

**SUPREME COURT OF NIGERIA**

17TH DECEMBER, 1993. SC. 119/1991

**CORAM:- M. L. UWAI, A. B. WALI, I. L. KUTIGI,  
Y. O. ADIO, A. I. IGUH, JJSC**

B.V. MAGNUSSON

(Carrying on business as  
United Producers)

..... DEFENDANT/APPLICANT/  
APPELLANT

AND

1. K. KOKI

..... PLAINTIFFS/RESPONDENTS

2. SILVER NORTH LIMITED

3. SILVER NORTH International  
Limited

APPEALS - Court of Appeal's error - in wrongfully deeming a prayer in a motion paper as abandoned and dead - where that prayer could not have been granted - whether appellant suffered any injustice thereby

APPEALS - Pending appeal before the Court of Appeal - whether court can mandate a merchant bank - to delve into certain issues appealed against

COURTS - Motion supported by affidavit - Counsel's failure to argue the second prayer - whether court was bound to have considered that prayer and rule on it

INTERLOCUTORY APPLICATIONS - Motion for stay of execution - Counsel's failure to argue one of the prayers - whether tantamount to abandonment of that prayer

PRACTICE & PROCEDURE - Moving of motion supported by affidavit - Counsel's silence in respect of a prayer - whether that prayer should be deemed as abandoned and dead

**FACTS**

The Plaintiffs/ Respondents before the Lagos High Court, obtained judgment against the Appellant in the sum of \$894390 or its naira equivalent being special damages amongst other grants to die said Respondents. Upon the High Court's dismissal of the Appellants' application for stay of execution pending appeal, Appellant made a similar application to the Court of Appeal praying also for variation of the High Court's order - prayer (2).

The Court of Appeal granted the application for stay but refused to consider prayer (2) (variation of the High Court's Order), deemed it as abandoned and dead merely because Appellant's Counsel did not argue it in his address. As part of the conditions for granting the stay of execution, the Court of Appeal referred certain issues relating to the naira equivalent of the judgment debt and interest rates, that are pending in the appeal before it to a merchant bank for determination. Appellant being dissatisfied has further appealed to the Supreme Court, challenging the Lower Court's reference of those issues to a merchant bank and the treating of his prayer (2) as abandoned and dead.

**HELD** (unanimously allowing the appeal)

1. Although counsel did not say anything in respect of prayer (2) (variation of the High Court's Order), his silence simpliciter cannot be equated with abandonment of that prayer since the said prayer was not expressly withdrawn. (P.179L9)

2. As there was a 24 - paragraph affidavit in support of the two-legged application, the Court of Appeal was clearly wrong to have deemed prayer (2) of the application as abandoned and dead. The court was bound to have considered the prayer on the materiality and relevance of the affidavit in relation to the prayer and rule according, (p.179 L12)

3. Although the Court of Appeal was wrong to have deemed prayer (2) abandoned and dead, the Appellant suffered no injustice as a result of that ruling seeing that from the facts in issue the variation order prayed for could not have been made possible (p. 180 L7)

4. It was wrong for the Court of Appeal to have mandated the first city Merchant Bank to delve into issues in the appeal yet to be heard and decided by the court. And the paragraphs of that court's ruling containing those mandates

are hereby struck out (p. 182 L31)

*PER KUTIGI JSC "It is necessary for an applicant to state fully in an affidavit or affidavits, the facts he intends to rely upon in seeking the prayers or orders contained in the motion paper because except with leave of court, he will not be heard in respect of facts not contained in the affidavit. Nothing however prevents the court in appropriate cases, from allowing or permitting an applicant to make an oral application in open court". (P. 179 L. 1)*

*PER IGUH JSC Averments of facts in pleadings must however be distinguished from facts deposed to in an affidavit in support of an application before a court. Whereas the former, unless admitted, constitute no evidence, the latter are by law evidence upon which a court of law may in appropriate cases act..... an address of counsel in moving an application is not the evidence in support of such application. The evidence is the deposition contained in the affidavit in support thereof. (p. 187 L14)*

#### **REPRESENTATION:**

Chief G.N. Uwechue SAN, with E. Anyanwu for the Appellant.

Dr. Gbolaham Elias and Eme O. Mbanugo for the Respondents.

#### **CASES REFERRED TO**

1. Ajikawo v. Ansaldo (Nigeria) Ltd. (1991) 2 NWLR (pt. 173) 359 at 371
2. Babe v. Bankole (1986) 3 NWLR (pt. 27) 141
3. Olatunbosun v. N. I.S.E.R. Council (1988) 9 N.S.C.C. (pt. 1) 1025
4. Yusuf v. Nigeria Tobacco Company Ltd. (1977) 11 NSCC 349 25
5. Fawehimm v. Akilu (1990) 1 NWLR (pt. 127) 450 at 468 & 471
6. The National Investment & Properties Co. Ltd. v. The Thompson Organisation Ltd. (1969) NMLR 99
7. Falobi v. Falobi (1976) 9-10 SC. 15
8. Eboh v. Oki (1974) 3 SC. 179
9. Uku v. Okumagba (1974) 3 SC. 35)
10. Akinfosile v. Ijose (1960) 5 F.S.C. 192
11. Akanmu v. Adigun (1993) 7 NWLR (pt. 304) 218 at 231
12. Obmiami Brick & Stone Ltd v. A.C.B. Ltd (1992) 3 NWLR (pt. 229) 260 at 293

#### **LEAD JUDGMENT BY KUTIGI JSC**

The plaintiffs sued the defendant in the Lagos High Court and

obtained judgment against him in the following terms-

*"Judgment is hereby entered for the plaintiffs against the defendant for the special damages of \$894,390 or its Naira equivalent with interest at 15% per annum from 1st day of January, 1982 to 31st day of July, 1987 and at 20% per annum from 1st August 1987 until today and N1,000,000 (One million Naira) being general damages."*

The judgment was delivered on the 29th day of June, 1990. The defendant was not satisfied. He appealed to the Court of Appeal. Meanwhile he filed an application in the High Court for a stay of execution of the judgment pending the determination of the appeal by the Court of Appeal. The learned trial Judge in his ruling of 9th July, 1990 dismissed the application when he stated thus-

*"This application for stay is hereby dismissed. The First Bank of Nigeria Limited shall pay the amount preserved with the interest that has accrued thereon to the First City Merchant Bank Limited of Primrose Tower, 9th - 10th Floor, 17A Tinubu Street, Lagos.*

*The said First City Merchant Bank Limited shall give its bank's guarantee to the judgment debtor within 30 days of the receipt of the money from the First Bank of Nigeria Limited pending the determination of the appeal in this court."*

Not satisfied with the ruling of the High Court, the defendant filed a fresh application in the Court of Appeal, Lagos praying for the following:-

*"(1) An order staying the execution of the judgment of the High Court of Lagos State, delivered by Hon. Justice Afolabi Adeyinka on the 29th day of June, 1990 pending-*

- (a) the ascertainment of the exact total Naira value of the judgment debt, and*
- (b) the determination of the appeal already filed.*

*(2) An order varying the order of the High Court of Lagos State delivered by Hon. Justice Afolabi Adeyinka dated the 9th day of July, 1990 by directing that*

*(a) out of the sum of N5,863,960.00 and accrued interests thereon preserved with First Bank of Nigeria Limited of Adeyemo Alakija Street, Victoria Island, Lagos (First Bank), the sum of N2,464,482.90 being the judgment debt or such part of the sum earlier preserved as may be sufficient to satisfy the judgment debt be further preserved with the said First Bank, or African Continental Bank Limited of 27/29 Martin Street, Lagos or First City Merchant Bank Limited of Primrose Tower, 17A Tinubu Street, Lagos in a fixed deposit amount yielding interest at normal banking rates pending the determination of the appeal in this suit;*

(b) First Bank of Nigeria Limited or such other Banks as shall preserve the said judgment debt to give its bankers guarantee to the Chief Registrar of the High Court of Lagos State and the parties thereto for the due payment of the sum preserved and all accrued interests to the successful party in the appeal;

(3) Such further order or orders as the court may deem fit to make in the 5 circumstances."

The application was supported by an affidavit of 24 paragraphs with some exhibits attached. There was also a counter affidavit of 18 paragraphs sworn to by the 1st plaintiff.

In a considered ruling delivered by the Court of Appeal on 9th April 1991, 10 stay of execution was granted subject to the fulfillment of certain conditions. The Court of Appeal said -

*"In the light of the foregoing, the application for stay of execution is hereby granted, subject to the fulfillment of the following collateral conditions:*

(a) That the judgment debt as pronounced by the learned trial Judge be paid into an interest yielding account in the First City Merchant Bank Limited 15 of Primrose Tower, 9th - 10th floor, 17A Tinubu Street, Lagos within 30 days from the date of this ruling.

(b) That the Naira equivalent of the special damages of \$894,390 be computed by the said First City Merchant Bank Limited in strict conformity and in accordance with the Central Bank of Nigeria rate of the exchange value.

(c) That in computing the rate, the First City Merchant Bank Limited 20 should strictly abide by the judgment of the learned trial judge in respect of the relevant dates the two sets of interests will be computed. This is as indicated in (d) below.

(d) That for the avoidance of doubt in respect of (e) above, the interest of 15% on the Naira equivalent of \$894,390 be computed from 15th day of July, 1987 and at 20% per annum from 1st August, 1987 to 29th June, 1990.

(e) That in calculating the said interest, the said First City Merchant Bank 25 Limited should employ the usual trade practice in determining whether the interest is simple or compound by applying its professional expertise in the mailer to the mutual advantage and benefit of the parties.

(f) That the general damages of N1,000,000.00 be also paid into the said First City Merchant Bank Limited within 30 days from the date of this ruling.

30 On prayer (2) relating to variation of the order of the trial court, the Court of Appeal observed as follows:-

*"There is still one other issue of a general nature. Learned Counsel for the defendant/applicant argued only the first order sought and it is the order for stay of execution. He did not argue the second one for variation of the order of the learned trial judge. The law is common place that a relief either*

in a statement of claim or in a motion before the court, which is not pursued beyond the document by way of court process, will be deemed to have been abandoned. See *Ajikawo v. Ansaldo (Nigeria) Ltd. (1991) 2 NWLR (Pt.173) 359 at 375; Alhaji Bala & Ors v. Mrs. Bankole (1986) 3 NWLR (Pt.27) 141. Where pleadings or any other court process are abandoned or the case not stated in accordance with the court process, as in the instant case, the court 5 cannot resuscitate the process in favour of the party. See generally Olatubosun v. N.I.S.E.R. Council (1988) 9 N.S.CC (Pt.1) 1025; (1988) 3 NWLR (Pt.80) 25; Yusuf v. Nigeria Tobacco Company Ltd. (1977) 11 NSCC 349; (1977) 6 S.C 39. Accordingly, I will, in this ruling not touch the second order sought by the defendant/applicant. I deem it as abandoned and therefore dead."*

The defendant, now appellant, who left aggrieved by the conditions attached 10 to the grant of stay of execution and failure by the Court of Appeal to consider prayer (2) of the motion has now appealed to this Court. The plaintiffs will from now on be referred to as the respondents. Three grounds of appeal were filed. In accordance with the Rules of Court, counsel on both sides filed and exchanged briefs. There were adopted at the hearing. Oral submissions were also made in addition. 15

Chief Uwechue learned senior counsel for the appellant has formulated three issues for determination in this appeal as follows-

*"1. Whether the Court of Appeal was right in deeming as abandoned the arm of appellant's application praying for variation of the order of the High Court.*

*2. Whether the Court of Appeal was right in leaving the determination of the proper rate of exchange for the conversion of the part of the judgment 20 debt in foreign currency to Naira to First City Merchant Bank Ltd without first determining through a proper judicial process the relevant date for the conversion of the same, which was left open by the trial judge.*

*3. Whether reference of the final determination of the nature of the interest awarded (whether simple or compound) to First City Merchant Bank Limited did not occasion as serious miscarriage of justice."* 25

Arguing the first issue learned counsel submitted that the Court of Appeal was wrong when it deemed the prayer for variation of the preservation order of the trial court as abandoned and dead. He said the ruling of the Court of Appeal showed clearly on page 134 of the record that appellant's counsel moved the application and urged the court to grant it, and that the prayer (prayer (2)) 30 which was deemed abandoned formed part of the same application. It was also submitted that the Court of Appeal wrongly relied on cases which deal with pleadings not supported by evidence to come to the conclusion that the prayer for variation was deemed to have been abandoned. The reliance was

misplaced. He said address of counsel when moving application or motion was not evidence in support of the motion or application. The evidence was the affidavit in support of the application. In this case the appellant filed a 24-paragraph affidavit in support of the application and the Court of Appeal  
5 was wrong to have come to the conclusion that prayer (2) was abandoned.

Mr. Mbanugo learned Counsel for the respondents submitted that although the appellant filed a 24-paragraph affidavit in support of the two legged application, none of the paragraphs of the affidavit addressed the issue of variation, or the manner of the variation sought. Since there were no facts to support the relief sought and appellant's counsel in moving the application failed to address the issue of variation, the Court of Appeal was right to have held that prayer  
10 (2) was abandoned in the circumstance. He referred to the case of *Fawehinmi v. Akilu* (1990) 1 NWLR (Pt.127) 450 at 468 & 471. It was contended that although appellant's prayer for variation was deemed abandoned the Court of Appeal nevertheless considered the prayer when it granted stay of execution as shown by the conditions attached thereto.  
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I agree with Chief Uwechue for the appellant that the cases of *Ajikawo v. Ansaldo* (supra), *Alhaji Bala v. Bankole* (supra), *Olatunbosun v. NISER* (supra) and *Yusuf v. N.T.C. Ltd.* (supra) which the Court of Appeal relied upon to deem appellant's prayer (2) for variation as abandoned and dead, all in one way or another deal with pleadings and evidence led thereon. It is settled law that a party will only be permitted to call evidence to support his pleadings and evidence which is contrary to his pleadings must be ignored or expunged when considering the case (see for example *The National Investment & Properties Co. Ltd. v. The Thompson Organisation Ltd & Ors.* (1969) NMLR 99. Where also a party's pleadings is not supported by evidence, those paragraphs  
20 of the pleadings will certainly be deemed to have been abandoned (see *Bala v. Bankole* (supra). An application or motion on the other hand is usually supported by an affidavit or affidavits with or without exhibits, depending on the nature of the application. It is necessary for an applicant to state fully in an affidavit or affidavit, the facts he intends to rely upon in seeking the prayers or order contained in the motion paper because except with the leave of court, he will not be heard in respect of facts not contained in the affidavit.  
25 Nothing however prevents the court in appropriate cases, from allowing or permitting an applicant to make an oral application in open court. In this case the ruling of the Court of Appeal clearly showed that the appellant's Counsel moved the motion or application and finally urged the court to grant the application. Apparently in his oral submissions in court Counsel did not  
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say anything in respect of prayer (2) for variation. But his silence simpliciter cannot in my view be equated with abandonment of the prayer. There was no express withdrawal of the prayer. There was a 24 - paragraph affidavit in support of the two-legged application. The Court of Appeal was therefore clearly wrong to have deemed prayer (2) of the application as abandoned and  
5 dead. The court was bound to have considered the prayer on the materiality and relevance of the affidavit in relation to the prayer and rule accordingly. It is not sufficient as submitted by Mr. Mbanugo that the affidavit in support did not address the issue of variation. If it did not, the court should have so found and should have dismissed the application. It did not and the prayer was never considered on its merit. Affidavit evidence upon which application or motions are largely decided are not the same thing as pleadings in a civil  
10 suit which are written statements (and not evidence) generally of facts relied upon by a party to establish his case or his answer to his opponent's case. It is in exceptional cases for example where there are irreconcilable affidavits from both sides, that oral evidence will be allowed to be led in support of interlocutory application (see *Falobi v. Falobi* (1976) 9-10 S.C. 15, *Eboh & Ors. v. Oki & Ors.* (1974) 1 SC. 179), *Uku & Ors. v. Okumagba & Ors.* (1974)  
15 3 SC. 35) unlike pleadings which will have to be supported by evidence at the trial as stated earlier. The Court of Appeal was with due respect clearly wrong when it deemed prayer (2) abandoned and dead.

But having said that, did the appellant suffer any injustice merely because  
20 e prayer (2) was deemed abandoned? The facts from the affidavit evidence before the court were that this sum of money, N5,863,960.00 was originally ordered to be deposited or preserved at the First Bank of Nigeria PLC at the instance of trial High Court as security to cover the amount of damages claimed by the plaintiffs against the defendant when the case was initially filed. The defendant/appellant now contends that the total amount of damages awarded  
25 by the High Court to the respondents, according to his own table of conversion, is only N2,464,482.90. The plaintiffs/respondents on the other hand said according to their own conversion table, the damages stand at N28,024,754.56 so in short while the appellant wants only N2,464,482.90 to be reserved and the balance from N5,863,960.00 originally deposited paid back to him, the respondents are saying that the total amount deposited or reserved is at today  
30 not even sufficient to liquidate the damages now standing at N28,024,754.90.

It appears to me therefore that since the parties do not even agree on the actual amount of damages (N2.4m or N28m), the variation order prayed for by the appellant could not have been made possible since it would have meant

accepting without any justification the appellant's figure of N2.4m alone. That would be unacceptable. I am therefore firmly of the view that although the Court of Appeal was wrong to have deemed prayer (2) abandoned and dead, the appellant suffered no injustice as a result of the ruling. I feel it will be in the interest of justice and the parties too to maintain the status quo until after the appeal already lodged in the Court of Appeal is determined and the actual amount of damages or liability arrived at.

Issues 2 & 3 can conveniently be treated together. They deal with the date of conversion and the rate of exchange for the conversion of the part of the judgment debt in foreign currency to Naira, as well as the nature of the interest awarded (whether simple, or compound), all left undecided by the trial High Court but which the Court of Appeal in its ruling has now asked the First City Merchant Bank Limited to determine.

Chief Uwechue said the appellant in his application to the Court of Appeal had sought for a stay of execution pending the determination of the total naira value of the judgment debt which was partly in naira and partly in U.S. dollars. He also said the trial High Court had directed the preservation of the sum of N5,863,960.00 with interest, belonging to the appellant judgment debtor, which sum with accrued interest had been preserved in the course of trial since April, 1987, pending the determination of the appeal against its judgment. It was then submitted that failure on the part of the learned trial Judge to fix the date of conversion of the foreign currency into naira rendered the judgment unenforceable in its present form. That the question as to the date of conversion of foreign currency into naira is a question of law to be determined by a court of competent jurisdiction and not by any bank. He said once the date of conversion is determined, the working out of the actual equivalent of the foreign currency into local currency becomes merely procedural which could then be referred to anybody to be worked out. He said the Court of Appeal ought to have determined the date of conversion first by itself before directing the First City Merchant Bank to compute the naira equivalent of the special damages of \$894,390.00.

It was also submitted that the decision whether the interest awarded is "simple" or "compound" is that of the trial court and not of the First City Merchant Bank Ltd. He added that the appellant had in fact appealed against the award of interest by the trial court. He said the Court of Appeal erred by referring these issues to the First City Merchant Bank which was incompetent to decide them. The court was urged to strikeout paras. (a), (b), (c), (d) and (e) of the conditions attached to the order for the stay of execution.

Responding Mr. Mbanugo said the proper rate of exchange for the conversion of the judgment debt in foreign currency to Naira can be determined

by the First City Merchant Bank by applying banking laws and doing proper arithmetical calculations. He said the date of exchange should be the date of payment and that the First City Merchant Bank was only to determine the actual amount as determined by market forces as at the date of payment to the judgment creditor. It was also submitted that whether the interest awarded by the trial court was "compound" or "simple", was already settled by the trial court itself which awarded compound interest. That the only thing left to be done by First City Merchant Bank was to work out the actual amount. He said the order of the Court of Appeal was clear and unambiguous and that the appellant has not shown why paras. (a), (b), (c), (d) and (e) of the conditions for stay of execution should be deleted or struck-out. On the N5,863,960.00 deposited or reserved in the bank by the appellant on the orders of the trial court. Counsel said this sum is less than half the naira equivalent of the sum of \$894,390.00 and that it would work hardship and injustice on the respondent if the amount of the deposit is further reduced or varied. The appellant who is a foreigner has no assets here and it would be difficult to recover the judgment debt once the appeal is over. The court was asked to dismiss the appeal and uphold the ruling of the Court of Appeal.

This being an interlocutory appeal care should be taken to avoid making any observation which might appear to pre-judge the issues yet to be decided in the substantive appeal still pending before the Court of Appeal. I will therefore be brief in my consideration of these two issues.

The plaintiffs/respondents no doubt obtained judgment against the defendant/appellant as stated at the beginning of this judgment for:

*".....special damages of \$894,390.00 or its naira equivalent with interest at 15% per annum from 1st day of January 1982 to 31st day of July, 1987 and at 20% per annum from 1st August, 1987 until today and N1,000,000 (one million naira) being general damages."*

The judgment clearly:-

(a) did not state or give the date of conversion of \$894,390.00 to its naira equivalent;

(b) it did not state or give the rate of exchange;

(c) it also did not state whether 15% and 20% interests are "simple" or "compound" interests.

The defendant/appellant filed his Notice and Grounds of Appeal against the judgment of the trial High Court and Ground 7 of the Grounds of Appeal on page 105 of the record reads as follows:-

*"7. The learned trial Judge erred in law and on the facts in awarding the plaintiffs full damages and interests as claimed by plaintiff and N1million general damages to the 1st plaintiff."*

*PARTICULARS OF ERRORS OF MIXED LAW AND FACTS"*

Omitted

The appellant also filed additional grounds of appeal. Ground 2 of the additional grounds on page 114 reads:-

"2. The learned trial Judge erred in law when he failed to address his mind to the vital issues of the date of conversion of the sum awarded in foreign currency into the Naira equivalent and the fatal omission of the mandatory endorsement of a certificate as to the date of conversion and Naira value of the said foreign currency on the plaintiff's amended Writ of Summons, which rendered that part of his judgment given in foreign currency a nullity and unenforceable in Nigeria.

## 10 PARTICULARS OF ERROR

Omitted"

It is thus clear from the grounds of appeal setout above that there is an appeal not only in respect of award of the special and general damages against the defendant/appellant, there is also an appeal about the date of conversion of the special damages which is in foreign currency and the naira equivalent of the same foreign currency. Issue 2 & 3 would therefore appear to have been covered by the grounds of appeal above. The appeal is yet to be decided by the Court of Appeal. And in so far the Court of Appeal purported to have mandated the First City Merchant Bank to delve into these issues before the appeal is heard as per paras, (a), (b), (c), (d) & (e) of the conditions for the stay of execution, it was wrong of it to have done so and accordingly the offending paragraphs will have to be deleted or struck-out. The 2nd and 3rd issues are therefore resolved in favour of the appellant.

All the issues having been resolved in favour of the appellant, the appeal succeeds and it is hereby allowed. Paragraphs (a), (b), (c), (d) and (e) of the collateral conditions for stay of execution ordered by the Court of Appeal are hereby struck out. For the avoidance of doubt, the order of the Court of Appeal granting stay of execution shall now read as follows-

*"The application for stay of execution is hereby granted subject to the fulfillment of the following collateral conditions:*

(a) *The sum of N5,863,960.00 and accrued interest thereon preserved with the First Bank of Nigeria Limited at Adeyemo Alakija Street, Victoria Island, Lagos, be further preserved with the said First Bank of Nigeria Limited in a fixed deposit account yielding interest pending the determination of the appeal.*

(b) *The general damages of N1,000,000.00 (One million naira) be paid into the First Bank of Nigeria Limited at Adeyemo Alakija Street, Victoria Island, Lagos in a fixed deposit account yielding interest within six (6) weeks from the date of this judgment pending the determination of the appeal.*

*The appellant is awarded costs assessed at N1,000.00 (One Thousand Naira).*

## UWAIS JSC

I have had the opportunity of reading in draft the judgment read by my learned brother, Kutigi J.S.C. I entirely agree with the reasoning and conclusion therein. Accordingly, I too allow the appeal. I adopt the orders made in the lead judgment.

## WALI JSC

I am privileged to have seen in advance a copy of the lead judgment of my learned brother, Kuitigi, J.S.C. with which I agree.

For the lucid reasons set out in the judgment which I hereby adopt, I shall also allow the appeal and hereby abide by the consequential orders made therein.

## ADIO JSC

I have read, in draft, the judgment just read by my learned brother, Kutigi, J.S.C., and I agree with his reasoning and conclusion. I too allow the appeal. I abide by the consequential orders made by my learned brother, Kutigi, J.S.C. including the order for costs.

## IGUH JSC

My learned brother, Kutigi, J.S.C. has succinctly stated the facts and the issues raised in this appeal in his lead judgment. I entirely agree with his reasoning and conclusions. I will only comment briefly on the first issue which questions whether the Court of Appeal was right in deeming as abandoned that arm of the appellant's application which prayed for a variation of the order of the High Court.

The ruling of the lower court appealed against was upon an application made to that court on the 4th day of September, 1990 praying for:-

- (1) a stay of execution of the judgment of the trial court pending-
- (a) the ascertainment of the extract total naira value of the judgment debt; and
- (b) the determination of the appeal already filed;

- 5 (2) a variation of the order of the lower court preserving the sum of N5,863,960.00 so as to include the preservation of accrued interests thereon pending the determination of the appeal at the Court of Appeal.

The application was supported with a 24-paragraph affidavit and exhibits. The respondents also filed a Counter-affidavit. The application was  
10 duly argued. On the 9th April, 1991, the lower court, in its ruling, ordered a conditional stay of execution of the judgment of the trial court pending the determination of the appeal on that judgment by the Court of Appeal. On the 19th April, 1991, the appellant filed a notice of appeal to this court against parts of the said ruling of the lower court.

15 Turning now to the first issue, the appellant's complaint is that the Court of Appeal erroneously deemed his afore-mentioned second prayer for a variation of the preservation order of the trial court as "abandoned and therefore dead". In this regard, the Court of Appeal disposed of this prayer as follows:-

20 *"There is still one other issue of a general nature. Learned Counsel for the defendant/applicant argued only the first order sought and it is the order for stay of execution. He did not argue the second one for variation of the order of the learned trial Judge. The law is commonplace that a relief either in a statement of claim or in motion before the court, which is not pursued beyond the document by way of court process, will be deemed to have been*  
25 *abandoned. See Ajikawa v. Ansaldo (Nigeria) Limited (1991) 2 NWLR (Pt. 173) 359 at 375; Alhaji Bala and others v. Mrs. Bankole (1986) 3 NWLR (pt.27) 141. Where pleadings or any other court process are abandoned or the case not stated in accordance with the court process, as in the instant case, the court cannot resuscitate the process in favour of the party. See generally Olatubosun v. N.I.S.E.R. Council (1988) 9 NSCC. (Pt.1) 1029; Yusuf*  
30 *v. Nigeria Tobacco Company Ltd. (1977) 11 NSCC 349. Accordingly, I will, in this ruling, not touch the second order sought by the defendant/applicant. I deem it as abandoned and therefore dead."*

The appellant's case is that his learned Counsel did, in fact, moved his

application of which the second prayer deemed abandoned was a part. The appellant argued that his application was amply supported with a 24-paragraph affidavit which deposed to material facts upon which his prayer in issue was based. He contented that the decided cases relied upon by the Court of Appeal in arriving at its decision that his said second prayer was deemed abandoned was not relevant to the issue involved as they dealt with averments in plead- 5 ings which are not supported by evidence and not with facts deposed to in an affidavit in support of an application. He stressed that his prayer for a variation of the order was at no time abandoned.

The respondents, on the other hand, argued that none of the paragraphs of the affidavit in support of the application addressed the issue of the variation 10 applied for. They therefore contended that the Court of Appeal was right in dismissing the appellant's second prayer as abandoned. They submitted in the alternative that even though the Court of Appeal held that the second prayer was deemed abandoned, it nonetheless went ahead to consider the same and made an order for a stay of execution partly along the line of the appellant's prayer. 15

I think it right to observe that the question for determination is not whether the affidavit in support of the application addressed the issue of variation as prayed. Indeed paragraphs 16, 17 and 18 of the said affidavit deposed as follows:-

*"16. That the First City Merchant Bank Limited had offered to preserve the said sum but declined to give a guarantee for the payment of accrued interests 20 on the sum to be preserved. That the document now shown to me and marked Exhibit "G" is a copy of the letter from the said bank.*

*17. That I verily believe that First City Merchant Bank Limited and other Commercial and Merchant Banks are willing to give a guarantee for the pay- 25 ment of principal and interest if the judgment debt is preserved with them. The document now shown to me and marked Exhibit "H" is the copy of the letter to our Chambers from one of the Commercial Banks. African Continental Bank Limited, offering to pay interest on any sum preserved with it.*

*18. That I verily believe that preservation of the judgment debt in an interest yielding account pending the determination of the appeal will not in any way prejudice the plaintiffs/respondents who will be entitled to the accrued 30 interests, if the appeal fails."*

In the light of the above depositions, it cannot, I think, be seriously argued that there were no facts disclosed in the appellant's affidavit in support of his prayer on variation or that the said affidavit did not address the issue of

variation.

It is not in dispute that the appellant at no time expressly withdrew his application for a variation of the order in issue. The question for determination is whether the appellant's learned Counsel may be deemed to have abandoned his second prayer by the implication of law for the sole reason that he inadvertently failed to address the court on the issue.

There is no doubt that the learned Counsel for the appellant did in fact move his application before the Court of Appeal of which the prayer deemed abandoned was a part. He concluded his said application by urging the court below to grant the same. These are apparent from the ruling of the said court when it stated as follows:-

10 *"That was on 9th January, 1991, the day Counsel moved the application filed on 4th September, 1990. I should add that the defendant/applicant has, in addition to the stay of execution, sought for a variation of the learned trial Judges Order of 29th June, 1990. The application is supported by an affidavit of 18 paragraphs. The 1st plaintiff/respondent is the deponent."*

15 A little later on in the said ruling, the court below in concluding the summary of the submissions of learned appellant's Counsel stated as follows:-

*"He stopped there. He did not say more. He did not say less. He urged us to grant the application"*

(Italics is mine for emphasis)

20 The Court of Appeal in arriving at its decision that the prayer for a variation was abandoned relied on four decided cases. These are Ajikawo v. Ansoldo (1991) 2 NWLR (Pt.133) 359 at 375; Alhaji Bala v. Bankole (1986) 3 NWLR (Pt.27) 141; Olatunbosun v. N.I.S.E.R. Council (1983) 19 N.S.C.C. (Pt.1) 1025 and Yusuf v. Nigerian Tobacco Co. Ltd. (1977) 11 NSCC 349. I have had the advantage of reading the said judgments but wish to observe, with due respect, that they mainly dealt with the position of averments in pleadings which are not supported by evidence. An averment in pleadings is not and has never been considered as legal evidence unless the same has been admitted by the other side to the litigation. Accordingly an averment which is not admitted must be proved or established by evidence. An averment of a material fact in pleadings which is denied but is not established by evidence is worthless and must be discountenanced. In a sense, such an averment may in law be rightly regarded as abandoned. See generally on the above, Akinfosile v. Ijose (1960) 5 F.S.C. 192; (1960) SCNLR 447; Muraina Akanmu v. Adigun (1993) 7 NWLR (Pt.304) 218 at 231; Obmiami Brick and Stone Ltd v. A.C.B. Ltd (1992) 3 NWLR (Pt.229) 260 at 293 and Anyah v. A.N.N Ltd. (1992) 6 NWLR (Pt.247) 319 at 331.

Averments of facts in pleadings must however be distinguished from

facts deposed to in an affidavit in support of an application before a court. Whereas the former, unless admitted, constitute no evidence, the latter are by law evidence upon which a court of law may in appropriate cases act. The Court of Appeal, if I may say with the utmost respect, appeared to be under the erroneous impression that an averment in pleadings is synonymous with a deposition in an affidavit in support of an application. This is clearly not the case. So too, an address of Counsel in moving an application is not the evidence in support of such an application. The evidence is the deposition contained in the affidavit in support thereof.

In the instant case, the applicant filed a 24 paragraph affidavit in support of his prayers. In my view, the appellant's prayers contained in his application were bound to be considered severally by the court below against the background of the facts deposed to in the affidavit in support thereof and none of the said prayers ought to have been treated as abandoned. Accordingly I find myself unable to agree with the decision of the Court of Appeal that the second arm of the appellant's prayers which was properly supported by affidavit evidence must be deemed abandoned simply because Counsel inadvertently failed to address the court thereupon.

15 It is however clear to me that the appellant suffered no injustice as a result of this error in law on the part of the lower court. This is in view of the other issues involved in this appeal which have been ably resolved in favour of the appellant in the lead judgment. These issues have made it necessary in the interest of justice to maintain the status quo as between the parties pending the determination of the appeal in the Court of Appeal.

20 In the circumstances and for the detailed reasons set out by my learned brother, Kutigi, J.S.C. I, too, would allow this appeal. A stay of execution is hereby endorsed on terms clearly stipulated in the said lead judgment. I make the same consequential orders inclusive of those as to costs contained in the lead judgment.



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