

SUPREME COURT OF NIGERIA
4TH JULY, 1995. SC. 19/1991
CORAM:- M.L. UWAIS, I.L. KUTIGI,
E.G. OGWUEGBU, Y.O. ADIO, A.I. IGUH, JJSC.

ALHAJI M.U.GOMBE APPELLANT
AND
P.W. NIGERIA LIMITED & ORS RESPONDENTS

APPEALS - Orders sought - Where beyond pending interlocutory appeal
- Whether appellate court is competent to entertain them.

COMPANY LAW - Minority share holders petition - Rule in *Foss v Harbottle* - Where applicable - Consequences thereof.

JURISDICTION - Issues raised - Where court lacks jurisdiction to entertain - What is the proper order to be made.

FACTS

The petitioner (herein appellant) filed an Amended Petition in the Federal Court, Ilorin in 1988 praying among others for the winding up of the 1st respondent company. The petitioner during the pendency of this petition, brought fresh application before the court against P. W of Dublin and Mr. H. V. Flinn praying for certain reliefs. The appellant's petition and application were heard and dismissed by the trial Federal High Court. Dissatisfied, the appellant appealed to the Court of Appeal, Kaduna Division. While this appeal was pending before the Court of Appeal, the appellant filed a fresh motion on Notice at the same court on 19th February, 1990 praying the court for various orders. The court of Appeal on 13th June, 1990 ruled that it has no jurisdiction to hear the Motion and dismissed it. The appellant appealed against that ruling of 13/6/90 to the Supreme Court raising five issues for determination which issues, the court viewed conveniently reduced into two issues in APPEAL NO. 1.

The court of Appeal ruled on 11th December, 1990 affirming the ruling Federal High Court Ilorin, dismissing the appellant's appeal. The appellant further appealed against that ruling raising seven issues as falling for determination. The Supreme Court however, adopted the three issues formulated by the respondent as adequate for the disposition of APPEAL No. 2, but considered only one of those issues that sufficiently disposed of

the said appeal No. 2.

ISSUES FOR DETERMINATION

1. *Whether or not the Court of Appeal has original jurisdiction to hear and determine the application filed before it; and*

2. *Whether or not the order of dismissal by the Court of Appeal was the proper order to be made in the circumstances of the case.*

*“(i) Whether or not the Appellant has **Locus standi** to initiate an action in respect of a wrong done to the Company. In other words does the rule in **FOSS v. HARBOTTLE** apply in this case?*

(ii) Whether or not Mr. H. V. Flinn (representing Public Works Limited of Dublin) should have been joined as a party to this suit.

(iii) Whether or not Public Works Limited of Dublin is an existing company and a shareholder in the first Respondent Company.”

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

Appeals - Orders sought

1. I have considered the submissions of counsel in the case and come to the conclusion that the Court of Appeal was right to have declined jurisdiction. I have also closely examined the orders sought in the application above and irresistibly also come to the conclusion that the orders sought are quite extensive which go beyond the ambit of the interlocutory appeal actually the pending before the Court of Appeal (Appeal No. 2 herein). The Court of Appeal was clearly incompetent to entertain those matters not being a court of first instance. I agree with the Court of Appeal that neither section 6(6) of the Constitution nor Section 16 of the Court of Appeal Act nor Order Rule 20(5) of the Court of Appeal Rules was of any assistance to the appellant in the application. (p. 1330 C)

Lack of jurisdiction - Proper order to be made

2. But the Court of Appeal having declined jurisdiction was clearly in error when it proceeded to dismiss the application instead of striking it out. The appeal therefore succeeds in part only. The order of the court below declining jurisdiction to entertain the application is upheld; while the order dismissing the application is hereby substituted with an order striking out the application. (p. 1330 F)

Minority share holders petition

3. It is significant that there is no appeal against any finding of fact made by the learned trial judge and on which he relied to come to the conclusion

that the rule in FOSS v. HARBOTTLE (supra) applied to the application of the appellant in this case. I therefore find no difficulty on the facts in agreeing both with the decisions of the trial court and of the Court of Appeal that the Rule in FOSS v. HARBOTTLE applied and that therefore the appellant had no *locus standi*. As stated already the lower courts came to a correct decision that the rule applied and I am also satisfied that the factual situation of the case did not bring it within the exceptions to the Rule which the learned trial judge took pains to consider. (p. 1332 G)

NOTABLE POINTS OF INTEREST

KUTIGI JSC

1. Locus standi defined and resolved

The term “*locus standi*” or “standing” which denotes legal capacity to institute proceedings in a court of law or tribunal or the right of a party to appear and be heard on the question before a court or tribunal vide ADESANYA v. SHAGARI (1981) 5 SC 112, having been resolved against the appellant, it is no longer necessary to consider the remaining two issues. Suffice is to say however, that neither Mr. H. V. Flinn nor the Public Works Limited of Dublin is a party to the winding up petition filed by the appellant. And neither of them has been joined by leave or any order of court anywhere. (p. 1333E)

UWAIS JSC

2. Lack of jurisdiction - Proper order to be made

Where a court lacks the jurisdiction to entertain a case, the proper order to be made by the court is that of striking out the case and not dismissing it. This has since been stated by this Court in a number of cases. (p. 1334 B)

3. Proper party to complain of fraud against company

Although in the second appeal the Appellant felt aggrieved by what he complained about, to wit, that Mr. H.V. Flinn, the Managing Director of the respondent was defrauding the Respondent, the trial court found that the appellant was a minority shareholder in the company. Therefore, the proper party to complain about the fraud is the company itself. The rule in the case of FOSS v. Harbottle. (1843) 2 Hare 461, which precludes a minority shareholder or shareholders from suing where there is an irregularity in the internal management of a company that is capable of being confirmed by a simple majority of the shareholders, clearly applies to this case. For that reason the Federal High Court could not interfere at the suit of the Appellant as a majority of the shareholders. (p. 1334 C)

OGWUEGBU JSC*4. Exception to the Rule in Foss v. Harbottle*

It is clear law that in order to redress a wrong done to a company or to recover money or damages alleged to be due to a company, the action should be brought by the company itself except where the majority are B endeavouring directly or indirectly to appropriate to themselves money, property or advantages which belong to the company or in which the other shareholders are entitled to participate. (p. 1335 G)

IGUH JSC*C 5. Duty of court to preserve the res*

It is true that the court from which an appeal lies as well as the court to which the appeal lies, not only have jurisdiction, but they also have a duty to preserve the res in issue in a suit for the purpose of ensuring that an appeal, if successful, is not in vain or rendered nugatory. In the present D case, however, none of the reliefs claimed in the application is concerned with the preservation of the res in issue in the interlocutory appeal for the purpose of preventing the appeal, if successful, from being nugatory. Indeed as I have already pointed out, those reliefs are totally unconnected with both the claim in the substantive petition and the subject matter of the E interlocutory appeal before the Court of Appeal. It cannot, therefore, be suggested, and indeed, there is no suggestion that the application in issue was filed before the court below for the preservation of any res to ensure that the interlocutory appeal, if successful, is not rendered nugatory. (p. 1336 H)

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6. Exercise of jurisdiction distinguished from inherent power

It ought to be stressed that to equate the jurisdiction vested in a court with the exercise of its inherent powers in a cause within its jurisdiction is a clear misconception. The exercise of jurisdiction in a cause or matter must be G distinguished from the exercise of an inherent power by a court of law in a cause or matter within its jurisdiction. The inherent power of a court of record is entirely supplementary to and dependent on the statutory jurisdiction of the court in a cause. A court may have or exercise inherent power or inherent jurisdiction in respect of a cause or matter within its jurisdiction. It H has, however, no inherent power or jurisdiction over a cause or matter not within its jurisdiction. There lies the distinction between the two terminologies. (p. 1338C)

7. Need to disclose locus standi ex facie in all actions

It has to be observed that the onus is on the appellant to disclose *ex facie* in his amended petition that he had locus standi to present the petition. This is a basic requirement in all actions as failure to disclose any locus standi by a petitioner, a plaintiff or an applicant is as fatal to a cause or matter as failure to disclose a cause of action in a suit. If therefore the appellant has no business in claiming the reliefs he sought in his interlocutory application, the same of necessity stand dismissed. (p. 1339 H)

REPRESENTATION

A. Kareen for the Appellant.

S. N. Nweke for the Respondent.

C

CASES REFERRED TO

Akilu v. Fawehinmi (No.2) (1989)2 NWLR (Pt. 102)107

Okotie-Eboh v. Okotie-Eboh (1986) 1 SC. 479

Kigo v. Holman Bros (1980) 5-7 SC. 60

D

Western Steel Works Ltd. v. Iron & Steel Works Union (1986)3 NWLR (pt. 30)617

Thomas v. Olufosoye (1986)1 NWLR 669 at 600

Adesanya v. Shagari (1981) 5 SC. 112

Olotiode v. Oyebi (1984) 1 SCNLR 390

E

Okoye v. Nigerian Construction and Furniture Co. Ltd. (1991) 6 N.W.L.R. (part 199) 501

Akinibu v. Oseni (1992) 1 N.W.L.R. (Part 215) 97

Road Transport Employers Association of Nigeria v. National Union of Workers (1992) 2 N.W.L.R. (Part 224) 381

F

Omisade v. Akande (1987) 2 N.W.L.R. (Part 55) 158

Kigo(Nigeria) Ltd. v. Holman Bros (Nigeria) Ltd. (1980) 5-7 S.C. 60 at 70

Mozley v. Alston 41 E.R. 833

Elufioye v. Halilu (1993)6 N.W.L.R. (Pt. 301)570

G

STATUTES & RULES REFERRED TO

Constitution of the Federal Republic of Nigeria, 1979 SS. 6(6);219

Court of Appeal Act, 1976, s.16

Court of Appeal Rules, 1981 O.1 r.20(5).

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LEAD JUDGMENT BY KUTIGI JSC

The Petitioner by an amended petition filed in the Federal High Court, Ilorin on the 17th October, 1988 prayed as follows:-

“(i) That PW. (Nigeria) Limited be wound-up by the Court under

the provision of the Companies Act 1968.

(ii) *And for such further order(s) as may be just to make in the circumstance.*

(iii) *Your humble petitioner will at the hearing of the petition rely on the Certificate of Incorporation of the Company. Photostat copy of the letter ref. No. CAD/CR/POL.200/13 and the letters stated in paragraphs above and or any other document or documents in any way connected with the petition."*

While the petition was still pending the petitioner brought an interlocutory application in these terms:-

"(1) *An order that P.W. of Dublin, its servants or agents or howsoever, be restrained from holding out itself as having proprietary interest either as shareholder or Director or Managing Director in the respondent company and to render accounts for the period Mr. H. V. Flinn or any other person (representative of P.W. Dublin) was Managing Director of the respondent company.*

(2) *An order of the Honourable Court that an independent manager other than the present ones be appointed to manage and control the affairs of the company and to receive all monies, profits, rents and or interests due or receivable by the respondent company pending the determination of this case.*

(3) *An order of the court directing the Registrar of Companies to strike out the name of P.W. Dublin from the list of member shareholder of P.W. (Nigeria) Limited.*

(4) *A declaration that the purported allotment of shares to P.W. Dublin is invalid, null and void and of no effect whatsoever.*

(5) *An order that P.W. Dublin through its agent Mr. H.V. Flinn make reparation for and refund of all monies, properties movable and immovable made to the said P.W. Dublin in the course of the invalid allotment and exercise of proprietary rights in the respondent company.*

AND FOR such further order(s) as the Honourable court may deem fit to make in the circumstance."

The application was supported by an affidavit and a further affidavit all sworn to by the petitioner. The respondent also filed its own counter-affidavit and further counter-affidavit. In a considered ruling the learned trial Judge Eigbedion J., struck out the name of one Mr. H.V. Flinn whom the petitioner chose to have made a party in the suit without the leave of court and then dismissed the application thus:-

"As I held herein before, the application is a misconceived one, as I find no basis for bringing (the application. Secondly, it is my considered opinion, that the Rule in Foss V. Harbottle (1843) 2 Hg 461 applies to this

application. Having so held, the orders sought by the petitioner/applicant must, and are hereby refused.

The application is dismissed in its entirety.”

Dissatisfied with the ruling above, the petitioner appealed to the Court of Appeal, Kaduna Division. Meanwhile while the appeal was still pending and yet to be decided by the Court of Appeal, the petitioner filed a fresh motion on notice dated the 19th day of February, 1990 praying for the following orders:-

“(1) An order that the purported Annual General Meeting of the 1st respondent company held on the 29th January, 1990 inspite of motion of 16/1/90 still pending at Sheraton Hotel, Lagos is null and void and of no effect.

(2) An order setting aside all resolutions taken in pursuance of the said meeting.

(3) An order of the court removing 2nd respondent H. V. Flinn as the Managing Director of the 1st respondent company.

(4) An order of the court that N7.3 million profit declared by the 1st respondent company for the year 1988 be paid into fixed deposit account and to a bank approved by the Honourable court, pending the determination of the petition for winding up and that applicant be made a signatory to the said account or alternatively.

That the profit of N7.3 million declared by the 1st respondent for the year 1988 be paid into the court and Chief Registrar to hold same on trust for the parties pending the determination of the case.

(5) An order of the court that the purported increase of shares capital of the company dated 31/5/88 and 21/5/88 and in the hand of H.V. Flinn (2nd respondent) is null and void and of no effect.

(6) An order that the respondents jointly and severally by themselves, their agents or servants or whosoever be restrained and that an injunction restraining them jointly and severally from calling or holding the Annual General meeting of the 1st respondent company now at any time until the determination of the appeal and the substantive petition now pending before the Honourable Court of Appeal and the Honourable Federal High Court, Ilorin.

(7) An order restraining the respondents jointly and severally by themselves, their agents or servants or howsoever and that an injunction be granted restraining them from altering, modifying, increasing or in any manner howsoever from interfering with the share capital or membership of the 1st respondent company until the determination of the substantive suit in FHC/2/M/88 and the appeal now pending before the Honourable Court.

And for such further Order(s) as the Honourable Court may deem

1328 Gombe v PW Nig. Ltd (1995) 7 KLR Kutigi JSC
fit to make in the circumstance."

There were affidavits in support of the motion and counter-affidavits in opposition. In a reserved ruling delivered on the 13th day of June, 1990 the Court of Appeal ruled that it had no jurisdiction to hear and determine the motion and dismissed it accordingly.

B Not satisfied with the ruling of the Court of Appeal, the petitioner has now appealed to this court. This appeal against the Court of Appeal ruling of 13/6/90 will hereinafter be referred to as "*APPEAL Number One*".

C The appeal against the ruling of the Federal High Court of 26th July, 1989 was later heard by the Court of Appeal on 13/9/90 and judgment delivered on 11th December, 1990. The Court of Appeal in its judgment affirmed the ruling of the trial Federal High Court and dismissed the appeal in its entirety.

D Aggrieved by the decision of the Court of Appeal the petitioner has once more appealed to this Court. This appeal against the judgment of the Court of Appeal delivered on 11/12/90 will hereinafter be referred to as "*Appeal Number TWO*". The petitioner shall henceforth be called the "appellant" in the two appeals.

The two appeals will now be treated in turn.

APPEAL NUMBER ONE

E Lest you forget, this is an appeal against the ruling of the Court of Appeal itself, refusing or dismissing the petitioner's motion filed before it on the ground of want of jurisdiction. I have already reproduced above the terms of the motion.

F The appellant filed five grounds of appeal and submitted five issues for determination on pages 3 & 4 of his brief. But it is my view that they can conveniently be reduced into two issues as follows:-

1. Whether or not the Court of Appeal has original jurisdiction to hear and determine the application filed before it; and

G 2. Whether or not the order of dismissal by the Court of Appeal was the proper order to be made in the circumstances of the case.

H Mr. Kareem learned counsel for the appellant adopted the brief filed on behalf of the appellant at the hearing. He said the facts are not disputed and that the central point in the appeal is the jurisdiction of the Court of Appeal to entertain the motion. He said the reliefs sought by the appellant being temporary or interim orders in nature, pending the determination of the appeal, the Court of Appeal had the necessary jurisdiction to entertain the application. He referred to section 16 of the Court of Appeal Act, 1976 and to Order 1 rule 20(8) of the Court of Appeal Rules 1981. The cases of *Akilu v Fawehinmi (No.2) (1989) 2 NWLR (Pt.102) 122* and *Okotie-Eboh v. Okotie-Eboh (1989) 1 S.C. 479; (1989) 4 NWLR (Pt. 113)*

113 were cited in support. He said the Court of Appeal has the power to preserve the res and prevent the respondent from carrying out the capital restructuring of the company subject matter of the appeal. He referred to Kigo v. Holman Bros. (1980) 5-7 S.C. 60.

It was also submitted that the Court of Appeal erred in law when having declined jurisdiction, it proceeded to dismiss the application instead of simply striking it out. The court was urged to allow the appeal. B

Mr. Nweke learned counsel for the respondents in reply submitted that the jurisdiction of the Court of Appeal is wholly appellate. He referred to Section 219 of the 1979 Constitution. He said section 16 of the Court of Appeal Act has defined the general powers of the Court which include inter alia power to make an interim order or grant an injunction which the court below is authorised to make or grant. Similarly Order 1 rule 20(5) of the Court of Appeal Rules also gives the Court of Appeal wide powers in relation to appeals before it and enables the court to exercise all the powers of a court of first instance. He said for the Court of Appeal to exercise its jurisdiction under section 16 of the Act or under Order 1 rule 20(5) of the Rules, there must first and foremost be an appeal from the court below before the Court of Appeal. He cited in support Mrs. Alero Jadesimi (Nee Okotie-Eboh) v. Adolo Okotie-Eboh (1986) 1 NWLR (Pt.16) 264 at 274 per Karibi-Whyte, J.S.C. C D

It was submitted that since there was no appeal filed by the appellant at the Court of Appeal when he filed the application which was never decided by the Federal High Court, the Court of Appeal could not have invoked section 16 of the Act or Order 1 Rule 20(5) of the Rules and that the Court of Appeal rightly declined jurisdiction. E

Learned counsel for the respondents however conceded, rightly in my view, that when the Court of Appeal declined jurisdiction the proper order it would have made was that of striking out the application. He said the order of dismissal made by the Court of Appeal was not the correct and proper order to make. Subject to this, counsel urged the court to dismiss the appeal. F G

On the issue of jurisdiction, the Court of Appeal after considering the cases of Western Steel Works Ltd. v. Iron & Steel Workers Union (1986) 3 NWLR ((Pt.30) 617; Fawehinmi v. Akilu (1989) 3 NWLR (Pt. 112) 643 at 671 ; Akilu v. Fawehinmi (No.2) (1989) 2 NWLR (Pt.102) 122 at 197 and Mrs. Alero Jadesimi v. Adolo Okotie-Eboh (1986) 1 NWLR (Pt. 16) 264 came to the following conclusion on page 607 of the lead judgment:- H

"The prerequisite of the exercise by this Court of its inherent jurisdiction under Section 6(6) of the Constitution, and its other enabling powers of rehearing under Section 16 of the Act, is an appeal duly entered and pend

ing before it, and in respect of which so much of the records of the lower court necessary for hearing and determining the appeal or matter before it has been filed. An application, like the one in hand, in respect of which the lower court was not seised, nor given a decision appealed and for which no record of the court below is placed before this Court, cannot be entertained for lack of jurisdiction under Sections 219 to 225 of the 1979 Constitution, nor under the ancillary provisions of Section 6 of the 1979 Constitution, Section 16 of the Court of Appeal Act 1976, as well as Order 1 rule 20(5) of the Court of Appeal Rules, 1981.

The motion herein has invoked an original jurisdiction which this Court does not have. This application should have been directed to the court below which has powers, under Sections 300 and 304 of Decree No. 1 of 1990..... “

I have considered the submissions of counsel in the case and come to the conclusion that the Court of Appeal was right to have declined jurisdiction. I have also closely examined the orders sought in the application above and irresistibly also come to the conclusion that the orders sought are quite extensive which go beyond the ambit of the interlocutory appeal actually then pending before the Court of Appeal (Appeal No.2 herein). The Court of Appeal was clearly incompetent to entertain those matters not being a court of first instance. I agree with the Court of Appeal that neither section 6(6) of the Constitution nor section 16 of the Court of Appeal Act nor Order 1 rule 20(5) of the Court of Appeal Rules was of any assistance to the appellant in the application.

But the Court of Appeal having declined jurisdiction was clearly in error when it proceeded to dismiss the application instead of striking it out. The appeal therefore succeeds in part only. The order of the court below declining jurisdiction to entertain the application is upheld; while the order dismissing the application is hereby substituted with an order striking out the application.

APPEAL NUMBER TWO

I have earlier reproduced above the interlocutory motion or application filed before the trial Federal High Court in a substantive petition for the winding up of the respondent company by the appellant. The application was heard and the learned trial Judge in his ruling after due consideration of the affidavit evidence and the submissions of counsel dismissed the application. The appellant then appealed to the Court of Appeal, Kaduna. The Court of Appeal in its judgment delivered on the 11th day of December, 1990 dismissed the appeal and affirmed the ruling of the trial

Court.

Dissatisfied with the judgment of the Court of Appeal the appellant again appealed to this court.

The parties filed and exchanged briefs which were adopted at the hearing.

The appellant's brief contained seven issues for determination which the respondents quite properly summarised into three as follows:- B

"(i) Whether or not the appellant has locus standi to initiate an action in respect of a wrong done to the company. In other words does the rule in Foss v. Harbottle apply in this case?"

(ii) Whether or not Mr. H. V. Flinn (representing Public Works Limited of Dublin) should have been joined as a party to this suit. C

(iii) Whether or not Public Works Limited of Dublin is an existing company and a shareholder in the first respondent company."

Needless to state that these same issues were amongst the four issues raised at the Court of Appeal and which were duly considered before they were dismissed. D

On issue (i) Mr. Kareem learned counsel for the appellant submitted as follows:

1. The matters in the application are matters which the majority cannot rectify or remedy.
2. The 2nd respondent is the alter ego of the 1st respondent company. E
3. The 2nd respondent committed and still commits the alleged acts of dishonesty and fraud complained of.
4. The 2nd respondent retains the management and control of the 1st respondent.
5. The factual situation does not bring the case within the rule in Foss v. F Harbottle but rather within its exceptions.

These cases were cited -

Edwards v. Halliwell (1950) 2 AER 1064 at 1066;

Omisade v. Akande (1987) 2 NWLR (Pt.55) 158;

Spoke v. Grosvenor Hotel (1897) QBD 124;

Waller-sterner v. Moir (No.2) (1975) 2 WLR 389. G

Mr. Nweke for the respondents submitted that the learned trial Judge properly applied the rule in Foss v. Harbottle to the case and that the exceptions to the rule do not apply. He referred to the case of Edwards v. Halliwell (supra) and to page 92 of the ruling of the trial court. He said on the face of the amended petition it would be observed that Mr. H. V. Flinn is an employee and Managing Director in the 1st respondent company and that he has no control over the 1st respondent in the context of majority shareholding. He referred to Wallersteiner v. Moir (supra). The Amended

Petition he said clearly shows that Nigerians are the majority shareholders and in control of the 1st respondent company. A case of fraud by those in control of the 1st respondent was not made out and the exception to the rule did not apply. It was finally submitted that the appellant failed completely to show on the face of the Amended Petition that he has locus standi and that both the Federal High Court and the Court of Appeal were right when they held that the rule in *Foss v. Harbottle* applied to the application of the appellant. He cited the case of *Thomas v. Olufosoye* (1986) 1 NWLR (Pt.18) 669 at 681, para. H (Pt. 18).

On this issue of appellant's locus standi, the learned trial Judge had this to say on page 91 of the record -

"The petitioner/applicant holds N30,000 shares in the company. He is suing in his name. The sum total of his complaint is that Mr. H. V. Flinn, the Managing Director of the company is defrauding the company by sending the company's money abroad in different guises. Mr. Flinn is not a shareholder or member of the company. He is an employee of the company and therefore a third party. The principle in the rule of Foss v. Harbottle (1843) 2 Hg. 461 is that prima facie every action must be brought in the name of the company to remedy a wrong done to it for the court has no jurisdiction into the internal management of a company. The rule does not of course prevent a member from suing in respect of an individual wrong."

The learned trial Judge thereafter considered the exceptions to the rule and concluded on page 93 of the judgment thus:-

"As I held herein before, the application is a misconceived one. As I find no basis for bringing the application, Secondly, It is my considered opinion that the rule in Foss v. Harbottle (1843) Hg. 461 applies to this application. Having so held, the orders sought by the petitioner/applicant must and are hereby refused. The application is dismissed in its entirety."

The Court of Appeal agreed with the finding of the trial court that the wrongs complained of by the appellant, if at all, were wrongs done to the company and that only the company could redress them whereupon it dismissed the appeal.

It is significant that there is no appeal against any finding of fact made by the learned trial Judge and on which he relied to come to the conclusion that the rule in *Foss v. Harbottle* (supra) applied to the application of the appellant in this case. I therefore find no difficulty on the facts in agreeing both with the decisions of the trial court and of the Court of Appeal that the rule in *Foss v. Harbottle* applied and that therefore the appellant had no locus standi. In *Edwards & Anor v. Halliwell & Ors* (Supra), Jenkins, L.J. said of the Rule at Pages 1066-1067 as follows:-

"The rule in Foss v. Harbottle as I understand it, comes to no more than this. First, the proper plaintiff in an action in respect of a wrong alleged to be done to a company or association of persons is prima facie the company or the association of persons itself. Secondly, where the alleged wrong is a transaction which might be made binding on the company or association and on all its members by a simple majority of the members, no individual member of the company is allowed to maintain an action in respect of that matter for the simple reason that, if a mere majority of the members of the company or association is in favour of what has been done, then cadit quaestio. No wrong has been done to the company or association and there is nothing in respect of which anyone can sue. If on the other hand, a simple majority of members of the company or association is against what has been done, then there is no valid reason why the company or association itself should not sue. In my judgment, it is implicit in the rule that the matter relied on as constituting the cause of action should be a cause of action properly belonging to the general body of corporators or members of the company or association as opposed to a cause of action which some individual member can assert in his own rights.

The cases falling within the general ambit of the rule are subject to certain exceptions."

As stated already, the lower courts came to a correct decision that the rule applied and I am also satisfied that the factual situation of the case did not bring it within the exceptions to the rule which the learned trial Judge took pains to consider.

Issue (i) is therefore answered in the affirmative. The rule in Foss v. Harbottle (supra) applied and the appellant therefore had no locus standi to bring the application. The term "*locus standi*" or "*standing*" which denotes legal capacity to institute proceedings in a court of law or tribunal or the right of a party to appear and be heard on the question before a court or tribunal vide Adesanya v. Shagari (1981) 5 S.C. 112; (1981) 2 NCLR 358 having been resolved against the appellant, it is no longer necessary to consider the remaining two issues. Suffice it to say however, that neither Mr. H. V. Flinn nor the Public Works Limited of Dublin is a party to the winding up petition filed by the appellant. And neither of them has been joined by leave or any order of court anywhere in the record.

The appeal therefore fails and it is hereby dismissed.

In summary the two appeals are dismissed except that the order of the Court of Appeal dismissing appellant's application before it is substituted by an order striking out that application only.

The respondents are awarded costs of one thousand (N1,000.00) Naira only

UWAIS JSC

I have had the advantage of reading in draft the judgment read by my learned brother Kutigi J.S.C. I am in complete agreement with him that the two appeals lack merit and that they should accordingly be dismissed.

B Where a court lacks the jurisdiction to entertain a case, the proper order to be made by the court is that of striking out the case and not dismissing it. This has since been stated by this court in a number of cases including Oloriode v. Oyebe (1984) 1 SCNLR 390; Okoye v. Nigerian Construction and Furniture Co. Ltd. (1991) 6 NWLR (Pt.199) 501; Akinbinu v. C Oseni (1992) 1 NWLR (Pt.215) 97; Ohiaeri v. Akabeze (1992) 2 NWLR (Pt.221) 1; Road Transport Employers Association of Nigeria v. National Union of Road Transport Workers (1992) 2 NWLR (Pt.224) 381; and Adesokan v. Adetunji (1994) 5 NWLR (Pt.346) 540.

Although in the second appeal the appellant felt aggrieved by what D he complained about, to wit, that Mr. H.V. Flinn, the Managing Director of the respondent was defrauding the respondent, the trial court found that the appellant was a minority shareholder in the company. Therefore, the proper party to complain about the fraud is the company itself. The rule in the case of Foss v. Harbottle (1843) 2 Hare 461, which precludes a minority shareholder or shareholders from suing where there is irregularity in the internal management of a company that is capable of being confirmed by a simple majority of the shareholders, clearly applies to this case. For that reason the Federal High Court could not interfere at the suit of the appellant as a minority of the shareholders. Admittedly, there are exceptions to F the rule in Foss v. Harbottle which do enable a minority shareholder to sue where there is a fraud on the majority shareholders - see Cook v. Deeds (1916) 1 A.C. 554; Omisade v. Akande (1987) 2 NWLR (Pt.55) 158 and Yalaju-Amaye v. AR.E.C. Ltd. (1990) 4 NWLR (Pt.145) 422. However, the exceptions do not apply to the present case. In Yalaju-Amaye case (supra) G Karibi-Whyte, J.S.C. observed as follows at page 451 E-H thereof:-

"Appellant in claim 6 sought for an order for injunction restraining the 2nd to 6th defendants/respondents and their agents and servants from operating the accounts of the 1st defendant/respondent company in the 7th and 8th defendants/respondents bank without prior consent or approval H by the plaintiff/appellant. I think this is the most ambitious of all the claims in the writ of summons. In arguing this head of claim counsel to the appellant must have taken into consideration the fact that he is only holder of 16.6% of the shares of the 1st defendant company. The 2nd - 6th defendants hold 86.3% of the shares. Thus at any time, the management of the

The question of the operation of the accounts of the 1st defendant/respondent company is a matter to be determined by the Board of Directors or the Managing Director, in who is vested the management of the company. See Art. 80 Table A. It seems to me well settled that a minority shareholder, which plaintiff/appellant is in the instant case, has no legal right to interfere with the management of the company, except where fraud has been alleged against the majority."

In my opinion, the Court of Appeal was right in the decision it reached in its ruling on the interlocutory application by the appellant and the appeal before it from the judgment of the Federal High Court. It is for these reasons and those contained in the judgment read by my learned brother, Kutigi, J.S.C. that I too hereby dismiss the appeals with N1,000.00 costs to the respondents. The order of dismissal wrongly entered by the Court of Appeal is set aside and in its place I substitute an order of striking out the appellant's application thereat.

OGWUEGBU JSC

I agree with the judgment of my learned brother, Kutigi, J.S.C. dismissing both appeals. I also dismiss them. The court below wrongly dismissed the application of the appellant after declining jurisdiction to entertain the same. Since it had no jurisdiction to determine the application, the proper order which it should have made is that of striking out. See *Oloriode & Ors. v. Oyebe & Ors.* (1984) NSCC 286 at 292; (1984) 1SCNLR 390; *Onwunalu v. Osedeme* (1971) 1 All NLR 14 and *Adesokan & Ors. v. Adetunji & Ors.* (1994) 5 NWLR (Pt.346) 540. I hereby substitute the order dismissing the application with that of striking out.

I also agree with the finding of the learned trial Judge which was affirmed by the court below that the wrongs complained of by the appellant were done to the company and that the proper plaintiff in such a case is the company itself. It is clear law that in order to redress a wrong done to a company or to recover money or damages alleged to be due to a company, the action should be brought by the company itself except where the majority are endeavouring directly or indirectly to appropriate to themselves money, property or advantages which belong to the company or in which the other share-holders are entitled to participate. See *Foss v. Harbottle* 67 E.R. 189; *Mozley v. Alston* 41 E.R. 833 and *Elufioye & Ors. v. Hallilu & Ors.* (1993) 6 NWLR (Pt.301) 570.

For the above reasons and the fuller reasons contained in the lead judgment. I also dismiss the appeal and abide by the consequential orders

ADIO JSC

I have had the opportunity of reading, in draft, the judgment just delivered by my learned brother Kutigi J.S.C. and I agree that the appeal fails.
B Accordingly, I too dismiss the appeal except that I substitute the order dismissing the appellant's application made to the court below during the proceedings before that court, with an order striking out the aforesaid application.

C —————

IGUH JSC

I have had the advantage of a preview of the judgment just delivered by my learned brother Kutigi J.S.C. and I agree that these appeals are without substance and should be dismissed.
D

I wish, however, to make some comments by way of emphasis only.

The facts that lead to these appeals have been fully set out in the lead judgment of my learned brother and no useful purpose will be served by my repeating them all over again. It suffices to state that the application from which the first appeal has arisen relates to various reliefs or prayers which are clearly not ancillary to the substantive petition before the trial court for winding up of the 1st respondent company.
E

It is beyond argument that the reliefs sought in the application are fresh and independent reliefs, totally unconnected with the petition for the winding up of the 1st respondent company in the substantive suit. It is also clean that the said reliefs have no nexus whatever with the issues for determination before the court below in the interlocutory appeal pending before it.
F

It is hardly necessary to state that the Court of Appeal is essentially a court of appellate jurisdiction and not a court of first instance. See Section 219 of the 1979 Constitution of the Federal Republic of Nigeria. Subject to the provisions of the said Constitution, its jurisdiction empowers that court to hear and determine appeals from the Federal High Court, the High Court of a State, the Sharia Court of Appeal of a State, the Customary Court of Appeal of a State, the Code of Conduct Tribunal and other Courts or Tribunals as the National Assembly may designate, The Court of Appeal, therefore, has no original jurisdiction.
G
H

It is true that the court from which an appeal lies as well as the court to which the appeal lies, not only have jurisdiction, but they also have a duty to preserve the res in issue in a suit for the purpose of ensuring that

an appeal, if successful is not in vain or rendered nugatory. See Kigo (Nigeria) Ltd. r. Holman Bros. (Nigeria) Ltd. (1980) 5-7 S.C. 60 at 70; Chief Sodeinde and others v. The Registered Trustees of The Ahmadiyya Movement-in-Islam (1980) 1-2 S.C. 163 at 181 - 182; Wilson v. Church (No.2) (1897) 12 Ch. D. 454 at 459 and Vaswani Trading Company v. Savalakh and Company (1972) 12 S.C. 77 at 81. In the present case, however, none of the reliefs claimed in the application is concerned with the preservation of the res in issue in the interlocutory appeal for the purpose of preventing the appeal, if successful, from being nugatory. Indeed as I have already pointed out, those reliefs are totally unconnected with both the claim in the substantive petition and the subject matter of the interlocutory appeal before the Court of Appeal. It cannot, therefore be suggested, and indeed, there is no suggestion that the application in issue was filed before the court below for the preservation of any res to ensure that the interlocutory appeal, if successful, is not rendered nugatory.

It was contended on behalf of the appellant that one of the general powers of the Court of Appeal under Section 16 of the Court of Appeal Act, 1976 includes the exercise of:-

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

Reference was also made to the provisions of Order 1 rule 20(5) of the Court of Appeal Rules, 1981. These rules give the Court of Appeal wide powers in relation to appeals before it and confer jurisdiction on the court to exercise all the powers of a court of first instance.

I think it necessary to emphasize that the above powers of the Court of Appeal under Section 16 of the Court of Appeal Act, 1976 and Order 1 rule 20(5) of the Court of Appeal Rules, 1981 have not and cannot be construed as conferring original jurisdiction on the Court of Appeal such as has been conferred by law on the various courts of first instance. These powers are only exercisable by the Court of Appeal with respect to appeals before it and it will certainly amount to a misconception of the law to suggest that they confer original jurisdiction on the Court of Appeal to entertain fresh causes or matter as if it were a court of first instance. In my view, the powers conferred under Section 16 of the Court of Appeal Act, 1976 and Order 1 rule 20(5) of the Court of Appeal Rules, 1981 are only exercisable in respect of appeals pending before that court and applications made under or in connection with appeals where the reliefs claimed have bearing with and are connected with such appeals, their subject matter or the reliefs claimed thereunder. Where, however, the reliefs or orders applied for are entirely alien to, and unrelated with, a proposed or pending appeal

and issues arising therefrom. It seems to me that the said general powers of the court may not lawfully be exercisable in respect of such an application. See *Mrs. Alero Jadesimi (nee Okotie- Ehoh) v. Adolo Okotie-Ehoh and others* (1986)1 NWLR (Pt.16) 264.

In the present appeal, the prayers in the application before the Court of Appeal are in all respects totally unrelated with the interlocutory appeal pending before it and the issues arising therefrom. Although the application was initially made before the trial High Court, it was for undisclosed reason withdrawn and refiled directly in the Court of Appeal. In my view, it was an application which ought to have been filed before the trial court for determination in its original jurisdiction.

It was further argued on behalf of the appellant that the Court of Appeal was entitled to assume jurisdiction and to entertain the application by the invocation of its inherent jurisdiction. In this regard, it ought to be stressed that to equate the jurisdiction vested in a court with the exercise of its inherent powers in a cause within its jurisdiction is a clear misconception. The exercise of jurisdiction in a cause or matter must be distinguished from the exercise of an inherent power by a court of law in a cause or matter within its jurisdiction. The inherent power of a court of record is entirely supplementary to and dependent on the statutory jurisdiction of the court in a cause. A court may have or exercise inherent power or inherent jurisdiction in respect of a cause or matter within its jurisdiction. It has, however, no inherent power or jurisdiction over a cause or matter not within its jurisdiction. There lies the distinction between the two terminologies.

It has to be carefully noted too that an inherent power or inherent jurisdiction is not and has never been known to be a distinct or separate jurisdiction. No inherent power can add to the jurisdiction of any court of record where no jurisdiction to entertain a cause had not been vested in the Constitution or statute law. Inherent power is only exercisable to enhance statutory jurisdiction in a cause or matter within the jurisdiction of the court. As it was explained by Nnaemeka Agu, J.S.C. in *Akilu v. Fawehinmi* (No.2) (1989) 2 NWLR (Pt. 102) 122 at 197:-

"In my judgment, inherent jurisdiction or inherent power (as it is more commonly called) of a court is that which is not expressly spelt out by the Constitution or in any statute or rule but which can, of necessity be invoked by any court to supplement its express jurisdiction and powers an inherent power; nebulous as it usually is, does not extend the jurisdiction of a court of record. Rather it practically lubricates its statutory jurisdiction and makes it work."

In the present case, I have held that the court below lacks jurisdic-

tion to hear and determine the application in issue. In the circumstance, it seems to me plain that the contention that the Court of Appeal ought to have invoked its inherent power to assume jurisdiction in the determination of the application in question is, with respect, erroneous on point of law and totally misconceived. I entertain no doubt that the court below, not being a court of first instance, was wholly incompetent and lacked jurisdiction to entertain the application in issue. B

It was finally submitted by learned appellant's counsel in the alternative that the Court of Appeal, even if it lacked jurisdiction to entertain the application, erred in law by dismissing the same instead of transferring it to the appropriate Federal High Court in the interest of justice for hearing C and determination. The short answer to this submission is that where a cause or matter is outside the statutory jurisdiction of a court, the only proper and lawful cause is for that court to strike it out and not to transfer it and any order transferring it to another court of competent jurisdiction would be ineffective and null and void. See *Balogun & Ors v. Adesanya & Anor* 19 NLR 19. Such an order of transfer, therefore being a nullity ab initio, there would be no cause or matter pending before the latter court to which it is purportedly transferred. I agree entirely with the court below that not being a court of first instance, it was wholly incompetent and lacked jurisdiction to entertain the application. E

It must however be observed that the Court of Appeal, with respect, was in error when it proceeded to dismiss the application for want of jurisdiction. It cannot be over-emphasized that when there is no jurisdiction in a court of record to entertain a cause or matter before it, the only appropriate order open to it is to strike out such an action. See *Oloriode v. Oyebe* F (1984) 1 SCNLR 390 and *Adesokan v. Adetunji* (1994) 5 NWLR (Pt.346) 540. The court below was therefore in error when it dismissed the application which it had no jurisdiction to entertain.

The appeal in respect of the first appeal therefore succeeds in part only. The order of the court below declining jurisdiction to entertain the application is hereby upheld but the order of dismissal of the application is hereby set aside as wrong in law. It is further ordered that the said order of dismissal is hereby substituted with an order striking out the application. G

The second appeal is concerned inter alia with whether or not the appellant has locus standi to institute an action in respect of a wrong done H to a company. In this regard, it has to be observed that the onus is on the appellant to disclose ex facie in his amended petition that he had locus standi to present the petition. This is a basic requirement in all actions as failure to disclose any locus standi by a petitioner, a plaintiff or an appli-

cant is as fatal to a cause or matter as failure to disclose a cause of action in a suit. See *Thomas v Olufosoye* (1986) 1 NWLR (Pt.18) 669 at 681. If therefore the appellant has no business in claiming the reliefs he sought in his interlocutory application, the same must of necessity stand dismissed.

The learned trial Judge, in a well considered ruling on the appellant's application held, applying the rule in *Foss v. Harbottle* (1843) 2 Hare 461, that the wrongs the applicant complained of, if at all, were wrongs done to the 1st respondent company and that only the said company could redress such wrongs whereupon he dismissed the application. He concluded as follows:-

C *"As I held herein before, the application is a misconceived one, as I find no basis for bringing the application. Secondly, it is my considered opinion that the rule in Foss v. Harbottle (1843) 2 Hare 461 applies to this application. Having so held, the orders sought by the petitioner/applicant must, and are hereby refused. The application is dismissed in its entirety."*

D The Court of Appeal in a unanimous judgment upheld the said decision of the trial court.

I have critically examined these decisions of the trial court and the court below and find myself in complete agreement with them. In my view, the rule in *Foss v. Harbottle* (supra), on the facts before the court, clearly applied to the case and it seems to me that the appellant had no locus standi to institute the action or seek the reliefs he claimed in his interlocutory application. This second appeal accordingly fails and it is hereby dismissed.

F It is for the above and the more elaborate reasons contained in the lead judgment that I too dismiss both appeals, save that an order striking out the relevant application in the first appeal is substituted for the order of the court below dismissing the application. I endorse the order as to costs contained in the lead judgment.

G

H