

SUPREME COURT OF NIGERIA
22ND JANUARY, 1999. SC.81/1998.
CORAM:- A. B. WALI, M. E. OGUNDARE, U. MOHAMMED,
S. U. ONU, A. I. IGUH, JJSC.

ECOCONSULT LIMITED PLAINTIFF/APPLICANT
AND
PANCHO VILLA LIMITED DEFENDANT/RESPONDENT

***APPEALS** - Interlocutory appeal - From Court of Appeal to Supreme Court - Now prohibited by statute - Void decisions are not excluded.*

***APPEALS** - Interlocutory decisions of Court of Appeal - Removal of right of appeal therefrom to Supreme Court- The orders now appealed against are interlocutory decisions.*

***APPEALS** - Interlocutory Orders of the Court of Appeal - If made without jurisdiction - Appellant can move that court to set them aside - Refusal might then ground right of appeal to the Supreme Court.*

FACTS

In a suit and counter suit between the plaintiff/applicant and defendant/respondent before the Lagos High Court, certain issues went on appeal to the Court of Appeal. In the course of handling the motions that came before it, the Court appeal made orders. The applicant being dissatisfied has now appealed to the Supreme Court against those orders.

By the provision of Decree No. 3 of 1998 which amended s. 213 of the 1979 Constitution, appeal from an interlocutory decision of the Court of Appeal to the Supreme Court is prohibited. The apex court has to determine whether the decision appellant has appealed against is an interlocutory decision.

HELD (Unanimously striking out the appeal per lead ruling of **OGUNDARE JSC**)

Interlocutory decisions of Court of Appeal

1. It is clear from this provision that the Constitution now prohibits an appeal to this court from an interlocutory decision of the Court of Appeal. The question that, therefore, arises for determination in this Ruling is whether the decision the Appellant has appealed against in the appeal now before us is an interlocutory decision. No doubt, the orders appealed against are interlocutory decisions. Mr. Layonu conceded, as he must, that the orders are interlocutory. (p. 182 D/ 190 B)

Interlocutory appeal

2. His argument, however, is that , though interlocutory, they amount to a nullity ab initio having been made without hearing the parties before they were made and without either party asking for same. It is learned counsel's further contention that being void they amount to no decision and are thus not caught by section 213(3) of the 1979 Constitution (as amended). He relied on some English authorities. I have examined these authorities but, with regret, find them not helpful to him. This is the passage Mr. Layonu relied in support of his submission that the orders made by the Court below were indeed a nullity and therefore no decision and that thus this Court had jurisdiction to entertain the appeal. Mustill L J may be right in his observation but I am not satisfied that the situation mentioned by him exists in this case as to compel me to entertain the present appeal. (p. 190 B)

Interlocutory Orders

3. Again, I must repeat what I said earlier on that I am not satisfied that the situation of bias, whimsy or personal interest can be attributed to the Justices of the court below. It may be that the orders they made ought not to have been made I offer no opinion on this - I would have expected the Appellant to move that court to set the orders aside and if it refused, the refusal might then be a final order that would ground right of appeal to this court. Mr. Aluko generously suggested this course in his argument. (p. 192 E)

NOTABLE POINTS OF INTEREST**OGUNDARE JSC***1. Lower court to pursue best interest of justice*

As the matter may, perhaps, find its way back to this court I will refrain from commenting on the propriety or otherwise of the orders being complained of. Suffice it to say, however, that as parties no longer have right of appeal against interlocutory decisions of the Court of Appeal much responsibility is placed on that court to act more sensibly in the best interests of justice, rather than capriciously, in the knowledge that an aggrieved party has nowhere else to go. (p. 193 A)

IGUH JSC*2. Interlocutory decisions - No appeal to Supreme Court*

By virtue of the provisions of Section 1 (a) of the Constitution (Amendment) Decree No. 3 of 1998 which came into force on the 20th day of March, 1998, there is no longer any right of appeal from an interlocutory decision of the Court of Appeal to this court. It does not, in my view, matter whether or not the decision sought to be appealed against is attacked on ground of being a nullity, so long as it is an interlocutory decision of the court below. Indeed, as pointed out in the leading judgment, if such a decision appears ex facie to be a nullity, an aggrieved party will be entitled to apply to the court that made the void order to have it set aside on ground of nullity. It seems to me that it is only where that court refuses the application to vacate the order that such order of refusal which must be regarded as a final order becomes appealable as of right. (p. 195 E)

PRESENTATION

A. I. Layonu, for the plaintiff/appellant

B. Aluko, SAN with R. Odusola for the respondent

CASES REFERRED TO

Aden Refinery Co. v. The Ugland Obo One Co. (1986) 3 All ER 737, 747
Daisystar Ltd. v. Town Country Building Society (1992) 2 All ER 321,

B **LEAD RULING BY OGUNDARE JSC**

Section 1 (a) of Decree No.3 of 1998 entitled Constitution (Amendment) Decree 1998 and which came into force on 20th March 1998 amended section 213 of the Constitution of the Federal Republic of Nigeria 1979. By amendment section 213(3) now reads:-

C *"Notwithstanding the provisions of subsection (2) of this section, no appeal shall lie to the supreme Court from any decision of the Court of Appeal in respect of an interlocutory decision"*

(underlining is mine)

D **It is clear from this provision that the Constitution now prohibits an appeal to this court from an interlocutory decision of the Court of Appeal. The question that, therefore, arises for determination in this Ruling is whether the decision the Appellant has**
E **appealed against in the appeal now before us is an interlocutory decision.**

The Appellant, as plaintiff, had sued the Respondent in the High Court of Lagos State claiming:-

F *"(i) A declaration that the use of the premises at plot 176A Moshood Olugbani Street, Victoria Island, Lagos for a night club or a late bar is in breach of the lease agreement between the plaintiff and the Defendant in respect of the premises.*

G *(ii) An order directing the Defendant not to operate any night club or late bar in any manner from and within the premises at plot 176A Moshood Olugbani Street, Victoria Island, Lagos and specifically that the Defendant shall not operate any business on the premises after 12.00 mid night.*

H *(iii) An order directing the Defendant not to play or permit to be played any disco music or operate or permit to operate any band or Orchestra or synthesized or programmed musician, disc jockey or presenter in or about the premises at plot 176A Moshood Olugbani Street,*

Victoria Island, Lagos.

(iv) *An order of interlocutory injunction restraining the defendant its agents assigns or privies from operating any night club or late bar in any manner from the premises at plot 176A Moshood Olugbani Street, Victoria Island, Lagos pending the determination of this suit.* B

(v) *An order of perpetual injunction restraining the defendants, their agents, assignees or privies from using the premises plot 176A Moshood Olugbani Street, Victoria Island, Lagos as a night club or a late bar in any manner whatsoever.*

(vi) *The sum of N250,000.00 as consequential loss being the cost of the solicitors fee of the plaintiff in this matter.* C

(vii) *The sum of N5 Million only being special damages suffered by the plaintiff.*

(viii) *The sum of N10 Million being general damages caused to the disruption of the plaintiff business by the activities of the Defendant."* D

The Appellant filed along with the writ of summons a statement of claim. On the same day he brought a motion on notice for the following reliefs E

-
"(i) *An order of interlocutory injunction restraining the defendant its agents, assigns or privies from operating any night club or late bar in any manner from the premise at plot 176A Moshood Olugbani Street, Victoria Island, Lagos pending the determination of this suit.* F

(ii) *An order of interlocutory injunction restraining the defendant its agents, assigns or privies from operating any night club or late bar in any manner from and within the premises and specifically that the defendant shall not operate any business within the premises at plot 176A Moshood Olugbani Street, Victoria Island, Lagos after 12.00 midnight in any day pending the determination of this suit.* G

(iii) *An order of interlocutory injunction restraining the defendant it's agents assigns privies from playing, operating or to permit to be played any disco music or operate or permit to operate any band or orchestra or synthesized or programmed musician, disc jockey or presenter in or about the premises at plot 176A Moshood Olugbani Street,* H

Victoria Island , Lagos.

The Appellant on 13/5/98 also filed an ex parte application supported by an affidavit of urgency, for the reliefs above pending the determination of the motion on notice. On 14th May 1998, the trial Judge (Alabi, J)

B granted the application ex parte and made the following order:

"AN ORDER OF INTERIM INJUNCTION is hereby made RE-
STRAINING the Defendant, its agents assigns and/or privies from oper-
ating any night club or late bar in any manner from and within the
premises at plot 176A Moshood Olugbani Street, Victoria Island, Lagos
and specifically, the defendant shall not operate any business on the
premises after 12.00 midnight in any one day pending the hearing and
final determination of the Motion on Notice for an order of Interlocutory
Injunction dated 23rd April, 1998 which Motion on Notice is hereby
D adjourned till Friday 22nd May, 1998 for arguments.

AN ORDER OF INTERIM INJUNCTION IS HEREBY made restrain-
ing the Defendant, its agents assigns and/or privies from playing or per-
mit to be played any disco music or operate or permit to be operated any
E band or orchestra or synthesized or programmed music, disc in or about
the premises at plot 176A Moshood Olugbani Street, Victoria Island,
Lagos pending the hearing and final determination of the Motion on
Notice aforesaid.

F AN ORDER OF INTERIM INJUNCTION is hereby made restraining the
Defendant its agents, assigns and /or privies from operating any night
club or late bar in any manner from the premises at plot 176A Moshood
Olugbani Street, Victoria Island, Lagos pending the hearing and final
determination of the Motion on Notice aforesaid."

G Meanwhile, the Respondent had filed a cross action in respect
of the same subject matter and had brought a motion for interim reliefs.

It would appear from the records that the Respondent breached
the interim orders made by Alabi J on 14/5/98. The result was contempt
H proceedings brought by the Appellant against the Respondent.

In the course of the proceedings for committal, the Respondent,
through his counsel, applied that the interim orders obtained ex parte be
discharged. Needless to say that the application was refused by the

learned trial Judge. This was on 28th May 1998. The committal proceedings were further adjourned to 23rd June 1998.

On 29th May 1998, the Respondent appealed to the Court of Appeal against -

"(1) The trial-court's 28th May, 1998 decision refusing to dissolve/discharge, and vacate, or to suspend the operation of its interim Orders of Injunction earlier pronounced on Thursday, 14th May, 1998 upon the plaintiff's Motion Ex parte dated and filed on Wednesday, 13th May, 1998.

(2) The trial-Court's 28th May, 1998 decision refusing to give any consideration to the Defendant's 18th May, 1998 and 21st May, 1998 Motion Ex parte and Notice of Cross-Motion both seeking the dissolution / discharge of its 14th May, 1998 Order of Interim Injunction until after the determination of committal proceedings for their enforcement lately commenced by processes which were only served on 28th May, 1998: the very date of the decision of which this appeal complains."

The notice of appeal contained three grounds of appeal which, without their particulars, read:

"1. The learned trial Judge erred in law by refusing to dissolve/discharge and vacate or to suspend the operation of its Interim Orders of Injunction earlier pronounced on Thursday, 14th May 1998 upon the plaintiff's Motion Ex Parte dated and filed on Wednesday, 13th May, 1998, where there were substantial grounds of law apparent ex facie the processes on record that showed good cause as to why the plaintiff had become disentitled to enjoy the further sustenance/perpetuation of the subsisting restraining Orders.

2. The learned trial- Judge erred in law when, during the proceedings held before him on 8th May 1998, he punished this Defendant by refusing to entertain the Defendant's Motion Ex parte and Notice of cross-Motion to discharge the Court's subsisting Ex parte Order of Injunction earlier pronounced on 14th May, 1998, in that the court permitted relevant considerations that bear no examination on any conduct of which this Defendant could, ex facie the court's record, be justly accused to preclude them from any hearing to move the court for the dissolution

of the subject Orders.

3. The court below erred in law by refusing, during the court's Thursday, 28th May, 1998 proceedings, to entertain the Defendant's Ex Parte applications (respectively filed on, and pending since 18th May, 1998 and 21st May 1998, both applications having been earlier fixed for hearing on Thursday, 28th May, 1998) for the discharge/dissolution of its Interim Orders of Injunction on the grounds that an allegation of disobedience/contempt of those Orders, being an allegation which was impossible in law, yet made and contained in a process itself filed by the plaintiff that very morning, ought to be examined before the hearing of the pending applications."

The Respondent on the same date filed a motion on notice before the Court of Appeal praying for the following orders:

"(i) An order that this appeal may be summarily heard and determined by the oral submissions to be made by Counsel on the processes delivered attached to our 29th May, 1998 application, as well as on the 'Record of proceedings' attached to my Affidavit in Support separately sworn today for the purposes of a Motion On Notice for departure from the rules, also filed today.

(ii) An order dissolving/discharging, and vacating, or alternatively, an order suspending the operation of divers Interim orders of injunction procured and made by the Court below against PANCHO VILLA on Friday, 14th May, 1998 upon the conclusion of an Ex parte hearing held in that Court on the day in our absence.

(iii) An order staying all further committal proceedings recently brought in the Court below by the service, on Thursday, 28th May, 1998, of a Notice of Consequences of Disobedience To order of Court: From No. '48', which seeks to compel PANCHO VILLA'S obedience to the Interim orders of Injunction referred to in (i) above.

[the orders sought in (ii) and (iii) above to be made to last until after the hearing and determination of this appeal, or alternatively, until such other time as this Honourable Court might, in its independent discretion, otherwise direct].

(iv) An order authorizing us to make and pursue the application

for the reliefs summarized as (ii) and (iii) above directly before this Honourable Court, notwithstanding the fact that no prior application to the Court below for the making of orders in those terms has to date been made."

Respondent's motion came before the Court of Appeal on 14th B June 1998. Appellant's counsel asked for an adjournment as he was only served 2 days earlier with the motion papers and needed time to file a counter-affidavit. The Court (coram: Onalaja, Pat-Acholonu and Opene JJCA) made the following order:

"This matter is adjourned technically-insufficiency of the re- C
quired days under the rules of Court to serve the other party for this reason we adjourn the two applications to enable Respondent file counter affidavits to the two motions pending the hearing of the motion filed on 29/5/98 and 2/6/98 we suspend the ex parte order of injunction pending D
the determination of the application before this Court.

In like manner we suspend the further proceeding of the committal proceedings based on the ex parte order of injunction.

The case is adjourned to 16th July, 1998"

(underlining are mine)

It is against these orders that the Appellant has on 8/6/98, appealed to this Court upon five grounds of appeal which, without their particulars, read:

"1, The learned justices of the Court of Appeal Lagos, erred in F
law, ex facie, when they suspended the ex parte orders of interim injunction and ordered a stay of the committal proceedings, made on 14th May 1998 by the High Court, Alabi J. without giving the parties, and/or on particular, the plaintiff/Appellant any hearing and /or a fair hearing.

2. The learned justices of the Court of appeal erred in law, ex G
facie, when they suspended the orders of the High Court and ordered a stay of the committal proceedings and in the circumstances determined both pending applications of the Defendant/Respondent and the substantive Appeal itself.

3. The learned justices of the Court of Appeal based on H
grounds 1 and 2 above, ex facie, erred in law when they granted to the Defendant/Respondent a relief it did not ask for and /or a relief it could

not obtain in law.

4. Further and/or alternatively, the learned justices of the Court of Appeal erred in law, *ex facie*, when they neither attached/imposed any conditions nor considered the balance of convenience of the parties.

5. The learned justices of the Court of Appeal erred in law, *ex facie*, when they did not apply the principle in law that the duration of such or any interim orders as they made, even if right, (which is not conceded) should only be of very limited duration until such a time as to enable the plaintiff/Appellant to file its counter-affidavits to the Defendant/Respondent's applications.

The Appellant followed the filing of the appeal with a motion on notice filed in this Court on 11/6/98 praying for:

"1. An order for departure from the Rules, directing that this pending appeal brought by the plaintiff/Appellant/Applicant by Notice of Appeal dated 5th June 1998 and filed on Monday, the 8th day of June 1998 at the Court of Appeal Registry, Lagos, against the decision of the court of Appeal, Lagos, pronounced on Thursday, the 4th day of June 1998 in Court of Appeal Suit No. CA/L/194M/98 between the parties herein do and shall be heard upon the processes comprised in this application and on a consideration of the bundle of documents complied herewith by the plaintiff/Appellant/Applicant and attached herewith as Exhibit 'A'.

2. An order for departure from the Rules, directing that this pending appeal do and shall be heard by the oral submissions of the respective counsel to the parties, thus dispensing with the filing of Briefs.

3. An order granting accelerated hearing of this appeal."

The Respondent, in turn filed a notice of preliminary objection to the effect -

"That this Honourable Court lacks the jurisdiction to hear and/or grant the prayers sought by the aforesaid Notice of Motion and any other application(s) that may be filed on behalf of the plaintiff/Appellant as well as the substantive appeal in furtherance of which the application is made."

on the ground -

"That by section 213(3) of the Constitution of the Federal Republic of Nigeria 1979 as amended by section 1(a) of the Constitution (Amendment) Decree No.3 of 1998, no appeal lies to the Court of Appeal, such as the decision purportedly under appeal in the instant case. Consequently, this appeal deserves to be struck out or dismissed in limine with substantial costs." B

When the matter came before us on 26th October 1998 we heard arguments from learned counsel for the parties on the preliminary objection. Mr. Aluko, SAN learned leading counsel for the Respondent submitted that this Court had no jurisdiction to entertain the Appellant's appeal or any application purportedly made in pursuance thereto, by virtue of section 1 (3) of the Constitution (Amendment) Decree No.3 of 1998 which took away the right of appeal to the Supreme Court against interlocutory decision of the Court of Appeal. He observed that the Decree came into force on 20/3/98, about 3 months before the decision complained about. He urged the Court to strike out the motion as well as the appeal. C D E

Mr. Layonu, for the Appellant submitted that the order of the Court of Appeal made on 4/6/98 and appealed against, though interlocutory, was a nullity and was therefore, not covered by Decree No.3 of 1998. He cited Aden Refinery Co. v. The Ugland Obo One Co. (1986) 3 All ER 737, 747; Daisystar Ltd. v. Town Country Building Society (1992) 2 All ER 321, 323-324. He submitted that there was no decision given by the Court of Appeal on 4/6/98 and, therefore, this Court would have jurisdiction despite Decree No 3 of 1998. He relied on Anisminic Ltd. v. Foreign Compensation Commission (1969) 1 All ER 208 as to the interpretation of "decision". He submitted that "decision " must mean a real determination and not a purported determination. He further submitted the Decree No.3 would only apply where a matter had been heard on its merits without the violation of a basic constitutional and fundamental requirement such as section 33 of the Constitution relating to fair hearing. He conceded it that in such a case the decision would be unappealable notwithstanding its correctness or otherwise. He finally submitted that F G H

where the competence of the Court of Appeal in arriving at a decision was in question, as in this case, there would be a right of appeal.

Mr. Aluko, in reply, submitted that where an interlocutory decision was a nullity it was up to the aggrieved party to apply to have it set aside and if such application was refused by the lower Court, there would be a right of appeal as it would then become a final decision.

No doubt, the orders appealed against are interlocutory decisions. Mr. Layonu conceded, as he must, that the orders are interlocutory. His argument, however, is that, though interlocutory, they amount to a nullity ab initio having been made without hearing the parties before they were made and without either party asking for same. It is learned counsel's further contention that being void they amount to no decision and are thus not caught by section 213(3) of the 1979 Constitution (as amended). He relied on some English authorities. I have examined these authorities but, with regret, find them not helpful to him.

In Aden Refinery Co. v. The Ugland Obo One (supra) the charterers were held, by arbitrators, liable to the owners. The arbitrators however recognized that there was an important issue involved which ought to be submitted to judicial decision. The charterers applied for leave to appeal to the High Court under section 1(3) of the Arbitration Act 1979. The judge refused leave on the ground that there was a strong prima facie case that the arbitrators' decision was right. The charterers appealed for leave to appeal against the judge's decision to the Court of Appeal. Now section 1(6A) of the 1979 Act provided that unless leave was granted by the High Court no appeal lay to the Court of Appeal from a decision of the High Court to grant or refuse leave to appeal. The judge held he was compelled by authority to refuse leave. The charterers applied direct to the Court of Appeal for leave to appeal against both refusals contending (i) that in both instances the judge had merely applied guidelines' established by authority and had failed to exercise his discretion either judicially or at all, and (ii) that accordingly, the Court of Appeal had jurisdiction to entertain a fresh application made direct to it notwithstanding the provisions of section 1(6A) and the rule that the grant or

refusal of leave was not a matter on which the court would entertain an appeal'

The Court of Appeal held that the application for leave would be refused for the reason, among others that on the true construction of section 1 (6A) of the 1979 Act the court had no jurisdiction to entertain B an appeal without leave of the High Court against the grant or refusal of leave to appeal under section 1(3) (b) of the 1979 Act. In the course of his concurring judgment in the case Mustill L J observed at page 747 of the report:

*"Accordingly I hold that the court has no jurisdiction to en- C
tertain the present appeal. I say the present appeal, because I can envis-
age that if a judge had in truth never reached 'a decision' at all; on the
grant or refusal of leave, but had reached his conclusion, not by any
intellectual process, but through bias, chance, whimsy, or personal inter- D
est, an appellate or other court might find a way to intervene. Of
course, nothing of this kind was suggested here. Leggatt J did arrive at
a decision. I prefer to leave the case of impropriety to be dealt with later,
if ever it is alleged."* E

**This is the passage Mr. Layonu relied in support of his sub-
mission that the orders made by the Court below were indeed a
nullity and therefore no decision and that thus this Court had ju-
risdiction to entertain the appeal. Mustill L J may be right in his F
observation but I am not satisfied that the situation mentioned by
him exists in this case as to compel me to entertain the present
appeal.**

Mr. Layonu also referred us to Daisystar Ltd. v. Town and Coun- G
try Building Society (supra) where the Court of Appeal (England) con-
strued the provisions of section 54(6) of the supreme Court Act 1981
which provide that no appeal lies from a decision of a single judge of the
Civil Division of the Court of Appeal determining an application for leave
to appeal to that Court. The Court held that the full court has no jurisdic- H
tion to entertain an appeal from such a decision refusing leave to appeal,
notwithstanding the fact that in reaching his decision the single judge
may have failed to exercise his discretion properly by, for example, tak-

ing into account matters not relating to the application. Lord Donaldson, Mr. in approving the passage in Mustill L J's judgment earlier quoted in this judgment, said at p. 234 of the report:

"For my part, I would affirm that comment by Mustill L J. While
 B I cannot and do not contemplate bias, whimsy or personal interest in the judgments of this court, mischance is always a remote possibility; if, for example, a Lord Justice had pre-read two cases and, owing to mischance and perhaps the absence of counsel or gross incompetence by counsel, in
 C the course of the argument it was never borne in on him that the case upon which counsel was addressing him was not in fact the case to which he was applying his mind. I can see that, in those circumstances, it could be argued that there had not been a decision and, if there was no decision, quite plainly s. 54(6) does not apply.
 D But here there was a decision, and the most that can be said by Mr. Martin- and, I repeat, I know not whether it stands up as a matter of fact is that Balcombe L J erred in taking account of a document which was not relevant to the case. That is an error like any other error and
 E does not vitiate his decision in the sense of making it 's decision that never was' ".

**Again, I must repeat what I said earlier on that I am not satisfied that the situation of bias, whimsy or personal interest can be attributed to the Justices of the court below. It may be that the
 F orders they made ought not to have been made I offer no opinion on this - I would have expected the Appellant to move that court to set the orders aside and if it refused, the refusal might then be a final order that would ground right of appeal to this court. Mr.
 G Aluko generously suggested this course in his argument.**

The case of Anisminic Ltd. v. Foreign Compensation Commission (supra) which Mr. Layonu also relied on is not on all fours with the present case. That case dealt with the supervisory jurisdiction of a superior court of record to correct errors of inferior tribunals. Here we are dealing with appellate jurisdiction. The words of section 213(3) of the constitution (as amended) are clear and unambiguous. To give an appeal in this case would defeat the whole object and purview of the constitu-

tion which is to end interlocutory matters in the Court of Appeal.

The conclusion I reach is that I must uphold the preliminary objection. As the matter may, perhaps, find its way back to this court I will refrain from commenting on the propriety or otherwise of the orders being complained of. Suffice it to say, however, that as parties no longer have right of appeal against interlocutory decisions of the Court of Appeal much responsibility is placed on that court to act more sensibly in the best interests of justice, rather than capriciously, in the knowledge that an aggrieved party has nowhere else to go.

I hereby strike out the appeal filed by the Appellant to this Court on 8/6/98 and all the motions subsequently filed therein and relating thereto. I award N1,000.00 (one thousand naira) costs to the Respondents.

WALI JSC

I have read before now the Lead Ruling of my brother Ogundare JSC and I entirely agree with his reasoning for upholding the preliminary objection.

The right of appeal to this court has been taken away by the amendment to section 213(3) of the 1979 constitution. The amendment took effect from 20th March, 1998. The orders by the Court of Appeal Lagos were made on 4th June, 1998. The appellant filed the Notice of Appeal to this court against the orders on 8th June, 1998.

Learned counsel for the Respondent Mr. Aluko SAN filed a Notice of preliminary objection that this court lacks jurisdiction to entertain the appeal having regard to the amendment effected to section 213(3) of the 1979 constitution which now provides as follows:-

"(3) Subject to be provisions of subsection (2) of this section, an appeal shall lie from the decision of the Court of Appeal to the Supreme Court with leave of the Court of Appeal or the Supreme Court.

Notwithstanding the provisions of subsection (2) of this section, H no appeal shall lie to the Supreme Court from any decision of the Court of Appeal in respect of interlocutory decision."

The provision of this amendment came into force on 20th March,

1998 vide Decree No.3 of 1998. The appeal is therefore caught by the amendment. This court has no jurisdiction to entertain it. It is hereby struck out.

The appellant has still not been left without a remedy as he can move the Court of Appeal to set aside the orders he is complaining about on ground that they were made without jurisdiction. If the application is refused, then the decision becomes final and right of appeal to this court will accrue.

The Respondents are awarded N1,000.00 costs against the appellant.

MOHAMMED JSC

I agree that the notice of preliminary objection filed by the learned counsel for the respondent against the application filed before this court is meritorious. The application is for departure from the rules of this court directing that the pending appeal filed by the applicant against the ruling of the lower court be heard upon the processes comprised in the application and on the bundle of documents complied by the plaintiff/applicant as record of this appeal.

Secondly, the plaintiff/appellant/applicant prayed for departure from the Rules directing that the appeal be heard by oral submissions of respective counsel to the parties, thus dispensing with the filing of briefs.

The preliminary objection is that this court has no jurisdiction to hear and or grant the prayers sought by the appellant/applicant as well as the substantive appeal because by the provisions of section 213 (3) of the Constitution of the Federal Republic of Nigeria 1979 as amended by Section 1 (a) of the Constitution (Amendment) decree No. 3 of 1998 no appeal lies to the Supreme Court from an interlocutory decision of the Court of Appeal. In consequence therefore, learned counsel for the respondent, Mr. Aluko, urged that this appeal deserves to be struck out or dismissed.

Accordingly, I agree with the ruling written by the learned brother Ogundare, JSC that this court has no jurisdiction to entertain the inter-

locutory appeal brought by the applicant. The appeal is struck out. I abide by the orders made in the lead ruling.

ONU JSC

B

Having had the advantage of reading in draft the leading Ruling just delivered by my learned brother Ogundare, JSC, I agree entirely with the reasoning and conclusion therein contained.

I award the same costs as assessed in the leading Ruling.

C

IGUH JSC

I have had the privilege of reading in draft the judgment just delivered by my learned brother, Ogundare, J.S.C. and I am in entire agreement with the reasoning and conclusion therein.

There is no doubt that the order of the 4th June, 1998 sought to be appealed against is an interlocutory decision of the Court of Appeal, Lagos Division. By virtue of the provisions of Section 1 (a) of the Constitution (Amendment) Decree No. 3 of 1998 which came into force on the 20th day of March, 1998, there is no longer any right of appeal from an interlocutory decision of the Court of Appeal to this court. It does not, in my view, matter whether or not the decision sought to be appealed against is attacked on ground of being a nullity, so long as it is an interlocutory decision of the court below. Indeed, as pointed out in the leading judgment, if such a decision appears ex facie to be a nullity, an aggrieved party will be entitled to apply to the court that made the void order to have it set aside on ground of nullity. It seems to me that it is only where that court refuses the application to vacate the order that such order of refusal which must be regarded as a final order becomes appealable as of right.

It is for the above and the more detailed reasons contained in the leading judgment that I, too, sustain this objection. I abide by the consequential orders including those as to costs therein made.