

**SUPREME COURT OF NIGERIA**  
13TH JANUARY, 1995. SC. 183/1992  
**CORAM:- M.L. UWAI, A.B.WALI, I.L. KUTIGI,**  
**M.E. OGUNDARE. U. MOHAMMED, JJSC.**

JOSIEN HOLDINGS LTD & 3 OTHERS ..... APPELLANTS  
AND  
1. LORNAMEAD LTD.  
2. TURA INTERNATIONAL LTD ..... RESPONDENTS

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*EVIDENCE - Affidavit - Whether certain paragraphs thereof - Art objection, legal argument, etc - To warrant their being struck out*

*INTERLOCUTOR APPLICATIONS - Stay of execution - Meru of a matter - Not to be dealt with by court at this stage - Whether applicant is thereby not permitted to show his appeal has merit*

*PRACTICE & PROCEDURES - Stay of Execution - Whether averments in affidavit went into the merit of the pending appeal - To warrant their being struck out*

*STAY OF EXECUTION - Substantial issue disclosed by grounds of appeal - When a stay will be granted.*

*STAY OF EXECUTION - Special circumstances - That must be established by the applicant - Need not be collateral - But inherent on the facts and nature of the case.*

*STAY OF EXECUTION - Wrongful dismissal of the application by the Court of Appeal - When set aside by the Supreme Court*

*STAY OF EXECUTION - Destruction of the res - Whether the lower Court was right - In holding that the res cannot be destroyed.*

**FACTS**

Before the Lagos High Court, the Plaintiffs/Respondents secured judgment against the Defendants/Appellants. The judgment prevented the

Defendants from passing off all their products bearing the trade names and mark TURA, KISS and SORAYA as those of the Plaintiffs. The judgment in its nature of authorising obliteration and destruction of defendants' marks and get-ups will also lead to a close-up of the Defendants' business if executed.

Consequently, the Defendants appealed against the judgment and applied for a stay of execution pending the determination of their appeal. Both the trial High Court and the Court of Appeal dismissed the Defendants' application for stay of execution. The Court below even struck out certain paragraphs of the affidavit in support for going into the merit at the pending appeal being legal arguments. Dissatisfied, the Defendants have further appealed to the Supreme Court to determine inter alia, whether the court below was right in holding that the Defendants have not made out a case for preservation of the "Res."

**HELD** (Unanimously allowing the appeal per lead judgment of **KUTIGI JSC**)

*Whether affidavit went into the merit of pending appeal*

1. It was wrong for the court below to have come to the conclusion that anything said in paragraphs 18, 27 & 30 of the affidavit above go into the main appeal and therefore the merit of the appeal yet to be heard. The contents are clearly allegations of fact which may be shown to be true or false. And if true, I do not think that any of them can result in the resolution of the appeal in favour of the defendants. None of them is an argument on the merit of the appeal in fact. In any case as submitted by chief Williams too, it is not inconsistent with any principle of law to say or imply that the merit of an appeal is irrelevant when considering an application for a stay or an injunction pending determination of appeal (p. 162 D)

*Stay of execution - Applicant to show his appeal has merit*

2. The court below was however perfectly right when it stated that a court should not deal with the merits of a matter at the stage of an interlocutory application, but that is not the same thing as saying that an applicant for a stay or injunction pending appeal is not permitted to demonstrate or show that his appeal has merit. No, that is not correct. (p. 162 G)

*When a stay of execution will be granted*

3. Where grounds of appeal exist suggesting substantiable issue of law to be decided on the appeal and where either side may have a decision in his favour a stay will be ordered. Invariably an application for stay or injunction pending appeal would be refused where the appeal is a frivolous one. I have therefore no hesitation in coming to the conclusion that paras. 18, 27 & 30 of the affidavit above were wrongly struck out by the court below. (p. 162 H)

*Whether affidavit contains legal argument as to be struck out*

4. The Court of Appeal erred in law in applying the provisions of sections 85, 86 & 87 and thereby wrongly struck out the paragraphs of the appellants' affidavit set out above. The court below was clearly in error when it purported to strike out these paragraphs on the ground that they are either "an objection, a prayer, a legal argument or a conclusion" contrary to section 86 of the Act which they are not. (p. 164 H)

*Special circumstances may be inherent on the facts of the case*

5. The "special circumstances" which an applicant for stay of execution or injunction pending appeal is required to establish need not necessarily be collateral but that it could be inherent on the facts and nature of the case itself as in this case where unless a stay is granted, the appellants would not only end up by having their goods destroyed but would remain out of business as a result of injunction. The appellants would have suffered irreparable loss. And that if the appellants win the appeal it would mean that the respondents would not have an exclusive right to the get-up, trade names and trade marks in question and thus the entire exercise of appealing would be rendered nugatory. (p. 166 A)

*Whether the res can be destroyed*

6. The tower courts were not correct when they came to the conclusion that the res "cannot be destroyed even though they attach to the infringing of goods which is capable of being destroyed." Both orders 1, 2, & 3 of the High Court above are clearly of the nature that if lit appellants succeed in this appeal in the Court of Appeal, a situation of complete helplessness would have been foisted upon the court because the affected goods would either have been completely destroyed or severely damaged or obliterated, and most important of all the appellants would have been put out of business. (p. 166 C)

*Wrongful dismissal of application for a stay of execution*

7. The Court of Appeal did not only wrongly struck out the material paragraphs of the affidavit in support of the application before it but it also fell into the error of applying the applicable principles of law wrongly to the case. Therefore the Ruling of the Court of Appeal delivered on the 8th day of June, 1992 dismissing appellants' application for a stay of execution is set aside. (p. 167 B)

**NOTABLE POINT OF INTEREST****KUTGLJSC*****1. Depriving successful litigant fruits of his success***

There is no doubt that an applicant seeking for an order for a stay of execution must show special or exceptional circumstances because the court will not make a practice of depriving a successful litigant of the fruits of his success. (p. 165 E)

**REPRESENTATION**

Chief F.R.A. Williams SAN, with U.B. Anekwe for the Appellants.  
Respondents absent and not represented.

**CASES REFERED TO**

Balogun v. Balogun (1969) 1 ANLR 439

Vaswani Trading Co. v. Savalakh Co. (1972) 12 SC, 77 (1972) ANLR 483

Deduwa v. Okorodudu (1974) 6 SC. 21

Kigo v. Holman (1980) - 7 SC. 60

Banque De L' Afrique Occidentale v. Alhaji Sharfadi (1963) N.L.R. 21

Horn v. Richard (1963) 2 ALL NLR 41; (1993) NNLR 67

Guilbert Martin v. Karr & Chubb (1887) 4 RFC 23 at 27

The North British Rubber Co. Ltd. v. Macintosh & Co. (1894) 11 RPC 477 at 489

Leeds Forge Co. Ltd. v. Deighton's Patent Flue & Tube Co. Ltd. (1901) 18 RPC 233 at 240

Jandus Lamp & Electric Co. Ltd. v. Arc Lmp Co. (1905) 22 RPC 277

Bugges Insecticide Ltd. v. Herbon Ltd (1972) RPC 197 at 214

Minnesota Mining & Manufacturing Co. v. Bondina Ltd (1973) RPC 491

Kigo v. Holma (1980) NSCC 204

Jadesimi v. Okotie-Eboh (1986) 1 NWLR (pt. 16) 264

**LEAD JUDGEMENT BY KUTIGI JSC**

The plaintiffs in the Lagos High Court obtained judgment against  
B the defendants in the following terms-

“1. *That the defendants whether by themselves, servants and/or  
agents, servants be and are hereby restrained from passing off all their  
products bearing the trade names and mark TURA, KISS and SORAYA  
with their get-ups (particularly those listed in the first relief sought in the  
C Writ of Summons) as those of the plaintiffs.*

2. *Obliteration by the defendants of all marks and get-ups or  
colourable imitation thereof upon all articles in the nature of the goods  
complained of bearing a similar get-up or colourable imitation thereof  
D which could be a breach of this injunction.*

3. *Delivery up or alternatively the destruction of any articles in  
possession, custody or control of the defendants bearing the trade marks  
or a get-up confusingly similar to the get-up used by the plaintiffs, in-  
cluding any packaging brochures, advertisement or other materials.*

4. *An enquiry as to damages or in the alternative an account of  
E profits and payment of all sums found due upon taking such an enquiry.*

5. *Disclosure of the names and addresses of all persons:  
(a) with whom the defendants have placed orders for every ma-  
terial bearing the names or get-up confusingly similar to the get-up used  
F by the plaintiffs in the trade marks the subject matter of this action.*

(b) *to whom the defendants have supplied any such materials  
including details of the quantities involved.”*

The defendants have since appealed to the Court of Appeal. Meanwhile  
by a motion on notice they applied to the High Court for an Order for stay  
G of execution of the judgment. The application was dismissed. The defen-  
dants not satisfied with the ruling of the High Court then applied to the  
Court of Appeal for the same order. The Court of Appeal also dismissed  
the application. The defendants have now appealed to this Court from the  
H decision of the Court of Appeal dismissing their application for stay of  
execution. They will from henceforth be referred to as the “*appellants*”  
while the plaintiffs will be referred to as the “*respondents*”.

I must observe at once that although the respondent had ample time  
within which to file their brief they did not do so up to the time this appeal  
was heard on 17/10/94. The record shows that this appeal first came up

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for hearing on 1/11/93. On that day the respondents were represented by Mrs Yemi Olayanju and Miss Yemisi Ilori of Counsel. They complained that they did not file their brief because they were not yet in possession of the record of appeal. Chief Williams SAN for the appellants there and then undertook to provide counsel with the record. The appeal was then adjourned to 17/10/94 for hearing. For a period of almost one year since the appeal was adjourned for hearing no brief has been filed for the respondents. To make matters worse the respondents were not even represented by counsel on the hearing day to offer any explanation. It was towards the end of Chief Williams address in the appeal that one Dr Abayomi who claimed to represent the respondents stumbled into court. He made it clear that the brief was not ready and the court therefore refused him leave to be heard in oral argument vide Order 6 Rule 8 (5) of the Supreme Court Rules 1985 (as amended). The appeal was therefore heard without the benefit or any contribution from the respondents.

Chief Williams SAN in paragraph 2 of his brief submitted the following questions for determination -

*“(i) Is the court below correct in striking out paragraphs 18, 27 & 30 of the affidavit in support of the defendants’ motion for stay of execution on the ground that the contents thereof deal with the merit of the substantive appeal?”*

*“(ii) Is the court below correct in holding that certain other paragraphs of the aforesaid affidavit contravene the Evidence Act?”*

*“(iii) Is the court below correct in coming to the conclusion that the defendants’ application for stay “lacks material facts to back it up”?”*

*“(iv) Is the court below correct in coming to the conclusion that the defendants have not made out a case for the preservation of the “res”?”*

Now, paragraphs 18, 27 & 30 of the affidavit complained of under issue (1) read thus -

*“18. That I am informed by Ben. O. Nwaogu Esq. and I verily believe him that the proprietorship of the trade marks in issue does not exist in vacuo but inhere and relate to goods now commanded to be destroyed.*

*27. I am further informed by the said counsel and I verily believe that the implications of a right of first user, embossment of a party’s name on the product in the light of paragraph 25 above have never been adjudicated upon by a higher Nigerian court.*

*30. That the applicants believe very strongly that the proprietorship, ownership, goodwill and every proprietary interest in the trade marks TURA, SORAYA and KISS in Nigeria belong to them.”*

Striking out the above paragraphs, the Court of Appeal (per Niki Tobi, J.C.A. who wrote the lead ruling and concurred by Kolawole; and Kalgo, J.J.C.A.) said on page 83 of the record -

“After a careful examination of the Notice of Appeal vis-  
B a-vis the judgment of the Court below, it is clear to me that para-  
graphs 18, 27 & 30 go into the main appeal and therefore the  
merits of the appeal yet to be heard. They deal with the live issues  
in the ground of appeal and it will be premature to take them at  
this stage. It is good law that a court of law should not deal with  
C the merits of a matter at the stage of interlocutory application  
.....

*In the light of the above, I hereby strike out paragraphs  
18, 27 and 30.”*

D I agree completely with Chief Williams that it was wrong for  
the court below to have come to the conclusion that anything said in  
paragraphs 18, 27 & 30 of the affidavit above go into the main appeal  
and therefore the merit of the appeal yet to be heard. The contents are  
clearly allegations of fact which may be shown to be true or false. And  
E if true, I do not think that any of them can result in the resolution of the  
appeal in favour of the defendants. None of them is an argument on  
the merit of the appeal in fact. In any case as submitted by Chief  
Williams too, it is not inconsistent with any principle of law to say or  
F imply that the merit of an appeal is irrelevant when considering an  
application for a stay or an injunction pending determination of appeal  
(see for example Balogun v. Balogun (1969) 1 All NLR 349, Vaswani Trading  
Co. v. Savalakh Co. (1972) 12 SC 77, (1972) 1 All NLR 483, Deduwa v. Okorodudu  
(1974) 6 SC. 21, Kigo (Nig.) Ltd. v. Holman Bros. (Nig.) Ltd. (1980) 5-7 SC 60.  
G The court below was however perfectly right when it stated that a court  
should not deal with the merits of a matter at the stage of an interlocutory  
application, but that is not the same thing as saying that an applicant for  
a stay or injunction pending appeal is not permitted to demonstrate or  
show that his appeal has merit. No, that is not correct. Where grounds of  
H appeal exist suggesting a substantiable issue of law to be decided on the  
appeal and where either side may have a decision in his favour a stay will  
be ordered (see Balogun v. Balogun (supra). Invariably an application for  
stay or injunction pending appeal would be refused where the appeal is a  
frivolous one. I have therefore no hesitation in coming to the conclusion

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that paras. 18, 27 & 30 of the affidavit above were wrongly struck out by  
the court below. Issue(1) therefore succeeds.

Issue (ii) relate to paras. 17, 19, 20, 21, 22, 23, 24 & 26 of the  
affidavit in support and para. 9 of the affidavit of Urgency which were  
equally struck out by the court below on the ground that they violate  
some provisions of the Evidence Act. I will first of all reproduce these  
paragraphs of the affidavit - B

*“17. From my personal knowledge of the Nigerian market, I  
believe that the value of the said goods runs into at least 10 Million naira  
within the controlled and uncontrolled or known and unknown distribu-  
tion channels.”* C

*19. I believe that the obliteration of the marks on and the de-  
struction of the appellants/applicants goods affected by the rights or to  
the trade marks” in issue will render the appeal nugatory if the appel-  
lants succeed on appeal.*

*20. I am informed by my counsel and I have also confirmed from my  
reading of the judgment that the learned trial Judge did not consider  
amongst other facts the issue of first user of the trade marks in Nigeria.* D

*21. That the evidence of Emmanuel Okonkwo was clear on the  
fact. That he was our distributor before Joe Aisien Ogbebor was ap-  
pointed to succeed him.* E

*22. I also discovered that the learned trial Judge did not con-  
sider the relationship between goodwill and the party whose name is on  
the product as it affects the parties.*

*23. The learned trial Judge also did not treat the trade marks separately,* F

*24. I know as a fact that all the goods claimed by the plaintiffs  
belong to defendants and the plaintiffs/respondents witness. Sylvester  
Chinemelu confirmed this in his oral testimony on 17/1/80.*

*26. I am informed by our counsel and I believe him that this is  
the first time that dispute over proprietary rights in a trade mark between  
a local distributor and a foreign manufacturer has arisen before this  
Honourable Court.”* G

Paragraph 9 of the Affidavit of Urgency also reads thus -

*“9. That I know as of fact that the destruction and obliteration in terms  
of the order of the court will lead to irreversible consequences in respect  
of the affected goods.”* H

Ruling on page 86 of the record the court below (per Niki Tobi, J.C.A.) said:

*“On a very calm examination of the paragraphs complained  
above, I am of the opinion that they violate the Evidence Act particu-*

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larily section 86 thereof. I do not think it is necessary to go into specifici-  
ties as to what paragraphs is an objection, a prayer, a legal argument or  
a conclusion. They are so clear. I therefore strike them out accordingly.”

Chief Williams contended that the court below failed to consider  
the true scope and meaning of the relevant sections 85, 86 & 87 of the  
Evidence Act. He referred to section 85 of the Act and submitted that  
B each of the paragraphs struck out comprises “a statement of facts and  
circumstances” to which the deponent deposes “either of his personal  
knowledge or from information which he believes to be true” and which  
is expressly permissible in an affidavit by virtue of section 85 of the  
C Evidence Act. He said to treat the afore-mentioned paragraphs of affida-  
vit as “objection or prayer or legal argument” is to misconstrue and or  
misapply the provisions of section 85 of the Evidence Act. The Court of  
Appeal therefore erred in applying the law to the affidavit evidence before  
it and in elucidating the meaning of the provisions of sections 85, 86 and  
D 87 of the Evidence Act and that as a result of the error that court wrongly  
struck out vital portions of the affidavit evidence in support of the  
appellant’s motion before it.

Now, an affidavit is a statement of fact which the maker or  
deponent swears to be true to the best of his knowledge, information or  
E belief. It must contain only those facts of which the maker or deponent  
has personal knowledge or which are based on information which he  
believes to be true (see section 85 of the Evidence Act). In the latter case  
he must also state the grounds of his belief (section 87 of the Act) and  
F state the name and full particulars of his informant (see section 88 of the  
Act). No legal arguments, conclusions or other extraneous matters must  
be included (see section 86 of the Act). Any paragraph of an affidavit  
which offends against any of these provisions may be struck out by the  
court, but if it is not struck out, then the court should not attach any  
weight to it (see *Banque De L’Afrique Occidentale v. Alhaji Baba Sharfadi*  
G & ors (1963) NNLR 21; *Horn v. Rickard* (1963) 2 All NLR 41, (1963)  
NNLR 67.

I have myself careful read through the above paragraphs of the  
affidavit and applying the law as stated above particularly the provisions  
H of sections 85,86 & 87 of the Evidence Act, I endorse the submission of  
Chief Williams above in toto and come to the same conclusion with him  
that the Court of Appeal erred in law in applying the provisions of sec-  
tions 85, 86 & 87 and thereby wrongly struck out the paragraphs of the  
appellants’ affidavit set out above. The court below was clearly in error

when it purported to strike out these paragraphs on the ground that they are either “an objection, a prayer, a legal argument or a conclusion” contrary to section 86 of the Act which they are not. Issue (ii) also succeeds.

The remaining issues (iii) and (iv) will be taken together. As far as issue (iii) goes, one thing is clear and that is that the court below having struck out paragraphs 17, 18, 19, 20, 21, 22, 23, 24, 26, 27 & 30 of the affidavit in support as shown above, had no alternative but to conclude as it did on page 87 of the record that -

*“more fundamental is the fact that a number of paragraphs have been struck out, thus starving the application of relevant facts. It is trite law that where an application such as this lacks material facts to back it up, it is bound to fail. I see in this application no material facts to justify granting it.”*

This issue therefore fails though the decision was the direct result of the erroneous decision to strike out those paragraphs of the affidavit evidence as earlier explained. The ruling then continued and concluded on page 88 thus-

*“On the whole, I do not see any special and exceptional circumstances deserving a favourable consideration of the application. It therefore fails and it is hereby dismissed. I award N500 costs in favour of the respondents.”*

This I think is the purport of issue (iv).

There is no doubt that an applicant seeking for an order for a stay of execution must show special or exceptional circumstances because the court will not make a practice of depriving a successful litigant of the fruits of his success. In *Vaswani Trading Co. v. Savalakh & Co.* (1972) 1 All NLR (Pt. 2) 483; (1972) All NLR 922 (Reprint) delivering the judgment of the court Coker J.S.C. said on page 926 thus

*“We take it that the word “special” in the context is not used in antithesis to the words “common” or “normal” for that would be tantamount to pre-judging the appeal on a determination for an application for a stay of execution. When it is stated that the circumstances or conditions for granting a stay should be special or strong we take it as involving 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 orders of the Court of Appeal or paralyse, in one way or the other, the exercise by the litigant of his constitutional*

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*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.*”

Chief Williams was therefore right when he submitted that the “special circumstances” which an applicant for stay of execution or injunction pending appeal is required to establish need not necessarily be collateral but that it could be inherent on the facts and nature of the case itself as in this case where unless a stay is granted, the appellants would not only end up by having their goods destroyed but would remain out of business as a result of injunction. The appellants would have suffered irreparable loss. And that if the appellants win the appeal it would mean that the respondents would not have an exclusive right to the get-up, trade name and trade marks in question and thus the entire exercise of appealing would be rendered nugatory.

I think to that extent I agree with Chief Williams that the lower courts were not correct when they came to the conclusion that the res “cannot be destroyed even though they attach to the infringing of goods which is capable of being destroyed.” Both orders 1,2, & 3 of the High Court above are dearly of the nature that if the appellants succeed in this appeal in the Court of Appeal, a situation of complete helplessness would have been foisted upon the court because the affected goods would either have been completely destroyed or severely damaged or obliterated and most important of all the appellants would have been put out of business.

Chief Williams cited the following English Authorities to illustrate the proposition that a stay is almost invariably granted in cases of this nature with suitable terms imposed to safeguard the position of the respondents in case the appellants’ appeal fails.

1. Guilbert - Martin v. Karr & Chubb (1887) 4 RPC 23 at 27
2. The North British Rubber Co. Ltd. v. Macintosh & Co. Ltd (1894) 11 RPC 477 at 489.
3. Leeds Forge Co. Ltd. v. Deighton’s Patent Flue & Tube Co. Ltd. (1901) 18RPC 233 at 240.
4. Jandus Lamp & Electric Co. Ltd. v. ARC Lamp Co. (1905) 22 RPC 277 at 297.
5. Bugges Insecticide Ltd. v. Herbon Ltd. (1972) RPC 197 at 214.
6. Minnesota Mining & Manufacturing Co. v. Bondina Ltd. (1973) RPC 491 at 548.

Chief Williams kindly made available photocopies of the judgments of these cases to the court. We are thankful to him. I have read the cases myself and found them useful. I agree with the submission above.

The practice dearly is that whenever it appears, that where an injunction is granted, as in this case, considerable damage would be done pending appeal to a defendant by the stoppage of his business which could not be compensated, the injunction is stayed on terms. Orders 1, 2 & 3 of the High Court above are unambiguous and point to that one direction only - the stoppage of the entire business of the appellants. We can and must intervene.

In summary I think this appeal deserves to succeed and it is hereby allowed. The Court of Appeal did not only wrongly struck out the material paragraphs of the affidavit in support of the application before it but it also fell into the error of applying the applicable principles of law wrongly to the case. Therefore the Ruling of the Court of Appeal delivered on the 8th day of June, 1992 dismissing appellants' application for a stay of execution is set aside. In its place an order granting stay of execution of the judgment of the Lagos High Court delivered on the 7th day of January 1992 is hereby substituted on the following conditions -

- (a) The defendants/appellants shall keep a proper account of goods sold.
- (b) The defendants/appellants shall on the last day of every month pay into a joint - account of the parties herein 20% of the sale price of the goods sold.
- (c) The defendants/appellants shall give an undertaking to prosecute the appeal with diligence with liberty reserved for the plaintiffs/respondents to apply to the appropriate court in case the appeal should not be prosecuted with due diligence.

The appellants are awarded costs assessed at N1,000.00 only.

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**UWAIS JSC**

I have had a preview in draft of the judgment read by my learned brother Kutigi, J.S.C. I entirely agree with the judgment.

Accordingly, the appeal succeeds and it is hereby allowed. The decision of the Court of Appeal is hereby set aside with N1,000.00 costs to the appellants.

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**WALI JSC**

I have read before now the lead judgment of my learned brother, Kutigi, J.S.C, and I agree with the reasoning and conclusion therein.

I have carefully read and considered paragraphs 18, 27 and 30 as well as paragraphs 17, 19, 20, 21, 22, 23, 24 and 29 of the affidavit filed in the court below by the appellants in support of their application for a stay of execution of the trial court judgment to wit - order of injunction

granted in the terms set out in that judgment, but cannot see anything wrong in them that could have led to their being struck out by the Court of Appeal.

As ably demonstrated by Chief Williams, SAN, in his written brief and oral submissions in elaboration of the said brief, the paragraphs of the affidavit struck out by the Court of Appeal do not in anyway contravene the provisions of Sections 85, 86 and 87 of the Evidence Act (Cap 112) Laws of the Federation of Nigeria 1990. The Court of Appeal was wrong in applying the provisions of the Evidence Act (supra) to strike out the paragraphs of the affidavit.

As also rightly stated by Chief Williams, SAN, it is not a correct statement of the law to say that the merit of the substantive appeal is irrelevant when an application for a stay of execution is being considered. Where, from the grounds of appeal filed there is a likely chance that the appeal might succeed or the grounds of appeal raise substantial point of law, procedural or substantive, the court usually leans in favour of granting the application. See *Vaswani Trading Co. v. Savalakh & Co.* (1972) 1 All NLR (Pt. 1) 483, *Kigo (Nig.) Ltd. v. Holman Bros. (Nig.) Ltd.* (1980) NSCC 204 and *Jadesimi v. Okotie-Eboh* (1986) 1 NWLR (Pt.16) 264.

On a calm view of the facts and circumstances in the case and taking into consideration the paragraphs of the affidavit that were wrongly struck out by the Court of Appeal, this appeal ought to succeed. The appeal is allowed. The judgment and orders of the Court of Appeal are set aside. In place thereof, I hereby substitute the consequential orders contained in the lead judgment of my learned brother Kutigi, J.S.C. including that of costs.

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### OGUNDARE JSC

I have had the advantage of a preview of the judgment just delivered by my learned brother Kutigi J.S.C. For the reasons given by him in the said judgment which I hereby adopt as mine I too agree that this appeal be allowed. I abide by the consequential orders made by him including the order for costs.

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### MOHAMMED JSC

I have had a preview of the judgment of my learned brother, Kutigi, J.S.C., and I agree with his reasoning and legal conclusions

reached. I have nothing more I can usefully add to the opinion so ably advanced in the lead judgment.

I accordingly allow the appeal and abide by all the consequential orders made in the lead judgment.

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