

# IN THE SUPREME COURT OF NIGERIA

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Suit No: SC27/1980

**Petitioner:** Kigo (Nigeria) Ltd

And

**Respondent:** Holman Brothers (Nigeria) Ltd

Date Delivered: 1980-06-24

**Judge(s):** Mohammed Bello , Chuckwunweike Idigbe , Andrews Otutu Obaseki , Kayode Eso , Muhammadu Lawal Uwais

## Judgment Delivered

On 5th May 1980, we granted the prayer of the Applicant, on a motion that

pending the determination of the appeal filed herein, further proceedings in the action now pending before the Kano High Court shall before the Kano High Court shall be stayed ..... .. """"

and reserved our reasons for so doing till today. To appreciate my reasons for coming to the decision taken with Your Lordships that the stay, prayed for, as aforementioned, be granted, it is necessary for me to state the facts that led to the application which gave rise to this aforesaid order of this Court.

The plaintiff in the High Court, Kigo (Nigeria) Limited who in this Ruling will hereinafter be referred to as the Respondent, took an action against the Defendant, that is, the Applicant in this court, and who hereinafter in this Ruling, will be referred to as the Applicant. The claim as per the writ of summons is as follows

.....the right to reject the whole crushing plant comprising one Goliath primary Crusher 30 x 18 and one Goliath Secondary 30 x 24 sold and delivered by the defendant to the plaintiff between April and September 1978.

"".....special and general damages for several branches of contract by defendant in respect of goods sold and delivered by the defendant and for several wrongs committed in tort against the plaintiff including deceit, fraud, false representations and negligence whereby the plaintiff has suffered substantial damages.

The total amount of special damages was N3,836,323.02. There was also a claim for general damages and interest.

The Applicant thereupon served a Third Party Notice upon Godwin Barsby Limited, hereinafter referred to in this ruling as the Third Party claiming

to be indemnified against the plaintiff's claim and the costs of the action or alternate contribution in respect of all or each of the plaintiff's claim on the grounds that the plaintiff's claim is the result of (sic) the third party's acts of commission and/or omission breaches of contract and breaches of warranty.

The Third Party brought an application in the trial court, the High Court of Kano, wherein he sought an order for

the setting aside of the proceedings in the Third Party notice or to strike out the Third Party from the action""....

The Court, presided over by Rowland J. in a considered ruling, granted the order, set aside the proceedings on the Third Party Notice and struck out the Third Party from action

for reason of lack of jurisdiction to entertain the matter if any between the defendant the Third Party""..

This was the beginning of the drama which eventually culminated in the instant application in this court. The applicant sought leave of the Kano High Court to appeal from the ruling of that Court and for the Court to grant a stay of further

proceedings pending the determination of such appeal.

Both prayers were refused. The applicant thereupon made similar application to the Federal Court of appeal with a simultaneous application to the Kano High Court for an adjournment, by that Court, of further hearing of the substantive action, in view of the application for leave to appeal and stay, made to and pending in the Federal Court of Appeal. The High Court refused that application for adjournment.

In regard to the application made to the Court of Appeal however, that Court made an interim order of stay of further proceedings in the substantive action in the Kano High Court, pending the determination by the Court (that is the Federal Court of Appeal) of the application before it for leave to appeal and stay.

This interim order for stay made by the Federal of Appeal continued till 31st March, 1980, when the Court gave their ruling on the application aforementioned. The Court, in their ruling, refused the applicants application for leave to appeal to that Court, and, this application for leave to appeal being the gravaman of the prayer before the court, the issue of the application for stay of further proceedings in the Kano High Court no longer arose, and so the application in regard thereto was also refused. The interim order for stay which was earlier granted automatically fused out. Nnaemeka-Agu, J.C.A. giving the ruling of the Court, with M. Nasir, P. and B. O. Kazeem, J.C.A. concurred said

Upon a calm view of the above facts and circumstances I am of the opinion that although the learned judge took a narrow perhaps wrong view of the bearing of Exhibit PO2 on the jurisdiction of Kano High Court, there were other sufficient and compelling reasons for the course he took. I have not been persuaded that there is prima facie a ground for which to say that he exercised his discretion on wrong principles. I must therefore refuse leave to appeal and application for stay of proceedings in the main case and they are hereby refused.

This was on 31st March, 1980.

The next stage in this interesting drama was set on 14th April 1980. The Applicant applied to the Federal Court of Appeal for leave to appeal from their decision of 31st March aforesaid to this Court. The Federal Court of Appeal granted the application for leave to appeal but refused an order for stay on the ground that granting such an order would tantamount to sitting as a Court of Appeal over their decision of 31st March.

This then is the background to this application before this Court for stay of further proceedings of the substantive action in the Kano High Court.

Before dealing with the several submissions of learned counsel in the application, it is pertinent to state that the Third Party notice, when filed, was served on Mr. J. B. Majiyagbe, S.A.N. of counsel. This is clear from the ruling of the trial court, for Rowland J., the trial judge, stated in that ruling that Mr. Majiyagbe admitted that he accepted service. It is also clear on the record that after pleadings had been ordered, Mr. Majiyagbe for the Third Party applied for extension of time within which to file a statement of defence for the Third Party. Further, it is on record that Mr. Majiyagbe, in asking for that extension of time to file the statement of defence, asked for a fixed date for the hearing of the action. It was on the application by Mr. Majiyagbe to extend time that the trial court granted thirty days extension of time to the Third Party to file his statement of defence and further set aside two weeks for the hearing of the case.

Indeed, the affidavit of the Managing Director of the Respondent Company, Mr. Kenneth Edward Gray filed in this Court in the process of the instant application, throws more light on the matter and brings out the more succinctly, the activities of the Third Party in this drama. I will refer to only two paragraphs of this affidavit. Mr. Gray deposed

7. On 19/11/79 Mr. Majiyagbe counsel for the Third Party informed the court he will file an application for extension of time to file Third Party Defence. Chief Bayo Kehinde counsel for defendants informed the court that he had no objection.

.....

12. The Third Party subsequently filed an application to extend time to file a defence. The Defendants did not object to the Third Party's delay to complete their pleadings. The Third Party's application was heard and granted on 10/12/79 ""Extension of time of 30 days to file a Defence was granted to the Third Party on 10/12/79 and all parties agreed that the case be fixed for hearing for two weeks commencing on 26/2/80.

(underlining mine)

So Mr. Majiyagbe not only accepted service, he applied for an order for pleadings, applied for extension of time and asked for definite date for the hearing of the case which the Court granted. Yet the same Court ruled

their counsel Mr. Majiyagbe only entered an appearance merely to protest that this court does not have jurisdiction to determine any dispute if any between the defendant and the third party and the entry of his appearance does not constitute a submission to the jurisdiction of this Court.

(underlining mine)

Now, it has been necessary to state all these facts antecedent to the present application, before this Court, to stay further proceedings before the High Court of Kano, and refer to the activities of learned counsel for the Third Party in the trial Court for the simple reason that the jurisdiction of the Court to entertain an application for the stay sought in the instant application is discretionary. Let me enter a caveat at once. It is not my intention here to pronounce on the aspect of the decision of the High Court which set aside the Third Party Notice striking out the Third Party from the action. I am conscious of the fact that there is still an appeal before this Court to determine whether the decision of the Federal Court of Appeal, refusing the Applicant leave to appeal to that court from that decision of the Kano High Court which set aside the proceedings on the Third Party Notice and struck out the Third Party from the action, is right or not. Care must therefore be taken not to prejudice that issue that may still come before the Federal Court of Appeal or give colour to anything that might have a seeming appearance of this court taking an appeal straight from the High Court for, definitely, under the Constitution, it has no such jurisdiction. And for that reason, no more will be said in this ruling on the issue of the action of the Third Party more than what is necessary of the facts that led to the exercise of our discretion in granting the stay sought in the application before us.

In support of his application, in this Court, for stay of further proceedings of the main action in the High Court, Chief Williams, S.A.N., learned counsel for the Applicant, dealt exhaustively with the issue of jurisdiction of this court and the Court of Appeal to grant such stay. He submitted that the Court from which the appeal lies as well as the Court to which the appeal lies both have duty to ensure that the appeal, if successful, is not nugatory and that the Court will make an order to that end. Learned counsel referred us to statutory powers of this Court contained in section 22 of the Supreme Court Act 1960 and in Order 7, Rule 26, Supreme Court Rules 1977 setting out general powers of the Court in this regard. Counsel also drew our attention to the recent decision of this Court in *Shodeinde and Ors. v. Ahmadiya Movement-In-Islam* (1980) 1-2 S.C. 163 and the cases considered in that decision to wit

*Ogunremi v Dada* (1962), 1 All N.L.R. 663

*Vaswani trading Co v. Savalakh & Co.*(1972) All N.L.R part 2 483

*Wilson V. Church* (No.1), (1879) 11 Ch.D 576

*Re Erinford Properties*, (1974) Ch.261

*Andler & Ors. V. Duke & Ors.*(1932) 3 Dom..L.R. 210

Learned counsel concluded by asking for an accelerated hearing of the case.

Mr. Noel Gray's learned counsel for the Respondent's, main contention was in regard to the issue of delay. He said there would be hardship on the Applicant if a stay was granted, while Mr. Majiyagbe, for his part did not seriously

oppose the issue in the prayer.

This Court in the recent case of Chief Yishau Popoola Oyesile Shodeinde and Ors. V. The Registered Trustees of the Ahmadiya Movement-in-Islam (1980), 1-2 S.C. 163, to which Chief Williams has directed our attention, reviewed the previous authorities on the jurisdiction of the court to stay proceedings where there is an appeal against its judgment. The question before the court in the Shodeinde case supra was strictly as regards the jurisdiction of the High Court, (that is a trial court), to grant an order of injunction pending an appeal against its decision where that court has dismissed the action. Idigbe, J.S.C. in his judgment, classified the question into two main parts and they are

(1) Whether, generally, the High Court has jurisdiction to stay proceedings in respect of its decision under appeal

(a) where by the said decision. it has dismissed a claim before it "absolutely"; and

(b) if so, whether in any event it can exercise such jurisdiction after the order has been drawn up and enrolled'

(2) (and this has been the major issue on which arguments have centred in this appeal) whether the High Court has jurisdiction to stay proceedings, under its judgment on appeal upon application by parties to the proceedings (and, in particular, by an unsuccessful plaintiff) for "injunction to restrain an act under the decision on appeal pending the determination of the said appeal.

The entire Court in that case held that the High Court, in such circumstance, has jurisdiction to grant a stay. The Court held

I find it difficult, therefore, to subscribe to the view that a court becomes stripped of its jurisdiction to control the proceedings to the extent of preserving the subject matter of litigation, should it become necessary to do so, as soon as the court dismisses the proceedings before it

""""as per Idigbe J.S.C. at (p.181 ibid)

The High Court does not lose its jurisdiction to entertain applications for stay of proceedings or actions under its judgment, order or decisions or actions under appeal to the Court of Appeal . . . . .

(p.184 ibid)

The real question for determination in this case is quite different. It is as regards the jurisdiction of this court to grant a stay of further proceedings in the High Court pending the determination an appeal against the decision of the Court of Appeal filed herein. And there lies the difference between this case and the question that arose in the Shodeinde case supra. It is therefore in view of this difference, that I intend to examine the authorities, as they relate to the question that arises in this case.

It is my firm view that the court from which an appeal lies as well as the court to which an appeal lies have a duty to preserve the res for the purpose of ensuring that the appeal, if successful, is not nugatory. In this case, the High Court of Kano, the Federal Court of Appeal and this Court not only have jurisdiction but also a duty to preserve the res. When a party is appealing, and leave to appeal to this Court has been granted him, either by the Federal Court of Appeal or this court, he possesses an undoubted right of appeal and this Court has a duty to see that the appeal, if successful, is not in (See Wilson V. church (No.2) (1879-80) 12 ch.D. as per Cotton L.J.). That, in my view, generally, constitutes an appropriate case for the Court to exercise its jurisdiction. I have used the word "generally", advisedly, for there would be cases where to grant a stay would inflict greater hardship than it would avoid notwithstanding the right of appeal in the applicant. There could also be cases where the appeal filed, even after leave has been obtained, is frivolous. Surely, in cases like these, it could not be said that the exercise of its jurisdiction by the court, seised of the appeal, would be appropriate.

It follows, therefore, that though the court has jurisdiction to preserve the res, once the matter is on appeal, the exercise of the jurisdiction, being a matter of the discretion of the court, would depend on the facts and circumstances in each

case. And this is more so for this Court, being the court of last recourse. For once this court is seised of the appeal it is in a good position to determine whether or not the appeal is frivolous, whether or not the circumstance is such that the exercise of its discretion in regard to granting a stay would cause greater hardship than none.

I will now deal with the derivation of the power, that is, the power of the court to preserve the res. The power has always been inherent though in certain cases as would be seen anon, it is also statutory. Indeed, from time immemorial, all courts of record, be they trial or appellate, possess power of preservation of the res in their custody. See *Andler v. Duke* (1932) 3 D.L.R. 210 as per McPhillips J. A. at p.220; see also *The Zamora* (1916) A.C. 77, where Lord Parker of Waddington put the matter thus

The primary duty of.....(as indeed of all courts having the custody of property the subject of litigation) is to preserve the res for delivery to the persons who ultimately establish their title

(underlining mine)  
page 99 *ibid*.

With respect, this legal proposition accords with commonsense, for it is a well-known fact that the court never acts in vain. It is my respectful view my Lords, that in the instant case, there is inherent power in the Kano High Court, the Federal Court of Appeal as well as this Court to preserve the res in action once an appeal was lodged against the decision of the High Court or the Federal Court of Appeal as the case may be. In other words, the Kano High Court could exercise its inherent power as soon as an appeal was filed against its decision (see the *Shodeinde* case *supra*); and similarly, the Federal Court of Appeal, once it was seised of the appeal from the Kano High Court whether or not the appeal was drawn up and entered, (see *Polini V. Gray*, (1879) 12 Ch.D 438 as per Cotton L.J. at p.446; see also the *Shodeinde* case (*supra*) as per Idigbe J.S.C. at p.185). Both the Federal Court of Appeal and this court also have power once the appeal was filed here against the decision of the Federal Court of Appeal.

With great respect to their Lordships of the Federal Court of Appeal, they were in serious error when they declined jurisdiction on the ground that granting the order of stay would tantamount to sitting as a court of appeal over their own decision. See the dictum of McPhillips J.A. in *Andler V. Duke* (*supra*) which was approved in the *Shodeinde* case *supra*. The learned judge said at p.218 of the report

.....With great respect to all contrary opinion, even though the judgment has been taken out and entered, there remains the power to preserve the res - it is not in any way changing or altering the judgment, it is merely a preservative order from time immemorial exercised by all courts

(underlining mine)

See also the *Zamora* (*supra*). Though the res in the *Zamora* is tangible - a vessel - the same principle obtains where the res is, as in this case, intangible. The res here, as Chief Williams has in my view, rightly submitted, is one of determination of the question of the opportunity of having whatever happens to the applicant being the responsibility of the Third Party.

The wide power of the Court to grant stay is further illustrated in the case of *Wilson V. Church* (No.1) 11 Cn.D 576. In that case, there were two actions; but the plaintiffs in *Wilson V. Church* were not parties to the other action. The trustees of the fund in issue were defendants in both cases. The plaintiffs in *Wilson V Church*, on the commencement of the second suit, (to which they were not parties) and which asked for declaration for the payment out of the trust fund to the plaintiffs in the second case, applied to the Master of the Rolls for an injunction to restrain the defendants/trustees in that second case from parting with any part of the trust funds. The Court of Appeal in England granted injunction against the trustees. The Court held that there would be an injunction to restrain the trustees from parting with any part of the fund till the hearing of the appeal. The effect of the judgment is that the Court granted the injunction binding the defendants/trustees from parting with the money to the plaintiffs in the second case though the plaintiffs in *Wilson v. Church* were not parties to that case.

So far for inherent powers. Apart from the power inherent in this Court to grant stay, there are, as I earlier said, statutory provisions. These are contained in s.22 of the Supreme Court Act No 12 of 1960, which empower this Court, from time to time, to make any order for the determination of the real question in controversy in an appeal and to make an interim order or grant any injunction which the High Court or the Federal Court of Appeal has power to make or grant; and, also, in Order 7 Rule 26(8) the Supreme Court Rules 1977 which provides -

The Court shall have power to make orders by way of injunctions .....  
for the protection of property..... pending the determination of an appeal...

For the statutory powers of the Federal Court of Appeal in this regard, see s.18 of the Federal Court of Appeal Decree, 1976.

It is now necessary to examine the appropriateness or otherwise of the exercise of the discretion of this Court in its jurisdiction to stay further proceedings in the instant case. The crux of the matter and the dispute here is the joinder of the Third Party. I have already stated the facts in regard to the action of learned counsel for the party after he had accepted service of the Notice. I have earlier on said that the res to be preserved is the opportunity for the determination of the question of the shift of responsibility from the Applicant to the Third Party, after the determination of the responsibility of the Applicant in the substantive case by the trial court, for, intangible as the res here appears to be, its substance lies in the purpose which the Third Party Rule is to serve.

What then are the objects of the Third Party Rule? I think it is necessary to expand a bit on this. The objects of the Third Party Rule are, firstly to prevent multiplicity of actions and enable the court to settle the disputes between all parties, that is, plaintiff, defendant and the Third Party in a single action; and secondly to prevent an issue from being tried twice with possibly different results. (See the observations of Lord Esher M.R. in *Baxter V. France* No. 2, 1895, 1 Q.B. 591, as at p.593.) I also approve of the dictum of Scrutton L.J. on the same subject

The object of the third party procedure said Scrutton L.J. in *Barclays Bank V. Tom*, 1923, 1 K.B. 221 at p.24 is in the first place to get the third party bound by the decision between the plaintiff and the defendant. In the next place it is directed to getting the question between the defendant and the third party decided as soon as possible after the decision between the plaintiff and the defendant, so that the defendant may not be in position of having to wait a considerable time before he establishes his right of indemnity against the third party while all the time the plaintiff is enforcing his judgment against the defendant. And thirdly, it is directed to saving the extra expense which would be involved by two independent actions.

What is important is that, where there are two independent actions, it is possible to have varying results (see *Benecke V. Frost*, (1876) 1 Q.B.D. 419 at 422, as per Blackburn J.; and *Standard Securities Limited V. Hubbard* (1967) Ch. 1056 as per Penny'cuick J. at p.1059).

It seems clear to me, therefore, that with the discharge of the Third Party from the action by the High Court of Kano, the application filed here for stay of further proceedings in that High Court pending the determination in this Court of the appeal against the order discharging the Third Party from the proceedings, is neither hollow nor idle. It is also clear to me that the application is, in fact, strengthened by the order of the Federal Court of Appeal itself, which has given leave to applicant to appeal to this court after the order of discharge and finally the activities of learned counsel for the Third Party after accepting service.

I have without hesitation come to the conclusion therefore, that this is an appropriate case for this Court to exercise its discretion in its undoubted jurisdiction to stay further proceedings. The complaint of Mr. Gray that there might be delay is taken care of by the application of Chief Williams for an accelerated hearing of the appeal. The justice of this case demands that a stay ought to be granted; and it is for all these reasons that I agree that your Lordships should grant the stay which was accordingly granted, and that the appeal before this Court be adjourned for hearing today.

Costs of N25.00 are hereby awarded in favour of the Applicant against the Respondent and the Third Party severally.

Reasons for Ruling given by  
Mohammed Bello. J.S.C.

I have read in draft the Reasons for Ruling just delivered by my learned brother, Eso J.S.C., and I entirely agree.

Reasons for Ruling given by  
Chuckwunweike Idigbe. J.S.C.

I have had the advantage of reading in draft the reasons for the Ruling of this Court on the 5th day of May 1980 in respect of this application delivered by My Lord Eso J.S.C. with which I entirely agree and do not think I can usefully add more.

Reasons for Ruling given by  
Andrews Otutu Obaseki. J.S.C.

I have had the advantage of reading, in draft, the reasons for the ruling delivered a short while ago by my learned brother, Kayode Eso J.S.C. and it was for the reasons so ably set out that I agreed to the grant of a stay of proceedings on the 5th day of May, 1980.

Reasons for Ruling given by  
Mohammadu Lawal Uwais. J.S.C.

I have had the opportunity of reading in draft the reasons for ruling just delivered by my learned brother Eso J.S.C. I have nothing to add except to say that I agree with all the reasons given by him for allowing the application to stay further proceedings in the suit before the Kano State High Court pending the determination of the appeal in this Court.