

**SUPREME COURT OF NIGERIA**  
FRIDAY 8<sup>TH</sup> MARCH, 2013. SC. 276/2003  
**CORAM:- W. S. N. ONNOGHEN, M. S. MUNTAKA-  
COOMASSIE, N. S. NGWUTA, M. U. PETER-ODILI,  
O. ARIWOOLA, JJSC**

ABOSELDEHYDE LABORATORIES PLC ..... APPELLANT  
AND  
1. UNION MERCHANT BANK LTD  
2. OTUNBA OLUTOLA SENBORE ..... RESPONDENTS

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JUDGMENTS - Declaratory judgment - Stay of - Such judgment cannot be stayed by an interim order - Except the declaratory order is coupled with a mandatory order (H1)

ORDERS OF COURT - Injunction - Purpose - The aim is to protect - An established right of the applicant (H2)

APPEALS - Ground of appeal - Injunction pending appeal - Since the pending appeal and application for injunction - Are based on same consideration - The grounds of appeal must be the same (H3)

APPEALS - Injunction pending appeal - Grant - Precondition - Court must go into a consideration of - Competing legal rights of the parties - To the protection of the injunctive relief (H4)

APPEALS - Injunction pending appeal - Applicant's duty - He must establish by evidence in affidavit - The legal right he seeks to protect by the order (H5)

**FACTS**

By a Deed of Mortgage Debenture between appellant and 1<sup>st</sup> respondent, appellant mortgaged all its movable property to 1<sup>st</sup> respondent as security for appellant's indebtedness to the said 1<sup>st</sup> respondent. Upon the failure of appellant to settle its said indebtedness, 1<sup>st</sup> respondent appointed 2<sup>nd</sup> respondent as a receiver/manager over appellant. Subsequently, 1<sup>st</sup> respondent filed originating summons in suit No. FHC/L/CS/777/99 at the Federal High Court, Lagos

praying inter alia for, an order of the court directing the receiver to take such steps as may be necessary to realise the assets of appellant with a view of paying its outstanding debt to 1<sup>st</sup> respondent. While the action was pending, appellant filed suit No. FHC/L/CS/803/99 against respondents seeking for a declaration that nullifies the appointment of 2<sup>nd</sup> respondent by 1<sup>st</sup> respondent as a receiver in respect of appellant's properties, damages and injunction against respondents. Appellant followed the suit with an application for interim injunction restraining 2<sup>nd</sup> respondent from taking over appellant's company pending the hearing of interlocutory injunction seeking for the same reliefs. The interim order was granted by the court.

Upon being served the interim order, respondents withdrew from the premises of appellant and filed an application in the court praying for the discharge of the said interim order of injunction. In its judgment, the court discharged the interim order of injunction and dismissed the application for an order of interlocutory injunction pending the determination of the suit. Meanwhile with regards to the proceedings in FHC/L/CS/777/99, appellant was ordered not to tamper with any of the 214 chattels including vehicles listed in the second schedule to the Deed of Mortgage Debenture whether by way of sale, transfer or other dispositions pending the hearing and determination of the applications before the court. Appellant's application for stay of execution of the ruling in suit No. FHC/L/CS/803/99 was dismissed. Dissatisfied, appellant filed a similar application in the Court of Appeal, Lagos State division. The court dismissed the application, which resulted in appellant filing appeal in Supreme Court.

### **ISSUES FOR DETERMINATION**

*"3.01 Whether the Appellant in the circumstances of this case was not entitled to an order of stay of Execution/or injunction as prayed before the lower court*

*3.02 Whether the learned Justices of the Lower Court were right to have in the course of considering the Appellant's application for stay of execution and/or injunction pronounced in (sic) the entire facts of the case thereby determining the substantive issues yet to be determined by the Court of first instance"*

# **HELD** (Unanimously dismissing the appeal per **ONNOGHEN JSC**)

*Declaratory judgment - Stay of*

**1. It is settled law that a declaratory judgment or order of a court cannot be stayed by an interim order, except the declaratory order is coupled with a mandatory order, such as an order of injunction.**

**From the facts of this case, it is clear that the judgment or ruling/decision of the lower courts sought to be stayed are interlocutory decisions, which dismissed appellant's application for an order of stay of execution or interlocutory injunction which made the decisions declaratory in nature as there was not mandatory order which went along with the said orders dismissing the applications. The orders also did not grant any monetary payment(s) to the respondent. In the circumstance, it is clear, and I hereby hold that the principles guiding the courts in applications for stay of execution of the judgment of the courts are not applicable to the facts of this case and are consequently discountenanced by me in this judgment.**  
(p. 1217 A)

*Injunction - Purpose*

**2. It is settled law that the aim of an order of injunction is to protect an established right of the applicant. This is a fundamental requirement. The question is whether appellant has established any right to the injunction sought. I had earlier reproduced the findings of the lower court on the facts before the court which findings have not been challenged in this appeal and therefore deemed to have been accepted as true by appellant.** (p. 1220 B)

*Ground of appeal - Injunction pending appeal*

**3. It is generally said that one of the guiding principles for consideration in an application for injunction pending appeal is how arguable the grounds of appeal are. However, to my mind, that requirement is not relevant to an application of this**

***nature where both the pending appeal and the application for injunction are subject to or are based on the same consideration. In other words, the ground of appeal challenging a refusal of an application for interlocutory injunction pending appeal will of necessity be the same as the ground required for the court to consider in the grant of an application for an order of injunction pending appeal, which are normally the right to be protected, the balance of convenience, the arguable nature of the grounds of appeal etc. In such a case if the applications by the lower court were to have been granted, there would be no need to consider the appeal.*** (p. 1221 F)

*Injunction pending appeal - Grant - Precondition*

***4. For a court to declare whether or not to grant an injunction pending appeal, it has, as of legal necessity to go into a consideration of the competing legal rights of the parties to the protection of the injunctive relief.*** (p. 1223 E)

*Injunction pending appeal - Applicant's duty*

***5. It is a duty placed on an applicant seeking injunction pending appeal to establish by evidence in affidavit(s) the legal right he seeks to protect by the order which of necessity makes it mandatory for the court to go into the facts to determine whether such entitlement has been established.*** (p. 1223 F)

## NOTABLE POINTS OF INTEREST

### **NGWUTA JSC**

#### ***1. Injunction is granted at the discretion of court***

***An injunction is an equitable relief and consequently it is granted at the discretion of the Court. It is not granted as a matter of grace. The discretion must be exercised judiciously and judicially.*** (p. 1226 D)

### **PETER-ODILI JSC**

#### ***2. Substantive matter must be avoided in interlocutory ruling***

It is not forgotten the principle of law that in an interlocutory application certain boundaries must not be crossed. A trial court or appellate one as the court below must desist from making any finding in any

interlocutory ruling which may prejudice the substantive case.  
(p. 1235 D)

### **REPRESENTATION**

Chief Wale Taiwo with Akerele Adetoun Esq., for the Appellant  
Dr. Wale Olawoyin, for the Respondents

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### **CASES REFERRED TO**

Ladunni v. Kukoyi (1972) 3 S.C. 31

Obeya Memorial Hospital Ltd v. A-G Federation (1987) 3 NWLR C  
(pt. 60) 325

Onyemelukwe v. Attamah (1993) 5 NWLR (pt. 293) 350

Hart v. TSKJ Nig. Ltd (1998) 12 NWLR (pt. 578) 372

Adeyemi Works Construction v. Omolehin (2004) 6 NWLR (pt. 870)  
650

D

Union Beverages Ltd. v. Pepsi Cola (1974) 3 NWLR (pt. 330) 1

Akano v. Hakeem - Habeeb (1992) 6 NWLR (pt. 241) 266

Buhari v. Obasanjo (2003) 17 NWLR (pt. 850) 587

Ikenta Best Nig Ltd. v. A-G Rivers State (2008) 6 NWLR (pt.1084)  
612

E

Adigun v. A-G Oyo State (1978) 1 NWLR (pt. 53) 678

Military Gov. Lagos State v. Ojukwu (1985) 2 SC 277

Ayorinde v. A-G Oyo State (1996) 2 SCNJ 198

Nwabueze v. Nwosu (1988) 4 NWLR (pt. 88) 252

F

Balogun v. Balogun (1969) 1 ALL NLR 349

Utilgas v. Pan African Bank Ltd (1974) 1 ALL NLR (pt. 2) 47

### **STATUTE & RULES REFERRED TO**

Court of Appeal Act 1976, s. 18

G

Court of Appeal Rules 1981, O. 3 r. 304, O. 4 r. 192

### **LEAD JUDGMENT BY ONNOGHEN JSC**

This appeal is against the Ruling of the Court of Appeal, Holden at Lagos in an application No. CA/L/392M/2001 praying the court for an order for stay of execution/injunction delivered on the 18th day of December, 2002 in which the court dismissed the application.

The facts of this case include the following:

By a Deed of Mortgage Debenture between appellant and 1st

respondent at pages 40 - 66 of the record entered into on the 21st day of May, 1999 appellant mortgaged/charged all its movable property contained in the schedules thereto to the 1st respondent as security for appellant's indebtedness to the said 1st respondent. Upon the failure/neglect of appellant to settle its said indebtedness, 1st respondent appointed 2nd respondent as a receiver/manager over the appellant vide the Deed of Appointment of receiver on the 11th day of June, 1999 - See pages 67 - 69 of the record.

On the 5th day of July, 1999, the 1st respondent filed an Originating Summons No. FHC/L/CS/777/99 at the Federal High Court praying the court for the following reliefs:-

*"(a) AN ORDER of this Honourable Court directing the Receiver to take such steps as may be necessary to realise the assets of the Respondent (that is Aboseldehyde Laboratories Plc) with a view of paying its outstanding debt to the Applicant.*

*(b) AN ORDER of this Honourable Court restraining the Respondent, its agents, privies and assigns including officers from doing anything that would prevent the Receiver from performing his lawful duties as a Receiver." The suit was assigned to Hon. Justice Odunowo."*

While that action was pending appellant instituted an action, suit No. FHC/L/CS/803/99 on the 9th day of July, 1999, which action was assigned to Hon. Justice Mustapha, against the present respondents claiming the following reliefs:

(a) A Declaration that the appointment of the second Defendant by the first Defendant as a Receiver in respect of the properties situate, lying and being at Plot C20, Alakoso Avenue, Amuwo Odofin Scheme Apapa and No. 7 Akin Osiyemi Street, Off Allen Avenue Ikeja respectively is illegal, unconstitutional, null and void and of no effect whatsoever.

(b) A Declaration that the forcible entry into the plaintiff's factory and office situate at Plot C20, Alakoso Avenue Amuwo Odofin Scheme, Apapa and No. 7 Akin Osiyemi Street, Off Allen Avenue, Ikeja respectively by Defendant and their agents with arms, cutlasses, machetes and other dangerous weapons is unlawful, illegal, unconstitutional, null and void and of no effect whatsoever.

(c) A Declaration that the Defendants have no right to take possession of the plaintiff's factory and office save in accordance with due process and law.

(d) A sum of N200M Naira only being special and general damages jointly and severally for unlawful and forcible entry and closure of the plaintiff's factory and business premises by the Defendants, their agents, servants and/or officers.

(e) An injunction restraining the Defendants, their agents, servants, privies or officers or any person or body of persons howsoever B from continuing the acts of trespass and from advertising in any national newspaper the appointment of the second Defendant as a Receiver to dispose the plaintiff's property.

Appellant followed the above suit with an application for interim injunction restraining the 2nd respondent from taking over the C appellant's company pending the hearing of the application for interlocutory injunction which sought the same reliefs, which interim order was granted by Mustapha J. (as he then was). Upon service of the interim order on them on 13/7/99, the respondents withdrew D from the premises of the appellant and filed an application on 14/7/99 in the court praying for the discharge of the said interim order of injunction.

On the 14th day of February, 2001 the trial court delivered a ruling on the applications - (a) for interlocutory injunction and (b) E discharge of the interim order of injunction in which it discharged the interim injunction and dismissed the application for an order of interlocutory injunction pending the determination of the suit.

Meanwhile with regards to the proceedings in FHC/L/CS/777/ F 99, on the 9th day of August, 1999, Hon. Justice Odunowo ordered appellant not to tamper with any of the 214 chattels including vehicles listed in the second schedule to the Deed of Mortgage Deben- ture whether by way of sale, transfer or other dispositions pending the hearing and determination of the applications before the court. G

The ruling of Mustapha J. (as he then was) in FHC/L/CS/803/ 99 delivered on 14/2/2001 resulted in an application by appellant before that court praying for an order of stay of execution and/or injunction filed on 22/2/2001 which the trial court dismissed vide a ruling delivered on 10th September, 2001. Being dissatisfied with the above ruling, appellant filed a similar application at the Court of Appeal dated 14th September, 2001 for stay of execution and/or H injunction, which application was also dismissed on 18th December, 2002 resulting in the instant appeal before this Court. The issues for

the determination of which have been identified by learned Counsel for appellant, CHIEF WALE TAIWO, in the appellant's brief filed on 7/2/12, as follows:-

B “3.01 *Whether the Appellant in the circumstances of this case was not entitled to an order of stay of Execution/or injunction as prayed before the lower court (Grounds 1, 2 & 4).*

C 3.02 *Whether the learned Justices of the Lower Court were right to have in the course of considering the Appellant's application for stay of execution and/or injunction pronounced in (sic) the entire facts of the case thereby determining the substantive issues yet to be determined by the Court of first instance” (Ground 3).*

On his part, learned Counsel for the respondents DR. WALE OLAWOYIN formulated a single issue for determination in the respondents' brief filed on 9/2/12 to wit:

D “*Whether the Court of Appeal in refusing to grant the application dated 14 September, 2001 for an order of stay of Execution/or injunction exercised its discretion judicially and judiciously?*”

It is important to note that appellant is seeking the following reliefs from this Court:

E “**RELIEFS SOUGHT FROM THE SUPREME COURT OF NIGERIA**

(1) *An order allowing the appeal.*

F (2) *An order staying execution of the decision of the court of first instance delivered on the 14th February, 2001 pending the hearing and determination of the appeal filed against the decision of the Federal High Court at the Court of Appeal and the substantive suit at the Federal High Court, Lagos. ALTERNATIVELY*

G (3) **AN ORDER OF INJUNCTION** *restraining the Respondents from selling and/or alienating the Appellant's assets and/or taking or causing to be taken any steps pursuant to the decision of the Federal High Court delivered on the 14th February, 2001 pending the hearing and determination of the appeal filed against the said decision at the Court of Appeal and the substantive suit at the Federal High Court, Lagos”* see page 206 of the record.

H I must point out at this stage that reliefs 2 and 3 supra are very similar to reliefs 1 & 2 before the trial court and the lower court; in the applications filed before those courts on 22/2/2001 and 14/9/2001 respectively. For ease of reference I reproduce them hereun-



der as follows:

*“1. AN ORDER staying execution of the decision of this Honourable Court delivered on the 14th February, 2001 pending the hearing and determination of the appeal filed against the said decision at the Court of Appeal.*

*ALTERNATIVELY*

*2. AN ORDER OF injunction restraining the Defendants/Respondents whether by themselves, their servants, agents and/or privies or whosoever from taking/or causing to be taken any steps pursuant to the decision of this Honourable Court delivered on the 14th February, 2001 pending the hearing and determination of the appeal filed against the said decision at the Court of Appeal.”*

While that filed before the lower court prays thus:

*“1. An order staying execution of the Ruling of the Federal High Court delivered on the 14th February, 2001 pending the hearing and determination of the appeal filed against the said decision.*

*ALTERNATIVELY*

*2. An order of injunction restraining the Respondents whether by themselves, their servants, agents and/or privies or whosoever from taking or causing to be taken any steps pursuant to the decision of the Federal High Court delivered on 14th February, 2001 pending the hearing and determination of the Court of Appeal.”*

From the above reliefs before the lower courts, it is very clear and I hereby find and hold that there is an appeal pending before the lower court against the decision of the Federal High Court made on 14th February, 2001 in which the court dismissed appellant's application for stay of execution or injunction etc, as supra which appeal existed side by side the similar application filed before the lower court on 14/10/2001 praying for the similar reliefs earlier reproduced in this judgment. It is therefore very clear that the appeal pending before the lower court and the application that court decided which gave rise to the instant appeal before us have the same substratum, as they both seek the same reliefs. No wonder appellant has practically abandoned the appeal against the ruling of the trial court refusing the application for interlocutory injunction! I will, however return to this matter later in this judgment.

However, in arguing the appeal, learned Counsel for appellant referred the court to the principles guiding the courts in deciding

applications for stay of execution/or injunction. Learned Counsel referred the court to the grounds of appeal in the notice of appeal dated 14/1/13 at pages 202-207 of the record and submitted that they are cogent and compelling; that as at the time the lower court decided the application, the rights of the parties were yet to be determined either by the trial court or the lower court so as to know the successful party; that the reliefs being sought at the trial court *“is a formal challenge of the appointment of the 2nd respondent and his right (2nd Respondent) to continue to remain in possession of the Appellant’s properties.”*

It is the further submission of learned Counsel that though the courts have decided that for an order of stay of execution to be made, the applicant must show special and exceptional circumstances, it is also settled that the constituents of special and exceptional circumstances include acts which tend to:

- (a) destroy the subject matter of the proceedings;
- (b) foist upon the court especially the Court of Appeal, a situation of complete helplessness;
- (c) render nugatory any order or orders of the Court of Appeal;
- (d) paralyze in one way or the other the exercise by the litigant of his Constitutional right of appeal; or
- (e) generally provide a situation in which whatever happens to the case and in particular, even if the appellant succeeds in the Court of Appeal, there could be a return to the status quo.

It is the further submission of Counsel that the appointment and intention of the 2nd respondent to sell the assets of the appellant, the subject matter of the substantive suit should have weighed heavily in the minds of the learned Justices of the Lower Court in granting the application for stay/injunction; that by the refusal of the application implied liberty is given the respondents to proceed to sell the assets of the appellant and that the constitutional right of appeal of the appellant is thereby paralysed and that there would be no return to the status quo if appellant succeeds in the suit as the subject matter would have been destroyed by the sale.

Finally, Counsel submitted that the lower court was influenced by an extraneous matter which was incorrect and prejudicial to the case of appellant to wit that the trial judge had already stated that the

appointment of the 2nd respondent as Receiver and/or Manager by the 1st respondent is valid in coming to the decision to refuse the application and urged the court to resolve the issue in favour of appellant.

On his part, learned Counsel for respondents submitted that it is settled law that the power conferred on the lower court to grant an application for stay of execution or injunction is discretionary which discretion is exercisable judicially and judiciously that the lower court did exercise its discretion in this case judicially and judiciously by considering the affidavit evidence before it; that the lower court found as a fact that the respondents were entitled to take over and occupy the factory and business premises of the appellant pursuant to a Deed of Mortgage Debenture between the 1st respondent and appellant exhibit UBN 1, at pages 40 to 66 of the record; that appointment of 2nd respondent had already been advertised on page 63 of the Guardian Newspaper of Tuesday 13 July, 1999 before the service of the court order in suit No. FHC/L/CS/803/99; that respondents first occupied the premises of appellant before service of the interim order of injunction but vacated same soon after service of the order on them; that they again occupied the premises following the order of 14th February, 2001 refusing the application for interlocutory injunction and discharging the earlier interim order, dated 13 July, 1999; that appellant failed to show any exceptional or special circumstances to justify the exercise of the court's discretion in its favour.

It is also the submission of Counsel that the principles governing grant of interlocutory injunction are well settled, relying on *Ladunni v. Kukoyi* (1972) 3 SC 31 at 34; *Obeya Memorial Hospital Ltd v. A.G. of Federation* (1987) 3 NWLR (pt. 60) 325; that appellant did not dispute the facts deposed to by respondents in the counter affidavit which makes the reliance on the facts by the lower court justifiable; that appellant failed to disclose material facts to the lower court such as the existence of a Deed of Mortgage Debenture between appellant and 1st respondent pursuant to which 1st respondent appointed the 2nd respondent as receiver/manager; the indebtedness of appellant to 1st respondent which, at the time, stood at N266, 577,974.48, which suppression constitutes a ground for refusal of the application for injunction, relying on *Onyemelukwe v. Attamah* (1993) 5 NWLR (pt. 293) 350; *Hart V. TSKJ Nig. Ltd* (1998) 12

NWLR (pt. 578) 372 at 399; Adeyemi Works Construction V. Omolehin (2004) 6 NWLR (pt. 870) 650 at 665.

It is the further submission of Counsel that a grant of injunction postulates the existence of a legal right to be protected, relying on Union Beverages Ltd. v. Pepsi Cola (1974) 3 NWLR (pt. 330) 1 at 12; Akano V. Hakeem - Habeeb (1992) 6 NWLR (pt.241) 266, 290 - 291; that the lower court was right from the facts before it, in concluding that appellant failed to establish a legal right to be protected particularly as appellant had, by the Deed of Mortgage Debenture divested its legal ownership of the assets involved, as long as the debt remained unpaid; that the balance of convenience is not in favour of appellant, relying on Buhari v. Obasanjo (2003) 17 NWLR (pt. 850) 587 at 648 - 649; that appellant is a chronic debtor whose creditors obtained judgments which were executed by attachment of the properties secured by the Deed of Mortgage Debenture as a result of which 1st respondent cannot fold its hands while the secured properties are being carted away by other creditors; that an appellate court is wary of setting aside the exercise of discretion by a lower court as the court is not at liberty to substitute its own discretion for the discretion already exercised by the lower court except where the appellate court reaches a clear conclusion that there has been a wrongful exercise of discretion, relying on Ikenta Best (Nig) Ltd. v. A-G Rivers State (2008) 6 NWLR (pt.1084) 612 at 647.

On the issue of reliance on extraneous factors learned Counsel submitted that the lower court's refusal of the application was based on hard facts which tilted the balance of convenience in favour of the respondents; that it is not every mistake that would result in the setting aside of the judgment and urged the court to resolve the issue against appellant.

I will begin a consideration of this issue by asking a question as to what is the proper relief between stay of execution and interlocutory injunction having regards to the facts of this case. Learned Counsel for both parties have addressed the court on the principles of law guiding the courts in applications for stay of execution and interlocutory injunction thereby leaving the court to choose the applicable relief in the circumstances of the case. The question posed supra is relevant due to the fact that it is not every judgment/order that is subject to the relief of stay of execution simpliciter.

***It is settled law that a declaratory judgment or order of a court cannot be stayed by an interim order, See Tukur v. Government of Gongola State (1989) 4 NWLR 592; Akibu v. Oduntan (1991) 2 NWLR 1; except the declaratory order is coupled with a mandatory order, such as an order of injunction.***

***From the facts of this case, it is clear that the judgment or ruling/decision of the lower courts sought to be stayed are interlocutory decisions, which dismissed appellant's application for an order of stay of execution or interlocutory injunction which made the decisions declaratory in nature as there was not mandatory order which went along with the said orders dismissing the applications. The orders also did not grant any monetary payment(s) to the respondent. In the circumstance, it is clear, and I hereby hold that the principles guiding the courts in applications for stay of execution of the judgment of the courts are not applicable to the facts of this case and are consequently discountenanced by me in this judgment.***

In the circumstance of the above holding, it is clear that the only relief open to appellant in this case is that of interlocutory injunction pending the determination of the appeal, which, as I had earlier found in this judgment based on the facts on record, is the same as the application for stay of execution or interlocutory injunction.

In considering the application, the lower court made the following findings at pages 191 - 192 of the record:

*"From the affidavit before the court the following issues are clear and uncontroverted.*

*1. That the Appellant/Applicant is indebted to the 1st Respondent as at 14th February, 2001, amount of indebtedness to 1st Respondent stood at N265, 577, 974.48 (Two Hundred and Sixty-Five Million, Five Hundred and Seventy-Seven Thousand, Nine Hundred and Seventy Four Naira, Forty-Eight Kobo).*

*2. That there exist a Board (sic) of Mortgage Debenture Exhibit UBN between the Appellant/Applicant and the Respondents pursuant to which the 1st Respondent appointed the 2nd Respondent as Receiver and or Manager of the Appellant/Applicant's company.*

*3. That the two Rulings of the lower court dated 16th May,*

*2009 and 14th February, 2001 stated that the appointment of the 2nd Respondent by the 1st Respondent as receiver and or manager to be valid.*

*4. That the Appellant/Applicant is a chronic debtor indebted to several creditors to several million (sic) of naira. ”*

B I must say that the above findings are backed by the evidence on record and that apart from (3) supra, appellant has not challenged the said findings of facts by the lower court.

The lower court continued its consideration of the application at pages 192 - 193 of the record as follows:-

C *“For the Appellant/Applicant to succeed in this application, the applicant must show special or exceptional circumstances as would warrant the court depriving the successful party the fruits of his judgment pending appeal.*

D *In the instant application, the Appellant/Applicant has sought to show that the continued closure of its factory and business premises by the appointment of the 2nd Respondent as Receiver or Manager has caused irreparable damage to the Appellant/Applicant in that*

E *(i) it cannot transact its business*  
*(ii) it is losing money running into millions of naira daily.*  
*(iii) it cannot meet its obligation to customers, suppliers (sic) employer (sic), creditors etc and*

F *(iv) the production machines are being destroyed due to non use and will require large amount of money to put it back into use.*

*That due to the order of the lower court on 14th February, 2001 the Respondents has taken over the Appellant/Applicant’s business factor (sic) and are in the process of disposing and setting the*  
G *assets.*

*That unless the Respondent, their agents, and privies are restrained pending the appeal, all the plaintiff will gesting (sic) the most likely exhausted the appeal being successful will be a date (sic) barred (sic) judgment.”*

H The lower court then went on to make the following evaluation and concluded, inter alia as follows:

*“I have given due consideration to the above special or exceptional circumstances put forward by the Appellant/Applicant. It is my view that in the face (sic) before the court, the special or exception*

*(sic) circumstances put forward by the Appellant/Applicant cannot avail it. It is very clear that under Exhibit UBN 1 the Deed of Mortgage Debenture the 1st Respondent is entitled to appoint a Receiver and or Manager to the undertaking of the Appellant/Applicant in default of payment of the loan forcibly granted to Appellant/Applicant and in the exercise of its powers under Exhibit UBN 1 it has appointed the 2nd Respondent. The Appellant/Applicant has not disputed the loan and has not show (sic) that it has paid the loan. Clause 13(a) of Exhibit UBN 1 empower the 3rd Respondent when so appointed in the exercise of his duties as Receiver and or Manager to sell of (sic) dispose as (sic) the properties of the Appellant/Applicant...*"

Another issue that deserved serious consideration is the fact the Appellant/Applicant is a chronic debtor owing several creditors approval (sic) millions of naira, these creditors have started executing court judgments on the properties of the Appellant/Applicant, the Respondents as secured creditors shall not fold their arms whilst the properties which they have secured their interest are being carted away by other creditors, the Respondents own (sic) themselves a duty to move forward and protect their secured interest.

Another issue of paramount importance is the fact apparent on the affidavit of the Appellant on the affidavit of the Appellant/Applicant that is that they did not exhibit good faith in their dealings with the Respondents. In Appellant/Applicant deposed in para 14 (ii) of its affidavit in support of this application. The para reads:-

*"14(ii) That the continued closure of the plaintiff's factory and business has caused irreparable damage to the plaintiff is (sic) that it is losing money running into millions of naira daily.*

*By the facts and the affidavit before the court the Respondents vacated the factory and the business premises after their initial take-over... on the 13th July, 1999. Since on the 13th July, 1999 to 14th February, 2001... the Appellant/Applicant has been in possession of its factory and business premises and by their own admission has been making millions of naira daily. They have not shown to this court that out of the millions of naira they are making daily they have paid the Respondents a kobo in satisfaction of their admitted debts to the Respondents. It is therefore clearly an act of bad faith if in spite of the millions of naira they make daily they failed and neglected to pay out a single kobo to the Respondents to when (sic) they admitted*

*they are indebted... I therefore hold that in the circumstances of this case the Appellant/Applicant is not entitled to have the discretion of this court exercise (sic) in its favour..."*

B Having regards to the above findings of fact based on the affidavit evidence on record, can it be said that the lower court did not exercise its discretion in refusing the application for interlocutory injunction judicially and judiciously? Appellant's Counsel has contended that the lower court failed to so act while Counsel for respondents insists that it did. Which of them is correct?

C ***It is settled law that the aim of an order of injunction is to protect an established right of the applicant. This is a fundamental requirement. The question is whether appellant has established any right to the injunction sought. I had earlier reproduced the findings of the lower court on the facts before the court which findings have not been challenged in this appeal and therefore deemed to have been accepted as true by appellant.*** The relevant facts are that:

E (a) appellant and 1st respondent executed a Deed of Mortgage Debenture, exhibit UBN 1 for a loan transaction which Deed gave 1st respondent the power to appoint a receiver and/or manager over the assets of appellant in case of default in the payment of the secured loan;

F (b) that appellant defaulted in the repayment schedule as a result of which 1st respondent appointed the 2nd respondent as its receiver/manager to take over the management and sale of the secured properties and business premises of appellant.

G (c) appellant is a chronic debtor whose various creditors instituted actions in various courts and obtained judgments against appellant which judgments were executed on some of the properties of appellant secured by exhibit UBN 1, thereby depleting the assets of appellant available to satisfying its debt to 1st respondent.

H (d) despite the admission by appellant that while in occupation of the premises it made millions of naira from its operations, there is no scintilla of evidence that it paid any kobo in part satisfaction of its indebtedness to 1st respondent.

(e) with exhibit UBN 1 the legal rights in the properties charged therein ceased to be in appellant but with 1st respondent thereby leaving appellant with only the equitable right of redemption which



can only mature upon full discharge or payment of the secured debt to the 1st respondent.

(f) With appellant's failure or neglect to repay the secured loan, its equity of redemption of the mortgaged properties remains not qualified of protection by an order of injunction as it cannot compete with the 1st respondent's legal right over the properties by virtue of the provisions of exhibit UBN 1. B

(g) That appellant concealed vital facts relating to the application from the court, such as the existence of exhibit UBN 1, etc.

Can it be said that the balance of convenience is on the part of appellant? I do not think so either. Here is a situation in which some of the properties of appellant which had been mortgaged to 1st respondent to secure a loan which appellant has failed and or neglected to repay are being sold in execution of judgments obtained against appellant for various debts, meanwhile appellant is saying that 1st respondent should be restrained from taking steps to protect its secured interest in the properties by taking over the management and/or sale of some of the available assets to realize its loan to appellant. At the rate at which the properties of appellant were being sold in execution of judgments, 1st respondent would at the end of the day be without the means of realizing the loan. I hold the considered view that having regards to the facts and circumstances of this case, justice and equity is more on the side of the respondents than appellant and in the circumstance the lower court exercised its discretion to refuse the application for interlocutory injunction judicially and judiciously. C D E F

***It is generally said that one of the guiding principles for consideration in an application for injunction pending appeal is how arguable the grounds of appeal are. However, to my mind, that requirement is not relevant to an application of this nature where both the pending appeal and the application for injunction are subject to or are based on the same consideration. In other words, the ground of appeal challenging a refusal of an application for interlocutory injunction pending appeal will of necessity be the same as the ground required for the court to consider in the grant of an application for an order of injunction pending appeal, which are normally the right to be protected, the balance of convenience, the argu-*** G H

***able nature of the grounds of appeal etc. In such a case if the applications by the lower court were to have been granted, there would be no need to consider the appeal.***

At the moment, it is clear that the purported appeal pending before the lower court is deemed abandoned as the same cannot be taken again. The sub-issue that the lower court considered extraneous matters which adversely affected its decision to refuse the application is very much misconceived. The reasons for the decision of the lower court had been reproduced in this judgment and they are clear and substantial.

That apart, it is not correct that the lower court said that the rulings of the trial court made on 16th May, 2000 and 14th February, 2001 were both made by Odunowo J. In any event, whether the lower court held that the appointment of 2nd respondent by the 1st respondent is valid or not, the fact remains that by exhibit UBN 1 appellant agreed with 1st respondent that 1st respondent has the power to appoint a receiver/manager of appellant where the situation demands it and 1st respondent, in exercise of that power did appoint 2nd respondent. Appellant has left the substance to chase shadows. In the circumstances I resolve issue 1 against appellant.

On issue 2, learned Counsel submitted that in deciding the application, the lower court went into a consideration of the substantive matters in controversy, an act frowned at by law and consequently a breach of the appellant's right to fair hearing liable to render the decision of the lower court null and void, relying on *Adigun v. A-G Oyo State* (1978) 1 NWLR (pt. 53) 678 at 709; *Chief Land Officer v. Anor* (1991) 4 NWLR (pt. 187) 617 at 627.

On his part, learned Counsel for the respondents submitted that the lower court did not contravene the law as the lower court did not decide the substantive issue before the trial court which issue related to the validity, legality or constitutionality of the appointment of the 2nd respondent as the receiver/manager that the issue before the lower court on the other hand relates to the possession and protection of the assets pending the determination of the case; that in the circumstances of the case, the lower court was within the acceptable bounds when it asserts that:

(a) the 1st respondent had the right to appoint the 2nd respondent pursuant to the Deed of Mortgage Debenture;

(b) the appellant is a chronic debtor owing several millions of naira; that the comments complained of did not decide the issues in the substantive suit which centres around the legality or validity of steps taken pursuant to the appellant's failure to pay its debts which facts were not in dispute; that there was therefore no breach of appellant's right to fair hearing in respect of the substantial matters in controversy and urged the court to resolve the issue against appellant.

This issue is clearly a ploy to continue to delay the substantive matter which was initiated by appellant at the trial court but which, as admitted by appellant is yet to pass the pleadings stage after about thirteen years!!! Added to that is the fact that the appeal against the ruling of the trial judge still pending at the lower court till date also filed by appellant. Now, appellant wants this Court to declare the ruling of the lower court refusing its application for injunction pending appeal a nullity and consequently order a rehearing of the said application. It is obvious that appellant appears to want to achieve the ends which the substantive suit is designed to achieve by way of an order of injunction pending appeal, which appeal it does not appear to have the desire to pursue.

I agree with the submission of learned counsel for respondents that the lower court in making the comments complained of did not determine the substantive suit at the interlocutory stage. ***For a court to declare whether or not to grant an injunction pending appeal, it has, as of legal necessity to go into a consideration of the competing legal rights of the parties to the protection of the injunctive relief. It is a duty placed on an applicant seeking injunction pending appeal to establish by evidence in affidavit(s) the legal right he seeks to protect by the order which of necessity makes it mandatory for the court to go into the facts to determine whether such entitlement has been established.***

The appeal once more raises the fundamental issue of undue delay in the prosecution of cases involving commercial practice. Here is a plaintiff who entered into a Mortgage Debenture arrangement to secure a loan transaction he took benefit of but failed and or neglected to repay. When the defendant took steps to realise the loan with interest the plaintiff instituted an action as far back as 1999 but

has not ensured that the matter is heard up till date. Rather, he is pursuing the application for injunction and injunction pending appeal and appeals on the refusal of the said applications. Even then both the substantive suit and the first appeal have been left hanging. Learned Counsel for appellant is not ashamed in telling this Court that:

*"It is instructive to emphasise at this juncture that both the substantive appeal at the lower court and the substantive claims at the trial court are yet to be determined. In fact, pleadings at the trial court were yet to be concluded."* See page 1 of the appellant's brief.

This is very sad considering that the said appellant's brief was filed in this court on 7/2/12. In conclusion I find no merit in the issue which is accordingly resolved against appellant.

The two issues formulated by learned counsel for appellant having been resolved in favour of the respondents, I hold that the appeal is grossly without merit and is consequently dismissed with costs which assess and fix at N500,000 against appellant and in favour of the respondents. Appeal dismissed.

E

### **MUNTAKA-COOMASSIE JSC**

This is an appeal against the ruling of the Court of Appeal, Lagos Division which court, hereinafter called the lower court, turned down the application praying that court for an order for stay of execution/injunction. The lower court actually dismissed the said application.

Not satisfied with the above ruling, the appellant further appealed to this court on four grounds of appeal thus:-

*"1. The learned Justices of the Court of Appeal misdirected themselves in law when in relation to this matter, it was stated in the lead judgment to which other Justices of the Court of Appeal concurred that:-*

*For the Appellant/Applicant to succeed in this application, the applicant must show special or exceptional circumstances as would warrant the court depriving the successful party the fruits of his judgment pending appeal.*

*2. The Justices of the Court of Appeal erred in law when they held that in the circumstances of this case the Appellant/Applicant is*

*not entitled to have the discretion of this court exercised in its favour.*

3. *The learned Justices of the Court of Appeal erred in law when in the consideration of the factors to be considered before an application for stay of execution and/or injunction is granted they pronounced on the entire facts of this case and thereby determined the substantive issues yet to be determined by the Court of first instance.* B

4. *The learned Justices of the Court of Appeal misdirected themselves in law when it was held that-*

*The two rulings of the lower court dated 16th May, 2000 by Odunowo J and 14th February, 2001 has already stated that the appointment of the 2nd Respondent as Receiver and or manager by the 1st Respondent is valid".* C

The appellant then formulated two issues out of four grounds of appeal thus:- D

*"1. Whether the Appellant in the circumstances of this case was not entitled to an order of stay of execution/or injunction as prayed before the lower court - (Grounds 1, 2 and 4).*

*2. Whether the learned Justices of the lower court were right to have in the course of considering the Appellant's application for stay of execution and/or injunction pronounced in (sic) the entire facts of the case thereby determining the substantive issues yet to be determined by the court of first instance. (Ground 4)".* E

It is clear that in this appeal there are concurrences of the decisions of the two lower courts i.e. Federal High Court Lagos and the lower court. Both courts turned down the request for stay of execution or injunction. F

I was opportune to have read before now the lead judgment of my learned brother Walter Onnoghen JSC just delivered. I entirely agree with the lead judgment. I agree that the two issues formulated be resolved against the appellant. For the reasons adumbrated in the lead judgment leading to the dismissal of this appeal, I too dismiss this appeal. I endorse the order as to costs. Appeal dismissed. G

H

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### **NGWUTA JSC**

I read in draft the lead judgment just delivered by My Lord, Onnoghen, JSC and I agree with the reasoning and conclusion therein.

In mortgaging/charging all its movable property contained in the schedules to the Mortgage Deed to the 1st respondent as security for its debts to the 1st respondent, the appellant signed off his right to the mortgaged property in the event of failure to pay the debt. Now that it failed to repay the debt for which it used the property in question as security it has lost its legal right to the mortgaged property.

An interlocutory injunction seeks to maintain the status quo ante - the dispute. See *Military Governor of Lagos State & Ors v. Chief Emeka Ojukwu & Anor* (1985) 2 SC 277 at 317. What is the status quo the appellant seeks to restore or maintain? The status quo ante bellum answers the question as to who, between the parties, has legal right over the mortgaged property at the moment the appellant defaulted in repaying his debt. At that point in time the appellant lost whatever right he had in the property having transferred his right pursuant to the term of the mortgage deed to the respondent. In an application for interlocutory injunction, applicant's legal right over the subject matter is a precondition for the consideration of special circumstances for the grant of the application.

An injunction is an equitable relief and consequently it is granted at the discretion of the Court. It is not granted as a matter of grace. The discretion must be exercised judiciously and judicially. See *Ayorinde v. A-G Oyo State* (1996) 2 SCNJ 198. On the facts before us the exercise of discretion by the trial Court, affirmed by the Court below, cannot be faulted.

Based on the above and particularly on the fuller reasons in the lead judgment, I also dismiss the appeal with N500,000.00 costs against the appellant in favour of the respondents.

G

### **PETER-ODILI JSC**

I am in total agreement with the reasoning and decision just delivered by my learned brother, W. S. N. Onnoghen, JSC and to show that support I shall make some remarks.

H This is an appeal against the ruling of the Court of Appeal, Lagos Judicial Division given on the 18th December, 2002. As a result of the refusal of its application for stay of execution/injunction in respect of the decision of the trial court delivered on 10th February, 2001 coram:

Mustapha J (as he then was), the appellant brought a motion on notice filed at the Court of Appeal on 14th September 2001, brought pursuant to Section 18 of the Court of Appeal Act 1976, Order 3 Rule 304 and Order 4 Rule 192 Rules of that court, 1981 as amended. In a unanimous decision of the Court of Appeal, the learned justices dismissed the application. It is against that ruling that the appellant being dissatisfied has lodged the appeal vide, Notice of Appeal dated 14th January, 2003 through an order for leave granted by the court below on 13th January, 2003. B

### FACTS

The Deed of Mortgage Debenture pursuant to which the 2nd respondent herein was appointed a Receiver was registered with the Land Registry in Lagos on 19th April, 1999. The 2nd respondent was appointed the Receiver for the appellant company under a Deed of Appointment dated 11th June, 1999. C D

The appellant herein as plaintiff at the trial court commenced an action against the 1st respondent as defendant through a writ of summons filed on 9th July, 1999 seeking reliefs which are best reproduced hereunder as follows:

(a) A declaration that the appointment of the 2nd defendant by the 1st defendant as a Receiver in respect of the properties situate, lying and being at plot C20, Alakoso Avenue, Amuwo Odofin Scheme, Apapa and No.7, Akin Osiyemi Street, off Allen Avenue, Ikeja respectively is illegal, unconstitutional, null and void and of no effect whatsoever. E F

(b) A declaration that the forcible entry into the plaintiff's factory and office situate at Plot C20, Alakoso Avenue, Amuwo Odofin Scheme, Apapa and No. 7, Akin Osiyemi Street, off Allen Avenue, Ikeja respectively by the defendants and their agents with arms, cutlass, machetes and other dangerous weapons is unlawful, illegal, unconstitutional, null and void and of no effect whatsoever. G

(c) A declaration that the defendants herein have no right to take possession of the plaintiff's factory and office save in accordance with due process of law. H

(d) A sum of N100 Million Naira only being special and general damages jointly and severally for unlawful and forcible entry and closure of the plaintiff's factory and business premises by the defendants, their agents, servants and/or officers.

(e) An injunction restraining the defendants, their agents, servants, privies or officers or any person or body of persons howsoever from continuing the acts of trespass and from advertising in any national newspaper the appointment of the 2nd defendant as a Receiver to dispose the plaintiff's property.

B Sequel to the reliefs above, the appellant's application at the Federal High Court was granted an interim injunction by Mustapha J, restraining the 2nd respondent from taking over the appellant's company pending the hearing of the Interlocutory Injunction seeking the same prayers.

C The appellant filed an application for stay of execution or injunction pending the appeal to preserve the res, subject matter of the dispute as the Receiver was in the process of disposing same. On the 10th September, 2001, the trial court delivered its ruling dismissing D the appellant's application. The appellant by an application dated 14th September, 2001 made a repeat application to the lower court pursuant to Section 18 of the Court of Appeal Act, 1976 as amended. After hearing arguments on the application and in a considered ruling given on 18th December, 2002, the lower court dismissed the E appellant's application. It is against that ruling that this appeal has been brought.

On the 15th January, 2013 date of hearing, learned counsel for the appellant adopted their brief settled by Chief Wale Taiwo and filed on 7th February, 2012. In the brief were framed two issues for F determination as follows:

1. Whether the appellant in the circumstances of this case was not entitled to an order of stay of execution/or injunction as prayed before the lower court - (Ground 1, 2 & 4).

G 2. Whether the learned Justices of the lower court were right to have in the course of considering the appellant's application for stay of execution and/or injunction pronounced in the entire facts to the case, thereby determining the substantive issues yet to be determined by the court of first instance.

H (Ground 3)

For the respondents, learned counsel on their behalf adopted the brief of argument settled by Dr. Wale Olawoyin and filed on 9/2/12. In the respondents' brief was crafted a sole issue for determination, viz:



Whether the Court of Appeal in refusing to grant the application dated 14th September, 2001 for an order of stay of Execution/ or Injunction exercised its discretion judicially and judiciously.

This sole issue of the respondents seems sufficient in the determination of this appeal and so I shall make use of it.

Learned counsel for the appellant in arguing this appeal contended that there is a plethora of authorities which laid down the principles for the grant of stay of execution/or injunction which principles are special circumstances, grounds of appeal which are somewhat on a novel point, grounds of appeal raising substantial legal issues to be determined and the need to maintain the status quo and the preservation of the res if the appeal is to have any meaning. He cited *Nwabueze v. Nwosu* (1988) 4 NWLR (pt. 88) 252; *Balogun v. Balogun* (1969) 1 ALL NLR 349; *Utilgas v. Pan African Bank Ltd* (1974) 1 ALL NLR (pt. 2) 47 at 49.

Learned counsel further submitted that where special circumstances which the court acknowledge and the application for stay of execution is brought the court must ensure that execution of the judgment would destroy the subject matter of the proceeding, foist on the court especially the Court of Appeal a situation of complete helplessness or render nugatory any order or orders of the Court of Appeal or generally provide a situation in which whatever happens to the case even if the appellant succeeds in the Court of Appeal there could be no return to the status quo. He referred to *Josien Holding Ltd. v. Lonarmead Ltd* (1995) 1 NWLR (pt. 371) 254 at 258 - 259; *Ajomale v. Yar'adua* (No 2) (1991) 5 NWLR (pt. 171) 266; *Onuzulike & Anor. v. Commissioner for Special Duties & Anor.* (1990) 1 NWLR (pt. 161) 252 at 259.

He stated that at the stage of determining the appellant's application for stay/injunction, the rights of the parties were yet to be determined either by the lower court or the court of first instance as to know who the successful party was. He said at the time of hearing the application leading to this appeal by the lower court, there was abundant evidence that the respondent had advertised in the Newspapers the sale of the assets of the appellant while the suit remained to be heard on its merit.

For the appellant it was further contended that the appointment and the intention of the 2nd respondent to sell the assets of the

appellant, the subject matter of the substantive suit should have weighed heavily in the minds of the learned justices of the lower court in granting the application for stay/or injunction. That the refusal of the Court of Appeal to grant the stay/injunction gave the respondent the liberty to proceed to sell the assets of the appellant, B subject matter of the proceedings at the trial court. The resultant effect being the constitutional right of appeal of the appellant being given away or paralysed and so there will be no return to status quo as the res of the appeal and the substantive suit would have been destroyed. That the court below allowed extraneous factors to lead it C to error since the only ruling by Odunowo J. delivered on 16th May, 2000 had no relevance to the application brought by the appellant. That the application at the trial court had to do with the determination of the appointment of a Receiver after the presentation of a D winding up petition. That a miscarriage of justice was occasioned to the appellant by what the Court of Appeal did.

Learned counsel for the appellant referring to pages 9, 16, 17, 21, of the ruling of the Court of Appeal opined that the learned justices of the lower court in that interlocutory application based on E an interlocutory appeal the entire substantive suit which was erroneous. He cited *Oduba v. Hontmangracht & Ors* (1977) 6 NWLR (pt.508) 185; *Ladejobi v. Odutola Holding Ltd.* (2002) 3 NWLR (pt.753) 121; *Obeya Memorial Hospital v. A.G. Federation & Ors.* (1978) 3 NWLR (Pt. 65) 325; *Group Danone v. Voltic (Nig) Ltd* F (2008) 7 NWLR (pt. 1087) 637 at 675 - 676.

Also canvassed by learned counsel for the appellant is that pleadings were yet to be completed in the substantive matter at the trial court and the Court of Appeal was yet to pronounce on the G main appeal on the propriety or otherwise of the trial court to discharge the interim order earlier made to preserve the appellant's application for interlocutory injunction by the trial court. That the question thrown up is whether the Court of Appeal ought to have made those far reaching findings and pronouncements at the inter- H locutory stage. That the answer seems settled that is, that the findings and conclusions were prejudicial to the substantive appeal before the lower court and the reliefs claimed at the trial court. He said the only way out is to nullify the Ruling in view of the breach to fair hearing of the appellant. He cited *Adigun v A. G. Oyo State* (1978) 1 NWLR

(pt. 53) 678 at 709; Chief Land Officer v. Alor (1991) 4 NWLR (pt. 187) 617 at 627; E. D. Tsokuma & Sons Ltd. v. CFAO (1993) 4 NWLR; Mobil Oil Nig Plc V. Kena (2001) 1 NWLR (pt. 695) 555 at 564.

Responding, learned counsel for the respondents said the application, basis of this appeal, is praying for the discretion of this court which discretion must be exercised judicially and judiciously. He cited Vaswani Trading Co. v. Savalakh & Co. (1972) 12 SC 77; Federal Housing Authority v. Abosede (1998) 2 NWLR (pt. 537); The Registered Trustees of Christ Apostolic Church v. Uffiem (1998) 10 NWLR (Pt.567) 312; FBA Akinyede v. The Appraiser (1971) ALL NLR 164; University of Lagos v. Olaniyan (1985) 1 NWLR (pt. 1) 156 at 175; Owners of M. V. Lupex v. Nigerian Overseas Chartering and Shipping Ltd (2003) 15 NWLR (pt. 844) 469 at 488.

He stated on, that the references made by the lower court which the appellant is not comfortable with came from averments in the counter affidavit. That the appellant had failed to support their application for stay of execution with instances of exceptional or special circumstances to justify the exercise of the court's discretion in their favour. That the appellant had failed to place before the court below the material facts to entitle them to the grant of the injunctive relief. He cited Adewole Construction Co. Ltd v. IBWA Ltd. (1991) 7 NWLR (Pt. 203) 498 at 506.

For the respondents was further submitted that there were material facts which appellant suppressed and concealed which concealment were enough to reject the right to the injunctive relief. He relied on Onyemelukwe v. Attamah (1993) 5 NWLR (pt. 293) 350; Hart v. TSKJ Nig. Ltd. (1998) 12 NWLR (pt. 578) 372 at 399; I.C.F Spry, The Principle of Equitable Remedies 6th Edu. 495 - 496, 498; Adeyemi Works Construction v. Omolehin (2004) 6 NWLR (pt. 870) 650 at 665. Learned counsel for the respondents went on to say that the appellant had not established the legal right as basis for the injunction sought. He referred to Union Beverages Ltd. v. Pepsi Cola (1994) 3 NWLR (pt.330) 1 at 12; Akapo v. Hakeem-Habeeb (1992) 6 NWLR (Pt. 241) 266 at 290 - 291. That even the balance of convenience did not avail the appellant for the grant of the injunctive relief. He cited Buhari v. Obasanjo (2003) 17 NWLR (pt. 850) 587 at 648 - 649. That there is no ground upon which this court can substi-

tute its own discretion for the one done by the Court of Appeal. He cited *Ikenta Best (Nig.) Ltd v. A.G. of Rivers State* (2008) 6 NWLR (pt.1084) 612; *Umeanadu v. A. G. of Anambra State & Anor.* (2008) 5 MJSC 151 at 172 - 173; *National Inland Waterways Authority v. Standard Trust Bank Plc* (2008) 2 NWLR (pt. 1072) 483 at 501.

B Learned counsel concluded for the respondents that the appellant has not shown how insignificant was the error of the Court of Appeal making reference to Odunowo's Ruling instead of Mustapha J. Ruling occasioned a miscarriage of justice. That it is not every mistake or error in a judgment that necessarily determines an appeal in  
C favour of an appellant. He relied on *Grosvenor Casinos Ltd. v. Halaoui* (2009) 4 -5 SC (pt. III) 200; *Akayepe & Anor v. Akayepe* (2009) 1 NWLR (pt. 1152) 217.

That it was not correct that the Court of Appeal reached conclusion  
D or decided the substantive issue before the trial court which relates to the validity, legality or constitutionality of the appointment of the 2nd respondent as the receiver manager. That the issue before the lower court and on which it was entitled to make comments which it did, related to the possession and protection of the assets pending the  
E determination of the case.

The sole question raised by the respondents, that is, whether in refusing the application for an order of stay of execution/or injunction the court below exercised its discretion judicially and judiciously.  
F This sole issue encapsulates the two questions crafted by the appellant. There is no gain saying that tackling this single question would answer the two posers of the appellant and it is therefore the easy way to go in the determination of this appeal.

In going into this issue, the guide on discretion by Mohammed  
G JSC in *Owners of MV Lupex v. Nigerian Overseas Chartering and Shipping Limited* (2003) 15 NWLR (pt. 844) 469 at 488 is apt. He stated thus:

*"Judges and courts exercise their discretion in accordance with rules of court and justice and not according to private opinion. An  
H exercise of discretion is a liberty or privilege to decide and act in accordance with what is fair and equitable under the peculiar circumstances of the particular case, guided by the spirit and principles of law."*

In the earlier judicial authority which has the hallmark of guid-

ing principles and which the courts have relied on frequently are in the case of *Obeya Memorial Hospital v. A.G. Federation* (1987) 3 NWLR (Pt.60) 325 SC. This court stated thus:

*"1. The court when considering an application for interlocutory injunction should not try to resolve conflict of evidence on affidavit as to facts on which the claims of either party may ultimately depend or decide difficult questions of law which call for detailed argument and mature considerations.*

*2. When an application for an interlocutory injunction to restrain a defendant from doing acts alleged to be a violation of the plaintiff's legal right is made upon contested facts, the decision whether or not to grant an interlocutory injunction has to be taken at a time when the existence of the right or the violation of it is uncertain and will remain uncertain until final judgment is given in the action.*

*3. The practice of granting an interlocutory injunction to a plaintiff was developed to mitigate the risk of injustice to the plaintiff of either his legal right or the violation of it could be resolved.*

*4. The object of interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial.*

*5. The plaintiff's need for a protection by way of an interlocutory injunction must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his legal rights for which he could not be adequately compensated in damages, if the uncertainty were resolved in the defendant's favour at the trial.*

*6. In considering an application for interlocutory injunction, it is not necessary to determine the legal right to a claim since at that stage there can be no determination, because the case has not been tried on its merits."*

In the application basis of this appeal, the appellant/applicant sought to establish that the continued closure of its factory and business premises by the appointment of the 2nd respondent as Receiver or manager has caused irreparable damage to the appellant/applicant, in that;

- (1) It cannot transact its business
- (2) It is losing money running into millions of naira daily.

(3) It cannot meet its obligation to customers, supplies, employer, creditors etc. and

(4) The production machines are being destroyed due to non-use and will require large amounts of money to put it back into use.

B (5) That due to the order of the lower court on 14th February, 2001 the respondents have taken over the appellant/applicant's business factory and were in the process of disposing and selling the assets.

C (6) That even if the respondents, their agents and privies are restrained pending the appeal, all the plaintiff properties will be exhausted and if the appeal is successful will be a date barred judgment.

The court below considering the circumstances above which applicants posited were special and exceptional stated that the circumstances were not as put forward by applicants and that from the Exhibit UBN 1, the Deed of Mortgage Debenture the 1st respondent is entitled to appoint a Receiver and or Manager to the undertaking of the appellant in default of payment of the loan facility granted to the appellant/applicant and in the exercise of the powers under Exhibit UBN 1, it has so appointed the 2nd respondent. That court below in its words stated thus:

F *"By the facts and the affidavit before the court the respondents vacated the factory and the business premises after their initial take over in compliance with the letters order of lower court of the 12th July, 1999 on the 13th July, 1999. Since on the 13th July, 1999 to 14th February, 2001 a period of over 11 years the appellant/applicant has been in possession of its factory and business premises and by their own admission has been making millions of naira daily. They have not shown to this court that out of the millions of naira they are making daily they have not paid the respondents a kobo in satisfaction of their admitted debts to the respondents. It is therefore clearly an act of bad faith if in spite of the millions of naira they make daily they fail and neglected to pay out a single kobo to the respondents even when they admitted they are indebted. See Ajayi v. Oladele (1999) 7 NWLR (pt. 612) 367. I therefore hold that in the circumstances of this case the appellant/applicant is not entitled to have the discretion of this court exercised in its favour."*

The Court of Appeal further held that from the facts and cir-

cumstances of this case what is thrown up is that the interest of justice, equity and fairness were favourably disposed towards refusing the prayers sought in the application. Also, that the applicant had not shown that the 2nd respondent had acted outside the scope of his authority in Exhibit UBN 1.

It needs be brought out that the depositions of the applicant in support of the application showed in paragraph 14(ii) of its affidavit that the learned trial judge had erred in law and was misdirected in the facts in refusing to grant the interlocutory injunction against the defendants which the appellant/applicant had sought therefrom and introduced the fact that in refusing earlier application the trial court erred when it held that the defendants had rightly exercised the right under the mortgage deed. Part of the main grouse of the appellant herein is that the Court of Appeal went outside the scope of what was before it in reaching its decision not to grant the application forgetting that it was from the supporting affidavit and of course the counter thereof that the court below found the materials it commented upon and made its decision.

It is not forgotten the principle of law that in an interlocutory application certain boundaries must not be crossed. A trial court or appellate one as the court below must desist from making any finding in any interlocutory ruling which may prejudice the substantive case. *Hart v. TSKJ Nig. Ltd.* (1998) 12 NWLR (pt.578) 372 at 392 per Uwaifo JCA (as he then was); *Ojukwu v. Governor of Lagos State* (1986) 3 NWLR (pt. 26) 39, *Elufoje v. Halilu* (1993) 6 NWLR (pt. 301) 570.

It is a principle of our law that ordinarily a court has a discretion to grant or refuse stay of execution pending an appeal or hearing of a substantive suit as the case may be but the discretion must be exercised both judicially and judiciously bearing in mind the equal rights of the parties. *Onyemelukwe v. Attamah* (1993) 5 NWLR (pt. 293) 350 at 361; *Governor of Lagos State v. Ojukwu* (1986) 1 NWLR (Pt. 18) 621.

At the risk of repeating what has now become trite, it has to be said that, an appellate court would not intervene and or interfere with the judgment of a trial court except it is shown that the court fell into error in its evaluation of facts or applied the law erroneously to findings of fact which were properly made. *Ojukwu v. Obasanjo*

(2004) 12 NWLR (pt. 886) 169 at 214 per Ejiwunmi JSC; Woluchem v. Gudi (1981) 5 SC 291; Obisanya v. Nwoko (1974) 6 SC 69; Lawal v. Dawodu (1972) 1 ALL NLR (pt. 2) 270; Magaji v. Odofin (1978) 4 SC 91; Ebba v. Ogodo (1984) 1 SC NLR 372; Omoregie v. Idugienwanya (1985) 2 NWLR (pt. 5) 41; Kate Enterprises v. Daewoo B Nig Ltd (1985) 2 NWLR (pt. 5) 115. Another way of saying it is that, it is a policy situation of the Supreme Court not to disturb concurrent findings of the two lower courts unless special circumstances exist to warrant interference. Such special circumstances include:

- C (a) Perverse findings;
- (b) Error in procedural or substantive law occasioning a miscarriage of justice. Okulate v. Awosanya (2000) 2 NWLR (pt. 645) 530 at 547 - 548 per Uwaifo JSC; Chinwendu v. Mbamalu (1980) 3 - 4 SC 31; Onwuka v. Ediala (1989) 1 NWLR (pt.96) 182; Adebayo D v. Ighodalo (1996) 5 NWLR (pt.450) 507; Ivienagbo v. Bazuaye (1999) 9 NWLR (pt. 620) 552.

The above having been stated and the mind set of this court reiterated, I cannot resist deprecating the scenario in this instance where a matter that was first initiated so long ago is still at the stage of E whether or not a stay of execution would be granted and the need for injunction while the main issue has not been gotten into. This situation should be discouraged when the occasion as the present is seen to exist.

F From what I have stated earlier and the fuller reasons in the lead judgment, I dismiss this appeal which lacks merit. I abide by the consequential orders made by my learned brother, Onnoghen JSC.

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