

**SUPREME COURT OF NIGERIA**  
13TH JULY 2001. SC. 101/1996  
**CORAM:- M. L. UWAIIS CJN, A. B. WALI, I. L. KUTIGI,**  
**S. U. ONU, U. A. KALGO, JJSC**

UNITED SPINNERS NIGERIA LTD. .... APPELLANT  
AND  
CHARTERED BANK LIMITED ..... RESPONDENT

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***APPEALS** - Error of lower court - The court of Appeal was in error - To refuse to grant the application - For stay of proceedings (H 4)*

***APPEALS** - Interlocutory applications - Stay of proceedings - Appellate courts should not deal with the merits of the substantive suit - In the interlocutory application - (H 3)*

***INTERLOCUTORY APPLICATIONS** - Stay of proceedings - Power to grant - The discretionary power of the court of Appeal - To stay proceedings must be exercised judicially and judiciously (H 1)*

***STAY OF PROCEEDINGS** - Exercise of discretion - The discretion of the lower court - Was wrongly exercised - As it failed to consider the very important issue - Necessary for exercising the discretion (H 2)*

**FACTS**

The Respondent in this case was the petitioner in the Federal High Court Lagos while the appellant was the Respondent to the petition. The appellant who had an account with the respondent had in 1992 been allocated the sum of two hundred thousand dollars by the respondent in reaction to the appellant's request for foreign exchange. Subsequently the respondent made demands upon the appellant to settle its indebtedness to it with respect to the foreign exchange.

The amount of indebtedness by 31st August, 1994 was N10,275,777.17. Consequently the respondent filed a petition at the Fed-

eral High Court Lagos in November, 1994 alleging that the appellant was insolvent and unable to pay its debt and praying the court to wind up the company under S. 408(d) Companies and Allied Matters Act 1990.

The appellant in January 1995 filed a preliminary objection on the grounds of lack of jurisdiction contending that the debt was doubtful and disputed. The learned trial judge in his ruling decided that the court has jurisdiction to entertain the petition and dismissed the application. The appellant appealed against the ruling to the Court of Appeal but while the appeal was pending brought a motion on notice praying the court for an order staying all further proceedings at the Federal High Court Lagos until the determination of the appeal.

The Appeal court however instantly dismissed the motion after hearing addresses by the counsel to both parties. The appellant has further appealed to the Supreme Court against the ruling of the Court of Appeal refusing to grant an order staying proceedings at the Federal High Court.

#### **ISSUES FOR DETERMINATION**

*"(i) Did the Court of Appeal in peremptorily dismissing the application, exercise its discretion judiciously and judicially?*

*(ii) Was the Court of Appeal's dismissal of the Appellant's application without considering the Appellant's Brief and adverting to the principles of law of stay of proceedings relevant to the application?*

*(iii) Is the Court of Appeal right to hold that the Appellant's claim is puerile and this cannot in their view constitute a genuine dispute as to indebtedness?"*

*"(1) Whether on the evidence and materials placed before the Court of Appeal, there was sufficient justification for the Court to refuse the grant for a Stay of Proceedings."*

*(2) Did the Court of Appeal in fact decide the substantive Appeal by its pronouncement when it refused to Stay Proceedings."*

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

***Stay of Proceedings - Discretionary power***

1. The nature of the application made before the Court of Appeal was simply to stay the proceedings in the petition brought by the Respondent (herein) to wind up the Appellant, pending determination of the appeal to the Court of Appeal. Now, the Court below has the inherent power to stay proceedings pending appeal in order that the *res* may be preserved. The power, which is indeed discretionary, must be exercised judicially and also judiciously- See *Shodeinde v. The Trustees of Ahmadiyya Movement -in-Islam*, (1980) 1-2 S.C.163 and *Kigo (Nig) Ltd. V. Holman Bros. (Nig) Ltd*, (1980) 5-7 S.C.60. (p. 2756 F)

***Stay of proceedings - Exercise of discretion***

2. The real issue to have been considered by the Court of Appeal was not whether the Appellant was indebted to the Respondent but rather what could have happened if the proceedings for winding up went on in the Federal High Court and was concluded earlier than the appeal before it got determined. I am afraid the Court below did not advert its mind to this very important element in the motion as can be seen from the full text of its leading ruling quoted above. It follows, therefore, that the Court of Appeal did not exercise its discretion properly. In other words, the exercise of the discretion was neither judicial nor judicious. In my opinion it ought to have granted the application. (p. 2757 C/G)

***Stay of proceedings - Appellate courts not to deal with merit***

3. There is no doubt, and it is unfortunate, that this finding by the Court is prejudicial to the Appellant's case before the trial court. The Court of Appeal should not have adverted to the merit of the Appellant's case in the lower court. If the Court had limited its consideration to the principles laid down, in a long line of decision for the grant of stay of proceedings, it would not have been necessary for it to prejudge the merit of the case before the trial court. This propensity for appeal court to determine the merit of a case, which is not before it for a decision, had been deprecated by this court on many occasions. It is, therefore, necessary for appeal courts to restrain themselves, in dealing with the merit of the dispute in the substantive case, which is not necessary for the determina-

tion of any interlocutory appeal brought before them. (p. 2758 B)

***Appeals - Error of lower court***

4. For the foregoing reasons, I hold that the decision of the Court of  
B Appeal not to exercise its discretion to grant the application for stay of  
further proceeding in the winding up petition brought by the Respondent  
in the Federal High Court is erroneous. This is a proper case in which  
this Court can interfere with the decision of the Court below.

C Accordingly, the appeal succeeds and it is hereby allowed. The  
decision of the Court of Appeal is set-aside and in its place I grant the  
application. (p. 2758 E)

**REPRESENTATION**

D U. Nwokedi, Esq. for the Appellant.  
Respondent not represented.

**CASES REFERRED TO**

E Awani v. Erejuwa (1976)11 S.C. 307

University of Lagos v. Aigoro (1985)1 N.W.L.R.(Pt.1)156 at pp.168-9

Efetiororoje v. Okpalefe I I, (1991)5 N.W.L.R. (Pt.193) 517 at p.537

Collins v. Vesty of Paddington (1886)5 QBD 330 at p.381

F Ojukutu v. Odeh 14 W.A.C.A. 640

Akilu v. Gani Fawehinmi (1989)2 N.W.L.R. (Pt.102) 122 at pp.167-169

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

Nnoye v. Anyiichie (1989)2 N.W.L.R.(Pt.10) 110 at p.115 G-H

Jadesimi v. Okotie Eboh & Ors. (1989)1 N.W.L.R. (Pt.16) 264 at p.278

G Kigo (Nig.) Ltd. v. Holman Bros. (Nig.) Ltd. (1980)5-7 SC. 60

Shodeinde v. The Trustees of Ahmadiyya Movement-in-Islam (1980)1-2  
S.C. 163

Obeya Memorial Specialist Hospital & Anor. v. A-G of the Federation &  
H Anor. (1987)3 N.W.L.R. (Pt.60) 325

Vaswani Trading Co. v. Savalakh (1972)12 SC.77

Shankkton v. Swift (1913)2 K.B. 304 at 311-312

Hans International Construction Ltd. v. Mobil Producing Nigeria (1994)9

**LEAD JUDGMENT BY UWAIS CJN**

This is an interlocutory appeal from the decision of the Court of Appeal, Lagos Division (Musdapher, JCA, Uwaifo, JCA, as he then was, B and Pats-Acholonu, JCA).

The facts of the case, which are not in dispute, are briefly as follows. The Respondent herein was petitioner in the Federal High Court, Lagos while the Appellant herein was the Respondent to the petition. C The Appellant operated an account with the Respondent. On 18th March, 1992, the Appellant sent a letter to the Respondent requesting for allocation of foreign exchange. In the months of March and April, 1992 the sum of US\$200,000.00 (United States Two Hundred Thousand dollars) D equivalent then to N3,636,000.00 was allocated to the account of the Appellant. By a letter dated 26th March, 1992, the Appellant requested another bank - Continental Merchant Bank Plc, to send some documents, including "Form M", to the Respondent to enable the Respondent dispose of the foreign exchange allocated to the account of the Appellant. E The Continental Merchant Bank Plc forwarded the necessary documents to the Respondent vide a letter dated 30th March, 1992. The Respondent effected the transfer of the foreign exchange as instructed by the Appellant and debited its account.

Subsequently the Respondent made demands upon the Appellant F to settle its indebtedness to the Respondent with respect to the foreign exchange but the Appellant failed to do so. By 31st August 1994 the amount owed the Respondent by the Appellant on the transaction amounted G to N10,275,777.17 being the foreign exchange allocated and the accrued interest thereupon. Consequently, the Respondent filed a petition on 3rd November, 1994 in the Federal High Court Lagos alleging that the Appellant was insolvent and unable to pay its debt, and praying thus-

*"1. That United Spinners Nigeria Limited may be wound up by H the Court under the provision of section 408 (d) and 409 (a) of the Companies and Allied Matters Act of 1990.*

*2. Or such other orders as may be made in the Premises as shall*

*be just."*

On 6th January, 1995, the Appellant filed a notice of preliminary objection on the grounds that the trial court had no jurisdiction to entertain the petition and-

B *"(b) That the filing and prosecution of the petition is an abuse of the judicial process aimed at harassing and intimidating the Respondent into accepting liability for and making good debt which is doubtful and very much disputed."*

C Furthermore, an affidavit sworn to by the Accounts Manager of the Appellant, Mr. Elijah Arabambi, was filed in support of the preliminary objection. The affidavit stated in part as follows-

D *"2. I have studied the Petition to wind up served on us and observed that several statements contained therein are incorrect in material particulars and omit to mention several material facts relevant to the issue.*

*3. The Petitioner, on our instructions remitted the total sum of \$200,000.00 to some of our suppliers in Germany on or about March*  
E *25, 1992 and April 10, 1992 and were supposed to, as is the usual banking practice, debit our accounts with them immediately to the tune of the naira equivalent.*

*4. The Petitioner instead debited another of their customers*  
F *and did not discover this until on or about May 19, 1993 when they wrote us to say that they had accordingly debited our account with the principal sum of N3,636,000.00 plus the accrued interest. Attached herewith and marked exhibit EA1 is a photocopy of the said letter.*

*5. The Petitioner followed up with their letter dated June 14,*  
G *1993 by which they informed us that the principal sum plus accrued interest came to the sum of N5,499,355.42 and asking us to pay them the said sum. Attached herewith and marked exhibit EA2 is the photocopy of the said letter.*

H *6. In subsequent meetings and telephone discussions we stated categorically that we accept no liability for the allegedly accrued interest and would pay only the principal sum given their negligence in the matter.*

7. *The Petitioner's present deputy manager director, Mr. Akinsola Akinfemiwa, then wrote a letter dated June 18, 1993 pleading with our managing director, Mr. Ravi Chanrai to intervene and help them out of the problem which they had created. Attached herewith and marked Exhibit EA3 is a photocopy of the said letter.* B

8. *It is pertinent that, together with our sister companies we maintain accounts with well over twenty commercial and merchant banks given the size and volume of business ventures and activities with the result that keeping a tab on all our accounts is a major full time task in itself even without the negligence of any of our bankers.* C

9. *Further to paragraph 8 above, we wrote a letter dated May 18, 1992 to the Petitioner asking them to avail us with our bank statement on a weekly basis given the critical need for us to closely and constantly monitor our bank balances and plan accordingly. Attached herewith and marked exhibit EA4 is a photocopy of the said letter.* D

10. *Meanwhile, we continued to insist that we would not pay any sum more than the principal sum which the Petitioner refused to accept and purported to continue to accept and purported to continue to calculate interest and by their letter dated January 17, 1994 had calculated the sum of N8,020,537.17 as our total outstanding indebtedness, threatening to wind us up if we fail to pay the said sum within 21 days. Attached herewith and marked Exhibit EA5 is a photocopy of the said letter.* E F

11. *When we ignored what we considered their unnecessary and baseless threat as contained in exhibit EA5, the Petitioner unilaterally purported to grant us some concession on their equally unilateral interest computation vide their letter dated February 8, 1994 wherein they asked us to pay them the sum of the sum of N6,828,593.69 in full and final settlement of the sum of N9,105,408.50. Attached herewith and marked Exhibit EA6 is a photocopy of the said letter.* G

12. *Meanwhile, the Petitioner had earlier by their letter dated January 4, 1994 advised us that they had issued a commercial paper on our account in the sum of N8 million "to normalise the unauthorised overdraft in the account" notwithstanding that there was no mandate* H

*from us for such thing to be done. Attached herewith and marked exhibit EA7 is a copy of the said letter.*

13. *After the Petitioner made what they called "Final Demand Notice of Amount Outstanding" dated March 28, 1994 there ensued a rather long drawn out negotiations between us punctuated by the political crisis of June-September 1994 at the end of which we offered to pay the sum of N5 million in full and final settlement which the Petitioner refused to accept by its letter dated October 4, 1994 wherein they also stated that they would accept the sum of N8.16 million instead. Attached herewith and marked exhibit EA7A and 8 respectively are photocopies of the said letters.*

14. *The Petitioner's present counsel by a letter dated October 20, 1994 wrote us enclosing a draft copy of the petition, threatening to file it within seven days if we fail to pay the Petitioner the sum claimed in the petition. Attached herewith and marked exhibit EA9 is a photocopy of the said letter and accompanying petition.*

15. *We then got our solicitors to write the Petitioner the letter dated October 27, 1994, a photocopy of which is attached herewith and marked exhibit EA10.*

16. *In the circumstances of this case, I am convinced that this petition is intended to stampede us into paying the Petitioner monies which Frank Hoenyosi, our solicitor, tells me and I verify believe that they are not in any way entitled to especially given their negligence in not representing to us correct state of our account with them.*

17. *We have in the meantime paid the sum of N3.636 million to the Petitioner which I verily believe is the whole extent of our indebtedness to the Petitioner. Attached herewith and marked exhibit EA11 and 12 are the photocopies of the cheque and covering letter sent to the Petitioner's Counsel by our own Counsel."*

Further affidavit and counter-affidavit were respectively filed by the Appellant and the Respondent. Thereafter the Appellant filed a notice of preliminary objection.

After hearing counsel for the parties on the preliminary objection the trial court (Abdu-Kafarati,J.) delivered its ruling on 24th November,

1995. In concluding the ruling the learned judge held-

*"From the facts and circumstances of this case as can be discerned from the affidavit evidence and the Exhibits attached thereto, it is my opinion that the petition to wind up the respondent Company is properly before the court and is not an abuse of this Court's processes; (sic) B and so I hold. I also hold the view that this Court has jurisdiction to entertain the petition. This application therefore lacks merit and is hereby dismissed."*

Dissatisfied with the ruling the Appellant (herein) appealed to the Court below. Whilst the appeal was pending thereat the appellant brought a motion on notice on 13th march, 1996 praying the Court of Appeal for-

*"an order staying all further proceedings in the substantive suit pending the hearing and determination of the Respondent's appeal to the Court of Appeal against the ruling of the Federal High Court, Lagos Division (coram Abdu-Kafarati,J.) delivered on 24th November, 1995; D and for such further order(s) as (the Court of Appeal) may deem fit to make in the circumstances."*

The motion came up for hearing before the court of Appeal on E 15th June, 1996. Counsel for the parties addressed the Court. At the end of the addresses the motion was instantly dismissed.

The Appellant then decided to appeal to this Court from the ruling of the Court of Appeal. Briefs of argument were filed and exchanged F by the parties. The following issues have been formulated by the Appellant for our determination.

*"(i) Did the Court of Appeal in peremptorily dismissing the application, exercise its discretion judiciously and judicially? G*

*(ii) Was the Court of Appeal's dismissal of the Appellant's application without considering the Appellant's Brief and adverting to the principles of law of stay of proceedings relevant to the application? H*

*(iii) Is the Court of Appeal right to hold that the Appellant's claim is puerile and this cannot in their view constitute a genuine dispute as to indebtedness?"*

For its part the Respondent formulated two issues for determination. They are-

*"(1) Whilst ( sic whether) on the evidence and materials placed before the Court of Appeal, there was sufficient justification for the Court to refuse the grant for a Stay of Proceedings."*

*(2) Did the Court of Appeal in fact decide the substantive Appeal by its pronouncement when it refused to Stay Proceedings."*

In arguing issue no. (i) in the Appellant's brief, it is contended that unless the Court of Appeal acted on a wrong principle or disregarded a principle or acted under mistake of law or under a misapprehension of the facts or took irrelevant matters in account or on the ground the injustice would arise, the Supreme Court would not interfere with the Court of Appeal's exercise of discretion. The cases of *Awani v. Erejuwa* (1976) 11 S.C. 307; *University of Lagos v. Aigoro*, (1985)1 N.W.L.R. (part 1) 156 at pp. 168-9 and *Efetiororoje v. Okpalefe II*, (1991)5 N.W.L.R. (part D 193) 517 at p.537 were cited in support. Again it is contended that each party to a case has a right to have his case determined upon its merits and court should do everything to favour fair trial of the question before them. The cases of *Collins v. Vesty of Paddington*, (1886) 5QBD 330 at E p.381 and *Ojukutu v. Odeh*, 14 W.A.C.A. 640 were relied upon. It was then argued that the Court of Appeal did not carry out its judicial function in its ruling despite the fact that the grounds of appeal, the Appellant's motion for stay of further proceedings and the brief of argument in support of the motion were before the Court. As a result the Court failed to F advert its mind to the principles of law applicable to application for stay further proceedings as laid down in *Akilu v. Gani Fawehinmi*, (1989) 2 N.W.L.R (part 102) 122 at pp. 167-169. Nor did it take into consideration the preservation of the res, and the great hardship that the winding G up of the Appellant would cause. That the Court also failed to consider the grounds of appeal particularly the one that contended that there was a substantially disputed debt and the contention that the Federal High Court lacked jurisdiction. It is submitted that if these facts had been H taken into consideration by the Court of Appeal, it would not have dismissed the motion but would have granted the stay of further proceedings. It is further submitted that for the foregoing reasons, this Court should interfere with the ruling of the court below, which was wrong

exercise of discretion, and therefore grant the application by the Appellant.

With regard to issue no. (ii) the foregoing argument on issue no (i) is adopted by the Appellant and in addition, it is submitted that the terse ruling given by the Court of Appeal is a violation of the Appellant's right to fair hearing to wit that it failed or neglected to consider the vital issues in the Appellant's brief of argument. B

On issue no (iii) the Appellant refers to the leading ruling delivered by Uwaifo, JCA, and contends that the Court of Appeal had prejudged the substantive suit when it stated- C

*"It then says it would pay only principal sum and not the interest. This to me is a puerile claim. This cannot in my view constitute a genuine dispute as to indebtedness."*

It is submitted that the dictum is perverse and cannot stand having regard to the evidence which is available to the Appellant against the Respondent's claim. D

The Respondent, for its part, argues in its brief of argument that the Court of Appeal Rules, 1981 have not made provision for the filing of a brief of argument in support of motion for stay of proceedings nor did the Court direct the Appellant to file a brief of argument. The Appellant acted on his own in filling the brief and so could not complain if the Court of Appeal disregarded the brief. In any case, it is said, the Court did not mention in its ruling that it did not refer to the brief, in which case the Appellant cannot argue that Court disregarded the brief. It is again canvassed that the fact that the Court of Appeal did not expressly refer to the brief in its ruling does not mean that it did not read it. It is then contended that in its deciding to dismiss the application peremptorily, it cannot be argued that the Court of Appeal did not advert to the brief of argument or that the argument by the Appellant was not considered. It is submitted that both counsel for the Appellant and the Respondent addressed the Court before it gave the ruling which was based on all the material facts and documents before the Court. Therefore, this cannot be regarded as a denial by the Court below of the right to fair hearing. It is contended that the principles on which a stay of proceedings can be granted are laid E  
F  
G  
H

down in the case of *Okafor v. Nnaife*, (1987) 4 N.W.L.R. (part 64) 129 at p. 136 and it is submitted, on the authority of *Nnoye v. Anyiichie*, (1989) 2 N.W.L.R. (part 10) 110 at p. 115 G-H and *Jadesimi v. Okotie Eboh & Ors.* (1989) 1 N.W.L.R. (part 16) 264 at p. 278, that the Court of Appeal was entitled to consider the factual situation of the case by observing that the Appellant could not maintain a stance that there was genuine dispute as to its indebtedness to the Respondent.

Now, I think it is pertinent to reproduce the ruling of Uwaifo, JCA which is short. It reads:-

"The application before the court is for a stay of further proceedings of the petition before the lower court, i.e. the federal High Court, on the ground that (that) court has no jurisdiction. The issue of jurisdiction has been raised because the applicant says that there was a dispute as to the indebtedness of the applicant to the petitioner/respondent. This dispute, if (sic it) is said is in regard to the interest on the facilities of \$200,000 made available to the applicant. The said amount was not debited to the account of the applicant in time but when thus (sic the) error was discovered, the account was brought up to date by the petitioner. But the applicant now argues that since that debit was not done in time, it was misted. It then says it would pay only principal sum and not the interest. This to one is a puerile claim. This cannot in my view, constitute a genuine dispute as to indebtedness. This application has no merit and it is hereby dismissed with N1,000.00 costs to the petitioner/respondent."

The nature of the application made before the Court of Appeal was simply to stay the proceedings in the petition brought by the Respondent (herein) to wind up the Appellant, pending determination of the appeal to the Court of Appeal. Now, the Court below has the inherent power to stay proceedings pending appeal in order that the *res* may be preserved. The power, which is indeed discretionary, must be exercised judicially and also judiciously- See *Shodeinde v. The Trustees of Ahmadiyya Movement -in-Islam*, (1980) 1-2 S.C.163 and *Kigo (Nig) Ltd. V. Holman Bros. (Nig) Ltd*, (1980) 5-7 S.C.60. Res means a thing or things, or an object or objects. The

question is: What is the res in the present case to be preserved? The petition is for the Appellant to be wound up. The Appellant is, Therefore, the res to be preserved pending the determination of the interlocutory appeal before the Court below. If the proceedings were not stayed while the interlocutory appeal by the Appellant is pending in the Court of Appeal, the possibility and indeed the danger that the winding up proceedings could continue in the Federal High Court and even be concluded is real and present. Should this happen and the appeal before the Court of Appeal succeeded, the damage in winding up the Appellant could have taken place. The existence of the company would not therefore have been preserved in the circumstance.

**The real issue to have been considered by the Court of Appeal was not whether the Appellant was indebted to the Respondent but rather what could have happened if the proceedings for winding up went on in the Federal High Court and was concluded earlier than the appeal before it got determined. I am afraid the Court below did not advert its mind to this very important element in the motion as can be seen from the full text of its leading ruling quoted above.** In *Akilu v Fawehinmi (No.2) (1989)2 N.W.L.R. (part 102) 122 at p. 188*, I stated as follows:-

*"Some of the considerations which the court bring to bear on any application for stay of proceedings pending appeal are that the burden is on the applicant for stay of proceedings to show that if the appeal should succeed, the success would not be in vain. Also that in the peculiar circumstances of the case a refusal of stay of proceedings would not be unjust and unequitable.....- See jadesimi v Okotie-Eboh, (1986) 1 N.W.L.R. (part 16) 264, Obeya Memorial Specialist Hospital & Anor. v. A-G of the Federation & Anor, (1987) 3 N.W.L.R. (part 60) 325 and Okafor v. Nnaife, (1987) 4 N.W.L.R. (part 64) 129."*

**It follows, therefore, that the Court of Appeal did not exercise its discretion properly. In other words, the exercise of the discretion was neither judicial nor judicious. In my opinion it ought to have granted the application.**

Next the Appellant complained that the Court of Appeal pre-

judged the case in the trial court when it held thus:-

"...But the applicant now argues that since that debit was not done in time, it was misted. It then says it would pay only the principal sum and not the interest. This to one (sic me) is a puerile claim. This cannot in my view, constitute a genuine dispute as to indebtedness." ...." (underlining mine).

**There is no doubt, and it is unfortunate, that this finding by the Court is prejudicial to the Appellant's case before the trial court. The Court of Appeal should not have adverted to the merit of the Appellant's case in the lower court. If the Court had limited its consideration to the principles laid down, in a long line of decision for the grant of stay of proceedings, it would not have been necessary for it to prejudge the merit of the case before the trial court. This propensity for appeal court to determine the merit of a case, which is not before it for a decision, had been deprecated by this court on many occasions. It is, therefore, necessary for appeal courts to restrain themselves, in dealing with the merit of the dispute in the substantive case, which is not necessary for the determination of any interlocutory appeal brought before them.**

**For the foregoing reasons, I hold that the decision of the Court of Appeal not to exercise its discretion to grant the application for stay of further proceeding in the winding up petition brought by the Respondent in the Federal High Court is erroneous. This is a proper case in which this Court can interfere with the decision of the Court below.**

**Accordingly, the appeal succeeds and it is hereby allowed. The decision of the Court of Appeal is set-aside and in its place I grant the application.** The proceedings for the winding up petition in Federal High Court are hereby stayed pending the determination of the interlocutory appeal before the Court below. A panel of the Court of Appeal different from the one mentioned at the beginning of this judgment shall hear the pending interlocutory appeal. Costs assessed at N10,000.00 are hereby awarded in favour of the Appellant (herein) against the Respondent (herein).

**WALI JSC**

I have had the privilege of reading in advance the lead judgment of my learned brother Uwais, CJN and I entirely agreed with his reasoning and conclusion for allowing the appeal. I shall however wish to contribute the following by way of emphasis. B

The facts involved in this case have been sufficiently stated in the lead judgment and require no further recapitulation by me. Simply put, the appeal before this court is against the refusal by the court of Appeal to grant an interim order of stay of proceedings in the trial court involving a petition to wind up the appellant, pending the determination of the appeal before it. C

The primary duty of all courts (both trial and appellate) is to preserve the res (subject matter of litigation) so that at the end of the exercise, whatever decision is reached is not rendered nugatory: See KIGO v. HOLMAN (1980) 5 - 7 SC. 60 The affidavit evidence in this case reveals that there is a substantial issue to be considered by the court of Appeal. See KUFUJI V. KOGBE (1961) 1 ALL NLR 113. The determinant question in this type of application is balance of convenience. E Who will stand to lose more if the status quo is not maintained.

Considering the totality of the affidavit evidence in this case, it is my considered view that the balance of convenience lean in favour of granting the application. If the petition to wind up the appellant without resolving the issue of the extent of its indebtedness to the respondent is allowed to proceed and the appellant is wound up, no amount of damage can compensate it. See OBEYA MEMORIAL SPECIALIST HOSPITAL AYI-ONYEMI FAMILY LTD V ATTORNEY- GENERAL OF THE FEDERATION & ANOR (1987) SC (pt.1) 52 and KIGO V HOLMAN (supra). F G

It is for this and the fuller reasons contained in the lead judgment of my learned brother Uwais, CJN that I also hereby allow the appeal and grant the interim order as prayed. I abide by the other consequential orders in the lead judgment, including that of costs.

**KUTIGI JSC**

I have had the privilege of reading in advance the judgment just rendered by my learned brother Uwais, C.J.N. I agree with his reasoning and conclusion. There is merit in the appeal which is hereby allowed.  
B The winding-up proceedings now before the federal High court are hereby stayed pending a determination of the interlocutory appeal in the court below by a differently constituted panel. I endorse the order for costs in the lead judgment.

C \_\_\_\_\_

**ONU JSC**

I had the advantage of a preview of the judgment just delivered by my learned brother Uwais, C.J.N. I entirely agree with him that the  
D appeal is meritorious and ought therefore to succeed.

In the case herein on appeal, the facts and background of which have been fully stated in the leading judgment of my learned brother, the Chief Justice to need any further recapitulation here, the three issues the  
E Appellant has submitted for our determination – they indeed overlap the Respondent’s two issues – ask (and I propose to consider them serially) thus:

“(i) *Did the Court of Appeal in peremptorily dismissing the*  
F *application, exercise its discretion judiciously and judicially?*

(ii) *Was the Court of Appeal’s dismissal of the Appellant’s application without considering the Appellant’s Brief and adverting to the principles of law of stay of proceedings relevant to the application?*

(iii) *Is the Court of Appeal right to hold that the Appellant’s*  
G *claim is puerile and this cannot in their view constitute genuine dispute as to indebtedness.”*

**ISSUE NO.1**

(i) Now, the principles upon which a court can grant a stay of  
H proceedings are well settled, being a matter of discretion of the court. This, as established by a long line of decided cases, depends on the facts and circumstances of each case and founded on grounds of appeal, which must not be frivolous. See Vaswani Trading Co. v. Savalakh (1972) 12

SC.77; (1972) 1 All NLR (Part 2) 483; Okafor v. Nnaife (1987) 4 NWLR (Part 64) 129 at page 136. Thus, unless the court has acted on a wrong or in disregard of principles for the grant or acted under a mistake of law or under a misapprehension of the facts or taken into account irrelevant matters or on the ground that injustice could arise, an Appellate Court B will not interfere with the discretion of the High Court. See University of Lagos v. M.I. Aigoro (1985) 1 NWLR (Part 1) 156 at page 168 – 169; Efetiororoje v. Okpalefe II (1991) 5 NWLR (Part 193) 517 at 537 and Awani v. Erejuwa (1976) 11 SC.307.

(ii) On the exercise of judicial discretion by the Court, it was C Thesiger L.J. in Collins v. Vestry of Paddington (1886) 5 Q.B.D. 303, 381 who said:

*“Each party has a right to have his dispute determined upon the merits and courts should do everything to favour the fair trial of the D questions before them.”* See also Ojikutu v. Odeh 14 WACA 640.

Further, in the exercise of judicial discretion the primary objective of the court must be to attain substantial justice. Acting judicially it ought to be pointed out, imports consideration of the interest of both E parties and weighing them in order to arrive at a just and fair decision.

Abiding by the principles enunciated in Aigoro’s Case (supra) at pages 148 – 149, the court below per Uwaifo, J.C.A. as he then was, would not appear to have carried out this judicial function since before F that court and in the appeal herein there was a motion for stay of further proceedings. There was also a comprehensive appellant’s brief, a copy of which showed substantial and arguable grounds which could tilt the scales of justice on his (Appellant’s) side. Let me exemplify the above G pronouncement as follows:-

The learned Justices of the Court of Appeal in the interwoven pieces of evidence neither

(a) Considered the principles of law applicable to the application for stay of further proceedings explicit in Akilu v. Fawhinmi (1989) 2 H NWLR (Part 102) 122 at 165, 167; Shankkton v. Swift (1913) 2 K.B. 304 at 311 – 312.

(b) Nor did it, in my view, in peremptorily dismissing the appli-

cation take into consideration relevant issues, namely: the preservation of  
 the res, that the winding up of the Appellant Company will impose greater  
 hardship on it. See In re Boyo (1970) 1 All NLR 111. The Appellant  
 while conceding that it is not every point of law raised that constitutes  
 B special circumstances: See Agbaje v. Adelekan (1990) 7 NWLR (Part  
 164) 596, 611, but the one Appellant contends which raised the issue that  
 there is a substantially disputed debt or is bona fide contested and in this  
 case the retroactive interest demanded but refused by the Appellant, or  
 C that the Federal High Court had no jurisdiction, all these situations do not  
 fall within the law as to winding up on the grounds of inability to pay a  
 debt or that the Company (Appellant) thereby became insolvent. See  
Hans International Construction Ltd. v. Mobil Producing Nigeria (1994)  
 9 NWLR (Part 366) 76, 86 – 87 and Paper Sack Nigeria Ltd. v. Market-  
 D ing and Shipping Enterprises Ltd. (1977) 3 F.H.C.L.R. 342 at 344.

(c) I take the firm view that if the Court below had given due  
 consideration to the Appellant's Brief of Argument, it would have found  
 that a winding up order will not pay the debt owing if any, since the  
 E greater hardship will be the killing of the growing Company that will  
 consequently be thrown on the employment market. Learned counsel  
 for the Respondent's contention, inter alia, that "the Court of Appeal was  
 entitled to consider this factual situation and was therefore justified in  
 F observing as it did, that the Appellant cannot really maintain a stand that  
 there was a genuine dispute as to indebtedness." This, in my view, is  
 clearly wrong. However, the Appellant's contention that the court below  
 in dismissing the application failed to take into consideration the facts  
 mentioned above, disregarded the principles of law for the grant or re-  
 G fusals of stay of proceedings all of which have occasioned a miscarriage  
 of justice, has merit. A fortiori, I hold the view that the Appellant's  
 complaint that the court below in peremptorily dismissing its (Appellant's)  
 application without due consideration to the principles of law applicable  
 H to stay of proceedings, is fully justified. See Aladetoyinbo v. Adewunmi  
 (1990) 6 NWLR (Part 154) 98 at page 107; Mohammed v. Kano N.A.  
 (1968) 1 All NLR 24. Although a stay of execution is not granted to  
 every applicant e.g. a contemnor – see Governor of Lagos State v. Ojukwu

(1986) 1 NWLR (Part 18) 621 nor is it granted in every case where the grounds of appeal raise arguable point or points of law (see Balogun v. Balogun (1969) 1 All NLR 349 which has restricted the scope for such a grant) e.g. in Okafor v. Nnaife (1987) 4 NWLR (Part 64) 129 this Court has laid guidelines for the grant or refusal of such an application against an interlocutory decision or ruling. See Akilu v. Fawehinmi (No.2) (1989) 2 NWLR 122 at 165; Kigo (Nig.) Ltd. v. Holman Bros. (1980) 5/7 SC.61 and Jadesimi v. Okotie-Eboh (1986) 1 WLR 264. My answer to Issue No.1 is accordingly in the negative.

On Issue No.2, while adopting all I have considered on Issue No. (I) above, I wish to add by saying that courts are bound to decide on issues placed before them. In this wise, I am in full agreement with the Appellant that a short cut or short circuiting such as employed by the court below in its Ruling of 5<sup>th</sup> June, 1996, may be counter-productive. See Civil Service Commission & Anor. v. Alexius I. Buzugbe (1984) 7 SC.19 at 40. The peremptory nature of the order of dismissal of the Appellant's application, without a consideration of the Appellant's Brief, the copious affidavit and other documents exhibited, applying the principles of law on stay of further proceedings to the case in hand, in my opinion, breaches the Appellant's fundamental rights to fair hearing as enshrined in Section 33(1) of the 1979 (now to be found in Section 36(1) of the 1999) Constitution. See also Alhaji Otapo v. Chief Sunmonu (1987) 5 SC.228 and Okoduwa v. The State (1988) 2 NWLR (Part 76) 524.

Issue No.2 is accordingly also answered in the affirmative. Finally, on Issue No.3 wherein the Appellant contends that the leading Ruling of Uwaifo, J.C.A. (as he then was) erred in these words:

*"This dispute, if it is said is in regard to the interest in the facilities of \$200,000 made available to the applicant. The said amount was not debited to the account of the Applicant in time but when this error was discovered, the account was brought up to date by the petitioner. But the Applicant argues that since that debit was not done, in time, it was misled. It then says it would pay only principal sum and not the interest. This to me is a puerile claim. This cannot in my view constitute a genuine dispute as to indebtedness. This application has no merit and it is*

hereby dismissed.” (Underlining is for emphasis.)

From the above conclusion, I take the view that the court below was in grave error to have refused to stay the proceedings being mindful of the fact that courts have unimpeded discretion to grant or refuse a stay. See Vaswani v. Savalakh (supra). In this, like in all instances, the court is bound to exercise that discretion both judicially as well as judiciously and not erratically. Okafor v. Nnaife (No.2) (1991) 5 NWLR (Part 191) 266 and Lijadu v. Lijadu (1991) 1 NWLR (Part 178) 733 by preserving the res pending the hearing of the appeal.

Finally, the trial court having made a finding of the existence of a dispute over the debt without qualification but proceeding to resolve that dispute, I agree with the Appellant’s submission that the instant dismissal of the application by the court below, cannot, with utmost respect, be allowed to stand.

It is for the above reasons and the fuller ones contained in the said Ruling of my learned brother, the learned Chief Justice, that I allow this appeal. Accordingly, I allow the appeal, set aside the Ruling of the Court of Appeal and grant a stay of proceedings pending in Suit No. FHC/L/11164/94 in the Federal High Court, Lagos pending the determination of the Appellant’s appeal to the Court of Appeal against the Ruling of the said Federal High Court delivered on 24<sup>th</sup> November, 1995. I award similar costs as contained in the leading judgment to the Respondent.

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### KALGO JSC

I have had the privilege of reading in draft the judgment just delivered by the learned Chief Justice of Nigeria Uwais CJN, and I agree with him entirely that there is merit in the appeal and it ought to be allowed.

This appeal is against the ruling of the Court of Appeal Lagos refusing an application for stay of further proceedings pending the determination of an appeal against an earlier ruling of Abdu-Kufarati J. of the Federal High Court in the same matter. The proceedings sought to be

stayed was in respect of the petition for winding up of the appellant under SS. 408 (d) and 409 (a) of the Companies and Allied Matters Act (Cap. 59 Laws of the Federation of Nigeria 1990) pending before Abdu-Kufarati J.

There is no doubt that the Court of Appeal has the power to B grant or refuse application for stay of proceedings in a trial court but that power is discretionary and must be exercised judicially and judiciously.

It is also well settled that an appeal court in reviewing the exercise of a discretion by a lower court, should not substitute its own discretion for that of the lower court, except where it is satisfied that the C discretion was exercised arbitrarily or illegally or without due regard to all the necessary considerations having regard to the circumstances of the particular case. See Nzeribe V Dave Eng. Co. Ltd (1994) 8 NWLR (pt. 361) 124 at 148-149. D

From the affidavit evidence in the application before the Court of Appeal, it is very clear that the petition for the winding up of the appellant was pending before the Federal High Court. If the petition proceeds to hearing and determination resulting in the winding up of the E appellant, the appellant would certainly be in great difficulty and cannot be compensated in damages. And since the main purpose of stay of further proceedings is to preserve the subject matter of the litigation, (See Kigo V. Holman Bros (Nig) Ltd (1980) 5-7 SC 60; Vaswani Trading F Co. V Savalakh & Co. (1972) 12 SC 77 at 81), it would be unfair and unjust in the circumstances of this case to allow the substantive case to proceed to trial and completion while the appeal on interlocutory decision in it is pending in the Court of Appeal see Shekoni V Ojoko 14 WACA G 504. It is my respectful view therefore that this situation sufficiently provides the cogent and exceptional circumstances which make the grant of the stay of proceedings in this case desirable, in the interest of justice (See Ajomale V Yaduat (No 2) (1991) 5 NWLR (Pt. 191) 266.

It is also very clear to me that although the ruling of the Court of H Appeal now appealed against is very short, it touched on the substance of the dispute in the petition pending in the Federal High Court especially where it considered the extent of the indebtedness of the appellant and

ended by saying "This cannot in my view constitute a genuine dispute as to indebtedness." This may have direct bearing on the winding up petition in the Federal High Court. This court has on many occasions frowned against making any findings in an interlocutory application which may prejudice a pending substantive case. See Elufiova V Halilu (1993) 6 NWLR (pt. 301) 570 at 596; Akapo V Habeeto (1992) 6 NWLR (pt. 247) 266 at 287; Orji V Zaria Industries Ltd (1992) 1 NWLR (pt. 216) 124 at 141.

From what I have said above and the more detailed reasons given by the learned Chief Justice of Nigeria in the leading judgment, I allow this appeal, set aside the ruling of the Court of Appeal delivered on 5th June 1996, and grant application for stay of proceedings in the case now pending in the Federal High Court. I abide by the consequential orders made in the leading judgment including the order as to costs.

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