

COURT OF APPEAL
JOS JUDICIAL DIVISION
10TH APRIL, 1996. CA/J/65M/95
CORAM: G. A. OGUNTADE, E. O. EDOZIE,
A. C. ORAH, JJCA

ALHAJI YAHAYA ARI DOMA & 2 ORS. APPELLANTS
AND
ALHAJI MOHAMMMED RAJJAB OGIRI & 2 ORS. RESPONDENTS

CONTEMPT- *Contempt of Court - Definition and classification - How to distinguish between a criminal and civil contempt.*

CONTEMPT- *Contempt of court - Right to be heard - The general rule - Is that a person in contempt cannot be heard - Or take proceeding in the same cause - Exceptions to the rule.*

CONTEMPT- *Contemnor - The applicant having filed an appeal-And an application for a stay of execution of the orders of the lower court- Cannot rightly be said to be in contempt of the said orders.*

INJUNCTIONS - *Application - For injunction - The Court will not grant it - To the applicant who has not any established legal right to protect.*

JUDGMENTS - *Orders - The test - Between declaratory orders of court.*

STATUTES - *Court of Appeal Act, 1976 - Provisions of s. 18 - By virtue of it an appeal neither operates as a stay of execution - Nor does it prescribe in favour of an execution.*

STAY OF EXECUTION - *Declaratory orders - A stay of execution cannot be granted in declaratory order - Except in respect of an executory order.*

STAY OF EXECUTION - Consequential order- An executory order be it consequential or collateral can be stayed - But the order in the instant case is not consequential.

STAY OF EXECUTION - Grant of - The principle governing the grant of stay of execution.

STAY OF EXECUTION - Application - Special circumstances - There does not exist one invariable way of showing special circumstances - To warrant a stay of execution.

STAY OF EXECUTION - Requirements - Recondite point of law - What it means.

STAY OF EXECUTION - Application - For stay of execution - What the court must consider.

STAY OF EXECUTION - Res - Nature of - The res in an action which a court has inherent power to preserve - May be tangible or intangible.

STAY OF EXECUTION - Status quo - The facts of the instant case and justice - Dictate maintenance of the status quo ante litem - Pending the determination of the appeal.

STAY OF EXECUTION - Res - Duty to preserve - The Court has a duty to preserve the res - To ensure that the appeal if successful is not rendered nugatory.

STAY OF EXECUTION - Status quo - Preserving any property in status quo - Presupposes the existence of an uncontested status quo - Preceding the pending controversy.

FACTS

The High Court of Justice Plateau State, sitting at Jos entered judgment

against the present appellants/applicants (as defendants in the action) in favour of the present respondents (as plaintiffs in same action) . With the demise of the last ANDOMA, late ONAWO, the stool of ANDOMA became vacant. The appellant/applicant was selected as the ANDOMA of DOMA by four (4) traditional selectors of Doma. The appointment of the appellant/applicant was subsequently approved by the Governor of Plateau State and State Council of Chiefs. The appellant/applicant has since then been installed the ANDOMA OF DOMA, moved into and has been resident in the PALACE of the ANDOMA of DOMA. He has since been giving instructions as the ANDOMA, performing the traditional functions and rites, enjoying the privileges appertaining to the office of the Andoma. The main disagreement leading to the present action is the introduction of three (3) title holders into the council of selectors for the STOOL OF ANDOMA. The three (3) title holders are the present respondents. The said disagreement led to the institution of several suits in the Plateau State High Court and the setting up of a panel of inquiry by the Governor.

In its judgment, the court (i) annulled the selection and recognition of the appellant/applicant as the ANDOMA OF DOMA by 4 selectors in accordance with Exh.'Q' (ii) declared the 3 respondents traditional selectors of ANDOMA in line with Exh. 'A' and also (iii) declared Exh. 'Q' which is the DOMA (modification native law and custom relating to the selection of the ANDOMA of Doma) Order 1993, unconstitutional, illegal, null and void and of no effect whatsoever there being a constitutional college or selectors in accordance with Exh. 'A'. The 4th order in the said judgment, also restrained the appellant/applicant perpetually from holding himself out as the ANDOMA, performing any of the functions, traditional rites and enjoying the privileges, traditional or official attached to the office of the ANDOMA. Dissatisfied with the judgment, the appellant/applicant appealed to the Court of Appeal, and subsequently brought this application for an injunction and stay of execution of the orders of the lower court against the respondent. The respondents opposed the application. The court distilled three issues as calling for determination in the case.

ISSUES FOR DETERMINATION

(i) Whether the appellant/applicant who lost the case in the lower court is entitled to a grant of injunction sought by him in his application against the successful respondents.

B (ii) Whether the appellant/ applicant whilst in disobedience of the judgment/ orders of the lower court against which he has appealed and filed an application for stay of execution of the said judgment is a contemnor, not entitled to be heard.

C (iii) Whether the judgment/orders of the lower court sought to be stayed are Declaratory orders and the appellant/applicant is not entitled to a grant of stay of execution.

HELD (Unanimously granting the application in part per leading Ruling delivered by **ORAH JCA**)

Injunctions - Application

1. It is therefore clear without doubt, that the appellant/applicant against whom the judgment of the lower court was entered, which he has appealed against and asks an injunction, has no established legal right which he seek a grant of an injunction against the respondents to protect. This court will not grant the injunction sought to the appellant/applicant who has not any established legal right to protect. Such an order if made by this court will be unwarranted, a null and void order made in vacuo. We resolve issue one (1) for a grant of injunction to the appellant/applicant against the appellant/applicant. Prayer one (1) for injunction sought by the appellant/applicant is hereby refused. (p. 504 E)

Contempt - Contempt of Court

2. Contempt of Court is defined and classified in Ezekiel-Hart v. Ezekiel-Hart (1990)1 NWLR (pt. 126) 276; (1990) 2 SCNJ 1 at P2.

"Contempt of court is either criminal or civil. It is criminal, when it consists of interference with administration of law, thus impeding and perverting the court of justice. It is civil, when it consists of disobedience to the judgments, orders, or other process of the court resulting or involving private injury."

In Abdullahi v. Governor of Lagos State (1989) 1 NWLR (Pt.97) 356 at P.359; Vaswani Trading Co. v. Savalakh (1972)12 SC 77 at p. 87-88 referred to) the distinction between criminal and civil contempt of court is also defined:-

"There is a distinction between a criminal contempt in respect of which a trial court may on its own motion issue a bench warrant for the arrest of the contemnor and a civil contempt where the powers exist. In a civil matter, the initiative rests with the party for whose benefit an order was made. (Vice Chancellor A.B.U. v. Ado (1986) 3 NWLR (pt. 31) 684 at 695 referred to)."

In the instant case, the contempt of court is a civil contempt (*sic, in*) disobedience to the judgment/orders of the lower court', to which there has been, neither a contempt proceedings initiated by the respondents against the appellant/applicant, nor evidence that the appellant/applicant had been adjudged a contemnor by any court of competent jurisdiction. (p. 508 G)

Contempt of Court - Right to be heard

3. On the issue, therefore, on whether a person in contempt can be heard; I will like to repeat what I said earlier on in the case of Chief E.I. Ifeadi & Anor. v. John Itsor Atedze (1995) 5 NWLR (pt. 394) 196 at pp. 219-202 paras. FF:-

"The general rule is that a person in contempt, that is a party against whom an order for committal has been made cannot be heard or take proceeding in the same cause until he has purged his contempt ; it is a step which the court will only take when the contempt itself impedes the course of justice and there is no other effective means of securing its compliance."

(a) *The rule is subject to the fundamental constitutional right to a hearing notwithstanding non-compliance with an order of court in the cause. The constitutional guarantee of a right to a hearing overrides and supersedes any common law principle precluding a hearing in any circumstances.*

(b) *The principle does not apply to applications challenging the*

order on ground of lack of jurisdiction.

(c) *The constitutional right to a hearing is clearly different from a right to enforce that right i.e. a consideration whether he is entitled to a declaration of the court whilst in continuing disobedience of the orders.*

(d) *a party who has appealed from an order and who has filed a motion for stay of execution therein cannot be proceeded against as a contemnor; nor can the order be enforced against him during the pendency of an application by him for stay of execution. Such a party cannot rightly be described as party in contempt to which the general rule should apply so as to deprive him a hearing for the simple reason that, whilst his application for stay is pending, he could not be said to be a contemnor.*

(e) *A person against whom a committal order has not been made is not a contemnor."* (p. 509 E)

Contempt - Contemnor

4. In the instance case, the appellant/applicant has not been adjudged a contemnor. The fact, that the appellant/applicant who suffered a defeat at the lower court is in continuing disobedience of the orders of the said lower court and cannot rightly be said to be in contempt of the said order (s), having filed an appeal which is still pending and an application for a stay of execution of the said orders of the lower court, he would be whilst in continuing contempt be entitled to his fundamental constitutional right of a hearing in the case. I adopt the authorities of the foregoing decisions of both the Supreme Court and the Court of Appeal and hold without fear of contradiction, that the appellant/applicant is not a contemnor, whilst in continuing disobedience or contempt of the orders of the lower court, is entitled to a hearing in his application for injunction and stay of execution. (p. 510 D)

Statutes - Court of Appeal Act, 1976

5. Section 18 of the Court of Appeal Act, 1976 deals with applications for stay of execution. By virtue of the provisions of section 18 of the

Court of Appeal Act, 1976, an appeal or filing thereof does neither eo ipso operate as a stay of execution, nor does it prescribe in favour of any execution being carried out during the pendency of an appeal, the Court of Appeal has got the jurisdiction to accede to an application for stay of execution conditionally or otherwise. The section does not give licence, B directly for the issue and execution of any process which may be offensive. The section simply delimits the scope of the statutory position of the parties after the filing of a Notice of Appeal (Shekoni v. Ojoko (1954) 14 WACA 504; Vaswani Trading Co. v. Savalakh & Co. (1972) 12 SC77 C at 83 referred to) (pp. 212-213 paras G-A). (p. 511 B)

Stay of execution - Declaratory orders

6. It seems to me therefore, that there is a common stand by both counsel for the parties, that the said orders 1, 2 and 3 of the lower court D sought by the applicant to be stayed are indeed Declaratory orders. I am equally of the opinion, that the said Orders 1,2, and 3 of the judgment of the lower court of 26/1/95 are declaratory orders for which a stay of execution cannot be granted. In the case of the Government of Gongola State v. Tukur (1989) 4 NWLR (Pt. 117) 592 at p.593, it was held, that E stay of execution cannot be granted in DECLARATORY judgments or orders of court, except they are EXECUTORY. This is because, a stay of execution only prevents the plaintiff or beneficiary of the judgment/ F order from putting into operation the machinery provided by the law for the execution of a judgment or order, as the case may be. An order for stay of execution pending an appeal, therefore, can only be granted in respect of an executory judgment or order. There is nothing executory G in the said orders 1,2 and 3 to execute, in favour of the respondents for which an order for stay can properly issue: See Makinde v. Akinwale (1995)6 NWLR (Pt.399) 1 at p8 (Paras. G-H); Government of Gongola State v. Tukur (1989) 4 NWLR (Pt.117) 592. (p. 513 B)

Judgments - Order

7. The test between Declaratory and Executory Judgments or Orders of court has been stated in a number of decided cases by the Supreme

Court. (See Okoya v. Santill (1990)2 NWLR (Pt.131) 172 at 178; Makinde Akinwale (1995) 6 NWLR (Pt.399) 1 and Govt. of Gongola State v. Tukur (1989) 4 NWLR (Pt. 117) 599.

To resolve the issue, whether a particular judgment/order of a court is executory, the question to be put and answered is:-

"Is there anything in the judgment/order(s) in favour of the respondents which the respondents could positively cause to be executed or enforced?"

If the answer is yes, the order/judgment is executory and if not, it is declaratory. Applying this simple test to Order 4 aforesaid, in which the lower court in favour of the respondents, restrained the appellant/applicant perpetually from holding himself out as the ANDOMA of DOMA, performing any of the functions, traditional rites and enjoying the privileges, traditional or official attached to the office of the ANDOMA, seems to me with the greatest respect, to be an executory order in line with the submission of Ayodele S.A.N. for the appellant/applicant which was not disputed at all by Alh. Adbullahi SAN for the respondents except that order 4 is a consequential order. (p. 514 B)

Stay of execution - Consequential orders

8. It is also noted, that Order 4 is not only executory, it purports to be so in future and in perpetuity. I am therefore, satisfied, that Order 4 is one which the respondents can cause to be executed. It is executory and therefore, one for which a stay of execution can be granted, pending the determination of the appeal. There is no law which says, that an executory order be it consequential or collateral cannot be stayed. I do not however accept, that Order 4 is consequential to Orders 1,2 and 3 aforesaid. Like heads of a claim to which a court should pronounce upon, the Orders 1, 2, 3 and 4 are specific Orders of the trial lower court. Each is an order independent of the other. None is ancillary or consequential to the other. Order 4 is not like an award of costs, that can be made at the discretion of the court. No court is entitled to grant to parties reliefs not sought by them. This is trite and well settled in law. Order 4 is not a consequential order. If it were so, it would be one made without jurisdiction.

tion. But this is not the case. (p. 515 G)

Stay of execution - Grant of

9. The principle governing the grant of stay of execution is now settled and laid down in a plethora of decided cases of the Supreme Court on the issue. The locus classicus is the case of Vaswani Trading Co. v. Savalakh & Co., (1972) 12SC 77 at P.28, in which the famous dicta of Bowen L.J. in the ANNOTLYLE (1886) 11 P.114 at p.16 was cited with approval and adopted, I choose to quote Bowen L.J. in the ANNOTLYLE in full:-

"We take it that the word "special" in the context is not used in antithesis to the words "common" for that would be tantamount to pre-judging the appeal on a determination of an application for stay of execution. When it is stated that the circumstances or conditions for granting a stay should be special or strong we take it as involving a consideration of some collateral circumstances and perhaps in some cases inherent matters which may, unless the order for stay is granted, destroy the subject-matter of the proceedings or foist upon the court, especially the Court of Appeal, a situation of complete helplessness or render nugatory any order(s) of the Court of Appeal or paralyze, in one way or the other, the exercise by the litigant of his constitutional right of appeal or generally provide a situation in which whatever happens to the case, and in particular even if the appellant succeeds in the Court of Appeal, there could be no return to the status quo. All rules governing stay of actions or proceedings, stay of proceedings, stay of executions of judgment s or orders and the like, are but corollaries of this great principle and seek to establish no other criteria, than the court and in particular the Court of Appeal, should at all times be master of the situation and that at no stage of the entire proceedings is one litigant allowed at the expense of the other or of the court to assume that role" (Italics mine for emphasis)

BOWEN L. J. has said it all. No other jurist has improve on that dicta. All other statements and /or pronouncements are but running commentaries or precis of the said principle so well ably propounded and stated. (p. 523 B)

Stay of execution - Application - Special circumstances

10. From the authority of the above decided cases, there does not exist just one invariable inexorable way of showing special circumstances to warrant a stay of execution. Each case depends on its own facts. Special circumstances may also arise from the inherent nature of the case on appeal as where the SUB-STRATUM of the case on appeal (as in the instant case) is the same as that on the application for stay, so that a refusal in consequence denudes the action of its substance. (See Okafor v. A.G. Anambra State (1989) 2 NWLR (Pt. 79) 736 at P.738). Another way of showing special circumstances is by filing grounds of appeal which raise substantial issues of law in an area in which the law is recondite. (See Blogun v. Blogun (1969) 1 ALL NLR 938. The list of special circumstances are not exhaustive. For an application for stay of execution to succeed, the applicant must show, that special circumstances exist. It will be special circumstances, where the subject-matter (the RES) will be destroyed, if the stay is not granted or foist upon the court, especially the Court of Appeal, a situation of complete helplessness or render nugatory any order(s) of the Court of Appeal or paralyze in one way or the other the exercise by the litigant of his constitutional right of appeal or generally provide a situation in which whatever happens to the case and in particular even if the appellant succeeds in the Court of Appeal, there could be no return to status quo (See Vaswani Trading Co. v. Savalakh & Co., (supra). It will be special circumstances if the appellant will be exposed to hardship (See Sentinel Assurance Co. Ltd. v. S.G.N. Ltd. (1992) 2 NWLR (Pt.224) 495 at p. 505. (p. 524 D)

Stay of execution - Requirements

11. A recondite point of law is one which having regard to the substance of the appeal, if the stay is not granted and the case is eventually decided in favour of the appellant, there will be irreparable damage such that there can be no return to the status quo because, the RES of the litigation has gone and the party who wins shall reap an empty judgment. (See Ajomale v. Yaduat (No.2) (1991) 5 NWLR (Pt.191) 266 at 291). On the meaning of recondite, it was held in Adefulu & 17 Ors v. Okulaja & 6 Ors. (1993)

2 NWLR (Pt. 274) 227 at p. 230 (page 240 para. D) thus:

"When it is said that an area of the law is recondite, it means that the law in that area is not commonly known or it is difficult to understand;

and I add; 'it has to be 'special' in the context that it is not used in antithesis to the words "common" for that would be tantamount to pre-judging the appeal on a determination of an application for stay of execution. All it means is, that the circumstances or conditions for granting a stay should be special, strong or substantial (Vaswani Trading Co v. Savalakh & Co. (1972) 12 SC 77 (supra). (p. 525 C) C

Stay of execution - Application

12. In considering an application for stay of execution, the court must also consider the following:- D

(i) The interest of the successful party to enjoy the fruits of his or their litigation, and

(ii) the need to preserve the RES of the litigation or status quo, if failure to do so will render the appeal nugatory (Okafor v. Nnaife (1987) 4 NWLR (Pt.64) 129. (p. 525 H) E

Stay of execution - Res

13. The Res in an action which a court of record has an inherent power to preserve may be tangible as in the case of funds in dispute or intangible as a right to decide who succeeds to the rulership as in the instant case in hand. (See Kigo (Nig) Ltd. v. Holman Bros (Nig) Ltd. (1980) 5-7 SC 60 at 73. (p. 527 E) F

Stay of execution - Status quo

14. I respectfully adopt the reasoning in the foregoing cases, which I have cited and examined and hold, that the facts of this case and justice dictate maintenance of the status quo ante litem pending the determination of the appeal before us. We are not at this stage dealing with and deciding the pending appeal. I would therefore, not discuss the issue further in details so as not to prejudice the appeal. But the possibility of G

the appellant/applicant succeeding on appeal cannot be ruled out. The appellant/applicant should, therefore, in my respectful view stay as he has been after his selection and recognition as the Andoma of Doma before he is restrained as per Order 4 of Exhibit 1, the judgment of the lower court of 26/1/95 from parading himself out as the Andoma of Doma. The office or stool of Andoma of Doma is an intangible Res - the sub-stratum of the dispute in the appeal and same in this application which needs to be preserved. (p. 527 F)

C *Res - Duty to preserve*

15. A court from which an appeal lies as well as a court to which an appeal lies have a duty to preserve the Res for the purpose of ensuring that the appeal if successful is not nugatory. (See Kigo (Nig.) Ltd. v. Holman Bros. (Nig.) Ltd. (1980) (supra) at p. 70 -72. (p. 528 A)

Preserving any property in status quo

16. Putting or preserving any property or status in status quo, presupposes the existence of an actual, peaceable, uncontested status quo preceding the pending controversy as distinct from a status quo effected by a wrong-doer by institution of the action e.g. where the ruler took office viet armis, in other words, a trespasser cannot by the very act of trespass create a status quo. (See Governor of Lagos State v. Ojukwu (supra) at p. 625, see also Thompson v. Peak (1944) 2 ALL ER 477 referred to). (p. 528 D)

REPRESENTATION

G Olajide Ayodele, (SAN) with O. B. James for the appellant/Applicants
Alh. Abdullahi Ibrahim (SAN) with Suleiman Adetunji and Oyeyipo Romiti for the Respondents

H CASES REFERRED TO

Shekoni v. Ojoko (1954) 14 WACA 504
Makinde v. Akinwale (1995)6 NWLR (Pt.399) 1 at p8 (Paras. G-H)
Vaswani Trading Co. v. Savalakh (1972) 12SC 77 at P.28

Okafor v. A.G. Anambra State (1989) 2 NWLR (Pt. 79) 736 at P.738

Balogun v. Balogun (1969) 1 ALL NLR 938

Ajomale v. Yaduat (No.2) (1991) 5 NWLR (Pt.191) 266 at 291

Adefulu v. Okulaja (1993) 2 NWLR (Pt. 274) 227 at p. 230 (page 240

Kigo (Nig) Ltd. v. Holman Bros (Nig) Ltd. (1980) 5-7 SC 60 at 73

Thompson v. Peak (1944) 2 ALL ER 477

STATUTE REFERRED TO

Court of Appeal Act, 1976, s. 18

BOOK REFERRED TO

Halsbury's Laws of England 4th edition vol. 9 para 206

LEAD JUDGMENT BY ORAH JCA

The High Court of Justice Plateau State, sitting at Jos, presided over by M.M. Ochoga. J. on the 26th of January, 1995, entered judgment Suit No. PLD/429/1993 against the present appellants/applicants (as defendants in the action). In favour of the present respondents (as plaintiffs in same action.). Entering the judgment of the court, the learned trial Judge said inter alia:-

"In the result, for the reasons which I have stated. I am of the opinion that plaintiffs have proved their case and these are my orders:-

"1. That Exh. 'Q' which is the Doma (modification of native law and custom relating to the selection of the ANDOMA of DOMA) Order 1993 is unconstitutional, illegal, null and void and of no effect whatsoever, there being a constitutional college of selectors in accordance with Exh. 'A'.

2. That the plaintiffs herein are hereby declared traditional selectors of ANDOMA of DOMA in Doma in line with EXh.'A'.

3. That the purported selection of Alhaji Yahaya Ari Doma as the Andoma of Doma by four selectors in accordance with EXh.'Q' is null and void and of no effect whatsoever.

4. That Alhaji Yahaya Ari Doma is hereby restrained from

holding himself out as the Andoma of Doma, performing any of the functions, traditional rites and enjoying the privileges, tradition or official attached to the office of the Andoma."

Dissatisfied with the judgment of the High Court of Plateau State, B Jos dated the 26th January, 1995, 1st defendant Alhaji Yahaya Ari Doma as appellant through his counsel, Olajide Ayodele (SAN) filed two Notices of Appeal dated the 31st January, 1995 and 6th March, 1995, respectively.

C Whilst the appeal is still pending before this court and not yet heard, appellant/applicant through his counsel, Olajide Ayodele (SAN) on 13/4/95, brought an application on notice dated the 13th of April, 1995, pursuant to section 18 of the Court of Appeal Act, 1976 and Order 3 Rule 3 (3) of the Court of Appeal Rules (as amended) 1981, praying the D court for the following orders:-

"(1) Restraining the respondents in this application, their agents, servants, privies, public servants and any other persons whatsoever from carrying out or giving effect to the Declaratory Order or Orders contained in the judgment of the Plateau State High Court in this suit dated E 26th day of January, 1995, pending the determination of the Appeal filed by the appellant/applicant by this Honourable Court."

2. Stay of Execution of the judgment of the Plateau State High F Court dated 26th January, 1995, pending the hearing and determination of the Appeal filed against the said judgment, by this Honourable Court."

In support of the application are three affidavits deposed to severally by (i) Mr. M.A. Akwe (Makama Doma), (ii) Mr. D.O. Ashikeni and (iii) Dr. Christopher O. Iyimogah. There is also, a further affidavit sworn to by Mr. M.A. Akwe (Makama Doma). All the affidavits were sworn to with the consent and authority of the appellant/applicant. In support of the motion - 'Reply to a further-counter affidavit of the 1st respondent' G appellant/applicant deposed himself to a 10 paragraph affidavit. For H easy reference, I will number and mark all these annexures in support of the application as follows:-

(1) Exhibit "A1" - is a 24 paragraph affidavit of Mr. M.A. Akwe, to which is annexed, a Ruling of the lower court dated 13/4/95 refusing

stay of Execution of its judgment of 26/1/95.

(2) Exhibit "A2" - is a 4 paragraph further -affidavit of Mr. M.A. Akwe.

(3) Exhibit "A3" - is a 16 paragraph affidavit of Mr. D.O. Ashikeni (Makama Doma).

(4) Exhibit "A4" - is a 10 paragraph affidavit of Dr. Christopher O. Iyimogah.

(5) Exhibit "A5" - is a 10 Paragraph affidavit in support of the motion -' REPLY to the further counter-affidavit of the 1st respondent." The following are marked and Exhibited to the affidavit in support:-

(6) Exhibit 1 - is a certified true copy of the judgment of the lower court of 26/1/95 appealed against.

(7) Exhibit 2 - is Notice of Appeal dated 31/1/95, consisting of five grounds of appeal marked serially (a) (b) (c) (d) (e) and (f).

(8) Exhibit 3 - is Notice of Appeal dated 6/3/95, consisting of six (6) grounds of appeal marked serially (g) (h) (i) (j) (k) and (l).

In effect, the two notices of appeal together consist of 12 grounds of appeal marked serially from (a) to (l).

In opposition to the application, the respondents filed a counter-affidavit and a further counter-affidavit, which for easy reference, I will also marked as Exhibits 6 and 7.

(a) Exhibit 6 - is a counter-affidavit of 31 paragraphs, and

(b) Exhibit 7 - is a further counter-affidavit of 9 paragraphs, both sworn to by the 1st respondent Alhaji Mohammed Rajab Ogiri (Pakachi Doma).

Annexed to Exhibit 7 - a further counter-affidavit, are the following two annexures therein marked Exhibits A and B respectively:-

(i) *Exhibit A - is "EWA & ODUDU DI DOMA 1996 ALMA-NAC carrying the photograph of his Royal Highness Alhaji Yahaya Ari Doma amongst others."* and

(ii) *Exhibit B - is a photocopy of SPECIAL WEDDING INVITATION' to one Alh. Den Tsoho to the wedding Fathia of Aishatu Yahaya on Friday 29th December, 1995 at the ANDOMA's palace, Doma. The invitation ex facie is at the instance of the families of His Royal High-*

ness, the Andoma of Doma, Alh. Yahaya Ari Doma and Chief Dania Ibrahim Dello.:

I have very carefully, painstakingly read through the affidavit evidence and the exhibits in support of the appellant/applicant's application, the count and further counter-affidavit and the exhibits of the respondents in opposition to the application. I have also equally very carefully, summarized the submissions of learned counsel for the determination in the case. From the foregoing, it seems to me, that the issues which fall for determination in the case are as follows:-

(i) *Whether the appellant/applicant who lost the case in the lower court is entitled to a grant of injunction sought by him in his application against the successful respondents.*

(ii) *Whether the appellant/ applicant whilst in disobedience of the judgment/ orders of the lower court against which he has appealed and filed an application for stay of execution of the said judgment is a contemnor, not entitled to be heard.*

(iii) *Whether the judgment/orders of the lower court sought to be stayed are Declaratory orders and the appellant/applicant is not entitled to a grant of stay of execution.*

In my respectful views, the above three (3) issues for determination which i have identified will suffice in the determination of the application in this case. I therefore propose to resolve these issues as the only issues in controversy in the application before us.

Before resolving the issues for determination above, which I have identified, it is necessary to state, the brief accepted facts of the case, in order to have a clear and unobscured view and knowledge of the whole case. The facts as herein-after stated, are called out of Exhibit 1 the judgment of the lower court of 26/1/95 annexed to the affidavit in support, the affidavit evidence, counter-affidavit evidence and annexures therein attached.

The brief facts of the case are as follows:-

With the demise of the last ANDOMA - late ADDRA ODE ALIYU ONAWOM on 13/6/91, the STOOL of ANDOMNA of became vacant. On 29/1/93; the appellant/applicant was selected the ANDOMA of DOMA,

by four(4) traditional selectors of Doma. The appointment of the appellant/applicant was subsequently approved by the Governor of Plateau State and State Counsel of Chiefs. The said approval took effect from 1/11/93. The appellant/applicant has since then been installed the ANDOMA of DOMA, moved into and been resident in the PALACE of the ANDOMA of DOMA. He has since been giving instructions as the ANDOMA, performing the traditional functions and rites, enjoying the privileges appertaining to the office of the ANDOMA and lying its flag. B

The main dispute/disagreement is what the appellant/applicant calls - 'the' introduction of the following three (3) title holders into the council of selectors for the STOOL of ANDOMA' (sic) (i) PAKACHI DOMA (ii) FAFIDA DOMA and (iii) WAZIRIN DOMA, which titles are claimed respectively by the three (3) respondents. The said disagreement led to the institution of several suits in the Plateau State High Courts and the setting up of a Panel of Inquiry by the Governor of Plateau State. D

Exhibit 1, the judgment of the lower court delivered on 26/1/95 annexed to the affidavit in support of the application in this case, is the result of an action by the respondents (as plaintiffs in this case); which (i) annulled the selection and recognition of the appellant/applicant as the ANDOMA of Doma by 4 selectors in accordance with Exh. 'Q' (ii) declared the three (3) respondents traditional selectors of ANDOMA in line with Exh. 'A' and also (iii) declared Exh. 'Q' which is the DOMA (modification native law and custom relating to the selection of the ANDOMA of Doma) Order 1993, unconstitutional, illegal, null and void and of no effect whatsoever, there being a constitutional college of selectors in accordance with Exh. 'A' . The 4th order in the said judgment, also restrained the appellant/applicant perpetually from holding himself out as the ANDOMA, performing any of the functions, traditional rites and enjoying the privileges, traditional or official attached to the office of the ANDOMA. F G

Dissatisfied with the judgment of the lower court of 26/1/95, the ANDOMA appealed and subsequently brought this application for an injunction and stay of execution of the orders of the lower court against the respondents. H

It is now apposite to resolve the issues for determination which I have identified. On issue one (1) 'whether, the appellant/applicant who lost in the court below is entitled to a grant of injunction against the successful respondents', it is trite law, that the court will grant an injunction to protect an established legal right. Oniah v. Onyiah 1989) 1 NWLR (Pt.99) 514 at p536; Green v. Green (1987) 3 NWLR (Pt. 61) 480 at p 482).

In resolving this issue, I will like to repeat, what I said earlier in Alhaji Abdulkarim Iyimoga & 18 Ors. v. Governor of Plateau State & 8 Ors (1994) 8 NWLR (Pt.360) 73 at P 103 paras. F-H (in which the present appellant/applicant was one of the respondents):

"It is trite law, that the aim of an injunction is to protect established legal right. The court will grant an injunction to protect an established legal right. Courts of law do not grant injunction to one who has not established the legal right he seeks to protect. It would amount to making an unwarranted order and in the instant case.... (to a person who lost at the lower court). Such an order would be a null and void order made in VACUO. .injunction is not granted as a matter of course (John Holt (Nig) Ltd. v. Holts African Workers Union of Nigeria and Cameroon (1963) 2 SCNLR 383; Misini v. Balogun (1968) 1 All NLR 318.

It is therefore clear without doubt, that the appellant/applicant against whom the judgment of the lower court was entered, which he has appealed against and asks an injunction, has no established legal right which he seek a grant of an injunction against the respondents to protect. This court will not grant the injunction sought to the appellant/applicant who has not any established legal right to protect. Such an order if made by this court will be unwarranted, a null void order made in vacuo. We resolve issue one (1) for a grant of injunction to the appellant/applicant against the appellant/applicant. Prayer one (1) for injunction sought by the appellant/applicant is hereby refused.

On issue two (2) whether the appellant/applicant whils in disobedience of the judgment/orders of the lower court against which he has appealed and brought an application for stay of execution of the said

judgment, is a contemnor and not entitled to be heard, the learned SAN has argued, that because the appellant/applicant has not complied with the judgment/orders of the lower court and has continued exercising the functions, rites and enjoying the privileges appertaining to the office of ANDOMA of Doma.. He has printed an ALMANAC with his photograph as His Royal Highness, the ANDOMA of DOMA and an invitation to his daughter's wedding ceremony, all in his capacity as the ANDOMA in contempt of the judgment of the lower court against him. He is not entitled to be heard and not entitled to a grant of stay of execution of the judgment he has not obeyed and flouts. In support of this contention, Abdullahi SAN, cited the case of Governor of Lagos State v. Ojukwu (1986) 1 NWLR (Pt. 18) 621 at p.633 para. G; 634(E); Lawal-Osuala v. Lawal (1995) 3 NWLR (Pt.382) 128 at p143-144 (para) paras. H - A; Ezegbu v. F.A.T.B. (1992)7 NWLR (Pt. 251) 89.

I have read in particular the case of Governor of Lagos State v. Ojukwu (1986) (supra). It should be distinguished from the facts of the instant case to which it does not apply. The case of Ezegbu v. First African Trust Bank Ltd. (1992) (supra) does also not support the submission of counsel for the respondents in this case.

Ezegbu v. FATB (supra) admits of the exception that:

" In certain cases however, the court issues disciplinary mandatory injunction to prevent a successfully party from preempting an application for stay of execution or from pre-empting the appeal itself by rushing the process of execution so as to frustrate the exercise by the court of its jurisdiction to hear the application for stay of execution or the appeal itself. It is the disobedience to such disciplinary mandatory type of order that will prevent the court from exercising its discretion to entertain such application".

The above quoted passage in Ezegbu v. FATB (supra) was the fact in Governor of Lagos State v. Ojukwu (supra). It is not the fact in the instant case. In such cases i.e. in Ezegbu v. FATB (supra) and Governor of Lagos State v. Ojukwu (supra), the disciplinary mandatory order is made against the respondent who may or have taken peremptory steps or rushed the process to frustrate or stultify an application for a

stay of execution and/or the appeal.

The view canvassed by the learned SAN for the respondents is without doubt grossly misconceived. The case of Ezegbu v. FATB (supra) cited by Abdullahi SAN supports the view canvassed by Ayodele B SAN for the applicant. In Ezegbu v. FATB (supra) at (Pt.91), the court held:-

"Where a party who has suffered a defeat following a trial in any cause or matter is appealing, and asked the court for a stay, he will not be held to be in contempt merely because he has not obeyed the order C which he is appealing against or which he wants stayed or suspended pending appeal. In the instant case, the plaintiffs/applicants would not be committing any act of contempt of court for failing to comply with the order contained in the ruling of the Court of Appeal dated 5th December, D 1991, having purportedly filed on the 18th December, 1991 a notice of appeal and accompanied same with an application simultaneously for stay of the order of the court pending the appeal. (Military Governor Lagos State v. Ojukwu (1986) 1 NWLR (Pt.18) 621; Rastico Nig. Ltd. v. E S.G.S. (1990)6 NWLR (Pt.158) 608 referred to (P 101) paras. C-D, and C-H):.

It seems to me therefore, that the submission of Abdullahi SAN for the respondents, that the appellant/applicant or indeed, a person in F contempt of the order of court cannot be heard, is grossly misconceived and untenable. The general rule has been stated in Halsbury's Laws of England 4th Edition Vol. 9. para. 206 as follows:

"the general rule is that a party in contempt, that is a party G against whom an order for committal has been made, cannot be heard or take proceedings in the same cause until he has purged his contempt."

This strict rule has its history and origin in common law. It was later adopted by the Ecclesiastical, Chancery and Divorce Courts. Chuck v. Cremer (1846) 1 Coop. Tempt. Cott 206; 47 ER. 820.

H Denning L.J in Hadkinson v. Hadkinson (1952) CA 285, after tracing the history and circumstances which gave rise to the rule and reversing the several cases decided in the Chancery, Ecclesiastical and Divorce Courts, stated the modern rule and said at (P.298);

"These cases seems to me to point the way to the modern rule. It is a strong thing for a court to refuse to hear a party to a cause and it is only to be justified by grave consideration of public policy. It is a step which the court will only take when the contempt itself impedes the course of justice and there is no other effective means of securing its compliance. B

After referring to what Sir, George Jessel M.R. said in Re: Clements v. Eleanner (1877) 44 L.J. Ch. 375, 368, he said:

"Applying this principle, I am of the opinion, that the fact that a party to a cause has disobeyed an order of the court is not itself a bar to his being hear, but if his obedience is of such that, so long as it continues it impedes the course of justice in the case, by making it more difficult for the court to ascertain the truth or to enforce the order which it may make, then the court may in its discretion refuse to hear him until the impediment is removed or good reason is shown why it should not be removed". C D

(i) *Karibi-Whyte JSC in Odogwu v. Odogwu* (1992) 2 NWLR (Pt. 225) 539 at p.553 said:- E

"It is the constitutional right of the applicant to be heard."

(ii) *In Fred Huang v. Bello* (1990) 6 NWLR (Pt.159) 671 at (Pp.678) para. G, it was held:-

"That the Governor of Lagos State v. Ojukwu (1986) 2 SC 77. (1986) 1 NWLR (Pt.18) 621 has been misconceived." F

(iii) *Karibi-Whyte JSC in first African Trust Bank Ltd. & Ors. v. Basil O. Ezegbu & Anor* (1992) 9 NWLR (Pt.264)132, (1992)12 SCNJ 1 at (p.3) held and said:-

"The right to be heard in our courts of law or tribunals is fundamental and guaranteed under our constitution. At the same time, the constitution vests in the court all inherent powers and sanctions of a court of law by section 6(6) (a) of the Constitution, 1979. These unspecified common law powers enable the courts to enforce their decisions to do justice according to law between litigants coming before them. This right overrides and supersedes any common law principle precluding hearing in any circumstance." G H

(iv) Wali JSC delivering the judgment of the Supreme Court therein re-emphasizing what he said in *Odogwu v. Odogwu* (supra) said:

"However, whereas a contemnor is entitled to be heard even in respect of a matter in which he is in contempt, it is clearly a different consideration whether he is entitled to the discretion of the court whilst in continuing disobedience of its orders. The common law principles precluding persons in disobedience of orders of court from being heard in respect of matters in which they stand in disobedience is well settled. There are a few exceptions to this general rule. The principle however does not apply to applications challenging the order on the lack of jurisdiction. There is a clear distinction between the right to be heard in defence of the order made and the right to enforce an order whilst in disobedience. The right to be heard is clearly different from the right to enforce a right whilst in obedience."

(v) Babalakin, J.C.A. (as he the was) in *Huang v. Bello* (1990) 6 NWLR (Pt.156)671 at 678 said;

"..... several decisions of this court and that of the Supreme Court show, that where a party is appealing against a matter in which he has suffered a defeat and asked for a stay of execution pending the determination of that appeal, he will not be held in contempt merely because he had not obeyed the order which he is appealing against or which he wants stayed or suspended pending an appeal."

I am in respectful agreement with the views expressed in the foregoing cases which I have expounded.

I am also of the opinion, that lord Denning's dicta above-quoted in *Hadkinson v. Hadkinson* (supra), postulates a distinction between Criminal and Civil contempt of court, for which Court of law ought to have different approach and consideration.

Contempt of Court is defined and classified in Ezekiel-Hart v. Ezekiel-Hart (1990)1 NWLR (pt. 126) 276; (1990) 2 SCNJ 1 at P2.

"Contempt of court is either criminal or civil. It is criminal, when it consists of interference with administration of law, thus impeding and perverting the court of justice. It is civil, when it consists of disobedience to the judgments, orders, or other process of the court

resulting or involving private injury."

In *Abdullahi v. Governor of Lagos State* (1989) 1 NWLR (Pt.97) 356 at P.359; *Vaswani Trading Co. v. Savalakh* (1972)12 SC 77 at p. 87-88 referred to) the distinction between criminal and civil contempt of court is also defined:- B

"There is a distinction between a criminal contempt in respect of which a trial court may on its own motion issue a bench warrant for the arrest of the contemnor and a civil contempt where the powers exist. In a civil matter, the initiative rests with the party for whose benefit an order was made. (Vice Chancellor A.B.U. v. Ado (1986) 3 C NWLR (pt. 31) 684 at 695 referred to)."

In the instant case, the contempt of court is a civil contempt (sic, in) disobedience to the judgment/orders of the lower court', to which there has been, neither a contempt proceedings D initiated by the respondents against the appellant/applicant, nor evidence that the appellant/applicant had been adjudged a contemnor by any court of competent jurisdiction.

On the issue, therefore, on whether a person in contempt E can be heard; I will like to repeat what I said earlier on in the case of *Chief E.I. Ifeadi & Anor. v. John Itsor Atedze* (1995) 5 NWLR (pt. 394) 196 at pp. 219-202 paras. F.F:-

"The general rule is that a person in contempt, that is a party F against whom an order for committal has been made cannot be heard or take proceeding in the same cause until he has purged his contempt; it is a step which the court will only take when the contempt itself impedes the course of justice and there is no other effective means G of securing its compliance.

(a) *The rule is subject to the fundamental constitutional right to a hearing notwithstanding non-compliance with an order of court in the cause. The constitutional guarantee of a right to a hearing overrides and supersedes any common law principle precluding a hearing H in any circumstances.*

(b) *The principle does not apply to applications challenging the order on ground of lack of jurisdiction.*

(c) *The constitutional right to a hearing is clearly different from a right to enforce that right i.e. a consideration whether he is entitled to a declaration of the court whilst in continuing disobedience of the orders.*

B (d) *a party who has appealed from an order and who has filed a motion for stay of execution therein cannot be proceeded against as a contemnor, nor can the order be enforced against him during the pendency of an application by him for stay of execution. Such a party cannot rightly be described as party in contempt to which the general rule should apply so as to deprive him a hearing for the simple reason that, whilst his application for stay is pending, he could not be said to be a contemnor.*

D (e) *A person against whom a committal order has not been made is not a contemnor."*

In the instance case, the appellant/applicant has not been adjudged a contemnor. The fact, that the appellant/applicant who suffered a defeat at the lower court is in continuing disobedience of the orders of the said lower court and cannot rightly be said to be in contempt of the said order (s), having filed an appeal which is still pending and an application for a stay of execution of the said orders of the lower court, he would be whilst in continuing contempt be entitled to his fundamental constitutional right of a hearing in the case.

I adopt the authorities of the foregoing decisions of both the Supreme Court and the Court of Appeal and hold without fear of contradiction, that the appellant/applicant is not a contemnor, whilst in continuing disobedience or contempt of the orders of the lower court, is entitled to a hearing in his application for injunction and stay of execution. Having disposed of the issue of injunction, we are obliged to give the appellant/applicant a hearing for prayer (2) of his application for a grant of stay of execution of the judgment/orders sought in his application.

The final issue for determination in this case (sic) "whether the judgment/orders of the lower court sought to be stayed are declaratory

orders and the appellant/applicant is not entitled to a grant of stay of execution." deals with appellant/applicant's prayer (2) for stay of execution of the judgment of the Plateau State High Court dated the 26th January, 1995, pending the hearing and determination of the appeal filed against the said judgment before this court. B

Section 18 of the Court of Appeal Act, 1976 deals with applications for stay of execution. By virtue of the provisions of section 18 of the Court of Appeal Act, 1976, an appeal or filing thereof does neither eo ipso operate as a stay of execution, nor does it prescribe in favour of any execution being carried out during the pendency of an appeal, the Court of Appeal has got the jurisdiction to accede to an application for stay of execution conditionally or otherwise. The section does not give licence, directly for the issue and execution of any process which may be offensive. The section simply delimits the scope of the statutory position of the parties after the filing of a Notice of Appeal (Shekoni v. Ojoko (1954) 14 WACA 504; Vaswani Trading Co. v. Savalakh & Co. (1972) 12 SC77 at 83 referred to) (pp. 212-213 paras G-A). C D E

The grant of stay of execution is undoubtedly and clearly at the discretion of the Court of Appeal which discretion must be exercised judicially (Martins v. Nicannar Food Co. Ltd. (1988) 2 NWLR (Pt.74) 76 (p.223 paras. F-G).

Opposing the appellant/applicant's prayer (2) for stay of execution, Alh. Abdullahi S.A.N for the respondents submitted, that the application is misconceived in that, the orders of the lower court (sic): F

(i) Orders 1,2 and 3 at page 20 of Exhibit 1- the judgment of the lower court delivered on 26/1/95 are Declaratory, it being trite that they cannot be stayed (see Government of Gongola State v. Turkur (1989) 1 NWLR (Pt. 117) 592 at P. 593; Akibu v. Oduntan (1991) 2 NWLR (Pt 171)1 at p. 13, and G

(ii) Order 4 of the said judgment of the lower court delivered on 26/1/95 at page 20 Exhibit 1 is a consequential order, cannot stand alone, follows the principal reliefs, which if they fail collapses. Order 4 aforesaid is incapable of standing alone. H

It is further submitted by the learned SAN for the respondents, that the applicant must show in addition:

(iii) That there is special circumstances to warrant a stay of execution i.e good grounds of appeal in an area where the law is recondite.

It is submitted, that there is nothing of that nature in the grounds of appeal attacking the findings of the lower court which are seen every day. They are not new. It is submitted, that Exh 'Q' is not recondite and the application must fail. It is submitted, that a similar application was refused in Akibu's case (supra) (and distinguished from Adefulu's case (supra):

(iv) *That the applicant must also show, that the RES will be destroyed if stay is refused and foist upon the court a situation of hopelessness i.e. if the applicant succeeds in the appeal, he cannot be restored to the status quo, because he can still contest. (See Vaswani Trading Co. v. Savalakh & Co., (1972) 12 SC 77.*

The learned S.A.N. urged the court to refuse the stay of execution sought by the appellant/applicant.

At this stage, I deem it necessary to reproduce the orders of the lower court referred to above at page 20 of Exhibit 1 as follows:-

"1. That Exht 'Q' which is the Doma (Modification of native law and custom relating to the selection of the ANDOMA of Doma) order 1993 is unconstitutional, illegal, null and void and of no effect whatsoever, there being a constitutional college of selection in accordance with Exht 'A' "

"2. That the plaintiffs herein are hereby declared traditional selectors of ANDOMA of Doma in line with Exht 'A' "

"3. That the purported selection of Alhaji Yahaya Ari Doma as the ANDOMA of Doma by four selectors in accordance with Exht 'Q' is null and void and of no effect whatsoever."

4. That Alhaji Yahaya Ari Doma is hereby restrained PERPETUALLY from holding himself out as the ANDOMA of DOMA, performing any of the functions, traditional rites and enjoying the privileges, traditional or official attached to the office of the ANDOMA."

In respect of the orders (1), (2) and (3) above, of the lower court sought to be stayed by the appellant/ applicant, which learned counsel for the respondents submitted are declaratory orders for which a stay should not in law be granted, it seems to me, that Ayodele S.A.N. for the applicant did not express any strong and contrary view to that of Abdullahi S.A.N above -stated. **It seems to me therefore, that there is a common stand by both counsel for the parties, that the said orders I, 2 and 3 of the lower court sought by the applicant to be stayed are indeed Declaratory orders. I am equally of the opinion, that the said Orders 1,2, and 3 of the judgment of the lower court of 26/1/95 are declaratory orders for which a stay of execution cannot be granted. In the case of the Government of Gongola State v. Turkur (1989) 4 NWLR (Pt. 117) 592 at p.593, it was held, that stay of execution cannot be granted in DECLARATORY judgments or orders of court, except they are EXECUTORY. This is because, a stay of execution only prevents the plaintiff or beneficiary of the judgment/order from putting into operation the machinery provided by the law for the execution of a judgment or order, as the case may be. An order for stay of execution pending an appeal, therefore, can only be granted in respect of an executory judgment or order. There is nothing executory in the said orders 1,2 and 3 to execute, in favour of the respondents for which an order for stay can properly issue: See Makinde v. Akinwale (1995)6 NWLR (Pt.399) 1 at p8 (Paras. G-H); Government of Gongola State v. Tukur (1989) 4 NWLR (Pt.117) 592.**

To the extent, that the application of the appellant for stay of orders 1,2 and 3 of the lower court which the respondents could not cause to be executed, it may be rightly argued, as submitted by abdullahi SAN for the respondents, was misconceived by the appellant/applicant.

I will now consider Order 4 of the Orders made by the lower court in "Exh '1' - at page 20 above-stated. The only submission made by the learned SAN for the respondents is, that "order 4 is a consequential order, it follows the principal orders. It cannot stand alone and if the principal orders fail it collapses." The above submission was Abdullahi

SAN's reply to the positive submission of Ayodele SAN, that order 4 aforesaid is executory, which point Ayodele SAN re-emphasized in reply to Alh. Abdullahi's submission above -stated. The learned S.A.N for the respondents has not submitted before us, that Order 4 aforesaid, is either Declaratory or not executory.

The test between Declaratory and Executory Judgments or Orders of court has been stated in a number of decided cases by the Supreme Court. (See okoya v. Santill (1990)2 NWLR (Pt.131) 172 at 178; Makinde Akinwale (1995) 6 NWLR (Pt.399) 1 and Govt. of Gongola State v. Tukur (1989) 4 NWLR (Pt. 117) 599.

To resolve the issue, whether a particular judgment/order of a court is executory, the question to be put and answered is:-

"Is there anything in the judgment/order(s) in favour of the respondents which the respondents could positively cause to be executed or enforced?"

If the answer is yes, the order/judgment is executory and if not , it is declaratory. Applying this simple test to Order 4 aforesaid, in which the lower court in favour of the respondents, restrained the appellant/applicant perpetually from holding himself out as the ANDOMA of DOMA, performing any of the functions, traditional rites and enjoying the privileges, traditional or official attached to the office of the ANDOMA, seems to me with the greatest respect, to be an executory order in line with the submission of Ayodele S.A.N. for the appellant/applicant which was not disputed at all by Alh. Adbullahi SAN for the respondents except that order 4 is a consequential order.

In the affidavit of the appellant/applicant, in support of this application, it is deposed to, at paragraphs 20 and 21 of Exhibit 'A1"- the affidavit of Mr. M. Akwe (Makama Doma) as follows:-

"20. That the appellant/applicant has been on the throne as ANDOMA of Doma from the 1st day of November, 1993 until the 26th day of January, 1995, when the Plateau State High Court declared his appointment as ANDOMA invalid".

"20. That I know as a fact, that the respondents are bent on

starting the exercise for the selection of the ANDOMA of Doma all over again in order to cause another person to be nominated and appointed the ANDOMA of Doma before the determination of the appeal filed by the appellant by this Honourable Court."

I have read through the counter-affidavit and further-counter-affidavit of the respondents. No where in the said counter-affidavits of the respondents did they deny paragraph 21 of the affidavit. Paragraph 21 of the appellant/applicant's affidavit is a clear, undenied evidence, that the respondents as a fact, were indeed already starting the exercise of enforcing order 4 by a process of selecting a new ANDOMA. The only reply to order 4 which we have on record is, the submission of the learned S.A.N. for the respondents, that it does not necessarily follow, that because, the stool is declare vacant, a selection would be rushed or is automatic. It is noted, that counsel for the respondents submitted, that paragraph 9 of the counter-affidavit which merely stated (sic)

"that there are 7 recognized traditional selectors making up the Council of Selectors amongst whose functions are the selection of the ANDOMA of Doma and the respondents are members of the same", is a denial to paragraphs 20 and 21, My finding from the records before us is, that paragraph 21 is specific and was not anywhere denied. The above is only an example to show, that order 4 is executory and as stated, the respondents are bent on starting/commencing the process of causing its execution by selecting a new ANDOMA, thus putting a stop to him parading himself out as ANDOMA of Doma and performing the functions of his office both traditional and official. Independent of the above, I am satisfied, that order 4 is executory.

It is also noted, that Order 4 is not only executory, it purports to be so in future and in perpetuity. I am therefore, satisfied, that Order 4 is one which the respondents can cause to be executed. It is executory and therefore, one for which a stay of execution can be granted, pending the determination of the appeal. There is no law which says, that an executory order be it consequential or collateral cannot be stayed. I do not however accept, that Order 4 is consequential to Orders 1,2 and 3 aforesaid. Like heads of a claim

to which a court should pronounce upon, the Orders 1, 2, 3 and 4 are specific Orders of the trial lower court. Each is an order independent of the other. None is ancillary or consequential to the other. Order 4 is not like an award of costs, that can be made at the discretion of the court. No court is entitled to grant to parties reliefs not sought by them. This is trite and well settled in law. Order 4 is not a consequential order. If it were so, it would be one made without jurisdiction. But this is not the case.

It seems to me therefore, that order 4 is not a consequential order. Apart from its juxtaposition it is indeed, the focal and one of the main planks on which the judgment of the lower court rests.

Having held, that order 4 is an executory order for which a stay of execution can be granted, it remains for me to resolve, the issue whether the appellant/applicant on his affidavit in support of his application and the grounds of appeal, has satisfied the court, that a stay ought to be granted.

I will now proceed to deal with the merits of the application. This stage brings to focus, the submission of the learned SAN for the respondents, that for a stay of execution to be granted, the appellant/applicant must show the following:-

- (i) That there is an appeal pending, which is conceded;
- (ii) that there is special circumstances to warrant a stay of execution i.e. good grounds of appeal in an area where the law is recondite;
- (iii) that the res will be destroyed or rendered nugatory if a stay is refused and foist upon the court a situation of helplessness if the appeal succeeds and the appellant cannot be restored to status quo.

For the appellant/applicant, Ayodele S.A.N had submitted:

- (i) That the motion on NOTICE dated 13/4/95 and filed the same day is supported by a 34 paragraph affidavit and a further 4 paragraph affidavit of Mr. M.A. Akwe (Exhibits A1 and AA I respectively), a 16 paragraph affidavit of Mr. D.O. Ashekeni (Exht A3) and a 10 paragraph affidavit of Dr. Christopher O. Iyimogah (Exhibit A4). These are as they relate to a consideration of the application for stay of execution on the merits.

(ii) He relied on the facts deposed to on the affidavits and further affidavits in particular:- (a) paras. 1-6., 8-11 and 20-22 of Exhibit A1 viz:-

"1. That I am the Makama of Doma and I have the authority of the appellant/applicant Alhaji Yahaya Ari Doma to depose to this affidavit from facts within my knowledge and information received by me which I verily believe to be true.

2. That I am a traditional title holder in Doma and a member of the Ayigoga Ruling House - one of the Ruling Houses in Doma.

3. That the appellant/applicant was selected the ANDOMA of Doma on the 29th day of October, 1993.

4. That the appointment of the appellant/applicant was subsequently approved by the Governor of Plateau State and the State's Council of Chiefs.

5. That with the approval, aforementioned the appointment of the appellant/applicant took effect from the 1st day of November, 1993.

6. That the respondents in this application commenced proceedings before the Plateau State High Court, in which they asked for declarations to the effect that the appointment and subsequent approval of the said Alhaji Yahaya Aro Doma is null, void and no effect whatsoever.

8. That on the 26th day of January, 1995, the Plateau State High Court presided over by Honourable Justice M.M Ochoga delivered judgment in the said suit and amongst other things declared the appointment of the appellant/applicant as the Andoma of Doma, null and void and of no legal effect whatsoever. A certified true copy of the judgment of the Plateau State High Court is shown to me and marked Exhibit 1.

9. That being dissatisfied with the judgment of the Plateau State High Court, the appellant/applicant has filed two Notices of Appeal against the said decision - one dated 31st January, 1995 and the other dated 6th March, 1995. The said Notices of Appeal are shown to me attached to this affidavit and are marked Exhibits 2 and 3.

10. That the appellant/applicant also filed a motion asking for an order of the Plateau State High Court, restraining all persons from giving effect to its Order as contained in its judgment dated 26th Janu-

ary, 1995, and staying the execution of the said judgment.

11. That the Plateau State High Court presided over by M.M Ochoga heard the appellant/applicant's application on 16th of February, 1995 and delivered its ruling on the said application on the 13th day of April, 1995.

12. That as at the time of deposing to this affidavit, I have made serious efforts to obtain a Certified True Copy of the ruling of the court, but I have not been able to obtain same. It is noted by me, that a Certified True Copy of the said ruling of 13/4/95 by the lower court refusing a stay of execution of its judgment is attached to Exhibit'AAI' the further affidavit of Mr. M.A. Akwe.

13. That the respondents in this appeal have always insisted that they are members of the traditional selectors for the ANDOMA of Doma stool, whilst their opponents within Doma community have maintained that the respondents in this appeal are not traditional selectors for the Andoma of Doma stool.

14. That by means of Legal Notice No.2 of 1993 whose date of commencement is 28th October, 1993, an order was made by the Governor of Plateau State naming the persons who are traditional selectors for the Andoma of Doma stool.

15. That I am informed by Mr. Olajide Ayodele S.A.N., the leading counsel for the appellant/applicant and I verily believe him, that the validity of the above-mentioned Order made by the Governor of Plateau State is the focal point of the appellant/applicant's appeal.

16. That I am further informed by Mr. Olajide Ayodele S.A.N. leading counsel to the appellant/applicant and I verily believe him that the Notices of Appeal filed by the appellant/applicant raises substantial points of law for determination by this Honourable Court.

20. That the appellant/applicant has been on the throne as the ANDOMA of Doma from the 1st day of November, 1993 until the 26th day of January, 1995, when the Plateau State High Court declared his appointments as Andoma of Doma invalid.

21. That I know as a fact, that the respondents are bent on starting the exercise for the selection of the Andoma of Doma all over

again in order to cause another person to be nominated and appointed as the Andoma of Doma before the determination of the Appeal filed by the appellant by this Honourable Court.

22. That in the event the appeal filed by the appellant/applicant is successful, the fact that there will be another Andoma of Doma whose appointment would have to be nullified and declared invalid will precipitate further division amongst the people of Doma, which division is capable of further violence, strife and disorder within Doma land."

(b) paragraphs 5-9 of Dr. C. Iyimogah's affidavit in support of the application (Exhibit A4) viz:-

"5. That I am informed by the appellant/applicant and I verily believe him that he is making strenuous efforts to ensure that the appeal is entered in this Honourable Court and the same is pursued to its logical conclusion and to this end he is taking steps to ensure that there is no delay in the compilation of the record of proceedings in the plateau State High Court Registry.

6. That the Andoma of Doma stool is very important to the people of Doma and I know as a fact, that the position touches on the social life of the people of Doma.

7. That I know as a fact, that unless restrained, the respondents, in this appeal will commence a new exercise for the selection of a new Andoma of Doma, whilst the appellant/applicant's appeal is still pending before this Honourable Court.

8. That I know as a fact that if a new exercise for selection of an Andoma is commenced whilst the appellant/applicant's appeal is still pending before this Honourable Court for determination, it will cause a lot of strife, rancour and civil disturbance within Doma land.

9. That to the best of my knowledge, information and belief, none of the respondents in this appeal has indicated his willingness or readiness to contest for the stool of the Andoma under the 1972 order which is one of the issues in dispute between the parties to this suit." Ayodele, S.A.N. for the applicant submitted, as deposed to in paragraph 16 of the affidavit in support of the application (Exhibit A1 - the affidavit of Mr. M.A. Akwe (the Makama of Doma), that the two Notices of

Appeal filed in this case (Exhibits 2 and 3) raise substantial points of law for determination by this Honourable Court (the grounds are numbered serially (a)-(f) and (g)-(l) respectively. He relied particularly on the following grounds-

B (1) *In Exhibits 2-3 the 1st Notice of Appeal to grounds (a),(c) (d) and (e) shorn of their particulars viz:-*

"(a) The decision is against the weight of evidence.

C (c) *The learned trial Judge further erred in law when she held that the setting up of a Judicial Panel of Inquiry by the 2nd defendant amounts to interference with the functions of the Judiciary as set out in section 6 of the 1979 constitution as amended.*

D (d) *The learned trial Judge also erred in law when she held that in the instant case the setting up of the Panel of Inquiry which eventually led to the making of the Order Exht.'Q' on 15/12/93 amounts to pre-empting the decision which would be made by the two courts entirely frustrating the exercise by the trial court of its jurisdiction to determine the application one way or the other.*

E (e) *The learned trial Judge also erred in law when she held that Exhibit 'Q' was made in anticipation of what the judgment of the court would be like, especially when it was stated that the commencement date of Exhibit 'Q' would be 28/10/93 the same day judgment was delivered in the pending suit."*

F (2) *In Exhibit 3- the Second Notice of Appeal to grounds (g) (h) and (i) viz:-*

G (g) *The learned trial Judge erred in law when she held that Exhibit 'Q' the new order on the (Modification of native law and custom relating to the selection of the Andoma of Doma) Order 1993 which was signed into law at Jos on the 15/12/92 on the Governor's command.*

(h) *the learned trial Judge misdirected herself on the evidence adduced before the court when she held-*

H *"In the instance case setting up the Panel of Inquiry and eventually which led to the giving birth of Exhibit 'Q' on 15/12/92 amount to pre-empting the decision which would be made by the trial courts thereby frustrating the exercise by the trial court of its Jurisdiction to determine*

the application one way or the other."

It is submitted, that the se grounds in Exhibits 2 and 3 - the two Notices of Appeal, raise substantial issues to be argued in this appeal. The judgment of the lower court is annexed to the affidavit in support of the application and marked Exhibit 1. So also, the ruling of the trial lower court refusing an application for stay if its judgment on 13/4/95 attached to exhibit AA1 the further affidavit of Mr. M. A. Akwe.

In considering the application on the merits, it is only necessary to consider whether the applicant has satisfied the requirements of the law, to entitle him to a grant of stay of execution with or without a counter-affidavit of the respondents. However, since there are counter-affidavit filed in opposition to the application, I deem it necessary to consider same even obliquely in order to give a balanced consideration to all the relevant affidavit evidence in the case. I am therefore obliged to also, reproduce the following relevant paragraphs 9-17, 20-21,23-24 and 27 to 31 of the respondent's counter-affidavit, thus putting all the cards bare on the table:-

"9. That there are 7 recognized traditional selectors making up the council of selectors amongst whose functions are selection of the Andoma of Doma and the respondents are members of same.

10. That the purported selection, approval and appointment of the appellant/applicant as Andoma of Doma was not in accordance with the native law and custom of Doma as contained in the LAFIA LOCAL ADMINISTRATION (Modification of Native law and Custom relating to the selection of the Andoma of Doma) Order 1972 i.e. LEGAL NOTICE No. 27 of 1972, being the law governing the selection of an Andoma of Doma, nor in accordance with the wish of the majority of Doma people.

11. That on 26th January, 1995, the said appointment of the 1st appellant/ applicant as Andoma of Doma was declared null and void and of no effect whatsoever by the plateau State High Court as contained in Exhibit 1 annexed to the affidavit of Mathew A. Akwe of 13th April, 1995 in support of the appellant/applicant's motion on Notice of same date.

12. That since the said judgment of the Plateau State High Court,

the appellant/applicant has continued parading himself as the Andoma of Doma.

13. *That the appellant/applicant has continued to occupy and reside in the place of the Andoma of Doma.*

B 14. *That the Andoma flag is presently flown at the Andoma's palace when under Doma law and custom it should only be flown when a recognized Andoma resides in the palace as it symbolizes his presence.*

C 15. *That the appellant/applicant continues to hold traditional meetings with certain titled holders and traditional functionaries in the palace with the appellant/applicant presiding.*

16. *That the appellant/ applicant continues to give instructions as to the performance of traditional functions and rites when he has no such right to do so as same can only be done by a recognized Andoma.*

D 17. *That after the said judgment of the Plateau State High Court on 26/1/95 his few supporters threatened and attacked innocent citizens of Doma with bows and arrows and further destroyed many properties belonging to the Local Government.*

E 20. *That the appellant/applicant also continues to use privileges attached to the office of the Andoma of Doma.*

21. *That the appellant/applicant's appeal does not raise any substantial points of law for determination by this Honourable Court.*

F 23. *That since the last Andoma of Doma, late Andoma Addra Ode Aliyu Onawo died on 13th June 1991, the stool of the Andoma was vacant until the purported appointment of the appellant/applicant about November, 1993.*

G 24. *That in the absence of a recognized Andoma, the Owuse of Doma acts in his stead.*

27. *That the appellant/applicant continues to be an eligible candidate for selection as Andoma as long as there is compliance with the custom and tradition of the Doma people.*

H 28. *That the appellant/applicant will not suffer any loss damage if the Honourable Court does not grant this application.*

29. *That the respondents are anxious to join their members of the council of traditional selectors and enjoy the rights and privileges at-*

tached therein as before.

30. *That the respondents will be greatly prejudice if this application is granted.*

31. *That it is in the interest of justice to refuse this application."*

There is no doubt, that an appeal against the judgment sought to B
be stayed, is now pending before this court. This is conceded by Alh.
Abdullahi SAN for the respondents in his submissions in opposition to
the application on 8/2/96 before us. **The principle governing the grant
of stay of execution is now settled and laid down in a plethora of C
decided cases of the Supreme Court on the issue. The locus classicus
is the case of Vaswani Trading Co. v. Savalakh & Co., (1972) 12SC
77 at P.28, in which the famous dicta of Bowen L.J. in the
ANNOTLYLE (1886) 11 P.114 at p.16 was cited with approval and
adopted, I choose to quote Bowen L.J. in the ANNOTLYLE in full:- D**

*"We take it that the word "special" in the context is not used
in antithesis to the words "common" for that would be tantamount to
pre-judging the appeal on a determination of an application for stay of E
execution. When it is stated that the circumstances or conditions for
granting a stay should be special or strong we take it as involving a
consideration of some collateral circumstances and perhaps in some
cases inherent matters which may, unless the order for stay is granted,
destroy the subject-matter of the proceedings or foist upon the court, F
especially the Court of Appeal, a situation of complete helplessness or
render nugatory any order(s) of the Court of Appeal or paralyze, in one
way or the other, the exercise by the litigant of his constitutional right
of appeal or generally provide a situation in which whatever happens G
to the case, and in particular even if the appellant succeeds in the
Court of Appeal, there could be no return to the status quo. All rules
governing stay of actions or proceedings, stay of proceedings, stay of
executions of judgment s or orders and the like, are but corollaries of
this great principle and seek to establish no other criteria, than the H
court and in particular the Court of Appeal, should at all times be
master of the situation and that at no stage of the entire proceedings is
one litigant allowed at the expense of the other or of the court to as-*

sume that role'(Italics mine for emphasis)

BOWEN L. J. has said it all. No other jurist has improve on that dicta. All other statements and /or pronouncements are but running commentaries or precis of the said principle so well ably
B **propounded and stated.**

I find the principle inexorably appropriate for the resolution of the present case. The principle has in summary or precis consistently been re-echoed in plethora of cases viz :-

C "Martins v Nicannar Food Co Ltd. (1988) 2 NWLR (Pt. 74) 75;
Vaswani Trading Co. v. Savalakh & Co., (1972) 12 SC 77 at pp.82 83 v.
A.G. Anambar State (1992) 8 NWLR (Pt. 261) 528; (1992) 10 SCNJ at
p. 161; Okafor v. Nnaife (1987) 4 NWLR (Pt.64) 129 at p. 136; (1972)
1 ALL NLR 83; Oteneoku Odogwu v. Owechei Odogwu (1994) 1 NWLR
D (Pt. 323) CA 708 at p.175.

From the authority of the above decided cases, there does not exist just one invariable inexorable way of showing special circumstances to warrant a stay of execution. Each case depends on
E its own facts. Special circumstances may also arise from the inherent nature of the case on appeal as where the SUB-STRATUM of the case on appeal (as in the instant case) is the same as that on the application for stay, so that a refusal in consequence denudes the
F action of its substance. (See Okafor v. A.G. Anambra State (1989)
2 NWLR (Pt. 79) 736 at P.738).

Another way of showing special circumstances is by filing grounds of appeal which raise substantial issues of law in an area in which the law is recondite. (See Blogun v. Balogun (1969) 1 ALL
G NLR 938.

The list of special circumstances are not exhaustive. For an application for stay of execution to succeed, the applicant must show, that special circumstances exist. It will be special circum-
H stances, where the subject-matter (the RES) will be destroyed, if the stay is not granted or foist upon the court, especially the Court of Appeal, a situation of complete helplessness or render nugatory any order(s) of the Court of Appeal or paralyze in one way or the

other the exercise by the litigant of his constitutional right of appeal or generally provide a situation in which whatever happens to the case and in particular even if the appellant succeeds in the Court of Appeal, there could be no return to status quo (See Vaswani Trading Co. v. Savalakh & Co., (supra). B

It will be special circumstances if the appellant will be exposed to hardship (See Sentinel Assurance Co. Ltd. v. S.G.N. Ltd. (1992) 2 NWLR (Pt.224) 495 at p. 505. Where a recondite point of law is raised, there is special circumstances (Balogun v. Balogun (1969) 1 All NLR (supra) 349 at p. 351; Matins v. Nicannar (1989)2 NWLR (Pt 74) 75; A.E.S.S. Ltd. v. Aina Adeosun & Sons Ltd. (1993) 5 NWLR (Pt.293) 377 at 384. C

A recondite point of law is one which having regard to the substance of the appeal, if the stay is not granted and the case is eventually decided in favour of the appellant, there will be irreparable damage such that there can be no return to the status quo because, the RES of the litigation has gone and the party who wins shall reap an empty judgment. (See Ajomale v. Yaduat (No.2) (1991) 5 NWLR (Pt.191) 266 at 291). D

On the meaning of recondite, it was held in Adefulu & 17 Ors v. Okulaja & 6 Ors. (1993) 2 NWLR (Pt. 274) 227 at p. 230 (page 240 para. D) thus: F

"When it is said that an area of the law is recondite, it means that the law in that area is not commonly known or it is difficult to understand;

and I add; 'it has to be 'special' in the context that it is not used in antithesis to the words "common" for that would be tantamount to pre-judging the appeal on a determination of an application for stay of execution. All it means is, that the circumstances or conditions for granting a stay should be special, strong or substantial (Vaswani Trading Co v. Savalakh & Co. (1972) 12 SC 77 (supra). G H

In considering an application for stay of execution, the court must also consider the following:-

- (i) The interest of the successful party to enjoy the fruits

of his or their litigation, and

(ii) the need to preserve the RES of the litigation or status quo, if failure to do so will render the appeal nugatory (Okafor v. Nnaife (1987) 4 NWLR (Pt.64) 129.

B Considering therefore, the right of the respondents to enjoy the fruits of their litigation, the need to preserve the Res or status quo and the hardship if the application is refused:-

(a) *On the part of the respondents:-*

C They have been declared traditional selectors. The judgment of the lower court is in their favour and the appellant/applicant is by law no longer de jure the Andoma of Doma.

(b) *On the part of the appellant/applicant:*

D He has been selected the Andoma of Doma on 29/10/93. His appointment as Andoma of Doma was subsequently approved by Governor of Plateau State and the State's Council of Chiefs with effect from 1/11/93. From 1/11/93 to 26/1/95 the date of the judgment of the lower court sought to be stayed and on appeal, the appellant/applicant has been E the lawful de jure Andoma of Doma. He has since then been installed the Andoma of Doma, moved into and occupies the palace of the ANDOMA to date, been exercising and still exercise the traditional functions and rites of the office of an ANDOMA of Doma before and during the contest. F

For both parties, the selection and recognition of the appellant/applicant as the ANDOMA of Doma is the focus and core issue in this application and the appeal. The question in the circumstances, having regard to the affidavit evidence before us, whether, whilst the validity of G the selection and recognition of the appellant/applicant as the ANDOMA of Doma is still pending before us and yet to be determined, it will be right to grant or refuse a stay of execution in the case.

H I think, that we must by analogy draw a parallel from the doctrine of Lis Pendens Pendente Lite Nihil Inovator (i.e. that nothing should change during the pendency of action". In Ogundiani v. Araba & Barclays Bank of Nigeria Ltd. (1978) 6-7 SC 55 at 74, the Supreme Court considering the doctrine said:

"The doctrine of lis pendens prevents the affective transfer of rights in any property which is the subject-matter of an action pending in court during the pendency in court of the action. In its application against any purchaser of such property, the doctrine is not founded on the equitable doctrine of notice-actual or constructive - but upon the fact that the law does not allow to litigant parties or to give to them during the currency of the litigation involving any property rights in the property (i.e. the property in dispute) so as to give to prejudice any litigant parties." (Italics mine for emphasis)

OGUNTADE, J.C.A. the presiding Justice in the instant case in Okafor & Ors v. A.G. Anambra State (1988) 2 NWLR (pt. 79) 736 at P 739 paras. D-E said:

"I do not see any difference in principle between selling a property, the subject matter of a litigation and that in emasculating the right to property or the right to a declaration. They both from the Tangible and Intangible Res which is the subject-matter of litigation, either must prejudice the litigating parties."

The Res in an action which a court of record has an inherent power to preserve may be tangible as in the case of funds in dispute or intangible as a right to decide who succeeds to the rulership as in the instant case in hand. (See Kigo (Nig) Ltd. v. Holman Bros (Nig) Ltd. (1980) 5-7 SC 60 at 73.

I respectfully adopt the reasoning in the foregoing cases, which I have cited and examined and hold, that the facts of this case and justice dictate maintenance of the status quo ante litem pending the determination of the appeal before us. We are not at this stage dealing with and deciding the pending appeal. I would therefore, not discuss the issue further in details so as not to prejudice the appeal. But the possibility of the appellant/applicant succeeding on appeal cannot be ruled out.

The appellant/applicant should, therefore, in my respectful view stay as he has been after his selection and recognition as the Andoma of Doma before he is restrained as per Order 4 of Exhibit 1, the judgment of the lower court of 26/1/95 from parading himself

out as the Andoma of Doma. The office or stool of Andoma of Doma is an intangible Res - the sub-stratum of the dispute in the appeal and same in this application which needs to be preserved.

A court from which an appeal lies as well as a court to which an appeal lies have a duty to preserve the Res for the purpose of ensuring that the appeal if successful is not nugatory. (See Kigo (Nig.) Ltd. v. Holman Bros. (Nig.) Ltd. (1980) (*supra*) at p. 70 -72.

The court ought to countenance the selection and recognition accorded the 1st appellant/applicant by the 2nd appellant (i.e. the Government of Plateau State) who has since 1/1/93 been the de jure Andoma of Doma until 26/1/95 when the trial High Court below annulled his selection and recognition as the Andoma of Doma - the sub-stratum of this application and the pending appeal. The appellant/applicant did not ascend to the throne of Andoma of Doma vi et armis. Not to preserve the Res or the status quo ante litem may result in chaos as deposed to in the respective affidavits of the parties to this application.

Putting or preserving any property or status in status quo, presupposes the existence of an actual, peaceable, uncontested status quo preceding the pending controversy as distinct from a status quo effected by a wrong-doer by institution of the action e.g. where the ruler took office vi et armis, in other words, a trespasser cannot by the very act of trespass create a status quo. (See Governor of Lagos State v. Ojukwu (*supra*) at p. 625, see also Thompson v. Peak (1944) 2 ALL ER 477 referred to).

In the final analysis, I find that special circumstance exist in this application to warrant a stay. In the exercise of our discretion judicially and judiciously, in the circumstances we make the following orders:-

(i) *A stay of execution of Order 4 of the High Court of Justice of Plateau State, sitting at Jos in Suit No. PLD/1429/1993, delivered on the 26th day of January, 1995 (sic) "That Alhaji Yahaya Ari Doma is hereby restrained perpetually from holding himself out as the Andoma of Doma, performing any of the functions, traditional rites and enjoying the privileges, traditional or official attached to the office of the Andoma", is hereby granted pending the hearing and determination of the appeal*

filed against the said judgment/order by this court."

(ii) Parties are to bear their own costs in the case which has been so well argued by both learned Senior Advocate of Nigeria for the parties.

B

OGUNTADE JCA

I agree.

C

EDOZIE JCA

In his lead ruling delivered, the draft of which I had read before now, my learned brother Orah J.C.A has dealt comprehensively and adequately with all the issues germane to this application. I am in complete agreement with his reasoning and conclusion that of execution be granted with respect to the restraining order of the court below. I abide by the order as to costs.

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