

SUPREME COURT OF NIGERIA

FRIDAY 22ND JANUARY, 2016. SC. 75/2005 (NO.1)

**CORAM:- W. S. N. ONNOGHEN, N. S. NGWUTA, M. U.
PETER-ODILI, O. ARIWOOLA, M. D. MUHAMMAD, JJSC**

NIGERIAN AGRICULTURAL APPELLANT
CO-OPERATIVE BANK LIMITED
AND
MR. LEWECHI OZOEMELAM RESPONDENT

APPEALS - Jurisdiction - Stay of execution - Where there is appeal from CA to SC - Both courts have concurrent jurisdiction in an application for stay of execution - Pending determination of the appeal (H1)

APPEALS - Filing - Stay of execution - Application for stay of execution pending determination of appeal - Presupposes that appeal had been filed - Or simultaneously with the application (H2)

ORDERS OF COURT - Stay of execution - Application - In the absence of an appeal against the order of trial court - CA could not have entertained application for stay of execution pending appeal (H3)

FACTS

By an Originating Summons brought before the High Court of Kaduna State, plaintiff/respondent raised the following questions inter alia, whether the refusal of defendant/appellant to release the title documents in respect of Plot No. Katuru Road, Sabon Tasha, Kaduna does not amount to a breach of the agreement entered into between the parties? If the answer is in the positive, respondent seeks for an order compelling appellant to release forthwith to respondent all the title deeds in its possession in respect of the aforementioned property. Alternatively, respondent seeks for an order compelling appellant to refund to respondent all the monies paid to appellant's bank by respondent with general damages for breach of the agreement between the parties. Fact leading to the commencement of the suit is that respondent bought the property in issue from a third party

(one Apolus Chikezie) his predecessor-in-title. Upon taking possession of the property, respondent discovered that his predecessor-in-title had mortgaged the property to appellant. Respondent paid off the outstanding debt and the accrued interest and thereafter demanded the release of the title deeds to him. Rather than release the title deeds to respondent, appellant demanded some form of authorization from respondent's predecessor-in-title before the documents could be released. This prompted the action. Appellant was duly served and the matter was fixed for hearing. However, it failed to appear and gave no reason for his non appearance.

The trial Court on oral application of counsel for respondent heard the matter and in absence of appellant reserved its ruling. The ruling was delivered in favour of respondent. Respondent attached the property of appellant in execution of the judgment in his favour. Thereafter, appellant brought an application on notice praying the court for enlargement of time within which to apply to set aside its judgment, an order to set aside the judgment or order staying execution of the judgment. The court heard the application and dismissed same. Appellant filed another application in which it prayed the court to stay further execution of the judgment particularly the sale of appellant's vehicle pending the determination of the appeal against the ruling of the court and for an order to release the vehicle pending the hearing of the appeal. The court denied the application and pursuant to Order 45 Rule 2 (2) of the Kaduna State High Court Rules ordered appellant to deposit the judgment sum in the account of the High Court pending the determination of the appeal before the Court of Appeal. Appellant appealed to the Court of Appeal with the leave of the trial court. The court dismissed the appeal. Appellant has therefore appealed to the Supreme Court asking for stay of execution of the judgment or in alternative an order restraining the Deputy Sheriff High Court of Justice Kaduna State from releasing the judgment debt pending the determination of its appeal to the apex court.

ISSUES FOR DETERMINATION

"1. Whether the Court of Appeal was correct when it held that the strength of Section 24 of the Supreme Court Act that only the latter Court was vested with exclusive jurisdiction to entertain an application for stay of execution pending the determination of appeal by the said Court and that the Court of Appeal lacked jurisdiction

once there was no longer an appeal pending before it against the judgment of the High Court?

2. Whether on the merit, the Court below was not in error when it refused the prayers for stay of execution and injunction pending appeal in the light of the facts and materials before the Court?"

HELD (Unanimously dismissing the appeal per
NGWUTA JSC)

Jurisdiction - Stay of execution

1. With reliance on *Shodeinde v. Registered Trustees of Ahamadiya Movement in Islam* (1980) All NLR Reprints 64 at 75-77, learned Senior Counsel for the appellant had argued that where there is appeal from the Court below to the Supreme Court, both Courts have concurrent or co-ordinate jurisdiction in an application for a stay of execution of judgment pending the determination of the appeal.

I entirely agree with learned Senior Counsel. And as indicated in the case law cited, the application must first be made to the Court from which the appeal emanates before it can be made to the Court in which the appeal lies, though there may be special circumstances making it impracticable to apply to the Court of trial or the Court from which the appeal lies to the Court above. (p. 418 G)

APPEALS - Filing - Stay of execution

2. An application for stay of execution pending the determination of appeal presupposes that an appeal had been filed before or simultaneously with the application. After all, a major consideration in the application is whether or not there are arguable grounds of appeal. Be that as it may, in exceptional or appropriate circumstances, the order for stay may be granted when the appeal had not been lodged upon an undertaking to file the notice of appeal without delay. (p. 419 B)

Stay of execution - Application

3. Now, relating the above principles to the matter at hand, the record shows that the only appeal from the trial Court to the Court below has been disposed of. That order for custody of the judgment debt was made by the trial Court pending that
B determination of the appeal to the Court of Appeal and so, upon the pronouncement of the judgment of the Court of Appeal the order for custody of the fund was spent.

It is to be noted that there was no appeal against that
C order. As I said before in this judgment, irrespective of the phraseology adopted and employed by the respected Senior Counsel for the Appellant "...judgment of the Kaduna State High Court as affirmed by this Honourable Court" the application sought a re-enactment, as it were, of the spent order
D for the custody of the judgment debt. That order was not on appeal to the Court of Appeal and while it subsisted it was and remained an order of the trial Court against which there was no appeal.

E In absence of an undertaking to file a notice of appeal against the order of the trial Court, the Court below could not have entertained an application for a stay of execution pending appeal pursuant to S.17 of the Court of Appeal Act.

F In the same vein, the Supreme Court cannot invoke its powers under S.24 of the Supreme Court Act to stay the execution of, or revive a spent order of the trial Court even if there was appeal against that order to the Court of Appeal. The Supreme Court exercises its powers under S.24 of the Supreme Court Act in an application for stay of execution of
G the judgment of the Court of Appeal pending the determination of appeal against that judgment to the Supreme Court.

If there was an appeal against the order to the Court of Appeal and then to the Supreme Court, both Courts would have been competent to stay execution of the judgment. In
H this case, there was no appeal and neither the Court of Appeal under S.17 of the Court of Appeal Act nor the Supreme Court under S.24 of the Supreme Court Act can exercise its discretion to grant a stay of execution, even though the two Courts have co-ordinate jurisdiction to entertain an applica-

tion to stay the execution of the judgment of the Court of Appeal on appeal to the Supreme Court even when the Court of Appeal had disposed of the appeal before it.

My Lords, on the facts illustrated in this judgment, Issue 1 is merely academic and though I am constrained to resolve it in favour of the appellant it serves no useful purpose in the determination of the appeal. (p. 419 E)

REPRESENTATION

A. A. Adedeji with S. O. Sanni (Mrs.), M. J. Lidani, for the Appellant C
Festus Okoye with M. A. Abdullahi, for the Respondent

CASES REFERRED TO

Labiya v. Anretiola (1992) 10 SCNJ 1
Nwidenyi v. Aleke (1996) 4 NWLR (pt. 442) 349 D
Shodeinde v. Regd. Trustees of Ahmadiya Movement in Islam (1980)
All NLR 64
Nzeribe v. Dave Eng. Co. Ltd (1994) 8 NWLR (pt. 361) 124
United Spinners Ltd. v. Chartered Bank Ltd. (2001) FWLR (pt. 66)
640 E
Trans Nals Ltd v. Joseph (1997) 5 NWLR (pt. 504) 176
Amuda v. Adedokun 1994) 8 NWLR (pt. 360) 23
Abacha v. State (2001) 7 NWLR (pt. 713) 551
Okin Biscuits Ltd v. Oshe (2001) 6 NWLR (pt. 709) 369 F
Yekini v. Etamo (1995) 40 NWLR (pt. 387) 28
Martins v. Nicannar Foods Co Ltd (1988) 2 NWLR (pt. 174) 75
Comptroller of Nig. Prison Serv. v. Adekanye (1999) 6 NWLR (pt.
607) 381
NDLEA v. Okorodudu (1997) 3 NWLR (pt. 492) 221 G
Fatoyinbo v. Osadeyi (2002) 5 SC (pt. 11) 1
Mbadinuju v. Ezuka (1994) 8 NWLR (pt. 364) 535

STATUTES & RULES REFERRED TO

Supreme Court Act, s. 24 H
Court of Appeal Act, s. 18
Kaduna State High Court Rules, O. 45 r. 2(2)

LEAD JUDGMENT BY NGWUTA JSC

By way of Originating Summons issued on 14/12/1998 in the Registry of the High Court of Justice of Kaduna State, Kaduna Judicial Division, the Respondent (then Plaintiff) raised the following questions:

- B 1. *Whether the refusal of the defendant in this suit to release the title documents in respect of Plot No. Katuru Road, Sabon Tasha, Kaduna does not amount to a breach of the agreement entered into between the plaintiff and the defendant.*
- C 2. *Whether the plaintiff is entitled to a refund of the money he paid to the defendant if the defendant is no longer interested in giving effect to the agreement entered into by both parties."*

Upon the anticipated favourable answers to the two questions posed, the plaintiff prayed the Court for:

- D *"An order of Court compelling the defendant to release forthwith to the plaintiff all the title deeds in its possession in respect of plot No. 2, Katuru Road, Sabon Tasha, Kaduna.*

ALTERNATIVELY:

- E *An order of Court compelling the defendant to refund to the plaintiff all the monies paid to the defendant Bank by the plaintiff as reflected in annexure 6 and 7 attached to the supporting affidavit together with general damages for breach of the agreement between the plaintiff and the Bank."*

- F Below is a brief summary of the facts leading to the suit in the trial Court. The Respondent (then plaintiff) bought a piece of property from a third party, one Apolus Chikezie, his predecessor-in-title. After the Respondent had taken possession of the property, he became aware of the fact that his predecessor-in-title had mortgaged the property to the appellant, then defendant. The Respondent paid off the outstanding debt and the accrued interest and thereafter demanded the release of the title deeds to him.
- G

- H Rather than release the title deeds to the Respondent, the defendant (now appellant) demanded some form of authorization from his predecessor-in-title before the documents could be released to him.

Aggrieved, the Respondent, as plaintiff, took out the Originating Summons reproduced above.

The appellant (as defendant) was duly served and the matter

was fixed for hearing on 1/2/1999. The appellant did not respond to the processes served on it and was neither present in Court nor represented by Counsel on the date fixed for hearing, 1/2/1999. There was no excuse for the absence of the appellant/Counsel in Court on 1/2/1999. The trial Court on oral application of Counsel for the respondent (then plaintiff) heard the matter on the day it was fixed for hearing, 1/2/1999 in absence of the appellant (as defendant) and reserved its ruling to 19/2/1999. The ruling was not delivered as scheduled but was eventually delivered on 28/5/1999. B

On 21/12/2000, the Respondent attached the property of the appellant in execution of the judgment in his favour. On 28/12/2000, the appellant filed a motion on notice praying the trial Court for enlargement of time within which to apply to set aside the judgment of 28/5/1999, an order to set aside the judgment or order staying execution of the judgment, particularly sale of appellant's vehicle and or order to release the said vehicle to the appellant before or at the hearing of the application. D

The affidavit evidence consists of a five-paragraph supporting affidavit and a counter-affidavit of 11 paragraphs.

In its considered ruling delivered on 12/2/2001, the trial Court E concluded thus:

"Having considered the facts presented before me in this application, I find that the application has no merit and same must be dismissed. The entire application is accordingly dismissed."

On 14/2/2001, the appellant filed another application in which F it prayed the Court to stay further execution of the judgment particularly the sale of the appellant's bus Reg. No. AJ 969 DKA pending the determination of the appeal against the ruling of the trial Court of 12/2/2001 and an order to release the vehicle pending the hearing of the appeal. On 3/8/2001, the trial Court denied the application and pursuant to Order 45 Rule 2 (2) of the Kaduna State High Court Rules ordered the appellant to deposit the judgment sum in the account of the High Court pending the determination of the appeal before the Court of Appeal. G

On 14/2/2001, appellant appealed with leave of Court the trial Court's ruling of 12/2/2001. The lower Court dismissed the appeal on 16/7/2004. Appellant appealed to this Court on 4/10/2004 and also asked for stay of execution of the judgment or in alternative H

an order restraining the Deputy Sheriff High Court of Justice Kaduna State (joined as 2nd Respondent) from releasing the judgment debt pending the determination of the appeal to this Court.

On 3/5/2005, the Court below dismissed the appellant's application for a stay of execution of the judgment of the High Court of Kaduna State and injunction to restrain the 2nd Respondent from releasing the judgment debt pending the determination of the appeal before this Court.

In summary, there are two appeals from the judgment/ruling of the Court below:

(1) Appeal No. 1 arose from the ruling of the Court below on 3/5/2005, and

(2) Appeal No. 2 arose from the judgment of the lower Court delivered on 16/7/2004.

Having demonstrated the common origin and background of the two appeals, I will take them seriatim.

In appeal No. 1 against the ruling of the Court of Appeal delivered on 3/5/2006, the appellant appealed to this Court on three grounds from which the following two issues were distilled for determination:

"1. Whether the Court of Appeal was correct when it held that the strength of Section 24 of the Supreme Court Act that only the latter Court was vested with exclusive jurisdiction to entertain an application for stay of execution pending the determination of appeal by the said Court and that the Court of Appeal lacked jurisdiction once there was no longer an appeal pending before it against the judgment of the High Court?"

2. Whether on the merit, the Court below was not in error when it refused the prayers for stay of execution and injunction pending appeal in the light of the facts and materials before the Court?"

In his wisdom, learned Counsel for the Respondent chose to frame three issues, purportedly, from the appellant's three grounds of appeal. The three issues are reproduced hereunder:

"1. Whether on a proper consideration of the facts and materials placed before it, the discretion of the Court of Appeal in refusing the reliefs sought could in any way be faulted.

2. Whether the Court of Appeal, on the strength of the provisions of Section 24 of the Supreme Court could still proceed to en-

tertain the appellant's application when an appeal in respect of the matter is already pending in the Supreme Court.

3. Whether the Court of Appeal is vested with the jurisdiction to stay the execution of the judgment of the Kaduna State High Court when there is no longer an appeal pending before it."

I am constrained to observe here that the Respondent's issues for determination are equal in number to the appellant's grounds of appeal from which the issues were said to have been framed. I do not recommend this practice. The principle that guides the formulation of issues for determination in appeal is that a number of grounds of appeal would, where appropriate, be formulated into a single issue running through them. See *Labiya v. Anretiola* (1992) 10 SCNJ 1 at p.2.

Issues for determination are not formulated to coincide with the number of grounds of appeal. See *Nwidenyi & Ors v. Aleke* (1996) 4 NWLR (Pt.442) 349.

A more fundamental vice bedeviling the Respondent's issues is the marriage of the said issues with the appellant's three grounds of appeal. Issue 1 is said to be a product of grounds 2 and 3 of the Notice of Appeal while issues 2 and 3 are framed from appellant's grounds 1 and 3.

Ground 3 of the Notice of Appeal is therefore split into three to form issues 1, 2 and 3. Since one issue is framed from one, but usually a combination of grounds of appeal, it is manifestly wrong to split one ground of appeal into three issues as the Respondent has done. It is undesirable to split an issue in appeal. See *Labiya v. Anretiola* (supra). It is equally not appropriate to split a ground of appeal in the formulation of issues.

A Respondent may decide to cry more than the bereaved by framing issues in excess of appellant's issue but he cannot do that in breach of the appellate principle of formulation of issues in an appeal. I will reject the Respondent's issues and adopt the issues formulated by the appellant in the determination of this appeal.

Arguing issue 1 in his brief of argument, learned Senior Counsel for the Appellant stated that it is a traditionally held principle that the Court from which appeal is laid and the Court to which appeal lies have concurrent jurisdiction to preserve the subject matter of the appeal which he said is the sum of N254,000 judgment debt, depos-

ited with the Chief Registrar of the High Court for payment into an interest yielding account to pend the determination of the appeal.

Learned Senior Counsel referred to the comparison between Section 24 of the Supreme Court Act and Section 18 of the Court of Appeal Act and argued that the lower Court was wrong in its ruling that the application does not fall under Section 18 of the Court of Appeal Act. He relied on *M. Shodeinde v. Registered Trustees of Ahdmediyya Movement in Islam* (1980) All NLR Reports 64 at 75/77; *Nzeribe v. Dave Eng. Co. Ltd* (1994) 8 NWLR (Pt.361) p.124 at 142 and *United Spinners Limited v. Chartered Bank Limited* (2001) FWLR (Pt.66) p.640 at 654 and submitted that the Court that delivered the judgment and the Court to which appeal against the said judgment is brought have concurrent jurisdiction to preserve the res pending appeal. He urged the Court to resolve issue one in favour of the appellant.

In issue two, learned Senior Counsel argued that in essence the motion before the Court of Appeal was to keep matters in status quo pending the determination of the appeal, a prolongation of the order made by the High Court on 3/8/2001. He referred to page 196 of the record and argued that though the Court below restated the law on the subject matter correctly, its failure to exercise its discretion properly or fairly within the ambit of the facts, circumstances and the applicable law is erroneous.

He said that what was before the Court below was an order to continue the retention of the funds as ordered by the High Court until the determination of the appeal. He conceded that there had been some form of execution as the appellant had parted with the funds as far as the High Court is concerned. In the alternative, he said that the appellant had a conditional stay of execution. He contended that the Court below was not entitled to come to the conclusion that the money had been released to the Respondent but then he curiously argued that the Court did not reach such a conclusion.

Learned Counsel argued that from the materials placed before the Court below, it ought to have exercised its discretion in favour of the applicant, since there were arguable grounds on the jurisdiction of the Court. He relied on *Trans Nals Ltd v. Joseph* (1997) 5 NWLR (pt. 504) 176 at 182; *Amuda v. Adedokun* 1994) 8 NWLR (Pt.360) 23; *Abacha v. State* (2001) 7 NWLR (Pt.713) 551 at 555;

and Okin Biscuits Ltd v. Oshe (2001) 6 NWLR (Pt. 709) 369 at 381.

He argued that the grounds of appeal annexed to the application raise issue of jurisdiction. He relied on Yekini v. Etamo (1995) 40 NWLR (Pt.387) 28 at 41/42 and Martins v. Nicannar Foods Co Ltd & Anor (1988) 2 NWLR (Pt. 174) p.75 in his argument that issue of jurisdiction constitutes special circumstance for the grant of application to stay execution of judgment. B

He argued that nondisclosure in the applicant's affidavit of the manifest inability of the Respondent to repay the sum should the appeal succeed pales into insignificance in the face of serious issue of jurisdiction. He urged the Court to resolve the issue in favour of the appellant. C

Having summarised his brief, learned Senior Counsel urged the Court to allow the appeal, set aside the ruling of the Court below and grant an order directing the High Court to retain the amount paid into her deposit account by the applicant. D

I have rejected the three issues formulated by the Respondent as incompetent as ground 3 of the appellant's grounds of appeal was split and shared by the three issues formulated by the Respondent in his brief. The issues framed from split ground 3 of the Notice of Appeal are incompetent and so is the argument proffered in each issue. E
I will determine the appeal on appellant's issues.

In the Motion from which this appeal arose, the Applicant (now Appellant) prayed the Court below for:

"(i) Stay of execution of the judgment of Kaduna State High Court as affirmed by this Honourable Court in this proceeding pending the determination of the appeal by the Supreme Court of Nigeria. F

(ii) Alternatively, injunction restraining the 2nd Respondent from releasing the judgment debt deposited in the Registry of the Kaduna State High Court pending the determination of the appeal in the Supreme Court of Nigeria." G

The enrolled order in the judgment of the Court of Appeal which affirmed the judgment of the trial Court reads: H

"(1) That the appeal fails and is hereby dismissed.

(2) That the decision of the learned trial Judge is hereby affirmed.

(3) That there is costs assessed at N5,000.00 to the Respon-

The 1st and 2nd arms of the enrolled order of the Court below cannot be stayed and the application for stay does not relate to the 3rd arm which is the award of costs. From the above, it follows that though the appellant asked for stay of the execution of judgment of the High Court “as affirmed by this Honourable Court”, the application does not in real terms relate to the judgment of the Court below.

In my humble view, based on the record, the appellant sought an order to maintain the status as at 3/8/2001 in relation to the judgment debt of N254,000 when the trial Court ordered as follows:

“(1) *I hereby order that the applicant deposit the judgment sum in Court.*

“(2) *The judgment sum should be paid within 3 weeks from the date of making this order.*

“(3) *The money shall be paid to the Chief Registrar who shall keep the money in the deposit account of the High Court pending the determination of the appeal before the Court of Appeal.*

The issue here relates to the interpretation and application of Section 24 of the Supreme Court Act which is in pari materia with Section 17 of the Court of Appeal Act. Both are hereunder reproduced:

Supreme Court Act:

“S.24 : *An appeal under this Part shall not operate as a stay of execution but the Supreme Court may order a stay of execution either conditionally or upon the performance of such conditions as may be imposed in accordance with the Rules of Court.*”

Court of Appeal Act:

“S.17 : *An appeal under this Part of this Act shall not operate as a stay of execution, but the Court of Appeal may order a stay of execution with either conditionally or upon the performance of such conditions as may be imposed in accordance with the Rules of Court.*”

With reliance on Shodeinde v. Registered Trustees of Ahamadiya Movement in Islam (1980) All NLR Reprints 64 at 75-77, learned Senior Counsel for the appellant had argued that where there is appeal from the Court below to the Supreme Court, both Courts have concurrent or co-ordinate jurisdiction in an application for a stay of execution of judgment.

ment pending the determination of the appeal.

I entirely agree with learned Senior Counsel. And as indicated in the case law cited, the application must first be made to the Court from which the appeal emanates before it can be made to the Court in which the appeal lies, though there may be special circumstances making it impracticable to apply to the Court of trial or the Court from which the appeal lies to the Court above. See *Comptroller of Nigerian Prison Services v. Adekanye* (1999) 6 NWLR (Pt. 607) 381 at 388. B

An application for stay of execution pending the determination of appeal presupposes that an appeal had been filed before or simultaneously with the application. After all, a major consideration in the application is whether or not there are arguable grounds of appeal. Be that as it may, in exceptional or appropriate circumstances, the order for stay may be granted when the appeal had not been lodged upon an undertaking to file the notice of appeal without delay. See *NDLEA v. Okorodudu* (1997) 3 NWLR (Pt. 492) 221; *Fatoyinbo v. Osadeyi* (2002) 5 SC (pt. 11) 1. C D

Now, relating the above principles to the matter at hand, the record shows that the only appeal from the trial Court to the Court below has been disposed of. That order for custody of the judgment debt was made by the trial Court pending that determination of the appeal to the Court of Appeal and so, upon the pronouncement of the judgment of the Court of Appeal the order for custody of the fund was spent. E F

It is to be noted that there was no appeal against that order. As I said before in this judgment, irrespective of the phraseology adopted and employed by the respected Senior Counsel for the Appellant "...judgment of the Kaduna State High Court as affirmed by this Honourable Court" the application sought a re-enactment, as it were, of the spent order for the custody of the judgment debt. That order was not on appeal to the Court of Appeal and while it subsisted it was and remained an order of the trial Court against which there was no appeal. G H

In absence of an undertaking to file a notice of appeal against the order of the trial Court, the Court below could not

have entertained an application for a stay of execution pending appeal pursuant to S.17 of the Court of Appeal Act.

In the same vein, the Supreme Court cannot invoke its powers under S.24 of the Supreme Court Act to stay the execution of, or revive a spent order of the trial Court even if there was appeal against that order to the Court of Appeal. The Supreme Court exercises its powers under S.24 of the Supreme Court Act in an application for stay of execution of the judgment of the Court of Appeal pending the determination of appeal against that judgment to the Supreme Court.

If there was an appeal against the order to the Court of Appeal and then to the Supreme Court, both Courts would have been competent to stay execution of the judgment. In this case, there was no appeal and neither the Court of Appeal under S.17 of the Court of Appeal Act nor the Supreme Court under S.24 of the Supreme Court Act can exercise its discretion to grant a stay of execution, even though the two Courts have co-ordinate jurisdiction to entertain an application to stay the execution of the judgment of the Court of Appeal on appeal to the Supreme Court even when the Court of Appeal had disposed of the appeal before it.

My Lords, on the facts illustrated in this judgment, Issue 1 is merely academic and though I am constrained to resolve it in favour of the appellant it serves no useful purpose in the determination of the appeal.

Issue 2: The resolution of issue 1 has adequately disposed of issue 2. The application for stay of execution of the Judgment “as affirmed” by the Court of Appeal does not represent the true state of affairs. The order sought to be stayed was made by the trial Court and there was no appeal against that order to the Court of Appeal. That order was made against the judgment of the trial Court against which there was no appeal to the Court of Appeal.

The order is separate and not part of the judgment affirmed by the Court of Appeal. The judgment affirmed by the Court of Appeal was delivered prior to the order sought to be stayed and the order was not incorporated in the appeal.

This being the case, it is in my humble view, another wasteful academic exercise to delve into the merit of the issue which it does

not have and the same is resolved against the appellant.

Consequently, appeal lacks merit and is accordingly dismissed. There was no appeal against the order to the Court below or to this Court. The Respondent is entitled to costs assessed at N100,000.00.

Appeal dismissed.

B

ONNOGHEN JSC

I have had the benefit of reading in draft the leading Judgment of my learned brother NWALI SYLVESTER NGWUTA J.S.C. just delivered.

C

I agree with his reasoning and conclusion that the appeal lacks merit and should be dismissed.

I accordingly dismiss same and abide by the consequential orders made in the said leading Judgment including the order as to costs.

D

Appeal dismissed.

PETER-ODILI JSC

E

I agree with the judgment just delivered by my learned brother, Nwali Sylvester Ngwuta, JSC and in support of the reasoning from which the decision came about. I shall make some remarks.

The Respondent as Plaintiff in the trial High Court commenced an action by originating summons against the Appellant as Defendant. It was fixed for hearing on the 1st day of February, 1999 and the appellant though served was neither present in Court nor represented. The matter was heard and reserved for ruling on the 19th day of February, 1999 when the ruling was not ready for delivery on that day but the judgment was eventually delivered on the 28th day of May, 1999 in favour of the Plaintiff now Respondent.

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The Appellant did nothing in relation to the judgment until the 21st day of December 2000 when the Respondent attached the property of the Appellant. Appellant thereafter filed an application praying for an extension of time within which to apply to set aside the said judgment, an order setting aside the said judgment, an order staying further execution of the judgment and an order for the interim release of the attached vehicle. This application was refused by the

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learned trial judge who held that the application was brought almost a year and half after judgment while the Rules of Court permitted 6 days to bring such an application after judgment. Dissatisfied with that Ruling, the Appellant appealed to the Court of Appeal and the Court below refused the application and aggrieved, the appellant
B has come before this Court.

Mr. Adedayo Adedeji, learned counsel for the Appellant on the 27th October, 2015 adopted its Brief of Argument settled by J. B. Daudu SAN, filed on the 23/3/06 and deemed filed on the 16/10/06. He raised a single issue which is as follows:-
C

Whether the Court of Appeal was correct in its resolution of the appeal before her when she refused to extend time for the setting aside of the judgment of Umaru Adamu J of the Kaduna State High Court and at the same time set the said judgment aside in the face of
D overwhelming facts that the appellant had no notice of adjournments of the suit leading to judgment of the trial Court.

For the Respondents, Mr. Festus Okoye of counsel and adopted his Brief of Argument, filed on 20 the 30th November 2006. He formulated a similar single issue as stated hereunder:
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Whether the Court of Appeal applied the correct principles of law to the facts and circumstances of the present appeal in refusing to enlarge the time for the Appellant to apply to set aside the judgment of the Kaduna High Court, the Appellants having defaulted to show
F cause why the Court should exercise its discretion in this favour.

I shall utilise the sole issue as identified by the Respondents which is thus:

SOLE ISSUE

Whether the Court of Appeal applied the correct principles of
G law to the facts and circumstances of the present appeal in refusing to enlarge the time for the Appellant to apply to set aside the judgment of the Kaduna High Court, the Appellant having defaulted to show cause why the Court should exercise its discretion in their favour?

Canvassing the position of the Appellant, learned counsel con-
H tended that the Appellant in the affidavit in support of the application seeking inter alia to extend time to set aside the judgment of the trial judge was clear as to the reasons for seeking to set aside the said judgment. That the appellant asserted that hearing notice as to date of commencement of the proceedings was never served on the de-

fendant who had no knowledge of the proceedings in respect of the originating summons and all its subsequent adjournments leading up to the judgment. That the respondents suppressed any indication that it had in its possession a judgment of the High Court in respect of the same matter that it was vigorously negotiating for a release of the title documents. That it was not until the 6th December 2000 that approval to release the said title documents was obtained and by the 15th December 2000, the documents were released to the respondent's counsel when then sought to execute judgment for documents he had successfully obtained and damages of N254,000.00. B C

For the Appellant, it was submitted that the only way to establish the service was made on the Appellant is a certificate or affidavit of service as proof of service which was absent here. He cited *Schroder v. Major* (1989) 2 NWLR (Pt. 101) 1 at 11; *Mbadinuju v Ezuka* (1994) 8 NWLR (Pt. 364) 535 at 566; *Wema Bank (Nig.) Ltd v. Odulaja* (2000) 78 NWLR (Pt.663) 1 at 7. D

Learned counsel for the Appellant further submitted that the proceedings suffered haphazard adjournments before judgment was finally entered which made a favourable disposition of the Appellant's application to set aside the judgment worthy of a favourable consideration. He referred to *Fetuga v. Barclays Bank* (1971) All NLR 30 at 32; *Odutola v. Inspector Kayode* (1994) 2 NWLR (Pt.324) 1 at 15-16. E

It was contended for the Appellant that the Court of Appeal was in error when it held that the appeal was unnecessary, this is because the appeal was rooted in a bona fide complaint of absence of jurisdiction of the High Court to adjudicate in the dispute between the parties on account of a fundamental lapse which are absence of service of originating summons and absence of notification by hearing notice of haphazard adjournments. F G

In response, learned counsel for the respondents stated that nowhere the affidavit exhibited in the records is any explanation offered as to why the appellant failed to file their application within six days after the execution of the said judgment. That the Appellant could not disprove the assertion in the counter affidavit of the respondents that the Branch Manager of the Appellant was aware of the said judgment and decided to do nothing which indolence both H

Courts below would not tolerate. That Courts do not exercise their discretion in a vacuum nor do they proffer explanations for parties. He relied on *Etukhana v. Progress Bank Plc* (1997) 10 NWLR (Pt. 526) 616 at 625 - 626; *Mohammed v. Hussaini* (1998) 11-12 SCNJ 136 at 153 - 154.

B In brief, the Appellant posits that the proceedings in respect of which the respondents set out to enforce the judgment was from the very beginning null and void firstly because the originating process was neither served nor proved to be served and secondly, there were haphazard adjournments in the proceedings in respect of which hearing notices ought to have issued. That in the circumstances the proceedings should have been set aside.

C For the Respondents it is contended that the Kaduna State High Court and the Court of Appeal applied correct principles of law to the facts and refused to extend the time within which the Appellant could apply to set aside the judgment of the Kaduna State High Court. That the Appellant was given fair hearing and chose not to take advantage of the opportunity proffered.

D The main thrust of this appeal is within a very narrow area which is whether the Kaduna State High Court and the Court of Appeal could have exercised their discretion in favour of the Appellant considering that the Appellant did not show cause or put up a strong showing as to why the exercise of the discretion should have been in its favour. Also, if this is one of those instances where the Supreme Court would interfere in the concurrent exercise of discretion by the two Courts below in the prevailing circumstances.

E A reference to the accompanying affidavit to the Motion on Notice would show clearly that the appellant did not proffer any reason for their absence in Court on the 1st day of February 1999 when the matter came up for hearing. It was conceded by learned counsel for the Appellant that appellant was indeed served with the originating process but did not appear on the date fixed for hearing. Also that even though they had six days to bring the application but failed to do so and judgment was delivered on the 28th day of May, 1999. Again, Appellants tarried till 28th December 2000, a period of 18 months after the delivery of the judgment before bringing the application to have the said judgment set aside. This is infraction of Order 36 (a) of the High Court (Civil Procedure) Rules of Kaduna State

which Order provides thus:-

“Any judgment obtained where one party does not appear at the trial may be set aside by the Court upon such terms as may seem just, upon an application made within six days after the trial or within such longer period the Court may allow for good cause shown”.

It was based on the facts available to the trial Court and then the Court of Appeal in appraising what the Court of first instance did that the appellate Court came to the conclusion that the reason for the Appellant's absence from Court in disobedience to Court order remained a mystery and the appellant did not bother to show cause why the application should be allowed. It was therefore not the place of the Court to bend backward to search for what could have caused the default of the appellant. The situation putting the two Courts in a position where they could not give a sympathetic leaning in favour of the appellant. This because discretions of Court are not exercised in vacuo in the absence of explanations from the appellant as to indulge a party as the appellant had herein sought, it was duty bound to give the reason for failure to appear at the hearing in which the judgment was given in its absence and also explain away the undue delay between the time of application and the date of judgment so that the other party is not prejudiced. Also the appellant to show that his case is not supportable. In all the above enumerated conditions for a favourable disposition of Court to the appellant, the appellant was found wanting and so no basis for upsetting what the two Courts below did. See In Re: Alase (2002) 10 NWLR (Pt. 776) 553 at 563-564; Etukhana v. Progress Bank Plc (1997) 10 NWLR (Pt.526) 616 at 625-626; Mohammed v. Hussaini (1998) 11 - 12 SCNJ 136 at 153.

From the foregoing and the well articulated reasons in the leading judgment of my Lord N. S. Ngwuta, JSC, I too dismiss the appeal and abide by the consequential orders made.

ARIWOOLA JSC

I had the opportunity of reading in draft the leading judgment of my learned brother, Ngwuta, JSC just delivered. I am entirely in agreement with the reasoning that led to the conclusion that the appeal is devoid of merit and should be dismissed. I have nothing new

to add. I too will dismiss the appeal.

Appeal is dismissed.

I abide by the consequential orders in the leading judgment including the order on costs.

B

MUHAMMAD JSC

I read the leading judgment of my learned brother Ngwuta JSC, before now and in agreeing with his reasoning and conclusion therein, I also dismiss the unmeritorious appeal. I also abide by the consequential orders contained in the leading judgment.

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