

**SUPREME COURT OF NIGERIA**

6TH MAY, 2011. SC. 150/2010

**CORAM:- D. MUSDAPHER, M. MOHAMMED, C. M.  
CHUKWUMA-ENEH, M. S. MUNTAKA-COOMASSIE,  
BODE RHODES-VIVOUR, JJSC**

THE SHELL PETROLEUM  
DEVELOPMENT COMPANY ..... APPELLANT/APPLICANT  
OF NIGERIA LIMITED

AND

1. OJIOWHOR MONDAY ..... RESPONDENTS  
AMADI & 12 ORS

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JUDGMENTS - Appeals - Challenge - Procedure - By s. 233 of the Constitution - An aggrieved party cannot challenge a decision by filing a preliminary objection - He must come by filing an appeal (H1)

SUPREME COURT - Judgments - Stay of execution - Powers - Supreme Court has the discretion to grant a stay of execution - And such discretion must be exercised judicially and judiciously (H2)

JUDGMENTS - Declaratory judgment - Nature of - It essentially creates a res judicata and can be relied upon as an estoppel - As such it cannot be stayed (H3)

JUDGMENTS - Declaratory judgment - Further orders made - Stay of execution - Further orders may be subject to a stay - Onus is on the judge to examine the judgment - And decide if it contains further orders that cannot be stayed (H4)

JUDGMENTS - Stay of execution - Basis for grant - It would be granted - If applicant is able to show special and exceptional reasons - Applicant herein has provided such reasons (H5)

**FACTS**

Plaintiffs/claimants/respondents and defendant/ appellant/ap-  
plicant executed a deed of lease sometime in 1958 over a large acres

of land. The lease is made to last for a period of 99 years commencing from 9th February 1957. Respondents sought for forfeiture of the lease agreement. This action of respondent was based on the ground that appellant has breached the terms of the lease regarding payment of rent and obligation not to sublet without the consent of the lessor.

Consequently, respondents instituted this matter at the High Court of Rivers State, Port-Harcourt claiming inter alia, a declaration of title to the land in issue. The court delivered judgment in their favour. Dissatisfied, appellant appealed to Court of Appeal, Port-Harcourt Division. The court dismissed the appeal and affirmed the judgment of the High Court. Aggrieved further, appellant has appealed to Supreme Court. Appellant has also made an application for stay of execution pending the determination of the substantive appeal.

***HELD*** (Unanimously allowing the application per ***RHODES-VI-VOUR JSC***)

***Procedures to challenge judgment on appeal***

1. Section 27 (2) (a) and (b) and subsections (3) and (4) of the Supreme Court Act states that:

(2) the period specified for the giving of notice of appeal or notice of application for leave to appeal are:

(a) In an appeal in a civil case, fourteen days in an appeal against an interlocutory decision and three months in an appeal against a final decision.

(b) In an appeal in a criminal case, thirty days from the date of the decision appealed against.

(3) where an application for leave to appeal is made in the first instance to the court below, a person making such application shall, in addition to the period specified in subsection (2) of this section be allowed a further period of fifteen days from the date of the hearing of the application by the court below, to make an application to the Supreme Court.

(4) the Supreme Court may extend the period prescribed in subsection (2) of this section.

My lords, the clear interpretation of the above is that where the decision of the Court of Appeal is final the Supreme Court Act

vests in the Court of Appeal, jurisdiction to grant a litigant leave to appeal within 3 months of the decision. In this case the final decision of the Court of Appeal was delivered on 15/4/10. The Court of Appeal granted leave to appeal on 8/7/10. The 2nd notice of appeal was thus properly filed.

It would amount to an abuse of process if court improperly uses the judicial process to the annoyance of the adverse party, and the administration of justice.

On 8/7/10, the Court of Appeal granted the Applicant leave to appeal to this court on grounds other than law. Rather than appeal, learned counsel for the 1st, 2nd and 3rd sets of Claimants/Respondents filed the preliminary objection.

By the clear provisions of Section 233 of the Constitution a party dissatisfied with a decision of the Court of Appeal cannot challenge the decision by filing and arguing preliminary objection. He can only challenge the decision by an appeal.

Leave granted on 8/7/10 by the Court of Appeal is inviolate and is still subsisting in the absence of an appeal. The preliminary objection on this issue is an abuse of process and is hereby dismissed. Leave is hereby granted the Appellant/Applicant to file three additional grounds of appeal. Time is extended by 60 days from today to enable learned counsel for the Appellant/Applicant file that Appellant's brief of argument and amended notice of appeal. (p. 1440 G)

### ***SUPREME COURT - Power to grant stay of execution***

2. This court has inherent powers to stay the execution of a judgment and the exercise of that power is entirely at the discretion of this court. As with all discretionary powers it must be exercised judicially and judiciously. That is to say with correct and convincing reasons. Exercise of discretion calls for the judge considering the rules governing the issue and not acting arbitrarily or as he likes. (p. 1444 D)

### ***JUDGMENTS - Declaratory judgment - Nature of***

3. As quite rightly pointed out by Mr. L.E. Nwosu, SAN, twelve of the fourteen orders granted by the courts below were declaratory. Now, declaratory judgments are final orders which declare the rights of the parties. Such judgments cannot be stayed.

Declaratory judgments create a res judicata and can be relied upon as an estoppel. (p. 1444 F)

***JUDGMENTS - Declaratory judgment - Further orders made***

4. Further orders made along with a declaratory judgment, may be subject to a stay of execution. It is wrong to refuse to consider an application for stay or refuse to grant it simply because the reliefs sought in the trial court and most of the reliefs granted were declaratory. It is the duty of the judge considering an application for stay of execution to examine the judgment and see if indeed it was a declaratory judgment with orders that cannot be stayed. The issue, therefore is what does the Appellant/Applicant want stayed.

The Court of Appeal affirmed the judgment of the high court and among its orders, ordered:

“ a perpetual injunction is hereby granted restraining the Defendant by themselves, their servants, privies, agents, or howsoever from further entry into the said Plaintiffs’ land or from denying the title of the Plaintiffs as landlords over the said parcel of land. ”

The above order is not declaratory and that is the order the Appellant/Applicant wants stayed. An appeal does not operate as a stay and a stay of execution is not granted against a declaratory judgment or a judgment on admission. The former merely declares the rights of the parties, or the legal position of the parties in the action; while the latter is given after a party admits a claim. In both cases there is nothing to stay. Executory judgments on the other hand are stayed. (p. 1444 H)

***JUDGMENTS - Stay of execution - Basis for grant***

5. In considering an application for stay of execution or injunction the grounds of appeal should not be taken in isolation, rather it is the effect of refusal of the application on the Appellant if he subsequently wins the appeal that is of utmost importance. A stay of execution stops temporarily the beneficiary of the judgment from enjoying the fruits of the judgment while the appeal is being heard. It is usually granted before the hearing of the appeal and stays in force right through the hearing of the appeal. The aim being to protect the res from destruction, thereby avoiding a situation where the court hearing the appeal is presented with a fait accompli. A stay of execution

would be granted if the Applicant is able to show special and exceptional reasons.

In my view if a stay of execution is not granted the beneficiaries of the judgment would go into the Shell Residential Area (the Res) driven by all kinds of desires, the end is best imagined. The Res may be destroyed before the appeal is determined. A return to the status quo ante bellum in the event the Appellant wins would be impossible, and that would be bad for the streams of justice which must be kept pure at all times. This court would then be presented with a *fait accompli* before the judgment of this court is delivered. On no account should this court or an appeal court be presented with a *fait accompli*, but that would be the case.

After examining affidavit evidence the Appellant/Applicant has been able to show its huge investments on the Res known as the Shell Residential Area. Their staff resides there now. If a stay of execution is not granted its activities would be crippled. Everybody on the land would be asked to leave. This to my mind amounts to special, exceptional and strong reasons why this application should be granted. Considering equity and fairness, the rights of the claimants to the land ought to be put on hold pending the hearing and determination of the appeal. The balance of convenience is clearly on the side of the Appellant/Applicant.

Accordingly a stay of execution is hereby granted pending the determination of this appeal. (p. 1445 E)

## **NOTABLE POINTS OF INTEREST** **RHODES-VIVOUR JSC**

### *1. When to file a preliminary objection*

Preliminary objections are filed against the hearing of an appeal and so once it succeeds, the appeal no longer exists. All too often we see preliminary objections filed against one or more grounds of appeal. Once there are other grounds that can sustain the appeal, a preliminary objection should not be filed. Instead a notice of motion seeking to strike out the defective grounds of appeal should be filed. In this case a preliminary objection was properly filed because if it succeeds the appeal comes to an end. (p. 1438 B)

**MUSDAPHER JSC**

*2. Difference between filing and entering of an appeal*

It should be noted that the filing of an appeal is different from entry of an appeal. The general rule is that after an appeal has been entered; all other applications can only be made in the appellate court, even though applications may be filed in the court below for proper transmission to the appellate court. But the Court of Appeal will cease to have jurisdiction to hear any application when the records of appeal is received in the Supreme Court, which then has the sole jurisdiction to deal with all matters interlocutory or otherwise. An appeal is said to be entered when all the records of appeal is transmitted to the Supreme Court and the matter is entered in the cause list.  
(p. 1448 B)

**REPRESENTATION**

Chief R. Akinjide, SAN, (with him, K. Obisike, and O. Obi), for the 2nd Defendant/Applicant.  
L. E. Nwosu, SAN., (with him, I. A. Adedipe, SAN, Solomon U. Akuma SAN, C. A. C. Oburum, G W. Iwezor, E. Amadi, A. Ayogu, E. I. Amadi, and S. Ojile), for the 1st and 2nd set of Respondents/ Applicants.  
F. A. Osho, SAN, (with him, A. R. Abdulrahman), for the 3rd set of Respondents/Applicants.  
J. T. O. Ugboduma, for the 3rd set of Defendants/Respondents

**CASES REFERRED TO**

Okafor v. Nnaife (1987) 4 NWLR (Pt. 64) 129  
Ekpona v. Okon (2002) 5 NWLR (Pt.760) 445  
NEPA v. Ango (2001) 15 NWLR (Pt. 737) 627  
Coke v. Adeyemo (1965) ALL NLR 125 at 128  
Adigun v. Ayinde (1993) 8 NWLR (Pt. 313) 534  
Akinduro v. Iwakun (1994) 3 NWLR (Pt 330) 106  
Amadi v. NNPC (2006) 6 S.C.(Pt .I) 66; (2000) 10NWLR (Pt 674)  
Okoya v. Santilli (1990)3 S.C. (Pt. II) 1; (1990) 2 NWLR (Pt. 131)172  
Ajomale v. Yaduat (No. 2) (1991) 5 NWLR (Pt. 191) 266  
Agwasim v Ojichie (2004) 10 NWLR (Pt. 882) 613  
Tukur v. Govt. of Gongola State (1989) 4 NWLR (Pt 117) 592  
Olorunyolemi v. Akhabge (2010) 8 NWLR (Pt. 1195) 48

Commerce Bank Plc, v. Ekperi (2007) 3 NWLR (Pt. 1022) 493  
Auto Import and Export v. Adebayo (2002) 12 S.C. (Pt. I) 158;  
(2003) FWLR (Pt 140) 1686

***STATUTES & RULES REFERRED TO***

Constitution of Federal Republic of Nigeria 1999, s. 233  
Supreme Court Act, s. 27 (2) (a) (b), (3), (4)  
Supreme Court Rules, O. 2 r. 9, O. 8 r. 10 (5), O. 7 r. 2

***LEAD JUDGMENT BY RHODES-VIVOUR JSC***

Chief Richard Akinjide, SAN., learned counsel for the Appellant/Applicant filed two applications in this court. They are:

1. Motion on notice filed on 3/9/10.
2. Motion on notice filed on 27/5/10.

Learned counsel for the 1st and 2nd sets of Respondents, Mr. L.E. Nwosu, SAN., filed a preliminary objection to both applications.

Learned counsel for the 3rd set of Claimants/Respondents, Mr.

F. A. Osho, SAN., and learned counsel for the 3rd set of Defendants/Respondents, Mr. J.T.O. Ugboduma both associated themselves with the submissions of Mr. L.E. Nwosu, SAN., on the preliminary objection. I have examined the processes filed by both sides and I am of the view that since the applications are interwoven especially on facts, for better understanding and clarity, one ruling would suffice. I shall briefly set out the facts before I proceed to examine the issues in the preliminary objection and the applications.

In 1958, the Claimants and the Appellant/Applicant executed a deed of lease over a large area of land. The lease was for 99 years commencing on 9/2/57. The claimants were seeking forfeiture of the lease on the grounds that:

(a) There was breach of the terms of the lease regarding the payment of rent and obligation not to sublet without the consent of the lessor,

(b) There was allegation of challenge to title. The high court found in favour of the Claimants and declared as follows:

1. A declaration to the effect that at all material times the Plaintiff as customary owners are the landlords of the 2nd Defendants (i.e. the Appellant/Applicant) in respect of that piece or parcel of land lying and situate at Okoroshe in Ohio/ Akpor Local Government Area

of Rivers State comprising 153.5 acres as shown on Survey Plan No. 13AN/112/57 and contained in a deed of yearly tenancy made on 3/3/58 between Chief Elisha Njo Nwanwa Amos Amadi and the 2nd Defendants described in the said deed as Shell BP Petroleum Development Company of Nigeria Limited which deed is registered as No.62  
B at Page 62 in Volume 18 of the register at the lands registry in the office at Enugu now kept at the office in Port Harcourt.

2. A declaration that the acts of the 2nd Defendant in subletting part of the said land to third parties without the consent of the Plaintiffs and also for not paying its rent as agreed under the deed of  
C tenancy constituted fundamental breach of the 2nd Defendant's covenants contained in the said deed of tenancy and the 2nd Defendant has thereby forfeited its rights as a tenant thereof.

3. A declaration that the said deed of tenancy has been deter-  
D mined by reason of the 2nd Defendant's act of obtaining a certificate of occupancy in 1998 which aborted the tenancy.

4. A declaration that upon the coming into effect of the Land Use Act, 1978, the Plaintiffs were deemed to be granted the right of occupancy over the land covered by the deed of tenancy and there-  
E fore entitled to be granted the statutory right of occupancy in respect of the said land.

5. A declaration that the clandestine act of the 2nd Defendant in obtaining a certificate of occupancy covering the entire parcel of land for which they had not paid any consideration to the Plaintiff  
F while purporting to be the owner of the land constituted a challenge to the title of the Plaintiffs as landlords of the 2nd Defendant and for which challenge the 2nd Defendant has forfeited its right as a tenant in respect of the land.

G 6. A declaration that the certificate of occupancy dated 15/3/99 and registered as No. 24 at Page 24 in Volume 258 of the lands registry in Port Harcourt over the said parcel of land and surreptitiously obtained by the 2nd Defendant is unconstitutional, null and void and of no effect whatsoever.

H 7. A declaration that the said certificate of occupancy in so far as it was granted to the 2nd Defendant without a prior revocation of the deemed right of statutory right of occupancy vested in the Plaintiffs, the same is null and void and is of no effect whatsoever.

8. An order setting aside the certificate of occupancy is hereby

granted. “

9. An order of forfeiture is hereby granted against the 2nd Defendant in respect of the land subject matter of this suit as a result of various fundamental breaches and challenges of the Plaintiffs’ right as landlords of the said land.

10. An order of perpetual injunction is hereby granted restraining the Defendants by themselves, their servants, privies, agents or howsoever from further entry into the said Plaintiffs’ land or from further denying the title of the Plaintiffs as landlords over the said parcel of land.

11. In The Alternative to the last two reliefs above, if the 2nd Defendant desires to stay on the land it should pay to the Plaintiffs the sum of N40,000,000 (forty million naira) per acre being a fair market value of the land in full and final settlement of the Plaintiffs’ right over the unexpired term of the lease that has been determined.

In confirming the judgment of the trial court the Court Appeal said:

In summary this appeal substantially lacks merit and it is hereby dismissed. I allow the appeal only in respect of Appellant’s Issue 8. I hereby affirm all the findings and orders made by the learned trial judge in the Suit No. PHC/1198/2005 except the order for alternative relief which I hereby set aside. Costs of N60,000.00 are hereby awarded to the 1st and 2nd sets of Respondents and N30,000.00 to the 3rd set of Respondents.

The above gave rise to the applications filed by Chief F. Akinjide, SAN. On the 8th day of February, 2011, learned counsel for the Appellant/Applicant moved both applications. That is motions filed on 27/5/10 and 3/9/10. He urged us to grant both applications. Reference was made to the affidavits in support and his written address which he adopted. Finally, he urged us to dismiss all preliminary objections. Mr. L.E. Nwosu, SAN, relied on his preliminary objection filed on 22/11/10, his affidavits counter-affidavits and written address. He observed that both courts below found the Appellant/Applicant to be a trespasser and so it is not entitled to stay of execution. He urged us to refuse both applications.

Learned counsel for the 3rd Claimants/Respondents, Mr. F.A. Osho, SAN., associated himself with Mr. L.E. Nwosu, SAN’s submis-

sions on his preliminary objection filed on 22/11/10 and 35 reply argument filed on 20/10/10. He urged us to dismiss both applications.

Learned counsel for the 3rd set of Defendants/Respondents associated himself with the submissions of Mr. L.E. Nwosu, SAN., on the preliminary objection.

Order 2 Rule 9 of the Supreme Court Rules provide for the filing of preliminary objections.

Preliminary objections are filed against the hearing of an appeal and so once it succeeds the appeal no longer exists. All too often we see preliminary objections filed against one or more grounds of appeal. Once there are other grounds that can sustain the appeal, a preliminary objection should not be filed. Instead a notice of motion seeking to strike out the defective grounds of appeal should be filed. In this case a preliminary objection was properly filed because if it succeeds the appeal comes to an end. See:

NEPA v. Ango (2001) 15 NWLR (Pt. 737) 627.

The Appellants/Applicants' application filed on the 3rd of September, 2010 seeks the following orders from this court:-

1. Granting leave to the 2nd Defendant/Appellant/ Applicant to file and argue three (3) additional grounds of appeal herein attached as Exhibit SPDC 1 ;

2. Deeming as properly filed and served and filed copy of the additional grounds of appeal filed on the 3rd of September, 2010.

3. Extending the time within which the 2nd Defendant/ Appellant/ Applicant may file its brief of argument in this appeal.

An 18 paragraph affidavit was filed in support and an Exhibit, SPD 1 attached.

Mr. L.E. Nwosu, SAN., filed a 16 paragraph counter-affidavit, Learned counsel for the 3rd Claimant/Respondent and for the 3rd set of Defendants/Respondents did not file counter-affidavits Learned counsel for the 1st and 2nd sets of Respondents, Mr. L.E. Nwosu, SAN., and Mr. F.A. Osho, SAN., learned counsel for the 3rd set of Respondents filed preliminary objections.

The notice of preliminary objection filed by Mr. L.E. Nwosu, SAN was brought under Order 2 Rules 9 (1), 28 (1) and 29 (1) and (2) Order 8 Rules 2 (7), 11 and 12 (4) Rules of the Supreme Court

I shall now state the facts relevant to both applications. The

judgment of the Court of Appeal was delivered on the 15th of April, 2010 and on the same day the Appellant/Applicant filed notice of appeal containing two grounds of appeal of law. The appeal was entered in the Supreme Court on the 13th of May 2010. This process was filed by counsel for the Appellant Applicant in the Court of Appeal, Chief Okpoko, SAN., Chief F Akinjide, SAN., was briefed and he filed notice of appeal No. 2 dated 25/6/10. He filed a motion in the Court of Appeal seeking leave to appeal on grounds other than law. The Court of Appeal heard and granted the application within 3 months of the judgment delivered on 15/4/10. It was granted on 8/7/10. By this application filed on 3/9/10, learned counsel for the Appellant/Applicant seek in the main to add few more grounds of appeal to the 22 ground already filed. B  
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In his written address, learned counsel for the 1st and 2nd sets Respondents, Mr. L. E. Nwosu, SAN., observed that after the notice of appeal containing two grounds of appeal was filed the Court of Appeal and entered in the Supreme Court on 13/ 10, the Court of Appeal was wrong to grant the Appellant/Application leave thereafter to file twenty grounds of appeal. Relying on Order 8 Rule 11 of the Supreme Court Rules he submitted that where a 'notice of appeal before the Court of Appeal is incompetent an amendment of the notice of appeal at the Supreme Court to file additional grounds of appeal will not cure the defect. Reliance was placed on Co-operative and Commerce Bank Plc, v. Ekperi (2007) 1 S.C. (Pt. II) 130; (2007) 3 NWLR (Pt. 1022) 493. D  
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He urged us to dismiss the application. Both Mr. FA. Osho, SAN., and Mr. J. T. O. Ugbooduma associated themselves with the submissions of Mr. L. E. Nwosu, SAN.

Learned counsel for the Appellant/Applicant conceded that the 1st notice of appeal was entered in the Supreme Court on 13/5/ 10, but observed that the record transmitted to the Supreme Court was incomplete as no exhibits were forwarded to the Supreme Court. He further observed that in the absence of original documents admitted as exhibits, it cannot be said that the appeal was entered on 13/5/10. Reliance was placed on Order 8 Rule 10 (5) of the Supreme Court Rules. G  
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Olorunyolemi v. Akhagbe (2010) 2-3 S.C. (Pt.II) 11; (2010) 8 NWLR (Pt. 1195) 48.

In further argument he submitted that even if the appeal was entered in the Supreme Court on 13/5/10, the Court of Appeal still has jurisdiction to grant leave to appeal if leave was granted within 3 months. Reference was made to Section 27 of the Supreme Court Act.

B Finally learned counsel observed that after the Court of Appeal granted leave to the Appellant to file 2nd notice of appeal, there was no appeal and so the 1st, 2nd and 3rd sets of Claimants/ Respondents cannot challenge that decision by a preliminary objection. He urged us to dismiss the preliminary objection.

C Order 8 Rule 10 (5) of the Supreme Court Rules calls for interpretation. It reads:

*"All original documents delivered to the court below under this rule shall remain in the custody of the court below until the record of appeal has been prepared and shall then be forwarded with the record to the Registrar and shall remain in the custody of the court until the determination of the appeal."*

*In Olorunyolemi v. Akhabge (2010)2-3 S.C. (Pt II) 11; (2010) 8 NWLR (Pt. 1195) 48.*

E The record of appeal was transmitted without the exhibits. Onnoghen, JSC., held that the record was incomplete. In a letter reference CA/PH/51//2008/T/1 written by the Deputy Chief Registrar of the Court of Appeal to the Chief Registrar Supreme Court, in Item 2 it states that no exhibit was forwarded.

F My lords the record of appeal transmitted to the Court of Appeal on 13/5/10 was incomplete due to the fact that the exhibits were not transmitted along with the record. Accordingly in the absence of documents admitted as exhibits an appeal was not entered on 13/5/10. The appeal was entered on 24/8/10, when the supplementary record of appeal was received in the Supreme Court That document contained all documents, processes that were left out in the record of appeal transmitted to the Supreme Court on 13/5/10.

G **Section 27 (2) (a) and (b) and subsections (3) and (4) of the Supreme Court Act states that:**

**(2) the period specified for the giving of notice of appeal or notice of application for leave to appeal are:**

**(a) In an appeal in a civil case, fourteen days in an appeal against an interlocutory decision and three months in an**

**appeal against a final decision.**

**(b) In an appeal in a criminal case, thirty days from the date of the decision appealed against.**

**(3) where an application for leave to appeal is made in the first instance to the court below, a person making such application shall, in addition to the period specified in subsection (2) of this section be allowed a further period of fifteen days from the date of the hearing of the application by the court below, to make an application to the Supreme Court.**

**(4) the Supreme Court may extend the period prescribed in subsection (2) of this section.**

**My lords, the clear interpretation of the above is that where the decision of the Court of Appeal is final the Supreme Court Act vests in the Court of Appeal jurisdiction to grant a litigant leave to appeal within 3 months of the decision. In this case the final decision of the Court of Appeal was delivered on 15/4/10. The Court of Appeal granted leave to appeal on 8/7/10. The 2nd notice of appeal was thus properly filed.**

**It would amount to an abuse of process if court improperly uses the judicial process to the annoyance of the adverse party, and the administration of justice.**

**Okorodudu v. Okoromadu (1977) 3 S.C. 21; (1977) 3 S.C. (Reprint) 13.**

**Ekpona v. Okon (2002) 5 NWLR (Pt.760) 445.**

**Agwasim v Ojichie (2004) 4 S.C. Pt. 11; 1 60; (2004) 10 NWLR (Pt. 882) 613.**

**On 8/7/10, the Court of Appeal granted the Applicant leave to appeal to this court on grounds other than law. Rather than appeal, learned counsel for the 1st, 2nd and 3rd sets of Claimants/Respondents filed the preliminary objection.**

**By the clear provisions of Section 233 of the Constitution a party dissatisfied with a decision of the Court of Appeal cannot challenge the decision by filing and arguing preliminary objection. He can only challenge the decision by an appeal.**

**Leave granted on 8/7/10 by the Court of Appeal is in-violate and is still subsisting in the absence of an appeal. The preliminary objection on this issue is an abuse of process and**

**is hereby dismissed. Leave is hereby granted the Appellant/Applicant to file three additional grounds of appeal. Time is extended by 60 days from today to enable learned counsel for the Appellant/Applicant file that Appellant's brief of argument and amended notice of appeal.**

B In the light of the fact that an appeal is properly in place I shall now consider the Appellant's/Applicant's second, and final application, to which there are similar preliminary objections filed by learned counsel for the 1st, 2nd and 3rd sets of Claimants/ Respondents. The application reads:

C 1. An Order staying execution and/or 5 enforcement of the judgment of the High Court of Rivers State sitting in Port Harcourt dated 25/5/07 delivered by A. Enebeli, J., in Suit No. PHC/1198/2005 (Ojiowhor Monday Amadi and Ors. v. The Shell Petroleum Development Company of Nigeria Ltd. & Ors.) as confirmed by and/or the judgment of the Court of Appeal, Port Harcourt dated 15/ 4/ 10 in Appeal No. CA/PH/51 /08 pending the determination by the Supreme Court of Nigeria of the appeal filed by the Appellant against the judgment of the Court of Appeal aforesaid. Further or in the alternative:

F 2. An order or injunction for the preservation of 20 the subject matter and/or preservation of the status quo. By the parties pending the determination of the Applicant's appeal by the Supreme Court against the judgment of the Court of Appeal Port Harcourt Division dated 25 15/4/10 in Appeal No. CA/PH/51/08 (The Shell Petroleum Development Company of Nigeria Ltd. v. Ojiowhor Monday Amadi and Ors.).

G Learned counsel for the 3rd set of Respondents and the 3rd set of Defendant/Respondents associated themselves with the submission of Mr. L.E. Nwosu, SAN.

H I have read the affidavits filed in support and the counter - affidavits. I also considered the written submissions on this issue which is for stay of execution, the facts then and now is that after the Appellant/Applicant was granted a 99 years lease by 1 Claimants in 1958, it built on the land the Shell Residential Area Paragraph 20 of the further affidavit of Omonigho Oziegbe shows the investments made by the Appellant/Applicant on the land. It reads:

(a) There are about two hundred and forty-three (243) fully

and tastefully furnished four (4) and three (3) Bedrooms Bungalow Housing Units within the Shell Residential Area.

(b) There are also fully detached Guest Houses comprising of fully and tastefully furnished 120 rooms within the Shell Residential Area.

(c) There are a couple of management offices and conference offices within the Shell Residential Area. B

(d) There is a specially maintained full size football pitch within the Shell Residential Area.

(e) A fully equipped children clinic managed by expatriate and Nigeria medical personnel. C

(f) A dedicated power generating station run on gas turbines.

(g) Mega water treatment plant with highly advanced technologies.

(h) Various Olympic size lawn tennis courts. D

(i) Fire station with state of the art equipment.

(i) High Power Data Communication Station for satellite, internet and telecommunication.

(k) Police Post.

(i) Three (3) mega supermarkets, (m) Olympic size swimming pool. (n) A specially maintained full size Golf Course. And in Paragraph 21 of the same affidavit it is deposed that: E

“The Shell Residential Area is serviced and maintained by over 1500 (one thousand five hundred) employees and contract staff (of which 90% are Nigerians) who will immediately be thrown out of employment once this application is refused. F

Learned counsel for the 1st and 2nd Claimants/ Respondents argued in his preliminary objection that the application for stay of execution is incompetent. He observed that twelve of the fourteen G reliefs claimed and awarded at the trial court and affirmed by the Court of Appeal are declaratory reliefs, contending that a declaratory relief cannot be subject of an application for stay of execution. He further observed that the motion for stay of execution is not supported by any appeal on recondite points of law such that will become prima facie arguable. Finally, learned counsel observed that by concurrent decision of the two courts below, the Appellant/Applicant is adjudged to have forfeited its tenancy on the subject property contending that they have become trespassers and so cannot seek an H

equitable relief by way of stay of execution to perpetrate the trespass. He urged us to dismiss the application.

Learned counsel for the Appellant/Applicant observed that a stay of execution would be granted if the Applicant is able to show special circumstances. He observed that affidavit evidence shows that some irreversible circumstances would arise and substantial injustice would be done to the Appellant/Respondent if this application is refused and it eventually succeeds on appeal. He further observed that there are in fact recondite points of law. Reference was made to *Ajomale v. Yaduat* (No. 2) (1991) 5 S.C. 200; (1991) 5 NWLR (Pt. 191) 266. Finally, learned c observed that the balance of convenience is in favour of the Appellant/Applicant in that the 1st and 2nd sets of Respondents would loose nothing if the application is refused, but the Appellant/Applicant will lose everything most of which cannot be compensated in costs. He urged us to grant the application. The Appellant/Applicant was unable to argue an application for stay of execution in the Court of Appeal before the appeal was entered in this court. That explains this application.

***This court has inherent powers to stay the execution of a judgment and the exercise of that power is entirely at the discretion of this court. As with all discretionary powers it must be exercised judicially and judiciously. That is to say with correct and convincing reasons. Exercise of discretion calls for the judge considering the rules governing the issue and not acting arbitrarily or as he likes. See Okafor v.Nnaiife (1987) 4 NWLR (Pt. 64) 129, Balogun v. Balogun (1969) 1 ANLR 349, Akinduro v. Iwakun (1994) 3 NWLR (Pt 330) 106.***

***As quite rightly pointed out by Mr. L.E. Nwosu, SAN., twelve of the fourteen orders granted by the courts below were declaratory. Now, declaratory judgments are final orders which declare the rights of the parties. Such judgments cannot be stayed. See (Tukur v. Govt. of Gongola State (1989) 9 S.C. (1989) 4 NWLR (Pt 117) 592, Okoya v. Santilli (1990)3 S.C. (Pt. II) 1; (1990) 2 NWLR (Pt. 131)172.)***

***Declaratory judgments create a res iudicata and can be relied upon as an estoppel. Further orders made along with a declaratory judgment, may be subject to a stay of execution. It is wrong to refuse to consider an application for stay or***

refuse to grant it simply because the reliefs sought in the trial court and most of the reliefs granted were declaratory. It is the duty of the judge considering an application for stay of execution to examine the judgment and see if indeed it was a declaratory judgment with orders that cannot be stayed. The issue, therefore is what does the Appellant/Applicant want stayed. <sup>B</sup>

The Court of Appeal affirmed the judgment of the high court and among its orders, ordered:

*“a perpetual injunction is hereby granted restraining the Defendant by themselves, their servants, privies, agents, or howsoever from further entry into the said Plaintiffs’ land or from denying the title of the Plaintiffs as landlords over the said parcel of land.”* <sup>C</sup>

The above order is not declaratory and that is the order the Appellant/Applicant wants stayed. An appeal does not operate as a stay and a stay of execution is not granted against a declaratory judgment or a judgment on admission. The former merely declares the rights of the parties, or the legal position of the parties in the action; while the latter is given after a party admits a claim. In both cases there is nothing to stay. Executory judgments on the other hand are stayed. <sup>E</sup> In considering an application for stay of execution or injunction the grounds of appeal should not be taken in isolation, rather it is the effect of refusal of the application on the Appellant if he subsequently wins the appeal that is of utmost importance. <sup>F</sup> A stay of execution stops temporarily the beneficiary of the judgment from enjoying the fruits of the judgment while the appeal is being heard. It is usually granted before the hearing of the appeal and stays in force right through the hearing of the appeal. <sup>G</sup> The aim being to protect the res from destruction, thereby avoiding a situation where the court hearing the appeal is presented with a fait accompli. A stay of execution would be granted if the Applicant is able to show special and exceptional reasons. <sup>H</sup>

In my view if a stay of execution is not granted the beneficiaries of the judgment would go into the Shell Residential Area (the Res) driven by all kinds of desires, the end is best

***imagined. The Res may be destroyed before the appeal is determined. A return to the status quo ante bellum in the event the Appellant wins would be impossible, and that would be bad for the streams of justice which must be kept pure at all times. This court would then be presented with a fait accompli before the judgment of this court is delivered. On no account should this court or an appeal court be presented with a fait accompli, but that would be the case.***

***After examining affidavit evidence the Appellant/Applicant has been able to show its huge investments on the Res known as the Shell Residential Area. Their staff resides there now. If a stay of execution is not granted its activities would be crippled. Everybody on the land would be asked to leave. This to my mind amounts to special, exceptional and strong reasons why this application should be granted. Considering equity and fairness, the rights of the claimants to the land ought to be put on hold pending the hearing and determination of the appeal. The balance of convenience is clearly on the side of the Appellant/ Applicant.***

***Accordingly a stay of execution is hereby granted pending the determination of this appeal.***

The preliminary objection on this issue is also dismissed. Motion on notice filed on 14/9/10 by learned counsel for the 1st and 2nd sets of Claimants/Respondents/ Applicants is hereby dismissed. Both applications succeed and they are hereby granted. For the avoidance of doubt preliminary objections are hereby dismissed. It is ordered as follows:

1. Leave is granted the Appellant/Applicant to file three additional grounds of appeal.
2. Time is extended by 60 days from today to enable learned counsel file the Appellant's brief and amended notice of appeal.
3. A stay of execution is hereby granted pending the hearing and determination of the appeal.
4. No order on costs.

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### **MUSDAPHER JSC**

This is a ruling of this court on two applications filed by Chief

Richard Akinjide SAN, on behalf of the Appellant. The first application was filed on the 3/9/2010 and the following orders were sought by the Appellant/Applicant

1. Granting the Appellant leave to file and argue 3 additional grounds of appeal.

2. Deeming as properly filed and served a copy of the additional grounds already filed on 3/9/ 2010.

3. Extending the time within which to file the Appellant's/Applicant's brief of argument.

The second application filed on the 27/5/2010, prayed the court for the following reliefs:

1. An order staying the execution of the judgment pending the determination of the appeal.

2. An order of injunction to preserve the res pending the determination of the appeal.

There were separate affidavits in support of both applications. Learned counsel for the 1st and 2nd sets of Respondents Mr. Nwosu, SAN., opposed both applications by filing preliminary objections and counter-affidavits. Mr. F. A. Osho, SAN., and Mr. Ugbo-duma both appearing for the other Respondents also opposed both applications and associated themselves with the submissions of Mr. Nwosu, SAN.

Both applications were moved together and learned counsel in addition to the written address made oral submissions in support and against the applications.

My learned brother, Rhodes-Vivour, JSC., in the ruling just delivered which I had the opportunity of reading before now, has adequately and comprehensively dealt with all the points raised by counsel and I entirely agree with his reasoning and the conclusion arrived, that these applications be granted.

Preliminary objection is the procedure to be adopted where a Respondent opposes to the hearing of an appeal, the purpose of preliminary objection is to terminate the hearing of an appeal in limine either partially or totally.

Adelekan v. Ecu-line N. V. (2006) 5 S.C. (Pt. II) 32; (2006) 12 NWLR H (Pt 993)33.

It must be emphasized that by Order 2 Rule 9(1) the procedure is adopted only for the hearing of an appeal and not for any other process See *Auto Import and Export v. Adebayo* (2002) 12

S.C. (Pt. I) 158; (2003) FWLR (Pt 140) 1686; Amadi v. NNPC (2006) 6 S.C. (Pt. I) 66; (2000) 10 NWLR (Pt 674) 76. Adigun v. Ayinde (1993) 8 NWLR (Pt. 313) 534.

It needs to be emphasized that, the Respondents should wait until “3 days to the hearing of the appeal” before adopting the procedure under Order 2 Rule 9 (1). I accordingly reject the preliminary objection in the manner it is raised at this stage. On the issue whether, since the appeal was “entered” in this court the Court of Appeal ceased to have any jurisdiction in the matter. It should be noted that the filing of an appeal is different from entry of an appeal. The general rule is that after an appeal has been entered; all other applications can only be made in the appellate court, even though applications may be filed in the court below for proper transmission to the appellate court. But the Court of Appeal will cease to have jurisdiction to hear any application when the records of appeal is received in the Supreme Court, which then has the sole jurisdiction to deal with all matters interlocutory or otherwise. (See Coke v. Adeyemo (1965) ALL NLR 125 at 128.) An appeal is said to be entered when all the records of appeal is transmitted to the Supreme Court and the matter is entered in the cause list. See Esiri v. Idika (1987) 4 NWLR (Pt 66) 503; Lazard Bros, v. Midland Bank Ltd. (1933) AC 289. But see Olorunyolemi v. Akhagbe (2010) 2-3 S.C. (Pt. II) 11; (2010) 8 NWLR (Pt. 1195) 48) and Order 8 Rule 10(5) of the Supreme Court Rules.

It is clear that when the Court of Appeal granted leave to appeal to this court on grounds other than grounds of law on 8/7/2010, within the 3 months permitted for the Applicant to appeal, it would appear to me that both this court and the Court of Appeal would appear to have jurisdiction because the appeal was not “entered” properly in this court. If the Respondents are not happy with the decision, they should appeal against the ruling of the Court of Appeal rather than bring a preliminary objection to the hearing of another motion, I accordingly also grant the prayer in the first motion, leave is granted to the Applicant to file and argue 3 additional grounds of appeal. The Applicant shall file if he did not do so, an amended notice of appeal containing all the grounds of appeal. The time within which to file the Appellant’s brief is also extended.

On the issue of the application for stay of execution, after carefully examining the affidavit in support of the motion, the Applicant

has shown huge investments on the land in question and the crucial issue is only to do with what rental on land the Applicant shall pay as shown in the alternative claim. The Applicant and Respondent have a tenancy agreement on the land for 99 years. As mentioned above the Applicants have made huge *investments by developments and infrastructure. It will be just and fair to grant stay of execution pending the hearing of the appeal.* B

I accordingly agree with the decision in the aforesaid ruling of my lord and I also abide by the orders contained at the end of the ruling. I make no order as to costs. C

### MOHAMMED JSC

I was privileged to have read in draft the ruling of my learned brother, Rhodes-Vivour, JSC., which has just been delivered. I entirely agree with the reasoning and the conclusion he arrived at in dismissing all the preliminary objections to the competence of the Appellant/Applicant's appeal and in granting the Appellant/Applicant's application for leave to file additional grounds of appeal and stay of execution of the judgment of the trial high court as affirmed by the Court of Appeal; pending the determination of the Appellant's/Applicant's appeal in this court. E

The first attack on the Appellant's appeal came from the 1st and 2nd sets of Respondents though (sic) their learned senior counsel who filed a motion in this court on 14th September, 2010, urging the court to dismiss the appeal for want of diligent prosecution. The affidavit in support of the motion complained that the appeal was entered since 13th May, 2010, when the record of appeal was received in the registry of this court and that up to the date when the application was filed; no Appellant's brief of argument had been filed. Taking into considering that this motion was filed on 14th September, 2010, while the Appellant's motion filed earlier since 3rd September, 2010 for leave of this court to file additional grounds of appeal was still pending and awaiting hearing and determination by this court, failure of the Appellants to file the Appellant's brief of argument must await the determination of the Appellant's application for leave to file additional grounds of appeal. In any case, taking into consideration that the record of appeal filed in the registry of this F G H

court on 13th May, 2010 was not a complete record in the absence of this proceedings and ruling of the Court of Appeal on the Appellant's application for leave of appeal on grounds of fact and mixed law and fact and leave to file new grounds of appeal raising new issues filed and heard by that court within the three months period required under Section 27(2)(a) of the Supreme Court Act to file notice of appeal or application for leave to file the notice of appeal, time was not ripe to file the Appellant's brief of argument. There was therefore no basis to accuse the Appellant of failure to prosecute its appeal with diligence. The filing of complete record of appeal in this court is very necessary before the appeal could have been regarded as having been entered under Order 8 Rule 1 of the Supreme Court Rules being relied upon by the 1st and 2nd sets of Respondents in support of their application to dismiss the Appellant's appeal

On what constitutes complete record of appeal under the rules of this court, see Order 7 Rule 2 which states -

"2(1) As soon as an Appellant has filed his notice of appeal in the court below, the registrar of that court or (in the case to which Rules 6 and 7 of this order apply) the Appellant shall, with all due expedition, start to prepare the record in accordance with the provisions of this order.

(2) The record shall contain the following documents in the order set out

(a) the index;

(b) a statement by the registrar of the Court of Appeal giving brief particulars of the case and including a schedule of the fees paid in the Court of Appeal;

(c) copies of the documents and proceedings constituting the record of appeal before the Court of Appeal;

(d) copies of all documents and proceedings before the Court of Appeal;

(e) a copy of the order for leave to appeal whether made by the court or the Court of Appeal;

(f) a copy of the notice of appeal;

(g) a certificate by the Registrar of the Court of Appeal certifying that the notice of appeal was duly served upon the Respondent;

(h) a certificate by the Registrar of the Court of Appeal certifying that the Appellant has duly and punctually complied with the

conditions of appeal imposed upon him; and

(i) a certificate by the Registrar of the Court of Appeal certifying that the Appellant and Respondent have either collected their copies of the record respectively or that they have been duly notified that such record is ready for collection.”

It is very clear from the above provisions of this rule that a copy of the order for leave to appeal whether made by this court or the Court of Appeal, must form part of the record of appeal to this court before the record could be regarded as complete. In the present case therefore, since the supplementary record of appeal containing the proceedings of the Court of Appeal and ruling granting the Appellant leave to appeal to this court was not filed until 24th August, 2010 when the appeal was deemed to have been entered, the Appellant was still within time to file its Appellant’s brief of argument when the 1st and 2nd sets of Respondents’ motion to dismiss the appeal was filed on 14th September, 2010. Thus, the motion to dismiss the Appellant’s appeal was clearly misconceived and the same is hereby dismissed.

Coming back to the notices of preliminary objection to the competence of the Appellant’s appeal filed by the Respondents, my learned brother in his leading ruling had thoroughly dealt with and resolved the issues raised therein. The main grounds of the preliminary objections include that the Appellant’s/Applicant’s motion for leave to file additional grounds of appeal, extension of time to file the Appellant’s brief of argument filed on 12th July, 2010, pursuant to the leave granted by the Court of Appeal on 8th July, 2010 and the supplementary record of appeal filed on 24th August, 2010, were all null and void as they were filed following the leave to appeal to this court on grounds of fact, mixed law and fact granted by the Court of Appeal without jurisdiction. The contention of the Respondents was that the Court of Appeal lacked jurisdiction to hear the Appellant’s application for leave to appeal because the appeal had already been entered in this court before the application was heard. The real position of course is that the leave to appeal to this court granted to the Appellant by the Court of Appeal on 8th July, 2010 was given before the appeal was entered on 24th August, 2010 on filing the complete record of appeal as required by the rules of court, when the supplementary record of appeal was filed. Thus, the Appellant’s application

for leave to appeal having been heard and granted within the time prescribed by Section 27(2)(a) of the Supreme Court Act, and before the appeal was entered for hearing under Order 8 Rule 11 of the rules of this court, the notice of appeal containing 22 grounds of appeal filed on 12th July, 2010, pursuant to the order of the Court of Appeal is quite valid and competent to support any application by the Appellant in this court including the application for leave to file additional grounds of appeal and extension of time to file the Appellant's brief of argument. The Respondents' preliminary objection therefore have failed and the same are hereby dismissed.

With the dismissal of the 1st and 2nd Respondents' motion to dismiss the Appellant's/Applicant's appeal and the dismissal of all the preliminary objections of the Respondents in this matter, what remains is the consideration and determination of the Appellant's/Applicant's application for leave to file additional grounds of appeal and extension of time to file the Appellant's brief of argument filed on 3rd September, 2010 and the earlier application filed on 27th July, 2010 for stay of execution and injunction. On the determination of these two motions, I am completely with my learned brother, Rhodes-Vivour, JSC., in his ruling granting all the reliefs sought by the Appellant/Applicant.

Accordingly, I hereby abide by all the orders made in the leading ruling including the order on costs.

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### **CHUKWUMA-ENEH JSC**

I have had the advantage of reading before now the leading ruling of my learned brother, Rhodes-Vivour, JSC., just delivered. I agree with his reasoning and conclusions firstly, for overruling the 1st and 2nd sets of the Respondents' preliminary objections which have raised the issue of competence of the Appellant's/Applicant's appeal and to have the same dismissed, and secondly, for granting to the Applicant leave to file and argue additional grounds of appeal as well as staying execution of the judgment of the trial court and injunction as affirmed by the lower court pending the hearing of the appeal in this court in this matter. Having dutifully resolved all the issues raised in these causes I also agree with him that the reliefs sought in the application should be granted. I endorse all the orders contained

therein.

### **MUNTAKA-COOMASSIE JSC**

I was opportuned to have read in draft form (sic) the beautiful leading ruling of my learned brother, Rhodes-Vivour, JSC. I agree entirely with the reasoning and conclusions herein adumbrated which I adopt as mine. I only wish to add a little in concurrence with the leading ruling thus:-

The Plaintiffs, who were the 1st set of Respondents, instituted this action against the Appellant/Applicant at the High Court of Justice, Port-Harcourt in which they claimed amongst others as follows:-

“(a) A declaration that the Plaintiffs are entitled to the right of occupancy in respect of that piece or parcel of land lying and situate at Okporo Mgbuesilaru within Rumukoroshe residential area in the Obio/Apkor Local Government Area of Rivers State comprising 153.5 acres of land on Plan No. BAN/112/57 subject matter of the deed purportedly made on 3/3/58 between Chief Elisha Njo Nwanwa, Amos Amadi and the 2nd Defendant therein described as the Shell BP Petroleum Development Company of Nigeria Limited which deed is registered as No. 62 at Page 62 in Volume 18 of the register at the lands registry in the office at Enugu now kept at the Offiom Port-Harcourt.

(b) A declaration that the said deed fell short of a valid contract for want of consideration passing from the 2nd Defendant to the Plaintiffs for several terms of years which is purported to confer title on the 2nd Defendant.

(c) A declaration that the said deed of 3/3/58 has been brought to an end on account of fundamental breach of the 2nd Defendant’s covenants therein contained which breaches are expressly stated as entitling the Plaintiffs to a right of possession.

(d) A declaration that the certificate of occupancy dated 15/3/99 and registered as No. 24 at Page 24 in Volume 258 of the lands registry in Port-Harcourt over the said parcel of land and surreptitiously obtained by the 2nd Defendant, is unconstitutional, null, void and of no effect whatsoever.

(e) A declaration that the said certificate of occupancy in so far as it purports to extinguish by operation of law the title of the Plaintiffs and supplanted the head deed of 3/3/58 is fraudulent, covetous, and therefore null and void and of no effect.

(f) A declaration that the said certificate of occupancy is illegal in context, spirit, and intendment and contrary to public policy and therefore null and of no effect whatsoever.

(g) A declaration that the said deed had come to an end by reason of fundamental breaches by the 2nd Defendant for which the  
B requisite notice being given by the Plaintiffs.

The matter was heard, and judgment entered in favour of the Plaintiff. Dissatisfied with the said judgment of the trial court, the Appellant unsuccessfully appealed to the Court of Appeal, Port-Harcourt  
C Division, which unanimously dismissed the appeal, and affirmed the judgment of the trial court. The Appellant was again dissatisfied with the judgment of the Court of Appeal and has appealed to this court on a notice of appeal containing twenty two grounds of appeal together with Alternative Ground.

D The appeal having been entered in this court, the Appellant/Applicant then brought this application dated 26/5/2010 in which it sought the following orders:-

“(1) An order staying the execution and/or enforcement of the judgment of the High Court of Rivers sitting in Port-Harcourt dated  
E 25/5/ 2007 delivered by A. Enebeli, J., in Suit No. PHC/1198/2007 Ojiowhor Monday Amadi & Ors. v. Shell Petroleum Development Company of Nigeria Limited & Ors.) as confirmed by and/or, the judgment of the Court of Appeal, Port Harcourt dated 15/4/2010 in  
F Appeal No. CA/PH/51/2008 pending the determination by the Supreme Court of Nigeria of the appeal filed by the Appellant against the judgment of the Court of Appeal aforesaid. Further or in the alternative.

(2) An order of injunction for the preservation of the subject  
G matter and/or preservation of the status quo by the parties pending the determination of the Applicant’s appeal by the Supreme Court against the judgment of the Court of Appeal Port Harcourt Division dated 15/4/2010 in Appeal No. CA/PH/51/2008 (The Shell Petroleum Development Company of Nigeria Limited v. Ojiowhor Monday  
H Amadi & Ors.).

The application was supported with 15 paragraph affidavit, the relevant averments germane to this application are herewith reproduce as follows:-

By a deed of lease dated 3rd March, 1958 the Umucheta and

Umukuru Families jointly leased to the Appellant/Applicant all that vast land measuring approximately 153.5 acres of land situate at Rumukwurusi, Port-Harcourt for a term of 99 years.

Pursuant to the said deed of lease, Appellant/Applicant took possession of the said land, developed it by constructing several blocks of apartments for its staff residential quarters and for over 40 years the said land known popularly as Shell Residential Area has been occupied by the Appellant's/Applicant's members of staff and their families.....

11. I am informed by Oluyomi Adeyemi-Wilson, Esq., a member of the legal department of the Appellant/Applicant and I verily believe her that:-

*“(i) the Appellant/Applicant has been in occupation of the land subject matter of this appeal since 1958 and lessors of the 1st and 2nd sets of Claimants/ Respondents vide the deed of lease dated 3rd March, 1958 and has built quality residential quarters housing many of its members of staff including expatriate members of staff.*

*(ii) the land subject matter of this appeal serves as homes to the many members of staff referred to above and the members of their family.*

*(iii) the enforcement of the judgment will deny the said members of staff and members of their family access to their homes and properties and the same would completely ground the activities of the Appellant/ Applicant.*

*(iv) the enforcement of judgment of the lower court will render homeless and destitute many members of staff of the Appellant/Applicant and members of their families and grind the activities of the Appellant/Applicant to a halt.”*

The Applicant attached the two lower courts judgments and the notice of appeal to this court as exhibits in support of the application.

The two sets of Respondents filed joint counter-affidavit to the motion the relevant paragraphs of the said affidavit are herewith reproduced as follows:-

8. That the injunction against the Appellant/Applicant was to stop it from further entry into the said land or from denying the allodial title of the Respondents as landlords over the said land.

9. That he who comes to the equity must come with clean

hands.

10. That the Appellant's/Applicant's staffs are on the subject - matter through the Appellant/ Applicant and are not parties to this suit or the instant appeal.

11. That the notice and grounds of appeal filed by the Appel-  
B lant/Applicant do not contain arguable or substantial points in an area in which the law is *recondite* but are rather frivolous and untrue.

12. That there is no special or exceptional circumstances "shown  
C in the Appellant/ Applicant (sic) in support to warrant the granting of this application."

The Applicant filed further affidavit dated 3/11/2 in which the Applicant further expatiated its averments contained in the affidavit in support. The Applicant filed a written address in which an issue was formulated for determination thus:-

D "Does the Plaintiff's/Respondent's/Applicants' present application have merit and ought to be granted?"

The Applicant submits that the notice of appeal contains arguable grounds he referred to the notice of appeal and additional grounds of appeal filed.

E Learned senior counsel to the Applicant further submitted that special circumstances have been disclosed what amounts to special circumstance for purposes of the grant of stay or injunction pending appeal is not exhaustive, however where there are facts and/or in-  
F herent circumstances showing that if application is not granted some substantial injustice or so irreversible circumstances would result which would have made it more appropriate to grant a stay or injunction, a special circumstances having been shown. Learned senior counsel referred to *Ajomale v. Yaduat* (No. 2) (1991) 5 S.C. 200; (1991) 5  
G NWLR (PL 191) 266/291 and *Deduwa v. Okorodudu* (1974) 6 S.C. 21 at 24 - 26; (1974) 6 S.C. (Reprint) 21.

It was further submitted that the notice of appeal taken together with the surrounding circumstances have met the requirement  
H *recondite* or *reconditeness*. Thus, this does not depend on the importance or seriousness of the grounds of appeal taken in isolation, rather it relates to what effect of a refusal of stay of execution may be on the right of an Appellant if successful on appeal. Learned senior counsel to the Applicant further submitted that the balance of convenience is in its favour, that the Applicant will lose everything most

of which cannot be compensated in costs. The adverse effect of refusal will be monumental on the Applicant. It was further contended that the subject matter is land which will not diminish or disappear, and as a result, the Respondent will not suffer any loss if this application is granted.

The Respondents did not dispute the investments and developments already carried out by the Applicants on the land, there is no way they can dispute same. However they simply submitted that this application was intended to stop them from enjoying the fruits of the judgment. That the Applicant's staffs were put there by the Applicant and since they were not party to this appeal their interest should not be considered on the determination of this application.

Finally, it was the Respondents' contention that the grounds of appeal disclosed no argument or substantial points.

In this particular application, the following facts are not in dispute:-

*“(a) The land in dispute measuring 153.5 acres was leased to the Applicant in 1958 for a period of 99 years.*

*(b) The Applicant took possession and constructed its staff quarters, popularly known as Shell Residential Area consisting of 243 four and three bedroom bungalows, detached guest house, management and conference offices, fire station, children clinic and others.*

*(c) That all these developments have been completed before, the commencement of this case.”*

I must point out here that principles guiding an application for stay of execution and injunction pending appeal are the same. Both are subject to the discretion of the court, and in exercising its discretion the court is enjoined to consider some conditions in granting or refusing the application, some of which are:-

1. The grounds of appeal must raise substantial legal issues in an area of law that is novel or recondite.

2. The application must disclose special circumstances why the judgment should be stayed.

3. The application must disclose why matters should be put in status quo or preserve the res so as not to render the appeal nugatory.

The authorities for the above principles need not to be cited as they are well known and trite. However, my lords I will cite very few cases as tradition, thus:-

(a) *Onuzulike v. Commission (sic) for special duties Anambra and Anor.* (1990) 7NWLR (Pt. 161) 252/259 per Uwaifo, JCA., as he then was.

(b) *Akibu v. Oduntan* (1991) 2 NWLR (Pt.171) 1 per Obaseki, JSC.

(c) *Nwosu v. Nuajimka* (1997) 12 NWLR (Pt 531) 100.

B (d) *Nduba (Nigeria) Limited v. UBN Plc.* (2007) 9 NWLR (Pt 1040) 439. )

In the consideration of the first condition stated above, the court hearing an application for stay of execution or an injunction pending appeal must tread carefully and cautiously when considering whether the ground of appeal discloses substantial issue of law to be determined. It is not the duty of the court at this stage to consider whether the appeal will succeed or not. It is sufficient if the ground raises a point of law on the face of it. The requirement that the ground of appeal must raise a point of law that is *recondite* does not depend on the importance or seriousness of the ground of appeal taken in isolation, rather it relates to what the effect of a refusal of stay of execution on Appellant if the appeal succeeds. The principle has been well spelt out by this court in the case of:- *Ajomali v. Yáduat* (No.2) (1991) 5 S.C. 200; (1991) 5 NWLR (Pt. 191) 266 at 291 Paragraphs E - F per Nnaemeka-Agu, JSC., of blessed memory where he made statement thus:- “The *recondity* of a point of law with reference to an application for a stay of execution is not determined in the abstract by reference to the importance or difficulty of the point raised in the ground of appeal *per se*. Rather, it is determined in concrete terms by reference to what the effect of a refusal to stay execution may be on the rights of the Appellant, if successful in the appeal.....”

Applying the principle to this application, I have carefully perused the notice of appeal and the additional grounds of appeal filed in this case, and the effect the refusal of this application would occasion on the Appellant if the appeal is successful, on its developments and investments on the lands in dispute and particularly hundred of the workers that reside in the residential complex, I am of the view that the grounds of appeal have disclosed substantial points of law in an area that is *recondite* for determination. On the second condition, that the application must disclose special circumstances, I am of the view that the special circumstances under which an order of injunction pending an appeal may be made are:

(a) *Where the subject matter of the dispute will be destroyed if injunction is not granted.*

(b) *Where a situation of hopelessness would be foisted on the court especially an appellate court.*

(c) *Where execution will paralyse right of appeal.*

(d) *Where the order of the court would be rendered nugatory,* B

(e) *Where execution will prevent a return to status quo if the appeal succeeds. See Ndaba Nigeria Limited v. UBN Plc. supra.*

*The fulfilment of any of the requirements stated above will suffice for the grant of the application. The rationale behind these requirements C has been stated by Niki Tobi, JCA., (as he then was) in Lijadu v. Lijadu (1991) 1 NWLR (Pt 169) 627 at 644 - 645 as follows:-*

*"In an application for stay of execution the court has a primary duty to protect the res from being destroyed, annihilated or demolished. The court has a duty to ensure that the res is intact, not necessarily for posterity, but for the immediate benefit and pleasure of the party who is finally in victory in the litigation process. This is necessary because if the res is destroyed in the course of litigation before the party gets judgment, then he has no property to make use of in the way he wants as the owner and the direct result in such a circumstance is that the victor has on his land a barren victory, a victory without a difference, an empty victory. He leaves the court empty handed. In real fact he leaves the court in victory without victory. If the res is destroyed, annihilated or demolished before the matter is F heard on appeal, then this court will be reduced to a state of hopelessness and that will be bad, very bad indeed. This court, like every other court cannot give an order in vain. The court will then be reduced to a situation where it can bark by the use of its judicial powers under Section 6 (6) of the 1979 Constitution but cannot bite."* G

*I completely agree with the view of his lordship and I adopt same as mine. In the instant case, would this court allow the Respondents to take possession of the Applicant's residential area consisting of buildings numbering almost 500 and housing its labour force, with the possibility of the developments being annihilated or demolished or destroyed while an appeal is pending in the court? The answer is definitely in the negative; the developments and investment on the land in dispute have been effected before the commencement of this action.* H

*The Respondent did not deny these facts nor joint counter-affidavit. I am therefore of the firm view that the Applicant has disclosed special circumstances why this application should be granted.*

*The last requirement is closely related to the issue of disclosing special circumstances, which is that a balance of convenience in an application for an injunction or stay of execution, the Applicant has the burden to show that the balance of convenience he will suffer by refusal of the application is more than that which Respondent will suffer if it is granted, see: Ukechekwu v. Iwugo (1989) 2 NWLR (Pt. 101) 29; Total (Nig.) Plc, Efakire (1998) 5 NWLR (Pt 549) 307.*

*In an application for injunction pending appeal, balance of convenience is a relevant consideration and would not be granted where compensation will suffice and/or where the Applicant cannot compensate the Respondent in the damages to be suffered. I refer to Nwaganga v. Military Governor of Imo State (1987) NWLR (Pt 59) 185; Oye v. Governor of Oyo State (1993) 1 NWLR (Pt 303) 437; and Agbakoba v. Director SSS (1993) 7 NWLR (Pt 305) 363.*

*In the case at hand, considering the averments in the affidavit and the developments already carried out on the land, it is obvious that if the application is refused, the Applicant could not be compensated if it is eventually succeeds on appeal. It is also a fact that the Respondent will neither lose nor suffer any injury if this application is granted. The Applicant has been in possession since 1958, and I am of the view that the status quo is maintained in the meantime to determine the appeal they absolutely have *nothing to lose*.*

Finally, I find merit in this application and it is hereby granted; consequently, I order as follows:

An order of stay of execution is hereby granted for the preservation of the subject matter and/or preservation of the status quo ante by the parties pending the determination of the Applicant's appeal by this court against the judgment of the Court of Appeal Port Harcourt Division dated 15/4/2010 in Appeal No. CA/PH/ 81/2010. The Shell Petroleum Development Company of Nigeria Ltd. v. Ojiowhor Monday Amadi & Ors.

I abide by the orders and consequential orders made by my learned brother, Rhodes-Vivour, JSC., including the no costs order.