

SUPREME COURT OF NIGERIA
8TH DECEMBER, 2000. SC.167/1996
CORAM:- A . G. KARIBI-WHYTE, M . E. OGUNDARE, S. U.
ONU, O. ACHIKE, U. A. KALGO, JJSC

MESSRS. NV SCHEEP PLAINTIFFS/APPELLANTS
VAATMIJ UNIDOR WILIE MSTAD

AND

THE MV "S.ARAZ" DEFENDANTS/RESPONDENTS
KORAY SHIPPING AND TRADING INC.)
(OWNERS OF THE MV "S.ARAZ")

***ACTIONS** - Cause of action - Security for damages - Belongs to adjectival law - It is not a cause of action sufficient to ground a claim - Unless provided by a statute.*

***ADMIRALTY** - Jurisdiction of High Court - Cannot be invoked for sole purpose of obtaining security for subsequent award in foreign jurisdiction - But for enforcement of claim arising out of an arbitral award.*

***STATUTES** - Admiralty Jurisdiction Act 1991 - S.102(a) & (b) is different from S.26 U.K Civil Jurisdiction and Judgment Act 1982.*

FACTS

The plaintiffs/appellants had in February 1995 commenced an action in rem against the defendants/respondents in the Lagos high court claiming the sum of \$250,000.00 American dollars as Security for damages, interest and cost in respect to claims before an arbitration tribunal in London arising out of their Charter party agreement. A motion ex parte applying for the arrest of the 1st defendant vessel was also filed and refused by the trial Judge. Subsequently the plaintiffs filed another action in rem as agents to the plaintiffs with almost the same claim as contained in the earlier action only with a varying claim of \$300,000 American dollars. This second application was granted by the trial judge and the 1st defendant vessel was arrested. The defendants by motion on notice sought to

strike out the order for the arrest and detention of the MV " S. Araz" and for her release on various grounds including lack of jurisdiction by the high court and abuse of court process by the plaintiff in filing more than one Suit in respect of the same claim.

Before the hearing of the defendants motion on notice the plaintiff filed a notice of discontinuance in respect of the earlier suit and the trial Court dismissed the application of the defendants. The defendants thus dissatisfied appealed to the Court of Appeal which allowed the appeal holding that the admiralty jurisdiction of the high Court cannot be invoked for sole purpose of providing security for an arbitration award and ordered the unconditional release of the Vessel MV " S.Araz." The plaintiffs dissatisfied have now appealed to the Supreme Court raising 3 issues while the defendants raised 4 issues. However the case requiring a decision on the competence of the plaintiffs action was decided on that lone issue.

ISSUE FOR DETERMINATION

Whether the Admiralty Jurisdiction of the Federal High Court can be invoked against the Defendants/Respondents solely for the provision of Security for an Arbitration proceeding in a foreign jurisdiction.

HELD (Unanimously dismissing the appeal per lead judgment of **OGUN-DARE JSC**)

Cause of action - Security for damages

1. What is Plaintiffs' cause of action in the present proceedings? Is security for damages, interest and/or costs that may be awarded in a proceeding a cause of action? Certainly not. Security for damages, etc. belongs to the realm of adjectival law, that which prescribes method of enforcing rights or obtaining redress for their invasion, it is essentially rules of court, whether civil, criminal or appellate. Laws which fix duties, establish rights and responsibilities among and for persons – be they natural or corporate – are known as substantive laws. But those which merely prescribe the manner in which such rights and responsibilities may be exercised and enforced in a court are adjectival or procedural laws. Security for damages, etc. belongs to the latter group. It is usually required of a debtor or defendant

to assure the payment or performance of his debt by furnishing the creditor or plaintiff with a resource to be used in case of failure in the principal obligation. It is not a cause of action that can ground a claim, unless otherwise specifically provided by statute. (p. 3004 B)

Statutes - Admiralty Jurisdiction Act 1991

2. With profound respect to learned counsel for the Plaintiffs, I do not share the view that section 26 of the U.K. Act is in *pari materia* with section 10(2)(a) & (b) of our own Act. Section 10 of our Act presupposes the existence of a pending action that is ordered to be stayed or dismissed. Section 26 of the U.K. Act goes further than this. Although the facts in *The Jalamatsya* (supra) are almost on all fours with the facts of the case on hand, but because there is no equivalent of section 26 of the U.K. Act in our Admiralty Jurisdiction Act, 1991, that case is not relevant to the case on hand. (p. 3006 F)

Admiralty - Jurisdiction of Federal high court

3. There is nothing in sections 1, 2, 5 and 10 of the Act or any other section, that empowers the Plaintiffs to invoke the admiralty jurisdiction of the Federal High Court in the circumstances of this case. Plaintiffs' claim is not for the enforcement of, or a claim arising out of, an arbitral award; it is for the sole purpose of obtaining security for the satisfaction of whatever award that might ultimately be made in their favour in the U.K. arbitration proceedings. They cannot invoke the admiralty jurisdiction of the Federal High Court by an action in *rem* for that purpose. Our law as it stands does not clothe the Federal High Court with such admiralty jurisdiction. (p. 3007 A)

NOTABLE POINTS OF INTEREST

KARIBI-WHYTE JSC

1. Once abuse of court process is established the case will be struck out
It is pertinent to observe that where an abuse of the process of the court is established the peremptory order is the striking out of the suit. No reason is required. That ground alone is sufficient – See Ando v. Aiyekru

(1997)3 NWLR.126. Accordingly, where the court has not resorted to that order because of the peculiar circumstances of the case, as in this case admitting that at the time of the hearing of the motion subject matter of the application, because of a valid notice of discontinuance of the earlier
B suit, it had only one suit before it. The implication is that there was in fact no abuse of the process of the court. (p. 3018 G)

2. *What is abuse of court process?*

C The legal concept of the abuse of the judicial process or the abuse of the procedure of the court is very wide. The scope and content of the circumstances of the material facts and conduct, which will result in such abuse, are infinite in variety. It does not appear that the category can be closed. New unforeseen conduct from the stratagem of Plaintiffs can give rise to the abuse. An abuse may be constituted through a proper and legitimate
D conduct in bringing actions even in the exercise of an established right in the manner or time of instituting actions. It may also be constituted by irregularities in the pursuit of actions. In every and all cases the general principle is that an abuse of the process of the Court is constituted when
E more than one suit is instituted by a Plaintiff against a defendant in respect of the same subject matter to the harassment, irritation and annoyance of the defendant, and in such a manner as to interfere with the administration of justice. These principles have been enunciated in several decisions
F of this court – See Okafor v. Attorney General, Anambra State (1991) 6 NWLR.659. (p. 3019 H)

3. *When discontinuance will nullify complaint of abuse of court process*

G It is generally accepted that the abuse lies in the multiplicity of suits per se, and that is ipso facto prima facie an abuse. However, where there is an effective and valid discontinuance of one of the two suits constituting the abuse leaving only one of the suits in the hearing of the application it seems to me the essential ingredients of abuse is not complete. The abuse is not made out. (p. 3020 F)

H 4. *Submission to arbitration does not bar recourse to court*

It is true a party to an Agreement with an arbitration clause has the option

either to submit to arbitration or to have the dispute decided by the court. The choice of arbitration does not bar a resort to the court to obtain security for any eventual awards of the arbitrator in the absence of any provision for security for costs. (p. 3027 G)

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REPRESENTATION

L. C. Ilogu (U. A. Ogakwu with him) for the Appellants.
Dr. E. Atake, SAN (O. Onigbogi with him) for the Respondents.

C

CASES REFERRED TO

Bello & Ors. v. Attorney-General Oyo State (1986) 5 NWLR pg. 828
John Mills v. Franklin Beatrice Aweonor Renner (1940) 6 WACA.
Idika & Ors v Erisi & Ors (1988) 2 NWLR 563
General Oil Ltd v Chief Ogunyade (1997) 4 NWLR 613
Shitta-Bey v A-G. Federation (1998) 10 NWLR 392

D

STATUTES REFERRED TO

U. K. Civil Jurisdiction and Judgments Act 1982 S.26.
Admiralty Jurisdiction Act 1991 - S. 1(i) (a), 2 (3) (f), 10 (2) (a) & (b)
Federal High Court Law 1973 - S. 11.
Federal High Court Act Cap 134 LFN 1990 S. 7 (i) (d)

E

BOOKS REFERRED TO

- (1) CHRISTOPHER HILL'S MARITIME LAW (3RD edition)
- (2) ALHAJI O.A OYEKANMI V NEPA

F

LEAD JUDGMENT BY OGUNDARE JSC

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The main question that calls for determination in this appeal is as to whether the admiralty jurisdiction of the Federal High Court can be invoked solely for the purpose of obtaining security for damages, interest and costs that may be awarded in arbitration proceedings being conducted in a foreign country. There are two other minor questions raised in the appeal, the necessity for which resolution depends on the answer to the main question.

The facts briefly are as follows:

The Plaintiffs (who are appellants in this appeal) are owners of the vessel M.V. CINDYA. By a charter party dated 17th October, 1989 the 2nd Defendants/Respondents herein hired the said vessel from the Plaintiffs. A dispute arose between the parties resulting in a claim made by the Plaintiffs on the 2nd Defendants/Respondents for demurrage and or damages for detention of the vessel M.V. CINDYA. The claim was referred to arbitration in London, United Kingdom and was still pending when the proceedings leading to this appeal commenced in the Federal High Court, Lagos.

On 22nd February 1995, ASCONA Shipping Ltd, Agents for Messrs M.V. Scheep Vaatmij Unidov Willel Matad, Curacos – the Plaintiffs in the present suit filed an action in rem (Suit No. FHC/ L/CS/213/95, against the present 2 Defendants claiming –

“The Plaintiffs, as Agents to Messrs M.V. Sheep Vaatmij Unidor Wille Mstad of Curacoa, Owners of the Vessel M.V. CINDYA, claim against the Defendants, jointly and severally, the sum of US\$250,000.00 (United States Dollars Two hundred and fifty thousand only) as security for damages, interest and cost in respect of the claim for demurrage and/or damages for detention relating to the 2nd Defendant’s use or hire of the said M.V. CINDYA pursuant to a charter party dated 17th October, 1989 presently under arbitration in London, United Kingdom.”

An application by them, brought ex-parte, to secure the arrest of the 1st Defendant was on 27/2/95 refused by the learned trial Judge, Ukeje, J.

On 28th February 1995, the Plaintiffs brought yet another action in *rem* against the two Defendants herein claiming –

“The Plaintiffs, as Owners of the Vessel M.V. CINDYA, claim against the Defendants, jointly and severally, the sum of US\$300,000.00 (United States Dollars Three hundred thousand only) as security for damages, interest and cost relating to a claim for demurrage and/or damages for detention for the 2nd Defendant’s use or hire of the said M.V. CINDYA pursuant to a charter party dated 17th October, 1989, which claim is presently under arbitration in London, United Kingdom.”

Simultaneously with the filing of the action, they also filed another motion

ex-parte praying for the following two main reliefs:

1. "An Order for arrest and detention of the vessel, M.V. "ARAZ present at BULLNOSE Berth 19, Apapa Port, Apapa, Lagos, within the jurisdiction of this Honourable Court.

2. *That the said vessel be released from arrest only upon the Defendants/ B respondents furnishing an acceptable Bank Guarantee in the sum of US\$300,000.00 to meet the Plaintiffs/Applicants' claim."*

The motion was supported by a 9-paragraph affidavit to which were annexed a number of documents. Paragraph 3 of the said affidavit reads:

3. That I am reliably informed by Steven Fox, of counsel in the C firm of Inc. & Co., Plaintiff's Solicitors in London, and I verily believe as follows:

i. That Arbitration proceedings were commenced in July 1992 and are presently pending in London, United Kingdom, between the Plaintiffs/ D Applicants and the 2nd Defendants/Respondents in terms of a claim which the 2nd Defendants/Respondents have failed and/or neglected to settle.

ii. That the documents now shown to me and marked Exhibits "A F" are the claims Submissions and supporting documents submitted to the E Sole Arbitrator, one Mr. Mark Hamsher, of 18C Ensign Street, London E1 8JD, by solicitors to the parties.

iii. That the Defendants/Respondents have to date not provided any security to meet the Plaintiff's claim or any award thereon before the F Sole Arbitrator.

iv. That the Plaintiffs/applicants' claim before the Sole Arbitrator is for US\$224,519.79 being demurrage and/or damages for detention arising from the 2nd Defendant's use or hire of the Plaintiff's vessel, M.V. CINDYA, pursuant to a Charter party dated 24th October, 1989 annexed G hereto as Exhibit "D".

v. That the Plaintiffs/Applicants now wish to obtain security from the Defendants/Respondents to ensure payment of any arbitration award in its favour obtained at the end of the said proceedings. H

vi. That the 2nd Defendant/Respondent is the beneficial owner of the 1st Defendant vessel M.V. "S.ARAZ" as confirmed by the Lloyd's Confidential Index now shown to me and marked Exhibit "G" to this Affidavit.

vii. That it will be in the interest of justice to arrest the said vessel to ensure that the Defendants/Respondents provide adequate security in the form of an acceptable Bank Guarantee to meet any award in favour of the Plaintiffs/Applicants in the arbitration proceedings.

B viii. That the Plaintiffs/Applicants are prepared to give an undertaking in damages for this application.”

There was also an affidavit of urgency filed along with the motion papers. The motion was moved by learned counsel for the Plaintiffs on 6th March 1995 and, in a ruling delivered on 9th March, was granted by
C *the learned trial Judge (Ukeje J.) Who concluded and ordered as follows:*

“In the circumstance, the Plaintiff has made out a case sufficiently strong to move this Court to grant the reliefs sought.

Consequently, the Orders sought are granted, in part and the following Orders are made –

D (1) The vessel MV ‘S.ARAZ now lying at Bullnose Berth 19, Apapa Port, Apapa, Lagos, within the jurisdiction of this Court is hereby ordered to be arrested and detained until the determination of the Motion on Notice until this Court otherwise orders.

E (2) The said vessel shall be released from arrest and detention only upon the Defendants/Respondents furnishing an acceptable Bank Guarantee in the sum of US\$300,000 to meet the Plaintiff’s/Applicant’s claim.

F (3) The Plaintiffs shall file an undertaking to indemnify the Defendants against any loss or damage they may incur should it later transpire that this Order is needless.

That is the finding of this Court in this Ruling.”

On the warrant of arrest as ordered by Ukeje, J. Being served on the 1st Defendant, an application was on 3/5/95, filed on its behalf praying for an order.
G

“Striking out and/or discharging unconditionally the interim Order made on the 9th March, 1995 for the arrest and detention of the 1st Defendant/Applicant, that is, the M.V. “S.ARAZ” berthed at shed number 19 Apapa Port, Apapa, Lagos.”

Upon the grounds –

H (a) The 2nd Defendants are not the beneficial owners of the 1st De-

fendant/Applicant vessel, Viz: the M.V. "S.ARAZ".

(b) There is no cause of action against the 1st Defendant/Applicant because the 2nd Defendants are not the beneficial owners of the 1st Defendant/Applicant vessel.

(c) Arbitration is in fact in progress between the parties in England. B

(d) The proceedings in this suit are an abuse of the process of this Honourable Court.

(e) The case herein has no connection whatsoever with Nigeria."

The application was supported by a 13-paragraph affidavit, the penultimate paragraphs of which read: C

"3. That I am informed by the Disponent Owners of the 1st Defendant/Applicant vessel and I verily believe them that the owners of the 1st Defendant/Applicant vessel is Turkiye Kalkinma Bankasis A.S. as confirmed by the Lloyds Register of Ships 1994-95. There is now produced and shown to me a copy of the Lloyds Register of Ships 1994-95 marked "A1 1". D

4. That as Disponent Owners of the 1st Defendant/Applicant, they are the Managers and beneficial owners of the 1st Defendant/Applicant currently on Time Charter to Tigris International Corporation. There is now produced and shown to me a copy of the Time Charter Party (Charter Party) between the Disponent Owners, Ege Shipping Trading & Industry Corp and the Time Charterers, Tigris International Corp marked "A1 2". E

5. That the Disponent Owners of the 1st Defendant/Applicant informed me and I verily believe them that:- F

a) Koray Shipping and Trading Inc. as an Associated Company of Ege Shipping and Trading Industry Inc. are not the beneficial owners of the M.V. "ARAZ", the 1st Defendant/Applicant but are only the nominal owners of the 1st Defendant/Applicant in this suit as confirmed by a copy of the Lloyds Confidential Index. There is now produced and shown to me a copy of the Lloyds Confidential Index marked "A1 3" G

b) as nominal owners of the 1st Defendant/Applicant Koray Shipping and Trading Industry Corp. Do not have any actual interest in the 1st Defendant/Applicant, nor can they benefit from its profits. H

c) As nominal owners of the 1st Defendant/Applicant, Koray Shipping & Trading Inc. (the 2nd Defendant/Respondents in this suit) is not the

person who would be liable in an action in personam.

d) The person(s) who would be liable in an action in personam are the Beneficial or Disponent Owners of the 1st Defendant/Applicant.

B e) When the cause of action arose and to date, Ege Shipping and Trading Industry Inc. were and are the beneficial owners of all the shares in the M.V. "S.ARAZ", the 1st Defendant/Applicant.

C 6. That on the 9th March, 1995 the Plaintiffs obtained an Order of interim arrest and detention of the M.V. "S. ARAZ" before this Honourable Court for alleged demurrage and/or damages for detention arising from the 2nd Defendants use or hire of the Plaintiffs' vessel, M.V. CINDYA, pursuant to a Charter Party dated 24 October, 1989.

7. That there is no connection whatsoever between the M.V. S.ARAZ" and is not a sister vessel to the M.V. "CINDYA".

D 8. That I am informed by Adewale Atake of counsel whom I verily believe as follows:-

E a) that the Plaintiffs cannot maintain a cause of action against the 1st Defendant/Applicant for alleged demurrage/damages caused by the 2nd Defendants/Respondents in this suit because the 2nd Defendants/Respondents are not the beneficial owners of the 1st Defendant/Applicant.

F b) that this matter is currently before a Sole Arbitrator in London between the parties in this suit for which they have filed statements. There is now produced and shown to me the Statement of Claim of the Plaintiffs in suit and the Statement of Defence of the Defendant/Respondent in this suit filed before the Sole Arbitrator in London marked "A1 4" and "A1 5" respectively.

G c) That the Plaintiffs in this action commenced an action in rem for the arrest of the M.V. "S.ARAZ" the 1st Defendant/Applicant at the suit of Ascona Shipping in Suit No. FHC/L/CS/213/95 before the Honourable Justice Ukeje of the Federal High Court, Lagos which application was refused on the ground that the matter was pending before an arbitrator in London for which the parties have already filed statements. There is now produced and shown to me a copy of the Particulars of Claim and the Ruling of the Court in that suit marked "A1 6" and "A1 7" respectively.

H d) That the Plaintiff thereafter commenced another action for the same claim as the one in Suit No: FHC/LCS/213/95 for the arrest of the M.V.

"S.ARAZ", the 1st Defendant/Applicant using the name Vatimij Unidor Willie Mstad, who are the principals to the Plaintiffs in suit No. FHC/L/CS/213/95, referred to in paragraph © above. There is now produced and shown to me a copy of the Charter Party between the Plaintiff and the 2nd Defendant/Respondent indicating that the Plaintiffs in Suit No. FHC/L/CS/213/95 are the agents to the Plaintiffs in the suit herein marked "A1 8" and the particulars of claim in the suit herein marked "A1 9". B

e) That if the Plaintiffs want a security in satisfaction of their claim for demurrage and/or damages caused by the 2nd Defendants/Respondents use and/or hire of the M.V. "CINDYA" owned by the Plaintiffs, they should have done so before the Sole Arbitrator where arbitration proceedings are pending and not before this Honourable Court. C

9. That further to paragraph 8 (c) and (d) above, the Plaintiffs have not used the machinery of the Court bona fide, as they have abused the D process of the Court by engaging in oppressive and vexatious litigation against the st. defendant/Applicant.

10. That the cause of action in this suit has no connection with Nigeria.

11. *That since the Order of arrest obtained on the M.V. "S.ARAZ", she has been incurring costs, losses and expenses."* E

A number of documents was annexed to this affidavit and an affidavit of urgency was also filed along with the application.

The Plaintiffs responded to this application by filing a counter-affidavit in which one Folasade Giwa, a legal practitioner deposed, *inter F alia*, as follows:

3. *That the 1st Defendant's application together with the Affidavit in support and the affidavit of Urgency have been shown to me and this Counter Affidavit is in response thereto.* G

4. *That the Company, Turkiye Kalkinma Bankasi A.S. named in Exhibit A1.1 is owned by Koray Shipping and Trading Inc., the 2nd Defendant/Respondent as shown by Exhibit A1. 3 to this application.*

5. That the alleged Disponent Owners are not a party to this action H and have taken no steps to become a party thereto.

6. That no particulars or terms of the alleged disponent ownership have been presented to this Honourable Court.

7. That Exhibit A1.2, the Time Charter party with a third party, has

an Addendum which forms part thereof which the deponent failed to disclose. The same is now marked as "Exhibit FG1" hereto and shows that;

(a) the 2nd Defendant/Respondent is a party to the said Charter party;

(b) that 2nd Defendant/Respondent is not merely the nominal owner
B of the 1st Defendant/Applicant but remains the beneficial owner thereof
in all respects as to its shares and profits therefrom.

8. That with regard to paragraph 5 of the Affidavit in support, I am
informed by Steven Fox Esq., solicitor of Inc. & Co., London, instructing
solicitors in this matter and I verily believe him as follows:

C (a) That the 1st Defendant/Applicant, M.V. "S.ARAZ" is a Turkish
vessel registered in the Registry of Istanbul where the "proprietor" is men-
tioned as Turkiye Kalkimma Bankasi A.S. and the "owner" as KORAY
SHIPPING 7 TRADING INC. the 2nd Defendant/Respondent herein.

(b) That under Turkish Law, the 2nd Defendant/Respondent remains
D the beneficial owner as respect all the shares in the 1st Defendant/Appli-
cant vessel.

(c) That Turkiye Kalkinma Bankasi A.S. and the said Ege Shipping
Trading & Industry Corporation are companies owned by the 2nd Defendant/
E Respondent, Koray Shipping & Trading Inc.

(d) That the 2nd Defendant/Respondent is the person who would
be liable in an action in personam in the matter giving rise to this claim.

(e) That the alleged disponent owners are merely Managers of 1st
F Defendant/Applicant on behalf of the 2nd Defendant/Respondent, having
only use and control of the vessel and not beneficial ownership or interest
in its shares.

(f) That Ege Shipping & Trading Industry Corporation were never
the beneficial owners of all the shares in the 1st Defendant/Applicant either
G at the time the cause of action arose or presently.

9. That the 2nd Defendant/Respondent chartered the vessel M.V.
"CINDYA" from the Plaintiff/Applicant and breached the terms of the
said charter.

10. That the vessel M.V. "S.ARAZ" is not a sister ship to M.V. "CIN-
DYA" but remains beneficially owned by the 2nd Defendant/respondent.
H

11. That the matter before this Honourable Court in this suit remains

a claim for security for damages and not a claim for demurrage or damages for detention which is before the Arbitrator.

12. That the issue before this Court is different from that which is before the Sole Arbitrator in London.

13. That the Plaintiff/Respondent is free and entitled to bring this action in rem before this Honourable Court in exercise of its legal right. B

14. That the Plaintiff/Respondent is not obliged to present this claim before the Sole Arbitrator in the pending Arbitration and has not done so.

15. That Suit No. FHC/L/CS/213/95 was not commenced by the Plaintiff/Respondent in this suit. C

16. That the Plaintiff/Respondent in this suit is different from the Plaintiff/Applicant in Suit No. FHC/L/CS/213/95 and the Particulars of Claim and facts relied upon herein are different.

17. That the Plaintiff/Respondent in this Suit is entitled to the order granted by this Honourable Court on the facts disclosed notwithstanding that Arbitration is pending in London. D

18. That on the instruction of the Plaintiff/Applicant in Suit No. FHC/L/CS/213/95 the Court processes therein were never served on the Defendant/Respondent and the action has been discontinued and is no longer pending. The document now shown to me as Exhibit "FG2" herein is the Notice of Discontinuance. E

19. That the Plaintiff/Respondent has acted in good faith in this matter and has not in any way abused the process of this Honourable Court. F

20. That the Defendants have not in any way been oppressed by vexatious or several litigation at the instance of the Plaintiff/Respondent.

21. That the cause of action in this suit is enforceable in Nigeria against a vessel within her jurisdiction. G

22. That the said vessel M.V. "S.ARAZ" is presently under two earlier arrest in Suit Nos. FHC/L/CS/40/95 and FHC/L/CS/226/95 which were commenced prior to this suit.

23. That document now shown to me and marked Exhibit "FG3" is the particulars of claim in suit No. FHC/L/CS/226/95 commenced against, inter alia, the 2nd Defendant/Respondent in this Suit. H

24. That the 1st Defendant/Applicant is seeking to hide or disguise its true beneficial ownership in order to defeat the course of justice in

this matter.

25. That the order of arrest in this suit has not in any was imposed any cost on the Defendant/Applicant in view of the earlier and subsisting arrest orders.”

B (Underlining are mine).

The Notice of Discontinuance of Suit FHC/L/CS/213/95 dated 5th day of May 1995 is one of the documents annexed to the counter-affidavit. A further counter-affidavit was also filed in which Folasade Giwa deposed:

C 3. That on the 15th day of May, 1995, I deposed to a counter-affidavit in this matter.

4. That I had in paragraph 22 of the said Counter Affidavit deposed to the fact that the vessel M.V. “S.ARAZ”, is under arrest in Suit No. FHC/L/CS/40/95.

D 5. That the owners of the vessel M.V. “S.ARAZ” had filed an application in the said suit No. FHC/L/CS/40/95 for the order of arrest to be discharged. A certified True copy of the Affidavit in support of the motion is attached as Exhibit “FG4”.

E 6. That in paragraph 1 of Exhibit FG4 deposed to by the Captain of the vessel, the owners of the vessel is stated to be KORAY DENIZCILIK VE TICARET A.S. Which in English means KORAY SHIPPING & TRADING INC. – THE 2nd defendant.

F 7. That in paragraph 10 of the said Exhibit FG4, it is deposed that “according to Turkish Laws, the owner of the vessel, “S.ARAZ”, was always and still is KORAY DENIZCILIK VE TICAREY A.S.

8. *That the introduction of EGE SHIPPING TRADING & INDUSTRY CORP. As Disponent Owners is merely designed to mislead the Honourable Court.”*

G And had annexed to it a number of documents. The counter-affidavits provoked a further affidavit being filed on behalf of the 1st Defendant in which Adewale Atake deposed, inter alia:

H 3. *That I have seen and read the affidavit dated 3 May, 1995 of Chief Aloysius Idam a Senior Manager, Marine Division, S.G.S. Inspection Services Nigeria Limited representative of the Owners of the M.V. “S.ARAZ”, the 1st Defendant/Applicant herein.*

4. *That I have read the Counter Affidavit and further Counter Affidavit of*

Folasade Giwa filed on the 15th May 1995 and 16 May 1995 respectively.

5. That I discovered after perusing the Affidavit in support of the application for the arrest and detention of the 1st Defendant/Applicant that paragraph 3(iv) of the said Affidavit is not correct because the 2nd Defendant/Respondent are not the beneficial owners of the 1st Defendant/Applicant as confirmed by EXH. G of the said Affidavit. B

6. That the owners of the 1st Defendant/Applicant are Turkiye Kalkinma Bankasis A.S. As contained in paragraph 3 of the Affidavit in support of this application dated 3rd of May, 1995 and confirmed by EXH. "A1 1" of the said Affidavit. C

7. That paragraph 6 and 8 of the Further Counter Affidavit is not correct as the ownership of a vessel can only be established based on the entry in the Lloyds Register of Ships, i.e. EXH. "A1" referred to in paragraph 6 above. D

8. That paragraph 18 of the Counter Affidavit of Folasade Giwa dated 16 May, 1995 is not correct, the Notice of Discontinuance was only filed after the Plaintiffs' application in Suit No. FHC/L/CS/213/95 to arrest and detain the 1st Defendant/Applicant herein was dismissed and also after the 1st Defendant/Applicant in this suit had filed their application to strike and/or release unconditionally the 1st Defendant/Applicant in the suit herein." E

1st Defendant's motion came before Ukeje J. For hearing on 17th, 22nd and 23rd May 1995. After hearing arguments from learned counsel for the parties, the learned trial Judge, in a ruling delivered on 31st May 1995, refusing the prayers sought by the 1st Defendant, found: F

1. "It is therefore my considered view that by virtue of section 5(7), the provisions of 'Beneficial owner' under Section 5(4) relate only to a Nigerian Shipper. There is no doubt that the 2nd Defendant is neither resident in Nigeria nor does it have its place of business in Nigeria. G

1. By virtue of EXHS. A,B and D, it is beyond controversy that the 2nd Defendants are resident and carry on business in Istanbul, H Turkey. Therefore, the provision of Section 5(4) of the Decree do not apply to the 2nd Defendant. Accordingly, whether or not the 2nd Defendant is the beneficial owner of all the shares in the 1st Defendant vessel, within the meaning of Section 5 (4) (b) does not

arise and is inapplicable."

- B 2. *"From the totality of the foregoing, particularly, from the admission of the Captain of the vessel himself; and the exposition of Turkish Law, it becomes abundantly clear the Koray A.S. The 2nd Defendant herein is the Owner of the 1st Defendant vessel. In this regard, I should refer to Section 151 of the Evidence Act which makes admissible any averment against one's own pecuniary or other interest.'*
- C 3. *"Accordingly, whether the 2nd Defendants herein is the owner (per EXH. FG10 or the Disponent or nominal owner (per EXH. A1) or the owner as per paras. 1 and 10 of EXH. FG4), the 2nd Defendant is, within the meaning of the cases of Andrea Ursula and Congresso del Partido, the owner for the purposes of this suit. For all those, I find that the 2nd Defendant beneficially owns the 1st Defendant vessel."*
- D 4. *The 2nd Defendant owns the 1st Defendant, which thereby becomes liable to arrest on an admiralty claim in rem."*
- E 5. *"Without more, by combined effect of the provisions of Section 10(1) and (2) of the Decree, into which the facts of this case squarely fit, I find that notwithstanding the pendency of the Arbitration in London, this Court can if the Court sees fit, in exercise of its powers, in particular under Section 10 (1) (b) and 2 (b) of the Decree, order the arrest of the vessel and impose as a condition for its release, the sum claimed by the Plaintiff herein as security for payment of the award of the Arbitration.*
- F *See also M/V Da Quing Shang v. PAC (1991) 8 NWLR (Pt.209) at p.354 where the Court of Appeal upheld an arrest to secure the award of an arbitration. Therefore, I resolve this issue in favour of the Plaintiff."*
- G 6. *".....this Court has jurisdiction to hear and determine the application herein; and therefore, the Plaintiffs are properly before this Court".*
- H 7. *That suit FHC/L/CS/213/95 having been discontinued with, "there are not two actions now pending" and therefore there was no abuse of process of Court."*

The Defendants were displeased with the decision of the trial High Court and appealed to the Court of Appeal. That Court, after considering the submissions in the written briefs of the parties and the oral arguments of their respective learned counsel, allowed the appeal, struck out Plaintiff's suit and ordered the immediate release of the 1st Defendant. The Court. B
As per the lead judgment of R.D. Muhammad JCA with which the other Justices expressed consent, found, *inter alia*, as follows:

"I consider the conduct of the respondent as an abuse of the judicial process of the court in that the respondent having failed to secure the arrest of the ship in Suit No. FHC/L/CS/213/95 proceeded to obtain the arrest of the ship by filing suit No. FHC/L/CS/236/95 against the appellants while the earlier suit was still pending." C

"Suit No. FHC/L/CS/213/95 has been discontinued and struck out. There was only one case before the court below, when it heard the motion. Even though I have held that filing the second suit while the first one was pending before the court was an abuse due to the peculiar circumstances of this case. I.e. the first case has been discontinued. I don't think the appeal should be allowed on this alone." D

"A nominal owner cannot be said to be the beneficial owner with respect to all the shares in a ship he nominally owns. I, therefore, hold that the Lloyds's confidential index is not a confirmation that Koray Shipping is the beneficial owner of the M.V. "S.ARAZ." E

"I therefore, believe that M.V.S. "ARAZ" is owned by Turkiye Kalkimma Bankasi A.S. and not Koray Shipping and I so hold. For the above reason I hold that the trial Judge was wrong to hold Koray was the beneficial owner of the ship." F

That "since Koray Shipping are not the beneficial owners as respects the shares in M.V.S. "ARAZ", the action cannot be maintained under S.5 (4) (b)." G

"I hold that the learned trial Judge was wrong to hold that S.10 of the Admiralty Jurisdiction Act, 1991 applied to this case." H
Muhammad JCA concluded:

"As I have stated the only purpose of bringing, this action to obtain security from the appellants to ensure payment of any arbitration

award that may be made in favour of the respondents in an arbitration which has commenced in London since 1992. The combined effect of Sections 1(1) (a), S.5 (4) and S 10 of the Admiralty Jurisdiction Act, 1991 is that the admiralty jurisdiction of the Federal High Court cannot be invoked in such a situation."

Being dissatisfied with the judgment of the Court of Appeal, the Plaintiffs have now appealed to this Court upon two original and one additional grounds of appeal and in their amended brief of argument filed pursuant to the rules of this Court, have set down three issues as calling for determination in this appeal, to wit:

1. *Whether the Appellants' action was an abuse of process particularly after the earlier action had been discontinued?*

Whether the Admiralty Jurisdiction of the Federal High Court can be invoked against the Defendants/Respondents solely for the provision of Security for an Arbitration proceeding in a foreign jurisdiction?

Whether the 2nd Defendant/Respondent, KORAY SHIPPING & TRADING INC. are the Beneficial Owners of the Motor Vessel "S. ARAZ" in the circumstances of this case?"

The issues as formulated by the Defendants in their own brief are not dissimilar though differently worded. I propose to adopt Plaintiffs' issues in the determination of this appeal. And because Issue (2) relates to the competence of Plaintiffs' action, and therefore, the jurisdiction of the trial Court, it shall be the one to be considered first.

ISSUE (2)

Both in his written brief of argument and oral submissions, Mr. Ologu, learned counsel for the Plaintiffs submits that the admiralty jurisdiction of the Federal High Court can be invoked against the Defendants in an action for the provision of security for an arbitration proceeding as in the case on hand for the reason that the 2nd Defendants breached the terms of a charter party they had with the Plaintiffs and that breach gave rise under section 2(3)(f) of the Admiralty Jurisdiction Act, 1991 to a maritime claim and that in addressing such a claim it is the usual practice to require a defendant to give security for the satisfaction of any award which a Court or an arbitrator may eventually make. It is argued further

that as the maritime claim in this case was pending before an arbitrator and 2nd Defendant had not given security, it was proper for the Plaintiffs to claim for such security as they have done and that the Federal High Court would have jurisdiction to entertain such claim pursuant to section 2(3)(f) of the Act. It is argued that the provision of security is not limited to actions commenced in court of law alone but extends to arbitration proceedings as well. A passage at page 99 of Christopher Hill's Law (3rd edition) is cited as authority for this submission. It is learned counsel's submission that by the combined effect of sections 1(1) (a) and 2 (3) (f) of the Act "a claim for the provision of security for the satisfaction of an award by an arbitrator is a matter which the Federal High Court can hear and determine conclusively on the merits without more being required of the Plaintiffs as such a claim or matter arises out of an agreement for the use or hire of a ship". Learned counsel further submits that pursuant to section 10 (2) (a) & (b) of the Act, the Plaintiffs' action is, sustainable. Counsel relies on *M.V. "Da Quing Shan & Ors. V. Pan Asiatic Commodities Pte Limited* (1991) 8 NWLR 354 at p. 364 F-G in support of his submission. Learned counsel argues that if the Federal High Court can invoke the admiralty jurisdiction to order the arrest of a vessel where it stays proceedings in an action commenced before it for the purpose of having the dispute resolved by arbitration the mere fact that a party opts to go to arbitration in the first instance rather than go to court (which proceedings are liable to be stayed) does not derogate from the powers of the Court to order provision of security pursuant to an action *in rem* and an arrest made thereunder. Counsel submits that in interpreting a statute, every clause must be construed with reference to the context and other clauses of the Act as far as possible to make a consistent understanding of the whole statute and achieve its intendment. He relies on *Orubu v. NEC* (1988) 5 NWLR 323 at p.333 and urges this Court to hold that the Court of Appeal was in error when it held that the admiralty jurisdiction of the Federal High Court did not extend to a claim solely for the provision of security to satisfy an arbitration award. Relying on *The Jalamatsya* (1987)f2 Lloyd's Report 164 learned counsel observes that, in England, whether a plaintiff proceeded by way of arbitration rather than by court action would not matter as by virtue of S.26 of the Civil Jurisdiction and

Judgments Act 1982, such plaintiff could obtain security by was of in rem procedure without being accused of abusing the court's process. He urges this Court to follow the practice in England more so that section 26 of the U.K. Act applied in *The Jalamatsya* case is in *pari material* with section 10 of the Nigerian Act under consideration. After citing a passage on page 95 on Hill's Maritime Law, learned counsel concludes his submissions thus:

"The nature of the action filed in this suit as borne out by the Particulars of Claim (set out in page 2 of the Record of Appeal) does not derogate from the powers of the Federal High Court under S.11 of the Federal High Court Act to determine the matter of security completely and finally as distinct from the issue of the charter party breach being contested before the arbitrator in London. To this end, the Court is entitled and free to call for oral and documentary evidence from the parties before making any order as may be deemed appropriate in the interest of justice."

Dr. Atake, SAN learned leading counsel for the Defendants, both in his written brief and in oral submissions, argues that the admiralty jurisdiction of the Federal High Court cannot by the combined effect of section 1(1)(a) of the Admiralty Jurisdiction Act 1991 and section 11 of the Federal High Court Law 1973, be invoked in the circumstances of the case on hand. Learned Senior Advocate examines section 10(1) & (2) of the Act and submits that it applies only in cases where proceedings are stayed or dismissed, unlike in the case on hand where proceedings are not stayed or dismissed in the Nigerian Court. Learned Senior Advocate points out that the *M.V. "Dan Quing Shan"* case (supra) relied on by the Plaintiffs is not apposite to the case on hand as there was a substantive claim of ₦300,289.00 for excess freight, etc. in that case and that the issue here did not arise nor was decided in that case. Dr. Atake also draws the Court's attention to another passage in Christopher Hill's Maritime Law which appears to run counter to Plaintiffs' stand in the case on hand. He submits that The Jalamataya case is inapplicable and immaterial in deciding the case on hand in that section 26 of the U.K. Act is not in *pari materia* with section 10 of the Nigerian Act. Learned Senior Advocate urges the Court to uphold the decision of the Court of Appeal and dismiss

this appeal.

I have earlier in this judgment set out the claim of the Plaintiffs. No doubt, by the terms of the claim the sole purpose of the action is to seek in the Federal High Court security for whatever damages, interest or costs that might be awarded in Plaintiffs' favour in the arbitration proceedings then pending in London. It is this action that the learned trial Judge held she had jurisdiction to entertain. But the Court of Appeal held differently. The question that arises is who is right? B

To answer this question one must first have a look at the Federal High Court Act Cap.134 Laws of the Federation of Nigeria 1990. Section 7 (1) (d) of the Act confers on the Federal High Court admiralty jurisdiction which jurisdiction is provided in section 1 of the Admiralty Jurisdiction Act, 1991. Section 1 provides: C

"1. (1) The admiralty jurisdiction of the Federal High Court (in this Decree referred to as "the Court") includes the following, that is – D

(a) jurisdiction to hear and determine any question relating to a proprietary interest in a ship or aircraft or any maritime claim specified in section 2 of this Decree; E

(b) any other admiralty jurisdiction being exercised by any other court in Nigeria immediately before the commencement of this Decree;

(c) any jurisdiction connected with any ship or aircraft which is vested in any other court in Nigeria immediately before the commencement of this Decree; F

(d) any action or application relating to any cause or matter by any ship owner or aircraft operator or any other person under the Merchant Shipping Act or any other enactment relating to a ship or an aircraft for the limitation of the amount of his liability in connection with shipping or operation of aircraft or other property; G

(e) any claim for liability incurred for oil pollution damage;

(f) any matter arising from shipping and navigation or any inland waters declared as national waterways; H

(g) any matter arising within a Federal port or national airport and its precincts, including claims for loss of or damage to goods occurring between the off-loading of goods across space from a ship or an aircraft

and their delivery at the consignee's premises, or during storage or transportation before delivery to the consignee

B (h) any banking or letter of credit transaction involving the importation or exportation of goods to and from Nigeria in a ship or an aircraft, whether the importation is carried out or not and notwithstanding that the transaction is between a bank and its customer;

(i) any cause or matter arising from the constitution and powers of all ports authorities, airport authority and the National Maritime Authority;

C (j) any criminal cause and matter arising out of or concerned with any of the matters in respect of which jurisdiction is conferred by paragraphs (a) to (i) of this subsection.

D (2) The admiralty jurisdiction of the Court in respect of carriage and delivery of goods extends from the time the goods are placed on board a ship for the purpose of shipping to the time the goods are delivered to the consignee or whoever is to receive them whether the goods were transported on land during the process or not.

E (3) Any agreement or purported agreement, monetary or otherwise, connected with or relating to carriage of goods by sea whether the contract of carriage is executed or not shall be within the admiralty jurisdiction of the Court. "

What is a proprietary interest in a ship or aircraft or what is a maritime claim is to be found in section 2 of the Act which reads:

F "2. - (1) A reference in this Decree to a maritime claim is a reference to a proprietary maritime claim or a general maritime claim.

(2) A reference in this Decree to a proprietary maritime claim is a reference to-

(a) a claim relating to-

G (i) the possession of a ship, or
(ii) a title to or ownership of a ship or of a share in a ship, or
(iii) a mortgage of a ship or of a share in a ship, or
(iv) a mortgage of a ship's freight;

(b) a claim between co-owners of a ship relating to the possession, ownership, operation or earning of a ship;

H (c) a claim for the satisfaction or enforcement of a judgment given

by the Court or any Court (including a court of a foreign country) against a ship or other property in an admiralty proceeding in rem;

(d) a claim for interest in respect of a claim referred to in paragraph (a), (b) or (c) of this subsection.

(3) A reference in this Decree to a general maritime claim is a reference to-

(a) a claim for damage done by a ship whether by collision or otherwise;

(b) a claim for damage received by a ship;

(c) a claim for loss of life for personal injury; sustained in consequence of a defect in a ship or in the apparel

(d) or equipment of a ship;

including a claim for loss of life or personal injury, arising out of an act or omission of-

subject to subsection (4) of this section, a claim,

(i) the owner or character of a ship,

(ii) a person in possession or control of a ship,

(iii) a person for whose wrongful act or omission the owner, charterer or person in possession or control of the ship is liable;

(e) a claim for loss of a damage to goods carried by a ship;

(f) a claim out of an agreement relating to the carriage of goods or persons by a ship or to the use or hire of a ship, whether by charter party or otherwise;

(g) a claim relating to salvage (including life salvage of cargo or found on land);

(h) a claim in respect of general average;

(i) a claim in respect of pilotage of a ship;

(j) a claim in respect of towage of a ship or an aircraft when it is water borne;

(k) a claim in respect of goods, materials or services (including stevedoring and lighterage service) supplied or to be supplied to a ship for its operation or maintenance;

(l) a claim in respect of the construction of a ship (including such a claim relating to a vessel before it was launched);

(m) a claim in respect of the alteration, repair or equipping of a ship

or dock charges or dues;

(n) a claim in respect of a liability for port, harbour, canal or light tolls, charges or dues, or tolls, charges or dues of any kind, in relation to a ship;

B (o) a claim arising out of bottomry;

(p) a claim by a master, shipper, charterer or agent in respect of disbursements on account of a ship;

(q) a claim for an insurance premium, or for a mutual insurance call, in relation to a ship, or goods or cargoes carried by a ship;

C (r) a claim by a master, or a member of the crew, of a ship for –

(i) wages, or

(ii) an amount that a person, as employer, is under an obligation to pay to a person as employee, whether the obligation arose out of the contract of employment or by operation of law, including by operation of the law of a foreign country;

(s) a claim for the forfeiture or condemnation of a ship or of goods which are being or have been carried, or have been attempted to be carried in a ship, or for the restoration of a ship or any such goods after seizure;

E (t) a claim for the enforcement of or a claim arising out of an arbitral award (including a foreign award within the meaning of the Arbitration and Conciliation Act made in respect of a proprietary maritime claim or a claim referred to in any of the preceding paragraphs;

F (u) a claim for interest in respect of a claim referred to in any of the paragraphs (a) to (t) of this subsection.

(4) A claim shall not be made under subsection (3)(d) of this section unless the act or omission is an act or omission relating to the management of the ship, including an act or omission in connection with -

(a) the loading of goods on to or the unloading of goods from a ship;

G (b) the embarkation of persons on to or the disembarkation of persons from a ship; and

(c) the carriage of goods or persons on a ship.

(5) A claim under paragraphs (a) to (c) of this subsection may be made against the owner, agent or charterer of a ship.

H What then is a claim? The word is defined in Black's Law Dictio-

nary as meaning:

“demand as one’s own or as one’s right;.....A cause of action.....”

And the expression “cause of action” is defined in the said Dictionary as meaning –

“The fact or facts which give a person a right to judicial redress or relief against another. The legal effect of an occurrence in terms of redress to a party to the occurrence. A situation or state of facts which would entitle party to sustain action and give him right to seek judicial remedy in his behalf.”

See also: *Bello & Ors. V. Attorney-General Oyo State (1986) 5 NWLR pg. 828*

From the above, it can be seen that a claim presupposes a cause of action.

What is Plaintiffs’ cause of action in the present proceedings? D
Is security for damages, interest and/or costs that may be awarded in a proceeding a cause of action? Certainly not. Security for damages, etc. belongs to the realm of adjectival law, that which prescribes method of enforcing rights or obtaining redress for their invasion, it is essentially rules of court, whether civil, criminal or appellate. Laws which fix duties, establish rights and responsibilities among and for persons – be they natural or corporate – are known as substantive laws. But those which merely prescribe the manner in which such rights and responsibilities may be exercised and enforced in a court are adjectival or procedural laws. Security for damages, etc. belongs to the latter group. It is usually required of a debtor or defendant to assure the payment or performance of his debt by furnishing the creditor or plaintiff with a resource to be used in case of failure in the principal obligation. It is not a cause of action that can ground a claim, unless otherwise specifically provided by statute. One of such statute is the U.K. Civil Jurisdiction and Judgments Act, 1982 section 26 of which provides: E
F
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“Where in England and Wales, or Northern Ireland, a court stays or dismisses Admiralty proceedings on the ground that the dispute in question should be submitted to arbitration or to the determination of the courts of another part of the United Kingdom, or of an overseas country the court

may, if in those proceedings property has been arrested, or bail or other security has been given to prevent or obtain release from arrest – (a) order that the property arrested be retained as security for the satisfaction of any award of judgment which – (i) is given in respect of the dispute in the arbitration or legal proceedings in favour of which those proceedings are stayed or dismissed and (ii) is enforceable in England and Wales, or as the case may be, in Northern Ireland; or (b) order that the stay or dismissal of those proceedings be conditional on the provision of equivalent security for the satisfaction of any such award or judgment.”

It was on the basis of the above provisions that Sheen, J in The “JALAMATSYA” (supra held at page 165:

“That section (that is section 26) was enacted to enable claimants (I use a neutral expression) to obtain security if they proceeded by way of arbitration rather than by action. In my judgment 26 applies whether or not an arbitration has already been commenced. It follows that if an arbitration has been commenced, and if the claimants in the arbitration have not obtained security for any possible award, they can quite properly issue a writ in rem if they know that a ship belonging to the respondents in the arbitration is coming within the jurisdiction, and they may arrest that ship in order to obtain security.”

(Words in earlier brackets are mine)

In an earlier case The “Vasso” (1984)1 Lloyds Report 235; (1984) QB 477 which arose before the enactment of the 1982 Act the Court of Appeal (England), per Goff LJ. At p.242 affirming Sheen J, declared:

“However, on the law as it stands at present, the Court’s jurisdiction to arrest a ship in an action in rem should not be exercised for the purpose of providing security for an award which may be made in arbitration proceedings. That is simply because the purpose of the exercise of the jurisdiction is to provide security in respect of the action in rem, and not to provide security in some other proceedings, for example, arbitration proceedings. The time may well come when the law on this point may be changed: see s.26 of the Civil Jurisdiction and Judgments Act, 1982, which has however not yet been brought into force. But that is not yet the law. It follows that if a plaintiff invokes the jurisdiction of the Court to obtain the arrest of a ship as security for an award in arbitration proceedings,

the Court should not issue a warrant of arrest."

Sheen J had at the trial in the Admiralty Court held that:

"The appellants' only purpose in arresting Vasso was to obtain security for the satisfaction of whatever award might ultimately be made by the arbitrators; the appellants did not purport to invoke the jurisdiction of the Court for the purpose of hearing and determining any claim; accordingly the Court had no jurisdiction to arrest the vessel and the club's undertaking would be discharged."

The Plaintiffs in the appeal on hand have urged this Court to follow The Jalamatsya arguing that section 26 of the U.K. Act of 1982 is in pari materia with Section 10(2)(a) & (b) of our Admiralty Jurisdiction Act 1991. Now subsections (1) and (2) of section 10 provide –

"10. - (1) Without prejudice to any other power of the Court –

(a) where it appears to the Court in which a proceeding commenced under this Decree is pending that the proceeding should be stayed or dismissed on the ground that the claim concerned should be determined by arbitration (whether in Nigeria or elsewhere or by a court of a foreign country: and

(b) where a ship or other property is under arrest in the proceeding, the Court may order that the proceeding be stayed on condition that the arrest and detention of the ship or property shall stay or satisfactory security for their release be given as security for the satisfaction of any award or judgment that may be made in the arbitration or in a proceeding in the court of the foreign country.

(2) The power of the Court to stay or dismiss a proceeding commenced under this Decree includes power to impose any conditions as is just and reasonable in the circumstances, including a condition

(a) with respect to the institution or prosecution of the arbitration or proceeding in the court of a foreign country; and

(b) that equivalent security be provided for the satisfaction of any award or judgment that may be made in the arbitration or in the proceeding in the court of a foreign country."

With profound respect to learned counsel for the Plaintiffs, I do not share the view that section 26 of the U.K. Act is in *pari materia* with section 10(2)(a) & (b) of our own Act. Section 10 of our Act

presupposes the existence of a pending action that is ordered to be stayed or dismissed. Section 26 of the U.K. Act goes further than this. Although the facts in *The Jalamatsya* (supra) are almost on all fours with the facts of the case on hand, but because there is no equivalent of section 26 of the U.K. Act in our Admiralty Jurisdiction Act, 1991, that case is not relevant to the case on hand. There is nothing in sections 1, 2, 5 and 10 of the Act or any other section, that empowers the Plaintiffs to invoke the admiralty jurisdiction of the Federal High Court in the circumstances of this case. Plaintiffs' claim is not for the enforcement of, or a claim arising out of, an arbitral award; it is for the sole purpose of obtaining security for the satisfaction of whatever award that might ultimately be made in their favour in the U.K. arbitration proceedings. They cannot invoke the admiralty jurisdiction of the Federal High Court by an action in *rem* for that purpose. Our law as it stands does not clothe the Federal High Court with such admiralty jurisdiction.

The case of *M.V. "Da QUING SHAN"* (supra) relied on by the Plaintiffs is of no assistance to them for in that case there were a substantive claim of U.S.\$300,289 and an unspecified claim for damages. The trial court stayed proceedings and ordered the parties to submit to arbitration in London. The ship that had previously been arrested was ordered to be released. There was an appeal to the Court of Appeal and an application for stay of execution of the order of release. The facts clearly are different here. And the question is not whether this is a proper case for the making by the Court of an order for security but whether it is a matter that can be made the subject of a claim simpliciter in a writ of summons rather than by way of an application in a pending proceeding.

I have read Christopher Hill's *Maritime Law* (3rd Edition). I find nothing in it that is of assistance to the Plaintiffs having regard to our law.

The conclusion I finally reach is that the Federal High Court has no Jurisdiction to entertain Plaintiffs' action and the Court of Appeal was right in so holding. I, therefore, answer Question 2 in the negative. And in view of this conclusion the other two questions raised in this appeal for determination have become academic. No useful purpose will be served

in dealing with them in this appeal.

This appeal fails and it is dismissed by me with N10,000.00 costs to the Respondents.

B

KARIBI-WHYTE JSC

I have had the privilege of reading the judgment of my learned brother Ogundare, J.S.C. in this appeal. I agree entirely with his reasoning and conclusion that this appeal should be dismissed. I too hereby dismiss the appeal. I wish to make my contribution even if elaborate in support of the leading judgment. C

Introduction and Factual Background

The salient facts which have given rise to the litigation resulting in the appeals before us are not in dispute. They may be stated concisely D as follows –

Plaintiffs, who are now the Appellants before us, commenced an action on the 28th Feb., 1995 against Defendants, who are now the Respondents in Suit No. FHC/L/CS/213/95 claiming as follows – E

“Plaintiffs as Agents to Messrs N.V. Scheep Vaatmij Unidor Willie Mstad of Curacao, Claiming against the defendants jointly and Severally the sum of US\$300,000.00 (United States Dollars Three hundred thousand only) as security for damages interest and cost relating to a claim F for demurrage and/or damages for detention for the 2nd Defendants use or hire of the said M.V. CINDYA pursuant to a charter party dated 17th October, 1989, which claim is presently before arbitration in London, United Kingdom.”

On the 28th February, 1995, Plaintiffs ex parte motion seeking to arrest G and detain the M.V. “S. Araz”, was refused and dismissed by Ukeje J of the Federal High Court, Lagos. Plaintiffs thereafter filed another action in rem in Suit No. FHC/L/CS/236/95 in the name of Messrs. N. V. Scheep Vaatmij Unidor Willie Mstad as Agents to the Plaintiffs in suit No. FHC/L/ H CS/213/95 to issue the writ of summons. The particulars of claim in this suit is verbatim with that in FHC/L/CS/213/95. The only difference was in the amount of US\$300,000.

On the 9th March, 1995, Ukeje J, granted the application simultaneously filed with the second action FHC/L/CS/236/95, and arrested and detained the M.V. "S. Araz."

On the 3rd May, 1995, Defendants by motion on notice sought to strike out and/or set aside the order for the arrest and detention of the M.V. "S. Araz" and for her release unconditionally. The reasons for the application are that the actions of the Plaintiffs constitute an abuse of the process of the Court, and that the Court at the time of the making of the order of arrest and detention of the vessel M. V. "S. Araz" did not have the requisite jurisdiction. The grounds for the application are that –

(a) *The 2nd Defendants are not the beneficial owners of The 1st Defendant/Applicant vessel, viz the M. V. "S. Araz"*

(b) *There is no cause of action against the 1st Defendant/Applicant because the 2nd Defendants are not the beneficial Owners of the 1st Defendant/Applicant Vessel.*

(c) *Arbitration is in fact in progress between the parties in England.*

(d) *The proceedings in the suit are an abuse of the process of This Honourable Court.*

(e) *The case herein has no connection whatsoever with Nigeria."*

On the 15th May, 1995 before the Motion on notice of the Defendants to set aside the writ of summons to FHC/L/CS/236/95, was heard, Plaintiffs filed a notice of discontinuance in respect of FHC/L/CS/213/95. Arguments in the application were concluded on the 23rd May, 1995. The learned trial Judge dismissed the application of the Defendants on the 31st May, 1995. The Defendants dissatisfied appealed to the Court of Appeal against the order of dismissal.

On the 22nd April, 1996, the appeal of the Defendants was allowed by the Court of Appeal held that (i) the Admiralty jurisdiction of the Federal High Court cannot be invoked for the sole purpose of providing security for an arbitration award, (ii) the 2nd Defendants Koray Shipping & Trading Inc. are not the beneficial owners of the vessel M.V. "S. Araz." The Court having allowed the appeal, struck out the suit and ordered the unconditional release of the Vessel M. V. "S. Araz."

Plaintiffs dissatisfied with the judgment of the Court of Appeal

have now appealed to this Court relying on two original and one additional grounds of appeal. It is not necessary to reproduce the grounds of appeal which have been formulated into three issues for determination in this appeal. The issues are reproduced hereunder.

Issues for determination

Learned Counsel to both parties filed their briefs of argument and amended briefs of argument which they adopted and relied upon in their argument. Both learned Counsel have formulated issues for determination in this appeal, except that the three issues formulated by learned Counsel to the Respondent are identical with the three issues formulated by learned counsel to the Appellants. I will therefore for the purposes of this judgment, reproduce and adopt the issues as formulated by learned Counsel to the Appellants. The issues so formulated are as follows –

"1. Whether the Appellants' action was an abuse of process particularly after the earlier action had been discontinued.

2. Whether the Admiralty Jurisdiction of the Federal High Court can be invoked against the Defendants/Respondents solely for the provision of security for an Arbitration proceeding in a foreign jurisdiction.

3. Whether the 2nd Defendant/Respondent, Koray Shipping & Trading Inc. are the Beneficial Owners of the Motor Vessel "S. Araz" in the circumstances of this case."

In the interest of completeness and for the advantage it may have on clarity of exposition, I reproduce the issues as formulated by learned Counsel to the Respondent.

"The issues as raised by the learned counsel for the Plaintiffs/Appellants are formulated and tailor-made to suit the Appellants' case. It is submitted that the issues raised in this appeal are as stated below:

(i) Did the Plaintiffs/Appellants abuse the process of the court by engaging in vexatious and oppressive litigation by filing two actions on the same issues and/or subject matter and seeking the same reliefs in those same actions filed?

(ii) Can the Admiralty Jurisdiction of the Federal High Court be invoked in respect of an action whose only purpose is to provide security for arbitration proceedings which is being heard in a foreign country having

regard to the various provisions of the law?

(iii) Can the admiralty jurisdiction of the Federal High Court be invoked in this particular case and/or are the Owners of the M.V. "S. Araz" proper parties in this action having regard to the provision in section 5(4)(b) of the Admiralty Jurisdiction Act 1991? In other words, can Koray Shipping and trading Inc. be held in law to be the "beneficial owners" of the MV "S. Araz" when the materials and documents before the Court do not show that to be the case?"

Appreciation of the Issues

It is easily discernible from a cursory examination that issues (II) and (III) of Respondents formulation fall within issue (II) & (III) as formulated by the Appellants. There are three grounds of appeal in this appeal. I have found no merit in the prolixity of multiplying the issues for determination in any ground of appeal which can be formulated within one issue in the ground of appeal. This court has consistently, counseled and cautioned learned counsel in their formulation of issues to adhere strictly terseness without sacrificing clarity, but in any event to avoid prolixity – see Agu v. Ikewibe (1991)3 NWLR.385 Labiya v. Anretiola (1992)8 NWLR.157.

It is a well-established principle that issues for determination in the appeal can only be formulated from the grounds of appeal against the judgment. See Idika & ors. v. Erisi & ors (1988) 2 NWLR.563. Accordingly, any issues formulated not supported by any ground of appeal is invalid and cannot be countenanced in the determination of the appeal. See General Oil Ltd. v. Chief Ogunyade (1997) 4 NWLR.613. However, issue 1 has been formulated from the additional ground of appeal filed with leave of this Court. All the issues formulated arise from and are covered by the three grounds of appeal filed.

It seems to me on a careful analysis of the issues formulated that in substance the answers to issues 1 and 2 which question the jurisdiction of the court may, if positive result in the determination of the appeal without resort to consideration of any other issue. On the other hand, the third issue which is essentially a procedural matter, not challenging the jurisdiction of the Court does not have the same effect. I shall therefore

consider first issues 1 and 2 seriatim.

Preliminary Consideration

The determination of the question whether the court before whom an action comes for adjudication has jurisdiction is a radical and crucial matter relating to its competence to hear the action. Hence whenever the issue of competence and/or jurisdiction is raised before a court it has invariably been considered both imperative and appropriate first to settle the question. Shitta-Bey v. A-G. Federation (1998) 10 NWLR.392. The way the issue is settled will determine whether the Court can proceed to hear the matter before it.

In John Mills v. Franklin Beatrice Aweonor Renner (1940) 6 WACA.144 the West African Court of Appeal has taken the view, which all our courts have followed that,

"it would be manifestly absurd to suggest that a Court was bound to proceed with the taking of lengthy evidence of the parties to a suit where it appeared the whole suit could be decided upon the pleading without any evidence being called."

This counsel of judicial prudence employed in the adjudication process before the court follows upon the general principle that where there is a point of law which if decided one way is going to be decisive of the litigation, advantage ought to be taken of the facilities afforded by the Rules of Court to have it disposed of at the close of pleadings or very shortly afterwards. This proposition includes consideration of appeals. Some of the numerous cases where this principle has been applied are Fadare v. A-G of Oyo State (1982) 4 SC.1; Kingsley Maude v. Victoria Inning & Anor. (1986) 3 NWLR.23, Eshughayi Eleko v. Baddley & Anor. (1925)6 NLR.65 Agbizounon v. The Northern Assurance Co. Ltd. (1934)11 NLR.177. See also Everrett v. Ribbands (1952)2 QB.198; Addis v. Crocker (1961)1 QB.11.

If the appeal before the court can be disposed of by a determination of any of the issues formulated, it seems to me only desirable and necessary to decide such issue or issues primarily in the determination of the appeal.

Determination of the issues

I have stated that the substance of the issues 1 and 2 as formulated question the jurisdiction of the trial court where the matter was decided. Accordingly, I shall proceed to deal with these issues –

B Issue 1, complains that the institution of two suits per se by the Plaintiff against the same defendants in respect of the same subject matter is an abuse of the process of the court, which rendered the action liable to be struck out. The second issue seeks a determination whether a claim for security for costs merely, in support of an arbitration proceeding in a C foreign country outside the jurisdiction of the court is within the Admiralty jurisdiction of the Federal High Court.

D The contention is that having established that there was an abuse of the process of the court and the suit struck out; there was no suit in respect of which the court will exercise its jurisdiction. Again, whether a writ of summons claiming security for costs only, not in respect of or related to any substantive claim within the Admiralty jurisdiction of the court gives rise to a cause of action.

E I have no doubt in my mind that these two issues raise the question of the exercise of the trial court of its jurisdiction in respect of the subject matter before it. Accordingly if it is established that it had no jurisdiction to hear and determine the matter, that is the end of the appeal.

F I will now consider these issues which have already been set out in this judgment. The facts have already been set out.

Issue 1.

G The question to be answered in issue 1 is whether the action of the Appellants in instituting the action constituted an abuse of the process of the court. The facts are not in dispute. In arguing the appeal before us learned Counsel adopted and relied on their amended briefs of argument filed in this appeal. This issue was formulated from the additional ground of appeal filed with leave of this Court.

H It is useful to reiterate the salient aspects of the agreed facts, which have given, rise to this ground of appeal. In the first suit, No. FHC/L/CS/213/95. On 22nd Feb. 1995 the Ascona Shipping Limited as agents for Messrs. N.V. Scheep Vaatmij Unidor Willie Mstad, Curacosa

claimed against the Defendants, who are the present Respondents the sum of US\$250,000. This application in this action to arrest and detain the M.V. "*S.Araz*" was dismissed on the 27th February, 1995.

On the 28th February, 1995, Messrs. N.V. Scheep Vaatmij Unidor Willie Mstad, the principals of Ascona Shipping Limited, brought another action in Suit No. FHC/L/CS/236/95 against the Defendants, the Respondents in this appeal on the same subject matter, and issues as in Suit No. FHC/L/CS/213/95. On the 9th March, 1995 Appellants brought another application under the new Suit No. FHC/L/CS/236/95 for the arrest and detention of the same vessel M.V. "*S.Araz*." This application was granted.

The Defendants/Respondents brought an application on the 3rd May, 1995, challenging the order of arrest and detention of the M.V. "*S.Araz*" granted, as an abuse of the process of this court inter alia. This application was fixed for argument on the 16th May, 1995. On the 15th May, 1995, a day before the application was to be heard by the learned trial Judge, learned counsel for the Plaintiffs, the Appellants in this case filed a notice of Discontinuance in Suit No. FHC/L/CS/213/95.

In its ruling in the Federal High Court rejecting the application of the Defendants/Respondents seeking to dismiss the suit inter alia as an abuse of the process of the court, referred to the Notice of discontinuance in FHC/L/CS/213/95 and Order XL111 rule 1(L) of the Federal High Court Act and held that there are not two actions pending between the two parties in respect of the same subject matter.

Defendants/Respondents appealed to the Court of Appeal. The Court of appeal set aside the decision of the trial judge, and held that the conduct of the Plaintiff/Appellant was an abuse of the process of the Court, in that filing suit No. FHC/L/CS/236/95 against the Defendants/Respondents, after their failure to secure the arrest and detention of the vessel M.V. "*S.Araz*" in suit No. FHC/L/CS/213/95 whilst this suit was still pending was an abuse of the process of the Court. The court however, went on to state and relying.

On Okorodudu v. Okoromadu (1977) 3 SC.21 where the decision was to stay the latter suit pending determination of the earlier suit, and held,

3014 Nv Scheep v. "S.Araz" (2000) 12 KLR Karibi-Whyte JSC
"In our present case, the situation is different. Suit No. FHC/L/CS/213/95
has been discontinued and struck out. There was only one case before
the Court below, when it heard the motion. Even though I have held that
filing the second while the first one was still pending before the Court
was an abuse due to the peculiar circumstances of this case i.e., the first
case has been discontinued. I don't think the appeal should be allowed
on that ground, alone".
Arguments of learned Counsel to Appellants

C In arguing the appeal learned Counsel to the Appellants referred
to the dictum of the Court of Appeal and submitted that on the principle
in Okoromadu (supra) relied upon and applied to the facts of the case,
one of the suits would have been stayed if both were still on the record.
Counsel argued that in the circumstances of this case, there was no action
for either the High Court of Appeal to stay since the first suit instituted has
D been discontinued and was therefore of no consequence. Accordingly, it
was submitted there were no material facts on which the Court of Appeal
could sustain a finding of abuse of process in Suit No. FHC/L/CS/236/95
before the Court.

E Learned Counsel submitted that there was no abuse of the judicial
process since the amounts claimed in the two suits and some facts are yet
to be disclosed in pleadings. It is not necessary in this case for an order to
stay the first suit which has been voluntarily discontinued by the Plaintiffs/
F Appellants. It was pointed out that the Defendants/Respondents were not
served with the writ of summons or any other processes in the earlier suit.
The Defendants/Respondents cannot claim to have been irritated, scan-
dalized or harassed by processes taken out by the Plaintiffs/Respondents
and should not be heard, to complain.

G Learned Counsel observed the confusing inaccuracy in the judg-
ment of the Court of Appeal where it stated; "*due to the peculiar circum-*
stance of this case, i.e. the first case has been discontinued. I don't think
the appeal should be allowed on this ground alone." Counsel observed
that the above dictum should read, "...*I don't think the appeal should be*
allowed on this ground."

H He submitted that the argument about the conduct of Plaintiffs/

Appellants being an abuse of the process of the court has been overtaken by events and become merely futile and academic in the circumstances. He cited and relied on Adebayo v. Babalola (1995) 5 MWLR. (pt.408) 383; Overseas Construction Ltd. v. Creek Enterprises Ltd. (1985) 3 NWLR. (pt.13) 407. Finally, the learned Counsel urging us to uphold this issue, B submitted, cited and relied on ARCON vs. Fassassi (No.4) (1987) 3 NWLR.(pt.59) 42, 46 that “...once the court has finally determined the issue, it is *functus officio* that judgment, if it is by a Court Lower than Supreme Court it can only be corrected on appeal.”

Argument of Respondents Counsel C

Dr. Atake, SAN, Learned Counsel for the Respondent in his brief of argument and orally before us submitted that by filing two separate actions on the same matter against the same defendants, Plaintiffs/Appellants grossly abused the process of the Court. It was submitted that the D second suit No. FHC/L/CS/236/95 was filed after Plaintiff/Appellants had failed in their application for the arrest and detention of the vessel M.V. “S.Araz.”

He argued that Plaintiffs/Appellants would not have achieved their E desired objective of arresting and detaining the M.V. “S. Araz” in Suit No. FHC/L/CS/236/95 had they not abused the process of the Court. Indeed, Plaintiffs/Appellants filed a notice of discontinuance in FHC/L/CS/213/95 after the Defendants/Respondents filed a Motion on Notice seeking the F unconditional release of the M.V. “S. Araz” from arrest and detention challenging the basis of the second action. Learned Counsel submitted that an abuse of the process of the court was not curable. The options of the Court are either to set aside or strike out the writ of summons or stay G the proceedings in one of the suits. Learned counsel cited and relied on the dictum of Bello, JSC in Okorodudu & anor. v. Okoromadu & anor. (1977) NSCC. Vol.11, 105 at p.109 where it was said;

“it appears that the plaintiffs, having failed to secure amendments of their H pleadings in Suit No. W/8/73 proceeded to achieve what they had failed to obtain by amendments by filing therein suit No. W/117/73 against the defendants while suit No. W/8/73 was still pending in that court. We consider the conduct of the Plaintiffs in this regard as a flagrant abuse of

the judicial process of the Court."

It was submitted that on the facts of the case the abuse had already taken place by the filing of two concurrent suits by the Plaintiff against the same defendants in respect of the same subject matter.

B The second suit No. FHC/L/CS/236/95 was rightly struck out for being vexatious, frivolous, scandalous, indecent and an abuse of the process of the Court. It was submitted citing Castanho v. Brown & Root (UK) Ltd. & ors. (1981) Reports 133, 138 Vol. 1 Lloyds Law that filing a notice of withdrawal which in itself an abuse of the process is immaterial.

C Learned Counsel cited the Vessel "Saint Roland" v. Osinloye (1997)4 NWLR. (pt.500)387 at 409, 412, where Iguh, JSC stated;

"...it is indisputable that there is ample jurisdiction in the courts to set aside or strike out any process of court, including a Notice of discontinuance, taken out or issued in abuse of process, it may rightly be set aside or struck out by the court."

D Dr. Atake S.A.N. Contended that although a notice of discontinuance may terminate an action, it does not determine altogether the jurisdiction of the court in the suit. Learned counsel submitted that the best course of action E of the Plaintiffs/Appellants was to appeal against the decision in the first suit dismissing (not striking out) their application to arrest. By not doing so, they put the court in a position to invoke its inherent jurisdiction to set aside the order of arrest and a fortiori to strike out the action.

F There was nothing confusing about the pronouncement of the court below, and that the decision was very clear. It was submitted that the records of the court do not support the claim of the appellant. The court below was right in holding that notwithstanding that a notice of discontinuance had been filed to the first suit, to strike out the second suit, G to prevent the improper use of the machinery of the Federal High Court as a means of vexation and oppression in the process of litigation.

Analysis of arguments of Counsel

H These were the submissions of Counsel to the parties on the issue whether the Court of Appeal was right in holding that Plaintiffs/Appellants conduct in the Federal High Court in this litigation was an abuse of the process of that court. The trial Judge did not so regard it.

It is important to observe that of the three judgments of the court below, only Muhammad R.D. JCA who read the leading judgment discussed the issue of the Plaintiffs abuse of the process of the court by filing of two suits against the Defendants on the same subject matter. Musdapher and Uwaifo, JCA agreed with him.

Let us now consider what Muhammad R.D. JCA said, and considered confusing and sought to be explained by learned counsel to the Appellants. Learned Counsel to the Respondents has submitted it is not confusing.

After stating the facts regarded as an abuse of the process of the Court, Muhammad R.D. JCA stated at pp.244-245,

"It is an abuse of the court's process for a party on the same subject matter... In the same vein I consider the conduct of the Respondent as an abuse of judicial process of the court in that the Respondent having failed to secure the arrest of the ship in Suit No. FHC/L/CS/213/95 proceeded to obtain the arrest of the ship by filing Suit No. FHC/L/CS/236/95 against the Appellants while the earlier suit was still pending... In our present case, the situation is different. Suit No. FHC/L/CS /213/95 has been discontinued and struck out. There was only one case before the court below when it heard the motion. Even though I have held that filing the second suit while the first one was pending before the court was an abuse due to the peculiar circumstances of this case, i.e. the first case has been discontinued, I don't think the appeal should be allowed on this alone...."

It seems to me that the Court of Appeal is saying by this reasoning that though it would appear that the conduct of Appellants filing two suits in respect of the same subject matter against the same defendants, constituted an abuse of the process, in the different and peculiar circumstance of this case where the first case had been discontinued before the trial court heard the motion, in the second action, the court should not allow the appeal on this conduct alone.

That is to say the conduct complained of did not constitute an abuse of the judicial process. This view seems to accept the validity of the notice of discontinuance filed before the date fixed for hearing. It is pertinent to observe that where an abuse of the process of the court

is established the peremptory order is the striking out of the suit. No reason is required. That ground alone is sufficient – See Ando v. Aiyeckru (1997)3 NWLR.126. Accordingly, where the court has not resorted to that order because of the peculiar circumstances of the case, as in this case admitting that at the time of the hearing of the motion subject matter of the application, because of a valid notice of discontinuance of the earlier suit, it had only one suit before it. The implication is that there was in fact no abuse of the process of the court. It is a well established principle backed by rules of court which requires no citation of decided cases that a Plaintiff may without leave of Court discontinue a suit against all or any of the defendants in an action before the date fixed for hearing of the case – See Obienu v. Orizu (1972) 2 ECSLR.606 Izieme v. Ndokwu (1976) NMLR.280. I do not accept the submission of Dr. Atake SAN, that conduct, which is prima facie abuse, is incurable. Conduct is curable where it is subsequently shorn of the elements of vexation annoyance, irritation and harassment. The implication of the statement is that the court could not allow the appeal on the ground of the abuse of the process of the Court.

The interpretation of the dictum by learned Counsel for the Appellants before us has considerable force. It is essential in stating the grounds for the determination of an issue before the court to avoid ambiguity and imprecision and to limit the decision to the facts of the case. Where special or peculiar facts are taken into account in determining an issue and there is departure from the general rule there is a duty in the interest of clarity to state the reasons why there is such a departure. The Court of Appeal would seem to have appreciated the peculiar circumstances of this case and recognised the need for a departure from the general principle. It has not unambiguously, stated the rule that at the time of the hearing of the motion, there was only one suit between the parties. I do not agree with learned Counsel to the Respondents that the statement was clear and unambiguous as to the fact that the appeal should be allowed on the finding of the abuse of the process of the Court. Indeed it is that the appeal should not be allowed on the abuse of the process of the court alone.

The legal concept of the abuse of the judicial process or the abuse of the procedure of the court is very wide. The scope and content

of the circumstances of the material facts and conduct, which will result in such abuse, are infinite in variety. It does not appear that the category can be closed. New unforeseen conduct from the stratagem of Plaintiffs can give rise to the abuse. An abuse may be constituted through a proper and legitimate conduct in bringing actions even in the exercise of an established right in the manner or time of instituting actions. It may also be constituted by irregularities in the pursuit of actions. In every and all cases the general principle is that an abuse of the process of the Court is constituted when more than one suit is instituted by a Plaintiff against a defendant in respect of the same subject matter to the harassment, irritation and annoyance of the defendant, and in such a manner as to interfere with the administration of justice. These principles have been enunciated in several decisions of this court – See Okafor v. Attorney General, Anambra State (1991) 6 NWLR.659. The vessel “*Saint Roland*” v. Osinloye (1997)4 NWLR.387; Saraki v. Kotoye (1992)9 NWLR.156, 188-89. B
C
D

An abuse of the judicial process means that the process of the court has not been used bona fide and properly. See FRN v. Abiola (1997)2 NWLR.444; Owonikoko v. Arowosaiye (1997)10 NWLR.61. Hence it is generally accepted that the multiplicity of suits by the same Plaintiff against the same defendants in respect of the same subject matter is prima facie, vexatious and oppressive and an abuse of the process of the Court – Morgan & Ors. v. W.A.A. and Eng. Co. Ltd. (1971)1 NMLR.219 at pp.221-222. The abuse lies in the multiplicity of the actions rather than in the exercise of the right. See also Kotoye v. Saraki (1992)9 NWLR.156. E
F

It is generally accepted that the abuse lies in the multiplicity of suits per se, and that is ipso facto prima facie an abuse. However, where there is an effective and valid discontinuance of one of the two suits constituting the abuse leaving only one of the suits in the hearing of the application it seems to me the essential ingredients of abuse is not complete. The abuse is not made out. G

The view that instituting a multiplicity of actions per se against a defendant concurrently is an abuse of the process of the Court, will only satisfy the law where there is the intention to proceed with the multiplicity of suits. It does not seem to me to come within the accepted principles H

where by virtue of a valid notice of discontinuance the Plaintiff is only left with a suit against the Defendant - See Aghadiuno v. Onubogu (1998)5 NWLR.16. In this latter situation, the crucial and essential ingredients of vexation, annoyance and irritation caused by harassment of the Defendant by means of a vexatious litigation would be absent at the hearing of the application.

Learned counsel for the Respondent has argued that the better way to avoid an abuse of the process of the Court is to appeal against the decision in Suit No. FHC/L/CS/213/95 rather than discontinuing the action. I do not think that in the interest of the litigation that is not a prolongation of the action, rather than terminating an action discovered to be faulty. The discontinuance of the earlier action which avoids multiplicity is in my view the better way to avoid abuse.

In the instant case the Plaintiffs/Appellants claim that Defendants were never served with the writ of summons or any other processes in Suit No. FHC/L/CS/213/95 and were therefore never irritated, scandalized or harassed by the institution of that suit. There was therefore no abuse.

In my view institution of multiplicity of suits against the same defendants in respect of the same subject matter, though prima facie on abuse of the judicial process is not conclusive of the fact. Hence if before the writ of summons or any of the processes in respect of the suit is served and before hearing of the second suit a notice of withdrawal of the earlier suit is filed, it is clearly indicative of lack of intention to irritate, annoy and harass the defendant by instituting a multiplicity of actions. This is the position in this case as exemplified by the valid notice of discontinuance filed in FHC/L/CS/213/95 before the hearing of the second suit on the 16th May, 1995.

I therefore am not of the opinion that there was an abuse of process. I resolve this issue in favour of the Appellants.

The second issue is whether the Admiralty jurisdiction of the Federal High Court can be invoked against the Defendants/Respondents solely the security for an Arbitration proceeding whether in Nigeria or in a foreign jurisdiction.

It is the contention of learned Counsel to the Appellants that the

Admiralty jurisdiction of the Federal High Court can be invoked in an action solely for the provision of security for an Arbitration proceeding outside the jurisdiction of the Court. For this submission learned Counsel relied on his construction and interpretation of sections 1(1)(a), 2(3)(f) of the Admiralty Jurisdiction Act 1991.

Learned Counsel submitted that the provision of security is not limited to actions commenced in a court of law rather than by Arbitration. He argued that a party to an Agreement with an arbitration clause has a choice to submit his dispute to arbitration or to the Court. Arbitration proceedings is not a bar to invoking the Admiralty jurisdiction of the Court to obtain security for any eventual awards of the Arbitrator where no security has been provided by the Defendant during the pendency of the arbitration proceedings. Learned Counsel submitted that it is immaterial whether the arbitration is commenced within the jurisdiction or abroad, provided the right of arrest is exercised within jurisdiction. Learned Counsel relied on the opinion of Christopher Hill in his book Maritime Law 3rd Ed. At p.99.

Learned Counsel referred to the opinion of the Court below arising from construction of the combined effect of sections 1(1)(a), 5(4) and 10 of the Admiralty jurisdiction of the Federal High Court cannot be invoked to obtain the security from the appellants to ensure payment of any arbitration award that may be made in favour of the Respondents in an arbitration which has commenced in London since 1992.

It was submitted that cannot be the true intendment of the sections. Section 1(1)(a) of the Admiralty Jurisdiction Act, 1991, vests jurisdiction in the Federal High Court to “*hear and determine*” any matters relating to or arising from any of the subjects listed in section 2 of the Act Section 2(3)(f) thereof provides for “*a matter or claim arising out of an agreement for use or hire of a ship.*” This, it is submitted, clearly shows that a claim for the provision of security for the satisfaction of an award by an arbitrator is a matter which the Federal High Court can hear and determine on the merits without more being required of the Plaintiffs as such a claim or matter arises out of an agreement for the use or hire of a ship.

In respect of Section 10 of the Act, learned Counsel relies on the principles of admiralty practice relating to the granting of security

where a proceeding has been stayed to facilitate arbitration of the claim. It was submitted that Section 10(2)(a) and (b) of the Act can be applied in such situations in the interest of justice to impose terms of security even where the court is inclined to stay the proceedings or dismiss the action on account of the arbitration proceedings. Learned Counsel relied on the case of M.V. Dan Quing Shan and others v. Pan Asiatic Commodities Plc Limited (1991) 8 NWLR (pt.354) 364.

It was argued that if the Federal High Court can invoke its Admiralty Jurisdiction to order the arrest of a vessel where it stays proceedings in an action commenced before it for the purpose of having the dispute resolved by arbitration, the mere fact that a party opts to go to arbitration in the first instance rather than go to court does not derogate from the powers of the Court to order provision of security pursuant to an action in rem and an arrest made thereunder as provided under the Admiralty Jurisdiction Act 1991.

Learned Counsel submitted that the Court of Appeal has adopted the practice that in Admiralty Law and Practice which is consistent with other jurisdictions who subscribe to International Maritime Conventions. Accordingly, the arrest of vessels to meet security for award of arbitration, just like a judgment, which is common practice in England, and internationally by countries implementing the 1952 International Convention on the arrest of seagoing ships, should be applicable in Nigeria. Learned Counsel cited and relied on The Jalamatsya 1987 2 Lloyds Report 164, and section 26 of the U.K. Civil Jurisdiction and Judgments Act 1982, which is similar in wording with the provisions of section 10 of our Admiralty Jurisdiction Act 1991.

Referring again to Christopher Hill at p.95 it was submitted that it was legitimate for Appellants to invoke the admiralty jurisdiction of the Federal High Court by an in rem action which is principally designed for obtaining security for a claim whether in court or before the arbitrator. It was submitted that the nature of the action filed in this suit as exemplified by the particulars of claim does not derogate from the jurisdiction of the Court under Section 11 of the Federal High Court Act to determine the matter of Security completely and finally as distinct from the issue of the

breach of the Charter party contested before the arbitrator in London.

In opposing the above submissions learned counsel to the Respondents submitted that the only purpose of the action filed in Nigeria, long after commencement of the arbitration proceedings in London, is to obtain security for the sole purpose of satisfying a judgment in a foreign country B should the Plaintiffs/Appellants succeed in the arbitration proceedings in London. It was contended that having elected to pursue their claim in London, Plaintiffs/Appellants action cannot be maintained in Nigeria in the light of the combined provisions of section 1(1)(a) of the Admiralty C Jurisdiction Act 1991 and section 11 of the Federal High Court Act, 1973. Again, there was no claim and particulars before the Court at the time the in rem jurisdiction of the Federal High Court was invoked. Learned counsel submitted that the Admiralty jurisdiction of the Federal High Court within the meaning of section 1(1)(a) of the Act is to "*hear and D determine*" cases on the merits. The Federal High Court cannot properly exercise this jurisdiction where the action brought is to seek security in respect of arbitration of proceedings being heard in London. It is only in London where the arbitration proceedings was being heard that the matter E can be "heard and determined" on its merits.

Again, it was submitted that since the Federal High Court is by section 11 of the Federal High Court Act, 1973 vested with jurisdiction to grant all such remedies whatsoever as any of the parties thereto may F appear to be entitled to in respect of any legal or equitable claim properly brought forward by them in the cause or matter so that as far as possible, all matters in controversy between the parties may be completely and finally determined and all multiplicity of legal proceedings concerning G any of those matters avoided.

It was submitted that where the sole purpose of the action before the court is to obtain security in respect of an action commenced in a foreign court of tribunal, the Federal High Court cannot determine the case on its merits, i.e. determine all matters in controversy between the H parties completely and finally within the meaning of section 11 of the Federal High Court Act. In the instant case where no statement of claim and particulars were filed before the Federal High Court as required by

mandatory provision of Order 2 rule 2(1) of the Admiralty Jurisdiction Procedure Rules, the merits of the case will never be heard by the Federal High Court, once the vessel was arrested and detained, on a motion ex parte, the proceedings come to an end. Once the Plaintiffs/Appellants had elected to pursue a foreign arbitration proceeding thereby giving effect to the arbitration clause in the agreement between the parties, they are not entitled to file an action in the Federal High Court, invoking its Admiralty jurisdiction to obtain security for the foreign action.

Learned Counsel referred to the reliance by Appellants on section 10 of the Admiralty Jurisdiction Act 1991 and the case of M.V. "Da Quing Shan" & ors. v. Pan Asiatic Commodities Plc Limited (1991) 8 NWLR.354 in support of the proposition that the Admiralty Jurisdiction of the Federal High Court can be invoked for the sole purpose of providing security in a foreign country. Learned Counsel referred to the text of section 10(1) and (2) of the Admiralty Jurisdiction Act 1991 and submitted that the section applied only in cases where proceedings are stayed or dismissed. His is not such a case. Again, in view of the clear provisions of section 1(1)(a) of the Admiralty Jurisdiction Act 1991 and section 11 of the Federal High Court Act, 1973 which empowers the Federal High Court to hear and determine matters before it completely and finally, section 10 is inapplicable.

Learned Counsel referred to the case of M.V. "Da Quing Shan" v. Pan Asiatic Commodities Plc Limited (1991) 8 NWLR.354 and argued that the issue in the instant case was never raised or considered in that case. The relevant provisions of the Admiralty Jurisdiction Act 1991 and the Federal High Court Act 1973 were not discussed before the Court of Appeal. Learned Counsel distinguished the M.V. "Da Quing Shan" on the grounds that the two main issues discussed there were (1) Did the arrest and the subsequent release of M.V. "Da Quing Shan" amount to the execution of a Court Order (11) Can an order or re-arrest be seen as amounting to a stay of execution of the release order pending an appeal by the Plaintiffs against that release? In that case there was a valid claim before the Federal High Court for US\$300,289 payable by the Defendants to the Plaintiffs in respect of excess freight, expenses, loss of profit and bank charges. The action was first filed in the Federal High Court and

was subsequently stayed because the parties opted for arbitration.

In the instant case, there is no claim before the Federal High Court. The claim is before arbitration in London since the action was first filed in London. Learned Counsel referred to the passage in Maritime Law by Christopher Hill cited and relied upon by Learned Counsel to B the Appellants. He submitted the passage was referring to English Law and not Nigeria Law. In any event it was submitted the passage which is totally irrelevant does not apply to the case before this court.

Learned Counsel referred to the case of the *Jalamatsya* (1987) 2 C Lloyds Report 164 relied upon by Appellants Counsel. It was submitted that the Section 26 of the English Civil Jurisdiction and Judgments Acts in that case is said to be similar to section 10 of the Admiralty Jurisdiction Act 1991. It is submitted that the sections are not in pari materia. The case of the *Jalamatsya* is not applicable. Section 26 of the English Act D is quite different in content and context from section 10 of the Admiralty Jurisdiction Act 1991.

The gravamen of this issue is that the claim of the Plaintiffs/Appellants which is founded on the provision of security in respect of an arbitration proceedings in London does not give rise to a cause of action E in the Federal High Court.

Learned Counsel to the Appellants has relied on the construction of the provisions of sections 1(1)(a) and 2(3)(f) of the Admiralty Jurisdiction F Act 1991 and section 11 of the Federal High Court Act 1973 as vesting jurisdiction in the Federal High Court.

Section 1(1)(a) of the Admiralty Jurisdiction Act, 1991 inter alia provides as follows –

"1(1) That Admiralty Jurisdiction of the Federal High Court in this Act G referred to as "the Court" includes the following, that is
(a) jurisdiction to hear and determine any question relating to a proprietary interest in a ship or air-craft or any Maritime claim specified in section 2 of this Act." H

Section 11 of the Federal High Court Act states;

"The Court in the exercise of the jurisdiction vested in it by or under This Act, shall, in every cause or matter have power to grant, either absolutely

or on such terms and conditions as the court thinks just, all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any legal or equitable claim properly brought forward by them in the cause or matter so that, as far as possible all matters in controversy between the parties may be completely and finally determined and all multiplicity of legal proceedings concerning any of these matters avoided."

It is a well settled principle of the institution of proceedings that jurisdiction of the court is determined by the cause of action of the Plaintiff as endorsed on the writ of summons – see Adeyemi v. Opeyori (1976) 9-10 SC.31.

The particulars of claim in FHC/L/CS/239/96 is for the sum of US\$300,000 as security for damages, interest and cost relating to a claim for demurrage/and/or damages for detention of the 2nd Defendants use or hire of M.V. CINDYA pursuant to a charter party dated 17th October, 1989, which claim is presently under arbitration in London, United Kingdom. It is clear from the writ of summons as endorsed that the claim is not with respect to any action within the jurisdiction of the Federal High Court. Accordingly, the subject matter of the action which is damages for detention of the 2nd Defendants use or hire of M.V. CINDYA pursuant to a charter party, a claim under arbitration in London, United Kingdom is outside the jurisdiction of the court.

Learned Counsel to the Appellant's main contention is that the provision of security is not limited to actions which are commenced in a court of law rather than by arbitration. It is true a party to an Agreement with an arbitration clause has the option either to submit to arbitration or to have the dispute decided by the court. The choice of arbitration does not bar a resort to the court to obtain security for any eventual awards of the arbitrator in the absence of any provision for security for costs.

Learned Counsel for the Appellants cannot be right in the submission that it is immaterial whether the arbitration is commenced locally or abroad provided the right of arrest is exercised within.

A careful construction and analysis of the enabling provisions of section 1(1)(a) of the Admiralty Jurisdiction Act, 1991 and S.11 of the Federal High Court leads to the inescapable conclusion that the exercise of the jurisdiction inevitably involves the right to hear and determine

the case on its merits. This means that there must be a lis and a cause of action. A cause of action is a factual basis or some factual situation a combination of which makes the matter in litigation an enforceable right or actionable wrong. See Bello & ors. v. A-G. Oyo State (1986) 5 NWLR.828. I agree entirely with the submission of Dr. Atake that the Federal High Court cannot hear and determine the case on its merits where the only purpose of the action brought before it is for security in respect of arbitration proceedings in London. The actual matter in controversy giving rise to the demand for security not being before the court, there is no jurisdiction to deal with the ancillary issue. The Admiralty jurisdiction of the court prescribed in section 7(1)(a) of the Federal High Court Act and S.1(1) of the Admiralty Jurisdiction Act 1991 relates to substantive actions and not ancillary issues of adjectival nature. There is no doubt the Federal High Court cannot hear and determine the suit before it and determine all matters in controversy between the parties completely and finally. In such situation the court cannot exercise its jurisdiction without substantive claim, to order the arrest and detention of a vessel whose sole purpose is to provide security in respect of arbitration proceedings outside its jurisdiction.

I have not found helpful, the case of M.V. "Da Quing Shan" & ors. V. Pan Asiatic Commodities Plc Limited (1991) 8 NWLR.354 cited and relied upon by learned Counsel to the Appellants in support of the proposition that the Admiralty Jurisdiction of the Federal High Court can be invoked for the sole purpose of providing security for an arbitration in a foreign country. This proposition is not supported by section 10(1) and (2) of the Admiralty Jurisdiction Act 1991.

Analysis of the provisions discloses the misconception of learned Counsel to the Appellants. The provisions of section 10(2) expressly provide that section 10 applies to cases where proceedings are stayed or dismissed. It also applies without prejudice to any other power of the court. Hence section 10 does not apply to vest the exercise of jurisdiction under section 1(1)(a) of the Admiralty Jurisdiction Act and section 11 of the Federal High Court Act. The instant case does not fall within the purview of section 10(a) in relation to cases in which actions have been

commenced under the Act on the merits and while pending an application for a stay or dismissed on the ground that the claim concerned "*should be determined*" by arbitration (whether in Nigeria or elsewhere) or by a court of a foreign country. This is not an action pending within the meaning of section 10.

The arbitration proceedings in the instant case had already commenced, the court cannot therefore stay or dismiss the action on the ground that it should be determined by arbitration – See S.10 (2)(a).

I agree with the submission of Dr. Atake that learned counsel to the Appellants misunderstood the decision in M.V. "*Da Quing Shan*" & ors. V. Pan Asiatic Commodities Plc Limited (1991) 8 NWLR.354 to mean that the decision supports the proposition that an arrest and detention order on a vessel can be upheld notwithstanding that the sole purpose of the arrest order is to provide security in respect of arbitration proceedings in a foreign country.

Dr. Atake was quite right in his submission that the contention of learned Counsel to Appellants was not the basis of the decision in that case and indeed the issue was not considered in the case. The critical issue in the instant case which is whether the Federal High Court could invoke its admiralty jurisdiction to arrest and detain a vessel for the sole purpose of providing security for arbitration proceedings in a foreign country in view of the law was never raised or considered in that case. Similarly the relevant provisions of the Admiralty Jurisdiction Act 1991 and the Federal High Court Act 1973 were not discussed.

There are other distinguishing features. In the M.V. "*Da Quing Shan*" case there was a valid and substantive action and claim before the Federal High Court. That action was first filed in the Federal High Court and was stayed after the parties opted for arbitration. In the instant case, there was no substantive action in the Federal High Court, and arbitration had proceeded in London, and there was no application to stay proceedings in the Federal High Court. I must also advert to the fact that the case of *The Jalamatsya* (1987) 2 Lloyds Report 164 decided under section 26 of the English Civil Jurisdictions and judgments Act 1982 is clearly not applicable. I have compared the provisions of section 26 of the English

legislation with section 10 of our Admiralty Jurisdiction Act 1991. I find that they are not in pari materia. This is because there are crucial differences in the expressions and words used in the two legislation. Section 10 of our Admiralty Jurisdiction Act 1991 applies without prejudice to any other power of the court. Also in the same section 10, the action in rem B taken in the Federal High Court, must be pending at the time of staying or dismissing the action in favour of arbitration proceedings. The provision of section 26 of the Civil Jurisdiction and Judgments Act 1982 does not contain the word "*pending*."

For the reasons I have given I find it irresistible argument and in accord with the provisions of the enabling statutes that the Admiralty jurisdiction of the Federal High Court cannot be invoked solely for the provision of security for an arbitration proceedings whether in Nigeria or in a foreign jurisdiction. I therefore agree with the contention of Dr. D Atake, S.A.N. Learned Senior Counsel to the Respondents and answer the question in the second issue for determination in favour of the Respondents, that it cannot.

For the reasons I have given, the Federal High Court had no jurisdiction E to entertain the action of the Plaintiff and the Court of Appeal was right to so hold. The appeal therefore fails and is dismissed on the determination of this issue. In view of this conclusion no useful purpose will be served in considering the third and last issue for determination. F

Respondents are entitled to N10,000 as costs in this appeal.

ONU JSC

Having had the privilege of a preview of the judgment of my G learned brother Ogundare, JSC just delivered, I am in complete agreement with him that this appeal fails and I accordingly dismiss it for the reasons set out therein.

I wish to add a few comments of mine in expatiation thereof as H follows:-

The three issues that the Appellants have identified before us for determination are:

1. *Whether the Appellants action was an abuse of the process particularly after the earlier action had been discontinued?*

B 2. *Whether Admiralty Jurisdiction of the Federal High Court can be invoked against the Defendants/Respondents solely for the provision of security for an Arbitration proceeding in a foreign jurisdiction?*

3. *Whether the 2nd Defendant/Respondent, KORAY SHIPPING TRADING INC. are the Beneficial Owners of the Motor Vessel "S. ARAZ" in the circumstances of this case?"*

C In answer to these issues, my learned brother, quite rightly in my view, has, in spotlighting issue 2 as the fulcrum upon which revolves the answer thereto (founded as it were on jurisdiction) observed that there are two other minor questions raised in the appeal, the necessity for which resolution depends on the answer to the main question.

D Now, in the trial court the learned trial Judge, per Ukeje J. had ruled as follows:

E *"Without more, by the combined effect of the provisions of Section 10(1) and (2) of the Decree, into which the facts of the case squarely fit, I find that notwithstanding the pendency of the arbitration in London, this court can, if the court sees fit, in exercise of its powers in particular under Section 10(1) (b) and 2(b) of the Decree, Order the arrest of the vessel and impose as condition for its release the sum claimed by the plaintiff herein as security for payment of the award of arbitration."*

F Section 10 of the Admiralty Jurisdiction Act, 1991 provides:-

"10 – (1) Without prejudice to any other power of the Court, where:-

G (a) It appears to the court in which a proceeding commenced under this Decree is pending that proceeding should be stayed or dismissed on the ground that the claim concerned should be determined by arbitration (whether in Nigeria or elsewhere) or by a court of a foreign country; and

H (b) A ship or other property is under arrest in the proceeding, the court may order that the proceeding be stayed on condition that the arrest and detention of the ship or property shall stay or satisfactory security for their release given as security for the satisfaction of any award or judgment that may be made in the arbitration or in a proceeding in a court of

the foreign country.

2. The power of the court to stay or dismiss a proceeding commenced under this Decree includes power to impose any conditions as are just and reasonable in the circumstance, including a condition:-

(a) With respect to the institution or prosecution of the arbitration or proceeding in the court of the foreign country; and

(b) That equivalent security be provided for the satisfaction of any award or judgment that may be made in the arbitration or in the proceeding in the court of the foreign country."

The trial court after considering some applications including one expert motion as well as an affidavit of urgency, ruled on 9th March, 1995 in respect of the motion dated 6th March, 1995 as follows:

"In the circumstance, the Plaintiff has made out a case sufficiently strong to move this Court to grant the reliefs sought. Consequently, the Orders sought are granted, in part and the following orders are made:

(1) The Vessel M.V. 'SARAZ' now lying at Bullnose Berth 19, Apapa Port, Apapa, Lagos, within the jurisdiction of this Court is hereby ordered to be arrested and detained until the determination of the Motion on Notice until this court otherwise orders.

(2) The said Vessel shall be released from arrest and detention only upon the Defendants/Respondents furnishing an acceptable Bank Guarantee in the sum of US\$300,000 to meet the Plaintiffs/Applicant's claim.

(3) The Plaintiffs shall file an undertaking to indemnify the Defendants against any loss or damage they may incur should it later transpire that this Order is needless.

That is the finding of this Court in this Ruling."

As could be seen, the Lagos Division of the Court of Appeal (hereinafter referred as the court below to which appeal lay per R.D. Muhammad, J.C.A., allowed the appeal and in setting aside the judgment of the trial High Court, it held to be wrong, held as follows:

"It could be seen that by virtue of Section 10, the court is empowered to stay or dismiss an action on the ground that the claim be determined by arbitration. In granting the stay the court may impose conditions with respect to the institution or prosecution of the arbitration

or proceeding in the court of the foreign country. The Section could only apply in cases in which a party to the action brings an application that the action be stayed or dismissed on the ground that the arbitration has already begun in London. As such, the court cannot stay or dismiss the action on the ground that it should be determined by arbitration.”

The respondents also conceded in their brief by saying that the trial Judge was wrong to have held that Section 10 is applicable. They opined as follows:

“With due respect to the finding of the learned trial Judge, the given signation in this case does not seem to make Section 10(1) (2) and (3) of the Admiralty Jurisdiction Act, dealing with retention of security where proceedings are stayed, applicable.”

Continuing, the learned Justices (per Muhammad, J.C.A.) said:

“I therefore hold that the learned trial Judge was wrong to hold that Section 10 of the Admiralty Jurisdiction Act, 1991 applied to this case.

The respondent had submitted that the inapplicability of the said Section 10 notwithstanding, the trial Judge’s findings that he respondent’s action was maintainable is in order and should be upheld by this court since the respondent’s action was properly commenced. The case of *M.V. “Da Quing Shan and Ors. Vs. Pan Asiatic Commodities Plc Limited* (1991)8 NWLR 354 was relied upon.

As could be seen from the particulars of claim and the affidavit in support of the ex parte motion to arrest the ship, the sole purpose for instituting this action is to obtain security from the appellants to ensure payment of any arbitration award in favour of respondents. Also another reason for the arrest of the ship was to ensure that the appellants provide security in the form acceptable by the respondents.”

The learned Justice of the Court below who wrote the leading judgment (Muhammad J.C.A.) further observed as follows:

“Admiralty is a specialized branch of the law. Some of the procedures applicable to admiralty matters are peculiar to Rules and procedures evolved more than 1000 years ago by those maritime nations that engaged in trade with the Greeks and because they were evolved from ancient customs and usages. Admiralty is an international issue and as

such there is the need for uniformity in the applicable procedure and rules. Indeed, it is the need for uniformity that made most nations to subscribe to International Maritime Conventions, Nigeria being no exception. That is why the Nigerian admiralty practice is guided by the English Practice and Procedure, international conventions and the principle of uniformity B
in implementing these conventions.

As I have stated, the only purpose of bringing this action is to obtain security from the appellants to ensure payment of any arbitration award that may be made in favour of the respondents in an arbitration which has commenced in London since 1992. The combined effect of Sections 1(1)(a), Section 4 and also Section 10 of the Admiralty Jurisdiction Act, 1991, is that the admiralty jurisdiction of the Federal High Court cannot be invoked in such a situation." C

The learned Justices went on to conclude as follows: D

"In the final analysis and for the reasons given above, the appeal succeeds and it is hereby allowed. The suit is struck out. I order the immediate release of the M.V. "S. ARAZ" unconditionally."

I cannot agree more. E

For the above reasons and the fuller ones contained in the leading judgment of my learned brother Ogundare, JSC I too dismiss this appeal, strike out the suit and make the same consequential orders inclusive of costs to the Respondents as contained therein. F

ACHIKE JSC

I have the privilege of reading the leading judgment of my learned brother, Ogundare, J.S.C. I am fully in agreement with his reasoning and conclusions that this appeal should be dismissed. I have also before embarking on the preparation of this judgment had the opportunity and privilege of reading the concurring judgment of my learned brother, Karibi-Whyte, J.S.C. Which was equally elaborate and elucidating and with which I also agree. There is hardly, in my view, any stone that remains unturned in this appeal that calls for my further elaborate comment in this appeal except to briefly express my concurrence with the lack of jurisdiction of the Federal High Court to solely provide for security in the G
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circumstances of this case.

The thrust of this appeal is whether the vast admiralty jurisdiction conferred on the Federal High Court extends and includes the power of providing security for damages, interest and costs that may be awarded in arbitration proceedings currently pending in a foreign country. It is important to stress straightaway, that the power of the Federal High Court, like the other High Courts in this country, to make elaborate provisions for circumstances now under consideration whilst substantive arbitration proceedings are pending before it has never been in doubt. We have been treated to elaborate discourse of some cases in which provisions for costs were sought and granted but not for the sole purpose of providing for security in arbitration proceedings pending in a foreign country. For example, see M.V. Da Quing Shan & ors v. Pan Asiatic Commodities Pte Limited 8 NWLR 354 relied on by Mr. Ilogu, learned counsel for the appellant; that case is wholly inappropriate for making an order of arrest for the only purpose to furnish security or costs in arbitration proceedings pending in a foreign jurisdiction. Mr. Ilogu had also relied heavily on the combined effect of sections 1(1)(a), 2(3)(f) of the Admiralty Jurisdiction Act, 1991 as well as section 11 of the Federal High Court Act 1973 as sufficient, in the circumstances of this case, to confer jurisdiction on the Federal High Court to provide for security in the case pending in a foreign jurisdiction. Dr. Atake, learned respondents' counsel had argued to the contrary,

I am inclined to prefer the submission of Dr. Atake in this regard. It would be plainly painful to accede to the apparently ingenious submission of Mr. Ilogu in this regard; to do so, it would be incumbent on the appellants to establish that there exists a cause of action from which a claim can be founded in their favour. No such cause of action exists or has been shown to exist wherein a party can initiate processes for the sole purpose of obtaining security for arbitration proceedings currently pending in a foreign jurisdiction. To do so would only be possible by introducing extraneous matters into the lucid provisions of sections 1(1)(a) and 2(3)(f) of the Admiralty Jurisdiction Act, 1991 and section 11 of the Federal High Court Act 1973, which must be roundly condemned.

In the result, I hold that the admiralty jurisdiction of the Federal

High Court cannot be invoked for the purpose only to obtain an order of arrest which would provide security for arbitration proceedings pending in a foreign jurisdiction. Undoubtedly, the Court of Appeal was right to deny that the Federal High Court could exercise such jurisdiction. Accordingly, I, too, would dismiss this appeal on the sole issue of jurisdiction. B

There will be N10,000.00 costs in favour of the respondents in this appeal.

KALGO JSC C

I have had a preview of the judgment of my learned brother Ogundare JSC in this appeal and I agree entirely with his reasoning and conclusion reached therein. I agree that there is no merit in the appeal and that it should be dismissed. He has painstakingly dealt with all the issues raised in the appeal and I have nothing useful to add. I too find no merit in the appeal and I dismiss it accordingly. I abide by the consequential orders made in the lead judgment including the order as to costs. D E

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