

SUPREME COURT OF NIGERIA
FRIDAY 21ST FEBRUARY, 2003. SC. 15/2001
CORAM:- I. L. KUTIGI, U. MOHAMMED,
A. O. EJIWUNMI, U. A. KALGO, E. O. AYOOLA, JJSC

UNIBIZ NIGERIA LIMITED APPELLANT
AND
COMMERCIAL BANK
CREDIT LYONNAIS LTD RESPONDENT
(For itself and on behalf of
Babington Ashaye)

AGENCY - Company law - Receiver - Status - By s. 390(1) CAMA - Receiver or manager of property is deemed - An agent of the person on whose behalf he is appointed (H1)

COMPANY LAW - Action - Commencement - Locus standi - Respondent has locus standi to prosecute the action - And seek for the orders - Hence leave is not necessary in the circumstance (H2)

ORDERS OF COURT - Restraining order - Fair hearing - The order contravenes 1999 Constitution s. 36(1) - As appellant was neither heard - Nor was he put on notice (H3)

FACTS

Plaintiff/respondent commenced this action by way of originating summons at the Federal High Court Lagos, seeking for the following orders inter alia, an order directing the receiver to take such steps as may be necessary to realize the assets of respondent and a restraining order on respondent from doing anything that will prevent the receiver from performing his duties. An 18-paragraph affidavit was sworn in support of the application.

Pursuant to the application, the learned Judge without giving notice to defendant/appellant granted the application as prayed by respondent. Being dissatisfied, appellant appealed to the Court of Appeal, Lagos Division. The court did not hold in favour of appellant. Hence, it filed further appeal to Supreme Court.

ISSUES FOR DETERMINATION

“(i) Who is the proper party that has locus standi as between a debenture holder who has appointed a Receiver/Manager and the Receiver/Manager, to institute an action under section 391 of the CAMA to protect the assets forming the subject matter of the Receivership?

(ii) Whether the Court of Appeal was right in law in holding that the orders made by the trial court upon an ex-parte application were properly made.”

HELD (Unanimously allowing the appeal in part per EJIWUNMI JSC)

Company law - Receiver - Status

1. It is, I think, plain that the submission made for the respondent that a receiver or manager of any property is deemed by virtue of the provisions of section 390(1) of CAMA, an agent of the person or persons on whose behalf he is appointed. In the instant case, it is not in dispute that the receiver, a Mr. Babington Ashaye was duly so appointed by the Commercial Bank Credit Lyonnais Nigeria Ltd on or about the 13th day of October, 1999. In view of that agency relationship created by law, it seems to me clear that by the agency relationship so created with its principal, the Commercial Bank (Credit Lyonnais Nigeria) Limited, the principal can if it wishes take action for and on behalf of the agent. (p. 854 D/855 B)

Action - Commencement - Locus standi

2. The first observation that must be made is that in the instant case, we are concerned with the provisions of ss. 390 and 391 of CAMA. However, a careful reading of the above passage would reveal that the Receiver/Manager though recognized as an agent of its company, it was held that it was necessary for that agent to be granted leave by the court to prosecute the action. The reason that made such leave necessary is because it was considered that it must first be determined whether the proposed action would be the best way of disposing the issue. And also limit the costs that would be paid. In the instant case, the question of leave is unnecessary as the principal is itself initiating the action, and would be deemed to be in control of the

consequences of its own action. Moreover, the action in this case as was made clear in the prayers in the amended originating summons is clearly directed to empowering the receiver to take necessary steps to protect the interest of his principal.

From what I have said above, it is my humble view that there is nothing inimical in the fact that the action was commenced by the principal on behalf of its agent in seeking for the above orders. I will therefore hold that the respondent is vested with the locus standi to prosecute the action. The first issue is therefore resolved against the appellant. (pp. 856 G/865 E)

ORDERS OF COURT - Restraining order - Fair hearing

3. Now the question to be asked is, would the above principles apply as in the instant case, all the applicant, namely the respondent, by its second prayer asked for is an order restraining the appellant, its agents, etc, from doing anything that would prevent the receiver from performing his lawful duties as a receiver? Before this question is answered, it is pertinent to observe that the court below had held that the order made thereon by the trial court was a final order. And that decision has not been contested in this appeal. If the order is final, shouldn't the other side have been put on notice? It must be noted that in the instant case, the respondent did not ask for the restraining order to be made pending the determination of the suit, but simply asked that the appellant be restrained from doing anything that would prevent the receiver from performing his lawful duties. It seems to me that on this prayer, the respondent asked for an order of restraint, which was not tied to the happening of any event. Once granted as was done by the trial court, the appellant was clearly placed under an order of restraint for an indefinite period of time. It is the contention of learned counsel for the appellant that that order was made in breach of the civil rights and obligation of the appellant. This is because such a far-reaching order was made without hearing the appellant nor was he put on notice for him to be heard prior to the making of the order. On that premise he argued that the provisions of section 36(1) of the Constitution of the Federal Republic of Nigeria, 1999 ought to be considered to decide whether the appellant was denied his fundamental rights as enshrined in the Constitution. I therefore hold that the order was made in breach of the provisions

of section 33(1) of the Constitution. It is my view that the principles adumbrated in the *Kotoye v. C.B.N.* (supra) apply in the instant case having regard to the reasons given in the course of my consideration of that case. (p. 863 E)

B REPRESENTATION

Omotayo Oyetibo, Esq., for the Appellant
Alade Agbabiaka, Esq., for the Respondent

C CASES REFERRED TO

Idise v. Williams Intn'l Ltd (1995) 1 NWLR (Pt. 370) 142
Adediran v. Interland Transport Ltd. (1991) 12 SCNJ 27
Thomas v. Olufosoye (1986) 1 NWLR (Pt. 18) 669
Gombe v. PW (Nig.) Ltd. (1995) 6 NWLR (Pt. 402) pg. 402
Adefulu v. Oyesile (1989) 5 NWLR (Pt. 122) 377

D *Intercontractors (Nig.) Ltd. v. National Provident Fund Management Board* (1988) 2 NWLR (Pt. 76) 280

Intercontractors v. U.A.C. (1988) 2 NWLR (Pt. 76) 303
Afric Mining Co. Ltd. v. NIDB (2000) 2 NWLR (Pt. 646) 618

Provisional Liquidator, Tapp Industries v. TAPP Industries (1995) 5 NWLR (Pt. 393) 9

E *Moss Steamship Co. v. Whinney* (1912) AC 254
Pharmatek Industrial Projects Ltd. v. Trade Bank (Nig.) Plc (1997) 7 NWLR (Pt. 514) 639

F STATUTES REFERRED TO

Companies and Allied Matters Act 1990, ss. 390(1), 391
Constitution of the Federal Republic of Nigeria 1999, s. 31(1), 33(1), 36(1)

G BOOKS REFERRED TO

Principles of Modern Company Law 1979 4th Ed. pp. 488-489
Kerr on Receivers 1983 16th Ed
Court Forms 2nd Ed. Vol. 33 1981

LEAD JUDGMENT BY EJIWUNMI JSC

H This appeal is against the judgment of the Court of Appeal (Lagos Division: Coram Oguntade, Galadima, Aderemi, JJCA).

The leading judgment of the court was delivered by Aderemi, JCA, with which the other Justices concurred, dismissed the appeal of the appellant from the ruling made by Okeke, J. of the Federal High Court, Lagos. The action was commenced by the respondents, who as applicants before the Federal High Court, with an ex-parte originating summons for the following orders: - B

“(1) An order of this Honourable Court directing the receiver to take such steps as may be necessary to realize the assets of the respondent with a view to paying its outstanding to the applicant.

(2) An order of this Honourable Court restraining the respondent, its agents, privies and assigns including but not limited to its directors, and officers from doing anything that would prevent the receiver from performing his lawful duties as a receiver. C

(3) And for such further order or orders as this Honourable Court may deem fit to make in the circumstances.” D

In support of this application, Olugbenga Ojo, a senior official of the applicant bank attached to its Debt Recovery Unit, deposed to an 18-paragraph affidavit. And in order to appreciate why the applicant had to have recourse to the court, I deem it necessary to refer to paragraphs 6, 7, 8, 9, 10, 11, 12, 14, 15 and 16. E

“6. By the end of September, 1999, the exposure of the respondent to the applicant stood at N77,194,576.30 and the charge against the assets of the respondent has been up-stamped to cover this amount. F

7. Over a period of time, the applicant had made series of efforts to recover the large outstanding sum of money due to it from the respondent to no avail.

8. That arising from the above, the applicant sometime in 1998, appointed Mr. Babington Ashaye, Chartered Accountant of 21 G Araromi Street, Off Moloney Street, Lagos as Receiver/Manager of the respondent company. A copy of the Deed of Appointment dated 3rd of June, 1998 is attached herewith and marked EXHIBIT 0F3.

9. That as a result of entreaties by the respondent, Mr. Babington Ashaye was instructed by the applicant bank not to assume his position as receiver in order to give the respondent time to make good its promise to make arrangements for the liquidation of its outstanding indebtedness to the applicant. H

10. That whilst negotiation was going on between the

applicant and the respondent, the respondent instituted suit No. LD/1978/98 in which it alleged that it was not indebted to the applicant bank and the bank was obliged to file a defence to the said suit and make a counterclaim against the respondent.

B 11. That the respondent's action as deposed to in paragraph 10 above was taken by it with full knowledge that its claim was not meritorious but was initiated for the sole purpose of frustrating and or preventing any action the applicant might want to take to recover the outstanding loan.

C 12. That in proof of the facts stated in paragraph 11 hereof the respondent pleaded with the applicant bank to restructure the repayment of the credit facilities granted by it and the applicant did oblige the respondent as shown in the documents attached herewith as exhibit OF 4.

D 14. That in spite of concessions made by the applicant bank, the respondent has still not responded to demands for the liquidation of the sums outstanding against it hence the desire by the applicant to direct the Receiver/Manager to take over the assets and management of the respondent.

E 15. That on the advice of its solicitors, fresh instrument of appointment has been issued to the Receiver/Manager - Exhibit OF 6.

F 16. That the applicant is desirous of having the appointment of the Receiver confirmed by this Honourable Court and is also seeking the protection of the court to restrain the respondent from interfering with and or preventing the Receiver from performing the functions of his office."

Pursuant to this application, the learned Judge of the Federal High Court made the following orders: -

G "1. That the receiver is hereby directed to take such steps as may be necessary to realize the assets of the respondent with a view to paying its outstanding to the applicant bank.

H 2. That the respondent, its agents, privies and assigns including but not limited to its directors and officers is hereby restrained from doing anything that would prevent the Receiver from performing his lawful duties as a Receiver."

As the appellant was dissatisfied with the ruling and orders of the court, an appeal was lodged with the court below. As the

appellant was still not satisfied with the judgment of that court, it appealed further to this court. Pursuant to the rules of this court, briefs were filed and exchanged between the parties. For the appellant, the issues identified in its brief for the determination of the appeal are as follows: -

“(i) Who is the proper party that has locus standi as between a debenture holder who has appointed a Receiver/Manager and the Receiver/Manager, to institute an action under section 391 of the CAMA to protect the assets forming the subject matter of the Receivership?” B

“(ii) Whether the Court of Appeal was right in law in holding that the orders made by the trial court upon an ex-parte application were properly made.” C

In the brief filed on behalf of the respondent, these issues were identified for the determination of the appeal:- D

“(i) Does the respondent lack locus standi to invoke the jurisdiction of the lower (sic) trial court under section 391 of CAMA as a joint applicant.

“(ii) Does the Receiver/Manager appointed out of court rightly have a common interest with the respondent/debenture holder (his appointor) in ensuring the effective discharge of his functions as Receiver/Manager?” E

“(iii) Should the Application by the respondent and the Receiver/Manager in the court below have been made by notice to the applicant instead of being made ex-parte?” F

“(iv) If the application should have been made on notice instead of ex-parte, should failure to do so vitiate any or all the order(s) made by the lower court?”

Upon a careful reading of the two sets of questions set out above for the appellant and the respondent, it is, I think, manifest that the questions are materially similar. But in this appeal, the two questions set out for the appellant being more succinct, would in this judgment be considered in the determination of the merit of this appeal. H

Issue 1

Under this issue, the question raised by the appellant is, who has locus standi, as between a debenture holder who has appointed a Receiver/Manager and the Receiver/Manager, to institute an action

under section 391 of the Companies and Allied Matters Act, 1990 to protect the assets forming the subject matter of the Receivership. Both in the appellant's brief and his oral submission before us, the contention of learned counsel for the appellant appears to be that the only person who can bring this action is the receiver. It is his argument that the lower court recognized his submission that it is only the receiver who can institute this action. He further submitted that action could not have been brought as a representative action. This is because of the settled principles with regard to representative actions in such cases as *Idise v. Williams International Limited* (1995) 1 NWLR (Pt. 370) 142 at 152-153; *J. A. Adediran & Ors v. Interland Transport Ltd.* (1991) 12 SCNJ 27; (1991) 9 NWLR (Pt. 214) 155. In those cases, he argued that it is settled law that for an action to lie in a representative capacity, there must be the following:-

(i) a common interest (ii) a common grievance and (iii) the relief must be beneficial to all.

And as these conditions are not present in the present action, the respondent cannot be aided by claiming that the action was commenced as a representative action. Hence, he argued that the court below was wrong when in response to the argument for the appellant before that court that the leave of court was not sought nor obtained to prosecute the action in a representative capacity, Aderemi, JCA, in his lead judgment said:-

"My short reaction to this submission is that the rule as to representative action is a rule of mere convenience and so it ought not to be treated as rigid but as a flexible tool of convenience in the administration of justice. Failure to obtain leave to sue in a representative capacity is therefore not fatal to the action. See *Anatogu & Ors v. A.-G., East-Central State of Nigeria & Ors.* (1976) 11 SC 109 and *Anabaronye & Ors. v. Nwakaihe* (1997) 1 NWLR (pt. 482) 374. I therefore answer issue two in the appellant's brief and issue one in the respondent's brief in the affirmative."

For his main submission in this appeal, that for a cause of action to subsist, the plaintiff must have locus standi, reference was made to the following cases: - *Thomas v. Olufosoye* (1986) 1 NWLR (Pt. 18) 669 at 684; *Gombe v. PW (Nig.) Ltd.* (1995) 6 NWLR (Pt. 402) page 402 at 432 and *Adefulu v. Oyesile* (1989) 5 NWLR (Pt. 122) 377 at 415. Our attention was also drawn to the following cases

with regard to the powers of a receiver or Receiver/Manager under a Debenture Deed: *Intercontractors (Nig.) Ltd. v. National Provident Fund Management Board* (1988) 2 NWLR (Pt. 76) 280 at 292; *Intercontractors v. U.A.C.* (1988) 2 NWLR (Pt. 76) 303 at 323; *Afric Mining Co. Ltd. v. NIDB* (2000) 2 NWLR (Pt. 646) 618 at 619 and *Provisional Liquidator, Tapp Industries v. TAPP Industries* (1995) 5 NWLR (Pt. 393) 9. In respect of this issue, the contention made for the respondent both in the respondent's brief and in the oral argument of its counsel in open court, is to the effect that the respondent had the locus standi to institute the action.

The main thrust of the argument in support of that contention is that section 390(1) of Companies and Allied Matters Act creates a statutory agency relationship between the respondent bank and receiver manager. As this relationship cannot be altered, it is submitted that by virtue of the provisions of section 391 of Companies and Allied Matters Act, the respondent possessed the necessary locus standi to institute and prosecute the action. In support of this contention, reference was also made to the following authorities: *Gower's Principles of Modern Company Law*, 1979 (4th Edition) at pages 488-489; *Kerr on Receivers*, 1983 (16th Edition); *Moss Steamship Co. v. Whinney* (1912) AC 254; *Pharmatek Industrial Projects Ltd. v. Trade Bank (Nig.) Plc* (1997) 7 NWLR (Pt. 514) 639; *In Re: Adetona* (1994) 3 NWLR (Pt. 333) 481. It is also contended for the respondent that the facts in the case of *Intercontractors Nig. Ltd v. National Provident Fund Board* (supra) are clearly distinguishable from those in the instant case. Hence it is argued that that authority should not be followed to determine the merit of this case.

Now for the purpose of resolving the argument of parties, the starting point is and should be the provisions of sections 390 and 391 of the Companies and Allied Matters Act, 1990 (otherwise known as "CAMA"). They read:

"Section 390(1):

A receiver or manager of any property or undertaking of a company appointed out of a court under a power contained in any instrument shall, subject to section 393 of this Act, be deemed to be an agent of the person or persons on whose behalf he is appointed and, if appointed Manager of the whole or any part of the undertaking of a company he shall be deemed to stand in a fiduciary relationship

to the company and observe the utmost good faith towards it in any transaction with it or on its behalf.”

“Section 391:

A receiver or manager of the property of a company appointed in accordance with the provisions of subsection (1) of section 390 of this Act, may apply to the court for direction in relation to any particular matter arising in connection with the performance of his functions, and on any such application, the court may give such directions or make such order declaring the rights of persons before the court or otherwise, as it thinks just.”

It is, I think, plain that the submission made for the respondent that a receiver or manager of any property is deemed by virtue of the provisions of section 390(1) of CAMA, an agent of the person or persons on whose behalf he is appointed. In the instant case, it is not in dispute that the receiver, a Mr. Babington Ashaye was duly so appointed by the Commercial Bank Credit Lyonnais Nigeria Ltd on or about the 13th day of October, 1999. See EXH OF6 attached to the affidavit sworn in support of the application before the lower court. It reads:-

“COMPANY AND ALLIED MATTERS DECREE NOTICE OF APPOINTMENT OF RECEIVER/MANAGER PURSUANT TO SECTION 206(1)

Name By: UNIBIZ NIGERIA LIMITED

Presented By: COMMERCIAL BANK (CREDIT LYONNAIS NIGERIA) LIMITED

We COMMERCIAL BANK (CREDIT LYONNAIS NIGERIA) LIMITED of 146B Ligali Ayorinde Street, Victoria Island, Lagos.

With reference to UNIBIZ NIGERIA LIMITED of 16, Idowu Taylor Street, Victoria Island, Lagos hereby give you notice that:-

On the 12th day of October, 1999, we appointed Babington Ashaye as Receiver/Manager on all the company’s undertaking good-will properties and assets whatsoever and wheresoever both present and future including its uncalled capital for the time being and book debts.

Dated this 13th day of Oct., 1999.

COMMERCIAL BANK (CREDIT LYONNAIS NIGERIA) LIMITED

Signed

MANAGING DIRECTOR”

In view of that agency relationship created by law, it seems to me clear that by the agency relationship so created with its principal, the Commercial Bank (Credit Lyonnais Nigeria) Limited, the principal can if it wishes take action for and on behalf of the agent. In this respect, I must refer to the view held in *Intercontractors Nigeria Limited v. N.P.F.M.B.* (1988) 2 NWLR (Pt. 76) 280 at 294-295 (supra); (1988) 1 NSCC 759 where Karibi-Whyte at P.769 said thus:-

“The law is that generally the Receiver/Manager will bring the action in the name of the company and will seek leave of the court to do so. In certain circumstances he may bring the action in his own name. In *M. Wheeler and Company Ltd. v. Warren* (1928) Ch. 840, the Debenture deed provided for the Receiver/Manager to get in the property charged by the debenture. When there was a default in the terms of the debenture, the debenture holder appointed a receiver. The receiver issued a writ in the name of the company. A preliminary objection was taken by the defendant seeking to set aside the writ on the ground that the receiver had no power to commence an action in the name of the company. Lord Hornworth, M. R. after referring to the words of clause 6, sub-clause 1, similar to clause 1 in this case, and observing that it is not expressly stated that the receiver is to have power to use the company’s name for the purpose of bringing proceedings, stated that it is provided that the receiver

‘shall be the agent of the company and shall have power... to take possession of and get in the property hereby charged’ at p.844 construed this to mean and I entirely agree,... ‘that as the getting in of the property charged is to be done by the receiver and the property is vested in the company, he must have power to get in the property in the only way possible - namely, by bringing action in the name of the company. The fact that he was made the agent of the company and given power to get in the property charged, is in my opinion sufficient to give him power to take the only effective steps in the name of the company.’ P.844.

Since the defendant/appellant can bring action in the name of the company, it is not the law that he should be joined. It is action in the name of the company. See *Atkins Court Forms* (Second Edition) Vol. 33, 1981 issue; Forms 40,41, 42, 43 at pages 221-222 and second Edition Annual Supplement, 1979, Form 38A at p.336. Generally if in the opinion of the court the bringing of action by the

Receiver/Manager is the best way of disposing of the issue leave will be granted - *L. P. Arthur (Insurance), Ltd. v. Sisson* (1966) 2 All E.R. 1003.

In *Viola v. Anglo-American Cold Storage Company* (1912) 2 Ch. 305, Swinfen Eady, J., gave what is acceptable as the reason why leave of the court is necessary for a receiver to institute or defend actions whether the appointment of Receiver/Manager is by court or under a debenture-holder's Deed. He said at PP. 310-311 - It is however, well settled that in a mortgagee's action where a receiver and manager has been appointed it is for the court to determine whether proceedings shall be taken at the expense of the mortgaged property. The receiver cannot do this of his own initiative, but would run the risk of his cost being disallowed if he did not obtain the direction of the court. See *Bristowe v. Needham* (1847) 2 Ph. 190 and *Wynn v. Lord Newborough* (1790) 3 Bro. C.C. 88), and neither mortgagor nor mortgagee has any absolute right to insist upon an action being brought or to prohibit it being brought by the receiver at the expense of the mortgaged property. The appointment of a receiver is a matter of discretion to be governed by the circumstances of the case. See Lord Truro's judgment in *Owen v. Homan* (1851) 3 Mac & G 378 & 412. It is made in the first place for the protection of the estate and for the benefit of all concerned, and in sanctioning the receiver taking proceedings the court has regard to what it considers right and proper in the interest of all parties.

The first observation that must be made is that in the instant case, we are concerned with the provisions of Ss. 390 and 391 of CAMA. However, a careful reading of the above passage would reveal that the Receiver/Manager though recognized as an agent of its company, it was held that it was necessary for that agent to be granted leave by the court to prosecute the action. The reason that made such leave necessary is because it was considered that it must first be determined whether the proposed action would be the best way of disposing the issue. And also limit the costs that would be paid. In the instant case, the question of leave is unnecessary as the principal is itself initiating the action, and would be deemed to be in control of the consequences of its own action. Moreover, the action in this case as was made clear in the prayers in the amended originating summons is clearly directed to empowering the receiver to

take necessary steps to protect the interest of his principal. Although I have referred to them at the beginning of this judgment, it is, I think, desirable to repeat them. They read:-

“(1) An order of this Honourable Court directing the Receiver to take such steps as may be necessary to realize the assets of the respondent with a view to paying its outstanding to the applicant bank. B

(2) An order of this Honourable Court restraining the Respondent, its agents, privies and assigns including but not limited to its directors, and officers from doing anything that would prevent the Receiver from performing his lawful duties as a Receiver.” C

From what I have said above, it is my humble view that there is nothing inimical in the fact that the action was commenced by the principal on behalf of its agent in seeking for the above orders. I will therefore hold that the respondent is vested with the locus standi to prosecute the action. The first issue is therefore resolved against the appellant. D

2nd Issue

In respect of this issue, the question is, whether the Court of Appeal was right in law in holding that the orders made by the trial court upon an ex-parte application were properly made. Having regard to what I have said above in connection with issue 1 upon which I concluded that the respondent had locus standi, I must hold that it acted within the provisions of section 391 of CAMA in respect of its first prayer. However, the question that remains is, whether it was right for the Court of Appeal to have affirmed the order of the trial court in respect of the second prayer in the application. Learned counsel for the appellant has argued copiously in his brief, and in his oral argument before the court that the court below erred in upholding the order of the trial court. His core reason being that that order restraining the appellant, its agents, privies and assigns including but not limited to its directors, and officers from doing anything that would prevent the receiver from performing his lawful duties, was made in breach of the provisions of section 36(1) of the Constitution of the Federal Republic of Nigeria, 1999. Against this submission is that of the respondent. The argument proffered for the respondent in its brief and its counsel in the course of the hearing of this appeal is plainly to the effect that the court below was right to have affirmed H

the restraining order placed on the appellant. Both parties to this appeal placed before the court several authorities, which I will now consider. It is of course common ground that the order complained of was made pursuant to the ex-parte application of the respondent to the Federal High Court. The question to be resolved therefore is, whether the order was made in breach of the provisions of section 36(1) of the Constitution of the Federal Republic of Nigeria 1999 which provides that:-

“In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality.”

In support of his contention that the appellant was not given fair hearing as provided for in the above quoted paragraph 36(1) of the Constitution, he cited the case of *Kotoye v. C.B.N.* (1989) 1 NWLR (Pt. 98) 419. In that case, this court had to consider whether orders of interlocutory injunction made pursuant to an ex-parte application was proper in the circumstances. The Federal High Court made four orders upon the said ex-parte application brought before that court by the appellant. They read as follows: -

“(i) That 1st and 2nd defendants/respondents, their servants and agents should not in any way obstruct or frustrate the holding of the Annual General Meeting of 3rd defendant/respondent bank whenever it is fixed.

(ii) That when the said Annual General Meeting is held the ordinary affairs of the 3rd defendant/respondent bank should be discussed.

(iii) That no new Directors will be appointed, the old Directors should continue to function until the determination of this application or the court other Wise orders.

(iv) I hereby also order the 1st, 2nd and 3rd defendants/respondents to be served with the motion papers. This will enable them file whatever papers they wish to. Adjourned application to Monday, 27/4/87 at 11 a.m.”

Apparently, the 1st respondent did not go to the Federal High Court in response to the order of that court on 27/4/87, but proceeded

to appeal against the orders made by the court. After hearing the appeal, the Court of Appeal, Lagos Division, allowed the appeal. In the lead judgment of Awogu, JCA, to which Akpata and Kalgo, JJCA. (as they then were) concurred, he held inter-alia as follows: -

“(i) that what the learned C.J. made was, in the nature of an immediate absolute order, not an interim order; and not one appropriate under the rule it was purported to have been brought. B

(ii) that the order made by the learned C.J. amounted to a final order, without hearing the respondents.

(iii) that the trial court granted to the applicant more than what he asked for. C

(iv) that although an affidavit of urgency was filed no case of urgency was made out to warrant an ex-parte hearing; and

(v) that although he was allowing the appeal on other grounds, he would additionally have done so for failure of the applicant to give an undertaking as to damages.” D

In order to appreciate the argument of counsel for the appellant in this appeal, it is desirable to quote relevant excerpts from the judgment of Nnaemeka Agu, JSC in the *Kotoye v. C.B.N.*’s case (supra). I begin with the distinction made with regard to the difference between an ex-parte application for injunction and that made on notice. Nnaemeka Agu, JSC stated the distinction at page 440 of his judgment and which I gratefully quote thus: E

“I think it is correct to say that “ex-parte” in relation to injunctions is properly used in contradistinction to, “on notice” - and both expressions, which are mutually exclusive, more strictly rather refer to the manner in which the application is brought and the order procured. An applicant for a non-permanent injunction may bring the application ex-parte, that is without notice to the other side or with notice to the other side, as is appropriate. By their very nature, injunctions granted on ex-parte applications can only be properly interim in nature. They are made, without notice to the other side, to keep matters in status quo to a named date, usually not more than a few days, or until the respondent can be put on notice. The rationale of an order made on such an application is that delay to be caused by proceeding in the ordinary way by putting the other side on notice would or might cause such an irretrievable or serious mischief. Such injunctions are for cases of real urgency. The emphasis is on “real.” F
G
H

And his Lordship then went on to discuss what is meant by “real” in the context of an application for injunction without notice to the other party. At pages 440-441 he stated thus: -

“What is contemplated by the law is urgency between the happening of the event which is sought to be restrained by injunction and the date the application could be heard if taken after due notice to the other side. So, if an incident which forms the basis of an application occurred long enough for the applicant to have given due notice of the application to the other side if he had acted promptly but he delays so much in bringing the application until there is not enough time to put the other side on notice, then there is a case of self-induced urgency, and not one of real urgency within the meaning of the law. This self-induced urgency will not warrant the granting of the application ex-parte. Megarry, J., as he then was, put the principle rather succinctly in the case of *Bates v. Lord Hailsham of Marylebone* (1972) 3 All ER. 1019 at p.1025 where he stated:

An injunction is a serious matter, and must be treated seriously. If there is a plaintiff who has known about a proposal for ten weeks in general terms and for nearly four weeks in detail, and he wants an injunction to prevent effect being given to it at a meeting of which he has known for well over a fortnight, he must have a most cogent explanation if he is to obtain his injunction on an ex-parte application made two and a half hours before the meeting is due to begin. It is no answer to say, as counsel for the plaintiff sought to say, that the grant of an injunction will do the defendants no harm, for apart from other considerations, an inference from an insufficiently explained tardiness in the application is that the urgency and the gravity of the plaintiffs case are less than compelling. Ex-parte injunctions are for cases of real urgency, where there has been a true impossibility of giving notice of motion.”

Now in *Kotoye v. C.B.N.* (supra), it is clear that the court was there concerned with an application for injunction “until the final determination of the suit”. In that context, the court took the view such an application is for an interlocutory, and not an interim order. And the court then considered that the real is as to whether such an application can be heard and granted ex-parte. Nnaemeka Agu, JSC, at 444 examined the question thus: -

“I have examined above the nature of a decision in an in-

terlocutory injunction and shown that it entails a deliberation on a number of well-settled issues upon which the right of an applicant to the grant of it depends. The question, therefore, is, in view of the provisions of section 33 of the Constitution of 1979, can and should a court proceed to deliberate on those issue and come to conclusions on them on an ex-parte hearing that is without hearing all the parties to be affected by the order? To answer this question properly, it is necessary to consider the provisions under section 33 of the Constitution of 1979, particularly subsection (1). This provides as follows:

(1) In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality.

Clearly, whenever the need arises for the determination of the civil rights and obligations of every Nigerian, this provision guarantees to such a person a fair hearing within a reasonable time. Fair hearing has been interpreted by the courts to be synonymous with fair trial and as implying that every reasonable and fair minded observer who watches the proceedings should be able to come to the conclusion that the court or other tribunal has been fair to all the parties concerned. See on this Mohammed v. Kano N.A. (1968) 1 All NLR 424, at p.426. There are certain basic criteria and attributes of fair hearing, some of which are relevant in this case. These include:

(i) that the court shall hear both sides not only in the case but also in all material issues in the case before reaching a decision which may be prejudicial to any party in the case. See Sheldon v. Bromfield Justices (1964) 2 QB. 573, at p. 578.

(ii) that the court or tribunal shall give equal treatment, opportunity and consideration to all concerned. See on this: Adigun v. A.-G., Oyo State & Ors. (1987) 1 NWLR (Pt. 53) 678.

(iii) that the proceedings shall be held in public and all concerned shall have access to and be informed of such a place of public hearing and

(iv) that having regard to all the circumstances, in every material decision in the case, justice must not only be done but must manifestly and undoubtedly be seen to have been done: R. v. Sussex

Justices, *ex-parte* McCarthy (1924) 1 KB 256, at p. 259; *Deduwa & Ors. v. Okorodudu* (1976) 10 SC 329.

Thus, fair hearing in the context of section 33(1) of the Constitution of 1979 encompasses the plenitude of natural justice in the narrow technical sense of the twin pillars of justice - *audi alteram partem* and *nemo iudex in causa sua* - as well as in the broad sense of what is not only right and fair to all concerned but also seems to be so. In the context of interlocutory injunctions in which, as I have shown above, a number of decisions on set principles most of which are highly contentious, need be made, can it be doubted that to decide them after hearing only one side clearly offends each and everyone of the above, criteria and attributes of fair hearing? I do not want to concern myself with the unnecessary exercise of examining whether or not such applications can, on the letters of the rules, be brought *ex-parte*. But I am of the clear view that, once it is conceded that what is involved is an order for interlocutory injunction and not a mere interim order to keep matters in status quo pending the hearing of the application for interlocutory injunction on notice to both sides or until a near named date, then the procedure runs counter to the letters and spirit of section 33 of the Constitution of 1979 and ought not be entertained. For while it can be said that an interim order of injunction merely leaves matters in status quo and that the court does not have to decide any contentious issue before so doing, I do not see how the same could be said when the order by its very nature depends on the resolution of such issues as whether the applicant has established his possibility of success, that the balance of convenience is on his side as against the respondent, that the award of damages cannot sufficiently compensate his damage, and that his conduct all through entitles him to the discretion of the court. It must always be borne in mind when we consider English decisions on the point that in Nigeria, the right of fair hearing is a right entrenched in the Constitution whereas in England it is a creation of the common law which is regulated by the Rules. The effect of entrenching a provision in the Constitution is that it over-rides all contrary provisions in any law of the land, be they substantive or adjectival. As it is so, Chief Williams and Professor Kasunmu were right when they submitted that Orders 20 and 33 of the Federal High Court Rules must be interpreted and applied in such a way as not to run counter to the letters and spirit

of section 33 of the Constitution. In so far as this was the attitude of the Court of Appeal in their decisions which have been referred to in argument and which they applied in this case, that court has been right in the matter. I therefore wish to emphasize that although Order XXXIII rule 10 of the Federal High Court Rules, which is by the way general to all interlocutory applications and not limited to applications for injunctions, provides for three alternative orders by the court, namely:

- (i) refusing to make the order;
- (ii) granting the order to show cause why the order should not be made; or
- (iii) allowing the order to be made on notice.

There is nothing in the rule to empower the court to grant the application *ex-parte*."

Now the question to be asked is, would the above principles apply as in the instant case, all the applicant, namely the respondent, by its second prayer asked for is an order restraining the appellant, its agents, etc, from doing anything that would prevent the receiver from performing his lawful duties as a receiver? Before this question is answered, it is pertinent to observe that the court below had held that the order made thereon by the trial court was a final order. And that decision has not been contested in this appeal. If the order is final, shouldn't the other side have been put on notice? It must be noted that in the instant case, the respondent did not ask for the restraining order to be made pending the determination of the suit, but simply asked that the appellant be restrained from doing anything that would prevent the receiver from performing his lawful duties. It seems to me that on this prayer, the respondent asked for an order of restraint, which was not tied to the happening of any event. Once granted as was done by the trial court, the appellant was clearly placed under an order of restraint for an indefinite period of time. It is the contention of learned counsel for the appellant that that order was made in breach of the civil rights and obligation of the appellant. This is because such a far-reaching order was made without hearing the appellant nor was he put on notice for him to be heard prior to the making of the order. On that premise he argued that the provisions of section 36(1) of the Constitution of the Federal Republic of Nigeria, 1999 ought to be considered to decide whether the appellant

was denied his fundamental rights as enshrined in the Constitution. Section 36(1) reads thus: -

B “In the determination of his civil rights and obligations, including any question or determination by or against any government or authority, a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality.”

C The above provisions, it must first be observed are in pari materia with the provisions of section 33 of the 1979 Constitution. As the provisions of section 36(1) of the 1999 Constitution fell for consideration recently in the case of Provisional Liquidator, Tapp Industries Ltd. v. Tapp Industries Ltd. (1995) 5 NWLR 9, I will therefore refer to the views of this court in that case in relation to the said provisions of section 36(1) of the 1999 Constitution before deciding the question D raised in this appeal. In the Tapp Industries case (supra) one of the questions raised in the appeal was whether the appellant’s motions of 5/12/88 and 12/12/88 affect the civil rights and obligations of the 2nd - 8th respondents? The two motions sought:

E 1. An extension of time within which the appellant was to complete his assignment as provisional liquidator of the 1st respondent.

F 2. An order of court to enable him take into custody certain properties which appeared to him that the 1st respondent was entitled to.

This court in that case held in the said judgment at page 33 thus:-

G “As regards the 1st motion of 5/12/88 for extension of time it cannot be said that the determination of the civil rights and obligations of any of the parties, particularly the 2nd - 8th respondent, was in any way involved. The winding up petition was yet to be heard and determined. In any event, with the determination of the winding-up petition the term of the provisional liquidator would terminate. In respect of the 2nd motion of 12/12/88, what the appellant was asking for was an order of court to aid him carry out his principal duty of H preserving the properties of the 1st respondent. The motion did not seek to determine who, in fact, owned the said properties; it only sought to preserve them pending such determination.”

His Lordship after referring to the relevant provisions of the Companies Act and the Rules of Court made by the Chief Justice of Nigeria thereunder, then went on to hold that the rule appears to allow for ex-parte applications being brought except where an order is being sought against any person in which case such person will have to be put on notice of motion. This court quite properly and rightly held in that case that the principles adumbrated in *Kotoye v. C.B.N.* (supra) did not apply to the facts disclosed in the Tapp Industrial have before now set out the prayer of the respondent and the order made thereon in the course of this judgment. And I do not need to refer to them again. But what need be said having regard to what I have said already that the appellant has rightly contended that he ought to have been put on notice before the trial court granted to the respondent the restraining order was placed upon the appellant. I therefore hold that the order was made in breach of the provisions of section 33(1) of the Constitution. It is my view that the principles adumbrated in the *Kotoye v. C.B.N.* (supra) apply in the instant case having regard to the reasons given in the course of my consideration of that case.

It follows that that part of the appeal succeeds, and I therefore set aside the order made pursuant to the second prayer of the application restraining the appellant, its agents, privies and assigns, including but not limited to its directors, from doing anything that would prevent the receiver from performing his lawful duties as a receiver. For the reasons I had given in the judgment, the first prayer directing the receiver to take such steps as may be necessary to realize the assets of the respondent with a view to paying its outstanding to the respondent bank remains undisturbed.

The appeal having succeeded in part, I make no order as to costs in respect of this appeal in this court. The appellant is also entitled to half of the costs ordered against it in the court below. It is hereby ordered accordingly.

KUTIGI JSC

I read in advance the judgment just rendered by my learned brother Ejiunmi, JSC. I agree with him to dismiss the appeal in

respect of Order (1) directing the receiver to take such steps as may be necessary to realize the assets of the respondent with a view to paying its outstanding to the applicant bank. The appeal however succeeds in respect of Order (2) as the parties affected or named therein were never heard. I endorse the order for cost.

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MOHAMMED JSC

C I agree with the opinion of my learned brother Ejiwunmi, JSC, in the judgment, just read. I have had the privilege to read the judgment, in draft, before now. I have nothing more to add. I adopt the opinion of my learned brother to dismiss the appeal against the order directing the receiver to take such steps as may be necessary to realize the assets of the respondent with a view to paying its out-
D standing to the respondent bank. I agree that it was an error to grant the second prayer on an ex-parte application. The second prayer being an application for an order restraining the appellant, its agents, privies and assigns, including but not limited to its directors, from doing anything that would prevent the receiver from performing his
E lawful duties as a receiver. The appeal, therefore, succeeds in part.

I abide by the consequential orders made in the lead judgment on costs.

F

KALGO JSC

I have had a preview of the judgment of my learned brother Ejiwunmi, JSC just delivered in this appeal. I think he has painstakingly dealt with the issues which arose for determination in the appeal
G and I do not have anything useful to add. I entirely agree with his reasoning and conclusions which I adopt as mine. Consequently, I find that the appeal succeeds in part and the 2nd order of injunction restraining the respondent, its agents, privies and assigns from doing anything that would prevent the receiver from performing his lawful duties as receiver remains undisturbed.

H I also abide by the order of costs made in the leading judgment.

AYOOLA JSC

I had the privilege of reading in advance the judgment just delivered by my learned brother, Ejiunmi, JSC. I agree that the appeal succeeds in part. The appellant is entitled to half of the costs ordered against it in the court below. There is no order for costs of the appeal. Appeal allowed in part.

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