

SUPREME COURT OF NIGERIA
FRIDAY 10TH MARCH, 1995. SC. 191/1989
CORAM:- M. L. UWAI, S. M. A. BELGORE, A. B. WALI,
I. L. KUTIGI, M. E. OGUNDARE, Y. O. ADIO, A. I. IGUH, JJSC

1. 7-UP BOTTLING COMPANY LTD.
2. ADEMOLA SOMORIN APPELLANTS
3. FIRST CITY MERCHANT BANK LTD.

AND

ABIOLA AND SONS NIGERIA LTD. RESPONDENT

INTERIM INJUNCTIONS - *Difference between interim and interlocutory injunction - Whether both are the same.*

INTERIM INJUNCTIONS - *Status quo - Interim injunction order - Is granted to preserve the status quo - Contentious issues are not decided - Before it is granted*

INTERIM INJUNCTIONS - *Motion ex pane for interim injunction - Pending motion on notice for interlocutory injunction - Whether application was rightly granted.*

INTERIM INJUNCTIONS - *Fair hearing - Ex pane motion - Refusal to hear the appellants - Whether a violation of S.33(1) of the 1979 Constitution*

INTERPRETATION OF STATUTES - *Provision that is clear and unambiguous - The words used therein - Will be given plain and grammatical meaning.*

JUDICIAL PRECEDENTS - *Correct application - Of the principles in Kotye's case - Whether implemented by the Court of Appeal.*

FACTS

Matters related to Respondent's failure to pay certain loans granted to it by the 3rd Appellant caused the 3rd appellant to take steps towards sale of Respondent's assets as per the parties' debenture and loan agreement. The 2nd appellant was the appointed receiver while 1st Appellant was the purchaser of the said assets. The Respondent filed an action against the Appellants before the Ilorin High Court. Respondent further filed a motion ex parte for an order of interim injunction restraining the Appellants from disturbing the Respondent's peace pending the determination of its application for interlocutory injunction on notice.

The Appellants filed a motion on notice seeking leave of the learned trial judge to be heard on the motion ex parte. Appellants' motion was not granted. The trial court granted the Respondent's ex parte motion for interim injunction. Appellants' appeal to the Court of Appeal was dismissed. Being dissatisfied, Appellants have further appealed to the Supreme Court to determine whether their right to fair hearing under S.33 of the 1979 Constitution was violated. And whether the Supreme Court's decision in Kotoye's case was properly applied by the Court of Appeal.

HELD (Unanimously dismissing the appeal per lead judgment of **ADIO JSC**)

Provision that is clear and unambiguous

1. The provision of Order 8 rule 9 quoted above is clear and unambiguous. Where the provision of a statute is clear and unambiguous, it is the words used that governs. The provision of the statute is, in the circumstances given plain and grammatical meaning. So the question whether the provision should be given a strict or liberal meaning is completely irrelevant. (p. 655 C)

Difference between interim and interlocutory injunction

2. There was a real misconception and some confusion on the part of the appellants. The appellants, somehow, did not distinguish between an interim injunction and an interlocutory injunction and, for that reason, did not recognise the difference between the purpose for which an interim injunction is granted and the purpose for which an interlocutory injunction is granted. The result was that, in the appellants' brief, authorities relating to an application for an order of interlocutory injunction were being cited freely in support of contentions being made in relation to an order on interim injunction, as if an interim injunction was the same thing as an inter-

locutory injunction. That should not be so. (p. 655 E)

Interim injunction - Granted to preserve the status quo

3. An order of interim injunction is one granted to preserve the status quo and to last until a named date or definite date or until further order or pending the hearing and determination of a motion on notice. It is for a situation of a real emergency to preserve and protect the rights of the parties, before the court from destruction by either of the parties. It merely leaves matters in status quo and the court does not, at that stage, have to decide any contentious issues before granting it. (p. 656 D)

Motion ex parte for interim injunction

4. In the present case, the motion *ex parte* was for an interim injunction restraining the appellants from doing certain things to the properties of the respondent pending the determination of the motion on notice for interlocutory injunction. The ruling of the teamed trial Judge already quoted above was brief and it did not purport to determine any contentious issues. All that the learned trial Judge did was to consider the grounds, as deposed to in the affidavit in support of the application, to determine whether an order of interim injunction could properly be based on them and he, rightly, in my view, came to the conclusion that a case for the granting of the application was made out. (p. 656 F)

Interim injunction - Fair hearing

5. If, as it was in this case, the learned trial Judge could not properly determine any contentious issue when the motion *ex parte* for an order of interim injunction came before him, the question of giving an opportunity of being heard to the appellants before determining the application could not arise and the provisions of section 33(1) of the Constitution were not applicable and were not violated. The answer to the question raised under the first issue is in the affirmative. The refusal of the learned trial Judge to hear the appellants on *ex parte* motion for an interim injunction was not a violation of section 33 of the 1979 Constitution and the affirmation of the ruling of the learned trial Judge on the question by the court below was justified. (p. 657 E)

Correct application of Kotoye's case principles

6. I have read the judgment of the court below carefully and I am of the view that the principles enunciated in Kotoye's case relevant to the present case were correctly applied to the issues involved in this case. Consequently,

the answer to the question raised under the second issue is that the principles, if any, enunciated in Woluchem's case, Otakpo's case and Kotoye's case which were relevant in this case were correctly applied to the issues involved. (p. 659 D)

B NOTABLE POINTS OF INTEREST

ADIO JSC

1. Appellate court to rarely interfere with trial court's discretion

Where a matter depends on the exercise of the discretion of the trial court, an appellate court will rarely, if at all interfere with the decision of the trial court and an appellate court is not entitled to substitute its own discretion for that of the trial court. An appellate court will not interfere simply because faced with a similar situation it would have exercised its discretion differently. (p. 657 C)

D 2. Lower courts not bound by inapplicable decisions of the Supreme Court

The legal position in this country is that the Court of Appeal and other lower courts are bound by the decisions of this court. See *Osho v. Foreign Finance Corporation*, (1991) 4 N.W.L.R. (pt. 184) 157. However, where the principles enunciated in the decisions of this court are not relevant or applicable to the issue or issues arising for determination in the case before the Court of Appeal or any other lower court, it is not necessary that the Court of Appeal or any lower court should apply the aforesaid principle (p. 659 B)

F IGUH JSC

3. Ex parte motion - Respondent not to be heard save the court permits

I wish to state that whether an *ex parte* application is to be granted or refused is a matter at the entire discretion of the trial court. In application *ex parte*. Only the applicants may be heard unless the court in its absolute discretion directs that the other party or any other parties to be affected thereby be put on notice, otherwise such other party or parties to be affected may only be seen but not be heard at the hearing of the application. (p. 668 E)

H 4. Application to be heard does not convert ex parte motion to one on notice

No doubt, in a motion *ex parte*, the party to be affected may still be heard in the motion depending on if the court exercises its discretion favourably on such a party's application to be heard. It cannot however be seriously

argued that once there is an application by an interested party to be heard in a motion *ex parte*, the court, like Pontius Pilate, must wash off its hands and automatically convert such an *ex parte* application to a motion on notice. (P. 669 C)

REPRESENTATION

A. Olujimi Esq. for the Appellants.
D. Gbadayan Esq. for the Respondent.

CASES REFERRED TO

Fawehinmi v. Akilu & Or. (1987) 4 NWLR 797 at P. 860 C
Abioye v. Yakubu (1991) 5 NWLR (Pt. 190) 130
Obeya Memorial Specialist Hospital v. Attorney-General of the Federation (1983) 3 NWLR (Pt. 60) 325
Ojukwu v. Governor of Lagos State (1986) 3 NWLR (Pt. 26) 39
Woluchem v. Wokoma (1974) 3 SC 153 at 155 D
Osho v. Foreign Finance Corporation (1991) 4 NWLR (Pt. 184) 157
Otakpo v. Sunmonu (1987) 5 SCNJ 59 (1987) 2 NWLR (Pt. 58) 587
Mohammed v. Kano N.A. (1968) 1 All NLR 424 at P. 246
Oyeyipo v. Oyinloye (1987) 1 NWLR (Pt. 50) 356
Solanke v. Somefun (1974) 1 SC 141 at 150 E
Musa v. Hamza (1982) 7 SC 118 at 121
University of Lagos v. Olaniyan (1985) 1 NWLR (Pt. 1) 156 at 163
Kotoye & 7 others v. CBN (1989) 1 NWLR (Pt. 98) 419

STATUTE AND RULES REFERRED TO

Constitution of the Federal Republic of Nigeria 1979 SS. 33(1), 213(4), 6(6)(a) F
High Court (Civil Procedure) Rules, 1987 0.8 rr. 9, 11, 8, 10.

LEAD JUDGMENT BY ADIO JSC

The respondent sought for and was granted certain loans by the 3rd appellant which were secured by floating and fixed assets of the respondent. When the respondent defaulted in the repayment of the loans and the interest thereon, the 3rd appellant exercised its right under the Debenture and the loan agreement, executed by the respondent to secure the loans. The 2nd appellant was appointed by the 3rd appellant as a receiver of the respondent company. H

Pursuant to the exercise of his powers as the receiver of the respondent company, the 2nd appellant, a chartered accountant, allegedly

sold some machinery and equipment of the respondent to the 1st appellant. The 1st appellant, that was involved in the business of manufacturing soft drinks like the respondent, allegedly moved into the respondent's factory where the said machinery and equipment were. As a result, the former managing director of the respondent instituted an action in the High Court of Justice of Kwara State, Ilorin Judicial Division, against the appellants. At the same time, the respondent filed a motion *ex parte* seeking for an order of interim injunction restraining the appellants, their servants and/or agents from disturbing the respondent's quiet and peaceful enjoyment and occupation of the company's factory pending the determination of the motion on notice for an interlocutory injunction already filed in the suit restraining the appellants, their servants and / or agents from auctioning, selling or otherwise disposing of the interest of the respondent in the company's properties pending the determination of the substantive suit.

The application for an order of interim injunction was supported by an affidavit. There was an affidavit of urgency and there was also a document headed; "*NOTICE OF UNDERTAKING AS TO DAMAGES,*" attached to the said affidavit. The appellants filed a motion on notice, before the motion *ex parte* for an order of interim injunction was heard, seeking leave of the learned trial Judge to be heard on the motion *ex parte*. Alternatively, they sought for an order directing the respondent's motion *ex parte* to be on notice. The appellants also filed and served a counter-affidavit disputing what were deposed to in the affidavit in support of the motion *ex parte*. The learned trial Judge heard the arguments of the appellants' counsel on the application that the appellants should be heard on the motion *ex parte* and refused to grant it. The learned trial Judge then heard the respondent's motion *ex parte* and granted it.

The appellants being dissatisfied with the ruling of the learned trial Judge on the motion *ex parte* for an order of interim injunction restraining them, lodged an appeal against it to the Court of appeal. The Court of Appeal dismissed the appellants' appeal. Dissatisfied with the judgment of the court below, the appellants have lodged a further appeal to this court.

The parties duly filed and exchanged briefs. The issues, which related to the merit of the appeal, identified in the appellants' brief were two while the respondent too identified two issues for determination in its brief in the same connection. I think that the said two issues identified in the appellants' brief are sufficient for the determination of this appeal. They are as follows:-

(1) "*Whether the refusal of the trial court to hear the appellants on ex parte motion for interim injunction was not a violation of section 33 of*

the 1979 Constitution, so that the affirmation and justification of same by the Court of Appeal, based on Order 8 rule 9 of the High Court (Civil Procedure) rules, 1987 was unconstitutional, null and void and of no effect.

(2) Whether the ratios of the decisions of the Supreme Court in Woluchem v. Wokoma; Otapo v. Sunmonu and Kotoye v. Central Bank of Nigeria were relevant, applicable and/or properly applied by the Court of Appeal to the facts of this case.”

It is necessary before giving consideration to the issues for determination to point out that a notice of preliminary objections was given in the respondent's brief indicating what would be the contention of the respondent on the preliminary objections at the hearing of the appeal. When this appeal came up before this court for hearing, the notice of the preliminary objections was not pursued and the preliminary objections were not argued by the learned counsel for the respondent. It can be taken as having been abandoned. With reference to the question raised under the first issue, the learned trial Judge, after considering the submissions of the learned counsel on both sides, gave the following ruling:

“I have carefully gone through and considered the authorities cited by both counsel in this case as to whether or not the defendants have a right to be heard in an ex parte application of this nature. It is my considered view that the case of Chief Gani Fawehinmi v. Col. Halilu Akilu & Ors (1987) 4 NWLR (Pt.67) 797 at page 860 where Uwais J.S.C. said inter alia;

‘At the time the ex parte application is being moved the respondent does not take part ‘

It therefore follows that in our present case in hand the respondents have no right to be heard at this stage. As such the prayer of Mr. Awomolo learned counsel for the respondents to be heard in this ex parte application is rejected.”

The Court of Appeal, in affirming the ruling of the learned trial Judge, pointed out that the question whether an ex parte motion was to be granted or refused was a matter at the discretion of the court. In its view, a party aggrieved by a motion ex parte granted by the court had a remedy other than lodging an appeal against the ruling. He might, if he so desired, within seven days of service of the order on him, apply under order 8 rule 11 of the High Court (Civil Procedure) Rules of Kwara State to the court on good grounds to either vary or discharge the order. The court below. per Achike, J.C.A .. stated, inter alia. as follows:-

“Since the appellants’ counsel was physically present in court both when arguments were addressed to the court on 14/9/88 and the next day 15/9/

88, when the ruling refusing appellants' participation was delivered by the trial court, it was most opportune for the appellants, if they so wished, to seek a variation or discharge of the order made *ex parte*.....Despite the appellants' preparedness and desire to be heard, a quick perusal of order 8 rule 9. shows, at any rate, that *ex facie* they could not be heard
B because rule 9, *inter alia* stipulates that:

.....no party to the suit or proceedings although present other, than the party moving, shall be entitled to be then heard.' (emphasis supplied)

The above excerpt is sufficiently lucid and unambiguous. It emphasises the exclusive character of an *ex parte* motion. It is an applica-
C tion as already noted in which the suppliant alone is heard by the court, there being no provision empowering the court to let in any other party while the application remained *ex parte*The learned trial judge was bound by the subsisting and unambiguous rules of court to decline to learned counsel's request to be heard in the *ex parte* application."

D The learned Justice of the court below then gave consideration to the nature of an interim injunction and the difference between it and an interlocutory injunction and pointed out that an interim injunction should not be confused with the usual interlocutory injunction made pending the determination of a subsisting suit. He also pointed out that the court was
E powerless to grant an interlocutory injunction pending the determination of the suit by an *ex parte* motion without putting the other party on notice. That situation did not, according to the learned Justice of the Court of Appeal, arise in the present case as the respondent's application to the court was for an order of interim injunction which wits to preserve the
F status quo pending the determination of the motion on notice for interlocutory injunction. The learned Justice of the Court of Appeal then considered the question whether an order of interim injunction granted on the basis of an *ex parte* motion was inconsistent with the provision of section 33 (1) of the Constitution and came to the conclusion that it did not.

G It was submitted for the appellants that the learned trial Judge did not in refusing the application of the appellants that they should be heard in relation to the motion *ex parte* for interim injunction, construe the provision of Order 8 Rule 9 of the High Court (Civil Procedure) Rules strictly and the court below was wrong in giving very strict interpretation to the said
H provision. It was also contended that generally where leave is granted on *ex parte* application, no right or privilege is conferred on any of the parties over and above the others. Finally, it was submitted that Order 8 Rule 9 of the High Court (Civil Procedure) Rules which provides that no party to the suit or proceeding although present other than the party moving, shall be

entitled to be heard, violated or was inconsistent with the provision of section 33(1) of the Constitution and was, therefore, void.

The submission in the respondent's brief was that the provisions of Order 8 Rules 9, 10 and 11 of the High Court (Civil Procedure) Rules were lucid and explicit on the applicable procedure in an ex parte application B and that the respondent followed the procedure. The respondent further submitted that the provisions of Order 8 Rule 9 of the High Court (Civil Procedure) Rules did not violate the provisions of section 33(1) of the Constitution. The provision of order 8 rule 9 is as follows:-

"Any party moving the court ex parte may support his motion by C argument addressed to the court on the facts put in evidence and no party to the suit or proceedings although present other than the party moving shall be entitled to be then heard."

The provision of Order 8 Rule 9 quoted above is clear and unambiguous. Where the provision of a statute is clear and unambiguous, it is the words used that govern. The provision of the statute is, in the circumstances, given plain and grammatical meaning. See *Abioye v. Yakubu* (1991) 5 NWLR (Pt.190) 130. So the question whether the provision should be given a strict or liberal meaning is completely irrelevant.

There was a real misconception and some confusion on the part E of the appellants. The appellants, Somehow, did not distinguish between an interim injunction and an interlocutory injunction and, for that reason, did not recognize the difference between the purpose for which an interim injunction is granted and the purpose for which an interlocutory injunction is granted. The result was that, in the appellants' brief, authorities relating F to an application for an order of interlocutory injunction were being cited freely in support of contentions being made in relation to an order of interim injunction, as if an interim injunction was the same thing as an interlocutory injunction. That should not be so. It was the aforesaid misconception on the part of the appellants that led to the erroneous submission in G their brief that in the present case it was not necessary to make any distinction between an interim injunction and an interlocutory injunction. An order of interlocutory injunction is one made pending the determination of a pending suit. See *Obeya Memorial Hospital v. A.G. Federation* (1987) 3 NWLR (Pt.60) 325; *Ojukwu v. Governor of Lagos State*. (1986) 3 NWLR H (Pt.26) 39 and *Kotoye v. Central Bank of Nigeria* (19X9) 1 NWLR (Pt.98) 419. An interlocutory injunction cannot generally be granted without giving prior notice of the application to a respondent and the order cannot be made behind the respondent in view of the fact that the court has to decide

many things before it can properly come to a conclusion on the question of whether to grant or refuse it. Further, and this is very important, a grant of an application for an interlocutory injunction without notice to the respondent or behind the respondent is void by virtue of the provision of section 33(1) of the Constitution. An order of interim injunction is one granted to preserve the status quo and to last until a named date or definite date or until further order or pending the hearing and determination of a motion on notice. It is for a situation of a real emergency to preserve and protect the rights of the parties, before the court from destruction by either of the parties. Kotoye's case, *supra*. It merely leaves matters in status quo and the court does not, at that stage, have to decide any contentious issues before granting it. It is the extent to which a court can go, if at all, in the determination of contentious issues in the issues in the case when an application for an order of interim injunction or for an order of interlocutory injunction comes before it that constitutes one of the significant or decisive factors in the determination of whether all or any of them can be granted without hearing the other party or parties to the case in accordance with the provision of section 33(1) of the Constitution. An order of interlocutory injunction is predicated on the determination of a number of contentious issues which require that the court hears both sides before deciding. See Kotoye's case. *supra*, at page 446. On the other hand, an order of interim injunction merely leaves matters in status quo and the court entertaining the application does not have to decide any contentious issues before reaching a decision. See Kotoye's case *supra*.

In the present case, the motion *ex parte* was for an interim injunction re-straining the appellants from doing certain things to the properties of the respondent pending the determination of the motion on notice for interlocutory injunction. The ruling of the learned trial Judge already quoted above was brief and it did not purport to determine any contentious issue. All that the learned trial Judge did was to consider the grounds, as deposed to in the affidavit in support of the application, to determine whether an order of interim injunction could properly be based on them and he, rightly, in my view, came to the conclusion that a case for the granting of the application was made out. In the affidavit in support of the application. The deponent deposed, *inter alia*, that the security agreement executed by the respondent under which the 3rd appellant purported to appoint the 2nd appellant as a receiver of the respondent company had not become enforceable at the time that the said appointment of the 2nd appellant was made. It was also deposed to in the affidavit that arrangements by the 2nd

appellant had reached an advanced stage to cause the motor vehicles and machineries of the respondent to be sold at ridiculous prices. Above all, the deponent attached to the affidavit in support of the application a notice of undertaking, as to damages, in which the respondent undertook to pay damages to the appellants in the event that appellants incurred any loss or damage consequent upon the grant of the interim injunction during the time that the interim injunction might be in force. The foregoing were, inter alia: the materials before the learned trial Judge. The question whether the ex parte application for an interim injunction should be granted was at his discretion. The discretion was his and not that of the court below. Where a matter depends on the exercise of the discretion of the trial court, an appellate court will rarely, if at all, interfere with the decision of the trial court and an appellate court is not entitled to substitute its own discretion for that of the trial court. See *Adejumo v. Ayantegbe*, (1989) 3 NWLR (Pt.110) 417. An appellate court will not interfere simply because faced with a similar situation it would have exercised its discretion differently. See *Ceekay Traders Ltd v. General Motors Ltd.*, (1992) 2 NWLR (Pt.222) 132. There was really no legal basis for the court below to interfere with the ruling of the learned trial Judge and the court below was perfectly right in affirming the ruling.

If, as it was in this case, the learned trial Judge could not properly determine any contentious issue when the motion ex parte for an order of interim injunction came before him, the question of giving an opportunity of being heard to the appellants before determining the application could not arise and the provisions of section 33(1) of the Constitution were not applicable and were not violated. The answer to the question raised under the first issue is in the affirmation. The refusal of the learned trial Judge to hear the appellants on ex parte motion for an interim injunction was not a violation of section 33 of the 1979 Constitution and the affirmation of the ruling of the learned trial Judge on the question by the court below was justified.

With reference to the question raised under the second issue, the court below considered the decisions of this court in *Woluchem's* case and the *Otapo's* case and came to the conclusion that, the principles enunciated in the aforesaid cases, in relation to fair hearing and other issues, relied upon by the learned counsel for the appellants were completely irrelevant to the situation in the present case. The learned Justice of the court below expressed the following view:-

"It is perhaps appropriate at this stage to examine the submission of appel-

lants' counsel that the learned Judge's refusal to concede (to) , him audience during the hearing of the ex parte application offended the constitutional provision of right to a fair hearing. He cited Woluchem v. Wokoma (1974) 3 S.C. 153 at 155 and Otapo v. Sunmonu (1987) 5 SCNJ 59 at page 96; (1987) 2 NWLR (Pt.58)587.....counsel's assertion was
B woefully misconceived in the light of my analysis of Woluchem and Otapo I am in complete agreement with the submission of the learned counsel for the respondent that all the cases cited herein by appellants' counsel in respect of a fair hearing are completely irrelevant to the situation in hand and the submissions of learned counsel for the appellant in this regard are
C completely misconceived.....But the issue in the present appeal involves an application exparte for an interim injunction. It does not involve the court at this stage in the resolution of contentious matters. "

Otapo's case, Woluchem's case and Kotoye's case were referred to in the appellants' brief and mention was also made of the legal principles enunciated in them in relation to exparte injunctions generally, filing of ex parte application and motion on notice at the same time for the same injunctive reliefs; the requirement of section 33(1) of the Constitution: and the rules and the principles governing exercise of discretion in all applications for injunctions. It was then submitted that the court below summarily
E dismissed the submissions made for the appellants based on the aforesaid legal principles without regard to the substance of the issue of fair hearing, the bindingness of the decisions of this court, and the judicious use of discretion in applications for injunction.

There was substance in the view expressed by the court below that
F cases, pertaining to the general requirement stipulated in section 33(1) of the Constitution that opportunity of being heard should be given in the determination of the civil right of any person, and cases which decided that the aforesaid opportunity should be given in the case of an application for interlocutory injunction, were irrelevant to a case relating specifically to an
G application for an interim injunction. It is necessary, in this connection, to refer to the view which I have earlier expressed in this judgment. In the appellants' brief, the appellants did not recognise that an interim injunction was not the same thing as an interlocutory injunction. Indeed, the appellants' view, as stated in their brief, was that it was not necessary, in this
H case, to distinguish between an interim injunction and an interlocutory injunction. That led to the erroneous conclusion that principles enunciated in certain cases in connection with an application for an interlocutory injunction or enunciated generally in relation to opportunity of being heard stipulated in section 33(1) of the Constitution automatically applied with equal

force to an application for an interim injunction. The misconception, on the part of the appellants, also led to the submission that the court below summarily dismissed the submissions made for the appellants based on the Woluchem's case and Otapo's case without regard to the issue of fair hearing and to the bindingness of the decisions of this court on the lower courts. The legal position in this country is that the Court of Appeal and other lower courts are bound by the decisions of this court. See *Osho v. Foreign Finance Corporation*. (1991) 4 NWLR (Pt. 184) 157. However, where the principles enunciated in the decisions of this court are not relevant or applicable to the issue or issues arising for determination in the case before the Court of Appeal or any other lower court, it is not necessary that the Court of Appeal or any lower court should apply the aforesaid principles. With reference to Kotoye's case, some of the principles enunciated by this court therein apply to interim injunction only, some apply to both interlocutory injunction and interim injunction, and the others apply to interlocutory injunction only. I have read the judgment of the court below carefully and I am of the view that the principles enunciated in Kotoye's case relevant to the present case were correctly applied to the issues involved in this case. Consequently, the answer to the question raised under the second issue is that the principles, if any, enunciated in Woluchem's case, Otapo's case, and Kotoye's case which were relevant in this case were correctly applied to the issues involved.

On the whole, this appeal lacks merit. The judgment of the court below affirming the judgment of the learned trial Judge is affirmed. This appeal is accordingly dismissed with N1,000.00 costs to the respondent.

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UWAIS JSC

I have had the advantage of reading in draft the judgment read by my learned brother Adio, J.S.C. I agree with the judgment.

Order 8 rule 9 of the High Court of Kwara State (Civil Procedure) Rules, 1987 provides that when a party is making an ex parte application, no party to the proceedings, even if present in court, is entitled to be heard. The exact wording of the rule is as follows -

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"a. Any party moving the court ex parte may support his motion by argument addressed to the court on the facts put in evidence and no party to the suit or proceedings, although present, other than the party moving shall be entitled to be then heard."

When the respondent herein brought an application *ex parte* in the High Court, for the grant of interim injunction against the appellants, counsel for the latter who was present in court, having previously filed a counter-affidavit to the affidavit in support of the application, requested to be heard on behalf of the appellants. The learned trial Judge (Ibiwoye J.) refused to grant the request. The application *ex parte* was heard and granted by the learned Judge. This was on 15/9/88 and notwithstanding the motion on notice brought by the appellants on 1/9/88 which was fixed for hearing on 20/9/88. In the latter motion, the appellants sought for leave to be heard in the motion *ex parte* by the respondent. Hence the appeal by the appellants to the Court of Appeal which was dismissed by a majority of 2 to 1 (Mohammed J.C.A., as he then was, and Achike, J.C.A. with Ogundere, J.C.A. dissenting).

In the further appeal to this court the appellants complained that the decision of the Court of Appeal was erroneous on the grounds *inter alia* that the lower court was wrong to have relied on the decisions of this court in the cases of *Woluchem v. Wokoma*. (1974) 3 S.C. 153; *Otapo v. Sunmonu* (1987) 5 SCNJ 59; (1987) 2 NWLR (Pt.58) 587 and *Kotoye v. Central Bank of Nigeria*. (1989) 1 NWLR(Pt.98) 419 and to have upheld the refusal of the trial court to hear the appellants on the *ex parte*, motion, which refusal had been a violation of the appellants' right to fair hearing under section 33 subsection (1) of the constitution of the Federal Republic of Nigeria (1979), (Chapter 62 of the laws of the Federation of Nigeria, 1990).

I wish to deal only with the constitutional issue raised by the appellants. Section 33 subsection (1) provides thus -

"33(1) In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality."

It has been canvassed in the appellants' brief of argument that the provisions of order 8 rule 9, quoted above, are inconsistent with section 33 subsection (1) of the 1979 Constitution.

There is no doubt that the right to fair hearing under the constitution is synonymous with the common law rules of natural justice - see *Mohammed v. Kano N.A.* (1968) 1 All NLR 424 at page 426 and *Deduwa v. Okorodudu*. (1976) 1 NMLR 237 at page 246. In both criminal and civil proceedings, there are certain steps to be taken which are incidental or preliminary to the substantive case. Such steps include motions for direc-

tion, interim or interlocutory injunction. The time available for taking the steps may be too short or an emergency situation may have arisen. It, therefore, becomes necessary to take quick action in order to seek remedy for or arrest the situation. It is in respect of such cases that provisions are made in court rules to enable the party affected or likely to be affected to make ex parte applications. The orders to be made by the court, unlike final decisions, are temporary in nature, so that they do not determine the "civil rights and obligations" of the parties in the proceedings as envisaged by the constitution. I am strengthened in this view by the provisions of order 8 rule 11 of the High Court of Kwara State (Civil Procedure) rules, 1987, which state -

"11. Where an order is made on a motion ex parte any party affected by it may, within seven days after service of it, or within such further time as the court shall allow apply to the court by motion to vary or discharge it, and the court, on notice to the party obtaining the order, either may refuse to vary or discharge it with or without imposing terms as to costs or security or otherwise, as seems just."

Furthermore, when an application is made ex parte, there is a provision of the High Court Rules that gives the trial court the discretion to direct that the ex parte motion be made on notice to the parties that are likely to be affected by the ex parte motion. Order 8 rule 10 of the High Court of Kwara State (Civil Procedure) Rules, 1987, provides -

"10. Where a motion is made ex parte, the court may make, or refuse to make the order sought, or may grant an order to show cause why the order sought should not be made, or may direct the motion to be made on notice to the parties to be affected thereby."

If the Supreme Court can dispose of an application under section 213 subsection (4) of the 1979 Constitution without oral hearing of the application, then I see nothing wrong or unconstitutional for a trial court to deal with an ex parte motion under its rules. For the 1979 Constitution sanctions that procedure by providing in section 239 thereof as follows -

"239. The High Court of a State shall exercise jurisdiction vested in it by this Constitution or by any law in accordance with the practice and procedure (including the service and execution of all civil and criminal processes of the court) from time to time prescribed by the House of Assembly of the State."

See *Oyeyipo v. Oyinloye*. (1987) 1 NWLR (Pt.50) 356. It is for these and the detailed reasons contained in the lead judgment of my learned brother Adio, J.S.C. that I too dismiss this appeal with N1,000.00 costs to the respondent.

BELGORE JSC

There is no need to seek aid for interpreting a document once its words are clear and unambiguous. Order 8 rule 9 High Court (Civil Procedure) Rules of Kwara State is clear. The Rules of the court are made to make the functioning of the courts to be smooth and with order; they save time and expenses. Therefore the provisions for ex parte motions in certain cases is to save time and expenses and if relevant the res. The Rules of the court, owing to the existence to statutory provisions and in some cases to the Constitution, ought to be viewed as aids to smooth adjudication. Motions are interlocutory in the main and cannot be given the weight of substantive matters before the court as they can conveniently be taken up in the substantive hearing and if necessary on later appeal. The ex parte motions now in issue were properly taken at the trial court and my learned brother, Adio, J.S.C. has amply dealt with them that I do not need to repeat his reasons.

For the reasons he has well adumbrated in his judgment, which I adopt as mine, I find no substance in this appeal and I also dismiss it. I make the same consequential orders as to costs.

E

WALI JSC

I have had the advantage of reading in advance, a copy of the lead judgment of my learned brother, Adio, J.S.C. and I entirely agree with his reasoning and conclusion that the appeal is without merit.

The germane and determinant issue in the appeal is whether the appellants have the constitutional right of being heard in an ex parte application for an interim injunction pending the hearing of an application for an interlocutory injunction.

The appellants' main contention is that since they had filed an application opposing the ex parte application and were in court the day the application was heard and granted, the trial court was wrong to have refused them audience and which they submitted violated section 33(1) of the 1979 Constitution.

An interim injunction which is granted upon an ex parte application is always granted for a short and limited period, depending on the gravity and urgency of the situation, in order to preserve the status quo

pending the hearing of an interlocutory application in the same matter. The two applications - ex parte and interlocutory are usually filed on the same date or the latter is filed immediately after the former. An ex parte order is not granted for a long and indefinite period. The provisions of Order 8 rules 9,10 and 11 of the Kwara State High Court (Civil Procedure) Rules 1989 are very clear on the issue and do not need any construction to find out B what they mean. Rule 9 of Order 8 stipulates that on an application ex parte only the applicant will be granted audience by the court and that “*no party to the suit or proceedings, although present other than the party moving, shall be entitled to be then heard*”. (Italics supplied for emphasis)

If a party affected by the interim order made ex parte is not happy, C he can move the court under Order 8 rule 11 of the High Court (Civil Procedure) Rules, “*Within seven days after service of it or within such further time as the court shall allow*” to have such order either varied or discharged in toto (Italics supplied)

In my view, the fact that the appellants were refused hearing by D the trial court, when it was hearing the ex parte application, did not contravene section 33(1) of the 1979 Constitution. Section 33(1) states thus:-

“*In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a E reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality.*”

The emphasis here is, “*hearing within a reasonable time*”. The person affected by the order ex parte is not denied hearing simply because an interim F order for a limited period is made pending when the interlocutory application is taken, during which time the parties will be heard. The ex parte order is made only in an extreme situation of urgency. It is not meant to last up to the time when the “civil rights and obligations “of the parties are determined. The seriousness of the situation and its urgency always guides the G court as regards the time to be fixed to hear the parties on the interlocutory application. I entirely agree with Achike J.C.A. when he said:-

“*Bearing in mind that the real purpose of the interim order sought by ex parte motion is to afford an expeditious procedure for arresting any pos- H sible delay that would endanger the res, the importunate request of the opposing party who is present and has signified its intention to be heard on the ex parte application should make no difference. To accede to the request of such an importunate respondent as a matter of course, in order*

not to appear to offend the provisions of section 33(1), would lead to abuse and in turn unwittingly, undermine the continued existence of interim ex parte applications. In a proper case, such as the case in hand, once the appellants are let in through the subtle argument that they are present, have expressed desire to be heard and have filed and served their counter-affidavit on the respondent, then, the trial court would be obliged to go the whole hog and treat what is technically and in substance an ex parte application as one on notice, with all the far - reaching implications. The trial court, in order to be even-handed, must, on further requests by either or both parties, allow them to file further and better affidavit(s) and, if also requested, allow such extended time that either party may pray for to make possible the production of such documents they consider vital for the proper determination of the "ex parte" application. The situation may become thoroughly exacerbated if the parties' affidavit evidence is seriously in conflict as to necessitate calling of viva voce evidence. These and many other unforeseeable circumstances are bound to arise, impair or even frustrate the ex parte character and purpose of the application once a respondent, in the fancied and rather overstretched argument based on the right to a fair hearing, is conceded the right to be heard. Insistence on the observance of right of a fair hearing in relation to interim application made ex parte ought not to be pursued to the hilt. To my mind, since the status quo sought to be maintained inures to the interest of both parties and any damage to which the other party may be exposed consequent to the making of the interim ex parte order is fully guaranteed, and also mindful of the vide residuary inherent powers reserved to the courts under section 6(6)(a) of the Constitution, it seems to me that the powers of the courts to grant interim ex parte orders thus confined within the safeguards of rules of court and rules of practice ought not to be given a strict interpretation of being in conflict with the right to a fair hearing. In my respectful opinion, that is a simplistic view of section 33(1) of the Constitution. It is counter-productive. Operating within safeguards against abuse, the court ought to sanction their continued powers to grant ex parte interim injunctions in deserving cases - only in extreme cases where there are imminent and grave dangers of the res being destroyed or disposed of in rather suspicious or unwholesome circumstances."

H It is for this and the more detailed reasons contained in the lead judgment of my learned brother Adio, J.S.C., that I also hereby dismiss this appeal with N1000.00 costs to the respondent.

The judgment of the trial court and that of the Court of Appeal are hereby affirmed.

KUTIGI JSC

B

I will also dismiss this appeal for the reasons ably stated in the lead judgment of my learned brother Adio, J.S.C. which I was privileged to read before now. I endorse the order for costs.

C

OGUNDARE JSC

D

I have just read in advance the judgment of my learned brother Adio, J.S.C. just read. For the reasons given therein which I hereby adopt as mine I too dismiss this appeal. I have nothing more to add.

I abide by the order for costs made in the lead judgment of my learned brother Adio J.S.C.

E

IGUH JSC

F

I have had the opportunity of reading in draft the lead judgment just delivered by my learned brother, Adio, J.S.C. and I agree that there is no substance in this appeal.

The plaintiff had in a substantive action against the defendants at the High Court of Justice, Kwara State filed an ex parte application for interim injunction under the provisions of order 8 rules 9 and 10 of the High Court (Civil Procedure) Rules of Kwara State, 1987 pending the determination of the motion on notice for interlocutory injunction already filed in the suit. The defendants thereupon applied to the court for leave to be heard at the hearing of the ex parte application. Relying on the decisions of this court in Chief Gani Fawehinmi v. Col. Halilu Akilu and Another (1987) 4 NWLR (Pt.67) 797 at 860 where Uwais, J.S.C. indicated inter alia that when an ex parte application is being moved, the respondent does not take part, Ibiwoye, J. held that in an ex parte application of the nature under

consideration, the defendants had no right to be heard. The defendants' application was accordingly rejected. This was on the 15th September, 1988.

The learned trial Judge at the conclusion of argument on the ex parte application by learned counsel for the plaintiff felt satisfied that the same had merit. He therefore granted the orders as prayed on the 20th September, 1988.

The defendants being dissatisfied with the said two rulings lodged an appeal to the Court of Appeal which on the 9th May, 1989 dismissed the appeal. The defendants have further appealed to this court against the decision of the Court of Appeal, Kaduna Division.

The main issue that calls for determination in this appeal is whether in a motion ex parte, properly and competently filed by a party to a suit, the other party has a right to be heard particularly where the latter has applied to be heard on the motion.

D Order 8 rule 9 of the High Court (Civil Procedure) Rules of Kwara State, 1987 pursuant to which the ex parte application was brought provides as follows:"

E *Any party moving the court ex parte may support his motion by argument addressed to the court on the facts put in evidence and no party to the suit or proceedings although present other than the party moving shall be entitled to be then heard"* (Italics supplied for emphasis)

Rules of court are not made for fun or to be treated with levity but must be strictly complied with in the interest of fair administration of justice. See F Solanke v. Somefun (1974)1 S.C. 141 at 150, and Musa v. Hamza(1982) 3 NCLR 229; (1982) 5 S.C. 172. It seems to me crystal clear from the provisions of the above rule that the defendants could not simply because they had applied to be heard on the plaintiff's application ex parte compel the court to hear them as of right in the face of the express stipulation to G the effect that: -

".....no party to the suit or proceedings although present other than the party moving shall be entitled to be then heard"

There is however the provision of Order 8 Rule 10 of the Kwara State High Court Rules which provides as follows-

H *"10. Where a motion is made ex-parte, the court may make, or refuse to make the order sought, or may grant an order to show cause why the order sought should not be made, or may direct the motion to be made on notice to the parties to be affected thereby"*

(Italics supplied for emphasis)

It appears to me equally clear that the court has unimpeded right upon the hearing of a motion *ex parte* to order Inter alia that the other parties who may be affected by the court's order be put on notice. There can be no doubt that the defendants when they applied to the trial court for leave to defend the plaintiff's application *ex parte* were merely inviting the trial court to invoke its discretionary jurisdiction to let them in to defend the application. The trial court duly considered this application of the defendants and, in the exercise of its discretionary jurisdiction, refused the same. B

It is necessary to stress that the learned trial Judge had full discretion in the matter and was entitled to refuse the application so long as the exercise of that discretion was exercised judicially and judiciously. The refusal of the trial court to hear the defendants at the hearing of the plaintiff's application *ex parte* was clearly a result of the exercise by him of his judicial discretion and unless that discretion is shown to have been wrongly exercised or shown to have been exercised upon wrong principle or that the exercise was tainted by some illegality or substantial irregularity, an appellate court will on principle, not interfere with the exercise of that discretion. See *Anyah v. A.N.N. Ltd.* (1992) 6 NWLR (Pt.247) 319 and *University of Lagos v. Aigoro* (1985) 1 NWLR (Pt. 1) 143. I have not been persuaded to hold that the decision of the trial court by refusing the defendants leave to be heard on the *ex parte* application is erroneous on point of law or otherwise wrongful. See *University of Lagos v. Olaniyan* (1985) 1 NWLR (Pt. 1) 156 at 163 and *Niger Construction Ltd. V. Okugbeni* (1987) 4 NWLR (Pt.67) 787. This does not however mean that the defendants were without remedy if they felt dissatisfied with the said rulings of the trial court. D E

There is next the provision of order 8 rule II of the High Court F (Civil Procedure) rules of Kwara State, 1987 which goes as follows-

"Where an order is made on a motion ex parte, any party affected by it may, within seven days after service of it, or within such further time as the court shall allow apply to the court by motion to vary or discharge it, and the court, on notice to the party obtaining the order, either may refuse to vary or discharge it with or without imposing terms as to costs or security or otherwise, as seems just" G

(Italics supplied for emphasis)

It is thus clear that any party who is affected by an order made upon a motion *ex parte* may within 7 days of the service of the order upon him or within such further time as the court shall allow, apply to the court to vary or discharge such an order, Such an application shall however be by motion on notice to the party in whose favour the order complained of was H

made. I should perhaps add that the discretion of the court to grant or refuse such variation or discharge again remains unfettered.

In this regard, the Court of Appeal per Achike, J.C.A. observed as follows

B " *Rather than question the ex parte order in accordance with the lucid provisions of Order 8 rule 11 - by a simple motion on notice - the appellants chose to complain against the conduct of the learned trial Judge in this regard by way of appeal. No doubt the appellants have the constitutional right to appeal against the decision of a High Court under sections 219, C 220 and 221 of the Constitution of 1979 - which may be as of right or by leave - to the Court of Appeal. And the word "decision" by virtue of section 277 of the said Constitution includes orders made by the High Court. Nevertheless, questioning the order of the trial Judge by way of D appeal cannot, at any rate in this country, be said to be reasonably expeditious in the circumstances of this case when it may be recalled that the appellant was physically present and signified an intention to be heard. This proceeding by way of appeal, in contrast to the powers of review embedded under rule 11 (of order 8), is to call in aid an enormous lethal hammer to crack a rather small nut.* "

E I agree entirely with the above observations of Achike, J.C.A. and fully endorse them. A simple interlocutory matter which should have taken the trial court a matter of days, or at the worst a few weeks to determine had the defendants exercised their right under the provisions of Order 8 Rule 11 of the High Court Rules has now taken seven years to be concluded in this F court on appeal I do not conceive that it was in the best interest of the defendants to have elected to question the said order of the trial court made upon an ex parte application through the circuitous means of an appeal instead of taking advantage of the provisions of Order 8 Rule 11 of the High Court Rules 1987 to correct whatever error that was complained of.

G To conclude, I wish to state that whether an ex parte application is to be if-granted or refused is a matter at the entire discretion of the trial court. In application ex parte, only the applicants may be heard unless the court in its absolute discretion directs that the other party or any other parties to be affected thereby be put on notice, otherwise such other party H or parties to be affected may only be seen but not be heard at the hearing of the application.

Finally it is the provision of the law that where an order is made on a motion ex parte, any party affected by it may, within seven days after service of it, or within such further time as the court shall allow apply to the

court by motion on notice to the party obtaining the order to vary or discharge it. In my view, it cannot be the law that once a party to be affected by the order a court may make in an ex parte motion applies to be heard in defence of such motion, the court ipso facto loses its discretionary jurisdiction or power to determine whether such a party to be affected may or may not be heard in opposition to the motion ex parte. To hold otherwise B will mean that a legitimate motion ex parte shall automatically be converted to a motion on notice the moment there is an application no matter how frivolous or flimsy by a party to be affected for leave to be heard in opposition to the motion ex parte. As I have observed, I cannot conceive this to be the state of the law. No doubt, in a motion ex parte, the party to C be affected may still be heard in the motion depending on if the court exercises its discretion favourably on such a party's application to be heard. It cannot however be seriously argued that once there is an application by an interested party to be heard in a motion ex parte, the court, like Pontius D Pilate, must wash off its hands and automatically convert such an ex parte application to a motion on notice.

On the question of whether the refusal to concede the defendants audience during the hearing of the ex parte application offended the constitutional provision of right to fair hearing enshrined in section 33(1) of the 1979 Constitution, reference may be made to the observations of this court E per Ibekwe, J.S.C., in *Woluchem v. Wokoma* (1974) 3 S.C. 153. Said the learned Justice-

"It is well settled rule of practice in Civil Proceedings that the party to be affected by the order sought should normally be put on notice. In our view, therefore it should be a rule of practice that the court will not save in F exceptional circumstances, grant interlocutory injunction on an ex parte application. We also think it should at least be a rule of prudence" (Italics supplied for emphasis)

There can be no doubt from the above passage that this court in G no mistaken terms expressed its approval of the grant of an interim injunction on an ex parte application in exceptional circumstances as provided for by the law. See too *Kotoye and 7 others v. C.B.N.* (1989) 1 NWLR (Pt.98) 419. I think it can now be taken as well settled that an interim injunction may properly and lawfully be granted upon an ex parte applica- H tion in appropriate cases where the circumstances of the matter justify the making of the order. In my view, therefore, the provisions of order 8 rule 9 cannot be said to be in conflict with the constitutional provisions of right of fair hearing under section 33 (1) of the 1979 Constitution particularly when it is appreciated that the making of such interim orders of injunction is fully

backed by the inherent powers of the courts preserved under section 6(6)(a) of the said 1979 Constitution.

It is for these and the more elaborate reasons contained in the lead judgment of my learned brother, Adio, J.S.C. that I, too, dismiss this appeal. I abide by the consequential orders including the order as to costs therein made.

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