In the Supreme Court of Nigeria

On Friday, the 16th day of December 2011

Before their Lordships

Walter Samuel Nkanu Onnoghen	......	Justice Supreme Court
Muhammad Saifullah Muntaka-Coomassie	......	Justice Supreme Court
John Afolabi Fabiyi	......	Justice Supreme Court
Bode Rhodes-Vivour	......	Justice Supreme Court
Mary Ukaego Perter-Odili	......	Justice Supreme Court

SC.290/2007

Between

Chief (Dr.) Pere Ajuwa	......	Appellants
Honourable Ingo Mac-Etteli	......	
(Suing for themselves and on behalf of Ijaw Aborigines of Bayelsa State)		

And

The Shell Petroleum Development Company of Nigeria Limited	......	Respondent

Judgment of the court

Delivered by

John Afolabi Fabiyi. JSC

This is an appeal against the ruling of the Court of Appeal, Abuja Division ("the court below" for short) delivered on 10th May, 2007.

By an originating summons issued at the Federal High Court, Yenagoa, Bayelsa State but later transferred and heard at the Federal High Court, Port Harcourt, ("the trial court" for short) the Appellant sought to enforce the joint resolution of the National Assembly awarding to the Appellants the sum US$1.5 billion damages as compensation for environmental degradation of the Appellants' communities by the Respondent's oil production activities since 1956.

On February 24th, 2006, the trial court gave judgment and ordered the Respondent to comply with the resolution of the National Assembly and awarded the stated sum of US$1.5 billion to the Appellants as compensation for injuries suffered. The Respondent felt dissatisfied with the judgment of the trial court and appealed to the court below. Equally, it applied to the trial court for it to make an order of unconditional stay of execution of its judgment.

In a ruling delivered on Friday, May 19th, 2006, the trial court refused the application for unconditional stay and ordered the grant of stay of execution on condition that the judgment sum be deposited in the Central Bank of Nigeria on or before 12 noon on Monday May 22nd, 2006, in the name of the Chief Registrar of the Federal High Court.

Being dissatisfied with the ruling of the trial court, the Respondent filed a further application at the court below seeking that the order of conditional stay be varied by granting unconditional stay of execution pending the final determination of the appeal. The Respondent filed another application dated September 19th, 2006, seeking leave of the court below to amend its notice of appeal by filing and arguing the amended notice of appeal, leave to raise fresh issues and accelerated hearing of the appeal.

The two motions filed by the Respondent were part heard at the Port Harcourt Division of the court below when the appeal was transferred, *suo motu*, by the court for hearing at the Abuja Division of the court. When hearing resumed *de novo*, at the Abuja Division, the two applications were heard together. In the ruling of the court below delivered on May 10th, 2007, the court below granted all the reliefs sought in the two motions. The court below gave the parties time for filing briefs of argument and adjourned the appeal to 21st of June, 2007, for hearing.

The Appellants felt unhappy and appealed to this court against the stance posed by the court below.

Learned senior counsel to the Respondent raised preliminary objections against the grounds of appeal contained in the notice of appeal filed by the Appellants on 22nd May, 2007. For ease of reference and due appreciation, the six grounds of appeal without their particulars are reproduced as follows:-

Ground One

> The Court of Appeal erred in law in granting the Appellant/Applicant's prayer contained in their application filed on 20th November, 2006, seeking
>
> > "leave to the Defendant/Appellant/Applicant to amend the Notice of Appeal in this matter by filing and arguing the amended Notice of Appeal including raising fresh issues, herein attached as Exhibit SPD 1."

Ground Two

> The Court of Appeal erred in law when it held per O.O. Adekeye, JCA., (as she then was) as follows:-
>
> > "I do not agree that the judgment creditor must consent to stay of monetary judgment. This is only required where the judgment debt (sic) is a bank or financial institution."

Ground Three

> The Court of Appeal misdirected itself in law in granting the Appellant/Applicant's application for unconditional stay of execution of the judgment of the Federal High Court in this case on the ground that :-
>
> > "In the instant application, it is not disputed that the Appellant/Applicant has assets and facilities far in excess of the judgment debt within the jurisdiction of the court and Nigeria. SPDC is also a Nigerian Company wherein the Federal Government has 55% equity interests. It must not elude the court that any order made by court is an interim order pending the hearing and determination of the substantive appeal."

Ground Four

> The Court of Appeal erred in law in allocating the time within which the Appellant and the Respondents are to file their briefs of argument in this case and setting down the appeal for hearing on June 21st, 2007.

Ground Five

> The Court of Appeal erred in law in granting unconditional stay of execution of the judgment of the Federal High Court in this case in favour of the Appellant/Applicant's application when time within which to file the Appellant's brief had expired and there was no application by the Appellant/Applicant to file its brief.

Ground Six

> The Court of Appeal erred in law in refusing to dismiss the Appellant's appeal as urged by the Respondents on 20th March, 2007.

The senior counsel for the Respondent, with respect to the preliminary objection, initially maintained that since the present appeal arose from the interlocutory decision of the Court of Appeal made on May 10th, 2007, leave of the court below or this court ought to be obtained before filing the Notice of Appeal. He placed reliance on the provisions of Section 21 (2) of the Supreme Court Act. Senior counsel submitted that since the Appellants failed to obtain the requisite leave, the entire Notice of Appeal and the appeal are incompetent and should be struck out or dismissed.

Senior counsel urged that the provisions of Section 21 (2) of the Supreme Court Act should be read along with the provisions of Section 233(2) (a); (3) and (6) of the 1999 Constitution and that appeal on interlocutory decisions of the Court of Appeal lies to the Supreme Court with leave either of the court below or this court.

Senior counsel for the Appellants had a contrary view. He felt that since the grounds of appeal are grounds of law, an appeal lies as of right to this court. He submitted that the argument of learned senior counsel for the Respondent that Section 233 (1) and (2) (a) of the Constitution is subject to Section 21 (2) of the Supreme Court Act by reason of Section 233(6) of the Constitution belittles the Constitution which is the organic law of the state and the grundnorm. He observed that Section 233(2) (a) of the Constitution confers a specific right of appeal without any requirement for leave on questions of law against decisions of the Court of Appeal in any civil or criminal proceedings. He felt that what is contemplated by Section 233(6) are situations other than those already expressly provided for in the previous subsections of the section. He submitted that if a harmonious interpretation is given to Section 21 (2) of the Supreme Court Act, the court will arrive at an interpretation that leave of the court below or of this court is required for an appeal against an interlocutory order or decision of the court below on questions other than questions of law alone. He opined that this is consistent with the provision of Section 233(3) of the Constitution.

Senior counsel for the Appellants referred to decisions of this court in *National Employers Mutual General Insurance Association Ltd. v Uchay (1973) 4 SC 1; (1973) 4 SC (Reprint) 1 and Onigbeden v Balogun (1975) 4 SC 85; (1975) 4 SC (Reprint) 63.* He submitted that the interpretation put forward by the senior counsel for the Respondent is destructive of Section 233(1) and (2) (a) of the Constitution and disruptive of settled principles and therefore should be rejected. He cited

the cases of *Ojemen v Momodu (1983) 1 SCNLR 188 at 203; Comex Ltd. v N.A.B. Ltd. (1997) 3 NWLR (Part 496) 643 at 653; Maigoro v Garba (1999) 7 SC (Part III) 11; (1999) 10 NWLR (Part 624) 555 at 567-568; Adeyemo v Beyioku (1990) 10 NWLR (Part 635) 472 at 489; Ngige v Achukwu (2004) 8 NWLR (Part 875) 363 at 394.*

At this point, it is apt to reproduce the provisions of Section 233(2) (a), (3) and (6) of the 1999 Constitution along with Section 21(2) of the Supreme Court Act so as to appreciate their clear purport and intendment in relation to the point herein in contention. They read as follows:-

Section 233 (2) (a) of the 1999 Constitution:

> "An appeal shall lie from decision of the Court of Appeal to the Supreme Court as of right in the following cases
>
> (a) Where the ground of appeal involves question of law alone, decision in any civil or criminal proceedings before the Court of Appeal."

Section 233(3) of the 1999 Constitution:

> "Subject to the provisions of subsection (2) of this section, an appeal shall lie from the decisions of the Court of Appeal to the Supreme Court with leave of the Court of Appeal or the Supreme Court."

Section 233(6) of the 1999 Constitution:

> "Any right of appeal to the Supreme Court from the decisions of the Court of Appeal conferred by this section shall subject to Section 236 of this Constitution, be exercised in accordance with any Act of the National Assembly and rules of court for the time being in force regulating the powers, practice and procedure of the Supreme Court."

Section 21(2) of the Supreme Court Act:

> "Where in the exercise by the Court of Appeal of its jurisdiction an interlocutory order or decision is made in the course of any suit or matter, an appeal shall, by leave of that court or of the Supreme Court, as the case may be, lie to the Supreme Court; but no appeal shall lie from any order made ex-parte, or by consent of the parties or relating only to costs."

From the above reproduced Section 233(2) (a) of the 1999 Constitution, it is clear beyond peradventure that an appeal shall lie from decision of the Court of Appeal to the Supreme Court as of right where the ground of appeal involves question of law alone. Section 233(2) (a) of the Constitution confers a specific right of appeal without any requirement for leave on question of law against decisions of the court below in any civil or criminal proceedings. And Section 233(3) provides that subject to the provisions of subsection (2) of this section an appeal shall lie from decisions of the court below to the Supreme Court with the leave of the Court of Appeal or the Supreme Court. To my mind, appeal on question of law alone without leave is unique. Section 233(6) relates to other appeals against interlocutory decisions of the court below on questions other than those of law. This is consistent with the provisions of Section 233(3) of the Constitution.

It is my considered opinion that the provisions of Section 233 (2) (a), (3) and (6) should be given a harmonious reading in such a manner that it does not obliterate the clear provisions of Section 233(2) (a) which gives a specific provision of right of appeal without leave on point of law. Subsection (3) of Section 233 of the Constitution makes other rights of appeal subject to that provided in subsection (2)(a) of the same. To find otherwise will, in my opinion, be disruptive of settled principles. See: *Ojemen v Momodu II (supra) at Page 203.*

I do not agree with the stance posed by the Respondent. I hold that the appeal is competent

That now takes me to the objection raised to the competence of Grounds 3, 4 and 5 of the Appellants Notice of Appeal. Chief Akinjide SAN, submitted that Grounds 3, 4 and 5 are, at best, grounds of mixed law and facts and required the leave of either the Court of Appeal or this court before they could be lodged. He observed that the stated grounds and their particulars must be read together to reach a decision. Learned senior counsel cited *Opuiyo v Omoniwari (2007) 6 SC (Pt. I) 35; (2007) 16 NWLR (Part 1060) 415 at 430 and Metal Construction (W.A) Ltd. v Migliore (1990) 2 SC 33; (1990) 1 NWLR (Part 126) 299 at 314; Comex Ltd. v N.A.B. Ltd. (1997) 3 NWLR (Part 496) 643 at 654.*

Senior counsel submitted that the particulars attending to Grounds 3, 4 and 5 challenge the evacuation by the court below and that the Appellants contended that on the strength of the facts alleged therein, the court below ought to have reached a different conclusion. Senior counsel felt that same is clearly a question of fact.

Senior counsel submitted that the mere description or labelling of a ground of appeal as 'error of law' is not conclusive and is irrelevant to the determination whether that ground is of law, fact or mixed law and facts. The court looks at the substance of the complaint in the ground of appeal. He cited the cases of *Nwadike v Ibekwe (1987) 2 NSCC 1219 and Ojemen v Momodu II (1983) NSCC 135.* He observed that any issue for determination framed from Grounds 3, 4 and 5 of the Appellants' notice of appeal are incompetent.

Senior counsel further submitted that Grounds 3 and 5 should be deemed abandoned and liable to be struck out as no issue for determination was framed from the grounds. He cited *Chukwumah v Shell Petroleum (1993) 4 NWLR (Part 289) 512 at 551.*

Learned senior counsel finally urged that Appellants' Grounds 3, 4 and 5 should be struck out.

Learned senior counsel for the Appellants agreed that in the determination of the question whether or not a ground of appeal is of law or fact or mixed law and facts, it is important to consider together the principal complaint and the particulars of the error provided thereunder.

He felt that the substance of the complaint in Ground 3 is that the court below misdirected itself in law as there was no evidence on record to support its decision to grant unconditional stay of execution. He submitted that the court below did not exercise its power to grant unconditional stay of execution on recognised legal principles. He cited the case of *Ogbechie v Onochie (1986) 2 NWLR (Part 23) 484; Nwadike v Ibekwe (1987) 4 NWLR (Part 67) 718*. Senior counsel submitted that Ground 3 of the Notice of Appeal is a ground of law.

Further, senior counsel for the Appellants submitted that Grounds 3 and 5 were not abandoned as they were well covered by issues for determination raised by the Appellants. He observed that Ground 3 was argued under Issue 1 while Ground 5 relates to consequence of failure to file brief of argument within time prescribed by the rules of court.

It has been pronounced by this court in *Nwadike v Ibekwe (supra) at Page 1235*, that it is a recognised fact that the line of distinction between law *simpliciter* and mixed law and fact is a very thin one. But one does not convert a ground of mixed law and fact into a ground of law by christening it 'error of law' or misdirection in law.

Grounds of appeal and particulars attending to them must be carefully read together to arrive at a decision.

As carefully set out by Nnaemeka-Agu JSC, in *Nwadike v Ibekwe (supra)* on the point -

(a) It is an error of law if the adjudicating tribunal took into account some wrong criteria in reaching its conclusion. *O'Kelly v Trusthouse Forte Plc. (1983) 3 All ER 468.*

(b) Several issues that can be raised on legal interpretation of deeds, documents, term of arts and inference drawn therefrom are grounds of law. *Ogbechie v Onochie (supra) at 491.*

(c) Where a ground deals merely with a matter of inference, even if it be inference of fact, a ground framed from such is a ground of law. *Benmax v Austin Motor Co. Ltd. (1945) All ER 326*

(d) Where a tribunal states the law in a point wrongly, it commits an error in law.

(e) Where the complaint is that there was no evidence or no admissible evidence upon which a finding or decision was based, same is regarded as a ground of law.

(f) If a judge considers matters which are not before him and relies on them for the exercise of his discretion, he will be exercising same on wrong principles and this will be a question of law. *Metal Construction (W.A) Ltd. v Migliore (supra) at Page 315.*

A careful appraisal of the particulars attending to Ground 3 shows that the complaint therein is that there is no evidence before the court below that the Respondent is a Nigerian Company wherein the Federal Government has 55% equity interest. As for Ground 4, the real complaint is that there was no application before the court below for enlargement of time to file the Appellants' brief thereat. And as for Ground 5, the complaint is that unconditional stay was granted at the time when the Appellant did not seek leave to file its brief of argument. To my mind, the three grounds of the appeal, read carefully with their particulars; show that they are grounds of law.

It can be deduced that the first issue covers Ground 1 of the grounds of appeal. It touches on principles of granting unconditional stay of execution. Issue 3 is covered by Ground 5. It has to do with the complaint that Appellant failed to file brief of argument within the time allowed by the rules of court. In short, I am unable to surmise how the stated grounds of appeal can be said to have been abandoned.

In short, I overrule the preliminary objection taken on behalf of the Respondent. The appeal shall be considered on its merit anon.

The three (3) issues formulated on behalf of the Appellants for determination read as follows: -

"(1) Whether the Court of Appeal followed the principle laid down by the Supreme Court for the grant of unconditional stay of execution for money judgment in granting to the Respondent an unconditional stay of execution of the judgment of the Federal High Court.

(2) Whether the first prayer contained in the Respondent's motion dated 19th September, 2006 was not too vague and bad in law to be granted by the court.

(3) Whether the Court of Appeal ought not to have struck out the Respondent's appeal in the court below rather than setting it down for hearing expeditiously when the time within which the Respondent should file its brief of argument had expired and there was no application for enlargement of time to file the brief."

On behalf of the Respondent, four issues couched for determination read as follows:-

"(a) Whether the judicial discretion of the courts to grant unconditional stay of execution is dependent on the consent of the judgment creditor, irrespective of the peculiar facts of each case.

(b) Whether or not, having regard to the law and the affidavit evidence, the Court of Appeal was right in granting the reliefs contained in the first paragraph of the prayers in the Respondent's motion dated September 19th, 2006.

(c) Whether the order for the filing of briefs by the Court of Appeal is a necessary and consequential order following the grant by the Court of Appeal of the reliefs in the Respondent's motion dated 19/9/2006 (as the Respondent contends) or whether the order for the filing of briefs amounted to granting a relief not sought (as the Appellants contend).

(d) Whether or not having regard to all the facts and circumstances of the case, the Respondent's appeal at the Court of Appeal can, in law, be deemed to have been abandoned."

The 1st issue formulated by the parties, couched in different words, was hotly contested. It is whether the judicial discretion of the court to grant unconditional stay of execution is dependent on the consent of the judgment creditor or not.

Senior counsel for the Appellants submitted that since this is a money judgment, the only instance where the court may allow the judgment debtor who has applied for a stay of execution pending appeal to retain the judgment debt is where the judgment creditor consents to same. He relied principally on the decision of this court in *UBN Ltd. v Odusote Bookstore Ltd. (1994) 3 NWLR (Part 331) 129 at 151*. Senior counsel felt that the court below violated the principle of *stare decisis* for not following the decision of this court therein. He felt that such a stance also violated the provision of Section 287(1) of the 1999 Constitution.

Senior counsel submitted that impecuniosities, *per se*, is not a ground for granting an unconditional stay of execution or varying the terms of a stay already granted. He cited *Franchal (Nig.) Ltd. v Nigeria Arab Bank Ltd. (2000) 6 S.C. (Part I) 1; (2000) 9 NWLR (Part 671) 1 at 22; Nwabueze v Nwosu (1988) 9 SC 68; (1988) 4 NWLR (Part 88) 272.*

Senior counsel further submitted that the fact that a judgment debt is substantial or colossal is not a ground for granting an unconditional stay of execution. He cited *Mobil Producing (Nig.) Unlimited v Monokpo (2001) 18 NWLR (Part 744) 212 at 242.*

Senior counsel submitted that the court below seriously misdirected itself in law in basing its decision, inter alia, on the fact that SPDC is a Nigerian company wherein the Federal Government has 55% equity interests as there was no evidence on record on same. He observed that the Federal Government is not a party in the case.

Senior counsel further observed that the discretion to grant or refuse a stay of execution must take into account the competing rights of the parties. He cited *Okafor v Nnaife (1987) 4 NWLR (Part 64) 129 at 136; Mobil Oil (Nig.) Ltd v Agadaigho (1988) 2 NWLR (Part 77) 388 and Martins v Nicanner Food & Co. Ltd. (1988) 2 NWLR (Part 74) 75.*

On behalf of the Respondent, senior counsel submitted that the judicial discretion of the court below to vary the terms of the stay granted by the trial court by granting unconditional stay of execution is not dependent on the consent of the judgment creditor. He maintained that to hold otherwise is to convert the judicial discretion of the court below to the discretion of the judgment creditor. He asserted that judicial discretion must be exercised judicially and judiciously having regards to the peculiar facts of each case. Senior counsel maintained that where the exercise of discretion is clogged for being dependent on a factor outside the control of the court, like the consent of the judgment creditor herein as craved by the Appellant, it ceases automatically to be judicial discretion.

Senior counsel submitted that in the exercise of discretion, each case is to be decided on the strength of its peculiar facts. He observed that what the Appellants rely on to urge *stare decisis* arose from the opinion - *obiter dictum* of Uwais, JSC, (as he then was) in *UBN Ltd. v Odusote Bookstore Ltd. (supra).* He felt that the case is totally different from this case and therefore the principle of *stare decisis* does not arise.

Senior counsel maintained that the learned justice did not intend to lay down a binding principle of law applicable in all cases irrespective of the facts of each case that unless the judgment creditor consents, to allow the judgment debtor to retain the judgment debt would be to give the judgment debtor undue advantage over the judgment creditor. He observed that the opinion of the learned justice relates to - a bank that is a judgment debtor retaining the judgment debt as deposit.

Senior counsel maintained that the consent of the judgment creditor is not and cannot be a requirement for the court below to exercise its judicial discretion to grant unconditional stay of execution. He felt that it is not the law that a judgment creditor must consent before an order of unconditional stay can be made.

Senior counsel asserted that the terms of stay of execution imposed on SPDC by the trial court were onerous and impossible to comply with.

Senior counsel maintained that the case of SPDC for unconditional stay of execution was predicated on the doctrine of corporate death and not impecuniosity. He cited *Orient Bank (Nig) Plc. v Bilante International Ltd. (1996) 5 NWLR (Part 447) 166 at 180-182*.

On the point touching on colossal sum, he submitted that though same is not a determinant of whether conditional or unconditional stay should be granted, it is a factor to be taken into consideration.

Senior counsel observed that SPDC deposed to affidavit that the Federal Government of Nigeria (FGN) has 55% equity interest in the company and the averment was not controverted. The Federal Government of Nigeria has interest in the joint venture operated by SPDC. Senior counsel observed that third parties' interests are equity's darling and courts jealously protect them.

In the alternative, senior counsel urged that if it is decided in *UBN Ltd. v Odusote Bookstore Ltd. (supra)* that the only occasion when it would be proper to order unconditional stay of execution pending appeal, will be when the judgment creditor consents to the court seized with the matter making the order, this court should overrule the decision to that extent.

Learned counsel submitted that this court will overrule its previous decision where it is shown that:-

(i) the previous decision is clearly wrong and there is real likelihood of injustice being perpetrated; or

(ii) that the previous decision was given *per incuriam*; or

(iii) that a broad issue of policy was involved.

He cited *Okulate v Awosanya (2000) 1 SC 107; (2000) 2 NWLR (Part 646) 530 at 543; Adisa v Oyinwola (2000) 6 SC (Part II) 47; (2000) 10 NWLR (Part 746) 116*. He further observed that this court will overrule its earlier decision where same is capable of fettering the exercise of judicial discretion by a court. See: *Adisa v Oyinwola (supra).*

Senior counsel submitted that it will perpetrate injustice and also fetter the exercise of judicial discretion by the courts if it is upheld that the only occasion when it would be proper to order unconditional stay of execution pending appeal will be when the judgment creditor consents to the court seized with the matter making the order. He felt that such will put the grant of unconditional stay of execution in deserving cases at the whims and caprices of the judgment creditor who will just need to say ‘I do not consent.’ He asserted that the opinion expressed by the learned justice in *UBN v Odusote Bookstore Ltd. (supra)* did not require the judgment creditor to give reason for not consenting and that makes it impossible to challenge the refusal of the judgement creditor withholding his consent.

Senior counsel further asserted that it is also an issue of public policy to see that judicial discretion of the court is not put in the hands of interested parties to a case before the court. The court will be abdicating its constitutional role of adjudication if the court subjects the exercise of its judicial discretion to the whims and caprices of the interested parties.

The heat generated in respect of this point is intense. In the ruling of the court below delivered on 10th May, 2007, Adekeye, JCA, (as she then was), said:-

> “I do not agree that the judgment creditor must consent to all applications for stay of monetary judgment. This is only required where the judgment debtor is a bank or financial institution.”

In *UBN Ltd. v Odusote Bookstore Ltd. (supra)* at Page 151, the learned justice stated-

> “Finally, in my opinion, the only occasion when it would be proper to order that a bank that is a judgment debtor could retain the judgment debt, in an order for stay of execution pending appeal, will be when the judgment debtor (sic) consents to the court seized with the matter making the order.”

Earlier on at Page 150, the, learned justice stated as follows:-

> “To allow the bank to retain the judgment debt as deposit notwithstanding that it will pay commercial interest on the amount, is in my opinion tantamount to giving it undue advantage over the judgment creditor. For it is a matter of common knowledge that the bank would employ the funds in charging higher interests than could accrue to the judgment creditor in the event of the bank's appeal failing.”

At Page 151 C-D, the learned justice finally capped same as follows: -

> "In the present case, it is common ground, as the parties have agreed in the alternative to their conflicting submissions that the judgment debt should be deposited in either the First Bank of Nigeria Plc., or the United Bank of Africa Plc. Consequently, I am satisfied that on the whole there are special circumstances to warrant the grant of the application for stay of execution pending the appeal in this court. Accordingly, the application is hereby granted on the following terms ......"

In matters of judicial discretion, since the facts of two cases are not always the same, this court does not make it a practice to lay down rules or principles to fetter the exercise of its discretion or that of the lower courts. In matters of discretion, no one case is authority for the other. A court cannot be bound by a previous decision to exercise its discretion in regimented way, because that would be as it were, putting an end to discretion. See: *Akujinwa v Nwaonuma (1998) 11-12 SC 112; (1998) 13 NWLR (Part 583) 632 at 647; Attorney-General Rivers v Ude (2006) 6-7 S.C. 131; (2006) 17 NWLR (Part 1008) 436 at 461; Odusote v Odusote (1971) 1 All NLR 219 at 222.*

Judicial discretion is a sacred power which inheres to a judge. It is an armour which the judge should employ judicially and judiciously to arrive at a just decision. Same should not be left to the whims and caprices of a party to the action. It is not in tandem with the dictates of public policy which demands, inter alia, that administration of justice shall be discharged without any form of prompting by the parties.

Discretion had been defined to mean 'a power or right' conferred upon public functionaries by law of acting officially in certain circumstances according to the dictates of their own judgment and conscience, uncontrolled by the judgment or conscience of others. See: *State v Whitman R.11, 431 A.2d 1229,1233; Black's Law Dictionary, Sixth Edition Page 466.*

It is clear that a judicial officer should exercise his discretion judicially and judiciously as well. See: *University of Lagos v Olaniyan(1985) 16 NSCC (Part 1) 98 at 113; Eronini v lheuko (1989) 3 SC (Part I) 30; (1989) 2 NSCC (Part 1) 503 at 313;*

Let me say it in passing that this court does not condone a situation where an earlier decision is capable of fettering the exercise of judicial discretion. Judicial discretion is a vital tool in the administration of justice. See: *Adisa v Oyinwola (supra)*

It is my considered opinion that the decision of this court *UBN v Odusote Bookstore Ltd. (supra)* did not lay it down as a general principle of law that in all money judgments, the consent of judgment creditors must be secured to enable judges make order of stay of execution. It is when the judgment debtor is a bank or a financial institution and a proposal is being made as to where the judgment debt would be kept pending determination of the appeal that parties, but more especially the judgment creditor, will have an input.

In effect, I agree with the stance of the court below that it is not a must that the consent of a judgment creditor must be had and obtained in all applications for stay of monetary judgment. Such is only required where judgment debtor is a bank or financial institution which has to keep the judgment debt in its bank where same is employed to its advantage.

In sum, the invitation by the Respondent's senior counsel to overrule the decision in respect of the point in *UBN Ltd. v Odusote Bookstore Ltd. (supra)* is not of any moment.

In granting conditional stay of execution on May 19th, 2006, the trial court ordered as follows:-

> "That execution of the judgment in this suit is stayed on condition that the Judgment Debtor/Applicant deposit the judgment sum of US$1.5 billion with the Central Bank of Nigeria in an interest yielding account in the name of the Chief Registrar, Federal High Court of Nigeria on or before 12.00 noon on Monday, 22nd of May, 2006 to await the outcome of the appeal."

The court below found that the trial high court made the order of conditional stay in terms which were onerous and impossible to comply with. This is clearly manifest in the 3rd further affidavit of the Respondent. The Respondent was ordered to pay the sum of US$1.5 billion within a time that is less than one working day. As the ready cash was not available, the Respondent would have to dispose of its assets and oil wells etc. If the appeal succeeds, the judgment will be barren - as their assets would have gone. All these factors convinced the court below to find that the Respondent showed why the order is onerous and impossible of immediate performance. I feel the court below was in order

On behalf of the Appellants, it was submitted that impecuniousity is not a ground for granting an order for unconditional stay of execution. The Respondent agreed with same but maintained that their stand is predicated on doctrine of corporate death and not impecuniousity. The court below agreed that in line with the doctrine of corporate death, the Respondent should be kept 'alive' to enable it pursue its appeal. It maintained that the goose that lays the golden eggs must not be allowed to pass on. A death which denies the Respondent of prosecuting the appeal is not justice. The court below made its order to keep the Appellant alive to prosecute the appeal. I am unable to fault that decision. The same was the stance of the court below in *Orient Bank Nig. Plc. v Bilante International Ltd. (1996) 5 NWLR (Part 447) 166 at 180-182.*

The Appellants argued that there was no evidence before the court below that the Federal Government of Nigeria (FGN) has 55% equity interest in the company. But I note that same is covered in Paragraphs 13 and 14 of the 3rd further affidavit on Pages 107-108 of Volume 2 of the record of appeal. As the depositions were not challenged, they are deemed to be

admitted by the Appellants. See: *Omoregbe v Lawani (1980) 3- 4 SC 108 at 117; (1980) 3-4 SC (Reprint) 70; Fasoro v Beyioku & Ors. (1988) 2 NWLR (Part 76) 263 at 271; Mogaji v Cadbury Nig. Ltd (1972) 2 SC 97; (1972) 2 SC (Reprint) 136; Okerie v Ejiofor (1996) 3 NWLR (Part 434) 90 at 104.*

The Appellants felt that the Federal Government of Nigeria is not a party and that the Respondent ought to have joined the Federal Government of Nigeria as a party. It should be stated that the facts of the interest of Federal Government of Nigeria and other 3rd party interests in the joint venture operated by SPDC were deposed to for the purpose of bringing to the notice of the court below 'third parties interests' that would be adversely affected if unconditional stay was refused. That was well made as 'third parties' interests are Equity's darling'. The court must protect them jealously.

The 1st issue is hereby resolved in favour of the Respondent and against the Appellants.

Issue No 2, as couched by the Appellants, is whether the first prayer contained in the Respondent's motion dated 19th September, 2006, was not too vague and bad in law to be granted by the court.

On behalf of the Appellants, it was contended that Prayer 1 in the Respondent's motion dated 19th September, 2006 is bad in law for misjoinder of prayers. Senior counsel submitted that a prayer for amendment is distinct and separate from a prayer for leave to raise fresh issues on appeal.

He felt that the two prayers cannot be joined as the principles for the grant of the two prayers are not the same.

Senior counsel further submitted that just as an action is liable to be struck out for misjoinder of causes of actions, so also is an application liable to be struck out for misjoinder of prayers. He cited *C.C.B (Nig.) Plc. v Rose (1988) 4 NWLR (Part 544) 37 at 46 and Amachree v Newington 14 WACA 97*. Senior counsel maintained that it is not the function of the court to sever misjoined prayers. He cited *Government of Gongola State v Tukur (1989) 9 SC 105; (1989) 4 NWLR (Part 117) 595 at 603; Commissioner for Works, Benue State v Devcon Ltd. (1988) 7 SC (Part I) 29; (1988) 3 NWLR (Part 83) 407 at 420.*

Senior counsel felt that the court below ought not to have granted Prayer 1 because it is too vague and imprecise.

Senior counsel for the Respondent, on his part, maintained that the Appellants opposed only on technical ground by alleging misjoinder of prayers. The Appellants did not challenge the merit of the reliefs sought in the said motion. Senior counsel for the Respondent maintained that the Appellants do not complain that both reliefs were not sought. The only complaint is that both reliefs were misjoined in one paragraph. He asserted that the alleged misjoinder was, at best, an irregularity which the court below in its discretion waived when it granted the motion. Learned senior counsel opined that no miscarriage of justice was alleged or proved and they failed to show the way they were prejudicial or misled by the alleged misjoinder.

Senior counsel observed that the Appellants' allusion to misjoinder of causes of action is misconceived. He maintained that it is a rule of convenience and that the two prayers can be conveniently sought and granted in one application. He asserted that courts treat misjoinder of causes of action, if at all, as a mere irregularity.

Senior counsel observed that the current attitude of this court which has permeated all the levels of our court system is a total departure from technicality as courts no longer sacrifice the interest of justice on the altar of technicalities. He cited *Amaechi v INEC (2008) 1 SC (Part I) 36; (2008) 5 NWLR (Part 1080) 277.*

The reliefs sought in the motion dated 19th September, 2006 read as follows: -

> "1. Granting leave to the Defendant/Appellant/Applicant to amend the notice of appeal in this matter by filing and arguing the amended notice of appeal including raising fresh issues herein attached as Exhibit SPDC 1.
>
> 2. For accelerated hearing of the appeal."

To say the least, the wording of Prayer 1 can be described as inelegant. That is not to suggest that the two prayers to amend the notice of appeal and to raise fresh issues cannot be discerned therein. If they had been duly separated, the novel tag of 'misjoinder of prayers' would have been avoided.

In my considered opinion, same is a mere irregularity that was rightly waived by the court below. After all, the Appellants have not shown how they have been prejudiced or misled.

The technical objection is misconceived. The days of technicalities are gone. The current vogue is the doing of substantial justice to both sides in such a way that the main appeal will be heard and determined on its merit. See: *Bello v Attorney General Oyo State (1986) 12 SC 1; Ogunubi v Kosoko (1991) 18 NWLR (Part 210) 511; Fawehinmi v Akilu(1989) 3 S.C. (Part II) 1; (1989) 3 NWLR (Part 112) 643 and Egegbu v F.A. T.B (1992) 1 NWLR (Part 220) 709.*

This issue is also resolved in favour of the Respondent and against the Appellants.

Issue No 3 is whether the court below ought not to have struck out the Respondents' appeal rather than setting it down for hearing expeditiously when the time within which the Respondent should file its brief of argument had expired and there

was no application for enlargement of time to file the brief. This issue encapsulates Issues 3 and 4 formulated by the Respondent.

The complaint of the Appellants is that the Respondent failed to file its brief of argument within the time stipulated by Order 6 Rule 2 of the Court of Appeal Rules, 2002. On that ground, learned senior counsel for the Appellants urged that the appeal of the Respondent at the court below should be dismissed.

Further, senior counsel submitted that the court below was wrong when it allocated time within which the parties should file their briefs and set the appeal down for hearing. He felt that the appeal of the Respondent at the court below is deemed, in law, as having been abandoned.

Senior counsel for the Respondent observed that SPDC motion dated 19/9/2006 seeking amendment of SPDC original notice of appeal was filed on 20/9/2006 when SPDC was still within time in filing its brief of arguments. Senior counsel said it was not the fault of the Respondent that at the time the motion was eventually heard on March 20th, 2007 and ruling delivered on May 10th, 2007 time for the filing of the briefs had elapsed. He observed that SPDC was not entitled to file its brief of arguments when the motion for amendment of notice of appeal and raising fresh issues was pending.

Senior counsel submitted that the order for filing briefs was consequential to the orders granted to amend notice of appeal, raise fresh issues and accelerated hearing. He felt that it was immaterial that no application was made at the time the court below so acted. He cited the case of *Nneji & Ors. v Chukwu & Ors. (1988) 1 NSCC 1115.*

Senior counsel further submitted that having regard to the facts and circumstances of the case, it cannot be said that SPDC had abandoned its appeal at the court below for the mere reason that time for filing of briefs had elapsed. He cited the case of *Obomhense v Erhahon (1993) 7 NWLR (Part 303) 22 at 41.*

Senior counsel observed that this court has in several decisions particularly in *Amadi v N.N.P.C. (2000) 6 SC (Part I) 66; (2000) 10 NWLR (Part 674) 76*; frowned against the use of interlocutory appeal to delay the hearing of the substantive appeal; more so as there is nothing in this interlocutory appeal that will dispose of the substantive appeal. He urged that this appeal be dismissed.

From the facts and circumstances of this matter, it was not the fault of the Respondent that its motion to amend its notice of appeal and raise fresh issues was not heard in good time to enable it file its brief of argument within the time stipulated by the rules of the court below. The court eventually heard the motion and after granting same, made consequential orders to file briefs of argument and set the appeal down for hearing. All these steps were well taken. It was immaterial that no application was filed when the court below made the consequential orders. In *Nneji & Ors. v Chukwu & Ors. (supra)* with a similar setting, this court held that the order of the Court of Appeal for filing of briefs out of time without a prior application for same was an order necessary for determining the real question in controversy in the appeal. The orders appear necessary and the need for same arose incidentally.

In the circumstances of this matter, can the Respondent be said to have abandoned its appeal at the court below? I think not. Again in a similar setting in *Obomhense v Erhahon (supra) at Page 41,* this court held as follows:-

> "I do not think it is right or reasonable to hold that an Appellant who has filed a motion for leave to file and argue additional grounds of appeal lacks the will to prosecute his appeal. I regard it as preposterous and an abuse of language to so hold. It is certainly not evidence of apathy towards the prosecution of the appeal or tardiness in doing so. It is certainly in my opinion the opposite. An Appellant who has in court an application to file additional grounds of appeal cannot be said to be apathetic to the prosecution of the appeal the grounds of which he is seeking to add to."

The court below maintained that – 'there is no indication that this appeal was abandoned in default of filing the Appellant's brief'; I am at one with the court below as it was in order. In short, the issue is resolved in favour of the Respondent and against the Appellants. The court below in its bid to exercise its discretion judicially and judiciously examined the grounds of appeal and concluded that they raise substantial points of law as follows:-

(1) Constitutional law and doctrine of separation of powers.

(2) Statute of limitation.

(3) Jurisdiction of the Federal High Court to entertain the claims.

(4) Capacity of the Plaintiffs/Respondents (at the trial court) to bring the claim.

(5) Issue of bias.

I seriously feel that parties should go to the court below and concentrate their armour for due employment in respect of the main appeal thereat.

I come to the final conclusion that this appeal is devoid of merit and it is hereby dismissed. The Appellants shall pay ₦50,000.00 costs to the Respondent.

Judgment delivered by
Walter Samuel Nkanu Onnoghen. JSC

I have had the privilege of reading in draft the leading judgment of my learned brother, Fabiyi. JSC, just delivered and agree with the reasoning and conclusion therein stated.

Having nothing useful to add as my learned brother has dealt with the issues for determination exhaustively, I accordingly dismiss the appeal and abide by the consequential orders made in the said leading judgment including the order as to costs.

Judgment delivered by
Muhammad Saifullah Muntaka-Coomassie. JSC

On the 24/2/2006, Justice O J. Okeke sitting at the Federal High Court, Yenagoa Division delivered his judgment wherein he ordered as follows:

> "The court therefore grants the two declaration of reliefs sought by the Plaintiffs, and orders the Defendant to comply forthwith with the resolution of the National Assembly that it pays the sum of US$1.5 Billion as compensation to the Plaintiffs for the injuries and damaged suffer."
>
> (See Page 309 of the record).

The Defendant, who is the Respondent in this appeal, filed an application for the stay of execution of this judgment after filing the Notice of Appeal. The trial court heard the application and on 19/5/2001 conditionally granted the application as follows:

> "That the execution of the judgment in this suit is stayed on condition that judgment Debtor/Applicant deposits the judgment sum ofUS$1.5 Billion with the Central Bank of Nigeria in an interest yielding account in the name of the Chief Registrar, Federal High Court of Nigeria on or before 12 noon Monday 22nd May, 2006 to await the outcome of the appeal."

The Respondent thereafter filed an application before the Court of Appeal, Port-Harcourt Division, in which it prayed the lower court as follows:

> "1) The stay of execution of the Order of the Honourable Justice Okechukwu Okeke of the Federal High Court made on Friday May, 19th 2006 that the Appellant/Applicant deposit the judgment sum of 1.5 Billion US Dollars with the central Bank of Nigeria in the name of the Chief Registrar of the Federal High Court on or before 12 noon on Monday May 22nd 2006.
>
> 2) The ruling and orders of conditional stay of execution granted by Honourable Justice Okechukwu Okeke of the Federal High Court, Port-Harcourt on May 19th 2006 be varied by this honourable court by granting un-conditional stay of execution of the judgment and orders of the lower court pending the final determination of the Defendants/Applicant's appeal."

On the 20/9/2006, Respondent also filed another motion dated 19/9/2006 in which it prayed the lower court for the following reliefs:

> "1. Granting leave to the Defendant/Appellant/Applicant to amend the notice of appeal in this matter by filing and arguing the amended notice of appeal including raising fresh issue herein attached as Exhibit SPDC 1.
>
> 2. For the accelerated hearing of the appeal."

The two applications were consolidated after the matter has been transferred to the Court of Appeal, Abuja Division for hearing. The lower court in its considered ruling after hearing both parties on 10/5/2007, held thus:

> It must not elude the court that any order made by court is an interim order pending the hearing and determination of the substantive appeal. I do not agree that the judgment creditor must consent to all applications for stay of monetary judgment. This is only required where the judgment creditor is a bank or financial institution.
>
> In sum, from the peculiar circumstance of the instant case, I hold that there are good and justiable reasons to grant the prayer of the Applicant for unconditional stay of execution. It is my impression that if this appeal fails that Applicant has assets within the jurisdiction of the court to be attached for payment of the judgment debt whereas if the appeal succeeds such success will automatically be rendered barren and nugatory as the Appellant/Applicant would no longer be around to enjoy the dividend of victory. This court however endorses the undertaking of the

Applicant to accelerate hearing of the appeal. The Appellant is to file the Appellant's brief within (14) days and Respondent within (21) days of the receipt of the Appellant's brief. Appeal is adjourned to 21st day of June, 2007 for hearing.

The Appellant was dissatisfied with the ruling of the lower court and had appeal to this court. The Appellant in its notice of appeal dated 22nd of May, 2007, raised six grounds of appeal. Thereafter, in his brief of argument filed before this court formulated three issues for determination as follows:

1. Whether the Court of Appeal followed the principle laid down by the Supreme Court for grant of un-conditional stay of execution for money judgment in granting to the Respondent an un-conditional stay of execution of the judgment of the Federal High Court.

2. Whether the first prayer contained in the Respondent's motion dated 19/9/2006 was not too vague and bad in law to be granted by the court.

3. Whether the Court of Appeal ought not to have struck out the Respondent's appeal in the court below rather than setting it down for hearing expeditiously when the time within which the Respondent should file its brief of argument had expired and there was no application for enlargement of the time to file the brief.

The Respondent in its brief of argument formulated four (4) issues for determination as follows;

(a) “Whether the judicial discretion of court to grant unconditional stay of execution is dependant on the consent of the judgment creditor irrespective of the peculiar facts of each case. (Ground 2).

(b) Whether or not having regard to the law and affidavit evidence, the Court of Appeal was right in granting the reliefs contained in the first paragraph of the prayers in the Respondent's motion dated September I 9th, 2006 (Ground 1).

(c) Whether the order of filing of briefs made by the Court of Appeal is a necessary and consequential order following the grant by the Court of Appeal of these reliefs in the Respondent's motion dated 19/9/2006 (as the Respondent contends). Or whether the order for the filing of briefs amounted to granting a relief not sought (as the Appellants contend). (Ground 4).

(d) Whether or not, having regard to all the facts and circumstances of the case, the Respondent's appeal at the Court of Appeal can, in law, be deemed to have been abandoned. (Ground 5) 1.

The Respondent also in its brief of argument raised a preliminary objection as to competence or otherwise of the appeal itself and Grounds 3, 4 and 5 of the notice of appeal. The Respondent referred to Section 233(2), (3) and (6) of the 1999 Constitution, and Section 21 (2) of the Supreme Court Act and submits that the Appellant required the leave of this court to appeal against the interlocutory decision of the lower court. Hence the failure of the Appellant to obtain the leave of court before filing this interlocutory appeal renders the notice of appeal invalid and incompetent. The provisions of Section 21 (2) of the Supreme Court Act, is clear and un-ambiguous to the effect that an appeal against the interlocutory decision of the Court of Appeal can only be brought or filed with the leave of the lower court or this court. However, Section 233(2) of the 1999 Constitution creates an exemption, i.e.

> “an appeal shall lie from decision of the Court of Appeal to the Supreme Court as of right in the following cases: -
>
> (a) where the ground of appeal involves question of law alone, decision in any civil or criminal proceedings before the Court of Appeal.”

From the above, the word “decision” does not create a dichotomy between a “final” or interlocutory decision of the Court of Appeal. It is my view therefore that:-

(a) An appeal against the interlocutory decision of the Court of Appeal can only be brought with leave to this court where the grounds of appeal raise issues of facts alone or mixed law and fact; and

(b) The Appellant against an interlocutory decision of the Court of Appeal would not require the leave of Court of Appeal where the ground of appeal raises issues of law alone.

The Respondent must have realised this point when it proceeded to restrict its objection to Grounds 3, 4 and 5 of the notice of appeal and argued that being grounds of fact, and mixed law and fact in respect of which no leave has been obtained, they are therefore incompetent.

The Appellant in its reply brief submits that Grounds 3, 4 and 5 are grounds of law alone. He cited and relied on the following cases;

i) Ojemen v Momodu (1983) 1 SCNLR 118 at 203.

ii) *Gomex Ltd v Nab Ltd (1997) 3 NWLR (Part 496) 643 at 654.*

iii) *Maigoro v Garba (1999) 7 SC (Part III) 11; (1999) 10 NWLR (Part 624) 555 at 567- 568.*

v) *Adeyemo v Beyioku (1999) 13 NWLR (Part 635) 472;*

v) *Ngile v Achukwu (2004) 8 NWLR (Part 875) 363 at 394.*

One interesting point to note in all these cited authorities is that, the appeals in these cases were against the final judgments of the Court of Appeal. Thus, I paused here for a moment and asked myself what is the appeal in the case at hand all about? In my view, this appeal is against the exercise of discretion of the Court of Appeal to:-

a) grant unconditional stay of the judgment of the trial court pending the determination of the appeal before it; and

b) to grant an order amending the notice of appeal and to raise a fresh issue.

Therefore, can the lower court exercise its discretion without considering the material facts placed before it? If so, can any appeal against the exercise of that discretion be a matter of pure law without reference to the facts considered by the lower court? In my view, the answer would be in the negative. Furthermore, in trying to unravel the questions stated above. I have searched for the meaning of the word "judicial discretion" in Black's Law Dictionary 8th Edition, edited by Bryan Garner at Page 409, the word or phrase was defined as follows:-

> "The exercise of judgment by a judge or court based on what is fair under the circumstances and guided by the rules and principles of law, a court's power to act or not to act when a litigant is not entitled to demand the act as a matter of right."

Then in the New International Comprehensive Dictionary of the English Language - Encyclopaedia Edition at Page 365, the word "discretion" was defined as-

> "the act or the liberty of deciding according to justice and propriety, and one's idea of what is right and proper under the circumstances without wilfulness or favour."

Both dictionaries referred to the word –

> "circumstances" which means the facts or peculiar nature of the case which a judge exercising its discretion would consider."

Thus, whichever way the Appellants may put it, an appeal against the exercise of discretion by the lower court must involve the consideration of the 'circumstances' in order to determine whether discretion, was judiciously exercised. Thus, this appeal cannot therefore be said to involve the question of law alone, it must of necessity involve the consideration of the facts placed before the lower court. It is in this regard that I agree with my lord, Karibi-Whyte in *Metal Construction (W. A) Ltd. v Migliore (1979) 6-9 SC (Reprint) 118; (1990) 1 NWLR (Part 126) 299 at 314,* when he held as follows:

> "It is nevertheless a question of fact with the exercise of discretion. In *Grifths v J.P. Harrison Watford Ltd. (1963) AC 1*, Lord Denning expressed it succinctly thus;
>
> > "Reasonable people on the same facts may reasonably come to different conclusion, and often do Juries. So do Judges. And are they not all reasonable men?"
>
> It has therefore been recognised that these more or less discretion questions of impression or opinion in respect of which reasonable men may arrive at discrepant conclusions on the same evidence are questions of facts."

Therefore, this appeal cannot fall within the ambit of the provisions of Section 233(2) of the 1999 Constitution as amended. The applicable section is Section 233(3) and (6) of the 1999 Constitution as amended, and Section 21(2) of the Supreme Court Act. In the circumstances of this case, I hold that this appeal is incompetent as it has not been filed with the leave of either the lower court or this court. The appeal is therefore struck out.

My lords, I shall not end this contribution without making comments on the propriety of this appeal. While I do not wish a party should waive its constitutional right of appeal, if it feels strongly dissatisfied with the decision of the lower court, it is equally the duty of counsel to ensure a speedy trial and determination of the appeal. In this case the lower court delivered its ruling on 10/5/07 and fixed the appeal for hearing on 21/6/2007 within which time to appeal would have been heard and determined. Instead, learned senior counsel had embarked on this tortuous journey of appeal on the exercise of discretionary power by the lower court. This is 2011, four (4) years after which this appeal is been heard and determined by the lower court. Now the appeal is being sent to the lower court for trial after having wasted four years without the Appellants knowing their fate to the money in issue. This act, with due respect, is not encouraging and should not repeat itself and I would not say more than this.

I have had the privilege of reading in draft the illuminating leading judgment of my learned brother, John Fabiyi, JSC just delivered, I am in support of his lordship's reasoning and conclusions which I adopt, with respect, as mine. In fact the lucidity of the language employed in the said leading judgment and wisdom contained therein encouraged me to write more in support of it.

With the foregoing reasons of mine and more elaborate and detailed reasons adumbrated in the leading judgment of my Lord John Fabiyi, JSC. I too agree that the appeal though competent, lacks substance/merit and, like my brother, I dismiss the appeal. Consequently, I order an accelerated hearing of the appeal before the lower court. I endorse the order as to costs made in the lead judgment.

Judgment delivered by
Bode Rhodes-Vivour. JSC

On the 28th of May, 2002, based on a petition, the House of Representatives passed a resolution directing the Respondent to pay to the Appellant compensation in the sum of $1.5 Billion. The sum represented damages/compensation for environmental degradation of the Appellants' communities by the Respondent's oil drilling since the year 1956.

On the 24th of February, 2006 a Federal High Court in Port Harcourt, Rivers State ordered the Respondent to comply with the resolution and pay to the Appellants the said sum.

The Respondent was able to obtain a stay of execution of the judgment in the trial court. That court granted a conditional stay of execution. It ran as follows:

> "That the execution of the judgment in this suit is stayed on condition that judgment debtor/Applicant deposits the judgment sum of $1.5 Billion with the Central Bank of Nigeria in an interest yielding account in the name of the Chief Registrar, Federal High Court of Nigeria on or before 12 noon on Monday 22nd May, 2006 to await the outcome of the appeal."

The Respondent was not comfortable with the above. He wanted it varied. Much to his delight, the Court of Appeal granted the Respondents' prayers. That court said inter alia in granting an unconditional stay of execution that:

> "...... from the peculiar circumstances of the instant case I hold that there are good and justifiable reasons to grant the prayer of the Applicant for unconditional stay of execution. It is my impression that if this appeal fails that Applicant has assets within the jurisdiction of the court to be attached for payment of the judgment debt whereas if the appeal succeeds such success will automatically be rendered barren and nugatory as the Appellant! Applicant would no longer be around to enjoy the dividend of victory."

The Appellant was not satisfied with the unconditional stay of execution granted by the Court of Appeal and has come here.

Stay of execution, conditional or unconditional are granted entirely at the discretion of the court and with all discretionary powers/orders an appeal court is always loath to interfere with the way a court exercises its discretion but will be compelled to interfere if the discretion was wrongly exercised, or was tainted with some irregularity, or in breach of the law, or the court finds that it is in the interest of justice to interfere. See on these. *University of Lagos v Aigoro (1985) 1 NWLR (Part 1) 143; Nzeribe v Dave Eng. Co (1994) 8 NWLR (Part 361) 124.*

The grant/refusal of an application for stay of execution is a matter of discretion, and so the judge must examine the facts and circumstances of the case and the rules applicable and refrain from acting as he likes. He must take into account the competing rights of the parties and exercise his discretion judicially and judiciously. That is to say with sound and convincing reasons.

In my view, the learned justices of the Court of Appeal took into consideration the consequences of an unsuccessful appeal and a successful one and quite rightly came to the conclusion that an unconditional stay of execution met the justice of the case since the Respondent (in this appeal) has assets within the jurisdiction of the court to defray the judgment sum. The facts and circumstances clearly do not support tying down $1.5 Billion to await judgment at the end of lengthy appeals. The interference by the Court of Appeal with the way the trial court exercised its discretion to grant a conditional stay was clearly in the interest of justice. The Court of Appeal was correct to grant on unconditional stay of execution.

I am in complete agreement with the reasoning and conclusions of my learned brother, Fabiyi JSC.

Judgment delivered by
Mary Ukaego Peter-Odili JSC

This is an appeal against the ruling of the Court of Appeal delivered on I0th May, 2007. The Appellants were Respondents in the court below whilst the Respondent was the Appellant in that court.

The background of the facts relevant to this appeal are as follows:

On or about December 2000, the Appellants presented a petition to the House of Representatives against the Respondent. The petition of the Appellants had sought against the Respondent the sum of US$1.5 Biliion as compensation for the economic hardship and environmental degradation of the Appellants' communities by the Respondent's oil production activities in the Ijaw communities of Bayelsa State since 1956.

The Appellants' petition was referred to the Committee on Public Petitions of the House of Representatives.

The Respondent duly appeared before the committee to defend the petition and indeed submitted answers to the 107- point query raised by the committee on the petition.

The Respondent participated actively in the hearings and working visit of the committee and its secretary/legal adviser, one Mr. I. Odeleye, who represented the Respondent specifically said that the Respondent had no objection whatsoever to the hearing of the petition by the committee and would, to the best of their ability, assist and honour their obligations in respect of the petition.

In the course of its deliberations, the committee set up a legal advisory panel comprising Hon. Justice Mohammed Bello (former Chief Justice of Nigeria) as Chairman, Hon. Justice Kayode Eso; Hon. Justice Philip Nnaemeka Agu, and Chief Ladi Rotimi-Williams SAN, as Secretary.

The panel after reviewing the evidence presented to the committee by both the Respondent and the Appellants recommended to the committee that the compensation payable to the Appellants should be the sum of US$1.5 Billion. The committee in turn recommended that sum to the House of Representatives as the compensation payable to the Appellants.

The House of Representatives subsequently passed on May 28th, 2002, a resolution directing the Respondent to pay to the Appellants, compensation in the sum of US$1.5 Billion. The Senate also passed a similar resolution.

The Respondent however failed and/or refused to obey the resolutions and as such no compensation was paid to the Appellants pursuant to their petition.

In a bid to enforce the award made by the aforesaid resolution, the Appellants took out, in the Federal High Court, an originating summons seeking *inter alia* a declaration that the Respondent was bound to comply with the aforesaid resolution and an order compelling the Respondent to pay to the Appellants the compensation fixed at US$1.5 Billion. After hearing both parties, Okeke, J., of the Federal High Court granted the Appellant's reliefs in a judgment delivered on February 24, 2006.

Being dissatisfied with the judgment, the Respondent appealed to the Court of Appeal and applied to the Federal High Court for a stay of execution.

On 19th May, 2006 the Federal High Court in a ruling delivered on that date granted the Respondent's application on the condition that the Respondent deposited the judgment debt of US$l.5 Billion with the Central Bank of Nigeria in an interest yielding account in the name of the Chief Registrar, Federal High Court of Nigeria. The order was to be complied with on or before 22nd May, 2006.

The Respondent then filed in the Court of Appeal a similar application dated 19th May, 2006, seeking an unconditional stay of execution.

Whilst the Respondent's application for unconditional stay of execution was pending in the Court of Appeal, it brought another motion dated 19th September, 2006 seeking two prayers as follows:

> "1. Granting leave to the Defendant/Appellant/Applicant to amend the notice of appeal in this matter by filing and arguing the amended notice of appeal including raising fresh issues herein attached as Exhibit SPDC 1.
>
> 2. For accelerated hearing of the appeal."

The Court of Appeal decided to hear the two motions together and delivered a single ruling thereon on 10th May, 2007 in which the court granted the prayers contained in the motion dated 19th September, 2006 as well as an unconditional stay of execution of the judgment of the Federal High Court.

Being dissatisfied with the ruling of the Court of Appeal, the Appellants have appealed to this court by a notice of appeal dated 22nd May, 2006 and filed on same day.

On 6th February, 2008, this court granted the Appellants an order for extension of time within which the Appellants may file the record of appeal in this matter and deemed the record already filed as being properly filed.

The Appellants filed 6 grounds of appeal and formulated three (3) issues in an Appellants' brief filed on 28/9/09-

1. Whether the Court of Appeal followed the principle laid down by the Supreme Court for the grant of unconditional stay of execution for money judgment in granting to the Respondent an unconditional stay of execution of the judgment of the Federal High Court.

2. Whether the first prayer contained in the Respondent's motion dated 19th September, 2006 was not too vague and bad in law to be granted by the court.

3. Whether the Court of Appeal ought not to have struck out the Respondent's appeal in the court below rather than setting it down for hearing expeditiously when the time within which the Respondent should file its brief of argument had expired and there was no application for enlargement of time to file the brief.

The Respondent on the 12/6/08 filed a brief settled by Chief Richard Akinjide in which it framed a preliminary objection to the Appellants' notice and grounds of appeal. Learned counsel further couched four (4) issues for determination in the event that the preliminary objection failed. These are SPDC's issues for determination on the merit of the appeal.

In the alternative to the Respondent's (SPDC) preliminary objection, the Respondent argues as follows against the Appellant's appeal on the merit:

The Respondent (SPDC) formulates the following issues for determination:

(a) Whether the judicial discretion of the courts to grant unconditional stay of execution is dependent on the consent of the judgment creditor, irrespective of the peculiar facts of each case?

(Formulated from Ground 2 of the notice of appeal and encompasses Appellants' Issue 1)

(b) Whether or not, having regard to the law and the affidavit evidence, the Court of Appeal was right in granting the reliefs contained in the first paragraph of the prayers in the Respondent's motion dated September 19th, 2006?

(Formulated from Ground 1 of the notice of appeal and encompassed Appellants' Issue 2)

(c) Whether the order for the filing of briefs made by the Court of Appeal is a necessary and consequential order following the grant by the Court of Appeal of the reliefs in the Respondent's motion dated 19/9/2006 (as the Respondent contends) or whether the order for the filing of briefs amounted to granting a relief not sought (as the Appellants contend)?

(d) Whether or not, having regard to all the facts and circumstances of the case, the Respondent's appeal at the Court of Appeal can, in law, be deemed to have been abandoned.

The preliminary objection of the Respondent has to be taken before anything else since the competence or otherwise of the appeal is at stake and along with it the necessary jurisdiction of the court to adjudicate.

Chief Akinjide SAN., for the Respondent contended that the present appeal arose from the interlocutory decision of the Court of Appeal made on 10th May, 2007 and by virtue of Section 21 (2) of the Supreme Court Act, requires as a condition precedent, the leave of either the Court of Appeal or this court before the filing of the notice of appeal which leave the Appellant failed to obtain. He stated on that Grounds 3, 4 and 5 of the Appellants' notice of appeal are grounds of mixed law and facts and so leave was a necessity. He cited *Opuiyo v Omoniwari (2007) 6 SC (Part I) 35; (2007) 16 NWLR (Part 1060) 415 at 430; Metal Construction W.A. Ltd. v Migliore (1990) 2 SC 33; (1990) 1 NWLR (Part 126) 299 at 314 A-B; Nwadike v Ibekwe (1987) 2 NSCC 1219 at 1235; Ojemen v Momodu II (1983) NSCC 135.*

In a reply brief filed on 11/7/08, learned counsel for the Appellant answered the questions raised in the preliminary objection and enjoined the court to interpret Section 233 of Constitution reading all the relevant subsections together thereby derive the real meaning and the intendment behind the provisions. That Section 21 (2) of the Supreme Court Act must be interpreted to be in harmony with Section 233 of the Constitution. He referred to Section 117 of the 1963 Constitution in situations akin to the present, which section is in *pari materia* with Section 233 of the 1999 Constitution. He cited *National Employers Mutual General Insurance Association Ltd. v Uchay (1973) 4 SC 1; (1973) 4 SC (Reprint) 1; Onigbeden v Balogun (1975) 5 SC 63; (1975) 4 SC (Reprint) 63.*

I shall quote the relevant provisions of the 1999 Constitution in relation to appeals to this court and they are as follows:

Section 233(2) (a) of the 1999 Constitution:

"An appeal shall lie from decision of the Court of Appeal to the Supreme Court as of right in the cases:

(a) Where the ground of appeal involves question of law alone, decision in any civil or criminal proceedings before the Court of Appeal."

Section 233(3) of the 1999 Constitution:

"Subject to the provisions of subsection (2) of this section, an appeal shall lie from the decisions of the court of appeal to the Supreme Court with the leave of the Court of Appeal or the Supreme Court."

Section 233(6) of the 1999 Constitution:

"Any right of appeal to the Supreme Court from the decisions of the Court of Appeal conferred by this section shall, subject to Section 236 of this Constitution, be exercised in accordance with any act of the National Assembly and rules of court for the time being in force regulating the power, practice and procedure of the Supreme Court."

Section 21(2) of the Supreme Court Act:

"Where in the exercise by the Court of Appeal of its jurisdiction an interlocutory order or decision is made in the course of any suit or matter an appeal shall, by leave of that court or of the Supreme Court, as the case may be, lie from any order made ex-parte or by consent of the parties or relating only to costs."

The Respondent submitted that:

Section 233(3) of the Constitution provide for appeal with leave in all other cases not covered by Section 233(2) of the 1999 Constitution. Those interlocutory appeals from the Court of Appeal to the Supreme Court are covered by Section 233(3) of the 1999 Constitution.

Learned senior advocate for Respondent said that:

Section 233(6) of the 1999 Constitution provides, in mandatory terms, that the exercise of any right of appeal conferred by Section 233 of the Constitution, which no doubt includes the right of appeal created in Section 233(2)(a) of the 1999 Constitution, shall subject to Section 236 of this Constitution, be exercised in accordance with any act of the National Assembly, which no doubt, includes the Supreme Court Act.

That the latter provision of Section 233(6) of the 1999 Constitution, which takes precedence, having made the exercise of the right of the appeal created in Section 233(2) (a) of the 1999 Constitution exercisable in accordance with the Supreme Court Act, which is an Act of the National Assembly, Section (21)(2) of the Supreme Court Act, applies.

That by Section 21(2) of the Supreme Court Act, appeals on interlocutory decisions of the Court of Appeal lie to the Supreme Court with the leave either of the Court of Appeal or the Supreme Court.

Whereas Section 233(2) (a) of the 1999 Constitution relates generally to "decision" of the Court of Appeal, Section 21(2) of the Supreme Court Act deals specifically and unambiguously with appeals from interlocutory decisions of the Court of Appeal.

Reading the relevant constitutional provisions within the ambit of what is before the court, the appeal is really on grounds of law *simpliciter* and there is no requirement for leave to appeal first applied for and obtained. No matter how coloured, it cannot change from that of ground of law to being what it is not, that is mixed law and facts which the Respondent is urging, the numerous judicial authorities cited of Respondent's counsel notwithstanding. The preliminary objection fails and is therefore dismissed.

Arguing the appeal along the lines of the issues crafted, learned senior advocate, Tayo Oyetibo stated that this application being for a variation of conditions or terms of stay of execution, the Applicant has a burden to prove that the conditions or terms imposed by the trial court are onerous and deserve to be varied. That the variation cannot be granted on the mere asking. He cited *CBN v Beckitt Construction Ltd. (2004) 14 NWLR (Part 893) 233 at 297.*

That the Respondent had admitted before the trial court as per their 1st further affidavit that they had the financial ability to pay the judgment debt. That the Court of Appeal therefore misdirected itself in law when it granted the unconditional stay based on impecuniosity, colossal judgment debt, contribution to judgment debt by Federal Government, conditions not to come into play in such an application either for stay or variation for unconditional stay of execution of judgment. He cited *Franchal (Nig.) Ltd. v Nigeria Araba Bank Ltd. (2000) 6 S. C. (Part I) 1; (2000) 9 NWLR (Part 671) 1 at 22 B-C; Nwabueze v Nwosu (1988) 9 S.C. 68; (1988) 4 NWLR (Part 88) 272; Mobil Producing Nig. Unlimited v Monokpo (2001) 18 NWLR (Part 744) 212 at 242; Okafor v Nnaife (1987) 4 NWLR (Part 64) 129 at 136; Mobil Oil Ltd v Agadaigho (1988) 2 NWLR (Part 77) 388; Martins v Nicannar Food & Co. Ltd. (1988) 2 NWLR (Part 74) 75.*

Chief Akinjide SAN, responding submitted that the grant of unconditional stay of execution is a matter of the judicial discretion of the court and not subject to the discretion or consent of the judgment creditor. That if the discretion is left to the whims and caprices of a judgment creditor or any of the parties to the case, it ceases to be a judicial discretion. He cited *UBN Ltd. v Odusote Bookstore Ltd. (1994) 3 NWLR (Part 331) 129; NNPC v BCE Consulting Engineers (2004) 2 NWLR (Part 858) 484; Akujinwa v Nwaonuma (1998) 11-12 SC 112; (1998) 13 NWLR (Part 583) 632; A-G Rivers State v Ude (2006) 6-7 S.C. 131; (2006) 17 NWLR (Part 1008) 436 at 461.*

In granting the unconditional stay of execution, the Court of Appeal had held at Pages 317-318 of Volume 11 of the record of appeal as follows:

> "In view of the huge amount involved in the judgment/debt and the unreasonableness of the order itself particularly as to the time lag in the deposit of such amount, the third party interests in the assets relied upon to make the order
>
> (1) The Federal Government.
>
> (2) Third parties having various contracts with the Appellant/Applicant.
>
> (3) Agip and Elf Nigeria Limited as co joint venture, the preservation of the *Res* and the protection of the Applicant as a business entity, the court shall be cautious in the surrounding circumstance not to make an order that will have the effect of killing the goose that will eventually lay the golden egg. A situation where an Applicant will be unable to exercise his constitutional right of appeal due to impecuniousity will be a special circumstance that may persuade the court to grant the Applicant an unconditional stay. The case of *Mobil Producing v Monokpo (2001) 18 NWLR (Part 744) 212*, is not applicable to this application as the Applicant in that case is not a Nigerian company and more so had no known assets capable of being attached within Nigeria. In the instant application it is not disputed that the Appellant/Applicant has assets and facilities far in excess of the judgment debt within the jurisdiction of the court and in Nigeria. SPDC is also a Nigerian company wherein the Federal Government has 55 % equity interests. It must not elude the court that any order made by court is an interim order pending the hearing and determination of the substantive appeal.

What in my view is called in question is the judicial discretion exercised both by the trial Federal High Court and the Court of Appeal and what the attitude of this court should be to either of the two decisions. For effect, the high court granted a conditional stay which was to get the Respondent sum of 1.5 Million Dollars or 190 Billion Naira into an interest yielding bank account and at the Court of Appeal, the Respondent had asked for an unconditional stay of execution which in real terms was a variation of the order of the High Court and which variation the Court of Appeal granted.

The practice of law in matters of judicial discretion are spelt out in clear terms and that is, that since facts of two cases are not always the same, this court does not make a practice of laying down rules or principles to fetter the exercise of its discretion or of the exercise of discretion by the lower courts. Therefore, it is safe to say that in matters of discretion, no one case is authority for the other. This is because when one case is authority for another and the court bound by a previous decision in the particular way that would put an end to discretion. See: *Akujinwa v Nwaonuma (1998) 11-12 SC 112; (1998) 13 NWLR (Part 583) 632 at 647; A-G Rivers State v Ude(2006) 6-7 SC 131; (2006) 17 NWLR (Part 1008) 436 at 461.*

Indeed it is within the rights of the Respondent to apply for a further stay of execution with terms or conditions which may differ from those imposed by the Court of Appeal. This is allowable under Section 24 of the Supreme Court Act. This variation may be granted by the Supreme Court or further varied or annulled. See: *Union Bank of Nigeria Ltd v Odusote Bookstores Ltd. (1994) 3 NWLR (Part 331) 129 at 133;*

I am satisfied as my learned brother, Fabiyi JSC, in the leading judgment has found that the Court of Appeal was right to have made the orders it made of granting the unconditional stay of execution. This is because that court rightly found and I agree that not granting the unconditional stay of execution would have the effect of frustrating the possible outcome of the appeal in the event that the substantive appeal succeeded. The need to be cautious could not have been an overstatement.

This appeal is dismissed and I affirm the decision of the Court of Appeal including the unconditional stay of execution and the accelerated hearing of the appeal before that court.

Counsel

Tayo Oyetibo. SAN .... For the Appellants
with him
K. Onunojo
A. Kayode
O. Obele
S. Edward

Chief Richard Akinjide. SAN .... For the Respondent
with him
K. Obisike