

COURT OF APPEAL
ENUGU JUDICIAL DIVISION
HOLDEN AT ENUGU
15TH JUNE, 1993. CA/E/17/92
CORAM:- U. ABDULLLAHI, F.O. AWOGU, S.A. AKINTAN, JJCA

INTER-BAU CONSTRUCTION LTD. & ORS APPELLANTS
AND
EMMANUEL C. IKE & ORS. RESPONDENTS

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APPEALS - Issue of jurisdiction - That is not related to any of the grounds of appeal - Is incompetent (H1)

APPEALS - Competence - Leave - Objection to appeal on grounds of leave not being obtained - Is unfounded - Since the appeal is as of right (H2)

INJUNCTIONS - Exparte injunction - Basis of - There is no real urgency - To warrant grant of the injunction exparte in this case (H3)

INJUNCTIONS - Exparte injunction - Need to preserve the res - Does not arise here (H4)

PRACTICE & PROCEDURE - Actions - Discontinuance notice - Where filed and brought to the Court's notice - No further formality should be expected (H5)

INJUNCTIONS - Courts - Exparte Order - Being a serious business that may involve big losses - Should not be granted casually - Factors that should be considered (H6)

INJUNCTIONS - Exparte Order - Vacation of - Respondents did not meet needed requirements - To oppose vacation of the Order (H7)

COMPANY LAW - Meeting - Banking - Shareholders' interest - Weighs more than that of the managing director - In the matter of calling extra ordinary general meeting - To remove the managing director - From office (H8)

INJUNCTIONS - Exparte Order - Vacation of the Order - Trial court's discretion in refusing to vacate the order - Was wrongfully exercised (H9)

FACTS

The appellants are some shareholders of Orient Bank of Nigeria Plc and the 1st respondent is the managing director/Chief Executive of the Bank. Disagreement between the parties led to an action filed by the appellants before the Federal High Court Enugu vide a petition praying for the removal of the 1st respondent, Mr. Emmanuel C. Ike, from office. Exparte motion restraining Mr. Ike from resuming duty after his annual vacation was later on vacated by the court vide motion on notice. Appellants thereafter, through their solicitors forwarded a requisition for an extra-ordinary general meeting to respondent pursuant to s. 215 of Companies Act, 1990. Respondent filed a fresh action against the appellants together with a motion exparte before the Federal High Court.

The trial court granted the motion and made an exparte order restraining the appellants from convening any extraordinary general meeting of Orient Bank for the purpose of removing respondent as a director of the said Bank. Appellants filed a motion on notice seeking inter alia, that the exparte Orders be discharged. After hearing the motion, the trial court refused to discharge the exparte order. Being dissatisfied the appellants have now appealed to the Court of Appeal.

ISSUES FOR DETERMINATION

"i. Whether the federal High Court had jurisdiction to entertain the Motion Ex parte or indeed the claims relevant to that Motion?

ii. If, but only if the answer to question (1) is in the negative:-

(a) Whether the court below was correct in refusing to discharge its orders restraining the Defendants/Appellants and the 3rd to 9th Defendants/Respondents from requisitioning the convening of an Extra-Ordinary

nary General Meeting of Orient Bank of Nigeria PLC upon an Ex parte application?

(b) Whether the court below was correct in refusing to treat Suit No. FHC/E/M2/91 as having been discontinued?

(c) Whether the court below was right in sticking out certain paragraphs of the Affidavit in Support of the Defendants/Respondents application to discharge the Ex parte Orders.”

Whether the learned trial judge has in the circumstances and peculiar nature of the case exercised his discretionary power judicially and judiciously in refusing to vacate the order of injunction obtained exparte on the application of the appellants on notice.

HELD (Unanimously allowing the appeal per **ABDULLAHI JCA**)

APPEALS - Issue of jurisdiction

1. Let me start by pointing out that, I can not find the relationship between Issue No. 1 with any of the Seven grounds of appeal. Issue of jurisdiction is very important to any proceedings and if a party is desirous of complaining about jurisdiction of any court then it is imperative that a ground of appeal should be filed to that effect. Since this has not been done in this case, it is my view that issue number (i) is incompetent and it is accordingly struck out. See IYAYI v. EYIGEDE (1987) 3 NWLR (pt. 61) 523. (p. 1453 E)

APPEALS - Competence - Leave

2. Consequently refusing to discharge order of injunction is covered by the provisions of Section 220 (1) (g) (ii) of the 1979 Constitution. I therefore find no merit in the preliminary objection raised by the respondent. I accordingly dismiss it. (p. 1455 D)

Exparte injunction - Basis of.

3. See KOTOYE Vs. CBN (1989) 1 NWLR 419 where **NNAEME-KA-AGU JSC** at page 449 said:-

“Also the basis of granting an Exparte Order of Injunction, particularly in view of Section 33(1) of the Constitution of 1979, is the existence of Special circumstances, invariably, all pervading real urgency, which

requires that the order must be made, otherwise an irretrievable harm or injury would be occasioned to the prejudice of the applicant.

Put in another way, if the matter is not shown to be urgent, there is no reason why the Exparte order should be made at all. The existence of real urgency, and not self imposed urgency, is a sine qua non for a proper Exparte Order of Injunction.”

In his contribution in the same case, NNAMANI JSC at page 454 stated that:-

“Usually in case of exparte applications for injunction on the ground of real urgency the court would, as indicated earlier, examine the fact to ensure that the party applying has not been guilty of delay and further more that there is an impossibility of bringing an application on notice and serving the other party.”

(Underlining mine).

D In the light of the situation in this case and the principle of law enunciated in KOTOYE’S CASE SUPRA, I think, I am more inclined to agree with the learned counsel for appellants that there was no real urgency to warrant the grant of the exparte injunction. (p. 1457 E)

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Exparte injunction - Need to preserve the res

4. It is submitted and I agree with the submission that an application for preservation of the Res must have a direct or proprietary interest in it.

F A mere passing nexus with the Res is not enough see OYEFESO VS. OMOGBEHIN (1991) 4 NWLR 596. (p. 1459 G)

Actions - Discontinuance notice

G 5. There is evidence that, a notice of discontinuance was filed before the trial court and this was brought to the notice of the learned trial judge who circumvented the information and said that it has not been formally discontinued. I find it difficult to understand why the learned trial judge said that. The notice had been formally filed in his court. His attention was drawn to it, I do not know what other formal discontinuance he is expecting. In any event, I do not find the relevance of that Suit to the application before him even if the suit was not formally discontinued. I do not want to share the view of the learned counsel for respondent that

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it has any nexus with the Suit No. FHC/E/14/91, which is a suit filed by his client, the respondent. In my view it can not be used as a ground for the preservation of any Res. (p. 1460 C)

Courts - Exparte Order

6. I think it is important to start by pointing out that trial courts should also keep in mind consistently, that the grant or refusal of an application for an interim application, or exparte application as it is popularly known is a very serious business which must not be taken or treated casually. This is because it could involve a lot of inconveniences or big losses particularly where heavy investments are involved or elaborate preparations are rendered useless by disruption. B
C

Therefore some of the important factors the courts should take into consideration as a guide, just to mention a few are:- D

(1) The applicant must show that he has a legal right to be protected.
(2) The applicant must show that his request is based on the principle of evenness, that is that the protection he is seeking must not unduly outweigh the corresponding need to protect the interest of the other party. E
See OBEYA MEMORIAL HOSPITAL VS. ATTORNEY-GENERAL OF THE FEDERATION (1987) 3 NWLR (pt. 60) 325.

(3) The applicant must show that damages in the measure recoverable at law would be inadequate remedy and the defendant would not be in a financial position to pay him the damages. F

(4) The grant of the order, being an equitable remedy and a discretion of the court, the discretion must be exercised judicially and judiciously taking into account all the facts and circumstances. (p. 1460 H) G

Exparte Order - Vacation of

7. Now can it be said that the respondent in this case has satisfied these requirements in opposing the application to vacate the order made exparte. I think not. H

At best the respondent was only able to show that there was a serious move to summon a meeting at which he might be removed from

office as Managing Director and Chief Executive of the Bank. The worst that could have happened to him was to lose his job. If he lost the job, he could easily be compensated monetarily if at all he is removed wrongfully. (p. 1461 F)

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COMPANY LAW - Meeting - Banking

8. It is needless to mention that the appellants as shareholders of the Bank have every legal right to summon the meeting even if it is for the purpose of removing the respondent from office if they consider it desirable for the well being of the Bank.

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There is no doubt that there is no more love between the requisitionists/appellants and the respondent. Since the situation has reached crisis point certainly the operation of the bank will be affected adversely. If this is so the interest of the shareholders would weigh more than the interest of the respondent. In other words the loss that will follow will be much larger to the fortunes of the bank than that of the respondents. This is a point that has not been considered by the learned trial judge at all. The learned trial judge concerned himself more with the job of the respondent. (p. 1461 H)

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Discretion in refusing to vacate Ex parte Order order

9. On a calm view of the peculiar nature and the circumstances of this case I am satisfied that the learned trial judge did not exercise his discretion judicially and judiciously in refusing to vacate the order ex parte made on 28/10/91.

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Consequently the appeal succeeds and it is allowed. The order ex parte is hereby vacated. (p.1462 C)

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REPRESENTATION

CHIEF CHIKE CHIEGBUE ESQ. for Appellants
MAMMAN M. OSUMAN ESQ. For Respondent

CASES REFERRED TO

IYAYI v. EYIGEDE (1987) 3 NWLR (pt. 61) 523.

H

IFEZUE & ANOR vs. MBADUGHA & ANOR (1984) 5 SC 79

EGUAMWESE VS AMAGHIZEWEN (1986) NWLR 282

Elobisi Vs. Onyeonwu (1989) 5 NWLR 224.

KOTOYE Vs. CBN (1989) 1 NWLR 419

CALABAR CEMENT COMPANY LIMITED Vs ABIODON DANIEL
(1991) 4 NWLR 750

OKAFOR v. A.G. ANAMBRA STATE (1988) 2 NWLR 736 at 749

OYEFESO VS. OMOGBEHIN (1991) 4 NWLR 596

STATUTES & RULES REFERRED TO

Companies and Allied Matters Act 1990, ss.215, 262(6)

Federal High Court Civil Procedure Rules O. 43 r. 1

Constitution of Nigeria 1979 s. 220(1) (g) (iii)

LEAD JUDGMENT BY ABDULLAHI JCA

The dispute giving rise to this appeal arose from disagreements between some of the shareholders and the Management of the ORIENT BANK OF (NIGERIA) PLC or to be precise, EMMANUEL C. IKE, the Managing Director and Chief Executive of the Bank.

From the scattered facts available before this Court. It appears that some of the shareholders, namely – (1) G.M.O. & Company Limited; (2) Olympic Drinks Company Ltd; (3) F.G.N. Okoye and Sons Ltd; (4) Engineer E.C. Chikeluba set the ball rolling by instituting an action in Suit No. FHC/E/M2/91 before the Federal High Court, Enugu, by petition, praying for the removal of Emmanuel C. Ike from office as Managing Director/Chief Executive of the ORIENT BANK.

The Petitioners in this Suit No. FHC/E/M2/91 obtained by exparte motion an order of the Court restraining Emmanuel C. Ike from resuming duty after his annual vacation. This order obtained exparte was later on vacated by the court by way of motion on notice.

I decided to set out briefly this background history because of what emerged later, as will be highlighted in the course of this judgment.

Another chapter was opened by a firm of solicitors called Ibrahim G.Adamu and Co. When the firm issued a letter dated 23/10/91 and addressed to The Managing Director, Orient Bank of Nigeria PLC.

1444 Inter-Bau Ltd v. Ike (2004) 5 KLR Abdullahi JCA

think for the purpose of clarity, I better set out the letter in full. It reads thus:-

“23rd October, 1991

B IGA/OBN/91/1

*The Managing Director,
Orient Bank of Nigeria PLC,
20, Garden Avenue,*

C *G.R.A.,
ENUGU.*

Dear Sir,

RE: ORIENT BANK PLC

D REQUISITION BY SHARE HOLDERS FOR AN EXTRA-ORDINARY
GENERAL MEETING TO THE DIRECTORS OF ORIENT BANK PLC

*We act as Solicitors to the under-listed persons and Companies hereinafter
called “Our Clients” and on whose instructions we write this letter to you.*

Our clients are:-

- E 1. INTER-BAU CONS. LIMITED
2. LANDGOLD HOLDINGS LIMITED
3. UNITED AFRICA DRUG CO. LIMITED
4. IKECHUKWU IGBOANUGO

F 5. DR. PATRICK N.N. OKEKE
FOR PATELSONS SPECIALIST CLINICS AND MAT. HOSPITAL LIMITED

- G 6. IGWU INDUSTRIES AND TRADING COMPANY LIMITED
7. UGOCHUKWU & SONS LIMITED
8. NIGERIAN IMPORT & EXPORT SERVICES LIMITED
9. GODM SHOES IND. NIG. LIMITED
10. DIAMOND ARROW TILE LIMITED
11. ENGR. E.O. AGHANYA

- H 12. J. NWANKWU & BROS. LIMITED
13. OLYMPIC PARKERS LIMITED
14. OLYMPIC PARKERS LIMITED

15. *LIQUID INVESTMENT (NIG) LIMITED*

16. *MANNEX PRESS LIMITED*

17. *CHIEF JOSEPH ANENE OKONKWO*

18. *G.M.O. RUBBER PRODUCTS LIMITED*

19. *CLASSIC DRUG CO. LIMITED*

B

20. *STEMA ELECTRONICS CO, LIMITED*

Please find enclosed herewith the requisition for an extra-ordinary general meeting duly signed by all our clients in accordance with Section 215 of the Companies and Allied Matters Decree No. 1 of 1990.

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Kindly acknowledge receipt.

Yours faithfully,

For: IBRAHIM G. ADAMU & CO.

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(Sgd.)

IBRAHIM G. ADAMU, ESQ.

Principal Solicitor”

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On receipt of this letter, Emmanuel C. Ike, went into action and started another chapter. He went to the Federal High Court, Enugu and instituted an action in Suit No. FHC/E/14/91 as plaintiff against all the twenty shareholders, who signed the requisition calling for an extra-ordinary general meeting as well the Bank as 21st defendant. In the writ of summons issued, the following is claimed.

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C L A I M

”The plaintiff claims against the 1st to 20th defendants jointly and severally:-

G

(a) A declaration that the requisitions for an extraordinary general meeting of Orient Bank of Nigeria PLC each dated 7th October, 1991, made by the defendants for the expressed purpose of removing the plaintiff as a director of the said Bank constitute brazen interference with pending proceedings in the Federal High Court Enugu in Suit No. FHC/E/M2/91 in which a relief sought is the removal of the plaintiff as a director of the

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21st defendant bank and are therefore contemptuous of this court.

(b) A declaration that the said requisitions *prima facie* offend the principle of natural justice in that they did not state the grounds for the proposed removal of the plaintiff to enable him make representations in writing to the shareholders as prescribed by law.

(c) An injunction restraining the 1st to 20th defendants, and each of them, their agents, servants and privies and/or the directors of the 21st defendant from convening any meeting based on the same or any other requisitions calling for a general meeting for the purpose of removing the plaintiff as a director of Orient Bank of Nigeria PLC until the determination of the said Suit No. FHC/E/M2/91.

Dated the 25th day of October, 1991.

(Sgd).

(M. Usman & Orji Nwafor Orizu

Plaintiff 's Counsel

Whose address for service is:

113, Chime Avenue

New Haven, Enugu.”

On 28/10/91, the Plaintiff, Emmanuel C. Ike filed a motion ex-parte before the court praying for some orders as follows:-

“MOTION EX-PARTE

TAKE NOTICE that pursuant to the inherent jurisdiction of the court, Section 13(1) of the Federal High Court Decree and Order X Rule 5 (b) of the Federal High Court Rules, the court will be moved on Monday the 28th day of October, 1991, at 9 o'clock of the forenoon or so soon thereafter as counsel can be heard on behalf of the plaintiff/applicant above for an order of interim injunction restraining the 1st-20th defendants, their privies and agents from convening any extraordinary general meeting of Orient Bank of Nigeria PLC for the purpose of removing the plaintiff as a director of the said Orient Bank of Nigeria PLC until the determination of the motion on notice for the same prayer pending the determination of this suit.

And for a further order restraining the 21st defendant acting

through its directors from convening any general meeting of the said bank for the said purpose on the self same or similar requisition pending the determination of the said motion on notice.

And for a further order that the motion on notice for an interlocutory injunction be served on the 1st-20th defendants through their solicitors Messrs.. Ibrahim G. Adamu & Company of Law and Equity Chambers, Afro-American House Plot 11B, Eric Moore Road (By Nigerian Ropes) Surulere, Lagos.

And for such further and/or other order as to the court may seem fit.

Dated the 25th day of October, 1991.

(Sgd)

(Chief P.G.E. Umeadi, SAN D

&M.Usman)

Applicant's Counsel

Whose address for service is

113, Chime Avenue E

New Heaven, Enugu."

All the orders prayed for in the ex-parte motion were granted by the court.

Then on the 7th of November, 1991, the defendants filed a motion on notice praying for some orders, including an order for the discharge of the orders obtained ex-parte against them. The prayers are as follows:- F

"1. An order discharging the Orders obtained Ex-parte against the Defendant/applicant in the Suit on the 28th day of October, 1991 on the grounds stated in the Schedule hereto. G

2. An order directing the Plaintiff/respondent, his agents, servants or privies to desist forthwith from interfering with the rights of the Defendants/Applicants to assemble by way of exercising its rights conferred by Section 215 of the Companies and Allied Matters Decrees No. 1 of 1990. H

3. And for such further order or orders as this Honorable Court may deem fit to make in the circumstance."

"SCHEDULE

1. It is out side the jurisdiction of the Federal High Court to re-

strain shareholders from convening a meeting in exercise of their rights under Section 215 of the Companies and Allied Matters Decree No.1 of 1990.

B 2. *The exercise by the Shareholders of their rights under Section 215 of the Companies and Allied Matters Decree No. 1 of 1990 cannot be and is not prejudicial to proceeding Suit No. FHC/E/M2/91 as the said Suit is unconnected and unrelated to the provisions of Section 215 of the Companies and Allied Matters Decree No.1 of 1990 as it relates to the rights of Shareholders stated therein.*

C 3. *That the said proceedings cannot and has not taken away the rights of Defendants as provided under Section 215 Companies and Allied Matters Decree 1990.*

D 4. *That the parties to this Suit are substantially different from the parties in Suit No. FHC/E/M2/91 based on the established principles of law in the locus classicus of Salmon Vs Salmon 1897 AC 22 and other decisions in that regard.*

E 5. *That a company and or its shareholders are not bound to disclose any reasons for its intention to remove its directors and or its employees.*

F 6. *The Plaintiff/Respondent can make representations on the question or issue of his intended removal as the object of the intended meeting has disclosed that is intended that the 'Plaintiff/respondent be removed from the office of director.*

7. *That the Defendants can dispense with the services of the Plaintiff/Respondent as and when it so desires either through its general meeting or its Board of Directors.*

G 8. *That the Orders obtained ex-parte are prejudicial to the rights of Shareholders as guaranteed by law and are in breach of S. 33 of Constitution of the Federal Republic of Nigeria."*

H A very lengthy affidavit of 35 paragraphs was filed in support of the motion on notice. Emmanuel C. Ike as respondent in the motion filed a Counter affidavit and interestingly, a legal Officer in the service of 21st defendant, the Bank, also filed a counter-affidavit opposing the motion on notice seeking to discharge the ex-parte order. I shall consider the

affidavit and the Counter affidavits if there is need for me to do so. The motion was heard on 22/11/91 and ruling was reserved.

Before the motion on notice was heard on 22/11/91, a notice of discontinuance was filed on 5/11/91 in the Court by the petitioners in Suit No. FHC/E/M2/91. The presence before the Court of this notice of discontinuance was mention in the course of hearing of the motion on notice filed by the defendants praying for the discharge of the exparte order made against them. B

In a considered ruling dated 11/12/91, the learned trial judge Kolo J. refused to discharge the exparte order. In a portion of the ruling, the learned judge said:- C

“Having come this far is this application the type to be grant or not. It may be recalled here that this exparte order was made by this court pursuant to an exparte application in that regard in the light of an existing suit No. FHC/E/M2/91 which was said to be on the same issue as sought to be dealt with at an annual special general meeting of the 21st Defendant Bank. The issue was and still is the removal or otherwise of the Plaintiff/Respondent, one Mr. Ike, from his office as the Managing Director and Chief Executive of the 21st Defendant Orient Bank. Having got the information that the requisitionists intended that a meeting of the shareholders be held to remove him, the Plaintiff/Respondent then came to this court asking the court for an injunction against the requisitionists not to hold the meeting to discuss his removal. Meanwhile the plaintiff filed an exparte application for an interim order of injunction which the court granted and which is the subject matter now being challenged and which now brought about these proceedings. A careful and analytical perusal through the whole proceedings so far up to the observations I have made above in this ruling will, in my humble view, reveal that the present action as brought by the Plaintiff/Respondent is akin to what is usually referred to as the preservation of the Res or maintaining what is also usually referred to as the status quo. It is trite law by now that preservation of the Res shall, in the appropriate cases, be ordered by courts. In doing such a preservation it matters not whether the Res in question be tangible or intangible. As per Oguntade JCA at page 750 in the case of Okafor V. Attorney – General of Anambra State (1988) 2 NWLR pt. 779 p. 736” D E F G H

The Res in an action which a court of record has an inherent power to preserve may be tangible as in the case of funds in dispute or intangible as a right to decide who succeeds to the rulership as in this case in hand. A court does nothing in vain". Clearly the Res in the present action before me is in tangible but which also must be preserved its being intangible notwithstanding.

In conclusion therefore I am of the humble view that granting the present application for discharge will have the effect of not only destroying the res in this action but will also have the effect of rendering not only useless the decision of this court after the case No. FHC/E/M2/91 would have been finally determined but also nugatory and no court does or should act in vain. I therefore rule that this application to discharge an earlier ex parte order of this court is here refused accordingly."

The defendants were not happy with the ruling and they appealed to this court. Seven grounds of appeal were filed. They read as follows:-

"GROUNDS OF APPEAL

1. The court below erred in law in refusing to discharge the Ex parte Orders of Interim Injunction made on the 28th day of October 1991 against the Defendants the lower court's discretion having been exercised capriciously and not judicially.

2. The court below erred in law in refusing to discharge the Ex parte Orders of Interim Injunction made against the Defendants and thereby perpetuated the grave error of preventing the Defendants from convening any 'general Meeting whatsoever.

PARTICULARS OF ERROR

i. Section 215 of the Companies' and Allied Matters Decree of 1990 provides for a general meeting to be requisitioned by members of a company.

ii. The law court having held that the Defendants' were qualified to requisition a meeting under Section 215 of the Companies and Allied Matters Decree of 1990 ought not to have prevented the 'defendants from exercising their legal rights.

3. The lower court erred in law when it held that the action instituted by the Plaintiff is akin to what is usually referred to as a reservation of the 'res or maintaining what is usually referred to as the status quo and

that the discharge of the Exparte Orders of Interim Injunction will have the effect of not only destroying the Res in this action but will also have the effect of rendering the decision in Suit No. FHC/E/M2/91 nugatory.

PARTICULARS OF ERROR

i. *There is no Res to be preserved and the lower court did not identify any such res in this Suit.* B

ii. *Suit No. FHC/E/M2/91 is a separate distinct and independent action from this action with different parties and different claims.*

iii. *The status quo before the institution of this action by the Plaintiff in this action was that there was a requisition for an Extra Ordinary General Meeting of Orient bank Nigeria PLC and the Plaintiff's action does not claim a legal right as against the right of the Defendants to convene meeting by requisition.* C

4. *The lower court erred in law when it held that a Notice of Discontinuance filed and served before a date fixed for the hearing of a Suit requires leave of court to become effective.* D

PARTICULAR OF ERROR

i. *Order 43 Rule 1 of the Federal High Court Civil Procedure Rules entitles a Plaintiff to discontinue an action without leave of court before the date fixed for hearing.* E

ii. *The lower court having observed that a Notice of Discontinuance had been filed and served in Suit No. FHC/E/M2/91 ought to have regarded the said Suit as having been duly discontinued.* F

5. *The lower court misdirected itself in law when it held that the Exparte Orders of Interim Injunction made on the 28th of October, 1991 did not take away the legal rights of the Defendants to requisition a meeting under Section 215 of the Companies and Allied Matters Decree of 1990.* G

PARTICULARS OF MISDIRECTION

i. *Section 215 of the Companies and Allied Matters Decree of 1990 provides for the convening of an Extra Ordinary General Meeting by requisition of members of a Company.* H

ii. *The lower court held that the Defendants are qualified under Section 215 of the Companies and Allied Matters decree of 1990 to requisition a meeting.*

6. *The lower court erred in law in refusing to discharge the Ex-*

parte Orders of Interim Injunction made on the 28th day of October, 1991 as the Plaintiff did not give any undertaking as to damages and the lower court did not extract any such undertaking from the Plaintiff.

B 7. The lower court erred in law and in fact in sticking our paragraphs 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 19, 21, 23, 26, 28, 31, and 32 of the Affidavit of Edwin Egede in support of the application of discharge the Exparte Orders of Injunction.

PARTICULARS OF ERROR

C i. The depositions in the said Affidavit were matters of fact within the personal knowledge of the Deponent a Legal Practitioner.

ii. The lower court had used the paragraphs of the Affidavit to evaluate and resolve conflicts between it and the deposition of the Plaintiff in his Affidavit in support of his Exparte Application.

D iii. There was no Affidavit deposed to on the authority of the 21st Defendant Bank and the averments in E.E. Egede's Affidavit was not controverted by the 21st Defendant Bank.

RELIEFS SOUGHT FROM THE COURT OF APPEAL

1. Allow the Appeal.

E 2. Set aside the ruling of the lower court by which it dismissed the Application by the 1st – 10th and 18th – 20th Defendants to discharge its Ex parte Orders of Interim Injunction made against the Defendant.

F 3. Discharge the said Exparte Orders of Interim Injunction made on the 28th day of October, 1991."

In their brief of argument, the defendants hereinafter referred to as appellants set out the issues for determination in the following manner:-

"i. Whether the Federal High Court had jurisdiction to entertain the Motion Ex parte or indeed the claims relevant to that Motion?

G ii. If, but only if the answer to question (1) is in the negative:-

(a) Whether the court below was correct in refusing to discharge its orders restraining the Defendants/Appellants and the 3rd to 9th Defendants/Respondents from requisitioning the convening of an Extra-Ordinary General Meeting of Orient Bank of Nigeria PLC upon an Ex parte application?

H (b) Whether the court below was correct in refusing to treat Suit No. FHC/E/M2/91as having been discontinued?

(c) Whether the court below was right in sticking out certain paragraphs of the Affidavit in Support of the Defendants/Respondents application to discharge the Ex parte Orders.”

Let me start by pointing out that, I can not find the relationship between Issue No 1 with any of the Seven grounds of appeal. Issue of jurisdiction is very important to any proceedings and if a party is desirous of complaining about jurisdiction of any court then it is imperative that a ground of appeal should be filed to that effect. Since this has not been done in this case, it is my view that issue number (i) is incompetent and it is accordingly struck out. See IYAYI v. EYIGEDE (1987) 3 NWLR (pt. 61) 523.

Now the plaintiff, hereinafter referred to as respondent also filed brief of argument as well as a preliminary objection to the effect that the appeal is incompetent; and that since the appeal is incompetent, this Court has no jurisdiction to hear it.

The grounds of objection are that

(1) The appeal is against the ruling of the lower court in which the court refused to vacate its order made exparte.

(2) The grounds of appeal are on mixed Law and facts.

(3) No leave was obtained either from the lower court or from this court. Learned counsel for respondent contended that where the grounds of appeal are either of facts or mixed law and facts, leave is required. In the absence of leave, the purported appeal is incompetent.

The learned counsel cited the case of CHIEF MICHAEL OWHO-TEMU-KOKO vs THE STATE (1983)5

SC 17. In support.

Learned counsel maintained further that on-compliance with a fundamental condition precedent which would have given validity to the institution of the proceedings renders the act arising from the on-compliance incompetent. He cited in support the case of IFEZUE & ANOR vs. MBADUGHA & ANOR (1984)5 SC 79; and two other foreign decision HOWARD vs. BODINTON (1977) P.D. 203; PATCHET vs. LEATHEM (1949) T.C.R. Vol. 45 at 69. In his reply to the preliminary objection learned counsel for appellants contended that the preliminary objection is

misconceived. He pointed that out of the seven grounds of appeal filed, only ground (7) is a ground of mixed law and fact, all the other remaining six grounds, are grounds of law. Since the order appealed against is a decision within the meaning on S. 220 of the 1979 constitution, it is appealable as of right without leave being obtained in respect of the 6 (six) grounds.

Learned counsel submitted further that by virtue of the provisions of Section 220 (1) (g) (ii) of the 1979 Constitution, the appellants can appeal as of right without obtaining any leave of the Court on an order of Injunction or an order refusing to discharge an ex parte order of injunction where the application to discharge is made by motion on notice as has happened in this case. Learned counsel contended that this can be done whether or not the grounds of appeal involved mixed law and fact so long as the appeal arose from a decision of the High Court to the Court of Appeal where an injunction is granted or refused.

He relied again on the provisions of S. 220(i) (g) (ii) of the 1979 Constitution and also the case of EGUAMWESE VS AMAGHIZEWEN 1986) NWLR 282, Elobisi Vs. Onyeonwu (1989) 5 NWLR 224.

I think the position of the 1979 Constitution as well as the decided authorities are very clear on this issue. Section 220(i) (g) (ii) of the 1979 Constitution provides as follows:-

"220-(1) An appeal shall lie from the decisions of a High Court to the Federal Court of Appeal as of right in the following cases –

(g) decisions made or given by the High Court -

(ii) where an injunction or the appointment of a receiver is granted or refused."

I also still hold the same view I expressed in the case of CHIEF JOHN ATTAMAH AND ORS VS. THE ANGLICAN BISHOP ON THE NIGER AND OTHERS in appeal No. CA/E/155/92 dated 30/3/93, unreported. A similar preliminary objection was raised as to the competence of the appeal on the ground that refusal to discharge an order of injunction does not mean the same thing with refusal to grant injunction. I expressed the view that there is hardly any difference between grant or refusal to grant injunction with refusal to discharge or vacate an order of injunction.

Consequently refusing to discharge order of injunction is covered by the provisions of Section 220 (1) (g) (ii) of the 1979 Constitution. I therefore find no merit in the preliminary objection raised by the respondent. I accordingly dismiss it.

Learned counsel for respondent did not put all his eggs in one basket, because he went ahead and set out issues for determination from his own point of view in case his preliminary objection failed as it did. The issues he set out are three and they are as follows:-

“(1) Whether in the light of the substantive petition-in Suit No. FHC/E/M2/91 and the threat of removal of the 1st respondent premeditated by the Requisitionists in Suit No. FHC/E/14/91, the Order of injunction granted Ex-parte by the Lower Court was right in Law.

(2) Whether the material evidence relied upon by the Appellants were enough to compel the Lower Court to discharge its Ex-parte Order.

(3) Whether slotting in a Notice of Discontinuance in order to augment a Requisition for the removal of the 1st Respondent is automatic when:-

a. The Claim sought to be discontinued contains grave allegations of Crime.”

Having regard to the grounds of appeal and the issues identified by both the appellants and the respondent; it is clear that the focal point in the appeal is the refusal of the learned judge to vacate the order of injunction obtained exparte and the reasons he advanced for the refusal. It is my view therefore that the simple issue that arose for determination in this appeal is whether the learned trial judge has in the circumstances and peculiar nature of the case exercised his discretionary power judicially and judiciously in refusing to vacate the order of injunction obtained exparte on the application of the appellants on notice.

As I mentioned earlier in this judgment, there is no ground of appeal specifically challenging the jurisdiction of the lower court, therefore all arguments advanced by the appellants on this issue go to no issue.

On the issue of exercise of discretion by the lower court, Learned Counsel for appellants submitted that the Lower Court in exercising its discretion should have acted judicially and judiciously and not capriciously as it did and should have discharged the order. Learned counsel maintained

that there was no extreme urgency to warrant the making of the exparte order. He pointed out that the requisition was issued and served on the Directors of the Bank on 24/10/91 and the Directors had 21 days within which to convene the meeting requisitioned and thereafter the shareholders were bound in accordance with Section 215 (4) of the Companies and Allied Matters Decree (Act) of 1990 to convene the said meeting within 3 months thereafter. Learned counsel also pointed out that in accordance with Section 217 of the same Act, the requisitionists were bound to give 21 days Statutory notice. There was therefore a total maximum of 113 days and a minimum of 21 days in which the members or the directors respectively could have held the meeting. He also pointed out that the motion on notice was fixed for hearing by the lower court for the 12th of November, 1991, nineteen days from the service of the requisition.

What the learned counsel for appellants is saying in effect is that a requisition was issued on 24/10/91. From this date, there is a minimum requirement of 21 days before the meeting can hold. The exparte motion was filed and moved and granted on 28/10/91, and as at that date, there are about 17 days left before the meeting could have been held. This clearly had shown that there was really no urgency for the order exparte to be made. In the circumstances, the lower court was wrong in refusing to discharge the order exparte. On this issue of urgency, learned counsel for respondent contended that the exparte order was granted by the respondent in which he showed a real danger of his being harassed and removed by the requisitionists. He pointed out that the exparte order was given on 28th October, 1991, while the substantive motion-on-notice was fixed for meeting for hearing on the merits to the 12th November, 1991, barely two weeks.

Learned counsel contended that, if the respondent had waited for all the parties to be served, the statutory notice for the requisition would probably have matured and having regard to the prevailing situation, the respondent would be arbitrarily and unfairly removed, and this was what dictated the real urgency.

I think the argument of the learned counsel for respondent in this regard is colored with speculation as to what could happen, and speculation

can not be equated to real urgency as is required in consideration whether to grant or refuse an exparte order. See KOTOYE Vs. CBN (1989) 1 NWLR 419 where NNAEMEKA-AGU JSC at page 449 said:-

“Also the basis of granting an Exparte Order of Injunction, particularly in view of Section 33(1) of the Constitution of 1979, is the existence of Special circumstances, invariably, all pervading real urgency, which requires that the order must be made, otherwise an irretrievable harm or injury would be occasioned to the prejudice of the applicant. B

Put in another way, if the matter is not shown to be urgent, there is no reason why the Exparte order should be made at all. The existence of real urgency, and not self imposed urgency, is a sine qua non for a proper Exparte Order of Injunction.” C

In his contribution in the same case, NNAMANI JSC at page 454 stated that:- D

“Usually in case of exparte applications for injunction on the ground of real urgency the court would, as indicated earlier, examine the fact to ensure that the party applying has not been guilty of delay and further more that there is an impossibility of bringing a application on notice and serving the other party.” E

(Underlining mine).

In the light of the situation in this case and the principle of law enunciated in KOTOYE’S CASE SUPRA, I think, I am more inclined to agree with the learned counsel for appellants that there was no real urgency to warrant the grant of the exparte injunction. F

The other issue raised by the appellants is whether the respondent would have suffered any irreparable damage had the meeting been convened and he was ultimately removed. Learned counsel submitted, that at best the respondent would have been entitled to damages if the removal is wrongful. Learned counsel referred to the provision of Section 262(6) of the Companies And Allied Matters Act of 1990. It provides as follows:- G
“262-(1) A company may by ordinary resolution remove a director before the expiration of his period of office, notwithstanding anything in its articles or in any agreement between it and him. H

(b) Nothing in this Section shall be taken as depriving a person removed

under it of compensation or damages payable to him in respect of the termination of his appointment as a director or of any appointment terminating with that as director; or as derogating from any power to remove a director which may exist apart from this Section.”

B Learned counsel also referred to the case of CALABAR CEMENT COMPANY LIMITED Vs ABIODON DANIEL (1991) 4 NWLR 750.

A decision of this Court, where KATSINA-ALU JCA at page 758 said:-

C *“An employee cannot compel the employer to retain him no matter how desirable that may be on humanitarian or other grounds. In much the same way an employer cannot compel an employee to remain in his services no matter how indispensable his services may be to the employer.”*

Yet in another decision of this court in the case of OKAFOR v. A.G. ANAMBRA STATE (1988) 2 NWLR 736 at 749, OGUNTADE JCA said:-

D *It is settled law that before a court makes an order of interim injunction upon an ex parte Application the Court ought to have been satisfied that the material placed before it raises a prima facie case for the intervention of the Court through an order of interim injunction.”*

E Learned counsel contended finally that on this issue, the respondent had no legal right to protect by way of injunction.

This issue is linked with the next issue raised by learned counsel for appellants, that is the preservation of res.

F At the expense of repetition, I shall quote again a portion of the ruling of the learned trial judge on this issue. He said:-

G *“A careful and analytical perusal through the whole proceedings so far up to the observations I have made above in this ruling, in my humble view, reveal that the present action as brought by the Plaintiff/respondent is a kin to what is usually referred to as the preservation of the Res or maintaining what is also usually referred to as the Status quo. It is trite law by now that preservation of the Res shall, in the appropriate cases, be ordered by courts. In doing such a preservation it matters not whether the Res in question be tangible or intangible. Clearly the Res in the present action before me is intangible but which also must be preserved*
H *it being intangible notwithstanding. In conclusion therefore I am of the*

humble view that granting the present application for discharge will have the effect of not only destroying the Res in this action but will also have the effect of rendering not only useless the decision of this Court after the case No. FHC/E/M2/91 would have been finally determined but also nugatory and no court does or should act in ruin.”

Learned Counsel for appellants maintained that there was no Res to be preserved by the order of the lower Court. He contended that, if anything, the Res in this Suit is the Requisition which the lower court by its interim orders has rendered ineffective. **It is submitted and I agree with the submission that an application for preservation of the Res must have a direct or proprietary interest in it. A mere passing nexus with the Res is not enough see OYEFESO VS. OMOGBEHIN (1991) 4 NWLR 596.**

On this issue of Res, the learned counsel for respondent contended that the appellants misconceived the issue particularly when the relativity of Suit No. FHC/E/M2/91 and Suit No. FHC/E/14/91 are considered as has been done by the trial court in its ruling. He submitted that the respondent is the intangible Res because the joint efforts of the petitioners and the appellants in hounding the respondent would destroy the Res if the exparte injunctions was lifted.

I find it difficult to follow clearly the arguments of the learned counsel for respondent on this issue. Be that as it may, it appears he is overflogging the relevance of Suit No. FHC/E/M2/91 in relation to the application on notice for the discharge of the order exparte. **There is evidence that, a notice of discontinuance was filed before the trial court and this was brought to the notice of the learned trial judge who circumvented the information and said that it has not been formally discontinued.** I find it difficult to understand why the learned trial judge said that. The notice had been formally file in his court. His attention was drawn to it, I do not know what other formal discontinuance he is expecting. In any event, I do not find the relevance of that Suit to the application before him even if the suit was not formally discontinued. I do not want to share the view of the learned counsel for respondent that it has any nexus with the Suit No. FHC/E/14/91, which is a suit filed by his client, the respondent. In my view it can not be used as a ground

for the preservation of any Res.

Now, I would like to point out at this juncture that this appeal is not grounded on the original grant of the interim injunction on exparte motion. It is grounded on the refusal of the learned trial judge to vacate it when basked to do so in an application on notice. I have earlier on resolved the issue on the effect of such an order, I held the view that it amounted to the same think as granting or refusing to grant an injunction as contemplated under the provision of S. 220-(1) (g) (ii) of the 1979 Constitution.

C What then are guiding principles in the discharge of such exercise of discretionary power of the court.

I think it is important to start by pointing out that trial courts should also keep in mind consistently, that the grant or refusal of an application for an interim application, or exparte application as it is popularly known is a very serious business which must not be taken or treated casually. This is because it could involve a lot of inconveniences or big losses particularly where heavy investments are involved or elaborate preparations are rendered useless by disruption.

E Therefore some of the important factors the courts should take into consideration as a guide, just to mention a few are:-

(1) The applicant must show that he has a legal right to be protected.

(2) The applicant must show that his request is based on the F principle of evenness, that is that the protection he is seeking must not unduly outweigh the corresponding need to protect the interest of the other party. See OBEYA MEMORIAL HOSPITAL VS. ATTORNEY-GENERAL OF THE FEDERATION (1987) 3 NWLR (pt. 60) 325.

G (3) The applicant must show that damages in the measure recoverable at law would be inadequate remedy and the defendant would not be in a financial position to pay him the damages.

(4) The grant of the order, being an equitable remedy and a discretion of the court, the discretion must be exercised judicially and H judiciously taking into account all the facts and circumstances.

Now can it be said that the respondent in this case has satisfied

these requirements in opposing the application to vacate the order made *exparte*. I think not.

At best the respondent was only able to show that there was a serious move to summon a meeting at which he might be removed from office as Managing Director and Chief Execution of the Bank. B The worst that could have happened to him was to lose his job. If he lost the job, he could easily be compensated monetarily if at all he is removed wrongfully.

It is needless to mention that the appellants as shareholders of the Bank have every legal right to summon the meeting even if it is for the purpose of removing the respondent from office if they consider it desirable for the well being of the Bank. C

There is no doubt that there is no more love between the requisitionists/appellants and the respondent. Since the situation has reached crisis point certainly the operation of the bank will be affected adversely. If this is so the interest of the shareholders would weigh more than the interest of the respondent. In other words the loss that will follow will be much larger to the fortunes of the bank than that of the respondents. This is a point that has not been considered by the learned trial judge at all. The learned trial judge concerned himself more with the job of the respondent. D E

On a calm view of the peculiar nature and the circumstances of this case I am satisfied that the learned trial judge did not exercise his discretion judicially and judiciously in refusing to vacate the order *exparte* made on 28/10/91. F

Consequently the appeal succeeds and it is allowed. The order *exparte* is hereby vacated. The appellants are entitled to costs which I assess at N500.00 in their favour. G

AWOGU JCA.

I agree with the reasoning and conclusions reached in the judgment of my brother, Abdullahi, J..C.A. I too allow the appeal and make similar order as to costs. H

AKINTAN JCA

I had a preview of the lead judgment just delivered by my learned brother, Abdullahi, J.C.A. I agree with his reasoning and conclusion. I too allow the appeal, set aside the ex parte order and award N500 costs in favour of the appellants.

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