

SUPREME COURT OF NIGERIA

18TH JUNE, 1999. SC. 229/1991 & SC. 309/1989

**CORAM:- A. G. KARIBI-WHYTE, E. O. OGWUEGBU, U.
MOHAMMED, O. ACHIKE, A. O. EJIWUNMI, JJSC**

MADAM MARGARET EZEOKAFOR	APPELLANT
V.		
EMMANUEL EZEILO	RESPONDENT

APPEALS - *Entering of appeal - The effect of - An appeal being entered.*

APPEALS - *Entry of an appeal - Relationship with - Drawing up and enrolment of court's orders.*

APPEALS - *Jurisdiction - Nullity of an order - The Court of Appeal lacked jurisdiction to sit on appeal - And pronounce on the nullity of an order - When such an issue was not raised by way of an appeal before it.*

APPEALS - *Supreme Court Rules 1985 - Order 8 rule 11 - By that provision - The Court of Appeal was correct - In declining to entertain an application for injunction - Since the appeal against its ruling has been entered at the Supreme Court.*

JUDGMENTS - *Supreme Court decisions - In Shodeinde and Kigo cases - Have no bearing with the present appeal - As the issues before the court are different.*

JUDGMENTS - *Order - Of court of competent jurisdiction - Invalidity of - Cannot be presumed - Without a pronouncement to that effect by a court of competent jurisdiction.*

JUDGMENTS - *Order - Setting aside order of a court that is invalid - How done.*

LEGISLATIONS - *Retrospective law - Amendment to Edict No.8 of 1989 - Made with a retrospective effect - The edict cannot have any retrospective effect - On the validity or otherwise of acts done and completed under the then existing law - But it would affect acts that are yet to be completed.*

WORDS & PHRASES - *"Appeal has been entered" - What the phrase means.*

FACTS

Two sister appeals SC. 229/1991 and SC. 309/1989 were consolidated in this case. Both appeals emanated from the judgment of the High Court of Anambra State sitting at Awka in its appellate jurisdiction. The High Court entered judgment in favour of the Plaintiff/Respondent herein. Dissatisfied, the Defendant/Appellant herein applied for leave to appeal to the Court of Appeal. The application was granted by the High Court where upon the Appellant filed his notice of Appeal. The application for leave to appeal was heard and granted when the High Court of Anambra State was on its annual vacation.

Based on the aforesaid Notice of Appeal filed pursuant to the leave granted by the High Court, the Appellant applied to the Court of Appeal for an Order of injunction restraining the Respondent from causing any more damages, etc. on the land the subject matter of the suit pending the determination of the appeal. The Respondent's counsel opposed the application by way of preliminary objection based on the following grounds (a) that the Supreme Court was seised of the matter, and (b) that the lower Court therefore had no longer the jurisdiction to entertain the application. Relying on order 8 Rule 11 of the Supreme Court Rules 1985, the Court of Appeal upheld the objection and the application was accordingly struck out with costs in favour of the Respondent. Dissatisfied with the ruling, the Appellant appealed to the Supreme Court in SC.229/91 raising a lone issue. The Respondent also raised a lone issue. In the other appeal SC.309/89 based on the aforesaid Notice of Appeal and pursuant to the leave earlier granted by the High Court, during

its annual vacation, the appellant applied to the Court of Appeal for a stay of execution of the judgment of the High Court pending the determination of the appeal. The Respondent's counsel raised a preliminary objection to the application before the Court of Appeal on the ground that since the High Court had no jurisdiction to sit and transact legal business when it granted the leave to appeal the act of granting leave was invalid and accordingly, the Notice of Appeal filed pursuant to such purported leave was incompetent and ineffectual and could therefore not be relied upon as basis for the consideration or grant of Appellant's motion for a stay of execution, more so as there is consequently no valid appeal pending and there is no application or order for extension of time to appeal. The Court of Appeal upheld the objection and struck out the Appellant's application for stay. During the pendency of the application for stay Edict No. 16 of 1987 which precluded the High Court from sitting during vacation period was amended by Edict No. 8 of 1989 which was made retrospective. The amendment allowed the High Court to sit during vacation period. The Appellant dissatisfied with the ruling of the Court of Appeal has now appealed to the Supreme Court raising two issues but the appeal was determined on a lone issue.

ISSUES FOR DETERMINATION

Whether the Court of Appeal could continue to exercise its jurisdiction to grant an injunction even AFTER the appeal has been entered in the Supreme Court and it has become seised of the whole proceedings as between the parties thereto in conformance with the unambiguous provisions of Order 8 Rule 11.

"Whether the amendment Edict of No. 8 of 1989 had any effect on the order which granted Appellant leave to appeal on 20/8/87 against the judgment of the High Court Awka in Suit No. AA/3A/83 as well as other steps taken by the appellant pursuant to the grant of the leave."

HELD (Unanimously dismissing the first appeal and allowing the second appeal per lead judgment of **ACHIKE JSC**)

Words & Phrases - Appeal has been entered

1. It may then be asked what is meant by the phrase that the appeal has

been entered? In simple language, it may be said that once the court below transmits the Record of Appeal to the court that will hear the appeal and the appellate court in fact receives the same, the appeal is said to be entered see Ezomo v. A.G. Bendel State (1986) 4 NWLR (Pt. 36) B 448, Ogunremi v. Dada (1962) 1 All NLR (Pt. 4) 663. (p. 1875 H)

Appeals - Entering of appeal

2. What flows automatically from the appeal being entered is that the appellate court which has now received the record of appeal is said to be seised of the whole of the proceedings in the sense that the res in the appeal shall also automatically pass into the custody of the said appellate court seised of the whole proceedings. For avoidance of doubt, it is important to note that for the purpose of Rule 11 of Order 8 (under reference) there is no sharing of jurisdiction, over the res, the subject matter of the appeal, between the court below (i.e. transmitting the record of appeal) and the appellate court now seised of the appeal (i.e. the court receiving the transmitted record of appeal.) (p. 1876 B)

E

Entry of an appeal - Relationship with enrolment of orders

3. It seems to me that the phrase when an " appeal has been entered" has been tolerably explained. To enter an appeal should not be confused with "drawing up" judgment, order or any order, for that matter, that has been pronounced by the court. Whenever the court makes an order or delivers a judgment containing orders, it is the responsibility of the registry to draw up such orders made by the court. The drawn up and enrolled orders of the court can be made as and when the registry decides to do so. In fact, such orders may be drawn up and enrolled either before or after the appeal has been filed or entered. In short, "entry" of an appeal has no correlative relationship with drawing up and enrolment of court's orders. (p. 1876 D)

H

Appeals - Supreme Court Rules 1985

4. Therefore, by the lucid provisions of Order 8 Rule 11, I respectfully agree with the Court of Appeal that it was correct to decline to entertain

the application for injunction since the appeal against the Ruling of the court below had been entered at the Supreme Court. (p. 1876 H)

Judgments - Supreme Court decision

5. It is quite obvious from our succinct examination of the two landmark B decisions of this court - Shodeinde case and Kigo case - that they have no bearing with the present appeal which is specifically concerned with the interpretation of Order 8 Rule 11 of the 1985 Rules of this court. In as much as I was delighted to re-read those great authorities, I must state categorically that they were unhelpful in the interpretative exercise that C arose in this appeal. Accordingly, I hold that they did not dislodge the preliminary objection of Chief Mogboh, SAN which remains unanswerable. In the case before us, it is manifest that the question before the court below was not whether that court had jurisdiction to entertain the D application for injunction for the preservation of the subject matter after its judgment has been drawn up and enrolled (as was the case in Shodeinde case) or whether the court below had jurisdiction to grant a stay of execution once it was seized of the appeal from the court that heard and E decided the case leading to the appeal. On the contrary, the real question before us is whether the Court of Appeal could continue to exercise its jurisdiction to grant an injunction even AFTER the appeal has been entered in the Supreme Court and it has become seized of the whole pro- F ceedings as between the parties thereto in conformance with the unambiguous provisions of Order 8 Rule 11. I am persuaded by all I have said above that the answer to the 'real question' stated above must be absolutely in the negative. In other words, I am satisfied that the Court of G Appeal was correct to have upheld the preliminary objection to entertain the application for injunction. This application must now be channelled to this court for determination. (p. 1879 C)

Judgment - Order

6. It will, therefore follow that the preliminary objection taken on the H competence of the application for stay based on what learned counsel for Respondent referred to as "purported leave to appeal which was in-

competent as well as the Notice to Appeal filed pursuant to the purported order of leave of the High Court" was misconceived. This is so because, as I had earlier stated, neither the validity of the leave granted on 20/8/87 nor the Notice of Appeal filed on 14/8/87 by the Appellant has been appropriately questioned on appeal. Obviously, neither the Court of Appeal nor the Respondent can presume the invalidity of a subsisting order of a court of competent jurisdiction, the rule being that an order of court of competent jurisdiction subsists until set aside. This point was emphasized by the Supreme Court per Kayode Eso, JSC succinctly in Kigo (Nig) Ltd v Holman Bros (Nig) Ltd (1980) 5-7 SC 60. If only by way of emphasis, permit me to reiterate that the court is powerless to assume that a subsisting order of the court of competent jurisdiction can be ignored because that court, be it a higher court in the hierarchical order of our judicial system, presumes the order as made to be manifestly invalid without a pronouncement to that effect by a court of competent jurisdiction. It is unsafe for one to act in such circumstances. Regrettably, it seems to me that the Court of Appeal, so also the Respondent's learned counsel, overlooked this crucial point. (pp. 1884 C/1885 B)

Order - Setting aside

7. There is no gainsaying the fact that where an order of the court is invalid in the sense that it is so irregularly obtained that it is rendered a nullity or void, the court suo motu has inherent jurisdiction to set aside such an order. Similarly, the party affected by such order can take necessary steps by motion, and not necessarily by way of appeal, to set aside such order that is invalid on the ground that it is a nullity. Which-ever way is taken to set aside such an invalid order, it is clearly the law that the parties to the case or their legal representatives must be given a hearing to make an input, if they so wish, otherwise any pronouncement to the invalidity or voidity of the order will infringe the fundamental principle of fair hearing and must itself be set aside. See Okafor v A.G. Anambra State (1991) 6 NWLR (Pt. 200) 659. (p. 1884 G)

Appeals - Jurisdiction

8. Since the issue of nullity or otherwise of the leave granted to the Appellant to appeal by the High Court Awka was never a subject of appeal before the Court of Appeal. I think it was a grave error for the Court of Appeal to tinker even obliquely with such a jurisdictional and fundamental issue. Clearly, the Court of Appeal lacked jurisdiction to sit on appeal, as it were, and pronounce on the nullity of an order made by a court of competent jurisdiction when such an issue was not raised by way of appeal before it, and it is of no moment that the order manifestly or may readily be perceived to be a nullity. See Okafor v A.G. Anambra State (supra) at 650, 680. (p. 1885 G)

Legislations - Retrospective law - Amendment

9. It does not admit of any contest, as earlier on observed, that when the High Court Awka sat and granted leave to appeal on 20/8/87, during annual vacation, it lacked jurisdiction so to do by virtue of section 38 of Edict No. 16 of 1987 - the law in operation, not only as at 20/8/87 but also as at 31/12/86, being the effective date of the amendment Edict No. 8 of 1989. Obviously, it cannot be pretended that the purpose of the amendment law is to vitiate acts done when Edict No. 16 of 1987 was in existence. Again, neither can the new edict have any retrospective effect on the validity or otherwise of acts done and completed under the then existing law, nor can such completed acts be a subject matter for reconsideration under the amendment law. The validity or otherwise of the act or order decreed by the High Court Awka under the repealed edict cannot be subsequently affected by the Amendment edict. This is another way of saying that the order which granted the Appellant leave to appeal on 20/8/87 gave the Appellant a vested right over any subsequent Amendment Edict irrespective of the fact that the Amendment Edict was to operate retrospectively to cover the date when the leave was granted by the High Court Awka. See Leaus v Mitchell (1912) A.C. 400. But, obviously, the amendment edict would affect acts or orders of that court that are yet to be completed. (pp. 1887 A/1888 D)

NOTABLE POINTS OF INTEREST

ACHIKE.JSC

1. Power of the court to preserve the res - Reason for

Furthermore, it is incontestable that all courts of record, as re-echoed by
 B Eso, JSC in the Kigo case, possess power of preservation of the res in
 their custody. The reason for this may not be difficult to appreciate: it
 ensures that the final order the court may make in relation to the res does
 not expose the court to a state of helplessness, leaving the victorious
 C party to celebrate a mere empty and pyrrhic victory. Such a situation
 must be roundly condemned for it is a well-known maxim that the court
 does not act in vain. (p. 1874 B)

2. Declaring a law invalid after it has been amended and no longer an D issue before the court

It is needful to recall that the amendment legislation, i.e. Edict No.8 of
 1989, dated 18th May, 1989, retrospectively became operational on 31st
 December, 1986 while the Ruling of the Court of Appeal was delivered
 E on 23rd June, 1989. In other words, the amendment law Edict No. 8 of
 1989 - was extant on 23/6/89 at the date of the delivery of the Ruling
 now on appeal. Thus on 23/6/89 the amendment law had duly amended
 the vexed provisions of section 38 of Edict No. 16 of 1987, albeit, per-
 F haps, unknown to the Court of Appeal (a point which is completely irrel-
 evant and of no moment to the delivery of the lower court's Ruling). I
 say so because it would be contemptuous of the Court of Appeal to be
 openly said that it was ignorant of the amendment law on the date it
 delivered its decision. In the result, the amendment law had beneficently
 G amended section 38 of Edict No. 16 of 1987, and therefore, relieved the
 Court of Appeal some 30 days earlier of the burden of the necessity of a
 voyage of discovery of invalidity or otherwise of Order 26 Rules 8 and 9.
 In other words, as at the date of delivery of Judgment by the lower
 H court, i.e. 23/6/89, the validity or otherwise of Order 26 Rules 8 and 9
 had ceased to be an issue that would ever exercise the court. To that
 extent therefore, the issue of the invalidity or otherwise of Order 26
 Rules 8 and 9 had metamorphosed to an academic matter which I am

not obliged to engage in. This explains why I postulated only a single issue for determination in this appeal. (p. 1890 C)

CASES REFERRED TO

Ezomo v. A.G. Bendel State (1986) 4 NWLR (Pt. 36) 448	B
Ogunremi v. Dada (1962) 1 All NLR (Pt. 4) 663	
Adewoyin v. Adeleye (1962) 2 NLR (Pt. 1) 108	
Kigo (Nig) Ltd v Holman Bros (Nig) Ltd (1980) 5-7 SC 60	
Okafor v A.G. Anambra State (1991) 6 NWLR (Pt. 200) 659	C
Surtees v Ellison (1929) 9 B & C 750 at p. 752 or 8 L.R. QB at 5	
Rimini v Van Praagh (1872) 8 LR Q.B.1.	
In Kay v Godwin (1930) 6 Bing 576 at 582	
Powell v May (1946) K.B. 330	
White v Morley (1899) 2 QB 34 at 39	D
Iboko v Commissioner of Police (1965) 1 All NLR 219	
Ogunremi v. Dada (1962) 1 All N.L.R. (Pt. 4) 663	

REPRESENTATION

C. O. Anah Esq. for the Appellant	E
A. J. Offiah (Mrs.) for the Respondent	

STATUTES & RULES REFERRED TO

Supreme Court Rules of 1985, O. 8 r. 11	F
High Court Edict No. 16 of 1987 of Anambra State of Nigeria; s. 38	
Amendment Edict No. 8 of 1989 of Anambra State of Nigeria.	
Interpretation Law, Cap 73 of Anambra State 1986; s. 13	G

LEAD JUDGMENT BY ACHIKE JSC

These two suits were consolidated for the purpose of this appeal. Nevertheless, they will be considered separately. Learned Appellant's counsel elected to take them in the order in which they are set out above. H SC. 229/91

This appeal arose from the Ruling of the Court of Appeal Enugu Division delivered on 29th November, 1990. The genesis of the case as

it is relevant to this appeal may be found in the judgment of the High Court of Anambra State sitting at Awka in its appellate jurisdiction, delivered on 21/7/87. The judgment was in favour of the Respondent herein. Dissatisfied with the said judgment, the Appellant herein, by motion dated 14/8/87 applied for leave to appeal to the Court of Appeal. The application was heard and granted by the High Court Awka on 20/8/87 whereupon the Appellant filed his Notice of Appeal dated 14/8/87. It was common ground that when the learned Judge of the High Court Awka sat and granted leave to the Appeal to appeal (i.e. 20/8/87), the High Court of Anambra State was on its annual vacation.

Based on the aforesaid Notice of Appeal filed pursuant to the leave granted by the High Court, the Appellant applied to the Court of Appeal for an order of injunction, by a motion dated 20/1/90, restraining the plaintiff/Respondent from causing any more damages etc. on the land the subject matter of this suit, pending the appeal thereof. To this application, Respondent's counsel filed a Notice of Preliminary Objection on the following grounds, to wit, (a) that the Supreme Court was then seized of the matter, and (b) that the lower court therefore had no longer the jurisdiction to entertain the application.

Relying on order 8 Rule 11 of the Supreme Court Rules 1985, the Court of Appeal upheld the objection and accordingly struck out the application with costs in favour of the Respondent. Dissatisfied with the Ruling, the Appellant appealed to this court relying on one ground of appeal.

The parties filed and exchanged briefs of argument respectively dated 19th July, 1991 and 24th October, 1987. Appellant's learned counsel, Mr. C. O. Anah, in his brief identified one issue for determination, namely,

"Whether the jurisdiction of the Court of Appeal to grant injunction in respect of injunction in respect of its Ruling under Appeal to the Supreme Court is suspended arising from the fact that the Supreme Court is now seised of the matter, and the said matter had been entered at the said Supreme Court."

On the other hand, Mrs. A.J. Offiah, learned Respondent's counsel also

postulated a sole issue for determination, to wit,

"Can the Court of Appeal exercise its jurisdiction to grant injunction in respect of its decision AFTER an appeal therefrom has been entered herein and the Supreme Court is seised of the proceedings."

At the hearing before us, the submission of learned counsel for the appellant can be summarized thus: on the authority of Shodeinde v The Registered Trustees of the Ahmadiyya Movement-In-Islam (1980) 1-2 S.C. 163 and Kalgo (Nigeria) Ltd v. Holman Bros (Nigeria) Ltd (1980) 5-7 SC 60 the Court of Appeal could still entertain the application for injunction for the purpose of preserving the res as the court below did not lose its jurisdiction in this regard by the fact that the appeal had been entered in the Supreme Court. He urged us to allow the appeal because despite Order 8 Rule 11 the court below could still have entertained the application for injunction.

For the Respondent, learned counsel says that she relies on the submission in her brief and the Respondent's contention at p.17 of the record. She further submitted that Order 8 Rule 11 of the Rules of this court provides a total answer to the issue raised in this appeal. It is her further submission that the purpose of that Rule is that when the appeal is entered the Supreme Court becomes seised of the case to the exclusion of any court and the issue is not whether the court below and the Supreme Court have concurrent jurisdiction on the subject matter of the application. She proceeded to distinguish the decision in Shodeinde case from the operation of Order 8 Rule 11. In that case the appeal had not been entered before the application was made and furthermore, that case was concerned with the preservation of the res only and did not consider whether or not the appeal has been entered. Referring to Kigo case, she observed that no appeal was even pending at the Supreme Court when the appeal was heard by the Court of Appeal because the applicant was still applying for leave to appeal, and no appeal had therefore been entered. Finally, she submitted that in the two cases the Supreme Court was not concerned with the interpretation of Order 8 Rule 11. Accordingly, she urged us to dismiss the appeal.

It is clear to me that this appeal lies within a narrow margin. The

application before the Court of Appeal to which the Respondent's learned counsel raised a preliminary objection was one for an order of injunction. It is indisputable that by the combined effect of the provisions of sections 16 and 18 of the Court of Appeal Act 1976, the Court of Appeal has jurisdiction to grant an injunction where the circumstances so warrant. Furthermore, it is incontestable that all courts of record, as re-echoed by Eso, JSC in the Kigo case, possess power of preservation of the res in their custody. The reason for this may not be difficult to appreciate: it ensures that the final order the court may make in relation to the res does not expose the court to a state of helplessness, leaving the victorious party to celebrate a mere empty and pyrrhic victory. Such a situation must be roundly condemned for it is a well-known maxim that the court does not act in vain. But the issue seems to me to be to what extent, if any, is this expansive jurisdiction of the Court of Appeal to grant injunction Procedurally circumscribed, or even excluded by the operation of the Rules of court, and specifically by order 8 Rule 11 of Supreme Court Rules of 1985. For a better understanding of the Ruling of the Court of Appeal leading to this appeal, it is necessary to examine Order 8 Rule 11 on which the court below anchored its decision. Rule 11 or Order 8 states:

"After an appeal has been entered and until it has been finally disposed of, the court shall be seised of the whole of the proceedings as between the parties thereto, and except as may be otherwise provided in this Order, every application therein shall be made to the court and not to the court below, but any application may be filed in the court below for the transmission to the court."

The portions that call for emphasis under Rule 11 are:

"after an appeal has been entered and until it has been finally disposed of, the Court (meaning the Supreme Court) shall be seised of the whole of the proceedings"

The affidavit in support of the Notice of preliminary objection, as deposited in part by Mrs. A.J. Offiah, one of the Respondent's counsel ran thus:

"2. That this application was filed by the applicant on 22/1/90

and the same was served on the Respondent on 23/1/90.

3. That on 16/3/90 the Respondent filed a counter affidavit raising the issue that no appeal was then pending at the Supreme Court contingent upon the determination of which the application can be granted.

4. On application to the Supreme Court, the Applicant on 18/4/90 obtained leave and extension of time to appeal to the Supreme Court and thereafter filed his notice of appeal to the Supreme Court on 14/6/90.

5. That pursuant to Order 7 Rules 1 (2), 6 and 7 of the Supreme Court Rules 1985, the Applicant complied (sic) Records of Appeal to the Supreme Court which was submitted to the Registrar of this court and verified by affidavit of Applicant's counsel on 14/6/90.

6. That the said records were than transmitted to the Supreme Court and a copy thereof was served on Respondent's counsel on the same 14/6/90.

7. That the Supreme Court is now seised of the matter. Subsequent to the deposition of the affidavit supporting the Notice of Preliminary Objection, counsel to the applicant to the motion on 17/9/90 deposed to a Further Affidavit, and its relevant paragraphs state as follows:

"2. That I swear to this affidavit for and on behalf of the Applicant and already filed and affidavit in this application.

3. That the Applicant had already had already filed an affidavit in this application.

4. That having recently got the leave of the Supreme Court to appeal it has become necessary to file this further affidavit.

5. That is photocopy of the said leave is hereby attached as Exhibit "A".

6. That Notice and Grounds of Appeal is attached as Exhibit "B".

The above excerpts of the two affidavits respectively deposed to by the parties' legal practitioners clearly show that the appeal has been entered in the Supreme Court. **It may then be asked what is meant by the phrase that the appeal has been entered? In simple language, it**

may be said that once the court below transmits the Record of Appeal to the court that will hear the appeal and the appellate court in fact receives the same, the appeal is said to be entered see Ezomo v. A.G. Bendel State (1986) 4 NWLR (Pt. 36) 448, Ogunremi v. Dada (1962) 1 All NLR (Pt. 4) 663 and Adewoyin v. Adeleye (1962) 2 NLR (Pt. 1) 108. What flows automatically from the appeal being entered is that the appellate court which has now received the record of appeal is said to be seised of the whole of the proceedings in the sense that the res in the appeal shall also automatically pass into the custody of the said appellate court seised of the whole proceedings. For avoidance of doubt, it is important to note that for the purpose of Rule 11 of Order 8 (under reference) there is no sharing of jurisdiction, over the res, the subject matter of the appeal, between the court below (i.e transmitting the record of appeal) and the appellate court now seised of the appeal (i.e. the court receiving the transmitted record of appeal.)

It seems to me that the phrase when an " appeal has been entered" has been tolerably explained. To enter an appeal should not be confused with "drawing up" judgment, order or any order, for that matter, that has been pronounced by the court. Whenever the court makes an order or delivers a judgment containing orders, it is the responsibility of the registry to draw up such orders made by the court. The drawn up and enrolled orders of the court can be made as and when the registry decides to do so. In fact, such orders may be drawn up and enrolled either before or after the appeal has been filed or entered. In short, "entry" of an appeal has no correlative relationship with drawing up and enrolment of court's orders.

Returning to the case in hand, and applying the circumstances of that case to the affidavit evidence in support of the Notice of preliminary objection, it is common ground that the appeal in respect of the lower court's Ruling on the application for order of injunction was entered in the Supreme Court on 14/6/90, a fact confirmed by the further affidavit deposed to on behalf of the Respondent. **Therefore, by the**

lucid provisions of Order 8 Rule 11, I respectfully agree with the Court of Appeal that it was correct to decline to entertain the application for injunction since the appeal against the Ruling of the court below had been entered at the Supreme Court.

But this cannot be the end of the matter in view of the heavy B whether made by Appellant's learned counsel on two unquestionably substantial landmark decisions of the Supreme Court which have close bearing on the same subject matter. Of course, I have in mind the decisions in Shodeinde and Kigo. The impression being made by Appellant's C learned counsel was that the Ruling of the court below was in conflict with these two landmark decisions of the Supreme Court. To what extent that impression is correct or otherwise shall now be examined. I shall first observe that these two decisions were not made pursuant to D Order 8 Rule 11 of the Supreme Court Rules of 1985 since those decisions antedate Order 8 Rule 11 of the Supreme Court Rules 1985, both having been delivered in 1980. Furthermore, those decisions made no reference whatsoever even to similar procedural Rules of this Court i.e. E Order 7 Rule 21 of the Supreme Court Rules 1977 that were in force at all material time and which were, word for word, in pari materia to Order 8 Rule 11 of 1985.

Let us take first the decision in Shodeinde v. Registered Trustee of Ahmadiyya Movement-in-Islam (Supra). In my view, it is not necessary to set out the full facts of this case, but suffice it to say that the bone F of contention hinges on whether in an appeal from the High Court to the Court Appeal it is the former or the latter that has the power to preserve the status quo (i.e. by injunctive order) of the subject matter of litigation G pending the determination of the appeal. In any event, the matter in controversy in that case may be distilled from the questions for determination as set out in the leading judgment of that very erudite and lucid-minded Judge, Idigbe, JSC. They are:

"(1) Whether generally, the High Court has jurisdiction to stay H proceedings in respect of the decision under appeal (a) where by the said decision it has dismissed a claim before it "absolutely," and (b) if so whether in any event it can exercise such jurisdiction after the order has

been drawn up and enrolled?

(2)whether the High Court has jurisdiction to stay proceedings under its judgment on appeal upon application by parties to the proceedings (and in particular, by an unsuccessful plaintiff) for injunction to restrain an act under the decision on appeal pending the determination of the said appeal."

After a marathon review of the authorities, Idigbe, JSC concluded his judgment as follows:

"I would, therefore, like to conclude this judgment by making it quite clear that the High Court does not lose its jurisdiction to entertain applications for stay of proceedings or decisions under appeal to the Court of Appeal because by the said order, decision, or judgment it had dismissed the claim before it "absolutely (i.e) without reservation); it makes no difference in any event, that the decision order or judgment in question (i.e. on appeal) has been drawn up and entered."

In summary, the judgment of Idigbe, JSC in Shodeinde case was concerned with the competing rights of the court that had decided a case and the court to which an appeal therefrom has been lodged in making of a preservative order when the decision, order or judgment in question has been drawn up and entered.

On the other hand, in the latter case of Kigo (Nig) Ltd v. Holman Bros (Nig) & Ltd & anor (Supra), the application for stay of execution was made before the appeal to the Supreme Court was filed, the application having been made simultaneous with an application for leave to appeal. The Court of Appeal granted leave to appeal and refused the application for stay on the ground that such would be tantamount to sitting on appeal over its judgment. In his judgment, that erudite Judge, Eso, JSC clearly elicited the matter in controversy in Kigo case in contrast to the earlier case of Shodeinde case as follows:

" The real question for determination in this case is quite different. It is as regards the Jurisdiction of this Court (i.e. Supreme Court) to grant stay of further proceedings in the High Court pending the determination of an appeal against the decision of the Federal Court of Appeal

filed herein".

His Lordship answered the above question thus:

"It is my firm view that the court from which an appeal lies as well as the 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. In this case, the High Court of Kano, the Federal Court of Appeal, and this court not only have jurisdiction but also a duty to preserve the res."

In conclusion, Eso, JSC held that "the Kano High Court could exercise its inherent power as soon as an appeal was filed against its decision..... and similarly, the Federal Court of Appeal, once it was seised of the appeal from the Kano High Court whether or not the appeal was drawn up and entered."

It is quite obvious from our succinct examination of the two landmark decisions of this court - Shodeinde case and Kigo case - that they have no bearing with the present appeal which is specifically concerned with the interpretation of Order 8 Rule 11 of the 1985 Rules of this court. In as much as I was delighted to re-read those great authorities, I must state categorically that they were unhelpful in the interpretative exercise that arose in this appeal. Accordingly, I hold that they did not dislodge the preliminary objection of Chief Mogboh, SAN which remains unanswerable.

In the case before us, it is manifest that the question before the court below was not whether that court had jurisdiction to entertain the application for injunction for the preservation of the subject matter after its judgment has been drawn up and enrolled (as was the case in Shodeinde case) or whether the court below had jurisdiction to grant a stay of execution once it was seised of the appeal from the court that heard and decided the case leading to the appeal. On the contrary, the real question before us is whether the Court of Appeal could continue to exercise its jurisdiction to grant an injunction even AFTER the appeal has been entered in the Supreme Court and it has become seised of the whole proceedings as between the parties thereto in conformance with the unambiguous provisions of Order 8 Rule 11. I am persuaded by all I have

said above that the answer to the 'real question' stated above must be absolutely in the negative. In other words, I am satisfied that the Court of Appeal was correct to have upheld the preliminary objection to entertain the application for injunction. This application must now be channelled to this court for determination.

Accordingly, I would dismiss this appeal and order that the application for injunction at the instance of the Applicant/Appellant be brought before this court for disposal.

SC. 309/1989

The brings us to the sister appeal in this consolidated appeal i.e. SC. 308/89 between the same parties. The circumstance and facts of this appeal are completely divergent from those of SC. 229/91 and therefore some background factual information must be furnished for proper understanding of the problem that exercised the court below in this case now on appeal.

Again, like the sister appeal, its facts are straightforward. The High Court of Anambra State sitting at Awka in exercise of its appellate jurisdiction delivered its judgment in Suit No/AA/3A/83 on 21/7/87 in favour of the Respondent herein. The Appellant herein being dissatisfied with the said judgment applied by motion dated 14/8/87 for leave to appeal to the Court of Appeal. The application was heard and granted by the High Court, sitting at Awka, on 20/8/87. Thereupon the Appellant filed his Notice and Grounds of appeal dated 14/8/87. It was common ground that on 20/8/87 when the learned Judge granted leave to the Appellant to appeal, the High Court of Anambra State was on annual vacation. Be that as it may, based on the said Notice of Appeal and pursuant to the leave earlier granted by the High Court Awka, albeit during the annual vacation, the Appellant by a motion dated 20/7/88 prayed the Court of Appeal for a stay of execution of the judgment of the High Court Awka pending the determination of the appeal. Learned counsel for the Respondent raised and filed a Notice of preliminary objection to the application before the Court of Appeal on the ground that since the High Court Awka had no jurisdiction to sit and transact legal business on 20/8/87 it could not validly grant leave to appeal to the Appellant, and

accordingly, the Notice of Appeal filed pursuant to such purported leave was incompetent and ineffectual and could therefore not be relied upon as basis for the consideration or grant of Appellant's motion for a stay of execution, more so as there is consequently no valid appeal pending and there is no application or order for extension of time within which to B apply for leave to appeal, leave to appeal and extension of time to appeal.

The preliminary objection found favour with the Court of Appeal which accordingly upheld the objection and struck out the Appellant's application for stay. It is against this order that the Appellant has now C appealed to this court.

At the hearing before us, learned counsel for the Appellant, C.O. Anah, Esq adopted Appellant's brief dated 27/4/90 and remarked that the appeal calls for the interpretation of section 38 of the High Court Edict No.16 of 1987 of Anambra State of Nigeria. He drew attention that the D aforesaid section 38 was later amended by Edict No. 8 of May 1989 whereas the judgment was delivered on 23/6/89. It is for all these learned counsel submitted that the Ruling of the court below was given per incuriam and accordingly urges us to allow the appeal. E

Learned counsel for the Respondent, Mrs. A.J. Offiah adopted the Respondent's brief dated 7/8/98. She submitted that whether or not there was an amendment Edict in May 1989 the operative law when leave to appeal was granted on 20/8/87 was Edict No. 16 of 1987. According to learned counsel, Edict No. 16 of 1987 precluded the High F Court from sitting during vacation period and since leave to appeal was granted at the vacation period, the act of granting leave was invalid and therefore could not be validated by the amendment Edict No. 8 of 1989, G and it will be of no moment even if the Court of Appeal knew of such amendment before the delivery of its Ruling. Finally, counsel submitted that Rules 8 and 9 of Order 26 of the High Court Rules are inconsistent with section 38 of Edict No. 16 of 1987 and that no invalidity of Order 26 H Rule 9 (2) affects the right of the Chief Judge of the State to declare a vacation period. She urged us to dismiss the appeal.

Learned counsel for the Appellant postulated the following two issues for determination:

B *"(1) Whether the leave granted to the Defendant/Appellant to appeal against the judgment of the High Court, which leave was granted during vacation by virtue of Order 26 Rules 8 and 9 of the High Court Rules of Anambra State, was granted on a non dies and therefore invalid by virtue of section 38 of the High Court Edict No. 16 of 1987 of Anambra State which said Section 38 was later amended by the High Court Amendment Edict No. 8 of 1989 which Amendment Edict into effect on the 31st of December, 1986.*

C *(2) Whether the interpretation which the Court of Appeal gave to section 38 of the High Court Edict No. 16 of 1987 of Anambra State was not absurd and unconstitutional."*

For the Respondent, his learned counsel also identified two issues for determination, namely,

D *"(1) Whether a legislation can be made and given a retroactive effect to validate a completed act which was not validly done under the law in force at the time such act was undertaken and completed.*

E *(2) Whether the Court of Appeal declared order 26 Rules 8 and 9 of the High Court Rules invalid in its entirety and the effect of such decision on the Appellant's case.*

F It is important to recall graphically the Respondent's complaint for raising a preliminary objection to the Appellant's application for a stay of execution. This may be gleaned from the grounds set out in the Notice of Preliminary Objection. It seems to me that paragraphs 2, 3, 4 and 5 of the Respondent's Notice of Preliminary Objection which are self-explanatory should be reproduced verbatim in this Judgment for better understanding of the real issue in controversy that fell due to be determined at the hearing of the preliminary Objection by the court below. I
G now reproduce the salient grounds for the objection:

H *"2. No leave of either the High Court or the Court of Appeal has been properly obtained prior to the filing of the purported Notice and grounds of Appeal dated 14/8/87.*

3. The leave of the High Court purportedly obtained on 20/8/87 is incompetent as the High Court has no jurisdiction then to entertain the application for leave or grant same.

4. *The Notice of Appeal filed pursuant to the purported order of the High Court is incompetent and there is no valid appeal pending before this court.*

5. *The present application for stay of execution is predicated on the presumed fact that a valid appeal is pending.*"

The gravamen of the above paragraphs is that the leave to appeal was incompetent, so the notice of appeal which arose pursuant to the grant of the leave is also incompetent; accordingly, the application for a stay predicated on the existence of a valid appeal is incompetent.

It is common ground that during the pendency of the application for a stay of execution dated 20/7/88 an amendment law, Edict No. 8 of 1989 dated 8/6/89 which was made retrospective to 31st December, 1986 was decreed. The purpose of the retrospectivity of the amendment edict, I guess, was to encompass all acts done which were relevant to the prosecution of the appeal in hand. This must be a time which predated the grant of leave to Appellant to appeal by the High Court Awka, dated 20/8/87. This must be so because all steps so far taken by the Appellant were hinged on the leave granted for the prosecution of the appeal. It seems to me that the respective issues for determination No. 1 of the parties, as set out above, essentially oscillate on the validity of the said leave. While not rejecting the parties' respective issues No. 1, I would wish to couch Issue No.1 in this appeal as follows:

"Whether the amendment Edict of No. 8 of 1989 had any effect on the order which granted Appellant leave to appeal on 20/8/87 against the judgment of the High Court Awka in Suit No. AA/3A/83 as well as other steps taken by the appellant pursuant to the grant of the leave."

Mrs. Offiah, learned counsel to the Respondent submitted at the oral hearing of the appeal, and rightly in my view, that, whether or not there was an amendment Edict dated 18/5/89, the operative law when leave to appeal was granted was Edict No. 16 of 1987. Section 38 of this Edict stipulates:

"The court shall be open throughout the year except on Sundays and Public Holidays and during vacation, for the transaction of legal business."

It is not contested that leave to appeal was sought and granted on 20th August, 1987. This was during the period of the annual vacation of the Anambra State Judiciary because Order 26 Rule 9 provides that the long (i.e annual) vacation of the State Judiciary shall start in the month of August and last for six weeks. Undoubtedly, therefore, the said leave granted during vacation is arguably invalid but since no appeal was taken in respect thereof, the order granting leave to appeal subsisted, and, indeed, still subsists. Thus pursuant to it the Appellant, rightly in my view, filed the Notice of Appeal and in furtherance of the subsisting appeal he ventured to apply for stay to the Court of Appeal, pending the determination of the appeal to that court. In my view, the position so far, as at that stage and time, could not be faulted. **It will, therefore follow that the preliminary objection taken on the competence of the application for stay based on what learned counsel for Respondent referred to as "purported leave to appeal which was incompetent as well as the Notice to Appeal filed pursuant to the purported order of leave of the High Court" was misconceived. This is so because, as I had earlier stated, neither the validity of the leave granted on 20/8/87 nor the Notice of Appeal filed on 14/8/87 by the Appellant has been appropriately questioned on appeal. Obviously, neither the Court of Appeal nor the Respondent can presume the invalidity of a subsisting order of a court of competent jurisdiction, the rule being that an order of court of competent jurisdiction subsists until set aside. This point was emphasized by the Supreme Court per Kayode Eso, JSC succinctly in Kigo (Nig) Ltd v Holman Bros (Nig) Ltd (1980) 5-7 SC 60.**

There is no gainsaying the fact that where an order of the court is invalid in the sense that it is so irregularly obtained that it is rendered a nullity or void, the court suo motu has inherent jurisdiction to set aside such an order. Similarly, the party affected by such order can take necessary steps by motion, and not necessarily by way of appeal, to set aside such order that is invalid on the ground that it is a nullity. Whichever way is taken to set aside such an invalid order, it is clearly the law that the parties to the case or

their legal representatives must be given a hearing to make an input, if they so wish, otherwise any pronouncement to the invalidity or voidity of the order will infringe the fundamental principle of fair hearing and must itself be set aside. See Okafor v A.G. Anambra State (1991) 6 NWLR (Pt. 200) 659. If only by way of emphasis, permit me to reiterate that the court is powerless to assume that a subsisting order of the court of competent jurisdiction can be ignored because that court, be it a higher court in the hierarchical order of our judicial system, presumes the order as made to be manifestly invalid without a pronouncement to that effect by a court of competent jurisdiction. It is unsafe for one to act in such circumstances. Regrettably, it seems to me that the Court of Appeal, so also the Respondent's learned counsel, overlooked this crucial point.

In the penultimate paragraph to the end of the leading Ruling per Oguntade, JCA, to which Macaulay and Uwaifo JJCA concurred, his Lordship stated pointedly as follows:

"The order granting leave to appeal to the appellant on 20/8/87 is a nullity. I also pronounce it. That being so the appeal filed and predicated on such a null order is incompetent."

Thereupon the objection was upheld. Reading this excerpt of the leading Ruling of the court below, the erroneous impression that appears at a first glance is that the learned Justice of the Court of Appeal was dealing with the question of nullity of the leave granted by the High Court Awka on appeal before it. But that is not so. Indeed, on the contrary, we may well recall his Lordship was dealing with an application for stay wherein the question of the validity of the leave granted by the High Court Awka was raised as a preliminary objection. Since the issue of nullity or otherwise of the leave granted to the Appellant to appeal by the High Court Awka was never a subject of appeal before the Court of Appeal. I think it was a grave error for the Court of Appeal to tinker even obliquely with such a jurisdictional and fundamental issue. Clearly, the Court of Appeal lacked jurisdiction to sit on appeal, as it were, and pronounce on the nullity of an order made

by a court of competent jurisdiction when such an issue was not raised by way of appeal before it, and it is of no moment that the order manifestly or may readily be perceived to be a nullity. See Okafor v A.G. Anambra State (supra) at 650, 680.

B This point would have been sufficient for me to allow the appeal and set aside the Ruling of the Court of Appeal. But this is not necessarily the end of the matter because of the new dimension posed in the appeal by the amendment law i.e Edict No. 8 of 1989, dated 18th May, 1989 and which was to have a retrospective effect as from 31st December, 1986. Undoubtedly, this calls for some comment. The amendment law repeals some specific parts of High Court Edict No.16 of 1987. Material to this appeal is the repeal of section 38 and which shall henceforth read as follows:

D *"The Court shall be open throughout the year except on Sundays and public Holidays for the transaction of legal business.*

The crux of the submission of Appellant's counsel in his brief in this connection may be summarized to mean that by reason of the amendment edict, which has a retrospective effect, the act of the learned Judge in granting leave to appeal and which was undoubtedly void *ab initio*, was or could be, validated long after its completion. To say the least, this is a rather specious and novel submission. The novelty readily explains why the submission is not backed up by any authority. As we shall see anon this novel submission is substantially at variance with the provisions of section on 13 of the Interpretation Law, Cap 73 of Anambra State 1986.

Respondent's counsel, however, submitted to the contrary that section 38 of the repealed Edict No. 16 of 1987 only related to sitting of the Court and conduct of legal proceedings during vacation but did not relate or extend to completed acts done by the court under the new edict that repealed the old edict under which the act was done and completed. Learned counsel cites and relies on several authorities as well as the Interpretation Law of Anambra State 1986, section 13(a) (b) (c). I agree entirely with learned Respondent's counsel in this regard.

I must confess that I am completely at a loss to appreciate and comprehend what the amendment Edict No. 8 of 1989, with a retrospec-

tive effect of 31st December, 1986, is intended to achieve! **It does not admit of any contest, as earlier on observed, that when the High Court Awka sat and granted leave to appeal on 20/8/87, during annual vacation, it lacked jurisdiction so to do by virtue of section 38 of Edict No. 16 of 1987 - the law in operation, not only as at 20/8/87 but also as at 31/12/86, being the effective date of the amendment Edict No. 8 of 1989. Obviously, it cannot be pretended that the purpose of the amendment law is to vitiate acts done when Edict No. 16 of 1987 was in existence. Again, neither can the new edict have any retrospective effect on the validity or otherwise of acts done and completed under the then existing law, nor can such completed acts be a subject matter for reconsideration under the amendment law.** Under the common law, where an Act of Parliament is repealed by a subsequent enactment the effect of the repeal is that the earlier Act is, for all intents and purposes, obliterated and regarded as if never existed except with regards to transactions past and closed before its repeal. See Surtees v Ellison (1929) 9 B & C 750 at p. 752 or 8 L.R. QB at 5 and Rimini v Van Praagh (1872) 8 LR Q.B.1. In Kay v Godwin (1930) 6 Bing 576 at 582, Tindal C.J. stated the common law position very lucidly and tersely:

"The effect of repealing a statute is to obliterate it completely from the records of Parliament except for the purpose of these actions which commenced, prosecuted and concluded whilst was in existence."

The Interpretation Law, Cap 73 of Anambra State 1986 applicable to this case has relevance on the effect of repeals on any law by an amendment law. This statutory enactment has by and large encapsulated the common law effect of the repeal of an existing law by a subsequent enactment. Section 13(a) (b) and (c) of the aforesaid Law provides as follows:

"S.13:

The repeal of any law or any part thereof shall not, unless a contrary intention appears:-

(a) revive anything not in force or existing at the time at which the repeal takes effect

(b) affect the previous operations of any law so repealed or anything duly done or suffered under the enactment so repealed; or

(c) affect any investigation, legal proceedings, or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid; and any such investigation, legal proceeding or remedy may be instituted; continued or punishment may be imposed, as if the repealing law had not been passed."

Let us now relate the above provisions of the Interpretation Law to the case in hand. First, it is patently manifest that the jurisdiction of the Judges of the Anambra State Judiciary to sit ordinarily during the vacation never existed by virtue of section 38 of Edict No. 16 of 1987, the existing law as of 31/12/86 and which was the effective date of the Amendment Edict of No.8 of 1989. This lack of jurisdiction could not be revived by the subsequent Amendment Edict.

Second, **the validity or otherwise of the act or order decreed by the High Court Awka under the repealed edict cannot be subsequently affected by the Amendment edict. This is another way of saying that the order which granted the Appellant leave to appeal on 20/8/87 gave the Appellant a vested right over any subsequent Amendment Edict irrespective of the fact that the Amendment Edict was to operate retrospectively to cover the date when the leave was granted by the High Court Awka. See Leaus v Mitchell (1912) A.C. 400, Key v Godwin (supra) and Rimini v Van Praagh (supra). But, obviously, the amendment edict would affect acts or orders of that court that are yet to be completed.**

Thirdly, and by way of emphasis on the immediate proceeding paragraph, it further follows that the High Court Awka proceedings of 20/8/87 by the learned presiding Judge wherein he granted leave to appeal to the Appellant must be regarded, for purposes of enforceability or otherwise, as if the Amendment Edict No. 8 of 1989 had not been passed. Contrary, therefore, to the forceful submission by learned counsel to the Respondent on what is undoubtedly her view on the content of section 13 (c) of the Interpretation Law, vis-a-vis the posture of the Court of Appeal in examining the competence of the Notice of Notice made pur-

suant thereof, that subtle submission is manifestly unsustainable to justify the tinkering in whatsoever manner by the Court of Appeal with the order granting leave to the Appellant, which as it were, is being made surreptitiously and through the back door as a preliminary objection, when, as earlier shown, the grant of leave by the High Court Awka had never been a subject matter or appeal. I am afraid that the attack levelled on the leave granted by the High Court Awka by Respondent's learned counsel can only be meaningfully entertained if it is frontal, that is to say, by way of appeal and not otherwise. This the respondent has failed to do. B

I indicated earlier in this Judgment that I would explain why I chose to postulate only one issue for determination. I need only say a word or too about the parties' respective Issue No.2. Briefly put, the Court of Appeal declared Order 26 Rules 8 and 9 invalid in so far as these Rules "appear to say that the High Court of Anambra State can sit during the vacation" because those Rules are apparently in conflict with section 38 of Edict No. 16 of 1987 of Anambra State. This reasoning is predicated on the further argument that Order 26 Rules 8 and 9 being subsidiary legislation made under the enabling legislation, namely, Edict No. 16 of 1987, section 38, and being in conflict with the principal legislation, the latter should override the former. See Powell v May (1946) K.B. 330, White v Morley (1899) 2 QB 34 at 39 and Iboko v Commissioner of Police (1965) 1 All NLR 219. C D E

If I understand Mr. C.O. Anah, learned counsel for the Appellant, very well it is his submission that the interpretation accorded to section 38 of the High Court Edict No. 16 of 1987 of Anambra State by the Court of Appeal was absurd and unconstitutional. F

For the Respondent, Mrs. Offiah submitted that the Court of Appeal did not declare the entire Order 26 Rules 8 and 9 invalid but only to the extent of their inconsistency with the principal law i.e. Edict No. 16 of 1989. G

Speaking for myself, I think there is some mix-up in the submission of counsel to the Appellant in this regard. I am not sure that he has spoken squarely to the issue of validity or otherwise of order 26 Rules 8 and 9, vis-a-vis section 38 of the principal legislation. For her part, Mrs. H

Offiah submitted that the Court of Appeal did not declare Order 26 Rules 8 and 9 invalid 'but only to the extent of their inconsistency with the principal law'. This is not quite correct. The record unequivocally bears out that the court below pronounced Rules 8 and 9 of Order 26 invalid simpliciter. Mr. understanding, therefore, of Mrs. Offiah's submission is that she is making a case for the lower court in the sense that their pronouncement on invalidity ought not to extend to the entirety of Rules 8 and 9 but only to Rules 8 and 9 (2) (b) and (c) as Rules 9(1) and 9 2(a) are clearly out of the question of invalidity decided on by the lower court. I think she has a good point here.

It is needful to recall that the amendment legislation, i.e. Edict No.8 of 1989, dated 18th May, 1989, retrospectively became operational on 31st December, 1986 while the Ruling of the Court of Appeal was delivered on 23rd June, 1989. In other words, the amendment law Edict No. 8 of 1989 - was extant on 23/6/89 at the date of the delivery of the Ruling now on appeal. Thus on 23/6/89 the amendment law had duly amended the vexed provisions of section 38 of Edict No. 16 of 1987, albeit, perhaps, unknown to the Court of Appeal (a point which is completely irrelevant and of no moment to the delivery of the lower court's Ruling). I say so because it would be contemptuous of the Court of Appeal to be openly said that it was ignorant of the amendment law on the date it delivered its decision. In the result, the amendment law had beneficently amended section 38 of Edict No. 16 of 1987, and therefore, relieved the Court of Appeal some 30 days earlier of the burden of the necessity of a voyage of discovery of invalidity or otherwise of Order 26 Rules 8 and 9. In other words, as at the date of delivery of Judgment by the lower court, i.e. 23/6/89, the validity or otherwise of Order 26 Rules 8 and 9 had ceased to be an issue that would ever exercise the court. To that extent therefore, the issue of the invalidity or otherwise of Order 26 Rules 8 and 9 had metamorphosed to an academic matter which I am not obliged to engage in. This explains why I postulated only a single issue for determination in this appeal.

This conclusion, again, resolves the sole issue postulated by me in the negative, so also the respective Issue No. 1 of the parties.

From all I have been saying, I resolve the only issue postulated by me in the negative. In all the circumstances of this case, therefore, I hold that the learned Justices of the Court of Appeal were in grave error to have pronounced the order granting leave to appeal by the Applicant/Applicant on 20/8/87 a nullity when the issue of leave granted by the High Court Awka was not on appeal before it and the said leave was a subsisting order of a court of competent jurisdiction. The appeal having succeeded, the objection is overruled. Accordingly, the application for stay of execution is hereby remitted to the Court of Appeal Enugu Division for determination by a new panel of the same Division. C

On the issue of costs, it is manifest that each party in this consolidated appeal has been victorious in one appeal, on the one hand, and lost in the sister appeal, on the other. The parties' gains and losses being at par, it seems to me that in the circumstances of this case I should make no order as to costs, and accordingly, I so order. D

KARIBI-WHYTE JSC

I had the privilege of reading the draft of the judgment of my learned brother Okay Achike, JSC in these consolidated appeals. I agree entirely with his reasoning and conclusions therein. E

I also will and hereby dismiss the appeal of the appellant in SC.229/91 and order that the Appellant's application for injunction be brought before this Court for disposal. F

I will, as in the leading judgment, also allow the appeal in SC.309/1989, and overrule the objection. The application for stay of execution is remitted to the Court of Appeal, Enugu, Division, for determination before a new panel. G

Parties should bear the costs of this appeal.

OGWUEGBU JSC

In these appeals, the facts have been fully set out in the lead judgment of my learned brother Achike, J.S.C and I do not intend to H

repeat them here.

SC.229/1991:

In this appeal the appellant identified one issue for determination, namely,

B *"Whether the jurisdiction of the Court of Appeal to grant injunction in respect of its Ruling under appeal to the Supreme Court is suspended arising from the fact that the Supreme Court is now seised of the matter, and the said matter had been entered at the said Supreme Court."*

C On his part, the respondent also formulated one issue for our determination, namely,

D *"Can the Court of Appeal exercise jurisdiction to grant injunction in respect of its decision AFTER an appeal there-from has been entered therein and the Supreme Court is seised of the proceedings."*

The appellant herein was the defendant in the court of trial. Judgment was given against her in the Awka Judicial Division of the High Court of Anambra State sitting in its appellate jurisdiction. The appellant on 20-8-87 obtained leave of the High Court, Awka to appeal to the Court of Appeal. Based on the leave granted, she filed a notice of appeal and followed it with a motion praying the court below for:

F *"An order of injunction restraining the plaintiff/respondent from causing more damage, destruction or waste in respect of the land the subject-matter of this suit pending the appeal thereof"*

The plaintiff/respondent filed a notice of preliminary objection to the motion for injunction. The grounds for the objection are that :

G *"(1) The Supreme Court is now seised of this matter.
(2) This court therefore no longer has the jurisdiction to entertain the present application."*

H The court below heard arguments on the preliminary objection and upheld it and struck out the motion. It considered Order 8, rule 11 of the Supreme Court Rules, 1985 and the cases of Sodeinde & Ors. v. The Registered Trustees of the Ahmadiyya Movement-in-Islam (1980) 1-2 S.C. 163 and Kigo (Nigeria) Ltd . v. Holman Bros (Nigeria) Ltd. & Or (1980) 5-7 S.C. 60 (Pt.131) 172. On order 8 rule 11, the court below

held as follows:

"The wording of the above Rule is clear and explicit. It is not difficult to understand. It says in unmistakable terms that after an appeal has been entered at the Supreme Court, every application in the proceedings shall be made to the Supreme Court."

This appeal arose from the interpretation of Order 8, rule 11 of the Supreme Court Rules, 1985 by the court below. The learned appellant's counsel in his submission drew a distinction between an application to preserve the subject matter of the judgment and an application to stay further proceedings pending the determination of an appeal. We were referred to the cases of Sodeinde & Ors. v. The Registered Trustees of the Ahmadiyya Movement -in-Islam (supra) and Kigo (Nigeria) Ltd & Or. v. Holman Bros. (Nig) Ltd & Or. (supra). He submitted that the court below should have heard the application instead of declining from exercising its jurisdiction.

Mrs. Offiah for the respondent submitted that order 8 Rule 11 of the Supreme Court rules is a complete answer to the issue raised in this appeal. That the court below and this court have concurrent jurisdiction to entertain the application but after the appeal was entered in this court and the latter seised of the whole matter, the court below lost that jurisdiction. She further submitted that in the case of Sodeinde, the appeal had not been entered in this court and in Kigo's case, this court did not consider Order 8, rule 11 of the Supreme Court Rules, 1985 or Order 7 rule 21 of the Supreme Court Rules, 1977.

Section 16 of the Court of Appeal Act, 1976 gave the court below power to make any interim order or grant any injunction which the court below is authorized to make or grant. I have read the ruling of the court below. That court did not say that it had no jurisdiction to make the other sought. It say that its jurisdiction was suspended having regard to the provisions of Order 8, rule 11 of the Rules of this court and directed the appellants to channel her application to this court. Order 8, rule 11 provides as follows:

"11. After an appeal has been entered and until it has been finally disposed of, the court shall be seised of the whole of the proceed-

ings as between the parties thereto, and except as may be otherwise provided in this Order, every application therein shall be made to the court and not to the court below, but any application may be filed in the court below for transmission to the court."

B *(the underlining is for emphasis).*

As to the meaning of the phrase "after an appeal has been entered" this court in the case of Ogunremi & Or. v. Dada (1962) 1 All N.L.R. (Pt. 4) 663 held that an appeal is entered when the records of appeal have been complied and transmitted to the Chief Registrar of this court and the records entered and filed in cause list of this court. There is no doubt that the appeal against the ruling of the court below had been entered in this court at the time the motion was being argued in that court and the court was right when it directed the appellant to channel her application to this court. The provisions of Order 8, rule 11 are clear and explicit. After an appeal has been entered in this court in a civil case, the court takes complete control of the proceedings including applications in the proceedings during the pendency of the appeal. The questions which this court decided in the cases of Sodeinde and Kigo do not fit into the facts and circumstances of this case. Furthermore, the provisions of Order 7, rule 21 of the Supreme Court Rules, 1977 which are in pari materia with those of Order 8, rule 11 of the Supreme Court Rules, 1985 did not call for interpretation in both cases.

For the reasons I have given and the fuller reasons in the lead judgment of my learned brother, I too dismiss this appeal.

SC.309/1989

I have had the advantage of reading the judgment of my learned brother Achike, J.S.C. and I agree with his reasoning and conclusion. I too will allow the appeal and make no order as to costs in both appeals. Where the parties go from here is another matter.

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MOHAMMED JSC

I have had the advantage of reading the draft judgments of my learned brother, Achike JSC., concerning consolidated appeals No. SC

229/1991 and SC 309/1989. I agree with his opinion in both judgments. Once an appeal has been entered in this court and until it has been finally disposed of, this court shall be seised of the whole proceedings as between the parties. See Order 8 Rule 11 of Supreme Court Rules. The court below was right to refuse to consider the application for an injunction after knowing that the appeal had been entered in the Supreme Court. B

For the reasons given in his judgment in respect of appeal No. SC 229/1991 I shall dismiss the appeal and order that the appellant/applicant can bring his application for injunction for the determination of this court. C

Turning to the appeal No. SC 309/1989, I agree that the decision of the High Court granting leave to appeal during vacation on 20/8/87 was in error, being contrary to Edict No.16 of 1987 which precluded the High Court from sitting during vacation. I agree that the subsequent Edict No. 8 of 1989 which was passed amending Edict No. 16 of 1987 and which was made to cover retrospectively the period when the High Court granted leave to appeal during vacation did not validate the High Court's decision which was a nullity when made. This is because actions which were commenced, prosecuted, duly done and concluded or suffered under the repealed enactment remain valid. However, since no appeal had been filed against the order made by the High Court on 20/8/87 the Court of Appeal had no jurisdiction to declare it a nullity. The appeal against the Court of Appeal's ruling succeeds. It is allowed. I abide by all the consequential orders made in the lead judgment. D E F

EJIWUNMI JSC

I was privileged to have read the draft of the judgment just delivered by my learned brother Okay Achike JSC in these consolidated appeals. I agree with his reasoning and also with his conclusions therein.

In SC. 229/91, I will also dismiss the appellant's appeal and order that the Appellant's application for injunction be brought before this Court for disposal. H

With regard to SC. 309/1989, I will also as in the leading judg-

ment allow the appeal and overrule the objection. The application for stay of execution is remitted to the Court of Appeal, Enugu for determination before a new panel. Parties should bear the costs of this appeal.

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