

SUPREME COURT OF NIGERIA

7TH APRIL, 2000. SC. 78/1994

**CORAM:- A. G. KARIBI-WHYTE, M. E. OGUNDARE, A. I.
IGUH, A. O. EJIWUNMI, E. O. AYOOLA, JJSC**

PAVEX INTERNATIONAL COMPANY RESPONDENT/
(NIGERIA) LIMITED CROSS-APPELLANT

AND

1. INTERNATIONAL BANK FOR WEST AFRICA LTD.

(Now known as AFRIBANK LTD) APPELLANTS/

2. H. U. EZEMA, S. A. G. M. IBWA CROSS-RESPONDENTS
(Lagos & West)

APPEALS - Appellate Court - Record of appeal - It is the duty of an appellate court to consider - All the pieces of evidence forming part of the record before it.

APPEALS - Judgment - Mistakes - Only mistakes that affected the decision appealed against - Will result in the appeal being allowed.

APPEALS - Matters relating to appeal - Motions - Once an appeal has been brought to the Court of Appeal - All matters relating to the appeal must be agitated at that court and not the high court.

ACTIONS - Reliefs - Reformulation of by the court - It is not competent for the judge suo motu to make a case for the parties - Other than that which was set up by them.

COURTS - Appeals - Jurisdiction - Where a trial court has been declared as lacking jurisdiction by the Court of Appeal - Then whatever orders made by the trial court - Cannot be varied or further orders made thereon by the Court of Appeal.

COURTS - *Causes and proceedings - High Court Law of Lagos State s.60 - By that provision all civil and criminal causes and proceedings in the High Court - Shall so far as is practicable - Be heard and disposed of by a single judge.*

COURTS - *Motions - High Court Law of Lagos State - Proviso of s. 60 - To excuse the judge from being assigned to hear the motions in the instant case - It must be shown that it was not convenient and practicable - For the judge to hear the motions.*

NATURAL JUSTICE - *Fair hearing - Bias - Likelihood of - Where the judge had no jurisdiction in the matter - The question whether there was likelihood of bias - Is superfluous.*

PRACTICE & PROCEDURE - *Service of process - Deputy Sheriff - Is the statutory agent for the services of all court processes.*

STAY OF EXECUTION - *Erring respondent - Pendency of application - Vaswani case - Disciplinary power of the court - How to bring to bear on an erring respondent.*

FACTS

In the High Court of Lagos State, the plaintiff/respondent sued the defendants/appellants claiming an order of mandatory injunction to compel the defendants/appellants to transfer a certain sum of money to the plaintiff's overseas suppliers, special damages and general damages. At the conclusion of the trial, the learned trial judge (Adeniji J.) in a reserved judgment found for the plaintiff and entered judgment in its favour. Dissatisfied the defendants appealed to the Court of Appeal.

Meanwhile the defendants applied to the trial court for an order staying the execution of the judgment pending the appeal. The learned trial judge after a consideration of the argument advanced by learned counsel for the parties refused the application on 23rd July, 1991. Earlier on the plaintiff had applied for a writ of fife to enforce the judgment in its

favour. Its counsel now took steps to execute the writ. The writ was executed on 24th July, 1991. An inventory of the properties of the defendants was taken at No. 94 Broad Street Lagos, office of the defendants. In order to forestall the sale of their properties the 1st defendant issued two bank drafts for the sums of N500,000.00 and N1,281, 322.50 respectively which they handed over to the counsel to the plaintiffs in settlement of the judgment debt. The defendants had on 23rd day of July 1991 (the day their motion for stay of execution was refused by Adeniji J.) filed a motion in the Court of Appeal asking for a stay of execution of the judgment of the Lagos State High Court pending appeal. There was a dispute as to whether this motion came to the knowledge of the plaintiff and its counsel before the execution of the writ of Fife on 24th July. Then in the morning of the 25th July the defendants filed a motion on notice and an ex-parte motion before the High Court of Lagos State seeking the following orders:

"1. An order that the Writs of Execution issued in the matter herein be suspended pending the determination of the application on Notice for setting same aside filed herewith.

2. That the first Defendant/Applicant be at liberty not to give credit to the plaintiff for their bank Drafts given to counsel to the Plaintiff/Respondent K. O. Tinubu Esq. in satisfaction of the Writ of Execution aforesaid pending the determination of the Application on Notice filed along herewith"

The Court Registrar minuted the two motions to Balogun J. who was at the relevant time the Acting Chief Judge of Lagos State and drew the attention of the Acting Chief judge to the fact that the matter was handled by Adeniji J. Notwithstanding the minute of the Registrar to him, the learned Acting Chief Judge minuted back assigning the two motions to himself and heard the ex parte motion that same morning, that is, 25th July. After hearing the ex parte motion the learned Acting Chief Judge ordered as prayed by the defendants. The plaintiff was served with the motion on Notice which had been fixed for hearing on 31/7/91 and the order made ex parte by the Acting Chief Judge. The plaintiff promptly filed a Notice of preliminary objection upon the ground inter alia that the

Acting Chief judge, lacked competence and jurisdiction to have entertained the aforesaid Ex parte motion "so far as it sought to review, set aside or vary the order, the execution thereof, (as well as the consequential result of such order) of a judge of competent, concurrent and coordinate jurisdiction. Such assumption of jurisdiction is tantamount to sitting over the judgment/orders of a superior Court of Record with coordinate jurisdiction and therefore a nullity". Both the Motion on Notice and the preliminary objection were heard together by the Acting Chief judge. At the beginning of his ruling he reformulated the prayers sought by the defendants in their motion on Notice. In the end he concluded that he has jurisdiction and competence to pronounce on whether or not the writ of attachment was irregularly executed by the judgment creditor and/or the bailiff; but lacks jurisdiction and competence to pronounce on whether or not the writ of attachment signed and issued by Adeniji J., (a judge of co-ordinate jurisdiction) is null and void or to set it aside. Thus, the preliminary objection succeeded in part and failed in part.

The plaintiff appealed against this ruling to the Court of Appeal. The defendants also appealed against a part of the judgment. The Court of Appeal allowed the appeal and dismissed the cross-appeal of the defendants. The Court declared as null and void, the ex-parte order made by the Acting Chief Judge on 25th July 1991 and set it aside. It is against this judgment that both the defendants and the plaintiff have further appealed to the Supreme Court. In respect of the main appeal of the defendants they raised seven issues while in respect of the cross appeal the plaintiffs raised four questions.

ISSUES FOR DETERMINATION

(i) *Whether the Court of Appeal had jurisdiction to decide that the Plaintiff's counsel were not aware of the pendency of the application of the defendants for stay of execution at the time when the writ of Fifta was to be executed and if it had jurisdiction whether such decision was correct.*

(ii) *Whether there is any admissible evidence whatsoever to support the conclusion of the Court below (per Uwaifo JCA) that Adeniji J. was available to deal with the matter which Balogun Ag. CJ dealt with.*

(iii) *Whether it was open (or if it was so open whether it was proper) for the Court of Appeal to hold that Balogun Ag. CJ contravened section 60 of the High Court Law of Lagos State.* Etc. see p.1848

HELD (Unanimously dismissing the main appeal and striking out the cross-appeal per lead judgment of **EJIWUNMI JSC**)

Interpretation of statutes - Causes and proceedings

1. I Think a careful reading of the words of Section 60 of the High Court Law of Lagos State, would reveal that the intention of the Legislature was to ensure that all civil and criminal causes and matters and all proceedings in the High Court and all business arising thereout shall so far as is practicable and convenient be tried, heard and disposed of by a single judge. Then the section continued by stating that all proceedings in an action subsequent to the hearing or trial down to and including the final judgment or order shall so far as is practicable and convenient be taken before the judge who was seised of the case. The provisions of section 60 may therefore be stated thus:-

(i) All causes or matters, be they civil or Criminal, shall be tried by a single judge.

(ii) All proceedings in the High Court and all business arising thereout shall be tried by a single judge.

(iii) All proceedings in an action subsequent to the hearing or trial down to and including the final judgment or order shall be heard by the same judge who heard the case. (p. 1072 A)

Appeals - Appellate Court

2. It is the duty of an appellate Court to consider and give the necessary appraisal to all the pieces of evidence forming part of the record before it. It is in this light that the Court below considered the minutes forwarded to the trial court by the Court Registrar of the trial Court that Adeniji J had dealt with the matter. (p. 1073 C)

Courts - Motions

3. In order to meet the proviso of section 60 (supra) so as to excuse the

judge from being assigned to hear the motions in the instant case, it must be shown that it was not convenient and practicable for the judge to hear the motions. Upon that understanding of the proviso in Section 60 (supra), it is my respectful view that Balogun Ag. CJ, ought to have shown in the record that he had made the necessary enquiries which led him to conclude that the motions could not be assigned to Adeniji J, as he was unavailable to hear them. It is evidence that Balogun Ag. CJ did not avert to section 60 before he assigned the motions to himself, and therefore failed to make the enquiries which he ought to have made before assigning the motions to himself. (p. 1074 D)

Appeals - Judgment

4. It is not every slip of the lower court that will result in an appeal being allowed. It is only those mistakes that have been shown to have affected or influenced the decision appealed against that will result in the appeal being allowed. See Onajobi v Olanipekun (1985) 4 SC. 156 at 163; Ezeoke v Nwagbo (1988) 1 NWLR (pt. 72) 616 at 626. Applying this principle to the argument raised on behalf of the appellants that the Court below relied on matters not in the Record to determine the question before it, I must observe that it has not been shown that the mistake, if any, so made affected or influenced the decision appealed against. (p. 1075A)

Actions - Reliefs

5. The Court below was no doubt right to have held that Balogun Ag. CJ, lacked the competence to reformulate the prayers in the Motion on Notice, suo motu, and to make a case for the parties other than that which was set up by them. This principle has long been settled in several cases in this Court. May I refer on this to Commissioner of Works, Benue State V Devcon Ltd., (1988) NWLR (pt. 83) 407 at 420. (p. 1077 C)

H Stay of Execution - Erring respondent

6. A careful reading of the above extract from the judgment in the Vaswani case (supra) would surely reveal that this Court is there emphasizing, that in order to bring to bear the full weight of the disciplinary power of

the Court on an erring respondent, there must be clear evidence that the Respondent/judgment Creditor was well aware that the applicant/judgment debtor, had filed an application to the appellate court for a stay of execution pending the hearing of the appeal in that Court. In my respectful opinion, it seems to me that an applicant/judgment debtor has to ensure, first that he filed timeously his application for the stay of execution of the judgment debt pending his appeal to the appellate Court. Secondly, he must ensure that the respondent/judgment creditor, was well aware of the application that the judgment/debtor had filed in the appellate Court. (p. 1080 D)

Service of process - Deputy Sheriff

7. The fact that the Deputy Sheriff is the Statutory agent for the service of all Court processes is incontestable. (p. 1081 B)

Appeal - Matters relating to appeal

8. In the instant case, the appellants having been refused their application for stay of execution pending appeal to the Court of Appeal, quite properly, made a similar application to the Court of Appeal. It is evident from their affidavit filed in support of their motion that they had appealed to the Court of Appeal. Their appeal is deemed to have been brought to the Court of Appeal upon the filing of their Notice of Appeal in the Registry of the Court below, vide Order 3 Rule 5 of the Court of Appeal Rules 1981 (as Amended). As they had appealed to the Court of Appeal, all matters relating to that appeal must be agitated at that Court. Therefore, the motions which have now led to this appeal should have been filed and heard in the Court of Appeal. The High Court, no longer has the jurisdiction to hear those motions. What I have tried to explain above could be illustrated by the case of Military Governor of Lagos State v Ojukwu & Anor (1986) 1 NSCC 304. (p. 1081 G)

Courts - Appeals - Jurisdiction

9. Wide as the powers of the Court of Appeal are, and as envisioned in the provisions of section 16 of the Court of Appeal Act, 1976, and Order

3 Rule 23 of the Court of Appeal Rules 1981, reproduced above, the exercise of these powers with regard to the judgments and orders of any trial Court must depend on whether that court was vested with the jurisdiction to make such orders or determine the rulings and/or judgments on appeal to the Court of Appeal. It follows that where a court has been declared as lacking in jurisdiction by the Court of Appeal to hear and determine a matter, then whatever orders made by the trial court cannot be varied or further orders made thereon by the Court of Appeal. It follows that I must hold that the Court below, having held that Balogun Ag. CJ lacked jurisdiction to hear and determine the motions filed by the appellants, the orders made by Balogun Ag. CJ of the Lagos State High Court at the material time in this matter lack the requisite validity. The result then is that the parties were back where they were before 25/7/91. (p.1085 F)

Natural Justice - Fair hearing

10. Since the Court of Appeal found that Balogun Ag. CJ. had no jurisdiction in the matter, the question whether or not there was likelihood of bias was superfluous. (p. 1087 F)

NOTABLE POINTS OF INTEREST

IGUH JSC

1. Judgment delivered without jurisdiction effect of

Where a cause or matter is heard and ruling or judgment is delivered without jurisdiction, the proceedings will be a nullity and can neither be used for any purpose whatsoever nor be treated as if it ever existed ab initio. See Timitimi and others v. Chief Amabebe and others (1953) 14 W.A.C.A. 374 at 377. (p. 1102 D)

AYOOLA JSC

H 2. Considerations applicable in the exercise of a court's discretion

The jurisdiction and power of a court invoked to undo what has been done so that proceedings before it may not be frustrated or that it may not be presented with a *fait accompli* in regard to it, is not the same as the

jurisdiction and power of the court invoked to grant a stay of execution of a judgment pending an appeal. Different considerations apply to the cases in the exercise of the court's discretion. In the former in which the disciplinary power of the court is invoked the major consideration is whether the alleged "offending" party had tried" to steal a match", while B in the latter the principal considerations are whether the appeal will be rendered nugatory if a stay is not granted and the dictates of the balance of justice in the circumstances of the case having regard to established principles. (p. 1106 E) C

3. Proper venue for the determination of an interlocutory application when an appeal is pending

Although the Court of Appeal came to a correct conclusion that Balogun Ag. C.J. was not competent to entertain the motions before him, the D reasons for that conclusion appear misconceived. Balogun, Ag. C.J. lacked competence to entertain the motion, but not by reason of section 60 of the High Court Law of Lagos State; nor is it because the motions were in abuse of the process of the court. His lack of competence was E because the proper venue for the determination of such application was the Court of Appeal and not the High Court before which there were no proceedings pending which were to be protected by exercise of disciplinary powers of the court. (p. 1107 B) F

REPRESENTATION

T. E. Williams for Appellants/Cross-Respondents

CASES REFERRED TO

Onajobi v Olanipekun (1985) 4 SC. 156 at 163

Ezeoke v Nwagbo (1988) 1 NWLR (pt. 72) 616 at 626

Osafire v Odi (No. 1) (1990) 3 NWLR (pt. 137) 130

Udeze v Chidebe (1990) 3 NWLR (pt. 125) 141

Commissioner of Works, Benue State v Devcon Ltd., (1988) NWLR (pt. 83) 407 at 420

Military Governor of Lagos State v Ojukwu (1986) 1 NSCC 304

Timitimi v. Amabebe (1953) 14 W.A.C.A. 374 at 377

Nyarko v. Akowuah (1954) 14 W.A.C.A. 426

STATUTES AND RULES REFERRED TO

B High Court Law of Lagos State; s. 60 Court of Appeal Rules, 1981 (as amended); O.3 rr 3, 5, and 23;

Court of Appeal Act, 1976; s. 166

Supreme Court Act, s. 24

C Supreme Court Rules; O. VII r 87

LEAD JUDGMENT BY EJIWUNMI JSC

This appeal is against the judgment of the Court of Appeal declaring as null and void, the ex-parte Order made by Balogun Ag. CJ on D the 25th of July, 1991. The said Order was accordingly set aside. The respondent has also cross-appealed against that part of the judgment where it was held that the facts disclosed did not go far enough to established the likelihood of bias against the respondent/cross-appellant by the learned E Acting Chief Judge. The other aspect of the complaint of the cross-appellant against the judgment is the failure of the court below to order the 1st respondent to give credit for the draft issued in satisfaction of the judgment debt at the current rate of exchange.

F I think it is convenient at this stage to set as briefly as possible, what led to the present proceedings. It is an acknowledged fact between the parties that on the 7th day of June 1991, Adeniji J. gave judgment in the dispute between the parties against the appellants in the following terms:-

G "(i) *An order of mandatory injunction to compel the Defendants to transfer to the Plaintiff supplier, MALTERIES FRANCO SUISSE OF FRANCE, through B.T.A.O. Paris, the sum of DM. 113,348.00 (One hundred and thirteen thousand, three hundred and forty eight Dutch H Marks), being the equivalent of N248,028.75, (Two hundred and forty eight thousand, and twenty eight Naira, seventy five kobo) on the SFEM/FEM Exchange rate as at 19th August, 1987, lodged with the Defendants on account of Bill B/002/00005/87 for payment for 250 tons Pilson*

Barley Malt, within 30 (thirty) days.

(ii) Defendant to accept full liability or responsibility for any interest, charges and shortfalls accruing due to fluctuations in the FEM Exchange Rate between August, 1987, when the said Naira equivalent was lodged till date of remittance to the suppliers.

B

(iii) N300,000.00 General Damages

(iv) N5,000.00 as Costs."

As the appellants (then defendants) were not satisfied with that judgment, an appeal was filed against it, soon after the judgment was delivered. They also applied to the High Court Lagos, Coram Adeniji J. for a stay of execution of the judgment pending the determination of the appeal. That application was refused by Adeniji J. on the 23rd of July 1991. And a Writ of Execution was thereafter signed by the learned trial judge.

D

Following the refusal of the application for the stay of execution of the judgment by Adeniji J., the appellants then took the decisive step that led to this appeal. On the 24th of July, 1991, the next day after their application was refused, the appellants filed a Motion on Notice before the High Court of Lagos State seeking for the following orders:-

E

"1. An order that all the Writs of Execution issued in the matter herein be set aside, pending the determination of the application made to the Court (by the Defendants/Applicants) for the stay of execution of the final judgment of this Honourable Court dated the 7th day of June, 1991, pending the determination of the Defendants' appeal;

F

2. An order that the Bank Drafts of the first Defendant/applicant (which it) issued to the Solicitor of the Plaintiff K. O. Tinubu Esq. in satisfaction of the Writ of Execution aforesaid be returned to the applicants, or alternatively that the first Defendant/Applicant be at liberty not to give credit therefor.

G

And for such further Order or Orders as this Honourable Court shall deem fit to make in the circumstances.

H

AND FURTHER TAKE NOTICE that the Defendants/Applicants shall rely in support of this Application on the Affidavit filed in support of the Motion Ex-Parte herein."

And as stated above, the Appellants duly filed a Motion Ex-parte on the same day i.e. 24/7/91. The Motion Ex-Parte was brought, pursuant to Order 2, Rule 10, Judgment Enforcement Rules, Order 40 Rule 3 of the High Court of Lagos State (Civil Procedure) Rules 1972, and the inherent jurisdiction of the Court; seeking for the following interim orders; namely:-

"1. An order that all the Writ of Execution issued in the matter herein be suspended, pending the determination of the application on notice for setting same aside, filed herewith.

2. That the first Defendant/Applicant be at liberty not to give credit to the Plaintiff for their Bank Drafts given to Counsel to the Plaintiff/Respondent, K. O. Tinubu Esq. in satisfaction of the Writ of Execution aforesaid, pending the determination of the application on notice filed along herewith."

On Thursday the 25th day of July, 1991, the Motion Ex-Parte came up for hearing before Balogun Ag. CJ, as he had assigned it to himself for hearing. I will later in this judgment consider that aspect of the appeal, as it was raised as one of the questions in this appeal.

Now, having heard submissions of O. Ayanlaja, Esq. learned counsel for the Defendants/Applicants on the Ex-Parte Motion, Balogun Ag. CJ., ordered as follows per the Enrolment Order made in that behalf. It reads:-

"IT IS HEREBY ORDERED that pending the hearing of the Motion on notice herein, dated 24th day of July, 1991, seeking for an order to set aside the Writ of Execution.

1. All the Writ of Execution issued in this matter be and is hereby suspended.

2. The first Defendant/Applicant be at liberty not to give credit to the plaintiff for their two Bank Drafts No. HO/1015381 dated 24th July, 1991 for N500,000.00 and No. HO/1-015382 dated 24th July, 1991 for N281,322.50.

3. The hearing of the Motion on Notice be and is hereby fixed for Wednesday the 31st day of July, 1991.

4. A Certified True Copy of this Order shall be served on the

Plaintiff's Counsel and on the Deputy Sheriff of this Court.

5. *The Deputy Sheriff shall suspend any further steps in the execution of the final judgment herein, pending the hearing and determination of the Motion on Notice."*

Upon being served with the above order and the Motion on Notice that was filed on the same day, 24th July, 1991, the respondent/cross-appellant filed a Notice of Preliminary Objection against the application on the 29th of July, 1991. It must also be noted that hearing of the Motion on Notice had also been fixed by Balogun Ag. CJ. for the 1st day of August, 1991.

As aforesaid, the respondent/cross-appellant had filed a Notice of Preliminary Objection, upon the following grounds as set out in the said Notice;

"(ii) *The Hon. Justice A.L.A. BALOGUN, O.F.R. Ag. Chief Judge, Lagos State lacked competence and jurisdiction to have entertained the Ex-Parte Motion dated 25/7/91 by the Defendants/Applicants herein so far as it sought to review, set aside or vary the order, the execution thereof, (as well as the consequential result of such order) of a Judge of competent, concurrent and co-ordinate jurisdiction. Such assumption of jurisdiction is tantamount to sitting over the judgment/orders of a superior Court of Record with Co-ordinate jurisdiction and therefore a nullity.*

1(1) *The orders made on the Ex-Parte application are illegal in that they are intended to, and have frustrated the order of a Court of competent and co-ordinate jurisdiction to wit: Levy execution on the goods and Chattels of the judgment/debtor in satisfaction of the judgment debt. The orders to suspend the execution and that no credit be given for the drafts already issued by the judgment/debtor thus encourage a litigant to flout the orders of a competent Court a Superior Court of Record.*

(2) *By the same token the said Hon. Justice A.L.A. Balogun O. F.R. Ag. Chief Judge lacks competence and jurisdiction to entertain the Motion on Notice filed on 25/7/91 and fixed for hearing on Wednesday 31/7/91.*

No fair hearing: *The plaintiff/Respondent the judgment/creditor*

herein, has not been afforded a fair hearing before the Court made orders on the Ex-Parte application. *"Audi alteram partem"* is one of the hallowed and immutable pillars of the Rule of Law.

3(i) The admonition of the Supreme Court in dealing with such an application has not been heeded - See *KOTOYE V C.B.N.* (189) 1 NWLR (pt. 98) Page 419 at PP 423.

"Held 6 - Main attributes of an Ex-parte injunction:-

(a) It can be made when there is a real urgency, but not a self-induced or self imposed urgency.

(g) Although it is made without notice to the other party, there must be a real impossibility of bringing the application for such injunction on notice and serving the other party.

3 (ii) The admonition of the SUPREME COURT in *BAKARE V APENA* (1986) 2 NWLR (pt. 33) P. 1 at P. 20 has not been heeded to it: Per *Aniagolu* JSC. That a Judge should not adopt a method of adjudication alien to procedural rules of justice holding as it were, as a justifying machiavellian principle, that the end, justifies the means et seq. in Alhaji Raimi Edun v Odan Community (1980) 8-11 SC. 103 at 123, quoted with approval in *Bakare v Apena* (supra).

(4) The Hon. Ag. Chief Judge further failed to extract an undertaking in damages from the Defendants/Applicants as enjoined in *KOTOYE V C.B.N* (supra) and other like authorities.

AND TAKE FURTHER NOTICE that at the hearing of the Motion on NOTICE, if the Court insists on assuming jurisdiction, the Respondent will rely on the affidavit filed herein and dated 29th July, 1991.

The Court is urged to revoke its orders made on 25/7/91 pursuant to the Ex-parte application as made without competence or jurisdiction. AND to decline jurisdiction on the Motion on Notice dated 25/7/91."

An Affidavit deposed to by K. O. Tinubu Esq. learned counsel for the Respondent/Cross Appellant was filed in support of the Notice of Preliminary Objection. I do not consider it necessary to relate them in this judgment. But where necessary reference will be made to relevant parts of the affidavit. The affidavit filed in support of the Ex-Parte Mo-

tion and the Motion on Notice will also be similarly treated.

The preliminary objection was apparently taken together with the application made by the Appellants. And after hearing the submissions of learned counsel, he delivered his ruling on the 9th day of August, 1991.

In the course of that ruling the learned trial judge, Balogun Ag. CJ, formed the view that his failure to order an undertaking at the hearing of the motion ex-parte cannot nullify the proceeding at that stage, or the interim orders made by him on 25th July, 1991. He reinforced his view on that point by stating that an undertaking for payment of damages can still be extracted from the appellants/cross respondents by this Court, or by the Court of Appeal.

Be that as it may, the learned Ag. Chief Judge, concluded his ruling thus, and I quote:-

"In the end therefore, and for all the reasons I have endeavoured to give, the preliminary objection as to lack of jurisdiction and competence of Balogun J, Acting Chief Judge, to hear and adjudicate in the matter succeeds in part and fails in part thus:-

(a) Balogun J. Acting Chief Judge has jurisdiction and competence to pronounce on whether or not the writ of attachment (Exh. A) was irregularly executed by the judgment creditor and/or the bailiff.

(b) Balogun J, Acting chief Judge lacks jurisdiction and competence to pronounce on whether or not the writ of attachment (Exh. A) signed and issued by Adeniji J., (a judge of co-ordinate jurisdiction) is null and void; or to set it aside"

The Plaintiff in the trial Court being dissatisfied with that ruling, and who is now the respondent/cross-appellant, filed its appeal against the ruling. Its complaint being that Balogun, Acting Chief Judge, was wrong to have assumed jurisdiction to entertain the motion ex-parte by first re-assigning the matter to himself. It was also alleged that he was wrong to have heard it during the court's long vacation against procedural rules in that regard, and without putting the other party on notice. The appellants/cross-respondents, as defendants in the Court of first instance, by their cross-appeal raised the question as to whether Balogun,

Ag. CJ, was right when he held that he had no jurisdiction to pronounce on the issue that the writ or execution was irregularly issued or was a nullity. The Court below, per Uwaifo JCA, (as he then was), with Sulu-Gambari JCA, and Kalgo JCA (as he then was) concurring, held that B Balogun Ag. CJ, had no competence and jurisdiction to do what he did and was completely out of track in his use of "irregular issue" and "irregular execution" of the Writ of attachment. The cross-appeal was therefore dismissed.

C However, the Court below allowed the plaintiff's appeal. The Court declared as null and void, the ex-parte order made by Balogun Ag. CJ., on the 25th July, 1991 and set it aside. The Court below went on to hold that the interference with the execution carried out on 24th July, 1991 was unlawful. It was also ordered that the execution should stand D and that in satisfaction thereof credit should be given in full by the 1st defendant for the two Bank Drafts.

Again, the parties being dissatisfied with the judgment of the Court below have further appealed to this Court. I will deal first with the E main appeal filed by the appellants. Pursuant thereto, the appellants in support of their appeal filed and exchanged their brief of argument. In that brief the following are the questions for determination:-

F (i) *Whether the Court of Appeal had jurisdiction to decide that the Plaintiff's counsel were not aware of the pendency of the application of the defendants for stay of execution at the time when the writ of Fife was to be executed and if it had jurisdiction whether such decision was correct.*

G (ii) *Whether there is any admissible evidence whatsoever to support the conclusion of the Court below (per Uwaifo JCA) that Adeniji J. was available to deal with the matter which Balogun Ag. CJ dealt with.*

H (iii) *Whether it was open (or if it was so open whether it was proper) for the Court of Appeal to hold that Balogun Ag. CJ contravened section 60 of the High Court Law of Lagos State.*

(iv) *Whether the Court of Appeal was correct in coming to the conclusion that the defendant's motion "to suspend or set aside the writ of execution and to prevent the bank drafts issued to the plaintiff's So-*

licitor from being honoured" is simply a variant of the prayer for stay of execution which they had earlier brought in the same Court but was refused."

(v) *Whether the Court of Appeal was correct in saying that Balogun Ag. CJ. "improperly reformulated the prayers on the Defendant's motion on notice dated 24/7/91"* B

(vi) *Whether Balogun Ag. CJ. had jurisdiction and competence to:-*

(a) *suspend the Writ of attachment signed by Adeniji on the ex- C*
parte application of the defendants;

(b) *pronounce on whether or not the issue of the said Writ of attachment by Adeniji J. is null and void or to set it aside; or*

(c) *pronounce on whether or not the said Writ of attachment was D*
irregularly executed.

(vii) *Whether the Court of Appeal had jurisdiction to make the orders made by it in its decision after hearing the appeal before them.*

The respondent/cross-appellant upon being served with the appellant's brief also filed its brief. Though several issues were set down E in the said brief for the determination of the appeal, I do not consider it necessary to reproduce them in this judgment. This is because I am satisfied from a careful reading of those issues that they are similar with the questions identified in the appellants/cross-respondents' brief. I will F therefore consider this appeal upon the questions raised in the appellants/cross-respondents' brief.

The questions raised in the appellants' brief, though set down serially were not argued in that order. However, as questions (i), (ii), G (iii), (iv), (v) and (vi) (a) deal with the competence of Balogun ag. CJ to hear and determine the ex-parte Motion, and the Motion on Notice filed by the appellants in the High Court of Lagos State, I will set down arguments concerning them together. Thereafter the arguments proffered by the respondent will next be set down. I will now start with the issues as H argued in the appellants' brief.

This means that question (iv) will be first considered. Under this, the issue is whether the Court of Appeal was correct in coming to

the conclusion that the defendant's motion "to suspend or set aside the writ of execution and to prevent the bank drafts issued to the plaintiffs from being honoured" is simply a variant of the prayer for stay of execution which they had earlier brought in the same Court but was refused.

B It seems clear from the argument offered in support of this issue that the premises of the contention being made for the appellants is a desire to maintain the status quo ante. This is evidence from the argument of learned counsel for the appellants at page 5 of the appellants' brief. On that page, after reference has been made to the prayers of the C appellants in the motion on notice, he then submitted that:-

"The prayers seek orders to undo or nullify what the judgment Creditor had done pursuant to the Writ of Fife issued within 24 hours of the refusal of the defendant's application for stay pending appeal."

D It is therefore argued for the appellants that the jurisdiction sought by the appellants to undo or nullify what was done by the judgment creditor, is founded upon the judgment of this Court in GOVERNOR OF LAGOS STATE V. OJUKWU & ANOR (1986) 1 NWLR 621, where E Obaseki JSC cited with approval a passage from the judgment of the Supreme Court of the United States of America in Jones v. Securities and Exchange Commission 80 L. ED 1015. And also First African Trust Bank Ltd v Ezegebu (1993) 6 NWLR (pt. 297) page 1.

F It is next argued for the appellants that the Motion on Notice dated 24/7/91 filed by the appellants as defendants in the Court of first instance, did not raise any questions relating to the issues which have to be considered before a decision is made whether or not to grant a stay of execution pending appeal. It is also the contention of learned counsel for G the appellants that the Court of Appeal may, in the exercise of its concurrent jurisdiction, reconsider those same questions that were considered and decided by Adeniji J. Hence, it is the submission of counsel for the appellants in their brief of Argument that the Court of Appeal per Uwaifo H JCA, (as he then was) in his lead judgment fell into serious error when he held, inter alia, that the lower Court ceased to have jurisdiction to entertain the Motions filed on 25th July, 1991. It is also further submitted for the appellants, that the Court below failed to recognize the true nature

and object of their motion dated 24/7/91. Their true object, according to what is stated in the appellants' brief; "Was to ensure that a "faith accompli" is not foisted on the Court of Appeal when it comes to hear the defendants' motion on notice for stay pending appeal, it was not to obtain from the High Court, the very orders they were seeking to obtain from the Court of Appeal, as the learned Justice of Appeal seems to think." It is therefore submitted for the appellants that Question IV, be answered in the negative.

It is next argued for the appellants in their brief that Balogun Ag. CJ had jurisdiction and competence to suspend the Writ of attachment signed by Adeniji J. on the ex-parte application of the appellants. This is in relation to question vi(a). The first observation made for the appellants is that there has been no appeal against the interim orders made by Balogun Ag. CJ by the respondent. While it is conceded that the grounds in support of the Notice of Preliminary Objection attack the ex-parte order for want of jurisdiction in the judge who made it, the Notice shows that the objections set out were to be raised at the hearing of the motion on notice. Hence when the Motion on Notice was argued, both sides only presented elaborate arguments on the jurisdiction and competence of Balogun Ag. CJ to entertain the Motion on Notice or to have granted the ex-parte order. It must be added that following the arguments, the learned trial judge decided that whilst he had no jurisdiction and competence to decide whether the Writ of execution issued by the court was null and void, he did have jurisdiction and competence to decide whether the said Writ was irregularly executed by the judgment creditor. It would appear then that the contention being made for the appellants is that the respondent was well aware that their application for stay was pending before the Court of Appeal. This fact, it is claimed, was brought to the knowledge of the respondent by the appellants through the court Bailiff. Upon that premise, counsel for the appellants submits that ex-parte applications are permissible. In support of that submission, he cites Kotoye v Central Bank of Nigeria (1989) 1 NWLR 419 at 442. And it is the further submission of appellants' counsel that this Court should hold that this is a case where there has been no controversy over the fact that it was nec-

essary to hear the appellants' application ex-parte. Question VI(a) should therefore be answered in the affirmative. It is next argued for the appellants in their brief of argument that the signing of the Writ of Execution was a ministerial act, Balogun Ag. CJ, had the competence and jurisdiction to set aside the Writ of Execution signed by Adeniji J. In support of this proposition, the following authorities are cited: Administrative Tribunals and the Court, by DR. D. M. GORDON, Vol. 49, LAW QUARTERLY REVIEW, 1933, at Pages 98 and 100, Bakare v Apena (1986) 4 NWLR 1 at P. 24. It is therefore urged that Question V be answered in the negative.

Questions (ii) and (iii) of the questions identified in the appellants' brief of Argument were next argued together. The Question (ii) deals first with whether there is any admissible evidence whatsoever to support the conclusion of the Court below, that Adeniji J. was available to deal with the matter. Question (iii) is concerned with whether it was open (or if it was so open, whether it was proper) for the Court of Appeal to hold that Balogun Ag. CJ. contravened Section 60 of the High Court Law of Lagos State. It is the view of counsel for the appellants that those two questions be answered in the negative. The reasons advanced for coming to that conclusion are as follows; first, there was no evidence before the Court to lead the lower court to hold that Adeniji J. was available to take the two motions at the material time. The contention made for the appellants is that all that was on record before the Court below was that the Long Vacation of the Court commenced on 22nd July, 1991. And that the only vacation Judge at the material time was Justice Akinsaya (Mrs). It is further submitted for the appellants that official minutes which passed between the Judge or the Chief Judge on the one hand and the Chief Registrar or other officers of the Court on the other, and which did not form part of the documentary evidence tendered in open Court in the course of the trial are not material which the Court of Appeal can look at. To hold otherwise, it is argued would lead to the introduction of fresh evidence by such a party without having to go through the relevant rules of procedure. See The Queen V Wilcox (1961) ALL NLR (Old series) 631 or (New series) 658.

The first line of argument made for the appellants in their brief of argument was to the effect that the service on the respondent or its counsel did not arise before Balogun Ag. CJ. What happened before Balogun Ag. CJ, it is argued was the pure question of law relating to his jurisdiction. The appellants, it is argued, made no admissions concerning the case made by the respondent in regard to the service of the motion. Upon that premise, and the transcript of the proceedings when the preliminary objection and motion on Notice were argued, Balogun Ag. CJ did not, and could not have made or given any decision on the question, whether the appellants' motion dated 23/7/91 was served. As there was no such decision by Balogun Ag. CJ the Court of Appeal cannot pronounce on it. Moreso, where the respondent did not appeal against it to the Court below. It is therefore the contention of learned counsel for the appellants that the Court below had no jurisdiction to have decided that the respondent's counsel were not aware of the pendency of the application of the appellants for stay of execution at the time when the Writ was executed or caused to be executed.

The alternative argument canvassed for the appellants on this issue may be put thus - It is contended for the appellants that the Court below in placing reliance on Vaswani V Savalakh (supra) over looked the portion of that judgment which recognized that the Deputy Sheriff as an agent for service of process in the circumstances. Vide Order II Rule 29 of the Judgments (Enforcement) Rules Cap 189 of the Law of Nigeria. As the Deputy Sheriff was served the process by the appellants, it is the submission of counsel for the appellants, that it was idle for the respondent to argue that he was not aware of the pendency of the application for stay at the material time.

Another argument raised on behalf of the appellants is that the question in issue in this case is not one which requires personal service. Vide Order 1 Rule 3 Sub-Rules (2) and (6). Therefore, it is urged that these rules be not departed from.

It is the further submission of counsel for the appellants that if the idea that it is permissible for the Court to probe whether documents which do not require personal service, must not be deemed to have been

served on or given to a legal practitioner the moment such document is left at the address where he has his officer or Chambers, would create a good deal of mischief. It would open the flood gate for unmeritorious difficulties being placed in the path of those who have to prove such service.

I will now review the arguments proffered for the respondent in the Brief of Argument filed on its behalf by its learned counsel, K. O. Tinubu Esq. It must be noted that as there was no appearance by counsel at the hearing of the appeal, the appeal was deemed as argued for the respondent on its Brief of Arguments. In order to make for clarity, the arguments so proffered for the respondent would be set down and considered in the light of the relevant questions raised and argued in the appellants' brief.

I will therefore begin with the consideration of questions (ii) and (iii) in the appellants brief. The contention of the appellants in respect of those issues is that it should be held that there was no admissible evidence whatsoever to support the conclusion of the Court below that Adeniji, J. was available to deal with the matter. And that Balogun Ag. CJ. did not contravene Section 60 of the High Court Law of Lagos State.

It is however the contention of learned counsel for the respondent that the Court below was right to have held that there was nothing whatsoever to show that Adeniji J. was not available to deal with this particular business arising out of the said suit. Furthermore, it is argued for the respondent that there was enough material before the Court below to arrive at its conclusion on the availability of Adeniji J. to hear and determine the motions. In this regard, reference was made to the affidavit filed in support of the Notice of Preliminary Objection. It is also the submission of learned counsel for the respondents that the Court below did rely only on matters in the Records to conclude that Adeniji J. was available at the material time to hear and determine the motions. In any event, argued learned counsel for the respondent, Balogun Ag. CJ. acted in breach of S. 60 of the High Court of Lagos State Law, by assigning the motions to himself. In support of the above arguments, reference was made to the following authorities:- Buraimoh v Bamgbose (1989) 3 NWLR

(part 109) 352 at 363a . Iri v. Erhurhobara (1991) 2 NWLR (pt. 173) 252 at 262; Onibudo v Akibu (1982) ALL NLR 207 at 219; Attorney general of Bendel State v Aideyan (1989) 4 NWLR (pt. 118) 646 at 673 (F-G); Alashe v Ilu (1964) ALL NLR (NS) 383 at 390; Minister of Lands Western Nigeria v Ambrose Family (1969) ALL NLR (N.S) 48 at 58; Bakare v Apena (1986) 4 NWLR at 24; Rex v Northumberland Compensation Appeal Tribunal Ex-Parte Shaw (1952) I.K.B. 338; Smalley v Robey & Co. Ltd (1962) 1 ALL ER 133.

It is not in dispute that the action that led to the instant appeal was heard and determined by Adeniji J. of the High Court of Lagos State. It is not also in dispute that following the judgment delivered in the matter against the appellants, they sought for an order to stay the execution of the judgment. That prayer was not granted. Thereupon, the appellants brought two applications before the High Court of Lagos State, namely; An Ex-Parte Motion and a Motion on Notice. The simple question that has to be determined is whether it was proper for Balogun Ag. CJ, to take the motions, rather than Adeniji J, who had dealt with the matters that led to the motions aforesaid. I have earlier in this judgment set down the arguments relied upon by the appellants to sustain their view that Balogun Ag. CJ was right to have assigned the case to himself. Their principal reason being that there was no evidence before the court below that Adeniji J. was available to take the two motions. And that the Court below relied upon materials that do not form part of the record. In coming to its conclusion the Court below had held that by virtue of S. 60 of the High Court Law of Lagos State the motions should have been assigned to Adeniji J.

Now, that Section reads thus:-

"60. Subject to the provisions of this or any other enactments and subject to any rules of Court, all Civil and Criminal causes or matters and all proceedings in the High Court and all business arising thereat shall so far as is practicable and convenience be tried, heard and disposed by a single judge, and all proceedings in an action subsequent to the hearing or trial down to and including the final judgment or order shall so far as is practicable and convenient be taken before the judge

before whom the trial or hearing took place."

I think a careful reading of the words of Section 60 of the High Court Law of Lagos State, would reveal that the intention of the Legislature was to ensure that all civil and criminal causes and matters and all proceedings in the High Court and all business arising thereout shall so far as is practicable and convenient be tried, heard and disposed of by a single judge. Then the section continued by stating that all proceedings in an action subsequent to the hearing or trial down to and including the final judgment or order shall so far as is practicable and convenient be taken before the judge who was seised of the case. The provisions of section 60 may therefore be stated thus:-

(i) All causes or matters, be they civil or Criminal, shall be tried by a single judge.

(ii) All proceedings in the High Court and all business arising thereout shall be tried by a single judge.

(iii) All proceedings in an action subsequent to the hearing or trial down to and including the final judgment or order shall be heard by the same judge who heard the case.

It is also clear that by S. 60 of the Act, the jurisdiction of a High Court Judge as analyzed above is predicated in each case, upon whether it is practicable and convenient for a single judge to hear and determine the matter. Similarly it can be stated that, it is only where it is not practicable and convenient that a civil or criminal cause or matter, proceedings, before and subsequent to final judgment, would such matters not be heard by the same judge.

In the instant case, as I have said before, it was Adeniji J. who was seised of the case, prior to the filing of the motions that have led to this appeal. From what I have said above the motions should have been assigned to him. But having regard to the qualification to the hearing of a matter by a single judge, I must now consider whether it was practicable and convenient for Adeniji J. to try the motions as the material time. In this regard, bearing in mind the argument of counsel that the court below relied upon matters which were not part of the record to deter-

mine whether Adeniji J. was available or not, that submission is predicated upon the reference to this statement emanating from the judgment of Uwaifo JCA at Pages 122 - 123 of the record; it reads:-

"The learned trial judge was aware that Adeniji J. was assigned the Suit No. LD/1545/88 in question. His attention was drawn to that fact by the appropriate court official." B

It is therefore the submission of counsel for the appellants that the court below should not have placed reliance on the minutes of the court official to determine whether Balogun Ag. CJ, Lagos State High Court, was aware, that Adeniji J. had heard and determined the case which led to the motions filed by the appellants in the High Court of Lagos State. With due respect, I think that submission is misconceived. In my humble opinion, **it is the duty of an appellate Court to consider and give the necessary appraisal to all the pieces of evidence forming part of the record before it. It is in this light that the Court below considered the minutes forwarded to the trial court by the Court Registrar of the trial Court that Adeniji J had dealt with the matter.** I therefore do not see how the court below has erred in that regard. Apart from that piece of evidence, it must also be noted that the court below had before it, the affidavit sworn to by learned counsel for the respondent, K. O. Tinubu, Esq. in support of the Notice of Preliminary Objection in the matter, challenging the jurisdiction and competence of Balogun Ag CJ to adjudicate on the motion on notice in paragraphs 17 and 18 of the said affidavit, the deponent stated:- C D E F

"(17) That Hon. Justice A.L.A.L. Balogun O.F.R. as Ag. CJ, Lagos State cannot plead ignorance of the fact that Adeniji; seised of this case, even though not a vacation Judge, is in the station, at his post, and still sitting vide - cause life for this weak commencing 29th July, 1991." G

(18) That should the learned Ag. CJ insist on assuming jurisdiction to hear the motion on notice by the defendants/applicants I shall rely on the Hon. Justice Adeniji's Judgment dated 7/6/91, his ruling refusing "stay" dated 23/7/91, my affidavit of urgency for variation of hearing dated 8/7/91, the affidavit in support and counter affidavit relating to H

the defendants/applicants' application for "Stay" and all other relevant processes in the Courts' file.

The averments so made in the paragraph 17 and 18 of the affidavit of K. O. Tinubu Esq, quoted above, were neither denied or uncontradicted by the appellants. With the averments made in the above paragraphs of the affidavit sworn to by K.O. Tinubu Esq, and which remained uncontradicted, I do not think that the Court below was wrong to have held that the learned trial judge was aware that Adeniji J. was assigned the suit No. LD/1545/88 in question.

In deciding whether Balogun Ag. CJ, properly assumed jurisdiction to hear the appellants' motion, the Court below also considered whether the learned Ag. CJ complied with the provisions of Section 60 of the High Court of Law of Lagos State.

Hence the court below, carefully examined the provisions of the section before coming to its conclusion. As I have tried to show above, the fact that Adeniji J. was the Judge who determined the earlier suit between the parties is one thing. **In order to meet the proviso of section 60 (supra) so as to excuse the judge from being assigned to hear the motions in the instant case, it must be shown that it was not convenient and practicable for the judge to hear the motions. Upon that understanding of the proviso in Section 60 (supra), it is my respectful view that Balogun Ag. CJ, ought to have shown in the record that he had made the necessary enquiries which led him to conclude that the motions could not be assigned to Adeniji J, as he was unavailable to hear them. It is evidence that Balogun Ag. CJ did not avert to section 60 before he assigned the motions to himself, and therefore failed to make the enquiries which he ought to have made before assigning the motions to himself.** The Court below surely cannot be faulted for recognizing that Balogun Ag. CJ fell into error when he failed to consider the provisions of section 60 of the High Court Law of Lagos State before assigning the motions to himself. That was the main reason why the court below held that Balogun Ag. CJ, wrongly assigned the motions to himself.

In coming to my conclusion on the merits of the two questions,

namely, (ii) and (iii), I need to bear in mind the attitude of this Court when considering appeals from the lower Court. In that regard it is noted that **it is not every slip of the lower court that will result in an appeal being allowed. It is only those mistakes that have been shown to have affected or influenced the decision appealed against that will result in the appeal being allowed.** See Onajobi v Olanipekun (1985) 4 SC. 156 at 163; Ezeoke v Nwagbo (1988) 1 NWLR (pt. 72) 616 at 626; Osafire v Odi (No. 1) (1990) 3 NWLR (pt. 137) 130; Udeze v Chidebe (1990) 3 NWLR (pt. 125) 141.

Applying this principle to the argument raised on behalf of the appellants that the Court below relied on matters not in the Record to determine the question before it, I must observe that it has not been shown that the mistake, if any, so made affected or influenced the decision appealed against. It follows from all I have said above, that I must hold that the questions ii & iii lack merit.

I now turn to consider question V. The question raised here is whether the Court of Appeal was correct in saying that Balogun Ag. CJ improperly reformulated the prayers on the appellants' Motion on Notice dated 24/7/91. I have earlier in this judgment reviewed the arguments for the appellants in respect of this question, they will not be repeated here, they will be considered along with the arguments proffered for the respondent. But it is also right to be reminded that the position of the appellants is as stated at page 17 of their brief, where the allegation that Balogun Ag. CJ. "reformulated" the appellants' prayers on the motion on notice is tenuous and amounts to much ado about nothing. For the respondent, however, it is argued in its brief that the motion on notice filed by the appellants was reformulated. And it is further argued for the respondent that the learned Ag. CJ, had no right so to do. In support, the case of OKOYA V SANTILL (1990) 2 NWLR (part 131) 172 at 226 (H) was cited.

In my humble view, the real question for determination is whether Balogun Ag. CJ, had the competence to reformulate the prayers in the motion on notice filed by the appellants. I say this because the appellants' are not disputing the fact that the prayers were reformulated, it is only

that the Court below made much ado about nothing. In determining this question the Court below held that the learned judge, Balogun Ag. CJ had no competence to reformulate the prayers sought by the motion on notice. Moreso, as the reformulated prayers are completely irreconcilable with the terms of the prayers sought for by the appellants in both their motion on notice and the ex-parte motion filed by them. The effect of the reformulation of the prayers in the motions is that the Court made a case for the parties outside what they had sought from the Court.

What is interesting in this matter is that the reformulation of the prayers was made known at the beginning of the ruling delivered by Balogun Ag. Chief Judge on the 9th of August, 1991. This was after he had heard arguments from counsel in respect of the Notice of Preliminary Objection filed by the respondent against the Motion on Notice filed by the appellants. In that ruling, the two Orders sought by the appellants were first set down thus:-

"1. An order that all the Writs of execution issued in the matter herein be set aside, pending the determination of the application made to the Court of Appeal (by the defendants/applicants) for the stay of execution of the final judgment of this Honourable Court dated the 7th day of June, 1991, pending the determination of the Defendants' appeal.

2. An order that the Bank Drafts of the first Defendant/applicant (which it) issued to the Solicitor of the Plaintiff K.O. Tinubu Esq. in satisfaction of the Writ of Execution aforesaid be returned to the applicants."

That was followed by the following headed:-

OR Alternatively

"(2a) An order that the first defendant/applicant be at liberty not to give credit for the Bank Drafts of the first Defendant/applicant aforesaid, issued to the Solicitor of the Plaintiff, K. O. Tinubu Esq, in satisfaction of the Writ of Execution aforesaid."

After the Orders were set down, Balogun Ag. CJ said thus:-

"I have broken up the prayers in the said Motion on Notice into prayers 1,2, and 2A for clarity, "because as I understand, and interpret the prayers in the motion paper, there are three prayers thereby sought,

and each can stand on its own. Further while prayers 1, 2 are sought cumulatively, prayer 2A is sought as an alternative prayer to prayer 2." (underlining mine).

I am in no doubt from a careful reading of these prayers that prayer 2A was deliberately designed and formulated by the learned judge B Balogun Ag. CJ to enable him have competence to deal with the Motions to achieve a particular objective. That objective was made clear at the end of his ruling, where he held thus:-

"I have jurisdiction and competence to hear and determine the C issue whether or not the Writ of Execution was irregularly executed, but that I have no jurisdiction or competence to determine the issue whether the Writ of Execution is a nullity or was irregularly issued by Adeniji J."

The Court below was no doubt right to have held that D Balogun Ag. CJ, lacked the competence to reformulate the prayers in the Motion on Notice, suo motu, and to make a case for the parties other than that which was set up by them. This principle has long been settled in several cases in this Court. May I refer on this to Commissioner of Works, Benue State V Devcon Ltd., (1988) E NWLR (pt. 83) 407 at 420 it was observed by the Supreme Court:-

"It is elementary and fundamental principle for the determina- F tion of disputes between parties that the judgment must be confined to the issues raised by the parties. It is clearly not competent for the Judge suo motu to make a case for either or both of the parties and then proceed to give judgment on the case so formulated contrary to the case of the parties before him It is well settled that a Plaintiff is bound by the case put forward in (the) Writ of summons, as in A.C.B Ltd. V Attorney-General, Northern Nigeria (1969) NWLR 231. Similarly, ap- G plicant will be bound by the prayers in his motion."

See also Okoya v Santilli (1990) 2 NWLR (part 131) 172. I do not need to say much more except to observe that the question whether Balogun Ag. CJ, reformulated the prayers in the motion on notice cannot be de- H scribed as making much ado about nothing. Question V must therefore be answered in the affirmative.

Question (1) now falls to be considered. By that question the

appellants are asking whether the Court of Appeal had jurisdiction to decide that the respondent was not aware of the pendency of the application of the appellants for stay of execution at the time when the Writ of *Fifa* was to be executed, and if it had jurisdiction whether such decision B was correct.

The argument proffered for the appellants with regard to the first part of this question is that the service of their motion was not an issue before the Court below. Therefore, it is further argued, the Court C below had no jurisdiction to decided that aspect of the question. That argument was refuted by the respondent in its brief of argument. In that brief of argument filed by the appellants as cross-appellants in the court below, where at page 88 of the record the appellants in their cross-appellants' brief raised the question as an issue thus:- "When was the defendants' motion on Notice dated 23/7/91 filed in the Court of Appeal and D served on the appellant?"

It is manifest from the issue raised above by the appellants in respect of their cross-appeal to the Court below, that the contention that E the Court below had no jurisdiction on this aspect of the appeal cannot be right. And I so hold. Having so held that the Court below had jurisdiction to pronounce on the service of the motion, I will now consider the subsidiary question which is whether the decision of the Court below F was correct. The thrust of the argument advanced for the appellants here is against the statements of the Court below, when the Court, per Uwaifo JCA said:-

"Under no force of argument can they persuade me that the plaintiff was aware of the pendency of their application for stay of execution G simply because a copy of the application was left in their Chambers."

This statement was made after a review of the facts relevant to whether the respondent was served with the appellants' motion dated 23rd July, 1991 for a stay of execution in the Court of Appeal. The H contention of the appellants on this aspect of the matter is that though the learned Justice of the Court of Appeal Uwaifo JCA relied on the case of Vaswani Trading Co. v. Savalakh (supra) to hold that the respondent was not served, that part of the judgment in the Vaswani case (supra) which

recognized that the Deputy Sheriff their agent in these matters by virtue of Order 11 Rule 29 of the Judgments (Enforcement Rules, Cap 189, was overlooked.

For the respondent, it is argued in the respondent's brief that upon the evidence before the Court below, that Court was right to have concluded that the respondent's counsel or itself were not served with the appellants' motion on notice. It is further argued for the respondent that Order 11 Rule 29 of the Judgment Enforcement Rules (Cap 189), would not apply in the instant case. It is submitted that in the Vaswani case (supra) the Supreme Court was satisfied that the judgment creditor was served. The reference to the Judgment Enforcement Rules (supra) must be regarded as obiter dictum in the circumstances. It is also argued for the respondent that, in any event, there was no proof that the Deputy Sheriff was served in accordance with Order 6 Rule 15 (2) of the High Court of Lagos State Civil Procedure Rules 1972.

Though, at the beginning of this judgment, I have reviewed the facts leading to this appeal, I think that it is necessary to restate the facts relevant to this aspect of the appeal. On the 24th of July, 1991, Adeniji J. signed the Writ to attach the 1st Appellant's movable property for an amount of N1,281,322.50 and general damages of N500,000.00. Its goods were attached that same day. The appellants, however alleged, that after the ruling of Adeniji J. on 23rd July, 1991 refusing their application for stay of execution, they filed a similar application for stay of execution that same day in the Court of Appeal. They also claimed that the respondent was served that same day through the Chambers of its counsel. Learned counsel for the appellant K. O. Tinubu Esq., swore to an affidavit that neither he nor his junior in Chambers was aware of that application for stay of execution till the evening of 24th July, 1991. The Court below took the view that Order 1 Rule 3 of the Court of Appeal Rules does not avail the appellants.

The Court below then took the view that the respondent's counsel was not aware of the appellants' motion allegedly served in the Chambers of the respondent's counsel on the 23rd of July, 1991. Therefore, the Court below held that the principle enshrined in the case of Vaswani

Trading Co. v Savalakh & Company (1972) 1 ALL NLR (pt. 2) 483 is not of assistance to the appellants. Having regard to the argument on whether the court below was right in so holding, the relevant portion of the judgment of this Court in that case would be reproduced. At page B 490, the Supreme Court, held, inter alia:

"We are satisfied that in this case the respondents were aware that a motion was pending before this Court for a stay of execution duly filed in accordance with law at a time when the respondents might not proceed to execution Thus, although section 24 of the Supreme Court Act states that an appeal shall not operate as a stay of execution it does not interfere with proceedings or an application for a stay of execution and by the same token whilst an application for a stay of execution is pending in this Court, for the obvious or subtle purpose of stultifying D the exercise by this Court of its jurisdiction, and indeed its duty to consider the application on its merits, must not be countenanced."

A careful reading of the above extract from the judgment in the Vaswani case (supra) would surely reveal that this Court is E there emphasizing, that in order to bring to bear the full weight of the disciplinary power of the Court on an erring respondent, there must be clear evidence that the Respondent/judgment Creditor was well aware that the applicant/judgment debtor, had filed an applica- F tion to the appellate court for a stay of execution pending the hearing of the appeal in that Court. In my respectful opinion, it seems to me that an applicant/judgment debtor has to ensure, first that he filed timeously his application for the stay of execution of the judgment debt pending his appeal to the appellate Court. Secondly, G he must ensure that the respondent/judgment creditor, was well aware of the application that the judgment/debtor had filed in the appellate Court.

On this point, I need to refer, howbeit, briefly, to the reference H made in the appellants' brief to a portion of the Judgment of this Court in the Vaswani's case (supra), which was allegedly overlooked by the Court below. That portion reads:-

"We think it is idle for the respondents to argue as learned coun-

sel on their behalf has attempted to do, that they were not aware of the pending proceedings in this Court. We think that they were so aware and even if that were not so the law clearly makes the Deputy Sheriff their agent in these matters by virtue of Order 11 Rule 29 of the Judgments (Enforcement) Rules, Cap 189"

B

The fact that the Deputy Sheriff is the Statutory agent for the service of all Court processes is incontestable.

Having regard to the fact that this Court recognized the factual situation that the respondent was well aware of the application made to that Court, it would appear that the reference made to the Statutory provisions for the service of process through the Deputy Sheriff was not meant to delimit the factual situation which the Court had found against the respondents. Be that as it may, the next point that must be considered is whether Balogun Ag. CJ was vested with the jurisdiction to take both the Ex-parte Motion and the Motion on Notice. It is not in dispute that after Adeniji J. delivered judgment against the appellants, they appealed against that judgment to the Court of Appeal. They also filed an application for a stay of the execution of the judgment pending the hearing of their appeal in the Court of Appeal.

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But instead of pursuing their appeal in the Court of Appeal, they resorted to the filing of Motions which have resulted in this appeal, in the High Court of Lagos State. The question then is whether they were right to pursue whatever rights they have in the High Court of Lagos State after appealing to the Court of Appeal. I think not. Order 3 Rule 3 of the Court of Appeal Rules 1981 (as Amended) reads thus:-

F

"Where an application has been refused by the Court below, an application for a similar purpose may be made to the Court within fifteen days after the date of the refusal."

G

In the instant case, the appellants having been refused their application for stay of execution pending appeal to the Court of Appeal, quite properly, made a similar application to the Court of Appeal. It is evident from their affidavit filed in support of their motion that they had appealed to the Court of Appeal. Their appeal is deemed to have been brought to the Court of Appeal upon the

H

filing of their Notice of Appeal in the Registry of the Court below,
 vide Order 3 Rule 5 of the Court of Appeal Rules 1981 (as Amended).
 As they had appealed to the Court of Appeal, all matters relating to
 that appeal must be agitated at that Court. Therefore, the motions
 B which have now led to this appeal should have been filed and heard
 in the Court of Appeal. The High Court, no longer has the jurisdic-
 tion to hear those motions. What I have tried to explain above
 could be illustrated by the case of Military Governor of Lagos State
 C v Ojukwu & Anor (1986) 1 NSCC 304. In that case, an ex-parte
 application was made by Emeka Ojukwu on 10th October, 1985 before
 the High Court of Lagos State seeking interim injunction restraining the
Military Governor of Lagos State, the Commissioner of Police Lagos
State, and the Attorney-General Lagos State from ejecting the said Emeka
 D Ojukwu from his house at No. 29 Queen's Drive, Ikoyi. The learned
 Judge who heard the application refused the equitable relief of injunction
 against the Lagos State Government. What followed was an application
 by Ojukwu Transport Limited as a party interested before the Court of
 E Appeal asking for leave to appeal against the ruling of the High Court and
 an application by Ojukwu seeking that he be "reinstated in his residence
 at No. 29 Queen's Drive Ikoyi." The Court of Appeal having heard the
 application, granted the requests of the applicants against the respon-
 F dents, Military Government Lagos State. For completeness, I will add
 that as the Military Governor of Lagos State, was dissatisfied with that
 ruling, he filed on the 11th December, 1985, an application to the Su-
 preme Court for an order staying the execution of the ruling delivered by
 the Court of Appeal. To that application, the respondents, through their
 G learned counsel Chief F.R.A. Williams, SAN, filed a notice of preliminary
 objection. The application and the preliminary objection were taken to-
 gether on the 16th December, 1985 and it was determined that day.

It is manifest from the steps taken in the Ojukwu case (supra)
 H that though the complaint against the Military Governor was instituted by
 Ojukwu by an ex-parte order in the High Court of Lagos State, the matter
 went on to the Court of Appeal, which has supervisory appellate jurisdic-
 tion over the High Court. This matter which commenced on the 10th

October, 1985, ended effectively on the 16th December, 1985 at the Supreme Court. Thus Ojukwu was able to obtain redress within three months of initiating his action against the Military Governor of Lagos State. Apart from the principle enunciated by this Court in the VASWANI case (supra) and to which attention had been drawn earlier in this judgment, it is pertinent to also refer to the procedure followed before the matter was determined by this Court. In the Vaswani case (supra), judgment for possession was given against the applicants (as defendants in the action) by the High Court, Lagos on the 29th July, 1972. The present applicants have appealed to this Court against that judgment and they seek in the meantime that the order for possession might be stayed until the determination of their appeal to this Court. Section 24 of the Supreme Court Act provides as follows:-

"24 An appeal under this part shall not operate as a stay of execution, but the Supreme Court may order a stay of execution unconditionally or upon the performance of such conditions as may be imposed in accordance with rules of Court."

And Order VII Rules 37 of the Rules of the Supreme Court, which deals with the type of application contemplated, provides as follows:-

"37 Wherever an application may be made either to the Court below or to the Court, it shall be made in the first instance to the Court below but, if the Court below refuses the application, the applicant shall be entitled to have the application determined by the Court."

Having regard to Section 24 of the Supreme Court Act, and Order VII Rule 37 of the Rules of the Supreme Court, Coker JSC (Delivering the judgment of the Court), observed thus:-

"Hence the applicants were bound to and indeed did apply to the High Court Lagos, for an order for stay of execution of the judgment of that Court. The motion to the High Court, Lagos was duly heard and was on the 12th day of June, 1972, dismissed."

The applicants having failed in the High Court, then appealed to this Court, as I have already stated above.

Thus the applicants in the VASWANI case (supra) were obliged

to pursue their redress for a stay of execution of their judgment to the Supreme Court after their prayers were refused by the High Court of Lagos State.

It must be noted that the same procedure was followed in the case of the Military Governor of Lagos State v. Ojukwu & Anor. (supra). Having regard to the Provisions of Order 3 Rule 3 of the Court of Appeal Rules (1981) (as amended), there can be no doubt that it is mandatory for any applicant in the position of the appellants to follow the procedure laid down by the rules of court as was done in the Vaswani case (supra) and the Military Governor of Lagos State v. Ojukwu & Anor. (supra).

In the instant appeal, having regard to what I have said above, the motions which were filed at the Lagos High Court, should have been filed and pursued at the Court of Appeal (Lagos Division). It is to that court that they should have pursued their remedy against the respondent. They indeed filed an appeal to the Court of Appeal, Lagos Division which they should have pursued to protect their interest in the matter. However, it is clear in my respectful view that Balogun, Ag. C.J. was well aware that he had no scintilla of jurisdiction to hear the motions. Hence, he engaged in all kinds of manoeuvres to vest himself with a jurisdiction which was not available to him. With the greatest respect to learned Senior Advocate for the appellants, I think that I am obliged to say that the procedure adopted in this matter to seek redress for the appellants has not, obviously, been in the best interests of the appellants and the cause of justice. It is pertinent to observe that this matter which was determined by the judgment of Adeniji, J. on the 7th day of June, 1991, would, perhaps, have been finally settled before now, if the proper procedure had been followed. One is inclined to add that the whole exercise has been an idle attempt to circumvent the established procedure of the Court. With the conclusion that I have reached that Balogun Ag. CJ. was not vested with the necessary jurisdiction to hear and determine either of the Motions, be it the ex-parte motion or the motion on notice that led to this appeal. Issues ii, iii, iv, v, and vi, must necessarily fail for this reason and the other reasons already given.

I will now consider question (vii). Here the issue is whether the

Court of Appeal had jurisdiction to make the Orders made by it in its decision after hearing the appeal before them.

The contention made for the appellants is that since the Court of Appeal had come to its conclusion that Balogun Ag. CJ had no jurisdiction to deal with the motions then that Court cannot vary or amend orders made by the Balogun Ag. CJ. I think that contention is right. The Court of Appeal is vested with the following powers by virtue of Section 16 of the Court of Appeal Act, 1976 which says in part:-

"The Court of Appeal shall have full jurisdiction over the whole proceedings as if the proceedings had been instituted in the Court of Appeal as Court of first instance and may re-hear the case in whole or in part, or may give such other directions as to the manner in which the court below shall deal with the case in accordance with the powers of that court"

See also Order 3 Rule 23 of the Court of Appeal rules, 1981 which vests the Court of Appeal with the same general powers.

It states:-

"The Court shall have power to give any judgment or make any order that ought to have been made and make such further or other orders as the case may require, including any order as to costs. These powers may be exercised by the Court, notwithstanding, that the appellant may have asked that part only of a decision may be reversed or varied, and may also be exercised in favour of all or any of the respondents or parties, although such respondents or parties may have not appeal from or complained of the decision."

Wide as the powers of the Court of Appeal are, and as envisioned in the provisions of section 16 of the Court of Appeal Act, 1976, and Order 3 Rule 23 of the Court of Appeal Rules 1981, reproduced above, the exercise of these powers with regard to the judgments and orders of any trial Court must depend on whether that court was vested with the jurisdiction to make such orders or determine the rulings and/or judgments on appeal to the Court of Appeal. It follows that where a court has been declared as lacking in jurisdiction by the Court of Appeal to hear and determine a mat-

ter, then whatever orders made by the trial court cannot be varied or further orders made thereon by the Court of Appeal. It follows that I must hold that the Court below, having held that Balogun Ag. CJ lacked jurisdiction to hear and determine the motions filed by the appellants, the orders made by Balogun Ag. CJ of the Lagos State High Court at the material time in this matter lack the requisite validity. The result then is that the parties were back where they were before 25/7/91. This means that they were at the point where execution was levied and bank drafts were given in satisfaction of the judgment debt. This position was in my respectful view properly recognized by the Court below, when in concluding its lead judgment, Uwaifo JCA said:-

"The appeal by the plaintiff succeeds and is allowed. The ex parte order made by Balogun Ag. CJ. on 25th July, 1991 in this matter is null and void, and is accordingly set aside. The interference with the execution carried out on 24th July, 1991 whereby bank drafts had been issued by the 1st defendant in satisfaction of the judgment debt was an unlawful interference. It is ordered that the execution should stand and that in satisfaction thereof credit should be given in full by the 1st defendant for the two bank drafts."

Having regard to all that I have said above, the court below was right to have made the orders quoted above. I therefore uphold the orders so made.

As the respondent was not satisfied with some aspect of the decision of the court below, a cross-appeal was filed accordingly. At the hearing of the appeal; learned counsel for the respondent/cross-appellant was absent. The appeal was therefore heard upon the briefs earlier filed and served by its counsel, K. O. Tinubu, Esq. The cross respondents/appellants also filed and adopted their brief, filed on their behalf by Chief F.R.A. Williams SAN. Four issues were identified for the determination of the appeal in the brief of the cross-appellant. They are:-

"(a) Whether the Court of Appeal was correct in concluding that the plaintiff failed to establish its allegation of bias.

(b) Even if there was no bias (which is denied), were the circum-

stances not such as would have caused a loss of confidence in the adjudicative process?

(c) Was the plaintiff entitled to the value of the Bank drafts at the current rate of exchange at the date of judgment of the Court of Appeal?

B

(d) Should the Court of Appeal have made a finding on the question of what constitutes the record of proceedings?"

I think that issues (a) and (b) could properly be considered together, and that is what I intend to do. The thrust of the argument made for the cross-appeal appears to be having regards to the findings the court below made as to the conduct of Balogun Ag. CJ, about how he himself to hear the motions, and rulings he made thereon, the court below should have found bias against him. In support of this contention, reference was made to the following cases:- Deduwa v Okorodudu (1976) 9-10 SC. 329 at 347; Bakare V Apena (1986) 4 NWLR (part 33) 1 at 13; (1986) NSCC 935 at 941.

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For the appellants/cross-respondents, the first submission made for them is that the Court of Appeal was right to have refrained from finding that a likelihood of bias existed. This is because if the Court so found, then the court below would have obliged to remit the matter back for proper adjudication. For this proposition, reference was made to Legal Practitioners Disciplinary Committee v Chief Gani Fawehinmi (1985) 2 NWLR (pt. 7) 300. The other submission made for the appellants/cross-respondents is that **since the Court of Appeal found that Balogun Ag. CJ. had no jurisdiction in the matter, the question whether or not there was likelihood of bias was superfluous.** It is further argued that it would have been proper for the court below to have opted not to say anything on the issue. The issue, according to the appellants/cross-respondents is no longer a live issue. It is academic and superfluous.

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I agree with that submission. That issue must therefore be struck out. It is hereby struck out accordingly. I do not consider it necessary to deal with the two other issues raised in this cross-appeal. Similarly. The issue as to the order made in respect of the sum adjudged in favour of the cross-appellants/respondents by the court below, is no longer a

H

live issue having regard to the decision reached in the main appeal on that issue raised in appellants' question (vii).

As question (i), (ii), (iii), (iv), (v) and (vi) have been resolved against the appellants, their appeal has failed to that extent. The cross-
B appeal, of the Cross-appellant/respondent has succeeded for the reasons given, and it is hereby allowed.

In the result, the appeal of the appellants is dismissed as explained above. The respondent is awarded costs of N10,000.00 but no costs would be awarded to the respondent in respect of its success in the
C Cross-appeal.

KARIBI-WHYTE JSC

D I have had the privilege of reading the leading judgment of my learned brother A. O. Ejiwunmi, JSC just read. I agree entirely with his reasoning and the conclusion dismissing the appeal and striking out the cross-appeal. I also will and hereby dismiss this appeal and strike out the
E cross-appeal.

Respondents shall have N10,000.00 as costs of the appeal. No costs is awarded Respondents.

F

OGUNDARE JSC

The Plaintiff has sued the Defendants claiming:

(1) Order of Mandatory injunction to compel the Defendants to transfer to the plaintiff's suppliers, Malteries Franco Suisse of France,
G through BIAO/PARIS, the sum of DM1113,348 (One hundred and thirteen thousand, three hundred and forty eight Deutch Marks) being the equivalent of N248, 028.75 (Two Hundred and Forty-Eight Thousand, and Twenty Eight Naira Seventy-Five kobo) on the SFEM/FEM Exchange
H rate as at 19/AUGUST/1987, lodged with defendants on account of Bill B/002/00005/87 for payment for 250 tons Pilsen Barley Malt.

(2) An order that the said Defendants do accept full liability or responsibility for any interest, charges and shortfalls accruing due to

fluctuations in the FEM exchange rate between AUG/87 when the said Naira equivalent was lodged and the date of this Writ."

and (3)

"Special Damages:

(i) *The first and second defendants have by their culpable negligence or intentional wrongful act in failing to remit the said DM.113,348 Deutch Marks to the plaintiff's suppliers caused the plaintiff to incur interests on late payment to the tune of DM.12,375 or its Naira equivalent as per letter dated 6th July, 1988 and invoice dated June 23, 1988 both attached to this Statement of Claim as Exhibits 'L' - 'L1' from supplier.*

(ii) *Any further or other sum/s charged as further interest by plaintiff's suppliers from July 1988 till the defendants finally transfer the money and the confirming bank receives same OR till the defendants finally transfer the money (including the Exchange present FEM Rate difference and the accrued interests and bank charges) to ABACUS Merchant Bank Limited, Lagos.*

(iii) *Any sum (to be quantified latter) plaintiff is found liable for in respect of the foreign action taken against it by the confirming bank or the suppliers for the delay in effecting this transfer and this transaction.*

(iv) *Loss of Credit facilities on future supplies by the plaintiff's suppliers.*

General Damages - N500,000.00

Pleadings were filed and exchanged and amended by the Defendants filing a further amended statement of defence. The Plaintiff also filed a reply to the original statement of defence. Evidence was led on both sides at the trial and in a reserved judgment the learned trial Judge (Adeniji J.) found for the Plaintiff and adjudged as hereunder:

"Judgment is hereby entered for the Plaintiff against the Defendants for:-

(i) *An order of Mandatory Injunction to compel the Defendants to transfer to the Plaintiff's Suppliers, MALTERIES FRANCO SUISSIE OF FRANCE, through B.I.A.O./PARIS, the sum of DM113,348 (One*

hundred and thirteen thousand, three hundred and forty-eight Deutch Marks) being the equivalent of N248,028.75 (Two hundred forty-eight thousand, and twenty-eight Naira, Seventy-five Kobo) on the SFEM/FEM Exchange rate as at 19th August, 1987, lodged with Defendants on account of Bill B/002/00005/87 for payment for 250 tons Pilsen Barley Malt, within 30 (thirty) days.

(ii) Defendants to accept full liability or responsibility for any interest, charges and shortfalls accruing due to fluctuations in the FEM Exchange Rate between August, 1987 when the said Naira equivalent was lodged till date of remittance to the Suppliers.

(iii) N500,000.00 as General Damages."

being dissatisfied the Defendants appealed to the Court of Appeal.

Meanwhile the Defendants applied to the trial Court for an order staying the execution of the judgment pending the appeal. The learned trial Judge after a consideration of the argument advanced by learned counsel for the parties refused the application on 23rd July 1991. Earlier on the Plaintiff had applied for a writ of *fifa* to enforce the judgment in its favour. Its counsel now took steps to execute the writ. The writ was executed on 24th July 1991. An inventory of the properties of the defendants was taken at No. 94 Broad Street Lagos, office of the defendants. In order to forestall the sale of their properties the 1st defendant issued two bank drafts for the sums of N500,000.00 and N1,281,322.50 respectively which they handed over to the counsel to the plaintiffs in settlement of the judgment debt. Almost simultaneously they also filed a motion at the High Court of Lagos State on 24th July 1991 praying for the following orders:

(i) An order that all the Writs of Execution issued in the matter herein be set aside pending the determination of the application made to the Court of Appeal for the stay of execution of the judgment of this Honourable Court dated the 7th day of June, 1991, pending the determination of the Defendants' appeal.

(ii) That the Bank drafts of the First Defendant/Applicant issued to the Solicitor of the Plaintiff, K. O. Tinubu Esq., in satisfaction of the Writ of execution aforesaid be returned to the Applicants or alter-

natively that the First Defendant/Applicant be at liberty not to give credit therefore.

They had on the 23rd day of July 1991 - the day their motion for stay of execution was refused by Adeniji J. - filed a motion in the Court of Appeal asking for a stay of execution of the judgment of the Lagos State High Court pending appeal. There was a dispute as to whether this motion came to the knowledge of the plaintiff and its counsel before the execution of the writ of *fifa* on 24th July. Then in the morning of the 25th July the Defendants filed in the registry of the Lagos State High Court a motion on notice and an *ex-parte* motion seeking the following prayers:

"1. An order that the Writs of Execution issued in the matter herein be suspended pending the determination of the application on Notice for setting same aside filed herewith.

2. That the first Defendant/Applicant be at liberty not to give credit to the Counsel to the Plaintiff/Respondent K. O. Tinubu Esq. in satisfaction of the Writ of Execution aforesaid pending the determination of the Application on Notice filed along herewith."

The Court Registrar minuted the two motions to Balogun J. who was at the relevant time the acting Chief Judge of Lagos state and drew the attention of the Acting Chief Judge to the fact that the matter was dealt with by Adeniji J. Notwithstanding the minute of the Registrar to him, the learned Acting Chief Judge minuted back assigning the two motions to himself and heard the ex parte motion that same morning, that is, 25th July. It came out in the course of proceedings that the two motions were filed in the morning of 25th July by the son of the learned acting Chief Judge. After hearing the ex parte motion the learned acting Chief Judge made the following orders:

"1. All the Writs of Execution issued in this matter be and is hereby suspended.

2. The First Defendant/Applicant be at liberty not to given Credit to the Plaintiff for their two Bank Drafts No. HO/1015381 dated 24th July, 1991 for N5000,000.00 and No. HO/1/015382 dated 24th July, 1991 for N1,281,322.50.

3. *The hearing of the Motion on Notice be and is hereby fixed for Wednesday the 31st day of July, 1991.*

4. *A Certified True Copy of this Order shall be served on the Plaintiff's Counsel and on the Deputy Sheriff of this Court.*

B 5. *The Deputy Sheriff shall suspend any further steps in the execution of the final judgment herein, pending the hearing and determination of the Motion on Notice."*

C The plaintiff was served with the motion on Notice which had been fixed for hearing on 31/7/91 and the order made ex-parte on 25th July by Balogun Ag. Chief Judge. On being served on 29th July, the plaintiff promptly filed a Notice of preliminary objection, I set hereunder the notice. It reads:

D "*TAKE NOTICE that at the hearing of the Motion on Notice filed herein on 25/7/91 and fixed for hearing on Wednesday 31/7/91, the Plaintiff/Respondent herein will raise the following objections to the competence and jurisdiction of this Court and the irregular procedure adopted as per the schedule hereunder:*

E **SCHEDULE**

F 1. *The Hon. Justice A.L.A.L. Balogun, OFR, Ag. Chief Judge, Lagos State lacked competence and jurisdiction to have entertained the Ex parte Motion dated 25/7/91 by the Defendants/Applicants herein in so far as it sought to review, set aside or vary the order, (the execution thereof, as well as the consequential result of such order) of a Judge of competent, concurrent and co-ordinate jurisdiction. Such assumption of Jurisdiction is tantamount to sitting over the judgment/orders of a superior Court of Record with co-ordinate jurisdiction and therefore a NUL-*
G **LITY.**

H 1 (i) *The orders made on the Ex parte application are illegal in that they are intended to, and have frustrated, the order of a Court of competent and co-ordinate jurisdiction to wit: Levy execution on the goods and chattels of the judgment/debtor in satisfaction of the judgment debt. The orders to suspend the execution and that no credit be given for the drafts already issued by the judgment/debtor thus encourage a litigant to flout the orders of a competent Court - a superior Court of Record.*

2. (By the same token) *The said Hon. Justice A.L.A.L. Balogun OFR, Ag. Chief Judge lacks competence and jurisdiction to entertain the Motion on Notice filed on 25/7/91 and fixed for hearing on Wednesday 31/7/91.*

3. *No fair hearing: The Plaintiff/Respondent the judgment/creditor herein, has not been afforded a fair hearing before the Court made orders on the Ex parte application.*

'Audi alteram partem' is one of the hallowed and immutable pillars of the Rule of Law.

(3 (i) *The Admonition of the Supreme Court in dealing with such an application has not been heeded. See Kotoye v. C.B.N. (1989) NWLR Part 98 Page 419 at pp. 423:*

'Held 6 - Main attributes of an ex parte injunction

(a) *It can be made when there is a real urgency, but not a self-induced or self-imposed urgency*

(g) *Although it is made without notice to the other party, there must be a real impossibility of bringing the application for such injunction on notice and serving the other party.*

Et al

3(ii) *The admonition of the Supreme Court in Bakare v. Apena (1986) 2 NWLR (pt. 33) p. 1 at p. 20 has not been heeded, to wit: Per Aniagolu JSC That a Judge should not adopt a method of adjudication allied to procedural rules of justice holding as it were, as a justifying machiavellian principle, that the end justifies the mean' et. seq.*

AND also

In Alhaji Raimi Edun v. Odan Community (1980) 8-11 SC. 103 at 123 quoted with approval in Bakare v. Apena (supra).

4. *The Hon. Ag. Chief Judge further failed to extract an undertaking in damages from the Defendants/Applicants as enjoined by Kotoye v. C.B.N. (supra) and other like authorities.*

AND TAKE FURTHER NOTICE that at the hearing of the Motion on Notice if the Court insists on assuming jurisdiction, the Respondent will rely on the affidavit filed herein and dated 29th July, 1991.

The Court is urged to revoke its Orders made on 25/7/91 pursuant to the

Ex parte application, as made without competence or jurisdiction to decline jurisdiction on the Motion on Notice dated 25/7/91."

The Notice was supported by an affidavit sworn to by Alhaji Kafaru Oluwole Tinubu learned counsel for the plaintiff in which he deposed, B inter alia, as follows:

"7. That early on Wednesday 24th July, 1991 about 8.30 a.m. my said junior and I met in the High Court, Lagos and put into motion, the execution of the writ of fifa. The Writ was duly executed.

C *8. It was on our return to the office - Chambers on Wednesday 24th July, 1991 about 6p.m. after the completion of the execution, that we were shown an application to the Court of Appeal for a further STAY by the defendants/applicants. The application had been received by our Secretary - the previous day - Tuesday 23/7/91 and duly receipted for by* D *him.*

9. That my said junior and I were not aware of the said application for a further stay till the evening of Wednesday 24/7/91 - i.e. after the execution of the judgment had been successfully carried out.

E *10. That my Chambers commenced the annual vacation on Thursday 25/7/91 - having postponed it till then because of this matter i.e. the consideration and determination of defendants' application for 'STAY'.*

11. That it was on a casual visit to the Court Registry on Thursday 25/7/91 that I saw a lawyer, later known as Mr. Balogun, with processes, one headed 'Ex parte' as well as some other processes bearing the F *suit No. and the headings of this suit.*

12. That I was going through the Cause List for Lagos Division of this Court Friday afternoon 26/7/91 when I noticed, this case is fixed G *for Wednesday 31/7/91 before the Hon. Chief Judge in Court No. 1.*

13. That on making enquiries I found out that the ex parte application had been taken, certain orders made and a motion on notice, of which up till now I have not been served with has been fixed for hearing H *as per paragraph 12 above.*

14. That it is my firm believe that the assumption of jurisdiction by the learned Ag. chief Judge is irregular, null and void and that the said Ag. chief Judge lacks competence and jurisdiction to determine the

Motion on Notice pending in this matter.

15. *That the proper forum for the Ex Parte application as well as the pending Motion on Notice is the Hon. Justice A. B. Adeniji of Court 8, unless the said Adeniji J. is no more in the service, not in the station or away on vacation.*

B

16. *That when I brought an application before the substantive C. J. to vary and advance the date of hearing of the application for STAY, His Lordship in his wisdom, notwithstanding the allegations of MALA FIDE and abuse of judicial process made in it, did not assume JURISDICTION to hear and determine it. Rather he sent it to the Judge seized of the matter - the Hon. Justice A. B. Adeniji at Court 8.*

C

17. *That Hon. Justice A. L. A. L. Balogun OFR as Ag. C. J. Lagos State cannot plead ignorance of the fact that Adeniji J., seized of this case, even though not a vacation Judge, is in the station; at his post; and still sitting - vide Cause List for this week commencing 29th July, 1991."*

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Both the motion on Notice and the preliminary objection were heard together by Balogun J. and on 9th August 1991 he delivered a 37- page Ruling in which he concluded as follows:

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"In the end, therefore, and for all the reasons I have endeavoured to give, the preliminary objection as to lack of jurisdiction and competence in Balogun J. Acting Chief Judge, to hear and adjudicate in the matter succeeds in part and fails in part thus:

F

(a) Balogun J. Acting chief Judge has jurisdiction and competence to pronounce on whether or not the writ of attachment (Exhibit A) was irregularly executed by the judgment creditor and/or the bailiff;

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(b) Balogun J., Acting Chief Judge, lacks jurisdiction and competence to pronounce on whether or not the writ of attachment (Exhibit A) signed and issued by Adeniji J., (a judge of co-ordinate jurisdiction) is null and void; or to set it aside."

Curiously enough he did not make an order in respect of the motion on Notice for stay of execution brought by the Defendants. The learned Judge adjourned further hearing of that motion.

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The plaintiff appealed against this Ruling to the Court of Appeal.

The defendants also appealed against a part of the judgment. The Court of Appeal allowed the appeal and dismissed the cross-appeal of the defendants. The Court of Appeal declared the order made ex-parte by Balogun Ag. Chief Judge on 25th July, 1991 to be null and void and set it aside. It further ordered:

"The interference with the execution carried out on 24th July, 1991 whereby bank drafts had been issued by the 1st defendant in satisfaction of the judgment debt was an unlawful interference. It is ordered that the execution should stand and that in satisfaction thereof credit should be given in full by the 1st defendant for the two bank drafts. I award costs of N2,500.00 in favour of the appellant in respect of the two appeals; that is, N1,500.00 for the appeal and N1,000.00 for the cross-appeal."

It is against this judgment that both the Plaintiff and the defendants have further appealed to this Court upon seven grounds of appeal. I need not set out the grounds of appeal of both the plaintiff and the defendants in this judgment.

Pursuant to the Rules of this Court; the parties filed and exchanged their Briefs of argument both in respect of the main appeal of the defendants and the cross-appeal of the plaintiff. In respect of the main appeal the defendants posed seven questions as arising for determination. These are:

"(i) Whether the Court of Appeal had jurisdiction to decide that the Plaintiff's counsel were not aware of the pendency of the application of the defendants for stay of execution at the time when the Writ of Fifta was to be executed and if it had jurisdiction whether such decision was correct."

(ii) Whether there is any admissible evidence whatsoever to support the conclusion of the court below (per Uwaifo JCA) that Adeniji J. was available to deal with the matter which Balogun Ag. CJ dealt with."

(iii) Whether it was open (or if it was so open, whether it was proper) for the Court of Appeal to hold that Balogun Ag. CJ contravened Section 60 of the High Court Law of Lagos State."

(vi) Whether the Court of Appeal was correct in coming to the

conclusion that the defendant's motion 'to suspend or set aside the Writ of execution and to prevent the bank drafts issued to the plaintiff's solicitor from being honoured' is 'simply a variant of the prayer for stay of execution which they had earlier brought in the same court but was refused.'

(v) *Whether the Court of Appeal was correct in saying that Balogun Ag. CJ 'improperly reformulated the prayers on the Defendant's motion on notice dated 24.7.91.'*

(vi) *Whether Balogun Ag. CJ had jurisdiction and competence to -*

(a) *suspend the writ of attachment signed by Adeniji J. on the ex parte application of the defendants;*

(b) *pronounce on whether or not the issue of the said Writ of attachment by Adeniji J is null and void or to set it aside; or*

(c) *pronounce on whether or not the said writ of attachment was irregularly executed.*

(vii) *Whether the Court of Appeal had jurisdiction to make the orders made by it in its decision after hearing the appeal before them."*

Although the plaintiff also set out questions for determination in his own brief they are in my view variants of the questions posed in the defendant's brief. In respect of the cross-appeal the plaintiff formulated four questions to wit:

"(a) *Whether the Court of Appeal was correct in concluding that the plaintiff failed to establish its allegation of bias?*

(b) *Even if there was no bias (which is denied), were the circumstances not such as would have caused a loss of confidence in the adjudicative process?*

(c) *Was the plaintiff entitled to the value of the bank drafts at the current rate of exchange at the date of judgment of the Court of Appeal?*

(d) *Should the Court of Appeal have made a finding on the question of what constitutes the record of proceedings?"*

The defendants in their own brief posed the following four questions:

(a) Likelihood of Bias

(i) *Whether the question of likelihood of bias is still a live issue*

having regard to the fact that the learned judge had retired.

*(ii) Whether it is open to the plaintiff who had elected to argue and obtain the decision of the Court of Appeal to the effect that the trial court had no jurisdiction to entertain the motion on notice before it, to
B raise or insist on raising the question of likelihood of bias on the part of the judge of the trial court.*

(b) Record of Proceedings

*(iii) Whether the Supreme Court had jurisdiction to entertain an
C appeal based solely on the Plaintiff's complaint that the Court of Appeal did not make a pronouncement, on what constitutes the "Record of Proceedings."*

(c) The two bank drafts

*(iv) Whether the Court of Appeal was in error in directing that
D credit should be given in full by the 1st defendant for the two bank drafts."*

It would appear some of these questions are arguments in answer to the questions posed by the plaintiff. I shall, however, take them into consid-
E eration when considering the cross-appeal. I may mention at this stage that the plaintiff also filed a Reply brief in respect of its cross-appeal.

I now proceed to consider the main appeal of the defendants. The questions arising for determination can be grouped under two broad
F headings to wit - jurisdiction of Balogun Ag. CJ. and the Orders made by the Court of Appeal.

JURISDICTION OF BALOGUN, Ag. C.J.

The competence of Balogun, Ag. CJ has been criticized on three
G grounds, that is, that pursuant to section 60 of the High Court Law of Lagos State it was Adeniji, J rather than Balogun Ag. C.J. who should have entertained Defendants' motions of 25/7/91; Secondly, that the said motions filed in the High Court rather than in the Court of Appeal were an abuse of process of court and thirdly, that Balogun ag C.J. had no com-
H petence to reformulate the prayers contained in those motions. As the second ground is, in fact, an attack on the competence of the High Court itself I think it is better considered first.

The court of Appeal in the lead judgment of Uwaifo J.C.A. (as

he then was) held:

"It seems to me having regard to the substance of the motions which in effect amounts to stay of execution, and in the fact that (1) a stay of execution had been refused by Adeniji, J., and (2) a similar application for a stay of execution had been filed in this Court on 23 July, B 1991, as contended by the defendants, not only did the lower court cease to have jurisdiction to entertain the motions filed on 25 July, the filing of those motions was an abuse of process of the court. An abuse of process of the court may occur when a party improperly uses judicial process to C the harassment, irritation and annoyance of his opponent, and to interfere with the administration of justice, a clear instance is where two similar processes are used against the same party in respect of the exercise of the same right and subject-matters see Okafor v. Attorney-General An-ambra State (1991) 6 NWLR (pt. 200) 659 at 681; Saraki v. Kotoye D (1992) 9 NWLR (pt. 264) 156 at 188-189."

It is contended by the defendants that the Court below failed to recognize the true nature and object of their motion on Notice dated 24/7/91 which was to ensure that a Fait accompli is not foisted on the Court of Appeal E when it comes to hearing the defendants' motion on Notice for stay of execution pending appeal. It is further argued that the purpose of the motion was not to obtain from the High Court the very orders they were seeking to obtain from the Court of Appeal as the court below seemed to F think. I agree with this contention of the defendants. They filed the motion for stay of execution pending appeal at the Court of Appeal on 23/7/91 following the refusal by the High Court of Lagos State of a similar prayer on that same day. On the 24th of July execution was levied which G undoubtedly, if not reversed, would render futile the defendants' application to the Court of Appeal. The question however, is to which Court should the applications dated 24th July be addressed. That is, which Court would have jurisdiction to entertain those applications both the one H ex parte and the one on Notice. Surely if the purpose of the applications was to ensure that a fait accompli was not foisted on the Court of Appeal before whom there was then pending an application for stay of execution it would be that Court that would have jurisdiction to entertain the appli-

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 cation. This is brought out clearly by the decisions of this Court in such cases as Vaswani v. Savalakh (1972) ANLR 922 and Governor of Lagos State v. Ojukwu (1986) 1 NWLR 621. By the levy of execution on 24/7/91 it was the Court of Appeal that would be faced with the fait accompli when it came to consider the defendants' motions for stay of execution pending before it, and not the High Court. If there was any abuse of process of Court, it would be that of the Court of Appeal and not that of the High Court that had become functus officio by the Ruling of Adeniji J. on 23/7/91 refusing stay of execution. The High Court of Lagos State, therefore, had no jurisdiction to entertain the two motions filed by the defendants on 25/7/91.

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 I think this is efficient to dispose of the question of jurisdiction since whatever was done by Balogun Ag. C.J. which might also rob him of competence would be irrelevant as the Court itself had no jurisdiction anyway to entertain those applications. For these reasons, therefore, I agree entirely with the Court below that the proceedings before Balogun Ag. C.J. were all a nullity.

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 With this conclusion, it has become unnecessary for me to consider Questions (i), (ii), (iii), (iv), (v) & (vi) in detail. Suffice it however, to say that there was evidence on the record in the affidavit of K. O. Tinubu Esq. which I have set out earlier in this judgment and which was not challenged by the defendants, from which the Court below could make the findings that the plaintiff and his counsel were not aware of the pendency of the application for stay of execution pending in the Court of Appeal at the time execution was levied and also that Adeniji J. was available to deal with the matter which Balogun Ag. C.J. dealt with. Having held as above that Lagos State High Court had no jurisdiction to entertain the applications of defendants filed on 25/7/91 it follows that Questions (i) to (vi) must be resolved against the defendants.

THE ORDERS MADE BY THE COURT OF APPEAL:

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 In concluding the lead judgment of the Court below, Uwaifo JCA said:

"The appeal by the plaintiff succeeds and is allowed. The ex-parte order made by Balogun, Ag. C.J. on 25 July, 1991 in this matter is

null and void, and is accordingly set aside. The interference with the execution carried out on 24 July, 1991 whereby bank drafts had been issued by the 1st defendant in satisfaction of the judgment debt was an unlawful interference. It is ordered that the unlawful interference. It is ordered that the execution should stand and that in satisfaction thereof B credit should be given in full by the 1st defendant for the two bank drafts."

It is now being contended in this appeal that the Court below had no jurisdiction to order that "the execution should stand and that in satisfac- C tion thereof credit should be given in full by the 1st defendants for the two bank drafts". It is submitted that the proper order it should have made would have been to refer the two motions to Adeniji J. for adjudication. In view, however of the conclusion I have reached on the juris- D diction of the High Court of Lagos State to deal with the two motions, it follows that the Court below could not have remitted the matter to Adeniji J. for adjudication. The proceedings before Balogun Ag. C.J. being a nullity, the orders made by him are ipso facto a nullity. The parties were then back in the position they were before 25/7/91 and that is, that ex- E ecution was levied and bank drafts were given in satisfaction of the judgment debt. It is this position of the status quo ante that is emphasized by the orders made by the Court below. In my view those orders are merely incidental to the striking out of the proceedings and decisions of Balogun F Ag. C.J. I therefore, answer Question (vii) in the affirmative.

I now turn to the cross appeal. The complaint of the plaintiff is that the Court below should have found from the circumstances of the hearing of the applications before Balogun Ag. C.J. that there was real G likelihood of bias. This line of attack is, in my respectful view, an alternative to the line of attack of jurisdiction of Balogun Ag. C.J. The principal line of attack of jurisdiction of Balogun Ag. C.J. The principal line of attack having succeeded, I do not see any usefulness in considering the alternative line of attack. The contention that there was a real likeli- H hood of bias would presuppose that Balogun Ag. C.J. had jurisdiction to entertain the application before it but that in doing so, he breached the cardinal rule of natural justice and, therefore, the proceedings and his

decision were vitiated. Having held, however, that the learned Ag. CJ infact had no jurisdiction, the question of real likelihood of bias is no longer a live issue as rightly contended by Chief F.R.A. Williams SAN in his brief. I, therefore, strike out the cross-appeal.

B From all I have been saying, the main appeal must fail. I, too, like my learned brother Ejiwunmi JSC, dismiss it with costs as assessed by him in his lead judgment.

C **IGUH JSC**

I have had the privilege of reading in draft the judgment just delivered by my learned brother, Ejiwunmi, J.S.C. and I agree that the trial court lacked jurisdiction to entertain the two motions in issue. Accordingly, the proceedings before Balogun, Ag. C.J. were all null and void and of no effect whatever.

Where a cause or matter is heard and ruling or judgment is delivered without jurisdiction, the proceedings will be a nullity and can neither be used for any purpose whatsoever nor be treated as if it ever existed ab initio. See Timitimi and others v. Chief Amabebe and others (1953) 14 W.A.C.A. 374 at 377, Nana Nyarko v. Nana Akowuah (1954) 14 W.A.C.A. 426 etc. In the circumstance, the main appeal lacks substance and is hereby dismissed. The cross-appeal, being a complaint against the conduct of proceedings that are incompetent and wanting in jurisdiction is hereby struck out.

For the avoidance of doubt, it is further ordered that the two applications in question which were filed before the High Court be and are hereby struck out for want of jurisdiction. I abide by the order for costs made in the leading judgment,

H **AYOOLA JSC**

I have had the privilege of reading in draft the judgment delivered by my learned brother, Ejiwunmi, JSC. I agree with him in the broad conclusions he arrived at both in the appeal and in the cross-ap-

peal. He has given meticulous consideration to the issues raised by the appeal and cross-appeal and the argument of counsel. I agree with the reasons he gives for arriving at the conclusions he arrived at upon a consideration of those issues and argument. I only desire to add a few remarks on some aspects of the matter.

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There have been several decisions in the proceedings commenced in the High Court of Lagos State which engendered the appeal before us. These decisions can be enumerated as follows:-

(1) A final decision given in the substantive action by Adeniji, J. on 7th June, 1991 whereby the learned judge entered judgment for the plaintiff against the defendant and ordered the defendants to transfer a specified sum of money to the plaintiff's overseas suppliers and pay general damages in the sum of N500,000.

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(2) An interlocutory decision given by Adeniji, J. whereby the learned judge refused a stay of execution of that judgment on 23rd July, 1991.

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(3) An order made by Balogun, Ag. CJ, on 25th July, 1991 whereby he ordered, on an ex-parte application by the defendant, that the writ of execution issued pursuant to the final judgment mentioned in (1) above be suspended pending the determination of defendants' motion on notice brought to set aside the writ of execution.

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(4) An interlocutory decision made by Balogun, Ag. CJ, on 9th August, 1991 whereby a preliminary objection to the motion on notice mentioned in (3) above was upheld in part and rejected in part.

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The plaintiff (now respondent before us) and the defendants (now appellants before us) appealed to the Court of Appeal from the decision of 9th August 1991. The Court of Appeal allowed the respondent's appeal and set aside the ex-parte order (mentioned in (3) above) and dismissed the cross-appeal. The decision of that court was given on 28th March, 1994. That is the decision from which this appeal has been brought.

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It is evident that this appeal is not concerned directly with the merits of the final decision given by Adeniji, J, on 7th June, 1991 nor with the merits of the ex-parte order made on 25th July, 1991. There is

a substantive appeal from the former and no appeal from the latter.

Dealing with the appeal before them from Balogun, Ag. CJ's decision of 9th August, 1991, the Court of Appeal held that Balogun, Ag. CJ. had no jurisdiction to entertain both the motion ex-parte and the motion on notice filed in the High Court on 25th July, 1991 inter alia because the two applications were in abuse of the process of the court. In the leading judgment delivered by Uwaifo, JCA (as he then was), with which Sulu-Gambari, JCA and Kalgo, JCA (as he then was) agreed, the learned justice rested his conclusions on three main props as follows: (1) Balogun, Ag. CJ, had no competence to entertain the motions ex-parte and on notice because by virtue of section 60 of the High Court Law of Lagos State, such motions should have been heard by Adeniji, J who was, in terms of that section, "the judge before whom the hearing or trial took place". (2) The motions before Balogun, Ag. CJ were in abuse of the process of the court because Adeniji, J had on 23rd July, 1991 refused an application for stay of execution of the judgment delivered by him on 7th June, 1991 and a similar application had been filed in the Court of Appeal on 23rd July, 1991. (3) Balogun Ag CJ had reformulated the prayers sought by the defendants' motion on notice when dealing with a preliminary objection without hearing the parties before the reformulation.

Being of the view that real likelihood of bias in Balogun, Ag. CJ has not been established, the Court of Appeal rejected the respondent's contention in the court below that the decision of Balogun Ag CJ was bad by reason of real likelihood of bias. At the end of the day the appeal of the plaintiff (then appellant), succeeded.

The Court of Appeal, upon allowing the plaintiff's (respondent's) appeal, made orders that:

1. The ex-parte order made by Balogun, Ag. C.J., on 25th July, 1991 was null and void and accordingly was set aside.
2. The interference with the execution carried out on 24th July, 1991 was an unlawful interference.
3. The execution should stand and in satisfaction thereof credit should be given in full by the 1st defendant for the two bank drafts.

Two appeals have been taken from the decision of the Court of

Appeal. One, the main appeal, is by the defendants that appeal is against the whole decision. The other, the cross-appeal, is by the plaintiff. The cross-appeal was in the main about that part of the decision holding that there was no real likelihood of bias.

It is convenient to consider the main appeal first. Although seven B issues for determination have been formulated by the appellant in this appeal, it seems clear to me that the appeal can easily be disposed of on three questions: (1) Whether on the material before them the court below was right in holding that Balogun, Ag. C.J., had no competence to hear C and determine the motion by virtue of section 60 of the High Court Law of Lagos State. (2) whether the proceedings before him were taken in abuse of the process of the Court, and, (3) whether the Court of Appeal had jurisdiction to make the orders made by it.

From the manner in which the appellants' appeal had been ar- D gued on the appellants' brief, the first two questions become somehow intertwined, since the nature of the applications made to Balogun, Ag. C.J. would, to a large extent, have material bearing on the questions whether Balogun Ag. C.J. has heard them contrary to section 60 of the E High Court Law and whether they were made in abuse of the process of the court.

It is clear that the appellants claimed to have made the applica- F tions to Balogun Ag. C.J. in order to protect the motion filed and pending in the court below for stay of execution of the judgment of Adeniji, J delivered on 7th June, 1991 from being rendered nugatory by reason of execution of the judgment during the pendency of that motion. It was for this reason that reference was made to and reliance placed on such G cases as Governor of Lagos State v. Ojukwu (1986) 1 NWLR 621 and First African Trust Bank Ltd v. Ezegebu (1993) 6 NWLR (part 297) 1 by the appellants' counsel. This position was clearly articulated in the appellants' brief thus:

"In particular the learned Justice of Appeal failed to observe H that the true object of the motion was to ensure that a fait accompli is not foisted on the Court of Appeal when it comes to hear the defendants' motion on notice for stay pending appeal, it was not to obtain from the

High Court, the very orders they were seeking to obtain from the Court of Appeal, as the learned Justice of Appeal seems to think."

It was on this submission that the respondent built its alternative argument that the proper venue for the appellants' motions would have been the Court of Appeal whose jurisdiction would have been stultified by the respondent levying execution while a motion for stay of execution was pending. The respondent urged the court to hold that Balogun, Ag. C.J. had no jurisdiction, notwithstanding the reasons the Court of Appeal gave for coming to that conclusion.

The main order sought by the defendants by their motion on notice was that the writ of execution be set aside pending the determination of the application made to the Court of Appeal for the stay of execution of Adeniji J's judgment of 7th June, 1991. It is clear from the prayer in the motion on notice that the Court of Appeal completely misconceived the nature of the defendants' (appellants') motion when they held (per Uwaifo, JCA (as he then was) that "the substance of the motion amounts to stay of execution" which "has been refused by Adeniji, J. "and "a similar application for a stay of execution had been filed" in the Court of Appeal on 23rd July, 1991. The jurisdiction and power of a court invoked to undo what has been done so that proceedings before it may not be frustrated or that it may not be presented with a fait accompli in regard to it, is not the same as the jurisdiction and power of the court invoked to grant a stay of execution of a judgment pending an appeal. Different considerations apply to the cases in the exercise of the court's discretion. In the former in which the disciplinary power of the court is invoked the major consideration is whether the alleged "offending" party had tried" to steal a match", while in the latter the principal considerations are whether the appeal will be rendered nugatory if a stay is not granted and the dictates of the balance of justice in the circumstances of the case having regard to established principles.

I venture to think that the real question in this appeal is not whether section 60 of the High Court Law of Lagos State should apply or not where the object of the application is to preserve proceedings in the Court of Appeal, but whether any judge of the High Court has jurisdiction to

entertain such motions whereby a disciplinary jurisdiction was invoked, as was done by the defendants' motions.

There is much merit in the submission made by counsel on behalf of the respondent that the proper forum for the type of motions filed in the High Court on 24th July, 1991 was not the High Court but the Court of Appeal whose jurisdiction it was to exercise disciplinary powers to protect proceedings before them from frustration. B

Although the Court of Appeal came to a correct conclusion that Balogun Ag. C.J. was not competent to entertain the motions before him, the reasons for that conclusion appear misconceived. Balogun, Ag. C.J. lacked competence to entertain the motion, but not by reason of section 60 of the High Court Law of Lagos State; nor is it because the motions were in abuse of the process of the court. His lack of competence was because the proper venue for the determination of such application was the Court of Appeal and not the High Court before which there were no proceedings pending which were to be protected by exercise of disciplinary powers of the court. Having come to that conclusion, the question raised by the cross-appeal whether or not real likelihood of bias has been established becomes purely academic and inconsequential. So also is the question whether or not Balogun, Ag. C.J. erroneously reformulated the prayers. D E

The outstanding question raised by the appeal is whether the orders made by the Court of Appeal should have been made upon allowing the respondent's appeal. It was contended by the appellants that they had no jurisdiction to make the orders which Balogun, Ag. C.J. could not have made, as the learned Ag. C.J. properly could only have ordered that the motion on notice be heard by Adeniji, J. if he had sustained the preliminary objection. It was submitted that the Court of Appeal should have remitted the matter to Adeniji, J. or heard it themselves under section 16 of the Court of Appeal Act. The respondent on the other hand argued that the Court of Appeal had acted under section 16 to determine the motion on notice. F G H

It does not require much effort to conclude that the Court of Appeal, having held that Balogun Ag. C.J. was not competent to hear the

B motions, did not proceed to consider the motion on notice on its merits. The consequence of that court declaring the proceedings before Balogun Ag. C.J. incompetent was to restore the motions to the High Court for determination by the appropriate judge had that court itself had competence. The order made by the Court of Appeal that the execution should stand would itself have pre-empted the proper hearing and determination of the motions or of the motions for stay of execution still pending at the Court of Appeal. Such cannot be right. However, in view of the conclusion that I think is appropriate; that is, that the High Court lacked competence to hear and determine the application, the proper order to make is to strike out the motion on notice filed in the High Court on 25th July, 1991. With the striking out of that motion the ex-parte interim order made by Balogun Ag. C.J. pending the determination of the motion on notice would automatically lapse. The result is that the parties would revert to the position they were before the motions filed in the High Court on 25th July, 1991 were filed.

E It needs to be remarked that while all these interlocutory proceedings and appeals were pursued, the substantive appeal at the Court of Appeal as well as the motion for stay of execution before that court, probably remained yet to be heard. A little reflection would have shown that less time and energy than have been expended on these interlocutory applications and appeal would have been more usefully spent in prosecuting the substantive appeal.

G Be that as it may, for the reasons which I have given and the reasons given by Ejiwunmi, JSC., I would dismiss the appeal of the appellants. The consequential orders made by the Court of Appeal consequent on allowing the respondent's appeal in the court below can reasonably be regarded as a declaration, for avoidance of doubt, that effect should not be given to the orders made without jurisdiction, by Balogun, Ag. C.J. It now needs to be emphasized, as earlier stated, also for avoidance of doubt, that the consequence of deciding that the High Court lacked competence to entertain the motions filed on 25th July, 1991 is to put the parties in the position they would have been had the motions not been filed and orders made by Balogun, Ag. C.J. not been made.

Since the High Court was incompetent to hear the motions and make orders therein, the foundation of the cross-appeal was gone. The point taken as to real likelihood of bias, taken in the cross-appeal, would have been point well taken had the High Court been competent to hear the motions. However, since the High Court had itself lacked competence to B entertain the motions, no useful purpose is served by making any consequential order upon the decision that proceedings before Balogun, Ag. C. J. were vitiated by real likelihood of bias.

I abide by the orders in regard to costs made by my learned C brother, Ejunmi, JSC.

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