

SUPREME COURT OF NIGERIA

FRIDAY 16TH MAY, 2014. SC. 71/2004

**CORAM:- M. MOHAMMED, J. A. FABIYI, M. U. PETER-
ODILI, M. D. MUHAMMAD, K. M. O. KEKERE-EKUN, JJSC**

LAWRENCE S. U. AZUH APPELLANT
AND
UNION BANK OF NIG. PLC RESPONDENT

ORDERS OF COURT - Injunction - Purpose of - Is usually granted to protect a party's existing legal right - From invasion by another (H1)

COURTS - Powers - Injunction - Grant of - Is one of the inherent powers of court for enhancement of justice - And being a discretionary power - It must be judicially and judiciously exercised (H2)

INJUNCTIONS - Grant - Application for - An order of injunction is usually granted - Pending determination of substantive suit - Or determination of an earlier application pending before court (H3)

CRIMINAL PROCEDURE - Commencement - Power - To institute criminal proceedings resides in AG Federation or of a State by 1999 Constitution ss. 174 & 211 - And such power may be exercised by AG - Or through any officers of his department (H4)

CRIMINAL PROCEDURE - Commencement - In Magistrate's Court - Prosecution of criminal proceedings before the court is done by police pursuant to Police Act s. 23 - But subject to 1999 Constitution ss. 160 & 174(1) (H5)

CRIMINAL PROCEDURE - Pending charges - Where charges are pending against accused - His right to freedom of movement pending determination of the case - May be curtailed by court (H6)

BAIL - Terms of - Amendment - Application to vary bail conditions cannot be entertained by court of concurrent jurisdiction - Rather prosecution should apply to the court that granted bail (H7)

ACTIONS - Necessary party - Non joinder of such party in a suit - Is an irregularity that does not affect jurisdiction of court - To adjudicate on the matter before it (H8)

ORDERS OF COURT - Actions - Non party - Order made against a person who was not party to action in court - Though not a nullity but is to no avail - As it cannot stand test of time - And is not binding (H9)

FACTS

Plaintiff/respondent commenced this action via writ of summons at the High Court of Delta State seeking among others for a declaration that defendant/appellant having been charged to court in charge No. CMA/250C/2001 pending before the Chief Magistrate Court 1, Asaba, wherein respondent is the substantive complainant must or ought to undergo his trial to conclusion and a declaration restricting appellant from traveling outside Nigeria so as not to frustrate his pending criminal trial. Respondent simultaneously filed a motion ex-parte seeking inter alia for interim injunction restraining appellant from traveling out of the country pending the determination of the motion on notice and for interim order directing the sheriff of the court to take possession of the International Passport and other traveling documents of appellant pending the determination of the motion on notice.

There was no record of the filing of the motion on notice referred to in the motion ex-parte. The sheriff of the court and Nigeria Immigration Service referred to in reliefs 4 & 5 of the writ of summons and reliefs (b) & (c) of the ex-parte application were not made parties to the suit. In its ruling, the court granted the order as prayed by respondent on the same day the processes were filed and gave a return date. The court did not refer to any pending motion on notice. Appellant was aggrieved by the orders made against him without notice and consequently appealed to the Court of Appeal Benin City Division. The court dismissed the appeal which led appellant to file appeal in Supreme Court.

ISSUES FOR DETERMINATION

1. Whether the learned Justices of the Court of Appeal were

right in holding that the learned trial judge had jurisdiction to grant the interim orders of injunction against the appellant.

2. Whether the Learned Justices of the Court of Appeal were right in holding that the Respondent made out a case for the grant of the interim orders of injunction in its favour.

HELD (Unanimously allowing the appeal per **KEKERE-EKUN JSC**)

Injunction - Purpose of

1. It is also well settled that an order of injunction is usually granted to protect a part's existing legal right from invasion by another. (p. 1767 H)

COURTS - Powers - Injunction - Grant of

2. There is no doubt that the power to grant an interim or interlocutory order of injunction is one of the inherent powers of a court of law for the enhancement of the administration of justice. By virtue of the powers conferred on the High Court by Section 6 (6) (a) of the 1999 Constitution (as amended) and the provisions of Order 8 Rule 7 (2) of the High Court (Civil Procedure) Rules 1988 of Bendel State applicable in Delta State, the High Court has the power to grant an ex-parte order of interim injunction upon the fulfillment of certain conditions. There is also no doubt, as argued by the learned Senior Counsel for the respondent, that the court has a duty to preserve the res or subject matter of litigation. The grant of an order of interim or interlocutory injunction is an equitable remedy within the discretionary powers of the court. As with all exercise of discretion, the power must be exercised judicially and judiciously, taking all relevant circumstances into account. (p. 1768 B)

INJUNCTIONS - Grant - Application for

3. It is also trite that an application for an order of injunction is usually granted pending the determination of the substantive suit, or the determination of an application pending be-

fore the court before which the application is made.

(p. 1769 B)

CRIMINAL PROCEDURE - Commencement - Power

4. There is no doubt that the appellant is facing grave and weighty charges at the Chief Magistrates Court 1, Asaba. The alleged missing sum of N89, 958,931.46 is said to belong to the respondent who made the complaint that led to the arrest and prosecution of the appellant. Notwithstanding the fact that individuals or corporate entities may be victims of crimes, the power to institute criminal proceedings resides in the Attorney-General of the Federation or of a State, as the case may be by virtue of Sections 174 and 211 of the 1999 Constitution (as amended). Such power may be exercised by the Attorney-General himself or through any officers of his department. In appropriate circumstances, the Attorney-General may instruct a private legal practitioner to appear on his behalf.
(p. 1769 G)

CRIMINAL PROCEDURE - Commencement - In Magistrate's Court
5. Customarily, initiation and prosecution of criminal proceedings before the Magistrates Courts is done by the Police pursuant to powers conferred on it by Section 23 of the Police Act. The powers are subject to Sections 160 and 174 (1) of the 1999 Constitution. (p. 1770 B)

CRIMINAL PROCEDURE - Pending charges

6. Where criminal charges are pending against an accused person, his right to freedom of movement pending the determination of the case may be curtailed by the court seised of the matter or by a higher court, depending on the nature of the offence. (p. 1770 E)

BAIL - Terms of - Amendment

7. In the instant case, having drawn the court's attention in paragraph 7 of the affidavit in support to the fact that High Court No. 5, Asaba had already granted the appellant bail, the trial court had no jurisdiction to entertain the application for

the ex parte interim orders, which had the effect of varying the bail conditions already granted by a court of concurrent or co-ordinate jurisdiction. The proper procedure should have been an application by the prosecution (not the respondent) to the court that granted bail to vary the bail conditions. The question posed earlier must therefore inevitably be answered in the negative. B

In the final analysis, this issue must be answered in the negative and is hereby resolved in the appellant's favour on the ground that the trial court had no jurisdiction to grant reliefs that had the effect of varying the bail conditions already granted by a court of co-ordinate jurisdiction. (pp. 1772 D/1773 C) C

ACTIONS - Necessary party - Non joinder of

8. With regard to relief (c) of the ex parte application, it is contended by the appellant that the order in respect thereof, which was granted against the Nigeria Immigration Service, a party who was not joined in the proceedings, is a nullity. The respondent, as noted earlier, contends that it is the aggrieved party who should complain and not the appellant. The lower court agreed with the respondent. The position of the law is that non-joinder of a necessary party in a suit is an irregularity that does not affect the competence or jurisdiction of the court to adjudicate on the matter before it. (p. 1772 F) D E F

Actions - Non party

9. However, an order made against a person who was not a party to the action before the court, though not a nullity, is to no avail. It cannot stand the test of time and is not binding on such non-party to the action. (p. 1772 H) G

REPRESENTATION

C. O. ERONDU ESQ., with N. N. Anozie Esq., G. O. Ejiesieme (Miss) and Foster Odoje Esq., for the Appellant H
L. O. EGBOYI ESQ., for the Respondent

CASES REFERRED TO

Mandilas & Karaberis Ltd v. Apena (1969) NMLR 199

- Balogun v. Amubikahun (1989) 3 NWLR (pt. 107) 18
 Olusemo v. COP (1998) 11 NWLR (pt. 575) 547
 Arubo v. Aiyeleru (1993) 3 NWLR (pt. 280) 126
 Oyubu v. Akpobarojoro (1998) 4 NWLR (pt. 546) 436
 Onyekwulunne v. Ndulue (1997) 7 NWLR (pt. 512) 250
 B Directors SSS v. Agbakoba (1999) 3 NWLR (pt. 595) 314
 Buhari v. Obasanjo (2004) FWLR (pt. 191) 1487
 Owodunni v. Regd. Trustees Celestial Church (2000) FWLR (pt. 9) 1455
 C Ogboru v. Ibori (2004) ALL FWLR (pt. 225) 173
 Kotoye v. C.B.N. (1989) 1 NWLR (pt. 98) 419
 Akapo v. Hakeem-Habeeb (1992) 7 SCNJ 119
 Orji v. Zaria Ind. Ltd. (1992) 1 SCNJ 29
 Universal Trust Bank Ltd. v. Dolmetsch Pharmacy Nig. Ltd. (2007) 6
 D SC (pt. I) 1
 F.R.N. v. Osahon (2006) 5 NWLR (pt. 973) 361

STATUTES & RULES REFERRED TO

- Criminal Procedure Law of Bendel State (as applicable to Delta State),
 E ss. 131, 132
 Constitution of the Federal Republic of Nigeria 1999, ss. 6(6), 41(1),
 160, 174, 211
 High Court (Civil procedure) Rules of Delta State, O. 15, O. 8 rr.
 F 7(2), 11

LEAD JUDGMENT BY KEKERE-EKUN JSC

- This is an appeal against the judgment of the Court of Appeal,
 Benin Division (lower court) delivered on 25/3/2004 affirming the
 G ex-parte interim orders granted by the High Court of Delta State
 sitting at Asaba (trial court) on 20/11/2001.

On 20/11/2001, the respondent, as plaintiff at the trial court,
 took out a writ of summons against the appellant herein as defend-
 ant seeking the following reliefs:

- H (1) A declaration that the defendant having been charged to
 court in charge No. CMA/250C/2001 pending before the Chief Mag-
 istrate Court 1, Asaba, wherein the plaintiff is the substantive com-
 plainant must or ought to undergo his trial to conclusion.
 (2) A declaration that the defendant having been charged to

Court in Charge No. CMA/250C/2001 pending before the Chief Magistrate Court 1, Asaba is not allowed to travel outside the country with the aim of frustrating the criminal trial thereby making it impossible for him to be prosecuted.

(3) An order of injunction restraining the defendant from traveling outside this Country to any other place pending the determination of the substantive suit. B

(4) An order directing the sheriff of Court to take possession of the International Passport and other traveling documents of the defendant pending the conclusion of the criminal trial in Charge No. CMA/250C/2001 pending before the Chief Magistrate Court 1, Asaba. C

(5) An interlocutory order directing the Nigerian Immigration Service not to allow the defendant to travel outside the country pending the determination of Charge No. CMA/250C/2001 or this suit whichever is the first in time. D

(6) An order of perpetual injunction restraining the defendant from leaving the country pending the conclusion of the criminal trial in Charge No. CMA/250C/2001 pending against him at the Chief Magistrate Court 1. Asaba.

It simultaneously filed a motion ex-parte seeking the following orders: E

“a) An order of interim injunction restraining the defendant from traveling out of this country and/or place pending the determination of the motion on notice.

b) An interim order directing the sheriff of this Honourable Court to take possession of the International Passport and other traveling documents of the defendant pending the determination of the motion on notice. F

c) An interim order directing the Nigeria Immigration Service not to allow the defendant to travel abroad pending the determination of the motion on notice”. G

The grounds for the application were set out in paragraphs 3-10, 14 and 16 of the supporting affidavit at pages 8 and 9 of the record as follows: H

“3. That the defendant was the Branch Manager of the plaintiff/applicant’s Asaba Branch.

4. That sometime in April, 2001, the plaintiff/applicant reported a case of fraud in Asaba Branch in which the sum of over N89,

958,931.46 (Eighty-Nine Million, Nine Hundred And Fifty-Eight Thousand, Nine Hundred And Thirty-One Naira, Forty-Six Kobo) could not be traced.

B 5. That the Police on the 29th day of October, 2001 charged the defendant and six others with stealing of N89, 958,931.46 (Eighty-Nine Million, Nine Hundred and Fifty-Eight Thousand, Nine Hundred and Thirty-One Naira Forty-Six Kobo) belonging to the plaintiff/applicant in Charge No. CMA/250/2001. Attached herein and marked Exhibit "A" is the said charge sheet.

C 6. That defendant voluntarily pleaded to the charges and was ordered to be remanded in prison custody.

7. That I know as a fact that the defendant is currently on bail by virtue of an order made pursuant to an application filed before High Court No. 5.

D 8. That I also know as a fact that the defendant is making frantic efforts to travel out of the country so as to scuttle the trial of the criminal charges pending against him and six others.

9. That I also know as a fact that the surety to the defendant is also planning to leave the country.

E 10. That if this application is not granted as a matter of urgency, the defendant will leave this country a situation that will frustrate the criminal charge pending against the defendant at the Chief Magistrate Court 1, Asaba.

F 14. That the other accused persons charged together with the defendant were granted bail by the Chief Magistrate on condition that they deposit all their traveling documents with the Court and surety that must be resident in Asaba.

G 16. That if the respondent is put on notice without the interim orders he would abscond and travel out of this Country."

H There is nothing in the printed record to show that the motion on notice referred to in the motion ex-parte was ever filed. It is also noteworthy that the sheriff of the Court and Nigeria Immigration Service referred to in reliefs 4 & 5 of the writ of summons and reliefs (b) & (c) of the ex-parte application were not made parties to the suit. The trial court granted the order as prayed on 20/11/2001, the same day the processes were filed and gave a return date of 7/12/2001. The court did not refer to any pending motion on notice. The appellant was aggrieved by the orders made against him without notice

and appealed to the lower court vide a notice of appeal filed on 3/12/2001. The appeal was dismissed on 25/3/2004. He has further appealed to this court vide Notice of Appeal filed on 21/4/04 containing 3 grounds of appeal.

The parties duly filed and exchanged briefs of argument in compliance with the rules of this court. At the hearing of the appeal on 25/2/2014, C.O. ERONDU ESQ., of counsel, adopted and relied on the appellant's brief filed on 5/7/04 and reply brief filed on 10/2/09. In further adumbration of his brief, he submitted that the trial court lacked jurisdiction to grant the interim orders against the appellant without putting him on notice. He argued that the interim reliefs granted amounted to a variation of the bail conditions granted by the High Court, a court of coordinate jurisdiction. He urged the court to allow the appeal.

L. O. EGBOYI ESQ., of counsel, adopted and relied on the respondent's brief settled by CHIEF E. L. AKPOFURE, SAN. It was filed on 8/12/04 but deemed properly filed and served on 9/4/2008. Expatriating on the submissions contained in the said brief, L.O. EGBOYI ESQ., submitted that by virtue of Order 8 Rule 7 (2) of the High Court (Civil Procedure) Rules 1988 of the defunct Bendel State, then applicable in Delta State (henceforth referred to as the High Court (Civil Procedure) Rules), the High Court was empowered to grant orders ex-parte. He contended that in the circumstances it would be wrong to say that the court lacked jurisdiction to grant the orders. He also observed that the appellant failed to take advantage of the provisions of Order 8 Rule 11 of the said rules, which permits any party who is dissatisfied to apply to set aside the order within seven days of the order. He further argued that it is the Nigeria Immigration Service, which is affected by one of the orders made, that has the locus to complain about it. He observed that there is no complaint from that organisation. He urged the court to dismiss the appeal.

In reply, C.O. ERONDU ESQ., of counsel, submitted that the appellant was entitled to elect which option to pursue and that he chose to appeal rather than apply to have the orders set aside. In his brief of argument the appellant formulated two issues for determination, which were adopted by the Respondent. They are as follows:

1. Whether the learned Justices of the Court of Appeal were

right in holding that the learned trial judge had jurisdiction to grant the interim orders of injunction against the appellant.

2. Whether the Learned Justices of the Court of Appeal were right in holding that the Respondent made out a case for the grant of the interim orders of injunction in its favour.

B Learned counsel for the respondent contended that the appellant did not distil any issue from ground 2 of the notice and grounds of appeal and that the said ground should be deemed abandoned. The grounds of appeal without their particulars are as follows:

C 1. The learned justices of the Court of Appeal erred in law in holding that the High Court had the jurisdiction to make the interim orders of injunction.

D 2. The learned Justices of the Court of Appeal erred in law in holding that the appellant had no locus standing to complain that the interim relief against the Nigeria Immigration Service (a non-party) was a nullity.

3. The learned Justices of the Court of Appeal erred in law in holding that the plaintiff/respondent made out a case for the interim reliefs on the strength of its unchallenged affidavit evidence.

E I have closely examined the grounds of appeal and I am of the considered view that the appellant's issue 1, which deals with the issue of jurisdiction encompasses both grounds 1 and 2 of the notice of appeal. The contention that ground 2 has been abandoned is therefore misconceived. I shall now proceed to consider the merits of
F the appeal.

In support of the first issue, C.O. ERONDUESQ., learned counsel for the appellant argued that the learned Justices of the lower court were wrong in holding that the learned trial judge had the jurisdiction to grant the interim orders of injunction. He submitted that
G the respondent was the substantive complainant in charge, No. CAM/250c/2001 pending at the Chief Magistrate's Court 1 Asaba, against the appellant. He noted further that the charge was not the subject of a private prosecution. He submitted that the respondent had no right
H to seek the interim reliefs bearing in mind the fact that a complainant in criminal proceedings is not a party to the proceedings but only a witness. He referred to: *Nitel Plc V. Emmanuel O. Awala* (2003) 3 NWLR (Pt. 753) 1. He submitted that since the respondent had averred in paragraph 7 of his supporting affidavit that the appellant

had already been granted bail by High Court 5, Asaba, a court of coordinate jurisdiction, the learned trial judge ought to have been reluctant to accede to the respondent's prayers. He submitted further that the learned Justices of the lower court erred in affirming the decision. He submitted that the State is in control of criminal proceedings at the Magistrate Court and is a party to the bail application. B That it was its exclusive responsibility to apply for the revocation or variation of the bail conditions granted the appellant in the event of any default on his part. He referred to Sections 131 and 132 of the Criminal Procedure Law of Bendel State as applicable to Delta State. C He contended that the respondent used the interim reliefs to vary the appellant's bail conditions.

Learned counsel argued that a complainant has no civil right or obligation to protect under criminal jurisprudence. He submitted that the only duty of a complainant is to lodge a complaint with the police. He submitted further that the power of the police to arrest, investigate and prosecute a case does not in law ripen into an agency relationship. He contended that once the complainant goes beyond the report and attempts to influence the police, the Law adjudges him to have set the law in motion against the suspect and he would be liable to a cause of action in false imprisonment and malicious prosecution. He referred to: *Mandilas & Karaberis Ltd V. Apena* (1969) NMLR 199; *Balogun V. Amubikahun* (1989) 3 NWLR (Pt. 107) 18; *Sunday Olusegun Olusemo V. Commissioner of Police* (1998) F 11 NWLR Pt. 575, 547, 558.

Referring to Order 15 of the High Court (Civil procedure) Rules, C.O. ERONDU ESQ., of counsel, submitted that a party may exercise a right of action in civil proceedings by an interlocutory application to arrest an absconding defendant or for the defendant to furnish security for costs to ensure the satisfaction of the judgment sum whose recovery is the subject of a pending action, Referring to the finding of the lower court to the effect that there is a pending civil proceeding in which the exercise of a legal right called for determination, he submitted that the civil right or obligation of the respondent in respect of the recovery of its funds allegedly stolen was not the cause of action in the proceedings before the trial court. He submitted that the grant of interim reliefs by the trial court, which amounted to a review of the bail conditions already granted by a court of coor-

dinate jurisdiction, was a gross abuse of process and should not have been allowed to stand. He relied on: *Arubo V. Aiyeleru* (1993) 3 NWLR Pt. 280, 126; *Augustine Oyubu V. Francis Akpobarojero* (1998) 4 NWLR (Pt 546) 436.

With regard to relief (c) of the motion *ex-parte*, by which the Nigeria Immigration Service was directed not to allow the appellant to travel abroad pending the determination of the motion on notice, learned counsel argued that it was aimed at infringing the appellant's right to freedom of movement as enshrined under Section 41 (1) of the 1999 Constitution (as amended). He submitted that in the circumstances, contrary to the view expressed by the lower court, the appellant in fact had the locus to challenge the order. In further support of this contention he submitted that it is settled law that a "*person aggrieved*" is a person who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongly refused him something or wrongfully affected his title to something. He cited the case of: *Societe Generale Bank (Nig) Ltd V. Afekoro* (1999) II NWLR (Pt. 628) 521 @ 537. He also submitted that it is a general principle of law that an injunction of whatever type (interim, interlocutory or perpetual) should not be granted against a person who is not a party to litigation and any such order, if made, becomes a nullity. He relied on: *Pan African Bank Ltd v. The State* (1997) 4 NWLR (Pt. 499) 296; *Onyekwulunne v. Ndulue* (1997) 7 NWLR (Pt. 512) 250 @ 280.

Learned counsel observed that the lower court delved into the constitutionality of *ex-parte* proceedings, which was not an issue canvassed before it. Relying on the authority of *Directors SSS V. Olisa Agbakoba* (1999) 3 NWLR pt. 595 314, 370, 371, he urged the court to set aside the decision of the lower court on this issue.

In reaction to the above submissions, CHIEF E.L. AKPOFURE, SAN submitted that the law casts a duty on every court to preserve the *res* of any case. He submitted that the failure of the court to preserve such *res* has been held to be an abdication of duty on the part of such court. He relied on: *Kigo (Nig,) Ltd V. Holman Bros. (Nig.) Ltd.* (1980) 3-4 SC 60 @ 70; (1980) 5-7 SC (Reprint) 41 @ 47. For the definition of "*res*" as held by this court, he referred to: *Buhari v. Obasanjo* (2004) FWLR (pt. 191) 1487 @ 1519 A. He submitted that "*res*" generally refers to the subject matter of the right

complained of by the applicant. He contended that the appellant's physical presence and the need for him to undergo his trial in respect of the criminal charge against him constitutes the res in the case before the trial court. He referred to the reliefs set out in the writ of summons. He reproduced order 8 Rule 7 (2) of the High Court (Civil Procedure) Rules and submitted that, by virtue of the said order, the trial court has statutory jurisdiction to grant interim orders of injunction and that the application before the trial court fell squarely within the aforesaid provisions. B

With regard to the contention that the respondent lacked the locus standi to institute the action before the trial court, learned Senior Counsel submitted that relief (1) of the writ of summons, which is the substantive relief in the suit, adequately shows the standing of the respondent as "*the substantive complainant*" in the criminal charge pending against the appellant in Charge No. CMA/250C/2001 pending before the Chief Magistrates Court 1, Asaba. He noted that all the other reliefs are ancillary to the main relief. He was of the view that the copy of the 14- count charge sheet annexed to the affidavit in support of the ex-parte application further strengthened the respondent's position. He submitted that the respondent was entitled to the reliefs sought in the application notwithstanding the fact that only declaratory reliefs are sought in the suit before the trial court. He relied on: *Owodunni V. Regd. Trustees Celestial Church* (2000) FWLR (pt. 9) 1455 @ 1496 A to the effect that a plaintiff who claims only declaratory reliefs would have the necessary locus standi to prosecute his claim as long as he pleads sufficient interest in the subject matter of the suit. In the instant case, it is the contention of the learned senior counsel that the colossal amounts referred to in the charge against the appellant belong to the respondent. He submitted that in the circumstances the lower court was correct when it held that the declaratory reliefs sought by the respondent are covered by the provisions of Sections 6 (6) and 272 of the 1999 constitution (as amended). He submitted that the authorities of *NITEL Plc. Vs Emmanuel O. Awala* (supra) and others relied upon by the appellant are not applicable to the facts of this case. E F G H

On the contention that the suit is an abuse of process, Learned Senior counsel argued that learned counsel for the appellant is of the erroneous view that suit No. A/188/2001 is the same as charge No.

CMA/250c/2001. He submitted that it would be wrong in law to have deferred proceedings in suit No. A/188/2001 until the conclusion of criminal proceedings or prosecution in Charge No. CMA/250C/2001. He relied on: *Ogboru V. Ibori* (2004) ALL FWLR (pt. 225) 173 @ 196-197 G-C and urged the court to hold that the suit before
 B the trial court is not an abuse of the process of court.

In conclusion, he submitted that the parties necessary for, the effective and effectual determination of the matter before the trial court were present. He contended that it is not sufficient, nor does it
 C lie in the mouth of the appellant, to say that non-joiner of the Nigeria Immigration Service robbed the trial court of its jurisdiction. He noted that the Nigeria Immigration Service was only directed by the order of the trial court to do a specified act without any prejudice to its interest. He submitted that, assuming without conceding that its right
 D or interest was adversely affected by the order, the only course of action for the Nigeria Immigration Service is to apply to set aside the order or to appeal against it. He referred to: *7-up Bottling Co. Ltd v. Abiola & Sons Ltd* (1995) 3 NWLR (pt. 383) 257 @ 280-291 D-B. He was of the considered view that the failure of the Nigeria Immi-
 E gration Service to exercise any of the options referred to is a clear indication that the order of the trial court was properly made. He urged the court to resolve this issue against the appellant.

In reply to the submissions of learned Senior Counsel for the respondent, learned counsel for the appellant submitted that there
 F was a misconception as to whether the appellant is seeking the deferment of the civil proceedings at the High Court pending the determination of the criminal proceedings before the Chief Magistrates Court, Asaba. He maintained that the appellant's position is that the interim
 G and substantive reliefs sought by the respondent are merely a ploy to vary, stiffen and/or revoke his bail conditions, which only the court that granted the bail in the first place has jurisdiction to do. He submitted that varying of bail conditions cannot be the subject of civil proceedings and that in any event such an application could only be
 H brought by the State and not the complainant.

In determining this appeal, an appropriate place to start would be the nature of interim and interlocutory injunctions and circumstances in which they could be granted ex-parte. The locus classicus on the issue is the case of: *Kotoye V. C.B.N.* (1989) 1 NWLR (Pt.98)

419 @ 440 C - D where this court held as follows:

"I think it is correct to say that "ex parte" in relation to injunction is properly used in contradistinction to "on notice" - and both expressions, which are mutually exclusive, more strictly rather refer to the manner in which the application is brought and the order procured. An applicant for a non-permanent injunction may bring the application ex parte, that is without notice to the other side or with notice to the other side, as is appropriate. By their very nature, injunctions granted on ex-parte applications can only be properly interim in nature. They are made, without notice to the other side, to keep matters in status quo to a named date, usually not more than a few days, or until the respondent can be put on notice. The rationale of an order made on such an application is that the delay to be caused by proceeding in the ordinary way by putting the other side on notice would or might cause such an irretrievable or serious mischief. Such injunctions are for cases of real urgency. The emphasis is on "real"."

At pages 441 B, 442A-B & 447 E - F (supra):

"Applications for interlocutory injunctions are properly made on notice to the other side to keep matters in status quo until the determination of the suit.

... Interim injunctions, on the other hand, while often showing the trammels of orders of injunction made ex parte are not necessarily coterminous with them. Their main feature which distinguishes them from interlocutory injunctions is that they are made to preserve the status quo until a named date, or until further order or until an application on notice can be heard.

... It is settled that a person who seeks an interim order ex parte while also applying for an interlocutory injunction files two motions, simultaneously, one ex parte asking for the interim order, and the other one on notice applying for an interlocutory injunction. The court before whom the applications comes takes the ex parte motion, and if satisfied that it has merit ex facie, grants it making the order to the date when the motion on notice shall be heard. Parties and their counsel ought not to be encouraged to file and argue a sole application ex parte when asking for orders which can only be properly made on notice."

It is also well settled that an order of injunction is usu-

ally granted to protect a part's existing legal right from invasion by another. See: Akapo V. Hakeem-Habeeb (1992) 7 SCNJ 119, Orji v. Zaria Industries Ltd. (1992) 1 SCNJ 29; Universal Trust Bank Ltd, & Ors. V. Dolmetsch Pharmacy (Nig.) Ltd. (2007) 6 SC (Pt. I) 1; (2007) 16 NWLR (Pt.106) 520.

There is no doubt that the power to grant an interim or interlocutory order of injunction is one of the inherent powers of a court of law for the enhancement of the administration of justice. By virtue of the powers conferred on the High Court by Section 6 (6) (a) of the 1999 Constitution (as amended) and the provisions of Order 8 Rule 7 (2) of the High Court (Civil Procedure) Rules 1988 of Bendel State applicable in Delta State, the High Court has the power to grant an ex-parte order of interim injunction upon the fulfillment of certain conditions. There is also no doubt, as argued by the learned Senior Counsel for the respondent, that the court has a duty to preserve the res or subject matter of litigation. The grant of an order of interim or interlocutory injunction is an equitable remedy within the discretionary powers of the court. As with all exercise of discretion, the power must be exercised judicially and judiciously, taking all relevant circumstances into account.

Now, applying the above stated principles to the facts of this case, the first issue to consider is the nature of the right sought to be protected by the grant of the order or the subject matter of litigation to be kept in status quo pending the determination of the motion on notice. Learned counsel for the respondent drew the court's attention to relief (1) of the writ of summons, which he described as the principal relief. Although it has been reproduced earlier in this judgment it is necessary to repeat it here for ease of reference. It reads:

"A declaration that the defendant having been charged to court in charge No. CMA/250C/2001 pending before the Chief Magistrate Court 1, Asaba, wherein the plaintiff is the substantive complainant must or ought to undergo his trial to conclusion."

The first observation in respect of this relief is that it refers to a criminal charge pending against the appellant at the Chief Magistrate's Court 1, Asaba. It is clearly therefore not in respect of proceedings pending before the High Court. Secondly, the respondent is seeking

a declaration that the appellant must undergo his trial before the said Chief Magistrate's Court to conclusion. What is the subject matter of the dispute before the High Court? I am at pains to find it. As rightly observed by learned counsel for the appellant although the respondent is the complainant in the charge before the Chief Magistrates court, it has not shown the right it seeks to protect by the suit before the trial court. It is significant that there is no pending civil suit between the appellant and the respondent aimed at recovering the alleged missing sum of money. B

It is also trite that an application for an order of injunction is usually granted pending the determination of the substantive suit, or the determination of an application pending before the court before which the application is made. The reliefs sought in the ex parte application are predicated upon the reliefs set out in the writ of summons. A careful perusal of the printed record of appeal shows that although the reliefs in the ex parte application are sought pending the determination of a motion on notice, there is no evidence that there was indeed a motion on notice filed along with the ex parte application that was pending before the court. Indeed there is no evidence that a motion on notice was filed simultaneously with the motion ex parte. When the learned trial Judge adjourned the proceedings after granting the ex parte orders on 20/11/2001, he merely gave a return date of 7/12/2001 without reference to any pending application. C D E

What all these facts reveal is that the purpose of the ex parte application was to restrain the appellant from traveling out of the country pending the determination of the charge before the Chief Magistrates Court, Asaba and not to protect any existing right pending the determination of proceedings before the High Court. There was no status quo to be maintained by the parties to Suit No. A/188/2001, as there was no cause of action. F

There is no doubt that the appellant is facing grave and weighty charges at the Chief Magistrates Court 1, Asaba. The alleged missing sum of N89, 958,931.46 is said to belong to the respondent who made the complaint that led to the arrest and prosecution of the appellant. Notwithstanding the fact that individuals or corporate entities may be victims of crimes, the power to institute criminal proceedings resides in the Attor- G H

ney-General of the Federation or of a State, as the case may be by virtue of Sections 174 and 211 of the 1999 Constitution (as amended). Such power may be exercised by the Attorney-General himself or through any officers of his department. In appropriate circumstances, the Attorney-General may
 B **instruct a private legal practitioner to appear on his behalf.** See: F.R.N. V. Adewunmi (2007) 10 NWLR (Pt.1042) 399; (2007) 4 SC (Pt. III) 30; F.R.N. Vs Osahon (2006) 5 NWLR (Pt.973) 361.
Customarily, initiation and prosecution of criminal proceedings before the Magistrates Courts is done by the Police pursuant to powers conferred on it by Section 23 of the Police Act. The powers are subject to Sections 160 and 174 (1) of the 1999 Constitution. See: F.R.N. Vs. Osahon (supra). The point being made here, as submitted by learned counsel for the appellant,
 D is that only the parties mentioned above, have the locus to make any application in respect of pending criminal proceedings. The fact that the respondent is the “*substantive complainant*” in the proceedings before the Chief Magistrates Court, Asaba, does not confer any right on it to initiate any process in its own name in relation to the said
 E charges before that court or before the High Court.

Where criminal charges are pending against an accused person, his right to freedom of movement pending the determination of the case may be curtailed by the court seised of the matter or by a higher court, depending on the nature of the offence.
 F By the averment in paragraph 7 of the affidavit in support of the motion ex parte, the appellant had been granted bail by Court No. 5 of the same High Court. The enrolled order in respect thereof does not form part of the record before us. However, it is
 G evident, from the reliefs sought, that the respondent was not satisfied with the bail conditions granted by that court, which led to the institution of the suit that gave rise to this appeal, whose sole purpose was to have the bail conditions varied by making them more stringent, and specifically to ensure that the appellant remained within the country
 H for the duration of his trial. In view of a subsisting order granting bail to the appellant by a court of co-ordinate jurisdiction, did the trial court have the jurisdiction to vary the said order, or to sit on appeal over that order? The position of the law as stated by this court in: Witt & Busch Ltd, V. Dale Power Systems Plc, (2007) 17 NWLR

(Pt.1062) 1; (2007)15 - 6 SC 121, per Ogbuagu, JSC, is as follows:

“...in the absence of statutory authority or except where the judgment or order is a nullity, one Judge has no power to set aside or vary the order of another Judge of concurrent and co-ordinate jurisdiction... The rationale or reason for this is that there is only one High Court in a State.” See: Amanabu V. Okafor (1966) 1 ALL NLR 205 B @ 207; Uku Vs Okumagba (1974) 1 ALL NLR (Pt. 1) 475; Wimpey (Nig.) Ltd. V. Balogun (1986) 3 NWLR (Pt.28) 324 @ 331, cited with approval in Witt & Busch Ltd, V. Dale Power Systems Plc, (supra).

In the case of N.I.M.B. Ltd, Vs U.B.N. Ltd, (2004) 12 NWLR C (Pt.888) 599, a situation arose where the appellant instituted an action at the High Court of Lagos State against the 2nd respondent (West African Marine Products Ltd.) for the recovery of a sum of money or the security, which consisted of assorted frozen fish imported with an overdraft facility granted by the appellant's bank. The High Court granted an ex-parte application granting the appellant leave to take possession of, remove and sell the entire stock of fish stored in the cold room of the 2nd respondent, including injunctive reliefs against the 2nd respondent. After the order was made, the 1st respondent (Union Bank of Nig. Ltd.) filed an action at the Federal High Court in respect of the same fish, subject of the High Court order and applied for an order of injunction restraining the 2nd and 3rd respondents, who were defendants in the suit at the Federal High Court from tampering with, disposing of or further selling the total quantity of fish stored in the 2nd respondent's cold room/warehouse. It also sought injunctive reliefs restraining the 2nd and 3rd respondents from interfering with the duties of the receiver/manager. The Federal High Court made an order restraining the 2nd and 3rd respondents from disturbing, harassing, intimidating or in any manner whatsoever interfering with the performance of the duties of the receiver/manager pending the determination of the motion on notice. The appellant appealed against the order of the Federal High Court, which appeal was dismissed. On further appeal to this Court, in allowing the appeal, His Lordship, Pats-Acholonu, JSC had this to say H at page 621 - 622 H - D (supra):

“The theory of justice to which we adhere rests a priori on the premise that there must be certainty and parties to the legal duel

should be in a position to know where they stand at a certain time. A system of law where Judges of the same degree i.e. of co-ordinate jurisdiction make contradictory and inconsistent orders in respect of the same subject matter involving the same parties i.e. each relying on his whims, caprices, prejudices and sometimes a vaunting ego, makes nonsense and mockery of the law. The beauty ... of the law is that just as stare decisis exercises a restraining influence on our courts, so too do discipline in the courts in dutifully adhering to normative order by which courts of co-ordinate jurisdiction do not sit on appeals on each other, attracts respect for the law."

Per Uthman Mohammed, JSC at page 622 F (supra):

"That order made by the Federal High Court ought not to have been made after its attention was drawn to the extant order of the Lagos High Court."

In the instant case, having drawn the court's attention in paragraph 7 of the affidavit in support to the fact that High Court No. 5, Asaba had already granted the appellant bail, the trial court had no jurisdiction to entertain the application for the ex parte interim orders, which had the effect of varying the bail conditions already granted by a court of concurrent or co-ordinate jurisdiction. The proper procedure should have been an application by the prosecution (not the respondent) to the court that granted bail to vary the bail conditions. The question posed earlier must therefore inevitably be answered in the negative.

With regard to relief (c) of the ex parte application, it is contended by the appellant that the order in respect thereof, which was granted against the Nigeria Immigration Service, a party who was not joined in the proceedings, is a nullity. The respondent, as noted earlier, contends that it is the aggrieved party who should complain and not the appellant. The lower court agreed with the respondent. The position of the law is that non-joinder of a necessary party in a suit is an irregularity that does not affect the competence or jurisdiction of the court to adjudicate on the matter before it. See: Okoye V. Nigerian Construction & Furniture Co. Ltd. & Ors. (1991) 7 SC (Pt.III) (Reprint) 33 @ 56; Green V. Green (1987) 3 NWLR (60) 480. However, an order made against a person who was not a party to

the action before the court, though not a nullity, is to no avail. It cannot stand the test of time and is not binding on such non-party to the action. See: Uwazurike & Ors, v. A.G. Federation (2013) 4-5 SC (Pt.1) 90 @ 119 lines 16-21; (2013) LPELR-20392 (SC) 1 @ 24, per Fabiyi, JSC; Uku V. Okumagba (supra).

In the instant appeal, it is correct to say that the appellant cannot raise the issue of non-joinder on behalf of the parties to whom the orders are directed. B

However he has shown his locus in the circumstances of the present case, to complain against the orders made, as the said orders, particularly the one directed to the Nigeria Immigration Services, if enforced, would affect his right to freedom of movement. C

In the final analysis, this issue must be answered in the negative and is hereby resolved in the appellant's favour on the ground that the trial court had no jurisdiction to grant reliefs that had the effect of varying the bail conditions already granted by a court of co-ordinate jurisdiction. D

Having resolved the first issue in the appellant's favour, the second issue has become academic and is hereby struck out. The appeal therefore succeeds and is hereby allowed. The judgment of the lower court delivered on 25/3/2004 is set aside. The ex-parte order of interim injunction made on 20/11/2001 by the trial court is also set aside. The entire suit no. A/188/2001 before the High Court of Delta State, Asaba Judicial Division is struck out. E

It is most unfortunate that because of the pendency of the appeals to the lower court and to this court, an ex-parte order of interim injunction, meant to last for just a few days, has remained in place for 13 years, when an application pursuant to Order 8 Rule 11 of the High Court (Civil Procedure) Rules, which provides that an application to set aside the order may be brought within 7 days of the order, would have disposed of the matter a long time ago. The parties shall bear their respective costs in the appeal. F

MOHAMMED JSC

The Appellant in this appeal is a staff of the Union Bank of Nigeria Plc, the Respondent, being the Branch Manager of the Bank at Asaba, was charged with other accused persons at the Asaba Chief H

Magistrate Court for stealing the sum of N89, 958,931.46 belonging to the Respondent. The Appellant and his co-accused persons were granted bail by the High Court No. 5 Asaba and the Chief Magistrate's Court Asaba respectively pending their trial. The Respondent which was not happy with the release of the Appellant on bail in particular, B went to High Court No. 12 Asaba of Delta State and filed a civil suit No. A/188/2001 on 20th November, 2001 against the Appellant as the sole Defendant and claimed 6 declaratory and injunctive reliefs. All the reliefs claimed against the Defendant now Appellant were predi- C cated on the charge No. CMA/250C/2001 in the criminal case against the Appellant and others charged along with him pending before the Chief Magistrate Court 1, Asaba and not on the outcome of the civil case filed at the High Court. Accompanying the Writ of Summons at the High Court was an Ex-parte motion also filed by the Respondent D on the same day and time as the Writ of Summon on 20th November, 2001 seeking the following reliefs -

“(a) An order of interim injunction restraining the Defendant from travelling out of this country and/or place pending the determination of the motion on notice.

E *(b) An interim order directing the Sheriff of this Honourable Court to take possession of the International Passport and other travelling documents of the Defendant pending the determination of the motion on notice.*

F *(c) An interim order directing the Nigerian Immigration Service not to allow the Defendant to travel abroad pending the determination of the motion on notice.”*

It is very significant to observe that although the Respondent as the Applicant before the High Court sought the 3 reliefs in the Ex- G parte motion pending the hearing of the motion on notice, there was no such motion on notice filed by the Respondent/Applicant which was to be heard on the return date fixed by the High Court at 7th December, 2001 after granting all the reliefs sought the Ex-parte motion on 20th November, 2001. The Respondent/Applicant's main H grounds for approaching the trial High Court ex-parte were that if the reliefs were not granted ex-parte as a matter of urgency, the Defendant/Appellant would frustrate his trial in the Chief Magistrate Court by escaping out of the Country and this could be prevented by not putting the Defendant/Appellant on notice. The Defendant/Appellant's

appeal to the Court of Appeal Benin Division against the Ex-parte orders of the trial High Court having been dismissed on 25th March, 2004, the Appellant is now on further appeal to this Court having distilled two issues from the three grounds of appeal filed in the Notice of Appeal. The issues are -

“(a) Whether the learned Justices of the Court of Appeal were right in holding that the learned trial Judge had the jurisdiction to grant the interim orders of injunction against the Appellant.

(b) Whether the learned Justices of the Court of Appeal were right in holding that the Respondent made out a case for the grant of the interim orders of injunction in its favour.”

The law is trite that an applicant for a non-permanent injunction may bring the application ex-parte without notice to the other side or with notice to the other side, as is appropriate. By their very nature, orders of injunctions granted on ex-parte applications, as in the present case, can only be properly interim in nature. The orders are made without notice to the other side in order to keep matters in status quo to a named date, usually a few days or until the Respondent is put on notice. The rationale of an order made ex-parte is that the delay to be caused by proceeding in the ordinary way by putting the other side on notice, might cause an irretrievable or serious damage or mischief. Such ex-parte orders of injunctions therefore are only for cases of real urgency. See *Kotoye v. Central Bank of Nigeria* (1999) 1 N.W.L.R. (Pt. 98) 419 at 440.

The law on this subject of ex-parte interim injunctions is also well settled that a person who seeks an interim order ex-parte while also applying for an interlocutory injunction as was the situation in the present case, files two motions simultaneously, one ex-parte asking for the interim order and the other one on notice applying for an interlocutory injunction pending the determination of the substantive suit. The Court before which the applications are filed takes the ex-parte motion, and if satisfied that it has merit ex-facie, grants it making the order to last up to the date when the motion on notice shall be heard. See *Kotoye v. Central Bank of Nigeria* (supra). However, what is baffling in the present case is the fact that although the trial Court granted the interim orders of injunction ex-parte pending the hearing of the motion on notice for interlocutory injunction pending the hearing of the Respondent's substantive suit filed in the same trial

High Court, it not only that the motion on notice to be served on the Appellant who would have been the Respondent to the motion was not actually filed in that Court but it apparent from the record of this appeal that even the trial Court was aware of the non filing of the motion on notice as none was adjourned for hearing on the return
B date fixed for 7th December, 2001. It is quite plain from the record of this appeal therefore, in the absence of the necessary and relevant motion on notice, pending the hearing and determination of which on the return date of 7th November, 2001 the ex-parte orders were
C made, the trial High Court lacked the jurisdiction to hear and grant the ex-parte motion heard and granted on 20th November, 2001 in the absence of the Appellant. The Court below was therefore wrong in its judgment now on appeal in finding otherwise.

Very close examination of the reliefs claimed by the Respon-
D dent in the Writ of Summons filed along with the ex-parte motion against the Appellant which is the subject of this appeal, clearly reveals that all the declaratory and injunctive reliefs claimed, are predicated on the prosecution and determination of the criminal case against the Appellant at the Asaba Chief Magistrate Court 1, which case com-
E pletely outside the reach or control of that High Court. In other words, neither the Respondent which was the plaintiff and Applicant at the trial High Court was a party to the criminal case at the Chief Magistrate Court 1 Asaba, nor the High Court itself where the Respondent
F filed his suit and ex-parte motion has any control to the pending criminal proceedings in respect of charge No. CMA/250C/2001 against the Appellant at the Chief Magistrate Court 1 Asaba to warrant the basing of the ex-parte order on the outcome of the case at the Chief Magistrate Court. The reliefs which lack character of any dispute for
G the determination of any question as to the civil rights and obligation of the Respondent as Plaintiff at the trial Court line with Section 6(6) of the 1999 Constitution, has deprived that Court of any jurisdiction, statutory or inherent, to entertain the suit as framed the Writ of Sum-
H mons including the ex-parte motion filed with the suit. This is because the trial High Court has no jurisdiction to hear and determine the reliefs which are not predicated on the pending suit before it but which are predicated on the pending action or suit in another Court, be it civil or criminal case. In short, there was no cause of action before the trial High Court upon which the ex-parte orders could

have been founded as the recovery of the money alleged stolen by the Appellant and other accused persons, was not the subject of the Respondents civil suit No. A/188/2001, at the trial High Court. In the result, for the above reasons and more comprehensive reasons contained in the lead judgment of my learned brother Kekere-Ekun, JSC, which I have had the opportunity to read before today and with which I entirely agree, that I also allow this appeal, set aside the decisions of the Courts below and replace same with order setting aside the ex-parte interim orders of injunction made by the trial Court on 20th November, 2001, while the entire suit No. A/188/2001, filed by the Respondent/plaintiff now pending at the trial Asaba High Court of Justice, is hereby struck out with no order on costs.

FABIYI JSC

I have had a preview of the judgment just delivered by my learned brother - Kekere-Ekun, JSC. I agree with the lucid reasons therein advanced to arrive at the conclusion that the appeal is meritorious and should be allowed.

The appeal is against the judgment of the court below delivered on 25th March, 2004 in which the ex-parte interim orders granted by High Court No 12, Asaba, Delta State on 20th November, 2001 was affirmed. I rely on the facts garnered in the lead judgment.

It is extant in the record that the appellant is currently on bail by virtue of an order made by High Court No 5 pursuant to an application filed thereat.

I wish to say a word or two on the appellant's issue 1 before this court. It reads as follows:-

“(1) Whether the learned Justices of the Court of Appeal were right in holding that the learned trial Judge had jurisdiction to grant the interim orders of injunction against the appellant.”

There are certain vital questions that beg for answers in this matter. The first question is - can the High Court 12 Asaba, Delta State grant an order of injunction ex-parte without notice to the appellant to curtail his right of movement instead of the bail earlier granted him by High Court 5, Asaba, Delta State? It goes without saying that the order granted ex-parte infringed the constitutional

right of the appellant to right of free movement contrary to section 41(1) of the 1999 Constitution of the Federal Republic of Nigeria (as amended). The decision of this court in the case of *Director SSS v. Olisa Agbakoba* (1999) 3 NWLR (pt. 595) 314 at 370 is directly in point. This point should have agitated the mind of the court below.

B But unfortunately, it did not. It was the duty of the courts below to ensure that the appellant's constitutional right to movement without any shred of cog or inhibition was preserved and not eroded by subterfuge; in the main.

C The next crucial question is - can High Court 12 sit on appeal over or vary the bail conditions granted by High Court 5 and pretend to vary same, as it were? The undoubted answer is that High Court 12 has no vires-power to sit over or vary the bail conditions granted by High Court 5 - a court of co-ordinate jurisdiction. See: *N.I.M.B Ltd. v. U.B.N Ltd.* (2004) 12 NWLR (pt. 888) 599. To say the least, the trial High Court 12 lacked jurisdiction to so act.

The trial High Court 12 even made its order to compel the Nigeria Immigration Service (NIS) to inhibit the movement of the appellant. The pertinent question is - can the powers of the Nigeria Immigration Service be put on hold when it is not a party to the suit or even placed on notice? The short answer is that Nigeria Immigration Service, which is not a party to the action, is not bound by the order made behind its back. It was made to no avail.

F See: *Uku v. Okumagba* (1974) 1 All NLR 475 wherein it was clearly pronounced that judgment made with order against a person who was not a party to a pending suit, as herein, is to no avail.

G With due diffidence to the two courts below, it is clear that they did not exercise adequate discretion in the manner in which the trial court dishd out interim order of injunction in favour of the respondent and affirmed by the court below. Discretion should be exercised judicially and judiciously as well. See: the cases of *University of Lagos v. Olaniyan* (1985) 16 NSCC (pt. 1) 98, 113; *Eronini v. Iheuko* (1989) 2 NSCC (Pt. 1) 503, 513; (1989) 3 SC (pt. 1) 30.

H It is basic that where exercise of discretion is carried out in a capricious fashion, as done by the two courts below herein, such equates with compelling reason that will make this court to interfere with such screwed exercise of discretion. See: *Kale v. Coker* (1952) 12 SC 252; *Anaeze v. Anyaso* (1993) 5 NWLR (pt. 291) 1. There is

justification for due intervention herein in the prevailing circumstance. Issue 1 is hereby resolved in favour of the appellant and against the respondent.

The above is just to lend my full support to the comprehensive judgment of my learned brother whose reasons I hereby adopt in allowing the appeal. I abide by the consequential orders therein contained; inclusive of that relating to costs. B

PETER-ODILI JSC, CFR

I agree with my learned brother, Kudirat M. O. Kekere-Ekun, JSC in the judgment and reasoning's just delivered. To underline my support, I shall make some comments. C

The Respondent as Plaintiff in a writ of summons filed on 20/11/2001 prayed for the following reliefs against the Appellant as defendant in the High Court of Delta State, Asaba Judicial Division thus:- D

1. A declaration that the defendant having been charged to Court in Charge NO. CMA/250C/2001 pending before the Chief Magistrate Court 1, Asaba, where the Plaintiff is the substantive complainant must or ought to undergo his trial to conclusion. E

2. A declaration that the defendant having been charged to Court in Charge No, CMA/250C/2001 pending before the Chief Magistrate Court 1, Asaba is not allowed to travel outside the Country with the aim of frustrating the criminal trial thereby making it impossible for him to be prosecuted. F

3. An order of injunction restraining the defendant from travelling outside this Country to any other place pending the determination of the substantive suit.

4. An order directing the sheriff of court to take possession of G the International Passport and other travelling documents of the defendant pending the conclusion of the criminal trial in Charge NO. CMA/250c/2001 pending at Chief Magistrate Court 1, Asaba.

5. An interlocutory order directing the Nigerian Immigration Services not to allow the defendant to travel outside the country pending the determination of Charge No.CMA/250C/2001 or this suit whichever is the first in time. H

6. An order of perpetual injunction restraining the defendant from leaving the Country pending the conclusion of the criminal trial

in Charge No. CMA/250/2001 pending against him at the Chief Magistrate Court 1, Asaba.

The Appellant was the Asaba Branch Manager of the Respondent Bank. Sometime around April, 2001, the respondent, at its Asaba branch was defrauded of over N89, 958,931.46 (Eight-Nine Million, B Nine Hundred and Fifty-Eight Thousand, Nine Hundred and Thirty-One Naira, Forty-Six Kobo). The fraud was reported to the police who thereafter went into full investigation of the matter.

Sometime around the 29th day of October, 2001, the police C based on the outcome of their investigation, charged the appellant and six others with the offence of stealing of the said sum of N89,958,931.46 (Eight-Nine Million, Nine Hundred And Fifty-Eight Thousand, Nine Hundred And Thirty-One Naira, Forty-Six Kobo) the property of the respondent herein. The appellant and the other D six accused persons were charged to the Magistrate Court vide Charge NO. CMA/250C/2001.

After the plea of the appellant, the learned trial Magistrate remanded him in prison custody. The appellant was later granted bail by High Court No. 5 in the Asaba Judicial Division of the High Court E of Justice, Delta State.

After appellant was granted bail, the Respondent filed Suit NO. A/188/2001 vide a writ of summons on 20/11/2001 whereat the reliefs already set out above were sought by the respondent against the appellant. The respondent, through a motion ex-parte prayed F for and was granted the following orders:-

(a) An order of Interim injunction restraining the defendant from travelling out of this country and/or place pending the determination of the motion on notice.

G (b) An interim order directing the Sheriff of this Honourable Court to take possession of the International passport and other travelling documents of the defendant pending the determination of the motion on notice.

H (c) An interim order directing the Nigerian Immigration Services not to allow the defendant to travel abroad pending the determination of the motion on notice.

The appellant appealed to the Court of Appeal against the granting of those interim orders of the High Court. On the 25th day of March, 2004, the Court of Appeal dismissed the appeal which

brought about the dissatisfaction of the appellant who has now appealed to the Apex Court.

In keeping with the Rules of this Court, parties filed and exchanged their respective Briefs and on the 25th day of February 2014, learned counsel for the Appellant, Mr. C. O. Erundu adopted the Brief of Argument of the Appellant he settled and filed on 5/7/2004^B and a Reply Brief of 10/2/07. He distilled two issues for determination which are as follows:-

1. Whether the learned justices of the Court of Appeal were right in holding that the learned trial judge had the jurisdiction to grant the interim orders of injunction against the Appellant.^C

2. Whether the learned Justices of the Court of Appeal were right in holding that the Respondent made out a case for the grant of the interim orders of injunction in its favour.

Mr. Egboyi, learned counsel for the Respondent adopted the Brief of Argument of the Respondent settled by Chief E. L. Akpofure SAN, filed on the 9/4/08. Learned counsel for the Respondent adopted the issues as crafted by the Appellant.

The two issues being easy to handle together, I shall take them on as such.^E

ISSUES 1 & 2:

The question raised is the rightness of the Court below in holding that the trial Court had jurisdiction to grant the interim orders of injunction against the Appellant and if a case was really made out by the Respondent for the grant of that interim injunction.^F

Canvassing for the Appellants learned counsel, Mr. Erundu submitted that the Court of Appeal was wrong in holding that the trial court could do what it did. This is so because from the respondent's showing, it was the substantive complaint in charge No. CMA/250c/2001 pending in the Chief Magistrate Court Asaba against the appellant as accused person in that charge. Also, the substantive action and interim application for injunction were all anchored on the pending criminal charge and therefore under the said setting the Respondent had no right to press for the said reliefs as a complainant under criminal jurisprudence is not a party to the said proceedings but only a witness. He cited NITEL PLC v. Emmanuel O. Awala (2003) 3 NWLR (Pt. 753) 1.^H

He stated further that since the state is in control of the crimi-

nal proceedings at the Magistrate court and a party to the bail application, it was its exclusive responsibility to press for the revocation or the variation of the appellant's order for bail in the face of an established manifest default on the appellant's part. He cited Sections 131, 132 of the Criminal procedure Law of Bendel State as applicable to Delta State. That what has come out is the respondent using the interim reliefs to vary the appellant's bail conditions by the tenor of the substantive and interim reliefs. Mr. Erundu of counsel said a complainant does not have any civil right or obligation to protect under criminal jurisdiction. That the only duty on a complainant is to lodge the complaint to the police and the ministerial discretion of the police to arrest, investigate and prosecute the case does not in law ripen into an agency relationship, He said when the complainant goes beyond the report and attempts to influence the police, the law adjudges him to have set the law in motion against the suspect and will be liable to cause of action in false imprisonment and malicious prosecution that the essence of criminal justice system is not to secure the conviction of the felon but to assist in the administration of justice. He referred to *Mandilas & Karaberis Ltd v. Apena* (1969) NMLR 199; *Balogun v. Amubikahun* (1989) 3 NWLR (Pt. 107) 18; *Sunday Olusegun Oluseno v. COP* (1998) 11 NWLR (pt. 575) 547; 558; *Atanda v A. G.* (1965) NMLR 225 at 232.

For the Appellant was contended that since the respondent/complainant had no civil right or obligation to ventilate under the criminal justice system, the trial court lacked the jurisdiction to entertain the interim application for injunction that was solely predicated on a pending criminal charge at the Chief Magistrate Court 1, Asaba. That the civil right or obligation of the respondent to the recovery of its funds allegedly stolen was not the cause of action in the proceedings in the High Court subject of this appeal.

Learned counsel for the Appellant stated further that the recovery of funds was not the subject of the action which brought about this appeal, rather it was to stiffen the appellant's conditions of bail in respect of a pending criminal charge, which bail was granted by a court of co-ordinate jurisdiction to the High Court under review. He cited *Arubo v. Aiyeleru* (1993) 3 NWLR (pt. 280) 126; *Augustine Oyubu v. Francis Akpobarojero* (1998) 4 NWLR (546) 422 at 436.

He stated on that the reliefs were granted against the appellant

without notice and no opportunity given him to ventilate his grievance of having his travel document or passport impounded thereby without notice or a hearing. He cited *Director SSS v. Lisa Agbakoba* (1999) 3 NWLR (pt. 595) 314 at 370, 371; Section 41 (1) of the 1999 Constitution.

Mr. Erundu of counsel said the respondent did not make out a case of real urgency and impossibility of service of motion such a drastic measure of an ex-parte injunction being visited on the Appellant. He cited *Kotoye v CBN & Ors* (1989) All NLR 76. B

Also that there was a paucity of details in the supporting affidavit of the Respondent such as travelling arrangements of the appellant and the identity of his surety. The affidavit not disclosing material facts that should have been in place before the grant of the interim order, the order ought to be vacated and the Court of Appeal ought to have interfered in favour of the Appellant. C

In response, learned counsel for the Respondent, Mr. Egboyi submitted that the law casts a duty on every court to preserve the res of any case and it was the reason why the injunctive relief against the appellant was made. He cited *Kigo v. Holman* (1980) 3 - 4 SC 60 at 70; *Buhari v. Obasanjo* (2004) FWLR (pt. 191) 1487 at 1519. D

He referred also to the reliefs sought in the motion ex-parte and that the trial court was covered by Order 8, Rule 7 (2) of the High Court (Civil Procedure) Rules 1988 of Bendel State which covered the procedure. E

Learned counsel for the Respondent contended that the locus standi of the respondent is not derogated from by the fact that she sought declaratory reliefs in the suit at the trial court. He cited *Owodunni v. Registered Trustees, Celestial Church* (2000) FWLR (Pt. 9) 1455 at 1495; *NITEL PLC v. Emmanuel O. Awala* (2003) 3 NWLR G (Pt.753) 1; *Mandilas & Karaberis Ltd v. Afena* (1969) NMLR 199; *Balogun v. Aminikahum* (1989) 3 NWLR (Pt. 107) 18; *Sunday Olusegun Olusemo v. COP* (1998) 11 NWLR (Pt.575) 547 at 558; *Atanda v. A. G.* (1955) NMLR 225 at 232. F

He said it would have been wrong in law to have deferred proceedings in Suit No. A/188/2001 until the conclusion of criminal proceedings or prosecution in Charge No. CMA/250C/2001. He referred to *Ogboru v. Ibori* (2004) All FWLR (Pt. 225) 173 at 196 - 197. H

For the Respondent was further canvassed that the parties necessary for the effective and effectual determination of the matter before the trial Court were present and that the non-joinder of Nigerian Immigration Services did not adversely affect the order. He cited 7-Up Bottling Co. Ltd. v. Abiola & Sons Ltd (1995) 3 NWLR (Pt. 383) B 257 at 280 - 281.

Mr. Egboyi of counsel for the Respondent said the issue of locus standi as canvassed by the Appellant cannot stand because the respondent has legal right in the subject matter of the suit before the trial Court worthy of protection by injunctive order. That the ex parte application was predicated on the substantive suit, that is, the reliefs in the writ of summons. That the averments in the supporting affidavit for the interim order laid out sufficient materials to justify the grant. He cited Ajomale v. Yaduat (NO. 2) (1991) 5 NWLR (pt. 191) D 266 at 282 -283; Kotoye v. CBN (2001) FWLR (Pt. 49) 1567; Buhari v. Obasanjo (2004) FWLR (Pt. 191) 1487) at 1517 - 1518.

That the requirements were met of Order 8, Rule 7 (1) & (2) and Order 8, Rule of the High Court (Civil Procedure) Rules, 1988 of Bendel State applicable to Delta State.

The summary of the two disparate positions of the parties may be stated to be, that while the appellant posits that the Court below erred by not holding that the learned trial judge had no jurisdiction to grant the interim reliefs in that the respondent had no locus standi to institute the said reliefs in a pending criminal proceedings, the respondent's angle is that the Lower Court was right in holding that the trial Court had jurisdiction to grant the interim orders of injunction against the appellant and that the respondent made out a case for the grant.

Indeed, this appeal or the case from the very beginning produces very strange features and perhaps could be described as novel. The Appellant had been before a Chief Magistrate Court in CMA/250C/2001 along with six others on 14 count charge of various offences at the Union Bank, Asaba Branch, which in the main had to do with fraud and stealing. Appellant was granted bail in respect of the offences charged, by the High Court 5, Asaba.

On the 15th day of November, 2001 however, the Union bank now Respondent took out a writ of summons before another High Court of Delta State, Asaba Division asking for the following reliefs:-

1. A declaration that the defendant having been charged to Court in Charge No. CMA/250C/2001 pending before the Chief Magistrate Court 1, Asaba wherein the plaintiff is the substantive complainant must or ought to undergo his trial to conclusion.

2. A declaration that the defendant having been charged to Court in Charge No. CMA/250C/2001 pending before the Chief Magistrate Court 1, Asaba is not allowed to travel outside the Country with the aim of frustrating the criminal trial thereby making it impossible for him to be prosecuted.

3. An order of injunction restraining the defendant from travelling outside this Country to any other place pending the determination of the substantive suit.

4. An order directing the Sheriff of Court to take possession of the International passport and other travelling documents of the defendant pending the conclusion of the criminal trial in Charge NO.CNA/250/2001 pending at Chief Magistrate Court 1, Asaba.

5. An interlocutory order directing the Nigerian Immigration Services not to allow the defendant to travel outside the country pending the determination of Charge No. CMA/250C/2001 or his suit whichever is the first in time.

6. An order of perpetual injunction restraining the defendant from leaving the Country pending the conclusion of the criminal trial in Charge NO. CMA/250C/2001 pending against him at the Chief Magistrate Court 1, Asaba.

The same day as the Writ of summons was filed, the same day the Plaintiff now Respondent filed a Motion Ex-parte stating as follows:-

"IN THE HIGH COURT OF JUSTICE: DELTA STATE OF NIGERIA

*IN THE ASABA JUDICIAL DIVISION HOLDEN AT ASABA
SUIT No. A188/2001*

BETWEEN:

UNION BANK OF NIG. PLC - Plaintiff/Applicant

AND

LAWRENCE S. U. AZUH - Defendant

MOTION EX-PARTE

TAKE NOTICE that this Honourable Court will be moved on the ____ day of ____, 2001 at the hour of 9 o'clock in the forenoon or so

soon thereafter as Counsel can be heard on behalf of the plaintiff/ applicant praying this Honourable Court for the following orders:-

a) An order of interim injunction restraining the defendant from traveling out of this Country and/or place pending the determination of the Motion on Notice.

B b) An interim order directing the sheriff of this Honourable Court to take possession of the International Passport and other traveling documents of the defendant pending the determination of the Motion on Notice.

C c) An interim order directing the Nigerian Immigration Services not to allow the defendant to travel abroad pending the determination of the Motion on Notice.

And for such further order or other orders as this Honourable Court may deem fit to make in the circumstances.”

D The same day, the High Court granted those injunctive reliefs in the Motion Ex-parte which Motion had a supporting affidavit of 23 paragraphs which stated that the High Court 5 had granted the appellant bail sequel to those offences charged in the Chief Magistrate Court. It was also deposed to that the appellant was making E frantic efforts to leave the country in a bid to frustrate the criminal charge before the Magistrate.

Clearly shown is that the substantive action and interim application for injunction were all anchored on the sole Charge before the Chief Magistrate Court for which bail had been obtained before a F Court of Co-ordinate jurisdiction to The High Court 12. The questions that arise consequent upon these features are:-

(1) Can the High Court 12 grant an injunction ex-parte without notice to the Appellant to curtail his rights of movement in spite G of the bail granted by a High Court 5 earlier.

(2) Can the powers of the Nigerian Immigration Services be put on hold when they are not party to the suit or even placed on notice.

(3) What civil right or obligation would propel the Respondent H to interlope and take over the processes in a criminal procedure before a Magistrate Court?

(4) Can the High Court 12 sit on appeal by whatever means over the order granting bail made by High Court 5 and thereby proceed to vary the bail conditions obtained from the said High Court

5.

I see no way out of answering all the above posed questions in the negative. The reasons are that the bail order granted by the High Court 5 to the Appellant could only be varied by itself upon application or on appeal to the Court of Appeal. Therefore, the High Court 12 lacked the vires to do what it did in the granting of the injunctive reliefs albeit ex-parte. Furthermore, when a complainant for that is what the Respondent is, have set the law in motion by lodging the complaint to the police, it goes no further except to give evidence as a witness as the matter is taken over by the police to arrest, investigate and prosecute. Going as far as they have done is an interloping venture not authorised by law and practice. See NITEL PLC v. Emmanuel O. Awalan (2003) 3 NWLR (pt. 733) 1; Mandilas & Karaberries Ltd v. Apena (1969) NMLR 199; Balogun v. Amubikahun (1989) 3 NWLR (Pt. 107) 18.

The situation would have been different if the Respondent had initiated a suit for the recovering of its funds, which would have been covered by Order 15, Rule 1 of the High Court (Civil Procedure) Rules of Bendel State applicable to Delta State. Also must be said is that the Respondent had activated the High Court 12, Asaba to review the bail granted by High Court 5, Asaba in a move that can only be seen as an abuse of Court process and one cannot excuse such a harassing, irritating high handed irregular process. See Arubo v. Aiyeleru (1993) 3 NWLR (Pt. 280) 126; Augustine Oyubu v. Francis Akpobarojero (1998) 4 NWLR (Pt. 545) 422.

The Court of Appeal ought to have acted against what the trial court did and the finding by the Court below that the respondent made out a case for the grant of the interim reliefs by the trial High Court judge especially where those reliefs granted ex-parte had the power of infringing on the Appellant's constitutional right to movement contrary to Section 41 (1) of the 1999 Constitution when another Court of equal power had granted him bail. I rely on Director SSS v. Olisa Agbakoba (1999) 3 NWLR (Pt. 595) 314 at 370; Kotoye v. CBN (1989) All NLR 76.

The present scenario is one of those instances where the Appellate Court and now this one should intervene and right an obvious wrong. The conclusion of the Court of Appeal is not borne out of the facts before Court.

From the foregoing and the better articulated reasoning by my learned brother, K. M. O. Kekere-Ekun, JSC, I too allow the appeal and set aside the judgment of the Court of Appeal which affirmed what the trial Court did. I abide by the consequential order as made.

B

MUHAMMAD JSC

I read in draft the lead judgment of my learned brother Kekere-Ekun JSC just delivered. I entirely agree with the reasoning and the conclusion arrived at in the judgment which I hereby adopt as mine. I abide by the consequential orders made in the lead judgment as well.

D

E

F

G

H