

SUPREME COURT OF NIGERIA
28TH APRIL, 1995. SC. 290/1988
CORAM:- . BELLO CJN, S.M.A. BELGORE,
U. MOHAMMED, S.U. ONU, Y.O. ADIO, JJSC.

FUNDUK ENGINEERING LTD APPELLANT

AND

1. JAMES MCARTHUR)
2. DRINSCO COMPANY LTD)
3. THE COMMISSIONER OF) RESPONDENT
POLICE OYO STATE)
4. INSPECTOR AMODU)
5. INSPECTOR OYEDIRAN)

STAY OF EXECUTION - *Grant or refusal - Is at court's discretion - What a party seeking to set aside the Order must show.*

STAY OF EXECUTION - *Jurisdiction - Where the issue of jurisdiction is latent or patent - Whether it will make grant of a stay imperative.*

STAY OF EXECUTION - *Discretion of trial court - In refusing the application - Wrongly exercised.*

STAY OF EXECUTION - *Justice of the case - Whether 'respondents satisfied the court - That a stay would meet justice of their case given the circumstances.*

STAY OF EXECUTION - *Fair trial - Where denial thereof was established - Whether it is an exceptional circumstance that will attract a stay.*

STAY OF EXECUTION - *Conditions attached to the order - Where found to be very fair - whether to be disturbed.*

FACTS

The appellant as plaintiff filed an action against the respondents before the Ibadan High Court claiming ownership of certain machinery, equipment, vehicles, etc, being in the wrongful possession of 1st, 2nd and 6th defen

dants. Appellant claimed the total sum of N5,241,600.00 as special and general damages for trespass, illegal seizure, detainee, and or conversion of the appellant's said property. During the Course of trial, 1st respondent who was away in England and later shown to be ill over there was not allowed to testify 35 the trial court would not grant further adjournments towards his arrival. Judgment was delivered in favour of the appellant for the sum of N3,721,000.00. The respondents appealed against the judgment and applied for a stay of execution.

The application for a stay was refused by the vacation judge (not being the trial judge) who heard it. The respondents' applied to the Court of Appeal which granted the stay of execution and imposed certain conditions the appellant felt were not proper. Being dissatisfied, the appellant has now appealed to the Supreme Court to determine inter alia, whether the respondents validly raised arguable grounds and special circumstances to justify a grant of stay of execution.

HELD (Unanimously dismissing the appeal per lead judgment of **ONU JSC**)
Stay of execution - Grant or refusal

1. Now, the grant or refusal of a stay of execution is at the discretion of the court and such discretion must be exercised judicially taking into consideration the competing rights of the parties to justice. Thus, a party such as the Appellant in the instant case who is seeking to set aside an order of stay of execution, must show that in the circumstances, it was unjust and inequitable to grant the order. (p. 954 A)

Stay of execution - Jurisdiction

2. The issue of jurisdiction, it must be pointed out, is so fundamental that if the court below eventually comes to consider it in the light of Exhibit 10 quoted in the ground of appeal above and it is found that the trial court after all lacked jurisdiction, then the whole judgment which is the by-product of such a trial becomes a nullity no matter how well conducted. Even when the Respondents failed to quote the passage in the ground attacking the jurisdiction of the trial court, the fact that Exhibit 10 referred to therein was available at the hearing to give credence to the allegation would validly, in my respectful view, raise in the minds of the learned Justices the question that an arguable ground and a fortiori, a special circumstance was latent, not patent to deserve their attention to make the grant of a stay of execution imperative.
 (p. 954F)

Stay of execution - Discretion of trial court

3. On numerous occasions this Court has consistently stressed the fact that the grant of a stay is a matter within the discretion of trial court, which discretion must be exercised judiciously bearing in mind the competing claims of the parties to justice. In other words, the exercise of such a discretion should be made in the interest of all. In the circumstances of this case, I take the view that the discretion was wrongly exercised by the learned vacation Judge when he refused to order a stay. (p. 955 F)

Stay of execution - Justice of the case

4. The attack on the Justices of the court below regarding the propriety or otherwise of a ruling of a lower court without its reasoning being stated on the materials before it, is misconceived. The Ruling of the trial court refusing stay of execution dated 8th August, 1988, although terse in context, was albeit before the court below and with the other materials before it, the Respondents discharged the onus placed on them to satisfy the court that in the peculiar circumstances of their case, a stay would meet the justice of their case. (p. 956 H)

Stay of execution - Fair trial

5. Considered as a whole, in the circumstances of this case, it is clear that there are reasons for coming to the view that the 1st Respondent was justified to complain of lack of fair trial. If that were so, and once established at the trial, it was wrong reason for the learned Justices of the court below in my opinion, come to the view that an exceptional or special circumstance was disclosed for the grant of a stay of execution of the judgment pending appeal. The question I ask myself is, was the discretion of the court below granting the stay of execution exercised judicially as well as judiciously? My answer, with utmost due respect, is that the discretion was exercised judicially and judiciously. (p. 957 B)

Stay of execution - Conditions attached to the order

6. With regard to its consideration of the conditions attached to the order for stay, I can but say that the court below was very fair in relation to imposition of these conditions. True it is that the 1st Respondent if an alien presently resident outside Nigeria and whose visa to re-enter the country has expired. Albeit, the request for an order that physical money be paid in bulk into an interest-yielding account to abide the result of the appeal, is an impossibility, at least for now, because of the sheer fact that 1st Respondent who would have been asked to do so, is not available. The order made or condition

imposed regarding the implements, machinery and equipment, is in my opinion, correct and ought not to be disturbed. (p. 957 E)

REPRESENTATION

Appellant not represented.

1st and 5th Respondents absent. Not represented

H. F. Sule Esq., Chief Legal Officer, Oyo State, for the 2nd, 3rd and 4th Respondents.

CASES REFERRED TO

Djukpan v. Oroyuyovbe (1967) NMLR 287; (1967)1 All NLR. 134 at 137

Uor v. Loko (1988)5 S.C. 25 at 35

Vaswani Trading Company v. Savalakh & Co. (1972)12 S.C.77

Balogun v. Balogun (1969)1 All N.L.R. 349

Atuyeye v. Ashamu (1987)1 NWLR (Part 49)267

Okafor v. Nnaife (1 987)4 NWLR (Part 64)1 29

Ebegbuna v. Ebegbuna (1974) W.S.C. A. 23

Mobil Oil (Nig.) Ltd v. Agadaigho (1988) Vol. 19(a) N.S.C.C. 777 at 780

Unongov. Aku (1983)11 S.C1 129 at 179

Atano v. A.G. Bendel State (1988)2 NWLR (Part 75)201 at 218

Ibodo v. Enarofia (1980)5-7 S.C. 42

STATUTES & RULES REFERRED TO

Supreme Court Rules 0.6 r.6

Court of Appeal Rules 0.3 r. 2(4)

Evidence Act (Cap 112 L.F.N. 1990) s. 58(1)

High Court Law of Oyo State ss. 9, 10, 14

BOOKS REFERRED TO

Law of Practice Relating to Evidence in Nigeria - Dr. T. A. Aguda para. 9 -10 to 9- 14

Practice and Procedure of the Supreme Court, Court of Appeal, etc - Dr. Aguda 1st Ed. para. 44.49 p.535

LEAD JUDGMENT BY ONUJSC

This is an appeal against the ruling of the Court of Appeal sitting in Ibadan on 28th of November, 1988 granting to the 1st defendant/appellant/respondent a stay or execution of the judgment of Ibidoju -Obe, J. of the High Court of Oyo State holden at Ibadan and delivered on 14th July, 1988, pending

the determination of the appeal lodged at the Court of Appeal (hereinafter referred to as the Court below). The appellant which was the, respondent in the court below, was the plaintiff in the trial High Court, where it filed an action against all five respondents then defendants upon a writ of summons for:

“(a) A declaration that the plaintiffs are the rightful owners of the
B *machinery, equipment, vehicles, drilling tools and materials listed in the annexure to the further Amended Statement of Claim which are lying in the premises of Trans-Atlantic Services Ltd, Old Lagos Road, Ibadan and/or otherwise in the wrongful possession of the 1st, 2nd and 6th defendants.*

C *(b) The sum of Five Million, two hundred and forty-one thousand, six hundred naira (N5,241,600.00) only being Special and General damages for trespass, illegal seizure, detainue, and/or conversion of the plaintiff’s machinery, equipment, vehicles, drilling tools and materials listed in the annexure to the Further Amended Statement of Claim.*

D *(i) Special damages of Four Million, seven hundred and forty-one thousand, six hundred Snaira (N4,741,600.00) only being an aggregate of:*

E *(a) The sum of N2,741, 600.00 being the current market value of the plaintiff’s equipment, vehicles, machinery, drilling tools and materials listed; and*

(b) the sum of N2 million for loss of use and loss of business.

(ii) General Damages of N500,000.00 “

F The course charted by this case in its journey to this court on appeal may be briefly stated as follows:-

The appellant’s claim as hereinbefore set out in the High Court, was for a declaration that it was the owner of certain drilling equipment, machinery vehicles and sundry tools wrongfully seized by the 3rd, 4th and 5th respondents and converted to the use of the 1st respondent - James McArthur. The
G appellant was in addition claiming for a total aggregate sum of N5,241 ,600.00 being special and general damages for trespass, illegal seizure, detainue and/or conversion of the said goods. Pleadings having been ordered, filed and exchanged, the case went to trial.

H During the course of trial, the appellant called witnesses and tendered documents in support thereof. The 3rd to 5th respondents who were represented by counsel, called two witnesses in support of their defence. The 1st respondent’s counsel then orally informed the trial court of his client’s desire to give evidence and the court granted two adjournments for the pur

pose. It is stated that 1st respondent was away in England. However, on the third adjourned date, his counsel again orally applied for a further adjournment on the ground that his client who wished to testify, was indisposed in London after a brief admission in a hospital in Ibadan. No documentary evidence was tendered to back up the assertion. The Court in a ruling dated the 6th of July, 1988, refused this application and consequently closed the case B for him and fixed the matter for address on 13th July, 1988. When the date, 13th July, 1988 arrived for the address by learned counsel for him, he applied to court for leave to appeal against the ruling of 6th July, 1988 and for a stay of proceedings. It was on this dated fixed for addresses that learned counsel for 1st respondent produced a Medical certificate and other documents to explain the absence of his client. Both applications were peremptorily refused as the document were deemed to be irrelevant at that stage. C

The learned trial Judge (Ibidapo-Obe, J.) delivered judgment on the 14th of July 1988 in favour of the appellant for the sum of N3,721,000.00 plus costs assessed at N1,000.00. The respondents subsequently appealed against the judgment to the court below and then applied for a stay of execution pending the final determination of the appeal. However, since the application was brought during the court's vacation and was therefore heard by the vacation Judge (Akin Apará, J., as he then was), i.e. a Judge other than the trial Judge. He refused it. Hence, a similar application was made to the court below. E

The court below having granted the application in a considered ruling, as herein before suited, the appellant has now appealed to this Court premised on five grounds. F

The appellant and 3rd to 5th respondents subsequently filed and exchanged briefs of argument in accordance with the rules of court. The appellant submitted three issues as arising for determination. They are:-

1. Whether the respondent has by his Notice of Appeal and in the Court of Appeal validly raised arguable grounds and special circumstances to justify a grant of stay of execution. G

2. Whether their Lordships of the Court of Appeal exercised their discretion properly on the materials before them in granting the respondents a Stay or Execution of the judgment of the High Court.

3. Whether the condition imposed by their Lordships of the Court of Appeal on the grant of the said stay of execution was the proper condition bearing in mind the nature of the subject matter of the judgment and all the circumstances of the case. H

On behalf of the 3rd, 4th and 5th respondents (learned Chief Legal Officer claims he now represents 2nd, 3rd and 4th respondents) three issues were also submitted for determination. They are:

- “1. *Whether the appellant can argue points of law not argued before the lower court.*
- B 2. *Whether from the circumstances of this case the 1st respondent was entitled to the stay of execution of the judgment granted by the Court of Appeal Ibadan Division on 28th November, 1988 having shown special circumstances.*
- C 3. *Whether from the circumstances of this case the conditions imposed by the Justices of the Court of Appeal were proper.”*

In my consideration of this appeal, I intend to stick to the appellant’s issues as formulated. On 6th February, 1995 when this appeal came up for hearing, Appellant’s counsel who had riled a comprehensive brier was absent. Mr. H.F. Side, Chief Legal Officer, Oyo State., appeared for the 2nd, 3rd and 4th respondents. 5th respondent was unrepresented. The appellant’s appeal was accordingly treated as having been argued vide Order 6 rule (6) Supreme Court Rules, while learned Chief Legal Officer for the 2nd, 3rd and 4th respondents adopted his brief and urged to dismiss the appeal. The 5th respondent being only a respondent can but be regarded as passive in these proceedings.

E It is pertinent to point out, however, that at the hearing or the appeal, we were assured that the appeal is still pending before the court below.

I will now proceed to consider the appeal with all the three issues taken together but before doing so, I wish to stress that argument founded on grounds 1 and 2 and considered in the respondent’s brief under issue 1, would not normally be proffered here, moreso that no leave was first sought and obtained to do so as fresh points of law. See Djukpan v. Orovuyovbe & Anor (1967) NMLR 287; (1967) 1 All NLR 134 at 137 and Udzar Uor & ors. v. Paul Loko (1988) 5 SC 25 at 35; (1988) 2 NWLR (Pt.77) 430. That notwithstanding, having regard to my consideration or how legitimate it was of the court below to have elicited facts from the affidavit filed by 1st respondent’s counsel in support of his application for adjournment elsewhere in this judgment, and thus giving treatment to the two grounds, the matter, in my opinion, pales into insignificance.

It was firstly submitted that the stay of execution of the judgment of the High Court granted by the court below was wrongly granted as the learned justices of that court did not exercise their discretion judiciously in line with the settled principles guiding the grant of stay of execution. It is contended that the learned Justices grounded the grant of stay of execution to the respondents primarily on the case of Vaswani Trading Company v. Savalakh &

Co. (1972) 12 SC 77 and Balogun v Balogun (1969) 1 All NLR 349 and held that since the respondents had raised the twin issues of fair trial and jurisdiction which could be decided either way, then a stay or execution ought to be granted.

It is therefore appellant's contention in the first place that the Notice or Appeal filed by the respondents did not in itself validly raise the issue of jurisdiction which could weigh in the minds of the learned Justices of the court below in the exercise of their discretion. Our attention was adverted to the purport of Order 3 Rule 2(4) or the Court of Appeal Rules and the case of Atuyeye v. Ashamu (1987) 1 NWLR (Pt. 49) 267. After selling out the ground of appeal touching on jurisdiction, it was then submitted that nowhere in this ground or the particulars thereof, did the respondents quote the passage or passages in which the learned trial Judge relied heavily on the said Exhibit 10 but rather quoted the Agreement. It is not the contention, it was further pointed out, that the said Exhibit 10 was in issue in the trial court or that it was an agreement between any of the parties to the action.

The fact that an agreement states that it shall be interpreted in accordance with English Law (or any particular variety of law), it is further maintained, does not in anyway without to an ouster of jurisdiction of Nigerian courts to interpret or enforce the provisions of the said document. For instance, (i) where there is a question as to foreign law and the opinions of experts in books, they are admissible to explain same vide section 57 of the Evidence Act and AGUDA on Law of Practice Relating to Evidence in Nigeria, paragraphs 9-10 to 9-14, pages 116-118 and, (ii) that it is trite law that any clause or provision in an agreement seeking or purporting to oust the jurisdiction of the court, is void. The learned Justices or the court below, it was next maintained, could not and ought not to have treated the ground as having validly raised the question of jurisdiction when, in their ruling, they said that:

"I am satisfied that the ground does disclose sufficiently a substantially arguable point of law."

The second matter which weighed heavily on the minds or the learned Justices of the court below, it was argued, was the question of whether or not fair trial had been accorded the respondents. After selling out the ground as couched, to wit: that the 1st respondent had not given evidence; that he was willing to do so but prevented by ill-health in Mansfield, Great Britain, the learned trial Judge refused the appellant's application. It was appellant's contention therefore that the learned Justices misdirected themselves firstly, in holding that the ground of appeal as couched by the respondents had disclosed substantial and arguable issue of law and secondly, that they ought

not to have arrived at conclusions regarding the propriety or otherwise of a ruling of a lower court without the reasoning of the lower court on the materials put before it as being obvious. Our attention was then drawn to numerous occasions when this court had stressed the point that the grant of a stay is a matter within the trial court's discretion and that such discretion must be exercised judiciously, bearing in mind the competing claims of the parties to justice. In the circumstances of this case, it was therefore argued, the respondents did not show that the learned trial Judge wrongly exercised his discretion in refusing to grant another in a series of adjournments at the request of 1st respondent. Following from the above, it was the contention of the appellant that the respondents have not shown any special circumstances to justify the grant of a stay of execution especially in view of the position this court had taken and as expressed in *P.O.P Martins v. Nicannar Food Co. Ltd* (1988) 2 NWLR (Pt. 74) 75 at page 76, which also quoted with approval the words of Coker, J.S.C. in *Vaswani v. Savalakilz* (supra) at page 81 to the effect that when the order or judgment of a lower court is not manifestly illegal or wrong, it is right for the Court of Appeal to presume that the order or judgment appealed against is correctly or rightly made until the contrary is proved or established. The respondents not having done anything to puncture this presumption of correctness in favour of a valid order or judgment of the lower court, it is maintained, no special circumstances could be said to have arisen. Consequently, it is submitted, the respondents failed to discharge the onus placed on him to satisfy the court that in the peculiar circumstances of their case, a stay would meet the justice of the case vide *Lawrence Okafor v. Felix Nnaife* (1957) 4 NWLR (Pt. 4) 129.

With regard to the subject-matter of the judgment being money, to wit N3,721 ,000.00 costs, it is appellant's contention that the respondents had failed to satisfy the condition usually required by the courts in granting a stay of execution in judgments of this nature. After we were referred to Dr. T.A. Aguda in *Practice and Procedure of the Supreme Court, Court of Appeal and High Court, of Nigeria, First Edition*, paragraph 44 -49, page 535: *Martins v. Nicannar Food Co. Ltd. (supra)* and *Ebegbuna v. Ebegbuna* (1974) W.S .C.A 23, for the proposition that where judgment is in respect of money and costs, there should be a reasonable probability of recovering these back from the respondent if the appeal succeeds. If however the learned Justices of the court below were right in granting the respondents a stay of execution, the appellant contended, that condition in the circumstances would have the effect of placing the *"equity in this matter completely on the side of the applicant and totally to the detriment of the respondent,"* it being clear that 1st respondent is an alien presently resident outside Nigeria and whose visa

to re-enter the country has expired. The appellant therefore contends that at the time of the trial and at all times thereafter, the 1st respondent had converted its equipment, some of which had been passed on to third parties. There is nothing before the court therefore to show that 1st respondent presently has any property whatsoever in Nigeria which could be affected by the order of the court below restricting his right to sell, hire, mortgage or otherwise dispose of his property in Nigeria. B

It is further argued that the 1st respondent being an alien resident outside the country, with an expired visa and who had not shown up once at any stage of this matter, has now been shown to own any property in Nigeria. Thus, it is submitted, the kind of condition attached to the stay or execution granted, is to out the appellant at the mercy or the respondents who had given no indications of a speedy prosecution of the appeal. The appellant, it is urged, has not been shown to be insolvent and there is nothing also to show that the money could not be recovered if paid over to it pending the determination or the appeal. Furthermore, it is maintained, the judgment was fixed without a provision for interest, adding that, a condition which does not take cognisance or the depreciation or the true value of the judgment debt; the continuous and substantial depreciation in the value of the Naira in relation to other currencies; and the potentially long period over which the appeal might stretch, cannot be said to take into account the appellant's equal right to justice and such discretion could not be said to have been judiciously exercised. Appellant therefore contended that in view of the above, even if this court is minded to uphold the stay or execution granted by the court below, proper and more equitable conditions should be attached. Such conditions, it is submitted, are that C D E F

(i) The respondents should produce a Bank guarantee for the full amount with a provision for interest until final determination of the Appeal:

(ii) The respondents should pay the full amount or the judgment debt into court for the sum to be kept in an interest yielding account until final determination or the appeal. G

(iii) The respondent should pay the full amount or the judgment debt into the appellant who will produce a Bank guarantee for the return of the money should the appeal succeed.

The appellant contended in conclusion that the conditions would not work undue hardship on either of the parties as the substance or the judgment debt will be protected by the provision for interest which the successful party would be entitled to take. The case of Mobil Oil (Nig.) Ltd v. H

cited in support or the proposition.

Now, the grant or refusal of a stay or execution is at the discretion or the court and such discretion must be exercised judicially taking into consideration the competing rights of the parties to justice. Thus, a party such as the appellant in the instant case who is seeking to set aside an order or stay of execution, must show that in the circumstances, it was unjust and inequitable to grant the order. See *Mobil Oil (Nig.) Ltd v. Agadaigho (supra)*.

Prima facie, the Notice or Appeal tiled by the respondent would validly, in my view, raise the issue or jurisdiction which could weigh on the minds or the justices or the court below in the exercise or their discretion to grant or refuse a stay of execution. For instance, the ground or appeal in which the respondents purported to raise the issue of jurisdiction was couched in the following terms:-

“The learned trial Judge erred in law in giving judgment in favour of the plaintiff when he relied on the documents that has ousted the jurisdiction of the Court.

PARTICULARS OF ERRORS

The learned trial judge relied heavily on Exhibit 10 in giving judgment in favour of the plaintiff which by its paragraph 11 stated thus:

‘This agreement shall be interpreted in all respect in accordance with English Law’

Since there was in the Agreement that the English Law shall be the basis of the interpretation of the Agreement the High Court of Ibadan had no jurisdiction to try the suit which emanated from document marked Exhibit 10.”

The issue of jurisdiction, it must be pointed out, is so fundamental that if the court below eventually comes to consider it in the light of Exhibit 10 quoted in the ground of appeal above and it is found that the trial court after all lacked jurisdiction, then the whole judgment which is the by-product of such a trial becomes a nullity no matter how well conducted. See *Madukolu & Ors. v. Nkemdilim* (1962) 1 All NLR 589; (1962) 2 SCNLR 341, It is in this wise, that the reliance placed on the provisions of Order 3 rule 2(4) of till Court of Appeal Rules, as amended which states that:

“Where a ground of appeal alleges error in law or misdirection, not only must the passage where the error or misdirection occurred be quoted, full and substantial particulars of the alleged errors or misdirection must be given.”

and the case of *Atuyeye v. Ashamu (supru)* is not directly in point here. Even when the respondents failed to quote the passage in the ground attacking the

jurisdiction of the trial court, the fact that Exhibit 10 referred to therein was

available at the hearing to give credence to the allegation would validly, in my respectful view, raise in the minds of the learned Justices the question that an arguable ground and afortiori a special circumstance was latent, if not patent to deserve their attention to make the grant of a stay of execution imperative. When, therefore, the court below (per Sulu-Gambari, J.C.A) ruled that

"I am satisfied that the ground does disclose sufficiently a substantially arguable point of law" they were clearly justified in arriving at the view and I so hold.

Similar consideration would apply, in my view, to the ground in which the question whether a fair trial had been accorded to respondents at the trial. That ground of appeal alleged that:

"The learned trial Court erred in giving judgment in favour of the plaintiff when the 1st defendant had not given evidence and after showing his willingness to testify in his case but prevented by ill health in Mansfield Great Britain to give evidence before the court."

PARTICULARS OF ERROR

The learned trial Judge had by his Acts denied the 1st defendant of his constitutional right of fair hearing in that from the opening of the case on 30th March, 1988 and other adjourned dates the Court was told of the inability of the 1st defendant to be present in Court to give evidence due to ill-health and admission at U.C.H. Ibadan and in a London Hospital."

It is clear even from the brief filed by the appellant that the trial court closed the case of the respondent even when a medical report said to emanate from the 1st respondent explaining the cause of the latter's absence from the court was available and that the 1st respondent had expressed a wish to give evidence in the matter. On numerous occasions this Court has consistently stressed the fact that the grant of a stay is a matter within the discretion of trial court, which discretion must be exercised judiciously bearing in mind the competing claims of the parties to justice. See *Vaswani 'trading Co. v. Savalakh* (supra) and *Okafor v. Nnaife* (supra). In other words, the exercise of such a discretion should be made in the interest of all. In the circumstances of this case. I take the view that the discretion was wrongly exercised by the learned vacation Judge when he refused to order a stay.

Be that as it may, while conceding that the issue of foreign law is a matter to be proved by evidence, by virtue of sections 9, 10 and 14 of the High Court Law of Oyo State "English law" is not a foreign law in Oyo State and the Judge has judicial knowledge of it. Thus, section 57 of the Evidence Act (now re-enacted in section 58(1) of the Evidence Act, Cap. 112 Laws of the Federation of Nigeria, (1990) is not relevant for his (Judge's) knowledge of "*English law*." The case of *N.P.A. v. C.C.F.C.* (supra) cited to us wherein an application

for adjournment was refused is, in my respectful view, distinguishable from the one in hand in that the plaintiff in that case refused to bring his witnesses who were his employees. In the instant case, the 1st respondent was prevented from giving evidence. Further, on the issue of fair hearing, this Court had in the case *Isiyaku Mohammed v. Kano N.A.* (1968) 1 All NLR 426 (per Ademola, C.J.N.) this to say:

B *“It has been suggested that a fair hearing does not include a fair trial. We think a fair trial to the case consists of the whole hearing. We therefore see no difference between the two. The true test of a fair hearing is the impression of a reasonable person who was present at the trial whether from his observation justice has been done in the case.”*

C See also *Paul Unongo v. Aper Aku & Ors.*; (1983) 2 SCNLR 332; (1983) 11 SC 129 at 179; *Rasaki Arriori & Ors v. Muraina Elemo & Ors.* (1983) 1 SCNLR 1; (1983) 1 SC 13 at 59 and *Atano v. A.G. Bendel State* (1988) 2 NWLR (Pt. 75) 201 at 218.

D A careful perusal of the trial court’s judgment shows that there were allegations and counter allegations which disclosed the need for 1st respondent to have been given the opportunity to be heard before judgment. It is not correct to say as did the appellant that because the particulars above did not obviously provide the full information required by the court below that the learned Justices or that court looked to the affidavit of the respondents for details. The affidavit evidence in the trial court, it must be pointed out, formed part of the documentary supporting exhibits filed in that Court upon which it could and was enabled to gauge the efficacy of the legal submissions. See *Ukpe Ibodo & ors. v. Iguasi Enarofia & ors.* (1980) 5-7 SC 42. The affidavits upon which an application for stay was founded and which formed in legal part of the materials placed before the trial court, would as to sufficiency, have enabled it to arrive at the view that the application was meritorious; out as it did not countenance them surely both the court below and this court are entitled to look at those contents. Thus, the court below, in my view, was perfectly entitled to observe as it did that

G *“In spite of all these, the learned trial Judge by his ruling dated 6th July, 1988 upon an application by the applicant’s counsel for an adjournment refused the application and caused the case to be closed, the the above enumerated facts can be gathered from paragraphs 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, and 19 of the main affidavit deposed to in support of the application.”*

H Therefore, the attack on the Justices of the court below regarding the propriety or otherwise of a ruling of a lower court without its reasoning being stated on the materials before it, is misconceived. The Ruling of the trial court

refusing stay of execution dated 8th August, 1988, although terse in context, was albeit before the court below and with the other materials before it, the respondents discharged the onus placed on them to satisfy the court that in the peculiar circumstances of their case, a stay would meet the justice of their case. See *Okafor v. Nnaife* (supra) at page 130. Considered as a whole, in the circumstances of this case, it is clear that there as a whole, in the circumstances of this case, it is clear that there are reasons for coming to the view that the 1st respondent was justified to complain of lack of fair trial. If that were so, and once established at the trial, it was enough reason for the learned Justices or the court below in my opinion, to come to the view that an exceptional or special circumstance was disclosed for the grant of a stay of execution or the judgment pending appeal. The two grounds of appeal considered above as I have demonstrated do raise issues or jurisdiction and law respectively and prudence demands that in such a situation, the court below was not pre-empting the issues or law to be decided in the main appeal but had guardedly taken into account the chances of success of the grounds, all things being equal, when the appeal eventually comes to be heard.

The question I ask myself is, was the discretion of the court below granting the stay or execution exercised judicially as well as judiciously?

My answer, with utmost due respect, is that the discretion was exercised judicially and judiciously.

With regard to its consideration or the conditions attached to the order for stay, I can but say that the court below was very fair in relation to its imposition of these conditions. There was the argument for variation of the conditions to include an order for the payment or the judgment debt of N3.72 million into court with an order that that sum with accruing interest at the end of the day i.e. after the appeal, be paid over to the successful party. In these days when the implements, machinery and equipment are appreciating in value daily rather than depreciating, they are in my view, more than money itself. True it is that the 1st respondent is an alien presently resident outside Nigeria and whose visa to re-enter the country has expired. Albeit, the request for an order that physical money be paid in bulk into an interest-yielding account to abide the result of the appeal, is an impossibility, at least for now, because of the sheer fact that 1st respondent who would have been asked to do so, is not available. The order made or condition imposed regarding the implements, machinery and equipment, is in my opinion, correct and ought not to be disturbed.

My answers to all three issues considered together is rendered in the positive

It is for the above reasons that this appeal fails and is accordingly dismissed by me with costs assessed against the appellant in the sum of N1,000.00 in

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favour of 2nd respondent and N1, 000.00 jointly in favour or 3rd and 4th respondents respectively.

BELLO CJN

I had a preview of the lead judgment delivered by my learned brother,
B Onu, J.S.C.

For the reasons stated therein, I also dismissed the appeal and affirm the decision of the Court of Appeal. I adopt the order as to costs.

BELGORE JSC

C I read in advance the lead judgment of Onu, J.S.C and I am in full agreement with him that this appeal lacks merit. I adopt his reasons as mine in my also dismissing this appeal. The respondent that I group into two to wit Drinsco Ltd on one side and 3rd, 4th and 5th respondents on the other are each entitled to N1,000.00 costs against the appellant.

D

MOHAMMED JSC

I entirely agree with the opinion of my learned brother, Onu, J.S.C., in the judgment just read. I will also dismiss the appeal because I agree that the respondents have shown special circumstances which justified the grant of stay of execution of the judgment of the High Court by the Court of Appeal. I abide by the consequential order on costs.

ADIO JSC

F I have had the privilege of reading, in draft, the judgment just read by my learned brother, Onu, J.S.C., and I agree that the appeal fails. The respondent satisfied the conditions precedent to the granting of stay of execution. The conditions attached to the order staying execution by the court below were reasonable and proper. Accordingly, I too dismiss the appeal and
G abide by the order for costs.

H