

SUPREME COURT OF NIGERIA

25TH MAY, 2001. SC. 9/2001

**CORAM:- A. B. WALI, M. E. OGUNDARE, A. I. IGUH, A. I.
KATSINA-ALU, A. O. EJIWUNMI, JJSC.**

CENTRAL BANK OF NIGERIA APPELLANT/APPLICANT
AND

1. SAIDU H. AHMED

2. LEADING LEATHER PRODUCTS LTD. RESPONDENTS

3. SAIDTALL SHOES

***APPEALS** - Interlocutory injunction - Balance of convenience in the present case - Lies with the applicant - And it is therefore entitled to the order of injunction sought (H 4)*

***APPEALS** - Interlocutory applications - Extension of time to appeal and leave to appeal - Conditions precedent to granting the order - The applicant has given good and substantial reasons for the delay - Thus fulfilling one of the conditions (H 2)*

***APPEALS** - Interlocutory applications - Leave to appeal - The courts duty in considering the grounds of appeal - Proposed in support of the appeal - Is limited to whether the grounds are substantial and reveal arguable grounds - And not the merit of such grounds (H 3)*

***COURT PROCESSES** - Abuse of - Where a party exercises his constitutional right to appeal - Even if he had applied for extension of time - To comply with the same court order - His conduct does not amount to abuse of court process (H 1)*

FACTS

The appellant/applicant, Central Bank of Nigeria, by motion on notice sought for certain orders from the Supreme Court amongst which were, an order granting extension of time to seek leave to appeal against

a Court of Appeal judgment and an order granting leave to appeal against the said judgment and an injunction to restrain the respondents from enforcing the judgment of the Federal High Court amongst other orders sought. The application was opposed by the respondents who filed a preliminary objection.

The background facts are that the respondents had sued the applicants at the trial Federal High Court claiming damages of over 10 million dollars and 50 million Naira. After the close of the evidence the trial judge gave judgment to the respondents to the tune of almost 10 million dollars while dismissing the N50,000.000 claim. Dissatisfied with the judgment an appeal was lodged at the Court of Appeal. The applicant also applied to the Court of Appeal for an order staying execution of the judgment of the Federal High Court. The application was opposed and the Court of Appeal in its ruling made an order of conditional stay of the judgment, the condition being that the applicant should deposit the judgment sum with the Deputy Chief Registrar of the court who will in turn pay it into an interest yielding account for the benefit of the successful party. The Bank having failed to appeal against the ruling within 14 days has now brought this application to the Supreme Court for its ruling thereon.

ISSUES FOR DETERMINATION

“(1) Whether the applicant has set forth good and substantial reasons for failing to seek leave to appeal within the prescribed period.

(2) Whether leave to appeal ought to be granted in favour of the Applicant.

(3) Whether the applicant is entitled to an order of injunction restraining the respondents from executing the judgment sought to be stayed by this appeal.”

HELD (Unanimously granting the application per lead ruling of **EJIWUNMI JSC**)

Preliminary Objection - Abuse of court processes

1. Now, there can be no doubt that the applicant in its position has the constitutional right to appeal against a ruling which it considered

unfavourable to it or wrong in law. Learned counsel for the respondents argued, that the interests of the respondents have been unduly affected by the decision to appeal against the ruling of the lower Court. However, it does not seem that that singular act ought to be sufficient to describe the application of the applicant as an abuse of process, having regard to the authorities I have referred to above.

In my respectful view the authorities envisaged a situation where the erring party was reopening issues already closed by the decision of the Court, and or generally pursuing the other party with multifarious actions in respect of the same subject matter to the annoyance of the other party. True enough it is a matter of concern for the respondents to find by this application that the applicant is now seeking to avoid the order of the lower Court. But it must also be borne in mind that the applicant has not been shown to have acted outside its constitutional right of appeal against an unfavourable decision. It is not in dispute that the applicant had applied to the Court below for extension of time to comply with the orders of the Court below. It is my respectful view that the conduct of the applicant in that regard cannot be said to come within the purview of the kind of act that ought to be classified as an abuse of the process of Court. True enough, the respondents' rights to the judgment sum might suffer some delay. The application would have been differently viewed if it was shown that the applicant had commenced a fresh action in respect of the same subject matter. I do not think the exercise of the statutory right of a party such as the applicant should not be stifled in the circumstances. The preliminary objection raised by the respondents is therefore hereby overruled.

(p. 1914 H)

Extension of time to appeal - Condition precedent

2. After due consideration of the reasons given by the applicant and recognising the discretionary power vested in the Court in this matter, it is my humble view having regard to the facts reviewed above, that the applicant has shown good and sufficient reason for the delay in filing this application. It must be remembered that before an application of this kind could succeed, the applicant must satisfy the Court that there are good

and satisfactory reasons for not filing his application timeously. It must also be shown that the applicant has good substantial and arguable grounds of appeal. It is settled that for this Court to exercise its discretionary power an application of this sort must be supported by an affidavit which must give sufficient reasons to explain the delay, the judgment or ruling of the Court below against which he is seeking to appeal, and the proposed grounds of appeal against the said judgment or ruling. See Ibodo & Ors. V. Enarofia & Ors. (1980) N.S.C.C. 195; University of Lagos v. Olaniyan (1985) 1 N.W.L.R. (pt. 1) 156. Obikoya v Wema Bank Ltd. (1989) 1 NWLR (Pt. 96) 157.

In the instant application, the applicant duly filed an affidavit wherein reasons were given for the delay in making this application. Also filed are the certified copy of the ruling of the Court below and the proposed grounds of appeal against the said ruling. As I have already considered the reasons given for the delay in filing the appeal timeously. (p. 1916 H)

E Leave to appeal - Courts duty

3. Now, the duty of the Court in the consideration of grounds of appeal proposed by an applicant to support an application for leave to appeal is limited to whether the grounds of appeal are substantial and reveal arguable grounds. It is not the business of the court at this stage to decide upon the merits of such grounds as are filed in support of the application.

I have carefully considered the grounds of appeal proposed by the applicant in relation to the ruling of the Court. I must in the circumstances uphold the submission made on behalf of the applicant that the two grounds of appeal disclose arguable grounds. I certainly take the view that the grounds do show a prima facie case that the Court below failed to exercise its discretion on correct principles. (p. 1918 H)

H Interlocutory injunction - Balance of convenience

4. In my humble view, I do not think that the Court should ignore or attempt to play down the colossal amount involved in this matter. While the amount involved in a transaction should not necessarily affect the

decision of a Court, it must be remembered that the discretionary power of a Court entitles it to consider the peculiar nature of each case. In my respectful view, the facts involved in this matter must compel caution in the exercise of its discretion. Though it is the settled principle that every Court remains unfettered in the exercise of its discretionary power, yet it seems to me that if the Court below had considered the application before it in the light of some of the authorities referred to above, it is my respectful view that the Court below might have decided the matter differently. In my respectful view, I think that in the determination of this prayer, I must consider judiciously and judicially the facts presented in the instant application. After a careful consideration of such facts which have been made available in this matter, it is my humble view that the balance of convenience and justice should be resolved in favour of the applicant. I will therefore, hold that the applicant ought to be granted its 4th prayer for an order of interlocutory injunction restraining the respondents by themselves, servants, their privies and or agents from enforcing the judgment of the federal High Court in suit No. FHC/L/CS/1306/95 delivered on the 25th January 2000, pending the determination of this appeal. The applicant, must in the event be prepared to give an undertaking in damages which will be set down presently. (p. 1925 F)

NOTABLE POINT OF INTEREST

EJIWUNMI JSC

1. Parties should not be visited with punishment for the mistake of their counsel

While I do not necessarily agree with that submission, yet it is desirable to be reminded that this Court has stated in several decisions that it is not right to visit the parties with punishment arising out of the mistakes or inadvertence or negligence of Counsel. It follows that in such a case, the Court is not estopped in the exercise of its discretion, which requires the court to exercise its powers judicially and judiciously. See Ibodo & ors. V. Enarofia & Ors. (supra) at p. 201. (p. 1919 E)

REPRESENTATION

A.Oyeyipo (with him A.O. Falade and S. Afolayan) for the Applicant.
A.R. Kadiri for the Respondents.

B CASES REFERRED TO

University of Lagos v. Olaniyan (1989)1 NWLR (Pt.1) 156
Obikoya v. Wema Bank Ltd. (1989)1 NWLR (Pt.95)
Okafor v. A.G. Anambra State (1991)6 NWLR (Pt.200) 659 at 681
Okorodudu v. Okoromadu (1977)3 SC.21

C Arubo v. Aiyeleru (1993)3 NWLR (Pt.280) 126 at 142

Wills v. Earl of Beauchamp (1886)11 p.59, p.63

Stephenson v. Garnett (1898)1 QB 67,CA

Spring Grove Services Limited v. Deane (1972)116 S.J. 844

D Ibodo & Ors. v. Enarofia & Ors. (1980) N.S.C.C. 195

Holman Bros.(Nig.) Ltd. v. Kigo (Nig.) & Anor. (1980)8-11 SC.43

G.B.A. Akiyede v. The Appraiser (1971)1 ALL N.L.R. 162 at 166

Doherty v. Doherty (1964)1 ALL N.L.R. 299

E Tunji Bowaje v. Moses Adediwura (1976)6 SC.143 at 147

Vaswani Trading Company v. SAVALAKH & Company (1972) N.S.C.C.
692

Wilson v. Church No.2 (1879)12 Ch. D. 454 at 460

F

LEAD RULING BY EJIWUNMI JSC

By a motion on notice dated 12th January 2001, brought pursuant to Order 2 Rule 31, Order 6 Rule 2 and Order 8 Rule 12 of the Supreme Court Rules (As amended) and section 233 (3) of the 1999 Constitution of the Federal Republic of Nigeria, the applicant, namely, the Central Bank of Nigeria, is praying for the following orders:

G (1) An Order granting extension of time to seek leave to appeal against the decision of the Court of Appeal (Lagos Division) dated 11th
H December, 2000 in Appeal No. CA/L/178/2000.

(2) An Order granting leave to the Applicant to appeal against the decision of the Court of Appeal (Lagos Division) dated 11th December, 2000 in Appeal No. CA/L/178/2000.

(3) An Order extending time within which the Applicant can file its Notice of Appeal against the decision of the Court of Appeal dated 11th December 2000 in Appeal No. CA/L/178/2000.

(4) An Order of interlocutory injunction restraining the respondents by themselves or through their servants, agents, privies whomsoever from enforcing the judgment of the Federal High Court howsoever in Suit No. FHC/L/CS/1306/95 pending the determination of this Appeal.

(5) And for such further or other orders as the Honourable Court may deem fit to make in the circumstances.

In support of the application a 16 paragraph affidavit was filed and deposed to by one Olatubosun Kojogbola, male, who described himself as a litigation clerk in the Chambers of Abdullahi Ibrahim & Co, counsel to the applicant. In view of the nature of this application, particularly as the respondents have filed a preliminary objection against the consideration of the application on its merit, it is, in my respectful view, necessary to give some background facts that led to the filing of this application.

It would appear from the records attached to this application that the respondents to this application namely, (1) Saidu Ahmed (2) Leading Leather Products Ltd. and (3) Saidtall Shoes Ltd. by their amended Statement of Claim, dated 11th December 1996, commenced action against the applicant, namely, the Central Bank of Nigeria, for the following reliefs:

"SPECIAL DAMAGES:

(i) *A refund of the balance of \$109,852.01, being the unutilised transaction commission held for plaintiff's account by the defendant.*

(ii) *Interest on the said sum of \$109,852.01 at the rate of 21% per annum with effect from September 30th 1991 till final judgment.*

GENERAL DAMAGES:

(i) *\$1,000,000 (One million dollars only) for deprivation suffered, loss of leverage and loss of profits the plaintiffs would have earned on the \$109,852.01 unlawfully held from him by the defendant, and financial embarrassment (sic) and dislocations in business suffered by the plaintiffs.*

(ii) *N50,000,000.00 (Fifty Million Naira only) for the cancellation of the registration of the 1st plaintiff's company, Mercury Assurance*

Company Ltd., which has resulted in loss of income, severe embarrassment (sic) and the bringing to public odium the plaintiff and his standing in the business community as a clear fallout of the defendant's action against the 1st plaintiff.

B *Whereof the 2nd and 3rd plaintiffs, respectively, claim from the defendant:*

(i) \$4,306,372.73 (*Four Million, three hundred and six thousand, three hundred and seventy-two dollars and seventy-three cents only*) being the five years profit lost by the 2nd plaintiff which it would have earned if it was not jeopardised by the defendant's action as reflected in the feasibility study reports done by Delloite Haskins & Sells International Limited, a world acclaimed firm of management consultants as contained in page 21, section 8.1 and page 35 appendix ix of their feasibility report on the 2nd plaintiff.

(ii) \$4,034,150 (*Four million, thirty-four thousand and one hundred and fifty dollars only*) being the five years profit lost by the 3rd plaintiff which it would have earned if it was not jeopardised by the defendant's action as reflected in the feasibility study reports done by Delloite, Haskins & Sells International Limited, a word acclaimed firm of Management consultants as contained in page 19, section 8.1, and page 31, appendix of their feasibility report on the 3rd plaintiff."

F Following the order for pleadings, these were duly filed and exchanged. The suit was thereafter heard by the learned trial judge, Odunowo J, of the Federal High Court. At the trial, both parties called evidence in support of their respective cases. From what can be gathered from the evidence led for the respondents their complaints which led to the commencement of this action may be put briefly thus: The 1st respondent, who described himself as the promoter and majority shareholder in the 2nd and 3rd respondents, claimed that in March, 1991, he applied to the debt conversion committee of Central Bank of Nigeria, to redeem some Nigerian external debt instruments. According to the witness, he claimed that the transaction was for the purpose of investing the proceeds of the redemption in the 2nd and 3rd respondents. The investment in the 2nd and 3rd respondents was meant for the purpose of leather processing and shoe

manufacturing. It is also claimed that after he had duly submitted the forms required by the Central Bank to take part in the debt conversion, he also submitted two feasibility reports prepared by the investment consulting firm of Delloite, Haskins & Sells to the debt conversion committee of the Central Bank. The reports were submitted to the applicant at its request so that the applicant could evaluate the profitability of the business proposed by the 1st respondent in respect of the 2nd and 3rd respondents. Copies of these reports were also submitted to the Union Bank and the Nigerian Export-Import Bank (NEXIM). This was because the reports were to form the basis for approving the projects. According to the 1st respondent, the Union Bank and NEXIM approved of the projects proposed for the 2nd and 3rd respondents by the 1st respondent. B C

The 1st respondent, it would appear, claimed that he duly notified the applicant of the position. A few days after such notification, approval was given to the respondent's application to participate in the debt conversion auction which took place on the 30th August 1991. The 1st respondent claimed that he participated in the debt conversion and won. He also took part successfully in the subsequent auction in May 1992. And he claimed that as a result he cancelled at the two auctions Nigeria Promissory Notes with the face value of 3.7 million U.S. Dollars. He then claimed that after the 1st auction in August 1991, as directed by the applicant, he deposited the sum of \$164,925 into the applicant's account in Morgan Guarantee Trust Company, New York. That amount represented 2.5% of the instruments cancelled. D E F

The 1st respondent also claimed that after each cancellation, his account was duly debited. It is claimed that by May 1992, and after the transactions he carried out with the applicant in respect of the auction, he had in his account the sum of \$109,852.01. It was this sum of money which the 1st respondent asked the applicant to pay to him. But the defendant did not pay the money to him. And as the applicant failed to pay the money to the 1st respondent, he was unable to meet his commitment with the Union Bank and NEXIM. He claimed also, that as the applicant did not pay his money to him, he was also unable to pay his own expected equity contribution in the Mercury Assurance Company Ltd., a legacy G H

bequeathed to him by his late father. Eventually the licence of the Mercury Assurance Company was cancelled in January 1996.

According to the 1st plaintiff, he suffered several losses and reversals in fortune following the refusal of the applicant to pay his money standing in the sum of \$109,852.01, hence he commenced the action.

The above represent the bare evidence of the 1st respondent. In the fact of the opposing evidence of the applicant, the learned trial judge, made the following orders:-

“(1) The 1st plaintiff shall be paid his balance of unutilised transaction commission in the sum of \$109,852.01 together with interest at the rate of 21% per annum with effect from September 30th 1991.

(2) The 1st plaintiff is hereby awarded the sum of \$100,000 (One hundred thousand dollars) as general damages.

(3) The claim for N50,000,000 (Fifty Million Naira) as General damages for cancellation of the registration of the 1st plaintiff’s insurance company is hereby dismissed.

(4) The 2nd plaintiff is hereby awarded the sum of \$4,306,372 (sic) (Four million, three hundred and six thousand and seventy-two dollars, and seventy-three cents) as special damages for five years loss of profit and

(5) The 3rd plaintiff is hereby awarded the sum of \$4,034,150 (Four million, three hundred and six thousand and fifty dollars) as special damages for five years loss of profit.”

It must be noted that for the purposes of this application the relevant orders made by the Federal High Court are as follows:-

“(1) The defendant (applicant) should refund the sum of \$109,852.01 unutilized transaction commission to the 1st respondent with interest at 21% per annum from 21st September, 1991.

(2) General damages of \$100,000 in favour of the 1st respondent.

(3) Special damages of \$4,306,372.73 in favour of the 2nd respondent.

(4) Special damages of \$4,034,150.00 in favour of the 3rd respondent.”

Being dissatisfied with the said decision and orders of the learned judge of the Federal High Court, Lagos Division, an appeal was lodged against the judgment. Pursuant thereto the applicant caused the record of appeal to be compiled shortly after the judgment, and had it transmitted to the Court of Appeal.

For the other events that took place in this matter and which eventually led to the filing of this application, I will refer to the affidavit sworn to by Olatunbosun Kojogbola, male a litigation clerk in the chambers of Abdullahi Ibrahim & Co., Solicitors to the applicant. It reads inter alia, thus:-

“1. By Motion on Notice dated 9th May 2000, the Applicant applied to the Court of Appeal Lagos Division for an order staying execution of the judgment of the Federal High Court. A copy of the said motion on notice is annexed hereto and marked Exhibit “OK 3”.

2. The Respondents filed a counter affidavit to the said motion on notice to which the Applicant herein also filed further affidavit. The counter affidavit is annexed to this affidavit as Exhibit “OK 4” while the further affidavit is also annexed hereto and marked Exhibit “OK 5”.

3. By 30th October 2000 the Applicant herein had filed and served its brief of argument for the substantive appeal at the Court of Appeal.

4. On 1st November 2000, the Court of Appeal Lagos Division heard arguments on the motion for stay of execution after the Respondents’ counsel had rejected a proposal from the court to the effect that the appeal be given accelerated hearing rather than the parties dissipating energy on the motion for stay of execution.

5. By ruling dated 11th December 2000 the Court of Appeal Lagos Division made an order of conditional stay of execution of the judgment of the Federal High Court, the condition being that the Applicant deposits the judgment sum with the Deputy Chief Registrar of the Court who will in turn pay same in an interest yielding account for the benefit of the successful party. A copy of the ruling of the court below is annexed hereto as Exhibit “OK 6”.

6. Upon the delivery of the ruling of the Court of Appeal Lagos, the Applicant was duly informed but due to the Christmas, Sallah and

New Year festivities/public holidays no decision could be immediately taken on the next line of action.

7. Furthermore, our chambers went on end of year vacation from Thursday 21st December 2000 and only re-opened on Thursday 4th January 2001.

8. Subsequently upon our return from the end of year break, we got instructions from the Applicant to appeal the decision of the Court of Appeal since it was felt on further consideration that the judgement sum was safer with the Applicant being the banker to the Federal Government and every other bank in the country.

9. I am informed by Adetunji Oyeyipo of counsel handling this appeal and I verily believe him as follows:

a. That being an interlocutory decision of the court below, the Appeal ought to have been filed within 14 days of delivery of the ruling..

b. That he has prepared a proposed Notice of Appeal and same is annexed to this affidavit and marked Exhibit "OK 7".

c. The grounds of appeal in the proposed Notice of Appeal are grounds of mixed law and facts for which leave of this Honourable Court or the court below is necessary.

d. That the appeal is against the order of conditional stay granted by the lower court.

e. That if an injunction restraining the Respondents from executing the judgment of the Federal High Court dated 25th January 2000 pending the determination of this appeal is not granted, the respondents will take steps to execute the said judgment and the decision of this Honourable Court in this appeal if successful will be rendered nugatory.

f. The Respondents certainly do not have the means to refund the judgment sum if paid to them and this appeal succeeds.

g. That the Applicant is ready and in a position to give appropriate guarantee to pay the judgment sum with interest in case its appeal is unsuccessful.

h. Although the Respondents have been served with the appellant's brief in the substantive appeal before the Court below since 1st November 2000, they are yet to file their brief and they are grossly out

of time.”

As I have noted above the 1st respondent on behalf of the other respondents raised a preliminary objection to this application. By their motion on notice dated 19th February 2001 and on 20/2/2001 filed to that effect the respondents sought for:

“(1) *An order dismissing or alternatively striking out the Appellants/Respondents Motion on Notice dated 12th January, 2001 and the briefs of argument based thereon on the grounds set out herein below.*

(2) *And for such further or other orders as the Honourable Court may deem fit to make in the circumstances.*

GROUND FOR APPLICATION

(i) *That the Appellant/Respondent’s aforesaid motion contravenes the provisions of section 233(3) of the Constitution of the Federal Republic of Nigeria, 1999.*

(ii) *That the said motion is incompetent and is an abuse of the process of this Honourable Court in that the Appellant had already accepted the decision of the Court of Appeal to which it had filed a motion for time within which to comply with the said decision...*

In accordance with the rules of this Court, the parties filed their respective briefs of argument.

It is pertinent to observe that in the said briefs the respondents did not consider it necessary to set out any issue in their own brief. They were content to react to the issues raised in the applicant’s brief which read thus:-

“(1) *Whether the applicant has set forth good and substantial reasons for failing to seek leave to appeal within the prescribed period.*

(2) *Whether leave to appeal ought to be granted in favour of the Applicant.*

(3) *Whether the applicant is entitled to an order of injunction restraining the respondents from executing the judgment sought to be stayed by this appeal.*

At the hearing of this application, A. R. Kadiri Esq., of learned counsel to the respondents commenced his argument by submitting that the applicant was in contravention of the provisions of S.233(3) of the

1999 Constitution, and later changed to say that he was no longer pressing his argument on the contravention of section 233(3) of the 1999 Constitution. He however pressed on with his other ground raised with regard to the preliminary objection against the application. The court B then decided to give its ruling when the ruling on the main application is given.

On issue (1), the contention made for the applicant in its brief and his oral argument before us is that there are good reasons for its failure to appeal within time and that there are substantial points of law to be C canvassed at the hearing of the appeal. And on that latter point, learned counsel for the applicant contends that it is therefore desirable for the appeal to be heard on the merits. It is his further submission that the applicant does not have to satisfy the Court at this stage that the appeal, if leave is granted, D will be successful. All that is needed, argued learned counsel for the applicant, is that the grounds of appeal contain substantial and arguable grounds which the court ought to examine on their merits. In support of this contention reference was made to the following cases:- (1) University of La- E gos v. Olaniyan (1989) 1 NWLR (Pt. 1) 156 and (2) Obikoya v. Wema Bank Ltd. (1989) 1 NWLR (Pt. 95).

The answer of the respondents in their respondents' brief to the question raised by the applicant in its issue (1) is in the negative. It is F further argued for the respondents that the applicant had neither disclosed any good reasons for its failure to appeal within time, nor has it shown any substantial points of law to be canvassed at the hearing of the appeal.

In view of the argument of learned counsel for the parties with regard to the reasons given by the applicant for the delay in filing this G appeal timeously, I think it is desirable to set down the reasons given as disclosed in the affidavit sworn to in support of the application. The affidavit of Olatunbosun Kajogbola, a litigation clerk in the chambers of Abdullahi Ibrahim & Co. Counsel to the applicant, reads, inter alia thus:- H
"Para. 9: The Court of Appeal Lagos Division on 1st November 2000, heard arguments on the motion for stay of execution after the respondents' counsel had rejected a proposal from the court to the effect that the appeal be given accelerated hearing rather than the parties

dissipating energy on the motion for stay of execution.

Para. 10: By ruling dated 11th December 2000 the Court of Appeal Lagos Division made an order of conditional stay of execution of the judgment of the Federal High Court, the condition being that the applicant deposits the judgment sum with the Deputy Chief Registrar of the Court who will in turn pay same in an interest yielding account for the benefit of the successful party. A copy of the ruling of the court below is annexed hereto as Exhibit "OK 6".

Para 11: Upon the delivery of the ruling of the Court of Appeal Lagos, the applicant was duly informed but due to the Christmas, Sallah and New Year festivities/public holidays no decision could be immediately taken on the next line of action.

Para. 12: Furthermore, our chambers went on end of year vacation from Thursday 21st December 2000 and only re-opened on Thursday 4th January 2001.

Para. 13: Subsequently on our return from the end of year break, we got instructions from the applicant to appeal the decision of the Court of Appeal since it was felt on further consideration that the judgment sum was safer with the applicant being the banker of the Federal Government and every other bank in the country."

On the other hand the respondents by their own counter affidavit sworn to by Saidu H. Ahmed, the 1st respondent in opposing this application and in order to refute the reasons given by the applicant for the delay in commencing the appeal proceedings in this matter, deposed inter-alia, thus:-

"Para. 9: The appellant accepted the aforesaid Ruling of the Court, and pursuant thereto, the appellant filled an application dated 3rd January, 2001 to request for extension of time within which it would pay the judgment debt to the Deputy Chief Registrar as directed by the Court of Appeal.

A Certified True Copy of the Appellant's Motion on Notice is H attached hereto as Exhibit SA I.

Para. 10: The appellant had deposed on oath in paragraph 5(d) of the affidavit in support of their motion to the Court of Appeal (Exhibit

SA I herein) as follows:-

5(d) “that he verily believe that if time is extended for the applicant to comply with the order of the Court (of Appeal), the applicant is ready and willing to deposit the said money with all accrued interest from the last day of the period for complying with the order.”

Para. 11: The aforesaid Motion on Notice and the substantial appeal is still pending for hearing at the Court of Appeal.

Para. 12: The appellant’s application to this Honourable (sic) is an abuse of the process of Court.

Para. 13: That the appellant has not given any substantial reasons to warrant the order of this Honourable Court granting it extension of time to file the Notice of Appeal.

Para. 14: The appellant had lied on oath (perjury) to this Honourable Court by deposing falsely in paragraph 12 of the affidavit in support of their Motion in this Court that their chambers was not re-opened until 4th January, 2001, whereas they were opened and indeed filed the motion to the Court of Appeal (Exhibit SA I herein) on 3rd January 2001.

Para. 15: That public holidays were declared on 25th and 26th December 2000 only and the appellant were operating through out December, 2000 and had so many days to file notices of Appeal if they were actually desirous of doing so.”

Before considering the argument of counsel in respect of the application, their argument with regard to the preliminary objection will be considered at this juncture. I will thereafter give my ruling thereon.

As already noted above, learned counsel for the respondents, having abandoned the first limb of the grounds for their preliminary objection against the application, that limb is accordingly struck out.

With regard to the second limb of the grounds of objection against this application, the contention of the respondents is that the application is not only incompetent, but it is also an abuse of the process of the Court. During the hearing learned counsel for the respondents argued in consonance with what had been set out in their Motion on Notice of preliminary objection against the application. This is to the effect that the applicant had already accepted the decision of the Court of Appeal and had filed in

that Court a motion for time within which to comply with the said decision. He also contended that the variation to pay the money to the Central bank would be oppressive.

In his reply, learned counsel for the applicant submitted that there is nothing wrong with appealing against an order of the lower Court, even if the orders of the Court have been complied with. B

It is manifest from paragraphs 10, 11 and 12 of the affidavit of Saidu H. Ahmed, and reproduced above, that the complaints of the respondents against this application are as stated in the said paragraphs of Saidu H. Ahmed's affidavit. As the applicant has not in any of its affidavit filed in respect of this application denied the facts deposed to in the said affidavit, it must be understood that the applicant filed the said motion on notice as alleged by the respondents. C

The question that therefore falls for determination is whether it is an abuse of the process of Court for the applicant to now seek to appeal against the ruling and orders of the lower Court after it had sought for time from that Court to comply with the orders of the said Court. D

It must be noted that in the consideration of this question it is admitted by the respondents that the said Motion on Notice referred to, and which is the ground for this objection is still pending before the Court below. E

There is no doubt that all Court take a firm stand against the abuse of the processes of Court. But before a party is admonished, it must be established that the erring party had abused the process of Court by improper use of the processes of Court. Action which amounts to an abuse of the process of Court may vary but it ought to fall generally within the kind identified in the case of Okafor v. A. G. Anambra State (1991) 6 NWLR (Pt. 200) 659 at 681, where Karibi-Whyte, JSC said:- F

"I venture to state quite concisely and clearly that an abuse of the process of the Court is only possible by improper use of the issue of the judicial process or process already issued to the irritation and annoyance of the opponent... it is the law that multiplicity of actions on the same matter may constitute an abuse of the process of the Court. But this is so only where the action is between the same parties with respect G

to the same subject matter. The Court has a duty in such a situation to interfere to stop an abuse of its process. See Okorodudu v. Okoromadu (1977) 3 SC. 21.”

B Bearing in mind that a Court has a duty to intervene to stop an abuse of its process, it is in my humble view pertinent to refer to the observation of Nnaemeka-Agu, JSC in Arubo v. Aiyeleru (1993) 3 NELR (Pt. 280) 126 at 142, where his Lordship said:-

C “Now inherent jurisdiction or power is a necessary adjunct of the powers conferred by the Rules and is invoked by a Court of law to ensure that the machinery of justice is duly applied and properly lubricated and not abused. One most important head of such inherent powers is abuse of process, which simply means that the process of the courts must be used bona fide and properly and must not be abused. Once a D Court is satisfied that any proceeding before it is an abuse of process it has the power, indeed the duty, to dismiss it. See on this, Wills v Earl of Beauchamp (1886) 11 p. 59, p. 63. It has been held in numerous cases that it is an abuse of process of the Court for a suitor to litigate again E over an identical question which has already been decided against him even if the matter is not strictly *resjudicata*. See Stephenson v. Garnett (1898) 1 QB 67, CA; also Spring Grove Services Limited v. Deane (1972) 116 S.J. 844.”

F With regard to the instant prayer of the respondents to declare the application of the applicant as an abuse of process, may I give the facts briefly again. It is common ground that the applicant was ordered by the Court below to pay over certain sums of money in favour of the respondents. The applicant then sought leave of the Court below for time to G comply with the orders made against it. Before that Motion on Notice was heard by the lower Court, the applicant apparently reconsidered its position, and therefore sought for the leave of this Court to appeal against the ruling and orders of this Court. That step taken by the applicant is what H the respondents would want this Court to declare as an abuse of process of this Court. **Now, there can be no doubt that the applicant in its position has the constitutional right to appeal against a ruling which it considered unfavourable to it or wrong in law. Learned counsel for**

the respondents argued, that the interests of the respondents have been unduly affected by the decision to appeal against the ruling of the lower Court. However, it does not seem that that singular act ought to be sufficient to describe the application of the applicant as an abuse of process, having regard to the authorities I have referred to above. B

In my respectful view the authorities envisaged a situation where the erring party was reopening issues already closed by the decision of the Court, and or generally pursuing the other party with multifarious actions in respect of the same subject matter to the annoyance of the other party. True enough it is a matter of concern for the respondents to find by this application that the applicant is now seeking to avoid the order of the lower Court. But it must also be borne in mind that the applicant has not been shown to have acted outside its constitutional right of appeal against an unfavourable decision. It is not in dispute that the applicant had applied to the Court below for extension of time to comply with the orders of the Court below. It is my respectful view that the conduct of the applicant in that regard cannot be said to come within the purview of the kind of act that ought to be classified as an abuse of the process of Court. True enough, the respondents' rights to the judgment sum might suffer some delay. The application would have been differently viewed if it was shown that the applicant had commenced a fresh action in respect of the same subject matter. I do not think the exercise of the statutory right of a party such as the applicant should not be stifled in the circumstances. The preliminary objection raised by the respondents is therefore hereby overruled. C D E F G

I now turn to consider the argument of counsel in respect of the application. I think it is right to observe that the negative answer given by the learned counsel to the respondents to the issue raised by the appellant was predicated on some of the facts deposed to in the paragraphs of the affidavit set out above. Upon those facts, the submission of learned counsel for the respondents is therefore to the effect that the applicant did not give enough reasons to justify the delay in making this application. In the H

view of learned counsel for the respondents, the applicant had enough time to file the application from when the ruling of the Court of Appeal was delivered. And that the excuse given that the Christmas, New Year and Sallah holidays that occurred the latter part of last year and early this year caused the delay in filing the application is unsatisfactory and should therefore be disregarded in the consideration of this application.

From the affidavit evidence of the applicant it is clear that the delay in filing this application was according to the applicant caused by the various holidays that occurred during the relevant period after the ruling of the Court of Appeal was delivered on the 11th of December 2000. In my respectful view I do not think that the reason given by the applicant for the delay in filing the application should be treated so lightly as suggested for the respondents by their learned counsel. I think it must be noted in this instance that the functional working of the Courts at that period of the year and the commencement of the new year cannot be as normal as during other periods. That apart, it was deposed for the applicant that the chambers of its learned counsel was closed during the period under consideration, and it opened again on the 4th of January 2001. The assertion that the chambers of the applicant was opened before the 4th of January 2001 was challenged in a paragraph of the affidavit deposed to by the 1st respondent. The basis of the challenge being that the applicant's counsel filed an application in this matter on the 3rd January 2001. That may well be so, but there is nothing to suggest or even prove on that bare fact that the chambers of applicant's counsel was not on vacation as claimed.

In addition to the fact of the intervention of the holidays, it is also the case of the applicant that while its lawyers were preparing to seek to take action in the Court of Appeal to vary its ruling in respect of the order made by that Court that the judgment sum be paid to the Deputy Chief Registrar of that Court, the applicant instructed its counsel that an appeal rather be filed against the ruling to this Court. The learned counsel for the applicant therefore proceeded with the present action for which leave is being sought to perfect the applicant's appeal.

After due consideration of the reasons given by the applicant and recognising the discretionary power vested in the Court in this

matter, it is my humble view having regard to the facts reviewed above, that the applicant has shown good and sufficient reason for the delay in filing this application. It must be remembered that before an application of this kind could succeed, the applicant must satisfy the Court that there are good and satisfactory reasons for not filing his application timeously. It must also be shown that the applicant has good substantial and arguable grounds of appeal. It is settled that for this Court to exercise its discretionary power an application of this sort must be supported by an affidavit which must give sufficient reasons to explain the delay, the judgment or ruling of the Court below against which he is seeking to appeal, and the proposed grounds of appeal against the said judgment or ruling. See Ibodo & Ors. V. Enarofia & Ors. (1980) N.S.C.C. 195; University of Lagos v. Olaniyan (1985) 1 N.W.L.R. (pt. 1) 156. Obikoya v Wema Bank Ltd. (1989) 1 NWLR (Pt. 96) 157. B
C
D

In the instant application, the applicant duly filed an affidavit wherein reasons were given for the delay in making this application. Also filed are the certified copy of the ruling of the Court below and the proposed grounds of appeal against the said ruling. As I have already considered the reasons given for the delay in filing the appeal timeously, I will now consider whether the proposed grounds of appeal disclose substantial and good grounds of appeal. E
F

The grounds of appeal being only two are set out as hereunder:-

1. *“The court below erred in mixed law and facts when it ordered the applicant to deposit the judgment sum with the Deputy Chief Registrar of the court who will then pay it into an interest yielding account to the benefit of the party who is successful in the appeal as a condition for staying the execution of the judgment of the Federal High Court dated 25th January 2000.* G

PARTICULARS

(i) *The clear evidence admitted by both parties is that applicant remains at all times in a position to pay the judgment sum.*

(ii) *The applicant, as the banker to all banker in Nigeria remains the best safeguard for the judgment sum bearing in mind the alarm-*

ing rate which banks become distressed in Nigeria.

(iii) Counsel had stated at the court below that applicant was prepared to guarantee the payment of the judgment sum with interest in the event that the appeal is successful.

B (iv) In the entire circumstances of the case as contained in the affidavit evidence before the court below, the court below did not exercise its discretion judicially and judiciously.

2. The court below erred in mixed law and fact when it held per Oguntade JCA, thus:

C “I am unable to accept that the Respondents will be unable to refund the judgment debt in the event the appeal succeeds, if paid to them now. I am impressed by the guarantee posted, on the respondents’ behalf of Union Merchant Bank Ltd.”

D

PARTICULARS

(i) The unchallenged evidence before the court below is that the respondents are indeed very broke and have no assets and have in fact E not been in business in the past few years.

(ii) The circumstances surrounding the issuance of the guarantee by Union Merchant Bank Ltd. in favour of the respondents as stated in the further affidavit filed on behalf of the applicant show clearly that F the guarantee is very suspect.

(iii) The court below virtually ignored the further affidavit deposed to on behalf of the applicant which further affidavit contains facts which show that the guarantee issued by the Union Merchant Bank Ltd. is most unreliable.”

G The learned counsel for the applicant in the brief filed in support of the application and his oral submission before this court has argued that the grounds of appeal proposed for challenging the ruling of the Court below disclose substantial grounds of appeal. He therefore urged that the H Court should so hold. Contrary to that submission of learned counsel for the applicant, it is contended for the respondents by their learned counsel A. A. Kadiri Esq., that the grounds of appeal disclosed no arguable grounds.

Now, the duty of the Court in the consideration of grounds of

appeal proposed by an applicant to support an application for leave to appeal is limited to whether the grounds of appeal are substantial and reveal arguable grounds. It is not the business of the court at this stage to decide upon the merits of such grounds as are filed in support of the application. See Ibodo's case (supra); University of Lagos & Anor. v. Olaniyan (supra); Obikoya v. Wema Bank (supra); Holman Bros (Nig.) Ltd. v. Kigo (Nig) & Anor (1980) 8-11 SC 43.

I have carefully considered the grounds of appeal proposed by the applicant in relation to the ruling of the Court. I must in the circumstances uphold the submission made on behalf of the applicant that the two grounds of appeal disclose arguable grounds. I certainly take the view that the grounds do show a prima facie case that the Court below failed to exercise its discretion on correct principles.

Before concluding, on this issue, I think it is desirable to advert to the contention made for the respondent that the learned counsel for the applicant did not appear to have acted diligently in the pursuit of this appeal. While I do not necessarily agree with that submission, yet it is desirable to be reminded that this Court has stated in several decisions that it is not right to visit the parties with punishment arising out of the mistakes or inadvertence or negligence of Counsel. It follows that in such a case, the Court is not estopped in the exercise of its discretion, which requires the court to exercise its powers judicially and judiciously. See Ibodo & ors. V. Enarofia & Ors. (supra) at p. 201; G.B.A. Akiyede v. The Appraiser (1971) 1 ALL N.L.R. 162 at 166; Doherty v Doherty ('964) 1 ALL N.L.R. 299; Tunji Bowaje v. Moses Adediwura (1976) 6 S.C. 143 at 147.

It follows therefore that having regard to the observation made above and the reasons given by the applicant for the delay which I have held are not unreasonable, the alleged conduct of its counsel in the management of the case cannot be employed by itself to affect the interest of the applicant in respect of this application. Having also considered and reached the conclusion that the grounds of appeal reveal arguable and substantial grounds, it is my respectful view that leave ought to be granted to the applicant to appeal against the ruling of the Court below dated the 11th

day of December, 2000.

From what I have said above issues (1) and (2) are therefore resolved in favour of the applicant.

What now remains to be considered is whether the applicant is
B entitled to an order of injunction restraining the respondents from executing the judgment of the trial High Court.

In connection with this question, I think it bears restating the order of the court below. By the order made pursuant to its ruling, that court
C ordered as follows:-

“A stay of execution is granted on the condition that the applicant deposit with the Deputy Chief Registrar of this Court within 21 days from the date of this order the judgment debt. The Deputy Chief Registrar is to cause the money when deposited to be placed in an interest
D yielding account so that the party that ultimately wins on the appeal may collect the money with the interest.”

The applicant by the 4th prayer of its application is therefore seeking an order of interlocutory injunction restraining the respondents by themselves or through their servants, agents, privies whomsoever from enforcing the judgment of the Federal High Court however in suit No. FHC/L/CS/1306/95 pending the determination of this appeal. Though I have earlier adverted to that judgment of the Federal High Court, and which was
F the subject of the order made by the Court in the course of this judgment, I do not think much harm is done if it is re-stated again. For this purpose I quote paragraph 3 of the affidavit deposed to by Olatunbosun Kajogbola, in support of this application. It reads:

“Para: 3: On the 25th January 2000, the Federal High Court
G delivered judgment against the applicant herein in the following terms:

(a) The defendant (Applicant herein) should refund the sum of \$109,852.01 unutilized transaction commission to the 1st Respondent with interest at 21% per annum from 21st September 1991.

H (b) General damages of \$100,000 in favour of the 1st Plaintiff (1st respondent herein).

(c) Special damages of \$4,306,372.73 in favour of the 2nd plaintiff.

(d) *Special damages of \$4,034,150.00 in favour of the 3rd plaintiff.*”

The applicant’s argument in support of this order may be put thus. First, he argued that as the applicant is the Banker of all Bankers, the judgment sum if ordered to be kept with it will be undoubtedly safe. That position cannot be said unequivocally of the respondents if the orders made by the court below are allowed to stand. It is also argued for the applicant that the underlying feature of this case is that if the judgment sum is paid as ordered by the Court below, and the res which is the subject of the appeal became unavailable then, this Court would be foisted with a situation of complete helplessness. In the event, it is argued, any order or orders the Court might make would be rendered nugatory.

The argument of learned counsel for the respondents is, of course, for the maintenance by this Court of the orders made by the Court below. He further argued that the applicant has not given such facts as would persuade the Court to exercise its discretionary power in its favour. He therefore urged that the prayer of the applicant for interlocutory injunction be refused.

In the resolution of this question, it is apparent that two principles are involved. The first is the long settled principle that the victorious party should to be denied of the fruits of his victory. And the other principle being that where it is evident that the party who has lost in the lower court is challenging upon very good ground, the order made in favour of the victorious party before an Appellate Court, then an order for the stay of the execution of that judgment may be made. It is in my respectful view apposite to revisit the case of Vaswani Trading Company v. SAVALAKH & Company (1972) N.S.C.C. 692 for the profound dictum of Coker JSC at pages 696 – 697; where His Lordship said thus:-

“More important, however, is the duty of this Court, as indeed that of other Courts, to ensure that its orders are not nugatory. The applicants are exercising their undoubted right of appeal. The respondents are well aware of this and the applicants are certainly entitled so to exercise that right as long as they do so in accordance with the provisions of the statute conferring the right. If they in transgression of those

terms go outside them or any one of them, they are not exercising an undoubted right for all rights of appeal are statutory and no question of abuse can arise. There has been no suggestion before us that the present applicants were acting out side the scope or terms of the statute and it is manifestly the duty of the court to protect the exercise of that right and to ensure that it own orders in that connection at any stage of the lawful and regular proceedings are not rendered useless by the action or conduct of either of the parties. In Wilson v. Church No. 2 (1879) 12 Ch. D. 454 at 460, Cotton, L.J. stated the principles thus:-

“That possibly was rather novel, but it was right, in my opinion, to make that order to prevent the appeal, if successful, from being nugatory. Acting on the same principle, I am of opinion that we ought to take care that if the House of Lords should reverse our decision (and we must recognise that it may be reversed), the appeal ought not to be rendered nugatory. I am of opinion that we ought not to allow this fund to be parted with by the trustees, for this reason: it is to be distributed among a great number of persons, and it is obvious that there would be very great difficulty in getting back the money parted with if the House of Lords should be of opinion that it ought not to be divided amongst the bond-holders.

(See also per Brett, L.J., *ibidem* at p. 459). The granting of a stay of execution is a matter of discretion for the court and any action or conduct which tends to stifle the exercise of such discretion must be frowned at by the court. (See the observations of Lord Esher, M.R., in The Attorney-General v. Emerson & Ors. (1890) 24 Q.B.D. 56 at p. 58.”

Though the facts that led to the above quoted dictum of Coker JSC are dissimilar to the facts in this case, I am clearly of the humble view that the principles enunciated in the said dictum with regard to the discretionary power of a court to grant an interlocutory injunction apply with equal force to the facts disclosed in this case. It follows inevitably that in the exercise of the discretionary powers vested in the Court, I must therefore consider whether the application should be granted having regard to the contending claims of the parties.

In its determination of whether the order of interlocutory injunc-

tion would be granted to the applicant, the Court below per Oguntade JCA said thus:-

“In the affidavit in support of the application, the applicant would appear to be relying on three matters as constituting exceptional circumstances justifying the grant of a stay of execution.

(1) That the respondents will not be in a position to refund the money if the appeal succeeds.

(2) That the judgment debt is colossal substantial

(3) That there are substantial points of law to be argued on appeal.

On the other hand, the respondents have deposed that they are able to refund the judgment debt in the event the appeal succeeds if the judgment debt is paid to them now. They have gone further to provide a bank guarantee from Union Merchant Bank Ltd. for about \$9m for the repayment. They have also argued that the grounds of appeal do not raise substantial issue of law.

I have considered the affidavit evidence to this application. I am unable to accept that the respondents will be unable to refund the judgment debt in the event the appeal succeeds, if paid to them now. I am impressed by the guarantee posted on the respondent’s behalf by Union Merchant Bank Ltd. I do not accept that the fact that the judgment debt is colossal is enough reason to deny to the respondents the fruits of the judgment in their favour.”

At this stage, as the appeal is not yet before this court, I ought not to make any comments on the merits or otherwise of this case which may prejudice the hearing of the appeal. See Egbe v. Onogun (1972) 1 ALL NLR (Pt. 1) 95; Ojukwu v. Governor of Lagos State (1985) 2 NWLR (Pt. 10) 806.

With this in mind I am left only with the consideration of such facts as have been made available to determine whether an order of interlocutory injunction ought to be made in favour of the applicant. In this regard it must be observed that the court below had indeed made an order of interlocutory injunction which the applicant thought would not protect the res. I have already referred to the conflicting claims of the parties

contained in their affidavit evidence on this point. In this regard, it is I think apposite to refer to the well known dictum of Lord Diplock in American Cyanamid v. Ethicon Ltd. (1975) 1 ALL ER. 504 at 511, (1975) AC 396 at 408 – 409: It reads:

B “Save in the simplest cases, the decision to grant or to refuse an
interlocutory injunction will cause to whichever party is unsuccessful on
the application some disadvantages which his ultimate success at the
trial may show he ought to have been spared and the disadvantages may
C be such that the recovery of damages to which he would then be entitled
either in the action or under the plaintiff’s undertaking would not be
sufficient to compensate him fully for all of them. The extent to which the
disadvantages to each party would be incapable of being compensated
in damages in the event of his succeeding at the trial is always a signifi-
D cant factor in assessing where the balance of convenience lies: and if the
extent of the uncompensatable disadvantage to each party would not
differ widely, it may not be improper to take into account in tipping the
balance the relative strength of each party’s case as revealed by the affi-
E davit evidence adduced on the hearing of the application. This, how-
ever, should be done only where it is apparent upon the facts disclosed by
evidence as to which there is no credible dispute that the strength of one
party’s case is disproportionate to that of the other party. The Court is
F not justified in embarking on anything resembling a trial of the action
upon conflicting affidavits in order to evaluate the strength of either party’s
case”

See also Obeya Memorial Hospital v. A.G. of the Federation (1987) 3
NWLR (pt. 60) 325 at p. 338. See also Sotuminu v Ocean Steamship
G (Nig.) Ltd. (1992) 5 NWLR. And which is authority for the proposition
that an applicant seeking for an order of interlocutory injunction must show,
inter alia, that he has a good cause of action to justify the order.

I have earlier in this ruling reviewed the facts leading to the in-
H stant application and considered the argument of counsel with regard to
the prayers sought for leave to file an appeal against the ruling of the court
below. I have also reviewed the contention of learned counsel for the par-
ties with regard to whether an order for interlocutory injunction ought to

be granted pending the hearing of the appeal. For the applicant its main argument is the res i.e. the judgment sum would remain safe with it being the Banker of Bankers. And that it would be ready to hand over the judgment sum to the respondents if at the end of the day victory remained with them. The respondents on the other hand have urged that the judgment sum be ordered to be paid as per the ruling of the Lower Court. The premise for that submission is plainly based on their argument which found favour with the Court below. In furtherance of that argument reference was made to the case of Sotuminu v ocean Steamship (Nig.) Ltd. & ors. (1992) 5 NWLR (Pt. 239) 1 at pages 6, 7, 8 and 9. It must also be observed that in answer to a question from the Court learned counsel for the respondents stated that he was not in a position to give an undertaking that steps would not be taken to enforce the judgment of the trial court.

The unchallengeable fact in this case is that the applicant is and would remain the Banker of Bankers. On that alone it is not in doubt that the judgment sum would be best kept with it rather than any other bank. But in addition to that is the conclusion already reached that the applicant has arguable grounds of appeal. And for that and other reasons leave has been granted to the applicant to appeal against the ruling of the Lower Court. The question that I must therefore consider is whether the appellate court should be placed in a state of utter helplessness if the res had disappeared when a decision had to be made thereon. **In my humble view, I do not think that the Court should ignore or attempt to play down the colossal amount involved in this matter. While the amount involved in a transaction should not necessarily affect the decision of a Court, it must be remembered that the discretionary power of a Court entitles it to consider the peculiar nature of each case. In my respectful view, the facts involved in this matter must compel caution in the exercise of its discretion. Though it is the settled principle that every Court remains unfettered in the exercise of its discretionary power, yet it seems to me that if the Court below had considered the application before it in the light of some of the authorities referred to above, it is my respectful view that the Court below might have decided the matter differently. In my respectful view, I think**

that in the determination of this prayer, I must consider judiciously and judicially the facts presented in the instant application. After a careful consideration of such facts which have been made available in this matter, it is my humble view that the balance of convenience and justice should be resolved in favour of the applicant I will therefore, hold that the applicant ought to be granted its 4th prayer for an order of interlocutory injunction restraining the respondents by themselves, servants, their privies and or agents from enforcing the judgment of the Federal High Court in suit No. FHC/L/CS/1306/95 delivered on the 25th January 2000, pending the determination of this appeal. The applicant, must in the event be prepared to give an undertaking in damages which will be set down presently.

This application having succeeded, the following orders are hereby made:

(i) Time within which to seek extension of time for leave to appeal against the decision and order of the Court of Appeal in Suit No. CA/L/178/2000 delivered on the 11th of December, 2000, is hereby granted and time is extended till today;

(ii) Leave is granted to the applicant to appeal against the said decision on grounds other than of law alone;

(iii) Time within which to appeal against the said decision is extended by 21 days from today;

(iv) An order of interlocutory injunction is hereby granted restraining the respondents by themselves, or through their servants, agents, privies whomsoever from enforcing the judgment of the Federal High Court howsoever in Suit No. FHC/L/CS/1306/95 pending the determination of the appeal.

(v) The applicant shall within 30 days hereof give an undertaking that in the event of its losing the appeal it shall pay by way of damages to the Respondents 21% per annum on the total judgment debt from the date of this Ruling until the date of the determination of the appeal.

(vi) Each party to bear its own costs.

WALI JSC

I have had a preview of the lead Ruling of my learned brother Ejiwunmi, JSC and I entirely agree with the reasoning and conclusion therein. I wish however to add the following by way of emphasis. B

The affidavit in support of the applicant's application for extension of time for leave to appeal as well as interlocutory injunction restraining the enforcement of the judgment of the trial court and the conditional order of stay of execution granted by the Court of Appeal, sufficiently explained C the reasons for failure to appeal within the prescribed statutory period for filing such appeal and which cannot be described as fallacious. The said affidavit in support of, in contrast to the counter-affidavit in opposition to an interlocutory injunction also contained sufficient reasons why the D injunction should be granted. See paragraphs 9, 10, 11, 12 and 13 of the affidavit. The application is supported by arguable grounds of appeal.

The respondents on the other hand did not give cogent reasons why leave to appeal and a stay of execution should not be granted. The fact deposed to in the counter-affidavit on behalf of the respondents that E the applicant by filing an application dated 3/1/2001 for extension of time to comply with the order of conditional stay granted by the Court of Appeal would not in my view, amount to accepting the conditional order of stay so F granted or a waiver of the applicant's constitutional right of appeal in the matter, nor would such application amount to abuse of the court's process. See OKAFOR V. THE A.G. OF ANAMBRA STATE [1991]6 NWLR G (Pt.200)659 at 681. The fact that the applicant had appealed against the judgment of the trial court and had applied for an interlocutory injunction of the same judgment is a clear demonstration by him of intention to challenge the correctness of the trial court's decision.

The Ruling by the Court of Appeal was handed down on 11th December, 2000. Before learned Senior Counsel for the applicant could H take any further step in the matter, he had to consult his client i.e. the applicant.

The application for extension of time and leave to appeal against the Court of Appeal's Ruling dated 12/1/2001, was filed in this court on

16/1/2001. It is supported by the proposed grounds of appeal and other documents relevant to the application. I do not consider the time lapse between the date the Ruling of the Court of Appeal was delivered and the date application was filed to this court to be inordinate and unreasonable.

B The conditions stipulated in Order 6 rule 2(1) of the Supreme Court Rules, 1985 [as amended], Section 233 (3) of the 1999 Constitution and Section 27 (1) of the Supreme Court Act, 1960 have been complied with. I am therefore inclined to grant both the application for leave to appeal and for an interlocutory injunction restraining the Respondents from enforcing the trial court pending the determination of the appeal against the Court of Appeal Ruling. See IBODO & ORS. V. ENAROFIA [1980]5-7 SC 42; UNIVERSITY OF LAGOS V. OLANIYAN [1985]1 NWLR (Pt.1) 156; OBIKOYA V. WEMABANK LTD. [1989]1 NWLR (Pt.96)157 and ERISI D V. IDIKA [1984]4 NWLR (Pt.66)511; OBIJURU V. OZIMA [1985]2 NWLR (Pt.6) 167 and VASWANI TRADING COMPANY V. SAVALAKH & COMPANY [1972] ALL NLR 922.

I adopt the consequential orders, including that of costs made in E the lead Ruling.

OGUNDARE JSC

F I have had a preview of the Ruling of my learned brother Ejiwunmi JSC just delivered. I agree with him that the preliminary objection of the Respondents is without merit; it is hereby overruled by me. I also agree with him that the prayers of the Applicant be granted as prayed subject, as regards prayer 4 that an undertaking as herein ordered, is given by the G Applicant.

The Applicant was defendant in Suit No. FHC/L/CS/1306/95 wherein the Respondents, as plaintiffs, had claimed, as per their amended statement of claim, as hereunder:

H “the 1st plaintiff claims from the defendant ‘SPECIAL DAMAGES:

(i) A refund of the balance of \$109,852.01 being the unutilised transaction commission held for plaintiff’s account by the defendant.

(ii) *Interest on the said sum of \$109,852.01 at the rate of 21% per annum with effect from September 30th 1991 till judgment and final payment.*

GENERAL DAMAGES

(i) *\$1,000,000.00 (one million dollars only) for deprivation suffered, loss of businesses, loss of leverage and profits the plaintiffs would have earned on the \$109,852.01 unlawfully held from him by the defendant, and financial embarrassments and dislocations in business suffered by the plaintiffs.*

(ii) *N50,000,000.00 (fifty million Naira only for the cancellation of the registration of the 1st plaintiff's company, Mercury Assurance Company Ltd., which has resulted in loss of income, severe embarrassments and the bringing to public odium the plaintiff and his standing (in the business community as a clear fallout of the defendant's action against the 1st plaintiff.*

WHEREOF the 2nd and 3rd plaintiffs, respectively claim from the defendant:

(i) *\$4,306,372.73 (Four million, three hundred and six thousand three hundred and seventy-two dollars and seventy-three cents only) being the five years profit lost by the 2nd plaintiff which it would have earned if it was not jeopardised by the defendant's action as reflected in the feasibility study reports done by Delloite Haskins & Sells international Limited a world acclaimed firm of management consultants as contained in page 21, section 8.1 and page 35, appendix ix of their feasibility report on the 2nd plaintiff.*

(ii) *\$4,034,150 (Four million, thirty-four thousand and one hundred and fifty dollars only) being the five years profit lost by the 3rd plaintiff which it would have earned if it was not jeopardised by the defendant's action as reflected in the feasibility study reports done by Delloite Haskins & Sells International Limited a world acclaimed firm of management consultants as contained in page 19, section 8.1 and page 31, appendix ix of their feasibility report on the 3rd plaintiff."*

Pleadings were ordered, filed and exchanged and, with leave of court, amended. The action proceeded to trial at the conclusion of which, and

after addresses by learned counsel for the parties, the learned trial Judge on 25/1/2000 adjudged as follows:

“(1) *The 1st plaintiff shall be paid his balance of unutilised transaction commission in the sum of \$109,852.01 together with interest at the rate of 21 per cent, per annum with effect from September 30 1991.*

(2) *The 1st plaintiff is hereby awarded the sum of \$100,000.00 (One hundred thousand dollars) as general damages.*

(3) *The claim for 50,000,000.00 (Fifty million Naira) as general damages for cancellation of the registration of the 1st plaintiff’s insurance company is hereby dismissed.*

(4) *The 2nd plaintiff is hereby awarded the sum of \$4,306,372 (Four million, three hundred and six thousand and seventy-two dollars, and seventy three cents) as special damages for five years loss of profit and*

(5) *The 3rd plaintiff is hereby awarded the sum of \$4,034,150 (Four million, thirty-four thousand one hundred and fifty dollars) as special damages for five years loss of profit.”*

The Applicant was dissatisfied with this judgment and appealed to the Court of Appeal upon five grounds of appeal which read –

“1. *The learned trial judge erred in law when he held that the unutilised transaction commission paid by the 1st Respondent was refundable to him.*

PARTICULARS

i. *The finding of the lower court is that the unutilised transaction commission was the balance from the sum of \$164,925.00 transaction commission paid by the 1st respondent upon his winning at auction 23 of the Debt Conversion Programme action.*

ii. *The 1st Respondent had been unable to redeem the amount of debt instruments he claimed he was in a position to redeem due to his own fault.*

iii. *The transaction commission having become attached to the Debt Conversion Programme is only refundable at the discretion of the Debt Conversion Committee set up by the Federal Government of Nigeria.*

2. *The learned trial judge erred in law when he ordered a refund of the balance of unutilised transaction to the 1st Respondent with interest, when the clear evidence before the court showed that the 1st Respondent is not entitled to a refund of the said unutilized transaction commission.*

B

PARTICULARS

i. *There is evidence before the court to the effect that the unutilised transaction is the balance of the sum of \$164,925.00 transaction commission paid by the 1st Respondent for his winnings at auction 23 of the Debt Conversion programme*

C

ii. *There is evidence before the court that the 1st Respondent could not redeem all the debt instruments he held himself out as being able to redeem due to the fact that he did not even have the said debt instruments.*

D

iii. *The 1st Respondent had deceived the Debt Conversion Committee that he had already secured the said debt instruments, an action which enhanced his chances of winning at the said auction.*

iv. *Failure on the part of the 1st Respondent to redeem all the debt instruments he bidded for at the auction 23 subsequent actions was due wholly to his own fault.*

3. *The lower court erred in law when it awarded \$100,000.00 general damages in favour of the 1st Respondent when it had earlier ordered a refund of the unutilised transaction commission to the 1st respondent with interest at 21% per annum thereby resulting in double compensation for the 1st Respondent.*

F

4. *The lower court erred in law when it awarded the sum of \$4,306,372.73 special damages in favour of the 2nd Plaintiff and \$4,034,150.00 special damages in favour of the 3rd plaintiff for loss of profit when evidence led on these two claims fell short of the strict proof required by law.*

G

5. *The lower court erred in law when it ascribed undue weight to Exhibits 'F' and 'G' which are feasibility reports on the 2nd and 3rd Plaintiff companies.*

H

PARTICULARS

i. Exhibits ‘F’ and ‘G’ contained the opinion of experts who were not called to give evidence.

ii. Exhibits ‘F’ and ‘G’ were not authenticated by the alleged makers.

B iii. Exhibits ‘F’ and ‘G’ contain assumptions based on information allegedly supplied to the makers and the sources of these information were not produced in court for examination.”

C The Applicant applied to the court below for an order of stay of execution of the said judgment, a similar application having been struck out by the trial High Court for non-prosecution. The court below in a ruling delivered on 11th December 2000 observed: -

D “I have considered the affidavit evidence before me. I am unable to accept that the respondents will be unable to refund the judgment debt in the event the appeal succeeds, if paid to them now. I am impressed by the guarantee posted on the respondent’s behalf by Union Merchant Bank Ltd. I do not accept that the fact that the judgment debt is colossal is enough reason to deny to the respondents the fruits of the E judgment in their favour. I have read the grounds of appeal. I bear in mind the reasoning of the Supreme Court in OKAFOR V. NNAIFE (1987) 4 NWLR (Pt. 64) 129 and I think it is wise on the facts and circumstances to steer the middle course.”

F And adjudged –

G “a stay of execution is granted on the condition that the applicant deposit with the Deputy Chief Registrar of this Court within 21 days from the date of this order the judgment debt. The Deputy Chief Registrar is to cause the money when deposited to be placed in an interest yielding account so that the party that ultimately wins on the appeal may collect the money with the accrued interest.”

The Applicant was unhappy with the conditional stay granted by the court below and has appealed to this Court upon two grounds which read:

H 1. GROUND OF APPEAL

1. The court below erred in mixed law and facts when it ordered the Applicant to deposit the judgment sum with the Deputy Chief Registrar of the court who will then pay it into an interest yielding account to the

benefit of the party who is successful in the appeal as a condition for staying the execution of the judgment of the Federal High Court dated 25th January 2000.

PARTICULARS

i. The clear evidence admitted by both parties is that the Applicant remains at all times in a position to pay the judgment sum. B

ii. The Applicant, as the banker to all bankers in Nigeria remains the best safeguard for the judgment sum bearing in mind the alarming rate at which banks become distressed in Nigeria. C

iii. Counsel had stated at the court below that the applicant was prepared to guarantee the payment of the judgment sum with interest in the event that the appeal is unsuccessful. D

iv. The amount of the judgment sum is so colossal that the court should be primarily concerned that the amount remains available for the successful party. E

v. In the entire circumstances of the case as contained in the affidavit evidence before the court below, the court below did not exercise its discretion judicially and judiciously. F

2. The court below erred in mixed law and fact when it held per Oguntade JCA thus:

'I am unable to accept that the Respondents will be unable to refund the judgment debt in the event the appeal succeeds, if paid to them now. I am impressed by the guarantee posted on the Respondents' behalf by Union Merchant Bank Ltd.' G

PARTICULARS

i. The unchallenged evidence before the court below is that the Respondents are indeed very broke and have no assets and have in fact not been in business in the past few years. H

ii. The circumstances surrounding the issuance of the guarantee by Union Merchant Bank Ltd. in favour of the Respondents as stated in the further affidavit filed on behalf of the Applicant show clearly that the guarantee is very suspect. I

iii. The court below virtually ignored the further affidavit deposed to on behalf of the Applicant which further affidavit contains facts

which show that the guarantee issued by the Union Merchant Bank Ltd. is most unreliable."

And sought the following relief:

B *"An order setting aside the order of the court below that the Appellant should deposit the judgment sum with the Deputy Chief Registrar and substituting therefore an order that the Appellant give an undertaking that it will pay interest on the judgment sum at the ruling rate in case its appeal at the court below does not succeed."*

C The Applicant has now applied to us seeking the following prayers:

"1. An order granting extension of time to seek leave to appeal against the decision of the Court of Appeal (Lagos Division) dated 11th December 2000 in Appeal No. CA/L/178/2000.

D *2. An order granting leave to the Applicant to appeal against the decision of the Court of Appeal (Lagos Division) dated 11th December 2000 in appeal No: CA/L/178/2000.*

E *3. An order extending time within which the Applicant can file its Notice of Appeal against the decision of the Court of Appeal dated 11th December 2000 in Appeal No: CA/L/178/2000.*

F *4. An order of interlocutory injunction restraining the Respondents by themselves or through their servants, agents, privies whomsoever from enforcing the judgment of the Federal High Court howsoever in Suit No: FHC/L/CS1306/95 pending the determination of this appeal.*

5. And for such further or other orders as the Honourable Court may deem fit to make in the circumstances."

In the affidavit of Olatunbosun Kajogbola in support of the application, the deponent deposed, inter alia, as hereunder:

G *"3. On the 25th January 2000, the Federal High Court delivered judgment against the Applicant herein in the following terms:*

H *a. The defendant [Applicant herein] should refund the sum of \$109,852.01 unutilized transaction commission to the 1st Respondent with interest at 21% per annum from 21st September 1991.*

b. General damages of \$100,000 in favour of the 1st Plaintiff [1st Respondent herein].

c. Special damages of \$4,306,372.73 in favour of the 2nd Plain-

tiff.

d. Special damages of \$4,034,150.00 in favour of the 3rd Plaintiff.

4. Dissatisfied with the judgment of the Federal High Court, the Applicant filed a Notice of Appeal to the Court of Appeal on 28th January, 2000. A copy of the Notice of Appeal is annexed hereto and marked Exhibit 'OK 2'.

5. Being desirous of an early disposal of the appeal, the Applicant took steps to get the record of appeal compiled quickly and transmitted to the Court of Appeal.

6. By Motion on Notice dated 9th may 2000, the Applicant applied to the Court of Appeal, Lagos Division for an order staying execution of the judgment of the Federal High Court. A Copy of the said motion on notice is annexed hereto and marked Exhibit 'OK 3'.

7. The Respondents filed a counter affidavit to the said motion on notice to which the Applicant herein also filed a further affidavit. The counter affidavit is annexed to this affidavit as Exhibit 'OK 4' while the further affidavit is also annexed hereto and marked Exhibit 'OK 5'.

8. By 30th October 2000 the Applicant herein had filed and served its brief of argument for the substantive appeal at the Court of Appeal.

9. On 1st November 2000, the Court of Appeal Lagos Division heard arguments on the motion for stay of execution after the Respondents' counsel had rejected a proposal from the court to the effect that the appeal be given accelerated hearing rather than the parties dissipating energy on the motion for stay execution.

10. By ruling dated 11th December 2000 the Court of Appeal Lagos Division made an order of conditional stay of execution of the judgment of the Federal High Court, the condition being that the Applicant deposits the judgment sum with the Deputy Chief Registrar of the Court who will in turn pay same in an interest yielding account for the benefit of the successful party. A copy of the ruling of the court below is annexed hereto as Exhibit 'OK 6'.

11. Upon the delivery of the ruling of the Court of Appeal Lagos, the Applicant was duly informed but due to the Christmas, Sallah and

New year festivities/public holidays no decision could be immediately taken on the next line of action.

12. Furthermore, our chambers went on end of year vacation from Thursday 21st December 2000 and only re-opened on Thursday 4th January 2001.

13. Subsequently upon our return from the end of year break, we got instructions from the Applicant to appeal the decision of the Court of Appeal since it was felt on further consideration that the judgment sum was safer with the Applicant being the banker to the Federal Government and every other bank in the country.

14. I am informed by Adetunji Oyeyipo of counsel handling this appeal and I verily believe him as follows:

a. That being an interlocutory decision of the court below, the appeal ought to have been filed within 14 day of the delivery of the ruling.

b. That he has prepared a proposed Notice of Appeal and same in annexed to this affidavit and marked Exhibit 'OK 7'.

c. The grounds of appeal in the proposed Notice of Appeal are grounds of mixed law and facts for which leave of this Honourable Court or the court below is necessary.

d. That the appeal is against the order of conditional stay granted by the lower court.

e. That if an injunction restraining the Respondents from, executing the judgment of the Federal High Court dated 25th January 2000 pending the determination of this appeal is not granted, the Respondents will take steps to execute the said judgment and the decision of this Honourable Court in this appeal if successful will be rendered nugatory.

f. The Respondents certainly do not have the means to refund the judgment sum if paid to them and this appeal succeeds.

g. That the Applicant is ready and in a position to give appropriate guarantee to pay the judgment sum with interest in case its appeal is unsuccessful.

h. Although the Respondents have been served with the Appellant's brief in the substantive appeal before the court below since

1st November 2000, they are yet to file their brief and they are grossly out of time.”

The Respondents also filed a motion praying for:-

“1. AN ORDER dismissing or alternatively striking out the Appellant/Respondents Motion on Notice dated 12th January, 2000¹ and the briefs of argument based thereon on the Grounds set out herein below.

2. And for such further or other orders as the Honourable Court may deem fit to make in the circumstances.”

Upon the grounds:-

“(i) That the Appellant/Respondents aforesaid motion contravenes the provisions of Section 233(3) of the Constitution of the Federal Republic of Nigeria, 1999.

(ii) That the said motion is incompetent and is an abuse of the process of this Honourable Court in that the Appellant had already accepted the decision of the Court of Appeal to which it had filed a motion for time within which to comply with the said decision.”

They rely for the motion on the counter-affidavit of the 1st Respondent sworn to in reaction to the affidavit in support of the Applicant’s motion.

Both parties filed and exchanged written briefs of argument in respect of the two motions and at the oral hearing, their respective learned counsel offered oral submissions. The first leg of the Respondents’ grounds for the preliminary objection was withdrawn and the same was struck out.

As stated earlier the Respondents have, in a separate motion, objected to the competence of the Applicant’s motion as being in abuse of the process of this Court in that *“Appellant had already accepted the decision of the Court of Appeal to which it had filed a motion for time within which to comply with the said decision...”* and asked that it be dismissed. In the affidavit in support of their motion, which also doubles as counter affidavit to Applicant’s affidavit in support of the motion, the 1st Respondent deposed, inter alia, as follows:

(Is this quotation below not a repetition of the one on pages 13 – 14?)

“8. The aforesaid motion was argued extensively by both par-

ties at the Court of Appeal, Lagos and on the 11th of December, 2000 the Court gave a well considered Ruling whereby the Appellant's application was granted, but subject to the condition that the Appellant should deposit the judgment debt with the Deputy Chief Registrar of the Court in an interest yielding account within 21 days of the Ruling (A copy of the Ruling is attached as Exhibit 'OK 6' of the Appellant's affidavit).

9. The Appellant accepted the aforesaid ruling of the Court of Appeal, and pursuant thereto, the Appellant filed an application dated 3rd January, 2001 to request for extension of time within which it would pay the judgment debt to the Deputy Chief Registrar as directed by the Court of Appeal. A Certified True Copy of the Appellant's Motion on Notice is attached hereto as Exhibit SA.1.

10. The Appellant had deposed on oath in paragraph 5(d) of the affidavit in support of their Motion to the Court of Appeal (Exhibit SA. 1 herein) as follows:

5(d) 'that he verily believes that if time is extended for the Applicant to comply with the order of the Court of Appeal, the Applicant is ready and willing to deposit the said money with all accrued interest from the last day of the period for complying with the order.'

11. The aforesaid Motion on Notice and the substantial appeal is (sic) still pending for hearing at the Court of Appeal.

12. The Appellant's application to this Honourable (Court) is an abuse of the process of Court."

It is on these facts that the Respondents say that the Applicant's motion is in abuse of the process of court. It is argued in their brief that as the Applicant had filed a motion in the court below seeking an extension of time to enable it comply with the decision of that court granting it conditional stay, it cannot now bring this application seeking to appeal against the same decision it had affirmed and accepted. To do so, it is submitted, would amount to approbating and reprobating at the same time. It is submitted thus:

"Notwithstanding the rights of parties to appeal against any decision of a lower court they are dissatisfied with, we submit that it is certainly not good practice where a matter is pending on a matter be-

tween two parties in the lower court for one of them to run to this court with the intent of taking an undue advantage of the judicial process. We humbly submit that based on the facts disclosed, the procedure being adopted by the Appellant, especially in respect of the motion now before this Honourable Court, amounts to abuse of the process of the court and accordingly we request that the Appellant's motion should be dismissed or struck out. See JOHN C. ANY ADUBA & ORS V. NIGERIAN RENOWNED TRADING CO. Ltd. (1990) ALL NLR 169 @ 175."

With respect, I don't see any merit in the preliminary objection of the Respondents. What is meant by abuse of process of court? It simply means that the process of the court has not been used bona fide and properly. In AMAEFULE V. THE STATE (1988) 2 NWLR 156 at 177, Oputa JSC defined the expression "abuse of process of the court" thus:

"Abuse of process of the Court is a term generally applied to a proceeding which is wanting in bona fides and is frivolous, vexatious or oppressive. Abuse of process can also mean abuse of legal procedure or improper use of legal process."

Examples of this abound in the Law Reports. In ARUBO V. AIYELERU (1993) 3 NWLR 126, this Court held that the relitigation of already decided issues is an abuse of court's process, even if the matter is not strictly res judicata – see STEPHENSON V. GARNETT (1898) 10 QB 677. See also ADIGUN & ORS. V. IWO LOCAL GOVERNMENT & ANOR. (1999) 8 NWLR 30 In NWOBOSHI & V. THE STATE & ORS. (1998) 10 NWLR 131, there was pending an action (A/53/95) between the parties in respect of the same subject matter. Meanwhile the 4th respondent in the appeal filed a motion (A/M/11/95) leading to the appeal. It was contended at the hearing of the appeal that the institution of the motion A/M/11/95 was in abuse of the process of the court. Akintan, JCA in his lead judgment (with which Rowland J.C.A. agreed, Achike JCA, as he then was, dissenting) observed at pages 154 – 155 of Report:

"There is no doubt that an abuse of judicial process is said to exist when a proceeding is wanting in bona fides, or is frivolous, or vexatious or oppressive or amounts to abuse of legal procedure or improper legal process. See AMAFULE V. THE STATE (1988) 2 NWLR (Pt. 75)

156 at 177 per Oputa, JSC. It is clear from the facts placed before the trial court that the 4th respondent was compelled to file the motion – suit No. A/M/11/95, as a result of fresh development that came up after he had filed his earlier action – suit No. A/53/95. The new development was the sudden publication of the four legal Notices. The procedure laid down for the application he was to make, as already shown above, is very peculiar. It is set out in Order 43 of the High Court Civil Procedure Rules 1988. It was therefore not possible under the applicable rules of court for the applicant to merely apply to amend his existing claim before the court or by filing the motion under the same suit. I therefore hold that the action taken by the 4th respondent in instituting the second action cannot amount to an abuse of the court process. The appeal also fails as relates to that issue.”

D Achike JCA in his dissenting judgment in the case, observed at p. 170:

“No doubt when a plaintiff uses legal process to harass or irritate an adversary or employs it to impede the administration of justice, this may tantamount to abuse of process of court. In other words, abuse of process arises where the court’s process is being used mala fide. It is, therefore, not enough that two suits have been instituted against the same parties on the same subject matter, it is necessary that the party complaining about abuse of process of court must go further to establish that plaintiff’s suits were motivated mala fide.”

F The two learned Justices of the Court of appeal are obviously agreed on what constitutes abuse of process of court. The use of the phrase “mala fide” must be qualified by what this Court said in the next case I am considering.

G In SARAKI V. KOTOYE (1992) 9 NWLR 156 this Court dealt exhaustively with what constitutes abuse of process of court. In his lead judgment in the case, Karibi-Whyte JSC observed at pages 188-189:

H “The concept of abuse of judicial process is imprecise. It involves circumstances and situations of infinite variety and conditions. Its one common feature is the improper use of the judicial process by a party in litigation to interfere with the due administration of justice.

It is recognised that the abuse of the process may lie in both a

proper or improper use of the judicial process in litigation. But the employment of judicial process is only regarded generally as an abuse when a party improperly uses the issue of the judicial process to the irritation and annoyance of his opponent, and the efficient and effective administration of justice. This will arise in instituting a multiplicity of actions on the same subject matter against the same opponent on the same issues. See OKORODUDU V. OKOROMADU (1977) 3 SC. 21; OYEGBOLA V. ESSO WEST AFRICAN INC. (1966) 1 All NLR 170. Thus the multiplicity of actions on the same matter between the same parties even where there exists a right to bring the action is regarded as an abuse. The abuse lies in the multiplicity and manner of the exercise of the right, rather than the exercise of the right, per se.

The abuse consists in the intention purpose, and aim of the person exercising the right to harass, irritate and annoy the adversary, and interfere with the administration of justice; such as instituting different actions between the same parties simultaneously in different courts, even though on different grounds. See HARRIMAN V. HARRIMAN (1989) 5 NWLR (pt. 119) 6.

Similarly so held was where two similar processes were used in respect of the exercise of the same right. Namely a cross-appeal, and a Respondent's Notice, - See ANYADUBA V. NRT Co. Ltd. (1990) 1 NWLR (PT. 127) 397; JADESIMI V. OKOTIE-EBOH (1986) 1 NWLR (Pt. 16) 278. This court has also held as an abuse of the process, an application for adjournment by a party to an action to bring an application for adjournment by a party to an action to bring an application to court for leave to raise issues of fact already decided by courts below, - See ALADE V. ALEMULOKE (1988) 1 NWLR (Pt. 69) 207. Hence as I have observed, it is not the exercise of the right, pe se, but its improper and irregular exercise which constitutes an abuse. Essentially, it is the inconvenience, inequities, involved in the aims and purposes of the application which constitute the abuse. Otherwise, where there is a right to bring an action the state of mind of the person exercising the right cannot affect the validity or propriety of its exercise. The proposition has been aptly expressed by Lord Halsbury in MAYOR & CITY OF

BRADFORD V. PICKLES (1895) AC at p. 594 when he said,

‘If it was a lawful act, however ill the motive might be, he had a right to do it. If it was an unlawful act however good his motive might be, he would have no right to do it. Motives and intentions in such a question as is now before your Lordships seem to me absolutely irrelevant.’

The above words apply mutatis mutandis to the facts of the case before us. The motive of the defendant in bringing the application is irrelevant. He is entitled to exercise his constitutional right to appeal.”

There are many other decisions of both this Court and the Court of Appeal on the point; I need not go into all of them in this judgment.

Turning now to the case on hand, the Applicant in bringing its application, is exercising its constitutional right of appeal under section 233(3) of the Constitution of the Federal Republic of Nigeria 1999. Its application to the court below is meant to invoke the discretionary power of that court to extend time to do that which that court had ordered. Complying with the order of conditional stay of execution ordered by the court below cannot estop the Applicant from appealing against that order, if it so desires. And it cannot be an abuse of process of court to exercise, bona fide, one’s undoubted right to appeal conferred by the Constitution. As Karibi-Whyte JSC put it in SARAHI V. KOTOYE (supra) at p. 189 of the Report:

“I should not be taken as saying that the improper exercise of a right of action to the prejudice of the administration of justice is permissible. I have quoted the above passage to illustrate the general principle that a proper exercise of a constitutional right of appeal, as was done in the instant case, which was not intended to harass, irritate, annoy or interfere with the course of justice, but aims at protecting the rights in the litigation of the party exercising the constitutional right cannot in my respectful view be regarded as reckless or frivolous, so as to constitute an abuse of the judicial process.”

Such is the case here. It has not been shown by the Respondents that the Applicant, in instituting his application for leave to appeal etc., is acting improperly; it is not satisfied with the conditional stay of execution granted by the court below and aims to appeal against that order. The mere fact

that it has applied to the court below for extension of time to fulfil the condition attached to the stay granted is no reason to suggest that the Applicant is not acting bona fide in exercising its constitutional right to appeal against the order of the court below. After all that order remains binding until set aside. And it has not yet been set aside. It is, therefore, not an abuse of process of the court for the Applicant to seek to set the order aside.

The preliminary objection is hereby overruled.

Regarding the Applicant's application for extension of time to seek leave to appeal against the order of the court below granting it a conditional stay of execution leave to appeal, extension of time to appeal and an order of interlocutory injunction restraining the Respondents by themselves or through their servants, agents, privies whomsoever from enforcing the judgment of the trial High Court in this case pending the determination of the appeal to this Court, I have carefully considered the affidavit evidence submitted by both sides, the decision sought to be appealed against, the proposed grounds of appeal, the submission, both written and oral, of learned counsel for the parties and the judgment of the trial Federal High Court. I am satisfied that the balance of convenience lies in favour of the Applicant. I consider the reason given for not appealing within time sufficiently good reason for the delay. And the proposed grounds of appeal show why the appeal should be heard. It is true that the Applicant has not given an undertaking as to damages in the event of the prayer for interlocutory injunction being granted. But this Court can extract an undertaking from it.

Consequently, it is ordered as prayed by the Applicant. Time within which to seek leave to appeal against the decision of the Court of Appeal given on 11th December 2000 in Appeal No. CA/L/178/2000 is extended till today. Leave to appeal is granted. Time to file the appeal is extended by 21 days from today. An order of interlocutory injunction restraining the Respondents by themselves or through their servants, agents, privies whomsoever from enforcing the judgment of the Federal High Court howsoever in Suit No. FHC/L/CS/1306/95 is granted pending the determination of the appeal to this Court. It is ordered that the Applicant do give an undertaking, within 30 days of the date hereof, to pay, by way of

damages, to the Respondents, in the event of its losing the appeal, 20% (twenty per centum) per annum on the total judgment debt from the date hereof until the date the appeal is determined by this Court.

I abide by the order for costs made in the Ruling of my learned brother Ejiwunmi, JSC.

IGUH JSC

I have had the privilege of reading in draft the ruling of my learned brother, Ejiwunmi, J.S.C. just delivered and I am in complete agreement with him that the preliminary objection raised by the respondents lacks substance and ought to fail.

I have also given careful consideration to the prayers sought by the applicant and have come to the conclusion that there is definite merit therein and that they ought to be granted.

Accordingly, the preliminary objection of the respondents is hereby overruled as lacking in substance and the applicant's prayers in the motion are granted as prayed subject, with regard to prayer 4, that an undertaking as ordered in the leading ruling be given by the applicant within 30 days hereof.

I, too, make no order as to costs in these proceedings.

KATSINA-ALU JSC

I have had a preview of the Ruling of my learned brother Ejiwunmi, JSC just delivered. I entirely agree with it and there is nothing I can usefully add.

H