties;*

(d) There is no basis for the suggestion that it is necessary to stop holding the meeting of 9/11/91 in order to preserve the “res” in the defendants’ appeal. In particular, Ground 3 of the defendants’ grounds of appeal cannot be treated as basis for stopping the said meeting.
30

(vii) If (which is denied) it had jurisdiction to entertain the defendants’ motion dated 21/11/91, the court below erred in law in making the orders prayed for “pending the determination of the appeal before us.”
35

Particulars of Error

(a) The decision of the Court of Appeal only dealt with the invocation of the disciplinary powers of that court to undo what had been done and no consideration was given nor were arguments presented to the court on the merit of prayer (iii) in the said motion.

5

(b) The Court of Appeal failed to appreciate that its decision to set aside the proceedings of and decisions taken at the meeting of 9/11/91 was a distinct and separate exercise from the consideration of the merits of prayer (iii):

10

(c) The orders made by the Court of Appeal were orders which were, in the circumstances unreasonable and which no tribunal, properly instructed in the law applicable, would or ought to have made.”

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The second Notice of Appeal dealing with questions other than questions of law alone reads as follows:

“GROUNDS OF APPEAL

20

(i) *The court below failed to give the plaintiffs a fair hearing by insisting on taking the defendants’ motion on notice dated 21/11/91 on 3/12/91 thereby giving the plaintiffs a grossly inadequate time to prepare an answer to the 39 paragraph affidavit of the said defendants.*

25

(ii) *The court below erred in law and on the facts in failing to observe that their failure to give the plaintiffs adequate time as aforementioned they contravened the plaintiff’s legal rights guaranteed under Section 33 of the 1979 Constitution.*

30

(iii) *The court below erred in law and on the facts in holding that (a) the defendants’ counsel told the Federal High Court that “he had just seen the Newspapers that morning and drew the attention of the court to the publication in one of them that the meeting had been held” and (b) Emmanuel Ejidike (one of the defendants) “read in the newspaper only on the morning of 11th November, 1991 that the meeting in question was held on 9th November, 1991.”*

35

Particulars of Error

(a) In the narration by the learned trial Judge of the address of learned counsel for the defendants it is clear that what he (Ajayi) said was that he was told that the meeting had been held but his clients
5 did not attend for reasons stated by him to the court;

(b) Mr. Ejidike's affidavit did not contain the statement attributed to him by the Court of Appeal.

10 The court below was wrong in coming to the conclusion that the defendants' counsel made an oral application to the learned trial Judge.

(iv) The court below was made wrong in coming to the conclusion that the defendants' counsel made oral application to the
15 learned trial Judge.

Particulars of Error

20 (a) It was the defendants' motion on notice dated 4/11/91 and no other cause or matter that was before the court when counsel for the defendants addressed the learned trial judge;

(b) Counsel for the defendants addressed the learned trial Judge
25 in the (with respect) erroneous belief that he could urge the court to grant him reliefs which were not specifically set forth in his motion on notice;

(c) If counsel for the defendants had wanted to make a fresh
30 oral application he would have complied with the provisions of the applicable rules of court.

(v) The court below erred in law and on the facts in holding
35 that "there exists special circumstances which made it impossible or impracticable to file the application in the court below.

Particulars of Error

(a) The main reason for the conclusion reached by the court below was the alleged failure of Jinadu, J. to fix a date for an ex parte motion and a motion on notice dated 13/11/91 filed on behalf of the defendants;

(b) In coming to the conclusion aforesaid, the court below failed to consider the content of paragraph 39 of Chief Ralph Obioha's affidavit and the document (Exhibit 7 to that affidavit) which supports what the Chief swore to; 5

(c) Both parties were before the court on 18/11/91 and it does not appear that the defendants made any complaint to the court; 10

(d) The Court of Appeal virtually made a finding of bias against Jinadu, J. when the material upon which they based such a severe inference was totally inadequate to support such finding; 15

(e) The Court of Appeal did not take account of the fact that the plaintiffs were not given adequate time to search the High Court file and offer affidavit evidence to show what in fact happened. 20

(vi) The court below was wrong on the facts and also in law in regard to the references and comments which they made to the appointment of Receiver/ Manager by Jinadu, J. before the commencement of trial in this action. 25

Particulars of Error

(a) Since the attention of the Court of Appeal was drawn to the fact that there was an appeal pending before them in regard to the appointment of Receiver Manager, the court should have refrained from making the references and comments which they made regarding the appointment; 30

Alternatively 35

(b) There was no application (oral or written) by either party for the appointment of a Receiver/Manager. In making the appointment Jinadu J. acted suo motu.

4. Reliefs Sought From the Supreme Court:

To set aside the order of the Court of Appeal and striking out the application of the defendants in the court below and or dismiss
 5 the same and or order a re-hearing thereon.”

In his brief of argument. Chief William, S.A.N. for the plaintiffs formulated the following issues for determination in this appeal:

(i) Whether the Court of Appeal had jurisdiction to entertain
 10 or determine the prayers contained in the Motion on Notice filed by the defendants and dated 21/11/91 when:

(a) There was an appeal initiated by a Notice of Appeal dated 21/11/91 filed by the defendants raising the same or substantially the
 15 same questions as those raised in the aforementioned Motion on Notice.

(b) No application was ever made to the Federal High Court for an order:
 20 “Generally restoring the status quo ante as at the date of judgment delivered on the 1st of November, 1991,”

Pending the determination of the appeal against the final judgment of 1st November, 1991

(c) Notwithstanding the fact that the prayer contained in the
 25 aforementioned Motion on Notice was for an order:

“Generally restoring the status quo ante as at the time of judgment delivered on the 1st of November, 1991”

(d) The only arguments considered by the Court of Appeal in their ruling were those relating to the disciplinary powers of that court
 30 to undo what has been done pending the appeal against the judgment of the 1st November, 1991 and not the jurisdiction (which was in fact erroneously exercised) to determine the merits of the application for temporary relief pending the appeal.

(ii) Even if (which is not conceded) the Court of Appeal had
 35 jurisdiction to entertain and determine the prayers contained in the defendant’s Motion On Notice dated 21/11/91, should a court properly instructed in the law applicable, have made the order which it made?

The subsidiary issue for determination is whether the Court of Appeal was correct in making vital and important pronouncements on the appointment of a Receiver/Manager pending trial at the Federal High Court, when they were aware that an appeal was pending before that court on that very matter.

In his own brief of argument, Chief Ajayi, S.A.N., for the defendants also formulated issues for determination arising from the grounds of appeal filed, but having regard to the grounds of appeal and the submissions of both counsel, I am of the view that the resolution of the issues formulated by Chief Williams will lead to the proper determination of this appeal. I will therefore confine myself to those issues.

The first issue raised for determination in the plaintiffs' brief is whether the Court of Appeal had jurisdiction to determine the prayer contained in the motion dated 21/11/91 when the appeal filed by the defendants on the same day raised the same or substantially the same question. Chief Williams in his brief drew the attention of the court to the defendants' motion dated 21/11/91 which, prayed the Court for an order:

(i) Setting aside the proceedings and decisions of the General Meeting of the 1st plaintiff held on Saturday the 9th November, 1991.

(ii) Nullifying any decisions taken or the implementation or any implementation thereof and in particular reinstating all employees of the Bank whose appointments were terminated after the date of the said meeting.

(iii) Generally restoring the status quo ante, at the 1st plaintiff/respondent bank, as at the date of the judgment delivered on the 1st of November, 1991

and submitted that the very issue raised by the defendants' pending appeal had been decided in advance by the Court of Appeal in its decision of 5/12/91. It was his contention that the Court of Appeal had no jurisdiction to do so, citing in support of his submission, the case of *Akilu v. Fawehinmi* (No.2) (1989) 2 NWLR (Pt. 102) 122 (1989) NSCC (Pt.1) 4611. I am unable to accept this submission. I think the order made by the Court of Appeal in its ruling of 5th December, suspending the decisions of the meeting of 9th November is an interlocutory order pending the determination of the ap-

peal. It cannot be said that the order has finally determined the appeal.

The second issue raised by Chief William (SAN) for the plaintiff on p. 5 of his brief is whether the Court of Appeal was right in granting to the defendants an order “generally restoring the status quo ante as at before the date of judgment delivered on 1st November 1991” when the prayer of the defendants was for an order:

“generally restoring the status quo ante as at the date of judgment delivered on the 1st of November, 1991.”

10 It was the submission of Chief Williams that the order should be set aside by this court as it was not the order asked for by the defendant.

While it is my view that a court should not generally grant to a party a relief not claimed by that party, there is nothing wrong in a court, in the exercise of its inherent power, to grant to a party a relief which, in the circumstances of the case that party is entitled to. In this case although prayer (iii) of the defendants’ motion dated 21st November, 1991 asked for an order:

20 *“generally restoring the status quo ante, at the 1st plaintiff/respondent bank, as at the date of judgment delivered on the 1st of November, 1991.”*

It is obvious from the submissions of their counsel that what was sought was the restoration of the status quo before the date of judgment which the Court of Appeal granted. In any case, it has not been shown that what the Court of Appeal granted was more than what the defendants prayed for. I see no substance in this appeal.

As to whether the Court of Appeal had jurisdiction to entertain the prayers contained in the motion dated 21st November, 1991 when the only arguments considered by the Court related to its disciplinary power only to undo what had been done. I am in complete agreement with Chief Ajayi that the court had the jurisdiction to do so. The defendants’ application to the court was to persuade it to exercise that jurisdiction which it undoubtedly had. Whether the court wrongly exercised that jurisdiction by omitting to invite arguments on some other aspects of the application is, in my view, an entirely different matter.

Another issue raised for determination is whether the Court of

Appeal was correct in making vital and important pronouncements on the appointment of a Receiver/Manager pending trial by the Federal High Court, when they were aware that an appeal was pending before that court on that very matter. It was the contention of Chief Williams that the finding of the Court of Appeal that he applied orally for the appointment of a receiver was not supported by any evidence and that that finding must be regarded as an error of law. 5
Now, was the Court of Appeal, on the matter before it, wrong to have made a finding that Chief Williams did make an oral application to the learned trial Judge for appointment of a Receiver/Manager? 10

Having carefully perused the record of proceedings, I have no doubt in my mind that the Court of Appeal was right when they upheld the submission of Chief Ajayi that Chief Williams did make an oral application for the appointment of a Receiver/Manager. The learned Senior Advocate's submission to the learned trial Judge on 10/6/91 as recorded by the trial judge makes this conclusion absolutely clear. On that day he is recorded to have said: "Submits that the contention of 20
the plaintiffs and that the register of members relied upon by the defendants is not the authentic register of members and that there is forgery of the register. The Managing Director of the Bank is also accused of concealing the true and authentic register of members. Submits that in this circumstance court cannot act on the register 25
until the other side is heard in evidence. Submits that in this case the question of whether the other 18 members are members is irrelevant to the prosecution of this case. I agree that the burden of argument is on us to show that notwithstanding the pendency of the dispute in the other suit FHC/L/M69/91 the Court can grant the plaintiffs prayer 30
in claim I of the Statement of Claim. If we fail we have an alternative claim for the appointment of a Receiver/Manager. Submits, there is no dispute that there are two factions and that the Managing Director belongs to one faction therefore why should he continue to manage 35
the bank. In view of the nature of the allegation it is not fair to allow the Managing Director to continue to run the bank. Submits the management of a company is something separate and distinct from the powers of the shareholders. I refer to Feathstone v. Cooke, 16

L.R. Equity 298, 301, 302 Trade Auxiliary v. Vicers, 16 L.R. Equity 303 at 305. On the fact that the board in this case can function. I rely on Automatic Self Cleansing Fitter Syndicate Co. v. Cunning home (1906) 2 Ch. 34 at 44 Gramophone & Typewriter Ltd v. Stanley (1908) 2 KB 89 at 105. Submits that until the whole case is finished

5 *we do not want the Managing Director to continue to run the affairs of the bank. I therefore submit that our case be heard and in the other case we ask for pleading.*"While it is true that there is nowhere in the record of proceedings specifically showing that Chief Williams made an oral application for the appointment of Receiver/Manager,

10 a careful consideration of the learned Senior Advocate's submission to the learned trial judge as set out above leaves no one in doubt that he did invite the learned trial Judge to do so. He indicated in clear terms, that his clients did not want the Managing Director to continue

15 running the affairs of the 1st plaintiff Bank. With regard to the issue relating to the comments said to have been made by the Court of Appeal on appointment of Receiver/Manager, it was the submission of Chief Williams that in his Ruling, Niki Tobi, J.C.A. made reference to the fact that the plaintiffs' counsel made an oral application to

20 Jinadu, J. for appointment of a Receiver and that the application was granted but when the defendants' counsel made his own oral application to the same judge to set aside the proceedings of the Extraordinary General Meeting held on 9/11/91, his application was refused. It was his submission that since there was an appeal pending on the

25 appointment of receiver, the Court of Appeal should not have made the comments which they did on the matter. While it is my view that an appellate court should generally refrain from commenting on a matter which is pending on an appeal before it, in this particular case, it is difficult to see how the Court of Appeal could possibly avoid

30 commenting on the circumstances relating to the appointment of Receiver/Manager by the learned trial Judge after both counsel had made submissions on the matter. In any case it has not been shown that the comments so made by the Court of Appeal are in any way,

35 likely to prejudice the fair hearing of the pending appeal or occasion a miscarriage of justice.

In the second Notice of Appeal filed by Chief Williams, SAN, on behalf of the plaintiffs, the learned Senior Advocate formulated eight questions (other than questions of law alone) for determination

as follows:

“(i) Whether the plaintiffs were given adequate time to answer the affidavit evidence of the defendants.

“(ii) If the answer to question (i) is in the negative, was the right of the plaintiffs to a fair hearing guaranteed under Section 33 of the 1979 Constitution contravened?

“(iii) Whether the Court of Appeal was correct in holding that there were circumstances which made it impossible or impracticable for the defendants to apply to the Federal High Court for the reliefs prayer for in their motion on notice dated 21st November, 1991.

“(iv) Whether the Court of Appeal was correct in holding that the defendants’ counsel in fact made an oral application to the Federal High Court when the defendants’ motion on notice dated 4/11/91 came up for hearing on 11/11/91.

“(v) If the Supreme Court should find that it was correct for the Court of Appeal to comment on the appointment of a Receiver/Manager pending trial were the comments made by that Court valid?

the question of what Chief Ajayi said before the Federal High Court 11/11/91 in relation to the National Concord of that date.

“(vii) Was the Court of Appeal correct in holding that in the circumstances of this case the defendants were compelled by necessity to make an oral application.

“(viii) Whether the Court of Appeal was correct in holding that the learned trial Judge failed to fix a date for Motion Ex Parte and a Motion on Notice tiled by the defendants dated 13th November, 1991.”

With regard to the first question raising the issue of fair hearing, Chief Williams submitted that the plaintiffs were served with the defendants’ motion dated 21/11/91 on 25th November, at 4.00 p.m. The hearing notice was for 2nd December, which was the first working day after the holidays as Wednesday, Thursday and Friday (27th-29th November) were public holidays. It was his submission that the Court of Appeal insisted that their counter-affidavit must be filed by 10 a.m. on the following day and that the hearing of their Motion must go on at 12 noon that day. He complained that the time given them to prepare their affidavit evidence was insufficient and submitted that failure on the part of the Court of Appeal to give them sufficient time to prepare their counter-affidavit amounted to a denial of

fair hearing. I do not see any substance in this complaint as there is nothing on the record to show that the learned Senior Advocate applied for time to enable the plaintiffs prepare their affidavit which application was unreasonably refused.

As to whether the Court of Appeal was correct in holding that
 5 there were special circumstances which made it impossible or impracticable for the defendants to apply to the Federal High Court for the reliefs prayed for in their motion dated 21st November, 1991. I am of the view that the court was correct. Now, Order 3 rule 3(4) of the rules of the Court of Appeal provides that.

10 *"Whenever 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."*
 15

In his lead ruling, Niki Tobi, J.C.A. dealt with this issue and after construing what, in his view, amounted to an impossible or im-
 20 practicable act, concluded as follows:

*"In the instant case, the learned trial Judge, by his failure to fix the motions for hearing had made it impossible or impracticable for the applicants to seek the reliefs in this court. The doors of the court
 25 were firmly locked against the applicants and they could only open them at the pain of possible deprivation on their part. In the circumstances, I hold that there exists special circumstance, which made it impossible or impracticable to file the application in the court below."*

30 The next issue is whether the Court of Appeal was right in holding that the defendants' counsel made an oral application to the Federal High Court when the defendants' motion on notice dated 4/11/91 came up for hearing on 11/11/91. I have no difficulty in coming to the conclusion that Chief Ajayi for the defendants did make an
 35 oral application to Jinadu, J. on 11/11/91 urging the learned trial Justice make an order, as recorded by Jinadu, J. in his Ruling of 12/11/91: *"setting aside the proceedings held as a result of the notice of meeting issued pursuant, to the order of this Court in its judgment*

and restore all parties affected to the positions which they were before this court's judgment." In that ruling, Jinadu, J. was of the view, agreeing with the submission of Chief Williams that "the court can only interfere in making the order sought if, and only if, there is a prayer to that effect contained in the motion paper." He concluded in his ruling as follows:

"Having regard to the following, coupled with the fact that Chief Ajayi, S.A.N. did not seek the leave of this court to amend the prayers contained in his application to incorporate the prayer to set aside the proceedings at the meeting of the 1st respondent held on 11/11/91 this court cannot grant the said prayer which is accordingly hereby refused." Anybody who has read the whole of Jinadu, J's ruling delivered on 18th November, 1991 would have no difficulty at all in coming to the conclusion that the "prayer" which was refused was Chief Ajayi's oral application.

Issue No. (v) relating to the comments said to have been made by the Court of Appeal on appointment of a Receiver/Manager has been dealt with earlier in this judgment. With regard to the issue of the resolution of the conflict of evidence by the Court of Appeal as to what happened in the Federal High Court on 11/11/91, paragraph 22 of the affidavit of Mr. Ejike in support of the motion on notice dated 21/11/91 reads as follows:

"When the Motion on Notice for the suspension of the orders of the learned trial Judge then came up on Monday 11th November, our counsel Chief G.O.K. Ajayi, S.A.N. informed the Court that he had just seen the Newspapers that morning and drew the attention of the Court to the publication in one of them that the meeting had been held and he thereupon made an oral application that the Court should set aside the proceedings of the meeting held on Saturday 9th November, 1991 as those proceedings were calculated to frustrate the exercise of the discretion of the Court to hear the application for the suspension of the order."

Paragraph 31 of the counter-affidavit deposed to by Chief Obioha says:

"Paragraph 22 of the said affidavit is untrue in the sense that I never heard Chief Ajayi say that he had just read of the Saturday meeting in the newspapers that morning, nor did he expressly tell the court that he was making any oral application to the court"

While Mr. Ejike in his affidavit swore categorically that Chief Ajayi informed the court that he had just seen the publication in one of the newspapers that morning stating that the meeting had been held, all that Chief Obioha said in paragraph 31 of the counter-affidavit was that he never heard Chief Ajayi say so.

5 In the circumstances, in my view the Court of Appeal was justified in preferring the affidavit evidence of Mr. Emmanuel Ejike to that of Chief Obioha.

As to whether the Court of Appeal was correct in holding that in the circumstances of the case, the defendants were compelled by necessity to make an oral application. I would answer the question in the affirmative since that court found, as a fact, on the affidavit evidence before it that it was on the morning of 11th November, 1991, that the defendants knew that the meeting in question was held on 10 Saturday, the 11th November, 1991.

15 The last point is whether the Court of Appeal was correct in holding that the learned trial Judge failed to fix a date for Motion ex parte and a Motion on Notice filed by the defendants dated 13th November, 1991. In my view the Court of Appeal was right in so doing. Paragraphs 31 to 35 of the affidavit of Mr. Emmanuel Ejike which stated specifically that the learned trial judge had failed to fix a date for the hearing of the motions have not been effectively controverted not even by paragraph 39 of the counter-affidavit which merely says:

25 *"The contents of paragraphs 33, 34 and 35 of the affidavit cannot be true. Exhibit 7 shows that the motion filed on 13/11/91 must originally have been fixed for the 18th of November. It was served on Chief Rotimi Williams' Chambers on 25/11/91 and is to come up for hearing on 3/12/91 (i.e. today)."*

30 In the circumstances the learned Justice of Appeal was absolutely right in his finding that *"here is no evidence that the motion was ever fixed by the learned trial Judge. And what is more, he has not up till this moment fixed the motion."*

35 Having given very careful consideration to all the arguments and submissions of learned counsel in the appeal. I have come to the conclusion that the decision of the Court of Appeal was right. The appeal therefore fails in its entirety and it is accordingly dismissed with N1000.00 costs awarded to the defendants.

KARIBI-WHYTE JSC

I have read the judgment in this appeal of my learned brother Kawu, J.S.C. I agree with the conclusion that the appeal of the appellants should be dismissed. I also hereby dismiss the appeal with N1, 000.00 to the defendants.

5

WALI JSC

I have had a preview of the judgment of my learned brother Kawu, J.S.C. and I entirely agree with his reasoning and conclusion for dismissing the appeal. 10

There is no doubt that when the application for injunction to retain the status quo ante is read against the background of the case and the subsequent events that happened after the judgment of the trial court, the respondents were in my view, right to apply to the Court of Appeal for the interim relief. Retaining status quo ante in the circumstances of this case cannot be ascribed any meaning other than the status quo of the res preceding the judgment of the trial court and its subsequent orders. 15 20

In Blacks Law Dictionary (5th Edition) the phrase status quo ante is defined thus on page 1264:

"The existing state of things at any given date quo ante bellum, the state of things before the war "Status quo" to be preserved by a preliminary injunction is the last actual, peaceable, uncontested status which preceded the pending controversy: Edgewater Construction Co Inc. v. Percy Wilson Mortgage & Finance Coops: 2 111 Dec. 864, 357 N.E. 2d 1307. 1314". 25

It is for this and the fuller reasons given in the lead judgment of my learned brother, Kawu, J.S.C. and which I hereby adopt that I too, will dismiss the appeal. It is accordingly dismissed with N1,000.00 costs to the respondents. 30

The ruling and Orders of the Court of Appeal dated 5th December, 1991 are hereby affirmed. 35

OGUNDARE JSC

I have had the advantage of a preview of the judgment of my

learned brother, Kawu, J.S.C. just read. I agree with his conclusion that this appeal be dismissed. I wish, however, to add a few words of my own.

Jurisdiction:

5 This is the first of the two issues set out in the appellants' brief as calling for determination in this appeal. My learned brother has set out in his judgment the facts leading to this appeal. I need not repeat them here again except in so far as they are relevant to my decision.

10 The judgment of the Federal High Court was given on 1/11/91 in the consolidated suits Nos., FHC/L/M67/91; First African Trust Bank Ltd & Anor v. Basil O Ezegbu & Anor and FHC/L/M69/91 Cletus M. Ibeto & Ors v. Chief Ralph Obioha & Ors. In Order to make for consistency and avoid confusion, I will here after refer to the plaintiffs in FHC/L/M69/91 as "plaintiffs" and the defendants in 15 that suit as "defendants" "Judgment having gone in favour of the plaintiffs in the judgment of Jinadu. J. delivered on 1/11/91, and the defendants appealed to the Court of Appeal and simultaneously applied to the trial court for an order to stay, pending appeal, that court order that a meeting of the shareholders of the 1st plaintiff Bank be 20 held. The plaintiffs were served with the motion which was fixed for 11/11/91 for hearing before Jinadu J. The plaintiffs held a meeting of the Bank's shareholders on 9/11/91 and took certain decisions that could not be said to be in defendants favour. When the motion for stay came up for hearing on 11/11/91 learned leading counsel for 25 the defendants, Chief G.O.K. Ajayi, S.A.N. informed the court of the development arising out of the plaintiffs' action and opined that his motion for stay had been pre-empted by the plaintiffs. He then suggested that the proper course of action for the court to take was to set aside all decisions taken at the meeting of 9/11/91. After taking argu- 30 ments from learned leading counsel on both sides, the judge, in a ruling delivered on 18/11/91, observed:

35 "Having regard to the statement made by Chief Ajayi, S.A.N. ... from the Bar which was unchallenged by Chief Williams, S.A.N., that the meeting ordered by the court to be called and held was held on Saturday 9/11/91, that is before 11/11/91 when the application for stay came up for hearing the application for stay can no longer be entertained because there is nothing left to be stayed. It was therefore in order for Chief Ajayi. S.A.N., not to have argued the applica-

tion as filed in court. I will therefore not aver in this ruling to all the submissions of Chief Williams, S.A.N. in respect of the merits or demerits of the application for stay,

“Chief Ajayi, S.A.N., has very rigourously relied on the Vaswani case, (supra) 77 at pages 87-88, 90-91 to urge this court to set aside the proceedings of the meeting held as a result of the notice issued

Pursuant to this court’s order and to restore all parties affected to the position which they were before the court’s judgment. On the other hand Chief Williams, S.A.N, also relying on the same Vaswani Case, (1972) 1 All NLR (Pt. 2) p. 483 at 485 line 30 to page 486 line 2 contended that the order now sought on behalf of the applicants herein cannot be granted because there was no application in that regard before the court. He agreed that the court can make such an order if circumstances permit it but argued that there must be a prayer to that effect before the court, that is, a prayer in the application before the court that the proceedings at that meeting should be set aside.

This court on the strength of the Vaswani case (supra), has the power to set aside the proceedings of the meeting held on 9/11/91 if it is found that the action or conduct of one of the parties to this action taken whilst this application for a stay of execution is pending in court was designed for the obvious or subtle purpose of stultifying the exercise of this court’s jurisdiction and indeed its duty to consider the application on its merits. In the unreported case of Oba S.K. Adetona v. A.G. Ogun State & ors. Suit No. FCA/1/110/82 decided on 24/8/83. Uche Omo, J.C.A. (as he then was) stated that a motion for a stay of execution shows a desire for the existing order to remain.

Be that as it may, I am in full agreement with the submissions of Chief Williams, S.A.N, that the court can only interfere in making the order sought if and only if there is a prayer to that effect contained in the motion paper. In Vaswani Case (supra), in addition to the prayer of the applicants therein the applicants specifically prayed for an order that the warrant of possession issued in the matter be set aside and the defendants therein restored into possession of the property in dispute until any order that the court therein might deem fit to make on the substantive motion dated 12th day of June, 1972 and the order was made accordingly by the Supreme Court in the cir-

cumstances of that case. This has to be so because it is trite law that the motion papers constitute pleadings and a party is bound by his pleadings. The parties join issues on the prayer in the motion papers, therefore a party cannot depart from its tenor without prior amendment.”

5 After citing from *Ekpenyong & ors v. Nyong & ors* (1975) 2 S.C. 71 (1974-75) 9 NSCC 28, 32-33, the learned judge concluded:

“Having regard to the following, coupled with the fact that Chief Ajayi, S.A.N, did not seek the leave of this court to amend the prayers contained in his application to incorporate the prayer to set
10 aside the proceedings at the meeting of the 1st respondent held on 11/11/91 this court can not grant the said prayer which is accordingly hereby refused.”

Following the refusal by the trial judge to set aside the proceedings of the meeting held on 9/11/91, the defendants applied to
15 the Court of Appeal on 21/11/91 for a similar order which that court granted. It is the granting of that prayer that is the subject matter of this appeal.

Chief Williams, S.A.N, for the plaintiffs contended that as the
20 defendants appealed against the trial court’s ruling of 18/11/91, the Court of Appeal would have no jurisdiction to entertain the application subsequently made to it which would, in effect, raise the same or substantially the same questions as those raised in the appeal. Chief Williams in his oral argument observed that the defendants appealed
25 against the ruling of 18/11/91. Our attention was called to pages 25-27 of the Record of Appeal. Learned Senior Advocate observed that the normal practice where stay pending appeal was refused by a lower court is either to appeal against the refusal or move the appellate court for stay. He submitted that a party could not do both. He
30 further submitted that the consequence of doing both in this case was that the Court of Appeal would have no jurisdiction to deal with the application for stay. Learned Senior Advocate submitted that the jurisdiction to decide on appeal should supersede the jurisdiction to decide on a motion. He relied on *Akilu v. Fawehehmi* (1989) 2 NWLR
35 (Pt.102) 122; (1989) NSCC (Pt. 1), 461 per Nnaemeka Agu J.S.C.

Chief Ajayi, S.A.N., for the defendants, in reply, submitted that the proposition of Chief Williams had no relevance to the facts of the present case. He referred to the prayers sought in the motion before

the Court of Appeal and submitted that those prayers had no relationship with the reliefs being sought in the appeal.

Learned Senior Advocate referred us to the two notices of appeal pending in this matter against the substantive judgment and against the trial court's ruling of 18/11/91. He observed that following hearing on 11/11/91 he filed yet another motion on 13/11/91 which had not been fixed for hearing and submitted that the application to the Court of Appeal was substantially the same as asking for stay pending appeal. He further submitted that the rule in *Akilu v. Fawehinmi* (supra) was not violated.

It is not disputed, and this court has laid it down in *Akilu v. Fawehinmi* (No, 2) (supra), that it is not competent for the court before which a motion seeking to invoke its inherent powers is brought to there and then decide the issue still pending before it. In my view, therefore, if the motion brought before the court below by the defendants would lead that court to decide the issue(s) in the appeal of 25/11/91 pending before it, it would be incompetent for that court to decide the motion.

In the motion before the Court of Appeal dated and filed on 21/11/91, defendants sought the following prayers:

(i) Setting aside the proceeding and decision of the General Meeting of the 1st plaintiff held on Saturday the 9th of November, 1991.

(ii) Nullifying any decision taken or the implementation or any implementation thereof and in particular reinstating all employees of the Bank whose appointments were terminated after the said meeting.

(iii) Generally restoring the status quo ante, at the 1st plaintiff/respondent bank, as at the date of the judgment delivered on the 1st November, 1991."

Although it was not expressly stated on the face of the motion that the prayers sought were to endure pending the determination of any appeal to the Court of Appeal, it would appear, however, both from the affidavits in support and counter affidavits arguments of learned counsel and the ruling of the Court that the prayers, if granted, were to be in force pending the determination of the appeal against the final judgment of the trial High Court: the substantive appeal, for short. In my respectful view, a decision on the motion cannot be said

to pre-empt the decision on the substantive appeal.

True enough, following the trial court's ruling of 18/11/91, the defendants appealed to the Court of Appeal upon one ground of appeal which read:

"1. Error in Law

5 *The learned trial Judge erred in law when he held that he could not set aside the proceedings of the General Meeting of the 1st plaintiff Bank held on the 9th of November, 1991 because the application for such order had been made orally in court when:*

10 *(i) The learned trial Judge had made an order in his judgment given on the 1st of November, 1991 directing that a General Meeting of Members listed in the Register of Members "Exhibit B" be summoned by the Company Secretary (then on suspension).*

15 *(ii) The defendants/appellants having appealed against the said judgment had filed an application for an order suspending the order for the holding of the General Meeting and served all parties affected within two days.*

20 *(iii) The plaintiffs/respondents did not dispute that they had been served with the application to suspend the said order which application was fixed for hearing on the 11th of November.*

(iv) The plaintiffs/respondents admitted before the learned trial Judge on the 11th of November that they had nevertheless proceeded on Saturday the 9th of November to hold the meeting of the shareholders pursuant to the order sought to be suspended.

25 *(v) The defendants/respondents only became aware of the holding of the said General Meeting through Newspaper Publications issued on the morning of the 11th of November, 1991 - the morning when their application for suspension of the order was due to be heard.*

30 *(vi) The defendants/appellants' counsel thereupon brought the facts to the knowledge of the Court orally in open court and pointed out that it would be impossible for him to move his own application unless the Court made an order setting aside the proceedings of the*
35 *General Meeting held on the previous Saturday and restored the status quo ante.*

(vii) The plaintiffs' counsel admitted again that:

(a) they had been duly served with the application for suspension of the court order:

(b) they had indeed held the said General Meeting on the previous Saturday.

(viii) There had been no time for the defendant/appellants to file a written application.

(ix) The learned trial Judge had before him all the material he needed to make an order which would nullify steps which one of the parties to the action had taken to frustrate any order which the court was entitled to make upon the application therein before it.

(x) In the particular circumstances of the case before the learned trial Judge there was no principle of law which prevented him from making the appropriate order which would have ensured the preservation of the dignity, effectiveness and authority of the Court as a superior Court of record."

and sought the following relief:

"an Order setting aside the decision of the learned trial Judge. And substituting an order setting aside the proceedings and decisions of the General Meeting of the 1st plaintiff Bank held on the 9th of November, 1991 and all other actions of measures including the removal of employees taken pursuant to any decisions taken at the said meeting."

Notwithstanding the relief sought the issue in that appeal, in my respectful view, is the correctness or otherwise of the reason given by the learned trial Judge for refusing defendants' application. With profound respect to Chief Williams, I do not share the view that that appeal precluded the defendants from again applying to the trial court or appellate court by way of a written motion for the exercise of its disciplinary power over the plaintiffs and for a stay of the orders made in the final judgment of the trial court pending the determination by the Court of Appeal of the appeal against the said orders. That precisely, in my humble view, was what the defendants did by their motion of 21/11/91 in the Court of Appeal. I am not prepared to say that that court lacked competence to entertain the motion before it. Nor am I prepared to say that the facts in the matter on hand are on all fours with the facts in *Akilu v. Fawehinmi (No.2)* (supra). If stay had been refused by Jinadu J. and the defendants had appealed against that refusal of stay, it would have been incompetent of the Court of Appeal to entertain a motion, at the instance of the defendants, for a similar prayer for stay while that appeal subsist. In the matter on hand,

the prayer for stay was not pursued with, that prayer having been preempted by the act of the plaintiffs in holding the meeting of 9/11/91. What the learned trial Judge decided was that there being no formal prayer before him he could not exercise his disciplinary power in respect of plaintiffs' conduct. It was this decision that was challenged in the appeal lodged on 21/11/91.

In conclusion, the issue of lack of jurisdiction or competence taken by learned leading counsel for the plaintiffs is, in my respectful view and with profound respect to learned senior advocate, not well taken. I dismiss it.

Coming now to the second issue or question raised in the appellants' Brief, it is sufficient for me to say that I agree with the reasoning of my learned brother Kawu, J.S.C., on this issue. The plaintiffs' conduct in holding the meeting of 9/11/91, when they well knew there was, a motion to be heard on 11/11/91 staying the court's order authorising that meeting to be held was highly reprehensible.

They clearly intended to pre-empt the decision of the court on the motion and render the court impotent in the matter. No tribunal worth its salt should allow a party to get away with such impunity. Had the court below failed in its duty to exercise its disciplinary power, as it did, the plaintiffs would have succeeded in rendering nugatory whatever decision in their favour the defendants would have had on the determination of their appeal. The plaintiffs would have, in the interim, altered the character of the 1st plaintiff Bank in such a manner that the defendants, in pursuing their appeal, would have engaged in an exercise in futility. The Court of Appeal, in the circumstance, acted properly and honourably in making the orders it made. I have no reason whatsoever to fault the exercise of their discretion which to me was in accord with the best interests of justice.

The subsidiary issue raised in the appellants' Brief has equally been adequately dealt with in the lead judgment of my learned brother Kawu, J.S.C. One only needs to add that the approach of the learned trial Judge to this matter was rather puzzling. On 10/6/91, he acted to protect the interests of justice. I refer to his ruling of that day in which he said:

"I am of the views that claim 1 on the Statement of Claim in this suit has nothing to do with the determination of the membership of the 1st plaintiff but since the defendants have brought in the issue

of membership in a counter-claim the two actions can now be decided upon after hearing the parties in evidence. However, there is much force in the submission of Chief Williams, S.A.N., that there are two factions to the matter; the Managing Director belongs to one of the two factions, I think it will be an unfair advantage to the other faction if the Managing Director is allowed to continue to manage the affairs of the bank which may be to the detriment of the other faction. I will be going on with the hearing of this suit now but I propose to appoint an independent person as a receiver/manager to manage the affairs of the bank until the conclusion of this case. It is also my view that the suit number FHC/M69/91 can conveniently be consolidated with this suit and trial can proceed on the, Statement of Claim and Statement of Defence already filed unless counsel hold different views which I will presently listen to. It is also my view that the two learned Senior Counsel can agree on who to be appointed a Receiver/Manager failing which I shall name one."

There was then no application before him for the appointment of a receiver/manager. Chief Williams, S.A.N. had submitted before him as follows:

"Submits that in this case the question of whether the other 18 members are members is irrelevant to the prosecution of this case. I agree that the burden of argument is on us to show that notwithstanding the pendency of the dispute in the other suit FHC/L/M69/91 the court can grant the plaintiff prayer in claim I of the Statement of Claim. If we fail we have an alternative claim for the appointment of a Receiver/Manager."

Chief Ajayi, S.A.N. in his reaction to the Judge's order appointing a receiver/manager said:

"I have no doubt that the court has power to appoint a Receiver/Manager but we are entitled to notice that this type of application is to be made before the court today to know what materials can be placed before the court before that order can be made and to prepare our argument in opposition to meet that application. It is only then that we would be accorded a hearing before the court makes the order. I have no doubt that the court has power in appropriate cases to make orders if they are provided for by the law but our Constitution provides that before an order is made affecting or to the prejudice of any individual he is entitled to be heard. The

Managing Director is under the Articles of Association entitled to run the day to day affairs of the company and the defendants representatives are entitled to be heard if anything is to be done to prejudice the expectation. What we came here to do today according to the Court's record is to hear the substantive suit. I therefore submit that
 5 *the court's order has come as a complete surprise, I therefore respectfully submit that the court ought not to proceed further with giving effect to that order."*

Chief Williams replied:

10 "If my learned friend does not like the order he can appeal as of right. I have never heard counsel in a case telling the judge not to proceed any further."

The learned trial Judge closed arguments on the issue in these words:

15 *"In the course of Chief Williams, S.A.N. argument he adverted the mood (sic) of the court (sic) to the fact that the Managing Director currently running the affairs of the bank belongs to one of the factions in dispute but Chief Ajayi, S.A.N. did not deny the submission. I believe (hat in my inherent jurisdiction I can act Suo motu to*
 20 *do what I consider is just in this circumstances of this case and that is exactly what I have done."*

He then proceeded to appoint the Official Receiver as the Receiver/Manager of the 1st plaintiff Bank.

25 When called upon by the defendants however, to exorcise his disciplinary jurisdiction over a party that had acted in disregard of his court, the learned trial Judge suddenly discovered there was no formal application before him to that effect. He said:

30 "This court on the strength of the Vaswani case, (supra) has the power to set aside the proceedings of the meeting held on 9/11/91 if it is found that the action or conduct of one of the parties to this action taken whilst this application for a stay of execution is pending in court was designed for the obvious or subtle purpose of stultifying the exercise of this court's jurisdiction and indeed its duty to consider
 35 the application on its merits. In the unreported case of Oba S.K. Adetona v. A.G. Ogun State & ors (1984) 5 NCLR 299 Suit No. FCA/1/110/82 decided on 24/8/93, Uche Omo, J.C.A. (as he then was) stated that a motion for a stay of execution shows a desire for the existing order to remain.

"Be that as it may, I am in full agreement with the submissions of Chief Williams, S.A.N., that the court can only interfere in making the order sought if and only if there is a prayer to that effect contained in the motion paper. In Vaswani Case, (supra) in addition to the prayer of the applicants therein the applicants specifically prayed for an order that the warrant of possession issued in the matter be set aside and the defendants therein restored into possession of the property in dispute until any order that the court therein might deem fit to make on the substantive motion dated 12th day of June, 1972 and the order was made accordingly by the Supreme Court in the circumstances of that case. This has to be so because it is trite law that the motion papers constitute pleadings and a party is bound by his pleadings. The parties join issues on the prayer in the motion papers, therefore a party cannot depart from its tenor without prior amendment."

He refused to uphold the dignity of the court for the reason that:

"Chief Ajayi, S.A.N., did not seek the leave of this Court to amend the prayers contained in his application to incorporate the prayer to set aside the proceedings at the meeting of the 1st respondent held on 11/11/91."

It is difficult indeed to reconcile the attitude of the learned trial judge in the two cases cited above. Could it be said that he held the scale of justice evenly between the parties? I cannot answer this question in his favour. But perhaps the less said about it all, the better. Suffice it to say, however, that what the court below did say on the appointment of a Receiver/Manager had nothing to do with the propriety or otherwise of making the appointment - an issue in the pending appeal before it, but on whether the learned trial Judge acted fairly in granting in favour of the plaintiffs an order they did not ask for; he acted suo motu, while refusing, when it was the defendants' turn, to act on the ground that they (defendants) did not formally ask for the order needed to uphold the court's dignity by the exercise of its disciplinary power over a party in contempt. After all, Order 33 rule 2 of the Federal High Court Rules allows him some discretion in the matter. It reads:

"Unless the Court otherwise orders, no motion shall be entertained until the party moving has filed a motion paper, or made ver-

36 F.A.T.B.Ltd. v. Ezegbu (1993) 7 KLR Ogundare JSC
bal application to the registrar, distinctly stating the terms of the order
sought.”

For the reasons given above and the fuller reasons given in the
lead judgment of my learned brother Kawu, J.S.C. I have no hesita-
tion in dismissing this appeal which I hold to be completely devoid of
5 any merit. I too award N1,000.00 costs in favour of the defendants.

OGWUEGBU JSC

10 I have had the opportunity of reading in draft the lead judgment of
my learned brother Kawu, J.S.C.

I agree with his conclusion that this appeal should be dismissed.
I also dismiss the appeal with N1,000.00 costs in favour of the re-
spondents.

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