

SUPREME COURT OF NIGERIA
25TH FEBRUARY, 2000. SC. 183/1995
CORAM:- M. L. UWAIS CJN, A. B. WALI, E. O. OGWUEGBU,
A. I. KATSINA-ALU, O. ACHIKE, JJSC

MR. MIKE MOMAH	APPELLANT
AND		
VAB PETROLEUM INC.	RESPONDENT

EVIDENCE - Affidavits - Intrinsic contradictions - In the affidavits filed by a party - The contradictions do not call for the hearing of oral evidence - In order to resolve them.

JUDGMENTS - Order - Consequential Order - Any such order which detracts from the judgment - Is not made within jurisdiction.

JURISDICTION - Lack of jurisdiction - How it may arise.

STAY OF EXECUTION - Balance of convenience - Requirement - It is the balance of convenience that tilts the scale always - In determining whether to grant a stay.

STAY OF EXECUTION - Dismissal of - Consequential Order - That the judgment debt should be deposited in Court - Does not detract from the dismissal of the application.

STAY OF EXECUTION - Foreign judgment - Consequential order - Foreign currency - It does not matter that such order is made in foreign currency.

STAY OF EXECUTION - Grant of a stay - Basic principle for such grant.

FACTS

In the High Court of Lagos State, holden at Lagos, the Judgment creditor/Respondent brought a motion on notice seeking an order of that Court to register a foreign judgment of the United Kingdom's High Court of Justice, Queen's Bench Division (Commercial Court) London, Pursuant to the Provisions of the Foreign Judgments (Reciprocal Enforcement Act) Cap 152. Laws of the Federation of Nigeria, 1990. The motion was contested by the judgment debtor appellant but it was granted by the court.

Being dissatisfied with the ruling, the judgment debtor appealed to the court of Appeal, Lagos Division. He also filed a motion on notice in which he prayed for an order of stay of execution of the order made by the High Court of Lagos wherein that Court ordered the registration of the foreign judgment. The Court of Appeal heard the application and in a considered ruling dismissed it. The court made a consequential order for the judgment sum to be deposited with the Deputy Chief Registrar of that court who is to lodge the said sum in an account to be opened with UBA which will yield high interest until the determination of the appeal. The judgment debtor who felt aggrieved by the ruling and consequential order has appealed to the Supreme Court raising four issues while the judgment creditor raised three issues. The Court relied on the issues raised by the judgment debtor/appellant.

ISSUES FOR DETERMINATION

"2.1 whether the Court of Appeal was right in refusing to grant a stay of Execution?

2.2 Whether their Lordships of the Court of Appeal did or did not exercise their discretion judiciously and judicially on the materials before them in refusing the Appellant's Application for Stay of Execution of the ruling of the High Court?

2.3 Whether their Lordships of the Court of Appeal could in dismissing the Appellant's Application for stay of the High Court's ruling, also by the same ruling, make an order for payment of the judgment debt to the Deputy Chief Registrar of the court below?

2.4 In view of the provisions of Section 4(3) of the Foreign

Judgments (Reciprocal Enforcement) Act Cap. 152 requiring foreign currency to be converted to Naira before being registered by the High Court, was the Court below right in ordering the Appellant to pay the judgment debt of USD316,363.75 to the Deputy Chief Registrar of the Court below?"

HELD (Unanimously dismissing the appeal per lead judgment of **UWAIS CJN**)

Grant of a stay

1. I now return to the issue under consideration. The basic principle for grant of stay of execution has been laid down by this Court in a long line of authorities including the cases of Vaswani Trading Company v. Savalakh, (1972) 12 S.C. 77. It is inter alia required that special or strong circumstances must exist before a stay could be granted. The essence of such stay is to maintain the status quo ante in order to ensure that the res, which is the subject matter of the appeal, is not destroyed to render the proceedings nugatory. (p. 553 G)

Evidence - Affidavits

2. The Court below was concerned with the intrinsic contradictions in the affidavits filed by the Appellant in support of his application and not the contradictions apparent between the Appellant's affidavits on one hand and the Respondent's affidavit on the other. While in the former case the contradictions do not call for the hearing of oral evidence in order to resolve them; in the latter case the contradictions must be resolved by oral evidence before the Court below could rely on any of the contradicting depositions to reach a decision. (p. 554 H)

Stay of Execution - Balance of convenience

3. It is the balance of convenience that tilts the scale always in determining whether to grant a stay. The Court below was not satisfied with the facts deposed to in the affidavits in support of the Appellant's application. It could not, therefore, in good conscience, grant him stay. In other words the balance of convenience in the case was not in favour of

the Appellant. (p. 555 D)

Lack of Jurisdiction

4. There is no doubt that the question whether the Court of Appeal acted properly in making the consequential order raises the issue of jurisdiction. For if the Court had jurisdiction the order would be valid and proper, and if it had no jurisdiction the order would be a nullity and therefore void. In Anisminic v. Foreign Compensation Commission, (1969) 2 W.L.R. 163, Lord Pearce Observed on P. 192 thereof as follows:-

"Lack of jurisdiction may arise in various ways. There may be an absence of those formalities or things which are condition precedent to the tribunal having any jurisdiction to embark on an inquiry, Or the tribunal may at the end make an order that it has no jurisdiction to make. Or in the intervening stage, while engaged on a proper inquiry, the tribunal may depart from the rules of natural justice; or it may ask itself the wrong questions; or it may take into account matters which it was not directed to take into account. Thereby it would step outside its jurisdiction."

This dictum received the approval of this Court in Okupe v. F.B.I.R., (1974) N.S.C.C. 200 at pp. 209 - 210. (p. 558 A)

Judgments - Dismissal of

5. As held in Obayagbona's case (supra) any consequential order must be such that gives effect to the judgment given. It was held further in the case at page 254 thereof -

"In its ordinary dictionary meaning the word 'consequential' means following as a result, or inference; following or resulting indirectly. See Concise Oxford Dictionary, 5th Edition, page 258. The word has never been regarded as a term of art A consequential order therefore made subsequent to a judgment which detracts from the judgment or contains extraneous matters is not made within jurisdiction because at that stage, having determined the rights of the parties by giving judgment for the plaintiffs as claimed the judge has become functus officio except for any act permitted by law or rules of Court." (p. 561 A)

Stay of Execution - Dismissal of

6. There can be no doubt that the consequence of the refusal to order stay of execution in the present case is, by inference, that the Respondent, as judgment creditor, is entitled to enforce the judgment in his favour. In my opinion, therefore, the order that the Appellant should deposit the judgment debt in Court to be kept in a bank account does not detract from the dismissal of the application for stay of execution. It appears to me that the consequential order is, in effect or by implication, the same as an order for stay of execution with a condition that the judgment debt should be paid into court instead of the Appellant's title deeds being deposited in Court as prayed. For if the consequential order is complied with, the Respondent will not be in a position to execute the foreign judgment before determination of the appeal in the court below. Furthermore, the Court of Appeal has the jurisdiction under section 16 of the Court of Appeal Act, Cap. 75 to have made the consequential order. (p. 561 D)

Stay of Execution - Foreign Judgments

7. It is to be noted that these provisions are concerned with the registration of a foreign judgment, while the issue before us and indeed before the Court of Appeal in this respect, is of the execution of the foreign judgment. It does not matter that the consequential order made by the Court of Appeal has been in foreign currency since there is no inhibition that a substantive claim could not be brought in foreign currency - see Metronex (Nig.) Ltd. v. Griffin & George Ltd. (1991) 1 N.W.L.R. (part 169) 651 at p. 659D. (p. 562 H)

NOTABLE POINTS OF INTEREST

OGWUEGBU JSC

1. Consequence of not approaching the court with clean hands

The applicant having contradicted himself on very serious and important issues of fact in his application which bordered on dishonesty should not have turned round to complain. He did not approach the court with clean hands and those averments disqualified him from the exercise of the

court's discretion in his favour. (p. 565 E)

ACHIKE JSC

2. How to checkmate the execution of a foreign judgment

B Clearly, the appellant, not having filed an appeal against the judgment
handed down in London, cannot competently seek a stay of execution of
the said judgment whereas the appellant can checkmate the execution of
the judgment obtained in London by either resisting the grant of such
C order for its registration or obtain an order to stay the order of registra-
tion. It is therefore clear that the appellant was perfectly in order not to
have sought in London a stay of execution of the registration order.
(p. 569 C)

D 3. Need to explain away contradictions in a party's case

The law frowns on a party who approbates in one breath and reprobates
in another. But having said that, I must hurry to state that the onus is
undoubtedly on the appellant confronted with its self-created contradic-
E tions to fully and properly explain away the contradictions to the satis-
faction of the court. Failure to do is bound to leave an indelible dent on
the appellant's case. It is not open to the court to enter into the arena of
judicial conflict between the parties in order to resolve the contradictions
F within the appellant's own affidavit evidence. (p. 570 C)

REPRESENTATION

Chief C. Chigbue, with him H. Kareem, J. D. Moze, A. Osuigwe and A.
Ohanele for the Appellant

G M.O.S. Amobi for the Respondent

CASES REFERRED TO

Fawehinmi v. Akilu, (1990) 1 N.W.L.R. (part 127) 450 at P. 470

H Okafor v. Nnaife, (1987) 4 N.W.L.R. (part 64) 129 at p. 136

Onogoruwa v. Adeniji, (1993) 5 N.W.L.R. (part 293) 317

Nwabueze v. Nwosu, (1988) 4 N.W.L.R. (part 88) 275

Ajomale v. Yadu'at (No. 2) (1991) 5 N.W.L.R. (part 191) 266 at p. 294

E-G

Vaswani Trading Company v. Savalakh, (1972) 12 S.C. 77

Okafor v. Nnaife, (1987) 4 N.W.L.R. (part 64) 129

Alao v. C.O.P, (1997) 4 N.W.L.R. (part 64) 199

Saeckler v. Tanimola, (1995) 4 NWLR (part 289) 370 at p. 378 B

STATUTES REFERRED TO

Foreign Judgments (Reciprocal Enforcement Act Cap. 152, Laws of the Federation of Nigeria 1990; S.4 (5)

Court of Appeal Act, Cap.75. Laws of the Federation of Nigeria, 1990; S.16 C

LEAD JUDGMENT BY UWAIS CJN

This is an interlocutory appeal from the decision of the Court of Appeal, Lagos Division. The Appellant herein is judgment debtor to a judgment delivered by the High Court of Justice, Queen's Bench Division, (Commercial Court) London, United Kingdom, while the Respondent herein is the judgment creditor to the said foreign judgment which was obtained in 1991. D

In 1993, the Judgment Creditor brought a motion on notice in the High Court of Lagos State, holden at Lagos, seeking an order of that Court to register the foreign judgment in question pursuant to the provisions of the Foreign Judgments (Reciprocal Enforcement) Act, Cap. 152 of the Laws of the Federation of Nigeria, 1990. The motion was contested by the judgment debtor but it was granted by Adeniji. J. in a considered ruling. F

Being dissatisfied with the ruling, the judgment debtor appealed to the Court of Appeal. He also filed a motion on notice in that Court in which he inter alia prayed for - G

"1. An order staying execution of the order made in this Suit on the 14th of December, 1993 by the Honourable Justice A. B. Adeniji of the High Court of Lagos sitting in Lagos wherein he ordered the registration of the foreign judgment of the High Court of Justice of the Queen's Bench Division of England pending the determination of the appeal filed H

in this Honourable court."

After filing series of affidavits, counter-affidavits and replies to counter-affidavits, the motion was heard by the Court of Appeal and a considered ruling was delivered on the 25th day of June, 1995 by pats-
 B Acholonu, J.C.A. (with whom Kalgo, J.C.A., as he then was, and Ibrahim Tanko Muhammad, J.C.A. concurred). He dismissed the application in a somewhat lengthy ruling dealing in some respects with the substance and merit of the appeal which the Court of Appeal was yet to hear and
 C determine. In my opinion, this is, with utmost respect, prejudicial, irregular and undesirable. Fortunately it is a different panel of the Court below that will now hear the pending appeal. Be that as it may, the ruling was concluded thus:-

"In the circumstances the application fails. However, as the
 D *respondent (i.e) VAB Petroleum Incorporated - the judgment creditor) has no asset in this country, the sum of money shall be deposited with the Deputy Chief Registrar of this Court who will open account with UBA and which will yield high interest rate until the determination of the*
 E *appeal."*

The judgment debtor felt aggrieved by the ruling and the consequential order and, therefore, appealed to this Court filing seven grounds of appeal.

F Appellant's and Respondent's briefs of argument were filed and exchanged by parties. The issues formulated by the Appellant for our determination are as follows:-

"2.1. Whether the Court of Appeal was right in refusing to grant
 G *a stay of Execution?"*

2.2. Whether their Lordships of the Court of Appeal did or did not exercise their discretion judiciously and judicially on the materials before them in refusing the Appellant's Application for Stay of Execution of the ruling of the High Court?"

H *2.3. Whether their Lordships of the Court of Appeal could in dismissing the Appellant's Application for stay of the High Court's ruling, also by the same ruling, make an order for payment of the judgment debt to the Deputy Chief Registrar of the court below?"*

2.4. *In view of the provisions of Section 4(3) of the Foreign Judgments (Reciprocal Enforcement) Act Cap. 152 requiring foreign currency to be converted to Naira before being registered by the High Court, was the court below right in ordering the Appellant to pay the judgment debt of USD 316, 363, 75 to the Deputy Chief Registrar of the Court below?"* B

The Respondent's brief of argument contains three issues for our determination and they are -

"(A) *Whether a litigant who abandons his right of appeal against a judgment of a court of competent jurisdiction outside Nigeria, can seek to nullify the said judgment here in Nigeria without first doing so in the appropriate appellate court where the judgment was given.*" C

(B) Whether in an application for a stay of execution, the Court of Appeal, faced with very clear evidence of mutual fears by both parties to the dispute for the safety of the judgment sum, can make appropriate order (s) pursuant to its inherent powers and also under section 16 of the Court of Appeal Decree 1976, directing that the said judgment sum be paid into the Registry of the Court pending the determination of the appeal, AFTER AND QUITE INDEPENDENT of its ruling on the application before it. D E

(c) Whether in the circumstances of this Appeal, the Court Below in dealing with proceedings for a stay of execution of judgment should not take into account, the conduct of the parties to the dispute as reflected in evidence before the Court in considering whether to grant or dismiss the application for a stay." F

In my opinion, issue (A) is not based on any of the seven grounds of appeal filed by the Appellant. I will have to therefore, discountenance G it. On the other hand issues (B) and (C) correspond with Appellant's issues Nos. 2.1., 2.2 and 2. 3. The later issues can conveniently accommodate the Respondent's issues in determining the questions in this appeal. Consequently I intend to rely on the issues formulated by the H Appellant in determining the appeal.

ISSUE NOS 2.1

The appellant's argument is that the grounds of appeal raised

substantial and arguable points of law. It is submitted that the Court of Appeal conceded this point when it held (per pats-Acholonu, J.C.A.) - "Merely having substantial grounds of appeal is not enough to sustain an application for a stay of execution or stay of proceedings, as the case may be." It is further argued that the balance of convenience in the case is in favour of the Court below granting to the Judgment Debtor a stay of execution pending determination of the appeal. It was emphasized that this is so since the Judgment Creditor had no assets in Nigeria and the Judgment Debtor had deposed that he had real property in Nigeria. The cases of Fawehinmi v. Akilu, (1990) 1 N.W.L.R. (part 127) 450 at P. 470 and Okafor v. Nnaife, (1987) 4 N.W.L.R. (part 64) 129 at p. 136; were cited in support.

On the conflicting facts deposed to in the numerous affidavits filed by the parties, which the Court of Appeal alluded to in its ruling, the Judgment Debtor contends that the conflict was not resolved by calling oral evidence and the Court of Appeal was wrong in resolving the contradictions in the affidavits in favour of the Respondent. The case of Onogoruwa v. Adeniji, (1993) 5 N.W.L.R. (part 293) 317 was cited in support of the argument.

Respondent replied that the application for stay of execution should have been brought by the "Appellant in London, where the judgment in default of appearance was obtained, and not in Nigeria. The fact that the 'Appellant had failed in 1991 to pay the judgment debt in full made the courts below refuse his application for stay of execution. Relying on the case of Nwabueze v. Nwosu, (1988) 4 N.W.L.R. (part 88) 275, it is argued that there were no special or exceptional circumstances to make the courts below deprive the Respondent of the fruits of his success in obtaining judgment against the Appellant.

The Respondent further contends that the discretion whether to grant or refuse stay of execution was exercised by the High Court and not the Court of Appeal. That the Appellant's case in the later court was an appeal against the refusal of the High court to grant him stay. The Court of Appeal did not exercise any discretion to refuse the Appellant stay but simply upheld the decision of the High Court since it was con-

cerned with whether the High Court acted correctly in refusing the application for stay of execution. In conclusion, relying on the dictum of Karibi-Whyte, JSC in Ajomale v. Yadu'at (No. 2) (1991) 5 N.W.L.R. (part 191) 266 at p. 294 E-G, the Respondent submitted that had the Court of Appeal granted stay to the Appellant it would have acted erroneously since the res would have been in possession of the Appellant who had been shown to be reckless in spending. B

Now, let me first of all correct the misconception by the Respondent that what was before the Court Appeal was not an application for stay of execution but an appeal against the refusal by the high Court to grant stay. Nothing can be farther from the truth. The motion on notice for stay in the High Court was dated the 14th day of December, 1993, while that which he brought before the Court of Appeal was dated the 5th day of May, 1994. In paragraph 7 of the affidavit in support of the latter application it was deposed - C D

"7. That on the same 4th day of May, 1994 the High Court of Justice of Lagos (sic) refused and dismissed the Application for Stay of Execution of its order pending the determination of Appeal." E

The next paragraph in the Appellant's affidavit stated that a certified copy of the ruling was applied for but was not made available by the High Court. In its counter-affidavit, the Respondent failed to allude to the depositions in paragraphs 7 and 8 of the Appellant's affidavit. F

The appeal pending before the Court of Appeal is against the ruling on the application by the Respondent to the High Court for an order granting leave to have the foreign judgment registered. It was yet to be determined by the Court below by the time the Appellant's application for stay of execution was heard by the High Court. G

I now return to the issue under consideration. The basic principle for grant of stay of execution has been laid down by this Court in a long line of authorities including the cases of Vaswani Trading Company v. Savalakh, (1972) 12 S.C. 77. Okafor & Ors. v. Nnaife, (1987) 4 N.W.L.R. (part 64) 129 and U.B.N. Ltd. v. Odusote Bookstore Ltd., (1994) 3 N.W.L.R. (part 331) 129. It is inter alia required that special or strong circumstances must exist before a H

stay could be granted. The essence of such stay is to maintain the status quo ante in order to ensure that the res, which is the subject matter of the appeal, is not destroyed to render the proceedings nugatory. In the present case, the Court below examined the grounds of

B appeal filed by the Appellant against the ruling of the learned trial judge granting the application for leave to register the foreign judgment, and came to the conclusion that "..... it would seem the grounds of appeal appear ex facie to raise important issues of law." Next in considering the Appellant's application, the Court below stated as follows -

C *"Merely having substantial grounds of appeal is not enough to sustain an application for a stay of execution or stay of proceedings, as the case may be. In all cases the court would have to look at the depositions in the affidavit to determine or discern the conduct of the applicant. The court would naturally examine whether there exist special circumstances which would enable the court to make the order sought before exercising the discretionary remedy.*

D *It must equally be admitted that the discretion of the Court to grant a stay will be based on the balance of convenience depending on the facts before the court."*

E The court then examined the affidavit and further affidavits filed by the Appellant in support of his application and came to the conclusion that there were inherent contradictions in the facts deposed in them and went on to hold:-

F *"He has not been telling the truth in his affidavit and where inconsistencies in the affidavit evidence are not resolved by the deponent it is not for this court to resolve them but the deponent, if he can wriggle out of the net engulfing him.*

G *In the application, the applicant has not been honest in disclosure of certain facts In an application of this nature what the Court needs are hard unadulterated facts substantial and credible enough to sustain the prayer sought Where the facts consist of wool to cover the eye of the court, (sic) the applicant would have failed woefully In the circumstances, the application fails."*

H It will be observed from the foregoing that **the Court below**

was concerned with the intrinsic contradictions in the affidavits filed by the Appellant in support of his application and not the contradictions apparent between the Appellant's affidavits on one hand and the Respondent's affidavit on the other. While in the former case the contradictions do not call for the hearing of oral evidence in order to resolve them; in the latter case the contradictions must be resolved by oral evidence before the Court below could rely on any of the contradicting depositions to reach a decision. It is the former position that the Court below relied upon to reject the Appellant's application. The argument of the Appellant, which has been based on the latter position, is a misconception. It is, therefore, irrelevant and unhelpful to his case.

On the whole, it cannot be said that the Court of Appeal did not exercise its discretion Judicially and judiciously in coming to the conclusion not to grant stay. **It is the balance of convenience that tilts the scale always in determining whether to grant a stay. The Court below was not satisfied with the facts deposed to in the affidavits in support of the Appellant's application. It could not, therefore, in good conscience, grant him stay. In other words the balance of convenience in the case was not in favour of the Appellant.** For my part, I do not see any error in the decision of the Court of Appeal in this respect and cannot hold that it acted wrongly in refusing the stay.

Issue No.2.2

This issue, which raises the question whether the Court of Appeal exercised its discretion judicially and judiciously, has been argued by the Appellant summarily. It is submitted that the facts before the Court of Appeal and the circumstances of the case when considered vis-a-vis the authorities cited above, the Appellant had put forward a good case for unconditional stay of execution to be granted.

Learned Counsel for the Respondent did not meet this argument in the Respondent's brief nor in his oral address before us because, as pointed out earlier, he had misconceived the issue that was before the Court of Appeal as not being an application for stay of execution but an appeal from the decision of the High Court refusing stay.

As already pointed out, while considering Appellant's first issue for determination, the Court of Appeal refused to grant the stay because it found that the affidavit and further affidavits filed in support of the Appellant's application before it were contradictory and unreliable. The finding is sound and has not successfully been faulted by the Appellant. It is, therefore, not right for the Appellant to contend that the decision by the Court of Appeal to refuse stay was not reached judicially and judiciously.

Issue No. 2.3

The question raised here is whether the Court of Appeal was right in making consequential order after refusing to grant the application for stay of execution. The order again reads:-

"However, as the respondent has no asset in this country, the sum of money shall be deposited with the Deputy Chief Registrar of this court who will open account with UBA and which will yield high interest rate until the determination of the appeal."

It is contended by the Appellant that the Court of Appeal could not dismiss the application for stay and at the same time make the consequential order when it agreed with the Appellant that the Respondent had no assets in Nigeria. It is further contended that the Court below had become functus officio on dismissing the application and that the only consequential order it could rightly have made was as to costs in the application. The order was, therefore, made without jurisdiction and as a result it is a nullity. The following cases were cited to support the contention - Alao v. C.O.P., (1997) 4 N.W.L.R. (part 64) 199 and Saeckler v. Tanimola, (1995) 4 NWLR (part 289) 370 at p. 378.

In reply, the Respondent pointed out that there was mutual fear by the parties about the safety of the res in the case. The counter-affidavit to the application for stay made in the Court of Appeal, which was sworn to by learned counsel for the Respondent, was referred to. Paragraphs 12 to 14 thereof state thus:-

"(12) That the above financial status notwithstanding, I am concerned with the spending habit of the said Mr. Momah, which naturally constitutes a danger to res, in that:

(a) *Since the inception of the proceedings in this suit, Mr. Momah has purchased more than four (4) luxury cars including a Mercedes Benz 600 registered as LA 6926 RA and a Honda Legend saloon.*

(b) *That three months ago in October, 1993, while this case was in progress, Mr. Momah displayed an unnecessary trait of imprudence by spending about N500,000.00 to sponsor a Lawn Tennis Tournament at Port Authority Sports Grounds, Surulere, Lagos, whereat participants collected cash prizes ranging from N70,000.00 for the winner, to lesser figures for runner-ups (sic). I attach a copy of the invitation for the closing ceremony invitation marked herein as Exhibit "R".*

(13) *That by this style of spending, I believe it would be in the interests of parties to this suit, in order to preserve the judgment debt, if the said debt is paid into this Honourable Court for a prudent deposit into an interest earning escrow account with a bank nominated by this Court.*

(14) *That by this measure, both parties to this suit will rest assured that the res is preserved to await collection at the end of the appeal which the 2nd Applicant, Mr. Momah, intends to canvass."*
The cases of Nwabueze v. Nwosu, (1988) N.W.L.R. (part 88) 257; First Bank v. Doyin Investment, (1989) 1 N.W.L.R. (part 99) 634 were cited in support. It is also argued on the authority of Union Bank of Nigeria v. Odusote Bookshop (supra) at P. 152, per Olatawura, JSC, that it is dangerous and risky to leave the judgment debt in the hands of the Judgment Debtor, even if he is rich and furthermore, to do so is to deny the Respondent the fruits of his success. Reliance is also placed on section 16 of the Court of Appeal Act, Cap. 75 of the Laws of the Federation of Nigeria, 1990. Which states in part-

"The Court of Appeal may from time to time make any order necessary for determining the real question in controversy in the appeal,...."

It is argued that despite the dismissal of the application for stay, the question of preserving the judgment sum remained bending as a real H issue to be determined by the Court of Appeal. Consequently the order made for the payment of the judgment debt into court was within the inherent jurisdiction of the Court which has been emphasized by Section

16 of the Court of Appeal Act, Cap. 75.

There is no doubt that the question whether the Court of Appeal acted properly in making the consequential order raises the issue of jurisdiction. For if the Court had jurisdiction the order would be valid and proper, and if it had no jurisdiction the order would be a nullity and therefore void. In Anisminic v. Foreign Compensation Commission, (1969) 2 W.L.R. 163, Lord Pearce Observed on P. 192 thereof as follows:-

"Lack of jurisdiction may arise in various ways. There may be an absence of those formalities or things which are condition precedent to the tribunal having any jurisdiction to embark on an inquiry, Or the tribunal may at the end make an order that it has no jurisdiction to make. Or in the intervening stage, while engaged on a proper inquiry, the tribunal may depart from the rules of natural justice; or it may ask itself the wrong questions; or it may take into account matters which it was not directed to take into account. Thereby it would step outside its jurisdiction."

This dictum received the approval of this Court in Okupe v. F.B.I.R., (1974) N.S.C.C. 200 at pp. 209 - 210.

In Obayagbona & Anor. v. Obazee, (1972) 5 S.C. 247, the learned trial judge (Irikefe, J. as he then was) in the High Court of Mid-Western State of Nigeria entered judgment for the plaintiffs and made a number of consequential orders one of which reads -

"I am of the view that the conduct of the plaintiffs was unconscionable and was an indirect attempt to prejudice the rights of the defendants. Both exhibits 'A' and 'Y' show that the plaintiffs have not succeeded in respect of all the land said to be in dispute and the effect thereof is that the defendants have succeeded to the extent that the plaintiffs have failed. For the above reasons I order that each party should bear its own costs."

The plaintiffs appealed to the Federal Supreme Court against the consequential order seeking the relief that judgment for the entire land in dispute be entered in their favour and that the defendants be condemned in costs for the proceedings in the High Court. It was held, per Sowemimo,

J.S.C., (as he then was) in the judgment of the Court, that the trial judge having entered judgment for the plaintiffs as claimed was wrong to have whittled down the effect of the plaintiff's victory by depriving them of costs, even though the award of costs was discretionary. It was also held that the learned trial judge was wrong to make consequential orders B which had the effect of varying his judgment in favour of the plaintiffs and which in any case were not specifically asked for. It was further held that the learned trial judge was functus officio immediately after he gave his judgment, so that both the consequential orders which he made C as well as his misconception of the judgment when considering the issue of costs were made without jurisdiction.

In the case of The Registered Trustees of the Apostolic Church v. Olowoleni. (1990) 6 N.W.L.R. (part 158) 514, the plaintiff sued the defendant for trespass over their church's land by entering and dumping D laterite thereupon and asked for perpetual injunction against the defendant. While the action was pending for hearing before the trial court, the plaintiffs built wall around the land in dispute. At the end of the trial the learned judge entered judgment for the defendant and made a consequential order for the wall to be pulled down by the plaintiffs. On appeal to the E Court below the plaintiffs lost and the consequential order was upheld. On further appeal to this Court, the decision in Obayagbona & Anor. v. Obazee, (supra) was distinguished (per Olatawura, JSC at pp. 530-531) F on the ground that the evidence adduced in the case supported the consequential order made. It went on to observe -

"It is a misconception to submit that consequential order made by a court must of necessity be based on the reliefs claimed. The basis of an order made by the court must be looked for from the evidence before G the court. It is trite law that the court cannot award more than is claimed. It is equally misconceived that an order cannot be made in favour of a defendant simply because he has not filed a counter-claim. An order H made in favour of a defendant even where he had not made a counter-claim must flow from the evidence and more so if the justice of the case demands."

However, the concurring judgments of Obaseki and Nnaemeka-

Agu JJ.S.C. in the case indicate that the consequential order was made as a punishment against the plaintiffs for their contempt of the trial court. Obaseki, JSC observed on p. 532 thereof -

B *"The dispute in this matter having been handed to the Court for determination, the appellants cannot be allowed to take the law into their own hands. The rule of Law and the Rule of Force are mutually exclusive - Law rules by reason and morality. Force rules by violence and immorality."*

C While Nnaemeka-Agu, JSC stated on p. 537 thereof -

D *"Thus it is clear that the learned trial judge made the (consequential) order not as an award to the respondents (sic) as such but in order to punish the appellants for what he considered an act of abuse and intentional disrespect in the proceedings before him. Therefore the question as to whether he thereby played 'Father Christmas' to the respondent by awarding to her what she did not claim does not arise.*

.....

E *The appellant further complained that the court could not have made the order sue motu, as there was no counter-claim before the court in which the relief was claimed. The truth is that the complaint of it was made to the learned trial judge."*

F It is to be noted that the principles laid down by Obayagbona & Anor. v. Obazee, (supra) were followed by this court in Akinbobola v. Plisson Fisko, (1991) 1 N.W.L.R. (part 167) 270 at pp. 278A - B, 279A - 286. The decisions in Alao's case (supra) and Saecklers case (supra), relied upon by the Appellant are decisions by the Court of Appeal.

G It is usual for an appellate court to order, as a condition, where an application for stay of execution is granted, the judgment debtor to deposit in court the judgment debt pending determination of appeal. However, it is not usual for an appellate court to refuse an application for stay and yet impose a condition against the applicant. It is true that in the H present case, the respondent did not apply in the Court below for the judgment debt to be deposited in the Court pending determination of the appeal before it. Could it then be said that the order made by the Court below is consequential or "conditional" to the refusal of the application

for stay? As held in Obayagbona's case (supra) any consequential order must be such that gives effect to the judgment given. It was held further in the case at page 254 thereof -

"In its ordinary dictionary meaning the word 'consequential' means following as a result, or inference; following or resulting indirectly. See Concise Oxford Dictionary, 5th Edition, page 258. The word has never been regarded as a term of art A consequential order therefore made subsequent to a judgment which detracts from the judgment or contains extraneous matters is not made within jurisdiction because at that stage, having determined the rights of the parties by giving judgment for the plaintiffs as claimed the judge has become functus officio except for any act permitted by law or rules of Court."

There can be no doubt that the consequence of the refusal to order stay of execution in the present case is, by inference, that the Respondent, as judgment creditor, is entitled to enforce the judgment in his favour. In my opinion, therefore, the order that the Appellant should deposit the judgment debt in Court to be kept in a bank account does not detract from the dismissal of the application for stay of execution. It appears to me that the consequential order is, in effect or by implication, the same as an order for stay of execution with a condition that the judgment debt should be paid into court instead of the Appellant's title deeds being deposited in Court as prayed. For if the consequential order is complied with, the Respondent will not be in a position to execute the foreign judgment before determination of the appeal in the court below. Furthermore, the Court of Appeal has the jurisdiction under section 16 of the Court of Appeal Act, Cap. 75 to have made the consequential order. As a result I see no merit in this issue.

Issue No. 2.4

The last question for determination is whether the Court below was right to order that the judgment debt should be paid in United States dollars contrary to the provisions of section 4 subsection (3) of the foreign Judgments (Reciprocal Enforcement) Act, Cap. 152.

Relying on the provisions, the Appellant argues that the learned trial Judge in the High Court, who ruled that the foreign judgment should be registered, should have determined the Naira equivalent of the judgment debt of US \$316,36.75. It is submitted that since this was not done the Court of Appeal could not have rightly made the order for the judgment debt to be deposited in the United States dollars. Instead, it is contended, that the Court below should have taken the easiest and fairest way out by ordering the Appellant to deposit his title deeds with the Court below as a condition for granting a stay pending appeal.

In reply, the Respondent argues that section 4 subsection (3) does not prohibit the mentioning, in an application for registration of judgment, of any currency other than the Naira. He explains that at the time the High Court granted the application to register the foreign judgment, the judgment had not been registered, and that the ruling of the High Court did not direct that the judgment sum in the foreign judgment should be registered in United States dollars as the Appellant contends. It is submitted that on the authority of Olaogun Enterprises Ltd. v. S.J. & M. (1992) 4 N.W.L.R. (part 235) 361 and Schorsch Meir GMBH v. Hennin, (1975) 1 All E.R. 152, a party to a suit is entitled to make his claim in court in Nigeria in either the local currency or in foreign currency if the basis of the transaction between the parties sought to be enforced is in foreign currency.

Now section 4 subsection (3) of the Foreign Judgments (Reciprocal Enforcement) Act, Cap. 152 provides -

"Where the sum payable under a judgment which is to be registered is expressed in a currency other than the currency of Nigeria, the judgment shall be registered as if it were a judgment for such sum in the currency of Nigeria as, on the basis of the rate of exchange prevailing at the date of the judgment of the original court, is equivalent to the sum so payable."

It is to be noted that these provisions are concerned with the registration of a foreign judgment, while the issue before us and indeed before the Court of Appeal in this respect, is of the execution of the foreign judgment. It does not matter that the

consequential order made by the Court of Appeal has been in foreign currency since there is no inhibition that a substantive claim could not be brought in foreign currency - see Metronex (Nig.) Ltd. v. Griffin & George Ltd. (1991) 1 N.W.L.R. (part 169) 651 at p. 659D; Olaogun Enterprises Ltd. case (supra) at p. 385C and Prospect Textile Mills (Nig.) Ltd. v. I C. I. Plc England, (1996) 6 N.W.L.R. (part 457) 668 at p. 682. It follows that there is no substance in this issue.

It is significant to point out that the exchange rate, as at the date the Court of Appeal made the order for the judgment debt to be deposited, can be easily ascertained from the Central Bank of Nigeria by either party, in the event of any doubt, if it becomes necessary for the judgment debt to be deposited in Naira. It is significant that the consequential order merely refers to "sum of money" and is not specific about the sum being in either dollars or naira.

On the whole this appeal lacks merit and it is hereby dismissed in its entirety with N10.000.00 costs to the Respondent against the Appellant.

WALI JSC

I have read before now, the Lead Judgment of my learned brother Uwais CJN, with which I entirely agree. He has comprehensively dealt with all the issues raised and canvassed in this appeal and as such, I have nothing useful to add by way of contribution.

For these same reasons ably stated in the Lead Judgment which I hereby adopt, I hereby dismiss this appeal as lacking in merit, with N10.000.00 costs in favour of the Respondent against the Appellant.

OGWUEGBU JSC

I have had a preview of the judgment just delivered by my learned brother Uwais, C.J.N. and I am in complete agreement with him that the appeal should be dismissed.

The appellant in his brief submitted that in the court below he showed that the grounds of appeal contained in his notice of appeal to that court contain and raise substantial and arguable points of law in an

area in which the law is recondite. It was also submitted in his brief that the court below did not exercise its discretion judicially and judiciously in refusing his application for stay of execution of the ruling of the High Court dated 14-12-93.

B In the court below both parties filed copious affidavits and counter-affidavits in support and in opposition to the application. Having regard to the materials before that court, can it be said that that court exercised its discretion wrongly? The court below was faced with the affidavits in support of the motion whose averments are inconsistent and
C incredible part of the findings of the court below on the said affidavits read:

"Now in one of the affidavits sworn to by the applicant he stated he was never at any time the Managing Director of Micmoson U.K. Ltd. and in further affidavit before this court stated that his investment in Great Britain is worth only #20,000.00. However in an affidavit he swore to on 4-11-93 in respect of proceedings in the court below he deposed as follows:

E *"para. 10. That I personally have a lot of investments in the United Kingdom and no such investments have been tampered with in any manner what-ever."*

He denied being the Managing Director of Micmoson U.K. Ltd. Yet in his letter to the Manager Banque, Paribas (Snisse) S.A. Geneva Switzerland (p.40 of the records) he signed as the Managing Director. He has not been telling the truth in his affidavit and where inconsistencies in the affidavit evidence are not resolved by the deponent it is not for the court to resolve them but the deponent if he can wriggle out of the net engulfing him. In the application, the application has not been honest in disclosure of certain facts. Where facts consist of wool to cover the eyes of the court, the applicant would have failed woefully."

H These are the findings and conclusion of the court below on the materials placed before it by the applicant. Based on the above findings, the applicant cannot be heard to contend that the court below did not exercise its discretion judicially and judiciously. With the inconsistent,

dishonest and woolly averments in the affidavits of the applicant, no reasonable tribunal could have granted his application. The court below was, even charitable to him to have gone into the merits of the application.

The courts are guided by well established principles contained in several decisions of this court in the grant or refusal of applications for stay of execution pending appeals. See Vaswani Trading Company v. Savalkh & Co. (1972) 12 S.C. 77 at 82, Kigo (Nig.) Ltd. & or. v. Holman Bros (Nig.) Ltd. (1980) 5-7 SC. 60 at 74 and Okafor & Ors. v. Nnaife (1987) 18 NSCC (pt. 2) 1194 at 1197 - 1198. The court below recognized that the grounds of appeal contained in the notice of appeal to that court raise arguable points of law and went further to hold that "merely having substantial grounds of appeal is not enough to sustain an application for a stay of execution....." I think the court below is right having regard to the facts disclosed. It is not the practice of appellate courts to stay execution after the judge at the trial court has refused to grant it, unless special circumstances are shown to exist.

The applicant having contradicted himself on very serious and important issues of fact in his application which bordered on dishonesty should not have turned round to complain. He did not approach the court with clean hands and those averments disqualified him from the exercise of the court's discretion in his favour.

In the result, for these reasons and the more detailed reasons in the judgment of my learned brother Uwais, C.J.N., I too would dismiss the appeal with N10.000.00 costs in favour of the respondent.

KATSINA-ALU JSC

I have had the advantage of reading in draft the judgment delivered by my Lord, Uwais CJN. I agree with it. I would wish to add some views of my own on issue No. 3. The question raised here for our determination is whether the court below was right in making a consequential order after refusing to grant the application for stay of execution. The order made by the court below states:

"However, as the respondent has no asset in this country, the sum

of money shall be deposited with the Deputy Chief Registrar of this court who will open account with UBA and which will yield high interest rate until the determination of the appeal."

It is contended by the appellant that this order was made without jurisdiction and as a result is a nullity. There is one reason why I think this contention is vexatious. The order of payment of the judgment debt into court has the effect of giving to the appellant the relief he asked for i.e. a stay of execution. I would have thought this called for jubilation on the part of the appellant. The reason is obvious. In the absence of this order, the respondent would have been free to execute the judgment in some unorthodox manner to the chagrin of the appellant. This issue, therefore has no merit whatsoever. Accordingly I dismiss this appeal with N10,000.00 costs in favour of the respondent.

ACHIKE JSC

The brief facts of this appeal are reasonably clear save for the areas of conflict arising from the numerous affidavits and counter-affidavits filed by the parties. The conflicts however, in my opinion, do not call for resolution as we shall show presently. Be that as it may, it is clear that essentially, it was the respondent's application for an order to register a foreign judgment of the United Kingdom's High Court of Justice, Queen's Bench Division (Commercial Court) London, pursuant to the provisions of our local law - Foreign Judgments (Reciprocal Enforcement) Act, Cap 152 of the laws of the Federation of Nigeria 1990 - that gave rise to the proceedings leading to this appeal. The said application on notice was made and granted by the High Court of Lagos State, holding in Lagos.

Dissatisfied with the order made in favour of the respondent, (the judgment creditor) the appellant, the judgment debtor, appealed to the Court of Appeal, Lagos Division. Additionally, the judgment debtor by a motion on notice sought a stay of the order of execution wherein the trial court had ordered the registration of the foreign judgment, pending the determination of the appeal in respect thereof filed in the court below. The lower court dismissed the application, and in the leading ruling, Pats-

Acholonu, J.C.A. (to which Kalgo, JCA., as he then was, and Tanko Mohammed, J.C.A. concurred) concluded as follows:

"In the circumstances the application fails. However as the respondent has no asset in this country, the sum of money shall be deposited with the Deputy Chief Registrar of this court who will open account with (sic) UBA and which will yield high interest rate until the determination of the appeal."

Again, dissatisfied with this ruling, appellant has appealed to this court upon seven grounds of appeal. Both parties filed and exchanged briefs of argument and each identified the issues for determination. While the appellant identified the following issues, to wit,

"2.1 whether the Court of Appeal was right in refusing to grant a stay of Execution?"

2.2 Whether their Lordships of the Court of Appeal did or did not exercise their discretion judiciously and judicially on the materials before them in refusing the Appellant's Application for Stay of Execution of the ruling of the High Court?"

2.3 Whether their Lordships of the Court of Appeal could in dismissing the Appellant's Application for stay of the High Court's ruling, also by the same ruling, make an order for payment of the judgment debt to the Deputy Chief Registrar of the court below?"

2.4 In view of the provisions of Section 4(3) of the Foreign Judgments (Reciprocal Enforcement) Act Cap. 152 requiring foreign currency to be converted to Naira before being registered by the High Court, was the Court below right in ordering the Appellant to pay the judgment debt of USD316,363.75 to the Deputy Chief Registrar of the Court below?"

the respondent postulated only three issues, viz,

"(A) Whether a litigant who abandons his right of appeal against a judgment of a court of competent jurisdiction outside Nigeria, can seek to nullify the said judgment here in Nigeria without first doing so in the appropriate appellate court where the judgment was given.

(B) Whether in an application for a stay of execution, the Court of Appeal, faced with very clear evidence of mutual fears by both parties

to the dispute for the safety of the judgment sum,, can make appropriate order (s) pursuant to its Decree 1976, directing that the said judgment sum be paid into the Registry of the Court pending the determination of the appeal. AFTER AND QUITE INDEPENDENT of its ruling on the application before it.

(C) Whether in the circumstances of this Appeal, the Court Below in dealing with proceedings for a stay of execution of judgment should not take into account, the conduct of the parties to the dispute as reflected in evidence before the Court in considering whether to grant or dismiss the application for a stay.

In passing, it seems to me that respondent's Issue A hangs in the air, as it were, because the same is not distilled from any of the grounds of appeal. It is the law that any issue for determination which is not predicated on any of the appellant's (or cross-appellant's) grounds of appeal is incompetent, the court is obliged to discountenance it. Appellant's Issue 1, 2 and 3 encompass respondent's remaining Issues B and C. I find the appellant's issues more distinctively worded that I wish to adopt them in disposing of this appeal.

Issues 1 and 2

The gravamen of these two issues addresses the question whether the lower court was right in refusing to order stay of execution of the ruling of the High Court and whether it did so judicially and judiciously. Applicant relied on the substantiality and arguability of his grounds of appeal, balance of convenience of grant of stay being in his favour as respondent has no asset by way of real property in Nigeria and also that the conflicting affidavit evidence placed before the lower court was resolved without calling oral evidence to do so, contrary to the long chain of authorities in this regard. Respondent, in reply, argued that the application for stay ought to have been brought in London where the judgment in default of appearance was obtained rather than in Nigeria. It was also argued on behalf of the respondent that no special or exceptional circumstance were shown to warrant the grant of a stay which has the devastating effect of depriving the respondent, the victorious party, the fruit of its success. Finally, the respondent submitted that the lower

court, in refusing to grant a stay, did so judicially and judiciously.

I shall like first to tackle respondent's argument that the stay of execution ought to have been brought in London where the default judgment was signed in favour of the respondent. This argument, with utmost respect, is a misconception of the issue before the court. It is common knowledge that the judgment was entered against the appellant in default of appearance and no appeal has been made in respect of that judgment. However, on the contrary, the present appeal is against the ruling of the lower court which had made an order in favour of the respondent to register the foreign judgment obtained against the appellant. If the order granted for registration of the foreign judgment is not stayed, the respondent, armed with the order will fully execute the remaining part of the foreign judgment. Clearly, the appellant, not having filed an appeal against the judgment handed down in London, cannot competently seek a stay of execution of the said judgment whereas the appellant can checkmate the execution of the judgment obtained in London by either resisting the grant of such order for its registration or obtain an order to stay the order of registration. It is therefore clear that the appellant was perfectly in order not to have sought in London a stay of execution of the registration order.

On the question of conflict of affidavit evidence placed before the lower court which appellant's learned counsel had submitted should be resolved by oral evidence in order to act on such evidence, our case law is replete with authorities that where a matter is being tried on affidavit evidence and the court is confronted with conflicting or contradictory evidence relied on by the parties on a material issue before the court; it is the law that the court cannot resolve such conflict by evaluating the conflicting evidence but is obliged to call for oral evidence in order to achieve resolution of the conflict. See Falobi v. Falobi (1976) 9 & 10 SC 1 and Akinsete v Akidutire (1966) All NLR 137. In the case in hand, the contradictions or conflicts in affidavit evidence did not relate to the affidavit evidence filed by the appellant, on the one hand, and that filed by the respondent, on the other; rather, the contradiction arose only in respect of the appellant's averments in his numerous affidavits. Therefore, the

age-long principle of fielding witnesses to furnish oral evidence for the resolution of the contradictions between the two separate sets of evidence by the parties did not arise. Rather, it was self-evident from the judgment of the lower court that the contradictions alluded to were those that arose from the inconsistencies in the depositions in the appellant's own affidavits. Clearly, where the appellant's case is plagued by inconsistencies or contradictions, there is no obligation, in such circumstances, on the court seized of the matter to arrange for oral evidence to be called for the purposes of making or resolving the contradictions in the appellant's case. The law frowns on a party who approbates in one breath and reprobates in another. But having said that, I must hurry to state that the onus is undoubtedly on the appellant confronted with its self-created contradictions to fully and properly explain away the contradictions to the satisfaction of the court. Failure to do is bound to leave an indelible dent on the appellant's case. It is not open to the court to enter into the arena of judicial conflict between the parties in order to resolve the contradictions within the appellant's own affidavit evidence.

It will surely be unfair to the lower court, who in evaluating the affidavit evidence placed before it in an attempt to grant or refuse to grant a stay, and who discovered that the appellant's case was riddled with its own unresolved contradictions to be dis-credited as not having exercised discretion to refuse stay, judicially and judiciously. In my respectful opinion, it is patently clear that the submission that the exercise of the lower court's discretion by its refusal to grant stay was not done judicially and judiciously is arid and unsustainable.

This Court is familiar with the guiding principle upon which it grants or refuses to grant a stay of execution of an order, ruling or judgment of a court. It is not a relief that is granted as a matter of course, being essentially an equitable remedy that must take into consideration the right of a successful party to harvest the fruits of its success in the suit, on the one hand, and the necessity not to impede the appellant's right to appeal as well as preserving the res so that if the appeal is successful the proceedings are not rendered futile. It is only granted where the court's discretion has been made in favour of the applicant judicially and

judiciously on the basis of established principle. The principle has long crystallized that a stay of execution can only be granted upon the applicant showing that there exist special or exceptional or strong circumstances for doing so, bearing in mind always that the compelling reason for granting a stay is to preserve the res from destruction and thereby maintain the status quo at all material time so that if the appeal is successful, at the end of the day, as we have earlier stated, the proceedings in respect thereof would not be rendered nugatory. See Vaswani Trading Co. v. Savalakh (1972) 1 All NLR (pt. 2) 483 at p. 487, Ajomale v. Yaduat (No. 2) (1991 5 NWLR (pt.191) 266 at 289 and Deduwa v. Okaorodudu (1974) 6 SC 21 at pp24 - 26. Thus the substantiality of the grounds of appeal is not full-proof for granting a stay. Many other crucial factor must be brought into play so that the victorious party in the suit between the parties would not be left with the impression that he has won only a pyrrhic victory. The lower court unquestionably conceded that the grounds of appeal seemingly raised "important issues of law." Be it also noted that there is the desirability to consider other factors before reaching a final decision on the question of stay. These include the conduct of the applicant as may be reflected or discernible from the evidence before the court. Additionally, it would examine the balance of convenience upon the facts before the court. It would examine the balance of convenience upon the facts before the court. It is against these factors that the court would eventually decided to exercise its discretion to grant or refuse stay, one way or the other. It was in the process of putting these factors in focus that the lower court, inter alia, as earlier noted discovered the serious contradictions in the appellant's affidavit evidence which were not explained away. I am satisfied that, on the whole, the lower court rightly declined to exercise its discretion to order a stay in favour of the appellant.

It is for the foregoing and the more detailed reasons contained in the leading judgment that I, too, would dismiss the appeal with N10.000.00 costs in favour of the respondent.