

SUPREME COURT OF NIGERIA
FRIDAY 18TH JANUARY, 2013. SC. 99/2004
**CORAM:- I. T. MUHAMMAD, J. A. FABIYI, M. U. PETER-
ODILI, O. ARIWOOLA, K. B. AKA'AH, JJSC**

VAB PETROLEUM INC APPELLANT
AND
MR. MIKE MOMAH RESPONDENT

COURTS - Jurisdiction - Absence of - Where court fails to pronounce whether or not it has jurisdiction - Once the law or subject matter before the court divested it of jurisdiction - Then jurisdiction does not reside in it (H1)

COURTS - Foreign court - Jurisdiction - Determination - By Foreign Judgment (Reciprocal Enforcement) s. 6 - The court shall inter alia have jurisdiction - Where judgment is given in action in personam (H2)

COURT PROCESSES - Writ of summons - Service - Proof - The act of filing a defence to the action before the original court - Is enough to establish service of the process on respondent (H3)

COURT PROCESSES - Service - Legal practitioner - Service on counsel is as good service on party - And proof of service is unnecessary - Where defendant appears (H4)

COURT PROCESSES - Service - Proof - It is wrong to say that defendant who filed defence to statement of claim - Was not served writ of summons - Because there was no bailiff's endorsement on the writ (H5)

PARTIES - Court - Legal representation - Where party is represented by counsel - His physical appearance to conduct the proceeding is not necessary - Except where court orders otherwise (H6)

JUDGMENTS - Default judgment - Failure to appeal - Since there is no appeal to set aside the foreign judgment - Supreme Court will not

be of any assistance - To party who willingly abdicate his responsibility (H7)

APPEALS - Court - Findings of fact - Where Court of Appeal wrongly disturbed findings of trial court - Supreme Court will not hesitate in restoring the finding (H8)

APPEALS - Practice & procedure - Pending appeal - After appeal has been entered - Appellate court shall be seised of the whole proceedings - As between the parties - Except as otherwise provided in the rules (H9)

COURT PROCESSES - Abuse - Characteristics - Abuse happens when a party improperly uses judicial process - To the irritation of his opponent - In respect of multiple actions between same parties - On same subject matter (H10)

JUDGMENTS - Foreign judgment - Registration time - The judgment is registered within twelve months after the judgment - And within such longer period - As the High Court will allow (H11)

COURTS - Relief - Basis for grant - Any one that asks for indulgence of court must place before it - All necessary materials which will assist court - In arriving at a just decision (H12)

FACTS

By a Motion on Notice filed before the High Court of Lagos State, the judgment creditor/applicant, prayed the court for an order to have the judgment of the United Kingdom's High Court of Justice, Queen's Bench Commercial Court Division, London, in suit No. 1991 Folio No.1048 between the parties hereto, registered in the court for execution and for such order(s) as the court may deem fit to make in the circumstances. Having evaluated the affidavit evidence placed before him by the parties, the learned trial Judge, Adeniji J. granted the application to register the said United Kingdom judgment.

Dissatisfied, the judgment debtor/respondent appealed to the Court of Appeal Lagos Division in Appeal No. CA/L/133/93 and subsequently filed another appeal No. CA/L/256/96. The latter appeal

was against the ruling of the learned trial Judge on an ex-parte motion of 30/4/96 wherein the learned trial Judge made some orders on the judgment sum as found by the London Queen's Bench Division of Commercial Court, interest rates payable, etc. The Court of Appeal in its judgment allowed both appeals and set aside both rulings of the trial court. Both parties felt aggrieved. Appellant filed the main appeal, while respondent cross appealed in Supreme Court.

ISSUES FOR DETERMINATION

MAIN APPEAL

A. "Did the London's Queens Bench Division Commercial Court have Jurisdiction to entertain this suit?"

B. Was the respondent served with the Writ of Summons and Processes of the case in London?"

C. Whether the Justices of the Court of Appeal, Lagos, were right in law to introduce and proffer suo motu evidence not before the Court and proceed to draw conclusions even without calling on the parties through their counsel to address the court on it."

i. "Whether in the face of the text of sec. 13 of the Foreign Judgments (Reciprocal Enforcement) Act, Cap. 152 of the Laws of the Federation of Nigeria, the learned trial Judge of the Lagos High Court was competent in law to entertain the application of the Appellant/Judgment Creditor after all the three relevant courts (High Court, Court of Appeal and Supreme Court) had dismissed the applications of the appellant for a stay of execution.

ii. Whether in the face of the text of the said Section 13, the learned trial Judge could reflect the rates of interest on judgment sum considered in the proceedings among other particulars, on the "Certificate" of the judgment.

iii. Whether the learned trial Judge was wrong in law to follow the principles of law laid down by the Supreme Court of Nigeria in the case of UBN v. ODUSOTE BOOKSHOP (1995) 9 NWLR (Pt.421) 558 at p. 563 Ratio 10 regarding judgments delivered in foreign currency.

iv. Whether the learned trial judge of Lagos High Court was right in law to entertain ex-parte, an application under Section 13 of the Act."

CROSS-APPEAL

"was the trial court not lacking jurisdiction over the cause ab

initio given that its order of registration of the subject foreign judgment was made several (13) months after expiration of the 12 months (from date of delivery) provided for by the applicable law i.e. Reciprocal Enforcement of Judgment Act, 1922 Cap., 175 Laws of the Federation and Lagos 1958?"

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HELD (Unanimously allowing the main appeal in part

and allowing the cross appeal per **MUHAMMAD JSC, FABIYI JSC** dismissing the cross appeal)

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Jurisdiction - Absence of

1. On the lower court's decision in Appeal No. CA/L/133/93, I have x-rayed the grounds of appeal in this court against that decision. I have found that ground (1) is premised on the jurisdiction of the lower court. It is the law that even where a court of law does not pronounce whether it has jurisdiction to try a matter or not, once the establishing law or other statutes or the subject matter or party before the court has divested that court of jurisdiction, then jurisdiction does not reside in the court. The ground is properly taken by the appellant in this appeal as issue of jurisdiction can be raised at any level of the proceedings of a court even at appeal levels. (p. 261 D)

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Foreign court - Jurisdiction - Determination

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2. But, what is the criteria of determining jurisdiction of a foreign court, here in Nigeria? I think by the provision of section 6 of the Foreign Judgment (Reciprocal Enforcements) Cap 152 of the LFN, 1990, one can be able with certainty to determine where a foreign court's jurisdiction lies. The section stipulates:

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"6. (2) for the purposes of this Section the courts of the country of the original court shall, subject to the provisions of Subsection (3) of this Section, be deemed to have had jurisdiction -

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(a) in the case of a judgment given in an action IN PERSONAM-

(iv) if the judgment debtor being a defendant in the origi-

nal court, was at the time when the proceedings were instituted, resident in, or being a body corporate had its principal place of business in the country of that court; or

(v) if the judgment debtor, being a defendant in the original court, had an office or place of business in the country of that court and the proceedings in that court were in respect of a transaction effected through or at that office or place.” (p. 265 C)

Writ of summons - Service - Proof

3. In furtherance of the proof of service of the Original Court’s processes, another document of relevance issued from the Original Court, is an acknowledgment of service of the court. In this document, where a party intends to instruct a solicitor to act for him, he should give him the form immediately. There is a signature on the form and the name of Leonard & Kalimi Solicitors appeared beneath it. Again, pages 66 - 69 of the Record of Appeal contain “Points of Defence of First and Second Defendants” (Statement of Defence) at the original court filed by the law firm of Leonard and Kalimi Solicitors. Thus, the act of filing a defence to the action before the original court is enough to establish service of the processes (writ of summons) on the respondent. I cannot imagine how a counsel/solicitor in an enlightened country such as United Kingdom would go out of his own way to file a defence to a civil suit without being briefed by a party to do so. That will certainly be against the ethics of his profession. Even where a counsel decides to conduct cases (especially in criminal matters) on PRO BONO basis, he will surely require the consent of the party in need thereof. It is thus difficult to appreciate the argument of the learned counsel for the respondent as well as the holding of the court below that no service of the processes was effected on the respondent. (p. 268 H)

COURT PROCESSES - Service - Legal practitioner

4. In fact, the court below appreciated and reiterated the position of the law that service of process on counsel is as good service on a party to the proceedings and that proof of ser-

vice is unnecessary where a defendant appears. (p. 269 E)

COURT PROCESSES - Service - Proof

5. The court however, erred, in my view, where it stated in this case that proof of service can only be established by an affidavit of service deposed to by a court below. The correct position of the law has repeatedly been stated by this court that it is straining the rule on proof of service to say that a defendant who filed a defence to the statement of claim was not served the writ of summons because there was no bailiff's endorsement on the writ. (p. 269 E)

PARTIES - Court - Legal representation

6. I think the law has for long been settled that where a party to a proceeding before a court is represented by a counsel of his choice, his physical appearance to conduct the proceeding by himself is no longer necessary except where for good reasons, the court conducting the proceedings, orders otherwise. (p. 270 A)

Default judgment - Failure to appeal

7. The firm of Leonard and Kalimi as per the endorsement on the writ of summons and the "Points of Defence of first and second defendants" before the Original Court in London must be taken to be the legal representative of the respondent. It is my observation again, that the foreign judgment which was exhibited along with Exh. "A" - Certificate of Master of the Queens Bench was marked Exh. B, in the counter-affidavit filed by the respondent/appellant, at the court below, is a judgment given in Default. Thus, the question of appearance does not even arise. It is a judgment which could be set aside by the same court if there was an appeal against it and the court was convinced that it ought to be set aside. Unfortunately, there was no appeal against that judgment. This court can hardly be of any assistance where a party willingly decides to abdicate his responsibility. This issue is resolved against the respondent. (p. 270 B)

APPEALS - Court - Findings of fact

8. The trite position of the law is that where the Court of Appeal wrongly disturbed any finding of fact of a trial court, the Supreme Court will not hesitate in restoring that finding.

(p. 271 G)

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Practice & procedure - Pending appeal

9. Once it is so entered, an appeal is then said to be pending. The Rule governing the control of proceedings during pendency of an appeal is that after an appeal has been entered and until it has been finally disposed of, the court shall be seised of the whole of the proceedings as between the parties thereto and except as may be otherwise provided in the Rules, every application therein shall be made to the court and not to the court below (i.e. the trial), but any application may be filed in the trial court for transmission to the court below. See Order 4, Rule 11. Thus, in pursuance of the above provisions of the Court of Appeal Rules, the trial court will have no competence or jurisdiction to decide on any application whether on notice or ex-parte in relation to an appeal which the trial court has become FUNCTUS OFFICIO. If the trial court takes any step thereon, except for the purposes of transmitting the processes so filed to the Court of Appeal, that step taken will be declared a nullity. (p. 276 E)

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COURT PROCESSES - Abuse - Characteristics

10. The trite position of the law on abuse of a court process is that it happens in regard to multiple actions between the same parties, on the same subject matter, when a party (such as the appellant in this appeal) improperly uses judicial process to the irritation, of annoyance and harassment of his opponent (the respondent herein) not only in respect of the same subject matter but also in respect of the same issues in the other action or actions. (p. 278 H)

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Foreign judgment - Registration time

11. The focal point of reference here is the time span within which to get the foreign judgment registered by the register-

ing High Court. The provision provides for two options:
i. Within twelve months after the date of the judgment
or;
ii. Within such a longer period as the registering High
Court will allow. (p. 282 F)

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COURTS - Relief - Basis for grant

12. The practice in the courts is that for anyone to ask for the
indulgence of a court, it is his duty to place before the court
all necessary materials which will assist the court in arriving
at a just decision. This, the cross-respondent had failed to do
and the correct presumption which has not been reverted is
that by the time he approached the trial court for registering
the foreign judgment, he was out of time by well over thirteen
months. (p. 286 A)

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NOTABLE POINTS OF INTEREST

MUHAMMAD JSC

1. Findings of facts based on credibility and that based on in-
ference - Distinction

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This is a finding of fact by a trial court. In a trial, there are generally two sets of findings of facts:

A finding of fact may be based on the credibility of witnesses or
 F may be informed from other facts proved before the trial court. Where
 a witness gives direct evidence that is the evidence of the facts in issue
 as seen, heard or perceived by any other sense by him. (Section 77
 of the Evidence Act). The finding of the trial court on such evidence
 depends on whether or not it believes that witness (credibility of the
 G witness). Such a finding on such evidence is a primary finding of fact,
 i.e. the way the witness testifies, his demeanor in the box tells much
 of his credibility. The trial court that saw and heard the witness is in
 the best position to assess his credibility and make findings of primary
 facts. But, where on the other hand, other facts are put in evidence
 H from which the facts in issue can be inferred, or where a witness gave
 circumstantial evidence, the finding of the trial court on the facts in
 issue depends on inference. This is a secondary finding of fact as it is
 not based on the credibility of the witness but on logical process of

inference.

In the former case, i.e. primary findings of fact, an appeal court should always be loathe in interfering with such a finding as it did not have the privilege of seeing, hearing or observing the demeanour of the witness.

In the latter case, i.e. where findings of fact are secondary, i.e. drawn from inferences, an appeal court is in as good position as a court of trial to do this. (p. 267 A)

2. Function of appellate court on question of facts

Finally, on this issue, I may have to reiterate the function of an Appellate Court on question of facts. It is mainly limited to seeking whether or not there was evidence before the trial court upon which its decision on facts was based, whether it wrongly accepted or rejected any evidence tendered at the trial; whether evidence called by either party to the conflict was put on either side of the imaginary scale and weighed one against the other. In other words, whether the trial court properly evaluated the evidence, whether the trial court correctly approached the assessment of the evidence before it and whether the evidence properly admitted was sufficient to support the decision upon the inference drawn therefrom. This is the only way and procedure open to an appellate court in the consideration of an appeal brought before it. (p. 271 H)

REPRESENTATION

M. O. S. Amobi Esq., R. Salami, for the Appellants
F. C. A. Okoli, for the Respondents

CASES REFERRED TO

Saude v. Abdullahi (1989) 4 NWLR (pt. 116) 387
Akibu v. Oduntan (2000) 13 NWLR (pt. 685) 446
Coker v. UBA Plc (1997) 2 NWLR (pt. 490) 641
Briggs v. Chief Lands Officer Rivers State (2005) 12 NWLR (pt. 938) 59
UBN v. Odusote Bookshop (1995) 9 NWLR (pt. 421) 558
Okesuji v. Lawal (1991) 1 NWLR (pt. 170) 661
Udogu v. Egwuata (1994) 3 NWLR (pt. 330) 120
Obulor v. Oboro (2001) 8 NWLR (pt. 714) 21

- Ebba v. Ogodo (1984) 4 SC 75
- Akintola v. Olowa (1962) 1 All NLR 224
- Fatoyinbo v. Williams (1956) 1 FSC 87
- Egri v. Uperi (1974) 1 NMLR 22
- Akpopuma v. Nzeka (1983) 2 SCNLR 1
- B Akinnuli v. Odugbezan (1992) 3 NWLR (pt. 258) 172
- Kehinde v. Ogunbumi (1967) 1 All NLR 306

STATUTES & RULES REFERRED TO

- C Foreign Judgments (Reciprocal Enforcement) Act Cap. 152 LFN 1990, ss. 6(2)(a)(iv)(v), 13
- Evidence Act, s. 77
- Court of Appeal Rules 1981 (as amended), O. 1 r. 22,
- Court of Appeal Rules 2007, O. 4 r. 10

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LEAD JUDGMENT BY MUHAMMAD JSC

By a Motion on Notice before the High Court of Lagos State (trial court), the judgment creditor/applicant, prayed the trial court for the following reliefs:

- E *i. “an order to have the judgment of the United Kingdom’s High Court of Justice, Queen’s Bench Commercial Court Division, London, in suit No. 1991 Folio No.1048 between parties hereto, registered in this Honourable court for execution.*
- F *ii. such order(s) as this Honourable Court may deem fit to make in the circumstances.”*

After having evaluated the affidavit evidence placed before him by the parties, the learned trial judge, Adeniji, J., granted the application to register the said United Kingdom judgment. Dissatisfied with the Ruling of the trial court, the judgment debtor/respondent, appealed to the Court of Appeal, Lagos Division (court below) in Appeal No. CA/L/133/93 on (4) four grounds of appeal as contained in the Amended Notice of Appeal filed on 25/11/96 (p.194 - 197 of the Record of Proceedings).

H There was again filed another appeal No. CA/L/256/96 as contained in the Notice and Grounds of Appeal (pages 38 - 41 of the Record of Appeal). This latter appeal was against the Ruling of the learned trial judge on the ex-parte motion of 30/4/96 wherein the learned trial judge made some orders on the judgment sum as found

by the London Queen's Bench Division of Commercial Court; interest rates payable etc. The court below in its judgment allowed both appeals and set aside both rulings of the trial court.

The respondent was also dissatisfied with some aspects of the court below's decision and he filed a cross-appeal. Briefs were settled in both the main and the cross-appeals. In his brief of argument, the learned counsel for the appellant distilled the following issues for determination.

A. *"Did the London's Queens Bench Division Commercial Court have Jurisdiction to entertain this suit?"*

B. *Was the respondent served with the Writ of Summons and Processes of the case in London?"*

C. *Whether the Justices of the Court of Appeal, Lagos, were right in law to introduce and proffer suo motu evidence not before the Court and proceed to draw conclusions even without calling on the parties through their counsel to address the court on it."*

Learned counsel for the respondent who filed a combined brief (main and cross appeals) set out a Preliminary Objection firstly and distilled the following issues:

"(ON THE MAIN APPEAL)

i. *Even if the grounds of appeal regarding appeal No. CAL/133/94 are deserving of consideration on the merits, which is not conceded, is the Lower Court not right in setting aside the registration of foreign judgment procured by the appellant in the trial court for want of jurisdiction of the foreign court when it found as a fact that the originating processes were not served on the respondent upon consideration of available evidence including the fact of the solicitors who purportedly represented him being evasive as to whether he indeed instructed them regarding the suit and that he was not ordinarily resident in the UK nor had he a place of business in that country?"*

ii. *Is the Lower court not right to have denied the jurisdiction of the trial court to make the orders that it made on June 18, 1996 when:*

a) *the trial court had become functus officio since its order of December 14, 1993 for registration of the foreign judgment;*

b) *the orders constituted a revision and an expansion of the said order of December 14, 1993; and*

c) at any rate not only was an appeal-as against the order of December 14, 1993 pending on the issue, the appeal had already been entered in the Lower Court which therefore became the only proper judicial forum for any application in the cause?

(ON THE CROSS APPEAL)

- B *iii. was the trial court not lacking jurisdiction over the cause ab initio given that its order of registration of the subject foreign judgment was made several (13) months after expiration of the 12 months (from date of delivery) provided for by the applicable law i.e. Reciprocal Enforcement of Judgments Act, 1922, Cap. 175 Laws of the*
 C *Federation and Lagos 1958?"*

Learned counsel for the respondent Mr. Okoli filed a Notice of Preliminary Objection under the provision of the Constitution and the Rules of Court, since the 29th day of November, 2007. He raised
 D objections against the hearing of the appeal on the two decisions of the court below. The grounds upon which he rested his objection are as follows:

In CA/L/133/93:

- E *"i. the grounds for the purported appeal involve questions of facts simpliciter and/or mixed law and facts for which prior leave of the Lower Court or this Honourable court is required for their validity;*

- F *ii. the appellant having failed/neglected to obtain the said leave the Honourable Supreme Court of Nigeria is Thus Shorn of Jurisdiction to hear the purported appeal constituted by those grounds.*

In CA/L/256/96

- G *i. the grounds of appeal are not challenging the critical issue(s) decided by the Lower Court, i.e. that the trial court lacked jurisdiction for several diverse reasons, but are instead concerned with what are at least OBITER DICTA:*

- H *ii. the issues highlighted in/by the grounds of appeal are academic as deciding them in the appellant's favour would still not result in the success of the appeal and a reversal of the lower court's decision."*

It is learned counsel's submission that the settled position of the law is that grounds of appeal must relate pointedly to the decision challenged, i.e. at least the *RATIO DECIDENDI* and not an obiter. He referred to *Saude v. Abdullahi* (1989) 4 NWLR (Pt. 116) 387;

Akibu v. Oduntan (2000) 13 NWRL (Pt. 685) 446; Coker v. UBA Plc (1997) 2 NWLR (Pt.490) 641. He argued further that none of the two grounds of appeal comes close to contesting the issue decided by the lower court which formed the ratio decidendi. The two grounds relate to obiter dicta. This error, it is argued, is fatal to the appeal.

On Appeal CA/L/133/93, the learned counsel submitted that the grounds of appeal all raise questions of fact simpliciter or, at best, questions of mixed law and fact, with no leave obtained before the court below or this court which renders the grounds invalid. The case of Briggs v. Chief Lands Officer Rivers State (2005) 12 NWLR (Pt.938) 59 was cited. Learned counsel submitted further that the tenor of the lower court's judgment is not on the applicable law but over whose version or account of the facts is acceptable. He urged this court to strike the grounds out.

On the lower court's decision in Appeal No. CA/L/133/ 93, I have x-rayed the grounds of appeal in this court against that decision. I have found that ground (1) is premised on the jurisdiction of the lower court. It is the law that even where a court of law does not pronounce whether it has jurisdiction to try a matter or not, once the establishing law or other statutes or the subject matter or party before the court has divested that court of jurisdiction, then jurisdiction does not reside in the court. The ground is properly taken by the appellant in this appeal as issue of jurisdiction can be raised at any level of the proceedings of a court even at appeal levels. See: Nigeria Eng. Works Ltd. v. Denap Ltd. (2001) 18 NWLR (Pt.746) 726.

The 2nd ground of appeal at the court below was premised on what was said by other courts earlier e.g. the same court of appeal in its Ruling of 1996 (which was reported in (1996) 7 NWLR (Pt.458) 100 at pp. 108 - 109, E - B); again in the same Court of Appeal decision of 12/12/95 and also in Supreme Court decision in Appeal No. SC.183/95, between same parties, now reported in (2000) 4 NWLR (Pt.654) 534 at page 553 - G. References were made to the above earlier decisions upon which the court below was requested to consider.

Ground 3 challenges the holding of the court below that there were not enough materials or evidence upon which the trial court

could have acted in reaching its decision to order registration for execution of the foreign judgment. It is true that there was a foreign judgment which was tendered and sought to be registered and which was registered by the trial court. This is a formidable ground of appeal in this appeal which requires to be considered upon further appeal. These are all the grounds of appeal in CAL/133/93 before the court below and now on appeal before this court. They have nexus to the judgment appealed against which will require the views of this court. They are valid and sustainable grounds of appeal and I so hold.

On the Appeal in CAL/256/96, the challenge against the grounds of appeal herein, is whether the court below disregarded the decision of this court on the matter of rate of exchange of the foreign judgment debt in US Dollars to Nigerian Naira as against what was held in *UBN v. Odusote Bookshop* (1995) 9 NWLR (Pt.421) 558 at 563, whereas the decision of this court is binding on all courts in the Federation. Secondly, there is a challenge as to the interpretation given by the court below to section 13 of the Foreign Judgments (Reciprocal Enforcement) Act Cap. 152 LFN 1990. These according to the objector, are mere matters of academic exercise and they should be refused.

In my candid view, I think the grounds are raising matters of pure law, jurisdiction and interpretation of statutes. They are valid and proper grounds upon which this court is bound to make its views known. I hold that all the grounds raised by the appellant in this appeal are valid and competent. The Preliminary Objection lacks merit and it is hereby dismissed.

In his arguments on the appeal, the learned counsel for the appellant submitted that section 6(2)(a)(iv) and (v) of the Foreign Judgment (Reciprocal Enforcement) Act Cap. 152 LFN, 1990, clothes the Queen's Bench Division a Commercial Court, London with full jurisdiction on the subject matter of this appeal.

On the second issue the learned counsel submitted that the respondent was duly served with the Writ of Summons and other processes for his company (as 1st defendant). It is argued further that from the filing of the Statement of Defence, it is quite clear that the respondent received notice of the proceedings in sufficient time to enable him defend the proceedings and he cannot claim that he was

not served. Learned counsel referred this court to the case of Okesuji v. Lawal (1991) 1 NWLR (Pt 170) 661.

Learned counsel for the appellant submitted on issue 3 that the learned Justices of the court below were wrong in suggesting, suo motu, that the address in England was the customer's address of Mickmoson UK Limited (1st defendant) which was jointly sued with the appellant. It is submitted further that nowhere on the "Form 288" has it been suggested that the form was meant for a company as a company- does not have a "a date of birth", nor "previous forenames." Further, it is submitted, the law laid down in a number of decisions that it is the duty of the court to confine itself to evidence before it and that having raised the issue suo motu, the Learned Justices of the Court of Appeal ought to have heard the parties to the appeal through their counsel before giving a decision on the issue. Udogu v. Egwuata (1994) 3 NWLR (Pt.330) 120 at p.132; Obulor v. Oboro (2001) 8 NWLR (Pt.714) 21 were cited in support.

In Appeal No. CA/L/256/96, the issues formulated by the appellant read as follows:

i. *"Whether in the face of the text of sec. 13 of the Foreign Judgments (Reciprocal Enforcement) Act Cap. 152 of the Laws of the Federation of Nigeria, the learned trial Judge of the Lagos High Court was competent in law to entertain the application of the Appellant/Judgment Creditor after all the three relevant courts (High Court, Court of Appeal and Supreme Court) had dismissed the Applications of the Appellant for a stay of execution.*

ii. *Whether in the face of the text of the said Sec. 13, the learned trial judge could reflect the rates of interest on judgment sum considered in the proceedings among other particulars, on the "Certificate" of the judgment.*

iii. *Whether the learned trial judge was wrong in law to follow the principles of law laid down by the Supreme Court of Nigeria in the case of UBN v. Oduote Bookshop (1995) 9 NWLR (Pt.421) 558 at p.563 Ratio (10) regarding judgments delivered in foreign currency.*

iv. *Whether the learned trial judge of Lagos High Court was right in law to entertain ex-parte, an application under Sec. 13 of the Act."*

Let me now deal with the 3 issues formulated by the learned

counsel for the appellant on what he called appeal No. CA/L/133/93. The 1st issue is on jurisdiction. The holding of the court below on the jurisdiction of the Original Court in London reads as follow:

"It would appear from the evidence before the lower court that the address in England was the business Address of MICMOSON B UK. Limited jointly, sued in this case..."

Residence of a foreigner in England or any other country is a matter of law and factual situation. I agree with the learned senior counsel that the appellant here can only be regarded as Nigerian C resident in England if and only if he has a right of residence under a right of abode or settlement Certificate issued by the appropriate British authorities. The issuance of a visitors' visa by the British authorities cannot be taken as a proof of the residence of the appellant. Also the fact that the appellant filled a form at the London Company D Registry copied at page 50 of the Records stating that his residence to be in England does not make him resident in England at the time the proceeding was initiated in the original court.

On this premise, the lower court was in error in ordering the registration of the foreign judgment as the original court had no juris- E diction and could not assume same as the appellant neither had a place of business nor was (he) resident within the jurisdiction of the English courts at the time the action was instituted in the year 1991."

When the appellant at the court below lodged his appeal in F CA/L/133/93, his 1st ground of appeal reads:

"The court below erred in law in ordering the registration of the judgment of the High Court of Justice of the Queen's Bench Division of England in suit No. 1991 Folio 1048 when the said reg- istration will be in contravention of the Foreign Judgment (Reciprocal Enforcement) Act Cap. 152 Laws of the Federation of Nigeria. G

PARTICULARS OF ERROR

- a) The said judgment is not final judgment*
- b) The High Court of England had no jurisdiction in the cir- cumstances of the case to enter judgment against the appellant*
- H *c) The appellant was neither served with any court process of the High Court of England nor did he appear in the said proceed- ings."*(See Amended Notice of Appeal, pages 210 - 211 of the Record of Appeal).

From the above, two important issues on jurisdiction were

raised:

a) the High Court of England had no jurisdiction to enter judgment against the appellant;

b) the appellant was neither served with any court process of that court, nor did he appear in the said proceedings.

There is a finding by the trial court on the above two issues. It reads as follows:

“it is not the contention of the respondent that the English Court has no jurisdiction to give interlocutory or final judgment. It is also not the case of the respondent that he entered appearance and attended trial, his case is that he was not served.”

But, what is the criteria of determining jurisdiction of a foreign court, here in Nigeria? I think by the provision of section 6 of the Foreign Judgment (Reciprocal Enforcements) Cap 152 of the LFN, 1990, one can be able with certainty to determine where a foreign court’s jurisdiction lies. The section stipulates:

“6. (2) for the purposes of this Section the courts of the country of the original court shall, subject to the provisions of Subsection (3) of this Section, be deemed to have had jurisdiction -

(a) in the case of a judgment given in an action IN PERSONAM-

(iv) if the judgment debtor being a defendant in the original court, was at the time when the proceedings were instituted, resident in, or being a body corporate had its principal place of business in the country of that court; or

(v) if the judgment debtor, being a defendant in the original court, had an office or place of business in the country of that court and the proceedings in that court were in respect of a transaction effected through or at that office or place.”

From the facts contained in the printed record of appeal before this court, it is very clear that:

i. the respondent was the 2nd defendant in the original court in London. The trial court in its Ruling of 14/12/93, per Adeniji, J. made the following finding:

“Exhibit “N” shows that the suit was between:

VAB PETROLEUM INC - PLAINTIFF

AND

MICMOSON (UK) LTD - 1st DEFENDANT

MIKE M. MOMAH - 2ND DEFENDANT

Thus, the name of the respondent appeared in Exh. “N” as the 2nd defendant before the U.K. High Court of Justice, Queen’s Bench Commercial Division, London in suit No. 1991 folio No.1048. This satisfies the first requirement of Section 6(2)(a)(iv) that the respondent was a defendant before that court.

Secondly, it is clear also from the record of appeal that the respondent was resident in England at the time when the proceedings were instituted. Below is the finding of the trial court:

“Exhibit ‘K’ is the particulars of the 1st defendant. It shows the name of 2nd defendant as a Businessman, and a director and Secretary of the Company. The usual residential address of the 2nd defendant given as 60/62 London Road, Kingston-Upon-Thames, survey KTZ 6 Q2, England...

The respondent has shown by the said exhibits where he wants people to contact him or, where process is to be served on him, where such process is to be effected with reasonable possibility that he would receive it.”

Here again, there is no dispute as to the usual residential address of the respondent in England. This satisfies the second requirement of Section 6 (2)(a)(iv) and (v) that the respondent had his residential address at 60/62 London Road, Kingston-Upon-Thames, Survey, KT2 6 Q2, England. This is also the same place from where he conducted his businesses and where court process could be served/effected with reasonable possibility. In the face of the above facts and the holdings of the trial court, I resolve issue No. 1 against the respondent and in favour of the appellant.

On whether the respondent was served with the Writ and processes of the case (issue No.2), it is pertinent to refer to the record of appeal again. The learned trial judge made the following findings on service of the processes involved:

“The respondent has shown by the said exhibits where he wants people to contact him or where process is to be served on him, where such process is to be effected with reasonable possibility that he would receive it...

His contention that he was not served with court’s process and

was not resident in England at the time in question is untenable in the light of the Exhibits outlined above. I hold that the defendant/respondent was served with the court's processes in this case. "

This is a finding of fact by a trial court. In a trial, there are generally two sets of findings of facts:

A finding of fact may be based on the credibility of witnesses or may be informed from other facts proved before the trial court. Where a witness gives direct evidence that is the evidence of the facts in issue as seen, heard or perceived by any other sense by him. (Section 77 of the Evidence Act). The finding of the trial court on such evidence depends on whether or not it believes that witness (credibility of the witness). Such a finding on such evidence is a primary finding of fact, i.e. the way the witness testifies, his demeanor in the box tells much of his credibility. The trial court that saw and heard the witness is in the best position to assess his credibility and make findings of primary facts. But, where on the other hand, other facts are put in evidence from which the facts in issue can be inferred, or where a witness gave circumstantial evidence, the finding of the trial court on the facts in issue depends on inference. This is a secondary finding of fact as it is not based on the credibility of the witness but on logical process of inference. In the former case, i.e. primary findings of fact, an appeal court should always be loathe in interfering with such a finding as it did not have the privilege of seeing, hearing or observing the demeanour of the witness. There are several decided authorities on this: *Ebba v. Ogodo & Anor* (1984) 4 SC 75; *Akintola v. Olowa* (1962) 1 All NLR 224; *Fatoyinbo v. Williams* (1956) 1 FSC 87; *Egri v. Uperi* (1974) 1 NMLR 22; just to mention a few. In the latter case, i.e. where findings of fact are secondary, i.e. drawn from inferences, an appeal court is in as good position as a court of trial to do this. It can differ from the trial court. See: *Akpopuma V. Nzeka* (1983) 2 SCNLR 1.

My Lords, I have to go this extra mile because of the findings made by the court below which are not in harmony with the findings of the trial court on matter of service of the Original Court's processes. The court below made the following finding:

"It would appear to me that the appellant was not duly served with any original court processes. Neither was it shown that he received the notice of the proceedings in sufficient time to enable him

defend the action. He did not appear in the original court."

From the finding of the learned trial judge, quoted above, it is clear that such a finding was made from some exhibits which were attached to the affidavit in support of the motion before him. He mentioned such exhibits as Exhibits "K" and "N". These are exhibits
B where the respondent was said to have provided his address etc and he signed same. I think I should once more quote what the learned trial judge said:

"Exh. "K" is the particulars of 1st defendant. It shows the name
C of 2nd defendant as a Businessman, and a Director and Secretary of the Company. The usual residential address of the 2nd defendant given as 60/62 London Road Kingston-Upon-Thames, survey KTZ 6 Q2, England, Nationality - Nigerian and Date of Birth - 24/2/53. There is a column which reads:-

D *"I consent to act as director/secretary of the above named company."*

*It was signed and dated 8/11/90 by the respondent. Exhibit "N" is the letter headed paper of the company and contains the same address of the respondent as in Exhibit "K" also Exhibit "H" - he
E signed as the Managing Director.*

*It is trite law that a person who signs documents like Exhibits "K", "H", "I", is bound by its contents, for it is not the function of the court to change agreements made by parties or to make arrange-
F ments (sic) for them."* (page 3 of the Record of Appeal)

The learned trial judge concluded, rightly, in my view, as follows:

*"The respondent has shown by the said exhibits where he wants people to contact him or where process is to be served on him, where
G such process is to be effected with reasonable possibility that he would receive it see.*

*His contention that he was not served with court's process and was not resident in England at the time in question is untenable in the light of the Exhibits outlined above. I hold that the defendant/
H respondent was served with the court processes in this case."*

In furtherance of the proof of service of the Original Court's processes, another document of relevance issued from the Original Court, is an acknowledgment of service of the court. In this document, where a party intends to instruct a

solicitor to act for him, he should give him the form immediately. There is a signature on the form and the name of Leonard & Kalimi Solicitors appeared beneath it. Again, pages 66 - 69 of the Record of Appeal contain "Points of Defence of First and Second Defendants" (Statement of Defence) at the original court filed by the law firm of Leonard and Kalimi Solicitors. Thus, the act of filing a defence to the action before the original court is enough to establish service of the processes (writ of summons) on the respondent. I cannot imagine how a counsel/solicitor in an enlightened country such as United Kingdom would go out of his own way to file a defence to a civil suit without being briefed by a party to do so. That will certainly be against the ethics of his profession. Even where a counsel decides to conduct cases (especially in criminal matters) on PRO BONO basis, he will surely require the consent of the party in need thereof. It is thus difficult to appreciate the argument of the learned counsel for the respondent as well as the holding of the court below that no service of the processes was effected on the respondent.

In fact, the court below appreciated and reiterated the position of the law that service of process on counsel is as good service on a party to the proceedings and that proof of service is unnecessary where a defendant appears. The court however, erred, in my view, where it stated in this case that proof of service can only be established by an affidavit of service deposed to by a court below. The correct position of the law has repeatedly been stated by this court that it is straining the rule on proof of service to say that a defendant who filed a defence to the statement of claim was not served the writ of summons because there was no bailiff's endorsement on the writ. See Okesuyi v. Lawal (1991) 1 NWLR (Pt.176) 661, per Olatawura, JSC (of blessed memory).

Again, there is a finding by the court below (pp. 372 and 373) of the Record of Appeal as follows:

"Firstly, was there evidence before the lower court that the appellant voluntarily appeared in the proceedings or that he was a plaintiff or counter-claimed in the original court. It is this evidence, I find, in the circumstance of this case, (is) difficult to come by... He did

not appear in the Original Court.”

I think the law has for long been settled that where a party to a proceeding before a court is represented by a counsel of his choice, his physical appearance to conduct the proceeding by himself is no longer necessary except where for good reasons, the court conducting the proceedings, orders otherwise. See: Akinnuli v. Odugbezan (1992) 3 NWLR (Pt.258) 172, Kehinde v. Ogunbumi (1967) 1 All NLR 306.

The firm of Leonard and Kalimi as per the endorsement on the writ of summons and the “Points of Defence of first and second defendants” before the Original Court in London must be taken to be the legal representative of the respondent. It is my observation again, that the foreign judgment which was exhibited along with Exh. “A” - Certificate of Master of the Queens Bench was marked Exh. B, in the counter-affidavit filed by the respondent/appellant, at the court below, is a judgment given in Default. Thus, the question of appearance does not even arise. It is a judgment which could be set aside by the same court if there was an appeal against it and the court was convinced that it ought to be set aside. Unfortunately, there was no appeal against that judgment. This court can hardly be of any assistance where a party willingly decides to abdicate his responsibility. This issue is resolved against the respondent.

The last issue on this leg of the appeal is whether the Justices of the court below were correct to introduce and proffer suo motu evidence not before them. Learned counsel for the appellant pointed out the issue as follows.

“It would appear from the evidence before the lower court that the address in England was the business address of MICMOSON U.K. Limited jointly sued in this case.”

The learned counsel made his submission by introducing a document, “Form 288” in which the issue of the “usual Residential Address” of the respondent in U. K. arose. Learned counsel set out the form in his brief with a lot of questions. He concluded that nowhere in the form has it been suggested that the said form was meant for the respondents’ company. The learned Justices of the court below, it was argued, should have confined themselves to the evidence

before them and that they ought to have heard the parties to the appeal as they raised the issue suo motu. Cases such as *Obulor v. Oboro* (2001) 8 NWLR (Pt.714) 25; *Odogu v. Egwuatu* (1994) 3 NWLR (Pt.330) 120 at 132; were, among others, cited in support. The remaining submissions of the learned counsel for the appellant were anchored on the usage of inappropriate language which I believe is wrong and I should not reproduce same. This, perhaps, is what took the mind of the learned counsel for the respondent away from making submission on the core matter in issue No. (C) or 3. His own observation which is relevant reads as follows:

“a good portion of the appellant’s brief is replete with language not usually associated with brief writing in our appellate courts; what with its liberal perfunctory charges of diverse dishonesties against the Respondent...”

Now, if I understand what the court below said as quoted and challenged by the learned counsel for the appellant, was drawing a conclusion from the evidence laid before the trial court on the address given in “Form 288” which was in respect of change of director or secretary or change of particulars. Although a company does not have a ‘date of birth’ or ‘previous forenames’ as are applicable to a natural person, the trial court did not rely entirely on “form 288” to make a finding in favour of the appellant that the respondent had his usual residential address in England. What the court below did was to draw inference, itself, from the evidence made available before the trial court. There might be some misapprehension of the facts contained on “Form 288” by the court below. Further, the Company referred to i.e. MICMOSON, belonged to the respondent and both were sharing same residential/business address. I do not think the finding of the trial court on the address of the respondent in UK was perverse.

The trite position of the law is that where the Court of Appeal wrongly disturbed any finding of fact of a trial court, the Supreme Court will not hesitate in restoring that finding.

See: *Board of Customs and Excise v. Barau* (1987) 10 SC 48.

Finally, on this issue, I may have to reiterate the function of an Appellate Court on question of facts. It is mainly limited to seeking whether or not there was evidence before the trial court upon which its decision on facts was based, whether it wrongly accepted or re-

jected any evidence tendered at the trial; whether evidence called by either party to the conflict was put on either side of the imaginary scale and weighed one against the other. In other words, whether the trial court properly evaluated the evidence, whether the trial court correctly approached the assessment of the evidence before it and whether the evidence properly admitted was sufficient to support the decision upon the inference drawn therefrom. This is the only way and procedure open to an appellate court in the consideration of an appeal brought before it.

I find merit in this segment of the appeal which I allow in favour of the appellant. I set aside the judgment of the court below. I find the judgment of the Queen's Bench Division Commercial Court, London registrable for execution of the balance of the judgment sum. This is however subject to the outcome of the cross-appeal now pending in this court.

I shall now consider the appeal against the court below's judgment in Appeal No. CA/L/256/96. The antecedent of this appeal according to the appellant is that after the delivery of the Ruling by the trial court on 14/12/93, the respondent filed two applications to wit:

a) for a stay of execution of the order for registration pending the determination of his appeal

b) a petition under the Foreign Judgment (Reciprocal Enforcement) Act, 1990 for the setting aside of the same order for registration.

The trial court heard the two applications and by its rulings delivered on different dates, dismissed the applications. The respondent was dissatisfied with the ruling on the stay order. He appealed to the court below. The court below dismissed the appeal. (This is reported in *Momah v. VAB Petroleum Inc.* (1996) 7 NWLR (Pt.458) 100. The court below made a further order, "in the interest of justice", that the respondent was to deposit the sum in the court's registry for placement into an interest earning account.

The respondent filed a further motion before the court below asking for an order staying the said order for payment of the judgment sum into the court's registry. The court below dismissed the application. The respondent appealed against the said ruling in appeal No. SC.183/1995. This court dismissed the appeal. It is to be noted further, as asserted by the appellant, that, all through the pro-

ceedings up to this court, the respondent refused to deposit the money ordered by the court below to be deposited with the registry. Levy of execution on respondent's consignment of goods into Nigeria attempted by the appellant was aborted by the respondent.

Meanwhile, this court delivered a judgment in the case of *UBN v. Odusote Bookshop* (1995) 9 NWLR (Pt.421) 558, to the effect that in matters of judgments given in foreign exchange, the judgment debtor must provide sufficient Naira for the purchase of foreign exchange reflected in the judgment whenever the debt is being settled. The respondent, it was claimed further, this time around, "rushed" to make the deposit ordered by the court below since June 28, 1995, by a cheque, in April, 1996.

Later, the appellant realized that there was no order for the stay of order for registering the foreign judgment; no order for stay of proceedings pending and no order for accelerated hearing. The appellant applied for the issuance of certificate on the judgment under section 13 of the Foreign Judgment (Reciprocal Enforcement) Act, 1990.

Four issues for determination were set out by the appellant for the determination of the appeal. They read as follows:

i. *"Whether in the face of the text of sec. 13 of the Foreign Judgments (Reciprocal Enforcement) Act, Cap. 152 of the Laws of the Federation of Nigeria, the learned trial Judge of the Lagos High Court was competent in law to entertain the application of the Appellant/Judgment Creditor after all the three relevant courts (High Court, Court of Appeal and Supreme Court) had dismissed the applications of the appellant for a stay of execution.*

ii. *Whether in the face of the text of the said Section 13, the learned trial Judge could reflect the rates of interest on judgment sum considered in the proceedings among other particulars, on the "Certificate" of the judgment.*

iii. *Whether the learned trial Judge was wrong in law to follow the principles of law laid down by the Supreme Court of Nigeria in the case of *UBN v. ODUSOTE BOOKSHOP* (1995) 9 NWLR (Pt.421) 558 at p. 563 Ratio 10 regarding judgments delivered in foreign currency.*

iv. *Whether the learned trial judge of Lagos High Court was right in law to entertain ex-parte, an application under Section 13 of*

the Act.”

The issue identified by the learned counsel for the respondent in determining this appeal is issue No. (ii) from the respondent’s issues set out earlier. It reads as follows:

B *“(ii) is the lower court not right to have denied the jurisdiction of the trial court to make the orders that it made on June 18, 1996 when:*

a) the trial court had become functus officio since its order of December 14, 1993 for registration of the foreign judgment;

C *b) the orders constituted a revision and an expansion of the said order of December 14, 1993; and*

D *c) at any rate not only was an appeal-as against the order of December 14, 1993 - pending on the issue, the appeal had already been entered in the Lower Court which therefore became the only proper judicial forum for any application in the cause?”*

E The four issues by the appellant were argued separately in the appellant’s brief whereas the respondent re-formulated the four issues into one as seen above. The court below as well, treated all the issues in respect of that appeal at once. I will also treat all the issues at once, starting with the one on jurisdiction of the trial court as dealt with by the court below.

F The gist of the argument of learned counsel for the appellant on the issue of jurisdiction/competence of the trial court is contained under issue Nos. (i) and (iv). He submitted that as there was no order for stay of the judgment registering the foreign judgment or that for a stay of proceedings, the appellant/judgment creditor was within his rights to apply, under section 13 of the Foreign Judgment (Reciprocal and Enforcement) Act, 1990 for the issuance of the “Certificate” containing the particulars of the judgment and the trial court was competent to entertain the application. Learned counsel submitted further, that the learned trial judge was right to save valuable time of the court by taking the application ex-parte. This, he added, was essential because the particulars needed to be reflected in the Enrolment Order were already in the records of the court.

Learned counsel for the respondent argued differently. He submitted that the lower court’s decision is certainly beyond reproach. He referred to the averments in paragraphs (3), (4), (7) of the affidavit in support of the Ex-parte application which was granted by the

learned trial judge on June 18th, 1996. He argued that (i) an appeal was lodged on same December 14, 1993 against the trial court's ruling of that day which gave rise to appeal No. CA/L/133/93: (ii) the said appeal had been entered in the lower court on May 2, 1995.

The learned counsel argued that the trial court had clearly become FUNCTUS OFFICIO after delivering its ruling of December 4, 1993 and it lacked jurisdiction to subsequently re-open the case especially in making the said orders of June 18, 1996. He cited and relied on the following cases: *Obioha v. Ibero* (1994) 1 NWLR (Pt.322) 503; *ACC Ltd. v. NNPC* (2005) 1 NWLR (Pt.937) 563, among others.

In their judgment, the learned Justices of the court below found merit in this 2nd appeal and they allowed same by setting aside the Ex-parte Orders made by the trial court on the 18/6/96. In justifying their order of setting aside the ex-parte orders made by the trial court on 18/6/96, the court below, per Galadima, JCA (as he then was), made the following illuminating findings:

"I would wish to recapitulate on this point. By virtue of Order 1 Rule 22 of the Rules of this Court 1981 (as amended), the precondition for the entering of an appeal in this court is firstly, the receipt of the Record of Proceedings of the Appeal prepared and forwarded by the Registrar of the trial court or a bundle of documents prepared by the party showing interest in the appeal with leave of the court. This court having so received and admitted the bundle of documents filed by the appellant in Appeal No. CA/L/133/93, the appeal accordingly had been entered.

I seem to agree with the submission of the learned senior counsel, Chief Chigbue, SAN, that as the appeal in suit No. CA/L/133/93 had been duly entered in this court and the subject of the appeal was against the order of the court below to register the foreign judgment, the court below had no jurisdiction to further entertain and make the ex-parte orders registering the said foreign judgment because the court had become functus officio with respect to the order to register since 14/12/93. In other words, this court was already seized of this matter in suit No. CA/L/133/93 generally and the judgment sum particularly prior to the filing of the Ex-parte application and making of the Orders Ex-parte, the subject of this second appeal."

There appear to me to be three vital issues which are to be

determined as pointed out in the submissions of the learned counsel for the respective parties and as found out by the court below. The issues are:

- i. was there a pending appeal before the court below when the motion Ex-parte was filed and decided by the trial court?
- B ii. was the trial court competent to decide that application at that point in time?
- iii. Appeal No. CA/L/133/93 was on the legality of registering the foreign judgment as ordered by the trial court on 14/12/94. Was it not an abuse of process of court to have brought the matter again by a motion Ex-parte?

As observed earlier, there is a finding by the court below that there was a pending appeal before it as Appeal No. CA/L/133/93 which was entered on May 2, 1995. Now, in accordance with the provisions of the Court of Appeal Rules, 1981 (as amended) an appeal is said to be entered in the court when the record of proceedings in the trial court has been received in the Registry of the court. See: Order 1 Rule 22, Court of Appeal Rules (1981) (as amended); Order 4 Rule 10, Court of Appeal Rules, 2007 (as amended).

Once it is so entered, an appeal is then said to be pending. The Rule governing the control of proceedings during pendency of an appeal is that after an appeal has been entered and until it has been finally disposed of, the court shall be seised of the whole of the proceedings as between the parties thereto and except as may be otherwise provided in the Rules, every application therein shall be made to the court and not to the court below (i.e. the trial), but any application may be filed in the trial court for transmission to the court below. See Order 4, Rule 11. Thus, in pursuance of the above provisions of the Court of Appeal Rules, the trial court will have no competence or jurisdiction to decide on any application whether on notice or ex-parte in relation to an appeal which the trial court has become FUNCTUS OFFICIO. If the trial court takes any step thereon, except for the purposes of transmitting the processes so filed to the Court of Appeal, that step taken will be declared a nullity.

In the appeal on hand, it is clear from the printed record of appeal that:

- i. The ruling appealed against on the order granting the application to register the U.K. judgment was delivered on 14/12/93
- ii. An appeal was filed to the court below on same 14/12/93.
- iii. The said appeal was entered in the lower court's registry on the 2/5/95 and given appeal No. CA/L/133/93
- iv. The ex-parte motion giving rise to Appeal No. CA/L/256/96 ^B was dated and filed before the trial court on 30/4/96.
- v. Ruling on the ex-parte motion was delivered by the trial court on 18/6/96.
- vi. An appeal on the said Ruling was filed to the Court below ^C on 20/6/96
- vii. The appeal to the court below was determined on the 29/3/2001.

It is clear from the above that an appeal had been pending in CA/L/133/93, since the 14/12/93. Thus, by the time the motion ex-parte was filed and determined, the court below was seized of jurisdiction on any matter relating to the decision delivered by the trial court on 14/12/93 which culminated in Appeal No. CA/L/133/93. If there was any application in relation to the subject matter of that appeal, from the time the appeal was entered, such application ought ^E to have been filed before the court below. It was wrong of the trial court to have over-stretched its jurisdiction (which by the operation of law it did not have) to cover any matter or application whether on notice or ex-parte. The admonition given by Uwaifo, JCA (as he then was) is very apt in this appeal. In Adeniyi v. Onagoruwa (1994) 4 ^F NWLR (Pt.349) 225, the learned jurist had this to say:

"It seems clear to me that the rule is about when this court wholly takes control of every aspect of an appeal to the exclusion of the court below once the appeal is entered.... Hence, when an appeal has been entered and until it has been finally disposed of, the court shall be seised of the whole proceedings and every application therein shall be made to the court and not to the court below. It stands to reason that once the Record of Appeal is before this court and Appeal is listed, this court will not share jurisdiction over any ^H matter concerning the Appeal with the court below. This concurrent jurisdiction that both courts exercised as soon as an appeal was filed but before it was entered would terminate."

This court made a similar pronouncement in the case of Mobil

Oil Ltd. v. Agadaigho (1988) 2 NWLR (Pt.77) 553; Biochem Agrochemical v. Kudu Holdings (1996) 2 SCNJ 212 at 219; Leaders & Company Ltd v. Kusamutu (2008) All FWLR (Pt.405) 1800 at 1812 - 1814. The Ruling of the trial court of 18/6/96 was a nullity and ought to, as the court below did, be set aside. Before I do that however, it is pertinent for me to observe that in appeal No. CA/L/133/93, the principal issue to be decided by the court below was whether in view of the provisions of the Foreign Judgment (Reciprocal Enforcement) Act Cap. 152 Laws of the Federation of Nigeria, 1990, the lower court was right in ordering the registration for execution of the judgment of the High Court of Justice of the Queen's Bench Division of England partly executed by London bailiffs as a foreign judgment registrable in Nigeria. In the motion ex-parte before the trial court the first relief asked is for:

D *"An Order Registering the judgment of the Queen's Bench Division Commercial Court of London, United Kingdom, in suit No. 1991 folio 1048 dated November, 1991 pursuant to the Ruling of this Honourable Court made on Tuesday December 14, 1993, declaring the said foreign judgment registrable for execution in Nigeria to the extent of this outstanding balance of the judgment sum."*

E It is clear to all and sundry that both reliefs in Appeal No. CA/L/133/93 and the one in relief No. 1 of the motion ex-parte (as set out above) are one and the same thing. There is an apparent abuse of the process of the trial court. The first two issues formulated by the respondent as appellant at the court below read as follows:

F 1) *"whether the court below was right in entertaining and making the Ex-parte orders appealed against when the subject matter of the said ex-parte orders was already the subject of the Appeal in suit No. CA/L/133/93 which appeal had been entered in this Honourable Court?"*

G 2) *"Was the court below right in entertaining the respondent's ex-parte application filed on the 10th May, 1996 to order the registration of the foreign judgment and making the orders sought therein ex-parte, when it had in a previous application entertained the same application inter parties on the same subject matter and on the said previous occasion had made an order to register the said judgment?"*

H ***The trite position of the law on abuse of a court process is that it happens in regard to multiple actions between the***

same parties, on the same subject matter, when a party (such as the appellant in this appeal) improperly uses judicial process to the irritation, of annoyance and harassment of his opponent (the respondent herein) not only in respect of the same subject matter but also in respect of the same issues in the other action or actions. See: Okafor v. A - G Anambra State (1991) 6 NWLR (Pt.200) 659 at 681; Saraki v. Kotoye (1992) 9 NWLR (Pt.264) 156; Ikine v. Edjerode (2001) 18 NWLR (Pt.745) 446. B

Since there was an abuse of the court's process, the court below should have struck out that issue first and foremost without much ado as the order for registering the foreign judgment had already been set aside by the court in its decision on Appeal No. CA/L/133/93 (which was earlier in time (see p. 378 of the Record of Appeal). With respect to the other orders made by the trial court in respect of award of interest in favour of the appellant (respondent at the court below), the court below ought to have declared such orders a nullity and struck same out. C

In summary, the whole ex-parte application was a nullity conferring nothing on any of the parties. It ought to have been struck out without the unnecessary wastage of the precious time and resources of the court below. Therefore, I am constrained to call in aid the provision of Section 22 of the Supreme Court Act, 1960 to substitute the order made by the court below in setting aside the Ex parte Orders made by the trial court to that of striking same out. This is because an order setting aside, presupposes that it was an order setting something aside. D

In a proceeding which is ab initio, a nullity, nothing can be set aside out of it as there is nothing legally binding in it. Lord Denning M. R. said in the celebrated case of *Macfoy v. U. A. C.* (1962) AC 152 that one cannot build something on nothing and expect it to stand. It will certainly collapse. That is the situation in this appeal No. CA/L/256/96. There is no pivot upon which the ex-parte orders shall rest. The appeal CA/L/256/96 at the court below challenged the grant of the ex-parte orders made by the trial court. The court below allowed the appeal. I, too allow this segment of the consolidated appeal. I affirm the decision of the court below on this appeal CA/L/256/96 albeit in a substituted form for an order declaring the decision of the trial court on the Ex-parte orders made null and void, E
F
G
H

having no regard effect whatsoever. Thus, appeal No. CA/L/256/96 forming part of the present appeal before this court is hereby struck out.

Finally, the main appeal partially succeeds as shown supra. There shall be no order as to costs. I shall proceed, anon, to consider the cross-appeal.

In the Notice of Cross-Appeal which was filed on 10/6/2008, one ground of Cross-Appeal was couched. An issue for determination was distilled and it reads as follows.

“was the trial court not lacking jurisdiction over the cause ab initio given that its order of registration of the subject foreign judgment was made several (13) months after expiration of the 12 months (from date of delivery) provided for by the applicable law i.e. Reciprocal Enforcement of Judgment Act, 1922 Cap., 175 Laws of the Federation and Lagos 1958?”

Learned counsel for the cross-respondent formulated the following issues:

“[A] FOR APPEAL NO. CA/L/133/93

i. Under which laws of the Federal Republic of Nigeria are UK Judgments delivered by the Queen’s Bench Division Commercial Court, London, registrable in Nigeria and within what periods of time?

ii. Did the London’s Queens Bench Division Commercial Court have jurisdiction to entertain this suit with regard to service of the Writ of Summons and Processes of the case in London?

[B] FOR APPEAL NO. CA/L/256/96

In view of the texts and terms of the legislations for registration of foreign judgments in Nigeria, had the Lagos High Court become functus officio after its order of registration on December, 1993, in the face thereafter of DISMISSALS OF ALL APPLICATIONS FOR A STAY OF PROCEEDINGS BY THE CROSS-APPELLANT AT:

i. The Lagos High Court

ii. The Court below

iii. This Honourable court

SECTION 13 OF THE 1990 ACT?”

It is clear that the issues formulated by the Cross-respondent (since he has no appeal on ground) are out of tune with the normal trend of couching issues for determination. His issues seem to proliferate the single ground of the cross-appeal.

In his submissions, the learned counsel for the cross-appellant argued that rather than the Foreign Judgment (Reciprocal Enforcement) Act, Cap. 152 LFN, 1990, it is the Reciprocal Enforcement of Judgments Act, Cap. 175 LFN and Lagos, 1958 which applies as was decided by the Supreme Court in the case of *Macaulay v. R. Z. B. Austria* (2003) 18 NWLR (Pt. 85) 282. Learned counsel cited and relied on Section 3(1) of Cap. 175, 1958 Laws which provides that a judgment obtained in a High Court in the United Kingdom or Ireland is registrable in Nigeria, “within twelve months after the date of the judgment or such longer period as may be allowed by the court.” Cross-appellant’s learned counsel argued further that it took the appellant (Cross-respondent) all of 25 months i.e. 13 months after the deadline, before getting the present judgment registered. Since there was no order of extension of time the registration is of no effect and liable to be set aside. The judgment, it was argued further, was statute barred for purposes of registration at the time it was purportedly registered when the trial court was lacking jurisdiction at the time it made the order for registration. The cases of *Macaulay v. R. Z. B. Austria* (Supra). *Marine & Gen. Assurance v. Overseas Union Insurance Ltd.* (2006) 4 NWLR (Pt.971) 622 and *Owie v. Ighiwi* (2005) 5 NWLR (Pt.917) 184 were referred to. Learned counsel for the cross-appellant urged this court to allow the cross-appeal.

Let me straight away observe that the lone ground of the cross-appeal does not touch anything on the decision of the court below in appeal No. CA/L/256/96: The issue formulated in respect thereof by the learned counsel for the cross-respondent is of no moment. It is accordingly struck out and all arguments in respect thereof are dis-
 countenanced. Further, sub issue (ii) under issue “A” of the cross-respondent issues also has no relevance to the cross-appeal as that issue is premised upon the question of jurisdiction of the Queen’s Bench Division Commercial Court on the issue of service of the writ of summons and processes of the case in London. This was the 1st issue (issue A) formulated by the cross-respondent as appellant in the main appeal which has already been adequately treated and decided upon by this court. That sub issue has no relevance to the cross-appeal. As far as this court is concerned, it is a dead issue. It is hereby struck out and all submissions on it are hereby discountenanced. This court deals with live issues and there is no need beating a dead horse

as it will never rise again.

Thus, the only issue which appears relevant to the cross appeal is issue No. A (which questions the periods of time within which a foreign judgment is registrable in Nigeria. From the submissions of learned counsel for the cross-respondent, it is his argument that the cross-respondent chose to apply for registration under the 1990 Ordinance and he submitted that the trial court did not lack jurisdiction over the cause ab initio as suggested by the cross-appellant. He implores this court to dismiss the cross-appeal and affirm the trial court's order.

In treating this cross-appeal, I will advert my mind to the laws and the decided cases of this court referred to by the learned counsel for the cross-appellant.

The learned counsel referred to the Foreign Judgment (Reciprocal Enforcement) Act, 1922 Cap. 175, Laws of the Federation and Lagos 1958. The relevant provision of this Act reads as follows:

“3(1) where a judgment has been obtained in the High Court in England or Ireland, or in the Court of Session in Scotland, the judgment creditor may apply to a High Court at any time within twelve months after the date of the judgment or such longer period as may be allowed by the court, to have the judgment registered in the court, and on any such application the court may, if in all the circumstances of the case it thinks it is just and convenient that the judgment should be enforced in Nigeria, and subject to the provisions of this Ordinance, order the judgment to be registered accordingly.”

The focal point of reference here is the time span within which to get the foreign judgment registered by the registering High Court. The provision provides for two options:

i. Within twelve months after the date of the judgment or;

ii. Within such a longer period as the registering High Court will allow.

But, the cross-respondent submitted that the cross-respondent chose to apply for registration under the provisions of 1990 Ordinance. Now Sections 3(1) and 4(1) of the Foreign Judgments (Reciprocal Enforcement) Act, 1961, Cap. 152 Laws of the Federation of Nigeria, 1990, provide as follows:

“3[1] The Minister of Justice if he is satisfied that, in the event of the benefits conferred by this part of this Act being extended to Judgments given in the Superior Courts of any foreign country, substantial reciprocity of treatment will be assured as respects the enforcement in that foreign country of judgments given in the superior courts in Nigeria, may by order direct -

a) that this Part of this Act shall extend to that foreign country; and

b) that such courts of that foreign country as are specified in the order shall be deemed superior courts of that country for the purposes of this part of this Act.

4[1] A person being a judgment creditor under a Judgment to which this part of this Act applies, may apply to a superior court in Nigeria at any time within six years after the date of the judgment, or where there have been proceedings by way of appeal against the judgment, after the date of the last judgment given in those proceedings, to have the judgment registered in such court, and on any such application the court shall, subject to proof of the prescribed matters and to the other provisions of this Act, order the judgment to be registered.

Provided that a judgment shall not be registered if at the date of the application:

a) it has been wholly satisfied; or

b) it could not be enforced by execution in the country of the original court.”

The span of time given by this section is:

i. application for registering a foreign judgment can be done within a period of six months after the date of the judgment sought to be registered, or

ii. where there is appeal on the judgment sought to be registered, application for registering a foreign judgment can be made after the date of the last judgment in this appeal proceedings (or such applications as are pending)

However, in Section 10 of the same Act, the law provides:

“10. Notwithstanding any other provision of this Act -

a) a judgment given before the commencement of an order under section 3 of this Act applying Part 1 of this Act to the foreign country where the judgment was given may be registered within 12

months from the date of the judgment or such longer period as may be allowed by a superior court in Nigeria.”

It is to be noted that the provision of this section, especially paragraph (a) quoted above in my view, has made a very strict proviso, that, notwithstanding ANY OTHER PROVISION OF THIS ACT: B which is defined by Section 1 thereof to mean: “the Foreign Judgment (Reciprocal Enforcement) Act” of 1961 as contained in Cap., 152 of the Laws of the Federation, 1990.

This court in the case of *Macaulay v. R. Z. B. Austria* (2003) 18 C NWLR (Pt.852) 282 at pp. 298 H -299 A - B, per Kalgo, JSC observed as follows:

“By this provision, irrespective, regardless or in spite of any other provision in the 1990 Act, any judgment of a foreign country including United Kingdom to which part 1 of that Act was not extended, can only be registered within twelve months from the date of the judgment or any longer period allowed by the court registering the judgment since the provisions of Part 1 of the said Act had not been extended to it. Section 4 of the 1990 Act which speaks of registering a judgment within 6 years after the date of judgment only applies to the countries where Part 1 of the said Act was extended, that is to say, when the Minister made an order under the 1990 Act; and in this case it was not.”

Macaulay’s case (supra) was almost on all fours with the main appeal treated earlier which gave rise to the cross-appeal under consideration. Andrew Mark Macaulay was a foreigner who was resident in Nigeria since 1986. He, together with 2 other persons, who resided outside Nigeria, guaranteed a loan from the respondent to a company called Constante Trading Limited based in Channel Island. G The loan was to be repaid by the company in accordance with the terms and conditions set out in the deed of guarantee. The Company defaulted. The respondent sued the appellant and the other two guarantors jointly and severally in High Court, Queen’s Bench Division Commercial Court in England and obtained judgment on H the 19th of December, 1995 against them jointly and severally for the sum of Five Million, Five Hundred Thousand U. S. Dollars (US\$ 5,500,000.00) with interest in accordance with the deed of guarantee.

On the 28th of August, 1997, the respondents, by an EX-

PARTE petition applied to the High Court of Lagos State for leave to register the said judgment. By an order made on 8th of September, 1997, the trial High Court granted leave and the judgment was accordingly registered as a foreign judgment.

The appellant, dissatisfied, filed a petition on Notice on 22nd October, 1997 to set aside the said registration on the grounds that it was not in accordance with the relevant law and was contrary to public policy in Nigeria. The petition was heard by the trial court. On the 6th of February, 1995, the trial court dismissed the petition and held that the judgment was validly registered. Dissatisfied further, the appellant appealed to the Court of Appeal. The appeal was again dismissed by the Court of Appeal. The appellant finally appealed to this court.

So, here we are! This court has already laid a precedent. In the appeal on hand, it has already been shown earlier that the foreign judgment was delivered on the 6th day of November, 1991. The exact date when the cross-respondent filed his Motion on Notice before the trial court, appears uncertain as there is no document exhibited to show the exact date of filing the process. However, the cross-appellant himself quoted the 6th day of November, 1991, when the judgment of the foreign court was made. And in a counter-affidavit filed by the cross-respondent as respondent to a motion filed by the cross-appellant for an order for stay of execution, the cross-respondent, himself, stated that the judgment of the foreign court was entered on 6/11/91. Thus the two parties are agreed that the foreign judgment was made on 6/11/91. The Ruling of the trial court on registration of the foreign judgment was made on the 14/12/93. The difference between 6/11/91 and 14/12/93 is exactly 2 years one month and 8 days or put simply, 25 months and 8 days. The cross-respondent had 12 months from the 6/11/91 within which to apply to the trial court to get the foreign judgment registered. That will mean that the last date within which to file his application for registration would have been the 5th day of November, 1992. There is nothing to guide and convince me that such application was filed within the given time. All I have seen and as relied upon by the parties and the court below is that the Ruling of the court below was delivered on 14/12/93. This date far exceeded the time limit provided by Section 10[a] of the 1990 Act. The cross-respondent would have, perhaps,

saved the situation if he had supplied the date he approached the trial court. Nothing has been exhibited including the initiating process i.e. Motion on Notice (as shown in the 1st line of the trial court's ruling of 14/12/93).

The practice in the courts is that for anyone to ask for the indulgence of a court, it is his duty to place before the court all necessary materials which will assist the court in arriving at a just decision. This, the cross-respondent had failed to do and the correct presumption which has not been reverted is that by the time he approached the trial court for registering the foreign judgment, he was out of time by well over thirteen months.

It is also not shown that there was an order extending the said time by the trial court. The trial court, thus, acted without jurisdiction in making an order registering the foreign judgment. It is rather unfortunate! That trial court's order is a nullity. It must be set aside.

On the account of this cross-appeal, the trial court's order registering the judgment of the High Court, Queen's Bench Division Commercial Court's judgment of 6/11/91 is hereby declared to be a nullity and it is hereby set aside. The cross-appeal succeeds and it is allowed. I affirm the judgment of the court below which set aside the trial court's decision. I make no order as to costs in this cross-appeal.

FABIYI JSC

I have had the preview of the judgment just handed out by my learned brother - I. T. Muhammad, JSC. I agree with the reasons therein ably advanced to arrive at the inevitable conclusions that the main appeal should be allowed in part while the cross appeal deserves to be dismissed.

I have nothing useful to add and I hereby keep my peace.

ARIWOOLA JSC

I had the opportunity of reading the draft of the lead judgment just delivered by my learned brother, Tanko Muhammad, JSC. The appeal and cross appeal were admirably considered and I am in total agreement with the reasoning and conclusion.

I agree that the main appeal has some merits and it should succeed in part. Accordingly I also hold that the appeal succeeds partially as held in the lead judgment, with no order as to costs.

With respect to the cross appeal, I also hold that the trial court was without jurisdiction when it made the order registering the judgment of the High Court, Queen's Bench Division Commercial Court's judgment of November 6, 1991. There is no doubt, any order made by a court without competence is a nullity, liable to being set aside. B

In the circumstance, the court below was right in its decision on the appeal to it. Accordingly, the cross appeal succeeds and it is also allowed by me. The judgment of the court below which set aside the judgment of the trial court is hereby affirmed. I also make no order as to costs. C

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