

SUPREME COURT OF NIGERIA
12TH FEBRUARY, 1999. SC. 66/1997,
CORAM:- S. M. A. BELGORE, A. B. WALL,
M. E. OGUNDARE, E. O. OGWUEGBU,
U. MOHAMMED, S. U. ONU, A. I. IGUH, JJSC.

FEDERAL MORTGAGE BANK OF NIGERIA APPELLANT
AND
NIGERIA DEPOSIT INSURANCE CORPORATION RESPONDENT
(Liquidator of United Commercial Bank Limited)
IN LIQUIDATION

COMPANY LAW - *Proceedings against liquidator - Leave of court is required if proceedings is in the Federal High Court - But it is not so required in State High Court.*

COMPANY LAW - *Execution on company's property - Provisional liquidator is empowered to take delivery of company's goods before completion of execution - Except where the liquidator's power has been set aside by the court.*

CONSTITUTIONAL LAW - *Jurisdiction - Application of section 230(1) (d) of the Constitution - Nature of transaction between banks is a determinant.*

JUDGMENTS - *Appeals - A judgment subsists until set aside on appeal against it - It cannot be set aside in an appeal against another judgment - Order 3 rule 22 Court of Appeal Rules is an exception.*

FACTS

The plaintiff/appellant placed the sum of 5,000,000.00 (five million Naira) on a short term deposit with the defendant the United Commercial Bank Ltd. on 8/12/92 at an interest of 40% per annum. The deposit matured on 6/3/94 after four roll-overs. The defendant defaulted

in paying back the said deposit and interests despite numerous demands made by the plaintiff. The plaintiff then brought an action on 31/5/94 claiming against the defendant the principal sum and interest. The defendant failed to enter appearance whereupon at the instance of the plaintiff judgment was entered against it on 12/7/94. When the plaintiff took steps to levy execution, the defendant brought a motion praying the court for an order of stay of execution and an order allowing it to liquidate the judgment debt instalmentally. Before the motion could be heard, on 19/9/94 the plaintiff brought another motion praying for an order compelling NDIC (the respondent) to produce and deposit in the court the defendant's attached properties, and an order directing the Deputy Sheriff to take custody and control of the said properties.

The plaintiff's motion was argued on 23/9/94 and ruling was reserved to 14/10/94. On 5/10/94 the NDIC, which had been appointed on 9/9/94 as liquidator to the defendant brought a motion praying for an order for the arrest of the ruling on the plaintiff's motion, and an order of stay of proceedings pending the outcome of the appeal, which it had filed on 4/10/94 against the judgment of 12/7/94. The respondent's motion was argued on 14/10/94 and refused. Ruling was then delivered by the trial judge on the plaintiff's motion on 15/9/94, granting the prayers sought.

Being dissatisfied with the ruling the respondent appealed to the Court of Appeal. The appeal was predicated on the ground that the trial court had no jurisdiction to adjudicate on the matter and or deliver a ruling on it. The respondent argued inter alia, that by virtue of section 230(1) (d) of the Constitution (Suspension and Modification) Decree No. 107 of 1993 the matter fell under the jurisdiction of the Federal High Court since it was a matter between two banks. The Court of Appeal allowed the appeal. Aggrieved by the decision of the Court of Appeal the plaintiff has now appealed to the Supreme Court raising six issues for determination.

ISSUES FOR DETERMINATION

"1. Was the Court of Appeal vested with jurisdiction and did it act properly when it heard and determined issue(s) regarding the validity of the judgment of the Lagos High Court dated July 12, 1994 when, in fact

and in law, there was no valid appeal against the said judgment pending before the Court of Appeal for hearing and determination?

2. Is the judgment of the Lagos High Court dated July 12, 1997 given in favour of the Appellant Constitutional, valid and enforceable?

3. Is the Appellant a 'bank' within the contemplation of section 230(1)(d) of the Constitution (Suspension and Modification) Decree No. 107 of 1993?

4. Does Lagos State High Court share a concurrent jurisdiction with the Federal High Court in respect of banker - customer disputes/transactions as provided in the proviso to section 230(1) (d) of Decree No. 107 of 1993? Etc. see p. 348

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

A judgment subsists until set aside on appeal

1. Any complaint that does not relate to the judgment appealed against cannot be relevant in the appeal and will, therefore, be incompetent. This is so because it is settled law that a judgment subsists until it is set aside and an aggrieved person who has not appealed against a judgment stands no chance of seeking to have the judgment set aside in an appeal against another judgment, except, perhaps, in the circumstances covered by Order 3 rule 22 of the Court of Appeal Rules which requires that an interlocutory judgment against which there is no appeal is not to prejudice an appeal before the Court or where that other judgment is a nullity and it is being set up to support a plea of res judicata. (p. 353 D)

Constitutional law - Jurisdiction

2. I do not share the view that the proviso in section 230 (1) (d) would not apply where in a customer/banker relationship the customer is a bank. To say that where there is a dispute between two banks, the forum for the resolution of the dispute is the Federal High Court is to read into section 230 (1) (d) what is not there. A lot depends on the nature of the transaction between the two banks. The facts show that Plaintiff, like any other customer, placed a short term deposit with the Defendant on

agreed interest. After some roll-overs, Plaintiff sought to retrieve its deposit and interest but Defendant defaulted. In the absence of any evidence to the contrary about the custom in the industry I must hold that it is a simple customer/banker relationship which the proviso in section 230(1) (d) exempts from the exclusive jurisdiction of the Federal High Court. (p. 357 H)

Proceedings against liquidator

C 3. Surely, the Plaintiff's motion cannot be described as an action or proceeding proceeded with or commenced against the Defendant. We must not lose sight of the fact that at the stage of the proceeding, the Respondent was brought in in its own behalf and not as representing the Defendant. In any event, what is prohibited by section 417 except with leave D of court, is an action or proceeding pending or instituted in the Federal High Court for that is the meaning of the word "court" as used in the section - see section 650 of the CAMA. I think, therefore, that the court below was in error when it held that leave was required before the Plaintiff could proceed with its motion against the Respondent in the High E court of Lagos State. (p. 361 A)

Execution on company's property

F 4. It is not in dispute that the Respondent was appointed by the Governor of the Central Bank, on his revoking the Defendant's licence, to act as provisional liquidator of the Defendant. This was on 8th September 1994. On 5/9/94 the deputy sheriff of the High Court of Lagos State had, at the G instance of the Plaintiff, attached the goods of the Defendant. By law, sale could not take place until five clear days after attachment of the goods, that is, 10th September 1994. Thus at the time the Respondent was appointed, the sale of the Defendant's goods had not taken place. By section 500(2) of CAMA, execution begun on 5/9/94 had not been H completed and by section 500(1) the Plaintiff could not retain the benefit of the execution, unless the rights conferred on the Respondent by the section were set aside by the court in favour of the Plaintiff. The "court" is the Federal High Court - see section 650 of the Act and not the High

Court of Lagos State as argued by learned counsel for the Plaintiff. There has been no such order made by the Federal High Court. The position, in law, then is that the Respondent was in lawful possession of the goods of the Defendant seized by the deputy sheriff in execution levied on 5/9/94. This is so because section 501(1) enjoined the deputy sheriff, in the circumstances of this case, to deliver the seized goods to the Respondent. (p. 364 B)

REPRESENTATION

F. O. Fagbohunbe with A. Ajayi for the appellant
Prof. G. A. Olawoyin, SAN with Dr. A. Olawoyin and A. Adewuyi for the respondent

CASES REFERRED TO

Atoyebi v. Governor of Oyo State (1994) 5 NWLR 290 at 305 B-C Commerce Assurance Ltd. v. Alli (1992) 3 NWLR 710 at 724 - 725 H-A
Ede v. Omeke (1992) 5 NWLR 428, 434 G-H
Globe Fishing Industries Ltd v. Coker (1990) 7 NWLR 265, 282 E-F
Attorney-General of Oyo State v. Fairlakes Hotel (1988) 5 NWLR 1, at 23 B-E
Metal Construction (West Africa) Ltd. v. D.A. Migliore In re Miss C. Ogundare (1990) ANLR 142 at p. 148

STATUTES & RULES REFERRED TO

Sheriffs and Civil Process Law of Lagos State; S. 22 (2), S. 22 (1)
Constitution (Suspension and Modification) Decree No. 107 of 1993; S. 230(1)(d), S. 1(3)
Banks and Other Financial Institutions Decree 1991; S. 38 (1) and (3), S. 61
Companies and Allied Matters Act 1990; SS. 500(1) and (2), 501, 425(1)(a), 422(2), S. 417
Constitution of Nigeria 1979; S. 33(3), S. 258(1)
High Court of Lagos State Civil Procedure Rules, 1979; Order 36 Rule 1
Court of Appeal Rules 1981; Order 3 Rule 22

Federal Mortgage Bank of Nigeria Decree No. 82 of 1993; S. 5(1)(a), S.6(1)(a) and (b).

Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Decree No. 18 of 1994; s. 29.

B

LEAD JUDGMENT BY OGUNDARE JSC

The Plaintiff (now Appellant) placed the sum of 5,000,000.00 (five million naira) on a short term deposit with the United Commercial Bank (hereinafter is referred to as the Defendant) on 8/12/92 at an interest of 40% per annum. There were roll-overs. The deposit eventually matured on 6/3/94. The Defendant defaulted in paying back the said deposit and interests despite numerous demands made by the Plaintiff. By a writ of summons filed on 31/5/94, the Plaintiff claimed from the Defendant -

"(i) The sum of Five million Naira (5,000,000.00) being the principal amount paid on the short term deposit/placement made on the effective date of 8/12/92 by the Plaintiff with and in favour of the Defendant and which said sum finally matured on 6/3/94 after four roll-overs which the Defendant has refused and failed to repay despite demands by the Plaintiff.

(ii) Interest on the above mentioned sum at the agreed rate of 40% per annum from 6/12/93 to 6/3/94 being the effective and maturity dates respectively of the 4th roll over.

(iii) Interest on the said sum at the agreed rate of 40% per annum from 6/3/94 (being the agreed maturity dates respectively of the 4th roll over.

The Plaintiff filed simultaneously a statement of claim by paragraph 14 of which it finally claimed as hereunder:

"(i) The sum of five million naira (5,000,000.00) being the principal amount of the short term deposit/placement made on the effective date of 8/12/92 by the Plaintiff with and in favour of the Defendant and which said sum finally matured 6/3/94 after four (4) roll overs which the Defendant has refused and failed to repay despite numerous demands by the Plaintiff.

(ii) Interest on the above mentioned sum at the agreed rate of 40% per annum from 6/3/94 (being the agreed maturity date of the 4th roll over) until judgment is given and thereafter over) until judgment is given and thereafter at the rate of 15% per annum until full repayment.”

On failure of the Defendant to enter appearance and file its pleadings, B judgment, at the instance of Plaintiff was on 12/7/94 entered against it. The Defendant did not appeal against this judgment. Rather, on the Plaintiff taking steps to levy execution on the movable property of the Defendant in satisfaction of the judgment debt, the latter, on 6/9/94, by way of C motion applied for -

“1. An Order of stay of execution restraining the Plaintiff from further levying execution and sale of the goods and chattels of the Defendant pursuant to the judgment of this Honourable court dated 12th July 1994;

2. An order of this honourable Court allowing the Defendant to liquidate the entire judgment debt instalmentally;”

In the supporting affidavit, the Defendant's Company Secretary/ Legal Adviser, Mrs. Nkoyo Egbedi deposed, inter alia; E

“2. That I have the authority of my employers to depose to this affidavit;

3. That judgment was given in this suit by this Honourable Court on the 12th of July, 1994 in favour of the Plaintiff/Respondent for the sum F of 6,252,245.13 (six million, two hundred and fifty-two thousand, two hundred and forty-five Naira, thirteen kobo only);

4. That on 5th September, 1994 the representative of the Plaintiff and the Deputy Sheriff came to levy execution pursuant to the said judgment G by attaching the goods and chattels of the Defendant at Victoria Island;

5. That on the said 5th September, 1994, the Defendant paid the counsel to the Plaintiff 2,500,000.00 (Two million, five hundred thousand naira only) vide a Commercial Trust Bank Limited Bank draft No. 15592;

6. That now shown to me and attached as Exhibit A is a copy of the H bank draft referred to in paragraph 5 supra;

7. That the Defendant is desirous of liquidating the debt by paying instalmentally upon terms and conditions to be agreed upon by both par-

ties;

8. *That in proof of the fact that the Defendant wishes to liquidate the debt, I repeat paragraph 5 supra;*

9. *That the Defendant will suffer substantial injustice if a stay is not granted, as it will be unable to fulfil its obligations to its numerous customers if its goods and chattels are sold by the Plaintiff;*

10. *That it will be equitable and in the interest of justice if the Defendant is allowed to liquidate the judgment debt instalmentally;*

11. *That the current political and economic crisis in the nation makes it impossible for the Defendant to liquidate the judgment debt immediately;*

12. *That the Defendant is acting in good faith;"*

This motion was yet to be heard when on 19/9/94 the Plaintiff, too, brought a motion praying for -

(i) *An order of this Honourable Court compelling the Respondent (N.D.I.C.) to produce forthwith and deposit in the Lagos High Court premises all the Defendant's attached properties listed in the inventory attached herewith and marked Exhibit 'A' which said properties were attached on 5/9/94 by a Bailiff of the Lagos High Court in the name of the Plaintiff in execution of the judgment of this Honourable Court given on 14/7/94 and which said properties have now been removed and detained by the Respondent (N.D.I.C), and which still remain in the Respondent's possession and custody.*

(ii) *An order of this Honourable Court directing the Deputy Sheriff of the Lagos High Court to take custody and control of the said properties and to immediately effect the sale of same in accordance with section 22(2) of the Sheriffs and Civil Process Law of Lagos State."*

The Respondent to the motion was the Nigerian Deposit Insurance Corporation (N.D.I.C., for short) who had been appointed on 9/9/94 by the Governor of the Central Bank of Nigeria (CBN) as liquidator to the Defendant following the revocation by the CBN of the Defendant's licence. Francis Adewale, a legal Practitioner, swore to an affidavit in support of the motion. In it he deposed -

"3. *That on 31st May, 1994, the Plaintiff instituted this action against*

the Defendant (United Commercial Bank) claiming the sum of five million naira (5,000,000.00) with substantial accrued interest being a short term deposit or investment made on 8/12/92 by the Plaintiff in favour of the Defendant.

4. *That on 12th July, 1994 judgment was given by this Honourable Court in favour of the Plaintiff for the sum of six million two hundred and fifty-two thousand, two hundred and forty-five Naira, thirteen kobo (6,252,245.13).*

5. *That on 5th September, 1994, the Plaintiff acting in concert with a Bailiff of the Lagos High Court levied execution of the said judgment at the Defendant's head office at Adeola Odeku Street, Victoria Island, Lagos.*

6. *That due to the inability of the Defendant to readily pay the amount of the judgment debt, the said Bailiff was constrained to attach all the goods and chattel of the Defendant in the name of the Plaintiff.*

7. *That the said, Bailiff took an inventory of the Defendant's attached goods and chattel and the said inventory was duly signed by the Defendant's Managing Director, the said Bailiff and a Police Officer as being a correct list of the Defendant's goods and chattel duly and completely attached down within the Defendant's premises in the name of the Plaintiff. A copy of the said inventory is attached herewith and marked Exhibit 'A'.*

8. *That the said goods and chattel were attached down within the Defendant's premises because the Defendant had issued a post-dated. Chartered Bank Cheque to mature on 5th September, 1994 for the sum of two million Naira (2,000,000.00) in part satisfaction of the judgment debt. A copy of the said cheque is attached herewith and marked Exhibit 'B'.*

9. *That at maturity, the said cheque was returned unpaid through the Plaintiff's letter dated 14th September, 1994 a copy of which is attached herewith and marked Exhibit 'C'.*

10. *That on Friday 9th September, 1994 (4 days after the Plaintiff had attached the said goods and chattel) the Central Bank of Nigeria revoked the Defendant's banking license and appointed the Respondent*

(N.D.I.C.) to liquidate the Defendant.

11. That on Monday 12th September, 1994, the Plaintiff's counsel, Messrs. F.O. Fagbohunbe & Co. promptly wrote to the Respondent notifying the Respondent of the earlier attachment of the Defendant's goods and chattel and advising the Respondent to restrain from tampering or intermeddling with the attached properties as they no longer constituted part of the Defendant's assets. A copy of the Plaintiff's counsel's letter is attached herewith and marked Exhibits 'D' & 'D1'.

12. That I am verily informed by the Plaintiff and I do believe same, that in spite of the afore-said notice of the said attachment given to the Respondent (N.D.I.C.), the Respondent still proceeded to remove the Defendant's attached goods and chattel and now detains same which remains presently in the possession and control of the Respondent.

13. That I am informed by the Plaintiff and I verily believe same that in brazen defiance and contempt of the judgment of this Court, the Respondent has evinced a clear intention to depose (sic) of the said attached goods and chattel immediately unless otherwise ordered and/or restrained.

14. That if the Respondent is allowed to dispose of the attached goods and chattel, it will render nugatory (sic) and set aside both the judgment of this Honourable Court and execution or same levied on 5th September, 1994.

15. That the five (5) days of grace which the Defendant has to redeem its attached goods and chattel by satisfying the judgment debt has since elapsed on 12th September, 1994.

16. That the Defendant's attached goods and chattel are now ripe for sale by the Deputy Sheriff of this Honourable Court."

The Plaintiff's motion was argued on 23/9/94 and ruling was reserved to 14/10/94. On 5/10/94, however, the NDIC, through its counsel, brought a motion on notice praying for:

"1. An order for the arrest of the ruling on the Motion on Notice of the Plaintiff/Respondent dated 15th September, 1994 and fixed for delivery on 14th October, 1994.

2. An order for stay of proceedings in respect of this matter pending

the outcome of the appeal.”

Upon the ground that the trial court had no jurisdiction “*to adjudicate on this matter and or to deliver a ruling on it.*” In the affidavit in support of the motion, Joseph Enuakit, a counsel in the chambers of Olawoyin & Olawoyin, solicitors to the NDIC, deposed:-

“2. By a Motion on Notice dated 15th September, 1994 the Plaintiff/Respondent sought amongst other things for an order compelling the present Applicant to produce and deposit in the premises of the Lagos High Court properties which were attached by a Bailiff in favour of the Plaintiff/Respondent in execution of the judgment of this Honourable Court dated 14th July, 1994. B C

3. On 23rd September, 1994, the Motion on Notice referred to in paragraph 2 above was argued by both the Plaintiff and the present Applicant and ruling on same was reserved for 14th October, 1994. D

4. I am informed by Professor G.A. Olawoyin of counsel and I verily believed him as follows:

(a) That the action between the Plaintiff and the Defendant relates to a short-term investment made by the Plaintiff in the Defendant’s bank. E

(b) That the subject-matter of the action concerns two banks and/or arose from banking transactions.

5. I am further informed by Professor G.A. Olawoyin of counsel and I verily believed him that the Plaintiff’s action is governed by the provisions of the Constitution (Suspension and Modification) Decree No. 107 of 1993 which confer exclusive jurisdiction in banking transactions on the Federal High Court. F

6. I am also informed by Professor G.A. Olawoyin of counsel and whose information I sincerely believed that this Honourable Court does not have jurisdiction to adjudicate on this matter and/or entertain any arguments relating to the present action. G

7. Further to paragraph 6 hereof, I am informed by Professor G.A. Olawoyin of counsel and I verily believed him that this Honourable Court does not have jurisdiction to entertain the Plaintiff’s application dated 15th September, 1994 and to deliver a ruling on same. H

8. I am also informed by Professor G.A. Olawoyin of counsel and I

verily believed him as follows:

(i) *That by reason of lack of jurisdiction of the Honourable Court it is necessary for the Applicant to arrest the delivery of the ruling slated for 14th October, 1994.*

B (ii) *That the issue of jurisdiction of the Court can be raised by a party at any stage of the proceedings.*

(iii) *The stay of proceedings in this matter is necessary pending the determination of the appeal. Attached herewith and marked Exhibits NDIC 1 and 2 are photocopies of the Notice of Appeal filed by the Applicant and the Treasury Receipts respectively.*"

This application was predicated on an appeal filed on 4/10/94 against the judgment of 12/7/94. The notice of appeal contained two grounds of appeal to wit:

D (i) *The learned trial Judge lacks jurisdiction to entertain the case by virtue of Section 230(1) of the Constitution (Suspension and Modification) Decree No. 107 of 1993.*

PARTICULAR

E (a) *The action is one between one bank and another.*

(b) *Section 230(1)(d) of Decree No. 107 of 1993 vests exclusive jurisdiction in the Federal High Court to entertain all such actions between one bank and another.*

F (c) *The Lagos State High Court has no jurisdiction to entertain the claims of the Plaintiff bank against the Defendant bank. (ii) The decision of the learned trial Judge entering a final judgment for the Respondent without jurisdiction amounts to a nullity and has no effect whatsoever.*

G PARTICULARS

(a) *The claims of the Plaintiff/Respondent against the Defendant/Appellant comes within the provision of Section 230(1) (d) of Decree No. 107 of 1993.*

H (b) *The Lagos State High Court presided over by the Hon. Justice Adeniji lacks the jurisdiction and competence to entertain the action and to make any pronouncements thereon.*

(c) *The judgment of the learned trial Judge in the matter made in*

favour of respondent herein is a nullity.”

This appeal was not pursued with by the NDIC in that the Corporation took no steps to prosecute it and counsel at the hearing of the present appeal informed us that the said appeal had been abandoned by them.

The NDIC’s motion was argued on 14/10/94 and refused. Thereupon, the learned trial judge delivered his ruling on the Plaintiff’s motion of 15/9/94 and granted the prayers sought therein. Being dissatisfied with the grant of Plaintiff’s prayers, the NDIC appealed to the Court of Appeal upon four grounds which, without their particulars, read:

“(1) *The learned trial Judge erred in law when he failed to consider the relevance of section 38(3) of Banks and Other Financial Institutions Decree (BOFID), 1991 and Sections 500(1) and (2) and 501 of (CAMA) 1990 by holding that the Appellant as Liquidator of the Defendant does not come within the provisions of those sections.*

(2) *The learned trial Judge erred in law by assuming jurisdiction to try and determine the matter and make pronouncements thereon by virtue of the provisions of section 230(1)(d) of the Constitution (Suspension and Modification) Decree No. 107 of 1993.*

(3) *The learned trial Judge erred in law to have proceeded to deliver a ruling on the Respondent’s Motion on Notice dated 15th September, 1994 without jurisdiction in spite of the Appellant’s application to arrest the said ruling and to stay proceedings in the matter pending the outcome of the appeal.*

(4) *The learned trial Judge erred in law in failing to consider first the judgment Debtor’s application for stay of execution dated 6th September, 1994 before hearing arguments on the Respondent’s Motion on Notice dated 15th September, 1994.”*

Pursuant to the rules of the Court of Appeal, the NDIC and the Plaintiff filed and exchanged their respective briefs of arguments. On the appeal coming up for hearing before the Court of Appeal on 18/4/96 (after previous adjournments), the Court, suo motu, observed:

“Court:- *The issue of the so called Registry judgment fundamental we need to fully addressed (sic) on the point.*”

“*Prof. Olawoyin: I shall file the necessary papers including leave to*

argue the issue in due course. I agree it is a fundamental matter. Mr. Ajayi: I have no objection."

Hearing of the appeal was adjourned to 14/10/96.

On 9/5/96 Professor Olawoyin, on behalf of the NDIC filed a motion B praying for the following orders:

"1. An order of this Court for leave to amend the Notice of Appeal herein by the addition of two (2) new grounds of appeal as shown in the proposed additional grounds of appeal attached to the affidavit in support hereof as Exhibit A.

2. An order of this Court deeming the proposed amended notice of appeal attached hereto as Exhibit B as properly filed and served.

3. An order of this Court for leave to file a Supplementary Appellant's Brief of argument in respect of the additional grounds of appeal."

D The application was granted. The Court below ordered as hereunder:

"Court: Order as prayed. Leave is granted to the applicant to amend the Notice of Appeal by the filing of additional two grounds of appeal. The Notice of Appeal as amended should be filed and served within 7 E days from today. The Appellant should file the supplementary brief within 14 days from today and the respondent's supplementary brief be filed 21 days thereafter."

The amended notice of appeal filed by the NDIC pursuant to the above F order contained six grounds of appeal which, without their particulars, read:

"(1) The learned trial Judge erred in law when he failed to consider the relevance of section 38(3) of Banks and Other Financial Institutions Decree (BOFID), 1991 and Sections 500(1) and (2) and 501 of (CAMA) 1990 by holding that the Appellant as Liquidator of the Defendant does not come within the provisions of those sections.

(2) The learned trial Judge erred in law by assuming jurisdiction to try and determine the matter and make pronouncements thereon by virtue H of the provisions of Section 230(1)(d) of the Constitution (Suspension and Modification) Decree No. 107 of 1993.

(3) The learned trial Judge erred in law to have proceeded to deliver a ruling on the Respondent's Motion on Notice dated 15th September,

1994 without jurisdiction in spite of the appellant's application to arrest the said ruling and to stay proceedings in the matter pending the outcome of the appeal.

(4) The learned trial Judge erred in law in failing to consider first the Judgment Debtor's application for stay of execution dated 6th September, 1994 before hearing arguments on the Respondent's Motion on Notice dated 15th September, 1994. B

(5) The learned trial Judge erred in law when he gave his approval for the registry judgment entered in favour of the respondent in chambers in the absence of the Defendant bank and thereby denied it the opportunity to be heard contrary to the provisions of section 33(3) of the 1979 Constitution, as amended. C

(6) The learned trial Judge erred in law by approving the purported registry judgment when same was not delivered in accordance with the mandatory provisions of section 258(1) of the 1979 Constitution, as amended and Order 36 Rule 1 of the High Court of Lagos State Civil Procedure Rules, 1979". D

Supplementary briefs were filed by the parties and oral arguments E proffered by their learned counsel. The Court below, sitting as a full court, allowed the appeal of the NDIC. In the lead judgment of Uwaifo JCA (as he then was) with which the other Justices agreed, the Court held:

1. "I think placing deposits with a bank to get attractive interest rates will fall within a lawful transaction. I hold the view that when it does that, it becomes an individual customer of that bank for that purpose." F

2. "I hold that the Federal Mortgage Bank Limited (the respondent) is a bank envisaged in section 230(1)(d) of Decree No. 107 of 1993." G

3. "But I find it difficult, with due respect, to accept the submission of Professor Olawoyin that the action arising from the transaction which took place between the appellant and the respondent is an action between one bank and another falling within the purview of section 230 (1)(d) H through what he called 'inter-bank placement' which however, he did not define as to see whether it excludes every aspect of individual customer and bank relationship."

4. “What the provision [in section 230(1) (d) of CAMA] renders necessary and results in upon the circumstances contemplated is, as I apprehend it, four-fold in its ramifications:

(i) that the State High Court shall have jurisdiction in the circumstances indicated in the proviso; (ii) that the Federal High Court shall not have exclusive jurisdiction, as given to it under the main section, when it comes to matters falling within circumstances of the proviso; (iii) that the fact that the Federal High Court’s exclusive jurisdiction in para. 230(1) (d) ‘shall not apply’ (to use the language of the proviso thereto) in those circumstances does not entirely remove jurisdiction therein from the Federal High Court; and (iv) that both the Federal High Court and the State High Court therefore have and can exercise concurrent jurisdiction in such circumstances.” [box brackets supplied by me]

5. “I think the Lagos State High Court would have jurisdiction to hear the dispute as to liability under the proviso to section 230(1)(d) of decree No. 107 of 1993.”

6. “First, the section 38(3) of the BOFID, the NDIC may be appointed by the Governor of the Central Bank of Nigeria (CBN) as the official receiver or as a provisional liquidator of a company. When so appointed, the NDIC shall have the powers conferred by or under the CAMA and shall be deemed to have been appointed a provisional liquidator by the Federal High Court for that purpose. Under section 425(1)(a) of the Companies and Allied Matters Act, 1990 (the CAMA) the liquidator shall have the powers to bring or defend any action or other legal proceeding in the name and on behalf of the company. To a large extent, for all practical purposes, a provisional liquidator exercises the powers of a liquidator unless limited or restricted by the Court: see section 422(2) of the CAMA”.

7. “In the present case, the order of the Court to attach the Appellant’s property was made on 5 September, 1994 while the NDIC was appointed provisional liquidator on 8 September. By law, as argued by Professor Olawoyin, sale could not be effected by the Deputy Sheriff until at least five days after attachment: see Section 22(1) of the Sheriffs and Civil Process Law (Cap. 127) Laws of Lagos State. I think Professor Olawoyin

is right to say that the Deputy Sheriff who had notice of the appointment of provisional liquidator was bound to deliver the goods attached to the appellant and that the appellant was entitled to take custody thereof.”

8. “The true position is that once a provisional liquidator is appointed for a company, no action or proceeding shall be proceeded with or commenced against the company except by leave of the court given on such terms as the court may impose: see section 417 of the CAMA. The court meant there is the Federal High Court. If therefore, such action was intended to be proceeded with or commenced against the company in a State High Court, it cannot be done without obtaining the leave of the Federal High Court: see Abekhe v. Nigeria Deposit Insurance Corporation (1995) 1 NWLR (pt. 406) 228 at 242 - 243. No such leave was obtained here. It follows that the proceeding in respect of that motion was conducted without jurisdiction and the order made was accordingly a nullity.”

9. “How very appropriate to adapt the reasoning in the above-quoted observation to the circumstances of this case. The 1979 Constitution has provided for which functionaries can constitute a court in Nigeria and how decisions are to be reached. No rules or laws which tend to create a contradiction to or short-circuit those provisions can be valid. Having regard to the Constitutional provisions under the 1979 Constitution which I have already considered here but to which the attention of this court was not drawn in Narva Company of Nigeria Ltd v. J.A. Monster B.V. (supra), I hold that that case was decided per incuriam and is, therefore, not binding on this court. I further hold that Order 36, rr. 8 and 9 and all other Rules which permit the so-called Registry Judgment or the like are consistent with the 1979 Constitution and are accordingly declared void to the extent of the inconsistency.”

10. “Finally, I hold that the ‘judgment’ of 12 July, 1994, got as Registry Judgment by which the respondent was awarded the sum of 5,000,000.00 with interest, is unconstitutional, invalid and unenforceable.”

The court below set aside both the judgment of 12/7/94 and the ruling of 14/10/94 on the ground that the latter was given without jurisdiction “or

in any case, which has no foundation any longer to rest on.”

Being aggrieved with the judgment of the Court of Appeal the Plaintiff has now appealed to this Court upon eleven grounds of appeal. The NDIC also cross-appealed against that part of the judgment of the court below which held that the State High Court had jurisdiction to entertain the suit before it pursuant to the provision of the proviso to section 230(1)(d) of Decree No. 107 of 1993.

The parties filed and exchanged their respective briefs of arguments and, at the hearing of the appeal, their learned counsel proffered oral arguments in elucidation of arguments in their briefs. In the Plaintiff’s brief, the following six questions are set down as calling for determination:

“1. Was the Court of Appeal vested with jurisdiction and did it act properly when it heard and determined issue(s) regarding the validity of the judgment of the Lagos High Court dated July 12, 1994 when, in fact and in law, there was no valid appeal against the said judgment pending before the Court of Appeal for hearing and determination?

2. Is the judgment of the Lagos High Court dated July 12, 1997 given in favour of the Appellant Constitutional, valid and enforceable?

3. Is the Appellant a ‘bank’ within the contemplation of section 230(1)(d) of the Constitution (Suspension and Modification) Decree No. 107 of 1993?

4. Does Lagos State High Court share a concurrent jurisdiction with the Federal High Court in respect of banker - customer disputes/transactions as provided in the proviso to section 230(1) (d) of Decree No. 107 of 1993?

5. Was the Lagos High Court deprived of jurisdiction to entertain the Appellant’s motion for the production of the attached goods of United Commercial Bank Limited as a result of the failure of the Appellant to seek and obtain leave of the Federal High Court before filing the said motion?

6. Who, as between the Appellant and the Respondent, is entitled to the goods and chattels of the Defendant (United Commercial Bank Limited) which had already been attached by a bailiff of the Lagos High

Court in favour of the Appellant before the appointment of the Respondent as provisional liquidator of Defendant, particularly in the light of the ruling of the Lagos High Court dated October 14, 1994?"

The NDIC, in its brief, sets down four questions as arising for determination in the main appeal and cross-appeal. These are:

"1. Whether the issue of the constitutionality of the Registry Judgment of 12 July, 1994, was properly before the Court of Appeal when it heard arguments in respect of the matter on 21 January, 1997?"

2. Whether the Registry Judgment of the Lagos High court dated 12 July, 1994, was constitutional, valid and enforceable.

3. Whether the Appellant is a bank and, if so, can a State High court exercise jurisdiction in respect of a matter between it and another bank by virtue of section 230(1)(d) of the Constitution (Suspension and Modification) Decree No. 107 of 1993.

4. Whether by virtue of section 38(3) of the Banks and Other financial Institutions Decree No. 25 of 1991 and sections 500 and 501(1) of the Companies and Allied Matters Act, 1990, the Respondent has the statutory right to take and retain custody of the goods in questions in the circumstances of this case."

The two sets of questions essentially raise the same issues. I shall, however, adopt the questions as raised in the plaintiff's brief.

QUESTION 1

Mr. Fagbohungebe, learned counsel for the Plaintiff, both in his brief and in oral argument, submits that ground 5 and 6 contained in the amended notice of appeal before the Court below were incompetent as they did not relate to the High Court ruling of 14/10/94 which was the decision on appeal to the Court below. Those grounds, according to counsel related only to the main judgment of 12/7/94 which was not on appeal before the court below as the appeal against that decision had been abandoned. He urges us to declare incompetent the pronouncements of the Court below relating to those grounds. Learned counsel refers to Atoyebi v. Governor of Oyo State (1994) 5 NWLR 290 at 305 B-C; Commerce Assurance Ltd. v. Alli (1992) 3 NWLR 710 at 724 - 725 H-A; Ede v. Omeke (1992) 5 NWLR 428, 434 G-H and Globe Fishing Industries Ltd v. Coker (1990)

7 NWLR 265, 282 E-F and submits that before the issue of the validity or otherwise of the decision of a court of record can be validly and properly raised, considered and pronounced upon by an appellate court, there must be an existing appeal filed against the decision which is in dispute, otherwise the appellant court may end up acting in vain if it is shown that there was no appeal against the decision of the lower court in the first place.

It is argued in the brief of the NDIC (hereinafter is referred to as the Respondent) as follows:

"It will be recalled that the Respondent filed two Notices of Appeal to the court below. The first one filed on 4 October, 1994 was against the Registry judgment while the second one dated 27 October, 1994 was against the ruling of 14 October, 1994. That the Respondent initially elected to pursue the second appeal was dictated by the circumstances already referred to in paragraph 2.14 above.

As indicated in paragraphs 2.15 to 2.20 hereof, the court below was constrained by what looked like the absence of a judgment from the records before it to requests for more facts about the judgment of the Lagos High Court, if ever there was any. Furthermore, when the Appellant in its verifying affidavit exhibited the said 'judgment' the court below was rightly left in no doubt that the validity of the 'judgment' itself was crucial to the determination of the issues arising from the ruling of 14 October, 1994, which naturally could not be divorced from the Registry judgment. It is submitted that the only proper course open to the court below in the circumstances was to set in motion, as it did, the machinery for the determination of the validity or otherwise of the Registry judgment.

It is instructive to recall that the amended Notice of Appeal specifically called into question the constitutionality of the Registry judgment. It is also significant that both the Appellant and the Respondent specifically addressed the issue of the constitutionality of the Registry judgment in their respective Supplementary Briefs. It is, therefore, quite evidence that the parties were fully aware of the fact that the validity of the Registry judgment was crucial to the determination of the other issues before the court below.

As rightly pointed out by the Appellant in various paragraphs of its Brief, one cannot put something on nothing. Accordingly, if there appears to be no real judgment upon which a subsequent ruling by a court can be sustained, reason and prudence clearly dictate that an appellate court called upon to review such subsequent ruling has a duty to examine, determine and also pronounce on the sustainability of such judgment. The Respondent submits that that was precisely the sensible and logical step taken by the court below in this case.

The references by the Appellant to certain cases in paragraphs 4.16 to 4.18 of its Brief are most inappropriate and, indeed, irrelevant to the present case. The dictum of the Supreme Court in Atoyebi v. Governor of Oyo State (1994) 5 NWLR (Pt. 344) 290 at 305 paras B-C was clearly quoted out of context. Contrary, to the impression sought to be created by the Appellant, there was in fact a complaint in the present case, as clearly evidenced by the grounds of appeal in the amended Notice of Appeal. Similarly the other cases cited in those paragraphs have been taken out of their contexts. There is no doubt that the Appellant itself recognized the fact that the validity of the Registry judgment was clearly in issue before the court below. None of the parties was at any time misled into thinking that this was not so.

Arising from the above, it is submitted that all the Appellant sought to do in its Brief was merely to avoid the real issue in the present case by raising essentially technical points in the hope that this Honourable Court would feel inclined not to determine the fundamental issue of the constitutionality of the Registry judgment obtained by the Appellant in the Lagos High Court on 12 July, 1994. The Respondent therefore urges your Lordships to hold that the issue of the constitutionality of the Registry judgment of 12 July, 1994 was properly before the Court of Appeal when it hear arguments in respect of the matter on 21 January, 1997.”

Professor Olawoyin, for the Respondent, in his oral arguments, observes that there was an appeal filed against the High Court judgment on 12/7/94 but that that appeal was not prosecuted and it was in the process of prosecuting that appeal that the issue of the validity of the judgment of 12/7/94 was raised. He then amended the notice of appeal in that second

appeal to accommodate the issue and submits that it is irrelevant that grounds 5 and 6 thereof did not arise out of the ruling of 14/10/94. He cites Attorney-General of Oyo State v. Fairlakes Hotel (1988) 5 NWLR 1, at 23 B-E and submits that the status of the judgment of 12/7/94 was a necessary and relevant consideration for the appeal against the ruling of 14/10/94. Professor Olawoyin further submits that by virtue of section 16 of the Court of Appeal Act the Court below had the power to raise the issue and make order necessary for determining the real question in controversy.

I have given careful consideration to the submissions of learned counsel for the parties. It is not in dispute that the decision on appeal before the court below was the ruling of 14/10/94 and not the judgment of 12/7/94. Indeed, the Defendant (now in liquidation) which was concerned with that judgment was content to abide by it and had, in fact, taken steps to satisfy it. It was in the process of doing so that the Central Bank withdrew the licence of the Defendant and appointed the NDIC as liquidator. The liquidator though differently and proceeded to appeal against the judgment of 12/7/94 but, strangely enough, did not pursue the appeal. The liquidator pursued rather its appeal against the ruling of 14/10/94 that ordered the sale of the Defendant's movable property on attachment pursuant to the execution of a writ of fieri facias issued by the High Court. The question that arises is: can the validity of the judgment of 12/7/94 be raised in the appeal against the ruling of 14/10/94?

I rather think not.

Grounds 5 and 6 in the Respondent's amended notice of appeal in the Court below read as follows:

“(5) *The learned trial Judge erred in law when he gave his approval for the registry judgment entered in favour of the respondent in chambers in the absence of the Defendant bank and thereby denied it the opportunity to be heard contrary to the provisions of Section 33(3) of the 1979 Constitution, as amended.*

(6) The learned trial Judge erred in law by approving the purported registry judgment when same was not delivered in accordance with the mandatory provisions of section 258(1) of the 1979 Constitution, as

amended and Order 36 Rule 1 of the High Court of Lagos State Civil Procedure Rules, 1979.”

The particulars to these grounds are omitted. There can be no doubt that these grounds do not relate to anything decided by the High Court in its ruling of 14/10/94 on appeal before the Court below. Those grounds would be relevant in an appeal against the High Court judgment of 12/7/94. As this Court, per Karibi-Whyte, JSC put it in Metal Construction (West Africa) Ltd. v. D.A. Migliore & Ors. In re Miss C. Ogundare (1990) ANLR 142 at p. 148:

“What then is a ground of Appeal? I consider it presumptuous, but will still venture to define a ground of appeal as consisting of error of law or fact alleged by an appellant as the defect in the judgment appealed against and relied upon to set it aside.” (underlining is mine for emphasis)

It follows from this that **any complaint that does not relate to the judgment appealed against cannot be relevant in the appeal and will, therefore, be incompetent. This is so because it is settled law that a judgment subsists until it is set aside and an aggrieved person who has not appealed against a judgment stands no chance of seeking to have the judgment set aside in an appeal against another judgment, except, perhaps, in the circumstances covered by Order 3 rule 22 of the Court of Appeal Rules which requires that an interlocutory judgment against which there is no appeal is not to prejudice an appeal before the Court or where that other judgment is a nullity and it is being set up to support a plea of res judicata.**

Prof. Olawoyin has argued that section 16 of the Court of Appeal Act enabled the Court below to raise the issue of the validity of the judgment of 12/7/94. Now, section 16 provides:

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 authorized 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-
B 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 direction 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
C below in that court's appellate jurisdiction, order the case to be re-heard by a court of competent jurisdiction."*

As wide as the powers given the Court of Appeal appear to be, they do not include, in my humble view, power to consider incompetent grounds of appeal such as grounds 5 and 6 in the appeal before it, were. It is one
D thing for the court to raise an issue, suo motu, and ask to be addressed on it. It is, however, another thing to consider and pronounce on incompetent grounds of appeal which, in duty, it ought to have struck out.

Finally, on question (1), I hold that grounds 5 and 6 in the Respondent's
E amended notice of appeal in the Court below were incompetent and ought to have been struck out by that court. The pronouncements and decisions by the Court below on these grounds are incompetent and are here by set aside.

F QUESTION (2):

This question has been answered under Question (1). As the judgment of the Lagos High Court given on 12/7/94 was not on appeal before the court below or this court, its validity could not be decided in the appeal before the court below nor in the appeal now before us.

G QUESTION (3):

The court below found that the Plaintiff is a "bank" envisaged in section 230(1)(d) of Decree No. 107 of 1993. I think there is an error here. For Decree No.107 of 1993 titled Constitution (Suspension and
H Modification) Decree has no section 230(1)(d). What I believe the Court below and all parties had (and still have) in mind in section 230(1)(d) of the constitution of the Federal Republic of Nigeria, 1979 as amended by section 1(3) of Decree No. 107 of 1993. The plaintiff, in this appeal,

contends that the finding of the court below is wrong and relies on the definition of the word “bank” in section 61 of the Banks and Other Financial Institutions Decree No. 25 of 1991 (BOFID, for short).

Now section 230(1)(d) of the 1979 constitution (as amended) provides:

“230(1) Notwithstanding anything to the contrary contained in this Constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly or a Decree, the Federal High court shall I have and exercise jurisdiction to the exclusion to any other court in civil causes and matters arising from -

(d) banking, banks, other financial institutions, including any action between one bank and other, any action by or against the Central Bank of Nigeria arising from banking, foreign exchange, coinage, legal tender, bills of exchange, letter of credit, promissory note and other fiscal measures:

Provided that this paragraph shall not apply to any dispute between an individual customer and his bank in respect of transactions between the individual customer and the bank.”

The word “bank” is not defined in the Constitution nor in the interpretation Act. In its ordinary grammatical meaning, the word “Bank” means an organization or place that provides financial service. Having regard to the provisions of the law setting up the Plaintiff, particularly section 5(1)(a) and section 6(1)(a) & (b) of the Federal Mortgage Bank of Nigeria Decree No. 82 of 1993, I think it is right to say that it falls within this ordinary meaning. Whatever difficulty one may have is dispelled by the definition of the word “bank” in section 29 of the Failed Banks (Recovery of Debts) and Financial malpractices in Banks Decree No. 18 of 1994 which defines the word thus:

“‘bank’ has the meaning assigned to it under the Banks and Other Financial Institutions Decree 1991 and includes (a) a financial institution as defined under that Decree or under the Nigeria Deposit Insurance Decree 1988, and

(b) a development bank and any other bank established by law.”

In my respectful view, therefore, the Court below is right in holding that

the Plaintiff is a bank and comes within section 230(1)(d) of the Constitution (as amended).

QUESTION 4

The court below, per Uwaifo JCA, observed:

B *“But I find it difficult, with due respect, to accept the submission of Professor Olawoyin that the action arising from the transaction which took place between the appellant and the respondent is an action between one bank and another falling within the purview of section 230(1)(d) through what he called ‘inter-bank placement’ which, however, he did not define as to see whether it excludes every aspect of individual customer and bank relationship. The mere fact that a bank takes an action against another bank does not make such action triable exclusive by the Federal High court under section 230(1)(d). It must depend on the nature of the transaction and the capacity in which one of the banks dealt with the other. There is therefore the need to examine such transaction and to look at the proviso which talks of transactions between an individual customer and his bank to ascertain its applicability.”*

E After considering the nature of the transaction between the Plaintiff and the Defendant, the Court concluded -

F *“It must however be realized that the horizon left for the State High Court under the proviso must not be shrunk into absurdity, or perhaps undue insignificance, by a restrictive interpretation to oust its jurisdiction whenever two banks are involved, simply because they are banks. A bank is an individual legal entity. It can be an individual customer to any other person when not acting as a bank. So it is that it can be an individual customer to a bank in any particular transaction - depending on the type of transaction. Therefore, a possible scenario where one bank as an individual legal entity plays the part of an individual customer to another bank in a given transaction must be appreciated and not ruled out. For instance, when one bank (say a merchant bank) renders service to another bank as an ‘Issuing House’, any dispute arising from that transaction between the two banks must be heard in the Federal High Court. But if one bank as an individual is interested in earning interest from another bank through deposit, then the relationship of individual*

customer and bank is established as in the present case. Any dispute arising from that transaction is triable in the State High court as well as in the Federal High Court.

It must be taken, I think, that by depositing money with the appellant bank for a given period so as to earn interest payable by that bank, the respondent (though a bank) created the relationship in respect of that transaction of an individual customer and its bank. The 5,000,000,00 deposit for 90 days' duration had been rolled-over four times at 40% interest per annum. The dispute came about when at the maturity of the 4th roll-over period the appellant defaulted in repayment of the interest for that last quarter and the principal. I think the Lagos State High Court would have jurisdiction to hear the dispute as to liability under the proviso to section 230(1)(d) of Decree No. 107 of 1993."

The Respondent was unhappy with this conclusion and this forms the kernel of its cross-appeal. It is contended that by virtue of the provisions of section 230(1)(d) of the Constitution the High Court of Lagos State lacked competence and jurisdiction to entertain the action brought by the Plaintiff against another bank, the Defendant in this case. It is the further contention of the Respondent that any action between one bank and another falls within the exclusive jurisdiction of the Federal High Court.

It is contended for the Plaintiff that the transaction between the Plaintiff and the Defendant leading to the action in the High Court of Lagos State was a dispute between an individual customer and his bank which is exempted from the exclusive jurisdiction of the Federal High Court by the proviso in section 230 (1)(d). It is submitted that the Plaintiff, in relation to that transaction was an individual customer to the Defendant. Reliance is placed on BI ZEE BEE HOTELS Ltd. v. Allied Bank (Nig). Ltd. (1996) 8 NWLR 176 at 185 - 186 G-A.

I have considered the arguments advanced by the parties. I agree entirely with the reasoning of the Court Below. With respect to the learned counsel for the Respondent, **I do not share the view that the proviso in section 230 (1) (d) would not apply where in a customer/banker relationship the customer is a bank. To say that where there is a dispute between two banks, the forum for the resolution of the**

dispute is the Federal High Court is to read into section 230 (1) (d) what is not there. A lot depends on the nature of the transaction between the two banks. The facts show that Plaintiff, like any other customer, placed a short term deposit with the Defendant on agreed interest. After some roll-overs, Plaintiff sought to retrieve its deposit and interest but Defendant defaulted. In the absence of any evidence to the contrary about the custom in the industry I must hold that it is a simple customer/banker relationship which the proviso in section 230(1) (d) exempts from the exclusive jurisdiction of the Federal High Court.

With this conclusion, I must hold that the cross-appeal fails and it is hereby dismissed by me.

QUESTION 5:

In the course of his judgment, with which the other Justices agreed, Uwaifo JCA said:

“The issue, or matter arising therefrom, does not quite end there. After it became known that the NDIC had become the provisional liquidator of the United Commercial Bank Limited, the respondent as plaintiff/applicant commenced or still continued proceedings against it culminating in the ruling of 14 October, 1994 given by Adeniji J. There was an objection that the court had no jurisdiction to entertain the application which was to compel the NDIC to bring the company’s goods to the court premises to be sold. The NDIC had taken possession of the goods by law as the provisional liquidator as I have already shown. The learned trial judge overruled the objection and granted the motion. The ruling is, of course a subject of this appeal.

The true position is that once a provisional liquidator is appointed for a company, no action or proceeding shall be proceeded with or commenced against the company except by leave of the court given on such terms as the court may impose: See section 417 of the CAMA. The court meant there is the Federal High Court. If therefore such action was intended to be proceeded with or commenced against the company in a State High Court, it cannot be done without obtaining the leave of the Federal High Court: see Abikhe v. Nigeria Deposit Insurance Corpora-

tion (1995) 7 NWLR (pt. 406) 228 at 242-243. No such leave was obtained here. It follows that the proceeding in respect of that motion was conducted without jurisdiction and the order made was accordingly a nullity.”

It is the conclusion reached in the passage above that has come under attack in this appeal. It is submitted in the Plaintiff’s brief thus:

“5.43 With respect, the Appellant submits that the Court of Appeal erred when it adverted to section 417 of CAMA on this issue when, in fact, section 417 is totally inapplicable to the Appellant’s said motion given the surrounding circumstances.

5.44 It is submitted that section 417 of CAMA is only applicable to actions which are just about to be freshly instituted or proceedings which are already pending in Court against a Company for which a Provisional Liquidator has been appointed. Accordingly, section 417 would be rendered inapplicable in respect of matters which had already been concluded before the appointment of the Provisional Liquidator.

5.45 The Appellant’s action against the Defendant (United Commercial Bank Limited) had been concluded on 12th July, 1994 when Judgment was obtained against the Defendant. Therefore, the action was neither pending nor fresh as the date the Respondent was appointed as Provisional Liquidator.

5.46 Therefore, the Appellant’s motion for the production of the attached goods simply sought, at best, an ancillary or consequential relief since judgment had already been obtained in the substantive suit on 12th July, 1994, about two (2) months before the Respondent’s appointment as the Provisional Liquidator.

5.47 In fact, the Respondent was appointed as Provisional Liquidator of the Defendant not just after the date of judgment, but in fact, after the Appellant had levied execution of same and the Defendant had paid 2 million and also issued a cheque in settlement of the balance of the judgment debt.

5.48 It is submitted that section 417 CAMA does not apply to applications filed after judgment (i.e. after the final conclusion of an action) for consequential or ancillary reliefs such as applications for stay of

execution, installmental payment of a judgment debt, setting aside of a default judgment or production of goods which had been attached in the course of levying execution of a judgment which pre-dates the appointment of the Provisional Liquidator.”

B The Respondent offered no arguments on this issue. What proceedings did the Court below hold could not be continued with without the leave of the Federal High Court? It was the proceedings leading to the High Court ruling of 14/10/94. The proceedings commenced with a motion on notice dated 15/9/94 in which the Plaintiff sought against the Respondent, for orders:

D “(i) *An order of this Honourable Court compelling the Respondent (N.D.I.C.) to produce forthwith and deposit in the Lagos High Court premises all the Defendant’s attached properties listed in the inventory attached herewith and marked Exhibit ‘A’ which said properties were attached on 5/9/94 by a Bailiff of the Lagos High Court in the name of the Plaintiff in execution of the judgment of this Honourable Court given on 14/7/94 and which said properties have now been removed and detained by the Respondent (N.D.I.C) and which still remain in the Respondent’s possession and custody.*

F “(ii) *An order of this Honourable Court directing the Deputy Sheriff of the Lagos High Court to take custody and control of the said properties and to immediately effect the sale of same in accordance with Section 22(2) of the Sheriffs and Civil Process Law of Lagos State.”*

G The Respondent was the party to the proceedings and not the Defendant. For the Respondent had taken possession of the Defendant’s good under attachment and the purpose of the motion on notice was to take the goods from the possession of the Respondent and to hand same to the Deputy Sheriff. Is this the action or proceeding envisaged in section 417 of CAMA? I rather think not.

Section 417 reads:

H “*If a winding-up order is made or a provisional liquidator is appointed, no action or proceeding shall be proceeded with or commenced against the company except by leave of the court given on such terms as the court may impose.”*

Surely, the Plaintiff's motion cannot be described as an action or proceeding proceeded with or commenced against the Defendant. We must not lose sight of the fact that at the stage of the proceeding, the Respondent was brought in in its own behalf and not as representing the Defendant. In any event, what is prohibited by B section 417 except with leave of court, is an action or proceeding pending or instituted in the Federal High Court for that is the meaning of the word "*court*" as used in the section - see section 650 of the CAMA. I think, therefore, that the court below was in error C when it held that leave was required before the Plaintiff could proceed with its motion against the Respondent in the High court of Lagos State.

I resolve Question 5 in favour of the Plaintiff.

QUESTION 6:

Again, the court below, per Uwaifo JCA, observed:

"The NDIC on being appointed the official receiver or as a provisional liquidator of a company shall have the powers of a liquidator conferred by or under the CAMA. One of such powers as given under E section 50(1) of the CAMA is that where any goods of a company are taken in execution and before the sale thereof or the completion of the execution by the receipt or recovery of the full amount of the levy, notice is served on the Sheriff that a provisional liquidator has been appointed, F the Sheriff shall, on being so required deliver the goods and any money seized or received in part satisfaction of the execution to the liquidator.

In the present case, the order of the court to attach the appellant's property was made on 5 September, 1994 while the NDIC was appointed G provisional liquidator on 8 September. By law, as argued by Professor Olawoyin sale could not be effected by the Deputy Sheriff until at least five days after attachment: see section 22(1) of the Sheriffs and Civil Process Law (Cap. 127) Laws of Lagos State. I think Professor Olawoyin is right to say that the Deputy Sheriff who had notice of the appointment H of provisional liquidator was bound to deliver the goods attached to the appellant and that the appellant was entitled to take custody thereof."

The Plaintiff contends that the court below was in error in its conclusion.

The Respondent contends to the contrary.

Now section 38(1) - (3) of the BOFID provides:-

“38. - (1) Where the Governor makes an order revoking the licence of a bank and requiring the business of that bank to be wound up, the bank shall, within 14 days of the date of the order, apply to the Federal High Court for an order winding-up the affairs of that bank and the Federal High Court shall hear the application in priority to all other matters.

(2) If the bank fails to apply to the Federal High Court within the period specified in sub section (1) of this section, the Governor may apply to the Federal High Court for the winding- up of the bank.

(3) If the Governor is satisfied that it is in the public interest to do so, he may, without waiting for the period mentioned in subsection (1) of this section to elapse, appoint the Nigerian Deposit Insurance Corporation or any other person as the official receiver or as a provisional liquidator and the Corporation or such other person shall have the power conferred by or under the Companies and Allied Matters Decree 1990 and shall be deemed to have been appointed a provisional liquidator by the Federal High Court for the purpose of that Decree.”

Other relevant statutory provisions are sections 500 and 501 of the BOFID and these run thus:

“500. (1) Where a creditor issues execution against any goods or land of a company or attaches any debt due to the company, the company is subsequently wound up, the creditor shall not be entitled to retain the benefit of the execution or attachment against the liquidator in the winding-up of the company, unless he has completed the execution or attachment before the commencement of the winding-up:

Provided that -

(a) Where any creditor has had notice of a meeting having been called at which a resolution for voluntary winding-up is to be proposed, the date on which the creditor so had notice shall, for the purposes of the foregoing provision, be substituted for the date of the commencement of the winding-up;

(b) if a person purchases in good faith under a sale by the Sheriff any goods of a company on which an execution has been levied, he shall

acquire a good title to them against the liquidator;

(c) the rights conferred by this subsection on the liquidator may be set aside by the court in favour of the creditor to such extent and subject to such terms as the court thinks fit.

(2) For the purposes of this section, an execution against goods shall be taken to be completed by seizure and sale, and at attachment of a debt shall be deemed to be completed by receipt of the debt, and an execution against land shall be deemed to be completed by seizure and, in the case of an equitable interest, by the appointment of a receiver

501. (1) Subject to the provisions of subsection (3) of this section, where any goods of a company are taken in execution and before the sale thereof of the completion of the execution by the receipt or recovery of the full amount of the levy, notice is served on the Sheriff that a provisional liquidator has been appointed or that a winding-up order has been made or that a resolution for voluntary winding-up has been passed, the sheriff shall, on being so required deliver the goods and any money seized or received in part satisfaction of the execution to the liquidator; but the costs of the execution shall be a first charge on the goods or money so delivered, and the liquidator may sell the goods, or a sufficient part thereof, for the purpose of satisfying that charge.

(2). Subject to the provisions of subsection (3) of this section, where under an execution in respect of a judgment for a sum exceeding 100.00 the goods of a company are sold or money is paid in order to avoid sale, the sheriff shall deduct the costs of the execution from the proceeds of the sale or the money paid, and retain the balance for fourteen days; and if within that time notice is served on him of a petition for the winding-up of the company having been presented or of a meeting having been called at which there is to be proposed a resolution for the voluntary winding-up of the company and an order is made or a resolution is passed, as the case may be, for the winding-up of the liquidator, who shall be entitled to retain it as against the execution creditor.

(3). The rights conferred by this section on the liquidator may be set aside by the court in favour of the creditor to such extent and subject to such terms as the court thinks fit.

(4). *In this section and section 500 of this Act -*

(a) “good” includes chattels personal; and

(b) “sheriff” includes any officer charged with the execution of a writ or other process.”

B I think the above provisions are clear enough and present no difficulty in interpretation. It is not in dispute that the Respondent was appointed by the Governor of the Central Bank, on his revoking the Defendant’s licence, to act as provisional liquidator of the Defendant. This was on 8th September 1994. On 5/9/94 the deputy sheriff of the High Court of Lagos State had, at the instance of the Plaintiff, attached the goods of the Defendant. By law, sale could not take place until five clear days after attachment of the goods, that is, 10th September 1994. Thus at the time the Respondent was appointed, the sale of the Defendant’s goods had not taken place. By section 500(2) of CAMA, execution begun on 5/9/94 had not been completed and by section 500(1) the Plaintiff could not retain the benefit of the execution, unless the rights conferred on the Respondent by the section were set aside by the court in favour of the Plaintiff. The “court” is the Federal High Court - see section 650 of the Act and not the High Court of Lagos State as argued by learned counsel for the Plaintiff. There has been no such order made by the Federal High Court. The position, in law, then is that the Respondent was in lawful possession of the goods of the Defendant seized by the deputy sheriff in execution levied on 5/9/94. This is so because section 501(1) enjoined the deputy sheriff, in the circumstances of this case, to deliver the seized goods to the Respondent.

G In my respectful view, the court below is right in its construction of the statutory provisions applicable in this case. It was wrong of the learned trial Judge to have granted the application before him. The Respondent was in lawful possession of the Defendant’s goods which on 8/ H 9/94 could no longer be sold by the deputy sheriff. I resolve Question 6 in favour of the Respondent.

With this conclusion I must hold, and I so do, that the Plaintiff’s appeal must fail, notwithstanding that Questions 1, 4 and 5 are resolved

in its favour. It is hereby dismissed by me. The order of the court below setting aside the High Court ruling of 14/10/94 is affirmed by me but its order in respect of the judgment of 12/7/94 is set aside and declared a nullity, having been made without jurisdiction.

As both the main appeal and the cross appeal fail, I make no order as to costs.

BELGORE JSC

I have read the judgment of my learned brother, Ogundare, JSC. with which I am in full agreement. The appeal is dismissed with no order as to costs.

WALI JSC

I am privileged to have read in advance the lead judgment of my learned brother Ogundare, JSC, with which I entirely agree.

For the same reasons ably stated in the judgment which I adopt, I also dismiss the appeal, adopting the consequential orders made therein.

OGWUEGBU JSC

I have had the advantage of reading the draft of the judgment just delivered by my learned brother Ogundare, J.S.C. He has fully dealt with the facts and all the issues raised in this appeal and I agree with the reasoning and conclusions arrived at by him. I wish, however, to add the following points.

The issue of the jurisdiction of the Lagos High Court to entertain the action rests essentially on whether or not the appellant is a “bank” within the contemplation of section 230(1)(d) of the Constitution as amended by section 1(3) of Decree No. 107 of 1993. I will first set out the provision of section 230(1)(d) of the Constitution as amended.

It reads:-

“230 (1) Notwithstanding anything to the contrary contained in this

Constitution and in addition to such other jurisdiction as may be conferred upon it by an Act of the National Assembly or a Decree, the Federal High Court shall have and exercise jurisdiction to the exclusion to any other court in civil causes and matters arising from:-

- B (a)
 - (b)
 - (c)
 - (d) *banking, banks, other financial institutions, including any action between one bank and other, any action by or against the*
- C *Central Bank of Nigeria arising from banking, foreign exchange, coinage, legal tender, bills of exchange, letter of credit, promissory note and other fiscal measures:*
- D *Provided that this paragraph shall not apply to any dispute between an individual customer and his bank in respect of transaction between the individual customer and the bank”.*

It was submitted in the appellant’s brief that two mandatory conditions must be satisfied by an institution before it can legally qualify as a “bank”, namely;

- (i) Such institution must be a company duly incorporated at the Corporate Affairs Commission, Abuja.
- (ii) Such institution must hold a valid banking licence issued by the Central Bank of Nigeria under the Banks and Other Financial Institution Decree No. 25 of 1991 (BOFID for short).

We were referred to sections 2.51 and 61 of the Banks and Other Financial Institutions Decree No. 25 of 1991.

It was the submission of the respondent in its brief that the appellant is a “bank”. The court was referred to the provisions of section 7 of the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks (Amendment) Decree No. 18 of 1995 which defined the word “bank”. It was finally submitted that the appellant is in law and in fact a bank and that the Federal High Court has exclusive jurisdiction to entertain the action by virtue of section 230(1)(d) of the 1979 Constitution as amended by Decree No. 107 of 1993.

In the absence of a definition of the word “bank” in the Constitution,

I have to fall back on the following provisions of our laws dealing with banking:-

Section 43(1)(a) of the Banking Act Cap. 28 Laws of the Federation of Nigeria, 1990, section 7 of Failed Banks (Recovery of Debts) And Financial Malpractices In Banks (Amendment) Decree No. 18 of 1995, B Banks and Other Financial Institutions Decree No. 25 of 1991 and Decree No. 82 of 1993.

BANKING ACT:

“Section 43(1). In this Act, unless the context otherwise requires, the following expressions have the meanings hereby assigned to them, respectively, that is:- C

“bank” means any hereon who carries on banking business, and includes a commercial bank, an acceptance house, discount house, financial institution and merchant bank; D

and this definition includes:-

(a)

(b)

(c) E

(d) *“Financial Institution” means any person in Nigeria who transacts banking business but who is no a commercial bank, an acceptance house or a discount house;”*

The Failed Banks (Recovery of Debts) and Financial Malpractices in F Banks (Amendment) Decree No. 18 of 1995 provides:-

“Section 7. Section 29 of the principal Decree is amended by substituting for the interpretation of the words “bank” and “failed bank”, the following new interpretation, that is: “bank” has the meaning assigned to it under the Banks and Other Financial Institutions Decree 1991 and includes :- G

(a) financial institution as defined under the Nigeria Deposit Insurance Corporation Decree 1988.

(b) a development bank; H

(c) a mortgage bank or any other bank established by law:” (underlining is for emphasis).

In section 61 of Banks and Other Financial Institutions Decree No. 25

of 1991. “*bank*” means a bank licensed under that Decree. Even though section 51(1) (c) of Decree No. 25 of 1991 exempts the appellant from the provisions of that Decree, it does not follow that it is not a “*bank*” under section 230(1) (d) of the 1979 Constitution as amended by section 1(3) of Decree No. 107 of 1993.

Decree No. 25 of 1991 regulates banking and other financial institutions by prohibiting the carrying on of such businesses in Nigeria except under licence and by a company incorporated in Nigeria. The definition of the word “*bank*” in section 7 of Decree No. 18 of 1995 laid to rest any ambiguity as to whether the appellant is a “*bank*” which comes within section 230(1)(d) of the Constitution as amended by Decree 107 of 1993. I have therefore come to the same conclusion as the court below that the appellant is such a bank over which the Federal High Court has jurisdiction to the exclusion of any other court in matters set out in section 230(1)(d).

The next point to consider in this appeal is whether the nature of the transaction between the parties to the proceedings created the relationship of an individual customer and its bank or a transaction between one bank and another falling within the provisions of section 230(10) (d) of the Constitution as amended.

The court below per Uwaifo, J.C.A. (as he then was) held as follows:-

“But I find it difficult, with due respect, to accept the submission of Professor Olawoyin that the action arising from the transaction which took place between the appellant and the respondent is an action between one bank and another falling within the purview of section 230(1) (d) through what he called ‘inter-bank placement’ which, however, he did not define as to see whether it excludes every aspect of individual customer and bank an action against another bank does not make such action triable exclusively by the Federal High Court under section 230(1) (d). It must depend on the nature of the transaction and the capacity in which one of the banks dealt with the other, There is therefore the need to examine such transaction and to look at the provision which talks of transactions between an individual customer and his bank to ascertain

its applicability

It must be taken, I think, that by depositing money with the appellant bank for a given period so as to earn interest payable by that bank, the respondent (though a bank) created the relationship in respect of that transaction of an individual customer and its bank. The N5,000,000.00 deposit for 90 days' duration had been rolled over four times at 40% interest per annum. The dispute came about when at the maturity of the 4th roll-over period the appellant defaulted in repayment of the interest for that last quarter and the principal. I think the Lagos State High Court would have jurisdiction to hear the dispute as to liability under the proviso to section 230(1) (d) of Decree No. 107 of 1993."

I entirely agree with the court below on the above conclusion. One has to look at the nature of the transaction between the parties. When the appellant deposited the money with the respondent for the given period so as to earn interest, payable by the latter, the relationship of individual customer and its bank was created and the proviso in section 230(1) (d) applies even though the appellant is itself a bank. The dispute which arose between the parties was between an individual customer (appellant) and its bank (respondent) in respect of transaction between them in those capacities.

For the above reasons and the fuller reasons set out in the judgment of my learned brother Ogundare J.S.C., I too will and hereby dismiss the plaintiff's appeal even though some of the questions for determination were answered in his favour. The cross-appeal also fails. I abide by the consequential orders made by my learned brother in the said judgment. I make no order as to costs.

G

MOHAMMED JSC

I have had a preview of the judgment written by my learned brother, Ogundare, JSC, in draft, and I agree with his opinion therein.

H

The issue of the constitutionality of so called "*Registry Judgment*" was not properly before the Court of Appeal because there was no appeal filed against the judgment which was delivered by the High Court on 12/

7/94. It is plain that section 16 of the Court of Appeal Act could not cure the mistake committed by learned counsel for the respondent in the Court below when he included grounds 5 and 6 which question the legality of “*The Registry Judgment*” in the Notice of Appeal filed against the Ruling delivered by the trial High Court on 14/10/94.

The respondent who was appellant at the court below being dissatisfied with the trial court’s decisions in entering a “*Registry Judgment*” against it and the Ruling delivered on 14/10/94 decided to appeal against the two decisions. However, the respondent failed to pursue an appeal it filed against the “*Registry Judgment*” delivered on 12/7/94. It abandoned the appeal. It now filed a Notice of Appeal against the Ruling delivered on 14/10/94 and made grounds 5 and 6 in the Notice of Appeal to question the constitutionality of the “*Registry Judgment*”. This obviously is wrong. Since N.D.I.C. (the respondent) was not satisfied with the decision of the trial High Court in entering a “*Registry Judgment*” against the defendant, the Corporation (N.D.I.C.) must file a separate Notice of Appeal with valid grounds of appeal in order to sustain the appeal. It cannot use the Notice of Appeal filed against the Ruling delivered by the High Court on 14/10/94 to prosecute the appeal against the “*Registry Judgment*”.

There cannot be a cognizable appeal without a proper notice of appeal and it is fundamental that a notice of appeal must state the decision against which the appeal has been brought. In the case of Taliatu Adio v. The Attorney-General of Oyo State (1990) 7 NWLR (Pt. 163) 448 at 483 Kolawole JCA, dealing with similar situation held, quite rightly, that if no Notice of Appeal is filed against the judgment of a lower court, the Court of Appeal is incompetent to embark upon the hearing of an appeal. The appeal must properly be initiated against a particular judgment in accordance with Order 3 Rule 2 of the Court of Appeal Rules 1981. For the avoidance of doubt I will reproduce Order 3 Rule 2 (1) (2) and 3 of Court of Appeal rules.

It reads as follows:

“1. All appeals shall be by way of rehearing and shall be brought by notice (hereinafter called “the notice of appeal”) to be filed in the Reg-

istry of the court below which shall set forth the grounds of appeal, shall state whether the whole or part only of the decision of the court below is complained of (in the latter case specifying such part) and shall state also the exact nature of the relief sought and names and addresses of all parties directly affected by the appeal and shall be accompanied by a sufficient number or copies for service on all such parties. It shall also have endorsed on it an address for the service.

2. If the grounds of appeal allege misdirection or error in law the particulars and the nature of the misdirection or error shall be clearly stated.

3. The notice of appeal shall set forth concisely and under distinct heads the grounds upon which the appellant intends to rely at the hearing of the appeal without any argument or narrative and shall be numbered consecutive.”

Consequently, grounds 5 and 6 filed by the respondent before the Court of Appeal questioning the constitutionality of the Registry Judgment are therefore incompetent. They are struck out.

I also agree that the respondent will continue to be in lawful possession of the seized goods of the defendant and the deputy sheriff had no power to sell the goods without obtaining an order from the Federal High Court.

This appeal therefore fails and it is dismissed. I also agree to dismiss the cross appeal for the reasons given in the lead judgment. The decision of the Court of Appeal in respect of the Registry Judgment is hereby set aside. The decision of the Court of Appeal setting aside the ruling by the High Court delivered on 14/10/94 is hereby affirmed.

I also make no order as to costs.

ONU JSC

I am in complete agreement with the reasoning and conclusions of my learned brother Ogundare, JSC contained in the leading judgment just delivered by him, a preview of which I had the privilege to have in draft. I have nothing usefully to add thereto except to adopt the same as mine,

inclusive of all the orders therein made.

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 entirely agree with the reasoning and conclusion therein. I adopt them as mine and I have nothing more to add.

Consequently, I, too dismiss both appeals. The order of the Court of Appeal setting aside the ruling of the trial court made on the 14th October, 1994 is hereby affirmed but its order in respect of the judgment of the 12th July, 1994 which was made without jurisdiction is hereby declared a nullity and accordingly set aside. I abide by the order for costs made in the leading judgment.

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