

**SUPREME COURT OF NIGERIA**

23RD APRIL, 2004. SC. 13/2000

**CORAM:- M. L. UWAISS CJN, U. MOHAMMED, S. U. ONU,  
U. A. KALGO, A. O. EJIWUNMI, JJSC**

AIR VIA LIMITED ..... APPELLANT  
AND  
ORIENTAL AIR LINES LIMITED ..... RESPONDENT

---

WORDS & PHRASES - “Counterclaim” - Definition of - It is a means by which a debt - Could be substantially disputed (H1)

ACTIONS - Debt - Allegation of indebtedness - Could be answered in four methods - Respondent's answer here being a denial - Amounts to disputing the debt (H2)

EVIDENCE - Affidavits - Further and better particulars - Of a denied fact - Can be called for - Only by supplying further and better particulars - Of the required fact (H3)

COMPANY LAW - Winding-up petition - On ground of inability to pay debt - Disputation of the debt vide counterclaim - Is not frivolous but sufficient (H4)

COMPANY LAW - Winding-up petition - Propriety of - Where the ground is alleged inability to pay debt - Issue of the indebtedness - Cannot be separated - From the propriety of the action (H5)

COMPANY LAW - Winding-up petition - Triable issue raised in the petition - Is not a ground for sustaining it - Where the debt is disputed (H6)

**FACTS**

Before the Federal High Court Lagos Division, the appellant filed a petition against the respondent seeking the winding-up of the respondent company. Appellant averred that there was a written Wet Lease Agree-

ment for international and domestic civil air transportation for the term of 2 years between it and the respondent. By this agreement respondent was owing the sum of US \$823,545.00 to the appellant which it failed to pay despite repeated demands. So that the ground of filing the winding-up petition is inability to pay this debt. While there were other pending interlocutory matters between the parties, the respondent filed a motion on notice to strike out appellant's winding-up petition for not being properly filed. This is because the respondent had earlier filed a counterclaim in the sum of US \$100,280.00 in answer to the appellant's winding-up petition. Respondent contended that as the debt in issue is disputed by it, the winding-up petition should be struck out.

The trial court refused to grant respondent's prayers holding that the winding-up petition raised some triable issues. On appeal by respondent to the Court of Appeal, its prayer was granted and the petition was struck out, setting aside the trial court's ruling. The Court of Appeal found that the debt in issue was successfully disputed vide respondent's counterclaim. Being dissatisfied, appellant has now appealed to the Supreme Court.

**ISSUE FOR DETERMINATION**

*"Whether the Court of Appeal was right to have struck out the petition of the appellant in the circumstances of the case".*

**HELD** (Unanimously dismissing the appeal per lead judgment of **ONU JSC**)

***"Counterclaim" - Definition of***

1. The Black's Law Dictionary defines counterclaim as "A claim presented by a defendant in opposition to or deduction from the claim of the plaintiff .... if established such will defeat or diminish the plaintiff's claim."

From the foregoing definition of counterclaim, I am in agreement with the respondent that it is a means whereby a debt could substantially and materially be disputed. It is conceded that the respondent counterclaimed for the debt allegedly said to be owed by it when it stated in its affidavit wherein it counterclaimed for loss and damages suffered

as a result of the withdrawal of aircraft by the appellant of the sum of \$100,280 earned on a transaction involving the use of the aircraft in lifting a cargo of persons by the appellant when the aircraft was being returned to the respondent in Nigeria after the repairs of it by the appellant. (p. 990 G)

***ACTIONS - Debt - Allegation of indebtedness***

2. I agree with the respondent's submission that there are four probable methods of answering an allegation of indebtedness, to wit:

- (v) To admit the debt
- (vi) To deny the debt
- (vii) To counterclaim against the debt
- (viii) To set off against the debt.

In the instant case, the respondent did not take up the first method, namely to admit the debt. Had the respondent admitted the debt there would have been no contention on the part of the appellant. I am therefore of the view that the argument advanced at pages 10 and 11 of the appellant's brief to fault the judgment of the court below in this regard ignores the incontrovertible and unchallengeable fact that the opposite of admission of a debt is the denial of the existence thereof. The denial of the debt by the respondent in the instant case was emphatic and therefore, in my view, amounts to disputation of the debt. (p. 993 E)

***Affidavits - Further and better particulars***

3. The appellant disputed the counterclaim by denying it in its counter-affidavit and did not go beyond that. The next point that must therefore be made is that the appellant is entitled as of right to call on the respondent to provide further and better particulars of a denied fact where the appellant is not satisfied with the response of the respondent subject to the appellant supplying further and better particulars of fact required. The appellant having failed to do that cannot be seen to complain that the respondent has not disputed the debt or joined issue with it on the fact of indebtedness of the respondent. In this wise, I am in agreement with the respondent's submission that the court below was right in its unimpeach-

able judgment that denial of a debt disputes the debt just as admission of the debt does not dispute the debt and I so hold. (p. 995 C)

***Winding-up petition - On ground of inability to pay debt***

B 4. The fact that the appellant denied the debt in its counter affidavit does not render the counterclaim non-existent. It is a fact about which the parties have joined issue and only evidence can resolve same. See *Falobi v. Falobi* [1976] N.M.L.R. 169.

C I find myself in agreement with the respondent's submission that there is nothing speculative, frivolous or ambitious in its counterclaim of the existing business relationship which is evidenced by Aircraft Lease Agreement between the appellant and the respondent raising a strong and irresistible presumption though rebuttable, that the appellant must D have conducted itself in a manner likely to result in the breach of Aircraft Lease Agreement etc.; where there is the existence of a contract, allegation of breach of it cannot be dismissed with a wave of hand as the court has a duty to enquire into the breach.

E Consequently, I hold the firm view that the learned justices of the court below were right when they held that the debt, the subject matter of the petition, was sufficiently or materially disputed by the counterclaim of the respondent. (p. 996 B)

F ***Winding-up petition - Propriety of***

5. I am in entire agreement with the respondent when it argued that the issue whether a petition to wind up a company on the ground of its inability to pay its debt was properly brought before the court cannot be G divorced for the debt alleged upon which the petition revolves. The petition is intrinsically connected with the non-payment of debt and indeed, the propriety of the petition before the court cannot be considered in isolation of the debt allegedly owed. For the sake of emphasis, the sub- H stance of the petition is rooted on the debt without which the petition is useless, an abuse of the process of court and brought mala fide with the intention to embarrass the respondent which was the pith and substance of the respondent's injunctive application. As a matter of further empha-

sis, I take the view that whether or not the petition of the nature and type filed by the appellant disclosed a cause of action, cannot be determined without proper and close consideration of the alleged question of indebtedness of the respondent and its reactions thereto. (p. 997 A)

B

***Winding-up petition - Triable issue raised in the petition***

6. I agree with the respondent that the court cannot arrive at a conclusive decision that the petition was brought in good faith or not without considering or having regard to the reaction of the respondent to the alleged debt said to be owed by it. It is only when the court has considered in totality the stories of both sides that it will, in my view, determine good faith or otherwise of the petition and whether to halt it or not. For the above reasons I agree with the respondent's submission that it is not good enough for the trial judge to say that the petition raises a triable issue for determination without giving due consideration to whether the respondent has disputed the debt which is the crux of the issue to be considered in a petition for winding-up of a company. (p. 998 A)

D

E

**NOTABLE POINTS OF INTEREST**

**ONUJSC**

***1. Terminating life of a company - Need for care***

Furthermore, care and utmost caution must be exercise by the institution of justice in proceedings involving the termination of the life of a company with responsibility not only to the society but also to the section of the public namely, its employees who may be thrown into economic hardship of unemployment. Hence the need for the court to halt a petition of the type brought by the appellant likely to cause irreversible and incalculable damage especially when the circumstances of the case show that the respondent had disputed the debt alleged to be owed. (p. 997 E)

F

G

**UWAIS CJN**

H

***2. Winding-up petition - When recovery of debt action will be open to petitioner.***

It is possible for a respondent to a petition for winding-up to dispute the

petition by bona fide challenging the debt or its being due or on the ground that it is capable of paying the debt. Where the debt is disputed bona fide the petitioner/creditor must seek his remedy in an action for the recovery of the debt, because until the issue of the companies liability is resolved, it cannot be said for certain that the company is indebted to the petitioner. (p. 999 A)

**REPRESENTATION**

Olawale Akoni Esq., with T. Adebayo Esq., and A.O. Akinseye (Miss) for the appellant.  
Ben Diarhe Esq., for the respondent.

**CASES REFERRED TO**

Hansa International Construction Limited v. Mobil Producing Nigeria [1994] 9 N.W.L.R. (pt.366) 76  
Lewis & Peat (N.R.L.) Ltd. v. Akhimien [1976] 7 S.C. 157  
Folami v. Cole [1986] 2 N.W.L.R. (pt. 22) 367  
Bakare v. Nwosu [1997] 1 N.W.L.R. (pt. 478)  
Union Bank of Nigeria Limited v. Tropical Food Limited [1992] 3 N.W.L.R. (pt. 228) 231 at 250  
Re Euro Hotel (Belgravia) Ltd. [1975] 3 ALL E.R. [1075]

**STATUTES & RULES REFERRED TO**

Constitution of the Federal Republic of Nigeria, 1999, s. 233  
Company and Allied Matters Act Cap 59 LFN 1990 ss. 408(d), 409(a)  
Supreme Court Rules O. r. 1

**LEAD JUDGMENT BY ONU JSC**

This is an appeal by the appellant against the judgment of the Court of Appeal sitting at Lagos per Dahiru Musdapher, E.O. Ayoola, and JJ.C.A. (as they then were) and M.O. Onalaja, J.C.A., delivered on 20<sup>th</sup> April, 1998 wherein the lower court allowed the appeal of the respondent herein and struck out the winding-Up Petition filed by the appellant before the

Lagos Division of the Federal High Court.

The appellant herein (as Petitioner) in the winding-up petition brought under the Companies and Allied Matters Act. Cap. 59 of Laws of the Federation of Nigeria 1990 (hereinafter referred to in short as CAMA) had commenced the Winding-Up proceedings against the respondent in the trial court by filing the petition as pages 3-34 of the record. The petition was served on the respondent and the petitioner (appellant) brought an application to advertise the said petition, the relevant paragraphs giving rise to the action commenced in the Federal High court of Lagos averring as follows:

*“5. The petitioner states that on or about 23<sup>rd</sup> day of November 1990, the petitioner and respondent entered into a written Wet Lease Agreement (hereinafter called “the agreement”) for international and domestic civil air transportation for term of 2 (two) years commencing on the agreement in proof of this averment.*

*11. Further to the above, the petitioner states that as at the 30<sup>th</sup> day of June 1991, when the sum of US\$1,431,450.00 (One million Four Hundred and Thirty One Thousand Four Hundred and Fifty United States Dollars) was due and payable by the respondent to the petitioner in respect of the agreement, the respondent had only paid to the petitioner the sum of US\$590.005.00 (Five Hundred and ninety Thousand Three Hundred and Five Dollars) thereby leaving as outstanding the sum of US\$841,545.00 (Eight Hundred and Forty One Thousand Five Hundred and Forty – Five Dollars) in its account with the petitioner.*

*12. By mutual agreement of the parties, the sum of \$17,600.00 (Seventeen Thousand Six Hundred US Dollars) was deducted from the aforementioned outstanding amount bringing the total outstanding amount to \$823,545.00 (Eight Hundred and Twenty Three Thousand, Five Hundred and Forty Five US Dollars).*

*18. The petitioner states that as at 12<sup>th</sup> July 1991, the sum of \$823,545.00 (Eight Hundred and Twenty Three Thousand Five Hundred and Forty five US Dollars) was outstanding against the respondent, in favour of the petitioner.*

*19. The petitioner states that it continued to demand for the out-*

*standing sum due to it after the termination of the agreement, all to no avail.*

20. *The petitioner states upon its instructions, its solicitors, Messrs. Babalakin & Co. of 24 A Campbell Street Lagos, Nigeria, wrote a letter of demand to the respondent for the outstanding amount due. However the respondent failed, refused and/or neglected to pay the same. The petitioner shall rely on the letter dated 24<sup>th</sup> April 1992 written by Messrs. Babalakin & Co., to the respondent at the adjudication of this action.*

21. *The petitioner further states that by its letter dated 23<sup>rd</sup> April 1993 signed by a principal officer of the petitioner and delivered at the respondent's head office at 217/219 Apapa Road, Iganmu, Lagos, it made a demand for the above mentioned amount outstanding from the respondent and the respondent has neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the petitioner. The petitioner shall rely on the said letter at the hearing of this petition.*

22. *The petitioner states that the respondent is unable to pay its debts.*

23. *In the circumstances it is just and equitable that the respondent should be wound up."*

The trial Federal High Court (per Kolo, J.) on 23<sup>rd</sup> February, 1994 delivered its ruling – see pages 99 – 107A of the record as follows:

*"Coming this far the only point of importance raised by Mr. Azike in this application is in respect of demand notice contending that the present petition has not complied with the law in that regard. The 21<sup>st</sup> paragraph of the petition is relevant here in that it states that there was a letter dated 23/4/93 which was signed by a principal officer of the petitioner and which was delivered at the respondent's head office at 217/219 Apapa Road, Iganmu, Lagos, and that this said letter made a demand of the respondent to pay. This 21<sup>st</sup> paragraph ended that the "Petitioner shall rely on the said letter at the hearing of this petition". It is my humble view that above has, on the face of it as now before this court, substantially complied with the provisions of section 409(a) of CAMA more so that the said 21<sup>st</sup> paragraph has not been denied except the general denial in the 6<sup>th</sup> paragraph of the affidavit in support of this appli-*

*cation as already referred to earlier on in this court to hold otherwise. It is therefore my humble view that judging from the records in its entirety as now before this court vis-a-vis all that I have said above and of course the relevant law or laws as also dealt with in the above decided cases more particularly that of Folawiyo & Sons Ltd. v. Hammond Projects B (supra) (relied upon by Mr. Azike himself). I cannot but rule that this present application in its entirety cannot be granted and of necessity fails and I so rule."*

The respondent (as appellant) then appealed to the Court of Appeal (hereinafter referred to as the court below). It amended its Notice of Appeal several times culminating in the one dated 9<sup>th</sup> February, 1998 and filed on 11<sup>th</sup> February, 1998. The Brief of the respondent (as appellant) at the court below is at pages 227 – 250 of the record while the appellant's (as respondent) brief is at pages 270 – 271 of the record. D

The court below after hearing the appeal delivered its judgment dated 20<sup>th</sup> April, 1998 inter alia as follows:

*"The debt must be admitted or known or certain. In the instant case where the learned trial judge merely opined that petition presented E contains triable issues, then the petition for Winding-Up must be stayed pending the consideration of the triable issues in a proper forum. The appellant has put up a plausible defence to the action in that he has a serious counterclaim and because it believes that the respondent/peti- F tioner was liable to it on the same contract, it has neglected to pay what was claimed against it. In this kind of claim and counterclaim arising from breach of contract, the claims must first be established in a normal case before a petition of winding-up can be embarked upon, see the Re G London and Paris Banking Corp. (supra).*

*In the result, this appeal succeeds. I set aside the ruling of the lower court which Mohammed Kolo, J. delivered on the 23/2/1994. In its place, I strike out the petition filed for the winding-up of the appellant's company with costs assessed at N5,000.00 ( five thousand Naira) only in H favour of the appellant's company."*

Aggrieved by this decision the respondent/appellant/respondent (in the rest of this judgment simply referred to as appellant) has appealed to

the Supreme Court on four grounds. The lone issue preferred for our determination from the four grounds by the appellant reads:

B Whether the Court of Appeal was right to have struck out the petition of the appellant in the circumstances of the case. On behalf of the respondent the following six issues were submitted as arising for determination in this interlocutory judgment of the court below, to wit:

(i) Whether the denial and counterclaim of the respondent had materially and sufficiently disputed the debt as to justify the striking out of the petition by the Court of Appeal.

C (ii) Whether the Court of Appeal was right in its decision that in an action involving petition for winding-up of a company the learned trial judge ought not to have confirmed or limited himself to the issue as to whether the petition has established a cause of action but should have D gone further to show and consider whether the petition had satisfied the essential ingredients required to wind up a company under section 408(d) namely, there was an existing debt which is not substantially disputed and that the company is unable to pay.

E (iii) Whether the Record of Appeal is properly before the Court or whether it was filed in patent breach of Order 6 rule 4 of the Supreme Court Rules 1985 as amended.

F (iv) Whether the brief of argument of the appellant is properly before the court or whether it was filed in clear breach of Order 6 Rule 5(1)(a) of the Supreme Court Rules 1985 as amended.

(v) Whether the appeal is competent having regard to section 21(3) of the Supreme Court Act Cap. 424 1990 Laws of the Federation.

G (vi) Whether it is proper for the Honourable Court to allow the appellant to withdraw its earlier application of 15<sup>th</sup> May 2000 filed on 23<sup>rd</sup> May 2000 in respect of which the respondent had joined issues with the appellant by filing a reply brief.

#### STATEMENT OF FACTS

H The appellant herein commenced the action in the Federal High Court by a petition dated 3<sup>rd</sup> June, 1993 and filed on 4<sup>th</sup> June, 1993 wherein it sought that the respondent company be wound up by the court pursuant to section 408(d) and 409(a) of the Companies and Allied Matters

Act, Cap. 59, Laws of the Federation of Nigeria (“CAMA”) for its inability to pay its debts. In the petition, the appellant stated that pursuant to an aircraft lease transaction between itself and the respondent, the latter was indebted to it in the sum of US\$823,545.00 (eight hundred and twenty three thousand five hundred and forty five US Dollars) being unpaid lease rentals, which the respondent has refused to pay despite several demands. The appellant also stated that it made a demand signed by one of its principal officers, for the payment of the said debt, but the respondent had neglected to pay the same. The appellant thereafter filed an affidavit verifying the petition on 23<sup>rd</sup> June, 1996 (see pages 34-41 of the record), which was outside the time limited by the Companies Winding Up rules, 1983, for the filing of such affidavits. In order to regularize this petition, the appellant brought an application for extension of time for filing the affidavit and for deeming the said affidavit as having been properly filed. By a ruling delivered on 2<sup>nd</sup> August 1993, the lower court granted the application, extended the time as prayed for and also deemed the affidavit as having been properly filed.

The appellant also brought an application for the advertisement of the petition. The respondent then filed an application, which culminated in the ruling that was appealed to the court below. The said application together with the supporting affidavits and exhibits are to be found at pages 72 –86 of the record. The appellant’s counter-affidavit together with the supporting exhibits are on pages 87 – 98 of the record. The appellant’s application for leave to advertise the petition is still pending at the lower court.

In my consideration of the appeal I intend to deal with the lone issue contained in the appellant’s brief which being succinct and to the point, is sufficient to dispose of the appeal.

At the oral hearing of this appeal on 27<sup>th</sup> January, 2004, learned counsel for the appellant, Olawale Akoni Esq., after adopting the appellant’s brief and reply brief conceded that in view of section 233 of the Constitution of the Federal Republic of Nigeria, 1999 read together with Order 10 rule 1 of the Supreme Court Rules he would withdraw issues 3,1 and 3,2. There being no objection by learned counsel for the respondent, the

two issues were struck out. The other issues not being substantial were equally withdrawn and struck out.

ARGUMENT ON ISSUE 1

The part of the judgment of the court below appealed against is to be found in the leading judgment of Musdapher, J.C.A., at pages 287 – 291 and 294 of the record. It appears that the decision of the court below was based on its holding that the respondent had:

*“not only denied the existence of the debt in his (sic) affidavit but also made a counterclaim. It seems to me that the appellant has established a prima facie case in which its indebtedness or otherwise must first be established in the suit before an order for winding up can be made.”*

The court went on to hold as follows:

*“I have carefully read the ruling of the court below and the learned trial judge arrived at his decision merely because the petition contains “some triable issues for determination”. In other words, the petition discloses a reasonable cause of action. In my view, the learned trial judge erred in this respect. The petition for winding up of a Company for inability to pay debt or insolvency is not to be treated like a claim for the payment of debt. As mentioned above it is simply winding up of the company for insolvency. The debt must be admitted or known or certain. In the instant case where the learned trial judge merely opined that petition presented contains triable issues then the petition for winding-up must be stayed pending the consideration of the triable issues in a proper forum. The appellant has put up a plausible defence to the action in that he has a serious counterclaim and because it believes that the respondent/petitioner was liable to it on the same contract. It has neglected to pay what was claimed against it. In this kind of claim and counter claim arising from breach of contract, the claims must first be established in a normal case before a petition of winding-up can be embarked upon. See The Re London and Paris Banking Corp. (supra).”*

The appellant next submitted that in order to put the salient issues in this appeal in their proper perspective, it is important to ascertain and keep in mind the application, which the respondent brought before the Federal High Court and which resulted in the ruling that was appealed

against to the court below. The respondent had there sought the following prayers:

- (i) an order restraining the petitioner from taking any further proceedings upon the said petition whether by advertising the same or otherwise;
- (ii) that the petition be struck out; and
- (iii) that the petitioner should pay the cost of the motion; and
- (iv) such further other orders.

The above prayers, the appellant contended, should be borne in mind throughout the consideration of these submissions in this appeal, adding that it was not the winding-up petition itself that was being heard by the trial court.

At the trial court, it was the contention of the respondent that the petition was an abuse of court process and was brought mala fide to embarrass it and should therefore be struck out. In other words, it is asserted that there was no reasonable cause for bringing the petition since it is what the trial judge considered and made a finding upon. However, the court below rightly, in my view, considered that this amounted to an error on the part of the trial court. From the judgment of the court below quoted above, all the trial court was required to consider was, whether there was a dispute as to the debt and no more. This analysis of the law, it is contended with the greatest respect to the learned justices of the court below, is erroneous. What the respondent requested from the trial court, was a termination of the winding –up proceedings at the preliminary state or at least to restrain the appellant from taking any further steps on it on the ground that the petition as presented, was an abuse of process, and brought mala fide with a view to embarrass the respondent. The appellant therefore submitted with respect that what the court ought to concern itself with at that stage of the proceedings was whether the petition as presented was properly brought. It was up to the respondent, it is maintained, to establish to the court that the process had qualities in it, which tended to show that it was not brought in good faith but merely to harass and embarrass. The case of *Hansa International Construction Limited v. Mobil Producing Nigeria* [1994] 9 N.W.L.R. (pt.366) 76 was

called in aid for the view that the court below held that the following conditions must be satisfied to have a successful winding-up petition viz:

- (i) there must be a debt exceeding N2,000.00
- (ii) a demand has been made for its repayment;
- B (iii) the company has neglected to pay for a period of three weeks from the day of demand; and
- (iv) it must be a debt, which is not disputed on substantial grounds.

C The appellant further submitted that the learned trial judge was correct in considering whether the petition as presented, disclosed a reasonable cause of action or whether it was frivolous and further proceedings on it ought to be terminated in limine.

The next question posed is-

D Was there a real dispute on the debt, which was relied upon by the appellant? In other words, it is asked whether the debt relied upon by the appellant as the foundation for the winding-up petition was bona fide or substantially disputed as to render the petition incompetent? It is conceded, asserted the appellant that the position of the law with regard to positions for the winding-up of a company for inability to pay its debts, is generally that such a petition is not to be used as a machinery for trying a common law action. The machinery for winding-up petitions, it is further contended, is also not to be converted to an engine of debt collection  
F in circumvention of the established legal procedure for instituting an action in an appropriate court for the collection of debts.

Furthermore, it is argued, it is trite that the debt in question must be one, which is seen plainly and objectively or acknowledged as owing.  
G That such debt being a sum of money due by certain and express agreement as money owing to one person by another is demonstrated in the judgment of the court below. It is also the law, it is emphasized, that where the debt is bona fide disputed, it will not be a proper ground to  
H wind up a company. The essential facts relied upon by the appellant as the foundation of the debt, are contained in paragraphs 5 to 12 of the petition, the resume of which is that there was an Aircraft Lease Agreement between the parties signed on or about 23<sup>rd</sup> November 1990 pursu-

ant to which two TV – 154M aircraft together with technical personnel were leased by the appellant to the respondent for a term of 2 years. Under the agreement, it is maintained, lease rentals were required to be paid by the respondent to the appellant, calculated in a manner specified in the paragraphs of the petition. In the course of this lease, it is added; a sum of \$823,545.00 was due and outstanding from the respondent to the petitioner, based on these calculations. B

On its part, the summary of the respondent's response to the debt as contained in paragraphs 5 and 6 of the affidavit in support of its application at page 73 of the record, is that it is not indebted to the petitioner in any amount whatsoever and that all the statements and averments relating to the indebtedness of the respondent are untrue, false and malicious. The crucial issues then are what amounts to a bona fide dispute of a debt and whether the respondent satisfied the same in this case? D In answer, the appellant maintains that the courts have held that such dispute must be genuine, not a sham but a real one based on substantial grounds. The case of *In Re Great Britain Mutual life Assurance Society* [1880] 16 Ch. D 246 at page 253 where Jessel M.R. said about winding-up petition in which the respondent had not presented any evidence to support its alleged dispute of the debt in question, is in point or relevant as follows: E

*"....and in my opinion it is not sufficient for the respondents upon a petition of this kind, to say, 'We dispute the claim'. They must bring forward a prima facie case which satisfies the court that there is something which ought to be tried, either before the court itself, or in any action, or by some other proceeding."* F

The two cases of: G

(i) *Re Kings Cross Industrial Dwellings Company* [1870] 11 L.R. Eq. 149, and

(ii) *Re Imperial Hydropathic Hotel Co. Black Pool Ltd.* [1882] 49 L.T. 147 were cited in support of the proposition thereof; adding, that the trial judge considered this issue and held that the debt had not been bona fide disputed especially at page 105 of the record where he stated as follows:

“The above 10 paragraphs (paragraphs 5 and 6 inclusive), obviously, cannot be taken to have answered the petitioner’s assertions in the earlier quoted paragraphs 5 to 16 of the petition for the following reasons:

B 1. Nothing is said of the Lease said to have been signed on 23<sup>rd</sup> of November 1990 and which was to have taken effect on 12<sup>th</sup> day of December 1990.

C 2. The respondent’s 10 paragraphs above fail to show to the court what was the position/relationship between the parties vis-à-vis the said agreement in the period between 12<sup>th</sup> December 1990 and April 1992 when the respondent is said to have sent the aircraft to the petitioner in Bulgaria for repair works.”

D Unfortunately, however, the appellant contends, that the learned justices of the court below without reversing this finding still went on to hold that the respondent had disputed the debt in question. It is further submitted that in order for the “dispute” to be a real, bona fide and substantial one, it must go to the particulars and meet the substance of E the claim of the petitioner. For instance, it is asked, is the dispute as to the basic lease rental price, or in respect of the quantum of the amount claimed or is it that there was no lease agreement at all between the parties or what exactly? The respondent, it is pointed out, merely stated that it is F not indebted and that everything stated in respect of the debt is malicious untrue and false. This, it is argued, cannot amount to a bona fide dispute in the circumstances. We are therefore urged to hold that the debt which formed the basis of the petition was not disputed bona fide or substantially.

G THE COUNTER-CLAIM

**The Black’s Law Dictionary** defines counterclaim as “A claim presented by a defendant in opposition to or deduction from the claim of the plaintiff ..... if established such will defeat or diminish the H plaintiff’s claim.”

From the foregoing definition of counterclaim, I am in agreement with the respondent that it is a means whereby a debt could substantially and materially be disputed. It is conceded that the

**respondent counterclaimed for the debt allegedly said to be owed by it when it stated in its affidavit wherein it counterclaimed for loss and damages suffered as a result of the withdrawal of aircraft by the appellant of the sum of \$100,280 earned on a transaction involving the use of the aircraft in lifting a cargo of persons by the appellant when the aircraft was being returned to the respondent in Nigeria after the repairs of it by the appellant.**

It is argued next that the main ground upon which the court below based its conclusion that there was a dispute regarding the debt was that the respondent has set up a counter claim against the appellant. It appears that the court below took the position that once a company sets up a counter-claim against the petitioner in a winding-up petition, the debt which forms the foundation of the petition would be deemed to have been disputed. This appears to be the only conclusion that can be reached from the judgment of the court below, it is further argued. At the trial court, it is contended; the judge had considered the counter-claim and came to the following conclusions:

*“Granted that the petitioner owes the respondent the sum of \$100,280.00 (an assertion still to be fully substantiated) that in my view is not enough to move this court to hold that the present petition has no foothold before this court now.”*

In other words, it is argued that the fact that there is such an allegation of a possible counter debt, does not remove the fact that there is a certain debt which is owed by the respondent to the appellant which the respondent had failed to pay and that the petition could therefore not be faulted on that ground. The court below however held a contrary view, as at page 294 of the record it stated that:

*“The appellant has put up a plausible defence to the action in that it has a serious counter-claim and because it believes that the respondent/petitioner was liable to it on the same contract.”*

This conclusion, it is submitted, is erroneous in that a look at the facts relating to this counter claim will clearly show that there is nothing serious about it whatsoever,. In paragraphs 12-26 of the affidavit in support at pages 74 75 of the record, the respondent is said to have asserted

that it sent one aircraft to the appellant for repairs and that while returning it, the appellant used it to aircraft cargo for a person and that the sum of \$100,280.00 was earned on the transaction which money ought to be paid over to the respondent. It is further asserted that as a result of the withdrawal of the aircraft by the appellant, the respondent suffered loss and damages. In the first place, the appellant flatly denied any such allegations in paragraph 4, 5 and 6 of the Counter-Affidavit and further that regarding the amount allegedly owed, the trial judge had held inter alia as follows:

- “1. ....
2. ....
3. *The respondents have not shown to this court the full identity of the aircraft said to have been sent for repairs. Here I mean data like the registration number or numbers of the said aircraft as is in the 6<sup>th</sup> paragraph of the petition.*”

In respect of the other legs of the cross-claim, appellant submitted that they relate to alleged damages arising out of the withdrawal of the aircraft by the petitioner, an action which they assert they were entitled to take due to the failure of the respondent to fulfill its obligations under the Aircraft Lease Agreement. It is further submitted that the cross-claim of the respondent was at best speculative and ambitious in all the circumstances of the case. Such cross-claim put forward by the respondent, it is added, was not sufficient to halt the petition of the appellant.

At this juncture, it is maintained, the mere fact of the cross-claim is alluded to is not enough to halt an otherwise proper petition founded on a debt in respect of which there is no real or genuine dispute by the respondent. The English case of *Re Euro Hotel (Belgravia) Ltd.* [1975] 3 All E.R. [1075] was cited to the court below but regrettably was not considered by that court. In that case, it is submitted, the court, faced with a similar application for injunction to restrain the advertisement of a winding-up petition on the ground that there was a counter-claim, found that it was at best spurious and could not justify the halting of the petition. This, it is submitted, is precisely what the learned trial judge did and correctly too. The court below, it is then further said, did not carry out

such an examination of the basis of the claim but merely concluded that it was “serious”.

The learned Justices of the court below, it is argued, were therefore said to be in error. The holding of Meggary. J., in the decision cited above was quoted in support thereof. It is then submitted that the learned justices of the court below were therefore in error when they held that the respondent has disputed the debt relied upon by the appellant as the foundation for the existence of the debt in an affidavit as well as counter-claiming against the debt sought to be recovered which is tantamount to a genuine and bona fide disputation of the debt sued for by the petitioner/appellant. For purposes of clarity and for the avoidance of doubt, the court below at page 290 of the records held:

*“A winding-up order will not be made on a debt which is disputed in good faith by the company applying the above principles to the instant case, the appellant here in not only denied the existence of the debt but in its affidavit also made a counter-claim. It seems to me that the appellant has established a prima facie case in which the indebtedness or otherwise must first be established in a suit before an order for winding-up can be made.”*

It is for this reason that, **I agree with the respondent’s submission that there are four probable methods of answering an allegation of indebtedness, to wit:**

- (v) To admit the debt
- (vi) To deny the debt
- (vii) To counterclaim against the debt
- (viii) To set off against the debt,

In the instant case, the respondent did not take up the first method, namely to admit the debt. Had the respondent admitted the debt there would have been no contention on the part of the appellant. I am therefore of the view that the argument advanced at pages 10 and 11 of the appellant’s brief to fault the judgment of the court below in this regard ignores the incontrovertible and unchallengeable fact that the opposite of admission of a debt is the denial of the existence thereof. The denial of the debt by the re-

**spondent in the instant case was emphatic and therefore, in my view, amounts to disputation of the debt.** To exemplify that the court below was right in its decision, the words “denial and counter-claim” need to be examined to discover their legal and literal connotations to show or establish that by no other means could the respondent substantially or genuinely have disputed the debt other than by denial, counter-claim or set-off.

DENIAL

The Black’s Law Dictionary, 6<sup>th</sup> Edition defines denial as follows:  
*“a traverse in the pleading of one party of allegation of fact asserted by the other; a defence. A response by the defendant to matter(s) alleged by the plaintiff in the complaint.”*

The New Lexicon Webster’s Dictionary of English Language Deluxe Encyclopedic Edition defines denial to mean *“an assertion that something is not true; a refusal to acknowledge, disavowal; a refusal of a request; self denial.”*

The foregoing definitions of “denial” re-inforce and are supportive of the decision of the court below as there is no other way by which a debt can be disputed except by means of either denying same or counter-claiming against it so as to defeat the claim for the debt.

In further elucidation, a denial of allegation of indebtedness culminates in the parties joining issues the resolution of which is by means of evidence adduced by the parties at the trial. In other words, denial amounts to disputation of an allegation of fact or joining issue on same as opposed to admitting same. This elementary principle of procedural law has been judicially confirmed and applied in a host of cases, notable among which are:

- (i) Lewis & Peat (N.R.L.) Ltd. v. Akhimien [1976] 7 S.C. 157
- (ii) Folami v. Cole [1986] 2 N.W.L.R. (pt. 22) 367
- (iii) Bakare v. Nwosu [1997] 1 N.W.L.R. (pt. 478) at page 483.

On what constitutes a dispute, the Black’s Law Dictionary 6<sup>th</sup> Edition defines it as *“A conflict or controversy; a conflict of claims of rights, or demand on one side met by contrary claims or allegations on the other. The subject of litigation. The matter for which a suit is brought and upon*

*which issue joined and in relation to which jurors and witnesses are examined."*

In point of refutation of the obiter in Re Great Britain Mutual Life Assurance Society [1880] 16 Ch.D 246 at page 253 cited by the appellant at page 10 of its Brief of Argument, I agree with the respondent's sub- B  
mission that the decision is not binding on the Supreme Court but only serves as persuasive authority and the opinion expressed by Jessel M.R. therein fails to give a clear illustrative example of how a party to a case can dispute a debt other than by denying it. This case, in view, serves no C  
useful purpose while the respondent's vehement, emphatic and convincing argument that denial of a debt is tantamount to disputation of it, tallies with my view of same. **The appellant disputed the counterclaim by denying it in its counter-affidavit and did not go beyond that. The next point that must therefore be made is that the appellant is D  
entitled as of right to call on the respondent to provide further and better particulars of a denied fact where the appellant is not satisfied with the response of the respondent subject to the appellant supplying further and better particulars of fact required. The ap- E  
pellant having failed to do that cannot be seen to complain that the respondent has not disputed the debt or joined issue with it on the fact of indebtedness of the respondent. In this wise, I am in agree- F  
ment with the respondent's submission that the court below was right in its unimpeachable judgment that denial of a debt disputes the debt just as admission of the debt does not dispute the debt and I so hold.**

Consequently, the view expressed by the appellant to the effect G  
that there is nothing serious about the counter-claim, in my opinion, is highly misconceived and one that ignores the issue before the honourble Court. The issue that is being canvassed herein and which highly influ- H  
enced their Lordships of the court below to arrive at their decision, is that the respondent established the existence of a counter-claim bordering on an infringement of a legal right involving a monetary claim of \$100,280.00 and loss of unliquidated damages for withdrawal of the aircraft whilst the aircraft Lease was still in force. From the definition of counter-claim in

the Black's Law Dictionary, there is no doubt that the proof of counter-claim by the respondent will surely defeat the appellant's claim of the said debt alleged to be owed to the appellant in consequence of which the debt has been put in issue and disputed by the counter-claim of the respondent. Be it noted however, that **the fact that the appellant denied the debt in its counter affidavit does not render the counter-claim non-existent. It is a fact about which the parties have joined issue and only evidence can resolve same.** See *Falobi v. Falobi* [1976] N.M.L.R. 169.

I find myself in agreement with the respondent's submission that there is nothing speculative, frivolous or ambitious in its counterclaim of the existing business relationship which is evidenced by Aircraft Lease Agreement between the appellant and the respondent raising a strong and irresistible presumption though rebuttable, that the appellant must have conducted itself in a manner likely to result in the breach of Aircraft Lease Agreement etc; where there is the existence of a contract, allegation of breach of it cannot be dismissed with a wave of hand as the court has a duty to enquire into the breach.

Consequently, I hold the firm view that the learned justices of the court below were right when they held that the debt, the subject matter of the petition, was sufficiently or materially disputed by the counterclaim of the respondent.

Furthermore, the court below was right, in my view, when it held, inter alia as follows:

*"Now in his ruling the learned trial judge merely confined himself to the issue of whether the petitioner/respondent had established a cause of action. In my view, that is not enough. It must be shown that there was an existing debt which is not substantially disputed and that the company is unable to pay."*

The argument of the appellant at page 7 paragraph 5, 6 of its brief of argument that the court below ought to have concerned itself with whether the petition as presented was properly brought is, with due respect, highly misconceived, erroneous and demonstrates a complete

misunderstanding of the point at issue and the purport or essence of the injunctive application of the respondent. In that respect **I am in entire agreement with the respondent when it argued that the issue whether a petition to wind up a company on the ground of its inability to pay its debt was properly brought before the court cannot be divorced for the debt alleged upon which the petition revolves. The petition is intrinsically connected with the non-payment of debt and indeed, the propriety of the petition before the court cannot be considered in isolation of the debt allegedly owed. For the sake of emphasis, the substance of the petition is rooted on the debt without which the petition is useless, an abuse of the process of court and brought mala fide with the intention to embarrass the respondent which was the pith and substance of the respondent's injunctive application. As a matter of further emphasis, I take the view that whether or not the petition of the nature and type filed by the appellant disclosed a cause of action, cannot be determined without proper and close consideration of the alleged question of indebtedness of the respondent and its reactions thereto.**

Furthermore, care and utmost caution must be exercise by the institution of justice in proceedings involving the termination of the life of a company with responsibility not only to the society but also to the section of the public namely, its employees who may be thrown into economic hardship of unemployment. Hence the need for the court to halt a petition of the type brought by the appellant likely to cause irreversible and incalculable damage especially when the circumstances of the case show that the respondent had disputed the debt alleged to be owed. For the proposition that a court must be slow in terminating the life of a company by way of winding-up, this is given credence and support by the Court of Appeal case of Union Bank of Nigeria Limited v. Tropical Food Limited [1992] 3 N.W.L.R. (pt. 228) 231 at 250. See also appellant's brief at page 8, paragraph 5.7 to the effect that a court faced with a petition to wind up a company has a duty to consider whether the petition was brought in good faith and/or whether the petition proceeded from doubtful rights such as where the debt outstanding still remains unre-

solved and also whether the ensuing publication of the winding up proceeding would be counter-productive or cause irreparable damage to the other party.

It is for the above reasons that **I agree with the respondent that the court cannot arrive at a conclusive decision that the petition was brought in good faith or not without considering or having regard to the reaction of the respondent to the alleged debt said to be owed by it. It is only when the court has considered in totality the stories of both sides that it will, in my view, determine good faith or otherwise of the petition and whether to halt it or not. For the above reasons I agree with the respondent's submission that it is not good enough for the trial judge to say that the petition raises a triable issue for determination without giving due consideration to whether the respondent has disputed the debt which is the crux of the issue to be considered in a petition for winding-up of a company.**

For all I have been saying, my answer to the lone issue proffered and argued before this court is rendered in the affirmative.

In the result, I dismiss this appeal with N10,000.00 costs to the respondent.

---

#### UWAIS CJN

I have had the advantage of reading in draft the judgment read by my learned brother, Onu, J.S.C. I entirely agree with him that this appeal lacks merit and that it should be dismissed.

By way of emphasis, I wish to add the following. Section 408 of the Companies and Allied Matters Act, Cap. 59 of the Laws of the Federation of Nigeria, 1990 provides inter alia that a company may be wound-up by court if "*the company is unable to pay its debts.*" For this to take place the following essential ingredients are required:-

- (d) there must be a debt,
- (e) the debt must be due, and
- (f) the company to be wound-up is unable to pay the debt.

See *Bowes v. Hope Life Insurance & Guarantee Co.* [1865] 11

H.L. Cas. 389.

It follows from the foregoing that it is possible for a respondent to a petition for winding-up to dispute the petition by bona fide challenging the debt or its being due or on the ground that it is capable of paying the debt. – See *Re World Industries Bank* [1909] W.N. 245; *Yinka Folawiyo B v. Hammond Projects Ltd.* [1977] F.R.C.R.143 and *Standard Bank of Nigeria Ltd. v. Ready Mixed Concrete* [1979] F.H.C. 66. Where the debt is disputed bona fide the petitioner/creditor must seek his remedy in an action for the recovery of the debt, because until the issue of the companies liability is resolved, it cannot be said for certain that the company is indebted to the petitioner. C

In the present case, the respondent challenged the petition for winding-up before Kolo, J. by filing a counter-affidavit in which he inter alia denied the debt alleged by the appellant as petitioner. In addition the respondent filed a motion on notice praying that the petition be struck out. The learned trial judge rejected both the counter-affidavit and the prayers in the motion on notice. However, the Court of Appeal, per Musdapher, J.C.A. (as he then was) reversed the decision of Kolo. J. by holding – E

“... *In my view, the learned trial judge erred in this respect. The petition for winding-up of a company for inability to pay debt or insolvency is not to be treated like a claim for the payment of the debt.... The debt must be admitted or known or certain. In the instant case where the learned trial judge merely opined that (the) petition presented contains triable issues, then, the petition for winding-up must be stayed pending the consideration of the triable issues in a proper forum. The appellant (herein respondent) as put up a plausible defence to the action (viz petition) in that he (sic) has a serious counter-claim... In this kind of claim and counter-claim arising from breach of contract, the claims must first be established, in a normal case, before a petition of (sic) wind up can be embarked upon – see Re London and Paris Banking corp. (supra) (i.e. 1875 LR 19 EQ 444).*” F G H

I respectfully agree entirely.

It is for these and the reasons contained in the judgment of my learned brother, Onu, J.S.C., that I too hereby dismiss the appeal with

N10,000.00 costs against the appellant in favour of the respondent.

**MOHAMMED JSC**

I have had a preview of the judgment written by my learned brother,  
B Onu, J.S.C., in draft, and I agree with him that this appeal has failed.

I think the court of appeal is quite right to rule that the issue about  
the disputed debt has to be settled first before the appellant's petition for  
winding-up of the respondent can be considered. In addition to the denial  
of the debt the respondent counter-claimed against the appellant's action.  
C The facts of the counter-claim revealed a triable issue between the parties.

I therefore agree that this appeal has no merit and it is dismissed.  
I too award N10,000.00 costs to the respondent.  
D

---

**KALGO JSC**

I have had the privilege of reading in advance the judgment just  
delivered by Onu, J.S.C., in this appeal. I agree entirely that there is no  
E merit in the appeal and it should be dismissed for the reasons stated in the  
judgment, which I adopt as mine. I however wish to add a few words of  
mine by way of emphasis per the following paragraphs.

This appeal concerns a winding-up petition brought under the  
Companies And Allied Matters Act. Cap. 59 of Laws of Federation of  
F Nigeria 1990 (hereinafter called CAMA). In this judgment I shall refer to  
the appellant as "*the petitioner*". The relevant paragraphs of the petition  
giving rise to this action in the Federal High Court of Lagos, read: -

"5. *The petitioner states that on or about the 23<sup>rd</sup> day of Novem-*  
G *ber, 1990, the petitioner and respondent entered into a written Wet Lease*  
*Agreement (hereinafter called "the agreement") for international and*  
*domestic civil air transportation for term of 2 (two) years commencing*  
*on the 12<sup>th</sup> day of December, 1990. The petitioner shall rely on the Agree-*  
H *ment in proof of this averment.*

11. Further to the above, the petitioner states that as at the 30<sup>th</sup>  
day of June, 1991, when the sum of US \$1,431,450.00 (One Million four  
Hundred and Thirty-One Thousand Four Hundred and Fifty United States

Dollars) was due and payable by the respondent to the petitioner in respect of the Agreement, the respondent had only paid to the petitioner the sum of US \$590,305.00 (Five Hundred And Ninety Thousand Three Hundred and Five Dollars) thereby leaving as outstanding the sum of US \$841,145.00 (Eight Hundred and Forty One thousand Five Hundred and Forty-Five Dollars) in its account with the petitioner. B

12. By mutual agreement of the parties, the sum of \$17,600.00 (Seventeen Thousand Six Hundred US Dollars) was deducted from the aforementioned outstanding amount bringing the total outstanding amount, to \$823,545.00 (Eight Hundred and Twenty-Three Thousand, Five Hundred and Forty-Five US Dollars). C

18. The petitioner states that as at 12<sup>th</sup> of July, 1991, the sum of \$823,545.00 (eight Hundred and Twenty-Three Thousand, Five Hundred and Forty-Five US Dollars) was outstanding against the respondent, D in favour of the petitioner.

19. The petitioner states that it continued to demand for the outstanding sum due to it after the termination of the Agreement, all to no avail. E

20. The petitioner states that upon its instructions, its solicitors, Messrs. Babalakin & Co. of 24A Campbell Street Lagos, Nigeria, wrote a letter of demand to the respondent for the outstanding amount due. However the respondent failed, refused and/or neglected to pay the same. The petitioner shall rely on the letter dated 24<sup>th</sup> April, 1992 written by Messrs. Babalakin & Co. to the respondent at the adjudication of this action. F

21. The petitioner further states that by its letter dated 23<sup>rd</sup> April, 1993 signed by a principal officer of the petitioner and delivered at the respondent's head office at 217/219, Apapa Road, Iganmu, Lagos, it made a demand for the above mentioned amount outstanding from the respondent and the respondent has neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the petitioner. The petitioner shall rely on the said letter at the hearing of this petition. G H

22. The petitioner states that the respondent is unable to pay its debts.

23. In the circumstances it is just and equitable that the respon-

dent should be wound up”.

The petitioner then brought an application in the trial court to advertise the petition pursuant to Rule 19, Companies Winding-up rules, 1983. Thereafter the respondent filed an application to strike out the petition or stop the petitioner from taking any further action on the petition. The trial court heard the latter application and dismissed it. The respondent appealed to the Court of Appeal which in effect allowed the appeal and struck out the petition. The petitioner appealed to this court.

Both parties filed their respective briefs in this court as required by the rules of court. The appellant raised only one issue which reads:

*“Whether the Court of Appeal was right to have struck out the petition of the appellant in the circumstances of the case”.*

The respondent formulated six (6) issues in his brief. Issues 1 and 2 appear to me to be subsumed in the appellant’s issue 1 and can be argued together. Issues 2 – 6 would also appear to me not to have arisen from the grounds of appeal and in the absence of a cross-appeal, as in this case, they cannot be argued in the appeal. I therefore find that the appellant’s issue 1 is germane to the determination of this appeal.

Sections 408 (d) and 409 (a) of CAMA must be properly considered before any company registered under it can be wound up by the court.

Section 408 (d) provides: -

- “A company may be wound up by court if-
- (a) .....
  - (b) .....
  - (c) .....
  - (d) *The company is unable to pay its debts’*
  - (e) .....

Section 409 (a) also provides-

- “A company shall be deemed to be unable to pay its debts if-
- (a) *A creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding N2000, then due has served on the company, by leaving it at its registered office or head office, a demand under his hand requiring the company to pay the sum so due, and the company has for three weeks thereafter neglected to pay the sum or to*

*secure or compound for it to the reasonable satisfaction of the creditor;  
or*

- (g) .....  
(h) ..... ”

From the contents of paragraphs 18-22 of the petition copied ear- B  
lier in this judgment, the petitioner averred that as at 12<sup>th</sup> July, 1991, the  
respondent who was owing them, the sum of \$823,545.00 (Eight Hun-  
dred and Twenty-Three Thousand, Five Hundred and Forty-Five US  
Dollars) and up to the 23<sup>rd</sup> of April, 1993 (a period of about 20 months) C  
the respondent failed to pay this debt despite repeated demands. Learned  
counsel for the petitioner therefore submitted that the respondent was  
clearly unable to pay its debt within the period prescribed by law and  
should therefore be wound up.

The respondent did not file any formal response or reply to the D  
petition but after the respondent was served with the petitioner’s applica-  
tion to advertise the winding-up petition, it filed a counter-affidavit in  
reply. In it the respondent denied being indebted to the petitioner and  
went further to set up what amounts to a counter-claim against the peti- E  
tioner. It stated in paragraphs 5, 6, and 11 – 16 of the counter-affidavit  
thus:-

“5. That the respondent is not indebted to the petitioner in the sum  
of US \$823,540.00 or any amount whatsoever. F

6. That I have also read the petitioner’s petition dated 4/6/93 and  
that all the statements and averments in the said petition as relate to the  
respondents indebtedness to the petitioner are untrue, false and mali-  
cious. G

11. That it is the petitioner who is really owing the respondent. G

12. That sometime in or about April 1992, the respondent sent  
Aircraft TU-154 to the petitioner in Sofia Bulgaria for repairs.

13. That on returning the aircraft, the petitioner used the said  
Aircraft TU-154 to Airline Cargo from Sofia Airport, Bulgaria to Port- H  
Harcourt, Nigeria for one Phillip Onyekwuleye of 103 Awolowo Way,  
Ikeja.

14. That the petitioner received the sum of US \$100,280.00 in

*cash as payment for the transaction mentioned in paragraph 12 above. Attached herewith and marked Exhibit C are copies of the Air Way Bill for the transaction mentioned in paragraph 13 above.*

*15. That as it were, the petitioner was supposed to remit the said*  
B *sum of US \$100,280.00 to the respondent.*

*16. That the petitioner failed, refused and or neglected to remit the said sum and that the petitioner is still owing the respondent the said sum of US \$100,280.00”.*

C The respondent denied this in paragraph 2 of its affidavit filed on 15/12/93 (page 87 of record) without giving any particulars. And there is nothing in the petition or affidavit filed by the appellant where it was shown that the respondent had admitted the debt. In fact the respondent averred in the following paragraphs of its counter-affidavit that:-

D *“29. That the respondent has at no time admitted any indebtedness to the petitioner.*

*30. That the petitioner has not established that there is an existing debt.*

E *31. That the objective of the petitioner is to put pressure on the respondent for the purported debt.*

*32. That I do solemnly and sincerely declare that I made all enquiry into the affairs of the respondent company and having so done, I*  
F *have formed the opinion that the respondent company is solvent”*

The fact that the respondent has not admitted the debt to the petitioner is not in any doubt going by the documents filed by the parties. The petitioner has not explained in the petition how the debt was incurred except to say that it arose as a result of the Aircraft Wet Lease Agree-  
G ment. No particulars were given of how the debt was incurred and no admission made in respect thereof. There was also no evidence that the respondent was bankrupt or insolvent.

According to S. 408 (d) of CAMA, a company may be wound up  
H by the court if the company is unable to pay its debt. And when the debt is admitted or established followed by a formal demand and the debt was not settled or paid within three weeks of such demand, a court has no discretion but to wind up the debtor company. But in a case where the

debt is not paid within the time allowed and the debt is bona fide disputed, a winding-up order may not be made. In such a case the creditor has a remedy of establishing or proving his claim before the court in the normal way.

What then in this context is a bonafide dispute. The word B  
“*bonafide*” is a Latin word and is defined in the Dictionary of English  
Law by Earl Jowitt, Second edition as “*in good faith, honestly, without*  
*fraud, collision or participation in wrong doing*”. In this case the re-  
spondent swore to an affidavit that it is not owing the amount involved C  
and the petitioner appellant has not fully and clearly explained how the  
debt was incurred. It was not enough in my view to merely allege that the  
debt arose as a result of the Aircraft Wet Lease Agreement. The fact that  
payment was earlier made by the respondent to the petitioner does not  
establish that there was such a loan. The respondent did not admit in all D  
his correspondence to the petitioner, attached to the affidavit or counter-  
affidavit in these proceedings, that it was owing anything. As it stands, it  
was only oath of the petitioner in its affidavit alleging the debt and that of  
the respondent denying the debt. This in my view can only be settled in a E  
normal court case claiming the amount involved and calling evidence to  
establish it.

Furthermore, the respondent clearly and honestly in its counter-  
affidavit paragraphs 11 – 16, averred what may amount to a counter- F  
claim against the petitioner with particulars but the petitioner in his fur-  
ther affidavit of 15/12/93 merely denied these averments generally. In the  
circumstances, it is my respectful view that although a counter-claim is  
a separate and independent action, in this case, it has shown to my satis- G  
faction why the respondent did not pay the alleged debt even though a  
formal demand was made to it. I also believe that it did so honestly, and  
without any intention to defraud the petitioner in not paying the alleged  
debt. See R v. Hall [1881] 7 Q.B.D. 575; Alhaji Juradat Aminashoun v.  
G.A. Olojo [1990] 6 N.W.L.R. (pt. 154) 111. H

For the above and the more detailed reasons given by my learned  
brother, Onu, J.S.C., in the leading judgment, I find no merit in this  
appeal. I dismiss it with costs as assessed in the leading judgment.

**EJIWUNMI.JSC**

As I have had the opportunity of reading before now the judgment just delivered by my learned brother, Onu, J.S.C., I agree with his conclusion that this appeal be dismissed. However, I need to add the following as my reasons for also dismissing this appeal.

The action leading to this appeal was commenced at the Federal High Court, Lagos when the appellant by a petition filed on the 4<sup>th</sup> of June, 1993, wherein it sought that the respondent company be wound up by the court under the provisions of sections 408 (d) and 409 (a) of the Companies and Allied Matters Act (CAMA) for its inability to pay its debts. The relevant paragraphs of the petition in that regard, read thus:

*“5. The petitioner states that on or about the 23<sup>rd</sup> day of November, 1990, the petitioner and the respondent entered into a written Wet Lease Agreement (hereinafter called “the Agreement”) for international and domestic civil air transportation for a term of 2 (two) years commencing on the 12<sup>th</sup> day of December, 1990. The petitioner shall rely on the Agreement in proof of this averment.*

*6. The petitioner states further that pursuant to the Agreement, the petitioner leased 2 (two) TU-154m aircraft (hereinafter called “the aircraft”) with registration numbers LZ MIG and LZ MIK respectively to the respondent together with the flight crew and technical personnel of the said aircraft.*

*7. It was an initial term of the Agreement as provided in Annex I thereto, that the respondent would utilize in respect of each aircraft, a minimum of 100 (one hundred) block flight hours a month during the first 3 (three) months of the lease in consideration of the payment of a Basic Lease Price of \$130,000.00 (One Hundred and Thirty Thousand US Dollars) per month, payable in advance on the last working day of the first 3 (three) months.*

*8. The Agreement also provided in Annex I that the sum of \$1,100.00 (One Thousand One Hundred US Dollars) was payable on each aircraft by the respondent to the petitioner for every extra block flight hour utilized over and above the minimum number of 100 (one*

*hundred) block flight hours, such sum being payable by the respondent in arrears on the last working day of each month.*

9. Article 6 for the Agreement provided that the respondent would effect the above referred payments by telegraphic bank transfer into the petitioner's account and simultaneously inform the petitioner of the details of such a transfer by telex. B

10. Further to paragraph 7 above, the petitioner and the respondent agreed, as provided by Annex 2 of the Agreement that the respondent would from the 1<sup>st</sup> day of March, 1991 utilize in respect of each aircraft, a minimum of 70 (seventy) block flight hours a month in consideration of a Basic Lease Price of \$91,000.00 (Ninety One Thousand US Dollars) per month due and payable in advance on the last working day of February and March, 1991. C

11. Further to the above, the petitioner states that as at the 30<sup>th</sup> day of June, 1991, when the sum of US\$1,431,450.00 (One Million, Four Hundred and Thirty One Thousand Four Hundred and Fifty United States Dollars) was due and payable by the respondent to the petitioner in respect of the Agreement, the respondent had only paid to the petitioner the sum of US\$590,305.00 (Five Hundred and Ninety Thousand Three Hundred and Five United States Dollars) thereby leaving as outstanding the sum of US\$841,145.00 (Eight Hundred and Forty One thousand One Hundred and Forty five Naira) in its account with the petitioner. S D E F

12. By mutual agreement of the parties, the sum of \$17,600.00 (Seventeen Thousand Six Hundred US Dollars) was deducted from the aforementioned outstanding amount bringing the total outstanding amount, to \$823,345.00 (Eight Hundred and Twenty Three Thousand, Five Hundred and Forty Five US Dollars).” G

It is therefore manifest from the above that the appellant as petitioner was claiming that the respondent owed to it the sum of \$823,545.00 which it was made to pay as leave rentals despite repeated demands. It must be noted that as the appellant failed to file a verifying affidavit in support of the petition, the trial court granted the necessary leave to fulfill the conditions laid down by the Companies Winding-up rules 1983. H

Upon being served with the petition, the respondent filed a 35-paragraph counter-affidavit, dated 28<sup>th</sup> September, 1993 wherein it denied the allegations made against it by the appellant. The respondent also took the opportunity to make several allegations against the petitioner to show that the respondent was not indebted to the petitioner. It further alleged that the petitioner had not established that there was an existing debt, and that the objective of the petitioner was to put pressure on the respondent to pay what was described as a purported debt. On the same day that this counter-affidavit was filed, the respondent also filed a motion on notice pursuant to Order 31 Rule 19 of the Federal High Court for the following reliefs:-

- 1. that the respondent/petitioner named in the petition herein preferred to this court on the 3<sup>rd</sup> of June, 1993, be restrained from taking any further proceedings upon the said petition whether by advertising the same or otherwise.*
- 2. that the said petition be struck out.*
- 3. that the respondent/petitioner should pay the costs of this motion.*
- 4. such further orders and other orders as this honourable court may deem fit to make in the circumstances."*

This motion was accompanied by a number of documents in support of the above-mentioned reliefs sought by the respondent. After hearing learned counsel appearing for the parties, Kolo, J., of the Federal High Court delivered his ruling, which he concluded by dismissing the respondent's application. As the respondent was dissatisfied with the ruling, he proceeded on appeal to the Court of Appeal. In that court the issues raised by the respondent/appellant are: -

- (i) whether the learned trial judge was right to have ignored the further and better counter-affidavit of the appellant dated the 3<sup>rd</sup> of February, 1994 in his ruling delivered on 23<sup>rd</sup> day of February, 1994?*
- (ii) whether having regard to the petition, affidavit and counter-affidavits before the court, wherein the alleged debt was materially wholly and entirely disputed with necessary documents exhibits backing the appellant's claim the court ought not to have held that the petition filed*

*by the respondent was brought mala fides and an abuse of court process and consequently struck out?*

*(iii) whether from the circumstances of the case there was a valid verifying affidavit to the petitioner filed by the petitioner.”*

The court below after thorough examination of these issues on the facts and law relevant thereto, resolved issues (1) & (3) against the respondent, the appellant in that court. But the court below went on to resolve the 2<sup>nd</sup> issue in favour of the respondent and struck out the petition of the appellant. As a result, the appellant has appealed to this court. And in the brief filed pursuant to this appeal, raised only one issue for the determination of the appeal. This being,

*“Whether the Court of Appeal was right to have struck out the petition of the appellant in the circumstances of the case.”*

It is clear from the arguments in the appellant’s brief that the thrust of the complaints against the judgment of the court below, per Musdapher, J.C.A. (as he then was) is principally that portion of it at p. 294 which reads thus: -

*“I have carefully read the ruling of the court below and the learned trial judge arrived at his decision merely because the petition contains “some triable issues for determination.” In other words, the petition discloses a reasonable cause of action. In my view, the learned trial judge erred in this respect. The petition for winding-up of a company for inability to pay debt or insolvency is not to be treated like a claim for the payment of debt. As mentioned above it is simply winding-up of the company for insolvency. The debt must be admitted or known or certain. In the instant case where the learned trial judge merely opined that the petition presented contained triable issues than the petition for winding-up must be stayed pending the consideration of the triable issues in a proper forum. The appellant has put up a plausible defence to the action in that he has a serious counter-claim and because it believes that the respondent/petitioner was liable to it on the same contract. It has neglected to pay what was claimed against it. In this kind of claim and counter-claim arising from breach of contract, the claims must first be established in a normal case before a petition of winding-up can be em-*

*barked upon. See the Re London and Paris Banking Corp. (supra)*”

Learned counsel then went on to argue that the court below was erroneous in its analysis of the law in view of the reliefs sought by the respondent that led to the ruling of the trial and the judgment of the court below. What the respondent requested from the trial court was a termination of the winding-up proceedings at that preliminary stage or at least an order to restrain the appellant from taking any further steps on the petition on the ground that the petition as presented was an abuse of process brought mala fide with a view to embarrass the respondent. Reference was then made to *Hamsa International Construction Ltd. v. Mobile Producing Nigeria* [1994] 9 N.W.L.R. (pt. 366) and also to *Union Bank of Nigeria v. Tropic Foods Limited* [1992] 3 N.W.L.R. (pt. 228) 231 at 250. On the basis of those authorities, it is the submission of learned counsel for the appellant that the trial judge was right to have considered whether the petition, as presented disclosed a reasonable cause of action or whether it was frivolous and further proceedings on it ought to be terminated in limine. It is of course after the learned trial judge had considered these matters that he resolved not to strike out the petition.

The pertinent question then is, whether the Court of Appeal ought not to consider the merits of the order made by the trial court. In the consideration of the answer to this question, the court below properly in my view was obliged to consider whether the petition was proper in all the circumstances. I take note of the argument for the appellant in this regard.

In the view of learned counsel for the appellant, the respondent has not established that it had a bona fide dispute over the debt upon which the appellant sought for its winding-up. He argued further that the respondent merely stated that it is not indebted and that everything stated in respect of the debt is malicious, untrue and false. Learned counsel for the appellant went on to submit that the court below erroneously concluded that the counter-affidavit filed on behalf of the respondent sufficiently served as a dispute between the respondent and the claim of the appellant against it. It is his further submission that the cross-claim of the respondent was at best speculative and ambitious in all the circumstances

of the case. In support of the proposition that the mere fact that a cross-claim is alluded to, is not enough to halt an otherwise proper petition founded on a debt in respect of which there is no real or genuine dispute, cited the English decision in the case of *Re Euro Hotel (Belgravia) Ltd.* 1975 3 All E.R. 1075. B

In his response at the hearing of this appeal, learned counsel for the respondent argued that *Re Euro Hotel (Belgravia) Ltd.* (supra) is irrelevant, and urged that the appeal be dismissed. It is manifest from a careful reading of the arguments of counsel both at the hearing of this appeal C and in respective briefs of argument appears to be whether the respondent to this appeal sufficiently disputed the debt alleged against it by the appellant in the petition for its winding-up.

Now I have taken the opportunity to read *Re Euro Hotel (Belgravia) Ltd.* (supra) where at p. 1086, Megarry, J. said as follows: - D

*“The court is rightly concerned to prevent any abuse of the process of presenting winding-up petition; the process must not be used as a means of putting improper pressure on a solvent company. But I do not think that this concern should be extended to halting the proceedings on E a perfectly proper winding-up petition founded on an unquestioned debt merely because the company, being insolvent, can produce an argument of law, wearing a mask of complexity, which tends to support a cross-claim. The case before me is certainly not one in which it can be said that F the company is ready and able to pay the debt to the petitioning creditor if it is established, and I am very far from being satisfied that the company bona fide believes itself not to be indebted to the petitioning creditor.”*

In that case, the facts reveal that the party resisting the winding-up G petition had not disputed the debt alleged against it by the creditor petitioner hence the court in that case felt that the process for the winding-up of the debtor company should not be disturbed. It is I think pertinent to the case of *Re: LHF Wools* [1969] 3 All E.R. 882 [1970] Ch. 17 H to which reference was made in *Euro Hotel (Belgravia) Ltd.* (supra), thus:-

*“In those circumstances, the Court of Appeal held that the matter*

was one for the exercise of the discretion of the judge. The bank's judgment debt, taken by itself entitled the Bank *ex debito justitiae* to a winding-up order; but the existence of cross-claim made the matter one for the judge's discretion. A disputed debt will not support a winding-up petition, and whether an undisputed debt that is overstopped by a disputed cross-debt will support a petition is for the exercise of a judicial discretion. In the event, the Court of Appeal reviewed the grounds on which the judge had exercised his discretion in making a winding-up order, and reached the conclusion that there were sufficient grounds for interfering with his exercise of discretion. The Court of Appeal accordingly allowed the appeal and set aside the winding-up order."

It is evident, having regard to the above English authorities, that where a debt is disputed whether by a counter-claim or not, the petitioner in a winding-up proceedings has the burden of first establishing the debt owed him before proceeding to take steps to present its petition. May I in this connection and with due respect refer to my judgment to the case of Union Bank of Nigeria Ltd. v. Tropic foods Ltd. [1992] 3 N.W.L.R. (pt. E 228) 231, where at pp. 249-250 I stated thus:-

"I will now consider whether the order of injunction restricting the appellants from commencing winding-up proceedings against the respondent was properly made. But before doing so, I think it is useful to refer to decided cases where such applications have been considered principles that should a court in making and/or upholding an order of interlocutory injunction of the kind made in this case. In this regard I wish to refer to Charles Forte Investments v. Amanda [1963] 2 All E.R. 940, at page 944, Wilmer, L.J. said thus:-

'One case very much in point was *Re A Company* [1984] 2 Ch. 349 in which the petition had actually been presented, but an injunction was sought and obtained to restrain the advertisement of it. It was found in that case that the petition had been presented for the purpose of putting pressure on the company, and it was held that that was sufficient to justify an injunction restraining its advertisement.'

'Vaughan Williams, J., said at page 351:-

*In my judgment, if I am satisfied that a petition is not presented in*

*good faith and for the legitimate purpose of obtaining a winding-up order, but for other purposes, such as putting pressure on the company, I ought to stop it if its continuance is likely to cause damage to the company.'*

*'His Lordship then continued at page 945 thus:-*

*Some assistance, I think is also to be derived from two old cases which were referred to by Sir George Jessel, M.R. in Niger Merchants Co. v. Capper, which is reported in a note (18 Ch. D 557). The material part of the report was read by the learned judge in the course of giving his judgment in the present case. I can conveniently re-quote the passage, which the learned judge quoted from Sir George Jessel's judgment.*

*'The authorities stand thus: I find there is a case on this point, Merchant Banking Company of London v. Hough [1874] W.N. 230, not fully reported, in which HALL, V.C. in December, 1875, upheld an injunction previously granted to restrain the defendants, who had a claim against the plaintiff company, from taking proceedings to wind-up the company. Malins, V.C. a few days later, granted a similar injunction in the case of Cadiz Water-Works Co. v. Bornett [1874] L.R.19 Eo 182 at page 196 on the ground that it is the object of the court to restrain the assertion of doubtful rights in a manner productive of irreparable damage.'*

*Then His Lordship Wilmer, L.J. page 945, added the following observation:-*

*I accept, of course, as has been pointed out, that these cases being cases of creditors petitions, are not the same as the present case; but those words of Malins V-C as it seems to me, are words of general application."*

*And in that case, I came to the following conclusion, which I consider pertinent to the case in hand. It reads:-*

*"In my view the principles enunciated in the passage quoted above apply to the case under consideration. It seems to me that where a petition for the winding-up of a company is commenced against a company, and that company seeks to obtain an order of interlocutory injunction to restrain the petitioner from commencing its winding-up, the court in the determination of whether to restrain the petitioner or not has to consider*

*whether the petition was brought in good faith and/or whether the petition, proceeded upon doubtful rights, such as where the debt outstanding still remain unresolved, and also whether the ensuing publication of the winding-up proceedings would be productive of irreparable damages to the other party.”*

Returning to the instant case, it is unquestionable that though the appellant in its petition had stated that the respondent owed it the sum of \$823,545.00 (eight hundred and Twenty Three Thousand, Five Hundred and Forty Five United States Dollars), it is also not in dispute that the respondent by its counter-affidavit has disputed this debt allegedly owed to the appellant. The appellant for its own part did not address these claims frontally but sought to explain it away. That in my humble view is not good enough. It is thus clear that at that stage of the proceedings when the respondent sought for the intervention of the court to restrain the appellant from continuing with the winding-up proceedings, it cannot be said that the respondent owed the sum claimed by the appellant. Admittedly, the trial court in the exercise of its discretion, decided that it will not grant the reliefs sought by the respondent. But, it is my humble view that the court below was right to have set aside that order of the trial court.

It follows that I must uphold the order of the court below for all the reasons that I have given above and also for the fuller reasons in the leading judgment of my learned brother, Onu, J.S.C. The appeal is therefore dismissed by me as I find no merit in it. I also abide with the costs in the leading judgment.

G

---

2. Wet lease used herein was not found in the dictionaries. Net Lease found in Black's Law Dictionary means Lease which requires the tenant to pay, in addition to rent, the expenses of the leased property, e.g. taxes, insurance, maintenance, etc.

H Any who comes across the word - wet lease - should tell us source of the meaning and write us to publish subsequently. Or its use here may be a typographic error as net lease may be the correct word.