

SUPREME COURT OF NIGERIA
11TH JULY, 2008. SC. 162/2002
CORAM:- N. TOBI, G. A. OGUNTADE,
M. MOHAMMED, F. F. TABAI, J. O. OGEBE, JJSC

NIKA FISHING CO. LTD	APPELLANT
AND		
LAVINA CORPORATION	RESPONDENT

PRACTICE & PROCEDURE - Jurisdiction - Objection to - Manner of raising - It is different from a demurrer - Can be raised without filing pleadings and resolved before further steps - As rightly done by defendant herein (H1)

MARITIME LAW - Carriage of goods by sea - Jurisdiction clause - Construction of - Courts should give effect to it - Unless the party in breach shows a strong cause to warrant otherwise - Which was not the case herein (H2)

COURTS - Affidavits - Failure to file counter affidavit - Findings of fact - Evidence in support - Relevant facts relied upon by lower courts here - In finding for the respondent - Are not supported by appellant's affidavit - And no counter affidavit was filed (H3)

COURTS - Appeals - Findings - Discretion - As findings cannot be made from mere pleadings - Without evidence in a contested matter - Lower courts were wrong - In not granting appellant's application for stay of proceedings (H4)

FACTS

The Plaintiff/Respondent had sued the Defendant/Appellant at the Federal High Court, Lagos, claiming demurrage for alleged delay by the Appellant in taking delivery of the cargo within the time agreed by the parties in the Bill of Lading under their contract for carriage of goods by sea. It is a term of the Bill of Lading that any dispute arising thereunder shall be decided in Argentina. The court ordered for pleadings to be filed. In response, Respondent filed a

Statement of claim but upon being served with the statement of claim, Appellant, without filing a statement of Defence, brought a motion on notice praying for an order dismissing the suit for want of jurisdiction or an order staying proceedings in the suit. Respondent filed no counter-affidavit to the motion.

After hearing the motion on notice, the learned trial judge refused both prayers. It held that it had jurisdiction and also held that justice would be better served by refusing a stay of the proceedings. Appellant's appeal to the Court of Appeal was dismissed. He has brought this further appeal to the Supreme Court against the judgment of the Court of Appeal affirming the ruling of the trial court. He contends only the part of the ruling refusing an order for stay of proceedings.

ISSUE FOR DETERMINATION

"Whether in all the circumstances of this case, the Court of Appeal was right in holding that the learned trial Judge exercised his discretion judicially and judiciously in refusing the Appellant's application for stay of proceedings in the action brought against it by the Respondent in spite of the provision of a foreign jurisdiction clause contained in the agreement between the parties."

HELD (Unanimously allowing the appeal per **MOHAMMED JSC**) **Jurisdiction - Objection to**

1. The first relief is clearly a challenge to the jurisdiction of the trial court to hear and determine the suit as filed by the Respondent against the Appellant. The law in Nigeria when such a challenge to the jurisdiction of court is being considered by a trial court is well settled. When such an application or objection is raised before a trial court challenging its jurisdiction, the court could rely simply on the Writ of Summon, the Statement of Claim and affidavit in support of the applications as was rightly done by the trial court and affirmed by the court below in the present case. See *Arjay Ltd. v. Airline Management Support Ltd.* (2003) 7 NWLR. (Pt.820) 577 at 601 where Onu JSC stated the law -

"I agree with the Appellants' submission that there is a difference between an objection to the jurisdiction and a demurrer. I also agree with them that an objection to the jurisdiction of the Court can

be raised at anytime, even when there are no pleadings filed and that a party raising such an objection need not bring the application under any rule of Court and that it can be brought under the inherent jurisdiction of the Court. Thus, for this reason, once the objection to the jurisdiction of the Court is raised, the Court has inherent power to consider the application even if the only process of Court that has been filed is the Writ of Summons and affidavits in support of any interlocutory application, as in the case in hand."

In other words in the instant case where the Writ of Summons, the Plaintiff's/Respondent's statement of claim and the affidavit filed by the Appellant as Defendant in support of its application, show quite clearly that the subject matter of suit being a liability for and entitlement of the Respondent to demurrage in a contract of carriage of goods by sea from Argentina to Lagos, Nigeria, by Section 7 of the Federal High Court Act, is rightly within the Admiralty jurisdiction of the trial court as found by it and affirmed by the Court below. In fact having regard to the subject of the suit of the Respondent, it is only the trial Federal High Court that has jurisdiction to resolve the dispute between the parties in Nigeria. On the issue of jurisdiction therefore the Courts below were quite right in their decision that the subject matter of the Respondent's suit, was within the jurisdiction of the trial court. (pp. 2864 H/2865 C)

Carriage of goods by sea - Jurisdiction clause

2. The position of the law in this country regarding the enforcement or otherwise of a jurisdiction clause contained in a Bill of Lading as in the present case, was extensively discussed in the decision of this Court in *Sonner (Nig.) Ltd. v. Partenreedri M. S. Nordwind* (1987) 4 N.W.L.R. (Pt. 66) 520 also reported in (1987) All N.L.R. 548 at 567 - 568 where Eso J.S.C. in the lead judgment said

"It is true that in 'The Eleftheria (1969) 1 Lloyds L.R., 237, Brandon J. in his powerful judgment emphasized the essentiality of giving full weight to the prima facie desirability of holding the Plaintiffs to their agreement. xxxxx The tests set out by Brandon J. in 'The Eleftheria' are as follows-

"(1.) Where the Plaintiffs sue in England in breach of an agreement to refer disputes to a foreign Court, and the Defendants apply

for stay, the English Court, assuming the claim to be otherwise within the jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not.

(1.) The discretion should be exercised by granting a stay unless strong cause for not doing so is shown.

B *(2.) The burden of proving such strong cause is on the Plaintiffs.*

The law requires such discretion to be exercised by granting a stay unless strong cause for not doing so is shown. The burden of showing such strong cause for not granting the application lies on the door steps of the Respondent as the Plaintiff. The question is whether that burden had been discharged by the Respondent. In finding that the burden had been discharged, this is what the trial court said at page 29 of the record:-

D *“Having enumerated the statement of claim of the Plaintiff to see if this is a proper case to stay or assume jurisdiction taking Brandon Test into consideration, to me this is a simple contract guided by Exhibit A. The goods were delivered in Nigeria. What the Plaintiff is claiming is only demurrage. In my view the witnesses to prove the*
 E *case are all in Nigeria such as the Nigeria Ports Authority whose duty it is to know when the ship arrived and when It departed. I hold that it is in Nigeria Court that the issue of fact is situated or more readily available xxxxxx From the statement of claim of the Plaintiff which is*
 F *action on a simple contract, I hold that the Defendant does not genuinely desire trial in the foreign country but are only seeking a procedural advantage.”*

This finding of the trial court was not based on any evidence brought by the Respondent as Plaintiff as no counter affidavit was
 G filed by it in response to the application filed by the Appellant supported by an affidavit. (pp. 2866 D/2868 B)

Affidavits - Relevant facts

H 3. Furthermore, the Appellant’s affidavit in support of its application which the Court below said could be relied upon by the Respondent in discharging the burden of proof of satisfying the trial court of its claim to hear the case in Nigeria rather than in Argentina, in spite of having failed to file a counter affidavit, does not contain such rel-

evant facts relied upon by the trial court and the Court below to support the case of the Respondent. The fact that all the witnesses in the case are in Nigeria or that the circumstances of the matter show that the case is more connected with Nigeria than Argentina as found by the Courts below, are not at all contained in the Appellant's affidavit in support of its application. This is where the circumstances of this case differ significantly from the case of Sonner (Nig.) Ltd. v. Nordwind (supra), relied upon by both parties in which the Plaintiffs promptly reacted to the Defendants' application for stay by filing a counter affidavit exhibiting documents showing why and how the Plaintiffs would be prejudiced if their suit were to be heard in Germany in accordance with the agreement where the suit was already statute barred. The findings of fact made by the trial court in the present case that the witnesses to prove the Plaintiff's case are all in Nigeria and that the evidence on the issue of fact was situated or more readily available in Nigeria are not supported by evidence adduced by the Plaintiff/Respondent in discharge of the burden placed upon it by law. (p. 2868 G)

COURTS - Appeals - Findings - Discretion

4. Finding of facts cannot be made from paragraphs of the statement of claim filed by the Respondent as pleadings of which statements of claim are part, cannot take the place of evidence in a contested matter in Court. This is because Courts of law can only decide issues in controversy between parties on the basis of the evidence before them. See Ibrahim v. Shagari (1983) 2 S.C.N.L.R. 176, also reported in (1983) All N.L.R. 507 at 512, 524 and 534 where Nnamani JSC of blessed memory put it plainly thus -

"Although it seems fairly obvious it needs emphasis that Courts of law can only decide issues in controversy between parties on the basis of the evidence before them. It would be invidious if it were otherwise."

Thus in the absence of strong cause shown by the Respondent for the trial court not to grant the Appellant's application for stay, the law requires that court to exercise its discretion in favour of the Appellant by granting the application. The discretion of the trial court was therefore not exercised judicially and judiciously in the absence

of any evidence placed before the trial court by the Respondent, to base its decision upon. The Court below, in my view, was in error in its judgment now on appeal when it affirmed the decision of the trial court. (p. 2869 E/F)

B **REPRESENTATION**

O. M. Sagay, for the Appellant.

Respondent absent and not represented but duly served.

C **CASES REFERRED TO**

Ibrahim v. Shagari (1983) 2 S.C.N.L.R. 179

Izenkwe v. Nnadozie (1953) 14 W.A.C.A. 361

Adeyemi v. Opeyori (1976) 9-10 S.C. 31

Barclays Bank of Nigeria Ltd. v. Central Bank of Nigeria (1976) 1 All

D NLR. 409

Kasikwu Farms Ltd. v. Attorney General of Bendel State (1986) 1

NWLR. (Pt. 19) 695

Attorney General Kwara State v. Olawale (1993) 1 NWLR. (Pt. 272)

645

E Arjay Ltd. v. Airline Management Support Ltd. (2003) 7 NWLR. (Pt. 820) 577 at 601

Madukolu v. Nkemdelim (1962) 1 All NLR. (Pt. 4) 587

Akinfosile v. Ijose (1960) S.C.N.L.R. 447

Akanmu v. Adigun (1993) 7 N.W.L.R. (Pt. 304) 218

F Ajuwon v. Akanni (1993) 9 N.W.L.R. (Pt. 316) 182 at 200

Resident Ibadan Province v. Lagunju (1954) 14 W.A.C.A. 552

Emekede v. Emekede (1964) 1 All N.L.R. 102

Williams v. Voluntary Funds Society (1982) 1-2 S.C. 145

G Efetiroroje v. Okpalefe II (1991) 5 N.W.L.R. (Pt. 193) 517

STATUTES REFERRED TO

Constitution of the Federal Republic of Nigeria, 1979, ss. 6(1) & 6 (6) (b)

H Federal High Court Act, s. 7

LEAD JUDGMENT BY MOHAMMED JSC

This appeal is against the judgment of the Court of Appeal

Lagos Division given on 21st June, 2001, in which it dismissed the Appellant's appeal against the Ruling of the trial Federal High Court, Lagos of 28 June, 1989, dismissing the Appellant's application for stay of proceedings in an action for damages on liability for demurrage incurred in a contract of carriage of goods by sea filed by the Respondent as Plaintiff against the Appellant as the Defendant. B

The Respondent is the owner of the ship named 'MV Frio Caribic,' hereinafter referred to as '*the ship*.' The ship was chartered to convey a consignment of frozen fish from Mar Del Plata in Argentina, to Apapa Lagos, Nigeria. The ship arrived at the Apapa port on 29th December, 1987 and discharged its cargo. Following the alleged delay in the Appellant taking delivery of the cargo within the time agreed by the parties in the Bill of Lading, the Respondent brought an action against the Appellant at the Federal High Court, Lagos on 21st December 1988, claiming the sum of \$119,739.40 United States Dollars as demurrage. Following the order of pleadings by the trial court, the Respondent as the Plaintiff filed its statement of claim to pave the way for the hearing of the case. On being served with the Statement of Claim, the Appellant as Defendant, instead of filing its statement of defence, reacted by filing a motion on notice dated 2nd May, 1989 supported by an affidavit, asking for two specific prayers, namely - C D E

"1. An order dismissing the suit for want of jurisdiction.

2. An order staying proceedings in this suit." F

The Respondent did not file any counter affidavit to the Appellant's motion which was duly heard by the trial court. In its Ruling on 28th June, 1989, the trial court refused the application. Part of this Ruling at page 31 of the record reads -

"Having gone through all these authorities, I think justice is better served by refusing a stay than by granting one. Application is refused." G

Dissatisfied with this Ruling of the trial court, the Appellant, with the leave of the trial court, appealed to the Court of Appeal which in its decision delivered on 21st June, 2001, dismissed the appeal and affirmed the decision of the trial court. It is from that decision of the Court of Appeal that the Appellant has now further appealed to this Court on three grounds of appeal from which two H

issues for determination were formulated in the Appellant's brief of argument. The two issues are -

"1. Whether in all the circumstances of this case the Court of appeal was correct in holding that the learned trial Judge in the exercise of his discretion acted judicially and judiciously.

B *2. Whether the Courts below were under a duty to ascertain the inconvenience of litigating in accordance with the jurisdiction clause."*

C In the brief of argument filed on behalf of the Respondent by its learned Counsel however, only one issue was distilled from the grounds of appeal filed by the Appellant for the determination of the appeal. The issue is -

D *"Whether or not the Court of Appeal in the exercise of its appellate jurisdiction correctly held that the learned trial Judge exercised its discretion correctly and was therefore right to have refused a stay of proceedings or to have refused to dismiss the suit in its entirety."*

E The main issue for determination in this appeal as rightly identified by the parties in their respective first issue in the Appellant's and the only issue in the Respondent's brief of argument, is *whether in all the circumstances of this case, the Court of Appeal was right in holding that the learned trial Judge exercised his discretion judicially and judiciously in refusing the Appellant's application for stay of proceedings in the action brought against it by the Respondent in spite of the provision of a foreign jurisdiction clause contained in the agreement between the parties.*

F In his submission, learned Counsel to the Appellant recognized the general attitude of Nigerian Courts to a foreign jurisdiction clause that forms part of a Bill of Lading, had been to guard their jurisdiction and maintain their discretion to grant or refuse any application for stay of proceedings in such cases. A jurisdiction clause, according to learned Counsel, declares the intention of the contracting parties in relation to the forum and law applicable in the event of any dispute arising from the contract; that in the present case, the Bill of Lading contained such a jurisdiction clause which states; -

H *"Any dispute arising under this Bill of Lading shall be decided in the country where the carrier has his principal place of business*

and the law of such country shall apply except as provided elsewhere herein. "That since the forum and the law have already been determined by the parties in the event of any dispute, it is not material to argue that where the event occasioning the dispute occurred, shall be the place for the resolution of the dispute in spite of the clear wording of the jurisdiction clause. The guiding principles in Courts granting or refusing stay of proceedings in such cases, according to the learned Counsel, were laid down by the Supreme Court in the case of Sonner (Nig.) Ltd. v. Partenreedri M. S. Nordwind (1987) 9-11 S.C. 121 at 149 - 154 in which a number of English cases were cited with approval. Learned Counsel explained that the object of the Brandon Test laid down in one of the cases, Eleftheria v. Eleftheria (1969) 1 Lloyds L.R. 237 by Brandon J., was to ensure that there is, in every case, a basis upon which the discretion of the Court is founded, particularly the materials made available to the Court by the parties especially the Plaintiff on whom lies the burden of establishing a strong cause for refusal of stay.

Applying these principles to the present case, learned Counsel to the Appellant had argued that the Court below was in error in upholding the decision of the trial court refusing the application for stay of proceedings in spite of the fact that the Respondent upon whom the burden of satisfying the trial court of the existence of evidence to support the decision, had failed to discharge that burden, in the absence of a counter affidavit opposing the application. The cases of Sonner (Nig.) Ltd. v. Partenreedri M. S. Nordwind (1987) 9-11 S.C. 121 and Ibrahim v. Shagari (1983) 2 S.C.N.L.R. 179, were cited in support of this submission by learned Counsel who observed that the trial court only relied on the statement of claim of the Respondent which does not constitute evidence, in finding for the Respondent without looking into Appellant's affidavit in support of its application for stay; that it was in reliance on the inference drawn by the trial court from the statement of claim that the Court below erroneously based its decision that a strong cause had been made out to justify the trial court's refusal of the application.

For the Respondent however, it was strongly argued that the Court below was right in affirming the decision of the trial court refusing the Appellant's application for stay because that decision was

in line with the decision of this Court in the same case of Sonner (Nig.) Ltd. v. Nordwind (supra) also relied upon by the Appellant; that the jurisdiction clause conferring jurisdiction on a foreign Court in the present case had been constructed in the case of the Fehmarn (1958) 1 All E.R. 333, as not ousting the jurisdiction of the local Courts, particularly in Nigeria when Section 6(1), 6(b) of the 1979 Constitution and Section 6(1) and 6(b) of the 1999 Constitution are taken into consideration; that the subject matter of this suit being liability for and entitlement to demurrage in a contract of carriage of goods by sea, by Section 7 of the Federal High Court Act, squarely falls within the admiralty jurisdiction of the trial court especially when the issue of the performance of the contract after delivery of the goods in Nigerian Port of Lagos, is further taken into consideration. Learned Counsel emphasised that the law on the interpretation of a jurisdiction clause as in the present case is that such clauses though not ousting the jurisdiction of the local Courts, invest them with a discretion to decide whether to proceed with the hearing of the suit or order a stay; that all the decided cases on the subject have clearly stated that the discretion, unless for strong reason to the contrary, ought to be exercised in favour of holding the contracting parties bound by the terms of their contract. The cases relied upon include, The Chaparral (1969) 2 Lloyds Law Report 158; The Eleftheria (1969) 1 Lloyds Report 237 and the decision of this Court in Sonner (Nig.) Ltd. v. Nordwind (1987) 9-11 S.C 121 at 149-154; (1987) 4 N.W.L.R, (Pt.66) 520 S.C. at 539. Learned Respondent's Counsel concluded by asserting that since the witnesses required to prove the case at the trial court are in Nigeria where the ship discharged the goods, the decision of the trial court as affirmed by the court below that the proper venue for the resolution of the dispute between the parties is here in Nigeria, should not be disturbed by this court.

In the application filed on 2nd May, 1989 at the trial court by the Appellant which was the Defendant in that Court, the following reliefs were sought -

1. An order dismissing this suit for want of jurisdiction
2. An order staying proceedings in this suit."

The first relief is clearly a challenge to the jurisdiction of the trial court to hear and determine the suit as filed by the

Respondent against the Appellant. The law in Nigeria when such a challenge to the jurisdiction of court is being considered by a trial court is well settled. When such an application or objection is raised before a trial court challenging its jurisdiction, the court could rely simply on the Writ of Summon, the Statement of Claim and affidavit in support of the applications as was rightly done by the trial court and affirmed by the court below in the present case. See Izenkwe v. Nnadozie (1953) 14 W.A.C.A. 361; Adeyemi v. Opeyori (1976) 9-10 S.C. 31; Barclays Bank of Nigeria Ltd. v. Central Bank of Nigeria (1976) 1 All NLR. 409; Kasikwu Farms Ltd. v. Attorney General of Bendel State (1986) 1 NWLR. (Pt.19) 695; Attorney General Kwara State v. Olawale (1993) 1 NWLR. (Pt. 272) 645 and **Arjay Ltd. v. Airline Management Support Ltd. (2003) 7 NWLR. (Pt. 820) 577 at 601 where Onu JSC stated the law -**

“I agree with the Appellants’ submission that there is a difference between an objection to the jurisdiction and a demurrer. I also agree with them that an objection to the jurisdiction of the Court can be raised at anytime, even when there are no pleadings filed and that a party raising such an objection need not bring the application under any rule of Court and that it can be brought under the inherent jurisdiction of the Court. Thus, for this reason, once the objection to the jurisdiction of the Court is raised, the Court has inherent power to consider the application even if the only process of Court that has been filed is the Writ of Summons and affidavits in support of any interlocutory application, as in the case in hand.”

In other words in the instant case where the Writ of Summons, the Plaintiffs/Respondent’s statement of claim and the affidavit filed by the Appellant as Defendant in support of its application, show quite clearly that the subject matter of suit being a liability for and entitlement of the Respondent to demurrage in a contract of carriage of goods by sea from Argentina to Lagos, Nigeria, by Section 7 of the Federal High Court Act, is rightly within the Admiralty jurisdiction of the trial court as found by it and affirmed by the Court below. In fact having

regard to the subject of the suit of the Respondent, it is only the trial Federal High Court that has jurisdiction to resolve the dispute between the parties in Nigeria. See *Madukolu & Ors. v. Nkemdelim & Ors.* (1962) 1 All NLR. (Pt. 4) 587. **On the issue of jurisdiction therefore the Courts below were quite right in their decision that the subject matter of the Respondent's suit, was within the jurisdiction of the trial court.**

However, what was really in contention between the parties was whether having regard to the jurisdiction clause agreed between the parties in the Bill of Lading, the contract document binding between them which provided the venue or forum and the applicable law for the settlement of any dispute arising from the agreement in Argentina, the trial court exercised its discretion judicially and judiciously in refusing a stay of proceedings to give the parties the opportunity to be bound by their agreement executed outside Nigeria. This question relates to the second relief sought by the Appellant in its application at the trial court for stay of proceedings.

The position of the law in this country regarding the enforcement or otherwise of a jurisdiction clause contained in a Bill of Lading as in the present case, was extensively discussed in the decision of this Court in *Sonner (Nig.) Ltd. v. Partenreedri M. S. Nordwind* (1987) 4 N.W.L.R. (Pt. 66) 520 also reported in (1987) All N.L.R. 548 at 567 - 568 where Eso J.S.C. in the lead judgment said

"It is true that in 'The Eleftheria' (1969) 1 Lloyd's L.R., 237, Brandon J. in his powerful judgment emphasized the essentiality of giving full weight to the prima facie desirability of holding the Plaintiffs to their agreement, xxxxx The tests set out by Brandon J. in 'The Eleftheria' are as follows

(1.) Where the Plaintiffs sue in England in breach of an agreement to refer disputes to a foreign Court, and the Defendants apply for stay, the English Court, assuming the claim to be otherwise within the jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not.

(1.) The discretion should be exercised by granting a stay unless strong cause for not doing so is shown.

(2.) The burden of proving such strong cause is on the

Plaintiffs.

(3.) *In the exercise of its discretion, the Court should take into account all the circumstances of the particular case.*

(4.) *In particular, but without prejudice to (4), the following matters, where they arise, may be properly regarded:*

(a.) *In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign Courts.*

(b.) *Whether the law of the foreign Court applies and, if so, whether it differs from English law in any material respect.*

(c.) *With what country either party is connected, and how closely.*

(d.) *Whether the Defendants Genuinely desire trial in the foreign country, or are only seeking procedural advantages.*

(e.) *Whether the Plaintiffs would be prejudiced by having to sue in the foreign Court because they would -*

(i.) *be deprived of security for that claim;*

(ii.) *be unable to enforce any judgment obtained;*

(iii.) *be faced with a time-bar not applicable in England; or*

(iv.) *for political, racial, religious or other reasons be unlikely to get a fair trial.'*

To these "I would add, with all respect -

'Where the granting of a stay would spell injustice to the Plaintiff as where the action is already time-barred in the foreign Court and the grant of stay would amount to permanently denying the Plaintiffs any redress.'

This is the case here. And I think justice is better served by refusing a stay than by granting one."

It is observed that this Court in Sonner (Nig.) Ltd. v. Nordwind case referred to above, while applying the Brandon Tests was confronted with a situation which exceeded a mere balance of convenience. It was a total loss of action by the Plaintiffs, if effect were given to the principle of Pacta sunt servanda, having regard to the peculiar circumstances of the case where the action filed in the Federal High Court here in Nigeria, was already time barred in the foreign German Court agreed by the parties in the Bill of Lading.

In the present case however, where the Respondent brought its action at the trial Court in clear breach of the agreement to refer any dispute to a foreign Court in Argentina and the Appellant had reacted by filing an application for stay of proceedings, as the Respondent's suit was within the jurisdiction of that Court, the Court
 B has a discretion whether or not to grant the application. **The law requires such discretion to be exercised by granting a stay unless strong cause for not doing so is shown. The burden of showing such strong cause for not granting the application**
 C **lies on the door steps of the Respondent as the Plaintiff. The question is whether that burden had been discharged by the Respondent. In finding that the burden had been discharged, this is what the trial court said at page 29 of the record: -**

"Having enumerated the statement of claim of the Plain-
 D **tiff to see if this is a proper case to stay or assume jurisdiction taking Brandon Test into consideration, to me this is a simple contract guided by Exhibit A. The goods were delivered in Ni-**
 E **geria. What the Plaintiff is claiming is only demurrage. In my view the witnesses to prove the case are all in Nigeria such as the Nigeria Ports Authority whose duty it is to know when the ship arrived and when It departed. I hold that it is in Nigeria Court that the issue of fact is situated or more readily avail-**
 F **able xxxxxxxx From the statement of claim of the Plaintiff which is action on a simple contract, I hold that the Defendant does not genuinely desire trial in the foreign country but are only seeking a procedural advantage."**

This finding of the trial court was not based on any evidence brought by the Respondent as Plaintiff as no counter
 G affidavit was filed by it in response to the application filed by the Appellant supported by an affidavit. Further more, the Appellant's affidavit in support of its application which the Court below said could be relied upon by the Respondent in
 H discharging the burden of proof of satisfying the trial court of its claim to hear the case in Nigeria rather than in Argentina, in spite of having failed to file a counter affidavit, does not contain such relevant facts relied upon by the trial court and the Court below to support the case of the Respondent. The

fact that all the witnesses in the case are in Nigeria or that the circumstances of the matter show that the case is more connected with Nigeria than Argentina as found by the Courts below, are not at all contained in the Appellant's affidavit in support of its application. This is where the circumstances of this case differ significantly from the case of Sonner (Nig.) Ltd. v. Nordwind (supra), relied upon by both parties in which the Plaintiffs promptly reacted to the Defendants' application for stay by filing a counter affidavit exhibiting documents showing why and how the Plaintiffs would be prejudiced if their suit were to be heard in Germany in accordance with the agreement where the suit was already statute barred. The findings of fact made by the trial court in the present case that the witnesses to prove the Plaintiffs case are *all* in Nigeria and that the evidence on the issue of fact was situated or more readily available in Nigeria are not supported by evidence adduced by the Plaintiff/Respondent in discharge of the burden placed upon it by law. In this respect, the failure of the Plaintiff/Respondent to file a counter affidavit articulating or deposing to facts showing that in spite of the foreign venue agreed by the parties for the settlement of their dispute, it would be prejudiced if the trial court had not assumed jurisdiction to hear and determine the suit. **Finding of facts cannot be made from paragraphs of the statement of claim filed by the Respondent as pleadings of which statements of claim are part, cannot take the place of evidence in a contested matter in Court.** See *Akinfosile v. Ijose* (1960) S.C.N.L.R. 447 *Akanmu v. Adigun* (1993) 7 N.W.L.R. (Pt. 304) 218 and *Ajuwon v. Akanni* (1993) 9 N.W.L.R. (Pt. 316) 182 at 200. **This is because Courts of law can only decide issues in controversy between parties on the basis of the evidence before them. See *Ibrahim v. Shagari* (1983) 2 S.C.N.L.R. 176, also reported in (1983) All N.L.R. 507 at 512, 524 and 534 where Nnamani JSC of blessed memory put it plainly thus -**

"Although it seems fairly obvious it needs emphasis that Courts of law can only decide issues in controversy between parties on the basis of the evidence before them. It would be invidious if it were otherwise."

Thus in the absence of strong cause shown by the Respondent for the trial court not to grant the Appellant's application for stay, the law requires that court to exercise its discretion in favour of the Appellant by granting the application. The discretion of the trial court was therefore not exercised
 B ***judicially and judiciously in the absence of any evidence placed before the trial court by the Respondent, to base its decision upon. The Court below, in my view, was in error in its judgment now on appeal when it affirmed the decision of the trial***
 C ***court.*** Taking into consideration that in the present case the trial court did not take into account the facts averred in the Appellant's affidavit in support of its application the Court cannot by merely relying only on the statement of claim of the Respondent, be said to have exercised its discretion judicially and judiciously having acted under a mis-
 D conception of law in giving weight to irrelevant and unproved facts in support of its decision thereby justifying interference by this Court. See the Resident Ibadan Province v. Lagunju (1954) 14 W.A.C.A. 552; Emekede v. Emekede (1964) 1 All N.L.R. 102; Williams v. Voluntary Funds Society (1982) 1-2 S.C. 145 and Efetiroroje v. Okpalefe
 E II (1991) 5 N.W.L.R. (Pt. 193) 517.

Although one of the complaints of the Appellant in the lone issue for determination in this appeal is that apart from the failure of the trial court to adequately consider the effect of the failure of the
 F Respondent to file a counter affidavit to respond to the facts averred by the Appellant in the affidavit in support of its application for stay stating the nature of the agreement between the parties contained in the Bill of Lading which was an exhibit as part of the evidence, the Court below indeed examined that affidavit in its judgment. It is un-
 G fortunate however that the Court below also fell into the same error as the trial court of not realising that the Respondent on whom the law placed the burden of proving the existence of strong reasons for wanting to opt out of what was originally agreed by the parties in their agreement to submit their dispute to the Nigerian Courts for
 H resolution rather than the Courts in Argentina as specified in Clause 3 of the Bill of Lading, did not give any reason in evidence in support of its stand. In the absence of a counter affidavit by which the Respondent could have placed its evidence on the other side of the

scale like the Appellant did in its own side of the scale in the affidavit in support of its application, the trial court and consequently the court below, had nothing to consider in favour of the Respondent to support their decisions now on appeal that the trial court where the Respondent filed its action contrary to the agreement between the parties, is the proper venue for the hearing and determination of its case against the Appellant. B

It is for the foregoing reasons that I will allow this appeal. Accordingly the appeal is hereby allowed. The judgment of the Court below affirming the Ruling of the trial court refusing the application of the Appellant for stay of proceedings, is hereby set aside and replaced with an order granting the application. C

There shall be N50,000.00 cost to the Appellant against the Respondent

D

TOBI JSC

The plaintiff is the respondent in this court. The defendant is the appellant. The appellant is involved in the business of importing and selling of frozen fish. The respondent is the owner of the ship, MV “Frio Carbic”. The ship MV “Frio Carbic” became a chartered ship, being the subject of the charter party between the respondent (as the owner) and CACEX, Compania Argentina De Comercio Exterior SA (as the charterer). E

MV “Frio Caribic”, in accordance with the terms of the said bill of lading, set sail from Mar Del Plata in Argentina and bound for Apapa in Nigeria, carrying to the order of the appellant some 25,000 cartons of frozen fish. MV “Frio Caribic” arrived at the Apapa port on 29th December, 1987. The appellant discharged the cargo. F

The respondent brought an action at the Federal High Court on 21st December, 1988, claiming the sum of \$119,739.40 USD as demurrage for an alleged delay in taking delivery by the appellant. Pleadings were ordered by the court on 3rd April, 1989. The respondent filed a statement of claim on 17th April, 1989. The appellant in response to the statement of claim, brought an application under Order 27 Rule 1 of the Federal High Court (Civil Procedure) Rules 1976, as well as under section 7 of the Federal High Court G H

Decree 1973 and under the inherent powers of the court.

The appellant's application was by motion on notice dated 2nd May, 1989, which contained the following prayers: *"(1) An order dismissing the suit for want of jurisdiction; (2) an order staying proceedings in this suit and (3) and for such further or other orders that*
B *this Honourable Court may deem fit to make in the circumstances."*

The application was supported by an affidavit. The respondent did not file a counter affidavit. The learned trial Judge refused the application. He ordered the applicant to file his statement of defence and serve same on the respondent. On whether the trial should
C proceed in Nigeria or in Argentina, the learned trial Judge said at pages 29 and 30 of the Record:

"Having enumerated the statement of claim of the plaintiff to see if this is a proper case to stay or assume jurisdiction taking Brandon Test into consideration. To me this is a simple contract guided by
D *Exhibit A. The goods were delivered in Nigeria. What the plaintiff is claiming is only demurrage. In my view the witnesses to prove the case are all in Nigeria such as the Nigerian Ports Authority whose duty it is to know when the ship arrives and when it departed.*

I hold that it is in Nigerian court that the evidence on the issue of fact is situated or more readily available and the effect of this on the relative convenience and expenses of trial as between Nigerian court and the foreign court. From the statement of claim of the plaintiff which is action on a simple contract, I hold that the defendant
E *does not genuinely desire trial in the foreign country but are only seeking a procedural advantage.*
F

I hold the view that in the interest of justice this is a proper case to be tried in Nigerian courts."

G On appeal, the Court of Appeal dismissed the appeal. The court affirmed the decision of the learned trial Judge. The court said at page 172 of the Record:

"For all this, I am satisfied that there is a strong cause for refusing a stay. I also refuse it. Therefore the court below exercised its
H *discretion rightly and the appellant has failed to show that it was not judicially and judiciously exercised. The appeal lacks merit and is accordingly dismissed and the decision of the court below is hereby affirmed. The matter is sent back to the Chief Judge of Federal High*

Court to assign to another Judge.”

The appellant has appealed to this court. Briefs were filed and exchanged. The appellant formulated two issues:

“Issue One

Whether in all the circumstances of this case the Court of Appeal was correct in holding that the learned trial Judge in the exercise of his discretion acted judicially and judiciously. B

Issue Two

Whether the courts below were under a duty to ascertain the inconvenience of litigating in accordance with the jurisdiction clause.” C

The respondent formulated one issue for determination:

“Whether or not the Court of Appeal in the exercise of its appellate jurisdiction correctly held that the learned trial Judge exercised its discretion correctly and was therefore right to have refused a stay of proceedings or to have refused to dismiss the suit in its entirety.” D

Stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation in the trial on the basis of the merits of his case. Consequently, the court’s general practice is that a stay of proceedings should not be imposed unless the proceedings beyond all reasonable doubt ought not to be allowed to continue. See Chief Fawehinmi v. Col. Akilu (1988) 4 NWLR (Pt. 88) 367. E

In an application for stay of proceedings the court must take into consideration the following factors or principles: F

(a) Valid cause or right of action:

The first consideration for the court to determine in an application for stay of proceedings is whether the applicant has a valid cause or right of action. He should establish that he has a prima facie claim in law. Normally, this issue ought to be raised and settled before an application for stay of proceedings as it directly affects the jurisdiction of the court. In the event of an oversight on the part of counsel however, the issue could be raised at the stage of an application for stay of proceedings and indeed at any other stage, even on appeal. H Accordingly, where the applicant has no valid cause or right of action, there is in law no basis for an application for stay of proceedings as there is nothing in law to stay. See Akilu v. Fawehinmi (No. 2)

(1989) 3 S.C (Pt.II) 1; (1989) 2 NWLR (Pt. 102) 123.’

(b) Pending appeal:

In order to consider an application for stay of proceedings, there should be a pending appeal and the pending appeal must be valid. For instance, where an appeal is filed out of time, it is incompetent and therefore invalid. A court of law will not consider an application for stay in respect of such an incompetent or invalid appeal. See Olawunmi v. Mohammed (1990) 4 S.C. 40; (1991) 4 NWLR (Pt. 186) 516; The Provost Alvan Ikoku College of Education v. Amuneke (1991) 9 NWLR (Pt. 213) 49; NBN Ltd, v. NET (1986) 3 NWLR (Pt. 31) 667.

(c) Pending appeal arguable:

In order to grant an application for stay of proceedings, the pending appeal must be arguable and this should be borne out by the ground or grounds of appeal. In other words, the grounds of appeal must clearly donate the legal strength of the appeal but only in terms of it being arguable. An applicant has no duty to prove at that stage that the appeal will succeed. Once he shows that the appeal is arguable and there are chances of success, an application for stay could be granted. However, where the pending appeal is frivolous, unmeritorious, oppressive and not in law arguable, an application will be refused. In order to come to the conclusion as to the frivolity of the appeal, an appellate court is bound to expose itself to an inquiry into the record of appeal before it, in particular, the grounds of appeal as they relate to the proceedings before the lower court. The court will also find the ruling of the lower court useful. See (General Oil Ltd, v. Oduntan (1990) 7 NWLR (Pt. 163); State v. Ajayi (1996) 1 NWLR (Pt. 423) 169.

(d) Competing rights of the parties:

In application for stay of proceedings, the court will consider the competing rights of both the applicant and the respondent to justice. In other words, the court will take into consideration, the equity and justice of the application.

(e) Hardship:

One important factor in an application for stay of proceedings is hardship. A court of law will be most reluctant to grant an application for stay of proceedings if it will cause greater hardship than if the

application is refused. The question of hardship is a matter of fact which can be deduced from the competing affidavit evidence. The moment the court comes to the conclusion that the grant of the application will do more harm than good, it will be refused. See *Kigo (Nig.) Ltd, v. Holman Bros (Nig.) Ltd.* (1980) 5-7 S.C 60; (1980) 5-7 S.C (Reprint), *Arojoye v. UBA* (1986) 2 NWLR (Pt. 20) 101. B

(f) Preservation of the res:

One of the most important factors in an application for stay of proceedings is the preservation of the res or the subject matter of the suit. Courts of law have a duty to preserve the res for the purpose of ensuring that the appeal, if successful, is not rendered nugatory. Where there is evidence that the res will not be destroyed in the course of the litigation, an application may be refused. See *Kigo (Nig.) Ltd, v. Holman Bros (Nig.) Ltd.* (1980) 5-7 SC 60; (1980) 5-7 S.C (Reprint) 41, *Shodeinde v. Trustees of the Ahamdiyya Movement in D Islam* (1980) 1-2 SC 163; *Yinka Folawiyo and Sons Ltd, v. Hammond Projects Ltd.* 3 FRCR (1977) 373. C

(g) Special and exceptional circumstances:

An application for stay of proceedings can only be granted where special and exceptional circumstances exist. A special or exceptional circumstance is a peculiar or unique circumstance which is additional to the ordinary state of affairs. The application is not granted as a matter of routine as it is not a mechanical relief slavishly following the filing of an appeal. It is a matter of law and facts, and a very hard one in their combined content-. See *Akilu v. Fawehinmi (No. 2)* (1989) 2 NWLR (Pt. 102) 122; *General Oil Ltd, v. Oduntan* (1990) 7 NWLR (Pt. 163) 423. E

I leave the principles on stay of proceedings and take the contractual aspects of the matter. The bill of lading provided for the following jurisdiction clause: F

“Any dispute arising under this bill of lading shall be decided in the country where the carrier has his principal place of business and the” law of such country shall apply except as provided elsewhere herein.” H

The bill of lading contains the contractual terms between the parties and therefore binding on the parties. Parties are bound by the conditions and terms in a contract they freely enter into. See North-

ern Assurance Co. Ltd, v. Wuraola (1969) NSCC 22; United Bank for Africa v. Europhina Nigeria Limited (1991) 12 NWLR (Pt. 176) 677. The meaning to be placed on a contract is that which is the plain, clear and obvious result of the terms used. See Aouad v. Kesserawani (1956) NSCC 33. When construing documents in dispute between two parties, the proper course is to discover the intention or contemplation of the parties and not to import into the contract ideas not potent on the face of the document. See Amadi v. Thomas Aplin and Co. Ltd. (1972) 7 NSCC 262. Where there is a contract regulating any arrangement between the parties, the main duty of the court is to interpret that contract and to give effect to the wishes of the parties as expressed in the contract document. See Oduye v. Nigerian Airways Limited (1987) 2 NWLR (Pt. 55) 126. In the construction of documents, the question is not what the parties to the document may have intended to do by entering into that document, but what is the meaning of the words used in the document. See Amizu v. Dr. Nzeribe (1989) 4 NWLR (Pt. 118) 755. While a contract must be strictly construed in accordance with the well-known rules of construction, such strict construction cannot be a ground for departing from the terms which had been agreed by both parties to the contract. See Niger Dams Authority v. Chief Lajide (1973) 5 SC 207. It is the law that parties to an agreement retain the commercial freedom to determine their own terms. No other person, not even the court, can determine the terms of contract between parties thereto. The duty of the court is to strictly interpret the terms of the agreement on its clear wordings. See Nimanteks Associates v. Marco Construction Company Limited (1991) 2 NWLR (Pt. 174) 411. Finally, it is not the function of a court of law either to make agreements for the parties or to change their agreements as made. See African Reinsurance Corporation v. Fautaye (1986) 1 NWLR (Pt. 14) 113.

Paragraphs 4 and 5 of the affidavit in support of the application read:

“4. That I am informed by Mr. O. M. Sagay Esq. counsel in the chambers of solicitors to the defendant/applicant in this matter and I verily believe him that by clause 3 of the Bill of Lading, any dispute arising therefrom shall be decided in the country where the carrier has his principal place of business and the Law of such coun-

try shall apply except as provided elsewhere in the Bill of Lading. Attached is the bill of lading and marked Exh. A.

5. That the principal place of business of the carrier is Argentina.”

The respondent did not file any counter affidavit. Accordingly, paragraphs 4 and 5 of the affidavit in support are deemed to have been admitted. See NNB Plc v. Denclag Ltd. (2001) 1 NWLR (Pt. 695) 542; Evuleocha v. ACB Plc (2001) 5 NWLR (Pt. 707) 672; Nigerian Shippers Council v. United World Ltd. Inc. (2001) 7 NWLR (Pt. 713) 576; Ogar v. James (2001) 10 NWLR (Pt. 722) 621. In the absence of a counter-affidavit the High Court and the Court of Appeal had no material to consider the application for stay of proceedings in favour of the respondent. What the two courts did was clearly not borne out from the Record. It is clear to me from what the two courts said in refusing the application for stay of proceedings that they allowed themselves to be governed by sentiments; and sentiments cannot be legal basis for refusing application for stay of execution. It is a matter of legal principles and not one of sentiment or patriotism that the matter should be tried in Nigeria and not in Argentina.

Learned counsel for the appellant, Mr. Mogbeyi Sagay profusely cited the case of Sonnar (Nig.) Ltd. v. Nordwind (1987) 9-11 SC 121. In that case, the Supreme Court cited with approval the English case of Uter Wesser Reedere v. Zapata or The Chapparral (1968) 2 Lloyd's LR 158:

“The court has a discretion, but it is a discretion which in the ordinary way and in the absence of strong reason to the contrary, will be exercised in favour of holding the parties to their bargain.”

The court also accepted the decision in the English case of Eleftheria v. Eleftheria (1969) 1 Llyods LR 237 where Brandan, J said, as follows:

“1. Where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign court, and the defendants apply for a stay, the English court, assuming the claim to be otherwise within the jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not.

2. The discretion should be exercised by granting a stay unless

strong cause for not doing so is shown.

3. The burden of proving such strong cause is on the plaintiffs.

4. In exercising its discretion the court should take into account all the circumstances of the particular case.

5. In particular, but without prejudice to (4), the following matters, where they arise may be properly regarded:

(a) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign courts.

(b) Whether the law of the foreign court applies and, if so, whether it differs from English law in any material respects.

(c.) With what country either party is connected, and how closely.

(d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages.

(e) Whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would:

i) be deprived of security for that claim

ii) be unable to enforce any judgment

iii) be faced with a time-bar not applicable in England; or

(iv) for political, racial, religious or other reasons be unlikely to get a fair trial."

The above is referred to as the Brandan test, named after Brandan, J., who delivered the judgment in Eleftheria.

The Brandan test gives the discretionary power to the Judge in the exercise of his power to order a stay of proceedings. Like every discretion, the Judge must exercise it judicially and judiciously, that is discretion based or guided by law or discretion according to sound, and well considered reason respectively. Test No. 2 enjoins the court to exercise the discretion in favour of the applicant unless strong cause for not doing so is shown. The respondent did not show any cause not to talk of a strong cause; as no counter affidavit was filed. Test No. 2 places the burden of proof on the plaintiff. Again, the plaintiff who is the respondent did not discharge the burden placed on it as there are no materials before the court to enable it refuse the application for stay of proceedings.

In compliance with Test No. 4 of the Brandan, test, I am bound to exercise my discretion in favour of granting the stay of proceedings in the light of the fact that the respondent did not place before the learned trial Judge materials to enable that court to exercise its discretion against the appellant.

Learned counsel for the respondent cited what Eso, JSC, said in Sonnar Ltd, v. Nordwind, supra as follows in paragraph 4.2.3 of his Brief:

“To these I would add with all respect where the granting of a stay would spell injustice to the plaintiff as where the action is already time barred in the foreign country and grant of stay would amount to permanently denying the plaintiff any redress.”

Beyond the dictum of Eso, JSC, learned counsel did not say anything to the effect that the action is already time barred in Argentina. Counsel submitted that the Court of Appeal having closely scrutinized all the processes before it, including the writ of summons and statement of claim and the motion to dismiss with the supporting affidavit, rightly came to the conclusion refusing the application for stay of proceedings.

Learned counsel for the respondent submitted that particular selection clause under review conferring jurisdiction on a foreign tribunal has been construed in the past as not ousting the jurisdiction of the local court. He cited The Fehmaru (1958) 1 All ER 333. In that case, the ship owners did not object to the dispute being decided in England but wished to avoid giving security. That is not the situation here where the appellant disputes on the jurisdiction of the Nigerian courts.

Counsel also cited section 6(1) and 6(6)(b) of the 1979 Constitution and submitted that the case of the appellant will be contrary to the subsections. Section 6(ii) vests in the courts judicial powers of the Federation. Section 6(6)(b) provides that the judicial powers vested in accordance with the section shall extend to all matters between persons or between government or authority and any person in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person. As the subsection and indeed the whole of section 6 do not oust the jurisdiction of foreign courts in appropriate cases, I do not agree with the submission of learned counsel on a possible viola-

tion of the subsection.

Learned counsel submitted that the subject matter being liability for and entitlement to demurrage in a contract of carriage of goods by sea is within the jurisdiction of the Federal High Court by virtue of section 7 of the Federal High Court Act. That is rather simplistic. The clear jurisdiction clause in the bill of lading in the matter surpasses section 7 of the High Court Act.

Jurisdiction is a very hard matter of law and so cannot be subjected to particular feelings and sentiments of the court. Where a contract specifically provides for the venue of litigation, courts are bound to give teeth to the contract by so construing it, without ado. In this case, issue of difficulty of assemblage of witnesses, cost of litigation arising from the parties going to Argentina, do not arise because they are mere expression of sentiment and all that.

It is for the above reasons and the more comprehensive reasons given by my learned brother, Mohammed, JSC, in his judgment that I too allow the appeal. I also award N50,000.00 costs against the respondent in favour of the appellant.

E

OGUNTADE JSC

The respondent in this appeal was the plaintiff before the Federal High Court, Lagos where in suit No. FHC/L/130/88, it claimed against the appellant, as the defendant for the following:

“Demurrage at the sum of US Dollars \$119,737.40 cents or N942,349.07 at the rate of N7.87 to 1 US Dollar for 22 days from the 12th day of January, 1988 to the 3rd day of February, 1988 at the rate of US \$5,500 per day.

And the plaintiff claims the said sum of US \$119,739.40 cents or 14942,349.07.”

The respondent subsequently filed a Statement of Claim. In the said Statement of claim, it was made manifest that the claim arose from the failure of the appellant as an importer to evacuate timely from the respondent’s ship “MV Frio Caribic” a consignment of goods brought into Nigeria from Argentina for the defendant and respondent’s vessel “MV Frio Caribic”. The respondent claimed pecuniary damages for the delayed discharge of the said goods.

Paragraphs 8 to 12 of the Statement of Claim are eye-opening as to the foundation of the respondent's claim and read thus:

"8. The Plaintiff avers further that by letters dated 15th January, 1988 and 18th January, 1988 respectively, Panalpina Ltd. requested the defendant to take delivery of the cargo.

9. By the said letters Panalpina Ltd. also informed the Defendant that as a result of its delay in discharging, the Plaintiff was making the defendant liable for demurrage charges.

10. In spite of the said requests and in breach of Clause 8 of the Bill of Lading, the defendant neglected and/or refused to discharge the consignment from the said ship as fast as it could deliver and did not discharge the cargo until 23rd January, 1988.

11. Under the terms of the charter-party between the plaintiff and the said CACEX, Compania Argentina De Comercio Exterio S.A., the vessel was allowed 216 hours to discharge and thereafter demurrage accrued at the rate of US \$5,500 per day.

12. The vessel finally left Apapa port, Lagos on 3rd February, 1988."

In reaction to the Statement of Claim, the appellant filed an application that the claim be dismissed. The prayers sought on the application which was filed on 2/5/89 read:

"1. An order dismissing this suit for want of jurisdiction.

2. An order staying proceedings in this suit.

3. An order for such further or other orders that this Honourable Court may deem fit to make in the circumstance."

In the affidavit in support of the application, it was deposed thus in paragraphs 4 to 7:

"4. That I am informed by Mr. O. M. Sagay Esq. Counsel in the Chambers of solicitors to the Defendant/Applicant in this matter and I verily believe him that by Clause 3 of the Bill of Lading, any dispute arising therefrom shall be decided in the country where the carrier has his Principal place of business and the Law of such country shall apply except as provided elsewhere in the Bill of Lading. Attached is the Bill of Lading and marked Exh. A.

5. That the Principal place of business of the carrier is Argentina.

6. That I am informed by Mr. O. M. Sagay and I verily believe

him that the cause of action in this suit as between the parties falls outside the jurisdiction of this Honourable Court.

7. That I was informed by counsel to the Defendant/Applicant that it will be in the interest of justice if the suit is dismissed.”

B Now Clause 3 of the Bill of Lading which was annexed as an exhibit to the affidavit in support of the application reads:

“3. Any dispute arising under this bill of lading shall be decided in the country where the carrier has his principal place of business and the laws of such country shall apply except as provided elsewhere herein.”

C Remarkably, the respondent failed to file a counter-affidavit in reaction to the appellants application.

The application was heard by Ezekwe J., who on 28/06/89 delivered a Ruling on the application by the appellant. In refusing the D appellant’s application, the trial court said at pages 29-30 of the record:

“Having enumerated the statement of claim of the plaintiff to see if this is a proper case to stay or assume jurisdiction taking Brandon Test into consideration. To me this is a simple contract guided by Exhibit A. The goods were delivered in Nigeria. What the plaintiff is claiming is only demurrage. In my view the witnesses to prove the case are all in Nigeria such as the Nigerian Ports Authority whose duty it is to know when the ship arrives and when it departed.

E I hold that it is in Nigeria court that the evidence on the issue of fact is situated or more readily available and the effect of this on the relative convenience and expenses of trial as between Nigeria court and the foreign court. From the statement of claim of the plaintiff which is action on a simple contract, I hold that the defendant does not genuinely desire trial in the foreign country but are only seeking F a procedural advantage.

G I hold the view that in the interest of justice this is a proper case to be tried in Nigeria courts.”

H The court below affirmed the conclusion of the trial court when at page 172 of the record, it said per Chukwuma-Eneh JCA (as he then was):

“The foregoing passage demonstrates that the trial Judge (Ezekwe J. of blessed memory) in considering the issue of balance of convenience in this matter had to do so on the backdrop of the facts

and necessary inferences therefrom available on the face of the averments in the Statement of Claim and reached the above conclusion rightly in my view that a strong cause for not granting a stay had been made out. The instant cause of action is based on demurrage claims that arose from the delay that occurred at the port of discharge of the goods in Nigeria. Apart from the breach having occurred in Nigeria, the circumstances of the matter show that it is more connected with Nigeria than Argentina. To buttress the point, the necessary witnesses including the parties are in Nigeria they are within the jurisdiction of the court below. In other words where in all the circumstances does the centre of gravity of the action lie - it is in Nigeria."

It seems to me that the path to be followed in this matter had been charted for the two courts below by a binding judicial authority. The two courts would appear to have failed to recognize the principle of law stated by this Court in Sonner (Nig.) Ltd. v. Partenreedri M.S. Nordwind (1987) 4 NWLR (Pt.66) 520 at pages 538-539. Eso JSC said:

"It is true that in 'The Eleftheria (1969) 1 Lloyds L.R. 237, Brandon J. in his powerful judgment, emphasized the essentiality of giving full weight to the prima facie desirability of holding the plaintiffs to their agreement. He also enjoined upon the Courts to be careful not just to pay lip service to the principle involved and then fail to give effect to it because of a mere balance of convenience. I think, with respect, what we have in this case transcends mere balance of convenience. It is a total loss of action by the Plaintiffs, if effect is given herein to the principle of Pacta Servanda Sunt, having regard to the peculiar circumstances of this case. As it was observed in the course of the argument of this case by this Court, justice could not be served in this case by holding the Appellants to their pact of having the action taken only in the German Court.

The tests set out by Brandon J. in 'The Eleftheria' are as follows-

(1) Where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign Court, and the defendants apply for a stay, the English Court, assuming the claim to be otherwise within the jurisdiction, is not bound to grant a stay but has a discretion whether

to do so or not.

(2) The discretion should be exercised by granting a Stay unless strong cause for not doing so is shown.

(3) The burden of proving such strong cause is on the Plaintiffs.

B (4) In exercising its discretion the Court should take into account all the circumstances of the particular case.

(5) In particular, but without prejudice to (4), the Following matters, where they arise, may be Properly regarded:

C (a) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign Courts.

D (b) Whether the law of the foreign Court applies and, if so, whether it differs from English law in any material respects

(c) With what country either party is connected and how closely.

(d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages.

E (e) Whether the plaintiffs would be prejudiced by having to sue in the foreign Court because they would

(i) be deprived of security for that claim;

(ii) be unable to enforce any judgment obtained;

(iii) be faced with a time-bar not applicable in England; or

F (iv) for political, racial, religious or other reasons be unlikely to get a fair trial.'

To these I would add, with all respect -

"where the granting of a stay - would spell injustice to the plaintiff
as -

G *where the action is already time-barred in the foreign court and the grant of stay would amount to permanently denying the plaintiffs any redress."*

(Underlining mine)

H Now as stated in test 3 above in the tests given by Brandon J. in the "Eleftheria", the burden of proving a "strong cause" why parties should not be held to their agreement in a bill of lading as to the venue for the trial of disputes arising from the bill of lading is to be firmly placed on the plaintiff. In this case, the respondent who was

the plaintiff did not file a counter-affidavit disclosing why the venue agreed upon in the bill of lading for settling disputes arising of the bill was inconvenient or unjust or otherwise unsatisfactory to the plaintiff in the circumstances. The fact that the witnesses needed by the respondent to prove its case were all resident in Nigeria was ‘manufactured’ by the trial court. The plaintiff never deposed to any such fact. The court below fell into the same error when it adopted willy-nilly the reasoning of the trial court. It is my view that both courts below were wrong. B

I would also allow this appeal as in the lead judgment by my learned brother Mohammed JSC. I also subscribe to the order on costs made in the lead judgment. C

TABAI JSC

I had a preview of the lead judgment prepared by my learned brother Mohammed, JSC and I agree entirely with the reasoning and conclusion therein. The suit centered on the construction of the contract freely entered into by the parties. There is no ambiguity in the bill of lading and effect must be given to it. I agree that the appeal has merit and is accordingly allowed by me as well. I also abide by the issue on costs contained in the lead judgment. D

OGEBE JSC

I had a preview of the draft of the lead Judgment of my learned brother Mahmud Mohammed, JSC just delivered and I agree entirely with his reasoning and conclusion. E

Accordingly, I also allow the appeal and endorse the consequential orders made in the lead Judgment including the order of costs. F

H