

SUPREME COURT OF NIGERIA
2ND JUNE, 2000. SC. 186/1994
CORAM:- M. L. UWAIS CJN, U. MOHAMMED,
A. I. KATSINA-ALU, A. O. EJIWUNMI, JJSC

1. FRANCHAL NIGERIA LTD. APPELLANTS
2. CHIEF FRANCIS OKWUCHUKWU NZEKWESI
AND
NIGERIA ARAB BANK LTD. RESPONDENTS

***EVIDENCE** - Admissibility - Public document - Certified true copy - Of proceedings in a previous suit - There is nothing wrong in a court acting on an admission made in such a document*

***STAY OF EXECUTION** - Appeal - Judgment - Misdirection - Where the court did not rely on the misdirection - It did not occasion any miscarriage of justice*

***STAY OF EXECUTION** - Appeal - Record of appeal - Relevance - The record of proceedings being in possession of the court - Is no ground for granting stay of execution*

FACTS

In the High Court of Anambra State holden at Onitsha, the plaintiff/respondent claimed against the defendants/appellants for inter alia N39,053,312.89 (Thirty-nine million, fifty-three thousand, three hundred and twelve naira, Eighty-nine kobo) being the balance of the principal sum of overdraft granted to the 1st defendant/appellant and personally guaranteed by the 2nd defendant/appellant; and N32,575,004.67 (Thirty-two million, five hundred and seventy-five thousand and four naira, sixty-seven kobo) being interest, commissions and other bank charges which accrued to the principal sum of N129,780,076.52. The case was placed on the undefended list. The respondent is a licensed commercial bank. The 1st defendant is a company incorporated in Nigeria and maintains a bank

account with the Onitsha branch of the respondent bank. The 2nd defendant is the Chairman/Managing Director of the 1st defendant company. The claim before the court was founded on credit facilities granted by the bank to the 1st defendant which the 2nd defendant guaranteed. The plaintiff annexed to its affidavit in support of the claim on the undefended list a copy of the record of proceedings in an earlier case suit No. O/121m/92 (Exhibit Q). It was not certified as a true copy of the proceedings.

The defendants filed a memorandum of appearance with a notice of intention to defend the action. After considering and resolving some preliminary objections on procedure raised by learned Counsel for the defendants/appellants the learned trial judge entered judgment for the plaintiff for N39,053,312.89 against the defendants jointly and severally. He further held that the condition on which the defendants will be let in to defend the amount of interest and rate of interest claimed by the plaintiff is that they pay the plaintiff the sum of N29,000,000 immediately and the balance of N10,053,312.89 to be paid when the amount of interest is ascertained. Thereafter the defendants brought a motion on notice seeking an order of the High Court for a stay of execution pending the appeal which they filed to the Court of Appeal. The motion was heard and refused by the learned trial judge. The defendants filed another motion on notice in the Court of Appeal asking for a stay of execution pending the determination of the appeal before it. The plaintiff in opposing the application exhibited the same record of the earlier proceedings in suit No. O/121m/92 (Exhibit Q) to its counter affidavit, but it was now exhibited as a certified document.

In the said Exhibit Q the 2nd defendant made an admission to the effect that the defendants were indebted to the plaintiff in the sum of N29 million naira. The application was dismissed by the Court of Appeal. Dissatisfied, the defendants have now appealed to the Supreme Court raising four issues.

ISSUES FOR DETERMINATION

"1. Did the Court of Appeal base its Ruling on exhibit "Q" (which is an uncertified affidavit allegedly deposed to by the 2nd Appellant and used in a different suit (O/121M/92) wherein the Appellants allegedly

admitted owing the Respondent N29 million) and if they did was it proper (?)

2. Did the Court of Appeal hold that the 2nd Appellant placed before the Onitsha High Court an affidavit (exhibit Q) wherein he admitted owing the Respondent N29 million which necessitated the refusal of the motion for stay of execution pending appeal and if they did was it proper (?).

3. Did the Court of Appeal in its Ruling base the refusal of the motion for stay of execution pending appeal on the ground that the Respondent's averment, about the extent of the Appellant's massive wealth were never controverted and that the Appellants did not establish that by making the payment, they would be unable to prosecute their appeal, and if they did was it proper(?).

4. Was it proper for the Court of Appeal to refuse the said motion for stay of execution pending an appeal when the Record of Appeal relating to the substantive case had been forwarded to it and parties thereto are about to exchange their briefs of argument. (?)" (parenthesis mine).

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

Evidence - Admissibility

1. At the stage when Exhibit Q was annexed to the Respondent's counter-affidavit the Court of Appeal was concerned not with the appeal challenging the decision of the trial judge but the application before it for a stay of execution to be granted. Since at that stage exhibit Q had been certified as true copy of the proceedings in Suit No. 0/121m/92, the contention of the Appellants about its value as evidence is misdirected and irrelevant to the appeal before us. The same argument might be relevant to the appeal before the Court of Appeal in respect of the decision of the High Court but then it has to await the hearing of the appeal in that court, if not yet determined.

It follows that I see nothing wrong in the Court of Appeal acting on the admission made by the 2nd Appellant in Exhibit Q to the effect that

the Appellants were indebted to the Respondent in the sum of N29 million.
(p. 1861 C)

Stay of execution - Appeal

B 2. It is undoubtedly clear from the foregoing that the Court of Appeal did not rely on the misdirection, about the 2nd Appellant not controverting the allegation that he was massively wealthy," to refuse to grant stay of execution. In my opinion the misdirection did not occasion any miscarriage of justice. (p. 1863 G)

Stay of execution - Record of appeal

D 3. The final issue for consideration is issue no. 4, which complains that the Court of Appeal was wrong in refusing stay when the record of appeal was already in its possession. The case of Fawehinmi v. Akilu, (1990) 1 N.W.I.R. (Part 127) 450 at p. 460 (headnote no. 9) is cited in support. With respect I do not see any merit in this submission. Merely the record of proceedings being in possession of court is no ground for granting stay of execution. The case cited does not establish that fact. The headnote (no. 9) to which the Appellants refers states -

"The fact that the record of appeal is now before the Court of Appeal and parties are about to exchange briefs go to establish that a stay of execution would not occasion undue delay."

F The issue in the present case whose facts are distinguishable from those of the cases cited, has nothing to do with the granting of stay occasioning any delay. (p. 1864 A)

G NOTABLE POINTS OF INTEREST

UWAIS CJN

1. Why counsel should read the whole of the facts of the case he is relying on.

H It is lazy for counsel to rely on headnotes in law reports instead of reading the whole of the facts of the case he is relying on to see how relevant the decision in the case is to his own case. (p. 1864 D)

KARIBI-WHYTE JSC

2. Impecuniosity per se is not a valid ground for the grant of stay of execution.

It is important and pertinent to mention that impecuniosity per se is not a valid ground for the grant of stay of execution of judgment. - See Balogun v. Balogun (supra). The fundamental principle that the judgment creditor is entitled to the fruits of his litigation can only be defeated by circumstances which render it inequitable for him to enjoy the benefit of his victory. An applicant for stay of execution bears the burden of showing that the grant of stay of execution will not result in the determination of the issue subject matter of the appeal; and there will be no injustice to the Respondent - See LSDPC v. Citymark (W.A.) Ltd. (1998) 8 NWLR. 681, Vaswani v. Savalakh (1972) All NLR. 922, UBN v. Fajebe Foods (1994) 5 NWLR. 325, Obi v. Obi (1998) 4 NWLR. 51. (p. 1875 G)

3. The function of the record of appeal in an application for grant of stay of execution.

Possession of record of proceedings per se is not conclusive as to the merits of the appeal. It also does not suggest that it is in the interest of justice necessary to grant the application. The most the possession of record of appeal does is that granting a stay of execution would not occasion undue delay, because the appeal is with the exchange of briefs of argument ripe for hearing. (p. 1876 F)

MOHAMMED JSC

4. Important consideration in the grant of stay of execution

Stay of execution is a discretionary remedy. An appellate court in considering an appeal against the refusal of a court to order for stay of execution should ensure that the successful litigants are not unduly deprived of the fruits of the judgment which they had obtained at the lower court even though that judgment is the subject of a pending appeal - Utilgas v. Pan African Bank (1974) 10 S. C. 109. (p. 1877 B)

5. What the applicant for stay of execution should show

It is relevant to point out, as this court has done in several decisions, that the guiding principle in applying for a stay of execution of a judgment is for the applicant to show substantial reasons to warrant deprivation of the successful party of the fruits of his judgment. Where grounds exist suggesting a substantial issue of law to be decided on the appeal in an area in which the law is to some extent *recondite* either side may have a decision in his favour. See Balogun v. Balogun (1969) 1 All NLR 349. However, where the appeal is against a judgment where the applicant for a stay had admitted liability in the trial court it is my strong view that such application is without any merit and should be refused. (p. 1877 H)

REPRESENTATION

D Parties absent and unrepresented.

CASES REFERRED TO

Agueze v Pan African Bank Ltd (1992) 4 N.W.L.R. (Part 233) p. 76
E Anyakora v. Obiako (1990) 2 N.W.L.R. (Part 130) 52 at pp.56
Hada v Malumfashi (1993) 10 K.L.R. 102 at p. 104
Oko v Ntukidem (1993) 3 K.L.R. 114 at pp. 115 and 116
Intercontractors Nig. Ltd. v. U.A.C. Ltd. (1988) 2 N.W.L.R. (Part 76) 303
F Odufoye v. Fatoke (1975) 1 N.M.L.R. 222
Shoge v. Musa (1975) 1 N.M.L.R. 133
Wey v. Wey (1975) 1 S.C.
Balogun v. Balogun (1969) 1 All N.L.R. 349

G **LEAD JUDGMENT BY UWAIS CJN**

This is an interlocutory appeal against the decision of the Court of Appeal refusing an application by the Appellants for stay of execution pending appeal.

H The background facts to the case are as follows. The Appellants were indebted to the Respondent. On 29th October, 1993 the Respondent took out a writ of summons in the erstwhile High Court of Anambra State holden at Onitsha. The case was placed on the undefended list. The

Respondent's claim against the Appellants was for:-

(a) N39,053,312.89 (Thirty-nine Million, fifty-three thousand, Three Hundred and twelve Naira, Eighty-nine Kobo) being the balance of the principal sum of overdraft granted to the first defendant (1st Appellant) and personally guaranteed by the second defendant (2nd B Appellant).

(b) N32,575,004.67 (Thirty-two Million, Five hundred and seventy-five thousand, four naira, sixty-seven kobo) being interest, commissions and other bank charges which accrued to the principal sum C of N129,780,076.52.

(c) 40% compound interest on the principal sum and already accrued interest from 1st October, 1993 until the date of judgment.

(d) 5% simple interest on the judgment debt from the date of D judgment until it is finally liquidated."

The 1st Appellant was served with the writ of summons on 29th October, 1993 while the 2nd Appellant was served on the 2nd November, 1993 by substituted service. The case came up for hearing before Nwofor J. on the 11th November, 1993 and all the parties to the case were represented by counsel. In the case of the Appellants, they were jointly E represented and their counsel filed a memorandum of appearance earlier on the day in question. After considering and resolving some preliminary objections on procedure raised by learned counsel for the defendants, the F learned trial judge ruled as follows:-

"It is my view that all the issues raised by the defendants as their defence to the sum of N39 M claimed are not defence on merit and are merely being raised to dribble this action. The case of Nal Merchant Bank Ltd. v. Macaulay, (1986) 7 C. A (Part III) pp. 59 - 60 provides as G follows:

See also Chief B. C. Agueze v Pan African Bank Ltd., (1992) 4 N.W.L.R. (Part 233) p. 76. These cannot but apply the principles H established in these cases on this case and refuse the application in respect of the defence to the amount of N39,000.000 claimed and strike out the application by the defence in respect of that claim.

In respect of the N32,575,004.67 being the amount of interest

and commissions etc. I shall let in the defendants to defend this claim. The same goes for the claim of 40% compound interest because it is the rate of interest that determines the amount of interest . This decision is based on defendants defence that their agreement was 11% simple interest
B *and not compound interest.*

I shall therefore enter judgment for the plaintiff for N39,053,312.89 against the defendant jointly and severally. The condition in which the defendant will be let in to defend the amount of interest and the rate of interest as per paragraph B and C of the plaintiff's claim is
C *that they pay the plaintiff the sum of N29,000,000 immediately and the balance of N10,053,312.89 to be paid when the amount of interest is ascertained. This condition is made pursuant to Order 24 Rule 9 (3) of the High Court Rules of Anambra State, 1988."*

D Thereafter the defendants brought a motion on notice seeking an order of the High Court for a stay of execution pending the appeal which they filed to the Court of Appeal. The motion which was heard on 10th February, 1994 was refused by the learned trial judge on 21st February,
E 1994.

Next, the defendants filed another motion on notice in the Court of Appeal asking for a stay of execution pending the determination of the appeal before it. The motion was heard on the 26th May, 1994 and ruling
F reserved. The ruling was delivered on the 22nd June, 1994. In dismissing the application, the Court of Appeal (Achike, J.C.A., as he then was, Akintan and Adamu JJ.C.A.) held, as per Akintan J.C.A. thus-

"The main question to be resolved in the instant case therefore is whether from the facts disclosed in the various affidavits in support of the application, the grounds of appeal filed against the verdict (sic) of the court as well as all the circumstances of the case, the applicants have made a case warranting the exercise of this Court's discretion in their
G *favour. It is trite law that a discretion to grant or refuse a stay of execution*
H *must take into account the competing rights of the parties to justice. A discretion that is based in favour of an applicant for a stay but does not adequately take into account the respondent's equal right to justice, is a discretion that has not be (sic) judicially exercised. (See Mobil Oil Nig.*

Ltd. v. Agadaigho, (1988) 2 N.W.L.R. (Part 77) 383 and Okafor v Nnaife, (supra) (1987, 4 N.W.L.R. (Part 64) 129).

The respondent in the instant case is a licenced (sic) commercial bank. The 1st applicant is a company incorporated in Nigeria and maintains a bank account with the Onitsha branch of the respondent B bank. The 2nd applicant is the Chairman/Managing Director of the 1st applicant company. He is the man behind the company. The claim before the (High) court was founded on credit facilities granted by the bank to the 1st applicant which the 2nd applicant guaranteed. One of the C undisputed facts placed before the trial court is that the total amount of money granted to the 1st applicant and guaranteed by the 2nd applicant was over N130 million. The 2nd applicant admitted this fact in an affidavit he swore and placed before the trial court. He also admitted that out of D that amount, over 80% of the sum has been paid. He then averred that only N29 million was still outstanding. In other words, the 2nd applicant admitted that N29 million was still owed to the Bank. That was the amount which the court ordered the applicants to pay to the respondent.

The question therefore is whether it is equitable for this court to E grant a stay of execution of the portion of that judgment ordering the applicants to pay the N29 million which the applicants admitted owing the respondent while proceeding with the rest of the claim disputed. My answer to that question is definitely in the negative.

F The grounds of appeal filed against the judgment of the court have nothing to do with the issue of the amount which the 2nd applicant admitted as the balance due on the transaction.

G A ground of appeal alleging that the court awarding not what was claimed cannot therefore be said to raise any substantial issue for determination by this court.

H Another point raised is that in view of the heavy sum involved (29 million) it was not possible for the applicants to pay the said sum and yet continue in business. That averment was controverted by the respondent in its counter-affidavit in which it was deposed that the 2nd applicant is a very wealthy man with heavy investment in so may successful enterprises, and has recently founded an airline company. The averment

about the extent of his massive wealth was not controverted. Even if it is controversy, (sic); the applicants still need to show more than merely establishing that they were unable to pay, by establishing that by making payment, they would be unable to prosecute their appeal or that they would be unable to recover any money paid to the respondent in the event of their appeal succeeding.

In conclusion, therefore and for the reasons given above, I hold that the applicants have failed to make out a case to warrant granting a stay of execution of the judgment as they prayed for in their motion. The motion is accordingly dismiss (sic) with N1,500 costs in favour of the respondent." (parenthesis and emphasis mine).

The applicants were not satisfied with the ruling of the Court below. They therefore appealed from it to this Court. Only the Appellants filed brief of argument in which they raised four issues to be determined by this court, viz:-

"1. Did the Court of Appeal base its Ruling on exhibit "Q" (which is an uncertified affidavit allegedly deposed to by the 2nd Appellant and used in a different suit (0/121M/92) wherein the Appellants allegedly admitted owing the Respondent N29 million) and if they did was it proper (?)

2. Did the Court of Appeal hold that the 2nd Appellant placed before the Onitsha High Court an affidavit (exhibit Q) wherein he admitted owing the Respondent N29 million which necessitated the refusal of the motion for stay of execution pending appeal and if they did was it proper (?).

3. Did the Court of Appeal in its Ruling base the refusal of the motion for stay of execution pending appeal on the ground that the Respondent's averment, about the extent of the Appellant's massive wealth were never controverted and that the Appellants did not establish that by making the payment, they would be unable to prosecute their appeal, and if they did was it proper(?).

4. Was it proper for the Court of Appeal to refuse the said motion for stay of execution pending an appeal when the Record of Appeal relating to the substantive case had been forwarded to it and parties

thereto are about to exchange their briefs of argument. (?)" (parenthesis mine).

The Respondent failed to file its brief of argument. When the case came up for hearing before us on the 6th day of March, 2000 neither of the parties was represented by counsel nor was the 2nd Appellant present in court. Consequently we relied on the provisions of Order 6 rule 8 (7) of the Supreme court Rules, 1985 to deem the appeal argued on the Appellants' brief of argument only. The rule provides:-

"(7) When an appeal is called, and it is discovered that a brief has been filed for only one of the parties and neither of the parties concerned nor their legal practitioners appear to present oral argument the appeal shall be regarded as having been argued on that brief.

I intend to consider issues nos. 1 and 2 together as they are interrelated. Appellants complaint is that the Court of Appeal in refusing their application for stay acted improperly by relying on the content of an affidavit (Exhibit Q) in another case different from the present case, to hold that the 2nd Appellant admitted being indebted to the Respondent in the sum of N29 million. It is argued that Exhibit Q, being part of the record of proceedings in the earlier case suit No. 0/121m/92, was improperly before the Court of Appeal since it was not certified, being part of a public document, as a true copy of the original affidavit in accordance with the provisions of sections 110, 111 and 113 of Evidence Act. That the trial court relied on Exhibit Q in giving judgment in favour of the Respondent, that one of the Appellants' grounds of appeal against the judgment of the High Court averred that Exhibit Q was not properly before the High Court and that it was not consequently admissible evidence on which the High Court could rely to give judgment for the Respondent. Had the court of Appeal adverted to this, it would have come to realise that the trial court acted wrongly and this was a ground on which the Appellants' appeal could succeed and so for that reason the Court of Appeal should have granted the stay of execution sought. The following cases are cited to buttress the contention - Anyakora v. Obiako, (1990) 2 N.W.L.R. (Part 130) 52 at pp.56 and 57 (head note nos. 10 and 13); Hada v Malumfashi, (1993) 10 K.L.R. 102 at p. 104 (ratio no. 8) ; Fotuade v Onwoamanam, (1990) 2

N.W.L.R. (Part 132) 322 at p. 325; Oko v Ntukidem, (1993) 3 K.L.R. 114 at pp. 115 and 116 (ratio nos. 1 and 6) and Dobadina & Anor. v. Ambrose, 1969 N.M.L.R. 24.

It is contended that although the Respondent, subsequent to the judgment of the High court and the filing by the Appellants of application in the High court for stay of execution pending appeal, had caused Exhibit Q to be certified as a true copy, that had not altered the fact that the judgment of the High Court in the undefended list was based on inadmissible evidence. The Appellants argue that the Court of Appeal misdirected itself when, in its reasoning for refusing to grant stay, it stated that it was the 2nd Appellant that deposed to Exhibit Q admitting that the Appellants were indebted to the Respondent in the sum of N29 million. On the contrary, it is submitted, it was the Respondent that exhibited Exhibit Q in its affidavit in support of its claim in the trial court. That the Appellants did not at any time file any document in the High Court in which they admitted the debt of N29 million nor did they file Exhibit Q in the High Court.

Now, I think there is some confusion in the minds of the Appellants with regard to Exhibit Q. While it is true that the respondent annexed Exhibit Q to his affidavit in support of the claim on the undefended list (when it was not certified as a true copy of the proceedings in Suit No. 0/121m/92 - Chief Francis Nzekwesi v. Inspector-General of Police & 3 Ors.) the same document was exhibited as certified document to the counter-affidavit opposing the application in the Court of Appeal by the Appellants for stay of execution pending determination of the appeal to that Court. So that as far as the proceedings in the Court of Appeal for stay were concerned, Exhibit Q was a certified document properly before the Court of Appeal. Paragraph 5 of the counter-affidavit, sworn to by an employee of the Respondent (Wisdom Ngozi Nwabueze Nwachukwu) states -

"5. That paragraph 8 (of the Appellants' affidavit in support of their application in the Court of Appeal for stay of execution) is correct only to the extent that the court ruled that in matters coming under the undefended list memorandum of appearance was not appropriate and entered judgment based on the admission of the defendants in Ex. Q, a certified copy of same which is annexed and marked Ex. A.

While paragraph 5 of the Further Affidavit of Mr. Cletus Okolo, Manager of the 1st Appellant states as follows:-

"5. That paragraph 5 of the counter-affidavit of the plaintiff/ Respondent is false. In further answer to the said Paragraph 5, I hereby state that Ex. "A" attached to the counter-affidavit of the defendant was used in Suit No. 0/121m/92 during the Enforcement of Fundamental Rights proceedings and the alleged admission therein was never contained in the applicant's notice of intention to defend the relevant suit. (i.e Suit No.0/388/93)."

At the stage when Exhibit Q was annexed to the Respondent's counter-affidavit the Court of Appeal was concerned not with the appeal challenging the decision of the trial judge but the application before it for a stay of execution to be granted. Since at that stage exhibit Q had been certified as true copy of the proceedings in Suit No. 0/121m/92, the contention of the Appellants about its value as evidence is misdirected and irrelevant to the appeal before us. The same argument might be relevant to the appeal before the Court of Appeal in respect of the decision of the High Court but then it has to await the hearing of the appeal in that court, if not yet determined.

It follows that I see nothing wrong in the Court of Appeal acting on the admission made by the 2nd Appellant in Exhibit Q to the effect that the Appellants were indebted to the Respondent in the sum of N29 million. Consequently there is no merit in issues nos. 1 and 2 in the Appellants' brief of argument.

With regard to issue no. 3, the Appellants contend that the Court of Appeal refused to grant their application on the ground that they did not controvert the assertion by the Respondent's counter-affidavit that the 2nd Appellant was extremely wealthy. They submitted that the Court of Appeal acted erroneously since they abundantly showed in all the affidavits sworn to by them that they denied that they were very wealthy and went on to show that the payment of the judgment debt would not only cripple them but also deny them the resources to prosecute the appeal in that court. In support of the submission they refer to their affidavit of 21st February 1994 and their Further Affidavit of 21st April, 1994 (both in support of

their application in the Court of Appeal for stay of execution).

I agree that the Court of Appeal misdirected itself when it held -
"The averment about the extent of this massive wealth was not controverted."

Paragraphs 21 and 22 of the affidavit in support of the application in the
B Court of Appeal for stay of execution aver as follows:-

"21. That before the defendants can satisfy en bloc the said
judgment debt of twenty nine million naira, it will mean disposing off
(sic) all their assets and the exercise will not only stifle (sic) the defendants
but will also deprive them of the resources for the prosecution of the said
C appeal.

22. That there is economic recession in the country and the
companies are finding it difficult to put their heads above water and the
first defendant is not an exception."

D And paragraphs 7 and 8 of their Further Affidavit state thus -

"7. That Paragraph 14 of the counter-affidavit of the plaintiff is
false. In further answer to the said paragraph 14, I hereby state that
there was never a time the 2nd defendant/applicant floated an airline.
E Exhibit "B" attached to the counter-affidavit of the defendant/respondents
(sic) was fabricated for the purposes of this motion.

8. That paragraph 15, 16, 17, 18, 19 and 20 of the counter-
affidavit of the defendant/Respondent (sic) are false and untrue. In further
F answer to the said paragraph 15, I hereby state that the evacuation of all
the property of the 2nd defendant/applicant to the High Court, Onitsha
has further crippled the 2nd defendant/applicant financially who now
lives on charity."

This notwithstanding, Appellants application for stay was brought
G under the provisions of sections 16 and 18 of the Court of Appeal Act and
the Court of Appeal stated in its judgment the principles governing the
granting of stay of execution pending appeal. It observed thus:-

The main question to be resolved in the instant case therefore is
H whether from the facts disclosed in the various affidavits in support of
the application, the grounds of appeal filed against the verdict of the
court as well as all the circumstances of the case, the applicants have
made a case warranting the exercise of this court's discretion in their

favour. It is trite law that the grant of stay of execution involves the exercise of discretion which involves a consideration of the chances of the applicant's ability to satisfy the judgment debt if the appeal is unsuccessful and the general rule to maintain the status quo between the parties are also important considerations. See intercontractors Nig. Ltd. v. U.A.C. Ltd., (1988) 2 N.W.L.R. (Part 76) 303; Odufoye v. Fatoke, (1975) 1 N.M.L.R. 222; Shoge v. Musa (1975) 1 N.M.L.R. 133; Wey v. Wey, (1975) 1 S.C. and Balogun v. Balogun, (1969) 1 All N.L.R. 349"

The Court then considered the admission by the Appellants of their indebtedness to the Respondent in the sum of N29 million and examined the grounds of appeal in the appeal pending before it, thus:-

One of the undisputed facts placed before the trial court is that the total amount of money granted to the 1st applicant and guaranteed by the 2nd applicant was over N139 million. The 2nd applicant admitted this fact in an affidavit he swore to and placed before the trial court He then averred that only N29 million was still outstanding. In other words, the 2nd applicant admitted that N29 million was still owed to the bank. That was the amount which the court ordered the applicants to pay to the respondent.....

The grounds of appeal filed against the judgment of the (trial) court have nothing to do with the issue of the amount which the 2nd applicant admitted as the balance due on the transaction."

It is based on these considerations that the Court of Appeal came to the conclusion that -

"The question therefore is whether it is equitable for this court to grant a stay of execution of the portion of that judgment ordering the applicants to pay the N29 million which the applicants admitted owing the respondent while proceeding with the rest of claim disputed. My answer to that question is definitely in the negative."

It is undoubtedly clear from the foregoing that the Court of Appeal did not rely on the misdirection, about the 2nd Appellant not controverting the allegation that he was massively wealthy," to refuse to grant stay of execution. In my opinion the misdirection did not occasion any miscarriage of justice.

The final issue for consideration is issue no. 4, which complains that the Court of Appeal was wrong in refusing stay when the record of appeal was already in its possession. The case of Fawehinmi v. Akilu, (1990) 1 N.W.I.R. (Part 127) 450 at p. 460 (headnote no. 9) is cited in support. With respect I do not see any merit in this submission. Merely the record of proceedings being in possession of court is no ground for granting stay of execution. The case cited does not establish that fact. The headnote (no. 9) to which the Appellants refers states -

"The fact that the record of appeal is now before the Court of Appeal and parties are about to exchange briefs go to establish that a stay of execution would not occasion undue delay."

The issue in the present case whose facts are distinguishable from those of the cases cited, has nothing to do with the granting of stay occasioning any delay. It is lazy for counsel to rely on headnotes in law reports instead of reading the whole of the facts of the case he is relying on to see how relevant the decision in the case is to his own case. I see no merit in this issue.

On the whole the appeal fails and it is hereby dismissed with no order as to costs. It is hereby directed that the appeal, if pending before the Court of Appeal in the substantive case since 1994, should be given accelerated hearing .

KARIBI-WHYTE JSC

I had the privilege of reading in draft the leading judgment of my Lord the Chief Justice. I agree with him. I however, wish to make my own contribution.

On the 22nd June, 1994, the Court of Appeal, Enugu Judicial Division, dismissed the appeal of the Appellants against the refusal of an application for a stay of execution of the judgment in undefended list against them by Nwofor J of court No. 4, High Court of Onitsha. This ruling is in respect of the appeal against the judgment of the Court below.

The Respondent Bank filed a suit against the Appellants on the 26th October, 1993 under the undefended list claiming as follows:-

(1) N39,053,312.89 (Thirty-nine million, fifty-three thousand, three hundred and twelve naira, eighty-nine kobo) being the balance of the principal sum of the over-draft granted to the 1st defendant and personally guaranteed by the 2nd defendant.

(ii) N32,575, 004.67 (Thirty two million, five hundred and seventy-five thousand, four naira, sixty-seven kobo) being interest, commissions and other bank charges which accrued to the principal sum of N129,780,676.52.

(iii) 40% compound interest on the principal sum and already accrued interest from 1st October, 1993 until the date of judgment.

(iv) 5% simple interest on the judgment debt from the date of judgment until it is finally liquidated.

Appellants who were the Defendants filed their memorandum of appearance with a notice of intention to defend the action. They also filed a motion on notice seeking leave to defend out of time. After hearing the motion, the learned trial Judge ruled that the memorandum of appearance filed by the Defendants was not appropriate in the circumstance and proceeded to give judgment to the Respondents in the sum of twenty-nine million naira. Appellants appealed against the judgment.

Along with the notice of appeal, Appellants filed a motion on notice in the Onitsha High Court praying the Court for a stay of execution of the said judgment pending the determination of the appeal. Appellants subsequently filed further affidavit, further and better affidavit in support of the motion for stay of execution. Respondent in opposition to the motion for stay of execution, filed a counter affidavit, as well as a further counter affidavit. The motion for stay of execution which was fixed for hearing on the 17th February, 1994, was brought forward in a motion for accelerated hearing on the 10th February, 1994. The motion for stay of execution was heard on the 10th February. On the 21st February, the learned trial Judge refused the application.

Appellants appealed against the ruling to the Court of Appeal. The following grounds of appeal were filed:-

"GROUNDS OF APPEAL

That the learned trial judge erred in law by proceeding to award

judgment to the plaintiff on 13/12/93 whereas the case was specifically adjourned to 13/12/93 for ruling on whether the court can let in the defendants to defend.

PARTICULARS OF ERROR

B (a) *The plaintiff on the 26th day of October, 1993, commenced the suit under the undefended list.*

(b) *On the 11th day of November, 1993 the defendants filed their memorandum of appearance, notice of intention to defend as well as motion of notice to be let in to defend out of time.*

C (c) *On the 22nd day of November, 1993, the court heard arguments from counsel on both sides as regards whether or not the defendants could be let in to defend and thereafter adjourned the case to 13/12/93 specifically for ruling on whether or not the defendants could*
D *defend.*

(d) *The case was never adjourned to 13/12/93 for judgment on the substantive suit.*

(e) *That the learned trial judge erred in law by awarding judgment*
E *to the plaintiff for twenty nine million naira whereas the plaintiff never asked for judgment as required under the rules nor claimed or accepted the twenty nine million naira awarded by the court.*

PARTICULARS OF ERROR

F (a) *The plaintiff's claim in court were as follows:-*

(i) *N39,053,312.89 (Thirty nine million, fifty three thousand three hundred and twelve naira, eighty nine kobo) being the balance of the principal sum of the of the overdraft granted to the first defendant and personally guaranteed by the second defendant.*

G (ii) *N32,575,004.67 (Thirty-two million, five hundred and seventy-five thousand, four naira, sixty seven kobo) being interest, commissions and other bank charges which accrued to the principal sum of N129,789,676,52.*

H (iii) *40% compound interest on the principal sum and already accrued interest from 1st October, 1993 until the date of judgment.*

(iv) *5% simple interest on the judgment debt from the date of judgment until it is finally liquidated.*

(b) After the delivery of the court's ruling on the issue whether or not the defendants could be let in to defend or not, the plaintiff and/or its counsel never asked for judgment as required under the law before the court proceeded to award judgment.

(c) There is nowhere in the plaintiff's claim wherein it mentioned the sum of N29 million awarded by the court in its judgment. B

(d) The plaintiff never gave any indication that it was accepting the reduction of its claim to twenty nine million naira and the plaintiff's claim was never amended to accord with the amount awarded to it by the trial court. C

(e) There was no indication whatsoever as to how the figure (twenty nine million naira) was arrived at.

3. That the learned trial judge erred in law by going out of His way to sever the claim of the plaintiff and picking and choosing the ones to award judgment straight away and the ones that will proceed to full hearing and misericordia. D

PARTICULARS OF ERROR

The plaintiff's claim before the court was certain and unambiguous and it never severed its claim in court rather it was court that severed the claim of the plaintiff suo motu. E

4. That the learned trial judge erred in law to have awarded judgment to the plaintiff whereas there were conflicting affidavits filed in the case that would have required adducing of oral evidence and the defendants in their notice of intention to defend set up a counter claim that would have made the trial court to exercise its discretion to let in the defendants to defend the entire suit on the merits as required under the laws. F G

PARTICULARS OF ERROR

(a) Series of conflicting affidavits were filed in the case that would have necessitated resolution thereof via oral evidence before the court could validly proceed to enter judgment. H

(b) The defendants challenged the usurious interests charged by the plaintiff and moreover set up a counter claim that would have put the trial court on notice of the fact that the case is a proper one for viva voce

evidence to be adduced before judgment could be given.

The Court of Appeal after bearing, in a unanimous decision dismissed the appeal against the ruling of the High Court refusing the motion for stay of execution pending the appeal against the judgment. Costs assessed at N1,500 was awarded against the Appellant. The appeal before us is against this decision.

Appellant has in their notice of appeal relied on the following grounds of appeal.

"GROUNDS OF APPEAL -

C 1. *The learned trial Justices erred in law in refusing the motion for stay of Execution pending the determination of the Appeal before it on the bases of Exhibit "Q" (which is a purported affidavit deposed to by the 2nd Appellant in the Onitsha High Court) which has no eventual value*
D *in law.*

PARTICULARS OF ERROR

(a) *The said exhibit "Q" is supposed to be a copy of the affidavit deposed to by the 2nd Appellant, in respect of suit No. 0/12M/92 and as*
E *such a public document.*

(b) *The said exhibit "Q" was never certified as required by law when the plaintiff exhibited it in the High Court Onitsha and its authenticity was in doubt.*

F (c) *The said exhibit "Q" was allegedly used in Suit No. 0/12M/92, an entirely different case, the proceedings of which has nothing to do with Suit No. 0/388/93.*

(d) *The defendants/Appellants did not admit the said exhibit "Q" in all the documents they filed in the High Court Onitsha and in the court*
G *of Appeal Enugu.*

2. *That the learned trial Justices erred in law in holding that the 2nd appellant placed before the High Court Onitsha an affidavit (Exhibit Q) wherein he admitted owing the Respondent N29 million and*
H *consequently refused the motion for stay of execution pending Appeal.*

PARTICULARS OF ERROR

(a) *The said exhibit "Q" which was an alleged affidavit sworn to by the 2nd appellant was exhibited by the Respondent in the affidavit in*

support of its claim and was not certified. The Respondent certified the said Exhibit "Q" only on 13/4/94 during the proceedings in the Court of Appeal Enugu.

(b) The said exhibit "Q" was placed before the High Court Onitsha by the Respondent and not the Appellants.

B

(c) There was never a time in all the documents filed by the Appellants in the High Court Onitsha in Suit No. 0/388/93 wherein they admitted owing the Respondent the sum of N29 million.

(d) Their learned trial Justices had the mistaken impression that the Appellants not only admitted owing the Respondent the sum of N29 million but also made the document (i.e. exhibit Q) available to the High Court.

C

3. That the learned trial Justices erred in law in refusing the grant of the motion for stay of Execution pending appeal on the ground that the Respondent's averment about the extent of their massive wealth were never controverted and that the appellants did not establish that by making the payment, they would be unable to prosecute their appeal.

D

PARTICULARS OF ERROR -

E

(a) The Respondent in order to show the alleged massive wealth of the Appellants exhibited an envelope (exhibit B) purporting same to be an evidence of ownership of an airline by the Appellants.

(b) The Respondent never exhibited any document to show that the alleged Franchal Trans Air Limited is an incorporation Company and has maxus with the Appellants.

F

(c) The Appellants in all their affidavits in support of the motion for a stay of Execution pending Appeal did not only deny the alleged massive wealth but went ahead to depose to the fact that payment of the judgment debt would cripple them and deny them of the resources of prosecuting the Appeal.

G

4. That the learned trial Justices erred in law in refusing the motion for stay of Execution when the Record of Appeal relating to the case had been forwarded to it and parties about to exchange their briefs of argument.

H

PARTICULARS OF ERROR

(a) *As at the time the said Ruling was delivered, the record of proceedings relating to what transpired in the High Court Onitsha had been forwarded to the Court of Appeal Enugu and the parties thereto were about to file and exchange their briefs.*

B (b) *In the circumstances, grant of the stay of Execution pending Appeal would not have resulted to any injustice or undue delay."*

Learned Counsel to the Appellants filed a brief of argument. Respondents have not filed any brief in accordance with the rules. There has been no application before us by Respondent seeking enlargement of time to file his brief of argument, out of time. We shall therefore rely for our determination of this appeal on the brief of argument filed by the Appellants - See Order 6 rule 8 (7) Rules of the Supreme Court 1985 (as amended 1999).

D Learned Counsel to the Appellants has formulated the following issues for determination arising from the grounds of Appeal.

"ISSUES FOR DETERMINATION

(a) **ISSUE NO. 1**

E *Did the Court of Appeal base its Ruling on exhibit "Q" (which is an uncertified affidavit allegedly deposed to by the 2nd Appellant and used in a different suit (O/12/M/92) wherein the Appellants allegedly admitted owing the Respondent N29 million) and if they did was it proper.*

(b) **ISSUE NO. 2**

F *Did the Court of Appeal hold that the 2nd Appellant placed before the Onitsha High Court an affidavit (exhibit "Q") wherein he admitted owing the Respondent 29 million which necessitated the refusal of the motion for stay of execution pending Appeal and if they did was it proper.*

G (c) **ISSUE NO. 3**

Did the Court of Appeal in its Ruling base the refusal of the motion for stay of execution pending Appeal on the ground that the Respondent's averment about the extent of the Appellants' massive wealth were never controverted and that the Appellants did not establish that by making the payment, they would be unable to prosecute their appeal, and if they did was it proper.

(d) **ISSUE NO. 4**

Was it proper for the Court of Appeal to refuse the said motion for stay of Execution pending an Appeal when the Record of Appeal relating to the substantive case had been forwarded to it and parties thereto are about to exchange their briefs of argument ."

The issues 1, 2 for determination raise the question of the admissibility of Exhibit Q, wherein the Appellant was said to have admitted owing Respondent N29,000,000. It also raised in the third issue the Respondents averment that Appellant never controverted Respondents averments of Appellants massive wealth. And that Appellant did not establish that by making the payment they would be unable to prosecute the appeal. The Court of Appeal was said to have refused the Motion for stay of Execution pending appeal when the record of appeal in the substantive case had been forwarded before the parties were about to exchange their briefs of argument.

The appeal was considered on the brief of argument filed by learned Counsel to the Appellant since neither counsel was present to argue the appeal in person. It was argued in the brief filed that the Court of Appeal was wrong to have relied on Exhibit Q, wherein Appellant was allegedly said to have admitted owing the sum of N20,000,000 to the Respondent. It was submitted that Exhibit Q was used in an entirely different suit No. 0/121M/92 not related to the present action. It is a copy of the affidavit deposed to by the 2nd Appellant. It was submitted that Exhibit Q was never certified as required by law and was exhibited by Plaintiff/Respondent. Exhibit Q heavily relied upon by the trial Judge was not admissible evidence in the case. It was submitted Appellant never admitted owing the sum of N29 million in all the documents filed by Appellants in the High Court Onitsha in Suit No. 0/388/93.

On the issue of Appellant not controverting Respondents allegation of Appellants 'massive' wealth, it was argued in the brief that the Court of trial relied on Exhibit "B", an envelope purporting to be evidence of ownership of Airline by Appellants. There was not other evidence such as to allege incorporation in the name of the Appellants, or flight tickets to show that the Air line was operational. Appellants have consistently denied the allegation of the ownership of massive wealth and have gone further to

demonstrate by affidavit deposition how payment of the judgment debt would cripple them and render them incapable of prosecuting their appeal.

Finally, it was argued that in the circumstances of this case, grant of stay of execution pending appeal would not have resulted in any injustice to the Respondent or undue delay. Learned Counsel relied on Fawehinmi v. Akilu (1990) 1 NWLR. (pt. 127) 450 for the submission that in the special circumstances of this case where the record of proceedings is before the Court, and parties are to exchange their briefs of argument, these are special circumstances which warrant the grant of motion for stay of execution pending appeal.

It is convenient in my consideration of this appeal to dispose of what I regard as preliminary peripheral issues. These are the arguments contained in the related issues 1 and 2 which complain against the admissibility of Exhibit "Q". The contention is that Exhibit "Q" being part of the record of proceedings in an earlier case, namely, suit 0/121 M/92 was improperly before the Court of Appeal since it was not certified as a true copy of the original affidavit in accordance with the provisions of sections 110, 111 and 113 of the Evidence Act. It was submitted that the Court of Appeal should have granted a stay of execution if it adverted to the fact that the trial court acted wrongly. This it was argued was a ground of appeal on which the appeal was likely to succeed. The following decisions were cited and relied upon. - Anyankora v. Obiako (1990) 2 NWLR (Pt.130) 52, Hada v. Malumfashi (1993) 10 KLR. 102 Fatade v. Owoamanam (1990) 2 NWLR (pt. 132) 322; Oko v. Ntukidem (1993) 3 KLR.. 114, Dobadina & Anor. v. Ambrose (1969) NMLR. 24.

It was also the contention of Appellants that a subsequent certification of Exhibit Q in this case by the Respondent after judgment of the High Court and appellant's application for a stay of execution did not alter the legal character of the inadmissibility of Exhibit Q. It was pointed out that the Court of Appeal was wrong when it stated in refusing the appellant's application for stay of execution that Exhibit Q was deposed to by the 2nd Appellant. On the contrary, Exhibit Q was deposed to by the Respondent in its affidavit in support of its claim in the trial Court. Appellants at no time filed a document admitting the debt of N29 million

naira.

There is no doubt that both the learned trial Judge, Nwofor J, and the Court below relied on Exhibit Q. It is correct that when Respondent annexed Exhibit Q to his affidavit in support of the claim for judgment on the undefended list, it was not certified as a true copy of the proceedings in B Suit No. 0/121 M/92 Chief Francis Nzekwesi v. Inspector-General of Pol & ors.). However, Exhibit Q was exhibited as a certified document to the Counter-affidavit opposing the application by Appellants in the Court of Appeal for stay of execution pending determination of the appeal to that C court. It follows therefore that in so far as the Court of Appeal was concerned, Exhibit Q was a certified document properly before it.

Paragraph 5 of the Respondents counter-affidavit deposed as follows -

"5. That paragraph 8 (of the Appellant's affidavit in support of D their application in the Court of Appeal for stay of execution) is correct only to the extent that the Court ruled that in matters coming under the undefended list memorandum of appearance was not appropriate and entered judgement based on the admission of the defendants in Ex. Q. a E certified copy of same which is annexed and marked Ex. A."

Again on the same issue paragraph 5 of the Further, Further Affidavit of Mr. Cletus Okolo, Manager of 1st Appellant deposed to as follows -

"5. That paragraph of the counter-affidavit of the Plaintiff/ F Respondent is false. In further answer to the said paragraph 5, I hereby state that Ex. "A" attached to the counter-affidavit of the defendant was used in suit No. 0/121m/92 during the Enforcement of Fundamental Rights proceedings and the alleged admission therein was never contained in G applicant's notice of intention to defend the relevant suit. (i.e Suit No. 0/388/92)"

It is pertinent to observe that the above quoted paragraph of the counter-affidavit of Respondent was in respect of the opposition to the appellant's H application for a stay of execution. It was not concerned with the appeal challenging the decision of the trial Judge in the judgment under the undefended list. It seems to me therefore that the contention of Appellants about the admissibility of Exhibit Q is misconceived. In the circumstance,

the Court of Appeal was right to have acted on the admission made by the 2nd Appellant in Exhibit Q to the effect that he was indebted to the Respondent to the sum of N29 million naira. There is no merit therefore in issues 1 and 2, which I hereby resolve against the Appellants.

B Issue 3 is that Appellants did not controvert the averment of possession of immense wealth in the affidavit of the Respondent, and the finding of the Court of Appeal based on the affidavits that the 2nd Appellant was extremely wealthy. It was submitted that Appellants having denied in all the affidavits, sworn to by them in support of their application of the possession of immense wealth alleged, and that they would be crippled financially if made to pay the judgment debt, and would be unable to prosecute this appeal, the Court of Appeal was wrong to have dismissed their application.

D There is no doubt, and learned Counsel to the Appellants was on firm ground that the Court of Appeal misdirected itself in holding that Appellant did not controvert the allegation of its possession of massive wealth. The denial of such allegation is clearly averred in paragraphs 21 and 22 of the affidavit in support of the application for stay of execution in the Court of Appeal:-

I reproduce the relevant paragraphs -

F *"21. That before the Defendants can satisfy enbloc the said judgment debt of twenty nine million naira, it will mean disposing off (sic) all their assets and the exercise will not only stifle (sic) the defendants but will also deprive them of the resources for the prosecution of the said appeal.*

G *22. That there is economic recession in the country and the companies are finding it difficult to put their heads above water and the first defendant is not an exception."*

Again in paragraphs 7 and 8 of the further affidavit it was deposed to as follows-

H *"7. That paragraph 14 of the Counter-affidavit of the plaintiff is false. In further answer to the said paragraph 14, I hereby state that there was never a time the 2nd defendant/applicant floated an airline. Exhibit B attached to the Counter-affidavit of the defendant/respondents*

(sic) was fabricated for the purposes of this motion.

8. That paragraphs 15, 16, 17, 19 and 20 of the Counter-affidavit of the defendant/respondent (sic) are false and untrue. In further answer to the said paragraph 15, I hereby state that the evacuation of all the property of the 2nd defendant/applicant to the High Court, Onitsha, has further crippled the 2nd defendant/applicant financially who now lives on charity."

Appellants application for stay of execution, pending the determination of the appeal to that Court (Court of Appeal) was made under sections 16 and 18 of the Court of Appeal Act.

In considering the application, the Court of Appeal stated the well settled principles governing the grant of stay of execution pending appeal when it observed.

"The main question to be resolved in the instant case therefore is whether from the facts disclosed in the various affidavits in support of the application, the grounds of appeal filed against the verdict of the Court as well as the circumstances of the case, the applicants have made a case warranting the exercise of this Court's discretion in their favour. It is trite law the grant of stay of execution involves the exercise of discretion which involves a consideration of the changes of the applicant's ability to satisfy the judgment debt if the appeal is unsuccessful and the general rule to maintain the status quo between the parties are also important considerations - see Intercontractors Nig. Ltd v. UAC Ltd (1988) 2 NWLR (pt. 76) 303; Odufoye v. Fatoke (1975) 1 NMLR. 222 Shoga v. Musa (1975) 1 NMLR. 133; Wey v. Wey (1975) 1 SC. Balogun v. Balogun (1969) 1 All NLR. 349."

It is important and pertinent to mention that impecuniosity per se is not a valid ground for the grant of stay of execution of judgment. - See Balogun v. Balogun (supra). The fundamental principle that the judgment creditor is entitled to the fruits of his litigation can only be defeated by circumstances which render it inequitable for him to enjoy the benefit of his victory. An applicant for stay of execution bears the burden of showing that the grant of stay of execution will not result in the determination of the issue subject matter of the appeal; and there will be no injustice to the Respondent - See

1876 Franchal Ltd v. Nig. Arab Bank (2000) 6 KLR Karibi-Whyte JSC

LSDPC v. Citymark (W.A.) Ltd. (1998) 8 NWLR. 681, Vaswani v. Savalakh (1972) All NLR. 922, UBN v. Fajebe Foods (1994) 5 NWLR. 325, Obi v. Obi (1998) 4 NWLR. 51.

The admission by Appellants of their indebtedness to the Respondent in the sum of N29 million naira was critically examined by the Court of Appeal. The Court of Appeal after considering that the amount ordered by the Court of Appeal after considering that the amount ordered by the Court was that admitted owing, and was merely the balance from the N139 million granted, came to the conclusion that-

"The question therefore is whether it is equitable for this Court to grant a stay of execution of the portion of that judgment ordering the applicants to pay the N29 million which the applicants admitted owing the respondent while proceeding with the rest of the claim disputed. My answer to that question is definitely in the negative."

The above conclusion is clearly indicative that the Court of Appeal relied on the admission of Appellant of the indetedness and not the fact that the allegation of massive wealth was not controverted. I hold therefore that the alleged misdirection though established did not occasion any miscarriage of justice.

Issue No. 4 if a complaint that the Court of Appeal wrongly refused to grant the stay of execution when the record of appeal was already in the possession of the court. The decision of Fawehinmi v. Akilu (1990) 1 NWLR. (pt. 127) 450 was relied upon. The submission does not say why the stay of execution should be granted. Possession of record of proceedings per se is not conclusive as to the merits of the appeal. It also does not suggest that it is in the interest of justice necessary to grant the application. The most the possession of record of appeal does is that granting a stay of execution would not occasion undue delay, because the appeal is with the exchange of briefs of argument ripe for hearing.

On the whole the appeal fails and is hereby dismissed. If still pending before the Court of Appeal the appeal should be given accelerated hearing.

There is no order as to costs.

MOHAMMED JSC

I have had the preview of the opinion of my Lord the Chief Justice of Nigeria in the judgment which he has written and I agree with him that this interlocutory appeal has failed and ought to be dismissed.

Stay of execution is a discretionary remedy. An appellate court in considering an appeal against the refusal of a court to order for stay of execution should ensure that the successful litigants are not unduly deprived of the fruits of the judgment which they had obtained at the lower court even though that judgment is the subject of a pending appeal - Utilgas v. Pan African Bank (1974) 10 S. C. 109. The court below in this appeal considered the admission of the 2nd appellant in exhibit "Q" that N29 Million Naria was still outstanding in the transaction between the appellants and the respondent. From the facts, since the High Court, in the its judgment, ordered payment of only N29 Million out of the judgment debt I cannot see how one can fault the decision of the Court of Appeal in refusing to grant the application for a stay of the judgment of the High Court. Turning to the issue questioning the Court of Appeal's decision when the parties were yet to exchange their briefs of argument, it is pertinent to reproduce what the court below said in its ruling on the issue. It made the following observations:

"The grounds of appeal filed against the judgment of the court have nothing to do with the issue of the amount which the 2nd applicant admitted as the balance due to the transaction. While it is not proper, at this stage, to consider the merit or demerit of the appeal filed, since the record of appeal and the parties's briefs are not yet before this court, one may however say at stage that from the claim before the court, which was for a total sum of over N29 Million, it will not be out of place for a court to grant or order for the payment of N29 Million admitted out of the total sum claimed. That sum is less than the amount claimed and as such it is within the scope of what the court could award in the matter."

A ground of appeal alleging that the court awarding not what was claimed cannot therefore be said to raise any substantial issue for determination by this court".

It is relevant to point out, as this court has done in several decisions,

that the guiding principle in applying for a stay of execution of a judgment is for the applicant to show substantial reasons to warrant deprivation of the successful party of the fruits of his judgment. Where grounds exist suggesting a substantial issue of law to be decided on the appeal in an area B in which the law is to some extent recondite either side may have a decision in his favour. See Balogun v. Balogun (1969) 1 All NLR 349. However, where the appeal is against a judgment where the applicant for a stay had admitted liability in the trial court it is my strong view that such application C is without any merit and should be refused.

For these reasons, and the fuller reasons in the lead judgment this appeal has failed. I affirm the ruling of the Court of Appeal dismissing the application of the appellants for stay of execution of the judgment delivered by B.N. Nwofor J of Anambra High Court. I award the respondent D N10,000.00 costs against the appellants.

KATSINA-ALU JSC

E I have had the advantage of reading in draft the judgment of my learned brother Uwais, CJN. I entirely agree with it. There is nothing that I can usefully add.

F

EJIWUNMI JSC

Being privileged to have read in advance the judgment just delivered by my Lord Uwais CJN, I agree for all the reasons given that this appeal lacks merit. I also dismiss the appeal and abide with the other G orders made in the leading judgment.-

H