

SUPREME COURT OF NIGERIA
4TH MARCH, 1994. SC 171/1993
CORAM:- M. L. UWAI, O. OLATAWURA,
M. E. OGUNDARE, S. U. ONU, Y. O. ADIO, JJSC.

UNION BANK OF NIGERIA LTD DEFENDANT/APPLICANT
AND
ODUSOTE BOOK STORE LTD PLAINTIFF/RESPONDENT

INTERLOCUTORY APPLICATIONS - Stay of Execution - Supreme Court - Where special and general damages has been awarded by lower courts - Application to stay execution of the entire judgment debt - When Supreme Court will only grant application to stay execution of the general damages.

ORDERS - Judgment Debt Retention - Stay of execution - Bank that is the Judgment debtor - (Whether) it is not proper to order that the bank retains the judgment debt.

PRACTICE & PROCEDURE - Stay of Execution - Supreme Court - Where stay has been granted by Court of Appeal - (whether) further application can be made to the Supreme Court to vary it.

FACTS

The Plaintiff/Respondent filed an action against Defendant/Applicant before the High Court of Oyo State claiming various huge amounts as special and general damages as a result of Defendant's negligent management of Plaintiffs business affairs and accounts with the Defendant. Judgment was given in favour of the Plaintiff in awarding N12,040,691.76 special damages claimed and #20,000,000.00 general damages that is, total of N32,040,691.76. Defendant filed an application before the High Court for stay of execution pending determination of its appeal. The application was conditionally granted in part, refusing to grant a stay of the special damages awarded to plaintiff.

Defendant appealed to the Court of Appeal for the stay of execution on more favourable conditions. The court of Appeal granted the application

with a little modification, stating that no other more favourable condition can be given than that given by the High Court. The Defendant filed several similar applications for stay of execution before the Court of Appeal which eventually dismissed the substantive appeal of the Defendant. The Defendant who appealed to the Supreme Court against the Court of Appeal's decision has now brought this application for stay of execution on more favourable conditions pending the determination of the appeal by the Supreme Court.

HELD (unanimously granting the application in part)

1. Where a stay of execution has been granted by the Court of Appeal as in the present case, a further application can be made under S. 24 of the Supreme Court Act for a further stay of execution, and it is possible for the conditions imposed by the Court of Appeal to be varied or annulled by the Supreme Court. (p.100 L39)

2. The amount due to the plaintiff as special damages having been determined by the trial court and court of Appeal to be N 12,040,641.76, the plaintiff is entitled to receive it and a stay of execution in respect of this part of the judgment debt cannot be granted. (p.101 L8)

3. The general damages of N20,000,000.00 awarded by the lower courts in respect of which there is an appeal is the res to be preserved in this case because it is a consequential award. The balance of convenience and justice of the case demand that the status quo prior to the judgment of the High Court should be maintained until the determination of the appeal to the Supreme Court. (p. 101 L19)

4. To allow a bank that is the judgment debtor to retain the judgment debt in an order for stay of execution presupposes that the judgment creditor is the underdog. This cannot be right since as far as the decision in the case is concerned, he is the winner in the dispute between the parties, (p. 102 L17)

5. The only occasion when it would be proper to order that a bank that is a judgment debtor could retain the judgment debt in an order for stay of execution pending appeal, will be when the judgment debtor consents to the court seised with the matter making the order (P. 103 L10)

6. On the whole there are special circumstances to warrant the grant of the

application for stay of execution pending the appeal in the Supreme Court.
(p. 103 L15)

PER UWAIS JSC “Now the general purpose of granting a stay of execution pending determination of appeal is to preserve the res in the case and in doing so to maintain the status quo. It is settled that when an order or judgment of a lower court is not manifestly illegal or wrong it is proper to assume that the order or judgment being appealed against is correct or it is rightly made until the contrary is established. On this basis the principle laid down by this court is that a successful litigant should not be denied the fruit of his success unless of course where some special or exceptional circumstances are shown to exist. “(p. 99 L3)

REPRESENTATION

Dr. G. O. Elias (Miss O. Madariola with him) for the applicant
Chief Afe Babalola, S.A.N. (L. Sanusi and O. Ojo with him) for the Respondent

CASES REFERRED TO

1. Martins V. Niccanar Food Co. Ltd & Ors (1988) N.W.L.R. (pt 74) 75)
2. Ajomale v. Yaduat (1991) 5 N.W.L.R. (pt 191) 266 at p. 29ID - H
3. Union Bank of Nigeria Limited v. Emole (1991) 9 N.W.L.R. (pt. 213) 74 at p. 83E - F
4. Wood house v. NPMC Ltd (1971) 1 All E.R. 665 at p. 667 G - 668 D
5. Deduwa & Ors v. Okorodudu & 13 Ors (1974) S.C. 21
6. Vaswani Trading Co. v. Savalakh & Co. (1972) 12 S.C. 77
7. Kigo (Nig) Ltd & Anor v. Holman Bros (Nig.) Ltd. (1980) 5 - 7 S.C. 60-
8. Okafor & Ors v. Soremekum (1963) 1 All N.L.R. 349
9. Oyeti v. Soremekum (1963) 1 All N.L.R. 349
10. Akerele v. Adeoshun S.C. 13/1970
11. S.P.A. v. N.P.A. & Anor (1972) N.S.C.C 706; (1972) 12 S.C. 107
12. Mobil Oil (Nig.) Ltd v. Agbadaigho (1988) 1 N.S.C.C. 777
13. First Bank v. Doyin Investment Ltd. (1988) 1 NWLR (pt 99) 634, 636 H - 639E

LEAD.JUDGMENT BY UWAIS JSC

The respondent was the plaintiff in the High Court of former Oyo State where he brought action against the applicant as defendant, claiming as follows -

“(i) Declaration that the defendants were negligent in handling, Operating and management of plaintiff's business affairs and accounts with the defendant.

- (ii) *An order directing the defendant to refund to the plaintiff forthwith the sum of \$804,988.59 being the amount paid in respect of outstanding bills in Schedules 2B, 2C, 2D, 3 and 5.*
- (iii) *An order directing and compelling the defendant to pay the plaintiff the sum of \$12,302,555.24 being the difference between the applicable Pre-SFEM rate in respect of all the outstanding bills in Schedules 2B, 2C, 2D, 3 and 5 and the rate of which the said outstanding bill will now be remitted by private arrangement or by any process as may be directed by the Federal Government of Nigeria as at the time of judgment/payments.*
- (iv) *An order compelling the defendant to credit the plaintiff's account with values of bills IBC 3752 and 3732.*
- (v) *An order directing defendant to release the plaintiff's title documents forthwith to the plaintiff.*
- (vi) *An order directing the defendant to pay to the plaintiff the sum of \$33,410,972.58 (Thirty Three Million, Four Hundred and Ten Thousand, Nine Hundred and Seventy-Two dollars Fifty-Eight cents Only) being special and general damages suffered by the plaintiff as a result of negligent handling of plaintiff's foreign business and bank account by the defendant.*

PARTICULARS OF DAMAGES

20	<u>SPECIAL DAMAGES:</u>	
	(1) 50% Excess deduction made and withheld by the defendant on plaintiff's account as per Schedule 4.....	\$113,730.22
25	(2) 15% interest charged on wrongful debit. Entry posted to plaintiff's account by defendant in January, 1987.	\$ 11,731.75
	(3) Value of IBC 3752, IBC 3732 withheld by the defendants	6,865.76
30	(4) Refund of Deposit made in respect of outstanding bills in Schedules 2B, 2C, 2D, 3 and 5	804,988.59
	(5) Cost of remitting the outstanding bills through private arrangements loss applicable Pre-SFEM values	12,302.55.24
	SUB-TOTAL	\$13,239,871.56
35	<u>GENERAL DAMAGES</u>	
	(6) Loss of profit on the plaintiff's withheld capital	\$171,101.02
	(7) Loss of business, Contract and Good will with foreign business partners and benefactors together with loss	

sustained as a result of plaintiff's Managing Director's title documents \$20,000.00.00
OR ALTERNATIVELY damages for breach of contract by the defendant. \$20,000.000.00
TOTAL \$33,410,972.58"

At the end of the hearing of the case, judgment was entered for the respondent by the learned trial judge (Sijuwade, J). In awarding damages the learned trial Judge stated as follows -

"I, therefore, award as general damages the sum of N20 million, against the defendant. The plaintiff's action, therefore, succeeds in its entirety. In addition to all the declarations sought for in its amended pleadings which I have already granted in this judgment, the plaintiff is in all entitled to the sum total of N32,040,641.76 (Thirty-Two million, forty thousand, six hundred and forty-One naira seventy six kobo) made up as follows-

By way of Special Damages

1. 50% Excess deduction made and withheld by the defendant on plaintiff's accountN113,730.22 15
2. 15% interest charged on wrongful debit entry posted to plaintiff's account by defendant in January 1987 11,731.75 20
3. Value of IBC 372, IBC 3752 withheld by the defendant 6,864.76
4. Refund of deposit made in respect of outstanding bills 804,988.59
5. Cost of remitting the outstanding bills through private arrangements 11,103,375.44 25
- Sub -Total 12,040,691.76

Items 1-5 above Immediate Payment ordered

By way of General Damages

6. Loss of profit on plaintiff's withheld capital, loss of business contracts, and goodwill with foreign business partners and benefactors together with loss sustained as a result of plaintiff's Managing Director's title documents 20,000,000.00 30
- Total..... 32,040,691.76

(Thirty-two million forty thousand six hundred and ninety-one naira seventy-six kobo) with costs I assess at N5,000.00 against the defendant in favour of the plaintiff."

The judgment was delivered on the 30th day of October, 1989. The defendant brought an application on notice on the 31st day of October, 1989

in the High Court praying for an order granting a stay of execution of the judgment of this Honourable Court delivered on the 30th day of October, 1989, pending the determination of the appeal filed against the aforesaid judgment." The application was heard by Lajide, J., who ruled as follows on the 12th of April, 1990 -

5 *"I grant the application conditionally on the following terms by the following orders:-*

 (1) *That the defendant/applicant pays to the plaintiff/respondent the sum of N12.040,691.76 provided the plaintiff's current bank gives a*
10 *satisfactory guarantee for its refund if the appeal succeeds.*

 (2) *The sum of N20,000,000.00 shall be deposited into a special account be (sic) created by the defendant/applicant in its bank in the joint names of both parties pending the outcome of the appeal when whoever succeeds on appeal will be at liberty to collect it together with interest*
15 *accruing there from and,*

 (3) *The defendant/applicant shall return to the plaintiff/respondent the title deeds deposited with it and*

 (4) *The defendant/applicant shall pay to the counsel for the plaintiff/respondent the cost of N5,000.00 awarded against it within 7 days from*
20 *today provided the said counsel enters into an undertaking to refund if the appeal succeeds."*

On the 30th day of April, 1990, the defendant filed another application in the Court of Appeal, praying "for an order for stay of execution of the
25 judgment delivered on the 30th day of October, 1989 by the High Court, Ibadan, on more favourable conditions, pending the hearing and determination of the appeal against the said judgment.....

The affidavit in support of the application gave part of the reasons
30 for the application in paragraphs 8, 9, 10 and 12 thereof to be:-

"8. That the conditions laid down in (a) and (c) in paragraph 7 of this affidavit are onerous and unreasonable to the defendant/applicant and it has decided to make this application to this Honourable Court seeking more favourable conditions.

35 *9. That the judgment involves a large sum of money and I verily believe that if any portion of it is paid to the plaintiff/respondent it will be diverted to other purposes and it will be unable to repay the same back to the defendant/applicant in the event of the appeal succeeding.*

10. That the General Manager of the plaintiff/respondent testified

at the trial that the plaintiff/respondent carries out its business operation with money borrowed from financial institutions and I honestly reasonably believe that any money paid to it will be utilised for its business.

12. That the plaintiff/respondent is not financially stable and any money paid to it will be utilised in stabilising the said company and in paying its overseas customers, and in the most likely event of the appeal 5 being successful, the said judgment debt will be impossible to recover."

The affidavit in support of the defendant's application was challenged by the plaintiff in a counter - affidavit.

10

The ruling of the Court of Appeal (Sulu-Gambari, Akpabio and Agoro JJCA.) was delivered on the 28th day of November, 1990. It stated as follows (per Akpabio, JCA.)-

"On the totality of the foregoing, I regret that the applicant cannot 15 be given any more favourable term than what was given by Lajide, J. at the court below, This court believes that from the record of its assets and profits publicly declared by the applicant as one of the leading Commercial Banks in this country ("big, strong and reliable"), the applicant is perfectly capable of paying the judgment debt in the manner ordered by the lower court, 20 which will however be modified in the manner hereinafter following:-

(a) applicant is ordered to pay to the respondent within two weeks from the date hereof the sum of N937,316,32 representing "refund of deposit made in respect of outstanding bills" by respondent to appellant and other 25 charges shown as items 1-4 of special damages.

(b) The applicant shall pay to the respondent within one month from today the sum of N11,103,988.59 representing "cost of remitting the outstanding bills through private arrangement" for use in remitting the said bills to their overseas beneficiaries without further delay, upon a Guarantee 30 executed in favour of the applicant from a reputable Bank and in the form already executed by the respondent through the Bank of Credit and Commerce International (Nig.) Ltd. in exhibit A dated 17/5/90.

(c) The sum of N20,000,000.00 representing the general damages 35 or loss of earning awarded in favour of the respondent by the court below shall within one month from the date hereof be deposited into a special account to be opened by the applicant in its Bank at Bank Road, Ibadan to attract prime interest in the joint names of the parties pending the outcome

of the appeal to this court.

(d) In view of the Bank Guarantee ordered to be given to the applicant under (b) above, the applicant shall return forthwith to the respondent the title deeds deposited with it by the respondent if these have still not been returned.

5 Costs of this application is (sic) assessed at N500.00 in favour of the respondent."

Still not satisfied with the conditional stay of execution granted by the Court of Appeal, the defendant brought another application in the Court
10 of Appeal on the 17th day of December, 1990, this time seeking "an order of a stay of execution of the order made by this Honourable Court on the 28th day of November, 1990 pending the hearing and determination of the appeal to the Supreme Court against the said Order." The Court of Appeal (Akanbi, J.C.A., as he then was, Sulu-Gambari, J.C.A. and Ogwuegbu, J.C.A., as he then was)
15 ruled as follows (per Ogwuegbu, J.C.A.) -

"A substantial and arguable ground of law is a collateral circumstance worthy of consideration in deciding whether to grant a stay of execution or not See *Martins v. Niccanar Food Co. Ltd, & Ors. (1988) 2 NWLR (Pt.74) 75.*

20 Having regard to all the circumstances of the application including the grounds of appeal, I will amend order (b) or (2) made by this court in relation to the payment of the sum of N11,103,988.59 to read as follows:

"The applicant shall pay to the respondent within one month from today the sum of N11,103,988.59 representing "cost of remitting the out-
25 standing bills to the overseas beneficiaries provided the said plaintiff/respondent executes in favour of the applicant a satisfactory guarantee for its refund from a reputable commercial bank.

The said sum of money shall be refunded at an interest equivalent to that in order (3) or (c) made by this court should the appeal succeed.

30 But for this modification, the application is refused. No order as to costs." (parenthesis mine)

The appeal in the lower court was heard by the court on the 25th day of February, 1993 by Kolawole, Mukhtar and Salami, JJCA. Judgment of the
35 court was delivered on the 24 day of May, 1993. The appeal brought by the defendant did not succeed. It was dismissed by the court (per Kolawole, J.C.A.) in the following words with the other learned Justices having concurred:-

"Having considered all the three issues raised by the appellant in this case, I have come to the conclusion that the appeal fails on all issues. Accordingly the appeal is dismissed with N1,000.00 costs to the respondent. The judgment of the court below is affirmed." The cross-appeal brought by the plaintiff in the Court of Appeal was allowed in part and the following relief was granted to the plaintiff (per Kolawole, J.CA.)

"It is hereby ordered that the relief claimed in paragraph 48 (iii) of the final statement of claim shall be amended to read that:-

"An order directing and compelling the defendant to pay to the plaintiff the sum of N11,103,375.44 being the difference between the applicable bills pre-SFEM rate in respect of all the outstanding bills in schedule 2B, 2C, 2D, 3 and 5 and the rate at which the said outstanding bills will now be remitted by any process as may be directed by the Federal Government of Nigeria shall be (at) the prevailing rate as at the time of payment.

2. It is further directed that the defendant shall pay the cost of remitting the said outstanding bills at the rate of exchange prevailing as at the time of payment or remittance or by any process as may be directed by the Federal Government as at the time of payment.

The cross-appellant is entitled to the cost of this appeal which I fix at N350.00 against the defendant."

The defendant once more felt aggrieved. It filed a notice of appeal to this court and brought an application in the lower court seeking inter alia *"an order of stay of execution of the said judgment of this Honourable court pending the hearing and determination of the appeal to the Supreme Court against the said judgment."*

The affidavit in support of the application says nothing about the interlocutory appeal to this court against the ruling of the lower court made on the 28th day of November, 1990 which is yet to be heard.

The Application was heard by Mukhtar, Salami and Nsofor, JJ.C.A. who in refusing it stated thus (per Mukhtar, J.C.A.): -

"The applicant by his (sic) conduct has not come to this court with clean hands, most especially when he refused to comply with the conditional stay granted by this court and the court below, when the appeal was pending before this court.

In the circumstance and in the interest of justice we refuse the application for stay of execution on the condition that the respondent provides a bank guarantee within 50 days from today. We assess costs at N250.00 in

favour of the respondent."

The application which is now before this court is :-

"for an order of a stay of execution of the judgment given by the Court of Appeal Ibadan on the 24th of May, 1993, on more favourable conditions pending the hearing and determination of the appeal to the Supreme Court against the said judgment and for such further and/or other order(s) as this Honourable court may deem fit to make in the circumstance."

An affidavit in support of the application was sworn to by one Nonye Charity Nwosu of No.2 Tinubu Square, Lagos. As the affidavit contains the reasons for making the application. It will not, in my opinion, be out of place to quote it in extenso. It states as follows:-

"1. That I am one of the Junior Counsel in the Chambers of Messrs Kehinde Sofola & Co., the Legal Practitioner acting for the appellant/applicant herein and as such I am familiar with this case and all the facts deposed to herein are within my personal knowledge except as otherwise stated.

2. That I have the authority of the appellant/applicant to swear to this affidavit on its behalf.

5. That I have been informed that (sic) the Managing Director of the appellant/applicant and I verily believe that:-

(a) The highest profit ever declared and over which tax was paid by the said respondent was under N125,000.00;

(b) The balance sheets of the respondent for nine years preceding the action were tendered in evidence as Exhibits 222- 223 during trial and in no year did the turn-over of the respondent exceed N4,000.00.

6. The respondent is not financially stable and any money paid to it will be utilized in stabilising the said company and in paying its overseas customers, and in the likely event of the appeal being successful, the said judgment debt will be impossible to recover.

8. That the payment of any part of the judgment debt will confer on the respondent such a substantial financial benefit to which it is not in law and equity entitled and will amount to an unjust enrichment.

9. That the appellant/applicant is ready, willing and able to provide a guarantee to ensure the preservation of the res i.e. the judgment debt with interest, in the most unlikely event of the appeal being unsuccessful.

11. *That is in the interest of justice that the party who ultimately wins on appeal should be able to reap the fruit of judgment.*

12. *That the grounds of Appeal raise substantial and arguable points of law in an area which is recondite and the chances of success in the appeal are indeed considerable.*

14. *That the appellant/applicant is a public limited liability company which employs many Nigerians whose livelihood depends on the continued existence of the company.*

16. *That the appellant/applicant is a reputable bank and will satisfy the judgment debt immediately in the most unlikely event of the respondent succeeding in the appeal.*

18. *That the respondent will not loose (sic) anything if this application is granted by this Honourable Court.*

19. *That I swear to this affidavit in good faith in support of the Motion on behalf of the appellant/applicant at its request and with its knowledge and consent."*

The plaintiff has filed a counter-affidavit sworn to by one Mudasiru A. Delano, Manager at the Import Section of the plaintiff Company, 68, Awolowo Way, Oke-Bola, Ibadan. The counter - affidavit is prolix and verbose, but be that as it may, I think it will be necessary to quote it in full for a better understanding of the facts involved in the application. It reads -

"1. *That I am a Senior Manager with the plaintiff/respondent in this case.*

2. *That I was also a witness in the case.*

3. *That by virtue of the facts aforesaid, I am quite familiar with the very facts of this case.*

4. *That I have seen and gone though the applicant's motion filed on 10th August, 1993 and the supporting affidavit and exhibits.*

5. *That I have seen and gone through the applicant's motion filed on 10th August, 1993 and the supporting affidavits and exhibits.*

7. *That paragraphs 1, 2, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18 and 19 of the applicant's affidavit are incorrect.*

8. *That the appellant was the respondent's Bankers.*

9. *That between 1982 and 1983 the respondent ordered some books from overseas suppliers.*

10. *That at that time a Nigerian importer needed Central Bank of Nigeria approval for the remittance of money due to overseas suppliers.*

11. *That application for such remittance must be made to the Cen-*

tral Bank of Nigeria through the importer's Commercial Bank.

12. *That the plaintiff/respondent's Commercial Bank was the defendant Bank.*

13. *That all shipping and relevant remittance documents were submitted to the defendant/applicant for onward transmission to the Central Bank of Nigeria for approval.*

14. *That evidence before the court by the Central Bank of Nigeria official was that on the receipt of such remittance documents, approval was normally given within 24 hours.*

15. *That the applicant bank was found negligent either by losing or misplacing some of the remittance documents or by failure to forward these documents to Central Bank of Nigeria.*

16. *That consequent upon the failure of the defendant/applicant to send the documents to Central Bank of Nigeria and in spite of repeated demands by the plaintiff, it became impossible for overseas suppliers to be paid for goods supplied in 1982/1983 at the prevailing exchange rate at the time.*

17. *That up till now the overseas suppliers have not been paid.*

18. *That the lower court ordered that the defendant/bank should make money available for payment of money due to overseas suppliers but the applicant refused to pay.*

19. *That there is no appeal against the finding that the defendant/applicant was negligent.*

20. *That the respondent also paid commission to the appellant for the remittance.*

23. *That the rates used in calculating the cost of remitting the outstanding bills as at October, 1989 when judgment was delivered by the High Court was N12 to a U.S. Dollar and N20.00 to a Sterling Pound, which rates were the prevailing exchange rates as at the time of hearing.*

24. *That the order of court that payment of the said sum of N11,103,375.44 be made immediately was in realisation of fluctuating exchange rates to the detriment of the Naira.*

25. *That the exchange rate has continued to increase to the detriment of Naira since the date of judgment.*

27. *That failure of the appellant to pay immediately after the order is worsening and will continue to worsen the situation, considering the escalating rate of exchange to the detriment of the Naira.*

30. *That it has been the practice of the appellant to disobey the orders of the court since the inception of the case.*

31. That Chief Afe Babalola, S.A.N. informed me and I verily believe that the application of the appellant is designed to tie the hands of the respondent from paying the overseas suppliers so that the overseas suppliers who have black listed the plaintiff can re - open business with it.

32. That the appellant had twice applied to this honourable court for stay of execution and withdrew the applications whilst the appeal was 5 pending before the lower court.

33. That Chief Afe Babalola, S.A.N. counsel to the respondent informed me and I verily believe that there are no special circumstances to warrant depriving the overseas suppliers of their money due since 1982 on goods supplied to the respondent. 10

35. That the said respondent counsel further informed me and I verily believe that the appellant is not in law and in equity entitled to any better condition than granted by the lower court.

36. That the respondent has always been providing bank guarantee to secure the repayment of the judgment in case the appeal succeeds and the appellant has always disobeyed the orders of the lower court in spite of 15 the bank guarantees and the attendant expenses.

37. That the exchange rates fluctuate daily at the upward trend.

38. That unless the values of the outstanding bills are paid forthwith the plaintiff's overseas suppliers will not resume business with the plaintiff. 20

39. That both the High Court and the appeal court also ordered the immediate release of the respondent's title documents, which orders the applicant persistently flouted and that it was only two weeks ago that he released the documents.

40. That with reference to paragraph 5 of the affidavit of the applicant, the respondent is financially stable and will rely on the records before this court to show that the applicant admitted before the lower court that the respondent is a reputable company and that for over 20 years when the respondent did business with the applicant's bank, the respondent was always in credit. 25 30

41. That on the issue of profit, the evidence before the court, which was uncontradicted was as follows -

"If I were to look for the income of the plaintiff, I would look into the profit and loss account, and not the tax clearance certificate (as it the TCC is not founded on the Profit and Loss Account). The turnover of the plaintiff 35 in this year 1983 was N3,650,477.00 according to Exhibit 244. The exchange rate at 1982 was about \$1.00 plus to N1.00. With the exchange rate as at today the turnover of the plaintiff taking the figure of 1982 would be more than N30 million."

In the year 1988, the turnover of the plaintiff was N4,791,574.34. In the year 1988 the exchange rate was N13.00 to \$1.00. If the turnover of the plaintiff as I mentioned in the year 1988 is just over N4 million whilst in the year 1982, the present date turnover should be over N30 million, then it shows that the plaintiff as at 1988 by that turnover is not doing well. If the plaintiff were doing well the plaintiff should have been making since 1987 over N30 million turnover a year. The position of the plaintiff's low turn-over uptill today has not changed.

42. *That paragraph 7 of the applicant's affidavit is false in that the payment of the judgment debt as ordered by the court will have no effect whatsoever on the appellant.*

43. *That the appellant made this point before the Court of Appeal and that it was shown that the payment of the judgment debt would have no effect whatsoever on the operations of the applicant.*

44. *That the assets of the applicant as shown in its 1989 Annual Report and Accounts are as follow:-*

(a) *Gross earnings of the applicant as at 30th September, 1989 N1,059.418 million as shown on page 36 of the applicant's Annual Reports.*

(b) *Fixed assets of the applicant as at 30th September, 1989 is N177.444 million as shown on page 35.*

(c) *1989 Annual Profit of the applicant as at 30th September is N152.409 million before taxation as shown on page 36.*

(d) *Other assets of the applicant as at 30th September, 1989 is N243.059 million as shown on page 35.*

(e) *Statutory reserve of the applicant as at 30th September, 1989 is N101.927 million as shown on page 35. Copy of the 1989 Annual Report of the applicant is herewith attached and marked Exhibit 'C' and ever since the bank's income has been improving.*

45. *That paragraph 8 of the applicant's affidavit is untrue and that as a matter of fact until the overseas creditors are paid the suppliers have refused to enter into any other business with the respondent.*

46. *That the uncontroverted evidence of the Expert before the court are the difference between the amount on TCC and proper net profit is as follows:-*

"The taxable profit of a company are arrived at after deducting from the turnover the cost of sales, the overhead and the capital allowance. The tax is calculated according to the Finance Act of each year. For instance, it is now 40% of the taxable profit or income prior to 1987 it was 45% of the taxable profit or income."

47. *That the plaintiff company is a company with adequate means to pay any part of the judgment debt that may be set aside in the unlikely event of the appeal succeeding.*

48. *That the plaintiff company has property worth much more than the judgment award and which are free from all encumbrances.*

49. *That Chief Afe Babalola, S.A.N. told me and I verily believe that the application for better condition of stay granted by the lower court is a deliberate design to delay the payment ordered by the courts.*

50. *That to grant this application will be oppressive and detrimental to the business of the respondent and against the interest of justice.*

51. *That to refuse this application will not in anyway prejudice nor render nugatory any success of the applicant's appeal, as the respondent has enough assets to refund the entire judgment or any of it that may unlikely be set aside.*

52. *That I swear to this affidavit in good faith."*

In moving the application, Dr. Elias, learned counsel for the defendant/Applicant, relying on the affidavit in support, said that there is a recon-
dite point of law to be canvassed in the substantive appeal pending in this
court. The point pertains to foreign exchange and the rate of exchange to
apply to the judgment debt. He cited the cases of Ajomale v. Yaduat, (1991) 5
NWLR (Pt.191) 266 at p. 291 D- H and Martins v. Niccanar, (1988) 2 NWLR
(Pt.74) 75 at p.83 C-F. Learned counsel said that there is danger that if the
plaintiff is paid the judgment debt now and the defendant wins on the determi-
nation of the pending appeal the defendant will not be able to recover the
money. When asked by the court whether the defendant was willing to pay
the judgment debt into another Bank, Dr. Elias said the defendant was willing
to do so, except that that would not be necessary in view of the decision of the
Court of Appeal in Union Bank of Nigeria Limited v. Emole (1991) 9 NWLR
(Pt.213) 74 at p.83 E - F. He drew our attention to the fact that the plaintiff has
not been able to secure a bank's guarantee as ordered by the Court of Appeal.
He referred to the annual turn-over of the plaintiff as deposed in the defendant's
reply to the counter-affidavit and said that its biggest turn-over stands at
N4,791,5874.34 and its profit in 1988 was merely N70,407.07. Learned counsel
then submitted that in the alternative if the plaintiff should be able to produce
a bank's guarantee for the payment of the judgment debt to them as ordered
by the Court of Appeal, such guarantee should be issued by either the First
Bank of Nigeria Plc or the United Bank for Africa Plc. And if the defendant is
allowed to keep the judgment debt with it the defendant is willing to pay
commercial interest in that respect.

In his reply, Chief Afe Babalola, learned Senior Advocate, for the plaintiff, stated that he opposed the application. He referred to the judgment of the trial court and stressed that it was delivered in 1989 and that the defendant has failed to settle the judgment debt despite the fact that the defendant had at no time appealed against the award of special damages under heads 1 to 4 inclusive. As for the production of bank guarantee ordered, by the High Court, learned Senior Advocate referred us to the copy of the guarantee contained in the record of appeal as an exhibit to the plaintiff's counter-affidavit.

10 The guarantee was issued on 17th May, 1990 by Bank of Credit and Commerce International (Nigeria) Limited in respect of the sum of N12,040,691.76. Learned counsel stated that despite the issuance of the bank guarantee the defendant had not opened an account in the name of the plaintiff for the judgment debt guaranteed nor paid the amount to the plaintiff. He said that there have been

15 7 applications for stay of execution by the defendant and that this is the seventh application in the series. All the applications were granted on condition that the defendant paid to the plaintiff the sum of N11 million to enable it remit that money to its customers overseas, but the defendant has not satisfied any of the orders so granted. On the allegation by the defendant that the

20 plaintiff had not been able to produce a bank guarantee as ordered by the Court of Appeal, learned Senior Advocate argued that the order was frustrated by the defendant when it filed an appeal in this court against the order, and in addition filed the present application even before the time given to the plaintiff to obtain bank guarantee had expired. He submitted that a judgment

25 creditor should not be denied the fruit of his success and said that it is immaterial that the defendant is in a position to pay the judgment debt should the application be granted. He referred to paragraph 59/13/1 of the 1991 white Book (i.e the Supreme Court Practice, 1991 in England) in support of his submission. Learned Senior Advocate canvassed that from the history of this

30 case, the defendant should be made to comply with the order of stay granted by the Court of Appeal, it is desirable, he said, for immediate payment of the judgment debt to be made by the defendant to the plaintiff in view of the effect of delay on the business of the plaintiff. He cited the case of *Woodhouse v. NPMC Ltd. (1971) All E.R 665 at p. 667 G - 668 D.*

35

Learned Senior Advocate concluded his argument by submitting that should this court be inclined to grant the application by making an order that the judgment debt should be paid into a bank, the order should provide

that the interest payable should be commercial and accrue from the date of the delivery of the judgment of the trial court.

Now the general purpose of granting a stay of execution pending determination of appeal is to preserve the res in the case and in doing so to maintain the status quo. It is settled that when an order or judgment of a lower court is not manifestly illegal or wrong it is proper to assume that the order or judgment being appealed against is correct or it is rightly made until the contrary is established. On this basis the principle laid down by this court is that a successful litigant should not be denied the fruit of his success unless of course where some special or exceptional circumstances are shown to exist - See Deduwa & Ors. v. Okomdudu & 13 Ors. (1974) 6 S.C. 21; Vaswani Trading Co. v. Savalakh & Co. (1972) 12 S.C. 77; Kigo (Nig.) Ltd. & Anon. Holman Bms. (Nig.) Ltd. (1980) 5 - 7 S.C. 60; Okafor & Ors. v. Nnaife, (1987) 4 NWLR (Pt.64) 129, Martins v. Niccanar Food & Co. Ltd. (1988) 2 NWLR (Pt.74) 75 and Ajomale v. Yaduat, (No.2) (1991) 5 NWLR (Pt.191) 266.

The question then is: are there any special or exceptional circumstances in this case which would warrant the granting of further stay of the execution of the judgment which the lower courts had successively entered in favour of the plaintiff? The main reason given by the defendant for asking for stay is that the plaintiff is not financially stable and that should the judgment debt be paid to the plaintiff it would use the money to stabilise its position and pay its overseas customers.

A second important reason is that for the defendant to part with so large a sum as the judgment debt the defendant would be deprived of the use of which it could put the money as a banker and also be deprived a considerable amount of interest which it could derive from the large size of the judgment debt.

Now, I have deliberately narrated at the beginning of this judgment the antecedent to the present application to show that the defendant had used, to a great advantage, the rules of court allowing for the making and the granting of application for stay of execution to deny and stultify the plaintiff from enjoying its success since the judgment of the trial court was delivered on the 30th October, 1989. That is for well over four years now.

The principles which should guide a court in granting application for stay of execution have been repeatedly stated in cases decided by this court. Happily an attempt to list most of the guiding principles was made in Okafor &

Ors. v. Nnaife, (supra) per Oputa, J.S.C. at p. 136B thereof -

"1. The courts have an unimpeded discretion to grant or refuse a stay. In this, like in all other instances of discretion, the court is bound to exercise that discretion both judicially as well as judiciously and not erratically.

2. A discretion to grant or refuse a stay must take into account the competing rights of the parties to justice. A discretion that is biased in favour of an applicant for stay but does not adequately take into account the respondent's equal right to justice is discretion that has not been judicially exercised.

3. A winning plaintiff or party has a right to the fruits of his judgment and the courts will not make a practice at the instance of an unsuccessful litigant of depriving a successful one of the fruits of the judgment in his favour until a further appeal is determined. See Annot Lyle, (1886) 11 P.D. 144 at p.166 per Bowen, LJ.

4. An unsuccessful litigant applying for a stay must show "special circumstances" or "exceptional circumstances" eloquently pleading that the balance of justice is obviously weighed in favour of a stay.

5. What will constitute these "special" or "exceptional" circumstances will no doubt vary from case to case. By and large, however, this court in Vaswani Trading Co. v. Savalakh & Co., (1972) held that such circumstances will involve "a consideration of some collateral circumstances and perhaps in some cases inherent matters which may, unless the order for stay is granted, destroy the subject matter of the proceedings or foist upon the court, especially the Court of Appeal a situation of complete helplessness or render nugatory any order or order of the Court of Appeal or paralyse in one way or the other, the exercise by the litigant of his constitutional right of appeal or generally provide a situation in which whatever happens to the case, and in particular even if the appellant succeeds in the Court of Appeal there could be no return to the status quo."

6. The onus is therefore, on the party applying for a stay pending appeal to satisfy the court that in the peculiar circumstances of his case a refusal of a stay would be unjust and inequitable.

7. The court will grant a stay where its refusal would deprive the appellant of the means of prosecuting the appeal: Emmerson v. Ind. Coope & Co., (1886) 55 LJ. Ch. 905."

There is no doubt that where a stay of execution has been granted by the Court of Appeal, as is the case presently, a further application can be made

under section 24 of the Supreme Court Act for a further stay of execution with terms or conditions which may differ from those imposed by the lower court. It is possible for the conditions imposed by the Court of Appeal to be varied or annulled by this court - See Oyeti v. Soremekum (1963) 1 All NLR 349; (1963) 2 SCNLR 210 Akerele v. Adeosun, SC. 13/1970 (unreported) judgment delivered on 9th June, 1970 and Construzioni Generali Farsura Cogefar S.P.A v. N.P.A. & Anor. (1972) NSCC 706; (1972) 12 S.C. 107. Now, applying the principles guiding the grant of stay of execution stated above, there can be no doubt that the plaintiff made some payment to the defendant in respect of the former's business. The amount due to the plaintiff as special damages has been determined by the trial court and the Court of Appeal to amount to N12,040,641.76. Surely the plaintiff is entitled to receive this amount. It is inequitable for the defendant to continue to use it in order to further its own business. This is improper and should not be allowed because the balance of convenience is on the side of the plaintiff and not the defendant. A stay of execution in respect of this part of the judgment debt cannot, therefore, be granted.

Next is the general damages in the sum of N20,000,000.00 awarded by the lower courts and in respect of which there is appeal as contained in grounds 6 and 7 of the notice of appeal filed by the defendant. The two grounds shown on their particulars read-

"(6) The court below erred in law in holding that the award of N20 million should be based on rate of inflation and the fluctuations of the value of Naira in the world market and thereby came to the wrong decision in the appeal.

(7) The court below erred in law by holding that the award of N20 million as general damages was valid without properly considering the submissions made thereon and thereby came to a wrong decision in the appeal."

It seems to me this is the res to be preserved in the case because it is a consequential award. The balance of convenience and the justice of the case demand that the status quo prior to the judgment of the High Court should be maintained until the decision of this court, in the appeal, is delivered.

Dr. Elias, learned counsel for the defendant had submitted, relying on the Court of Appeal decision in Union Bank (Nig.) Ltd v. Emote (supra), that in the event of the application succeeding we should order that the judgment debt be retained by the defendant since it is reputable and financially buoyant. The decision in that case followed an earlier decision of the lower

court in *First Bank v. Doyin Investment Nigeria Ltd.*, (1989) 1 NWLR (Pt.99) 634. The factor that influenced the Court of Appeal to arrive at those decisions was the fact that the bank concerned were reputable and financially buoyant.

5 I am, with utmost respect, unpersuaded by the decision. To allow the bank to retain the judgment debt as deposit notwithstanding that it will pay commercial interest on the amount, is in my opinion tantamount to giving it undue advantage over the judgment creditor. For it is a matter of common knowledge that the bank would employ the funds in charging higher interest than could

10 accrue to the judgment creditor in the event of the bank's appeal failing. Furthermore, those decisions of the Court of Appeal ignored the fact that the judgment creditors were the successful parties and therefore, were entitled to be favoured more than the banks that were the judgment debtors, since a successful party to a case is, as of right, supposed to enjoy the fruits of his

15 success pending any appeal against the decision of the trial court. In addition, the decisions ignored the fact that the parties were equal before the law. Where a case has been based on a contractual agreement, as is the case here, neither of the parties to the agreement can claim superiority to or inequality of the other party to the judgment. It appears to me that to allow a bank to retain

20 a judgment debt, in an order for stay of execution, when the bank is the judgment debtor, presupposes that the judgment creditor is the underdog. But this cannot be right since as far as the decision in the case is concerned, he is the winner in the dispute between the parties. In *MohilOit (Nig.) Ltd. v. Agadaigho*, (1988) 2 NWLR (Pt.77) 388 (1988) 1 NSCC 777 the Court of Appeal

25 granted a stay of execution of a ruling of the High Court on the ground that "*the applicant is only an individual whilst the respondent can be part of a Multinational Oil Company*". On appeal to this Court, it was held at p. 787 (per Uwais, J.S.C.) that the consideration was irrelevant and further observed on p.797 thereof (per Karibi-Whyte, J.S.C.) that -

30 "*This Court has only recently held that" a discretion to grant or refuse a stay of execution must take into account the competing rights of the parties to justice. A discretion that is based in favour of an appellant for stay but does not adequately take into account the respondent's equal right to*

35 *justice is discretion that has not been judicially exercised see Okafor v. Nnaife, (1987) 4 NWLR at p. 136 .per Oputa, J.S.C. Where a stay of execution has been ordered in a pending litigation, the general rule is to maintain the status quo and not to allow either party take advantage of the litigation in dealing with the subject matter of the litigation. (emphasis mine).*

It is significant to point out that the applicant in the case in question, who was favoured by the Court of Appeal was considered by the Court of Appeal to be the weaker party of the two; and yet such consideration was held to be improper. By contrast, in the cases of First Bank v. Doyin Investment Nigeria Ltd. (supra) and Union Bank v. Emole (supra) the applicant were the "stronger" parties in the cases. If it was improper to apply the consideration to the weaker party, then there is a more cogent argument in not applying it to a stronger party.

Finally, in my opinion, the only occasion when it would be proper to order that a bank that is a judgment debtor could retain the judgment debt, in an order for stay of execution pending appeal, will be when the judgment debtor consents to the court seised with the matter making the order.

In the present case, it is common ground, as the parties have agreed in the alternative to their conflicting submissions, that the judgment debt should be deposited in either the First Bank of Nigeria Plc or the United Bank for Africa Plc. Consequently, I am satisfied that on the whole there are special circumstances to warrant the grant of the application for stay of execution pending the appeal in this Court. Accordingly, the application is hereby granted on the following terms:-

1. Items 1 to 4 inclusive of the special damages awarded to the plaintiff/respondent by the lower courts, which amount to N937,316.32 shall be paid forthwith by the defendant/applicant to the plaintiff/respondent.

2. Item 5 of the special damages awarded to the plaintiff/respondent by the lower court which amounts to N11,103,375.44 shall be paid by the defendant/applicant to the plaintiff/respondent on condition that the plaintiff/respondent gives to the defendant/applicant a bank guarantee in the said amount, issued by either the First Bank of Nigeria Plc or the United Bank for Africa Plc. guaranteeing a refund to the defendant/applicant in the event that the appeal by the defendant/applicant pending in this Court succeeds.

3. The applicant for stay of execution of the sum of N20,000,000.00 being the general damages awarded to the plaintiff/respondent by the lower courts is hereby granted on condition that a deposit account attracting commercial interest is opened, by the defendant/applicant in the said sum, in the name of the Chief Registrar of this Court at any branch in Lagos of

104 UBN Ltd v. Odusote Book Store Ltd. (1994) 4 KLR Uwais JSC
either the First Bank of Nigeria Plc or the United Bank for Africa Plc.

4. *That the said deposit account shall subsist pending the determination of the appeal in this court and thereafter the Chief Registrar of this Court shall pay over to the successful party the amount so deposited together with any interest that might have accrued thereto.*

The costs of this application assessed at N100.00 shall be paid by the defendant/applicant to the plaintiff/respondent.

10

OLATAWURA JSC

My learned brother Uwais, J.S.C. has, in his ruling touched every conceivable point and all issues raised in this application. I agree with him in to to.

15 The applicant has sworn to an affidavit showing its affluence. Money in the coffers of a rich man or a Bank is not necessarily safe. It is assumed it is safe. Preservation of the res which is the corner-stone of an application for a stay of execution will be meaningless or defeated if the res is preserved in the hands of the judgment Debtor on the sole ground that he is rich. It will also
20 amount to a glaring case of depriving a successful litigant the fruit of the judgment. I will also abide by the order for costs.

OGUNDARE JSC

25 I have had the advantage of a preview of the Ruling of my learned brother Uwais, J.S.C. just read. I agree with him that the defendant/appellant's application for a stay of execution of the judgment of the court below, subject to the conditions imposed, be granted. The conditions, will, in my humble view, meet the justice of the case.

30

As the award by the learned trial judge and confirmed by the court below, of the items (1) -(4) of Special Damages is not being challenged by any of the grounds of appeal, I can see no justification for further depriving the plaintiff/respondent of the fruits of his success in respect thereof. The defendant will be well advised to pay to the plaintiff the total sum of N937,316.32
35 representing those items.

As regards the award of item (5), that is, the cost of remitting the outstanding bills through private arrangements, different considerations ap-

ply. While the plaintiff should not be deprived any longer of funds with which to meet its long outstanding trade obligations to its overseas suppliers, which obligation ought to have been settled since 1983, the fears of the defendant that the plaintiff might not be able to refund the huge sum of N11,103,375.44 were the defendant to succeed on the appeal to this Court cannot lightly be ignored either. The defendant is challenging the award of this item in the appeal to this Court on the ground of illegality. Ground 5 of the grounds of appeal reads in full:

"(5) The Court below erred in law by holding that:-

The short answer to this question, in my view, is that no where in the judgment did the learned trial Judge hold that money should be remitted by the respondent to overseas countries through illegal channels No evidence of illegality was led either in chief of by cross-examination. The plea of illegality cannot now be raised or entertained at the appeal stage as no such defence was ever pleaded' and thereby came to a wrong decision in the appeal.

PARTICULARS OF ERROR

(a) There is abundant evidence of illegality in the evidence on record in this case.

(b) The learned trial judge held that the outstanding bills should be paid for under private arrangements which he fixed by saying that:-

'I accept their evidence that it is open to the plaintiff to remit these bills by private arrangement a rate which fluctuates between N17.00 or N20.00 to a pound, but since the 1st D.W. was not sure as to the exact rate the private arrangement was being operated not having patronized it. I will prefer and accept that evidence of the 4th P.W. that at the hearing of his evidence on 26/5/89 it was being operated at N20.00 to 1.00 sterling and N12.00 to one U.S. dollar.

See Page 368 line 45 of the Record of Appeal.

(c) D.W.1 at page 368 line 45 of the Record of Appeal said:-

"The dollar exchange rate as at 31/12/83 is No.7505 to U.S. \$1.00 (U.S.D.dollar) according to Exhibit 6. I agree that since December 1983 our Naira has since depreciated considerably in value. I could not know that the exchange rate went up to N20.00 to 1.00 sterling under private arrangement because I do not patronise that kind of market."

(d) As at the date the learned trial judge delivered the judgment, the Second-Tier Foreign Exchange Market Act Cap. 405. Laws of the Federation of Nigeria 1990 had approved the establishment of a Second-Tier Foreign Exchange Market from which the respondent could have purchased
5 its foreign exchange currency at rates operating in the market.

(e) There was no pleading or evidence led by the respondent to show the rate of exchange that would have been applicable in law on which
10 any valid judgment could be given.

(f) It is illegal at all material times for any foreign exchange transaction to be carried out by private arrangement and otherwise than through channels approved under the Exchange Control Act 1962. the Banking Act 1969 and the Second-Tier Foreign Exchange Market Act Cap. 405.
15

(g) When the respondent said it was claiming the cost of making payment overseas by 'private arrangement' the appellant could not have expected to know the "private arrangement" until evidence has been led as 'private arrangement' could possibly have meant through legal means."
20

It is self-evident that this ground raises a very important point of law on which the fate of the award of item (5) hangs. Strong fears have been expressed by the defendant that in the event of its victory, the plaintiff would not be in a position to refund the amount of N11,103,375.44. These fears are
25 based on the plaintiffs ability as evidenced by plaintiff's financial returns over some years. This picture of plaintiff's inability is rebutted in the counter-affidavit. As it would be inequitable to deprive the plaintiff any longer of the means to meet its obligations to its overseas suppliers, I am of the view that the justice of this case demands that the defendant pay over to the plaintiff
30 the said amount of N11,103,375.44 on the latter giving to the former a Bank Guarantee from a very reputable Bank, preferably First Bank of Nigeria Plc. or United Bank for Africa Plc., to refund same in the event of the plaintiff losing on appeal. In this way, the needs of the plaintiff would be met whilst the fears of the defendant would be allayed.

Perhaps I need to say a few words on the request of Dr. Elias, learned counsel for the defendant that the sum to be deposited in bank be deposited in the defendant Bank. He relied on the Court of Appeal decision in Union Bank (Nig.) Ltd. v. Emole (1991) 9 NWLR (Pt.231) 74, 83 E-F in support of this request. The Court of Appeal (Port Harcourt Division) had in Union Bank

(Nig.) Ltd. v. Emole followed an earlier decision of the same court (Lagos Division) in First Bank v. Doyin Investment Nig. Ltd (1989) 1 NWLR (Pt.99) 643, 638 H - 63E where Akpata, J.C.A. (as he then was) delivering the lead Ruling of that Court had observed.:

5

".... Chief Williams, S.A.N. for the applicants submitted that the applicants are a reputable Bank and that to make it to deposit the judgment-debt into another Bank is not proper. He therefore prayed this court to modify the former order made by the High Court by ordering that the amount of N1 million be deposited by the applicants in a special interest yielding account in the name of the applicants and the respondents in the applicants bank with effect from 12th July, 1988 on condition that whoever wins on appeal shall be entitled to the amount. 10

While not doubting the status and integrity of the applicants bank and conceding that they are a reputable bank, Chief Adebayo Ogunsanya, S.A.N. for the respondents, stated that the respondents preferred to have the money in another bank. He felt that the respondents would be able to negotiate for higher interest in the Union Bank. 15

20

With due respect to learned counsel for the respondents, I find no rhyme or reason for his insistence that the amount be transferred to another bank after he had conceded that the applicants are a reputable bank. The rationale in a court ordering a judgment debtor, after it has appealed against a judgment, to pay the judgment-debt into court or have it deposited in a bank account is to ensure that the amount with interest, if deposited in a bank, would be readily available to the respondent should the appeal fail. In the present application, the respondents have not shown that the money would be more readily available to them if deposited in the Union Bank than if placed in a special account in the applicants bank. 25 30

There is no averment in the counter-affidavits sworn on behalf of the respondents in this court and in the court below that the interest payable in the Union Bank or any other bank is higher than that available in the applicants bank. The position therefore is that paying the amount into the Union Bank will not be more beneficial to the respondents than paying it into a special interest yielding account in the applicants bank. On the other hand, transferring the amount into the Union Bank will be detrimental to the applicants while not beneficial to the respondents. It will, it seems to me, amount to a punitive measure against the applicants for no just cause." 35

In view of the consensus expressed by learned counsel for the parties in the case on hand that the money to be deposited in bank could be deposited in either the First Bank of Nigeria Plc. or the United Bank of Africa Plc., I do not consider it necessary to pronounce on the correctness or otherwise of the views expressed by Akpata, J.C.A. in the passage above. Moreso that we
5 have not had the benefit of full arguments on it and Dr. Elias has modified his stand on the issue.

I will not end this Ruling without commenting on the attitude of the defendant towards the judgment of the trial court. My learned brother has, in his lead Ruling, set out the various past applications made by the defendant
10 for stay of execution pending appeal and the outcome to each of these applications. Notwithstanding the orders of the trial High Court and the Court of Appeal, the defendant appears to have treated these orders with abandon. This is rather sad and regrettable. One has the judgment-creditor to blame for not having hitherto levied execution to enforce the judgment in its favour. The
15 defendant having failed or refused to comply with the conditions attached to the stay granted in its favour, the judgment-creditor ought to have taken steps to enforce the judgment. Whatever reasons the defendant might have. its conduct cannot be described as salutary.

In conclusion, I abide by the order for conditional stay made by my
20 learned brother, Uwais J.S.C. and his order for costs.

ONU JSC

I have had the privilege to read in draft the Ruling of my learned
25 brother Uwais, J.S.C. and with it I agree. I will myself grant the stay of execution upon the conditions and consequential orders set out therein, inclusive of the amount of cost awarded to the plaintiff.

ADIO JSC

I have had a preview of the ruling just read by my learned brother, Uwais, J.S.C and I agree with his reasoning and conclusion. I too grant a stay of execution to the extent stated in the lead ruling. I abide by the order for costs.
30

35 Application granted on conditions.