In The Supreme Court of Nigeria

On Friday, the 16th day of May 1997

Before Their Lordships

Salihu Modibo Alfa Belgore	.....	Justice, Supreme Court
Idris Legbo Kutigi	.....	Justice, Supreme Court
Michael Ekundayo Ogundare	.....	Justice, Supreme Court
Sylvester Umaru Onu	.....	Justice, Supreme Court
Anthony Ikechukwu Iguh	.....	Justice, Supreme Court

SC. 141/1994

Between

Jimi Oduba …… Appellant

And

C. V.Scheepv Aartonderneming Houtmangracht ..... Respondents
C. V . Scheepvarrtibdernment Raamgracht

Judgement of the Court
Delivered by
Anthony Ikechukwu Iguh. J.S.C

What calls for decision in this appeal is whether or not the Court of Appeal was right in setting aside the order of the High Court of Lagos State that the plaintiffs do give security for the defendant's costs in the sum of$84,279. 76 (Eighty-Four Thousand, Two hundred and Seventy- Nine U.S. dollars Seventy-Six cents) with ₦10,000.00 (Ten Thousand Naira) and that further proceedings by or on behalf of the plaintiffs in the suit be stayed until the said security is given.

It is, perhaps, convenient for a better appreciation of the issue that arises for consideration in this appeal to set out briefly the background facts to the dispute between the parties. The plaintiffs are foreign limited liability companies. Their case as pleaded is that the 1st plaintiff retained the professional services of the defendant, a legal practitioner, to defend its interest in Suit No FHC/PH/27/86 pending at the Federal High Court, Port Harcourt. This suit arose as a result of the collision between the 1st plaintiff's vessel, *M.V. Houtmangracht*, and a police jetty on or about the 12th day of July, 1986 at Port Harcourt. Their case is that between July, 1986 and November, 1987, the defendant directed his efforts towards achieving a settlement of the claims made by the owners of the jetty and other properties and that Court appearances comprised mainly of adjournments for report of settlement out of court. The plaintiffs claimed that during the pendency of the said proceedings, the defendant sent notes of his fees to the 1st plaintiff for various sums which were duly settled. These payments were effected on the 5th November, 1986, and the 17th July, 1987 in the sum of U.S. $40,520.00 and U.S. $57,360.00 respectively by the 1st plaintiff. The amounts were lodged by the 1st plaintiff into the defendant's bank account at the Barclays Bank PLC International Services Branch, Nottingham in the United Kingdom as directed by the said defendant.

At the conclusion of his services, the defendant sent a further fee note dated the 17th of November, 1987 to the 1st plaintiff claiming pound sterling £262,683.25 and U.S. $31,932.25. This further fee, the 1st plaintiff refused to settle. As a result, the defendant commenced a legal action against the 1st Plaintiff and its agents at the Federal High Court, Lagos on the 5th day of February, 1988 claiming the said fees with interest. On the same date, the defendant filed an application *ex-parte* for the arrest and detention of the 2nd defendant's vessel *M.V. Realengracht*, then anchored at the Lagos Port as Security for the settlement of his claims. This application was promptly granted by the Court and the vessel, *M.V. Realengracht*, was arrested by the Admiralty Marshal of the Federal High Court on the same 5th February 1988. The plaintiffs' case is that faced with the phenomenal losses being suffered by the 2nd plaintiff as a result of this arrest of its vessel, the 1st plaintiff was forced to agree to settle, and did in fact settle the defendant's said further fees in full with interest by paying the sum of £283,697.84 and US$34,487.83 into the defendant's bank account in England as directed, whereupon the defendant discontinued his suit and released the 2nd plaintiff's vessel on the 8th day of February, 1988.

The 2nd plaintiff further averred that the cost of the detention of the *M.V. Realengracht* was in excess of sterling £20,000.00 per day and that any delay in its release would have entailed the breach of future contractual engagements of the vessel. It was also the case of the 1st plaintiff that it only paid the aforesaid further bill of charges as a result of duress occasioned by the unlawful arrest of the 2nd plaintiffs vessel by the defendant and his threat that the vessel would be inordinately delayed in Lagos and the further threat that another vessel would be arrested unless the said fees were fully paid. The plaintiffs further alleged that the defendant, a maritime legal practitioner in Nigeria, improperly and deliberately misused the machinery of the Federal High Court to enforce a claim for professional fee, made against the 1st plaintiff so as to enable him to arrest a vessel belonging to the 2nd plaintiff and thereby compel the 1st plaintiff to settle his said fees. By reason of

the foregoing, the plaintiffs on the 3rd day of February 1989 filed the present action against the defendant at the High Court of Lagos State, claiming as follows:-

1. A declaration that an action brought in the Federal High Court by the defendant, who is a legal practitioner in Nigeria, to enforce a claim for fees for professional services rendered to the 1st plaintiff who is a ship-owner, is not within the jurisdiction of the Federal High Court.

2. A declaration that the defendant's application on the 5th February, 1988 for the arrest of the 1st plaintiff's ship *M.V. Realengracht* by order of the Federal High Court, Lagos was not sought pursuant to an action '*in rem*' and was therefore unlawful, and an abuse of the legal and judicial process.

3. A declaration that the methods employed by the defendant to recover his fees from the 1st plaintiff were entirely contrary to the provisions of the Legal Practitioners Act, 1975, Order 51 rule 5 of the High Court of Lagos (Civil Procedure) Rules, 1972, as well as Order 47 of the 'Rules of Professional Conduct' in the legal profession and are therefore unlawful.

4. A declaration that the payment of the sum of £283,697 .84 Sterling and U.S. $34,487.83 into the defendant's account at Barclays Bank PLC, Beeston, Notts, England by the 1st plaintiff in compliance with the precondition set by the defendant for the early release of the 1st plaintiff's aforesaid ship *M.V. Realengracht* from arrest was made under duress.

5. An order that the said sums of £283,697.84 Sterling and US$34,487.83 paid into the defendant's account at Barclays Bank PLC. Beeston, Notts, England be refunded together with interest at 15% per annum from the date payment was made by the 1st plaintiff to the date when a full refund is made by the defendant.

6. An order pursuant to section 16(2) of the Legal Practitioners Act, 1975 that the bills of charges dated 29th May, 1987 and 17th November, 1987 rendered by the defendant to the 1st plaintiff be taxed.

7. An order for damages of ₦500,000. 00 against the defendant for procuring the wrongful arrest of the 1st plaintiff's vessel *M.V. Realengracht*."

The defendant's case, in a nutshell, is that pursuant to professional services rendered, he forwarded a number of bills of charges to the plaintiffs between August, 1986 and November, 1987. The plaintiffs settled two of these bills by paying the respective fees charged into his Bank Account in the United Kingdom.

He asserted that upon failure to meet the outstanding sums of £262,683.19 pounds sterling and US$31,932.25 he commenced an action against the plaintiffs in the Federal High Court, Lagos in suit number FHC/L/16/88 for the recovery of this amount with interest.

By a motion ex-parte in the said suit, the defendant sought and obtained an order for the arrest of the vessel, *M.V. Realengracht*, which, he claimed, belonged to the 2nd plaintiff. He stated that following the arrest of the vessel, the plaintiffs struck an accord with him whereupon he released the said vessel. The plaintiffs, pursuant to the said accord, paid his claims and subsequently instituted the present action against him seeking the return of the monies paid to him.

On the 26th April, 1991, the defendant filed a motion on notice in the action pursuant to the provisions of Order 52, rules 2 and 7 of the High Court of Lagos (Civil Procedure) Rules, 1972 praying the trial court to order the plaintiffs to give security for the defendant's costs and to stay all further proceedings in the suit until such security was given by the plaintiffs. This was supported by a 16 paragraph affidavit sworn to by the defendant himself. The plaintiffs also filed a 10 paragraph counter-affidavit in opposition to this application.

At the conclusion of hearing, the learned trial Judge, Ope-Agbe, J. in a considered ruling granted the application on the 27th day of March, 1992 and ordered as follows:

> "I accordingly make an order that the plaintiffs do within 30 days from today 27/3/92 give security for the defendant's costs in the sum of $84,279.76 (Eight-Four Thousand, Two hundred and seventy-nine dollars, seventy-six cents) plus N 10,000.09 (Ten Thousand naira).
>
> It is further ordered that further proceedings by or on behalf of the plaintiffs be stayed until the security is given."

Being dissatisfied with the said ruling, the plaintiffs lodged an appeal against the same to the Court of Appeal, Lagos Judicial Division, which in a unanimous decision on the 1st day of June, 1992 allowed the appeal, set aside the order for security for costs made by the learned trial Judge and dismissed the defendant's application.

Aggrieved by this decision of the Court of Appeal, the defendant has appealed to this Court. I shall hereinafter refer to the plaintiffs and the defendant in this judgment as the respondents and the appellant respectively.
I think it ought to be stressed that this appeal only concerns the issue of security for costs ordered by the trial court in the circumstances of this case and does not involve the propriety or otherwise of the payment of the various sums of money to the appellant by the respondents or the arrest of the vessel concerned. As was pointed out quite rightly, by the Court below,

these are issues for the trial court to look into at the hearing of the substantive suit. I will only confine myself to the narrow issue, before this court in this appeal.

Pursuant to the rules of this court, the parties filed and exchanged their written briefs of argument. In the appellant's brief, one issue was formulated as arising for determination in this appeal. This is framed as follows:-

> "Was the Court of Appeal entitled to interfere with the decision of the trial Court for the reasons given by the court, having regard to the evidence and the issues properly arising for determination before it."

The respondents, on the other hand, submitted two issues in their brief of argument as arising in the appeal for the determination of this Court. These are set out as follows:-

> Issue No 1
> Had the Court of Appeal the power to "interfere" with the decision of the trial court?
>
> Issue No 2
> Did the Court of Appeal err in law in so "interfering" with the decision of the trial court, and if so, does such error invite this Honourable Court to reverse the Court of Appeal's decision?"

I have closely examined the two sets of issues identified in the respective briefs of the parties and it is clear to me that the two issues raised in the respondents' brief are adequately covered by the sole issue identified by the appellant. I will accordingly adopt the issue raised by the appellant for my consideration of this appeal.

At the oral hearing of the appeal, the appellant and his learned counsel, Chief G.O.K. Ajayi, SAN who settled the appellant's brief of argument, were both absent in Court although served with the hearing notice in respect of the appeal. Learned counsel for the respondents, Onyeabo, C. Obi, Esq. who was present in Court referred to the provisions of Order 6 rule 8(6) of the Rules of the Supreme Court and urged the Court to treat the appeal as having been argued on the briefs filed.

He adopted his own brief filed on behalf of the respondents and he urged the court to dismiss the appeal as unmeritorious so that the trial of the substantive case may proceed without further delay.

Learned Senior Advocate of Nigeria, Chief G.O.K. Ajayi in his appellant's brief, submitted that having held that the averments in the affidavit in support of the application relating to the witnesses the appellant intended to call from Overseas countries for his defence, the expenses he would thereby incur and the fact that the respondents were ordinarily resident outside jurisdiction with no assets within jurisdiction were not controverted, the Court of Appeal was in error to have interfered with the trial court's discretion in granting the application. Citing the case of *Onwoamanam v. Fatuade (1986) 2 NWLR (Pt 21) 199*, learned counsel pointed out that the decision of a lower court is presumed right unless an appellant rebuts this presumption. He claimed that the respondent was unable to rebut this presumption of law in the court below. He stressed that in the face of facts before the trial court, uncontroverted by the respondents, the plain duty of the two courts below was to accept them as established. He referred to the decisions in *Attorney-General Anambra State v. Onuselogu Ent Ltd (1988) 19 NSCC Vol. II 50 at 62; (1987) 4 NWLR (PL 66) 547* and *Ejowhomu v. Edok-Eter Ltd (.1 986) 5 NWLR (Pt 39)* and submitted that the Court of Appeal was in error to have held that the application in question was oppressive as no such issue was before the Court. He therefore, urged the Court to allow this appeal.

Learned counsel for the respondents, Onyeabo C. Obi, Esq. in his own brief submitted that the Court of Appeal was right in its finding that the trial court did not exercise its discretion judiciously by granting the application. Relying on the decisions on *Leonard Okere v. Titus Nlem (1992) 4 NWLR (Pt 234) 132* and *Odutola v. Kayode (1994) 2 NWLR (Pt. 324) 1*, he submitted that an appellate court has the right and, indeed, the duty to review the exercise of discretion by a lower court where, as in the present case, such a discretion was not exercised judiciously and or judicially. He pointed out that the trial court correctly identified the basic principles governing the exercise of its discretion in an application in respect of security for costs as enunciated in *Lindsay Parkinson Ltd. v. Triplan Ltd. (1973) 2 All ER 273 at 285*. It however unfortunately failed to apply them. He contended that the Court of Appeal rightly dismissed the appellant's application. Learned counsel argued that failure to controvert the allegations in the appellant's affidavit in support of the application on his proposal to call 30 witnesses from all corners of the world does not shift the onus of proof on the appellant to establish the relevance and competence of the alleged 30 witnesses and that the evidence of each and every one of them was indispensable in proof of his case. He pointed out that although much fuss was made about failure by the respondents to controvert some depositions in the appellant's affidavit, the depositions in issue were clearly not those of facts. Relying on the case of *Governor of Lagos State v. Ojukwu (1986) 1 NWLR (Pt.18) 621*, learned counsel submitted that it was therefore not incumbent on the respondents to controvert them. He contended that failure to controvert them did not constitute any admissions as submitted by the appellant. He described the handling of the case as not in the interest of justice and argued that the court below was entirely right so to hold. He urged the court to dismiss the appeal.

In the application which is the subject matter of this appeal, the appellant prayed as follows:-

1. That the plaintiffs do within 30 days give security for the defendant's costs to the satisfaction of the court and

2. That all further proceedings by or on behalf of the plaintiffs herein be stayed until the security is given accordingly and for such further or other order or orders as this Honourable Court may deem fit to make in the circumstances."

Order 52 rules I, 2 and 7, of the High Court of Lagos (Civil Procedure) Rules, 1972 under which the application was brought provide thus:-

> Rule 1
> In any cause or matter in which security for costs is required the security shall be of such amount, and be given at such times, and in such manner and form, as the Court or a Judge in Chambers shall direct.
>
> Rule 2
> *A plaintiff ordinarily resident out of the jurisdiction* may be ordered to give security for costs though he may be temporarily resident within the jurisdiction."
>
> (Italics supplied)
>
> Rule 7
>
> "Where the court orders costs to be paid, or security to be given for costs by any party, the court may, if it thinks fit, order all proceedings by or on behalf of that party in the same suit or proceeding, or connected therewith, to be stayed until the costs are paid or security given accordingly, but such order shall not supersede the use of any other lawful method of enforcing payment."

It is common place that the respondents are foreign companies not resident and with no assets within jurisdiction. I am therefore in total agreement with the Court of Appeal that the trial Court, pursuant to Order 52 rule 2 of the High Court of Lagos (Civil Procedure) Rules 1972 may properly order the respondents, to give security for the appellant's costs. See too *Republic of Costa Rica v. Erlanger (1876) 3 Ch. D 62*. The rules vest in the trial court a discretion as to whether or not to order a foreign plaintiff or plaintiffs ordinarily resident out of the jurisdiction, such as the respondents in the present case, to give security for the defendant's costs, and the amount of such security. See too *Aeronave S.P.A. v. Westland Charters Ltd. (1971) I WLR (1445), (1971) 3 All ER 531*. It cannot also be disputed that such discretion, like other judicial discretions must be exercised judicially and judiciously by having regard to all the circumstances of each case. See *Donald Campbell and Co v. Pollack (1927) AC 732.*

It must be exercised in good faith, uninfluenced by irrelevant considerations and not arbitrarily or illegally or upon a misconception of the law or under a misconception of the facts. See *University of Lagos and Anor v. Aigoro (l985} I SC 265 at 271; (1985) I NWLR (Pt. 1)143; Ntukidem v. Oko (1986) 5 NWLR (Pt.45) 909; Nneji and Anor v. Chukwu and Anor (1988) 3 NWLR (Pt.81) 184*, etc. A court's exercise of its discretion without adverting to all the peculiar facts and circumstances of the particular case before it has been said to be as bad as its exercise upon a wrong principle. See *Leonard Okere v. Titus Nlem (1992)4 NWLR (Pt. 234) 132* per Nnaemeka-Agu,J.S.C. And if there is any miscarriage of justice in the exercise of a judicial discretion, it is within the competence of an Appellate Court to have it reviewed. See *Odutola v. Kayode (1994) 2 NWLR (Pt.324) I; Nzeribe v. Dave Engineering Co. Ltd. (1994) 8 NWLR (Pt.361) I 24; John C. Okafor v. Bendel Newspaper Corporation (1991) 7 NWLR (Pt.206) 651* etc.

I think it ought to be observed in all fairness to the learned trial Judge that he appeared to have correctly identified the basic principles governing the exercise of a judicial discretion in an application for security for costs. Said he:-

> As rightly submitted by the learned SAN, the principle that has guided the Courts when considering an application for security for costs is that the courts have a discretion to order security for costs.
>
> It would appear however that by virtue of order 23 rule I RSC – see the Supreme Court practice 1988 Edition, Volume I which rule is almost in *pari materia* with our Order 52 rules I and 2 of the High Court of Lagos State (Civil Procedure Rules) 1972 - the courts now have a real discretion and indeed the courts are bound to consider the circumstances of each case. It is no longer an inflexible or rigid rule that a plaintiff resident abroad should provide security for costs. In the exercise of its discretion under the above rule, the Court will have regard to all the circumstances of the case and the court will make such order if having regard to all the circumstances, it would be just to make such an order. A major matter for consideration as submitted by learned counsel for the plaintiff/respondent is whether the plaintiff has a reasonably good prospect of success. See case of *Sir Lindsay Parkinson and Co. Ltd. v. Tripan Ltd*. (supra). Also if there is a strong prima facie presumption that the defendant will fail in his defence to the action, the Court may refuse him any security for costs See the case of *Crozat v. Brogden*, (supra).

It did not however, appear that he correctly applied the said principles to the facts and surrounding circumstances of the case. At any rate, so held the Court of Appeal. But the real question is whether the court below was right in so holding.

However, before I dispose of the point, it seems to me convenient at this stage to examine briefly the general principles of law governing the exercise of judicial discretion in applications for security for costs.

A number of issues may arise for consideration on the question of whether or not to order security for costs. In the case of *Sir Lindsay Parkinson and Co. Ltd v. Triplan Ltd. (1973) 2 All ER 273 at 285-286* Lord Denning MR in considering what needs be taken into account by a Court of Law when dealing with the issue of security for costs explained as follows:-

> "The court has discretion which it will exercise. The court has a discretion which it will exercise considering all the circumstances of the particular case. So I turn to consider the circumstances.
>
> Counsel for Triplan helpfully suggests some of the matters which the court might take into account, such as whether the company's claim is bona fide and not a sham and whether the company has a *reasonable good prospect of success*. Again it will consider whether there is an admission by the defendants on the pleadings or elsewhere that money is due. If there was a payment into court of substantial sum of money (not merely payment into court to get rid of a nuisance claim) that too would count. The court might also consider whether *the application for security was being used oppressively so as to try and stifle a genuine* claim. It would also consider whether the company's want of means has been brought about by the defendants such as delay in payment or delay in doing their part of the work."
>
> (Italics mine).

With great respect, I entirely endorse the above observations of the learned Master of the Rolls which in my view are clearly sound. It can therefore, be said that the more important of issues which the Court might take into consideration in ordering security for costs include:-

(i) Whether the plaintiff's claim is bona fide and not a sham.

(ii) Whether there is an admission by the defendant on the pleadings or elsewhere in respect of the plaintiff's claim or alternatively whether the claim has any chances or a reasonable good prospect of success. If there is a strong prima facie presumption that the defendant will fail in his defence to the action, the Court may refuse him any security for costs. See *Crozat v. Brogden (1894) 2 QB 30 at 33* CA as it may amount to a denial of justice to order a plaintiff to give security for the costs of a defendant who has no defence to the claim.

(iii) Whether the plaintiff is a mere nominal plaintiff or is in a condition of poverty or insolvency in which case an order for security for costs may be made. See: *Lloyd v. Hathern Station Brick Co. Ltd. (1901) 85 L.T. 158 CA MacNeal v. Biggart (1870) 18WR470.*

(iv) Whether it appears by credible evidence that there is reason to believe that the plaintiff will be unable to pay the costs of the defendant if his defence is successful in which case an order for security for costs may be considered.

(v) Whether the residence of the plaintiff is incorrectly stated in the writ of summons, unless the misstatement is innocent and made without any intention to deceive, an order for security for costs may be considered.

(vi) Whether a plaintiff is ordinarily resident out of the jurisdiction and has no assets therein which can be reached, though he may be temporarily resident within the jurisdiction in which case, an order for security for costs may be considered.

(vii) Whether the application for security for costs is being used oppressively so as to stifle an otherwise genuine claim in which case an order may be refused. See *Sir Lindsay Parkinson and Co. Ltd. v. Triplan Ltd. (1973) 2 All ER 273 at 285-286*.

On the first and second issues which mainly concern whether the respondents' claims are *bona fide* or otherwise frivolous and whether they have good chances of succeeding, the trial court which focused its attention mainly on the question of jurisdiction commented as follows:-

> "The issue of jurisdiction raised by learned counsel for the plaintiff/respondents which forms the main core of this action is an issue which I would not want to comment on at this stage without prejudging the case. I cannot therefore hold on the facts before me at this stage of the proceedings that the plaintiffs have reasonably good prospect of success; nor is there a strong prima facie presumption that the defendant will fail in his defence to the action."

The above observation was endorsed by the court below when, in dealing with the same issue, it stated:-

> "There is no doubt that the issue of the jurisdiction of the Federal High Court in dealing with the matter earlier leading to the arrest of the appellants' ship, is the core of the present action now pending in the trial court. Therefore, in my respectful view, the learned trial Judge was right when he said in his ruling on p.65 of the record that:-
>
> "The issue of jurisdiction raised by learned counsel for the plaintiffs/respondents which forms the core of this action is an issue which I would not want to comment on at this stage without prejudging the case."

I entirely agree with the above views of both Courts below in their treatment of the first and second issues. The question of jurisdiction, that is to say, whether the appellant's action to enforce a claim in respect of his alleged fees for professional services is competent and/or within the jurisdiction of the Federal High Court and, consequently, whether the order for the arrest of the 1st respondent's ship, *M.V. Realengracht*, by the order of the said Federal High Court is not unlawful and an abuse of legal process are clearly vital issues for determination in the trial court. Both courts below were therefore right when they refrained from making any pre-emptive comments in relation thereto in a mere motion for security for costs.

The 2nd, 3rd, 4th and 5th issues above adumbrated were not raised in the application under consideration. They are therefore of no consequence in the present appeal. I will now deal with the 6th issue which the appellant heavily relied on in this appeal. This pertains to the fact that the respondents are foreign limited liability companies ordinarily resident out of the jurisdiction.

There can be no doubt that the fact that the respondents are foreign companies, ordinarily resident out of the jurisdiction, and with no assets within the jurisdiction which can be reached is a cogent factor for which they may be ordered to give security for the defendant/appellant's costs. See: *Chellew v. Brown (1923) 2 K.B. 844* CA and Vol. 30 *Halsbury's Laws of England* 3rd Edition para 706 at page 378-380.

But as I have already pointed out, the provisions of Order 52 rules I and 2 of the High Court of Lagos State (Civil Procedure) Rules, 1972 confer upon the Courts a definite discretion on whether or not to order security for costs and, indeed the court is bound by virtue of the aforesaid provisions to consider, in all its ramifications, the circumstances of each case and in the light thereof, to determine whether and to what extent or for what amount a plaintiff may be ordered to provide security for costs. True, there was no inflexible rule that if a foreigner sued, he should give security for costs. See: *Crozat v. Brogden (1894) 2 QB 30 at 35* Per Lopes, L.J. This view, however, was disapproved by Denning, M.R. in *Aeronave SPA and Anor v. Westland Charters Ltd. and Ors. (1971) 3 All ER 531 at 533*, said the learned Master of the Rolls:-

> "This is putting it too high. It is the usual practice of the Courts to make a foreign plaintiff give security for costs. But it does so, as a matter of discretion, because it is just to do so. After all, if the defendant succeeds and gets an order for costs, it is not right that he should have to go to a foreign country to enforce the order. The ordinary rule still remains that it is a matter of discretion."

Accordingly, the power to order a foreign plaintiff to give security for costs is entirely discretionary. It is no longer an inflexible or rigid rule that a plaintiff resident abroad should be ordered to provide security for costs. Security for costs cannot now be ordered as of course by the Courts from a foreign plaintiff unless the Court is satisfied that it is proper and just to order such security. See: *Aeronove SPA and Anor v. Westland Charters Ltd. and Ors* (supra) at page 533. But in exercising its discretion, the court, as I have earlier observed, must have regard to all the circumstances of the case. It must be exercised in accordance with the rules of reason and justice, and most importantly, not according to the private or subjective views of the court. See *ldi Wurnov. U.A.C. Ltd (1956) 1 FSC 33 at 34*. I will later in this judgment examine whether the Court of Appeal was right in holding that the trial court in all the circumstances of the present case exercised its discretion erroneously by granting the appellant's application as prayed.

There is finally the 7th issue which involves a consideration of whether or not the appellant's application for security for costs is, in all the circumstances of the case, oppressive and/or an attempt to stifle an otherwise genuine claim. In this regard, a vital aspect of the appellant's case before the trial Court is that he would require 30 witnesses whose names he listed in paragraph 6 of the affidavit in support of his application to testify in his defence. 24 of these 30 witnesses were said to be based overseas and were expected to come from various countries, including Amsterdam, United Kingdom and Hong Kong. The said witnesses included the appellant's wife, Mrs. Oduba, and his house maid, Iyabo Alao, both of whom, with 6 others, were expected to come from the United Kingdom, 16 other witnesses were to come from Amsterdam and one from Hong Kong. There were also some 6 other witnesses who were expected from Port Harcourt, The appellant averred that these 30 witnesses from all over the world would be testifying for him in this apparently straight forward case which is mainly declaratory and involves recovery of money. Paragraphs 10 to 14 of the appellant's affidavit then averred as follows:-

> "10. That I have further enquired of the Eko Meridien Hotel and I am reliably informed that overseas visitors now pay for a room per night ₦1,200.00 although a deposit per night of ₦2,000.00 is demanded. These sums are required to be paid in hard currency (dollars or pounds) at the prevailing rate of exchange to the naira.
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> 11. That I have further enquired of reputed Car Hire Companies operating in Lagos and I am reliably informed that the rate of hire is ₦340.00 per day of 8 hours.
>
> 12. I am advised by Chief G.O.K. Ajayi, SAN, and I verily believe the same to be true that to save expenses, business seats should be offered to all the witnesses except Miss Alao who should be offered an economy class seat.
>
> 13. That the total cost of providing air tickets for the witnesses aforesaid and also providing accommodation for them as well as transport within Lagos other than for Mrs. Oduba and Miss Alao is as follows:-

15 witnesses from Holland {15 x US $3,208.00)		$48,120.00
1 witness from Hong Kong. (1 x US $4,289.00)		$4,289.00
7 witnesses from London (7 x US $2, 793.00		$19,551.00
1 witness from London (1 x US $2,026.00)		$2,026.00
22 witnesses x N2,000. 00 for 2 nights - N44, 000.00 at the prevailing exchange rate of N8,8131 to the Dollar ($4,992 x 2 occasions)		$9,985.13
Transport within Lagos 3 per car 8 cars at N340.00 .8 per car N2,720.000		$0.308.63
	Total	$84.279.76

14. That in addition to the above, I have been advised by Chief G.O.K Ajayi, SAN, aforesaid and verily believe the same to be true that six witnesses from Port Harcourt are to testify on my behalf. A provision of ₦10,000.00 is reasonably expected to meet the transport and accommodation expenses of the witnesses from Port Harcourt aforesaid."

The respondents in paragraph 8 of their counter-affidavit dismissed the appellant's application as:-

> "another ploy to delay and frustrate the trial of this suit."

As already stated, the learned trial Judge, Ope Agbe, J. exercised his discretion in favour of the appellant and granted all that he prayed for. He ordered as follows:-

> "that the plaintiffs do within 30 days from today 27/3/92 give security for the defendant's costs in the sum of $84,279. 76 (Eight-four thousand, two hundred and seventy-nine dollars, seventy-six cents) plus Nl0,000.00 (Ten thousand naira). It is further ordered that further proceedings by or on behalf of the plaintiffs be stayed until the security is given."

The learned trial Judge in acceding to the application swallowed hook, line and sinker all that the appellant prayed for. These included the cost of round trip business class flight tickets in U.S. Dollars for 24 alleged overseas witnesses in a simple declaratory and recovery of money claims, hire of 8 cars in Nigeria, again in U.S. dollars for the alleged 24 witnesses and the cost of their hotel accommodation, once again in U.S. dollars, totalling altogether U.S. $84,279.76 now roughly equivalent to over six million naira being costs the appellant might be entitled to if his defence succeeded. The appellant did not as much as aver why it would become necessary that in these respondents' claims before the court, 30 witnesses, including 24 from various overseas countries, his wife and her maid must all testify for him. There was no attempt to indicate what each and every one of these witnesses was going to testify on. It is under these circumstances that the respondents in their brief of argument submitted that:-

> "It will not be just to grant the application for security for costs, as this will amount to imposing financial hurdles before a foreign litigant seeking legitimate redress from our courts."

The vital question now is whether the court below was right to have held that the trial court failed to exercise its discretion judiciously having regard to all the facts and circumstances of the case.

In this regard, the Court of Appeal after a thorough consideration of the facts and the law applicable thereto had this to say:-

> "It is also important to observe that although the amount of security to be awarded must be fair and just having regard to all the circumstances of the case, it cannot be the practice of courts to order such an amount that may appear to be on a full indemnity basis. Accordingly, I find there is merit in this appeal. I hereby allow the appeal and set aside the order for security for costs made by the learned trial Judge in this matter. I also dismiss the application of the respondent in the trial court."

I entirely agree with the above observations of the Court of Appeal and fully endorse them. It is plain to me having regard to all the circumstances of the case that the application in issue is manifestly oppressive as against the respondents and a glaring attempt to stifle what prima facie appears to be an arguable claim. I entertain no doubt that the order of the learned trial Judge made on the 27th day of March, 1992 which was set aside by the court below is with profound respect, a reckless exercise of judicial powers which no appellate court can condone.

The appellant has however argued that the issue whether or not the appellant's application was being used oppressively so as to stifle a genuine claim was not before the court. He therefore, submitted that it was wrong for the Court below to have arrived at the conclusion that the application was being used oppressively so as to stifle a genuine claim.

With the greatest respect, I find it difficult to accept this submission of the appellant as well founded. In the first place, whether or not a process is being used oppressively so as to stifle a genuine claim may, in some cases, be an issue of straight fact provable by direct evidence and, in other cases, a matter of inference, derivable from all the circumstances of a case. I think the court below was entitled to draw an inference irresistibly warranted by undisputed or accepted evidence before the Court and therefore to arrive at the conclusion it reached on the overwhelming evidence before it.

In the second place, the respondents in their counter-affidavit averred that the appellant's application was another ploy to delay and frustrate the trial of the action. In their brief of argument before the court below, they further contended that it would "not be just to grant the application" as this would amount to "imposing financial hurdles" on the way of the respondents, thus preventing, them from "seeking, their legitimate redress, from the courts" The words "oppressively" or to "stifle a genuine claim" might not have been employed by the respondents in their counter affidavit to the application or in their respondents' brief before the court below. It is however plain to me that their opposition to the application in the trial court and their main complaint before the Court of Appeal revolved on issue touching on alleged scheme by the appellant to delay, frustrate or torpedo the respondents' claims by the imposition of extraordinary financial barrier on the way of the respondents with a view to stifle their claims. If these complaints do not render the appellants' application oppressive and/or an attempt to stifle the respondents' claims which, prima facie, appear arguable, I do not know what else will do so. In my view, therefore, it cannot be suggested with any degree of seriousness that there were no issues before the Court as to whether the application in question was oppressive and a device to stifle a genuine claim. I do not therefore hesitate to resolve the sole issue for determination in this appeal against the appellant.

This appeal accordingly fails and the same is hereby dismissed with costs to the respondents against the appellant which I assess and fix at ₦1, 000.00. I think I should finally observe that the claim before the trial court was filed since the 2nd day of February, 1989 - some nine years ago and has since seen no light of day. The parties, following the order for security for costs and a stay of the proceedings granted by the trial court have since been fighting the issue up to this Court at the expense of the expeditious determination of the main suit. Justice delayed, they say is justice denied. Accordingly, it is ordered that this case be remitted to the High Court of Lagos State with a direction that it receives an accelerated hearing before another judge of that court.

Judgement delivered by
Salihu Modibo Alfa Belgore. JSC

I agree with my learned brother, Iguh, J,S.C. that the main achievement of this matter travelling up to this court was to frustrate the expeditious trial of the substantive case that has been lying dormant for almost nine years due to stay of proceedings the appellant procured. It is true that out of respect for hierarchy of courts, once an interlocutory appeal is entered, the lower court stays proceedings in many cases voluntarily. But whether the stay is voluntary by the trial court or on it's being moved so to do, regard must be given to the overriding principle of justice of the case. If the stay of proceedings, by the nature of the case, will tend to stifle the case and cause great inconvenience and/or great loss to the person who wishes to proceed with the hearing, the trial Court should not stay the proceedings unless ordered by a Superior Court.

It is my view that the money of the respondents had been tied down by these proceedings in the three courts - High Court, Court of Appeal and finally here - by an unwholesome application of process of court. I find no merit in this appeal and I also dismiss it for the fuller reasons, in the judgment of Iguh, J.S.C. I make N I ,000.00 order for costs against the appellant. I also make the same consequential order as to expeditious hearing of the substantive suit.

Judgement delivered by
Idris Legbo Kutigi. JSC

I had the opportunity of reading before now the judgment just delivered by my learned brother, Iguh, J.S.C. I agree with his reasoning and conclusions. The appeal is accordingly dismissed with N I ,000.00 costs against the appellant.

Judgement delivered by
Michael Ekundayo Ogundare. JSC

I agree entirely with the reasoning and the conclusion reached in the judgment of my learned brother Iguh, J .S.C. just delivered. I have nothing to add. I too dismiss the appeal with costs as assessed in the said judgment.

Judgement delivered by
Sylvester Umaru Onu. JSC

I have had a preview of the judgment of my learned brother Iguh, J.S.C. just delivered, I am in entire agreement with it that this appeal fails and it is accordingly dismissed by me.

The issue that has led to this appeal is in relation to the payment of security for costs ordered by the trial court against the plaintiffs/respondents (hereinafter] called respondents) at the instance of the defendant/appellant (hereinafter referred to as appellant). It has, as it were, nothing to do with issues of the propriety or otherwise of the payment of the various sums of money the appellant was allegedly said to have exacted from the respondents or matters relating to the arrest of the respondents' vessel.

Of the two sets of issues formulated and submitted to us by both parties for our determination - one, by the appellant and two, by the respondents, I adopt the lone one proffered by the appellant to dispose of this appeal even though both are talking of one and the something. It states:-

> "Was the Court of Appeal entitled to interfere with the decision of the trial court for the reasons given by the Court, having regard to the evidence and the issues properly arising for determination before it."

Under the applicable rules of court vide Order 52 rules 1,2 and 7 of the High Court of Lagos (Civil Procedure) Rules, 1972 a plaintiff ordinarily resident out of the jurisdiction such as the respondents herein who are foreign companies, may be ordered to give security for costs, albeit that they may be temporarily resident with jurisdiction. Be it noted in the instant case that the respondents are not only foreign companies but are demonstrably shown to have no assets within jurisdiction. The appellant had in his application giving rise to the instant appeal prayed the trial court thus:

1. That the plaintiffs do within 30 days give security for the defendant's costs to the satisfaction of the court and

2. That all further proceedings by or on behalf of the plaintiffs herein be stayed until the security is given accordingly and for such further or other order or orders as this Honourable Court may deem fit to make in the circumstances;"

After considering the appellant's application, the learned trial Judge (Ope-Agbe, J.} granted all that were supplicated for inter alia as follows:

> "…. that the plaintiffs do within 30 days from today 27/3/92 give security for the defendant's costs in the sum of $84,279.76 (Eight-four thousand, two hundred and seventy nine dollars, seventy- six cents) plus ₦10,000.00 (Ten Thousand naira). It is further ordered that further proceedings by or on behalf of the plaintiffs be stayed until the security is given."

By the above order, what the learned trial Judge was acceding to was the wholesomeness of the appellant's request which included inter alia the astronomical costs of round trip business class flight tickets in U.S. dollars for 24 alleged overseas witnesses in a simple declaratory action and for recovery of money claims, the hire of 8 cars within Nigeria- all in U.S. dollars for the 24 witnesses and the cost of their hotel accommodation sounding also in U.S. dollars - a sum which in current Nigerian money will be the equivalent of some N 6 million of costs to the appellant. The appellant neither gave reasons why 30 witnesses including the 24 overseas ones along with his wife and maid, ought to be called nor did the learned trial Judge set about probing the overriding necessity to have what evidence each of them rationally would be expected to adduce with a view to cutting down on their number and/or costs where necessary. The respondents in argument had contended in their brief among other things as follows:- '

> "It will not be just to grant the application for security for costs as this will amount to imposing financial hurdles before a foreign litigant seeking legitimate redress from our courts."

The justification or otherwise of a judicious exercise by the trial court of its discretion in acceding to the appellant's prayer would seem to me to have found true expression and solution by the court below which after a thorough appraisal of the issue in this appeal as it emanated from trial held in the following unimpeachable words:-

> "It is also important to observe that although the amount of security to be awarded must be fair and just having regard to all the circumstances of the case, it cannot be the practice of court to order such an amount that may appear to be on a full indemnity basis. Accordingly, I find there is merit in this appeal. I hereby allow the appeal and set aside the order for security for costs made by the learned trial Judge in this matter. I also dismiss the application of the respondent in the trial court." –

I cannot agree more. Indeed, the facts and circumstances of this case demand that the trial court ought to have been flexible and not rigid in its exercise of its discretion to order security for costs even though a party not resident within jurisdiction is involved. It is for this reason that I hold as correct and justified the conclusion of the court below when it stated (Per Kalgo, J.C.A.) that:-

> "But this Court can correct a decision of the learned trial Judge, where it (sic) failed to advert its (sic) mind to a material fact as in this case even though this court cannot substitute its own discretion for that of the trial court. I am satisfied that discretion was exercised in this case on wrong principles and this court has a right to interfere. See *Leonard Okere v Titus Nlem (1992) 4 NWLR (Pt.234) 132 at I 49; Okafor v. Bendel Newspaper Corporation (1991)*

7 NWLR (Pt.206) 651 at 666. Also in the case of *Gulab (Nig.) Ltd. v Sachdeva (1965) I All NLR 266 at 267* the Supreme Court in dealing with discretion to order security for costs said that:-

> "..... A court of appeal can examine anew the relevant facts and circumstances in order to exercise a discretion by way of review which may reverse or vary the order. *Evans v. Bartiam (1937) AC 473 at page 486*."

Although in the *Gulah (Nig.) Ltd* case (supra) this Court, based on its own peculiar facts, held that security for the defendants' costs in the action should have been ordered and that it could not be said that the judge had exercised his discretion wrongly in refusing to order security for the counter-claim, in the instant case the trial Judge had not, in my opinion, exercised his discretion judiciously and judicially. See: *Olalshola v Olunjimi and Ors. (1972) 1 NMLR 331; Akanbi v Alao (1989) 3 NWLR (Pt. 108) 118at 141; Nneji v Chukwu (1988)3 NWLR Pt 81) 184* and *lkomi v. The State (1986) 3 NWLR (Pt.28) 340 at 343 and 360.*

It is for these reasons I have stated above and the more elaborate ones contained in the leading Judgment of my learned brother Onu, J.S.C. that I too dismiss this appeal and make similar consequential orders inclusive of costs. I also order that the case be remitted to the High Court of Lagos State for the hearing of the substantive action.

Counsel

Appellant absent and unrepresented	.....	
Onyeabo, C. Obi *with him* J.A. Nnajiofor	.....	For the Respondents