

SUPREME COURT OF NIGERIA
14TH JANUARY, 2011. SC. 101/2010
CORAM:- A. M. MUKHTAR, W. S. N. ONNOGHEN,
F. F. TABAI, I. T. MUHAMMAD, M. S. MUNTAKA-COO-
MASSIE, JJSC

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|--|-------------|
| 1. SHINNING STAR NIGERIA LIMITED | APPELLANTS/ |
| 2. MR. SATISH CHANDER KASHYAP | APPLICANTS |
| AND | |
| 1. ASK STEEL NIG. LTD. | |
| 2. SANJAY KUMAR SHARMA | RESPONDENTS |
| 3. NEMI CHAND KOTHAKI | |

INTERLOCUTORY APPLICATIONS - Treatment of - Appeals - Where such application seeks the same reliefs - As the substantive suit - The end of justice may be better served in hearing the main suit (H1)

APPEALS - Interlocutory applications - Refusal - Justification - Where the grant of such application - Will amount to determination of a pending appeal - The application should be refused (H2)

FACTS

The plaintiffs/appellants/applicants sued defendants/respondents jointly and severally before the Federal High Court. Applicants' claim was for sundry reliefs by which they sought for the appointment of a receiver/manager over the affairs of the 1st respondent company. Following the filing of the suit, applicants applied ex parte to the trial court for the same reliefs on interim basis pending the determination of the application for interlocutory reliefs. Following the grant of the ex parte order on 19/01/2007, which appointed one Mr. Ajayi as receiver/manager, respondents applied to the trial court for the discharge of the ex parte order.

The applications for discharge and interlocutory reliefs were consolidated and heard together. Trial court by its ruling dated 28/02/2007, discharged the ex parte order, and refused the interlocutory application. Applicants successfully appealed to Court of Appeal, which reversed the ruling of trial court, granted the applicant's interlocutory application and ordered applicants to prosecute their

main suit pending at the trial court with utmost diligence or forfeit the interlocutory orders. Upon resumption of trial at the trial court, parties made sundry applications, one of which was ruled on against applicants on 09/04/2009, resulting in their filing another interlocutory appeal before the Court of Appeal.

Following their said interlocutory appeal, applicants applied to trial court for stay of proceedings pending the appeal. Respondents did not oppose the application but rather applied to trial court to make applicants forfeit the interlocutory order earlier made by the Court of Appeal for failure of applicants to prosecute their suit with utmost diligence. Trial court granted the respective applications by both parties on 01/07/2009. Aggrieved, applicants appealed against that ruling to the Court of Appeal. While the appeal was pending, applicants filed an application before the Court of Appeal for a stay of execution of the orders made by trial court on the said ruling. Court of Appeal struck out the application for stay, for being incompetent in that no such application was first made to trial court as required by the rules of court and there was no special circumstance disclosed, to warrant a direct application to the Court of Appeal. Still dissatisfied, applicants have appealed to the Supreme Court against the decision of Court of Appeal. While this appeal was pending, applicants filed the instant motion on notice before the Supreme Court praying for substantially the same reliefs as they are praying for in their notice of appeal. Respondents filed a preliminary objection to the motion on the ground inter alia, that the application will dispose of the pending interlocutory appeals both before the Supreme Court and before the Court of Appeal.

ISSUE FOR DETERMINATION

Whether if this application is granted this court would, in effect, have disposed of the appeal in this court against the ruling of the court below of the 15th March, 2010 and also the appeal at the court below against the ruling of the trial court of 1st July, 2009.

HELD (Striking out the application by a majority per **TABAI JSC**, Onnoghen and Muntaka-Coomassie JJSC dissenting)

JUSTICE - Interlocutory applications - Treatment of

1. I have also reproduced the reliefs sought in the appeal against the ruling of the court below of the 15th March, 2010. Relief 2 thereof is

to the same effect as the three reliefs sought in this application, the only difference is that while in the Notice of Appeal filed on the 25th March, 2010, the Plaintiffs/Appellants/ Applicants seek injunctive orders, in the application, they seek interlocutory injunctive orders. Under such circumstances, would the end of justice not better be served in the hearing and determination of the appeal before this court than filing this application which, in substance, is to the same effect as the application of the 15th July, 2009, at the court below? I shall answer this question in the affirmative.

I am inclined to this view because of the settled principle of law that a court cannot, in an interlocutory application, decide an issue in the substantive case or appeal. (p. 250 B)

Interlocutory applications - Refusal - Justification

2. On the whole, in view of the appeals pending both in this court and at the court below and having regard to the fact that a grant of this application and the reliefs sought therein, would, in effect, be a determination of the substantive interlocutory appeals both in this court and at the court below, this application is refused and same is struck out. (p. 251 D)

NOTABLE POINTS OF INTEREST

MUKHTAR JSC

1. Parties cannot be altered unless by a formal process

The notice of appeal which is the foundation of this application has four parties as respondents, whereas the application has only three parties, exclusive of the Chief Registrar of the Federal High Court who is the 4th respondent in the notice of appeal. The Chief Registrar shouldn't have been excluded/omitted from the application before us, as, if the appeal is supposed to involve the Chief Registrar, then the Chief Registrar is supposed to be involved in the application. The parties in both processes should be the same, and none should be excluded unless it has been formerly withdrawn. In this respect, I endorse the submission of Chief Olanipekun SAN, on the issue of the parties, and I agree that the applicant cannot change the parties in the notice of appeal in this application. (p. 253 C)

ONNOGHEN JSC (DISSENTING)

2. The discharge of the order has negated the pending appeal

It is also agreed that following the order of 19th March, 2009 which was carried out, the respondents appealed to this court against the grant of same and followed same up with an application for injunction restraining the receiver so appointed from acting in that office; that it was during the pendency of the appeal in this court and the motion in the lower court that the respondents applied orally to the trial court to discharge the order of 19th March, 2009, made by the Court of Appeal, not a court of coordinate jurisdiction, which order was granted. It is therefore very clear that the grant of the prayers of discharge of the order of the Court of Appeal has effectively rendered nugatory the pending appeal by the respondents before this court against the order appointing the receiver. The situation is very worrisome and embarrassing to the judiciary and the legal profession. By granting the order of discharge not made by it but by a higher court, the trial court has in effect knocked off the bottom of the appeal against grant of that order now pending before this court. (p. 258 E)

3. Both parties are guilty of abuse of court process

It is true that the appeal by the applicants before this court and the application for interlocutory injunction, both appear to have the same substratum.

It is therefore the contention of learned senior counsel for the respondents that to grant the application would render the appeal by the applicants, now pending before this court, nugatory or that it would amount to granting the reliefs in the substantive appeal upon an interlocutory application. We therefore have a situation of the kettle calling the pot black. Both parties have dirty hands but the first happens to be the respondents by their action against the order of the lower court made on 19th March, 2009. (p. 259 E)

4. This is a proper case for grant of mandatory injunction

In exercising its power to grant mandatory injunction, the court is primarily concerned with the invocation of its disciplinary jurisdiction to prevent its jurisdiction to try the case before it from being frustrated or stultified,

I therefore hold the considered view that, it is in the best interest of judicial process, if parties are restored to the position they were before the setting aside of the lower court's order made on 19th March, 2009, which order was executed on the 23rd day of March, 2009, pending the determination of the appeal against the order and that against the ruling of the lower court, and every other pending application(s).

It is for the above reasons that I find myself unable to agree with the lead ruling in this application written by my learned brother TABAI, JSC just delivered. (p. 260 G)

MUNTAKA-COOMASSIE JSC (DISSENTING)

5. Company law - Receiver - An officer of court

See section 389 (1) of the Companies and Allied Matters Act -CAMA - A receiver when appointed by a court is not an agent of either party to the litigation. He is rather an officer of court when appointed over land, real property or corporate body, he de jure takes over possession and his appointment operates as general information against all the parties to the litigation. (p. 264 D)

6. This application can be heard without joining the receiver

Also, a receiver as such is not entitled to bring an action in his own name as receiver, this is because no property is automatically vested in him by his appointment, but he may acquire a right to sue in his own name out of his receivership but not in consequence of it alone. In the case at hand, the receiver/manager is not required to be a party to this case before this motion or the appeal could be heard. He is an officer of the court executing the orders and powers vested on him by reason of that appointment. It is for these reasons that I hold that this leg of the preliminary objection is misconceived. (p. 264 F)

7. Application for discharge ought to have been referred to Court of Appeal

My Lords, a trial court may not be satisfied with the orders or findings of the Court of Appeal, *there is nothing it can do about it, its constitutional and judicial role is either to obey or enforce that order, any act or process challenging the said order would have to be re-*

ferred, to the Court of Appeal, any act to the contrary, would amount to a breach of the constitutional provisions of the 1999 constitution of the Federal Republic of Nigeria. The same applies to the Court of Appeal where the Supreme Court's order is in question. By granting the order of discharge not made by it, but by a higher court, the trial court has in effect knocked off the substratum or lis of the appeal against the grant of that order now pending before this court.
(p. 267 F)

C 8. Respondents' takeover of 1st respondent premises amount to self help

It is not in dispute that the applicants have appealed against the ruling of the trial court dated 1/7/09 and also filed an application for stay of execution at the lower court against the said ruling. The respondents did not deny having knowledge of the said pending application and nevertheless proceeded without giving the lower court (*sic, the opportunity of*) first determining the said pending motion, proceeded to violently take over the premises of the 1st respondents, sent off all the workers and mis-managed its finances, as stated in the applicants affidavit which were not denied at all. This is not only in law an act of self help, but a gross disrespect to the process pending before the court. This court has in several occasions condemned this type of action. (p. 268 B)

F REPRESENTATION

Prof. S. A . Adesanya SAN with Waheed Kasah for the Appellants/ Applicants.

Chief Wole Olanipekun SAN with him G. Adeyemi Ayo Adesanmi G and A. Adeyemi for the 1st- 3rd Respondents.

CASES REFERRED TO

AMIARA Vs. ALO (1995) 7 NWLR (Pt. 409)623

A.C. B. LTD. Vs. AWOGBORO (1996) 3 NWLR (Pt. 437) 383

H AKAPOR Vs. HAKEEM HABEEB (1992) 6 NWLR (Pt. 249) 266

V. M. BANK LTD. Vs. PELFACO LTD. (1993) 9 NWLR (Pt. 317) 340

STATUTES REFERRED TO

Companies and Allied Matters Act, s. 389 (i)

Court of Appeal Act, s. 16

LEAD JUDGMENT BY TABAI JSC

This ruling is sequel to a motion dated the 28th July, 2010 and filed on the 29th of July, 2010. Motion prays for:-

1. An order of interlocutory injunction restraining the Respondents, their servants, agents, privies or through any person howsoever except Mr. Olusegun Bamidele Ajayi, the Receiver/Manager appointed by the Court of Appeal from running, operating and/or managing the 1st Respondent pending the determination of the appeal now pending in the Supreme Court. B
C

ALTERNATIVELY

2. An Order of interlocutory mandatory injunction to undo what has been done by restoring Mr. Olusegun Bamidele Ajayi who has been physically removed on the Receiver/Manager pending the determination of the said appeal in this court i.e. Supreme Court. D

3. An order of interlocutory injunction restraining the 2nd and 3rd Respondents, their servants, agents, privies or any person howsoever from acting as directors of the 1st Respondent or from interfering with finance, securities and other business of the 1st Respondent pending the determination of the appeal in the Supreme Court. E

4. For such further order or orders which this honourable court may deem fit to make in the circumstances.

The grounds for the reliefs sought in the application are set out in 11 paragraphs. The application is supported by an affidavit of 25 paragraphs to which were attached Exhibits SCK1, SCK2, SCK3, SCK4, SCK5, SCK6, SCK7, SCK8, SCK9, SCK10, SCK11 and SCK12. On that same 29th of July, 2010, the 2nd Plaintiff/Applicant deposed to an affidavit of urgency of 26 paragraphs. The facts deposed to are substantially the same as those he deposed to in the 25 paragraph affidavit in support of the motion. F
G

In opposition to the application, Mr. Ayo Adesanmi, counsel in the law firm of Chief Wole Olanipekun SAN, for and on behalf of the 1st-3rd Defendants/Respondents (who are Respondent herein) deposed to a counter affidavit of 94 paragraphs to which were attached Exhibits 1- 23. This was on the 13/10/2010. On that same day, on behalf of the 1st - 3rd Respondents, Chief Wole Olanipekun SAN, filed a notice of preliminary objection to urge the dismissal or striking out H

of the motion. The grounds of the preliminary objection are that:-

(i) *The party on whose behest and/or for whose benefit the application is being sought, is not an appellant before this court or a party to the appeal proceedings.*

(ii) *The entire application is incompetent*

B (iii) *If countenanced at all and/or granted, the application will dispose of the appeal against the ruling complained of by the Appellant and also dispose of the appeal at the lower court.*

(iv) *The application is a gross abuse of the processes of superior courts of record in Nigeria as:*

C (a) *While the Appellants appeal to the Court of Appeal against the decision of the trial High Court of 1st July, 2009, discharging the appointment of Olusegun Ajayi as the Receiver/Manager for the 1st Respondent and filed a motion at the lower court asking the lower court to upton the discharge order of the trial High Court, the same Appellants through the same counsel instituted five different actions at the Federal High Court, Lagos in the name of the said Olusegun Ajayi as a Receiver/Manager of the 1st Respondent in suit Nos. FHC/UCS/898/09, FHC/L/CS/899/09, FHC/L/CS/900/09, FHC/L/CS/901/09 and FHC/L/CS/897/09, claiming for reaching injunctive reliefs against some banks named as Defendants.*

D (b) *Appellants did not inform the Federal High Court, Lagos of the pendency of their substantive appeal and application at the Court of Appeal.*

F (c) *Appellants did not inform the Federal High Court of the discharge of the appointment of Olusegun Ajayi as Receiver/Manager by another judge of the Federal High Court on 1st July, 2009.*

G (d) *Appellants have deliberately hidden the facts adumbrated in (a) (b) and (c) supra before this court in their present application.*

H (e) *The Appellants/Applicants unilaterally changed the title of the case in their application from what it is/was in their notice of appeal filed in this court and from those of the parties appearing in the ruling of the lower court appealed against.*

(v) *The Supreme Court is without jurisdiction to countenance and/or grant the prayers contained in the body of the appellants application.*

(vi) *The said application is not in conformity with the mandatory demand of order 2 rule 28 of the Supreme Court Rules “.*

When the application and the preliminary objection were argued on the 19th of October, 2000, Prof. S. A. Adesanya SAN for the Appellants/Applicants made reference to the ruling of the Court of Appeal dated the 19th of March, 2009, the appointment of Mr. Olusegun Bamidele Ajayi by the Chief Registrar, Federal High Court on the 23rd of March, 2009, as the Receiver/Manager of the 1st Respondent, the appeal by the Respondents to this court against the ruling of the Court of Appeal of 19th March, 2009, and the appointment of the Receiver/Manager pursuant thereto and the ruling of the trial Federal High Court of the 1st July, 2009, discharging the appointment of Receiver/Manager of the 1st Respondent and argued in substance that the orders of the trial court some of which were not even sought, amounted to multiple abuses of the court process. Learned senior counsel urged particularly the grant of the alternative prayers for an order of interlocutory mandatory injunction to undo what has been done by restoring Mr. Olusegun Bamidele Ajayi as the Receiver/Manager of the 1st Respondent. He also urged the grant of interlocutory injunction restraining the 2nd and 3 Respondents their servants, agents, and or privies from acting as directors of the Respondent or from otherwise interfering with the finances and other businesses of the 1st Respondent pending the determination of the appeal at this court. Learned senior counsel further argued that on his appointment as Receiver/Manager of the 1st Respondent on the orders of the Court of Appeal, Mr. Olusegun Ajayi became an officer of the court by virtue of the provisions of section 389 (1) of the Companies and Allied Matters Act and that he was not a party in the proceedings. It was learned senior counsel's further contention that unless this application is granted in term of the prayers sought, the appeal before this court will be rendered nugatory. Learned senior counsel even urged the grant of a mandatory injunction setting aside the orders of the trial High Court. He referred to the counter affidavit of the Respondents especially paragraphs 5-85 and remarked that the facts deposed therein are all stories of what happened at the trial court and argued that the court cannot deal with what happened in that court. He urged in conclusion that the application be granted.

On his part, Chief Wole Olanipekun SAN, counsel for the Respondents argued in substance as follows:- The application he submitted was incompetent and a gross abuse of the processes of the

court. It was his submission that if, in the determination of this application, this court would not take cognisance of what happened at the trial court then that takes out the bottom of this application since the entire application was premised on or in reaction to the orders of the trial court, in its ruling on the 1st July, 2009. He referred to the Applicants notice of appeal at page 51 of the application wherein the chief registrar of the Federal High Court is stated to be the 4th Respondent and referred further to relief 3 of the notice of appeal at page 58 of the application, where an order of injunction is sought against the Chief Registrar of the Federal High Court and submitted that the reliefs sought against him cannot be granted since he was not yet a party. He submitted that if the applicants/appellants want to withdraw against the 4th Respondent, they can only do so by way of a written application. It was further contended that the first prayer of the application was rather at large. With specific reference to Mr. Olusegun Ajayi as Receiver/Manager, learned senior counsel referred to seven different originating processes filed at the Federal High Court wherein he was made a party. He urged finally that the application be dismissed.

In his reply, Prof. S. A. Adesanya SAN argued that preliminary objection to the application can only be based on the materials presented before the court by the applicants. He contended further that the Respondents were only trying to argue the appeal under the guise of a preliminary objection, and urged that the preliminary objection be dismissed.

I have considered the application, the grounds of the application, the 25 and 26 paragraph affidavits in support thereof, the 94 paragraph counter affidavit, the preliminary objection and the address of counsel for the parties. I shall first of all make recourse to the history of the case from the inception up to the 29/7/2009, when the present application under consideration was filed with particular reference to some documents/processes relevant to the determination of the issues raised in this application. The action itself was initiated in 2006.

In paragraph 20 of the statement of claim, the plaintiffs who are the Appellants/Applicants herein claimed against the Defendants/Respondents jointly, severally or in the alternative as follows:

1. A DECLARATION that the Plaintiffs' 58.3% majority equity

holding in the 1st Defendant is still valid and subsisting.

2. A DECLARATION that the resolution of the Board of Directors of the 1st Defendant company purportedly passed on the 31st day of October, 2005, but filed on the 17th day of January, 2006, was never held and never passed or any other resolution diluting or reducing the 58.3% majority equity shares of the plaintiffs in the 1st Defendant, is null and void and ineffective. B

3. A DECLARATION that the equity holding structure in the Defendant company as at 27/072005, is still valid and subsisting.

4. A MANDATORY INJUNCTION compelling the Defendants to revert back to the share holding structure held as at 27/07/2005, by filing the statutory forms at the Corporate Affairs Commission to reflect the valid equity shareholding structure which stood at 27/07/2005. C

5. AN ORDER compelling the Defendants to prepare and submit to the court a comprehensive financial statement of account from 2005 to 2006 financial year. D

6. AN ORDER compelling the 2nd Defendant to refund the N32,000,000.00 fraudulently removed from the 1st Defendant's account and misappropriated by the 2nd Defendant. E

7. AN ORDER compelling the Defendants especially and 3rd Defendants to account for the N27,000,000.00 loan granted by way of credit on countless promissory notes for steel ingots supplied to AKS ALLOYS PVT (INDIA) LIMITED which is a company owned by Mr. NEMI CHAND KOTHARY the 3rd Defendant. F

8. AN ORDER compelling the defendants to prepare the annual directors statement of the 1st Defendant and made same available to the shareholding.

9. AN ORDER compelling the Defendants to pay for the cost of this plaintiffs' action being a derivative for the benefit of the 1st Defendant and the shareholders. G

10. Ubi Jus Ibi Remedium

11. AND for such further order or other orders to meet the ends of justice in the case. H

At the trial High Court, the Appellants/Applicants as plaintiffs sought and obtained an interim *ex parte* order on the 19/01/2007 for the appointment of the receiver/manager to manage the affairs of the 1st Respondent company pending the determination of the sub-

stantive motion on notice for an interlocutory order for the same relief. The interlocutory order for the appointment of a receiver/manager was sought to pend the determination of the suit. The Respondents herein as defendants brought an application for an order discharging the exparte interim order of the 19/01/2007. The Respondents' application for the discharge of the interim order appointing a receiver/manager and the Applicant's application for the appointment of a receiver/manager were consolidated and heard together.

By its ruling on the 28/02/2007, the interim order appointing a receiver/manager for the 1st Respondent was vacated. The trial court however refused to consider the Applicant's application for the appointment of a receiver/manager for reasons stated in the ruling. The applicants were not satisfied with the ruling and thus proceeded an appeal to the court below. In its judgment on the 19/03/2009, the Court of Appeal allowed the appeal and made a number of far reaching consequential orders. In the concluding paragraphs of the judgment, the Court of Appeal, per Adamu JCA OFR at page 17 - 19 of the judgment stated as follows:

"Consequently, I hereby allow the Appellants' appeal, set aside the ruling of the trial court delivered on the 28/02/2007 and in its place I invoke the powers of this court under section 16 of the Court of Appeal Act and order 4 and 6 of the Court of Appeal Rules 2007, by granting all the prayers of the appellants as per their motion on notice filed before the lower court (dated and filed on 19/12/2006 - at pages 139-140 of the records) or in the alternative I hereby make interlocutory the interim orders (1) — (7) granted on the trial court pending the hearing and determination of the appellants' suit at the trial court. "

With respect to the reliefs granted, the Court of Appeal ordered as follows :-

Specifically, I grant the appellants' application for the appointment of a receiver/manager to manage the affairs of the 1st Respondent's company as follows:-

1. That the appellants are to supply the names and particulars of a reputable person or company to the Chief Registrar of the lower court (Federal High Court, Lagos) for appointment as a receiver/manager to take over the management and control of the operations of the 1st respondent ASK STEEL NIGERIA LIMITED whose

address or registered office is at No. 27 Industrial Scheme Odogunyan, Ikorodu, Lagos State and all its offices and guest houses as well as its banking operations, pending the determination of the trial now pending at the Federal High Court, Lagos.

2. The person to be appointed the receiver/manager shall render accounts periodically to the Chief Registrar of the lower Court, who shall also fix the remuneration of the said appointee pending the final determination of the suit. B

3. An order is hereby made directing the 2nd and 3rd respondents to prepare a comprehensive inventory and deliver up possession of all the properties and funds of the 1st respondent to the receiver/manager to be appointed by the Chief Registrar. C

4. The said 2nd and 3rd respondents are hereby restrained from further interfering with the finance, security and other businesses of the 1st respondent pending the determination of the suit. D

5. The 2nd and 3rd respondents are also restrained from acting as the directors of the 1st respondent pending the hearing and determination of the suit.

6. The appellants are to give satisfactory undertaking to the satisfaction of the Chief Registrar within 14 days from today and it is on that basis that the Chief Registrar will proceed to appoint the receiver/manager as per the 1st order above. E

7. The appellants are hereby directed to prosecute their suit now pending at the trial court with utmost and due diligence, failure of which will make them forfeit all the above orders made in their favour. F

It is as a result of the forgoing order that Mr. Olusegun Bamidele Ajayi was appointment the receiver/manager on 23/03/2009. G

Trial of the suit then commenced at the trial court on the 9th of April, 2009. There were a number of applications by both sides. By a motion dated and filed on 7th of May, 2009, at the trial court the plaintiffs/Applicants prayed for:

"AN ORDER of this Honourable Court staying further proceedings in this suit pending the hearing and determination of the appeal filed by the applicants to the Court of Appeal against the ruling of this Honourable Court made on the 9th day of April, 2009. " H

On the 22nd of May, 2009, the application for stay of pro-

ceedings was moved by Mr. Daniel Ozoma. Chief Olanipekun SAN, while not opposing the application for stay of proceedings contended that since the plaintiffs were not ready to prosecute their claim with utmost and due diligence as directed by the Court of Appeal and were even seeking an order to stay proceedings in their own case, the order for the appointment of receiver/manager be also discharged.

In its ruling on the 1st of July, 2009, the trial court granted the stay sought and also discharged the order for the appointment of the receiver/manager. In the concluding paragraphs of the ruling, the trial court stated:-

"The plaintiffs have clearly shown their reluctance to present their claim, from their conduct, I am satisfied that it will be proper to discharge the order appointing receiver manager."

1. I grant the application for stay by the applicants and stay further proceedings in this suit pending the hearing and determination of the appeal filed by the applicants at the Court of Appeal against the ruling of this court made on 9th April, 2009.

2. I also discharge the order appointing receiver manager appointed to take over the management and control of the 1st Respondent AKS STEEL NIGERIA LIMITED.

3. Chief Registrar to re-instate the 2nd and 3rd Respondents.

4. The receiver/manager shall give account of his operations to the Chief Registrar and same to be filed in court.

5. This suit is adjourned sine die.
The plaintiffs/Applicants were aggrieved by the ruling and on the 14th of July, 2009, filed their notice of appeal, containing one ground of appeal. The sole ground without its particulars reads:-

"1. Learned trial judge acted without jurisdiction in overruling/discharging on the 1st July, 2009, the various orders or substantially the orders made by the Court of Appeal in its judgment of 19th March, 2009 and thereby constituted himself an appellate court over the Court of Appeal."

And in the particulars, the orders contained in the judgment of the Court of Appeal of the 19th of March, 2009 and the ruling of the trial court of the 1st July, 2009, were reproduced. The reliefs sought from the Court of Appeal were:-

1. To allow the appeal and reverse the decision of the trial judge; and

2. For an order that the case be transferred to another judge of the Federal High Court to be heard on the merit.

On the following day, being the 15th of July, 2009, the Appellants/Applicants filed another motion seeking the following reliefs:-

1. AN ORDER staying and/or suspending the order/orders of the Federal High Court Lagos, made on the 1st July, 2009, in suit No. FHC/L/CS/105/06, whereby the said Federal High Court without jurisdiction discharged, interfered with and/or over-ruled the existing order/orders of this court i.e. the Court of Appeal in Suit No. CA/L783/07, made in its judgment on appeal to it on the 19th March, 2009, pending the determination of the appeal.

2. AN ORDER of interlocutory injunction restraining any one from acting as the Receiver/Manager of the 1st Respondent except Mr. Olusegun Ajayi appointed by the Chief Registrar of the Federal High Court pursuant to and in the execution of the order/orders of this court made in the judgment of 19th March, 2009 and further restraining the 2nd and 3rd Respondents from acting as directors of the 1st Respondent thus confirming and/or affirming the orders of this court in its judgment of 19th March, 2009 in the said suit No. CA/L/783/07 pending the determination of the appeal.

3. AN ORDER of interlocutory injunction restraining the Chief Registrar of the Federal High Court from complying with the orders of the Federal High Court of the 1st July, 2009, in so far as they affect him, pending the determination of the appeal.

4. AN ORDER joining the Chief Registrar of the Federal High Court to this suit.

5. For such, further or other orders which this honourable court may deem fit to make in the circumstances.

In opposing this application, the Respondents filed a counter affidavit of 89 paragraphs, a further counter affidavit and a further and better counter affidavit, by an order of court on the 29th October, 2009, the parties filed and exchanged written arguments.

In its ruling on the 15th of March, 2010, the Court of Appeal, for reasons stated therein, considered the application grossly incompetent and same was accordingly struck out. The Court of Appeal highlighted three main reasons for refusing the application. The first is with respect to the provision of order 7 rule 4 of the Court of Appeal Rules which provides:-

“Whenever under these rules an application may be made either to the court below or to the court it shall not be made in the first instance to the court except where there are special circumstances which made it impossible or impracticable to apply to the court below “

B The Court of Appeal reasoned that the supporting affidavit contained no circumstances, let alone special circumstances, to warrant the filing of the application first at the court. Another closely related reason was that the appeal had not been entered; that it is only the entry of the appeal by the transmission of records therein that it becomes
C seized of the case to entertain the application.

The second reason relates to the 3rd and 4th reliefs for injunction sought against the Chief Registrar of the Federal High Court and his joinder as the 4th Respondent. The court relying on a number of
D judicial authorities held that in the circumstances of the case an order for his joinder and injunction against him cannot be sought and obtained simultaneously; that he ought first and foremost be made a party before an order can be made against him; and that it would amount to a breach of the rules of natural justice and the fundamental rights of the said Chief Registrar for an order to be made against
E him before he becomes a party and aware of the application in respect thereto.

The third reason relates to the sole ground of appeal and the issue of the propriety or otherwise of the ruling of the Federal High
F Court on the 1st July, 2009, raised thereby. The Court of Appeal reasoned that granting the 1st and 2nd reliefs sought in the application would amount to a determination of the live issue in the substantive appeal pending before it. The foregoing is the substance of the reasons for the decision of the Court of Appeal in its ruling of the 15th of
G March, 2010, refusing the application.

The plaintiffs are again not satisfied with the decision and have since appealed to this court against that decision. The Notice of appeal dated and filed on the 25th of March, 2010 raised 14 grounds
H of appeal. The reliefs sought from this court in the Notice of Appeal are:-

1. Allow the appeal and reverse the decision of the Court of Appeal delivered on the 15th March, 2010.

2. AN ORDER of injunction restraining any one from acting

as the Receiver/Manager of the 1st Respondent except Mr. Olusegun Ajayi appointed by the Chief Registrar of the Federal High Court pursuant to and in the execution of the order/orders of this court made in its judgment of the 19th March, 2009 and further restraining the 2nd and 3rd Respondents from acting as directors of the 1st Respondent, thus confirming and/or affirming the orders of this court in its judgment of 19th March, 2009, in the said suit CA/L/783/07. B

3. AN ORDER of injunction restraining the Chief Registrar of the Federal High Court from complying with the orders of the trial court of 1st July, 2009 in so far as they affect the receiver/manager; C and

4. AN ORDER joining the Chief Registrar

As it stands today, there are three pending appeals, one at the court below and two in this court. So far, there has been four interlocutory appeals in this case, two at the court below and two in this court. The two at the court below were by the plaintiffs/Applicants. The earlier appeal which was against the ruling of the trial court dated 28th of February, 2007, was disposed of by the court below in the judgment on the 19th of March, 2009. The second appeal by the Plaintiffs/Applicants against the ruling of the trial court on the 1st July, 2009 is still pending and the two appeals before this court, one by the Plaintiffs/Appellants/Applicants and the other by the Defendants/Respondents are still pending. D E

Let me first of all examine the preliminary objection. I had earlier above reproduced the six grounds upon which the objection is predicated. Ground three thereof is to the effect that if this application is granted, this court would in effect, have disposed of the appeal in this court against the ruling of the court below of the 15th March, 2010 and also the appeal at the court below against the ruling of the trial court of 1st July, 2009. This was one of the main points agitated by Chief Olanipekun SAN on the 19th October, 2010, when arguments were taken on the application and the preliminary objection. In his view, the application was a gross abuse of the court process in view of the Plaintiffs'/Applicants' pending appeals in this court and at the court below. F G H

A comparison of this application and the one filed by the Plaintiffs/Appellants/Applicant at the court below on the 15th July, 2009, which ruling is the subject of their appeal before us, shows that the

two applications are identical in many respects. Apart from reliefs 3 and 4 of the application at the court below pertaining to the joinder of the Chief Registrar of the Federal High Court and the injunction sought against him, the two applications are in substance to the same effect. Reliefs 1 and the alternative reliefs 2 and 3 of this application are to the same effect as reliefs 1 and 2 of the application at the court below. Even reliefs 3 and 4 of the application at the court below concerning the Chief Registrar of the Federal High Court are implicitly for the same purpose of the injunctive reliefs sought.

I have also reproduced the reliefs sought in the appeal against the ruling of the court below of the 15th March, 2010. Relief 2 thereof is to the same effect as the three reliefs sought in this application, the only difference is that while in the Notice of Appeal filed on the 25th March, 2010, the Plaintiffs/Appellants/ Applicants seek injunctive orders, in the application, they seek interlocutory injunctive orders. Under such circumstances, would the end of justice not better be served in the hearing and determination of the appeal before this court than filing this application which, in substance, is to the same effect as the application of the 15th July, 2009, at the court below? I shall answer this question in the affirmative.

I am inclined to this view because of the settled principle of law that a court cannot, in an interlocutory application, decide an issue in the substantive case or appeal. See AKAPOR Vs. HAKEEM HABEEB (1992) 6 NWLR (Part 249) 266, VICTORY MERCHANT BANK LTD. Vs. PELFACO LTD (1993) 9 NWLR (Part 317) 340; AMIARA Vs. ALO (1995) 7 NWLR (Part 409) 623; A.C. B. LTD Vs. AWOGBORO (1996) 3 NWLR (Part 437) 383.

After a careful consideration of the application and the notice of appeal in the appeal pending before us, it is clear that we cannot grant the reliefs sought without thereby substantially deciding the substantive interlocutory appeal. The only issue in the interlocutory appeal pending at the court below on the sole ground of appeal is whether or not the trial court was right in its ruling of the 1st July, 2009, and I am, with respect, of the view that the interest of justice will be better served by the appellants' prosecution of the appeal instead of embarking on this application. The main suit is still pending

at the trial court without any conceivable progress towards its final determination. In paragraph 20 of their statement of claim, the Plaintiffs/Appellants/Applicants claim to have 58.3% equity share holding in the 1st Defendant/Respondent. They also claim that the resolution of the Board of Directors of the 1st Defendant/Respondent purportedly passed on the 31st of October, 2005, was never passed as no such meeting of the board was ever held. These show the Plaintiffs alleged interest in the 1st Defendant/Respondent. These issues have to be tried and no amount of interlocutory applications can help to solve the dispute.

In his concurrent ruling on the 15th March, 2010, GALINJE JCA said:-

“The appeal to this court is interlocutory and it is in the interest of justice and both parties to concentrate on getting the appeal heard, instead of indulging in endless applications.”

I agree entirely with sentiment expressed in the above opinion. These are in my view just too many interlocutory appeals and applications.

On the whole, in view of the appeals pending both in this court and at the court below and having regard to the fact that a grant of this application and the reliefs sought therein, would, in effect, be a determination of the substantive interlocutory appeals both in this court and at the court below, this application is refused and same is struck out.

I assess the costs of this application at N30,000.00 in favour of the Respondents.

MUKHTAR JSC

The application before this court is for-

“1. AN ORDER of interlocutory injunction restraining the Respondents, their servants, agents, privies or through any person however except Mr. Olusegun Bamidele Ajayi, the Receiver/Manager appointed by the Court of Appeal from running, operating and/or managing the 1st Respondent pending the determination of the appeal now pending in the Supreme Court.

ALTERNATIVELY

2. AN ORDER of interlocutory mandatory injunction to undo

what has been done by restoring Mr. Olusegun Bamidele Ajayi who has been physically removed as the receiver, manager pending the determination of the said appeal in this court i.e. Supreme Court.

3. *AN ORDER of interlocutory injunction restraining the 2nd and 3rd Respondents, their servants, agents, privies or any person howsoever from interfering with the finance, securities and other businesses of the 1st Respondent pending the determination of the appeal in the Supreme Court.*”

The application is supported by an affidavit to wit, certain documents were exhibited. The respondents filed a counter affidavit, and a notice of preliminary objection to the application. Documents were also exhibited by the respondents. On the 19th of October, 2010 learned Senior Advocates for the parties proffered oral argument in respect of their application and preliminary objection. The grounds of objection as contained in the notice of preliminary objection are as follows:-

“i. *The party on whose behest and/or for whose benefit the application is being sought is not an appellant before this court or a party to the appeal/proceedings.*

ii. *The entire application is incompetent;*

iii. *If countenanced at all and/or granted, the application will dispose of the appeal against the ruling complained of by the Appellant and also dispose of the appeal at the lower court.*

iv. *The application is a gross abuse of the processes of superior courts of record in Nigeria.*

v. *The Supreme Court is without jurisdiction to countenance and/or grant the prayers contained in the body of the appellants’ application.*

vi. *The said application is not in conformity with the mandatory demand of order 2 rule 28 of the Supreme Court Rules.*”

In moving his notice of preliminary objection, the learned Senior advocate for the respondents referred to the appellants/applicants notice of appeal on page 511 of the record of the applicants application to wit, he canvassed that a party is not allowed to change the parties in the notice of appeal, and referred to the cases of Plateau State v. Attorney-General of the Federation 2006 3 NWLR part 967 page 346, and Babatola v. Aladejana 2001 12 NWLR part 728 page 597. It is a fact that four parties existed in the notice of appeal,

but in the application before this court, the 4th respondent in the notice of appeal was dropped, and only three respondents are mentioned in it. The learned Senior Counsel for the respondents argued that to grant the prayers sought in the application would be tantamount to granting the reliefs sought in the appeal, because the substratum are the same. The learned Senior Counsel for the applicant has urged the court to dismiss the objection, as it has disclosed fresh issues, when it should be based on the application itself. B

In treating this notice of preliminary objection and the argument of both learned Senior Counsel, I will examine the notice of appeal and reproduce the relevant portions. The Notice of Appeal C which is the foundation of this application has four parties as respondents, whereas the application has only three parties, exclusive of the Chief Registrar of the Federal High Court who is the 4th respondent in the notice of appeal. The Chief Registrar shouldn't have been excluded/omitted from the application before us, as if the appeal is supposed to involve the Chief Registrar, then the Chief Registrar is supposed to be involved in the application. The parties in both processes should be the same, and none should be excluded unless it has been formally withdrawn. In this respect, I endorse the submission of Chief Olanipekun SAN on the issue of the parties, and I agree that the applicant cannot change the parties in the notice of appeal in this application. See the Plateau State and Babatola cases supra; D

Then to the reliefs sought in the notice of appeal, which read E
inter alia F

"2. AN ORDER of injunction restraining anyone from acting as the receiver/manager or the 1st Respondent except Mr. Olusegun Ajayi appointed by the Chief Registrar of the Federal High Court, pursuant to and in the execution of the order/orders of this court made in its judgment of 19th March, 2009 and further restraining the 2nd and 3rd Respondents from acting as directors or of the 1st Respondent, thus confirming and/or affirming the orders of this court in its judgment of 19th March, 2009 in the said Suit CAT/783/07. G

3. AN ORDER of injunction restraining the Chief Registrar of the Federal High Court from complying with the orders of the trial court of 1st July, 2009, in so far as they affect the receiver/manager. H

4. AN ORDER joining the Chief Registrar."

A careful study and consideration of reliefs (2) and (3) supra

reveal that they are in essence the same and of the same effect as the prayers sought in this application, and so the substratum are the same. In the circumstance, granting the prayers in the application will be tantamount to allowing the appeal and there will in fact be no need to hear the appeal, as the objective of the appellants/applicant would have been achieved. The appeal would have been overtaken, and that will occasion miscarriage of justice.

In the light of the above, I uphold the objection of the respondents and strike out the application. I have had the opportunity of reading in advance, the lead ruling delivered by my learned brother, Tabai JSC, which I agree with in its entirety. I abide by the consequential orders made in the lead judgment.

D **ONNOGHEN JSC (DISSENTING)**

On the 29th day of July, 2010, the appellants/applicants filed a motion on notice in this court praying for the following orders:-

“1. *AN ORDER of interlocutory injunction restraining the respondents, their servants, agents, privies or through any person howsoever except Mr. Olusegun Bamidele Ajayi, the Receiver/Manager appointed by the Court of Appeal from running, operating and/or managing the 1st respondent pending the determination of the appeal now pending in the Supreme Court.*

F **ALTERNATIVELY**

2. *AN ORDER of interlocutory mandatory injunction to undo what has been done by restoring Mr. Olusegun Bamidele Ajayi who has been physically removed as the receiver/manager pending the determination of the said appeal in this court i.e Supreme Court.*

G 3. *AN ORDER of interlocutory injunction restraining the 2nd and 3rd respondents, their servants, agents, privies or any person howsoever from acting as directors of the 1st respondent or from interfering with the finance securities and other businesses of the 1st respondent pending the determination of the appeal in the Supreme Court”.*

H The applicants listed eleven grounds for the application, some of which appears to be arguments on the application. In fact, ground 2 runs from (a) to (h) while ground 3 runs from (a) to (e). In support of the motion is an affidavit of 25 paragraphs on which the applicants relied in moving the court together with twelve exhibits.

On the other hand, the respondents filed a 94 (ninety-four) paragraphed counter affidavit to which a total of 23 documents have been exhibited.

There is also a Notice of Preliminary Objection filed on 13th October, 2010, praying the court to dismiss and /or strike out the motion on notice in limine. The grounds for the objection are listed as follows:-

“(i) the party on whose behest and for whose benefit the application is being sought, is not an appellant before this court or a party to the appeal/proceedings;

(ii) the entire application is incompetent;

(iii) if countenanced at all and/or granted, the application will dispose of the appeal against the ruling complained of by the appellant and also dispose of the appeal at the lower court;

(iv) the application is a gross abuse of the process of superior courts of record in Nigeria as:

(a) While the appellants appealed to the Court of Appeal against the decision of the trial High Court of 1st July, 2009, discharging the appointment of Olusegun Ajayi as the receiver/manager for the 1st respondent and filed a motion at the lower court asking the lower court to overturn the discharge order of the trial High Court, the same appellants through same counsel instituted five different actions at the Federal High Court, Lagos, in the name of the said Olusegun Ajayi as a receiver/manager of the 1st respondent in suit NOs. FHC/UCS/898/09, FHC/UCS/901/09 and FHC/UCS/897/09 claiming for reaching injunctive reliefs against some banks named as defendants.

(b) Appellants did not inform the Federal High Court, Lagos, of the pendency of their substantive appeals and application at the Court of Appeal.

(c) Appellants did not inform the Federal High Court, Lagos, of the discharge of the appointment of Olusegun Ajayi as receiver/manager by another judge of the Federal High Court on 1st July, 2009.

(d) Appellants have deliberately hidden the facts adumbrated in (a) (b) & (c) supra before this court in their present application.

(e) The appellants/applicants unilaterally changed the title of the case In their application from what it is/was in their notice of

appeal filed in this court and from those of the parties appearing in the ruling of the lower court appealed against.

(v) the Supreme Court is without jurisdiction to countenance and/or grant the prayers contained in the body of the appellants' application,

B *(vi) the said application is not in conformity with the mandatory demand of order 2 rule 28 of the Supreme Court Rules”.*

C Learned senior counsel for the appellant/applicants Prof. Adesanya, SAN informed the court at the hearing of the substantive motion on the 19th day of October, 2010, that the applicants filed no process in reaction to the notice of preliminary objection as they intended to oppose the objection on points of law only.

D In moving the court, learned senior counsel for the applicants, Prof. Adesanya, SAN, stated that on the 19th day of March, 2009, the lower court made an order in a ruling of that date in which the Chief Registrar of the Federal High Court was directed to appoint a receiver/manager for the 1st respondent and that the said order was duly carried out on the 23rd day of March, 2009. It is the contention of the learned senior counsel that by that appointment and by the provisions of section 389 (1) of the Companies and Allied Matters Act CAMA, the receiver so appointed became an officer of the Federal High Court; that the respondents were dissatisfied with the order and consequently appealed to the Supreme Court on the 26th day of March, 2009 and followed same with an application to the lower court for an order of injunction restraining the receiver from acting in that capacity, which application still pends, as well as the appeal before this court; that while these proceedings were pending, the respondents went back to the trial court for an order discharging the order appointing the receiver by the lower court which order had already been executed on the 23rd day of March, 2009; that the trial court granted the application on the 1st day of July, 2009 and purported to discharged the order appointing the receiver and in addition ordered that the 2nd and 3rd respondents act as directors of the 1st respondent contrary to the ruling of the lower court and which relief was never sought by the respondents to this motion; that these amounted to multiple abuses of the process of the court and that the trial court has no power to interfere with the orders of the higher court. Learned senior counsel then urged the court to intervene by

mandatory injunction to restore the status quo so as not to render the appeal a nugatory.

It is the further contention of learned senior counsel that following the discharge of the order of the lower court by the trial court, the 2nd and 3rd respondents used force of arms to take over the 1st respondent and all its property and drove away the receiver; that the receiver was never an autonomous litigant being an officer of the lower court and if this court restores the order of the lower court, the receiver is automatically restored to his position. B

On the preliminary objection, it is the views of learned senior counsel that it borders in hypocrisy; that the taking over of the 1st respondent by force of arms by the respondents has not been denied; that out of the 94 paragraphs of the counter affidavit, about 60 paragraphs deal with events that took place at the trial court and urged the court to discountenance them; that the respondents purportedly relied on paragraph 7 of the order of 19th March, 2009 of the Court of Appeal in obtaining the order of discharge; that paragraphs 22 - 64, 81- 85 of the counter affidavit are irrelevant to the issues in the application, just as paragraphs 66 - 77 dealing with petitions to National Judicial Council. Finally, learned senior counsel urged the court to grant the application. C D E

On his part, learned senior counsel for the respondents, Chief Wole Olanipekun, SAN submitted that the application is incompetent and constitutes an abuse of process; that if the court should take cognizance of what took place at the trial court the bottom of the instant application would be knocked off. F

Turning to the preliminary objection senior counsel stated that though this appeal has four respondents, the application under consideration has three; that reliefs 5 and 6 relates to the Chief Registrar who is the 4th respondent in the appeal but who is not a party in the application; that it is an abuse of process for a party to amend the title of the proceeding on his own. G

It is the further submission of learned senior counsel that prayer on the motion papers is too general to be effective and that to grant the mandatory injunction would dispose of the substantive appeal before this court as well as the appeal before the lower court whose notice of appeal is at page 57 of the record; that the court should not make that kind of order at an interlocutory stage of the H

proceedings.

Learned senior counsel also contends that the application is an abuse of process of the court because the applicants have filed numerous processes at the trial court seeking the same reliefs in favour of the receiver. It is also the submission of learned senior counsel that paragraphs 10, 11, 12, 13, 17, 19 and 23 of the supportive affidavit is argumentative, full of conclusions etc, and should be struck out.

Finally, learned senior counsel urged the court to dismiss the application.

By way of reply, learned senior counsel for the applicants submitted that a preliminary objection must be based on the application before the court which is not the case in the instant matter; that the objection ought to have been by way of notice of motion not a preliminary objection and urged this court to dismiss same for lack of merit and for introducing fresh facts.

It is not disputed that the order appointing a receiver was made by the Court of Appeal on 19th March, 2009 and that the said order was duly carried out on the 23rd day of March, 2009. Also not disputed is the fact that on the 1st day of July, 2009, the trial court upon an oral application by the respondents set aside the order of the Court of Appeal appointing the receiver, which order had long been executed. It is also agreed that following the order of 19th March, 2009, which was carried out, the respondents appealed to this court against the grant of same and followed same up with an application for injunction restraining the receiver so appointed from acting in that office; that it was during the pendency of the appeal in this court and the motion in the lower court that the respondents applied orally to the trial court to discharge the order of 19th March, 2009, made by the Court of Appeal, not a court of coordinate jurisdiction, which order was granted. It is therefore very clear that the grant of the prayers of discharge of the order of the Court of Appeal has effectively rendered nugatory the pending appeal by the respondents before this court against the order appointing the receiver. The situation is very worrisome and embarrassing to the judiciary and the legal profession. By granting the order of discharge not made by it but by a higher court, the trial court has in effect knocked off the bottom of the appeal against grant of that order now pending before this court.

Looking closely at the preliminary objection, I agree with learned senior counsel for the applicants that the objection is not based on the application under consideration but deals mainly with matters pending at the trial court such as suits instituted therein for the benefit of the receiver etc. There is therefore no merit in the preliminary objection which is accordingly dismissed. In an appeal against the ruling of the trial court of 1st July, 2009, the applicants complained as follows:-

“Learned trial judge acted without jurisdiction in overruling/ discharging on the 1st July, 2009, the various orders or substantially the orders made by the Court of Appeal in its judgment of 19th March, 2009 and thereby constituted himself an appellate court over the Court of Appeal”.

The above appeal still pends before the lower court just as the appeal by the respondents against the ruling of the lower court of 19th March, 2009.

Also pending is the appeal by the applicants against the ruling of the lower court of 15th March, 2010, refusing their application for inter alia interlocutory injunction against the 2nd and 3rd respondents, following the discharge of the orders of 19th March, 2009 by the trial court.

It is true that the appeal by the applicants before this court and the application for interlocutory injunction both appear to have the same substratum.

It is therefore the contention of learned senior counsel for the respondents that to grant the application would render the appeal by the applicants now pending before this court nugatory or that it would amount to granting the reliefs in the substantive appeal upon an interlocutory application. We therefore have a situation of the kettle calling the pot black. Both parties have dirty hands but the first happens to be the respondents by their action against the order of the lower court made on 19th March, 2009. One has to try very hard not to comment on the merit or demerit of the appeals and other applications pending both at the lower court and in this court between the parties. The question however, remains what should the court do in the circumstances of this case. Should the court fold its arms and watch helplessly on the face of gross abuse of court process by either party taking undue advantage of the other. I do not think

the court is helpless and should not intervene. The solution to me lies in an order of mandatory injunction which is often seen as a restorative order usually invoked by the court to deal with a party who has no respect for the court of law. It is usually deployed to set aside completed acts and restore the parties to the status quo ante bellum.

B The principles governing the granting of mandatory injunction are different from those relating to prohibitory interlocutory injunction. These are:-

(a) *The state of affairs which is complained of must be such that would have entitled the plaintiff to obtain prohibitory injunction.*

(b) *The state of affairs which might have been prohibited from happening must have arose at the time when the material order is made.*

(c) *It must not have become impossible for the defendant to restore the earlier position.*

(d) *It must appear that damages and other legal remedies are not sufficient to put the plaintiff in a favourable position as if he had received equitable remedy in specie - see Allport vs. Securities Corp. (1895) 64 LJCH.491.*

(e) *It must appear in all the circumstances and particularly in view of equitable considerations such as laches, hardship, impossibility of performance or compliance and inconvenience as between the parties, that the most just course is that the mandatory order be granted.*

(f) *The plaintiff's case must be unusually strong and clear.*

(g) *Where it can be shown that the defendant attempted to steal a march on the plaintiff by pushing to complete the act, mandatory injunction will be to restore the plaintiff to the position he would have been - see page 132 - 133 of Injunctions and Enforcement of orders by Afe Babalola, 2nd Ed, 2007.*

In exercising its power to grant mandatory injunction, the court is primarily concerned with the invocation of its disciplinary jurisdiction to prevent its jurisdiction to try the case before it from being frustrated or stultified,

I therefore hold the considered view that it is in the best interest of the judicial process if parties are restored to the position they were before the setting aside of the lower court's order made on 19th March, 2009, which order was executed on the 23rd day of March,

2009, pending the determination of the appeal against the order and that against the ruling of the lower court, and every other pending application(s).

It is for the above reasons that I find myself unable to agree with the lead ruling in this application written by my learned brother TABAI, JSC just delivered.

In the circumstance, I find merit in the application and I proceed to grant the alternative prayers in the following terms:-

"1. It is hereby ordered that Mr. Olusegun Bamidele Ajayi, the receiver/manager appointed for the 1st respondent on the 23^d day of March, 2009, following the orders of the Court of Appeal of 19th March, 2009, be and is hereby restored to his office as receiver/manager of the 1st respondent pending the determination of the appeal, pending before this court.

2. It is further ordered that the 2nd and 3^d respondents, their agents, privies or any person howsoever be, are hereby restrained from acting as directors of the 1st respondent or from interfering with the finance, securities and other businesses of the 1st respondent pending the determination of the appeal, pending in this court. "

There shall be costs of N50,000.00 against the respondents in favour of the applicants.

Application granted as above.

MUHAMMAD JSC

I need before now, the ruling just delivered by my learned brother, Tabai JSC. I agree with his reasoning and conclusion. I adopt same as mine. I sustain the preliminary objection and struck out the application.

I grant N30,000.00 costs to the respondents against the applicants.

MUNTAKA-COOMASSIE JSC (DISSENTING)

By a motion dated 28/7/2010 and filed on the 29/7/2010, the Appellants/Applicants prayed for the following Orders :-

1. AN ORDER of interlocutory injunction restraining the respondents, their agents, servants, privies or through any person who-

soever except Mr. Olusegun Bamidele Ajayi, the receiver/manager appointed by the Court of Appeal from running, operating and/or managing the 1st Respondent pending the determination of the appeal, now pending in the Supreme Court. **ALTERNATIVELY**

B 2. AN ORDER of interlocutory mandatory injunction to undo what has been done by restoring Mr. Olusegun Bamidele Ajayi, who has been physically removed as the receiver/manager pending the determination of the said appeal in this court i.e. Supreme Court.

C 3. AN ORDER of interlocutory injunction restraining the 2nd and 3rd respondents, their Servants, agents, privies, or any person whatsoever from acting as directors of the 1st respondent or from interfering with the finance, securities and other businesses of the 1st respondent, pending the determination of the appeal in the Supreme Court.

D The appellants, listed in paragraphs 1-11 the grounds upon which the application is based, most of these grounds are arguments. The application was supported with 25 paragraphs affidavit with Exhibits SCK 1, SCK 2, SCK 3, SCK 4, SCK 5, SCK 6, SCK 7, SCK 9, SCK 10, SCK 11, and SCK 12.

E The respondents filed a counter affidavit containing 1-94 with Exhibits 1, to 23. The facts of this case as can be gleaned from the processes filed can be stated thus:- The Appellants commenced an action at the Federal High Court, Lagos, in suit No. FHC/L/CS/1059/
F 16 in which they obtained an exparte order appointing the Deputy Chief Registrar of the court as the receiver/manager of the 1st Respondent on 31/1/2007. However, after hearing a motion on notice on 28/2/07 filed by the Respondents discharged the order without considering the applicant's motion on Notice pending . The applicants dissatisfied with the order successfully appealed to the Court of appeal by an amended Notice of Appeal dated 17/6/08. The Court of Appeal, in this judgment dated 19/3/2009. Allowed the appeal and ordered as follows:-

H (5) That the appellants are to supply the names and the particulars of a reputable person or company to the Chief Registrar of the Lower court for appointment as a receiver/manager to take over the management and control of the operation of the 1st respondent AKS Steel Nigeria Ltd. whose address and registered office is at No. 27 Industrial Scheme Odogunny Ikorodu Lagos State and all its of-

fices and Guest house as well as its banking operations, pending the determination of the suit now pending at the Federal High Court Lagos.

2. The person to be appointed the receiver/manager shall render account periodical to the Chief Registrar of the lower court who also fix the remuneration of the said appointee pending the final determination of suit. B

3. AN ORDER is hereby made directing the 2nd and 3rd respondents to prepare a comprehensive inventory and deliver up possession of all the property and funds of the 1st respondent to the receiver/manager to be appointed by the Chief Registrar. C

5. The 2nd and 3rd respondents are also restrained from acting as the directors of the 1st respondent, pending the hearing and determination of the suit.

6. The appellants are to give a satisfactory undertaking to the satisfaction of the Chief Registrar within 14 days from today and it is on that basis that the said Chief Registrar will proceed to appoint the receiver/manager as per the 1st order above. D

7. The appellants are hereby directed to prosecute their suit now pending at the trial court with utmost and due diligence failure of which will make to forfeit all the above orders made in their favour. E

Pursuant to this judgment, the Chief Registrar of the Federal High Court appointed Mr. Bamidele Olusegun Ajayi, a lawyer of 25 years experience as the receiver/manager of the 1st respondent on 23/3/2009. The trial of the matter commenced at the trial court. Various processes were filed both at the trial court and the Court of Appeal viz, application to file counter claim and to serve necessary party out of jurisdiction before the trial court, and an application for stay of the order of the Court of Appeal, made on 19/3/09, respectively. F G

However on 22/5/09, the respondents applied orally that the Court of Appeal order be discharged and vacated by the trial court. The trial court vacated the Court of Appeal orders on 1/7/09 and ordered the Chief Registrar of the Federal High Court to appoint 2nd and 3rd respondent directors of the 1st respondent. H

(Under-linings mine for emphasis)

The appellants appealed against this ruling of the lower court and also filed this application. The Respondents deposition was to the effect that the appellants were not diligent in prosecuting this case

and it was this lack of diligence that resulted into the trial court's order discharging the orders made by the Court of Appeal. The respondents, in addition to the counter-affidavit, filed a notice of preliminary objection in which this court was urged to strike out the application on the grounds, inter alia:-

- B i) That the party on whose behest and/or whose benefit the application is being sought is not an appellant before this court, or a party to the appeal/proceedings.
- ii) The entire application is incompetent.
- C iii) If countenanced at all and/or granted, the application will dispose of the appeal against the ruling complained of by the appellants and also disposed of the appeal at the lower court,
- iv) The application is a gross abuse of the processes of superior court of record in Nigeria.
- D v) The Supreme Court is without jurisdiction to countenance and/or grant the prayers in the body of the appellants' application.
- vi) That the said application is not in conformity with the mandatory demand of order 2 r 28 of the Supreme Court rules.

See section 389 (1) of the Companies and Allied Matters Act -

- E CAMA - A receiver when appointed by a court, is not an agent of either party to the litigation. He is rather an officer of court when appointed over land, real property or corporate body he de jure takes over possession and his appointment operates as general information against all the parties to the litigation. See *Uwakwe V. Odogwu*
- F (1989) 5 NWLR (pt. 123) 502.

- Also a receiver as such is not entitle to bring an action in his own name as receiver, this is because no property is automatically vested in him by his appointment, but he may acquire a right to sue
- G in his own name out of his receivership but not in consequence of it alone. See *Intercontractors Nigeria Ltd. V. U. A. C Nig. Ltd. (1994) 3 NWLR (pt. 333) 481 at 490*. In the case at hand, the receiver/manager is not required to be a party to this case before this motion or the appeal could be heard. He is an officer of the court executing the
- H orders and powers vested on him by reason of that appointment. It is for these reasons that I hold that this leg of the preliminary objection is misconceived. The other legs of the objection could be taken together with the application.

Learned Senior Counsel for the Applicants Prof. S. A.

Adesanya SAN, argued the application on the 19th October, 2010, reference was made to the ruling of the Court of Appeal dated the 19th March, 2009, the appointment of Mr. Bamidele Olusegun Ajayi as the receiver/manager of the 1st Respondent, the respondents' appeal to this court against the ruling of the Court of Appeal of 19th March, 2009 and the appointment of the receiver/manager pursuant thereto and the ruling of the Federal High Court of the 1st July, 2010, discharging the appointment of receiver/manager of the 1st Respondent and submitted that the orders of the trial court, some of which were not even sought for, amounted to multiple abuse of the court process. Particularly on the alternative prayers for an order of interlocutory mandatory injunction to undo what has been done by restraining Mr. Olusegun Bamidele Ajayi, as the receiver/manager of the 1st Respondent. He also urged the grant of the order of interlocutory injunction restraining the 2nd and 3rd respondent, their servants, agents and or privies from acting as directors of the 1st respondent or from otherwise interfering with the finances and other businesses of the 1st respondent, pending the determination of the appeal at this court.

On the preliminary objection learned senior counsel submitted that Olusegun Bamidele Ajayi was appointed on the orders of the Court of Appeal and as such became an officer of the court by virtue of the provisions of section 389 (1) of the Companies and Allied Matters Act CAMA, and that he was not a party to the proceedings. Learned Senior Counsel further submitted that the taking over by force of the 1st respondent by the 2nd and 3rd respondents had not been denied by the respondents, and this act amounts to self help and a gross abuse of the court process.

Learned counsel to the Respondents, Chief Wole Olanipekun G SAN, submitted that this application is incompetent and constitutes an abuse of court process, and if the court should grant same, the main appeal would have been disposed of. It was the submission of learned senior counsel that the first prayer of the application was rather at large. On Olusegun Bamidele Ajayi, as receiver/manager, the learned counsel referred to seven different originating processes filed at the Federal High Court wherein he was not made a party. He urged this court to dismiss the application.

In his reply, Prof. Adesanya SAN, submitted that a preliminary

objection must be based on the application before the court which is not the case in the instant matter, that the objection ought to have been by way of motion on notice, not a preliminary objection, and urged us to dismiss same for lack of merit and for introducing fresh facts.

B On the preliminary objection filed by the Respondents, it is not in dispute that the order appointing the receiver/manager, Mr. Olusegun Bamidele Ajayi was made by the Court of Appeal on 19th March, 2009 and that the said order was duly carried out on the 23rd day of March, 2009. It is my considered view that by the reasons of the said appointment, he is deemed an officer of the court, and not a party to the case. See section 389 (1) of the Companies and Allied Matters Act (CAMA). A receiver when appointed by a court is not an agent of either party to the litigation. He is rather an officer of court.

C

D When appointed over land, real property or corporate body he de jure takes over possession and his appointment operates as a general injunction against all the parties to the litigation. See *Uwakwe V. Odogwu* (1989) 5 NWLR (pt 123) 562 - Per Kawu and Nnaemeka-Agu JJSC at pp. 576 paras E, F & G; and p 589 paras D - G.

E Also a receiver as such is not entitled to bring an action in his own name as receiver; this is because no property is automatically vested in him by his appointment, but he may acquire a right to sue in his own name out of his receivership but not in consequence of it alone. I refer to *Intercontractors Nigeria Ltd. V. U.A.C Nigeria Ltd.* (1994) 3 NWLR (pt. 333) 481/490. In the instant case, the receiver/manager is not required to be a party to this case before this motion or the appeal could be heard. He is an officer of the court executing the orders and powers vested on him by reason of that appointment,

F

G it is for these reasons that I hold that this leg of preliminary objection is misconceived. The other legs of the objection could be taken together with the application. In the determination of this application, and in view of the facts of this case set out above, the pertinent questions to ask are as follows: -

H (a) Can the trial court i.e. the Federal High Court, discharge the order of the Court of Appeal made on 19/3/09, without reference to that court, or made any formal application before it? And

(b) Was the forceful and violent take-over of the premises of the 1st respondent by the 2nd and 3rd respondent valid, when there is

a motion for stay of, execution pending before the Court of Appeal.

QUESTION A.

As earlier stated in this ruling, the order of the Court of Appeal made on 19/3/09, was consummated with the appointment of Mr. Olusegun Bamidele Ajayi as the receiver/manager of the 1st respondent. It is also not in dispute that following the order of 19th March, 09, which had been carried out, the respondents appealed to this court against the grant of same and followed up with an application for an injunction restraining the receiver appointed from acting in that office. It is when this application and the appeal were in existence that the respondents orally applied to have the Court of Appeal order of 19/3/09 discharged. Thus, when this order was discharged on 1/7/09, it completely rendered ineffective and nugatory the motion and the appeal pending before the Court of Appeal and the Supreme Court. This situation, with tremendous respect to the learned senior counsel to the respondents, is extremely embarrassing to our judicial system and the order of seniority of the court of record in Nigeria. In the first place, the trial court is bound by the orders of the Court of Appeal and I therefore wonder where the trial court conjured its jurisdiction to discharge the higher court's order, not being a court of co-ordinate jurisdiction without any reference to the higher court. This is to dis-organise the constitutionally well arranged seniority of courts - hierarchy of courts and staire decises - brushed aside?.

(Underlines mine for clarity)

My Lords, a trial court may not be satisfied with the orders or findings of the Court of Appeal, *there is nothing it can do about it, its constitutional and judicial role is either to obey or enforce that order, any act or process challenging the said order would have to be referred, to the Court of Appeal, any act to the contrary, would amount to a breach of the constitutional provisions of the 1999 constitution of the Federal Republic of Nigeria. The same applies to the Court of Appeal where the Supreme Court's order is in question. By granting the order of discharge not made by it, but by a higher court, the trial court has in effect knocked off the substratum or lis of the appeal against the grant of that order now pending before this court.*

(Italics mine)

The learned respondents' counsel forcefully argued that to grant this application would amount to disposal of the pending ap-

peal before this court. Even if that postulation is correct, would this court be placed in a position where it would be looking helplessly where a judicial order as provided in the constitution is being recklessly abused or breached? No, this court would not fold its arms and watch helplessly on the face of this gross abuse of court process by either party taking undue advantage of the other. The appropriate thing to do is to fall back on the order of mandatory injunction which is restorable in nature to undo what has been wrongfully or illegally done. It is usually used to set aside completely acts and restore the parties to the status-quo ante bellum. In the case of Daniel V. Ferguson (1891) 5 CH. D. 27 at 30 the principles guiding the grant of mandatory injunction have been spelt out clearly as follows:-

“1. The state of affairs which is complained of, must be such that would have entitled the plaintiff to obtain prohibitory injunction.

2. The state of affairs which might have been prohibited from coming about must have arisen at the time when the material order is made.

3. It must not have been impossible for the defendant to restore to the earlier position.

4. It must appear that damages and other legal remedies are not sufficient to put the plaintiff in a favourable position as if he had received equitable relief in spent.

5. It must appear in all the circumstances and particularly in view of equitable considerations such as laches, hardship, impossibility of performance or compliance and inconveniences as between the parties, that the most just course is that of mandatory order be granted.

6. The plaintiffs case must be unusually strong and clear.

7. Where it can be shown that the defendant attempted to steal a match on the plaintiff by rushing to complete the act, mandatory injunction will lie to restore the plaintiff to the position he would have been”. See also ALLPORT V. SECURITIES CORPORATION (1895) 64 L. J CH. 491.

Though the above authorities are of persuasive nature, I agree with the principles stated therein. Where the restorative mandatory injunction is invoked to deal with the defendant who attempts to steal a match on the plaintiffs case, the court is concerned with the merit of the plaintiffs case. The court is concerned with the invocation

of its disciplinary jurisdiction to prevent its jurisdiction to try the case before it, from being frustrated or stultified. With due respect, the defendants did not only try to steal the match, but also decided to kill the 1st respondent by the various acts of financial mis-management they have inflicted on it, at the end of which the plaintiff would have lost all other investments in the 1st respondent. The justice of this case therefore demands that this order be granted. B

It is not in dispute that the applicants have appealed against the ruling of the trial court dated 1/7/09 and also filed an application for stay of execution at the lower court against the said ruling. The respondents did not deny having knowledge of the said pending application and never the less proceeded without giving the lower court (*sic, the opportunity of*) first determining the said pending motion, proceeded to violently take over the premises of the 1st respondents, sent off all the workers and mis-managed its finances, as stated in the applicants affidavit which were not denied at all. This is not only in law an act of self help, but a gross disrespect to the process pending before the court. This court has in several occasions condemned this type of action. In the Military Governor of Lagos State Vs. Ojukwu NSCC 1986 (pt. 1) vol. 17 p. 304 atEso JSC stated the legal position as follows:- C D E

“in the area where rule of law operates, the rule of self help by force is abandoned. Nigeria being one of the countries in the world, even in the third world which profess loudly to follow the rule of law, gives no room for the rule of self help by force to operate. Once a dispute has arisen between person and the government or authority and the dispute has been brought before the court, thereby involving the judicial powers of the state, it is the duty of the government to allow the law to take its course or allow the legal and judicial process to run its full course. The action of the Lagos Statecan have no other interpretation than the show of an intention to preempt the decision of the court. The courts expect the utmost respect of the law from the government itself which rules by the law.....” F G

Where an act of this kind is committed by a party to the case, the court in order to protect the process before it and its integrity will invoke its disciplinary powers to set aside that acts taken by such party and restore the parties to status quo ante. When I read the lead ruling of my learned brother, Tabai JSC and the concurrent rulings of H

my learned Lords, Mukhtar and Tanko Muhammad JJSC, I regretted not being able, with all sense of responsibility, to follow their conclusions. The dissenting ruling of my learned brother, Onnoghen JSC is more acceptable to me in the circumstances of this matter. The preliminary objection filed by the Respondents in this application is misconceived same is therefore dismissed.

That being the case, I have no slightest hesitation in setting aside the purported takeover of the management of the 1st respondent by the 2nd and 3rd respondents in this case. It is for the reasons stated above that I respectfully disagree with the lead ruling of my learned brother, Tabai JSC. In the circumstances, I find merit in this application and I hereby grant the alternative prayers in the following terms:-

1. It is hereby ordered that Mr. Olusegun Bamidele Ajayi the receiver/manager appointed for the 1st respondent on the 23rd day of March 2009, following the orders of the Court of Appeal of 19th March, 2009, be and is hereby restored to his office as receiver/manager of the 1st Respondent pending the determination of the appeal, pending before the Supreme Court.

2. It is further ordered that the 2nd and 3rd Respondents, their agents, Privies or any person howsoever be and are hereby restrained from acting as directors of the 1st Respondent or from interfering with the finances, securities, and other businesses of the 1st respondent pending the determination of the appeal, pending in this court. Both parties are advised to pursue all the appeals pending in all the Supreme Court. Thirty thousand naira (N30,000) costs are awarded in favour of the appellants/applicants in this application.

Application is granted.

H