

SUPREMECOURTOFNIGERIA
12THDECEMBER 1995,SC.323/1990
CORAM:-S.M.A.BELGORE,A.B.WALL,I.L.KUTIGI,
E.O.OGWUEGBU,U.MOHAMMED,Y.O.ADIO,
A.I.IGUH,JJSC.

AFRO-CONTINENTAL NIGERIA LTDAPPLICANT/APPELLANT

AND

JOSEPH AYANTUYI & 8 ORSPLAINTIFFS/RESPONDENTS
(For and on behalf of themselves and as
representatives of the Onishere Community of
Ifesowapo Local Government Area of Ondo State)

AND

1. GOVERNOR OF ONDO STATE
2. ATTORNEY-GENERAL OF ONDO STATE
3. COMMISSIONER FOR LANDS &DEFENDANTS/
HOUSING ONDO STATE RESPONDENTS

APPEALS - Respondent's notice - Seeking the Court of appeal to vary the High Court's order of injunction - By extracting undertaking as to damages - Whether right granted.

INTERLOCUTORY INJUNCTIONS - Undertakings as to damages - Whether Kotoye case or any other case - Decided that failure to secure undertaking - Is a ground for mandatory setting aside of the injunction.

JUDICIAL PRECEDENTS - Ratio - Distinguished from obiter - In Kotoye case - Sought to be relied upon

FACTS

In a land dispute between the parties, the plaintiffs vide a motion on notice obtained an interlocutory injunction restraining the defendants from disturbing the plaintiffs on the land pending the determination of the substantive suit. The injunction that was granted affected the appellant who was not a defendant in the suit. The appellant sought and obtained the Court of

Appeal's leave to appeal as a party interested and to be joined as co - defendant.

Appellant then filed a short brief in the Court of Appeal challenging the impropriety of the trial court's failure to secure undertaking as to damages. Plaintiffs filed a respondent's notice by which they urged the Court of Appeal to extract the undertaking. The undertaking was accordingly extracted by the lower court which refused to set aside the injunction. The appellant wrongly placing reliance on an obiter in the case of *Kotoye v. Central Bank* (1989) 1 NWLR (Pt. 96) 419, has further appealed to the Supreme Court raising one issue.

ISSUE FOR DETERMINATION

Whether the Court of Appeal was right in rejecting the Appellant's contention that the order for injunction granted by the Ondo State High Court ought to have been set aside on the ground that an undertaking as to damages had not been extracted from the Plaintiffs when the order for injunction was made.

HELD (Unanimously dismissing the appeal per Lead Judgment of **KUTIGI JSC**)

Ratio - Distinguished from Obiter

1. The ratio in *KOTOYE* case is therefore that it is wrong for any court to grant an interlocutory injunction ex parte. The ex parte application in *KOTOYE* was incompetent and consequently the Supreme Court strike it out as the appropriate order. All pronouncements or utterances on the requirement or necessity of an "undertaking as to damages" and consequence of failure thereof were therefore merely obiter and I so hold.

Undertaking as to damages

2. I have already made it known that the powerful statements of law on the requirement of an undertaking as to damages and consequences of failure thereof in *KOTOYE* were obiter. *KOTOYE* case is therefore not an authority to say that "in every order of an interlocutory injunction, if there is no undertaking as to damages the order must be set aside", as Chief Ajayi would want us to believe. *KOTOYE* did not so decide as shown above. The Court of Appeal was therefore right in rejecting the Appellant's contention that the order for injunction granted by the Ondo State High Court ought to have been set aside on the ground that an undertaking as to damages had not been extracted from the Plaintiffs when the order for injunction was made. That was not the decision in *KOTOYE* or any other case. The single Issue for determination is therefore resolved against the Appellant. (p. 2137)

Respondent's notice

3. On appeal to the Court of Appeal the Respondents filed a Respondent's notice and urged the Court of Appeal to vary the order by extracting an undertaking as to damages from them. Their request was granted and the order was varied. I think the Court of Appeal was right in its decision. Wide powers vested in that court under and by virtue of section 16 of the Court of Appeal Act, 1976 under which it can and ought to make orders which should have been made by the lower courts where it deemed it necessary so to do (p. 2138 A)

NOTABLE POINTS OF INTEREST**IGUJSC***1. The point made in Kotoye case*

It is therefore plain that the point which appeared made in Kotoye case is that an undertaking as to damages is the price that an applicant has to pay for the order of interlocutory injunction, that failure to give the undertaking leaves the order without a quid pro quo and is a ground for discharging the order by an appellate court and that this ought to be more so in respect of an ex parte which the order was made without the other side being heard. (p. 2146 F)

2. Per incuriam decision of Supreme Court is binding on lower courts

The question whether a decision or pronouncement of this court is binding on the Court of Appeal depends on whether that decision or pronouncement is an obiter dictum or was made per incuriam. If the pronouncement is a mere obiter dictum, then of course, it cannot be binding, but if it was made per incuriam, it will nevertheless be binding on the Court of Appeal in accordance with the principle of stare decisis until the error in the judgment has been corrected. (p. 2147C)

3. Undertaking as to damages - Whether compulsory in all cases of interlocutory injunctions

I think I ought to stress that it cannot be the law that in all cases of interlocutory injunction, the extraction of an undertaking as to damages must be treated as a condition sine qua non to the validity of an order. It is my view that each case must be treated on its particular facts as there are cases in which an undertaking as to damages is neither necessary nor arises and an order of interlocutory injunction in such cases without the extraction of an undertaking as to damages from the applicant cannot be regarded as invalid or incompetent. (p. 2148 G)

REPRESENTATION

G. O. K. Ajayi, SAN, with S.A. Afolabi for the Applicant/Appellant.

L.O. Fagbemi for Plaintiffs/Respondents.

A. A. Akindele (Chief Legal Officer, Ondo State) for Defendants/Respondents.

B

CASES REFERRED TO

N.A.B. Kotoye v. Central Bank of Nigeria (1989) 1 NWLR (Pt. 96) 419

Fenner v. Wilson (1893) 2 Ch. 656

C Graham v. Campbell (1877 - 1878) 7 Ch.D. 490

Oduntan v. General Oil Ltd (1995) 4 N.W.L.R. (Pt. 387) 1

Saude v. Abdullahi (1989) 4 N.W.L.R. (Part 116) 387

Bamgboye v. University of Ilorin (1991) 8 N.W.L.R. (Part 207) 1 at page,

Rossek v. African Continental Bank (1993) 8 N.W.L.R. (Part 312) 382

D Onyesoh v. Nnebedum (1992) 3 N.W.L.R. (Part 229) 315

STATUTES & RULES REFERRED TO

Court of Appeal Rules 0.3 r. 14(1)

Court of Appeal Act 1976 s. 16

E

LEAD JUDGMENT BY KUTIGI JSC

The plaintiffs by a Writ of Summons commenced an action against
F the defendants in Ondo State High Court holden at Ondo seeking for various
declaratory reliefs and an order of perpetual injunction to restrain all officers,
servants, agents and functionaries of the defendants from trespassing on or
unlawfully taking possession of the “*aforsaid land.*”

The plaintiffs thereafter filed a Motion on Notice praying the court
G for an order of interim injunction restraining the defendants from ejecting the
plaintiffs from the land or disturbing them thereon and generally to maintain
the status quo ante pending the determination of the substantive suit. The
motion was supported by a 32 paragraph affidavit. The defendants opposed
the motion for injunction and filed a 13 paragraph Counter-Affidavit, Para. 6 of
H the Counter-Affidavit which was sworn to by one Toluwa Olopete read thus -

“6. *That when the Rubber Board Company wound up, the assets
disposal committee of the Commodity Boards assigned the unexpired term of
its interest in the land now the subject matter of this present action to a
company Afro-Continental (Nigeria) Limited in which the Ondo State*

Government has 35% shares."

But despite the revelation above of the presence of Afro-Continental (Nigeria) Limited on the land in dispute, the Company was not made a defendant in the action. The motion was finally argued. The learned trial Judge in a reserved ruling granted the injunction sought by the plaintiff

Shortly thereafter a copy of the court's order was served on Afro-Continental (Nigeria) Limited which though not a party to the case has an interest in the land as shown in para. 6 of the Counter-Affidavit cited above. On thus becoming aware of the Suit in Ondo High Court, the company. Afro-Continental (Nigeria) Limited, applied to the Court of Appeal for leave to appeal as a party interested and also to be joined as a co-defendant. Both applications were granted. The company will henceforth be referred to as applicant/appellant.

The appellant filed a short brief in the Court of Appeal wherein the single issue for determination was stated thus -

"Whether the learned trial Judge was right in granting the order for interlocutory injunction with/without extracting an undertaking as to damages from the plaintiffs."

Meanwhile the plaintiffs, now respondents, also filed a respondent Notice of Intention to vary the Order of Injunction granted by the Ondo High Court. The respondent while accepting the issue for determination framed by the appellant, in line with their respondents' Notice added a second issue for determination -

"(2) Whether or not this Honourable Court will in the circumstances of this case order the plaintiffs to give the undertaking raised in the respondents' Notice within a specified period and order that the lower court's order of injunction should continue."

The respondents' Notice had stated in ground 7 of the grounds relied upon as follows -

"7. The plaintiffs/respondents do hereby undertake to indemnify the Party Interested/appellants and the defendants/respondents against all losses, pecuniary or material that may arise from the lower courts order of interlocutory injunction of that day if they lose the substantive suit still pending in the said lower court or which the lower court may find to have been wrongly granted in the first place."

The Court of Appeal carefully considered the submissions of counsel and Uche Omo. J.C.A. (as he then was) concluded his leading judgment (with which Ejiwunmi and Edozie U.C.A. agreed) in these words-

"I have therefore come to the conclusion that whilst the learned trial Judge erred in failing to extract an undertaking as to damages when he

made his order of injunction, this Court can obtain such an undertaking from the plaintiffs/respondents through their counsel, and allow the injunction ordered by the trial Judge to continue. It is therefore hereby ordered specifically that counsel for the plaintiffs/respondents gives to the Registrar of this Court a signed undertaking as offered by him in his Notice of Intention to Vary the judgment filed by him. The order of injunction made by Dr. O.O. Aguda J. on 17/7/89 in this matter subsists. In effect the appeal partly succeeds and the application to Vary; the judgment also succeeds. There will be no order as to costs."

In its consideration of the first issue of whether or not this was a proper case in which an undertaking as to damages was necessary, the learned Justice had stated on page 264 of the judgment thus -

"The conclusion arrived at therefore must be that this is not a proper case in which it can be held that an undertaking in damages is unnecessary ...

In other words the giving of an undertaking as to damages was necessary in this case. I need hardly say that conclusion clearly recognises that there may exist a situation where the giving of an undertaking may not be necessary.

Being dissatisfied with the judgment of the Court of Appeal which upheld the order of injunction made by the High Court and varying same by ordering the plaintiffs/respondents to give an undertaking as to damages, the appellant has now further appealed to this Court.

Pursuant to the Rules of Court the parties filed and exchanged briefs of argument. In the appellant's brief only one issue was set down as calling for determination in this appeal: It reads -

"Whether the Court of Appeal was right in rejecting the appellant's contention that the order for injunction granted by the Ondo State High Court ought to have been set aside on the ground that an undertaking as to damages had not been extracted from the plaintiffs when the order for injunction was made."

The plaintiffs/respondents in their brief wholly accepted the single issue formulated by the appellant for determination above. The appeal would thus appear to cover a very narrow compass.

Chief Ajayi learned Senior Counsel for the appellant submitted in his short brief of only two pages, that the sole issue raised in this appeal is covered by the decision of this Court in the case of N.A.B. Kotoye v. Central Bank of Nigeria & Ors.(1989) 1 NWLR (Pt.98) 419. He relied on and quoted extensively from the leading judgment of Nnaemeka Agu J.S.C. (as he then was) on pages 450 and 451 of the Report. He also relied and quoted portions of the judgment of Nnamani. J.S.C. (of blessed memory) on pages 456-457 of

the same Report. He said the learned Justices of the Court of Appeal erred in law in extracting an undertaking as to damages from the plaintiffs/respondents when the proper order to make on the appeal was one discharging the order of interlocutory injunction made by the High Court. The Court was urged to allow the appeal and discharge the order of injunction. B

Mr. Akindele, the Chief Legal Officer. Ministry of Justice. Akure, who represented the defendants/respondents, in his brief also submitted that this appeal is covered by the decision of this Court in *Kotoye v. Central Bank of Nigeria & Ors.* (supra). He referred to the judgments of Nnaemeka-Agu and C Nnamani (J.J.S.C.) and said the Court of Appeal erred in extracting an undertaking as to damages from the plaintiffs/respondents when the proper order to make on appeal was one discharging the order of interlocutory injunction made by the High Court. The Court was urged to allow the appeal.

Mr. Fagbemi. Learned Counsel for the plaintiffs/respondents in his D brief made the following main submissions -

1. That whether or not an order of interlocutory injunction obtained without an undertaking as to damages will be set aside by an appeal court depends upon the facts of the particular case. *Kotoye's* case relied upon by the appellant is not an authority for the proposition contained in the appellant's E brief that where an undertaking as to damages is not extracted, the Court of Appeal will automatically set aside the order of interlocutory injunction.

Reference was made to the case of *Onyesoh v. Nnehedun* (1992) 3 NWLR (Pt. 229) 315 per Nnaemeka-Agu, J.S.C. 344-345. F

2. That the Court of Appeal has not only the power but a duty to do substantial justice and preserve the res pending the final determination of the suit and is therefore entitled to make any order or such orders that will ensure that justice is done between the parties.

3. In the present suit unlike *Kotoye* case, there is a respondent's G Notice pursuant to Order 3 Rule 14(1) of the Court of Appeal Rules to direct the plaintiffs/respondents to give an undertaking as to damages which order the Court of Appeal can make in exercise of power conferred on it under section 16 Court of Appeal Act 1976.

4. The decision in *Kotoye* which the appellant placed heavy reliance H on in arguing this appeal is quite distinguishable from the situation in this case. The decision in *Kotoye* particularly on the issue of undertaking as to damages was given per incuriam. This was so because the Supreme Court did not consider neither was it urged upon it the provisions of Section 16. Court of

Appeal Act which gives the Court of Appeal power to, inter alia “*make an interim order or grant any injunction which the court below is authorised to make or grant.*”

5. The Supreme Court will not hesitate and will be anxious to depart from its previous decision and avoid perpetuation of errors if it is necessary and in the interest of justice to do so where the previous decision has been found to have been given per incuriam (See: Oduola v. Coker (1981) 5 SC. 187 Bucknor v. State (1991) 3 NWLR (Pt.1) 17; Odi v. Osajile (1985) 1 NWLR (Pt.1) 17.

We were urged to dismiss the appeal.

C There is no doubt whatsoever that this appeal is concerned about the judgment of this Court in the case of Kotoye v. C.B.N. & Ors. (supra) and revolves particularly on the strong pronouncements of law by both Nnamani and Nnaemeka-Agu, (JJ.S.C.) I will therefore first of all set out the relevant portions of the two judgments which Chief Ajayi for the appellant, so heavily D relied upon.

Nnaemaka-Agu, J.S.C. who wrote the leading judgment in Kotoye, stated on pages 450-451 of the Report as follows -

“It is my view that a necessary corollary to the fact that an undertaking as to damages is the price that an applicant has to pay for the order of E interlocutory injunction is that failure to give the undertaking leaves the order, without a quid pro quo, and, so should be a ground for discharging the order. This ought to be more so in respect of ex parte orders in which the order is being made without the other side being heard. Indeed the need for it to be so is stronger in Nigeria where no Registrar has got the power to F insert the order for the undertaking to be given while drawing up the order. Above all, this Court ought to take notice of the numerous cases of abuse of ex parte injunctions that have come up in recent times. The operation of a bank has been halted on an ex parte order of injunction granted to a person who had been removed as a director of the bank. Installation ceremonies of G chiefs have been halted in the same way even though the dispute had been dragging on for years. The convocation ceremony of a university has been halted on an ex parte application by two students who failed their examinations. As the courts cannot prevent such applicants from exercising their constitutional rights by stopping such applications, they can, and ought, at H least see that justice is done to the victims of such ex parte applications and orders by ensuring that the applicant fully undertakes to pay any damages that may be occasioned by any such order which may turn out to be frivolous or improper in the end. It is, therefore, my view that, save in recognized exceptions, no order for an interlocutory or interim injunction should be

made, ex parte or on notice, save upon the condition that the applicant gives a satisfactory undertaking as to damages. Chief Ajayi has again suggested that where such an undertaking as to damages was necessary but not considered or given, an appellate court should order that it be given. I do not agree. This is for the simple reason that invariably the damages, if at all, is done within a few days. It will serve no useful purpose to make an order on appeal which will have the effect of, as it were closing the stable after the animal has bolted away. In my judgment, therefore where a court of first instance fails to extract an undertaking as to damages where it should, an appellate court ought normally to discharge the order of injunction on appeal."

Nnamani J.S.C. in his concurring judgment also said on pages 456-457 of the Report thus -

"Finally, the question of undertaking to pay damages which is the third issue for determination has been exhaustively dealt with by my learned brother in the lead judgment. I merely wish to associate myself with the view that, having regard to the manner ex-parte injunctions have lately been used in this country, an undertaking to pay damages must be extracted before the grant of such injunctions. It is settled that an undertaking to pay damages is the price which the person asking for an interlocutory injunction has to pay, and it ought to be required on every interlocutory order. (See chappel v. Davidson 44 E.R. 289; Graham v. Campbell (1977 -1879) 7 Ch.D. 490 C.A.; Smith v. Day (1882) 21 Ch. D. 421 C.A.; Baxter v. Claydon (1952) W.N., 376. Tucker v. New Brunswick Trading Co. of London (1890) 44 Ch. D. 249. The undertaking to pay damages applies whether the plaintiff has not been guilty of misrepresentation, suppression or other default in obtaining the injunction."

The learned justice continues as follows -

"Chief Ajayi has submitted that rather than set aside the orders where the trial court which granted them has not extracted any undertaking, the Court of Appeal ought to extract the undertaking. I just suspect that the damage may well have been suffered by the defendant before reaching the Court of Appeal. Besides, the Court of Appeal could be accused of intervening on one side of the dispute.

I too would, and do, dismiss this appeal. I abide by all the orders made by Nnaemeka-Agu, J.S.C. including the order for costs."

Before expressing any opinion on the extracts from the judgments of the two learned Justices above, it will be necessary first to set out the actual and final decision of the Court in that crucial case.

Nnaemeka-Agu, J.S.C. concluded his leading judgment on page 451

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of the Report in the following words-

“While considering what consequential order to make, my attention was drawn to the order made by the Court of Appeal. Awogu, J.C.A. in his lead judgment stated:

B *“The orders of Anyaegbunam made in FHC/L35/87 on April, 22, 1987, are hereby set aside and declared null and void. The suit is remitted to the Federal High Court for continuation before another Judge.”*

Chief Williams in a Notice of Appeal dated 15th June, 1988, has attacked this order. In his sole ground of appeal, he contends that the Court of Appeal erred in omitting to strike out the plaintiffs Motion Ex-Parte in view of its decision that the motion was incompetent and ought not to have been granted.

C *In my view, Chief Williams is right. The decision of the Court of Appeal which has been confirmed by this judgment is that the learned C.J. granted the motion for interlocutory injunction ex parte but that he ought not to have done so. On the fact of that decision there is no basis for declaring the order null and void. But it is one that ought to have been set aside. As the only application before the learned Chief Judge was one for an interlocutory injunction which as I have held, he had wrongly granted ex parte, there is nothing left to be remitted to another Judge of the Federal High Court for determination. Having held that it was in error, the Court of Appeal should have just said so and if need be, made an order striking out the application.*

E *For all the reasons I have given above, the appeal fails and is hereby dismissed. The cross-appeal succeeds and is allowed. I hereby strike out the ex-parte application.”(Italics is mine for emphasis only)*

F All the other Justices (Nnamani, Karibi-Whyte, Agbaje and Craig JJ.S.C) who participated in the hearing of the appeal did concur with the lead judgment including the conclusion therein arrived at and the orders contained therein.

It is clear to me from conclusion above and the consequential orders therein finally made by Nnamani-Agu, J.S.C., that -

G 1. The Federal High Court (per Anyaegbunam, C.J.) granted the motion for interlocutory injunction ex parte.

2. The Court of Appeal held that the Federal High Court was wrong to have done so since the ex parte motion was incompetent.

H 3. The Court of Appeal proceeded to declare the orders made by the Federal High Court as null and void.

4. The Supreme Court upheld the decision of the Court of Appeal as in (2) above that the Federal High Court was wrong to have granted the interlocutory injunction ex parte.

5. The Supreme Court held that the Court of Appeal was wrong to have declared the order of interlocutory injunction null and void as there was

no basis for doing so.

6. The Supreme Court then proceeded to strike out the ex parte application which order the Court of Appeal should have made.

So that although the Court of Appeal said it was allowing the appeal on other ground; and that it would additionally have done so “*for failure of the applicant to give an undertaking as to damages*”, the Supreme Court never and did not in fact dismiss the appeal for want of an undertaking in damages. The ratio in Kotoye case is therefore that it is wrong for any court to grant an interlocutory injunction ex parte. The ex parte application in Kotoye was incompetent and consequently the Supreme Court had to strike it out as the appropriate order. All pronouncements or utterances on the requirement or necessity of an “*undertaking as to damages*” and consequence of failure thereof were therefore merely obiter and I so hold.

It is rather unfortunate that Chief Ajayi who was counsel for the appellants in Kotoye case is now appellants’ counsel in this case as well. His submissions in Kotoye urging the Supreme Court to extract an undertaking as to damages from the appellants in that case to ground the interlocutory injunction, failed because Chief Ajayi in my view, misconceived the principal issue therein. The real issue in Kotoye was that the ex parte application for the interlocutory injunction was incompetent and had to be struck out. You just simply cannot put something on nothing! It will collapse. And Kotoye actually collapsed.

Chief Ajayi, I say with respect, has once again misconceived the real issue before us in this appeal. He thought this is the time to get the Supreme Court to eat its own words, having rejected his earlier and the same submission in Kotoye.

I have already made it known that the powerful statements of law on the requirement of an undertaking as to damages and consequences of failure thereof in Kotoye were obiter. Kotoye’s case is therefore not an authority to say that “*in every order of an interlocutory injunction, if there is no undertaking as to damages the order must be set aside*”, as Chief Ajayi would want us to believe. Kotoye did not so decide as shown above. The Court of Appeal was therefore right in rejecting the appellants’ contention that the order for injunction granted by the Ondo State High Court ought to have been set aside on the ground that an undertaking as to damages had not been extracted from the plaintiffs when the order for injunction was made. That was not the decision in Kotoye or any other case. The single issue for determination is therefore resolved against the appellant. Consequently the appeal fails.

But before I close I wish to state again that in this present appeal the High Court granted the order of interlocutory injunction without an order of

undertaking as to damages. On appeal to the Court of Appeal the respondents filed a respondents' Notice and urged the Court of Appeal to vary the order by extracting an undertaking as to damages from them. Their request was granted and the order was varied. I think the Court of Appeal was right in its decision.

B Wide powers are vested in that court under and by virtue of section 16 of the Court of Appeal Act, 1976 under which it can and ought to make orders which should have been made by the lower courts where it deemed it necessary so to do. Section 16 of the Act (which is in pari materia with section 22 of the Supreme Court Act, 1960) reads thus-

C *"16. The Court of Appeal may from time to time make any order necessary for determining the real question in controversy in the appeal, and may amend any defect or error in the record of appeal, and may direct the court below to inquire into and certify its findings on any question which the Court of Appeal thinks it fit to determine before final judgment in the*
D *appeal and may make an interim order or grant any injunction which the court below is authorised to make or grant and may direct any necessary inquiries or accounts to be made or taken and generally shall have full jurisdiction over the whole proceedings as if the proceeding had been instituted in the Court of Appeal as Court of first instance and may re-hear the*
E *case in whole or in part or may remit it to the court for the purpose of such re-hearing or may give such other directions as to the manner in which the court below shall deal with the case in accordance with the powers of that court, or, in case of an appeal from the court below in that court's appellate jurisdiction, order the case to be re-heard by a court of competent jurisdiction.*"

F The appeal having failed, is hereby dismissed. The plaintiffs/respondents are awarded costs assessed at one thousand (N1,000.00) Naira against the applicant/appellant only.

BELGORE JSC

G I agree this appeal has no merit and I also dismiss it. I adopt for my decision the comprehensive reasoning contained in the judgment of my learned brother, Kutigi, J.S.C. and I also award the same costs.

WALI JSC

H I have the advantage before now of a preview of the lead judgment of my learned brother Kutigi, J.S.C. and I entirely agree with his reasoning and conclusion for dismissing this appeal.

The generally accepted principle of law is that except in recognised

Afro-Continental Ltd v. Ayantuyi (1995) 12 KLR WALI JSC 2139 cases as stated in paragraph 1072 (Pgs 596-597) and paragraph 1074 (p. 597) of Halsbury's Laws of England, 4th Edition, in an application (whether ex-parte or on notice) for an interim or interlocutory injunction, a beneficiary to such an order must provide an undertaking in damages. He is usually required to give an undertaking to pay all damages caused to the opposing party if the order so granted ought not to have been made. See *Witshire Bacon v. Associated Cinemas* (1938) 1 Ch. 268. B

In *Kotoye v. CBN. & 7 Ors.* (1989) 1 NWLR (Pt. 98) 419 all the arguments revolve around the granting of an interlocutory order upon application made ex-parte.

The two prayers in the ex-parte application read thus:-

"I restraining the 1st and 2nd defendants their servants and/or agents from in any way obstructing or frustrating the holding of the Annual General Meeting of the 3rd defendant Bank until the final determination of this suit. C

2. For an order of injunction that until the determination of this suit. The defendants be restrained from appointing or recognising the appointment of any person or persons as Directors of the 3rd defendant Company other than such of them as are or may be duly appointed in accordance with the provisions of the Articles of Association of the 3rd defendant Bank." D
(Italics supplied by one)

The words italicised clearly show that although the application is ex-parte, the order being sought is interlocutory. This is further borne out and supported by the concluding part of the lead judgment of Nnaemeka-Agu, J.S.C. wherein he said:- E

"The decision of the Court of Appeal which has been confirmed by this judgment is that the learned Chief Judge granted the motion for interlocutory injunction ex-parte but that he ought not to have done so. On the fact of that decision there is no basis for declaring the order null and void. But it is one that ought to have been struck out. As the only application before the learned Chief Judge was one for an interlocutory injunction which as I have held he had wrongly granted ex - parte, there is nothing left to be remitted to another Judge of the Federal High Court for determination. Having held that it was in error, the Court of Appeal should have just said so and, if need be make an order striking out the applicationI hereby strike out the ex-parte application." F G

The ratio in this case to my understanding is - Where an application is made praying for an interlocutory order and same was granted ex -parte, the application is ab initio incompetent; the order so granted would be set aside and the application struck out. H

The appeal is dismissed with N1,000.00 costs to the plaintiffs/respondents against the applicant/appellant only. The judgment of the Court of

Appeal is hereby affirmed.

OGWUEGBUJSC

I have had the opportunity of the draft of the judgment just delivered by my learned brother Kutigi, J.S.C. in this appeal. I am in complete agreement with his reasoning and conclusion that the appeal be dismissed.

I however wish to add the following for the purpose of emphasis. The only issue which the appellant/applicant submitted to this court as arising for determination reads:

C “Whether the Court of Appeal was right in rejecting the appellant’s contention that the Order for Injunction granted by the Ondo State High Court ought to have been set aside on the grounds that an undertaking as to damages had not been extracted from the plaintiffs when the Order for Injunction was made.”

D Chief Ajayi, S.A.N., appearing for the appellant based this sole issue on the decision of this court in the case N.A.B. Kotoye v. Central Bank of Nigeria & 7 Ors. (1989) 1 NWLR (Pt. 98) 419. He quoted very extensively the pronouncements made in the judgment of the learned justices of this court who heard the appeal to the effect that: “.. save in recognised exceptions, no order for an interlocutory or interim injunction could be made, ex-parte or on notice, save upon the condition that the appellant gives a satisfactory undertaking as to damages”.

Two issues were formulated for determination in Kotoye’s case supra, namely.

F “(1) Whether the learned trial Judge was right in making the orders he made on the ex-parte application before him.

(2) Whether the absence of an undertaking to pay costs rendered the orders made on the ex-parte application invalid.”

G This court held that in exceptional cases, the court may issue an interim injunction before hearing the other party; that such orders should be made on extreme urgency where for instance there is imminent danger to the subject matter of the suit and it is impossible to give notice to the other side and that such an order should be for a period of limited duration pending the service of the motion papers on the other side.

H The court went further that an undertaking by the plaintiffs as to damages ought to be given on every interlocutory injunction though not where the order is in the nature of a final order. See Fenner v. Wilson (1993) 2 Ch. 656 and Graham v. Campbell (1877 - 1878) Ch. D. 490.

The appeal in Kotoye’s case supra was not dismissed because the

trial Judge failed to extract an undertaking as to damages. The legal reason or ground for the decision of this court in that case is as stated by Nnaemeka-Agu, J.S.C at P.451 of the report:

“The decision of the Court of Appeal which has been confirmed by this judgment is that the learned C.J. granted the motion for interlocutory injunction ex parte but that he ought not to have done so. On the fact of that decision there is no basis for declaring the order null and void. But it is one that ought to have been set aside. As the only application before the learned Chief judge was one for an interlocutory injunction which as I have held, he had wrongly granted ex-parte, there is nothing left to be remitted to another Judge of the federal high Court for determination.”

The consequence of failure to extract an undertaking as to damages in an order of interlocutory injunction did not call for determination in that case. The learned Justices of this court who heard the appeal did not lose sight of the fact that the motion for interlocutory injunction was granted ex-parte. The pronouncements concerned a clear case of an abuse of ex-parte injunction hence the following observation by the court: Nneameka-Agu, J.S.C. at page 451 said:

“It is my view that a necessary corollary to the fact that an undertaking as to damages is the price that an applicant has to pay for the order if interlocutory injunction is that failure to give the undertaking leaves the order, without a quid pro quo this ought to be more so in respect of ex-parte orders in which the order is being made without the other side being heard Above all, this court ought to take notice of the numerous cases of abuse of ex-parte injunction that have come up in recent times.”

Nnamani, J.S.C. of the blessed memory observed in part at p.457:

“I merely wish to associate myself with the view that, having regard to the manner ex-parte injunctions have lately been used in this country, an undertaking to pay damages must be extracted before the grant of such injunctions.”

It is therefore my view that the pronouncements made in the said judgment in so far as they went outside the order of injunction on an ex-parte application made without an undertaking as to damages are obiter dicta. The observations on an undertaking as to damages on an order of interlocutory injunction as opposed to ex-parte injunction did not arise in that case as to require a decision. Kotoye’s case remains valid in respect of orders of injunction made ex-parte without an undertaking as to damages.

The facts of Kotoye’s case are distinguishable from the facts in the appeal before us as well as those in Oduntan v. General Oil Ltd. (1995) 4 NWLR

(Pt.387) 1, where the orders of injunction were made on interlocutory applications. In this appeal also, there was notice filed by the plaintiffs/respondents in the court below of their intention to contend that the decision of the High Court be varied which contention that court acceded to.

Whatever views that I expressed in Oduntan's case on undertaking B as to damages on interlocutory injunctions must be limited to the facts and circumstances of that case. It did not overrule Kotoye's case.

The exercise of the powers conferred upon the court below by section 16 of the Court of Appeal Act, 1976 is being challenged in this court. It provides:

C *"S.16 The Court of Appeal may from time to time make any order necessary for determining the real question in controversy in the appeal, and may amend any defect or error in the record of appeal, and may direct the court below to inquire into and certify its findings on any question which the Court of Appeal thinks fit to determine before final judgment in the*
D *appeal and may make an interim order or grant any injunction which the court below is authorised to make or grant and may direct any necessary inquiries or accounts to be made or taken and generally shall have full jurisdiction over the whole proceedings as if the proceedings had been instituted in the Court of Appeal as court of first instance and may re-hear the*
E *case in whole or in part or may remit it to the court below for the purpose of such re-hearing or may give such other directions as to the manner in which the court below shall deal with the case in accordance with the powers of that court, or, in case of an appeal from the court below in that court's appellate jurisdiction, order the case to be re-heard by a court of competent*
F *jurisdiction."*

I think that the powers conferred on the court below in the above statutory provision is wide enough to enable the said court vary the order of the learned trial Judge. It is an order which the trial court could have made. The variation of the order to include an undertaking as to damages is connected G with the issue in controversy in the appeal before it and not alien to that issue. Since the court below and this court held that the application in Kotoye's case was incompetent, there was no way either court could have exercised its powers under section 16 of the Court of Appeal Act or section 22 of the Supreme Court Act even if an application has been made to either court to H invoke its said powers.

For the above reasons and the fuller reasons contained in the lead judgment, of my learned brother Kutigi, J.S.C., I too, dismiss the appeal and abide by the order as to costs contained in the said judgment.

I agree with my learned brother, Kutigi, J.S.C. in the lead judgment, just read, that the ratio decided in the case of NAB. Kotoye v. Central Bank of Nigeria and 7 Ors. (1989) 1 NWLR (Pt.98) 419 is not an applicable authority to the single issue raised by the learned Senior advocate, Chief G.O.K. Ajayi, for the determination of this appeal. The main issue for the determination of this appeal is whether the Court of Appeal must automatically discharge or set aside every order of injunction granted by the high Court without the High Court having extracted an undertaking as to damages where such an undertaking is desirable or necessary. B

It is plain from the undisputed facts of Kotoye's case that the failure of the learned trial Judge to extract an undertaking in damages was not the basis for the Court of Appeal decision to set aside the ex-parte orders. The issue of giving an undertaking as to damages was merely an additional ground which the Court of Appeal agreed would also be a basis upon which the appeal could be dismissed. My learned brother, Nnaemeka-Agu, J.S.C. wrote the lead judgment in Kotoye's case and he explained the main issue in that appeal, thus; C D

"I wish to begin my consideration of this aspect of this appeal by pointing out that there is really no dispute that an application for injunction "until the final determination of the suit" is an application for an interlocutory, and not in interim order. The real issue is as to whether such an application can be heard and granted ex parte. I have examined above the nature of a decision in an interlocutory injunction and shown that it entails a deliberation on a number of well-settled issues upon which the right of an applicant to the grant of it depends. The question, therefore, is, in view of the provisions of section 33 of the Constitution of 1979, can and should a court proceed to deliberate on those issues and come to conclusions on them on an ex parte hearing, that is without hearing all the parties to be affected by the order?" E F

It is clear therefore that the dictum opined by this court in Kotoye's case, viz, if the court of first instance failed to extract an undertaking as to damages, where it should, an appellate court ought normally to discharge the order of injunction on appeal, was given per incuriam. G

Under section 16 of the Court of Appeal Act, 1976, the lower court has the power to make the order as it did by ordering the plaintiffs/respondents to give an undertaking as to damages so as to sustain the order of interlocutory injunction granted by the trial High Court. H

For the above reasons and fuller reasons given in the lead judgment this appeal fails and it is dismissed. I abide by all the consequential orders made in the lead judgment including the award of costs.

ADIO JSC

I have had the opportunity of reading, in advance, the judgment just read by my learned brother, Kutigi, J.S.C., and I agree that this appeal fails. I too dismiss it.

In my view, the real or crucial issue in Kotoye's case, supra upon which the appellant heavily relied, was whether an application for an interlocutory injunction can be heard and granted ex parte. This court answered the question raised by the issue in the negative. The aforesaid answer which was given by this court formed the basis of the decision, the ratio decidendi. The question of obtaining an undertaking to pay damages, which was canvassed at length, succeeded in beclouding the real or crucial issues mentioned above. The real or crucial basis for the decision in Kotoye's case as expressed by Nnaemeka-Agu, J.S.C., at p. 451, was as follows:-

"In my view, Chief Williams is right. The decision of the Court of Appeal which has been confirmed by this judgment is that the learned Chief Judge granted the motion for interlocutory injunction ex parte but that he ought not to have done so. On the fact of that decision there is no basis for declaring the order null and void. But it is one that ought to have been set aside."

The major defect of the order in question was that it was made ex parte and not failure to obtain an undertaking. In the circumstance, Kotoye's case is not an authority for the proposition that an order shall be set aside by reason only that the court that made it failed to obtain an undertaking as to payment of damages. It is for the foregoing reasons and the detailed reasons given in the lead judgment of my learned brother, Kutigi, J.S.C., that I agree that the appeal fails. I dismiss it and abide by the order for costs.

IGUHJSC

I have had the privilege of reading in draft the lead judgment just delivered by my learned brother, Kutigi, J.S.C. and I agree with him that there is no merit in this appeal.

The facts that gave rise to this appeal have been fully set out in the lead judgment and no useful purpose will be served by my repeating them all over again. It suffices to state that the single issue for determination as formulated by the appellant and adopted by the 1st to the 9th respondents is whether the Court of Appeal was right in rejecting the appellant's contention that the order for injunction granted by the Ondo State High Court ought to have been set aside on the ground that an undertaking as to damages had not been extracted from the plaintiffs when the order for injunction was made. The 10th

to the 12th respondents adopted the same issue but added a second one. This is whether the Court of Appeal was right in invoking the provisions of section 16 of the Court of Appeal Act to side-track the decision of this court in *Kotoye v. Central Bank of Nigeria & Ors. (1989) 1 NWLR (Pt.98) 419* to the alleged effect that where a trial court fails to extract an undertaking as to damages where it should, an appellate court ought normally to discharge such order of injunction on appeal. B

When this appeal subsequently came up for hearing, this court in the interest of Justice raised suo motu yet another issue and invited learned counsel to file supplementary briefs to address the same. The issue was framed thus - *Whether in the light of the provisions of section 16 of the Court of Appeal Act, chapter 75 and the decision of this court in Oduntan v. General Oil Limited (1995) 4 NWLR (Pt.387) 1 at pages 13H-14A, the earlier decision in Kotoye v. C.B.N. (1989) 1 NWLR (Pt.98) 419 should be overruled*". C

Supplementary briefs were duly filed by the parties in respect thereto. D

At the hearing of the appeal before us on the 3rd day of October, 1995 learned counsel for the parties adopted their respective briefs and made oral submissions in amplification thereof.

Upon a careful consideration of all the matters urged upon us, it seems to me that a relevant issue for determination in this appeal is whether the Court of Appeal must automatically discharge or set aside each and every order of interlocutory or interim injunction granted by the High Court without such a High Court extracting an undertaking as to damages from the applicant where such an undertaking is desirable or necessary. It is the submission of learned Senior Advocate for the appellant that the answer to this issue is contained in the decision of this court in *Kotoye v. Central Bank of Nigeria & Ors. (1989) 1 NWLR (Pt.98) 419* which involved an appeal in respect of an ex parte order of injunction granted by the Federal High Court, Lagos without extracting any undertaking as to damages from the applicants. The Court of Appeal in its judgment, had held inter alia that the ex parte order of injunction was liable to be set aside for failure by the applicant to give an undertaking as to damages which on the facts of the case appeared desirable. E F G

The applicant appealed to this court and Nnaemeka-Agu, J.S.C. in dismissing the appeal stated inter alia as follows:-

"It is my view that a necessary corollary to the fact that an undertaking as to damages is the price that an applicant has to pay for the order of interlocutory injunction is that failure to give the undertaking leaves the order, without a Quid pro quo, and, so should be a ground for discharging H

the order. This ought to be more so in respect of ex-parte orders in which the

order is being made without the other side being heard

.....It is, therefore, my view that save in recognised exceptions, no order for an interlocutory or interim injunction should be made ex-parte or on notice save upon the condition that the applicant gives a satisfactory undertaking as to damages.....

B *In my judgment, therefore, where a court of first instance fails to extract an undertaking as to damages where it should, an appellate court ought normally to discharge the order of injunction on appeal."*

He went on -

C *"Chief Ajayi has again suggested that where such an undertaking as to damages was necessary but not considered or given, an appellate court should order that it be given. I do not agree."*

He explained the rationale for the decision as follows:-

D *"This is for the simple reason that invariably the damage, if at all, is done within a few days. It will serve no useful purpose to make an order on appeal which will have the effect of, as it were, closing the stable after the animal has bolted away.*

In my judgment, therefore, where a court of first instance fails to extract an undertaking as to damages where it should, an appellate court ought normally to discharge the order of injunction on appeal".

E I think it is necessary to point out that Nnamani, J.S.C. in his concurring judgment in the same case observed as follows:-

"It is settled that an undertaking to pay damages is the price which the person asking for interlocutory injunction has to pay, and it ought to be required on every interlocutory order.....

F *The undertaking to pay damages applies whether the plaintiff has not been guilty of misrepresentation, suppression or other default in obtaining the injunction".*

G It is therefore plain that the point which appeared made in Kotoye case is that an undertaking as to damages is the price that an applicant has to pay for the order of interlocutory injunction, that failure to give the undertaking leaves the order without a quid prop quo and is a ground for discharging the order by an appellate court and that this ought to be more so in respect of an ex parte order in which the order was made without the other side being heard. The next question must be whether the above pronouncements of this court per Nnaemeka-Agu, J.S.C. are mere Obiter dicta or constitute part of the rationes decidendi in the appeal.

H It is indisputable that in the judgment of a court, the legal principle formulated by that court which is necessary in the determination of the issues

raised in the case, that is to say, the binding part of the decision is its ratio decidendi as against the remaining parts of the judgment which merely constitute obiter dicta, that is to say, what is not necessary for the decision. See *Saude v. Abdullahi* (1989) 4 NWLR (Pt.116) 387; *Bamghoye v. University of Ilorin* (1991) 8 NWLR (Pt.207) 1 at page 24 etc. An Obiter dictum of the Supreme Court is clearly not binding on this court or indeed on the lower courts, for obiter dicta, though they may have considerable weight are not rationes decidendi and are therefore not conclusive authority. See *American International Insurance Co. v. Ceekay Traders Ltd.* (1981) 5 S.C. 81 at page 110. Where however an obiter dictum in one case has been adopted and becomes a ratio decidendi in a latter case, such obiter dictum will be taken to have acquired the force of a ratio decidendi and would therefore become binding. See *Victor Rossek and others v. African Continental Bank and Another* (1993) 8 NWLR (Pt.312) 382. B C

The question whether a decision or pronouncement of this court is binding on the Court of Appeal depends on whether that decision or pronouncement is an obiter dictum or was made per incuriam. If the pronouncement is a mere obiter dictum then, of course, it cannot be binding, but if it was made per incuriam, it will nevertheless be binding on the Court of Appeal in accordance with the principle of stare decisis until the error in the judgment has been corrected. See too *Victor Rossek and others v. African Continental Bank Ltd. & Ors.* (1993) 8 NWLR (Pt.312) 382. D E

A close study of the facts in the *Kotoye* case clearly reveals that the application concerned a motion ex parte for an interim order of injunction as against the application in the present appeal which is in respect of a motion on notice for an interlocutory injunction, the applicable governing principles of which are not entirely the same in both cases. Secondly, it does also appear that the judgment of the Court of Appeal in the *Kotoye* case which came on appeal to this court mainly concerned the question of whether the application should have been made ex parte as no real urgency was disclosed in the affidavit in support thereof. In its judgment, the court below in allowing the appeal had no difficulty in holding inter alia that the application should not have been made ex parte as no real urgency was disclosed in the affidavit in support thereof to warrant an ex parte hearing. It further held- F G

(1) That the order of the Federal High Court was in the nature of an immediate absolute order, not an interim order; and not one appropriate under the rule it was purported to have been brought H

(2) That the said order amounted to a final order without hearing the respondents;

(3) That the trial court granted to the applicant more than what he asked for;

(4) That although an affidavit of urgency was filed, no case of urgency was made out to warrant an ex parte hearing; and

(5) That although the appeal was being allowed on the above grounds, the court, nonetheless would equally have allowed the appeal and set aside the interim order of injunction for failure by the applicant to give an undertaking as to damages.

It is this decision of the court below that came on appeal to this court. It is also the pronouncements of Nnaemeka-Agu and Nnamani, JJ.S.C. in the judgment of this court in the appeal in connection with the hypothetical observations of the Court of Appeal that it would additionally have allowed the appeal, all the same for failure by the applicant to give an undertaking as to damages as reflected in its ratio five above that are now being questioned in the present appeal.

It is necessary to point out that it does not appear to me established that the court below allowed the appeal before it in the Kotoye case because of the failure by the trial court to extract an undertaking as to damages from the applicant before issuing the interim order of injunction. What seems to me established from the decision of this court in that matter is that the court below allowed the appeal before it on other grounds observing however as an aside that it would have been prepared additionally to allow the appeal and set aside the order in question for failure by the applicant to give an undertaking as to damages before obtaining the order. It therefore seems to me clear that failure by the appellant to give an undertaking as to damages, although fully argued before the court, was not directly in issue in the appeal before this court. Consequently, I am prepared to hold and it is my view that the observations in the judgment of this court in the Kotoye case on the necessity of an undertaking as to damages in applications for interlocutory injunction and the consequences of failure to extract such an undertaking are clear obiter dicta and cannot qualify as any part of the rationes decidendi in the case. I am therefore unable to accept that Kotoye case is an authority to the effect that in each and every order of an interlocutory or interim injunction, failure to extract an undertaking as to damages renders such an order incompetent and liable to be set aside.

I think I ought to stress that it cannot be the law that in all cases of interlocutory injunction, the extraction of an undertaking as to damages must be treated as a *conditio sine qua non* to the validity of an order. It is my view that each case must be treated on its particular facts as there are cases in which an undertaking as to damages is neither necessary nor arises and an order of interlocutory injunction in such cases without the extraction of an undertaking as to damages from the applicant cannot be regarded as invalid or

incompetent.

The above situation is clearly recognised in the decision of this court in the Kotoye case under review where Nnaemeka-Agu, J.S.C. pronounced that save in recognised exceptions, no order for an interim or interlocutory injunction should be made ex parte or on notice save upon the condition that the applicant gives satisfactory undertaking as to damages. There are therefore situations where the extraction of an undertaking as to damages may be unnecessary. The trial court, without doubt, has discretion on the question whether or not to order an undertaking as to damages but, like all judicial discretions, they must be exercised judicially and judiciously. It is not and cannot be the law that in each and every case of interlocutory or interim injunction, an undertaking as to damages must be extracted as a condition precedent to the validity of the order made.

This position of the law was made clearer by another decision of this court in Onyesoh v. Nnebedum (1992) 3 NWLR (Pt.229) 315 in which the decision in Kotoye case was explained. In that case, Nnaemeka-Agu, J.S.C. quite rightly explained as follows -

“I wish to point out straight away that although, as I stated in Kotoye v. C.B.N & Ors. (1989) 1 NWLR (Pt.98) 419 at P.450, an undertaking as to damages is the price which every applicant for an interlocutory injunction has to pay for it and that, save in recognized exceptions, it ought not to be granted if no undertaking has been given, it is putting the consequences of the failure to give the undertaking too high to say, as the learned Senior Advocate for the appellant has stated in his brief, that that rendered the order made incompetent..... The true position is that it renders the order liable to be set aside. Whether it will be set aside in any case will depend upon the facts of the particular case’ (Italics supplied for emphasis)

See too, Oduntan v. General Oil Ltd. (1995) 4 NWLR 1 where this court also held that it is not in every case of interim or interlocutory injunction that an undertaking as to damages ought to be extracted and that each case must be considered against its peculiar and particular facts and circumstances.

In the present case, however, it is not in dispute that the facts make the extraction of an undertaking as to damages necessary. The High Court granted the order without such an undertaking as to damages. However, before the court below, respondents’ notice urged the court to vary the order by extracting an undertaking as to damages from the applicant. This application was granted pursuant to the provisions of section 16 of the Court of Appeal Act, Cap. 75, Laws of the Federation which empower the court to make any orders necessary for determining the real question in controversy in an appeal, and to amend any error or defect in the record of appeal and to exercise

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full jurisdiction over the whole proceedings as if it had been instituted in the Court of Appeal as court of first instance.

The said section 16 of the Court of Appeal Act provides as follows -
“16. The Court of Appeal may, from time to time, make any order necessary for determining the real question in controversy in the appeal, and may amend any defect or error in the record of appeal, and may direct the court below to inquire into and certify its findings on any question which the Court of Appeal thinks fit to determine before final judgment in the appeal and may make an interim order or grant any injunction which the court below is authorised to make or grant, and may direct any necessary inquiries or accounts to be made, or taken and generally shall have full jurisdiction over the whole proceedings as if the proceedings had been instituted in the Court of Appeal as court of first instance, and may re-hear the case in whole or in part or may remit it to the court below for the purpose of such re-hearing or may give such other directions as to the manner in which the court below shall deal with the case in accordance with the powers of that court or; in the case of an appeal from the court below in that courts' appellate jurisdiction order the case to be re-heard by a court of competent jurisdiction”.

It is not in dispute that the High Court of Ondo State as a court of record has the power to extract an undertaking as to damages from an applicant in a motion for an interim or interlocutory injunction. In my view, the Court of Appeal in the present case was fully entitled in the interest of justice and upon proper application as was done in this case to impose an undertaking as to damages on the applicant as it did.

It ought to be pointed out that the attention of this court was regrettably not drawn to section 16 of the Court of Appeal Act in the Kotoye case. I entertain no doubt that the pronouncements under review in the Kotoye case, if they are understood to mean that where a court of first instance fails to extract an undertaking as to damages where it should, an appellate court ought normally to set aside or discharge the order of injunction on appeal must be regarded as having been made per incuriam in view of the provisions of section 16 of the Court of Appeal act aforementioned.

The conclusion I therefore reach is that Kotoye case did not decide that an appellate court, like an automation, must in all cases set aside or discharge every order of interim or interlocutory injunction made in a court of first instance without the extraction of an undertaking as to damages from the applicant by such a court. It is also my view that the controversial pronouncements of this court in the Kotoye case being mere obiter dicta and not forming any part of the rationes decidendi in the appeal, the decision in the said Kotoye case need not be overruled.

It is for the above and the more detailed reasons contained in the lead judgment of my learned brother, Kutigi, J.S.C. that I too, dismiss this appeal as unmeritorious and affirm the decision of the Court of Appeal. I abide by the order for costs contained in the lead judgment.

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