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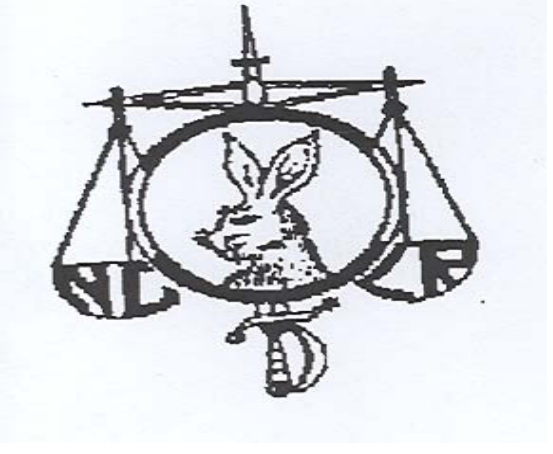

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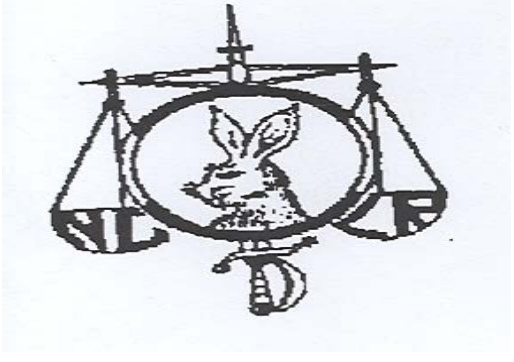

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VOLUME 2

NATIONAL COUNCIL FOR LAW REPORTING

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BAI MATARR DRAMMEH & ANOR V DEBORAH HANNAH FOSTER & ORS

COURT OF APPEAL OF THE GAMBIA
(Civil Appeal No 18/07)

17th April 2007

Agim PCA

Company Law – Companies Act – Effect of Section 81- Increase in share capital – Procedure required by law.

Court – Stay of execution - Principles guiding its grant – Jurisdiction of a Court to grant same – Ex-parte order – Attitude of Court on ex-parte order made to last till the determination of the case.

Injunction – Ex-parte order – Object thereof – Attitude of Court to ex-parte order made to last till the determination of the case.

Jurisdiction – Court – Whether the Courts have jurisdiction to grant stay of execution.

Practice & Procedure – Stay of execution – Guiding principles – Jurisdiction of the Court to grant same – Injunction – Ex-parte order – Object is to protect a legal right – Life time – Attitude of Court to order made to last till the end of the case.

Stay of Execution – Objective – Objectives of the concept of stay of execution – Guiding principles for the grant or refusal of an application for stay of execution – Special circumstances – What constitutes special circumstances – Jurisdiction of Court to grant same.

Held, *refusing the application (per Agim PCA)*

1. The objective of the concepts of stay of execution pending appeal is to protect the appeal proceedings and results from being rendered nugatory by the execution of the judgment appealed against.

2. The applicant seeking for a stay of execution pending appeal must satisfy the court on the following grounds which are not meant to be exhaustive: -

(i) That the appeal is arguable and not frivolous.
(ii) The existence of any special circumstances that is capable of defeating the appeal process if the judgment is not stayed.

[*Lang Conteh & Ors v T.K. Motors* (2002-2008) 2 GLR 23 referred to]

3. What constitutes special circumstances will depend on the peculiar facts of the case before the Court.

4. It is beyond per adventure that the Court has an unimpeded discretion to grant or refuse to grant a stay of execution of judgment pending appeal.

5. The applicant seeking an ex-parte order for an injunction must show the legal right he seeks to protect. The right must have existed status-quo ante bellum and not a right the applicant seeks to secure in the future by the contest. [*Paul v Azokpo* (1995) 4 SCNJ 119 referred to]

6. By Section 81 of the Companies Act, a certificate of shareholding is prima facie evidence of ownership of the shares.

7. Judicial restatements insist that an ex-parte injunction should not be made to last till the determination of the suit. They can only last for a short or interim period pending when both parties can be heard in respect of an interlocutory injunction.

8. Where an ex-parte order is made to last till the determination of the suit, the Courts have characterized it as a violation of the respondent's right to a fair hearing, as an illegality, an abuse of court process and a nullity. [*Kotoye v CBN* (1987) ALL NLR 76**;** *7up Bottling Co. Ltd. & Ors v Abiola & Sons Nig Ltd* (1995) 3 SCNJ 37 referred to]

9. An increase in share capital must be done through due and proper notice to all existing shareholders who must be present at the meeting when such decision is reached.

Cases referred to:

Belgolaise SA v Fawaz (1997-2001) GR 559
Ceesay v Bruce (1997-2001) GR 698
Jawara v Raffle (1997-2001) GR 67
Jawara No. 2 v Jabbi No. 2 (1997-2001) GR 534
Lang Conteh & Ors v T.K. Motors (2002-2008) 2 GLR 23
Kotoye v CBN (1987) ALL NLR 76
Paul v Azokpo (1995) 4 SCNJ 119
7up Bottling Co. Ltd. & Ors v Abiola & Sons Nig Ltd (1995) 3 SCNJ 37

Statutes referred to:

The Companies Act Cap 95:01 Vol. XXI Laws of The Gambia Section 81, 144
The Insurance Act Cap 54:01 Vol. XVII Laws of The Gambia Section 7
The Insurance Regulations 2004 Regulation 4

APPEAL against the ruling of the Learned Trial Judge vacating the second part of the order made on the 6th of March 2007 without hearing the parties and returning the parties to their status quo ante bellum. The facts are sufficiently stated in the opinion of Agim JCA**.**

M. N. Bittaye Esq. for the appellants/applicants
J. H. Esq. for the 1st & 4th respondents
H.Sisay-Sabally Esq. for the 3rd respondent

AGIM JCA. The plaintiffs commenced Civil Suit No. HC/342/06/CO/047/C2 by a writ of summons accompanied by a statement of claim. The plaintiffs claimed for among other things, the dismissal of the 1st Defendant as the Managing Director of the 2nd Plaintiff.

1. An order for the 1st Defendant to render accounts of all the assets of the 2nd plaintiff company, including all its bank accounts held in local banks and abroad, the money advanced to her on behalf of the 2nd Plaintiff company from Standard Chartered Bank (Gambia) Limited and monies she withdrew from the 2nd Plaintiffs' bank accounts abroad all for the purpose of purchasing and running as a business an ocean vessel owned by SEA EXPRESS LIMITED incorporated in The Gambia for the purpose of managing and running the vessel as an investment of the 2nd Plaintiff company, including an account of the unilateral management and running of the vessel based in Dakar, Senegal.

2. An order that the 2nd Defendant be the referee for the rendering of account by the 1st Defendant, DEBORAH HANNAH FOSTER.

3. A declaration that the 1st Plaintiff is a rightful member, Director Technical Adviser and owner of the 45% of the 90% issued and fully paid up of ordinary shares in the 2nd Plaintiff Company.

4. A declaration that the 4th Defendant's 667,859 ordinary shares in the 3rd Defendant Company are held in trust for the 2nd Plaintiff Company.

5. An order that the 4th Defendant to surrender and transfer the said 667,859 ordinary shares to the 2nd Plaintiff Company.

6. An order for rescission of the purported sale of the said shares by 2nd Plaintiff Company to the 4th defendant.

7. An order to dissolve the Board of Directors of the 2nd Plaintiff Company as presently constituted.

8. An order that the 1st Plaintiff BAI MATARR DRAMMEH be paid all his arrears of salary allowances and benefits he is entitled to from the 2nd Plaintiff Company.

9. An injunction against the 1st, 3rd and 4th Defendants by themselves their servants, proxies or agents to desist from

interfering with, dealing in or acting in any way or manner whatsoever in the running or management of the 2nd Plaintiff company, its assets or shares or the rights interests, duties and obligations thereof and in particular as against the 3rd and 4th defendants not to interfere with or act on or enforce any rights interests, duties or obligations in respect of the ordinary shares in the 3rd Defendant company held in the name of the 4th Defendant in trust for the 2nd Plaintiff, unless the court orders otherwise.

On the 1st of November 2006, upon the ex-parte application of the plaintiffs for an interim injunction, the Learned Trial Judge after ordering that the application be made on notice, proceeded to grant some of the orders ex-parte because plaintiff's counsel had impressed upon the Court that a certain meeting that would be detrimental to his client was to hold the next day. Whereupon the Court made orders that upon being drawn up, read as follows:-

"Upon hearing Counsel for the plaintiffs/applicants herein and upon reading the affidavit in support of this ex-parte application, I deem it fit to grant the application on prayers 4 and 5.

IT IS HEREBY ORDERED that the shareholders meeting of the 3rd defendant company scheduled to take place on Thursday, the 2nd of November, 2006 for the purpose of removing the 1st plaintiff as Executive Chairman or any other meeting to be convened for that purpose be suspended pending the determination of this suit.

It is further ordered that the 1st and 4th Defendants their agents, servants or proxies be restrained and an injunction order is hereby granted restraining the 1st and 4th defendants their agents, servants or proxies from exercising any rights or duties or deriving any benefits from the shares in the name of the 4th defendant in the 3rd defendant company till the determination of this suit."

The Learned Trial Judge who signed this drawn up order later realized that it did not reflect what is contained in her Court notes and transcripts. The Learned Trial Judge maintained that the words "for the purpose of removing the first plaintiff as executive chairman or any other meeting to

be convened for that purpose" do not form part of the first order she made. This issue led to the 1st plaintiff applying to the Learned Trial Judge to recluse herself from further hearing the said suit on grounds of bias. In ruling on the application on 6th March 2007, the Learned Trial Judge reclused herself from the case and set aside the ex-parte orders she made on 1st November 2006. She held that the first part of the order had been over taken by events since the meetings sought to be restrained had taken place. She decided to vacate the 2nd part of the Order and return the parties to their status quo ante bellum without hearing the parties. The plaintiffs appealed against this aspect of the ruling vacating the order without hearing them. The appeal was filed on the 14th March 2007. On the 21st March 2007, the plaintiffs as appellants applied to this Court by a motion ex-parte that this Honourable Court may be pleased to stay any action or reliance by the first, third and fourth defendants on the ruling of the Learned Trial Judge delivered on the 6th of March 2007 pending the determination of their appeal. When this matter came before me for hearing on the 27th March 2007, I ordered the appellants to put the respondents on notice of their application so that it can be heard inter-partes. On the 11th April 2007 when sitting in this matter resumed all the parties were represented. Joseph Joof Esq. had filed a notice of preliminary objection to the appellants motion on the ground that the application should have been made first to the Trial Court, before it can be brought to this Court. The objection was argued and overruled. Thereafter the parties proceeded to address this Court on the appellant's motion for stay. The motion is supported by a 10 paragraph affidavit deposed to by the 1st appellant. Exhibited along with the motion is the Trial Court's ruling of 6th March 2007, (from which the appeal arose)(BMDH), the notice of appeal (BMDH1), the Trial Court order of 1st November 2007 (BMDH2), GNIC Certificate of Shareholding for 667 859 shares in the name of Dr Mary Snow (BMDH3), GNIC certificate of shareholding for 510,000 shares in the name of the 2nd appellant (BMDH4), GNIC certificate of shareholding for 167,859 shares in the name of 2nd appellant (BMDH5), letter of 1st March 2006 from fourth respondent removing first appellant as Director of third respondent (BMDH6). The 1st and 4th respondents filed a 19 paragraph affidavit in opposition deposed to by the first respondent. Exhibited with it is a document titled Transfer of Shares (DHF) stating that the second appellant has assigned and transferred 677,859 shares to the fourth

respondent. The third respondent filed an affidavit of 17 paragraphs deposed to by one Sheik Lewis, the Company secretary of the third respondent. Exhibited with it are the writ of summons and statement of claim in the suit at the Trial Court, a letter dated 18th October 2005 from the Central Bank of The Gambia to the third respondent requesting it to recapitalize to meet the Capital and Solvency margin of D15 million as at March 31st 2007, minutes of the Extra-Ordinary General Meeting of shareholders of third respondent, the attendance sheet and notice of meeting.

Bittaye Esq. urged this Court to grant the appellants application because there are special circumstances warranting the grant of same. These circumstances include:–

1) That the grounds of appeal disclose substantial issues of law. He relied on Belgolaise SA v Fawaz (1997-2001) GR 559
2) That the appeal will be rendered nugatory if the application is not granted. He relied on Jawara v Raffle (1997-2001) GR 767

Counsel argued that the respondent is the owner of 677,859 ordinary shares in the third respondent company. That it is likely to be destroyed by alienation by the fourth respondent resulting in irreparable injury to the second appellant. The fourth respondent might conclude the dismissal for the first appellant as she had tried to do in exhibit BMDH6. He stated that the 677,859 shares on exhibit BMDH3 is the sum total of the 510,000 shares on exhibit BMDH4 and 167,859 shares on exhibit BMDH5 transferred by the second appellant to fourth respondent. It is his further contention that the 4th respondent holds the 677,859 shares in trust for the second appellant. Counsel however concedes that the 1st order in exhibit BMDH2 has been overtaken by events and that the first appellant is employed as executive chairman of the third respondent with the object that he keeps an eye on the 677,859 shares in the name of the fourth respondent who was holding same in trust for the second appellant.

Joof Esq. argued that the application should be refused for the following reasons –

1. The order is already vacated. There is nothing to stay or reverse.

2. It is not fair to preclude the first, third and fourth defendants from relying on the said ruling while the appellants are free to rely on same. He will prefer a situation where all parties are restrained from relying on the ruling.

3. It is clear that the appellants do not own shares in the third respondent. The second appellant who used to own shares in the third respondent has transferred her shares to fourth respondent. By Section 81 of the Companies Act, a Certificate of Share holding is prima facie evidence of ownership of the shares. The instrument of transfer makes her title complete.

4. That they transferred the shares to fourth respondent for safekeeping and for accounting purposes is an admission of fraud. The Court cannot enforce an illegality.

5. There is nothing authorizing the first appellant to sit on the board of the third respondent for the purpose of over seeing any shares.

6. The first respondent is the owner and majority shareholder of the second appellant. The share certificates are in the custody of the 4th respondent.

7. Section 114 of the Companies Act prohibits the holding of shares in trusts. The fourth respondent's name is in the register of shareholders as the holder of the said shares.

Sisay-Sabally Esq. restated the principles for the grant of a stay of execution pending appeal. She relied on Jawara v Raffle (supra), Jawara No. 2 v Jabbi No. 2 (1997-2001) GR 534 and Ceesay v Bruce (1997-2001) GR 698. She stated that the 3rd respondent is made a party to the suit and in this appeal because of the shares held by the 4th respondent in the 3rd respondent. The 1st and 4th respondents are afraid that the 3rd respondent is likely to comply with the Government on their regulations for increase in shares. The Central Bank of The Gambia has directed Insurance Companies to comply with Section 7 of the Insurance Act

which requires that an insurance company must have a minimum paid up capital as prescribed by Regulation 4 of the Insurance Regulations 2004. As exhibits D, D1 and D2 show, an Extraordinary General Meeting of Shareholders was held in April 2006 with the main agenda being capital argumentation of the Company. The fourth respondent is aware of this matter of capital argumentation. The above meeting was held before the commencement of this suit at the Trial Court. The statutory obligation of the 3rd respondent to increase its share capital has nothing to do with ownership of the disputed shares. She submitted that in the event that the application is granted it should be done in such a way that the 3rd respondent is not disabled from performing its statutory obligations. She concedes that the 4th respondent is the majority shareholder on their records. She prayed for an accelerated hearing of the appeal.

By way of rejoinder, Joof Esq. said that the 4th respondent has no objection to the Insurance Act and Regulations being complied with.

I have considered the facts deposed to in the affidavits and the arguments of Counsel. I must commend Counsel for the professionalism with which they have all handled this matter. I agree with the restatement by Bittaye Esq. and Sisay-Sabally Esq. of the principles for the grant of a stay of execution pending appeal. Let me also refer to the decision of this Court in *Lang Conteh & Ors v T.K. Motors* (2002-2008) 2 GLR 23, where these principles were more comprehensively restated following the earlier decisions of this Court. The objective of the concept of stay of execution pending appeal is to protect the appeal proceedings and results from being rendered nugatory by the execution of the judgment appealed against. The applicant must satisfy the Court that the appeal is arguable and not frivolous. The applicant must show the existence of any special circumstance that is capable of defeating the appeal process if the judgment is not stayed. See *Lang Conteh's case* cited above for a list of some of these circumstances. It is not meant to be an exhaustive list of special circumstances. What constitutes special circumstance will depend on the peculiar facts of the case before the Court. Be that as it may, it is beyond per adventure that the Court has an unimpeded discretion to grant or refuse to grant a stay of execution of a judgment pending appeal.

In our present case, it is correct that the appeal discloses substantial issues of law and fact to be tried. But in the circumstances of this case,

that alone cannot constitute enough reason for the grant of this kind of application. There is nothing in the evidence on record to show that the appeal proceedings and result will be rendered nugatory if this application is not granted. Learned Counsel for the appellants had contended that the respondent is the holder of 677,859 shares in the 3rd respondent whose ownership is being disputed by the appellants. There is nothing on record showing that the existence of the said shares is threatened. There is nothing to show that there is an intention to sell them. The ownership of those shares is not in issue in this appeal. What is in issue in this appeal is the procedure adopted in revoking the second part of the order in the ex-parte order of injunction of 1st November 2006. The refusal to grant this application will not in any way negate the proceedings at the Trial Court for the determination of the ownership of the shares.

This application seeks to revive the second part of the ex-parte order of injunction. It is important therefore that the applicant show the legal right that they seek to protect by the revival of the injunction. That right must have existed status quo ante bellum and not a right the applicant seeks to secure in future by the contest. The appellants have not shown any existing legal right in the disputed shares worthy of protection by an interim injunction. This is clear from the share certificates and the transfer of shares which are in 4th respondent's name. By Section 81 of the Companies Act, a Certificate of Shareholding is prima facie evidence of ownership of the shares. It is clear from the evidence and as was conceded here, that the 1st appellant is behind this whole saga. He is only an employee and not a shareholder. I do not see how an injunction in this case can lie at his instance to protect shares he has no existing prima facie interest in. See Nigerian Supreme Court decision in *Paul v Azokpo* (1995) 4 SCNJ 119 where it was held that an appellant for an injunction must establish a legal right warranting protection.

One of the reasons for this application is to preclude the fourth respondent from carrying out the dismissal of the first appellant as an employee of the third respondent. This is not part of the terms of the injunction sought to be revived. The second order sought to be revived restrains the first and fourth respondents from exercising any rights or duties, or enjoying any benefits from the disputed shares till the determination of the suit it did not restrain the dismissal of the 1st appellant.

Finally, the order sought to be revived is unconstitutional and thus illegal. It is so because it was made ex-parte to last till the determination of the suit. Judicial restatements insist that an ex-parte injunction should not be made to last till the determination of the suit. They can only last for a short or interim period pending when both parties can be heard in respect of an interlocutory injunction. In situations where an ex-parte order is made to last till the determination of the suit, the Courts have characterized it as a violation of fair hearing of the respondent, as an illegality, an abuse of court process and a nullity. See *Kotoye v CBN* (1989) ALL NLR 76. See also *7 up Bottling Co Ltd & Ors v Abiola & Sons Nigeria Ltd* (1995) 3 SCNJ 37. If the order is void, then what are we reviving for ex nihilo nihil fit. According to Lord Denning in the oft cited case of *Macfoy v UAC* (1962) AC 152, you cannot put something on nothing and expect it to stand it will collapse. There is nothing precluding the 3rd respondent from increasing her share capital as statutorily required by law. But this must be done with due and proper notice to all existing shareholders who must be present in the meeting where such decision is reached. There is nothing on record to show that an increase in the share capital of the 3rd respondent will prejudice the rights of any party to this appeal. The balance of convenience is clearly against the grant of this application.

For the above reasons, the application is refused. I hereby order that the appeal and suit pending at the Trial Court be heard from day to day till it is finally disposed. The appellants shall pay cost of D5, 000 to the 1st and 4th respondent.

Application Refused.
FLD.

OUSMAN SEMEGA-JANNEH and 8 Ors v ALHAJI BORA MANJANG

COURT OF APPEAL OF THE GAMBIA
(Civil Appeal No 11/2006)

21st January 2008

Agim PCA

Appeal – Power of Court of Appeal to require new evidence to be adduced – Judgment – What an appeal against a judgment should be based upon – Grounds of appeal – Whether it is essential for grounds of appeal to be based on issues in controversy at the trial.

Court – Appeal – Power of Court of appeal to allow or require new evidence to be adduced – Judgment – Issues arising from or raised at the trial – An appeal against a judgment should be based on the evidence on record.

Practice & Procedure – Effect of Rule 30 of The Gambia Court of Appeal Rules – Court of Appeal – Power to allow or require new evidence to be adduced – Appeal – Need for the grounds of appeal to be based on issues in controversy.

Held, *dismissing the application (per Agim PCA)*

1. The Court of Appeal has the power to allow or require a party to an appeal before it to adduce new or fresh evidence in the interest of justice by virtue of Rule 30 of The Gambia Court of Appeal Rules.

2. The power to allow or require new evidence to be adduced should be exercised sparingly and only in furtherance of justice. The court in exercising that power must bear in mind the fundamental principle of justice that there should be an end to litigation which is often expressed in the popular Latin maxim republicae ut sit finis litium.

3. An appeal against a judgment of a Court following trial is to be based on the issues arising from or raised at the trial. [*Obikoya v Wema Bank Ltd. & Anor* (1989) 1 SCNJ 127; *Ezeoke & Ors v Nwagbo & Anor* (1988) 3 SCNJ 37 referred to]

4. An appeal against the judgment of a Lower Court must be based on the issues in controversy at the Trial Court which were decided by the said judgment. Any ground of appeal not based on the matters decided by the judgment is not competent. [*Saraki & Anor v Kotoye* (1992) 11/12 SCNJ 26 referred to]

5. For a matter to be essential to the determination of the grounds of an appeal, it must be based on the issues in controversy at the trial nisi-prius which were decided by the judgment appealed against. So if the matter was not in issue at the trial, it cannot competently form part of the appeal arising from that trial unless leave of the Court is obtained to raise and argue such an issue as a new issue on appeal.

6. The fact that the judgment of a court or part thereof has been rendered unenforceable or nugatory is not relevant to the determination of an appeal against that judgment. Such an issue is independent of the appeal.

Cases referred to:

Ezeoke & Ors v Nwagbo & Anor (1988) 3 SCNJ 37
Obikoya v Wema Bank Ltd. & Anor (1989) 1 SCNJ 127
Saraki & Anor v Kotoye (1992) 11/12 SCNJ 26

Rules of Court referred to:

The Gambia Court of Appeal Rules Cap 6:02 Vol. II Laws of The Gambia Rule 30

APPLICATION praying for an order that the appellants/applicants be allowed to adduce as new evidence, an affidavit of Sourahata B Semega Janneh sworn to on the 21st of November 2007 deposing to facts that

came into existence after the Judgment of the Trial Court and after the commencement of this appeal. The facts are sufficiently stated in the opinion of Agim PCA.

H.*D. Njie Esq.* for the appellants/applicants
I.D. Drammeh Esq. for the respondent

AGIM PCA. Dissatisfied with the judgment of the Trial High Court, per Yamoa J, in Civil Suit No. 42/94 M No.2 of 4th April 2006, the applicants herein, on the 18th of April 2006 filed a notice of appeal to this Court commencing this appeal No. 4/2006. The Trial Court in its judgment ordered the Administrators of the estate of Howsoon Semega Janneh (Deceased) to complete the exercise of the option for the renewal of land leases with serial Nos. C16/57 C17/57 and complete the contract for the sale of the Suitland to the respondent herein. In obedience to this order, Sourahata B Semega-Janneh, a legal practitioner, on behalf of the said Administrators of the Estate of Howsoon Ousman Semega Janneh wrote a letter dated 31st July 2006 to the Department of State for Local Government, Lands and Religious Affairs requesting for the renewal of the said land leases and for consent to assign the term under the said land leases to the respondent herein. The Department of State in a letter dated 7th November 2007, refused to give consent for the renewal of the said land leases. Believing that, the request for renewal and the refusal is essential to the determination of grounds 4 and 5 of this appeal, the applicant brought this application to lead evidence of the said facts in this appeal even though such facts came into existence after the said judgment of the Trial Court and after the commencement of this appeal.

The application prays for an order that the appellants/applicants be allowed to adduce as new evidence, an affidavit of Sourahata B Semega Janneh sworn to on the 21st of November 2007 deposing to facts concerning the said request for renewal of the land leases and the refusal of same. It is supported by an affidavit of 9 paragraphs deposed to by one Suwaibou Janneh, a senior legal clerk in the law office of Learned Counsel for the applicants. The said affidavit is accompanied by another affidavit sworn to by Sourahata B Semega Janneh marked as SJ1 and a letter dated 6th December 2007 from the Department of State for Local Government, Lands and Religious Affairs, marked SJ2. The respondent filed an affidavit in opposition sworn to on the 7th January

2008 by one Mustapha Fofana, an office assistant to the Learned Counsel for the respondent.

Learned Counsel for the applicants, A.N.D. Bensouda Esq. in moving this application, stated that it is brought under Rule 30 of the GCA Rules Cap 6:02 Vol. II Laws of The Gambia 1990. She submitted that the principles regarding the introduction of fresh evidence on appeal are well known and referred to this Court's decision in Kebba Drammeh v Manjang delivered on 18th December 1987 in Civil Appeal No. 9/87 which restated and applied the principles laid down by the English Court in Ladd v Marshall (1954) 1 WLR 1489 or (1954) 3 ALL ER 745. She submitted that the fresh evidence sought to be adduced on appeal may be one existing before judgment but not adduced at the trial or one that came into existence after judgment. According to her the two are distinct and are therefore treated differently. She relied on the Supreme Court Practice Vol. I 1990 note 59/1016 to note 59/10/8 at pages 793 – 794. Learned Counsel contends that since the evidence sought to be adduced in this case, came into existence after judgment the principles stated in the cases of Kebba Drammeh v Manjang and Ladd v Marshall which deal with evidence before a judgment cannot apply here. She then proceeded to submit further that this Court has a wide discretion to deal with this application and should grant it for two reasons, namely that it is in the interest of justice and that it is essential to the determination of grounds 4 and 5 of this appeal. According to her the new evidence will enable this Court during the determination of the pending appeal to see that the order to renew the land leases and complete the contract of sale of the Suitland to the respondent is rendered incapable of performance due to the refusal to renew the land leases and so should not have been made. She relied on the English case of Hughes v Singh (1989) TR which sets out the applicable principles in receiving evidence arising post judgment on appeal. It is also her submission that even though the wordings of Rule 30 of the Court of Appeal Rules appear to be different from those of Order 59 Rule 10 of the English Rules, this Court in Kebba Drammeh v Manjang relied on the English rules in invoking Rule 30. Learned counsel contends that the legislative intention underlying the two are the same. She also argued that the respondent's affidavit in opposition is misconceived.

Learned Counsel for the respondent, A.N.M.O. Darboe Esq, in his submission replicando, first pointed out certain discrepancies in exhibit SJ1 and in the affidavit in support of the application and argued from that standpoint that the affidavit in support of the application is incomprehensible. After so stating, learned counsel then proceeded to raise certain questions like the rhetorical questions of Demosthenes, the legendary Greek Orator who reputedly addressed the sea when he had no human audience. But Learned Counsel here has the audience of this Court. The said questions are as follows:–

(i) Can this Court grant this application?
(ii) Is SJ1 fresh evidence within the contemplation of Rule 30 of the Court of Appeal Rules?
(iii) Would the new evidence have made the Trial Court to decide otherwise, if it had occurred before the judgment?
(iv) Is the resultant situation one of self-imposed impossibility?

Learned Counsel proceeded to argue that the record of this appeal shows that these issues were raised at the trial nisi prius and the applicants failed to adduce any evidence in support of them. He further argued that the applicants had opportunity at the trial to lead evidence to show that such order of specific performance is incapable of enforcement because the lease had expired, there was no consent to assign and that the competent Department of State had indicated its unwillingness to grant consent to assign. Counsel submitted that the issue of consent, whether present or in future clearly arose from the pleading. According to Learned Counsel, the Department of State for Local Government, Lands and Religious Affairs who was a defendant in the action at the Trial Court did give evidence at the trial. And that the issue of consent not being obtained was never raised at the trial. According to him where, as in this case, the applicants have stated that consent was necessary and a sine qua non for the grant of the order for specific performance to be made, he ought to have led evidence to show that the consent cannot be obtained.

Learned counsel for the respondent argues further that the purpose of this application is not to show that the order of specific performance ought not to have been made but to show that it is impracticable to comply with the said order of Court because of the act of a party to the

proceedings. According to him, this impracticable situation could only avail the 1st and 2nd defendants at the Trial Court if they are cited for contempt, but can have no bearing on the appeal pending before this Court. He submitted that this is a situation of self imposed impossibility and certainly does not qualify as fresh evidence.

It is his further submission, that under Rule 30, the discretion of this Court to allow fresh evidence on appeal is limited to evidence in existence before judgment, which a party was not aware of. He referred to IBCI v Ndow (1995-96) GR 44 at 52 – 53 which emphasized the principle that there must be finality to litigations. Learned Counsel distinguished the case of Hughes v Singh (Official Transcripts (1980-89) and other English cases cited therein like Murphy v Stone-Wall Nork Charlton Ltd (1969) 1 WLR 1023 from the case at hand. In this regard, counsel contends that those cases deal with assessment of damages. In those cases, some evidence had been led at the trial on assessment of damages. On appeal an application was made for leave to lead further evidence on the need to vary the damages awarded by the Trial Court. According to Counsel, the age old practice in England is that fresh evidence on appeal is allowable only in cases of reassessment of damages on appeal. Counsel also argued that the said English cases have been decided in the light of Order 59 Rule 10 of the English Court of Appeal Rules which expressly prescribe for the reception of new evidence arising post judgment on appeal in certain circumstances. According to him there is no such express provision in Rule 30 GCA Rules. He argued that this Court cannot rely on Order 59 Rule 10 of the English Court of Appeal Rules because there is no provision in The Gambia Court Appeal Rules or any other law permitting this Court to have recourse to the English rules in this situation. Counsel pointed out that in instances where it is intended that our Courts should have recourse to English rules or statutes, specific legislative provisions are made as is evident from Section 3 of the Courts Act Cap 6:01 Vol. II Laws of the Gambia 1990 which enables The Gambian High Court to exercise the jurisdiction and powers vested in the High Court in England before 18th February 1965. To underscore this point, counsel argued that the only instance where this Court can resort to the English Court of Appeal Rules is when it is faced with the question of reviewing its decision and this is specifically and expressly provided for in Rule 37 GCA Rules. Counsel rounded up this point by stating that a proper

Comment [FD1]:

reading of Rule 30 GCA Rules excludes the reception of evidence occurring after judgment.

In an alternative submission, counsel contended that even if this Court had the power to grant such an application, as was stated in Hughes v Singh (supra), it has to consider the conduct of the parties in deciding whether or not to grant the application. According to him, the new evidence and the impracticable situation it seeks to establish is the creation of the Secretary of State for Local Government and Lands who was the 12th defendant in the suit and as such cannot be relied on by the applicants but rather constitutes a defence to a charge of contempt.

Learned Counsel for the applicants in her reply on points of law argued that the notion of self imposed impossibility can apply only where the party that caused it is the one seeking to adduce the new evidence and that it cannot apply here because the 12th defendant who caused the impracticability is not the one seeking to adduce this new evidence. As further reasons why the idea of self impracticability should not apply, she stated that the defendant is not bound by the order of specific performance. She also submitted that whether consent to renew and assign was obtainable was not an issue at the trial and as such the fact that the 12th defendant did not lead evidence at the trial is not relevant. According to her the 12th defendant had no duty to indicate how they will treat an application for consent in the event that it is made.

Arguing further in reply on points of law, Learned Counsel stated that the interpretation placed by Learned Counsel for the respondent on Rule 30 GCA Rules seeks to fetter the discretion of this Court. According to her, Rule 30 did not distinguish between evidence that existed before judgment and the one that arose after judgment and that it gives this Court the general power to allow a party adduce new evidence on appeal were the justice of the case so demands. Counsel argued that a comparison of Rule 30 with the English Court of Appeal Rules show that the former vests an unimpeded discretionary power on the Court whilst the later limits the exercise of the power to specific grounds. She also argued that our Rule 30 permits the exercise of the power there under in furtherance of justice and that therefore the yardstick is the interest of justice. She concluded that it will be dangerous to restrict the application of Rules 30 to evidence that existed before judgment. According to her,

it will mean that this Court cannot under any circumstance consider evidence arising after judgment however grave the injustice that may result from failure to adduce such post judgment evidence.

From the foregoing submissions, the following issues arise for determination:-

1. Does this Court have the power, in appeals before it, to allow a party to adduce evidence of an event that happened after the judgment appealed against.
2. Granted that this Court has the power to allow the introduction of such post judgment evidence, is it in the interest of justice to allow the applicants herein to adduce such evidence as contained in the affidavit marked SJ1.

As rightly conceded by counsel to both parties in this appeal, this Court has the power to allow or require a party to an appeal before it to adduced new or fresh evidence in the interest of justice by virtue of Rule 30 of the Gambia Court of Appeal Rules. The question that follows therefore in the light of the arguments of Counsel is if this Court can exercise this power to allow a party to adduce evidence that came into existence after the judgment appealed against. To determine this question, it is necessary to read and interpret Rule 30 and for this purpose it is reproduced hereunder as follows:-

> "It is not open as of right to any party to an appeal to adduce new evidence in support of his original case, but, for the furtherance of justice, the Court may, where it thinks fit, allow or require new evidence to be adduced. Such evidence to be either by oral examination in Court, by affidavit or by deposition taken before an examiner or commissioner as the Court may direct. A party may by leave of the Court allege any facts essential to the issue that have come to his knowledge after the decision of the Court below and adduce evidence in support of such allegation."

I understand the wordings of this provision to mean that the new evidence that can be adduced on appeal in this Court must satisfy the following requirements:

1. The facts to be established by the new evidence must be essential to the issue on appeal and support the original case of the party seeking to adduce it.
2. The facts must have come to the knowledge of the party seeking to adduce it, after the decision of the Court below.
3. The new evidence to be adduced must be in furtherance of justice.

There is nothing in the wordings of the above Rule suggesting that the phrase "new evidence" as used therein excludes evidence that came into existence after the judgment. There is nothing in the said rule limiting or restricting the exercise of the power thereunder to evidence in existence before the judgment. I am in complete agreement with Learned Counsel for the applicants that Rule 30 gives this Court a general power with a wide discretion to allow a party to adduce new evidence in furtherance of justice irrespective of when the evidence came into existence so far as it is essential to the issue on appeal, is in support of the original case of the party seeking to adduce it and came to the knowledge of such party after judgment. The requirement that the facts alleged should be such that came to his knowledge after the decision of the Court should not be read to mean that evidence existing before the judgment but which the party had no knowledge of. There is no doubt that the requirement is capable of creating such an erroneous impression. This erroneous impression is, in my opinion, encouraged by the fact that the Courts are more frequently confronted with situations of new evidence of a fact in existence before judgment. Most judicial authorities dealing with the reception of new evidence on appeal are based on evidence existing before judgment. The frequency of the application of judicially established criteria for doing justice in such situations have tended to create the impression that the provisions in Rule 30 only apply to facts existing before judgment. What is material under Rule 30 is that the new evidence came to the knowledge of a party after judgment. The English Court of Appeal decision of *Hughes v Singh & Anor* (Official Transcripts (1980-89) cited by Learned Counsel for the appellant offers a useful guide here even though the wordings of Order 59 Rule 10(2) of the Rules of the Supreme Court relied on in that case differ from the wordings of our Rule 30. But I agree with Learned Counsel for the appellant that the two set of rules have the same legislative meaning and intention. The

said English Order 59 Rule 10 (2) states that "The Court of Appeal shall have power to receive further evidence on questions of fact, either by oral examination in Court, by affidavit, or by deposition taken before an examiner, but in the case of an appeal from a judgment after trial or hearing of any cause or matter on the merits, no such further evidence (other than evidence as to matters which have occurred after the date of the trial or hearing) shall be admitted except on special grounds". This provision expressly differentiates between evidence existing before judgment and evidence that came into existence after judgment. While it does not restrict the exercise of the power of the English Court of Appeal to receive on appeal evidence that came into existence after judgment, it excludes the power of that Court to receive on appeal evidence existing before judgment. Rule 30 GCA Rules draws no distinction between the two types of evidence and allows this Court a wide discretion to admit on appeal new evidence that came to the knowledge of a party after judgment when the interests of justice so dictates.

I must however caution that the power to allow or require new evidence to be adduced should be exercised sparingly and only in furtherance of justice. The Court in exercising that power must bear in mind the fundamental principle of justice that it is in the public interest that there should be an end to litigation which is often expressed in the popular Latin maxim republicae ut sit finis litium.

I will now proceed to deal with the second issue. There is no doubt that the facts sought to be established by the new evidence came to the knowledge of the applicants after the judgment appealed against. I fail to see how this evidence is essential to the determination of grounds 4 and 5 of this appeal. Learned Counsel for the appellant has maintained in her address that the fact that the consent to renew and assign the land leases may not be granted was not an issue at the trial nisi prius. I fail to comprehend how a fact that was not an issue at the trial can now be essential to the determination of any ground of this appeal as there is no ground of this appeal raising it and the leave of this court has not been obtained to raise and argue it as a fresh issue on appeal. An appeal against the judgment of a Court following trial is based on the issues arising from or raised at the trial. See the Nigerian Supreme Court decisions in *Obikoya v Wema Bank Ltd & Anor* (1989) 1 SCNJ 127 and in *Ezeoke & ors v Nwagbo & Anor* (1988) 3 SCNJ 37. An appeal against

the judgment must be based on the issues in controversy at the Trial Court which were decided by the said judgment. Any ground of appeal not based on the matters decided by the judgment is not competent. The decision of the Nigerian Supreme Court in *Saraki & Anor v Kotoye* (1992) 11/12 SCNJ 26 is instructive on this point. It follows therefore that for a matter to be essential to the determination of the grounds of an appeal it must be based on the issues in controversy at the trial nisi prius which were decided by the judgment appealed against. So if the matter was not in issue at the trial, it cannot competently form part of the appeal arising from that trial unless leave of this Court is obtained to raise and argue such an issue as a new issue on appeal. As conceded by Learned Counsel for the applicants, the purpose of this new evidence is to show that the order to renew the land leases and assign the term there under is not capable of performance and so should not have been made in the first place. I do not see how the impossibility of compliance with the judgment or order of Court can be of relevance in determining the grounds of an appeal. The fact that the judgment of a Court or part thereof has been rendered unenforceable or nugatory is not relevant to the determination of an appeal against that judgment. Such an issue is independent of the appeal and as Learned Counsel for the respondent said will become material as a defence to a charge of contempt for disobedience of the said judgment or order. In the case of *Hughes v Singh & Anor* (supra) and the case cited therein like *Murphy v Stone Wall Work (Charlton) Ltd* (1969) 2 ALL ER, the new evidence sought to be adduced was in respect of an issue that arose at the trial and formed the basis of the judgment appealed against. I cannot conceive how such new evidence of a fact not in issue at the trial and in this appeal can be in furtherance of justice in this appeal.

For the above reasons, I refuse to grant this application. It is accordingly dismissed. The appellants/applicants are hereby ordered to pay cost of D5, 000 to the respondent.

Application dismissed.
FLD.

LANG CONTEH & ORS v T. K. MOTORS

COURT OF APPEAL OF THE GAMBIA
CA. 8/05

19th December 2005

Agim JCA, Paul and Anin-Yeboah Ag. JCA

Appeal – Grounds of appeal – Incorporation of particulars of error in the grounds of appeal – Distinction between grounds of appeal and its proof.
Court – Grounds of appeal – Distinction between grounds of appeal and its proof thereof – Reliefs sought – How couched – Affidavits – Whether mandatory for Courts to hear parties verbally – Duty of counsel to protect and maintain Court's integrity – Discretion of Court – Discretionary power of Court to be exercised judiciously – Stay of execution – Guiding principles – Evaluation of evidence by Appellate Court – Stay of execution – Grant on terms – When issue of jurisdiction can be raised by parties.
Evidence – Evaluation of evidence – Interference by Appellate Court.
Stay of Execution – Granting of stay on terms – Principles guiding the grant of an application for stay.

Held, *allowing the appeal (per Agim JCA, Paul and Anin-Yeboah Ag. JCA concurring):*

1. While it is the usual practice to set particulars down separately, their incorporation into the grounds of appeal does not mean the requirements of Order 12(4) of The Gambia Court of Appeal Rules Cap 6:02 Laws of The Gambia have not been satisfied. [*Koya v United Bank for Africa Ltd.* (1997) 1 SCNJ 1 referred to]

2. It is only when an appellant successfully argues his ground of appeal with law or evidence on record that he will win his appeal. The mere fact that the ground of appeal is not seemingly supported by the evidence on record does not mean that it is vague or general or does not disclose a reasonable ground of appeal.

3. Simplicity and straight forwardness is always an aid to discerning what is sought from the court. It reduces the risk of what one wants getting lost in convoluted sentences.

4. Parties are bound by the contents of their affidavit unless the Court grants leave to the contrary. In some jurisdictions, when a motion is filed, after perusing both affidavits in support and against the motion, without a verbal hearing, a judge can enter the court and give his ruling without counsel on either side saying one word. It is only when the Court wishes to be addressed on a particular point of law or fact that counsel is called upon to speak.

5. In addition to Judges themselves, counsel have a duty to protect the integrity of the courts and not make baseless and unsupported allegations.

6. It is trite that a court has to exercise its discretion judiciously and the reasons for exercising the discretion must be evident on the face of the ruling or the record.

7. A court has a right to grant a stay of execution on terms. However, it has been established by a long line of cases that the grant of a stay of execution on onerous terms constitutes a refusal of the application. [*Minteh (No. 1) v Danso (No.1)* (1997 – 2001) GR 216 referred to]

8. When a case has been fully heard by a Trial Court, an Appellate Court is always reluctant to interfere with that court's evaluation of the evidence it has taken and findings of fact made therefrom.

9. A Court has an unfettered right to grant or refuse an application for stay. However like all exercises of discretion, it must be done judiciously and is therefore governed by guidelines. These guidelines are as follows:

1. A Court is enjoined to consider the interest of both parties while bearing in mind the right of the victorious party to enjoy his judgment.

2. The applicant must allege and prove by his affidavit special circumstances.

3. The circumstances of the victorious party must be examined to determine his ability to refund money obtained under the judgment should the appeal succeed. Where the Court decides he does not have this ability, the application may be granted on terms.

4. The Court will normally not suspend the operation of a judgment unless the applicant can show he has a serious point on the merits for consideration.

5. It is trite that jurisdiction is at the root of the powers of a Court. It can be raised at anytime. [*Republic v High Court of Denu: Ex-parte Avadali IV* (1993-94) 1 GLR 561]

Cases referred to:

Abdou Dandeh-Njie v Jallow
Amadi v Thomas Aplin & Co. Ltd (1972) NSCC 262
Edward Graham v Lucy Mensah (2002-2008) 2 GLR 22
Koya v United Bank for Africa Ltd (1997)1 SCNJ 1
Macauley v Tukura (1881-1911) 1 NLR 35
Meridien Biao Bank Gambia Ltd v Social Security and Housing Finance Corporation (1997-2001) GR 305
Minteh (No. 1) v Danso (No.1) (1997 – 2001) GR 216
7up Bottling Co. Ltd. & Ors v Abiola & Sons Nig Ltd (1995) 3 SCNJ 37
Republic v High Court of Denu: Ex-parte Avadali IV (1993-94) 1 GLR 561
The Gambia Ports Authority v the Owners & Master of M/V Xifias (unreported) (Civil Appeal NO. 59/98)

Statutes referred to:

Comment [M2]:

The Subordinate Courts (Civil Proceedings) Amendment Act 2002 Section 32 (a)
Subordinate Courts (Civil Proceedings) Act Cap 8:02 Section 3(1)

Rules of Court referred to:

The Gambia Court of Appeal Rules Cap 6:02 Rules 12(4), 12(6), 25
The High Court (Civil Procedure) Rules, 2004 (C.I 47) of Ghana Order 25 Rule 6

APPEAL against the ruling of the High Court delivered on 25th November 2005 granting a stay of execution of the Judgment of the Kanifing Magistrate Court delivered on 7th November 2005 on terms. The facts are sufficiently stated in the opinion of Anin-Yeboah Ag. JCA.

E.E. Chime for Appellants/Applicants
Amie Bensouda Esq. for Respondent

ANIN-YEBOAH AG. JCA. On 7th November 2005, the Kanifing Magistrate Court gave judgment for the respondent in this suit. The appellants being dissatisfied with the said judgment filed a motion ex-parte and were granted a seven days stay by the High Court. Upon the motion being repeated on notice, the court granted the stay on terms. This is an appeal against the ruling of the High Court delivered on 25th November 2005 granting the said stay on terms. By the said ruling the Court granted the appellants application for stay of execution of the Kanifing Magistrate Court's Judgment on the following terms:-

> "That the whole of the judgment debt be paid within 7 days to the Master of the High Court who should keep same in an interest bearing account.
>
> That the conditions of appeal should be fulfilled within fourteen days of the date when the application was granted i.e. 25th November 2005."

In addition to the omnibus ground that the ruling in question is against the weight of evidence, the appellants say the Judge erred in law by:-

1. Prejudging their motion and in not allowing them to move the said motion and
2. Imposing conditions that are so onerous and which are tantamount to a refusal of their stay of execution.

They seek from this Court, should their appeal succeed, an order setting aside the ruling in question, an order for stay of execution and any other further reliefs that this Court may see fit to grant.
The respondents take issue with the two grounds of appeal numbered above. They contend that the grounds of appeal as formulated are against Rule 12(4) of the Gambia Court of Appeal Rules Cap 6:02 Laws of The Gambia. The relevant rule states:-

> "No ground which is vague or general in terms or which discloses no reasonable ground of appeal shall be permitted, save the general ground that the judgment is against the weight of evidence, and any ground of appeal or any part thereof which is not permitted under this rule may be struck out by the Court on its own motion or on application by the respondent."

The respondents say that the two grounds of appeal earlier enumerated are vague and general and disclose no reasonable grounds of appeal. It is submitted that the serious allegations against the Learned Judge i.e. prejudging the motion and refusing to allow the appellants to move their motion is not supported by the record or any material before the Court. Reference is made to the case of *Edward Graham v Lucy Mensah* (2002-2008) 1 GLR 22 where this Court had cause to strike out a ground of appeal as being vague, general and disclosing no reasonable ground of appeal.

The offending ground of appeal had been couched thus:

"That the Leaned Trial Judge was wrong in making orders which were not in line with the evidence of the plaintiff."

The Learned Court of Appeal Judge reading the Judgment of the Court had definite and strong opinions about the way this ground had been stated. He had the following to say "…I find myself entirely at a loss in comprehending what it purports or intends to say or convey. How was the Learned Trial Judge wrong? Did he commit any error or misdirection in law; and if so how? Which of the several orders is being challenged and which particular piece or portion of the evidence of the plaintiff is being referred to? With due respect, it is my humble opinion that this ground violently and incurably offends Rule 12(4) of The Gambia Court of Appeal Rules Cap 6:02 Laws of the Gambia.

This Court in the case of *The Gambia Ports Authority and the Owners & Master of M/V Xifias* (Civil Appeal NO. 59/98) had cause to strike out seven grounds of appeal filed as being defective and incompetent. The Court once again drew attention to the necessity of carefully drafting grounds of appeal and described them as "the very soul and essence of any appeal."

The Respondents reasons for urging this Court to strike out the Appellants grounds of Appeal can be found on page three of their brief. Paragraph 5.1.2 states in part –

> "The serious allegation that the learned High Court Judge prejudged the motion for stay is not supported by the record of proceedings settled by the Appellants, Counsel and by the Registrar of the High Court. The Appellants also failed to give particulars or place any material before this Court to support the serious allegation that the learned High Court Judge prejudged the issue."

Para 5.1.3 says –

> "There is also no particular and/or material placed before this court to ground the allegation that the Appellants Counsel was not allowed to move the Appellants' Motion before the lower Court.

The Appellants also failed to give particulars and/or place materials before this Court to justify the allegation that the conditions imposed by the Lower Court are onerous and thus tantamount to a refusal of their application for stay of execution. The Appellant made reference to Orders of the Judge without stating what they were. The evidence of the

plaintiff referred to in the grounds of appeal was also not identified. A careful look at the ground of appeal which incurred the wrath of this Court in the case of *Edward Graham v Lucy Mensah* (supra) will reveal that it is pertinent to state how the Trial Judge erred.

It was no wonder that the judge reading the lead judgment of the court was so incensed. Does one have a like situation in the present case in relation to the Appellants' grounds of appeal referred to earlier?
We think not. While it is usual practice to set particulars down separately, their incorporation into the grounds of appeal as has been done by the Appellants herein, does not mean the requirements of Order 12(4) have not been satisfied. See the Nigerian Supreme Court decision in *Koya v United Bank For Africa Ltd*. (1997) 1 SCNJ page 1.
With the greatest respect to counsel for the respondents, a distinction must be drawn between a ground of appeal and its proof thereof. It is only when an appellant successfully argues his ground of appeal with law or evidence on record that he will win his appeal. The mere fact that the ground of appeal is not seemingly supported by the evidence on record does not mean that it is vague or general or does not disclose a reasonable ground of appeal.
It is the Court's considered opinion that there is nothing vague or general or unreasonable about the way the grounds of appeal have been worded. In any case section 12(6) of the Rules of this Court states that it is not confined to grounds of appeal set forth by the appellant so long as the Respondent is given opportunity of contesting the case on any new grounds. We are satisfied from the brief of the Respondent that the respondent has vigorously contested the Appellants grounds of appeal as understood by the Court even if because of their so called vagueness and generality, they were not to be so understood.

The Appellants set down three issues as those they perceive to be the issues for determination. These are reproduced verbatim below:-

Comment [M3]:

1. Whether the fact that the appellants were denied the opportunity of moving their motion and the Honourable Court took its self as moved and delivered its ruling does not amount to denial of fair hearing.

2. Whether the ruling appealed against does not amount to refusal of stay of execution.

3. Whether the ruling and order or order of the Court below reflects by way of recognition the contents of the appellants' affidavit in support of the motion for stay of execution.

4. Whether the Court below ought to have granted the application for stay different from modus adopted on the said date.

Apart from the second issue which is simple enough all the other issues put down for determination are long-winded and require some effort to comprehend. Simplicity and straightforwardness is always an aid to discerning what is sought from the Court. It reduces the risk of what one wants getting lost in convoluted sentences. What do issues three and four mean? After some mental effort we discern issue three to mean whether the order of the Court in anyway discloses that the contents of the Appellants affidavit were taken into consideration. We find issue four to mean whether the Court ought to have adopted a different procedure than that actually used when determining the application for stay.
The issues for determination set down by the Respondent were better formulated. The first issue relating to the Appellants grounds of Appeal has been dealt with.

Three other issues set down are as follows:-

1. Whether parties that impliedly waived their right of final address and acquiesced in the adoption of a procedure can later complain thereof?

2. Whether the decision of Yamoa J delivered on 25th November 2005 in Civil Appeal No HC/354/05/CH/47/B occasioned a miscarriage of justice?

3. Whether the ruling of the Lower Court is against the weight of evidence.

The Court is of the humble opinion that a resolution of the following issues will adequately deal with the questions raised by this appeal –

1. "Were the Appellants given an opportunity to be heard?

2. Did the Learned High Court Judge give due consideration to the case of the Appellants?

3. Is the Ruling/Order against the weight of evidence?"

Order 25 of Cap 6:01 Laws of The Gambia deals with Interlocutory Applications. The first process dealt with under that Order is MOTIONS. Rule 4 of that order states:-

> "There shall be filed with the motion paper all affidavits on which the person moving intends to rely."

Rule 23 states in part –

> "Oral evidence shall not be heard in support of any motion unless by leave of the Court''.

Rule 24 vests the Court with the right to examine witnesses viva voce or receive documents. These rules state what the legal position is. Parties are bound by the contents of their affidavit unless the Court grants leave to the contrary. Due to this, in some jurisdictions, when a motion is filed, after perusing both affidavits in support and against the motion, and without a verbal hearing, a judge can enter the Court and give his ruling without counsel on either side saying one word. It is only when the Court wishes to be addressed on a particular point of law or fact that counsel is called upon to speak. See Order 25 Rule 6 of the High Court (Civil Procedure) Rules, 2004 (C I 47) of Ghana.
It is clear from the preface of the order complained of that the Learned High Court Judge read both the affidavits in support and in opposition to the motion. Being bound by his affidavit, there was nothing more counsel for the Appellant could have addressed the Court on without its leave. The record does not show counsel applying for any such leave. It is interesting to note that the High Court used the same procedure in

hearing the Appellant's ex-parte motion for stay. One does not hear Counsel complaining about that. It is thus safe to assume that it is because counsel got exactly what he wanted from the Court. It is good for the development of the law that Counsel are consistent in the positions they take especially in the course of the same proceeding.

The holding in the Nigerian case of *Amadi v Thomas Aplin and Co Ltd* (1972) NSCC 262 is not applicable to the facts of this case. In that case the Trial Judge dismissed the motion to amend in the absence of counsel and without the application being moved at all. It is our considered opinion that the procedure used by the learned High Court Judge did not offend any rules of Court and did not deny the Appellant of the opportunity of being heard.

We find most unfortunate the implication inherent in paragraph 5.02 of the Appellant's brief subtitled ARGUMENT. I quote that paragraph –

> "The process of changing the adjournment dates and bringing the dates closer without the Appellants' knowledge even after the case was adjourned to 25th November denotes intention to deny the appellants a fair hearing and which finally was carried out."

The record shows that after the Appellants' motion was "taken as moved" on 18th November 2005 and an interim stay granted for seven days, the suit was adjourned to 25/11/2005 at 9:00 a.m. for hearing of the motion on notice. For some unstated reason, the matter was called on 23rd November 2005. The parties were absent but both counsel were present and the matter was again adjourned to the original date of 25/11/2005. It is this state of affairs that counsel says denotes an intention on the High Court's part to deny the Appellants a fair hearing. This court does not see anything in these events to support the allegation. In addition to Judges themselves, counsel have a duty to protect the integrity of the Courts by not making baseless and unsupported allegation.

The Appellants motion on notice for stay is supported by a thirty-six paragraph affidavit. A six-paragraph further affidavit in support was later filed. The respondents filed a thirty-four paragraph affidavit in opposition to which the Appellants filed a nine paragraph affidavit in Reply.

This Court has had cause in the two cases of *Abdou Dandeh-Njie v Jallow* and *Edward Graham v Lucy Mensah* (supra) to decry the filling of long processes. The frustration of the Court with the habit of filing unnecessarily long processes is evident in the Edward Graham case were counsel was advised to go and peruse a particular manual on brief writing. In the *Abdou Dandeh-Njie* case, the court was more restrained and implied that an unnecessarily long brief was likely to be muddle some and full of irrelevancies. This Court will again recommend to Counsel the practice of filing shorter processes. Brevity and conciseness never hurt anyone.

A Court has a right to grant a stay of execution on terms. However it has been established by a long line of cases including the case of *Minteh (No.1) v Danso (No.1)* (1997 – 2001) GR 216 that the grant of a stay of execution on onerous terms constitutes a refusal of the application. There are laid down guidelines for the grant or refusal of such an application which will be discussed later on in this judgment. For now, the issue that concerns the Court is whether the case of the Appellants was given due consideration by the Learned High Court Judge. In both the Motion ex-parte and the Motion on notice, the Appellants stated that they do not have the funds or money to liquidate the judgment debt or pay same into Court. Paragraph 22 to 30 is a litany of their financial woes. The Order/Ruling of the learned High Court Judge does not on the face of it give any reasons for the exercise of its discretion in the way it was done. In light of the Appellants definite statement in their paragraph 22 that they were in no position to pay the money into Court and the denial of that paragraph by the Respondents in their paragraph 18, there was the need for the Learned High Court Judge to come to some conclusion on the issue. Perhaps this was done but the terse Ruling handed down by the Court does not give any indication of this.

It is trite that a Court has to exercise its discretion judiciously and the reasons for exercising the discretion, (especially in circumstances such as the present where the two opposing sides present contradictory position on the same issue) must be evident on the face of the ruling or the record. We are satisfied from the record before this Court that the learned High Court judge did not give due consideration to the portions of the Appellants affidavit relating to their inability to pay the judgment debt into Court. Is the Ruling/Order made by the learned High Court

Judge against the weight of evidence? It is stated in *Macauley v Tukuru* (1881-1911) 1 NLR 35, a case cited with approval by this Court in the *Edward Graham* case (supra) that:-

Comment [M4]:

> "When a judgment is appealed from as being against the weight of evidence, the Appeal Court must make up its own mind on the evidence, not disregarding the judgment appealed but carefully weighing and considering it and not shrinking from overruling it, if, on full consideration, it comes to the conclusion that the judgment is wrong. If however the Appeal Court is in doubt, the appeal must be dismissed since the burden of proof is on the appellant."

When a case has been fully heard by a Trial Court, an Appellate Court is always reluctant to interfere with that Court's evaluation of the evidence taken and the findings of fact made. The ruling before this Court is as a result of a Motion. Dealing with this issue will call for an appraisal and assessment of the affidavits of the parties to decide whether the Appellants are entitled to the grant of stay of execution originally sought from the High Court. A Court has an unfettered right to grant or refuse an application for stay. However like all exercises of discretion, it must be done judiciously and is therefore governed by guidelines. The case *of Meridien Biao Bank Gambia Ltd v Social Security and Housing Finance Corporation* decided by this Court and found at (1997-2001) GR page 305 states these guidelines as follows:-

1. A Court is enjoined to consider the interest of both parties while bearing in mind the right of the victorious party to enjoy his judgment.

2. The applicant must allege and prove by his affidavit special circumstances.

3. The circumstances of the victorious party must be examined to determine his ability to refund money obtained under the judgment should the appeal succeed. Where the Court decides he does not have this ability, the application may be granted on terms.

4. The Court will normally not suspend the operation of a judgment unless the applicant can show he has a serious point on the merits for consideration.

These are just guidelines. At the end of the day each case is to be determined according to its peculiar facts and with the sole purpose of doing justice between the parties. As stated earlier in this judgment, the Appellants per paragraph 22 to 31 narrate their financial woes. They specifically state in paragraph 22 that they cannot afford to pay the judgment debt into Court. They cite a judgment of the High court against them by which the first appellant was ordered to give up his residential home and his business investment known as Destiny's Bar. They state that the loans used to construct and furnish the said bar had not been repaid at the time of the Court order referred to. They say that they obtained these loans by using the property of a friend as collateral and that the bank is threatening them with Court action. They attach a copy of the deed of mortgage covering this loan as Exhibit HM4. A copy of this judgment was not annexed to the affidavit in support but the respondents do not deny paragraphs 23 to 31 in their affidavit in opposition but surprisingly state that they are irrelevant.

This Court certainly finds them relevant to prove the impecunious state of the Appellants. Apart from the Respondent's denial in their paragraph 18 of the appellants claim that they do not have the funds to liquidate the judgment debt or pay same into court, they state that the appellants are disposing of their assets without mentioning a single one of these assets which are being so disposed of. While a party's impecuniousity is not a ground for staying a judgment, it is necessary to discuss the financial state of both parties because they were raised in their respective affidavits and because in some circumstances it determines the terms of a conditional stay of execution.

In opposing the motion for stay in the High Court, the Respondents state in paragraph 17 of their affidavit in opposition that they are a very reputable Company and would be able to pay any monies if the appeal succeeds. It is noteworthy that this assertion was NOT made in reaction to an allegation by the appellants that the Respondents cannot refund the judgment debt. That came later in their paragraph 20. No evidence of this ability to pay was attached to their affidavit in opposition. In circumstances where the ability of the Respondents to refund the

judgment debt is made an issue and a case is made by the Appellants for a stay of execution, the Courts will sometimes grant such a stay on terms such as paying the judgment debt into Court to keep the money safe. In all the circumstances of this case, (such as the undenied affidavit evidence about their financial position) the Court is satisfied that should it find that the Appellants are entitled to the exercise of its discretion in their application for stay, an order for the Appellants to pay the judgment debt into Court as a condition for staying the Ruling in question would be onerous. While it is not the duty of this Court to determine the merits of the appeal against the judgment of the Magistrate Court, in deciding if the appellant has a serious point for consideration by the High Court, that judgment has to be looked at.

The question of the Magistrate having exceeded her jurisdiction in awarding the sums she did was not made a ground of appeal in the notice of appeal filed in the High Court. However, it is trite that since jurisdiction is at the root of the powers of a Court, it can be raised at anytime. It is raised for the first time by the Appellants in this Court in the arguments filed in support of the present appeal when they say their appeal against the decision of the Magistrate Court, lodged before the High Court has a likelihood of success. See the Ghanaian Supreme Court case of *Republic v High Court of Denu: Ex-parte Avadali IV* (1993-94) 1 GLR pg 561. The Court per Ampiah JSC (as he then was) had this to say:-

> "An issue of jurisdiction could be raised at any stage of the proceedings and … where a Court has no jurisdiction to entertain an action or acts in excess of its jurisdiction, the whole proceedings become null and void."

In that case the applicant had applied for an order of certiorari to quash the decision of the High Court. The circumstances here are different but what was stated by the learned judge is the legal position when a Court acts without or in excess of its jurisdiction. Jurisdiction is a creature of statute. The Subordinate Courts (Civil Proceedings) (Amendment) Act 2002 amended the jurisdiction of the Magistrate Courts as provided under section 3(1) of Cap 8:02 and increased the jurisdiction of a First Class Magistrate to one million Dalasis in civil proceedings. For a Second Class magistrate the amount is 500,000 dalasis and for a Third

Class magistrate it is 250,000 dalasis. In the judgment complained of, the amounts awarded were $54,500 and GMD 103,590. Certainly the Appellants have raised a serious point for consideration by the High Court in re the jurisdiction of the Magistrate Court in this matter.

This Court is satisfied that in all the circumstances of this case and for reasons above given, the ruling of the High Court delivered on 25th November 2005 ought to be set aside and same is hereby set aside. It is also the Court's considered opinion that the Appellants have made out a case sufficient to warrant the exercise of this Court's discretion in their favour. They are hereby granted a stay of execution of the judgment of the Kanifing Magistrate Court delivered on 7th November 2005.

The Court is also satisfied that the order for stay of execution should be without any conditions (such as the payment of the judgment debt in Court) since such a condition would be onerous in light of the Appellants undenied financial predicament and would amount to refusing their application.

Accordingly, Judgment is given for the Appellants in the terms set out above. Costs of D5, 000.00 is awarded to the Appellant.

Agim PCA. I Agree

Paul AG JCA. I Agree

Appeal allowed.
FLD.

BOURGI COMPANY LTD v WITHAMS H/V & ANOR

COURT OF APPEAL OF THE GAMBIA
CA. 29/2006

28th June 2007

Agim PCA, Yeboah and Dordzie AG. JCA

Appeal – Judgment – Where no grounds of appeal formulated against a part of the judgment.

Court – Appeal – Issues raised for the first time on appeal – Jurisdiction – Appearance or protest whether amounts to submission – Foreign judgment – Rules as to conclusiveness – Grounds of appeal – Not formulated on judgment appealed against – Estoppel – When it can be invoked.

Evidence – Admission of facts – Need no further proof.

Estoppel – Court – Consequence of a party adopting wrong procedure at Trial Court.

Practice & Procedure – Acquiescence to wrong procedure at the Trial Court – Jurisdiction – Appearance under protest – Whether amounts to submission – Estoppel – When can plea bar the jurisdiction of a Court to hear a case.

Words & Phrases – Foreign judgment – Effect and meaning of Section 9 (1) of the Foreign Judgment Reciprocal Enforcement Act (FJRE) Cap 8:06 Laws of The Gambia.

Held, *dismissing the appeal (per Agim PCA, Yeboah and Dordzie AG. JCA concurring):*

1. It is trite that what is admitted need no further proof. [*Antoine Banna v Ocean View Resort Ltd* (2002-2008) 1 GLR 1 referred to]

2. Having acquiesced and adopted this wrong procedure at the Trial Court, the appellant cannot now be heard to complain of same on appeal. [*State v Abdoulie Conteh* (2002-2008) 1 GLR 150 referred to]

3. Since the issues were not raised or considered at the trial, the appellant ought to have first sought and obtained the leave of the appeal court to raise them before it can competently argue them on appeal. Not having done so, those grounds and issues are incompetent, void and cannot be argued. [*Gambia Shipping Agency v First International Bank Ltd* (unreported) judgment No. 24/2002 delivered on the 21st June 2007 referred to]

4. It is established by a long line of decisions that an appearance merely to protest that the court does not have jurisdiction will not constitute submission. [*Dulles v Vidler* (1951) CH. 842; *Razelo v Razelo (No.2)* (1970) 1 WLR 392 referred to]

5. The effect of Section 9 (1) of the FJRE Act is to accord such judgment recognition as conclusive between the parties in The Gambia even though it cannot be registered under the said Act. It only enables an unregistered foreign judgment to be recognized for the purpose of preventing a retrial of the same cause between the same parties in The Gambia.

6. The rule can only be successfully invoked if:
    1. The parties and cause of action are the same in all the proceedings.
    2. It is final and conclusive between the parties.
    3. The judgment must be one on the merits and must have been given by a Court of competent jurisdiction.

7. The said part of the judgment of the Trial Court not appealed against remains valid, subsisting and binding. No argument can competently be made against this part of the judgment when there is no appeal against it.

8. A successful plea of estoppel per rem judicatam is one of the situations that can bar the jurisdiction of a court to hear a case.

Cases referred to:

Antoine Banna v Ocean View Resort Ltd (2002-2008) 1 GLR 1
Atoyebi & Anor v Governor of Oyo State & Ors (1994) 5 SCNJ 62
Bank of Australia v Nais (1851) 16 QB 717
Black-Clawson International Ltd. v Papierwerke Waldhof Aschaffenburg AG (1975) AC 591
Dulles v Vidler (1951) CH 842
Fafa E. Mbai v Attorney General
Gambia Shipping Agency v First International Bank Ltd (unreported) judgment No. 24/2002, delivered on the 21st June 2007
Henderson v Henderson (1844) 6 QB 288
Lang Conteh v T.K. Motors (2002-2008) 2 GLR 23
Mdiwe v Okocha (1992) 7 SCNJ 355
Obikoya v Silvernorth (1983) NWLR
Razelo v Razelo (No.2) (1970) 1 WLR 392
ReCofi S.A. v Muhammed Kebbeh & Anor (Unreported) judgment No. 126/94
Sennar (No.2) (1985) 1 WLR 190
State v Abdoulie Conteh (2002-2008) 1 GLR 150
Williams & Glyn Bank PLC v Astro Dinami Co. CIA Naviera SA (1984) 1 ALL ER 760

Statutes referred to:

The Evidence Act of 1994 Section 101 (2) (e)
The Constitution of The Gambia Section 7(1) Foreign Judgment Reciprocal Enforcement Act Cap 8:06 Vol. II Laws of The Gambia 1990 Section 9 (1), (3)

APPEAL against the decision of the Learned Trial Judge in her ruling of 8th June 2006 in which she declined jurisdiction to entertain Suit No. HC/273/05/CO/44/C2, vacated the order of attachment of the 3 containers of vegetable oil aboard M/V Sally Maersk and dismissed the said suit. The facts are sufficiently stated in the opinion of Agim PCA.

Miss. C. Gaye and Mrs. S. Jaharteh for the appellant
M. Drammeh Esq. for the respondents

AGIM PCA. The appellant is a Gambian Company. The respondents are companies operating in Netherlands. The appellant and the 1st respondent entered into an international sale of goods agreement, under which the 2nd respondent agreed to supply to the appellant in the Gambia, three containers of vegetable oil on board the ship M/V Sally Maersk. Although the appellant paid for the goods, the 1st defendant suspended delivery of the goods and the original bills of lading to the appellant for reason of appellant's non-compliance with certain terms of the contract. Meanwhile M/V Sally Maersk arrived at the Port of Banjul, carrying on board amongst other things 3 containers of vegetable oil on behalf of 3rd respondent as shipper. The appellant felt that 2nd and 3rd respondents are not different as that they are run by the same persons. The appellant alleged that the whole thing was a scheme by the respondents to sell the goods by endorsing the set of original bill of lading to some other buyer and thus deprive the appellant of the said goods. To prevent this, the appellant commenced suit No. HC/273/05/CO/44/C2 and caused the goods to be attached.

Upon being served with the writ of summons, statement of claim, ex-parte order and all the processes in the said suit, the respondents challenged the jurisdiction of the Trial Court to entertain the matter. The 1st respondent filed a summons dated 6th September 2005 praying inter alia:-

> "For an order striking out or staying this suit since the Court does not have jurisdiction to hear matters arising from any contract of carriage of the goods shipped on board the vessel M/V Sally Maersk".
>
> ''That the plaintiffs are not a party to the contract of carriage of the said goods and they have no right to the said goods.
>
> That the ex-parte order be discharged.''

The 2nd and 3rd respondents equally filed a motion on notice dated 20th March 2006 praying for the release of the goods attached and the dismissal of the suit for lack of jurisdiction. The grounds challenging the Jurisdiction of the Trial Court, as contained in the affidavits and exhibits supporting the respective summons and motion on notice are as follows:-

''That the bills of lading covering the consignment of the 3 containers of vegetable oil in custodia legis show clearly that the appellant is not a party to the contract of carriage of the goods by sea. The shipper, consignee and notify party on the bill of lading is the 3rd respondent.

The appellant had earlier sued the 2nd and 3rd respondents over the same containers of vegetable oil and other food items at Hertogabosch in case Nos. 128445/K9 and 7AOJ.444. Judgment in those cases were rendered on 7th July 2005 against the appellant herein declining jurisdiction to hear the claim, referring the matter to the Injunctions Court in Rotterdam and the appellant was ordered to pay the costs of the proceedings estimated to be Euro 1660 for disbursement and Euro 816 for fees of the procurement.''

On the 26th July 2005, judgment was delivered in the Court of Rotterdam. The appellant claimed for an order that the 2nd and 3rd respondents herein hand over all bills of lading in their possession relating to the two agreements to deliver five containers of flour and three containers of vegetable oil and all documents necessary for their importation into the Gambia and that the 2nd respondent be condemned to deliver the containers of flour and pay all costs. The claim of the appellant was dismissed. The Court found that it was in default of the performance of the agreement number 50265 and also had not complied with another agreement No.50251 in respect of a parcel of vegetable cooking oil. The Rotterdam Court held that the 2nd respondent was entitled to suspend delivery obligations under the said agreement No.50251. It is this same agreement No.50251 between appellant and 2nd respondent that the appellant sought to enforce in this Gambian suit by attaching the goods shipped by 3rd respondent to The Gambia on M/V Sally Maersk.

In the agreement between the appellant and the 2nd respondent, it is stipulated that the General Trade Conditions deposited at the Chamber of Commerce Eindhoven would govern the agreement. It is an express term of the said General Trade Conditions that the Rotterdam Court shall have exclusive jurisdiction to deal with disputes arising under the agreements. The photostat copies of the English and Dutch versions of the above mentioned judgments, agreement, bill of lading and other documents were exhibited along with the affidavits in support of the said summons and motion on notice. The appellant filed no affidavit in

opposition to the affidavits in support of the summons or motion on notice as it had filed a notice of preliminary objection to the said summons and motion. On the application of the appellant on the 7th June 2006 the name of the 1st respondent was struck out as a party in the suit by the Trial Court. On the application of Mr. Drammeh for the 3rd respondent on the same day, the hearing of the summons and motions as well as the two preliminary objections were consolidated and heard together.

The Trial Court heard arguments from both sides, beginning with A.A.B. Gaye Esq. for the appellant on the same 7th June 2006, who started by saying that he is objecting to the now consolidated motions on grounds of law. That as the Court would have noticed, some of the exhibits accompanying those motions are in foreign language. Since the language of the Court is English, this Court should ignore those exhibits for the purpose of this application. He argued further that his objection goes to the root of the motion. He said that the case between appellant and the respondents in Netherlands, where judgment was entered against the appellant has no application to the present suit in The Gambia. According to him, the jurisdiction of each Court is limited by territoriality and as such a Gambian Court cannot make an order against a person in France. He also argued that the exception are the Reciprocal Enforcement of Judgment Act and Enforcement of Foreign Judgment Act which are not applicable here because there is no arrangement between Gambia and Holland for the reciprocal enforcement of the judgment of their respective Courts. Counsel argued further that the foreign judgment is not registered in The Gambia so it cannot apply to the proceedings in the Trial Court. He maintained that the jurisdiction of the Holland Court does not extend to The Gambia. Learned Counsel further submitted that Veronic Mendy and Marie Gaye who are the deponents to the affidavits in support of the consolidated motions are not experts in foreign law. They are law office clerks. That the Court cannot take judicial notice of foreign law as it is a matter that needs to be proved. The burden of proof of foreign law lies on the party who depends on it. That the Trial Court was not being asked to enforce foreign law. He argued that the appellant paid over $40,000 to someone in Holland and is being deprived of his constitutional right to bring a claim against the person who wronged him. Counsel further submitted that the consolidated motions are

misconceived and as such the Court ought to dismiss the appellant's application for being hopelessly and irredeemably without merit.

M. Drammeh Esq. For the 2nd and 3rd respondents replied that the use of Solicitors clerks as deponents to affidavits is proper, especially where as in this case the parties are beyond the seas and have merely sent instructions to their counsel in The Gambia and this is it is a usual and approved practice in many cases in The Gambia. He further submits that neither the Foreign Judgments Act or the Reciprocal Enforcement of Judgment Act apply here because Netherlands and The Gambia do not have a treaty or arrangement for reciprocal enforcement of judgments. He referred to the case of ReCofi S.A v Muhammed Kebbeh & Anor (Civil Suit No.126/94 R.No.4). He also argued that their motion is mainly predicated on the ouster of jurisdiction clause in the agreement. He refers to the case of Fafa E. Mbai v Attorney General to support his view that the ouster of a Court's Jurisdiction also excludes its inherent jurisdiction. He finally submitted that the burden of establishing that a Court has jurisdiction is upon the party who asserts the jurisdiction.

Gaye Esq. replied on points of law that his learned friend went into the merits of his motion. That the case of ReCofi (supra) cannot apply to this case. The objection there was that the foreign judgment could not be relied upon. The Court in that case held that the Gambia was a proper Country to enforce the judgment as the judgment debtor was in The Gambia. He maintained that he did not go into the merits of the case. The Learned Trial Judge in her ruling of 8th June 2006 declined jurisdiction to entertain Suit No. HC/273/05/CO/44/C2, vacated the order of attachment of the 3 containers of vegetable oil aboard M/V Sally Maersk and dismissed the said suit. The appellant appealed therefrom by a notice of appeal dated 9th June 2006 and filed next day. The grounds of appeal are as follows:-

> ''The Learned Judge erred in Law in dismissing the suit without giving the plaintiff a hearing on the merits of the Defendants consolidated motions.
>
> The Learned Judge was wrong in Law in dismissing the suit and thereby fell into a grave error.

The Learned Judge erred in Law in failing to deal properly or at all with issues raised by the plaintiff's Counsel on the preliminary objection.

The Learned Judge erred in Law in acting on matters of foreign Law and Judgment without ensuring that such matters were properly before her.

That Learned Judge erred in Law in acting on "evidence" of foreign Judgment and law without the requisite proof being properly adduced by the Respondent.''

This Court ordered that written briefs be filed. The appellants brief was filed on the 14th March 2007. From the above grounds of appeal the appellant distilled the following issues for determination:–

1. Was the Learned Trial Judge right, in the absence of any legally admissible evidence to rule that:

   "In this particular case, it is not in dispute that there is a judgment in Holland in respect of the same subject matter and same issues as well as same parties in this matter. It is not very relevant to the Court as to whether or not the procedures required for this Court to recognize or even enforce that judgment had been complied with. The bottom line is that the parties agree about the existence of the judgment and the Court cannot ignore the same in the interest of justice and for the purpose of ensuring that the credibility and impartiality of the Court is not questioned."

2. Was it right and proper for the Learned Trial Judge to hold that the Court lacked jurisdiction to entertain the suit.

3. Having held that the Court lacked jurisdiction to entertain the suit was the Learned Trial Judge correct to make substantive orders.

4. Did the Learned Trial Judge not exhibit a manifest lack of appreciation of the case before her and the issues raised for determination?

5. Did the Learned Trial Judge not foreclose her mind when she held that:

   "The Court is getting increasing worried that certain suits and application filed by interested parties, have the tendency to jeopardize the sanity, dignity and credibility of the Court. Sometime the Court can be forced or induced to interfere and adjudicate on certain matters, which gives the impression that the Court is not vigilant or prudent. The Courts want to serve Counsel and litigants, the Courts being so overstretched, yet willing to bend over backwards and serve, rely heavily on Counsel to put forward relevant facts and provide the necessary guidance to enable the Court reach its decision."

6. Was the Learned Trial Judge right to refuse a stay of the decision and consequential orders made on 8th June 2006?

7. Was the Learned Judge right in dismissing the suit?

The 4th and 5th grounds of appeal and issue No. 1 of the appellant's issues for determination are incompetent to the extent that they relate to the judgment being properly before the Trial Court or proof of same being properly adduced by the respondent. These issues were not raised or taken up nor considered at the trial. No question as to proof of the foreign judgment or as to whether the foreign judgments were properly before the Trial Court was ever raised by any party at the trial proceedings. In fact the appellant did not respond to the affidavit exhibiting the said judgments and thereby admitted the contents and existence of the said judgment and the fact that the parties and cause of action in all the proceedings are the same. Since it did not dispute the existence and content of the judgment and the averments of the affidavit, no issues were joined on this point and the need for proof never arose. It is trite that what is admitted need no further proof. See the case of *7up Bottling Co. Ltd. & Ors v Abiola & Sons Nig Ltd* (1995) 3 SCNJ 37 and the decision of this Court in *Antoine Banna v Ocean Resort* (2002-2008) 1 GLR 1. The appellant did not even object to the use of photocopies of such judgment in evidence. Respondents were duty bound to have

exhibited the certified true copies of the judgment as required by Section 101 (2) (e) of the Evidence Act 1994. The appellant was entitled to object to the use of photo copies of the judgment and have same expunged. But the appellant did not object to their admissibility and use. Rather the appellant relied on the same judgments in its argument before the Trial Court. By raising a preliminary objection to the summons and motions, the impression was created that the merit of the motion was not being dealt with at that stage. But the appellant in arguing its objection proceeded to argue the merit of the summons and motion it was objecting to. The argument of Learned Counsel for the appellant dealt with the merit of the issues in the motion and summons. The respondents replied to those issues accordingly. The situation the appellant put the Court and all the parties is one where after a determination of the issues raised by the arguments of Learned Counsel, the merit of the motion would have been effectively determined. Nothing would have been left to be dealt with after that. The argument of Learned Counsel clearly invited the Trial Court to determine the merit of the case at that stage when he knew he had filed no affidavit in opposition. It means that he had no intention to do so. See *Antoine Banna v Ocean Resort* (supra). The Trial Court was right to have relied on the copies of the foreign judgment before her. See the decision of this Court in *Lang Conteh v T.K. Motors* (2002-2008) 2 GLR 23. Having acquiesced and adopted this wrong procedure at the Trial Court, the appellant cannot now be heard to complain of same on appeal. See the decisions of this Court in *State v Abdoulie Conteh* (2002-2008) 1 GLR 150, *Antoine Banna v Ocean Resort Limited* (supra).

Since the issues were not raised or considered at the trial, the appellant ought to have first sought and obtained the leave of this Court to raise them before it can competently argue them on appeal. Not having done so, those grounds and issues are incompetent and void and cannot competently be argued. See the decision of this Court in *Gambia Shipping Agency v First International Bank Ltd* (Civil Appeal No. 24/2002 of 21st June 2007).

For the above reasons, I hereby strike out those grounds.

Grounds 1 and 2 of the grounds of appeal were abandoned. This is because no issue for determination was raised out of them and no

arguments were made in support of the grounds throughout the appellant's brief. The said grounds 1 and 2 of the grounds of appeal are hereby struck out. See the Nigerian Supreme Court decision in *Atoyebi & Anor v Governor of Oyo State & Ors* (1994) 5 SCNJ 62 and *Ndiwe v Okocha* (1992) 7 SCNJ 355.

The respondents adopted the appellant's issues without expressly saying so and proceeded to argue them seriatim. Having considered the arguments on both sides, and the judgment of the Learned Trial Judge, it is my view that the only issue for determination in this case is:-

> ''Whether the Learned Trial Judge was right in law to have declined jurisdiction to entertain the claim and having done so to have dismissed the suit for lack of jurisdiction.''

Comment [M5]:

A.A.B. Gaye Esq. for the appellant has argued at page 7 of the appellant's brief that the respondents had submitted to the jurisdiction of the High Court of The Gambia because, they entered unconditional appearance to the suit, they applied for the release of attached containers of vegetable oil and applied for a dismissal of the suit. Counsel posits that the respondents should have rather applied to set aside the writ. He submitted that the Learned Trial Judge was wrong to have held that it had no jurisdiction over this matter. The question that naturally arises is whether the respondents submitted to the jurisdiction of the Gambia High Court. It is clear from the record of appeal that after becoming aware of the writ of summons, statement of claim and ex-parte order of attachment of the goods, the next step the respondents took was to file their motion challenging the jurisdiction of the Trial Court and sought the dismissal of the suit and release of goods to the 3rd respondent. This cannot by any stretch of imagination be regarded as a submission to the jurisdiction of the Trial Court. It is clear from the motion and summons that the respondents entered an appearance in objection to the jurisdiction of The Gambian Court. In light of the jurisdictional challenges, the fact that the respondents filed no memorandum is irrelevant. The fact that they asked for a dismissal of the action and a release of the goods does not alter the fact that the jurisdiction of the Court is being challenged. Those reliefs are secondary issues that flow naturally in the circumstances of this case from the determination of the Trial Court that it has no jurisdiction over the matter. The question rather

should be whether it is appropriate to make them following a finding of lack of jurisdiction and not whether it shows that a party has submitted to the Court's jurisdiction. It has become established by a long line of decisions that an appearance merely to protest that the Court does not have jurisdiction will not constitute submission. See *Dulles v Vidler* (1951) CH 842 and also found in (1951) 2 ALL ER 69. *Razelo v Razelo* (No.2) (1970) 1 WLR 392 at 403. This is so even if the defendant seeks the discharge of an injunction or seeks a stay of proceedings pending the outcome of proceedings abroad. See *Obikoya v Silvernorth* (`1983) *Williams & Glyns Bank PLC v Astro Dinami Co Cia Naviera SA* (1984) 1 ALL ER 760.

A.A.B. Gaye Esq. has equally argued that the issue before the Trial Court was the applicable foreign law and that this is a matter of proof by expert evidence and not a matter that can be taken judicial notice of. He finally submitted on this point that without the benefit of the requisite expert evidence on the matter, the Trial Court was wrong to have declined jurisdiction. It is clear from the affidavit evidence, the argument of both counsel Trial Court and the judgment of the Trial Court that the issue before the Trial Court was not on the applicability of foreign law. It is one of conclusiveness of a foreign judgment and enforcement of a foreign jurisdiction clause in the Agreement. The submissions of learned counsel for the appellant on the requirement of proof of foreign law are therefore irrelevant.

I will now proceed to determine if the Learned Trial Judge was justified in invoking the rule as to conclusiveness of a foreign judgment in favour of the respondents. At paragraphs 4 to 16 of Marie Gaye's affidavit in support of the 2nd and 3rd respondents' motion challenging the jurisdiction of the Gambian Court, it is stated that the appellant had before the commencement of the Gambian suit, sued the respondents in the Courts in Netherlands. Judgment was entered in favour of the respondent. Accompanying the said affidavit of Marie Gaye are photocopies of the said Court judgments. On the basis of these undisputed facts, the respondents contend that The Netherlands judgment is conclusive against the appellant and the respondent and therefore the appellant could not relitigate the same matter against the respondents.

The respondents also contend that there is a foreign jurisdiction clause in their international sale of goods agreement with the appellant

which excludes the jurisdiction of The Gambian Courts over any dispute arising under the contract. The said Agreement was exhibited as Exhibit MG1. Learned Counsel addressed the Trial Court thus – "what the defendants are trying to say is yes sometime in July there was a case between Plaintiff Company and defendants in the Netherlands where judgment was entered against the plaintiff. Whatever happened in Netherlands has absolutely nothing to do with us. A foreign judgment whether rightly decided or wrongly decided has no application to this present suit in The Gambia." It is clear from this submission that Learned Counsel is not challenging the authenticity or correctness of the judgment. He concedes to the subsistence of the judgment. He rather contends that being the judgment of a foreign court, it cannot apply in the Gambia. It is therefore clear from the above submission of Learned Counsel for the appellant that he cleared the path which the Learned Trial Judge followed to reach the conclusion he is complaining of. The Court was right to have reached the conclusion that since it is not in dispute that the Holland judgment is in respect of the same subject matter, issues as well as parties, the present suit is not maintainable and the court lacks jurisdiction to entertain it. The Common Law rule as to conclusiveness of foreign judgments applies in The Gambia by virtue of Section 7(1) of the 1997 Constitution of The Gambia which makes Common Law part of the Laws of The Gambia. This common Law rule is preserved and given statutory effect by Section 9 of the Foreign Judgment Reciprocal Enforcement Act (FJRE) Cap 8:06 Vol. II Laws of The Gambia 1990. Its subsection (1) states that:-

> "Subject to the provisions of this section, a judgment to which Part I of this Act applies or would have applied if a sum of money had been payable thereunder, whether it can be registered or not, and whether, if it can be registered, it is registered or not, shall be recognized in any Court in The Gambia as conclusive between the parties thereto in all proceedings founded on the same cause of action and may be relied on by way of defence or counterclaim in any such proceedings."

Subsection (3) preserves the applicable common law rule in the following words:-

> "Nothing in this section shall be taken to prevent any Court in The Gambia recognizing any judgment as conclusive of any matter of law

or fact decided therein if that judgment would have been so recognized before the passing of this Act."

The Rotterdam Court judgment is clearly a judgment to which Part I of the Foreign Judgment Reciprocal Enforcement Act applies. B as it is a judgment given in the Superior Court of a foreign country. The effect of Section 9 (1) of the FJRE Act is to accord such judgment recognition as conclusive between the parties in The Gambia even though it cannot be registered under the said Act since there is no arrangement for the reciprocal enforcement of judgments given in Superior courts between The Gambia and the Netherlands and no sum of money was payable under such judgment. The section does not operate to enable the registration of a foreign judgment that has not fulfilled the requirements for registration under a law. It only enables an unregistered foreign judgment to be recognized for the purpose of preventing a retrial of the same cause between the same parties in The Gambia. It effectively grounds the plea of estoppel per rem judicatam.

The Learned Trial Judge, it would appear, did not rely on Section 9 of the FJRE Act. She never referred to it in her judgment or the common law rules on the enforcement of foreign judgments. She simply applied the principles of estoppel per rem judicatam without more, in the interest of justice. Although she did not give the impression that she appreciated that she was faced with a private international law problem, she still arrived at a conclusion which I cannot fault. Let me remark here that there is little or no difference between the common law rule on conclusiveness of a foreign judgment and the provisions of Section 9 of the FJRE Act. In any case, the rule on the conclusiveness of a foreign judgment can only be successfully invoked if the parties and cause of action are the same in all the proceedings, it is final and conclusive between the parties and the judgment must be one on the merits and must have been given by a Court of competent jurisdiction. The Learned Trial Judge held that it is not in dispute that the parties, cause of action and issues in the case in Netherlands are the same with the parties, causes and issues in The Gambian case. There was no appeal against this portion of the judgment of the Trial Court. It was only challenged under issue No.1 of the appellants brief. There is no ground of appeal on which it can be sustained. As I alluded to, this issue is incompetent and cannot therefore be countenanced. The result is that the said part of

the judgment of the Trial Court has not been appealed against. In the circumstance it remains valid, subsisting and binding. No argument can competently be made against this part of the judgment when there is no appeal against it. It is clear from the English version of the Judgment of the Court of Rotterdam that the action in Holland was filed by the appellant herein against the 2nd and 3rd respondents herein in connection with the sale and delivery by 2nd respondent to appellant of five containers of flour and three containers of vegetable oil. The flour is already in Banjul and the oil was yet to be sent to Banjul. Appellant has had the shipment of flour arrested. Appellant asked the Injunction Court to condemn 2nd and 3rd respondents to handover all the bills of lading in their possession relating to the Agreements for the delivery of the flour and the vegetable oil and all other documents necessary for their importation into the Gambia and to pay costs. There was a cross-action by 2nd respondent claiming that appellant be condemned to perform the agreement between them and cost of proceedings. The 3rd respondent maintained in that case that it has no contractual relationship with the appellant and urged that the appellant be condemned to pay cost of the proceedings. The Court held that there was an agreement in respect of a parcel of vegetable cooking oil and that Bourgi should comply with this Agreement and that it has not done so up till now. The Court further held that 2nd respondent was therefore entitled to suspend its delivery obligations flowing from the agreement until the appellant has himself performed the Agreement. The claim against 2nd respondent was dismissed. The claim by the appellant against 3rd respondent was equally dismissed. Appellant was condemned to pay various sums as costs. The cross-action was held to succeed. Appellant was ordered to perform within two weeks from the service of this judgment his obligations under the agreement. It was also order to pay the cost of the proceedings. The judgment is clearly a final and conclusive determination on the merits of the cause of action and issues between the parties. There is no dispute that the Rotterdam Court is a Court of competent jurisdiction. The appellant first filed his claim in the Court of Hertogenbosch. By its Judgment of 7th July 2005, that Court declined jurisdiction to hear the claims and referred the case as it stood to the Injunctions Judge in the Court of Rotterdam being the Court of competent jurisdiction. This decision was not challenged.

In light of the foregoing, it can safely be concluded that the facts of this case justify the successful invocation of the rule of conclusiveness of foreign judgments. The decision of the Trial Court is therefore correct. See *The Sennar (No.2) (1985)* 1 WLR 490 at 494 and 499; *Henderson v Henderson* (1844) 6 QB 288; *Bank of Australia v Nias* (1851) 16 QB 717 and *Black-Clawson International Ltd v Papierwerke Waldhof Aschaffenburg AG* (1975) AC 591. The merits of the case having been heard and determined in Netherlands by the Rotterdam Court, the proper course open to any party dissatisfied with the foreign judgment is to take appellate proceedings in Netherlands. The Gambian High Court cannot sit over the same case or sit on appeal over such judgment. It lacks the jurisdiction to do so. The Trial Court was therefore right to have declined jurisdiction in the light of the existing foreign judgment.

Learned Counsel did also submit at page 7 of the appellant's brief that the power to decline jurisdiction and order a stay of domestic proceedings can only be exercised where forum non-convenience applies, where there is a foreign choice of jurisdiction clause and where there is an agreement on arbitration. I do not think that this statement of law is correct. The power of a domestic court to decline jurisdiction or stay proceedings on account of a foreign judgment or proceeding is not restricted to the situations stated above. Like I had earlier stated, a successful plea of estoppel per rem judicatam is one of the situations that can bar the jurisdiction of a Court to hear a case. Even if we go by the above submission of Learned Counsel for the appellant, the decision to decline jurisdiction by the Trial Court will still be correct in law because there is an exclusive foreign jurisdiction clause in the agreement between the parties. The affidavit of Marie Gaye at paragraphs 5 – 7 states that the Agreement contains a clause vesting exclusive jurisdiction on the Rotterdam Court to determine disputes arising from the agreement. The agreement is exhibited as Exhibit MG1 and the General Trade Conditions applicable to the Agreement as Exhibit MG2. The appellant did not file an affidavit in opposition to these averments. Like I had already held, in the circumstances paragraph 5 – 7 of the affidavit of Marie Gaye in support of the 2nd and 3rd respondents motion remain admitted as establishing the facts alleged therein. This is trite law. See the earlier decisions of this Court in *Antoine Banna v Ocean View Resorts* (supra) and *FIB Ltd v Gambia Shipping Agencies* (supra).

The parties in the agreement (MG1) had stipulated that the General Trade Conditions deposited at the Chamber of Commerce Eindhoven would apply to the Agreement. The General Trade conditions at clause 1.11 under the heading "Court of Competent Jurisdiction and Applicable Law", states that all disputes that arise from the agreement between Withams and the opposite party, will be adjudicated upon by the Court in Rotterdam unless the parties choose explicitly and in writing to subject the dispute to judgment of before another competent Court, whether in the Netherlands or not. The appellant had challenged the applicability of the above General Conditions to its Agreement with the 2nd respondent in the case he filed in the Court of Hertogabosch, Netherlands. The 2nd respondent objected to the jurisdiction of that Court to entertain the matter because of the clause in General Trade Conditions vesting exclusive jurisdiction on the Rotterdam Court. The Court of Hertogenbosch held that the General Trade conditions applied to the agreement and declined jurisdiction because of the clause vesting exclusive jurisdiction on the Rotterdam Court. This decision is binding and conclusive against all the parties to these proceedings until it is set aside on appeal. Neither party can reopen this issue in these proceedings. See the Sennar (No.2) Supra. The above submission of Learned Counsel for the appellant rather supports the decision of the Trial Court to decline jurisdiction.

In light of the foregoing, I hold that this appeal lacks any scintilla of merit and is accordingly dismissed. The appellant shall pay D20, 000.00 as cost to the 2nd and 3rd respondents. The Judgment of the Trial Court is upheld. The three containers of vegetable oil on board M/V Sally Maersk now in custodia legis should be released forthwith to the 3rd respondent.

Yeboah AG JCA. I agree

Dordzie AG JCA. I agree

Appeal Dismissed.
FLD.

PUBLIC SERVICE COMMISSION; THE ATTORNEY GENERAL

v

N'JAGGA NJIE

COURT OF APPEAL OF THE GAMBIA
(Civil Appeal No. 5/2007)

29th May 2007

Agim PCA

Court – Discretion – Duty on applicant seeking its favourable exercise – Court ruling – Admissibility of – Judgment – Absence of judgment or ruling sought to be stayed – Appeal – Party appealing deserves some considerations from the Court – Stay of execution – Special circumstances to be shown by the applicant.

Party – Duty on party seeking favourable exercise of Court's discretion – Stay of execution – Option left to a party whose application for stay has been granted on terms – Stay of execution – Judgment or ruling sought to be stayed must be exhibited – Proper procedure – Where a party fails to exhibit judgment or ruling sought to be stayed – Appeal – Appellant deserves consideration from Court – Appeal – Existence of special circumstances – Need for applicant to show existence of same.

Practice & Procedure – Discretion of Court – Duty on party seeking for its favourable exercise – Judgment – Option open to a party dissatisfied with ruling of Court granting stay on terms – Stay of execution – Whether it is necessary for a party seeking a stay to exhibit the judgment sought to be stayed – Court ruling – Stay of execution – Attitude of Court towards a party who fails to exhibit judgment sought to be stayed –Appeal – Whether it operates as a stay.

Stay of Execution – Option left to a party whose application for stay has been granted on terms – Application – Whether mandatory to exhibit judgment sought to be stayed when an appeal has been entered – Court – Attitude of Court towards a party who fails to exhibit judgment sought to be stayed – Appeal – Whether operates automatically as a stay – Special circumstances – Need for a party to show its existence.

Held, *refusing the application (per Agim PCA)*

1. The minimum duty expected of an applicant seeking the exercise of the Court's discretion in his favour is to be very clear as to the relief he or she wants from the court. The proper and better way of couching such a prayer is to comply with this minimum requirement.

2. A party who is dissatisfied with a ruling granting a stay of execution of a judgment on terms is at liberty to appeal against the exercise of the discretion. The party can apply for a stay of execution of the portion of the ruling not satisfactory. Like in this case, the portion of the ruling ordering the furnishing of security or deposit of judgment sum as a condition of the stay of execution.

3. One of the requirements for a valid application for stay of execution pending appeal is that the applicant must exhibit along with his application the judgment, ruling or order whose execution is sought to be stayed. Without it, the court will be in no position to assess the grounds of appeal to find out if they disclose substantial issue of law or fact. [*Emeshie v Abiose* (1991) 2 NWLR (Pt 172) 192 referred to]

4. When an appeal had already been entered in the Court of Appeal, exhibiting the judgment, ruling or order would no longer be necessary, because in that case copies of the judgment are already available to the Court.

5. The proper procedure is for the applicant to depose to a further and better affidavit referring to and exhibiting the said ruling and explaining why it is being introduced at that stage. The said further affidavit upon being filed then forms part of the evidence before the Court along with the attached exhibit.

6. The Ruling of a Court being a public document, can only be admitted in Court, in its secondary evidence when it is a certified true copy. [*Ceesay v Bruce* (1997-2001) GR 698 and also by

virtue of 101(1) (e), 2 & 2(c) of the Evidence Act of 1994, referred to]

7. In the absence of the judgment, the argument and written submissions of the applicant is incompetent. This court cannot speculate on the contents of a judgment not before it. [*Emeshie v Abiose* (1991) 2 NWLR (Pt 172) 192 referred to]

8. A Court should not make it a practice to deny a successful litigant the fruits of his success, for instance by locking up the funds to which he is prima facie entitled merely because the judgment debtor has appealed. [*Minteh v Danso No.1* (1997-2001) GR 216, Rule 31 of The Gambia Court of Appeal Rules referred to]

9. A party appealing is entitled to a proper consideration of Court protection as regards the successful prosecution of the appeal and the result of the appeal so that at the end, the appeal is not rendered nugatory. [*Lang Conteh v T. K. Motors* (2002-2008) 2 GLR 23 referred to]

10. The Court can only grant this kind of application if the applicant has shown the existence of special circumstances, whether singly or in combination with other factors, which can render the process or result of the appeal nugatory. [*Emeshie v Abiose* (1991) 2 NWLR Pt. 172 at 192; Vaswani v Savalak (1972) 17 SC 77; *V.S.T Co. Ltd v Xodeus Trading Co.* (1993) 5 NWLR (Pt. 296) 675; *Jawara v Raffle* (1997-2001) GR 767, *Ceesay v Bruce* (1997-2001) GR 698; *Minteh v Danso No.1* (1997-2001) GR 216, referred to]

Cases referred to:

Ceesay v Bruce (1997-2001) GR 698
Emeshie v Abiose (1991) 2 NWLR (Pt. 172) 192
First International Bank Ltd. v Gambia Shipping Agencies Ltd. (2002-2008) 2 GLR 258
Jawara v Raffle (1997-2001) GR 767
Lang Conteh v T. K. Motors (2002-2008) 2 GLR 23

Minteh v Danso No.1 (1997-2001) GR 216
Meridien Bioa Bank Gambia Ltd v Social Security & Housing Corporation (1997-2001) GR 534
State v Abdoulie Conteh (2002-2008) 1 GLR 150
V.S.T Co. Ltd v Xodeus Trading Co. (1993) 5 NWLR (Pt. 296) 675
Vaswani v Savalak (1972) 17 SC 77

Statutes referred to:

The Evidence Act of 1994 - Section 101(1) (e), 2 & 2(c)

Rules of Court referred:

The Gambia Court of Appeal Rules Cap 6:02 Vol II. Laws of The Gambia Section 31

REPEAT APPLICATION for stay of execution of the Judgment of the High Court pending appeal after the grant (on alleged onerous terms) of an earlier application by Roche J. The facts are sufficiently stated in the opinion of Agim PCA.

J Joof Esq. for the appellant
B. Carrol Esq. for the respondent

AGIM PCA. On the 11th day of January, 2007 the High Court of the Gambia per Hon. Justice Roche rendered Judgment in Civil Suit No. 68/2004 against the defendant. On the 22nd January 2007 the defendants applied for stay of execution pending the determination of their appeal. In paragraph 4(iii) of their affidavit in support of this application they stated that they have filed a notice of appeal against the said judgment. It was attached as annex 'A' and bears Gambia Court of Appeal Civil Appeal No. 005/2007. On the 29th March 2007, the Learned Trial Judge granted the application on condition that the appellants/applicants herein provide valid, sufficient security for the judgment sum or deposit the said judgment sum with the Master of the High Court who will deposit it in an interest bearing account pending the determination of any appeal. She also held that no appeal had been filed against the judgment sought to be stayed. The appellants/applicants

herein on the 2nd April 2007 filed a notice of appeal against the above decision of the Learned Trial Judge granting their application for stay of execution on term. On the 4th April 2007, the appellants/applicants herein filed another motion on notice praying for an order staying execution pending the determination of their appeal. The respondent filed an affidavit in opposition and the appellants' filed a reply to it on 3rd May 2007. The appellants filed their written address on the 3rd May 2007 whilst the respondent filed its brief on the 16th of May 2007.

I have considered the arguments of Counsel on both sides and arrived at the conclusion that the issues emerging from the totality of the arguments are –

1. That it is not clear which decision of the Learned Trial Judge, between the judgment of 12th January, 2007 and the ruling of 29th March 2007 the application for stay relates to.

2. That the application is incompetent.

3. Granting that it had been competently made, it lacks merit.

Comment [M6]:

With respect to the first issue, I completely agree with the submission of Hawa Sisay-Sabally for the respondent that the application is not clear as to which decision of the Trial Court it seeks to stay. The applicants ab initio created this confusion when they failed to state in the first prayer of their motion the exact judgment whose execution is sought to be stayed. The said prayer reads thus:-

> "An order staying execution pending the determination of the appellants/applicants appeal."

The minimum duty expected of an applicant who seeks the exercise of a Court's discretion in his favour is to be very clear as to the relief he or she wants from the Court. The proper and better way of couching such a prayer should have read thus:–

> "An order staying the execution of the judgment of the Gambia High Court delivered on the 11th January 2007 in Civil Suit No. 68/2004 or

the ruling of the Gambia High Court delivered on the 29th March 2007 in Civil Suit No. 68/2004(as the case may be)."

The applicants compounded the confusion when, in paragraph 4 of their affidavit, they referred to both the judgment and the ruling. However, the applicants in paragraph 4(1) of their affidavit in reply to the respondent's affidavit in opposition gives the impression that their application for a stay of execution of the judgment having been refused, this was a second application for stay of execution. Therein it is stated thus:-

"In reply to paragraph 3 of the affidavit in opposition the fact is that a stay of execution was not granted, otherwise it would be superfluous applying for an order that had been granted".

However, the photocopy of the handwritten ruling of the Trial Court of 29th March 2007 shows clearly at page 4 therein that the application to stay the execution of the judgment was granted by the Trial Court in its said ruling of 29th March 2007 in the terms stated by the appellants/applicants in paragraph 4(1) of the affidavit in support of their motion. The appellants/applicants increased this confusion in their written submission. Apart from just referring to the ruling of 29th March 2007 as part of the narrative of facts at page 2 of the written submission, the appellants/applicants dwelt on the judgment of 11th January 2007 as the one relevant to this application. That is the one to be considered in deciding this application. This is clear from page 3 of their written submission:-

"…A substantial, and not frivolous, issue of jurisdiction will constitute a special or exceptional circumstance for purposes of grant of stay. E.g. The Court did not possess the requite jurisdiction to decree that the defendants should pay the plaintiff the sum of D10, 278 representing 6 months' salary as damages for breach of contract of employment.

It had no jurisdiction to order the defendants to pay the plaintiff the sum of D96, 684.00 representing plaintiffs full salary from 1st August 1997 to 31st December 1997 plus half salary from 1st January to 30th June 2003 and plaintiff's full salary from 7th July to 19th February, 2004 etc.

Submit, I am not oblivious of the fact that this Honourable Court has a discretion to grant or refuse the order sought but in view of the issue of jurisdiction, which the court did not posses to make the foregoing orders, I urge the Honourable Court to use its discretion judiciously and judicially and grant the order as prayed.

We urge the Court to take into consideration that:

a) The orders disobeyed were made without jurisdiction.
b) We are challenging the validity of the said order
c) The grounds of appeal involve substantial points of law and that the appeal will be rendered nugatory if the application is not granted."

Whether this application is for the stay of execution of the judgment or the ruling has remained on the realm of conjecture. It is the responsibility of the appellants/applicants to take their case out of the realm of conjecture. They made no effort to do so. They continued to argue as if the judgment and the past ruling on the motion to stay execution were one and the same thing when clearly they are not. A party who is dissatisfied with a ruling granting him or her stay of execution of a judgment in a case on terms is at liberty to appeal against the exercise of the discretion like the appellants/applicants have done in this case. The party can, following the grant of the stay of execution on terms, apply for stay of execution of the portion of the ruling ordering the furnishing of security or a deposit of the judgment sum as a condition of the stay of execution. For the purpose of this application, the relevant decision is the one ordering the furnishing of security or deposit of the judgment sum and nothing else. That is the res for the purpose of this later appeal and is the only one to be considered or dealt with for the purpose of the application. The judgment whose execution had been stayed on terms is not relevant for the purpose of the appeal against the ruling. The entire appellants written submission did not address the application for stay of execution of the portion of the ruling granting same on term. The written submission is thus incompetent and superfluous since it alluded to a judgment whose execution had already been stayed.

The application is clearly incompetent for the following reasons:-

i) The prayer for an order staying execution pending appeal, did not state the judgment, ruling or order to be stayed pending the determination of the appeal there from.

ii) The application did not exhibit the judgment or ruling sought to be stayed. One of the requirements for a valid application for stay of execution pending appeal is that the applicant must exhibit along with his application the judgment or ruling or order whose execution is sought to be stayed. Without it, the Court will be in no position to assess the grounds of appeal to find out if substantial issues of law and or fact have been raised. The appellants/applicants at the 2nd page of their written submission stated the law on this point and made reference to the Nigerian case of Emeshie v Abiose (1991) 2 NWLR (Pt 172) 192 as follows: –

> "In Emeshie v Abiose (1991) 2 NWLR (Pt 172) 192 it was laid down that before an application for stay of execution pending will recommend itself to favourable consideration the applicant must:-
>
> a. Attach the judgment, the stay of execution of which he is seeking.
> b. Not have delayed in bringing the application.
> c. Show that execution has not been levied.
> d. Show special circumstances warranting the grant of stay in his favour."

Knowing very well that this was a fundamental requirement, the appellants failed to comply with it in bringing this application. The only exception is when an appeal had already been entered in the Court of Appeal. In which case copies of the judgment are already available to the Court. In this case there is nothing to show that the records have been compiled and transmitted to this Court. At the last sitting of this Court, this Court drew the attention of Learned Counsel for the appellant to this lacuna and advised him to ensure that the situation is corrected before I rule on this application. On the 24th May 2007, the said Counsel filed a document titled **"**RE-COURT OF APPEAL ORDER TO SUBMIT THE LOWER COURT'S RULING OF THE 29TH MARCH, 2007, UNFAILING

BY 24TH MAY 2007". Attached to this document is a photostat copy of a document that is substantially faint and ineligible except for the last page. I do not see how this kind of procedure can be justified in interlocutory proceedings. Evidence is led by affidavit or orally where the Court so orders. The applicants should have deposed to a further affidavit referring to and exhibiting the said ruling and explaining why it is being introduced at this stage. The said further affidavit upon being filed then forms part of the evidence before the Court along with the attached exhibits. It is not correct to introduce evidence in interlocutory proceedings the way the applicant has introduced the Trial Court's ruling of 29th March 2007. Furthermore, the ruling of a Court being a public document, the only secondary evidence of it that is admissible is a certified true copy. See Section 101 (2)(1)(e) and 2(c) of the Evidence Act 1994. See also the decision of this Court in *Ceesay v Bruce* (1997 – 2001) GR 698 at 702. This becomes more compelling where the exact terms of the ruling is being disputed by the parties and the photocopy tendered is faint and not decipherable in most of the pages. The applicant should have obtained a clearer copy certified by the Registrar of the High Court. The Judgment of 11th January 2007 is not attached by the appellant. In the absence of this judgment the argument of the applicants in their written submission concerning that judgment become incompetent. This Court cannot speculate on the contents of a judgment not before it. Moreover, since the High Court by its ruling of 29th March 2007 had granted the application to stay execution of the judgment, it would be superfluous to apply again or argue that this Court should stay the execution of the same judgment once more and for the second time.

Comment [M7]:

Let me now proceed to the last issue. As this Court held in *Minteh v Danso No.1* (1997 – 2001) GR 216 at 217, a Court should not make it a practice to deny a successful litigant the fruits of his success and thus lock up the funds to which he is prima facie entitled merely because the judgment debtor has appealed. Rule 31 of the Gambia Court of Appeal Rules clearly state that an appeal shall not operate as a stay of execution or of the proceedings under the judgment or decision appealed from. On the other hand, a party appealing is entitled to proper consideration as regards the successful prosecution of the appeal and the result of the appeal so that at the end, the appeal is not rendered nugatory. See the decision of this Court in *Lang Conteh v T.K. Motors*

(2002-2008) 2 GLR 23 following the earlier decisions in *Minteh v Danso No.1* (supra) and *Ceesay v Bruce* (supra) at 708. The duty of this Court to do so is derived from Rule 31 of the Gambia Court of Appeal Rules.

As both sides have rightly submitted, this Court can only grant this kind of application if the applicant has shown the existence of special circumstances whether singly or in combination with other factors, which will render the process or result of the appeal nugatory. The authorities of *Emeshie v Abiose* (supra); *Vaswani v Savalak* (1972) 12 SC 77 and *V.S.T Co. Ltd v Xodeus Trading Co* (1993) 5 NWLR (Pt 296) 675 cited by O. Ajayi Esq. and the decisions of this Court in *Jawara v Raffle* (1997-2001) GR 767; *Ceesay v Bruce* (supra) and *Minteh v Danso No. 1* (supra) cited by H. Sisay-Sabally Esq. were quite apposite and helpful on this point. See also the decision of this Court in *Merideien Bioa Bank Gambia Ltd v Social Security & Housing Finance Corporation* (1997-2001) GR 534. It is clear that application of this principle presupposes that there is already a pending and arguable appeal or one disclosing substantial issues of law and or fact. In arguing that the grounds of appeal are substantial, Ajayi Esq. for the appellants/applicants stated at the third page of his written address that:-

> "… A substantial, and not frivolous, issue of jurisdiction will constitute a special or exceptional circumstance for purposes of grant of stay. For example where the Court did not possess the requite jurisdiction to decree that the defendants should pay the plaintiff the sum of D10, 278 representing 6 months' salary as damages for breach of contract of employment.
>
> It had no jurisdiction to order the defendants to pay the plaintiff the sum of D 96, 684.00 representing plaintiffs full salary from 1st August 1997 to 31st December 1997 plus half salary from 1st January to 30th June 2003 and plaintiff's full salary from 7th July to 19th February, 2004 etc.
>
> Submit, I am not oblivious of the fact that this Honourable Court has a discretion to grant or refuse the order sought but in view of issue of jurisdiction, which the court did not posses to make the foregoing orders, I urge the Honourable Court to exercise its discretion judiciously and grant the order as prayed."

It is clear from his above submission that the jurisdiction he is challenging is the jurisdiction to make the orders in the judgment of 11th of January 2007. Like I had pointed out, that judgment is not before this Court and without it, it is impossible to assess the grounds of appeal against that judgment. A Court cannot and should not speculate on the contents of a document not before it. Attaching the judgment whose execution an applicant seeks to stay is a condition sine qua non to the grant of same. See *Emeshie v Abiose* (supra) cited by the appellants/applicants Counsel. With respect to the ruling of 29th March 2007, Learned Counsel for the appellants said nothing concerning whether it should be stayed or not and whether the grounds of appeal should be relied on for this application. He said nothing about the nature of the grounds of appeal against the said ruling. In the light of the foregoing, it is clear that the appellants/applicants have not shown that the grounds of appeal against either the judgment or the ruling disclose substantial or arguable issues of law and or fact.

The appellants/applicants have equally not shown how the deposit or payment of the judgment to the Court to be kept in an interest yielding account as ordered in the ruling of 29th March 2007 will negate the appeal process or result. The application as presented failed to fulfill the very parameters stipulated in *Emeshie v Abiose* and other cases cited by the appellants/applicants. These conditions must be satisfied, before an application for stay of execution of a judgment pending an appeal can recommend itself to favourable consideration.

In light of the foregoing this application fails and is hereby refused. I will like to draw the attention of the appellants/applicants that they are yet to cause the records of their appeal against the judgment of 11th January 2007 to be transmitted to this Court. The same applies to the post-judgment ruling of 29th March 2007, which must be small. I think that if the appellants are really serious about appealing against the above decisions, they should take steps to cause their appeal records to be compiled and transmitted here. It is now about 5 months since the judgment of 11th January 2007 was rendered. There is nothing before me to show that the appellants have even applied to the Registrar of the High Court for the compilation of the records of appeal. See the decisions of this Court in *F.I.B. Ltd v Gambia Shipping Agencies Ltd*

(2002-2008) 2 GLR 258, *Lang Conteh v T.K. Motors Ltd* (supra) and The *State v Abdoulie Conteh* (2002-2008) 1 GLR 150.

The appellants/applicants shall pay cost of D3,000.00 to the respondent.

Application refused.
FLD.

OUSMAN SECKA v DENNIS JALLOW

COURT OF APPEAL OF THE GAMBIA
(Civil Appeal. 54/99)
18th May 2008

Agim JCA, Paul and Yamoa Ag. JCA

Court – Observance of equitable principles.
Equity – Equal equities between parties - Effect thereon – Competing equitable interests – Priority how placed.
Land Law – Long possession in land – What amounts to.
Practice and Procedure – Duty of party claiming priority over competing interest.
Words and Phrases – Nemo dat quod non habet – meaning of.

Facts

The plaintiff sometime in 1993 gave money to his mother and attorney, one Anna Bahoum to purchase land for him. The said attorney of the plaintiff entered into a transaction for the purchase of land situate at Kololi numbered 605 in the books of the Kanifing Municipal Council. According to the said attorney who gave evidence on behalf of the plaintiff, before the purchase price of D53, 000 was paid for the land, she conducted a search at the Kanifing Municipal Council (hereafter referred to as KMC) and there found that the plot numbered 605 was unencumbered; she also called for, and was shown the documents the vendor, one Sheriff Mbye, had on the land. Upon the payment of the purchase price, the plaintiff's attorney received from Sheriff Mbye on behalf of the plaintiff, the following documents: a Certificate of Ownership: exhibit 2, Planning Clearance: exhibit 3, a plan of the land: exhibit 4 and receipts of rate payments for the years 1991-92: exhibit 7 and another dated 17/8/92: exhibit 8. She also alleged that she received a receipt for the purchase price of D53, 000. A Deed of assignment, exhibit 9 was executed by Sheriff Mbye and the father of the respondent herein who gave evidence as PW2. The attorney then on behalf of the plaintiff went onto the land. The land had erected on it one course of blocks by way of wall fence. In her words, "There was only one line of

block. It was not plastered. There was one foundation. The line of blocks were plastered. It was not a long line of block. It was only that line." Upon enquiry the vendor Sheriff Mbye allegedly told the attorney that he was the one who put the line of blocks on the land. Sometime after this, the plaintiff's attorney received on behalf of the plaintiff, a letter from the Department of Physical Planning - exhibit 5, advising the KMC that the owner of the land was appellant herein and that the land should "revert to him." The plaintiff then caused his solicitor to write a letter, exhibit 6 in reply to that letter and commenced the action before the Court below in respect of which this appeal has been brought.

Held, *allowing the appeal in part (per Agim JCA, Paul and Yamoa Ag. JCA concurring)*

1. A vendor can only give, divest or assign what he has and not more.

2. The well-known equitable maxim is that where the equities are equal between two parties, the first in time prevails.

3. The fact of possession however long does not convert an equitable estate into a legal one. [*Touray v Waggeh* (1997 – 2001) GR 605 referred to]

4. A purchaser of an equitable interest without notice will take free from a prior equity if the vendor gives him the better right to a legal estate. A legal right is enforceable against any person who takes the property, whether or not he has notice of it. But the situation is different as regards equitable rights. A purchaser for valuable consideration who obtains a legal estate at the time of his purchase without notice of a prior equitable right is entitled to priority in equity as well as in law. In such a case equity follows the law; the purchaser's conscience is in no way affected by the equitable right. [*Pilcher V Rawlins* (1872) 7 Ch. App 259 referred to]**.**

5. The Customary grant by an Alkalo confers a lesser right than the legal title granted by the state. The customary grant is a right in

equity which needs to be perfected by the grant of a lease by The State.

6. When a transfer of interest in land is made by a deed of assignment, the significance of such an assignment is to divest the assignor of his interest in the property, the subject of the assignment, in favour of the assignee.

Case referred to:

Touray v Waggeh (1997 – 2001) GR 605

Statutes referred to:

Banjul and Kombo St Mary Act Cap 57:02 Vol. XIX Laws of The Gambia
The State Land Act of 1990 – Section 4

Rules of Court referred to:

The Gambia court of Appeal Rules Cap 6:02 Vol. II Laws of The Gambia
Section 36

APPEAL by the plaintiffs from the decision of Grante J in respect of an action for title to plot number 605 situate at Kololi.

*J. Joof Esq***.** for the appellant
*B. Carrol Esq***.** for the respondent

YAMOA Ag. JCA. This is an appeal from the judgment of Grante J (as he then was) in respect of an action by the respondent herein against the appellant and two others for the following reliefs:

a) A declaration that the plaintiff is the beneficial owner of a piece or parcel of land known as plot number 605 situate at Kololi in the Kombo St Mary Division of The Gambia;
b) Costs;
c) Further or other reliefs.

The facts on which the present appeal has been lodged and in respect of which counsel relied in their briefs are that the plaintiff sometime in 1993 gave money to his mother and attorney, one Anna Bahoum to purchase land for him. The said attorney of the plaintiff entered into a transaction for the purchase of land situate at Kololi numbered 605 in the books of the Kanifing Municipal Council. According to the said attorney who gave evidence on behalf of the plaintiff, before the purchase price of D53, 000 was paid for the land, she conducted a search at the Kanifing Municipal Council (hereafter referred to as KMC) and there found that the plot numbered 605 was unencumbered. The Plaintiff's attorney also said she called for, and was shown the documents the vendor, one Sheriff Mbye, had on the land. Upon the payment of the purchase price, the plaintiff's attorney received from Sheriff Mbye on behalf of the plaintiff, the following documents: a Certificate of Ownership: exhibit 2, Planning Clearance: exhibit 3, a plan of the land: exhibit 4, and receipts of rate payments for the years 1991- 92: exhibit 7 and another dated 17/8/92: exhibit 8. She also alleged that she received a receipt for the purchase price of D53, 000. A Deed of assignment: exhibit 9 was executed by Sheriff Mbye and the father of the respondent herein who gave evidence as PW2. The attorney then on behalf of the plaintiff went onto the land. The land had erected on it, one course of blocks by way of wall fence. In her words, "there was only one line of blocks. It was not plastered. There was one foundation on the land. The line of blocks were plastered. It was not a long line of blocks. It was only that line…"

Upon enquiry, the vendor Sheriff Mbye allegedly told the attorney that he was the one who put the line of blocks on the land. Sometime after this, the plaintiff's attorney received on behalf of the plaintiff, a letter from the Department of Physical Planning - exhibit 5 advising the Kanifing Municipal Council that the owner of the land was the appellant herein and that the land should "revert to him". The plaintiff then caused his solicitor to write a letter - exhibit 6 - in reply to that letter and to commence the action before the Court below in respect of which this appeal has been brought. In the evidence given by the vendor in support of the plaintiff's case at the Court below, the vendor alleged that he acquired the land from an Alkalo in 1990 and processed his documents in 1992. I must at this point say that Ebrima Faal, the Alkalo from whom the said vendor Sheriff Mbye acquired the land said that he in fact gave the land to the latter in 1992 not being aware that his predecessor had

given same to the present appellant who was the first defendant in the action at the Court below. The appellant herein testified that in April 1986, he acquired the land in dispute from Alkalo Lamin Ndure of Kololi, registered it the next year 1987 at KMC and paid rates in respect thereof. The plot was described in the book of KMC as No. 351, and lately after some renumbering, No. 350. The appellant tendered before the Court below copies of the following documents:

1. Letter from the Alkalo dated 30th May 1986 as exhibit D1
2. Rate payment receipts for the years 1986 to 1997 as exhibits D2, D3 and D3A (demand notice for D3), D4, D5, D6 and 6A (demand notice for D6) and Valuation of Assessment as exhibit D2A
4. Certificate of Ownership dated 15th April 1987 as exhibit D7
5. A Sketch Map as exhibit D7A

The appellant further testified that on the 18th of July 1988, he applied to the Department of Lands for a residential and agricultural lease of the land per exhibit 8 and received a reply thereto per exhibit 8A by which he was informed that the area was designated a "Wood Area" and so his application could not be granted.

The appellant said that from the time he was granted the land in dispute until the time he gave evidence before the Court, he had remained in possession thereof. According to the appellant, sometime in 1993, he found certain persons later found to be the agents of the respondent extending the one metre wall he had erected on the land. The appellant by a letter dated 5th November 1993 (exhibit 9) complained to the Department of Physical Planning regarding the said unauthorized presence on the land for which he received exhibit 10 - a letter dated 17th December 1993. The appellant further said that he built up the wall to its present height and placed a big metal gate. The appellant called four witnesses who confirmed this fact - the mason who erected the fence to its present height; the person who did the frontage; the metal worker who made the gate and the one who fixed same on the land. The case of the appellant was also corroborated by the Rating Clerk at the KMC who tendered in evidence, exhibit D11 the Rating Book and the entry in respect of the disputed land exhibit D11 A. He authenticated the receipts tendered by the appellant and stated that they had indeed been tendered

in respect of property recorded in the books of KMC as No. 351 and later No. 350. The Director of the Department of Physical Planning and Housing for the Department of State for Local Government and Lands who gave evidence for the other two defendants in the action corroborated the evidence of the appellant in some material detail. He was emphatic that the appellant received his grant from the Alkalo before the respondent did (he said the former grant was in 1988 whilst the latter was in 1990). This witness further stated that the appellant fenced the land to about one half of a meter before the respondent got his grant and that the respondent admitted to this at a meeting called by his office to resolve the dispute. The witness explained that although his office had issued the respondent with a Planning Clearance that did not vest ownership in the respondent as that document only clarified land use.

The Court below having heard the said pieces of evidence and the addresses of counsel, held that the parties had competing interests and that although the respondent's interest in the land was acquired after the appellant's, he had acquired a legal estate in the land. The Learned Judge then held the respondent to be a bona fide purchaser of a legal estate for value without notice and entered judgment for the respondent (plaintiff therein). It is against the said judgment that the present appeal has been lodged. The following are the grounds of appeal:

1(a) That the Learned Trial Judge erred in law and in fact in holding that the plaintiff was a bona fide purchaser for value without notice as against the appellant when there was ample evidence that the appellant's workers had fenced the perimeter of the property in 1990 at the latest to a level which ought to have put anyone on notice that the property belonged to someone else and the respondent should not have gone ahead with any deed of assignment in respect of the said land clearly encumbered by reason of the appellant's prior title.

1(b) The Learned Trial Judge erred in law and in fact when he held that the respondent was a bona fide purchaser of a legal estate for value without notice:

(i) Determining first whether Sheriff Mbye, the person the respondent allegedly purchased the land from

had in fact and in law a legal estate over the appellant's property which he purported to sell.

(ii) Determining whether the respondent was in fact and in law a purchaser of a legal estate;

(iii) Adverting his mind to the evidence that the appellant obtained his allocation from Alkalo Lamin Ndure under customary tenure in 1986 and subsequently applied for a lease under the Banjul and Kombo St. Mary Act Cap 102 1988 or thereabout well before the deed of assignment between Sheriff Mbye and the respondent was executed in 1992;

(iv) Determining whether Sheriff Mbye the person said to have sold the plot to the respondent had a lease or other legal estate over the land and when the land in question was allocated to the said vendor by Faal an Alkalo who came into office after Lamin Ndure (who allocated the land to the appellant) under customary tenure in 1992 some five years or so after the appellant had acquired the land.

2. The Learned Trial Judge erred in law and in fact in holding that there were equal equities between the appellant and the respondent when there was overwhelming evidence that the first defendant was the first to acquire the property in 1986 and never lost possession thereof and that the respondent could have only come to the land in 1992 subsequent to the deed of assignment made in 1992 between him and one Sheriff Mbye.

3. The Learned Trial Judge failed to consider and adequately evaluate or at all the evidence adduced on behalf of the first defendant/appellant.

Having read the arguments contained in the briefs of both counsel, I wish to state straight away that in my view, the Learned Trial Judge erred when he entered judgment for the respondent after holding him to be a bone fide purchaser for value without notice for the reasons canvassed in the grounds of appeal, among which is that the learned judge having adverted his mind quite correctly to the fact that at all times, it is the purchaser of a legal estate who having been demonstrated to have had

no notice of a prior equitable title, is to be protected by the law and whose interest is thus declared to override that of the holder of an equitable estate, disregarded the evidence led in its totality and particularly by the respondent and his witnesses, and held the plaintiff to be the holder of the legal estate in the land.

The Learned Judge held thus in spite of having quoted copiously and relied on erudite expositions on the law, contained in Snell's Principles of Equity 28th Ed. 48: "A legal right is enforceable against any person who takes the property, whether or not he has notice of it. But it is different as regards equitable rights. Nothing can be clearer than that a purchaser for valuable consideration who obtains a legal estate at the time of his purchase without notice of a prior equitable right is entitled to priority in equity as well as at law. In such a case equity follows the law and the purchaser's conscience is in no way affected by the equitable right". See the celebrated case of *Pilcher v Rawlins* (1972) 7 Ch App. 259.

From the evidence adduced before the Court, it is clear that there is no controversy about the fact that Sheriff Mbye acquired his land under customary tenure from Alkalo Ebrima Faal who himself testified that he gave same to the respondent in 1992. The said land was indeed registered in the books of KMC and numbered 605. Rate payments were made in respect of the said allocation to the KMC and later, a Planning Clearance was given therefore. None of these however, amounted to a legal estate in the land which in 1992 when it was acquired, could only be obtained upon the grant of a lease. Indeed the Director of the Physical Planning Department whose office issued the Planning Clearance explained the significance of it: that it was for the clarification of land use and did not confer title. The fact that the vendor executed for the respondent's benefit, a document he described as a deed of assignment did not, with respect, create a legal estate.

What is the significance of a customary grant by an Alkalo regarding land in respect of which the State grants leases? Being land situate in Kombo Saint Mary Division and not held in fee simple and thus governed by The State Lands Act of 1990 (See Section 4 of the Act), the customary grant of the suit land by an Alkalo conferred less than the legal title – a right in equity that had to be perfected by the grant of a lease by the State. Sheriff Mbye's interest in the land which was not the subject of the grant of a lease by the State therefore remained an

equitable one for it had not been perfected by the grant of a lease. When the said Sheriff Mbye transferred his interest in the land by Deed of Assignment, he could only give what he had, and not more, for the significance of an assignment is to divest the assignor of his interest in the property the subject of the assignment in favor of the assignee. The principle of nemo dat quod non habet raised by the appellant is pertinent in this case, for the vendor Sheriff Mbye whose grant only gave him an equitable interest in the land which had not been converted to a legal estate by the grant of a lease could not have transferred a legal interest to the assignee" for the vendor of an equitable interest can convey only what is vested in him See Snell's Principles of Equity (supra) at page 50.

The Learned Trial Judge rightly held that what Sheriff Mbye held was an interest in equity. The point at which I depart from his reasoning is that having held that the equities between the parties are equal, he inexplicably said that time was not of consequence. The well-known equitable maxim that where the equities are equal the first time prevails which sets out priorities seems to have been ignored by the Learned Trial Judge. See Snell's Principles of Equity (supra) at page 48. Incredulously, the Learned Judge proceeded to hold that the respondent was the holder of a legal estate when in fact the evidence adduced spoke to the contrary. It is my view that in the present instance, both parties had obtained equitable interests from the office of the Alkalo and so had competing interests. The equities in my view were equal, and so the appellant's grant which by the accounts of all including the Director of Physical Planning was before the respondent's would give him priority over any interest the respondent purportedly acquired.

With respect to the appellant's argument that he had possession and therefore a better right to the land, I would point out that although it is a hackneyed expression that "possession is nineteenths of the law" the fact of possession however long does not convert an equitable estate into a legal one. However, such long possession can negate the allegation of lack of notice raised by a purchaser if his presence was apparent on the land. See *Touray v Waggeh* [1997-2001] GR 605. Since the appellant clearly had an equitable right in the land which was created first in time to that of the respondent (acquired in 1990 according to the respondent, or in 1992 as per the grantor's evidence) it would prevail except in face of a bona fide purchaser of a legal estate for value and without notice of any prior interest. Even though counsel for the appellant

argued at length that the fact that, on the attorney's showing, there was a structure on the land, the respondent should have been put upon enquiry as to the existence of a prior interest, (I am satisfied that the respondent could not be fixed with notice of a prior title if his vendor (as the attorney alleged), told him that he in fact put up that structure, and if the numbering of the plot appearing in the books of KMC showed it upon enquiry to be without encumbrance.

With respect to value, it is a matter not in controversy that the respondent brought the land per his attorney for valuable consideration of D53, 000. But any claim to priority where the purchase is for valuable consideration, and bona fide with respect to notice, must be founded on this one fact - that the purchaser obtained a legal estate. I have before now held that what the respondent acquired from his assignor in 1990 or 1992 (as the case may be), was not a legal estate for it was the transfer of an equitable interest and should be held to rank after the appellant's which was acquired in 1986. Nor did the respondent demonstrate that although the acquirer of an equitable interest, he had a better right to a legal estate which could have given him priority over the appellant with a prior equitable interest for as an exception to the principle governing priority. I have taken the liberty of quoting this principle as succinctly stated in Snell's Principles of Equity that "a purchaser of an equitable interest without notice will take free from a prior equity if his purchase gave him the better right to a legal estate."

For the aforesaid reasons, I have reached the conclusion that the Judgment of the Court below cannot stand and same is hereby set aside. It is my view that notwithstanding Section 36 of the Gambia Court of Appeal Rules Cap 6:02 which empowers this Court to give any judgment or make any order, the appellant, who in the Court below made no counterclaim for the other reliefs he is now seeking cannot be granted same in this Court in respect of this appeal. The appeal is hereby allowed and the judgment of the Court below is hereby set aside. The other reliefs sought in this action are hereby refused. Costs of D15, 000 is awarded to the appellant.

Agim Ag. JCA: I agree
Paul Ag. JCA: I agee

Appeal allowed in part.
FLD.

OUSMAN TASBASI v ABDOURAHMAN JALLOW & IRENE JALLOW

COURT OF APPEAL OF THE GAMBIA
(Civil Appeal No. 40/2007)

30th October 2007

Agim JCA

Court – Stay of execution – Discretionary power of Court to grant same – Guiding principles – Applicant's nationality not relevant to its grant or refusal – Affidavit evidence – Attitude of Court to averments in an affidavit that are not denied – Judgment – Enforcements of orders, judgments and Court processes – Responsibility for the enforcement of judgments, orders and Court processes.

Evidence – Affidavit – Averments not denied taken as establishing the facts stated therein.

Judgment & Orders – Order for possession – Meaning and effect – Execution of judgment – How executed by the judgment creditor – Enforcement of Court Orders, Processes and Judgments – Need for strict compliance with the dictates of Section 6 of the Sheriff and Civil Process Act.

Practice & Procedure – Affidavit – Averments not denied – Deemed establishing the facts – Stay of execution – Guiding principles for its grant – Motion – Effect on party served – Judgment and Orders – Order for possession – How executed by judgment creditor – Enforcement of Orders – Responsibility for its enforcement.

Stay of Execution – Court – Discretionary power to grant or refuse – Principles guiding its grant – Motion for stay – Effect on the party served.

Held, *allowing the application in part (per Agim JCA)*

1. Where paragraphs of an affidavit are not denied, the Court will act upon it and same must be taken as establishing facts therein.

2. The Court can, in some situations, grant an application for stay of execution of judgment pending appeal even when it is clear that

the execution will not nugate the appeal. [*Christiana Williams v Melville Williams* (2002-2008) 2 GLR 491 referred to]

3. The pertinent observation of Agim JCA in *Lang Conteh v T.K Motors* (2002-2008) 2 GLR 23 is that:-

> "The general principles which should guide the Court in deciding to grant or refuse to grant an application for stay of execution are merely guidelines. The Court has an unimpeded discretion which it must exercise judicially and judiciously. Adherence to these principles helps in ensuring that the exercise of discretion is not based on vague, irrelevant and extraneous considerations in applying these competing principles to cases before them."

4. An order for possession pre-supposes that the adverse party against whom it is made is in possession.

5. The usual practice is for the judgment creditor to apply, preferably by a motion ex-parte, to the court for a writ of possession of the said land in issue in execution of the judgment obtained by him. The Judge will then issue and sign a writ of possession requiring the Sheriff to cause the execution creditor to have possession of the said land.

6. The general responsibility to enforce the orders and processes of court is statutorily vested on the Sheriff and the bailiffs by virtue of Section 7 of the Sheriff and Civil Process Act.

7. Enforcement of judgments, orders and processes of court in accordance with the rules and directions of the Court is strict and mandatory by virtue of Section 6(2) of the Sheriffs and Civil Process Act. [*Williams v Williams* (2002-2008) 2 GLR 491 referred to]

8. It is trite law that the enforcement or execution whether by the judgment creditor himself or by the Sheriff and his officers must be stopped once they become aware that the judgment debtor has filed a motion for stay of execution.

9. The Nationality without more of an applicant for stay of execution of a judgment pending appeal cannot constitute a veritable and lawful ground for the refusal or grant of such an application. To invite the court to refuse the application on the basis of that, is an invitation to violate the applicant's fundamental human right not to be discriminated against on account of his nationality as enshrined in Section 33(1), (3) and (4) of the Constitution of the Republic of The Gambia 1997.

Cases referred to:

Bentsi-Entchill v Bentsi-Entchill (1979) 2 GLR 303
Camara v Vake (1997-2001) GLR 50
Christiana Williams v Melville Williams (2002-2008) 2 GLR 491
Lang Conteh & Ors v T.K. Motors (2002-2008) 2 GLR 23

Statutes referred to:

The Sheriffs and Civil Process Act Sections 6 (2), 7
The Gambia Constitution of 1997 Sections 33(1), (3), (4)

Rules of Court referred to:

The Gambia High Court Rules Cap 6:01 Laws of The Gambia 1990 Order 43, Rules 1, 16, 17 & 19
The Gambia Court of Appeal Cap 6:02 Laws of The Gambia 1990 Rules Rule 31

REPEAT APPLICATION for stay of execution of the Judgment of the High Court pending appeal after the grant (on alleged onerous terms) of an earlier application by Roche J. The facts are sufficiently stated in the opinion of Agim PCA.

S.M. Tambedou for the applicant
S.B. Janneh with E. Janneh for the respondents

AGIM JCA. On the 6th of July 2007, the Gambia High Court per Roche J in Civil Suit No. 126/04 J No. 15 entered Judgment against the appellant

herein. Dissatisfied with this judgment, the appellant filed a notice of appeal therefrom on the 9th of October 2007. He thereafter filed a motion on notice praying the Trial Court to stay the execution of the above mentioned judgment pending the hearing and determination of the said appeal. After hearing both sides to the application, the Trial Court granted it on the condition that the appellant obeys the injunctive orders in the judgment and provide sufficient and valid security for the total judgment sum of D65, 000.00 with interest and costs pending the determination of the appeal. It is in disapproval of the conditions attached to the grant of the stay of execution by the Trial Court that the appellant has repeated the application to this Court. The application to this Court is supported by an affidavit of 22 paragraphs deposed to by the appellant. Accompanying the said affidavit are exhibits OT (the judgment appealed against), OT1 (the notice of appeal), OT2 (the application made to the Trial Court), OT3 (the ruling of the Trial Court conditionally granting the application), OT4 (bank guarantee), OT5 (the application struck out by this Court for incompetence) and OT6 (receipt dated 29th October 2007 acknowledging receipt of cost of D2, 000 awarded by the Court). The 1st respondent deposed to an affidavit of 28 paragraphs in reply.

Learned Counsel for the appellant Sheriff Marie Tambedou Esq. has argued urging this Court to grant the application as prayed. Learned Counsel for the respondents, S.B. Semaga-Janneh has argued urging this Court to refuse the application. I have adopted the approach of not reproducing the details of their respective submissions here but to refer to them in my determination of specific issues herein. I have considered the motion on notice, the supporting affidavits and exhibit particularly the judgment of the Trial Court, the notice of appeal and ruling of the Trial Court granting the stay of execution, as well as the affidavit of the respondents in reply and the respective arguments of Counsel.

I agree with the submissions of Learned Counsel for the appellant that the grant by the Trial Court of the stay of execution of the judgment on the condition that the appellant obey the orders of injunctions therein clearly amounts to a refusal of the application to stay the execution of those orders pending the determination of the appeal there from. It is beyond dispute and it is not disputed here that the appellant is well within his right to repeat the application for stay of execution before this Court. See the decision of this Court in *Lang Conteh & Ors V T.K. Motors*

(2002-2008) 2 GLR 23. It is clear from the affidavit in support of this application that the appellant has brought this application on two grounds, namely, that the notice of appeal contains grounds which disclose triable issues and that if the execution of the judgment is not stayed, the result of the appeal will be rendered nugatory in the event of success. The facts disclose that the 1st respondent owns the building and boys quarters where the appellant lives. The main building was leased to the appellant for residential purposes. The lease did not include the boys quarters which is occupied by his watchman. The lease is only in respect of the developed portion of the land. The appellant concedes that he is aware of the 1st respondent's expressed intention to begin the construction of his personal residence on the undeveloped portion of the land in future. One of the causes of the conflict between the parties is that the Landlord (1st respondent) wants to commence his building operation and wants to gain access to the undeveloped portion of land by opening the fence which the tenant (appellant) has built beyond the leased property to include part of the undeveloped land. He wants to open the fence and build a gate so that he can have an entry to the undeveloped portion distinct from the gate to the leased portion. The appellant contends that this will leave his apartment bare and unsecured. The respondent also wants the part of the fence extending beyond the leased portion and the shed built by the appellant on the undeveloped portion of land demolished.

After the judgment was delivered, the respondent on their own entered the undeveloped portion of the land and commenced the development of the land. Paragraph 26 of the 1st respondent's affidavit in reply state that the respondents completed the fencing of the said undeveloped portion of land on 30th October 2007 and re-installed a gate to the said portion. This paragraph of the affidavit in reply is not denied by the appellant. It therefore must be acted upon by this Court as establishing the facts therein. The appellant in paragraph 16 of his affidavit stated that the area fenced include the portion of land he is occupying and claiming as being part of the portion leased to him by the respondents. This deposition is not denied by the respondents. The facts therein become established. The appellant also stated in paragraph 9 of his affidavit that if the shed is demolished and if he is ejected from the boy's quarters, in execution of the judgment the result of the appeal in the event of success will be rendered nugatory.

Let me straightaway say that I cannot fathom how the demolition of the shed and the ejectment of the appellant from the boy's quarters will nugate the result of his appeal in the event of success. This contention that the clothes and other properties of him and his family will be destroyed because it is rainy season is groundless because it is now dry season in the Gambia and has been so at all times material to this application including the date this application was filed. Be that as it may, the Court can in some situations depending on the circumstances of the case, grant an application for stay of execution of judgment pending appeal even when it is clear that the execution will not nugate the appeal. See the decision of this Court in *Christiana Williams v Melville Williams* (2002-2008) 2 GLR 452. This is because the Court has an unimpeded discretion to grant this kind of application. This discretion must however be exercised judicially and judiciously. Rule 31 of The Gambia Court of Appeal Rules which give this Court the power to grant this kind of application did not prescribe any criteria and so did not limit the basis for the exercise of its discretion. This is understandable if the power has to remain discretionary then its exercise must not be limited in any way or predicated on fixed principles. However certain principles have evolved over time through case law as authoritative guides for the judicial and judicious exercise of this discretion. See the decision of this Court in *Lang Conteh v T.K. Motors* (supra) for a restatement of those principles and a review of most of the decisions of this Court applying them to cases. Those remain mere guides and nothing else. The following statement of this Court in *Lang Conteh v T.K. Motors* illuminates this point better:-

> "The above are the general principle which should guide the Court in deciding to grant or refuse to grant the application for a stay of execution. The Court has an unimpeded discretion which it must exercise judicially and judiciously. Adherence to these principles helps in ensuring that the exercise of discretion is not based on vague, irrelevant and extraneous considerations. In applying these competing principles to cases before them, it is important for the Courts to call to mind the statement of Sir Vahe Bairamian in his book Synopsis No. 2 at page 50 that administration of law consists in the application of principles to a particular combination of circumstances. Case law is a re-interpretation of principles in the light of new combination of facts.

> The re-interpretation of principles proceeds on lines of common sense. The combination of circumstances in a given case is the context in which a certain principle is applied if in the other case there is the analogy. If the combination is not the same but is sufficiently similar, the principle may be applied when there is no legally relevant distinction between the combination in the previous case and that on the latter case, or the principle may have to be extended or modified to make it applicable. But dissimilar cases should be decided differently."

That is why this Court in *Williams v Williams* (supra) stayed the execution of a judgment pending appeal even though the applicant had failed to show that the process and success of the appeal in the event of success will be rendered nugatory. It was decided on the basis of its own peculiar facts in furtherance of substantial justice. In that case, immediately after the refusal by the Trial Court to grant the appellant's application for stay of execution of judgment pending appeal, the respondent went to the children's school, took them out while the school was in session and thereby took custody of them in execution of the judgment just delivered in his favour. The appellant and respondent had separated and were living apart for over one and a half years. The children lived with their mother throughout this period and came from their mother's house to school that day. The respondent executed his judgment personally and without regard of the due process of execution of judgment by a competent authority of the Court as prescribed in the Sheriffs and Civil process Act. This Court held that:-

> "In our present case, there is no doubt that the grounds of appeal disclose triable issues. But there is nothing to show that if this application is not granted the appeal process or judgment will be rendered nugatory. Ordinarily, I should refuse such an application at this juncture for this reason. I have considered that to do so in this case will lead to injustice in the light of the peculiarities of the case which include the fact that the respondent engaged in self help and with malice aforethought tried to subvert the appeal process, that this matter touches on the very delicate subject of the emotional, moral and physical condition of the children and that what is of paramount

> importance in this kind of case is the child's interest during the pendency of this appeal and not the rights of their parents.
>
> Having lived for so long with their mother, they may have developed fondness for her which makes them feel more emotionally and psychologically secure with her. This compassionate and affectionate relationship is essential for the full development of the children's own character, personality and talents. See *Bentsi-Entchill v Bentsi-Entchill* (1979) 2 GLR 303 at 309. The execution of the said order must not be violent as this will inflict emotional and psychological shock, dislocation and confusion on the child. The execution must be carried out in such a way as to minimize emotional trauma on the child.
>
> For all of the above reasons, I will grant this application as a way of saying no to self help and to discourage the recurrence of such desperation."

I am not laying down any new principle of law. I have merely adumbrated a position restated by this Court in *Camara v Vare* (1997 –2001) GR 50, *Lang Conteh v T.K. Motors* (supra) and *Williams v Williams* (supra). This case is similar to the case of *Williams v Williams* in one respect. The respondents here also embarked on self-help in recovering possession of the portion of the land adjudged to be outside the leased portion. It is clear from the affidavit evidence in this application that the appellant had erected a fence which extended over the portion of land not leased to him. The respondents after the judgment built a fence round the unleased portion of land. It is obvious that the respondents could not have erected their fence without destroying the part of the appellant's fence that covers the unleased portion. It is clear from the evidence that the respondents recovered possession of the unleased portion of the land occupied by the appellant without regard to the due process of execution of such judgment. I do not think that this is right in law. An order for possession presupposes that the adverse party against whom it is made is in possession.

Unless the party against whom it is made (execution debtor) voluntarily obeys the order and relinquishes possession, the party who obtained the judgment (execution creditor) can only get possession through the Sheriff or other officer of Court under a writ of possession. The usual

practice is for the execution creditor to apply, preferably by a motion ex-parte to the Court for a writ of possession of the said land to issue in execution of the judgment obtained by him. See Order XLIII Rules 16, 17 and 19 Schedule II Rules of the High Court Cap 6:01 Vol. II Laws of The Gambia 1990. The Judge will then issue and sign a writ of possession requiring the Sheriff to cause the execution creditor to have possession of the said land and premises with appurtenances and thereafter report back to the Court about the process of execution of the writ of possession. The law and practice on enforcement of judgment relating to land or immovable property is clearly prescribed in Order XLIII Rule 1, Schedule II of the Rules of the High Court Cap 6:01 Vol. II Laws of the Gambia 1990 as follows:-

> "If the decree be for land or other immovable property, the execution creditor shall be put in possession thereof, if necessary by the Sheriff or other officer under a writ of possession.''

It is clear from the above provision that only the Sheriff and his or her bailiffs can, with leave of Court, enforce a judgment for possession of land. Furthermore, the general responsibility for enforcement of the orders and processes of the Court is statutorily vested on the Sheriff and the bailiffs by Section 7 of the Sheriff and Civil Process Act. The respondents and their agents are certainly not Sheriffs and bailiffs of Court. The requirement of enforcement of judgments, orders and process of Court in accordance with the rules and directions of the Court is strict and mandatory by virtue of Section 6 (2) of the Sheriffs and Civil Process Act. As this Court stated in *Williams v Williams* (supra) "the principle underlying these provisions is to ensure that due process is followed throughout the judicial process and thus enabling the Courts to be in effective control of their proceedings to avoid chaos and disorder. It will not help the reputation of the Courts if every judgment creditor resorts to self help in executing his judgment". The self help enforcement of the possession order of the Court is illegal and smacks of lawlessness and disorderly conduct.

What I find more disturbing about this case is the admission by the respondents in paragraphs 22, 23, 24, 25 and 26 of the 1st respondents affidavit in reply and their Counsel in Court that after they were served with a motion for stay of execution of the judgment they continued in their

self-help activities in contempt of the process of Court. It is trite law that the enforcement or execution whether by the execution creditor himself or by the Sheriff and his officers must be stopped upon them becoming aware that the execution debtor has filed a motion for stay of execution. It is surprising that the Sheriff encouraged this contempt of the process of Court as paragraph 25 of the affidavit in reply states. The Sheriff had a duty to ensure that the respondents promptly discontinued their activities immediately they were served with the motion for stay of execution of the judgment. It was indeed a bad day for administration of justice. The respondent it appears was apprehensive that the appellant was trying to stop and thereby further delay their construction work. This is why they continued their work so as to defeat that objective. Even if it were so, that does not entitle him to subvert the legal process of the Court. He clearly took the Law into his hands. The action of the appellant and the Sheriff is as undesirable as it is unconstitutional. Again, this Court stated in *Williams v Williams* that:-

> "The right to appeal is a constitutional right. It encompasses the right to do all such lawful things as will facilitate and protect the appeal. An application to the Court of Appeal for stay of execution pending appeal is part of the right of appeal. Anything done to pre-empt it or that has the effect of pre-empting it certainly is aimed at or is likely to frustrate the effective exercise of the right of appeal. This Court as well as any other Court should not condone such gross abuse of its process."

The respondents as a basis for opposing the grant of this application stated in paragraph 15 of the 1st respondent's affidavit in reply thus –

> "The appellant is a non-Gambian who hails from Turkey and is intent on further delaying our said building project on our own land which he does not deny belongs to us".

I agree with the submission of Tambadou Esq. for the appellant that the nationality of the applicant without more has no relevance to this application. The nationality without more of an applicant for stay of execution of a judgment pending appeal cannot constitute a veritable and lawful ground for the refusal or grant of such an application. To invite this Court to refuse the application on the basis only of the

nationality of the applicant is an invitation to violate the applicant's fundamental human right not to be discriminated against on account of his nationality as enshrined in Sections 33(1), (3) and (4) of the 1997 Constitution of the Republic of The Gambia. I will refuse such an invitation.

In light of the foregoing and in the peculiar circumstances of this case, I order that the execution of the judgment of the Gambian High Court delivered on the 6th of July 2007 in Civil Suit No. 126/04 J No. 14 is stayed pending the determination of this appeal except as ordered hereinafter:-

1. The respondent shall continue in occupation of the undeveloped and unleased portion of land already fenced by them and continue without hindrance or interference by the appellant or his agents or anybody, their building and construction works.
2. The appellant should as ordered by the Trial Court immediately demolish the shed and generator house.
3. The appellant should continue in occupation of the boy's quarters and pay the amount ordered as monthly rent by the Trial Court till this appeal is determined.
4. The above orders are without prejudice to the right of the 1st respondent as landlord under the lease arrangement in respect of the area of the land lawfully occupied by the appellant.
5. The above orders supersede the conditional order of stay of execution of the judgment made by the Trial Court on 17th July 2007.

I make no order as to costs.

Appeal allowed in part.
FLD.

ATTORNEY GENERAL v PAP CHEYASSIN OUSMAN SECKA

COURT OF APPEAL OF THE GAMBIA
(Civil Appeal No. 30/2006)

23rd July 2008

Agim PCA, Ota JCA, Wowo Ag. JCA

Administrative Law – Adjudicatory authorities – Status of - Commission of Inquiry – Power and function of – Effect of Section 202 (2) of The Gambia 1997 Constitution – Whether Chairman possesses powers, rights and privileges of a High Court Judge – Hierarchy and appellate jurisdiction distinguished from the High Court.

Appeal – Grounds of Appeal – Issues formulated therefrom – Issues for determination – Essence of raising issues – Distinction between principal and subsidiary issues – Purpose of formulating issues – Hierarchy and appellate jurisdiction of Courts and Commission of Inquiry distinguished – Appeal – Alternative remedy of appeal.

Court – Appeals – Essence of raising issues for determination – Appeals – Grounds of appeal – Where more issues have been formulated than grounds of appeal – Issues for determination – Purpose thereof – Adjudication – Competency of Courts – Jurisdiction – Supervisory jurisdiction of the High Court – Powers, rights and privileges of a judge of the High Court – Jurisdiction and hierarchy – Courts and Commission of Inquiry compared and distinguished – High Court Judge – Whether bound by previous decision of another High Court Judge – Jurisdiction – Limitation of High Court jurisdiction by Statute and Constitution – Jurisdiction – Whether Courts of concurrent or coordinate jurisdiction can exercise supervisory role on each other.

Interpretation of Statutes – Statutes – Words given ordinary dictionary meaning – Words read together in context – Statutes construed as a whole – Construction of words by reference to extraneous matters.

Judgment & Orders – High Court Judge – Whether bound by previous decision of another High Court Judge – Commission of Inquiry – Status of findings of the commission.

Jurisdiction – Court – Competency to adjudicate on an issue –Supervisory jurisdiction of the High Court – Commission of Inquiry – Powers and functions – Appellate jurisdiction and hierarchy of Courts and Commission of Inquiry distinguished – High Court – Limitation of jurisdiction – High Court jurisdiction limited by Statutes and Constitution – Whether Courts having concurrent or coordinate jurisdiction can exercise supervisory role on each other.

Practice & Procedure – Appeal – Issues for determination – Essence of raising issues for determination – Whether there should be more grounds of appeal than issues formulated – High court – Whether a High Court Judge is bound by previous decision of another High Court – Whether Courts having concurrent or coordinate jurisdiction can exercise supervisory role over each other.

Words & Phrases – ''Adjudicatory authorities'' – Meaning of

Held, *allowing the appeal (per Agim PCA, Ota JCA and Wowo Ag. JCA concurring)*

1. The essence of raising issues for the determination of the appeal is to reduce the grounds of appeal into terse, compact formulations which take cognizance and consideration of the same issues running through more than one ground of appeal. [*Sanusi v Ibrahim Ayoola & Ors* (1992) 11 & 12 SCNJ 142, *Oniah & Ors v Onyia* (1989) 1 NWLR (Pt 99) 515 referred to]

2. The general rule of practice is that there should not be more grounds of appeal than the issues they raise. [*Kalu v Odili* (1992) 6 SCNJ 76, *Ottin v Onoyerwe* (1991) 1 NWLR 116; *Oyekan v Akinrihwa* (1996) 7 SCNJ 165 referred to]

3. The issues must of necessity be limited by, circumscribed and based within the scope of the grounds of appeal filed. They must not be more in number than the grounds on which they are based [*Ayisa v Akanji* (1995) 7 SCNJ 145; *Agu v Ikewibe* (1991) 7 NWLR 385; *Obijiaku v Offiah* (1995) 7 SCNJ 148 referred to]

4. The principal issues as distinct from the subsidiary ones are those that in themselves will affect the result of the appeal. Subsidiary

issues are issues arising from the determination of the principal issues and therefore must of necessity derive therefrom [*Alhaji Sule Agbetoba & Ors v The Lagos State Executive Counc*il (1991) 6 SCNJ 1 referred to]

5. The essence of formulation of issues is to distill the principal issues. [Joseph Mangtup Din v African Newspapers of Nigeria Ltd. (1990) 5 SCNJ 109 referred to]

6. For a court to competently adjudicate on an issue, it must have a proper and valid jurisdiction. A court cannot validly adjudicate on an issue outside its jurisdictional competence. [*Kalu v Odili* (1992) 6 SCNJ 76 referred to]

7. The words ''adjudicatory authorities'' ordinarily means anybody, institution or agency that is engaged in adjudication. In this wide sense, the phrase includes judicial bodies and quasi-judicial bodies, like administrative bodies engaged in adjudication. Judicial bodies include superior courts like the Supreme Court, Court of Appeal, High Court and the Special Criminal Court.

8. It is settled law that unless the words in a statute or other document have been used in their special or technical meaning, it must be given its ordinary dictionary meaning without any gloss or interpolation. If the words have been used in their special or technical sense or have acquired such meaning, then the words must be used in such technical or special meaning in preference to their apparent, ordinary or grammatical meaning. [*Sydale v Casting Ltd* (1967) 1 QB 302, *British Bata Shoe Co. Ltd. v Roura & Forgas Ltd* (1964) GLR 190, *Biney v Biney* (1974) CC 555 referred to]

9. The true meaning of particular words in the provision of the constitution or a statute cannot be arrived at without reading the words together with the words accompanying them in that provision. The sense in which a word is used depends on the subject matter and the context. The best and safest determinant

of the sense in which a word is used in a provision is the words accompanying it in that provision.

10. It is trite law that the supervisory jurisdiction of the High Court is only exercisable against inferior courts and tribunals. [*R v Electricity Commissioners: Ex-Parte London Electricity Joint Committee* (1924) 1 KB 171, *R v Criminal Injuries Compensation Board: Ex-Parte Laine* (1967) 2 QB 864 referred to]

11. A document or statute to be better understood must be read as a whole to ensure consistency between the various parts of the same statute or document. *[Attorney General v Prince Augustus of Hanover* (1957) AC 436 referred to] The Courts have heavily relied on the oft quoted statement of Lord Coke that "it is the most natural and genuine exposition of a statute to construe one part of a statute by another part of the same statute for that best expresseth the meaning of the makers and this exposition is ex visceribus actus (i.e. from the bowels of the statute).

12. If the Commission cannot enforce the attendance of witnesses, examine them and compel production of documentary or other evidence then certainly it will be unable to carry out the functions and duties vested on it by Sections 200 (1) and 202 (1) of the 1997 Constitution.

13. The implication of Section 202(2) of The Gambia 1997 Constitution is that, the Commission of Inquiry in carrying out the inquiry and investigation is equivalent to a High Court at a trial.

14. Section 202 (2) is also to the effect that, the Commission of Inquiry during the conduct of its proceedings shall be of co-ordinate status with the high court at trial. [*Uganda Law Society v The A.G.* 6 CHRLD 41 referred to]

15. The words of Section 202(2) are clear and unambiguous. The provision did not say that the Commission shall be treated like a High Court or shall exercise powers like those exercisable by the High Court at trial. It gives to the commission in very mandatory

language the powers, rights and privileges of a judge of the high court at trial. [*Resident Electoral Commission v Nwocha (1991) 2 NWLR* (Pt 176) 732 referred to]

16. It is clear generally that appeals lie from the decisions of the High Court to the Court of Appeal, appeals equally lie as of right from the findings of the commission of inquiry to the Court of Appeal. It is the universal practice that Courts to which appeals lie from the other Courts are higher up in the judicial hierarchy than the ones from which the appeals arose.

17. It is trite that a judge of a High Court is not bound by the previous decision of another High Court Judge. [*Police Authority for Huddersfield v Watson* (1947) KB 842 referred to] The practice has been properly laid down by Lord Goddard in the above case as follows:
"I think the modern practice, and the modern view of the subject, is that a judge of first instance, though he would always follow the decision of another judge of first instance unless he is convinced the judgment is wrong, would follow it as a matter of judicial comity. He certainly is not bound to follow the decision of a judge of equal jurisdiction. He is only bound to follow the decisions which are binding on him, which, in the case of a Judge of first instance, are the decisions of the Court of Appeal, the House of Lords and the Divisional Court".

18. Even where the High Court has supervisory jurisdiction, it will refuse to exercise it or cannot competently exercise it where statute has provided an alternative remedy of appeal. [*Chief Constable of the Merseyside Police: Ex-parte Calveley* (1980) 1 ALL ER 257, *Sykt Bekerjasama-sama Serbaguna Sungai Gelugar v Majlis Perbandaran Pulau Pinang* (1996) 2 MLJ 697 or in Commonwealth Law Bulletin Volume 23 No. 3 & 4 of July and October 1997 at 787 referred to]

19. Section 204 (2) of the 1997 Gambia Constitution equates the findings of the Commission of Inquiry with the judgment of a High Court on appeal. It is therefore incontrovertible that the findings of

the Commissions have equal status with the judgment of a High Court.

20. Although the High Court exercises wide powers vested upon it by the Constitution, the extent of this jurisdiction can be and is limited by the provisions of the Constitution and particular Statutes. [*Cham (No. 2) v Attorney General (No. 2)* (1997-2001) GR 617; *Attorney General of the Federation & Ors v Sode & Ors* (1990) 1 NWLR (Pt 128) 500; Malick Leigh & Ors v Attorney General (unreported) judgment of CA/22/2001 referred to]

21. It is a cardinal rule that plain words must be given their plain meaning. [Alimi Lawal v G.B. Ollivant (Nig) Ltd. (1972) 3 SC 124 referred to]

22. Once the words in statute are clear, it cannot be construed by reference to extraneous matters. [*B.T. Ogunmade v Chief E.A.A. Fadairo* (1972) 8-9 SC 1 referred to]

23. The Courts have great powers, yet these powers are not unlimited. They are bound by some lines of demarcation as Courts are creatures of Statutes and the jurisdiction of each Court is therefore confined, limited and circumscribed by the Statute creating it [*Icon Ltd. v F.B.N. Ltd (1995) 6 NWLR* (Pt *401) 374* referred to]

24. It is trite that Courts of concurrent or coordinate jurisdiction cannot supervise each other.

Cases referred to:

A. G. Federation v A.G. Abia State & Ors (2001) 7 SC (Pt 1) 100
Agu v Ikewibe (1991) 7 NWLR 385
Ahmed v AIB Ltd (2001) FWLR 1560
Alhaji Chief A.R.O. Sanusi v Alhaji Ibrahim Ayoola & Ors (1992) 11 & 12 SCNJ 142
Alimi Lawal v G.B. Ollivant (Nig) Ltd (1972) 3 SC 124

Attorney General of the Federation & Ors v Sode & Ors (1990) 1 NWLR (Pt 128) 500
Attorney General v Prince Ernest Augustus of Hanover (1957) AC 436
Ayisa v Akanji (1995) 7 SCNJ 245
B.T. Ogunmade v Chief E.A.A. Fadairo (1972) 9-9 SC 1
Biney v Biney (1974) 1 GLR 318
British Bata Shoe Co. Ltd v Roura & Forgas Ltd (1964) GLR 1990
Cham (No. 2) v Attorney General (No. 2) (1997 – 2001) GR 617
Chief Constable of the Merseyside Police Ex-parte Calverley (1986) 1 ALL ER 257
Fatta Othman v A.G. No. 120/05 CA/22/2001
Icon Ltd v F.B.N. Ltd. (1995) 6 NWLR (Pt 401) 374
Joseph Mangtupdin v African Newspapers of Nigeria Ltd (1990) 5 SCNJ 209
Kalu v Odili (1992) 6 SCNJ 76
Louis Oniah & Ors v Chief Obi J.I. Onyia (1989) 1 NWLR (Part 99) 515
Lucy Mensah v Edward Graham (2002-2008) 1 GLR 22
Madukolu v Nkemdilim (1962) ALL NLR 587
Malick Leigh & Ors v Attorney General (unreported) decision of the Court of Appeal
Misc Offences Tribunal v Okoroafor (2001) 9-10 SC 91
National Bank Ltd v Soyoye (1977) 5 SC 181
Ndayo v Ogunsanya (1997) 1 SC 11
Obijiaku v Offiah (1995) 7 SCNJ 142
Oyekan v Akinrinwa (1996) 7 SCNJ 165
Onyenuchaya v Mil Administrator of Imo State (1997) 1 NWLR (Pt 482) 432
Ottia v Onoyekwe (1991) 1 NWLR 116
Police Authority for Huddersfield v Watson (1947) KB 842
R v Criminal Injuries Compensation Board: Ex-parte Laine (1967) 2 QB 864
R v Electricity Commissioners: Ex-parte London Electricity Joint Committee (1924) 1 KB 171
R v Maidenhead Corporation (1982) 9 QBD 494
Resident Electoral Commissioner v N. Wocha (1991) 2 NWLR (Pt 176) 732
Sallah v A. G. (1970) CC 555

Sule Agbetoba & Ors v The Lagos State Executive Council (1991) 6 SCNJ 1
Sydale v Castings Ltd (1967) 1 QB 302
Sykt Bekerjasama-Sama Serbaguna Sungai Gelugar v Mylrs Perbandaran Pulau Pinang (1996) 2 MLS 697
*Uganda Law Society v Attorney G*eneral 6 CHRLD 41
Unwin v Hanson (1891) 2 QB 115

Statutes referred to:

The Gambian Constitution of 1997 Sections 200, 204(1), 133, 24, 37, 10(3)(b), 4, 202(2), 204(2), 205, 120, 122, 123, 206, 120(1)(a), 120(1)(b), 130(2), 18 & 127
Public Assets and Properties (Recovery) Decree No. 11 of 1994 as amended by Decree No. 25 of 1994 Section 3

Books referred to:

Blacks Law Dictionary, 6th Edition
Bradley & Ewing on Constitutional and Administrative Law, 12th Edition, 1998
Cambridge Advanced Leaner's Dictionary, New Edition
Rupert Cross, Statutory Interpretations, Butterworths, London 1976

S. O. Ajayi for the appellant
Pap Cheyassin O. Secka for the respondent

AGIM JCA. On the 28th May 2004, the President of the Republic of The Gambia in exercise of the powers conferred on him by Section 200 of the 1997 Constitution of the Gambia, by instrument contained in Legal Notice No. 8 of 2004, set up a Commission of Inquiry into the Assets, Properties and Activities of Public Officer. The three member commission had a High Court Judge as chairman.

The commission was authorized to:–

a. Investigate the existence, nature, extent and method of acquisition of assets and properties and other related

matters of all persons including persons specified in the Schedule hereto, who were or have been public officers within the period from 22nd July 1994 to 2004 and to inquire into and investigate whether such assets and properties were acquired lawfully or otherwise;

b. Inquire into and investigate the activities of all persons referred to in paragraph (a) within the said period and ascertain:

(i) whether they maintained or are maintaining a standard of living above that which was or is commensurate with their past or present official emoluments;

(ii) whether they were or are in control of pecuniary resources or property disproportionate to their past or present official emoluments; and

(iii) Furnish, in writing to the President, a report on the results of the inquiry, including a statement of the reasons leading to the conclusions of the Commission.

The appellant herein, Mr. Pap Cheyassin Ousman Secka, a legal practitioner, having held public office as Honourable Attorney General and Secretary of State for Justice at the Department of State for Justice between 9th March 2000 and 30th January 2001, was on 12th and 19th August 2004 served a witness summons to appear before the Commission to give evidence. He appeared and gave evidence at the Commission. On the 22nd March 2005 the appellant received a Notice of Adverse Recommendation dated 21st March 2005, wherein adverse recommendations were made against him as follow:-

1. That Alhaji Pap Cheyassin Secka be made to produce to the Commissioner of Income Tax, the true and correct list of persons to whom he sold portions of land at Sukuta.

2. That he be made to declare to the Commissioner of Income Tax, the true and correct prices at which he sold the portions of land at Sukuta.

3. That Alhaji Pap Cheyassin Secka pay to the Commissioner of Income Tax the correct ad valorem duties on the properties sold by him, with interest at the rate of 25% per annum, within 14 days of assessment by the said Commissioner or, in default, any of his valuable properties shall be forfeited to the State.

On the 6th of May 2005, the appellant filed an originating notice at the Gambia High Court applying for an order of certiorari to quash the Adverse Recommendations of the Commission of Inquiry into the Assets, Properties and Activities of Public Officers between 22nd July 1994 to July 2004. The grounds upon which this relief is sought are as follows –

1. That the said adverse findings made by the said Commission against the applicant were made in excess and/or without Jurisdiction.

2. That the said adverse findings were actuated by bias and/or malice and/or by collusion.

3. The Notice of adverse recommendations dated the 21st of March 2005 is in violation of Section 204 (1) of the 1997 Constitution.

4. That the said adverse recommendations violate the rules of natural justice in that the Appellant was never given an opportunity to react to matters implicating him and arising out of his testimony as a witness.

5. The Commission failed to make a full and impartial investigation into the matter in respect of which it is established.

From the affidavits of the respondent the affidavit in opposition of the appellant and legal submissions of their respective Counsel, the following issues emerged for determination by the Trial Court.

1. Whether the trial High Court has the jurisdiction to entertain the respondent's suit as contained in Misc.App.No.HC/112/OTMF/49/F1.

2. Secondly, since the respondent failed to transmit a copy of the record of the proceedings in question to the Court, can the respondent be heard to object to the application or any part of it for this reason that a copy of the proceedings is not placed before the Court that this application or that matters relied on are not contained in such record of the proceedings.

3. Thirdly whether an order of certiorari lies in the circumstances of this case.

4. Whether the Commission of Inquiry did exceed its terms of reference.

After considering the arguments of both sides, the Learned Trial Judge in its judgment of 7th June 2006 held that:–

1. A Commission of Inquiry setup by Legal Notice No. 8 of 2004 pursuant to the 1997 Constitution is inferior to the High Court and subject to its supervisory jurisdiction.

2. The Trial High Court had the jurisdiction to entertain the application by virtue of Sections 133, 24 and 37 of the 1997 Constitution.

3. The respondent proved all the grounds for the application. The adverse recommendations were quashed.

On the 12th of June 2006, the appellant herein filed a notice of appeal containing the following grounds of appeal on the basis of which he

raised 14 issues for determination in the brief of argument it filed on 17th March 2004. The said issues are reproduced here in the manner couched by the appellant as follows:–

ISSUES TIED TO GROUND ONE AT PAGES 121-122 OF THE RECORD:-

1. Whether or not the Public Assets and properties (Recovery) Decree, 1994 Decree No. 11 as amended by Decree 25 of 23rd November, 1994 took effect as law enacted by the National Assembly Pursuant to the provisions of section 7 of the constitution of the Gambia 1997, and saved by Section 10(3) (b) 1997 Constitution.
2. Whether or not the provisions of Decree No. 11 as amended by Decree No. 25 of 1995 are constitutional, valid and conform or contravene section 4 of the constitution of the Gambia 1997.
3. Whether the Court created more confusion than it solved when it failed to indicate those specific provisions of Decree No. 11 that did not conform with the provisions of Section 4 of the Constitution.
4. Whether issue of constitutionality of the provisions of Decree No. 11 was a relief sought by the applicant.
5. What was the effect of the High Court's failure to name specific provisions of the Act that were inconsistent with the provisions of section 4 of the Constitution.

ISSUES TIED TO GROUND TWO (2) AT PAGES 122-123 OF THE RECORDS

1. Whether the Commission of Inquiry provided for in chapter 18 of the Constitution was intended to be under the provisions of Chapter 8 (judicature)
2. If the answer is in the negative in sections 202(2) and 204(2) and 205 of Constitution seek to achieve.
3. Whether or not the provisions in section 202(2) and 204(2) are clear and unambiguous for the court to assume jurisdiction in view of the subject matter of applicant/respondent.

ISSUES TIED TO GROUND NO. 3 AT PAGE 123 OF THE RECROD

1. Whether or not the averments in the applicant/respondent's affidavit emanated from the proceedings at the commission which informed the decision of the Commission, and if the answer is yes, did the Lower Court see the report of the Commission.
2. Whether the material facts contained in the Report were before the Court.
3. Whether a letter captioned adverse recommendations was rightly quashed when there is in existence a detailed report which culminated/arose from the commission's investigations.

ISSUES TIED TO GROUND NO. 4 AT PAGES 123-124 OF THE RECORD

1. Whether Legal notice NO. 8 an instrument under which the commission functioned can be said to be superior to the provisions in Sections 133 and 137 or those of 202(2), 204(2) and 205 of the constitution.
2. Whether the issue of failure to pay ad valorem duty on properties sold and the call to pay same vide Exh. Ap Cos 4 and the issue of the applicant's ex-wife's consent Saffie Secka, his son, and his first cousin were issues that constitute real likelihood of bias.

ISSUED TIED TO GROUND NO. 5 AT PAGE 124 OF THE RECORD

1. Whether or not the applicant/respondent's deposition in all his affidavit were issues which emanated from the proceedings at the commission and if the answer is in the affirmative will the Court be right by holding that the respondent failed to give reason(s) when reasons had been clearly stated in the report that was never before the Court."

The respondent filed his brief of argument on 15th May 2007 and raised 4 issues for determination therein as follows –

1. Does the High Court have supervisory jurisdiction over the Commission of Inquiry into the Assets, Properties and Activities of Public officers from 22nd July 1994 to July 2004, established under Legal Notice No. 8 of 2004), sufficient to issue on order of

certiorari to quash the decision or part thereof of the said Commission.

2. Are the provisions of the Public Assets and Properties (Recovery) Decree, 1994 (Decree No. 11), (established under Section 3 of the said Decree by the Armed Forces Provisional Ruling Council), applicable to the operations of the Commission of Inquiry into Assets, properties and Activities of Public officers issued in the exercise of the powers conferred on the President by Section 200 of the 1997 Constitution of the Republic of The Gambia.

3. What is the relevant period within which the commission of inquiry can investigate:

    i. The existence, nature, extent and method of acquisition of assets and properties and other related matters of the Respondent;

    ii. Or of the Respondent' activities;

    iii. Or whether the Respondent maintained or is maintaining a standard of living above that which was or is commensurate with his past or present official emoluments;

    iv. Or whether the Respondent was or is in control of pecuniary resources or property disproportionate to the Respondent's past or present official emoluments.

4. Can the High Court issue an order for certiorari when it is satisfied that:

    a. The Commission acted in excess of its jurisdiction

    b. There are errors on the face of the record;

    c. During the pendency of the Commission's Proceedings, the Commission's Chairman

exhibited bias and/or malice and/or was in collusion with a 3rd party against the Respondent.

d. The adverse recommendations "violate the rules of natural justice and fair play in that the Respondent was never given an opportunity to react to matters tendering to implicate him and which arose out of his testimony as a witness.

Before I go into the merit of the issues, I will like to observe that the fourteen (14) issues raised by Learned Counsel for the appellant are too prolix. I cannot conceive how 14 issues can be distilled from 5 grounds of appeal. This is a situation of a letter being longer than the envelope that contains it as often popularly said. As the Nigerian Supreme Court held in *Alhaji Chief A.R.O. Sanusi v Alhaji Ibrahim Ayoola & Ors* (1992) 11 & 12 SCNJ 142 the essence of raising issues for the determination of the appeal is to reduce the grounds of appeal into terse, compact formulations which take cognizance and consideration of the same issues running through more than one ground of appeal. As stated by Karibi – White JSC in the Nigerian case of *Louis Oniah & Ors v Chief Obi J.I. Onyia* (1989) 1 NWLR (Pt 99) 515 at 537 whereas the grounds of appeal accentuate the defects in the judgment sought to be set aside, the issues for determination accentuate the crux of the reasons encompassing one or more grounds of appeal for the determination of the appeal. The general rule of practice is that there should be more grounds than the issues they raise. To distill 14 issues for determination from 5 grounds of appeal is therefore wrong. This general rule is restated by the Nigerian Supreme Court in *Kalu v Odili* (1992) 6 SCNJ 76 at 93, *Ottin v Onoyerwe* (1991) 1 NWLR 116 at 214, *Oyekan v Akiwrinwa* (1996) 7 SCNJ 165 at 172. The Court in *Ayisa v Akanji* (1995) 7 SCNJ 245 at 253 and (1991) 7 NWLR 385 at 401 stated that since the issues must of necessity be limited by, circumscribed and fall within the scope of the grounds of appeal filed, they must not be more in number than the grounds on which they are based. The same court said in *Obijiaku v Offiah* (1995)7 SCNJ 142 at 148 that "when the number of issues formulated in a brief is far more than the number of the grounds of appeal, invariably it is a sign that something is wrong with the number of issues formulated." In my opinion the prolixity of the issues for

determination is an indication that the counsel did not understand the issues in controversy or is confused as to what constitutes the principal as distinct from subsidiary issues. The principal issues as distinct from the subsidiary ones are those that in themselves will affect the result of the appeal. Subsidiary issues are issues arising from the determination of the principal issue and are therefore predicated on the principal issue from which they derive. As the Nigerian Supreme Court held in *Alhaji Sule Agbetoba & ors v The Lagos State Executive Council* (1991) 6 SCNJ 1 the essence of formulation of issues is to distil the principal issues from the others. In *Joseph Mangtup Din v African Newspapers of Nigeria Ltd* (1990) 5 SCNJ 209 the same Court admonished that secondary issues and prolixity must be avoided. In spite of their prolixity and the inelegant manner they are couched, I have no choice than to determine them in the interest of justice. Being a procedural irregularity, it cannot be allowed to prevent this court from moving forward to deal with the substance of the matters in controversy in this appeal, since it has not occasioned any prejudice against the respondent who has shown that it did not prevent him from understanding the matters in controversy in this appeal. This is clear from the able manner he distilled his own issues. In a very clear, succinct, concise and precise manner he distilled 4 issues from the 5 grounds of appeal and the appellant's 14 issues. I prefer the issue as raised by him and will therefore adopt them for the determination of this appeal.

I will start by determining the question of the jurisdiction of the trial High Court to supervise a Commission of Inquiry issued under the 1997 Constitution of the Gambia. This is because the Trial Court must have supervisory jurisdiction over such a Commission of Inquiry before it can be said to have competently and validly determined the other issues in this appeal. If it does not have such jurisdiction, then it cannot be disputed that it was engaged in a futile exercise when it decided these other issues. For a competent adjudication can only be founded on a proper and valid exercise of jurisdiction. A Court cannot validly adjudicate on an issue outside its jurisdictional competence. As the Nigerian Supreme Court held in Kalu v Odili (supra), jurisdiction must be vested in a Court before the right of a party can be determined no matter the merits of his case.

S.O. Ajayi Esq. for the appellant has argued at pages 11 – 18 of the appellant's brief of argument that by virtue of Sections 120, 122, 123, 133, 200, 202(2), 204(1), 204(2), 205, this Commission of Inquiry, established pursuant to Sections 200 of the 1997 Constitution, is not a Court or adjudicatory authority inferior to, subordinate to or lower than the High Court. According to him it is of co-ordinate status or jurisdiction with the High Court and is therefore not subject to the supervisory jurisdiction of the High Court. In support of the submission, he relied on the following judicial authorities: Fatta Othman v A.G. (decision of Gambia High Court per Izuako J (as at then) in Misc. App. 120/05/MF/57/F1), and the Nigerian Supreme Court decision in Madukolu v Nkemdilim (1962) ALL NLR 587, A.G. Federation v A.G. Abia State & Ors (2001) 7 SC (Pt 1) 100, Ndayo v Ogunsanya (1977) 1 SC 11, National Bank Ltd v Soyoye (1977) 5 SC 181, Misc Offences Tribunal v Okoroafor (2001) 910 SC 91 at 101 – 102, Ahmed v AIB Ltd (2001) FWLR 1560, Onyenuchaya v Administrator of Imo State (1997)1 NWLR (Pt 482) 432. Pap Cheyassin O. Secka Esq. in his brilliant and well articulated submission under "Issue No.1" at pages 4 – 6 argued that the said Commission of Inquiry is an adjudicatory authority and is therefore subject to the supervisory Jurisdiction of the High Court.

Having considered the judgment of the Trial Court, and the arguments by both sides, I am of the view that this matter calls for a determination of the nature of the Commission of Inquiry, its status and the scope of the supervisory jurisdiction of the High Court. By virtue of Sections 200, 202, 204 and 206 of the 1997 Constitution, the Commission of Inquiry established under Section 200 of the 1997 Constitution is a judicial Commission of Inquiry with investigative and adjudicatory powers and functions. It is in substance an adjudicatory authority. Its exact status in the Gambia judicial hierarchy is the cornerstone for the determination of the question in issue here. Is it lower than or equal to the High Court in the judicial hierarchy of the Gambia. The Learned Trial Judge in her Judgment held that the said Commission of Inquiry is not a superior Court of the Gambia and that it is an adjudicatory authority and as such is subject to the Supervisory Jurisdiction of the High Court. Learned Counsel for the respondent argued at page 6 of the appellant's brief in support of this part of the judgment of the Learned Trial Judge that the commission of Inquiry is not a Superior Court. It is an adjudicatory

authority and as an adjudicatory authority, it falls under the Supervisory jurisdiction of the high Court under Section 133 of the Constitution. The exact scope of the supervisory jurisdiction of the High Court is defined by this section of the constitution which provides thus:–

> "The High Court shall have supervisory jurisdiction over all Lower Courts and adjudicatory authorities in The Gambia, and , in the exercise of its supervisory jurisdiction, shall have power to issue directions, orders or writs, including writs of habeas corpus, orders of certiorari, mandamus and prohibition as it may consider appropriate for the purposes of enforcing its supervisory powers''.

It is clear from the expressed provisions that the constitution limits the scope of the supervisory jurisdiction it vests in the High Court to only "Lower Courts and adjudicatory authorities" in the Gambia. These I apprehend to mean Courts and adjudicatory authorities lower than the High Court. So the Courts and adjudicatory authorities not lower than the High Court are not subject to its supervisory jurisdiction. So the supervisory jurisdiction as prescribed by Section 133 of the 1997 Constitution does not extend to all Courts and adjudicatory authorities. It is limited to Lower Courts and adjudicatory authorities. I agree with the Learned Trial Judge and learned counsel for the respondent that a Commission of Inquiry established under Section 200 of the 1997 Constitution is an adjudicatory authority. However, I do not agree with the decision of the said Learned Trial Judge and the argument of Learned Counsel for the respondent that, as such an adjudicatory authority, it is subject to the Supervisory Jurisdiction of the High Court by virtue of Section 133 of the 1997 Constitution. The Learned Trial Judge did not have regard to the word "lower" in the said Section 133 when she described a Commission of Inquiry as an adjudicatory authority. She applied Section 133 of the Constitution in this case as if the word "lower" therein has no relationship with the words "adjudicatory authorities". There is nothing in the said provision limiting the effect of the word "lower" before the word "Court" "to only "Court" and precluding its applicability to the phrase adjudicatory authorities". The word "lower" is an adjective which qualifies the nouns "Court" and adjudicatory authority". The use of the word "and" between "Court" and "adjudicatory" authorities further shows that the adjective "lower" is intended to qualify

the two nouns that follow it. This interpretation is more reasonable and practicable. The phrase adjudicatory authorities in its ordinary sense is very wide and means authorities that adjudicate or can adjudicate. The word adjudicate from which is derived the adjective adjudicatory is defined in page 14 of the new edition of the Cambridge Advanced Learners Dictionary to mean "to act as Judge in a competition or argument to make a formal decision about something." Black's Law Dictionary, 6th Edition, West publishing Co. USA at page 42 defined adjudicate as "to settle in the exercise of judicial authority." And states that it is synonymous with adjudge in its strictest sense. The same dictionary defines "adjudge" to imply "a judicial determination of a fact and the entry of a judgment." The verb "adjudicate" is defined in the Black's Law Dictionary (supra) as "the legal process of resolving a dispute, the formal giving or pronouncing of a judgment or decree in a Court proceeding, a hearing by a Court after notice of legal evidence on the factual issues involved." The words "adjudicatory authorities" therefore ordinarily mean any body, institution or agency that is engaged in adjudication. In this wide sense, the phrase includes judicial bodies and quasi judicial bodies like administrative bodies engaged in adjudication. Judicial bodies no doubt include the Superior Courts like the Supreme Court, Court of Appeal, High Court and the Special Criminal Court.

There is nothing in Section 133 or any provision of the Constitution indicating or suggesting that the phrase "adjudicatory authorities" is used in a special or technical sense and thereby rendering it a term of act. My attention has not been drawn to any law that gives it a special or technical meaning and I am not aware of any. It has not even been suggested here by the respondent or the Trial Court that the words have a special or technical meaning. It is settled law established by a long wave of cases including the English case of *Sydall v Castings Ltd* (1967) 1 QB 302 and the Ghanaian cases of *British Bata Shoe Co. Ltd v Roura & Forgas Ltd* (1964) GLR 190 and *Biney v Biney* (1974) 1 GLR 318, that unless the words in a statute or other document have been used in their special or technical meaning, it must be given its ordinary dictionary meaning without any gloss or interpolation. If the words have been used in their special or technical sense or have acquired such meaning, then the words must be used in such technical or special meaning in preference to their apparent, ordinary or grammatical meaning. Rupert

Cross in his formulations of the basic rules of English Common Law in his book Statutory Interpretation at page 43 stated inter alia that "the judge must give effect to the ordinary or where appropriate, the technical meaning of words in the general context of the statute, he must also determine the extent of the general words with reference to that context.'' Lord Esher dealing with one method by which words in a statute can acquire a technical meaning opined in *Unwin v Hanson* (1891) 2 QB 115 at 119 that:–

> "If the Act is directed to dealing with matters affecting everybody generally the words used have the meaning attached to them in the common and ordinary use of language. If the Act is one passed with reference to a particular trade, business or transaction, and words are used which everybody conversant with the trade, business or transaction knows and understands to have a special meaning in it, then the words are to be construed as having that particular meaning, though it may differ from the common or ordinary meaning of the words".

In the Ghanaian case of *Sallah v A-G* (1970) CC 555 the attempt by the defence to construe the word "established" appearing in Section 9(1) of the transitional provisions to the 1969 constitution in a technical meaning other than its ordinary meaning was rejected by the Court of Appeal sitting as the Supreme Court. The Learned Attorney General of Ghana had employed in aid the kelsons jurisprudential theory of law to give the word "established" a technical meaning. Archer JA (as he then was) said, along the line of the majority decision that "the constitution of Ghana is a conglomeration of English words. The lives of Citizens depend on these words. Rights and obligations, qualifications and disqualifications, privileges and disabilities depend on these words. Unless these words are specifically defined in the Constitution then the ordinary meaning of these words as properly and generally understood by literate persons should prevail. No system of jurisprudence, however popular it is - be it analytical positivism, the pure theory or the historical - can assist the Courts in this Country in their interpretation of the Constitution. Apallo JA (as he then was) also said "We would fail in our duty to effectuate the will of the Constituent Assembly if we interpreted the 1969 Constitution,

Section 9(1), not in accordance with its letter and spirit but in accordance with some doctrinaire juristic theory."

Since in its ordinary and literal meaning the phrase "adjudicating authorities" include superior Courts, it follows naturally that if the word lower in Section 133 of the Constitution is not read as applying to and therefore qualifying that phrase to read "Lower adjudicatory authorities", then it means that Superior Courts come under the supervisory jurisdiction of the High Court. I do not think that the 1997 Constitution in Section 133 or any part of it contemplated such an absurd and impracticable result or a piece meal reading of the words of that section. It is not the correct approach in law for a court to isolate certain words in a provision of a Constitution or Statute and read same in isolation from the other words of that provision or other provisions in the constitution or statute. This approach will certainly not yield a meaning that is reasonable, practicable and in accordance with the intendment of the constitution or statute. The true meaning of particular words in the provision of the constitution or a statute cannot be arrived at without reading the words together with the words accompanying them in that provision. The sense in which a word is used depends on the subject matter and the context. The best and safest determinant of the sense in which a word is used in a provision is the words accompanying it in that provision. This interpretative approach expressed in the Latin phrase noscitur a sociis requires that the meaning of a questionable and doubtful word or phrase in a statute may be ascertained by reference to the meaning of other words or phrases associated with it so to arrive at the correct meaning of the word. In a constitutional or statutory provision, the court must pay heed to the text of every provision and take account of all the words as they stand.

The Constitution clearly intended that only Lower Courts and adjudicatory authorities and not all courts and adjudicatory authorities should be subject to the supervisory jurisdiction of the High Court as prescribed by Section 133 of the Constitution. In any case, it is trite law that the supervisory jurisdiction of the High Court is only exercisable against inferior Courts and tribunals. Historically, the ancient prerogative writs (orders) of prohibition and certiorari have always laid primarily against inferior Courts, tribunals and bodies exercising judicial or quasi judicial functions. See *R. v Electricity Commissioners: Ex-Parte London Electricity Joint committee* (1924) 1 KB 171 at 205, *R v Criminal Injuries*

Compensation Board: Ex-Parte Laine (1967) 2 QB 864 at 882 and Constitutional and Administrative Law by Bradley & Ewing. In line with its judicial origin therefore, the supervisory jurisdiction of the High Court as prescribed in Section 133 of the Constitution is clearly intended to extend only to lower adjudicatory authorities not all adjudicatory authorities as the Learned Trial Judge held and the Learned Counsel for the respondent argued.

What follows to be inquired into at this juncture, is whether the Commission of Inquiry is a lower adjudicatory authority. S.O. Ajayi Esq. for the appellant has argued at pages 11 – 17 of appellants brief that Sections 202(2), 204(2) and (3), 205 of the 1997 Constitution intend that the Commission of Inquiry be equated with a High Court. P.C.O. Secka Esq. for the respondent has argued at pages 4 – 6 of the Respondent's brief that Sections 201, 202(2), 204, 205 and 206 do not confer on the Commission of Inquiry co-ordinate status with the High Court nor does it expressly exclude the supervisory jurisdiction of the High Court. He further argued that those provisions merely enabled the commission to exercise the functions and powers vested on it by Sections 200 and Section 202 (1) of the Constitution. The Learned Trial Judge held that:–

> "A Commission of Inquiry is an adjudicatory authority, in order to function; certain adjudicatory machinery must be put in place. This is what in my opinion the Constitution set out to do under Sections 204(2), 202(2) and 205. It is too far fetched to say that the Constitution under these Sections intend to equate a Commission of Inquiry created under it to a Superior Court, and for that matter the High Court.
>
> If the Constitution has any intention of equating the Commission of Inquiry to a Superior Court it would have clearly said so. Section 120 of the Constitution specifies Courts that are in the category of superior Courts in The Gambia. Section 120 (1) reads - "The Courts of the Gambia are:
>
> (a) The Superior Courts comprising:
> (i) The Supreme Court
> (ii) The Court of Appeal
> (iii) The High Court and the Special Criminal

Court and

(b) The Magistrate Court, the Cadi Court, District Tribunal and such Lower Courts and tribunals as may be established by an Act of the National Assembly.

It is obvious from Section 120 of the Constitution that a Commission of Inquiry established under the constitution is not one of the superior courts of the Gambia. The Constitution allows the Commission of Inquiry to exercise the powers of a High Court in specific situations only. These are in compelling witnesses to appear before it, in production of documents at its sittings and in commissioning witnesses to be examined abroad and in making interim orders. To conclude from this premise that once an aggrieved person can appeal against the findings of a Commission of Inquiry as an exercise of his right of appeal and once the Court of Appeal is to treat such a finding as if it were a judgment of the High Court and once witnesses appearing before the commission have the same immunity and privileges as if they were appearing before a High Court, then the commission of inquiry is a High Court I find to be a fallacy. The Commission of Inquiry issued by Legal notice No. 8 of 2004 I find to be an adjudicatory authority, it is not a superior Court of The Gambia and as such it is subject to the supervisory jurisdiction of the High Court."

Implicit in this decision of the Learned Trial Judge, is that if the Commission of Inquiry had been listed in Section 120 of the 1997 Constitution as a Superior Court, then it would not have been held to be subject to the Supervisory Jurisdiction of the High Court under Section 133 of the 1997 Constitution. With due respect, I think that the Learned Trial Judge was wrong to have relied solely on Section 120 of the 1997 to determine this question as if it is that simple and straightforward from the said provisions. Section 120 of the 1997 Constitution did not answer the question whether a Commission of Inquiry established under the 1997 Constitution is a Superior Court or a Lower Court, Tribunal and Adjudicatory Authority. Section 120(1)(a) which lists the Courts comprising the Superior Courts, did not include such a Commission of Inquiry. Section 120(1)(b) which lists Lower Courts and Tribunals did not list such Commission of Inquiry. It is curious that while the Learned Trial Judge pointed out that such Commission of Inquiry is not listed amongst

Superior Courts of record in Section 120, she failed to comment on the fact that it is equally not listed as a lower Court and tribunal therein. It is obvious that the status of a Commission of Inquiry cannot be determined by reference to Section 120 of the Constitution only. The approach of learned Counsel for the appellant in construing Section 120 and 133 of the 1997 Constitution by reference to Sections 201, 202(2), 204, 205 and 206 of the same constitution is correct in law for that best expresses the intention of the makers of the constitution. As this court held in *Lucy Mensah v Edward Graham* (2002-2008) 1 GLR 22 a document to be better understood must be read as a whole to ensure consistency between the various parts of the same statute. This court relied heavily on the oft quoted statement of Lord Coke that "it is the most natural and genuine exposition of a statute to construe one part of a statute by another part of the same statute for that best expresseth the meaning of the makers and this exposition is *ex visceribus actus* (from the bowels of the statute). Reading it through helps also in gathering its objects. An effort must be made to understand it as a harmonious whole." Lord Simmonds in *Attorney General v Prince Ernest Augustus of Hanover* (1957) AC 436 at 461 (HL) stated this approach thus:–

"I conceive it to be my right to examine every word of a statute in its context and I use context in its widest sense which I have already indicated as including not only other enacting provisions of the same statute, but its preamble, the existing state of the law, other statutes in pari material and the mischief which I can by those and other legitimate means, discern the statute was intended to remedy."

I will now proceed to consider each of the Constitutional provisions referred to above to find out if it is the intendment of those provisions to equate the Commission of Inquiry with the High Court. Section 202(2) of the 1997 constitution provides that:–

"(2) A Commission of Inquiry shall have all the powers, rights and privileges of a judge of the High Court at a trial in respect of –

(a) Enforcing the attendance of witnesses and examining them on oath, affirmation or otherwise.

(b) Compelling the production of documents;

(c) Issuing a commission or request for the examination of witnesses abroad, and
(d) Making interim orders."

I agree with Learned Counsel for the respondent when he said at page 5 of the respondent's brief that this provision is meant "to enable the Commission to make a full and impartial investigation into the matter in respect of which the Commission is established." The Learned Trial Judge in her judgment at pages 112 – 113 of the record of appeal held that the Constitution allows the Commission of Inquiry to exercise the powers of the High Court in specific situations listed in Section 202(2). The situations listed in Section 202(2) all relate to the inquiry and investigation process. This process is all about the proceedings of the Commission of Inquiry. This entails mainly eliciting evidence on the subject of inquiry or investigation. So the power exercisable by the Commission under Section 202(2) is very fundamental and strikes at the root of its ability to function as a Commission. It is the primary assignment of the Commission of Inquiry. If it cannot enforce the attendance of witnesses, examine them and compel production of documentary or other evidence then certainly it will be unable to carry out the functions and duties vested on it by Section 200(1) and Section 202(1) of the Constitution. These are the functions and powers that make it a Commission of Inquiry. The implication of Section 202(2) of the 1997 Constitution therefore is that the Commission of Inquiry in carrying out the inquiry and investigation is equivalent to a High Court at a trial. I apprehend Section 202(2) to mean that the Commission of Inquiry during the conduct of its proceedings shall be of co-ordinate status with the High Court at trial. The wordings of Section 202(2) are clear and unambiguous. The provision did not say that the commission shall be treated like a High Court or shall exercise powers like those exercisable by the High Court at trial. It gives to the Commission in very mandatory language the powers, rights and privileges of a Judge of the High Court at trial. In *Resident Electoral Commissioner v Nwocha* (1991) 2 NWLR (Pt 176) 732 at 754 – 755 held 10 (CA), The Election Tribunal from which first and final appeal lay to the High Court was held to be a superior court of record because the Decree establishing it vested on it the powers, rights and privileges of a High Court Judge. The question the Nigerian Court of Appeal determined in that case is whether the Onitsha Local

Government Council Election Tribunal is subject to the supervisory jurisdiction of the High Court. The Court held at pages 754-755 paras H-A thus:-

> "The election petition Tribunal by virtue of the powers conferred on it and statutory provisions guiding it in respect of election petition matters is a court of record and has the same powers and privileges of a Judge.''

And per Uwaifo JCA at paras G-B that:-

> "I shall first return to the question whether the Tribunal concerned in the present appeal is an inferior tribunal in view of Senator Anah's persistent reference to it as such. That was why he pressed the case of *Oduwole v Famakinwa* (supra). It must be admitted that the rights to hold elections and to contest the results by election petition are specially created. In respect of the last local government elections, Decree No.15 of 1989 created those rights. It supersedes the Constitution in respect of any rights derived from an election. It gives *exclusive* jurisdiction to the Tribunal created to hear election petitions. It confers powers of a Judge of the High Court on the Tribunal in respect of election petition matters. It has long been held that in such a situation and because of the statutory provisions, it is a Court of Record; See *R v Maidenhead Corporation* (1982) 9 QBD 494 at 500 C.A., and by the Representation of the people Act 1949, section 115(6), it has the same powers and privileges as a Judge for the purposes of the trial of a parliamentary election petition. See para 855 Halsbury's Laws of England, 4th edition Vol.15. That is what Decree No.15 of 1989 has made of the Tribunals to hear and determine local government election petitions. In view of what I have said above on the point and have earlier said, I cannot readily accept that the Tribunal is an inferior tribunal subject to prohibition and *certiorari* orders."

Since the Commission of Inquiry has all the powers, rights and privileges of a Judge of the High Court at trial, and the High Court is listed by Section 120(1)(a) as a Superior Court, a fortiori, the Commission of Inquiry is a Superior Court. Since the Commission of Inquiry and the High Court at trial have the same powers, rights and privileges, it

becomes an idle adventure to argue that one is subordinate to the other. They are clearly of co-ordinate status. This is also confirmed by the fact that just like appeals lie from the decisions of the High Court to the Court of Appeal, appeals equally lie as of right from the findings of the Commission of Inquiry to the Court of Appeal. It is clear from the tenor of parts 1 and 2 of Chapter VIII of the 1997 Constitution that the principle underlying the classification of Courts in Section 120(1) of the Constitution is the position of a Court in the hierarchy of appeals. It is clear that generally appeals lie from the Courts listed in Section 120(1)(b) to the High Court. Appeals from the High Court generally lie to the Court of Appeal and further to the Supreme Court as the case may be. So that where an appeal lies to the Court of Appeal from the decision of an adjudicatory authority it will accord with the existing constitutional hierarchy of courts according to their position in the hierarchy that the later is generally treated as a Superior Court. It is the universal practice that Court to which appeals lie from other Courts are higher up in the judicial hierarchy than the ones from which the appeals arose. This may explain why the Court Martial, though not listed in Section 120(1) of the 1997 Constitution as a Superior or Inferior Court like the Commission of Inquiry in question, is treated as a Superior Court of record. By virtue of Section 130(2) of the 1997 Constitution and Gambia Armed Forces Act Cap Vol.III Laws of The Gambia, appeals lie from the Court Martial to the Court of Appeal. I fail to see the basis for the argument or decision that an adjudicatory authority or Court from which an appeal lies to the Court of Appeal is an inferior Court for the mere reason that it is not expressly mentioned in Section 120(1)(a) as a Superior Court. This proposition is not consistent with the tenor of Section 120(1)(a) and parts 1 and 2 of the Constitution, the general practice across jurisdictions and the express words of Sections 202(2), 204(2), 205 and 206 of the Constitution. Section 204(2) of the 1997 Constitution stipulates that in the event of the appeal, the finding of the Commission shall be treated as if it were the judgment of the High Court. The same Section 204(2) further provides that during the hearing of the appeal the report of the Commission shall be treated as if it were such a judgment. Section 205 of the Constitution further confirms the intendment of the Constitution that the Commission of Inquiry and the High Court should be of Co-ordinate status. It provides that a witness before a Commission of Inquiry shall be entitled to the same immunities and privileges as if he or she

were a witness in proceedings before the High Court. In the case of *Uganda Law Society v The A-G* 6 CHRLD 41, the Ugandan Constitutional Court considered amongst other things the fact that appeals lie from the decisions of the General Court Martial to the Court of Appeal in holding that the said General Court Martial had concurrent jurisdiction with the High Court and cannot therefore be subordinate to the High Court.
Finally, Section 206 of the Constitution mandatorily requires that the power conferred by any law to make Rules of Court for the Superior Courts shall be deemed to include the power to make rules regulating the procedure and practice of all Commissions of Inquiry. This is a further confirmation that the Constitution regards the Commission of Inquiry as a Superior Court.

S.O. Ajayi Esq. for the appellant had referred to the decision of the Gambia High Court per Izuako J in *Abdul Fattah Othman v A-G* (Misc. App. No.120/05/MF/57/F1 which applied Sections 202(2) and 204(2) of the 1997 Constitution in similar circumstances and held that a Commission of Inquiry established under Section 200 of the 1997 Constitution is of co-ordinate status with the High Court. The Learned Trial Judge in dealing with this issue in her judgment at pages 111 to 114 of the record of appeal did not refer to or mention the above mentioned decision of the High Court or if she did, this is not reflected in her judgment. In any case, she took a position totally different and opposite to the previous decision of the High Court in *Abdul Fattah Othman v A-G* (supra). I do not think that the Learned Trial Judge gave due regard to the said decision of the Gambia High Court. Although it is trite that a Judge of a High Court is not bound by the previous decision of another High Court judge, the Trial Judge should have considered the decision and decide to follow or refuse to follow the decision. Although she is not bound to follow such decision, but to ensure uniformity of judicial application and comity she can follow it if the decision is correct. The practice is as laid down by Lord Goddard in *Police Authority for Huddersfield v Watson* (1947) KB 842 at 848 in the following words:–

> "I think the modern practice, and the modern view of the subject, is that a judge of first instance, though he would always follow the decision of another judge of first instance unless he is convinced the

judgment is wrong, would follow it as a matter of judicial comity. He certainly is not bound to follow the decision of a Judge of equal jurisdiction. He is only bound to follow the decisions which are binding on him, which, in the case of a judge of first instance, are the decisions of the Court of Appeal, the House of Lords and the Divisional Court".

In light of the foregoing, it is clear that the Commission of Inquiry is of the same status as the High Court and therefore is not a Lower Court or adjudicatory authority. It is therefore not subject to the supervisory jurisdiction of the High Court prescribed in Section 133 of the Constitution. Since the Trial Court lacked the jurisdiction to entertain and hear Misc. Appl. No.HC/112/05/MF.049/F1 it follows therefore that the entire exercise of jurisdiction is a nullity. The proceedings and ruling of that Court of 7th June 2006 are ab initio void and of no effect. Thus, it is unnecessary, idle and academic to deal with the remaining issues for determination.

All hope is not lost for the respondent. By virtue of Section 204(2) and (3) he has a right to appeal against the adverse findings to the Court of Appeal within three months of his being informed of the adverse findings. Although the said 3 months has long expired he can apply to this Court for leave to file the appeal outside the three months period by virtue of Section 204(3) of the Constitution. The Court of Appeal can competently deal with the issue raised in the application for more time at review. Quite apart from the point of jurisdiction decided above, it is important we call to mind that current jurisprudence seeks actively to curtail a proliferation of judicial review applications where the avenue of appeal exist. So that even where the High Court has supervisory jurisdiction, it will refuse to exercise it or cannot competently exercise it where statute has provided an alternative remedy of appeal. The Court of Appeal of Malaysia, following the English case of *Chief Constable of the Merseyside Police: Ex-Parte Calveley* (1986) 1 ALL ER 257 held in *Sykt Bekerjasama-Sama Serbaguna Sungai Gelugar v Majlis Perbandaran Pulau Pinang* (1996) 2 MLJ 697 or in Commonwealth Law Bulletin Volume 23, numbers 3 and 4 of July and October 1997 at 787 holdings 4 and 5 at page 789 that, the supervisory jurisdiction of the High Court would not be exercised where there was an alternative remedy by way of

appeal save in exceptional circumstances. The Court further held that where parliament provides an appeal procedure, judicial review will have no place unless the applicant can distinguish his case from the type of case for which the appeal procedure was provided.

I will therefore allow this appeal. The judgment and orders of the Trial Court made on 7th June 2006 in Misc. Appl. No. HC/12/05/MF/049/F1 are hereby set aside. I make no order as to costs.

OTA JCA. This appeal involves a question which has generated some serious furor in recent times which is "whether the Commissions of Inquiry established under Section 200 of the 1997 Constitution of the Gambia, are of co-ordinate jurisdiction with the High Court or are inferior adjudicatory authorities, subject to the supervisory jurisdiction of the High court pursuant to section 133 of the 1997 Constitution". It touches an area which appears to have been quite often misunderstood and misapplied by Trial Courts. There is thus an urgent need to state the correct position.

I had a preview of the Judgment just delivered by my learned brother Emmanuel Akomaye Agim PCA, I entirely agree with his reasoning and conclusions. I commend my brother for the resource and originality that went into that work. My learned brother has admirably set down the facts which form the back ground to this matter and they cannot bear repetition. For the purposes of this short concurring comment, I shall only mention such of them that are absolutely necessary.

The events that have crystallized into the present dispute in this Court appear to have started when the Respondent herein, Mr. Pap Cheyassin Ousman Secka, a legal practitioner who held public office as Honourable Attorney General and Secretary of State for Justice between 9th March 2000 and 30th January 2001, was served with a witness summons to appear before the Commission of Inquiry to give evidence. Consequently, and having duly appeared at the Commission of Inquiry and given evidence, the Respondent received a Notice of Adverse Recommendations dated 21st March 2005, wherein adverse recommendations were made against him as follows:-

1. That Alhaji Pap Cheyassin Secka be made to produce to the Commissioner of Income Tax, the true and correct list of persons to whom he sold portions of land at Sukuta.
2. That he be made to declare to the Commissioner of Income Tax, the true and correct prices at which he sold the portions of land at Sukuta.
3. That Alhaji Pap Cheyassin Secka pay to the Commissioner of Income Tax the correct ad valorem duties on the properties sold by him, with interest at the rate of 25% per annum, within 14 days of assessment by the said Commissioner or, in default, any of his valuable properties shall be forfeited to the state.

Pursuant to these adverse recommendations, the Respondent filed an originating notice dated the 6th day of May 2005 at the High court, for an order of certiorari to quash the Adverse Recommendations of the Commission of Inquiry. The grounds upon which this relief is sought are properly detailed in the lead judgment of my learned brother Agim PCA.

After considering the arguments preferred before her by both sides of the contest, the Learned Trial Judge entered her judgment on the 7th June 2006, wherein she held that a Commission of Inquiry established by Legal Notice No. 8 of 2004 pursuant to the 1997 Constitution is inferior to the High Court and subject to its supervisory jurisdiction. It is in consequence of the foregoing decision of the Trial Court and in dissatisfaction thereof, that the Appellants have appealed to this Court on the grounds set out in the notice of appeal filed on the 12th of June 2006 and detailed in the lead judgment of my learned brother Agim PCA. Suffice it to say that the paramount issue in this appeal is the question of the power of the High Court to exercise supervisory jurisdiction over Commissions of Inquiry.

It is common ground that the Commission of Inquiry into the Assets, Properties and Activities of Public Officers, was set up by the President of The Republic of The Gambia pursuant to the powers conferred on him by Section 200 of the 1997 constitution of The Gambia by instrument contained in Legal Notice No. 8 of 2004. There is no gainsaying the fact that the Commission is an adjudicating authority, set up to perform judicial functions. Because of this fact, a lot of force has gone into the contention that by the combined effect of the provisions of Section 120(1)

(a) of the 1997 Constitution, which recognizes the High Court as a superior court and that of Section 133 of the 1997 Constitution which gives the High Court "supervisory jurisdiction over all Lower Courts and adjudicating authorities in The Gambia", and which in the exercise of its supervisory jurisdiction, shall have power to issue directions, orders or writs, including writs of habeas corpus, orders of certiorari, mandamus and prohibition as it may consider appropriate for the purposes of enforcing its supervisory power" that the commissions are therefore inferior to the High Court and in that event subject to the supervisory jurisdiction of the High Court. I must disagree with this contention. It is nowhere stated, either in Section 120 1(a) or (b) of the Constitution or in fact the entire Constitution of 1997, that a Commission of Inquiry is a superior, inferior or Lower Court. The status of the Commissions therefore has to be derived from the express provisions of the Constitution relating to such bodies. It appears to me from the provisions of the constitutions that the intendment of legislation is that the Commissions are of co-ordinate or concurrent jurisdiction with The High Court. On this issue I agree in totality with the lead judgment of my learned brother that the fact that Section 202 (2) & 3 vests the commission with the powers, right, privileges and immunities of a High Court judge. The fact that Section 205 vests it with the power to procure evidence from witnesses and clothes the witnesses with the same immunities and privileges as if they were witnesses in proceedings before the High Court. The fact that by section 204, its findings were to be treated as decisions of the High Court, the fact that section 204 also mandates any person aggrieved with the findings of the commission to appeal against such findings to the Court of Appeal as of right as if the findings were a judgment of the High Court, and on the hearing of the appeal the report shall be treated as if it were such a judgment. The fact that by section 206 the procedure and practice of all Commissions of Inquiry were to be regulated by any law empowered to make Rules for the superior courts, show clearly that the intendment of the constitution is that the commissions are of coordinate jurisdiction with the High Court. Besides, we must not lose sight of the mere fact that Section 204 (2) makes appeals as of right from the Commissions to the Court of Appeal. This to my mind clearly shows that it is the intention of the legislature that such Commissions be treated as having coordinate jurisdiction with the High Court. I say this because appeals can only lie as of right from a

Superior Court or Court Martial to the Court of Appeal. It is arguable that because the Commissions are of limited jurisdiction as opposed to the High Court with unlimited powers and make recommendations and not judgments, that the Commissions are therefore of lower jurisdiction than the High Court. This argument to my mind is not sustainable in the face of the clear provisions of Section 204 (2) which equates the findings of the commission with the judgment of a High Court on appeal. It is therefore incontrovertible that the findings of the Commissions have equal status with the judgment of a High Court. Permit me to restate here that it goes beyond per adventure that the High Court inter alia, has original jurisdiction to hear and determine all civil and criminal proceedings and to interpret and enforce the fundamental rights and freedoms as provided in sections 18 to 33 of the Constitution. It is trite law, that although the High Court exercises such wide powers vested upon it vide Sections 127 and 133 of the Constitution; the extent of this jurisdiction can be and is sometimes limited by the provisions of the constitution and particular statutes. See this Court's decisions in *Cham (No. 2) v Attorney General (No. 2)* (1997-2001) GR 617. It is of paramount importance therefore for the courts to construe the words and nature of the provisions very carefully and to gather there from the nature of the limitations imposed upon the wide jurisdiction of the High Court. See *Attorney General of the Federation and Ors v Sode & Ors* (1990) 1 NWLR (Pt 128) 500 at 542. See also *Malick Leigh & Ors v Attorney General* CA No. 22/2001. These cases although not on the same facts with the instant case, however go to show that the supervisory jurisdiction of the High Court can be limited by Statutes.

Since from time immemorial, the supervisory jurisdiction of the High Court has been over inferior or lower courts and adjudicating authorities, it is my view that though an adjudicatory authority, the Commissions having been found to be of coordinate or concurrent jurisdiction with the High Courts are not however lower adjudicatory authorities to the High court and, do not therefore fall within the purview of the lower adjudicatory authorities contemplated by section 133 of the constitution. The combined effect of Sections 202, 204, 205 and 206 of the constitution which make the Commissions of coordinate jurisdiction with the High Court therefore clearly limits the supervisory jurisdiction of the High Court over the Commissions. It is my view that if the Constitution had intended the Commissions to be of lower jurisdiction to the High

Court it would have stated that in clear and unambiguous terms, however this is not the case here. Rather the makers of our Constitution expended considerable energy and expertise through Sections 202, 204, 205 and 206, in their efforts to show that the Commissions are of concurrent or co-ordinate status with the High Court. It is thus my considered view that any interpretation to the contrary is unconstitutional.

It is for the above reasons that I hold contrary to the view that the commissions are inferior Courts subject to orders of prohibition and certiorari. I therefore endorse my Learned brother's conclusions in the lead judgment that since the Trial Court lacked the jurisdiction to entertain and hear MISC APP No. HC/112/05/MF-049/F1, it follows therefore that the entire exercise of jurisdiction is a nullity. The proceedings and ruling of that court of 7th June 2008 are ab initio void and of no effect. In consequence I also allow this appeal.

WOWO Ag. JCA: I have had the privilege of reading in advance the judgment read by my learned brother E.A. Agim, PCA. I entirely agree with him. I see no need to re-state the powers of the Commission of Inquiry set up by the President in compliance with Section 200 of the 1997 Constitution. From the briefs of both the appellant and the respondents and submissions of both counsel the main issues for determination in this Appeal are –

(1) Whether the High Court has supervisory power over the Commission of Inquiry set up by the President in compliance with Section 200 1997 constitution.
(2) Whether the High Court can exercise the power of certiorari, when the record of proceedings of the Lower Court or adjudicating body is not before the Court.

Section 202(2) of the 1997 Constitution provides that -

"A commission of Inquiry shall have all the powers, rights and privileges of a Judge of the High Court at a trial in respect of –
(a) Enforcing the attendance of witnesses and examining them on oath, affirmation or otherwise;
(b) Compelling the production of documents;
(c) Issuing a commission or request for the examination of witnesses

abroad and
(d) Making interim orders.

Section 204(2) of the 1997 Constitution provides that –

"A person against whom any such adverse finding has been made may appeal against such finding to the Court of Appeal as of right as if the finding were a judgment of the High Court and on the hearing of the appeal the report shall be treated as if it were such a judgment."

Section 205 of the 1997 Constitution provides that –

"A witness before a Commission of Inquiry shall be entitled to the same immunities and privileges as if he or she were a witness in proceedings before the High Court."

Section 120(1) of the 1997 Constitution provides that –

(a) "The Courts of The Gambia are the Superior Courts comprising:
i. The Supreme Court.
ii. The Court of Appeal
iii. The High Court and the special criminal court and
(b) Magistrate Court, the Cadi Court, District Tribunals and said Lower Courts and Tribunals may be established by an Act of the National Assembly."

There is no doubt that by virtue of Section 120(1) the Commission of Inquiry is not a Court in the Gambia. The Commission of Inquiry could be termed as an adjudicatory body. The combined effect of Sections 202(2), 204(2) and 205 of 1997 Constitution in my mind clearly show the commission of Inquiry has a coordinate or concurrent jurisdiction as the High Court.

Section 133 of the 1997 constitution provides that –

''The High Court shall have supervisory jurisdiction over all Lower Courts and adjudicatory authorities in The Gambia, and in the exercise

> of its supervisory jurisdiction shall have power to issue directions, orders or writs, including writs of habeas corpus, orders of certiorari, mandamus and prohibition as it may consider appropriate for the purposes of enforcing its supervisory powers".

It is a cardinal rule that plain words must be given their plain meaning and the provisions of the law must be given their ordinary and natural grammatical meaning. See *Alimi Lawal v G.B. Ollivant (Nig) Ltd* (1972)3 SC 124. Again once words in a Statute are clear, it cannot be construed by reference to extraneous matters. See B.T. Ogunmade v Chief E.A.A. Fadayiro (1972) 8-9 SC 1. Section 133 of 1997 Constitution clearly gives the High Court power to exercise its supervisory jurisdiction only over Lower Courts and adjudicatory bodies and not Courts and adjudicatory bodies having coordinate or concurrent jurisdiction. Although the Courts have great powers, yet these powers are not unlimited. They are bound by some lines of demarcation as Courts are creation of statutes and the jurisdiction of each Court is therefore confined, limited and circumscribed by the statute creating it. See Icon Ltd v F.B.N. Ltd (1995) 6 NWLR (Pt 401) at 374.

Section 120(2) of 1997 Constitution provides that –

> "The Judicial power of The Gambia is vested in the Courts and shall be exercise by them according to the respective jurisdictions conferred on them by law."

Since I find that the Commission of Inquiry established by virtue of Section 200 of the 1997 Constitution is of coordinate or concurrent jurisdiction with the High Court, it therefore means that the high court does not have any supervisory power over it and therefore the High Court lacks the jurisdiction to quash the proceedings of the Commission of Inquiry since the High Court can only exercise its powers in accordance with the jurisdiction conferred on it by law. It is trite that a Court of concurrent or coordinate jurisdiction cannot supervise each other and therefore the Lower Court lacks the jurisdiction to quash the findings of the Commission of Inquiry whether right or wrong. I will also accordingly abandon the second issue for determination because since

the Lower Court lacks jurisdiction to exercise its supervisory powers over the commission of inquiry anything subsequently done will be a nullity.
I also agree with my learned brother that this appeal be allowed. I make no orders as to costs.

Appeal allowed.
FLD.

MANSONG DAMBELL; MANSONG PHOTOS LTD

v

THE WEST AFRICAN EXAMINATION COUNCIL

SUPREME COURT OF THE GAMBIA
(Supreme Court No. 6/2004)

3rd July 2008

Savage CJ, Mambilima JSC, Tobi JSC, Dotse JSC, Agim Ag. JSC

Appeal – Award of damages – When Appellate Court can reverse same.
Contract – General damages – When awarded – Nominal damages – When awarded.
Court – Appellate Court – Award of damages – When can reverse damages awarded by Trial Court – Power of Court to award damages.
Damages – General damages – Classification of – Nominal damages – Circumstances awardable – Appellate court – Principles guiding review of damages awarded.

Held, *dismissing the appeal (per Savage CJ, Mambilima JSC, Tobi JSC, Dotse JSC, Agim Ag. JSC concurring)*

1. General damages are damages given when the judge cannot point out any measure by which they are to be assessed except by opinion and judgment of a reasonable man.

2. General damages are classified into two categories –
   (a) That in which they may be inferred, e.g. in cases of defamation or personal injury, when pain and suffering may be presumed and
   (b) That in which they may not be inferred but must be proved; e.g. damages arising by way of general loss of business following an inquiry. [*Odumosu v A.C.B*. (1976) ll SC 58; *Attorney-General of Oyo State v Fairlakes Hotels (No. 2)* 1989 5 NWLR (Pt 121) 55 referred to]

3. Nominal damages are a trifling sum awarded when a legal injury is suffered but when there is no substantial loss or injury to be compensated. They are damages awarded for the infraction of a legal right where the right is one not dependent upon loss or damage. The award of nominal damages is a declaration that the plaintiff's right has been violated.

4. The well established principles which guide an Appellate Court in reviewing the level of damages awarded by a Lower Court, and to justify reversing the damages awarded by the Lower Court, is where the appellate court is convinced that the lower court had acted upon some wrong principle of law, or that the amount awarded was extremely high or so very small as to make it, in the judgment of the appellate Court an entirely erroneous estimate of the damage to which the plaintiff is entitled. [*Drammeh (No. 2) v Gambia Utilities Corporation (No. 2)* (1997 – 2001) GR 829 referred to]

5. A claim in damages must be specifically pleaded and proved. The details must be itemized in the claim. [*Yebu-Ode Local Government v Balogun and Co. Ltd*. (1991) 1 NWLR (Pt 160) 136; *Owners of the Steamship "Medina" v The Owners Master and Crew of the Lightship "Cammet"* (1900) AC 113 referred to]

6. It is trite law that a person who wishes to recover damages must prove that he has suffered a loss. It is for such claimant to prove with certainty, the quantum of such a loss.

Cases referred to:

Alhaji A.G. Samba v Kombo Beach Hotel (unreported) judgment of court of Appeal No 6/76
Attorney-General of Oyo State v Fairlakes Hotels (No. 2) (1989) 5 NWLR (Pt 121) 255
Beaumont v Greathead (1846) 2 CB 494
Bressaah v Asante (1965) 117
China Building Material Company v Kebba Ceesay (1995-1996) GR 286

Drammeh (No. 2) v Gambia Utilities Corporation (No. 2) (1997 – 2001) GR 829
Medical Research Council v Touray (1995-1996) GR 86
Standard Chartered Bank (Gambia) Ltd v Nelson (1998-99) SCGLR 810
Flint v Lovell (1935) 1 KB 354
Hadley v Baxendale (1854) 9 Exch. 341
Hartong v Collins and Sheilds (1939) 3 ALL ER 566
Igebu Ode local Government v Adedeji Balogun & Co Ltd (1991) NWLR (Pt 160) 136
Imana v Robinson (1973) 3-4 NSC 1
*Odumosu v A.C.B. (*1976) ll SC 58
Onagoruwa v I.G.P. (1991) 5 NWLR (Pt 193) 593
Owners of the Steamship "Medina" v The Owners Master and Crew of the Lightship "Cement" (1900) AC 113
Victoria Laundry v Newman Industries (1949) 1 All ER 997
Zik's Press Ltd v Ikoku (1951) 13 WACA 188

Books referred to:

MaCormic – Handbook on the Law of Damages
McGregor on Damages

APPEAL from the decision of the Court of Appeal overturning the Judgment of the High Court and setting aside the damages awarded made by the Learned Trial Judge. The facts are sufficiently stated in the opinion of Tobi JSC.

A.N.M.O. Darboe Esq. for the appellants
S.W. Riley for the respondent
A.N.D. Bensouda for the respondent

TOBI JSC. The plaintiffs are the appellants in this Court. The defendant is the respondent in this Court. It is an Examination Body of West Africa – The West African Examination Council. It is the case of the appellants that they entered into three separate written contracts with the respondent for the printing of examination question papers. That was on 13th July, 1994. The first contract was for the printing of The Gambia Middle School Leaving Certificate Examination Question Papers for 1995

at the contract price of D1, 818,800.00. The term of the contract was that the respondent would pay 75% of the total cost of the contract on or before the 31st October, 1994 and the remaining 25% to be paid on delivery of the question papers. It was a further term of the contract that the Senior Deputy Registrar shall submit to the appellants the manuscript on or before 31st October 1994 and that the appellants shall submit to the Senior Deputy Registrar or his representative two copies of the draft question papers. It was also agreed that on or before 25th December 1994, one copy of the corrected draft will be handed on to the appellants and that on or before 31st March 1995, the appellants will deliver to the Senior Deputy Registrar or his representative the completed exercises for the question papers. The second contract was for the printing of The Gambia Secondary Technical School Leaving Certificate Examination Papers for 1995 at the contract price of D325, 950, 00. The contract was along similar line as the first one in terms of percentage of payment and completion time. The third contract was for the printing of The Gambia Primary School Leaving Certificate Examination Question Booklets for the contract price of D1, 300,000.00 with the same mode and time of payment as in the first contract. The contracts were duly signed by the parties. The appellants proceeded to make necessary arrangements to execute the contracts.

On 15th November 1994, the respondent informed the appellants of its financial difficulties which emanated from the failure of the Government of The Gambia to pay full examination subsidies. At the meeting, the respondent notified the appellants that it will not submit to them drafts for the printing of the question papers and that the respondent will send to the appellants a letter formally cancelling the contract. That letter was written on 17th November 1994 and sent to the appellants. The letter sparked the flame of the action on breach of contract and claim for damages. The breach of contract was only on the 1995 Gambia Middle School Leaving Certificate Examination Question Papers and the appellants claimed D58, 000.00 as being amount short paid for work done. They also claimed interest at the current bank rate from 31st October 1994 to the date of judgment. The Learned Trial Judge gave judgment to the appellants as follows:-

"(a) Damages is awarded to plaintiffs in the sum of D363, 000.00 representing Breach of contract caused by the defendant in

repudiating the contract with the plaintiffs for the printing and delivery of the 1995 Gambia Middle School Leaving Certificate Examination question papers.

(b) D58, 000.00 being the amount shortfall to the plaintiffs by the defendant for work done by the plaintiffs for the defendants.

(c) Interest at the rate of 10% from 31st October 1994 to date of Judgment and thereafter at the rate of 4%."

The Court of Appeal overturned the judgment of the High Court and set aside the awards made by the Learned Trial Judge. Delivering the lead judgment of the Court, Semega-Janneh, President of the Court (as he then was) said at page 257 of the Record:-

"In the premises, I hereby set aside the judgment of the Lower Court and give judgment as follows –
(1) As regards the claim relating to exhibit 2, I award the plaintiff nominal damages for breach of contract fixed at D50, 000.00.
(2) The claims relating to exhibits 7 and 7A respectively are hereby dismissed."

Dissatisfied, the appellants have come to the Supreme Court. A Statement of Case was filed by the appellants. They formulated two issues for determination:

"1. In light of the evidence adduced before the Trial Court was the Lower Court right in reversing the finding that the Appellants are entitled to be paid the sum of D58, 000.00

2. Was the Lower Court justified in setting aside the award of general damages made by the Trial Court and substitute thereof an award of nominal damages in the sum of D500.00."

The above issues were adopted by the respondent. Learned counsel for the appellants, A.N.M.O Ousainou Darboe, Esq. submitted on Issue No. 1 that there was no mistake whether mutual or otherwise that is capable of rendering the contract void or voidable. He contended that the Court

of Appeal was belabouring under the mistaken belief that the mistake in the arithmetical calculation is the same as mistake as known to the law of contract. He argued that the conclusion of the Court of Appeal that the appellants are not entitled to recover the shortfall is not supported by the evidence before the Court. According to Counsel, the evidence shows that the respondent, having been supplied with the materials, now wishes to take advantage of "the omission of a number of their staff." Counsel posits that such a course would be unjust and unconscionable.
On the second issue, Learned Counsel submitted that the Court of Appeal was not justified in setting aside the award of general damages made by the Trial Court and substituting in its place an award of nominal damages of D500.00. He submitted that the law requires that special damages must be pleaded and not general damages. He cited Ijebu Ode Local Government v Adedeji Balogun and Co Ltd (1991) 1 NWLR (Pt 160) 136 at 158 and Owners of the Steamship "Medina" v The Owners Master and Crew of the Lightship "Cammet" (1900) AC 113.

On the assessment of damages, learned counsel cited Hadley v Baxendale (1854) 9 Exch. 341**;** Victoria Laundry v Newman Industries (1949) 1 All ER 997 and Alhaji A.G. Samba v Kombo Beach Hotel, Civil Appeal No. 6/76. Citing Onagoruwa v Inspector General of Police (1991) 5 NWLR (Pt 193) 593 at 650; China Building Material Company v Kebba Ceesay v (1995-1996) GR 286 and Standard Chartered Bank (Gambia) Ltd v Nelson (1998-99) SCGLR 810. It is also counsel's submission that with the fluctuation in the value of currency, a 20% profit margin awarded by the Learned Trial Judge is not unreasonable because the value of the currency is a factor that must be taken into account. He urged the Court to allow the appeal.

Amie Bensouda, learned counsel for the respondent, in the statement of respondent's claim, submitted on Issue No.1 that what is relevant in the circumstances was the intention of the parties at the time the contract was entered into. Relying on the evidence adduced before the Trial Court, and in particular, the evidence of D.W.1 and the case of Hartog v Collins and Shields (1939) 3 All ER 566, learned counsel submitted that the Court of Appeal was right in reversing the findings that the appellants are entitled to be paid the sum of D58, 000.00. Learned counsel submitted on Issue No. 2 that the Court of Appeal was right in setting aside the award of general damages made by the Trial Court and

substitute thereof an award of nominal damages in the sum of D500.00. Counsel argued that it is not within the discretion of the court to determine the award of damages or profit margin in the absence of any specific claim, pleading or evidence as to such profit margin, counsel argued. She submitted that the Learned Trial Judge was wrong in proceeding to award a sum in damages as if it was fixed by law or a matter for his discretion. She submitted that the cases relied upon by counsel for the appellants did not support the case of the appellants. Learned counsel submitted that a claim for damages for breach of contract does not absolve the plaintiff of the burden of adducing evidence as to damages actually incurred. She further submitted that a claim for loss of profit is a claim in the nature of special damages and must be clearly stated in the pleadings so that the defendant may not be caught by surprise and would have the opportunity of challenging it as to quantum. She relied on Imana v Robinson (1979) 3–4 SC 1. On the issue of fluctuation of the currency, learned counsel submitted that the issue was not relevant because there is no proper award on which any such principle could properly be applied. She urged the Court to dismiss the appeal.

Let me first take the submission of learned counsel for the appellants on the refusal of the Court of Appeal to accept the award of D58, 000.00 made by the Learned Trial Judge. The Learned Trial Judge dealt with the issue at page 141 of the Record. He said:

> "In effect there were two understated figures of D10, 000.00 and D48, 000.00 making a total of D58, 000.00 representing the shortfall of the amount paid to the plaintiffs. The defendant admitted the shortfall in the payments made to the plaintiffs, but argued that it was an arithmetical error made by both sides. DW1 had confirmed the mistake made when their accounts section did the extension on the items they were to supply against the cost of each item. In my view equity will not suffer a wrong to be without a remedy. In my opinion, the plaintiffs are entitled to be paid the D58, 000:00 of the shortfall."

The Court of Appeal in rejecting the above said and I will quote the Court in some detail, at page 256 of the Record:

> "It is also common ground that there were mistakes in the addition of the breakdown figures. The evidence is that the said contract prices were paid in full and the Respondents only submitted a claim for reimbursement of the shortfalls six months later. There is no evidence of a complaint or claim of the short falls prior to the submission of the claim for reimbursement. The fact that the contract prices were received and no complaint made until six months later is indicative that for all intents and purposes the parties executed exhibit 7 and 7A with those contract prices in mind.
>
> On the other hand if it could be said that the Respondents in fact intended to contract for higher prices, would it be fair or equitable in the circumstances for the Appellant to reimburse them the short falls? I do not think so. The unchallenged fact is that the contracts were for tender and the lowest bidder was to be chosen. The evidence is that the Respondents won the contracts on the basis of their bids being the lowest. To grant the Respondents reimbursement or payment of the shortfalls would unfairly deprive the Appellant the financial advantages or benefits of the tender."

I entirely agree with the Court of Appeal. I cannot hold a better view on the matter. The Court has beautifully applied the principles of equity. That is how it should be, and so be it. I have examined the evidence of DW1 and I do not see were the witness admitted that D58, 000.00 was a total shortfall made up of D10, 000.00 and D48, 000.00 from two contracts. However, at page 95 of the Record this witness said "yes" to the following question:

> "Is it correct you paid D44, 000.00 instead of D48, 000:00 and there was a shortfall of D4, 000:00."

This cannot be an admission of a shortfall of D58, 000.00. It is possible that the admission is in the Record. It is a pity that I cannot place it. Let me trace the relief from the statement of claim and the response of the respondent as defendant in the High Court. Paragraphs 17 and 18 of the statement of claim avers that:-

"17. The plaintiffs were underpaid the sum of D10, 000.00 for the printing of the Primary School Leaving Certificate Examination Papers and D48, 000.00 for the printing of the Gambia Secondary Technical Leaving Certificate Examination papers.

18. By letter dated 15th September, 1995 the plaintiffs wrote to the defendant demanding the payment of the sum of D58, 000.00 which represents the amount by which the plaintiffs were underpaid but the defendant has refused or neglected to comply with the plaintiffs' demand."

In response, paragraphs 1, 14 and 15 of the Amended Statement of Defence avers that:-

"The defendant avers that it does not owe the plaintiffs the sum of D1, 815, 000.00 and D58, 000.00 or any other sum at all.

By letter dated 4th December 1995, the defendant informed the plaintiffs that it could not entertain the claim on the ground that the tenders were accepted on the total amounts quoted which gave 1st plaintiff an advantage over others. The defendant says that if there was any mistake on the bid submitted by the 1st plaintiff such mistake originated from the 1st plaintiff and not from the defendant.

The defendant admits paragraphs 18 and 19 of the Statement of Claim but denies that the plaintiffs are entitled to the sums claimed or any other sums at all."

By the above, the parties clearly joined issues on the amount of D58, 000.00. And so the burden was on the appellants to prove the short payment. At page 67 of the Record, PW1, the Managing Director of the Appellant Company said:

"1st page of Exh. 7 No. 5 of D12 should have read D48, 000.00 and not D44, 000.00 D4, 000:00 was understated. The total should have been D440, 950.00. According to Exh.7, D352, 950.00 was understood as D48, 000.00. The total for the two contracts was D58, 000.00."

In a dispute such as this, will the Court rely merely on the above shallow and typical ipse dixit of PW1? And what is more, PW1 used the word "understated". What does that mean? Paragraph 17 of the statement of claim used the word "underpaid" and in paragraph 19 of the same statement of claim the word "short paid" is used. The Learned Trial Judge called it "shortfall". Which is the correct version? While the words "underpaid" and "short paid" in paragraphs 17 and 19 respectively in the statement of claim could be synonyms, I cannot come to the same conclusion on the word "understated" used by PW1. And so I see a situation where the evidence of PW1 has not properly articulated paragraphs 17 and 19 of the statement of claim. The adjectival effect or consequence of that is known. I need not go into it.

The Learned Trial Judge sought refuge in equity when he awarded the sum of D58, 000.00. I expected him to also have a look at the lapse of six months before the appellants raised the issue. Was the conduct of the appellants not caught by the same equity, in the circumstances, when the respondent believed that all was right in or with the figures? Why should the appellants wait for a period of six months to jump at the respondent with a surprise packet and with a big bang demand D58, 000.00? Did they not sleep over their rights and was such a slumber not against them? The principles of equity are not only for the appellants. They are also for the respondent. I expected the Learned Trial Judge to also look at the side of the respondent. It is sad that he did not. Happily, the Court of Appeal did.

The respondent averred in paragraph 14 of the Amended Statement of Defence that if there was a mistake in respect of the arithmetical calculation it originated from the 1st plaintiff and not from the defendant. The 1st plaintiff is the 1st appellant, while the defendant is the respondent. Did the appellants prove in evidence that the mistake was from the respondent? I did not see such evidence. In the absence of such evidence, the Learned Trial Judge could not award D58, 000.00 to the appellants. That was too much charity from the Judge. Learned counsel for the appellants submitted that the Court of Appeal belaboured under the mistaken belief that the mistake in the arithmetical calculation is the same as mistake known to the law of contract. While that may well be so, the submission does not assist the case of the appellants.

Underpayment, short payment or shortfall, in a contract is a fundamental claim which must be pleaded specifically and proved to the hilt in terms of raw figures in dalasi to the least butut. It is not a matter for the court to speculate possible amount of underpayment. This is because Relief (b) which asked for "D58, 000.00 being the amount short paid to the plaintiffs by the defendant for work done by the plaintiffs for the defendant" is a claim in special damages and not one in general damages. There is nothing general in the claim but there is everything specific and therefore special about it, particularly in light of the evidence of PW1 who said at page 68 of the Record that "I am also claiming D58, 000.00 for materials already supplied". That is special damages. A plaintiff cannot ask for general damages where the claim is specific as in Relief (b) which is an alleged amount of short payment. As a claim in special damages, I expected the appellants to itemize in the Statement of Claim specifically the details of how the shortfall of D58, 000.00 came about. That was not done in the Statement of Claim and so the relief was not available to them. As parties are bound by their pleadings, the Learned Trial Judge was in error in relying on Exhibit 6. I say this because I expected the contents of the exhibit to be pleaded as special damages.

General damages are damages given when the Judge cannot point out any measure by which they are to be assessed except on opinion and judgment of a reasonable man. From the point of view of proof by evidence, general damages are classified into two categories: (a) that in which they may be inferred e.g. in cases of defamation or of personal injury to plaintiff when pain and suffering may be presumed; and (b) that in which they may not be inferred but must be proved e.g. damages arising by way of general loss of business following an injury. In regard to this category, evidence will not be allowed to be given by the plaintiff of a loss of a particular transaction or customer (following the injury) which falls in the realm of special damages. See *Odumosu v A.C.B.* (1976) 11 SC. 58; *Attorney-General of Oyo State v Fairlakes Hotels* (No. 2) (1989) 5 NWLR (Pt 121) 255.

Mcgregor on Damages made the same point at pages 1338 and 1339 of the his book in the following excerpt:

> "Certain damages may be inferred or presumed; this is particularly so with non-pecuniary losses. Thus by showing serious personal injury to the plaintiff, it may be inferred that pain and suffering resulted. More particularly, damage is sometimes said to be presumed particularly in cases involving injury to reputation. In defamation the Court is entitled to award substantial damages although proof of damages is not produced. General damage other than that which is inferred or presumed requires to be proved, and the question then arises as to what evidence is admissible in proof thereof."

It is clear from the reliefs sought that they all involve pecuniary loss arising from breach of contract for the printing and delivery of the 1995 Gambia Middle School Leaving Certificate Examination Question Papers. As the reliefs were not on defamation or any other non-pecuniary loss, the appellants had a duty to prove them. Was there any evidence to justify the award of D363, 600.00? The Learned Trial Judge in awarding general damages of D363, 600.00 said at page 140 of the Record:

> "It is an accepted fact that in all commercial undertakings the primary objective is profit margin i.e. what the plaintiff would have earned had the contract been performed. Thus in modern commercial undertakings the profit margin is calculated within the region of 18% to 20%. Thus assuming the contract had been performed the plaintiff would be expected to get not more than 20% of the overall contract price as profit margin. Thus in the case under consideration, I hold that the plaintiff is entitled to D363, 600.00."

How did the Learned Trial Judge arrive at the above figures in percentage? Where did he get them from? What factorization or mathematical formula did the Learned Trial Judge use, adopt or apply? In between the figures 18 and 20 are two figures - by the application of the mathematical formula of subtraction. How did he explain the two figures in terms of calculation of damages in favour of the appellants? At what stage and in what bracket will the two figures in between be apportioned in favour of the appellants against the respondent? There are questions galore but I can stop here in the belief that I have made

the point that the Learned Trial Judge was merely involved in speculation, a power he does not possess, the Judge that he is.

A Judge *qua judex* is an exact human being and he deals with facts in cases with all exactitude or exactness. The Learned Trial Judge, with all due respect, threw overboard this important nature of his function and went into speculation or conjecture clearly outside the confines of judicialism by circulating or undulating between 18% and 20%. I do not think that was available to him, again, the Judge that he is.

In the law of contract, general damages are not awarded just for the asking. There must exist a clear basis for their award. The impression is created that general damages, because they are general, must be awarded in any sum or amount as a matter of routine once the plaintiff proves the breach of the contract. General damages, though apparently without limitation or limitless do not routinely follow a successful action on breach of contract, like the day following the night and vice versa. Although the word "general" generally is not a word of limitation but one concerning or including most cases and instances, the qualifying epithet or adjective does not tell a trial Judge that the sky is the limit of the award of such damages as he can go to any sum of money such as D363, 600.00. That is quite a big or huge amount considering the facts of the case. General damages are not awarded to compensate a plaintiff who fails to prove special damages. They are quite distinct specie in the law of damages. The Court of Appeal, in some predicament in the award of D363, 600.00 by the Learned Trial Judge, had another look at the facts of the case and decided in the place of general damages to award nominal damages of D500.00. Is the Court right in awarding nominal damages? The appellants say that the Court was wrong in awarding nominal damages. The respondent says that the Court was right in awarding nominal damages. Who is right?

In The Mediana (1900) AC 113, Lord Halsbury said at page 116 that:

> "Nominal damages is a technical phrase which means that you have negative anything like real damage, but you are affirming by your nominal damages that there is an infraction of a legal right which, though it gives you no right to any such damages at all, yet gives you a

right to the verdict of judgment because your legal right has been infringed."

Although Lord Halsbury also said in his definition that nominal damages does not mean small damages, that is what it materially, or essentially is, as it is in most cases, the smallest damage in the hierarchy of damages. In *Beaumont v Greathead* (1846) 2 CB 494 at 499, Maule J held that nominal damage is a sum of money that may be spoken of but that has no existence in point of quality. Nominal damages are a trifling sum awarded when a legal injury is suffered but when there is no substantial loss or injury to be compensated. They are damages awarded for the infraction of a legal right, where the extent of the loss is not shown, or where the right is one not dependent upon loss or damage, as in the case of rights of bodily immunity or rights to have one's material property undisturbed by direct invasion. The award of nominal damages is a declaration that the plaintiff's right has been violated. See McCormick, Handbook on the Law of Damages. Nominal damages are a token and negligible amount which the Court in the exercise of its powers awards, most of the time grudgingly, to fill an apparent vacuum in the process of awarding damages. They are damages which the Court awards with all reluctance, most of the time, to please the plaintiff, although the Courts pretentiously do not come out to say this.

The Court of Appeal awarded nominal damages of D500.00. Is the Court of Appeal justified in the award? In *Drammeh (No. 2) v Gambia Utilities Corporation (No. 2)* (1997-2001) GR 829, this Court examined when an Appellate Court will reverse the award of damages by a Lower Court. Jallow JSC, delivering the lead judgment of this Court, held that the well established principles which guide an Appellate Court in reviewing the level of damages awarded by a Lower Court are that in order to justify reversing the damages awarded by the Lower Court, the Appellate Court should be convinced that the Lower Court had acted upon some wrong principle of law, or that the amount awarded was extremely high or so very small as to make it, in the judgment of the Appellate Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. Applying the above principle enunciated in *Drammeh (No. 2)*, I cannot see any way clear in reversing the award of D500.00 by the Court of Appeal. That was the decision in *Drammeh (No.*

2) when the Court affirmed the sum of D2000 as general damages. See generally *Flint v Lovell* (1935) 1 KB 354. *Zik's Press Ltd v Ikoku* (1951) 13 WACA 188, *Bressaah v Asante* (1965) GLR 117; *Medical Research Council v Touray* (1995-1996) GR 86.

In sum, this appeal fails and it is dismissed.

SAVAGE C.J. I had read in advance the draft of the judgment of my Lord Tobi JSC just delivered and I entirely agree with the reasoning and the conclusion arrived at. For the same reasons lucidly set out in the aforesaid judgment, which I respectfully adopt as mine, I also dismiss the appeal.

MAMBILIMA JSC: I have read the lead judgment of my brother Niki Tobi JSC in the case. I agree entirely that this appeal must fail. It is trite law that a person who wishes to recover damages must prove that he has suffered a loss. It is for such claimant to prove with certainty the quantum of such a loss. My perusal of the pleadings reveals that the Appellants sought to be paid the entire contract sum as damages without any proof that they incurred such a loss. Such a shortcoming in proof of actual loss can only react against them.

With regard to the refund of D58, 000.00, simple arithmetic proves that indeed, there was an understatement of the amounts owing but the overriding issue, as pointed out by the Lower Court, is that there was a tender which was given to the lowest bidder on the understated value. To grant the Appellants the relief sought may result in undesirable tendencies whereby parties in a tender process would deliberately under quote with an intention of rectifying the 'mistake' later. This would not be in the public interest.

This appeal must be dismissed.

DOTSE JSC: I have been privileged to have read the lead judgment just delivered by my brother Tobi JSC. Since I agree with the rendition of the facts in the said judgment, and the conclusions reached therein, there is nothing useful to add thereto. An attempt to add to the judgment will only

amount to repetition of the facts and the law. I therefore also agree to the conclusions reached therein that the appeal must fail.

AGIM (ORG) Ag. JSC: I have read the draft of the judgment just rendered by my learned brother Tobi JSC. I agree with his reasoning and conclusions. I have no reason to differ or say more. I also dismiss this appeal.

Appeal Dismissed.
FLD.

FATOU BADJIE and 4 Ors v JOSEPH BASSEN

SUPREME COURT OF THE GAMBIA
(Supreme Court No. 4/2002)

3rd July 2008

Savage CJ, Mambilima JSC, Tobi JSC, Dotse JSC, Agim Ag. JSC

Action – Action for trespass – Trespass – Whether a person in possession can maintain action in trespass – Declaration of title to land – Ways of proving ownership to land – Production of document – Possession of connected or adjacent – Burden of proof – Onus of proof lies with the party asserting the affirmative – Declaration of title to land – Purpose of identifying boundaries of land the subject matter of the suit – Mere mention not enough – Identification of land forming part of a larger piece of land – Survey plan – Duty on party seeking to rely on same – Need for it to show physical structures on the land – Reliefs – Following the dismissal of plaintiff's claim can the Court give judgment in favour of the defendant especially when the relief given was not asked for – Proof of ownership to land.

Appeal – Declaration of title to land – Traditional evidence – Appellate Court – Evaluation of evidence – Findings of fact by Trial Court – Circumstances when Appellate Court can interfere with same.

Court – Formulation of issues from pleadings by Courts – Propriety of – Statement of claim – Whether Court can grant relief not endorsed on the writ – Appeal – Whether Appellate Court can interfere with findings of fact by Trial Court – Identity of land – Appeal – Jurisdiction – Whether can narrow down issues raised on grounds of appeal – Relief – Not sought for – Whether appropriate for Court to grant a defendant a relief not claimed were plaintiff's claim is dismissed – Record of proceedings – Proper procedure to be followed by the Court – Evidence – Test to apply in evaluating traditional evidence – Pleadings – Attitude of Court to variations in pleadings and evidence given – Orders – Issuance of unenforceable orders discouraged by the Courts – Cross-examination – Purpose of.

Court Pleadings – Whether Court can formulate issues for parties based on their pleadings.

Document – Conveyance – Need to define the land conveyed.

Evidence – Cross-examination – Purpose of – Evidence obtained therein – Effect thereof – Burden of proof in action for declaration of title to land – Failure to discharge the onus – whether party can rely on the weakness of the defendant's case – Evaluation – Test to apply in evaluating traditional evidence by the Court – Standard of proof – In civil and criminal proceedings – Cross examination –Appeal –evaluation of evidence – Whether proper for Appellate Court to engage in such an exercise.

Land Law – Acts of possession – Whether person in possession can maintain action for trespass – Declaration of title to land – Duty of party claiming same – Ways to prove ownership – Identification of the land – Where the land forms part of a larger portion sold out – Survey plan – Need to be tendered by party relying on same – Need for the survey plan to show and identify physical structures on the land.

Party – Declaration of title – Duty on party thereto.

Pleading – Content of – Purpose of.

Practice & Procedure – Ways of proving ownership to land – Survey Plan – What is expected of a party seeking to rely on same – Cross-examination – Purpose of – Appellate Court – Interference with Trial Court's findings of fact – Pleadings – Need to plead material facts and not evidence – Evaluation of evidence – Test to apply in evaluating traditional evidence – Variations in pleadings and evidence given during trial – Evidence – Proof of ownership to land by traditional evidence – Proof of ownership to land by documentary evidence – Proof of ownership to land by fact of possession of connected or adjacent land – Record of proceedings – Need for Court to adopt a proper procedure for recording proceedings – Technicalities – The role of the Supreme Court to champion the crusade to free Courts therefrom – Standard of proof – In adversary system – Jurisdiction – Appellate Court's power to evaluate evidence in a case before it – Grounds of appeal – Whether the Supreme Court of The Gambia can raise suo moto issues not raised by the parties.

Statement of Claim – Court – Granting of relief not sought by a party.

Words & Phrases – Land law – Meaning of legal maxim 'nemo dat quod non habet.'

Held, *dismissing the appeal in part (per Savage CJ, Mambilima JSC, Tobi JSC, Dotse JSC, Agim Ag. JSC concurring)*

1. Pleadings must contain the facts on which a party relies on in support of his case. [*Morohunfola v Kwara State College of Technology* (1990) 4 NWLR (Pt 145) 506 referred to]

2. A Court can formulate the issue or issues for determination based on the party's pleadings**.** This could be done in order to narrow down the areas of controversy and agree on the issues actually in dispute. Per Karibi-Whyte JSC (as he then was) in *Bamgboye v Olarewaju* (1991) 4 NWLR (Pt 184) 132 that this "saves valuable time and reduces the cost of litigation to remove the weeds of irrelevancies and cob-webs of matters unnecessarily beclouding otherwise clear issues".

3. The purpose of cross-examination in our adversarial system of justice is for the party doing the cross-examination to achieve any of the following results:-
   1. To punch holes and discredit the evidence of the witness
   2. To start laying a basis or foundation for his own case or to support his case where it has had already been led.

4. It has always been a cardinal principle of law and procedure in common law jurisdictions that a Court of Law cannot or does not grant relief or claim that has not been endorsed in a writ of summons or in a counter claim. [Per Tobi JSC in *GIHOC Refrigeration & House Hold Products Ltd v Hanna Assi (No. 1)* 2005-2006 SCGLR 458, Opinion of Date-Bah JSC and minority opinion of Sophia Akuffo JSC referred to]**.** However it is noteworthy to say that the Supreme Court of Ghana reversed its earlier decision when the parties applied for a review and this time a majority decision upheld the defendant's contention that a grant of the relief which was not asked for was proper in Hanna's case No. 2.

5. It is trite law that trespass to land is actionable at the suit of a person in possession of land, and such a person can sue for

trespass even if he is neither the owner nor a privy of the owner. This is because exclusive possession gives the person in such possession the right to retain it and have undisturbed enjoyment of it against all except a person who establishes a better title. [*Madubounwa v Nnalue* (1992) 8 NWLR (Pt 260) 440 referred to]

6. The duty of the Appellate Court is to ascertain whether or not there is evidence upon which the Trial Court acted and once there is such evidence, the Appellate Court must not interfere with the Trial Court's decision. However, an Appellate Court may interfere with the findings of fact of a Trial Court where the later failed properly to evaluate the evidence or make proper use of the opportunity of seeing or hearing the witnesses at the trial or where it has drawn wrong conclusions from the accepted evidence or where its findings are shown to be perverse. [*Thomas v Thomas* (1947) ALL ER 582; *Clarke v Edinburgh Tramways Co.* (1919) SCHC 35; *Powel v Streatham Manor Nursing Home* (1935) AC 243; *Bashaya & Ors v The State* (1998) 4 SCNJ 202; *GreenGold Limited v Kombo Poultry Farm* (2002 – 2008) 1 GLR 308 referred to]

7. The first duty of a plaintiff who comes to claim a declaration of title is to clearly show the Court the area of land to which his claim relates. Where the area of land is not identified with certainty, the claim is bound to fail [*Aweni v Olorunkosebi* (1991) 17 NWLR; *Epi v Aigbedon* (1992) 1 All NLR 307; *Oyetunji v Akanni* (1985) 5 NWLR (Pt 42) 461; *Baruwa v Ogunsola* 4 WACA 159; *Adufia v Afia* 6 WACA 216; *Oluwo v Eniola* (1967) NMLR 339 referred to]

8. Proof of ownership to land can be done by any of five ways:-
   1. By traditional evidence;
   2. By production of documents of title;
   3. By acts of the person claiming the land;
   4. By acts of long possession; and
   5. By proof of possession of connected or adjacent land

   [*Idundun v Okumagba* (1976) 9-10 SC 140; *Adimora v Ajiefo* (1988) 3 NWLR (Pt 80) 1; *Ajadi v Okenihun* (1985) 1 NWLR (Pt 3)

484; *Eronini v Iheuko* (1989) 2 NWLR (Pt 101) 46; *Makanjula v Balogun* (1989) 3 NWLR (Pt 108) 192 referred to]

9. The burden of proof lies on the party asserting the affirmative and who will fail if the burden is not discharged. [*Kodilinye v Odu* (1935) 2 WACA 336; *Atlanta v Ajani* (1998) 2 NSCC 511; *Sorungbe v Omotunwage* (1988) 3 NSCC 252; *Adebanjo v Olowosoga* (1988) 2 NSCC 503; *Banga v Dianie* (1989-90) 1 GLR 519 referred to]

10. The purpose of establishing the exact boundaries of the land in dispute in an action for declaration of title to land, trespass and injunction are:-

    (a) To enable the parties and any other persons claiming through them to know precisely the area of the land to which the judgment or order relates for the purpose of enforcement of the decision of the Court and

    (b) To obviate the possibility of future litigation of that particular area of land as between the same parties and their privies.

    [*Nwogo v Njoku* (1990) 3 NWLR (Pt 140) 571, *Ugbo v Aburime* (1994) 9 SCNJ 213 referred to]

11. In an action for declaration of title and or other reliefs concerning land, part of the duty of the plaintiff to prove his claim includes the duty to accurately identify the Suitland. It is trite law as restated by the Court in *Maberi v Alade & Ors* (1987) 4 SCNJ 102 and in *Ugbo v Aburime* (1994) 9 SCNJ 213, that where a plaintiff in an action for declaration of title fails, as in this case, to prove the boundaries, dimension or extent and features of the Suitland, he has failed to prove his case and the claim will be dismissed. The duty to accurately identify the land requires the plaintiff to plead in the statement of claim facts which clearly describe the identity of the Suitland. If the statement of claim does not clearly identify the Suitland, then the plaintiff would have failed to prove the identity of the Suitland. So the identity of the Suitland becomes an issue not only when the defendant disputes it, but also where the facts in

the plaintiff's statement of claim do not describe its limits, extent and salient features so as to make it easily ascertainable and put it beyond doubt.

12. Where the land in dispute consists of a smaller portion of land sold out of a larger portion, the limits of the said smaller portion must be clearly identified by the Party who claims for a declaration of title to such suit land. [*Akeredou & Ors v Akinremi & Ors* (1989) 1 SCNJ 102 referred to]

13. A party who seeks to rely on a survey plan as evidence of the identity of the suitland must ensure that it is formally tendered and admitted. It can only be relied on and used by all the parties and the Court if it is admitted as evidence by the Court.

14. The features in the disputed land relied on by a party must be shown on his survey plan. If he fails to do so, such evidence will be regarded as unsatisfactory. [*Anyanwu v Mbara & Anor* (1992) 6 SCNJ 122 referred to]

15. It is of utmost importance that a document or any instrument conveying or allocating any title or interest in land should define the land conveyed or allocated therein. If the area, extent and limit of the land conveyed or allocated are not stated in the allocation paper or certificate, then the identity of the land is uncertain. [*Dabup v Kolo* (1993) 12 SCNJ 1 referred to]

16. Appellate Courts all over in common law jurisdictions have the discretion to narrow down the issues formulated in cases before them. [*Dasebre Nana Osei Bonsu II v Akwasi Mensah & 3 Ors* (unreported) Judgment of the Ghanaian Court of Appeal No. H1/13/05 delivered on 13th July 2006 referred to]

17. The principle that it is only material facts that are pleaded, and not evidence is a rule of practice that is so firmly rooted in our laws that it will be like sending coal to new castle to repeat it here. [*William v Wilcox* (1838) 8 A & E 314 and *Philips v Philips* (1877) 4 QBD 127 referred to]

18. The dismissal of the plaintiff's claim alone does not vest a Court will the power to grant a defendant a relief that he has not claimed. "In an action for declaration of title to land, dismissal of the plaintiff's claim does not, in the absence of counter claim amount to judgment for the defendant." [*Gyang Dung v Chung Chollom* (1992) 1 NWLR (Pt 220) 738 referred to]

19. As the final Court of The Gambia, this Court should champion the crusade to free the courts of unbridled technicalities that sometimes reduces the administration of justice to absurdities and incongruous results.

20. It is a pity that the Learned Trial Judge did not record the questions that led to the answers on record. The method used by the Learned Trial Judge in recording only the answers during cross-examination is not the best. The desirable method should have been to record the question and then the answer. That way there will be no ambiguity in the recording and answers given.

21. If the plaintiff in a civil suit failed to discharge the onus on him and therefore was unable to establish a case for the reliefs he sought before the Court, he cannot take cover in the weakness of the case preferred by the defendant. However if the plaintiff made out a case by his evidence and the defendant remained silent, then if the case as was given by the defendant when he testified amounted to creating weaknesses in the defendant's case which as it were tended to enure to and support the plaintiff's case, then in such a situation the plaintiff would be entitled to strengthen his case. [*Kodilinye v Odu* (1935) 2 WACA 336; *Martey v Mechanical Lloyd Assembly Plant Ltd.* (1987-88) 2 GLR 314 referred to]

22. The best way of evaluating traditional evidence is to test the authenticity of the rival version against the background of positive and recent acts of possession or ownership. [*Achoro & Anor v Akanfela & Anor* (1996-97) SCGLR 209 referred to]

The Supreme Court of Ghana in the case of *Adwubeng v Domfeh* (1996-97) SCGLR at 660 stated the same principle with more emphasis as follows:-
"Where it was difficult, on the basis of traditional evidence, for the Trial Court to make a finding as to which of the ancestors of the parties was the first to settle on the disputed land, the recommended approach was to have recourse to facts in recent years as established by the evidence".

23. Where there are variations in the pleadings and the evidence given at the trial, but which does not substantially destroy a party's case and was not material, in appropriate circumstances, the variations can be safely ignored.

24. Evidence of traditional history should paint a genealogical picture of ancestors usually from time immemorial. The plaintiff or party claiming title should prove in some chronological sequence or detail, the ownership of the suit land from his ancestors, and in the chronology, there should be no broken period but there must be a of connection.

25. If the document of title is a conveyance, it must mention in clear terms that the suit land belongs to the party claiming it. If the boundary of the suit land is in dispute, there must be a survey plan clearly demarcating or indicating the boundary.

26. The plaintiff must prove that the suit land is in some nearness, proximity, or contiguity with the other land in possession of or owned by the plaintiff or claimant. There is no need for a mathematical measurement of distance between the suit land and other land in possession of or owned by the plaintiff or claimant.

27. The Supreme Court of Nigeria in the case *Sorungbe v Omotunwas* (1988) 3 NSCC 252, held that in a case for declaration of title to land the onus is clearly on the plaintiff to lead strong and positive evidence to establish his case and that an evasive averment does not displace the plaintiff's burden. Webber CJ, delivering the judgment of the West African Court of Appeal in

the case of *Kodilinye v Odu* (1935) 2 WACA expressed similar sentiments.

28. In the adversary system, there are two basic standards of proof. One in civil proceedings and the other in criminal proceedings. In civil proceedings, such as this appeal, proof is on the balance of probability or on the preponderance of evidence. In criminal proceedings the standard of proof is one beyond reasonable doubt.

29. The import of the legal maxim 'nemo dat quod non habet' is that a person cannot give to another a better title than he possesses. [*Famuroti v Agbeke* (1991) 5 NWLR (Pt 189) 1 referred to]

30. Evidence obtained from cross-examination is strong and admissible evidence in law. I will place it above evidence obtained in examination-in-chief because the former is aimed at demolishing the case of the opponent and building up the case of the cross-examiner.

31. Though evaluation of evidence starts or commences at the Trial Court, it is not exclusive to that court and the exercise may be continued at the Appellate Court. An Appellate Court also shares in the judicial function. The difference is that while the Trial Court evaluates the evidence before it with the exclusive privilege and advantage of watching the demeanour of the witnesses, an Appellate Court does so only on the cold records before it. It is therefore the province of the law that as an Appellate Court has not the eagle eyes of a Trial Court to watch the demeanour of the witnesses, it must rely on the findings of the owner of the eagle eyes unless same appears to be perverse.

32. It is an established practice of administration of justice that Courts should not issue unenforceable orders, for a Court like nature will not act in vain.

33. The Supreme Court can suo motu raise issues not raised by the parties in their grounds of appeal by virtue of Rule 8 (7) and (8) of

the Supreme Court Rules which states that this Court shall not, in deciding an appeal, confine itself to the grounds set forth by the appellant or be precluded from resting its decision on a ground not set forth by the appellant. Sub rule (8) provides that where the Court intends to rest a decision on a ground not set forth by the appellant in his notice of appeal or on any mater not argued before it, the Court shall afford the parties reasonable opportunity to be heard on the ground or matter without re-opening the whole appeal.

34. The duty of the plaintiff to prove his case includes the duty to plead in the statement of claim facts that disclose a cause of action and that when proven entitle him to judgment for the reliefs claimed. It is not a general rule that whenever the evidence tendered by the plaintiff is unchallenged, uncontroverted, the plaintiff is automatically entitled to judgment. The evidence adduced must bear relevance to the facts pleaded and the issues joined. [*Jeng v George Stowe Co. Ltd No. 1* (1997-2001) GR 44; *Nwogo & Ors v Njoko & Ors* (1990) 3 NWLR (Pt 132) 322 referred to]

35. The mere mention of the name of the land is not enough. The description and boundaries of the land must be proved accurately. [*Odiche v Chibogwu* (1994) 7-8 SCNJ 317; *Okedara v Adebara & Ors* (1994) 6 SCNJ 254 referred to]

Cases referred to:

Amos Bamgboye & Ors v Olarewaju (1991) 4 NWLR (Pt 184)
Akeredolu & Ors v Akinremi & Ors (1989) 1 SCNJ 102
Anyanwu v Mbara & Anor (1992) 6 SCNJ 122
Awoke & Ors v Okere & Ors (1994) 5 SCNJ 2
Awote & Ors v Owodunni & Anor (1987) 5 SCNJ
Aweni v Olorunkosebi (1992) 17 NWLR
Cham v Barrow (1994) GR 121
Clarke v Edinburg Tramways Co (1919) SCHL 35
Chukwu v Nneji (1990) 6 NWLR (Pt 156) 363
Dabup v Kolo (1993) 12 SCNJ 1

Famuroti v Agbeke (1991) 5 NWLR Pt 189 1
Fatuade v Onwuamanam (1990) 2 NWLR (Pt 132) 322
Edim & Ors v Inyang & Ors (1975) 2 SG TI
Gambia Commercial & Development Bank Ltd (No 1) v Jeng (1997-2001) GR 291
GreenGold Limited v Kombo Poultry Farm (2002-2008) 1 GLR 308
GIHOC Refrigeration & House hold products Ltd v Hanna Assi (No 1) 2005-2006 SCGLR 458
Gyang Dung v Chung Chollam (1992) 1 NWLR 220
Hanna Assi (No 2) v GIHOC (2007-2008) SCGLR 633
Ibenemeka vV Egbuna (1964) 1 WLR 220
Jobe v Kebbeh (unreported) judgment of The Gambia Court of Appeal No 29/90
Kado v Obiana (1997) SCNJ 33
Madubounwa v Nnalue (1992) 8 NWLR (Pt 260) 440
Morokunfola v Kwara State College of Technology (1990) 4 NWLR (Pt 145)
Nwogo & Ors v Njoku (1990) 3 NWLR (Pt 140) 571
Nwoke & Ors v Okere & Ors (1994) 5 SCNJ 2
Odiche v Chibogwu (1994) 7-8 SCNJ 317
Okedare v Adebara & Ors (1994) 6 SCNJ 254
Philipps v Phillips (1877) 4 QBD
Powel v Streatham Manor Nursing Home (1935) AC 243
Thomas v Thomas (1947) All ER 582
William v Wilcox (1838) 8 A & E

Statutes referred to:

Halsbury Law of England, 4th Edition Para 185
Local Government Act Cap 33:10 Sections 2, 45 (1)
Banjul and Kombo St Mary Act 1946 Cap 57:02 Vol. XIX Laws of The Gambia Section 50
State Land Act 1991 Section 4
The Gambia Constitution of 1997 Section 126 (2)
The Lands (Provinces) Act Cap 57:03 Section 4

Rules of Court referred to:

England Supreme Court Rules Order 15 rule 16
The Gambia Supreme Court Rules Rule 8 (7) (6), 25 (3)
The Gambia Court of Appeal Rules 36, 42
The Gambian High Court Rules Order 23 Rule 2 Schedule 2, Order IV, Schedule 2

APPEAL against the Judgment of the Court of Appeal delivered on 14th November 2002 overturning the decision of the High Court which in part declared title to the suitland to belong to the defendant following the plaintiffs' failure to establish their case.

A.N.M.O. Darboe for the appellant
S.B. Semega-Janneh for the respondent

DOTSE JSC. This is an appeal against the Judgment of The Gambia Court of Appeal delivered on the 14th day of November 2002 wherein the Court of Appeal reversed the decision of The Gambia High Court dated 12th February 1998 and held in part on 14th November 2002 as follows:-

> "We hold that the plaintiffs had woefully failed to discharge the onus on them of proving their claim by credible evidence and ought to have failed. The issue for determination is therefore answered in the negative. The defendant on the other hand, had properly established his case. This appeal therefore succeeds we set aside the judgment, findings, declarations and orders of the Trial Court. In their stead, we find for the defendant and declare that the suit land in question belongs to the defendant, Joseph Bassen. The appellant is entitled to costs".

This is the part of the Judgment that the Plaintiffs/Appellants hereafter referred to as the Plaintiffs have appealed against to the Supreme Court on 23rd December 2002 with the following as the grounds of appeal.

GROUNDS OF APPEAL

i. "The Learned Justices of the Court of Appeal erred in law when they held that the Alkalo Pw1 had nothing to give by way

of allocation of the suit land to the Appellants when the Respondent also relied on his own purported title on the same grant or allocation being exhibit 2, the Certificate of land ownership from the same Alkalo.

ii. The Learned Justices of the Court of Appeal erred in law and in fact when they held that the suit land was the same as the "Sinana" land so-called purportedly belonging to the respondent's father when in fact there was no satisfactory evidence to that effect.

iii. The Learned Justices of the Court of Appeal erred in law when they placed reliance on the unsubstantiated evidence of traditional title of ownership adduced by the respondent.

iv. The judgment is against the weight of evidence.''

ADDITIONAL GROUNDS OF APPEAL

v. The Learned Justices of the Court of Appeal erred in law in dismissing the Appellants claim on the ground that the Alkalo had no authority to allocate land to the Appellant.

PARTICULARS OF ERROR

(a) The Alkalo's authority to allocate land to any person was not an issue raised by the pleadings.

(b) The issues raised by the pleadings were whether or not there was an allocation or a grant of land by the Alkalo to the appellant.

(c) Evidence of lack of authority should not have received the consideration of the Justices of Appeal since such evidence related to no issue on the pleadings.

6. The Learned Justices of Appeal erred in declaring that the Suit land belonged to the Respondent when there was no counterclaim by the Respondent seeking for any declaratory judgment "or other relief in his favour".

7. The Learned Justices of Appeal were wrong in setting aside the award for damages for trespass on the ground that there was no evidence as to the cost of the things destroyed.

8. The Learned Justices of Appeal wrongly evaluated the evidence on record and consequently wrongly concluded that the Appellants have not proved their case.

The Plaintiffs acting for themselves and some ten other persons commenced this suit against the Defendant on 24th December 1992, in the High Court of The Gambia claiming the following reliefs.

1. A declaration that the plaintiffs are the owners of the land at Eboe Town edged red on the Sketch plan herewith attached.
2. An injunction restraining the defendant his servants or agents from demolishing or damaging any fence or structure on the said land or in anyway interfering with the land.
3. Damages for trespass on the said land.
4. A declaration that any lease granted to the defendant is held by him in trust for the plaintiffs
5. Further or other reliefs.
6. Costs".

The Plaintiffs premised their action against the Defendant on a grant of land made to them by the Alkalo. The plaintiffs contended further that, they performed various overt acts of ownership on the land in dispute peacefully and quietly until the riotous entry of the Defendant on to the land in or about February 1990 and his attendant destructive activities.
The defendant on his part contested the suit at the High Court, filed his Defence and virtually denied all the claims of the plaintiffs. The Defendant contended that the disputed land which he called "Sinana Rice Fields" has been the property of the Defendant's family since the latter part of the 19th Century when his grandfather cultivated the said land. According to the Defendant, at a meeting in the offices of the Director of Lands and Survey and in the presence of Dambou Camara and the Alkalo, the said Alkalo confirmed that the suit land is the property of the Defendant and his family. A perusal of the Defence of the Defendant clearly indicated that the Defendant denied in substance the claims and the reliefs which the plaintiff sought against him. It must however be noted that the Defendant did not counterclaim against the plaintiffs.

At the trial before the High Court, all the five plaintiffs whose names appear on the writ of summons testified and were cross-examined. They also called two witnesses, namely, Pw1 Landing Jarju, the Alkalo of Eboe Town and Pw2, Adama Jammeh, the Rating Assistant at the

Kanifing Municipal Council. The Defendant on his part testified and was cross-examined. Thereafter, he also called two witnesses, namely,
Dw1, Jupiter James Loum a retired Supreme Court Interpreter, a farmer and a boundary neighbour to the Defendant's rice fields at Sinana.
Dw2, Abdulahi Kujabi, a farmer and boundary owner to Defendant rice fields at Sinana.

HIGH COURT DECISION

After the closing addresses of Counsel for the parties, Learned Trial Judge Obayan J, delivering the judgment of 12th February 1998 said:-

"I am not convinced that the defendant had shown any better title to those of the plaintiffs to warrant him to take laws into his hand to begin to pull down the structures he found on the land. I am inclined to believe the story of Pw1 – the Alkalo relating to the allocation of the land to the defendant and his relations. The Alkalo knew the extent of the land he granted in Exhibit 2. I also believe the Alkalo on the meeting with the Director of Survey and the fact that the defendant failed to honour a future meeting to resolve any apparent dispute. The defendant attempted to place the act of trespass on the plaintiffs when he was on posting to the provinces. It will appear that since the land granted to the defendant was not for him alone one should have expected that other relations who have an interest in the land should have taken some steps to stop the encroachment if any. I am not convinced by this testimony of the defendant, in the circumstances I find for the plaintiff.

''(1) I therefore declare that the plaintiffs are the owners of the plot of land granted to each of them in Eboe Town.
(2) The order of injunction is granted against the defendant, his servants, or agents however described from further demolishing or damaging any fence or structure on the land of the plaintiffs or in any way interfere with the land of the plaintiffs as highlighted in my judgment.''

"On damages for trespass, I have held that the plaintiffs were in possession therefore they are entitled to damages. The title of the defendant is not superior to those of the plaintiffs. Though the plaintiffs

established that damages were done to their properties yet they failed to ask for compensation. I therefore award each plaintiff D2000 for trespass. Since there are five plaintiffs, the total award is D10, 000 against the defendant.

Plaintiffs' counsel had abandoned the relief for a declaration that any lease granted to the defendant be held in trust for the plaintiffs because no lease had yet been granted to the defendant".

Aggrieved by the above judgment, the Defendant appealed against same to the Gambia Court of Appeal, which as I have already stated allowed the appeal on the 14th day of November 2002, wherein the judgment, findings, declarations and orders of the Trial Court were all set aside. Instead, judgment was entered for the Defendant and the suit land was declared to belong to the Defendant. It is this Appeal Court Judgment that is the thrust of this judgment by the Supreme Court. I have perused the written statement of claim for the plaintiffs and the Defendant. I also take note of their appreciation of the grounds of appeal filed which formed the basis of their submissions.

However, I am minded to follow the plaintiffs' identification of the four (4) issues which fall for determination. I also observed that, the Respondent lumped two of the said issues together as one but since it is the plaintiff who has initiated the appeal process, I shall follow the said four issues which have been identified and stated by the plaintiff as follows:-

1. Whether it was proper for the Court of Appeal to base its judgment on an issue not raised by the parties in their pleadings
2. Was the Court of Appeal right in making the orders it made in favour of the Respondent.
3. Was the Court of Appeal right in setting aside the award of damages for trespass
4. Whether the Court of Appeal properly evaluated the evidence.

ISSUE NO. I

In order to appreciate the submission of learned counsel for the plaintiff on this point very well, it is necessary to quote in extenso the pleadings in the statement of claim and the Defence.

Paragraph (1) of the Plaintiffs amended statement of claim filed pursuant to leave granted by the Supreme Court on 25th June, 2008 reads as follows:-

1. "The Plaintiffs severally bring this action for themselves and the following, Karamo Danso, Seedy Drammeh, Arit Gomez, Sheriff Chatie, Kabiro Touray Sainee Jallow, Sainey Behie, Bashiru Sonko, Dembo Camara, Alieu Muhtar Jallow and Omar Jallow all of whom and the Plaintiffs were each granted a plot of land at Eboe Town by the Alkalo on different dates and at different times"

In response to the above pleadings the Defendant averred thus:

1. "Paragraph 1 of the Statement of Claim is denied.
2. The Defendant avers that the suit land, locally called "SINANA rice fields has been the property of the Defendant's family since the latter part of the 19th Century when his grandfather farmed the said land.
3. The Defendant further avers that Sanie Jallow had on two occasions after the issue of the writ of summons herein told him that he was not a party to the action.
4. The Defendant further avers that at a meeting in the offices of the Director of Lands and Survey, and in the presence of Dambou Camara and the Alkalo, the said Alkalo confirmed that the suit land is the property of the Defendant and his family.
5. Paragraph 2 of the claim is denied".

It must be noted that, paragraphs 1 to 4 of the amended Defence referred to (supra) must be deemed to be answers by way of defence to the averments contained in paragraph one (1) of the amended statement of claim. This is because, after the denial of the averments in paragraph one of the amended Defence, paragraphs 2, 3, and 4 of the amended statement of Defence then go on to deal with further averments. In any case, it was not until paragraph 5 of the amended statement of Defence that the Respondent answered the averments contained in paragraph 2 of the amended statement of claim. If I understand the contention of learned counsel for the Plaintiff correctly, it is to the effect that it was improper for the Court of Appeal to have raised the issue of lack of authority of the Alkalo to allocate land to the plaintiffs and for the Court to have imported and dealt with an issue not raised in

the pleadings. This according to learned counsel for the plaintiff meant that the Court of Appeal was in complete error in treating such an issue as evidence and not as a material fact which needed to be raised in the pleading.

On the part of the Defendant, learned counsel submitted rather forcefully that, the answer to paragraph one of the Statement of claim in their paragraph one of the Defence necessarily raised the issue of the Alkalo's authority or lack of it to grant the suit land to the plaintiffs. Without attempting to go any further, it appears logical that the issue as to whether or not the Alkalo had authority to grant the suit land to the plaintiffs naturally arose from the pleadings referred to supra. This is because if as is the case herein, the plaintiffs aver that they were granted land by the Alkalo and that particular averment has been denied by the Defendant, then it is correct to infer that the Defendant denies lack of authority in the Alkalo to make grant of the land to the plaintiffs. Furthermore, it is my view that the averments in the entire amended statement of Defence have to be read together to form a holistic picture.

As a matter of fact, paragraphs 2, 3, and 4 of the amended statement of Defence are also answers to paragraph (1) of the amended statement of claim and must be read as such. If the above scenario is accepted, then it follows quite logically, naturally, reasonably and sequentially that the authority of the Alkalo if any to make grants of the suit land to the plaintiffs has been questioned by the Defendant by the very nature of the pleadings.

However, learned counsel for the plaintiffs contends that, since the issue of the authority of the Alkalo to make the grant of land was not pleaded, it was wrong for the Court of Appeal to have relied on same to in giving judgment for the Defendant. This brings into focus the purpose of pleadings and what amounts to material evidence which I concede ought to be pleaded, and evidence which need not be pleaded. This point was sufficiently stated in the Nigeria Supreme Court case of *B. A. Morohunfola v Kwara State College Of Technology* (1990) 4 NWLR (Pt 145) 506 per Belgore JSC where he stated the purpose and what amounts to pleadings as follows:-

> "In our High Courts, the best method of explaining issues between the parties before hearing is by way of pleading. Pleadings must contain

> facts on which a party relies for his case and the facts must be material. In the matter of pleadings, it is for the plaintiff to plead sufficient material facts so that the defendant will know the case he is to face, it is then up to the defendant to admit or traverse those facts".

Surprisingly, the above case was referred to by learned counsel for the plaintiff to support his contention that the Defendant did not plead material facts upon which the Court of Appeal deduced its findings to hold that the Alkalo had no authority to have granted land to the plaintiffs. On the contrary, this Court is of the opinion that having specifically traversed the facts contained in the averment of the plaintiffs, the issues therein contained are then joined between the parties. It was therefore wrong for the Learned Trial Judge to have discounted and or rejected relevant evidence on record to that effect. I have also appraised myself with the decision of the Nigerian Supreme Court and relied on by the plaintiffs, *Amos Bamgboye & Others v Raimi Olarewaju* (1991) 4 NWLR (Pt 184) 132. Even though I agree with the dictum in the above decision that "the Court should confine itself to issues raised by parties both in their pleadings in the trial court, their complaints raised in the grounds of appeal on which briefs are written and the issues they have raised in their briefs for the Court to adjudicate upon and ought not to venture to raise new matters for the parties", there have been several exceptions to the said principle. I have listed a few of such instances below:-

1. To allow a Trial Judge or an Appellate Court to formulate an issue or issues for the parties arising from their pleadings or statements of claim or defense.
2. This could also be done in order to narrow down the areas of controversy and agree on the issues actually in dispute.

As was stated by Karibi-Whyte JSC in the *Amos Bamgboye & Others v Raimi Olarewaju* case (supra) such an approach

> "Saves valuable time and reduces the cost of litigation to remove the weeds of irrelevancies and cob-webs of matters unnecessarily beclouding otherwise clear issues".

In the instant appeal, the plaintiffs filed four original grounds of appeal and four additional grounds. However in the formulation of the issues for determination by this Court, whilst the Appellant re-formulated these eight grounds of appeal to only four, the Respondent re-formulated them to only three issues. This shows clearly that relevancy of the issue or issues so formulated must be found to be germane to the trial of the substantive case in determining the core issues raised in the appeal.
I am of the firm opinion that the conduct of the Court of Appeal in dealing with the issue of whether the Alkalo had authority or not to deal with the grant of the Suitland to the Plaintiffs was germane and relevant to the determination of the case.

It is for this reason that Appellate Courts all over in common law jurisdictions have the discretion to narrow down the issues raised in several grounds of appeal formulated in cases before them. A similar situation arose in the unreported Ghanaian case of *Dasebre Nana Osei Bonsu II Alias S.T. Oswald Gyimah Kessie v Akwasi Mensah & 3 Ors* Suit No. H1/131/05 dated 13th July 2006 where the Court noted with concern the reduction of 28 grounds of appeal to only one ground.
In the instant appeal, I consider the following statement of the Court of Appeal to be appropriate and consistent with the pleadings and evidence that was led before the Trial Court:-

> "The title of the Alkalo becomes an issue to ascertain and of course, cross-examining the Alkalo on his title or authority is very relevant and any evidence elicited thereby is admissible. It goes to the root of the whole case and was apparent right from the pleadings to the trial. The evidence was rightly admitted and the Trial Court ought to have given it consideration instead of rejecting it out of hand as belated".

As pointed out earlier, once the plaintiffs trump card, i.e. the Alkalo's title to grant or allocate land to the plaintiffs, had been specifically traversed, the only logical and reasonable deduction is that the Defendant had denied that the Alkalo had any authority to grant or allocate the suitland whatsoever. Under the circumstances, any good Solicitor or counsel worth his salt cannot miss the opportunity to elicit evidence from the very Alkalo when he is called as a witness by the very plaintiffs who rely on his title to establish their root of title.

In understanding this issue, it must also be borne in mind that the purpose of cross-examination in our adversarial system of justice is for the party doing the cross-examination to achieve any of the following results.

1. To punch holes and discredit the evidence of the witness.
2. To start laying a basis or foundation for his own case or to support his case that had already been led.

Having considered the contents of the cross-examination of Pw1, the Alkalo, it appears learned counsel for the Defendant achieved the necessary results stated above during the cross-examination. This fact was not lost on the Learned Trial Judge when he stated in his judgment, as follows:-

> "I now come to the issue of title of the Alkalo. The learned counsel made the point that the said Alkalo had no authority to grant land since 1980. This assertion was admitted by the Alkalo and it was confirmed by Pw2. The issue of title to my mind is belatedly raised both in the evidence and in the address of the learned counsel to the defendant because it was not pleaded." emphasis mine.

These were the findings which the Court of Appeal rightly in my view set aside and held that the issue of the title of the Alkalo had indeed become an issue. I cannot but agree with the Court of Appeal because it is the entire pleadings in a case that has to be considered and juxtaposed against the corresponding pleadings on the other side. Furthermore, I have stated the principle that it is only material facts that are pleaded, not evidence. This rule of practice has been so firmly rooted in our laws that it will be like sending coal to New castle to repeat it here. Lord Denman C.J. in *William v Wilcox* (1838) 8 A & E 314 at 331, 112 E.R 857 at 867 said:

> "It is an elementary rule in pleading that when a state of fact is relied upon, it is enough to allege it simply without setting out the subordinate facts which are the means of proving it or the evidence sustaining the allegation".

Brett L.J further clarified this position in the case of *Philipps v Philipps* {1877} 4 QBD 127 where he stated the rule as follows:-

> "Where the facts in a pedigree are facts to be relied upon as facts to establish the right or title, they must be set out, but where the pedigree is the means of providing the facts relied on as facts by which the right or title is to be established, then the pedigree is evidence that need not be set out."

In formulating pleadings, facts should be stated and the use of terse, short, curt and blunt sentences should be used. In the instant appeal, the Defendant not only denied the authority of the Alkalo to make grants of the Suitland to the plaintiffs, but went forward to give the historical basis of his own root of title. Furthermore, the Defendant was able through cross-examination of the Alkalo, to punch holes in his testimony and to establish the fact that he had no authority whatsoever to grant the suit land because the land did not belong to him. This witness stated that "sometimes in 1980, the Ministry instructed us not to allocate land. It could be an Alkalo can allocate his own land. The District Authority I concede owns the land I allocated. I have been an Alkalo since 1985 (emphasis mine).'' It must be noted that, the Learned Trial Judge recognized this fact and made allusions to it in his judgment. The Learned Trial Judge stated that Pw1 the Alkalo conceded the fact that he had no authority to grant the suit land since 1980 and this was confirmed by Pw2. I have had to go to this extent to establish the fact that, from the pleadings, the evidence and the law, the issue of the authority of the Alkalo to grant or not to grant the Suit Land was legitimately considered by the Court of Appeal and that there is no error whatsoever in their decision on that aspect of the case.

This ground of appeal fails and is accordingly dismissed.

ISSUE 2

Was the Court of Appeal right in making the declaratory Judgment it made in favour of the Respondent?

The resolution of this issue admits of some complexities in view of some recent Supreme Court decisions from Ghana that have been brought to my attention. In this Appeal, it must be conceded that the Defendant did

not counter claim in his amended defence during the trial of the case. Therefore, having dismissed the Plaintiffs case, was the Court of Appeal right in giving Judgment to the Defendant thereby granting him reliefs he never asked for? Learned Counsel for the Plaintiffs forcefully submitted that the dismissal of the Plaintiff's claim is no reason why a Court should grant a defendant a relief he has not claimed. Learned counsel for Plaintiff concluded his submissions thus quoting the following paragraph from the Nigerian case of *Gyang Dung v Chung Chollom* (1992) 1 NWLR (Pt 220) 738:-

> "In an action for declaration of title to land dismissal of the Plaintiff's claim does not, in the absence of counter claim amount to Judgment for the Defendant".

On his part, learned counsel for the Defendant contended that the Gambia Court of Appeal was right and properly acted within its discretion to make the declarations it made in favour of the Defendant. Learned Counsel made references to Rule 42 of the Gambia Court of Appeal Rules and contended that in the absence of clear rules of procedure, Order 15, rule 16 of the English Rules of Supreme Court applies and therefore gives the Gambia Court of Appeal power to make "binding declarations of right, whether any consequential relief is or could be claimed or not." Learned Counsel also contended that The Gambia Court of Appeal has wide discretionary powers to have made the declaratory Judgments in favour of the Defendant. Learned Counsel finally referred this Court to Halsbury's Laws of England, 4th Edition paragraph 185 and also the Privy Council case of *Ikebife I Beneweka v Egbuna* (1964) 1 WLR 219.

Ordinarily, there is a lot of wisdom in the statement that there must be an end to litigation and termination of further legal actions. This is a public interest policy and the Supreme Court as the final Court in The Gambia must be interested in ensuring that its Judgments have the finality that such a Court is bound to have. What is the effect of the declaratory Judgment made in favour of the Defendant by The Gambia Court of Appeal? It would appear that as regards the Plaintiffs and third parties as well, the Defendant is well protected. However, it has always been a cardinal principle of the Laws, and procedure in common Law

Jurisprudence such as The Gambia that a Court of Law cannot or does not grant a relief or claim that has not been endorsed in a writ of summons or in a counter claim. A similar situation arose in the Ghana Supreme Court case of *Gihoc Refrigeration & House Hold Products Ltd. v Hanna Assi (No.1)* [2005 – 2006] SCGLR 458.

In that case, the Defendant was the owner of a plot of Land and carried on business as principal shareholder of a company he incorporated in 1974. In 1979, the proprietary rights of the company and its shareholding were confiscated by the Armed Forces Revolutionary Council (AFRC) under a Decree enacted by the military Junta. The Decree did not purport to also confiscate the landed property. A government institution GIHOC took charge of the Defendants Company and continued to run the business of the defendant until it was restored back to the defendant after the return of constitutional rule in 1979. However, in 1982 the Company was re-confiscated under another Decree enacted by the Provisional National Defence Council (PNDC) the new military Junta that had taken over the reigns of power in Ghana. The property of the defendant was again handed over to GIHOC to manage.

In 1997, the defendant sued the Plaintiff for recovery of possession of the property and in defence to that action the Plaintiff pleaded that it had been in adverse possession for more that twelve years and therefore had extinguished the title of the defendant in the property and had thus become the owner. The defendant subsequently discontinued the action. After the discontinuance of the 1997 action, the Plaintiff itself brought another action in the High Court against the defendant claiming

(a) A declaration of title to the property,

(b) A declaration that the right to title which the defendant hitherto had in the property had become extinguished because it had been in adverse possession of property for more than twelve years.

The trial High Court dismissed the action, holding that on the evidence, the plaintiff had been in occupation of the property with the permission of the government and that the plaintiff was a licensee of the government and therefore not in adverse possession. The Trial Court however declared title to the property in favour of the defendant because he had acquired a land title certificate to the property and that this interest therein was indefeasible. The plaintiff appealed to the Court of Appeal.

The Court by its judgment affirmed the Trial Judge's dismissal of the action. The Court of Appeal however set aside the order of the Trial Court granting title of the property to the defendant on the ground that the defendant had not at the trial counterclaimed for that relief.

The plaintiff appealed to the Supreme Court from the decision of the Court of Appeal. The defendant also cross-appealed against the Court of Appeal's decision setting aside the order for declaration of title made in his favour by the trial High Court because he, the defendant had not counter-claimed for that relief. The Supreme Court, by a unanimous decision dismissed the plaintiffs appeal and by a three-two majority decision dismissed the defendants cross appeal. In this judgment I will refer to the majority decision as well as the minority, since it appears that there are very useful lessons to be learnt from both opinions. This is especially so if one considers the public interest policy measures behind the minority decision which, as it were, turned into the majority decision of the Court upon review of the said case as reported in (2007) SCGLR 16 as Hanna Assi (No. 2) v GIHOC. His Lordship Date-Bah JSC held in part as follows:-

> "The Court of Appeal had rightly reversed the decision of the trial High Court granting a declaration of title and ordering recovery of possession of the disputed land in favour of the defendant who had not counterclaimed for those reliefs. Upholding those reliefs would be tantamount to giving remedies to a person who had not sued. The Courts were not in the business of conferring unsolicited remedies on those who had not invoked the Court's jurisdiction. The fact "that the plaintiffs action had failed and it had been denied a declaration of title could not be a basis for positively declaring title for the defendant when he had not thought it fit to counterclaim for such relief. In the context of the instant case, it was only on a counter-claim, which was in effect, a cross-action that the positive reliefs of a declaration of title and an order of recovery of possession could validly be granted."

A contrary view was expressed by Sophia Akuffo JSC who stated as follows that:-

> "Throughout the trial of this matter, the defendant's original ownership of the property was never in any serious question, and therefore once the Trial Judge found that the plaintiff had never acquired any adverse title to the same, it necessarily followed that the defendant remained the owner thereof, since his title had never been affected by the Government's confiscatory action and the plaintiffs occupation of the land. Hence the Trial Judge's declaration of the Defendant's title was in the nature of a consequential relief, a verbalization of a status that was necessarily implied by his findings". In these circumstances, we would be stretching procedural technicality to the point of absurdity to conclude that, just because Counsel for the Defendant failed or neglected to include in the statement of Defence a counterclaim for a declaration of title and an order for recovery of possession, the Learned Trial Judge did not have jurisdiction to grant, as he did, those reliefs to the Defendant … Since the matters in controversy were properly before the Trial Judge and the suit placed the title of both parties before him, the judge had the power to make the orders which naturally and logically flowed from his findings and since there was no rule of law or of statute to the contrary, the Judge held that such a decision was possible.

In another dissenting opinion on the same matter Prof Ocran JSC expressed his view thus:-

> "The position taken on the cross-appeal by the majority not only reduces our substantive holdings into a pyrrhic victory for the defendant, but it may also mean that the latter might have to return to Court in a fresh suit to seek a formal declaration of title for self protection in the future as against third parties. Such a position does not bode well for judicial economy and the need to defuse unnecessary Court litigation. It is the sort of judicial stiffness that we, as the final court of the land charged with administration of justice should be hesitant to embrace."

I have had to go to such great lengths to show the diversity of legal opinion in the Supreme Court in Ghana and the reasoning behind such opinions. As was stated earlier on, the parties in the *Hanna Assi (No. 1) v Gihoc* case applied for review before the Supreme Court of Ghana, in

Civil Motion No. J7/2/2006. In a judgment delivered on the 4th April 2007, the Supreme Court by a majority decision of six-to-one upheld the Defendants contentions that the grant of the "counterclaim" which was not asked for was proper.

In other words, the Supreme Court reversed its earlier decision and the minority opinion therefore became majority opinion. In delivering his opinion in the Hanna Assi (No. 2) case, Prof. Ocran JSC stated in part as follows:-

> "There has been a major disagreement between some of us on this case at various stages of our deliberations. It is clear that this disagreement reflects differences in our respective judicial philosophies, quite apart from differences in our interpretation of the rules of procedure."

I am tempted to say that there will be such a disagreement in the thinking of this court as well which might also be a reflection of our judicial philosophies. Speaking for myself, I would expect and applaud a system of interpretation that will avoid arid technicality that will amount to subverting the ends of justice. As I stated earlier, it is a fact that the Defendant did not counterclaim. However, at the trial by the nature of the Defence put up by him it was clear both the titles of the plaintiffs and the Defendants were in issue before the Trial Court. Relevant pieces of evidence had been led by the Defendant which appear cogent and credible to me to form the basis of the Court of Appeal decision. So therefore, if consideration is given to the material facts pleaded by the Defendant in his pleadings and the evidence led in support of his root of title, it would appear that there is sufficient material upon which the court could validly grant him the relief that he had not expressly claimed.

Secondly, as the final Court of The Gambia, this Court should champion the crusade to free the Courts of unbridled technicalities that sometimes reduces the administration of justice to absurdities and incongruous results. Besides, Article 126(2) of the Constitution of the Republic of The Gambia states as follows:-

> "The Supreme Court may depart from a previous decision when it appears to it right to do so, and all other Courts shall be bound to follow the decisions of the Supreme Court on a matter of law".

In this regard, may I enquire whether the time is ripe for the Supreme Court to deliver decisions which will give meaning and rationale to the judgments of the Court? I have been mindful of the following quotation from Halsbury's Laws of England already referred to supra.

> "There is a general power to make a declaration whether there be a cause of action or not, and at the instance of any party who is interested in the subject matter of the declaration, and although a claim to consequential relief has not been made, or has been abandoned or refused, but it is essential that some relief should be sought, or that a right to some substantive relief should be established".

I have been prevailed upon to accept the position that the time is definitely not ripe to import fresh and untested principles of Law such as granting a counterclaim to a defendant where none was pleaded. I have been made to understand even though not static, there must be cautious optimism when old and established principles of law are sought to be changed. In view of the real danger and possibility that the approval of The Gambia Supreme Court to the views and decision of the Ghana Supreme Court in the *Hanna Assi No. 2* case already referred to supra, might be a recipe for disaster, I will urge that The Gambia Courts tread cautiously in their bid to assimilate untested and unknown principles of law. In this regard, I am unable to accede to the decision of the Court of Appeal in the grant of the unsolicited reliefs to the Defendant.

There is another compelling reason why the decision of the Court of Appeal must fail. That reason is the fact that, just as the Plaintiffs failed in my view to give details of the exact identity and measurements of their land, so did the defendant also fail to do. Since Judgments declaring a party as owner of a portion of land must be in respect of certain, defined and identifiable land, I hold that it will lead to absurdities if the Court of Appeal decision granting declaration of title and recovery of possession to the defendant is made to stand. In view of the above, this ground of appeal succeeds.

ISSUE 3

Was the Court of Appeal right in setting aside the award of damages for trespass?

Learned Counsel for the plaintiff submitted on this issue that, since trespass is actionable at the suit of a person in possession of land, and that such a person can sue for trespass even if he is neither the owner nor privy of the owner, it was wrong for the Court of Appeal to have based their award of damages on the lack of evidence of the value of the cost of the houses and structures destroyed or demolished during the trial. Learned Counsel therefore referred the Court to the case of *Madubounwa v Nnalue* [1992] 8 NWLR (Pt 260) at 440. Learned Counsel for the plaintiff therefore submitted that the Court of Appeal was wrong in reversing the award of damages.

On his part, Learned Counsel for the Defendant summarily dismissed the claims of the plaintiffs on this issue of damages. This is because, according to learned counsel, once the plaintiffs have been held not to have had title superior to that of the Defendant, the issue of damages does not arise at all. Learned Counsel for the Defendant also relied on this very *Madubuonwu v Nnalue* case which has already been referred to.

I have perused the said case and have come to the conclusion that the decision of the Court of Appeal is right taking into consideration the ratio of the *Madubuonwu v Nnalue* case and the decision arrived at by the Court of Appeal. This is so because there is a caveat that has been given in the said case which if considered would have been consistent with the decision that the Court of Appeal gave. Out of abundance of caution let me quote the relevant portion of the decision of the Nigeria Court of Appeal, Enugu Division in the said case which states as follow:-

> "It is trite law that trespass to land is actionable at the suit of a person in possession of land, and such a person can sue for trespass even if he is neither the owner nor a privy of the owner. This is because exclusive possession gives the person in such possession the right to retain it and have undisturbed enjoyment of it against all except a person who establishes a better title".

In the instant appeal, the Defendant has been adjudged by the Court of Appeal to have had a better title than the plaintiffs. That is why I stated that the decision the Court of Appeal delivered on the issue of damages is consistent with their conclusions and decisions in the entire case. My own views and opinions on this matter is that since the plaintiffs must fail in this appeal because of insufficiency of title on their part, it is needless to discuss any further this issue of damages. The Court of Appeal in my view rightly reversed the awards of the nominal damages in favour of the plaintiffs and same is therefore confirmed. This now brings me to the last issue in this judgment and this is issue four.

ISSUE 4

Did the court of appeal properly evaluate the evidence?

On this issue, Learned Counsel for the Plaintiffs submitted rightly in my view that when questions of fact have been tried by a judge without jury, and there is no question of misdirection of himself by the judge, an appellate Court which is disposed to come to a different conclusion on the evidence on record should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion. As a matter of fact, there is a long line of distinguished legal authorities to support the above proposition. Cases which readily come to mind are:-

1. *Thomas v Thomas* [1947] AER 582
2. *Clarke v Edinburgh Tramways Co.* [1919] SCHL 35 at 36
3. *Powell v Streatham Manor Nursing Home* [1935] AC 243 at 250 HL
4. *Greengold Limited v Kombo Poultry Farm* (2002-2008) 1 GLR 308

In the Greengold case all the cases listed supra were reviewed in the lead Judgment by Mambilima JSC were the Court held that an Appellate Court can only differ from the findings of fact of a case tried and arrived at by a Trial Court when it is satisfied that any advantage enjoyed by the Trial Court in seeing, hearing and observing the demeanour of witnesses

cannot be explained by the conclusions reached by the Trial Court. The Court concluded that "an Appellate Court should be slow in dismissing those conclusions or coming to different conclusions based on the facts and not the law". Learned Counsel for the Defendant, whilst agreeing with the statement of the law by learned Counsel for the plaintiff on the above principle of law, referred this court to the decision cited by the Gambia Court of Appeal on page 140 of the record in its Judgment. Bashaya & Ors v The State (1998) 4 SCNJ 202 at page 222 where Wali JSC of the Supreme Court of Nigeria stated the same principle thus:

> "The duty of the Appellate Court is to ascertain whether or not there is evidence upon which the Trial Court acted, and once there is such evidence, the Appellate Court must not interfere with the Trial Courts decision. However, an Appellate Court may interfere with the findings of fact of a Trial Court where the latter failed properly to evaluate the evidence or make a proper use of the opportunity of seeing or hearing the witnesses at the trial or where it has drawn wrong conclusions from the accepted evidence or where its findings are shown to be perverse."

Based on this and other authorities, learned counsel for the Defendant submitted before this Court that the Court of Appeal was right in stating that the learned judge rejected properly admitted evidence and found to the contrary. What was the nature of the evidence that was led before the trial High Court? The 3rd Plaintiff, Omar Jallow testified in brief as follows:-

> "I have a landed property at Eboe Town. I brought the defendant to court because he trespassed into my compound and broke the fence. He told me that the particular land belonged to his grandfather. The land was allocated to me by Alkalo Landing Jarju. It was allocated to me in 1991".

The 4th Plaintiff Bully Trawally also testified on page 22, lines 16 – 25 as follows:-

> "….I went to get a proper plan through the Alkalo. Alkalo led me to a place. I fenced it. I constructed a house with five single rooms

> ...The property is at Eboe Town ... The land was granted to me by Alkalo in 1989."

Under cross-examination by learned counsel for the Defendant, the 4th plaintiff stated thus:-

> "There were no boundaries at the time of allocations of the land to me. It is not to my knowledge that my plot and that of Fatou Badjie belong to the Defendant".

The 5th Plaintiff, Pa Momodou Saine testified on page 25, lines 7-30 of the appeal record as follows:-

> "I have a plot of land at Eboe Town. I started to develop the property (sic) when the defendant came and said that the place belongs to his grandfather. Thereafter the defendant made a fence which prevented me having access to the said plot. I then took a legal action. I acquired this plot of land in 1984. It was given to me by Alkalo".

For his part, the 1st plaintiff, Fatou Badjie testified on page 27 lines 17 to 30 of the appeal record as follows:-

> "I know the defendant, Joseph Bassen. I know him when he took my compound at Eboe Town, year before last. I acquired it after the abortive coup in 1981. It was given to me by Alkalo after I had asked him. The Alkalo was Landing Bojang. He was Alkalo of Eboe Town. I built a house on it after I was given. The house fell down. It was during the rainy season when it fell down."

The 1st plaintiff in further evidence stated as follows:-

> "I knew the defendant took my land because I found him on the land. I found him on a Sunday in the year before last. When I found him on the land I asked him why and he said that the land belonged to his grandfather".

The 2nd plaintiff Demba Ba also testified in like manner on page 30 lines 5 – 30 of the appeal record. However of particular significance is the following piece of evidence.

> "When I found the defendant on the land I indicated to him that the same plot of land belonged to me. It was then that the defendant told me that the said plot of land belonged to his grandfather then I informed him that the said property of land was allocated to me by Alkalo. I obtained a document from Alkalo".

From the evidence of the plaintiffs referred to supra, it is clear that the following facts stand unchallenged.

1. All the plaintiffs had their grants of land from the Alkalo.
2. None of the plaintiffs was able to give the exact measurement or acreage of the land that he or she was given by the Alkalo.
3. All the Plaintiffs consistently testified that the Defendant told them the land belonged to his grandfather and warned them by asserting title to the said land.

I have already held in this judgment that, from the evidence on record, the Alkalo had no authority to grant or allocate the Suit land to the plaintiffs. The evidence of Pw1, (Landing Jarju, who is the Alkalo) is full of inconsistencies and conflicting pieces of evidence that it will be manifestly unreliable to act upon such evidence. Examples of these conflicts are

1. On page 18, lines 7-10, Pw1 testified that the plaintiffs asked to be allocated land in Eboe Town which he did.
2. On the same page, lines 11-19, the Pw1 testified that the Defendant later came and identified a plot of land and he then allocated that plot of land to him.
3. Pw1 testified again that before the grant of this land to the Defendant, other persons were on the land.
4. Pw1 stated that part of the land given to the Defendant had also been given to the plaintiffs in the same location.
5. In all cases, Pw1 never gave details of the actual size of the plot of land he was granting or allocating to people.

6. Pw1 also said on page 18, line 20-22 that even though he issued a document to the Defendant upon the grant of land to him, he has since regretted that incident. One would ask why the Alkalo should regret having issued a document to authenticate the grant of land to the defendant if what he did was genuine and or legitimate.
7. From the evidence of Pw1 it is clear that the defendant and his other siblings were all granted land by the Alkalo.
8. Pw1 confirmed that, when the defendant complained to him about the trespass of the plaintiffs on the land and summoned him before the Director of Survey, he confirmed to the Director that he had allocated land to the defendant, but that the defendant had taken another plot not allocated to him. See page 19, lines 15 – 20.
9. Pw1 said the defendant refused to attend another meeting aimed at resolving the crisis and that he had never allocated land to the family of the defendant. This would be contrary to the contents of Exhibit 2, which the Pw1 had issued to the Defendant.
10. Pw1 stated categorically that in 1980, the ministry instructed them i.e. Alkalo not to allocate land.
11. Pw1 also confirmed that he did not own the land he allocated, since the land was owned by the District Authority. Page 20, lines 15-18. This would seem to be in breach of the principle "Nemo dat quod non habet."
12. On page 20, lines 27-29, Pw1 stated that the family of the defendant were temporary occupants of the land since "they come and go".
13. On page 20, line 31 and page 21, lines 1-6 shows Pw1 as a confused and incoherent person. This is what he said.

    "…I allocated land to the defendant and he did develop it. (Sic) I did not particularly allocate where he occupied".

    "What I said was that when I allocated the land to the defendant he did not fence it, later he fenced it together with the place I allocated to the plaintiffs. The defendant has added part of the land not allocated to him".

Continuing further, Pw1 testified thus:

> "It was after allocation to the defendant then the plaintiffs were allocated. The defendant was first allocated land before the plaintiffs."

From the above pieces of evidence led by Pw1, it is clear that either he was confused when he testified or deliberately decided to testify on falsehoods. This is because, if Pw1 stated in one breadth that before the Defendant was allocated land there were other persons on the land, and stated in another breadth that the defendant was allocated land before the plaintiffs, then such a witness lacks credibility and cannot be believed. Secondly, Pw1 stated that he did not allocate land to the Defendant's family, but Exhibit 2 shows that the defendant and his siblings were allocated land, and regretted issuing such a document. Thirdly, Pw1 stated that the family of the Defendant were temporary occupants - "they come and go". In what respect were they temporary occupants? It is a pity that the Learned Trial Judge did not record the questions that led to the answers on record. The method used by the Learned Trial Judge in recording the answers only during cross-examination is not the best. The desirable method should have been the record of the question and then the answer. That way, there will be no ambiguity in the recording and answers given. However, from the statement that the family of the defendant were temporary occupants, meaning they come and go, is indicative of the fact that the defendant's family had shown a strong presence on the land for the Alkalo to have taken note of their periodic presence on the land. His evidence that the defendant's family do not own any property on the land and have not been resident on the disputed suit land is therefore inconsistent with other portions of his evidence. Fourthly, Pw1 said the defendant did not develop the land he allocated to him, but later, he said the defendant fenced his land including the land allocated to the plaintiffs. Which of the plaintiffs, is it all the plaintiffs, or only some of them? This is not clear. Fifthly, if the defendant was allocated land before the plaintiffs, then it meant that he was in possession of the land before the plaintiffs.

There is also no evidence as to what size of land was allocated to the various persons Pw1 claimed to have allocated land to. It must be noted that, in all land transactions, the identity and size of the land must always be clear and well demarcated. In the instant case, it appears from the

evidence of Pw1 that what transpired between the parties was a boundary dispute which has arisen because of the haphazard manner in which Pw1 handled the allocation. In my opinion, since Pw1 has stated that the defendant was on the land before the plaintiffs came, it meant that it was the plaintiffs who went to meet the defendant already in possession. Assuming without admitting, that the Alkalo had authority to make the grant of the suitland having already divested himself of title there was nothing left for him to convey to the plaintiffs. Herein comes into operation, the "nemo dat quod non habet principle".

I have had to go to this extent, to show that the Court of Appeal did not jettison the findings of the Trial Court for nothing. There is sufficient evidence on record from the plaintiffs own perspective to have evaluated the entire evidence against them. Now if one considers the evidence of the defendant and his witnesses from pages 36 – 46 of the appeal record a strong indication is given that the Defendants' case is more probable than that of the plaintiffs. In any case, since the Defendant did not counterclaim, the onus of proof was on the plaintiffs to prove their case on a balance of probabilities. And with all the inconsistencies and conflicts I have referred to supra, no one can say that the plaintiffs have discharged this burden. As a matter of fact, if one considers the evidence of the defendant already referred to supra, it is certain he gave solid evidence which established a long line of overt acts of ownership performed by him and his predecessors in title.

In addition, the Defendant also gave historical evidence as to how he and his predecessors in title came to own the land in dispute. Finally, the defendant in my estimation was able to give sufficient explanation why he had to approach Pw1 the Alkalo for Exhibit 2 to evidence the fact that he had now succeeded his father on the land. It must be understood that, that approach was definitely not for the said Alkalo to allocate land to the Defendant. This is because, as at that time, the defendant, his family and predecessors had been on the land and performed various overt acts of ownership. Having reviewed the entire evidence led by the parties and their witnesses, and having evaluated same with the judgments delivered by the Trial Court and the Court of Appeal, I am satisfied that there is sufficient evidence on record which the Learned Trial Judge should have used to come to a different conclusion as to whether the plaintiffs story or the defendants case should be believed. This case is certainly one of

those cases where because of the abundant evidence on record, an Appellate Court such as the Supreme Court must intervene to set aside findings made by the Trial Court because those findings are not supported by evidence on record.

The plaintiffs in my estimation did not discharge the onus of proof that lay on them. I can safely summarise the position of the present law on the issue of proof thus: - If the plaintiff in a civil suit failed to discharge the onus on him and therefore was unable to establish a case for the reliefs which he sought before the Court, then he cannot take cover in the weakness of the case preferred by the defendant to seek judgment. However if the plaintiff made out a case by his evidence and the defendant remained silent, then if the case as was given by the Defendant when he testified amounted to creating weaknesses in the Defendant's case, which as it were, tended to inure to and support the Plaintiffs case, then in such a situation the plaintiff would be entitled to rely on the weakness in the defendant's case to strengthen his case.

The above principle would seem to be an improvement on the strength and weakness criteria that has been stated in a long line of cases commencing with the dictum of Webber C.J in *Kodilinye v Odu* (1935) 2 WACA 336 at 337-338 and the Ghana Supreme Court case of *Nartey v Mechanical Lloyd Assembly Plant Ltd*. [1987-88] 2 GLR 314. As a matter of fact, considering the evaluation of the entire case and the fact that the plaintiff's relied on the inconsistent and conflict riddled testimony of Pw1 to justify their case, I cannot but endorse the findings and observations of the Court of Appeal that the findings of the Learned Trial Judge in the Trial Court were perverse and that he did not properly evaluate the evidence.

I will therefore affirm the Court of Appeal decision on this point.

EVIDENCE OF TRADITIONAL HISTORY

Learned Counsel for the Plaintiffs submitted that the pleadings of the Defendant and the evidence adduced in support thereof are at variance with each other. Learned Counsel submitted further that whilst the pleading and the evidence of the defendant is to the effect that Sinana is a rice field, Dw1 & Dw2 assert that Sinana is a village. Learned Counsel submitted that there is a vast difference between a village and a rice field. Learned counsel therefore submitted that the Court of Appeal

wrongly held that the defendant had proved title by traditional history. On the other hand, learned counsel for the defendant submitted that there was complete harmony between the defendants pleading and the evidence supporting it. Learned counsel submitted that the distinction between Sinana the former village and Sinana rice fields raises no contradiction. Learned counsel for the defendant referred the court to The Gambia case of *Alieu Badara Cham v Alhaji Momodou Barrow & Anor* (1994) GR 121 which threw light on customary tenure and evidence of traditional history as applied in the Gambia. In the instant case, Pw1 the Alkalo himself was at pains to admit that the predecessors of the Defendants were temporary occupiers of the land. He conceded that they "go and come". Secondly there was sufficient evidence from the two witnesses Dw1 & Dw2 that the Defendant predecessors had been on the suit land cultivating rice. Thirdly, I am satisfied from Exhibits D, D1-D7 and D7A that the Defendant and his predecessors have had a long period of occupation and dealing with the suit land since time immemorial, farming rice and residing on the land.

Besides, evidence on record suggests that when each of the plaintiffs encountered the defendant, the plaintiffs have conceded in their evidence that the Defendant made references to the ownership of the Suit land by his grandfather and father. This is consistent with the defendant's case. The guidelines stated by the Court in the *Alieu Badara Cham v Momodou Barrow* (supra) states as follows:-

> "Evidence before the court, including that submitted by the defence indicated that the Cham family had held the suit land from time immemorial. The plaintiff was claiming title to land by right of inheritance which he had proved, whereas the defendant was claiming on the basis of a lease without having proved the root of his title to the land. The evidence indicated that the plaintiff had a traditional usufructuary right and a lease could not over ride such a right, or could only take effect subject to it."

Similar situations arose in the Ghana Supreme Court case of *Achoro & Anor v Akanfela & Anor* [1996-97] SCGLR 209 at 213. Where the Supreme Court stated the test to be applied in evaluating traditional evidence as follows:-

> "Now part of the evidence led by both parties is traditional and the best way of evaluating traditional evidence is to test the authenticity of the rival versions against the background of positive and recent acts".

Again, the Supreme Court in Ghana in the case of *Adwubeng v Domfeh* [1996-97] SCGLR at 660 stated the same principle with more emphasis as follows:-

> "Where it was difficult, on the basis of traditional evidence, for the Trial Court to make a finding as to which of the ancestors of the parties was the first to settle on the disputed land, the recommended approach was to have recourse to facts in recent years as established by the evidence".

Lord Denning years ago in the celebrated case of *Adjeibi Kojo v Bonsie* (1957) 3 WALR 257 at 260 P.C., observed that, "once traditional history is handed over by word of mouth, it must be "recognized that, in the course of transmission from generation to generation mistakes may occur without any dishonest motives. Whatever witnesses of the utmost veracity may speak honestly but erroneously as to what took place a hundred or more years ago".

In the instant case, it is only the Defendant who seeks to establish his root of title by traditional evidence. Even then, he has managed to refer to recent acts of possession and occupation by himself and his predecessors. Taking a cue from the observations of Lord Denning in the *Adjei Bi Kojo v Bonsie* case, the existence of gaps here and there have not detracted from the authenticity of the recent and positive acts referred to by the defendant in his evidence, supported in large measure by the evidence of Pw1, Dw1 and Dw2. Finally, it should be noted that, variations in the pleadings and the evidence that did not substantially destroy a party's case was not material and could in appropriate circumstances be safely ignored. In the instant case, it could be ignored with no substantial damage or injury to the defendant's case on the inaccuracies in the traditional evidence led by the defendant. As a matter of fact, I am yet to encounter a case where the evidence led in support of pleadings by a party is 100% in agreement with each other. Once the variation is not material and in any case does not change the nature of the party's case, no harm results. And since the defendant's case of

historical evidence is consistent with his pleadings I am prepared to affirm the Court of Appeal decision on the issue as having adopted the test that is presently accepted in evaluating such pieces of evidence. To conclude this judgment, it must be stated in no uncertain terms that Exhibit D3 relates to criminal summons i.e. charge sheet directed to the father of the defendant in or about January 1969 in respect of Lodgers Tax and Stranger Farmers Tax- Ref. page 104 of appeal record. It is therefore clear that the defendant's father was farming and lodging on the suit land long before 1990 when Exhibit 2 was issued by the Alkalo.
On the totality of the evidence before the Court, I affirm the entire judgment of the Court of Appeal and would dismiss the appeal herein.

CLOSING REMARKS

The appeal by the plaintiffs against the decision of the Court of Appeal dated the 14th day of November 2002 is dismissed in part for the following reasons.

1. From the pleadings of the Defendant, it is apparent and clear that the Defendant put in issue the authority of the Alkalo to make a grant or allocation of the suit land to the plaintiffs. That being the situation, the Court of Appeal was right in making it an issue which called for determination.
2. The time is not yet ripe for the courts in The Gambia to adopt principles of law which run counter to the age long principles upon which civil procedure rules have been founded, to wit, the courts do not grant reliefs which have not been pleaded. As a result, the decision by the Court of Appeal that the Defendant is granted declaration of title and recovery of possession in respect of the Suit land is set aside. The appeal therefore succeeds on this ground.
3. Once the Defendant has been adjudged to have superior title to the plaintiffs, the Court of Appeal was right in setting aside the award of damages by the Trial Court.
4. On the facts, the Court of Appeal properly evaluated the evidence on issues like traditional history and applied tests that are judicially accepted.

Also the Court of Appeal applied the burden of proof and analysed same judicially. Save therefore for the setting aside of the orders granting

declaration of title and recovery of possession to the Defendant, the appeal herein stands dismissed.

Tobi JSC: The Appellants were the plaintiffs in the High Court. They are five. As the 2nd appellant died before the appeal was heard, he was, by Order of this court on 15th February, 2008, substituted by Alpha Ousman Bah. The respondent was the defendant in the High Court. The case of the appellants is that a piece of land was allocated to each of them by the Alkalo of Eboe Town. His name is Landing Jarju. They effected some developments on the plots before the respondent encroached and damaged the structures and fence on the plots. They claimed payment of rates in respect of the plots as recognized owners to the Kanifing Management Council. In order to resolve the matter, a meeting was held by the Director, the Alkalo and the respondent, but to no avail. The case of the respondent is that the suit land belonged to his father who died in 1972. His father inherited the suit land from his father, who was the grandfather of the respondent. He said that his father built a mud house on the plot before, who he called, an invader came. His father lived on the land and farmed rice on it. The farm land was registered with the Brikama Area Council.
The appellants sued, asking for two declaratory reliefs, one injunctive relief and a relief on damages for trespass. Pleadings were filed and duly exchanged. Both parties filed amended pleadings. As a matter of fact, the appellants moved a motion for leave to file Amended Statement of Claim on 25th June, 2008. As counsel for the respondent did not oppose, this court granted the motion as prayed. The matter was heard. The Learned Trial Judge gave appellants judgment. Obanyan, J (as he then was) said at pages 77 and 78 of the Record:

> "In the circumstances I find for the plaintiffs: (1) I therefore declare that the plaintiffs are the owners of the plot of land granted to each of them in Eboe Town. (2) The order of injunction is granted against the defendant, his servants, or agents however described from further demolishing or damaging any fence or structure on the land of the plaintiffs or in any way interfere with the land of the plaintiffs as highlighted in my judgment … I therefore award each plaintiff D2000 for trespass. Since there are five plaintiffs the total award is D10, 000 against the defendant."

On appeal to the Court of Appeal, that Court allowed the appeal. The President of the Court said at pages 140 and 141 of the Record that:

> "We hold that the plaintiffs had woefully failed to discharge the onus on them of proving their claim, by credible evidence and ought to have failed. The issue for determination is therefore answered in the negative. The defendant on the other hand, had properly established his case. This appeal therefore, succeeds. We set aside the judgment, findings, declarations and orders of the Trial Court. In their stead, we find for the defendant and declare that the suit land in question belongs to the defendant, Joseph Bassen."

Dissatisfied, the appellants have come to the Supreme Court. The appellants formulated four issues for determination:

"(1) Was it proper for the Court of Appeal to base its judgment on an issue not raised by the parties in their pleadings.
(2) Was the Court of Appeal right in making the orders it made in favour of the Respondent?
(3) Was the Court of Appeal right in setting aside the award of damages for trespass?
(4) Did the Court of Appeal properly evaluate the evidence?"

The respondent formulated three issues for determination as follows:

"1. Whether the Gambian Court of Appeal was right in law and on the evidence in holding that the defendant and not the plaintiffs had better title to the suit land.
2. Whether the pleadings of the parties in the High Court necessarily raised the issue of the Alkalo's authority (or lack of it) to "grant" the suit land to the plaintiffs and if not, whether it was the plaintiffs or the defendant who ought to have raised it in their pleadings.
3. Whether the Gambian Court of Appeal was right in declaring that the suit land belongs to the defendant."

Learned counsel for the appellants, Mr. A.N.M. Ousainou Darboe, submitted on Issue No.1 that the Court of Appeal was wrong in basing its judgment on an issue not raised by the parties in their pleadings. He

argued that the respondent did not raise the issue of lack of authority of the Alkalo to allocate land to the appellants. Contending that evidence not supported by the pleadings go to no issue, counsel cited Morobunfola v Kwara State College of Technology (1990) 4 NWLR (Pt 145) 508 and Bamgboye v Olarewaju (1991) 4 NWLR (Pt 184) 132. While contending that the Learned Trial Judge was right in declining the invitation of the respondent to investigate whether or not the Alkalo had authority to allocate land, counsel argued that the Court of Appeal was in complete error in treating such an issue as evidence and not material facts which ought to be raised on the pleadings.

On Issue No. 2, learned counsel submitted that the Court of Appeal was not right in making the declaratory judgment in favour of the respondent, as the respondent, apart from denying the appellants ownership of the suit land, did not positively assert his ownership of the land. He referred to the Amended Statement of Defence and argued that as it did not contain a counterclaim, the declaratory judgment in favour of the respondent was wrong in law. Where a plaintiff fails to prove his case, the proper order for the Court to make is one of dismissal, and the dismissal of the plaintiff's claim is no reason why a court should grant a defendant a relief he has not claimed. He cited Chukwu v Nneji (1990) 6 NWLR (Pt 156) 363 and Dung v Chollom (1992) 1 NWLR (Pt 220) 738.

On Issue No. 3, learned counsel submitted that the Court of Appeal was wrong in setting aside the award of damages for trespass by the trial Judge. He contended that the approach of the Court of Appeal to the issue of damages for trespass was influenced inferentially by the thinking that evidence of the value and cost of the houses and structure destroyed or demolished must be placed before the Court. Counsel submitted that trespass is actionable at the suit of a person in possession of land; and such a person can sue for trespass even if he is neither the owner nor a privy of the owner. This is because exclusive possession gives the person in such possession the right to retain it and have undisturbed enjoyment of it against all persons except a person who establishes a better title. He cited Madubouwu v Nnalue (1992) 8 NWLR (Pt 260) 440.

On Issue No. 4, learned counsel submitted that the Court of Appeal did not properly evaluate the evidence. He submitted that:

"(a) Where a question of fact has been tried by a Judge, without jury, and there is no question of misdirection of himself by the Judge, an Appellate Court which is disposed to come to a different conclusion on the evidence on record, should not do so unless it is satisfied that any advantage enjoyed by the Trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion.

(b) The appellate court may take the view that without having seen or heard the witnesses, it is not in a position to come to the satisfactory conclusion on the printed evidence.

(c) The Appellate Court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken advantage of his having seen and heard the witnesses, and the matter will then become at large for the Appellate Court."

He cited Gambia Commercial Development Bank Ltd (No.1) v Jeng (No.1) (1997-2001) GR 291. Learned counsel dealt in some detail at pages 6 to 11 of his Statement of Claim on what he regarded as the improper evaluation of the evidence by the Court of Appeal. He urged the Court to allow the appeal.

Learned counsel for the respondent, Mr. S.B. Semega-Janneh, submitted on Issue No.1 that an Appellate Court must not lightly interfere with a finding of fact made by the Trial Court, since the Judge below had the advantage of seeing and hearing the witnesses. To learned counsel, the Court of Appeal did advert their minds to the principle and acted on it with due deliberation. He cited Bashaya v The State (1998) 4 SCNJ 202 at 222 and Kado v Obiana (1997) SCNJ 33 at 47 and submitted that the Court of Appeal was justified in leveling the strictures against the trial Judge. He examined the evidence of PW1 and PW2, and in particular, the evidence of the Alkalo (PW1) to the effect that the suit land belonged to the District Authority. Counsel submitted that the evidence was necessarily admitting that the land did not belong to him to enable him legally allocate to the plaintiffs/appellants; and this coupled with the admitted fact that the Ministry had prohibited allocations of land by Alkalos in KSMD since 1960, show that the Alkalo was devoid of authority or title to grant or allocate the suit land. Counsel contended that the Learned Trial Judge improperly discarded the ample evidence of

traditional ownership spanning over 100 years from grandfather Ajimia to father Emmanuel aka Jaja to eldest son, the respondent.

On prior and better title, learned counsel submitted that the Court of Appeal was right in holding that the purported allocations by the Alkalo to the appellants were all later in time than the purported allocation to the respondent. Counsel adopted his submission at page 147, lines 2-32 of the Record. He submitted that the appellants' assertion that "the appellants and the respondent have plots of land in the same area or location" is totally unsupported by the evidence in examination in-chief. Therefore, logically the land was given first to the respondent and in any case (without more) land cannot in law be allocated to one person and then re-allocated to another. He cited Jobe v Kebbeh, Civ App. 29/90 in the GCA Bound Judgments for May/June 1991.

On traditional title, learned counsel submitted that the Court of Appeal analysed the law as well as the evidence pertaining to traditional ownership of the suit land and concluded rightly that the respondent "proved his root of title and showed how his grandfather cleared the land and that his father inherited it on the death of his grandfather." He cited Cham v Barrow (1994) GR 121. He argued that there was no contradiction between the respondent's evidence and the evidence of his witness, much less as to the names of the respondent's ancestors.

On District Authority, learned counsel explained that under section 50 of the Lands (Banjul and Kombo St. Mary) Act 1946 Cap. 102 of the 1967 Edition Laws of The Gambia, all land in the Kombo St. Mary Division was declared to be held of the State on a year to year basis. The Act was repealed and replaced by the State Lands Act 1991, section 4 of which provides that all lands in Kombo St. Mary shall absolutely vest in the State. Therefore, it is evident that the radical owner of land in Kombo St. Mary is the State. In the provinces, on the other hand, the radical owner of the land in every district was and is (unless otherwise designated under the State Lands Act) the District Authority, which institution is defined in Section 2 of the Local Government Act Cap 33:10 learned counsel further explained. Since the government owns the land in Kombo St. Mary and not any District Authority (unlike in the provinces where the District Authority owns the land) the Government Ministry had every right to give directions prohibiting allocation of land in Kombo St. Mary by Alkalos as was done after 1980 according to the evidence in the suit learned counsel submitted. He argued that the appellant's

submission that the ministerial directive was ineffective is futile as ineffectiveness (without more) does not change the legal position of the Alkalo vis-à-vis the land. Winding up Issue No.1, learned counsel submitted that the Statement of Claim as answered by the Defence necessarily raised the issue of the Alkalo's authority or lack of it to grant the suit land to the appellants. He referred the Court to paragraph 1 of the Amended Statement of Defence where the respondent denied paragraph 1 of the Amended Statement of Claim and submitted that the respondent necessarily joined issue with the appellants on the question whether the Alkalo had authority to grant the suit land. Counsel dealt in some detail with the distinction between the words "allocate" and "grant" used in the Statement of defence of the appellants and the Amended Statement of Claim respectively.

Taking Issue No. 2 learned counsel referred to Order 23 Rule 2 Schedule 2 of the High Court Rules and argued that it is certainly not the respondent's duty under the rules governing pleadings to raise matters which ought to have been raised by the appellants to buttress their case. He submitted that the appellants neither produced nor proved any grant to them nor did they prove any title in the Alkalo to allocate land to them. Counsel pointed out that the appellants did not even plead that land was allocated to them by the Alkalo. Curiously, the appellants pleaded grant but attempted to prove allocation, which attempt woefully failed, because it was elicited by cross-examination that the Alkalo had no authority to allocate land at Eboe Town, counsel argued. Counsel also referred to Order 23 Rule 13 of the High Court Rules and submitted that by the rule, the respondent was at liberty to cross-examine the witness and counsel did so to confirm the allocations.

On Issue No. 3, learned counsel submitted that the Court of Appeal properly declared that the suit land in question belongs to the respondent. He relied on Rules 36 and 42 of the Gambia Court of Appeal Rules, Order 15 Rule 16 of the English Rules of the Supreme Court, Halsbury's Laws of England 4th Edition, paragraph 185, and the Privy Council decision of Ibenemeka v Egbuna (1964) 1 WLR 219. Counsel submitted that there must be an end to litigation and the termination of further legal actions is greatly assisted by a clear declaration of the Court of Appeal that the suit land belongs not to the appellants but to the respondent, contrary to what the High Court had decided. He urged the Court to dismiss the appeal.

This appeal involves the proof of ownership to land. Proof of ownership to land can be done by any of five ways: (1) by traditional evidence; (2) by production of documents of title; (3) by acts of the person claiming the suit land; (4) by acts of long possession, and (5) by proof of possession of connected or adjacent land. See the following cases - *Idundun v Okumagba* (1976) 9-10 SC 140; *Adimora v Ajiefo* (1988) 3 NWLR (Pt 80) 1*; Ajadi v Okenihun* (1985) 1 NWLR (Pt 3) 484; *Eronini v Iheuko* (1989) 2 NWLR (Pt 101) 46; *Makanjuola v Balogun* (1989) 3 NWLR (Pt 108) 192.

Evidence of traditional history should paint a genealogical picture of ancestors usually from time immemorial. The plaintiff or party claiming title should prove in some chronological sequence or detail, the ownership of the suit land from his ancestors, and in the chronology, there should be no broken period but there must be a chain of connection. If the document of title is a conveyance, it must contain in clear terms that the suit land belongs to the party claiming it. If the boundary of the suit land is in dispute, there must be a survey plan clearly demarcating or indicating the boundary. This will however not be necessary if the suit land can be proved by various acts of ownership, numerous and positive and extending over a length of time as to warrant the inference of ownership. The period of time is not dogmatic. It depends upon the facts of each case borne out from the circumstances of the case. The Court will consider the aggregate of the acts of ownership in deciding title. Certainly one isolated act of ownership may not suffice. The acts of long possession must be really long. Again the length of the time is not dogmatic. It depends on the special circumstances of the case and in the light of the facts.

In proof of possession of connected or adjacent land, the plaintiff must prove that the suit land is in some nearness, proximity, or contiguity with the other land in possession of or owned by the plaintiff or claimant. There is no mathematical measurement of distance between the suit land and other land in possession of or owned by the plaintiff or claimant. That also depends on the facts and circumstances of the case. Where a plaintiff relies on acts of possession, he must also prove the nature and origin of that possession, and that origin must go beyond the plaintiff. Who has the burden of proof in this matter? In other words, on whom lies the burden of proof? The burden of proof lies on the party asserting the affirmative. The burden of proof lies on the party who will fail if the

burden is not discharged. All the two ways zero on the appellants. They brought the matter to Court and they must prove their case to have judgment. That is the essence of Section 143 of the Evidence Act 1994 of The Gambia. In Jeng (No.1) v George Stowe Co. Ltd (No.1) (1997 – 2001) GR 444 the Court of Appeal dealt with the standard of proof in a declaration of title to land. Although the case is not a binding authority on this court, I want to examine it for its novelty of principle. The case involved declaration of title under customary law. The plaintiff claimed that as the customary owner he was entitled to the possession of a plot of land at Kololi. The Court of Appeal, dismissing the appeal, held that in a land matter for a declaration of title, a higher degree of proof is required, unlike an ordinary civil case in which proof is on the balance of probabilities. The Court held that whilst it would be a mis-statement of the law to equate the level of proof in criminal cases with that required in a land suit for a declaration of ownership, the evidence of the plaintiff in the latter case should be seen or be seen to be credible, strong, positive, sufficient and reliable to ensure victory. The court relied on the Nigerian cases *Kodilinye v Odu* (1935) 2 WACA 336; *Atanda v Ajani* (1989) 2 NSCC 511; *Sorungbe v Omotunwase* (1988) 3 NSCC 252 and *Adebanjo v Olowosoga* (1988) 2 NSCC 503 and the Ghanaian case of *Banga v Dianie* (1989–90) 1 GLR 519 at 526.

Let me examine the case law relied upon by the Court of Appeal because the pronouncement of Lartey JCA will have a very serious effect on proof of title to land in The Gambia. In *Kodilinye v Odu* (supra), Webber CJ delivering the judgment of the West African Court of Appeal said at pages 337 and 338:

> "The onus lies on the plaintiff to satisfy the court that he is entitled on the evidence brought by him to a declaration of title. The plaintiff in this case must rely on the strength of his own case and not on the weakness of the defendant's case. If this onus is not discharged, the weakness of the defendant's case will not help him and the proper judgment is for the defendant. Such a judgment decrees no title to the defendant, he not having sought the declaration."

In *Atanda v Ajani* (supra), Craig JSC said at page 532:

> "In a claim for a declaration of title, the duty of the trial judge is mainly to ascertain whether the plaintiff-claimant has discharged the onus or burden of proof on him which will entitle him to the declaration. The burden is only discharged when credible evidence of the highest probative value is adduced by the plaintiff through witnesses in strength sufficient to outweigh other evidence and establish satisfactorily and unequivocally the title of the plaintiff-claimant to the piece or parcel of land … Thus the plaintiffs must rely on the strength of their own case and not on the weakness of the defendant's case."

In *Shonigbe v Omotunwase* (supra), the Supreme Court of Nigeria held that in a case for declaration of title, the onus is clearly on the plaintiff to lead strong and positive evidence to establish his case for such a declaration, an evasive averment does not remove the burden on the plaintiff. In *Adebanjo v Olowosoga* (supra), the Supreme Court of Nigeria held that the onus of proving title is on the party claiming ownership, until the onus is proved the burden does not shift to the other party.

In the Ghanaian case of *Banga v Djanie* (supra), Francois JSC said at pages 519 and 520 of the Report:

> "The principle has for several decades been the fulcrum for determination of ownership in land matters in our Courts. In recent times a dangerous trend has been erupting of equating this burden with the normal burden in civil case of measuring success by a balance of probabilities. In my view the requirement of a higher burden of proof in land matters cannot be whittled away by glosses on the principle. The quality of proof has sometimes even been equated with proof in criminal matters. Suffice it to emphasise that a high measure of proof is necessary to sustain victory in a plaintiff seeking a declaration of title to land. It seems to me that the authorities require a plaintiff to lead positive evidence to merit victory and not merely to rely on the shortcomings of a defendant in the discharge of this obligation."

It does not appear to me that the Nigerian cases cited by Lartley JCA, support his superlative view that relief for declaration of title requires a higher degree of proof than the proof of balance of probability. With respect, none of the four cases said so. In Atanda, which is nearest to

the position held by Lartey JCA, Craig JSC said that the onus is discharged when credible evidence of the highest probative value is adduced. It is not my understanding that the superlative adjective "highest" means evidence in proof higher than the balance of probability. What Craig JSC meant in the sentence is that the evidence must be of the highest probative value. He said so clearly in the judgment. The adjective "highest" qualifies "probative value" and it does not go out of the qualified words "probative value". The new one to me is the Ghanaian decision of Banga. That appears clear to me as supporting the view of Lartey JCA in Jeng. I had no opportunity of reading the case in the Law Report. If Francois JSC, said what is credited to him, then I should say that there must be a provision in the Ghanaian Evidence Act justifying the position. If there is none and no procedural laws of Ghana justify the position taken by Francois JSC, then I will respectfully decline to accept it. I do not see any such provision in the Evidence Act of The Gambia which is in keeping with the tradition of the common law adversary system which The Gambia operates. In the adversary system, there are two basic standards of proof: one in civil proceedings and the other in criminal proceedings. In civil proceedings, such as this appeal, proof is on the balance of probability or on the preponderance of evidence. In criminal proceedings, proof is beyond reasonable doubt. I do not see any hybrid situation in the Evidence Act of The Gambia to deserve the dichotomy or cleavage made by Lartey JCA.

And what is more, property law, unlike election petition, which is *sue generic,* does not attract a higher standard of proof beyond the balance of probability. As the case is not before this Court, I will tame the temptation to declare that aspect of the law bad. This court will wait for the day the opportunity will come. I merely touched the case because of the effect it is likely to have on the procedural aspects of property law in The Gambia. Did the appellants discharge the burden the Evidence Act places on them? That is my next consideration. Before I answer that question, I should say that the claim of title to the suit land is based on a grant by the Alkalo. Paragraph 1 of the Amended Statement of Claim is the fulcrum of the case of the appellants and it reads:

> "The plaintiffs severally bring this action for themselves and the following:- Karamo Danso; Seedy Drammeh; Arit Gomez; Sheriff Chatie; Kabaro Touray, Sainie Jallow; Saine Behie, Bashiru Sonko;

> Dambou Camara; Alieu Muhtar Jallow; and Omar Jallow all of whom and the plaintiffs were each granted a plot of land at Eboe Town by the Alkalo on different dates and at different times."

What is the evidence in proof of paragraph 1 of the Amended Statement of Claim? The appellants gave evidence that they were given land by the Alkalo in Eboe Town, in vindication of their Amended Statement of Claim. The Alkalo, Landing Jarju, PW1, in his evidence in-chief, said at page 18 of the Record:

> "I know the plaintiffs because they all have plots of land in my village. They came and met me. I asked them and I allocated lands to them. I know the defendant. The defendant came to meet me. It was about five in the evening. He told me he had seen a place which he wanted me to help him … Then I allocated a place to him. When I gave him the land he did not develop it. Before I gave him the land, people had already been there. I gave him this land in 1990. It is 20th February, 1990. Part of the land given to the defendant was given to the plaintiffs. In other words, the land given to the plaintiff's were in the same location with the defendant."

Under cross-examination, PW1 said at page 20 of the Record:

> "Sometimes in 1980, the Ministry instructed us not to allocate land. It could be an Alkalo can allocate his own land. The District Authority I concede own the land I allocated."

Let me take here the submission of learned counsel for the appellants that the respondent did not raise the issue of lack of authority by the Alkalo to allocate land to the appellants and that the Court of Appeal was in complete error in treating such an issue as evidence. I had earlier reproduced paragraph 1 of the Amended Statement of Claim. I need not repeat it here. In light of the averment in paragraph 1 of the Amended Statement of Claim and the averments in paragraphs 1, 2 and 4 of the Amended Statement of Defence, the parties clearly joined issues on the authority of PW1 to grant land to the appellants. Therefore, I do not, with the greatest respect to learned counsel for the appellants, agree that the issue of lack of authority ought to have been raised by the respondent

before the Court of Appeal pronounced on it. In my humble view, there is enough in the pleadings for the Court of Appeal to make pronouncement in the way the Court did.

Learned counsel for the respondent went into some detail in exercise in semantics by trying to locate a distinction between the words allocate and grant. I do not think he succeeded in the exercise. Although the words are not synonymous, they seem to have a common denominator in the word "alienate" in property law, as both words, like "alienate" involve some element of transfer of property. The exercise in semantics notwithstanding, I entirely agree with his submission in paragraph 22 of the Statement of defence that the parties joined issue in the authority of the Alkalo to grant land. That is clear from a community reading of the amended pleadings.

The evidence of PW1 has completely destroyed the case of the appellants on their title to the suit land purportedly allocated to them by the witness. This is because in law, he has no property to allocate to the appellants. See *Famuroti v Agbeke* (1991) 5 NWLR (Pt 189) 1. The property he purportedly allocated to the appellants according to him is owned by the District Authority. I therefore entirely agree with learned counsel for the respondent that the legal maxim, *nemo dat quod non habet,* applies *mutatis mutandis* to the purported allocation. In law, no property passed to the appellants. I recall here the submission of learned counsel for the respondent in paragraph 19 of the Statement of defence. He said:

> "In the provinces, on the other hand, the radical owner of the land in every district was and is (unless otherwise designated under the State Lands Act) the District Authority, which institution is defined in section 2 of the Local Government Act Cap. 33:01. By way of further elucidation I cite Section 45 (1) of the Local Government Act which reads:
> "The District Authority in every district shall be the Head Chief as advised by the Headman of the District and such elders and advisers as by tradition advise any Head Chief and are available and willing, at any time to advise."

The above apart, Section 4 of the Lands (Provinces) Act, Cap. 57:03 provides that all provinces lands are hereby declared to be vested in the

Authorities for the Districts in which such lands are situated, and shall be held and administered for the use and common benefit direct or indirect, of the communities concerned. In my view, the evidence of PW1 vindicates the above provisions of the statute and that nullifies any purported allocation by the witness. The evidence of PW1, on the lack of authority on his part to grant land, is clear evidence against interest. His interest was to give evidence in favour of the appellants. The appellants had a corresponding interest that PW1 will give evidence in their favour. They called him to give evidence in their favour but somewhere along the line, the evidence he gave was against them. Admission against interest is the best evidence in civil proceedings and Courts of law grab it with both hands, and I do grab it.

In the case of *Ajikawo v Ansaldo (Nig) Ltd.* (1991) 2 NWLR 359, a Court of Appeal decision, I said at page 375 that:

> "Pleadings though drafted by Solicitors and Advocates after receiving litigation instructions from their clients, cannot speak or talk in court. This is because they do not have the mouth to speak or talk. They have not the capacity or power to demonstrate in Court. They cannot give the court a precise or concise pictorial view of the events pleaded therein beyond the language. Accordingly, pleadings however brilliantly written, cannot take the place of oral evidence in Court in a matter which is contentious and contested. In such a situation, pleadings lie helplessly in the case file, waiting anxiously for their owner, through counsel, to make the best use of them. And this the owner can do only by oral evidence to awaken the apparently dead averments … I have been talking about a contested matter, or better still, and more particularly, contested averments in pleadings."

The case is relevant in respect of paragraph 1 of the Amended Statement of Claim. Until the appellants and PW1 gave oral evidence, paragraph 1 of the Amended Statement of Claim lay docile or dormant in the case file. The evidence of the appellants and PW1 gave life to the paragraph. While the evidence of the appellants vindicated their case, the evidence of PW1 procured under cross-examination, completely demolished their case, as he had no authority to allocate the plots of land to the appellants. It is too late in the day for the appellants to deny, or better, abandon the evidence of PW1, a witness they called. And what is

more, evidence obtained from cross-examination is strong and admissible evidence in law. I will place it above evidence obtained in examination in-chief because the former is aimed at demolishing the case of the opponent and building up the case of the cross-examiner.

Let me take the issue of evaluation of the evidence by the Court of Appeal. Though evaluation of evidence starts or commences at the Trial Court, it is not exclusive to that court, as if a monopoly of the Court, but continues at the Appellate Court. An appellate Court also shares in the judicial function. The difference is that while the Trial Court evaluates the evidence before it with the exclusive privilege and advantage of watching the demeanour of the witnesses, an Appellate Court does so only on the cold records before it. It is therefore the province of the law that as an appellate court has not the eagle eyes of a Trial Court to watch the demeanour of the witnesses, it must rely on the findings of the owner of the eagle eyes, unless they are perverse. It is the law that an Appellate Court should not lightly interfere with the findings of fact of the Trial Court because that Court physically saw it all, by way of physical utterances, gestures, mannerisms, actions or inactions of the witnesses. Although demeanour may at times not be the best lead, particularly in respect of some witnesses, which for lack of better expression, I call professional witnesses by their regularity in Court to give evidence, it plays some vital role and helps the Court in assessing the authenticity or veracity of witnesses.

While I entirely agree with learned counsel for the appellants for the position he has taken at page 6 of his Statement of Claim in light of the decision in *Gambia Commercial and Development Bank Ltd. (No.1) v Jeng (No.1)* (1997 – 2001) GR 291, I do not agree with him that the Court of Appeal failed to properly evaluate the evidence before it. That Court did and admirably too for that matter. Let me just take one aspect to justify the position I have taken in favour of the evaluation by the Court of Appeal. In attacking the findings of the Court of Appeal, learned counsel for the appellants submitted that the Court of Appeal was wrong in its view that the allocations to the appellants were later in time. He relied on part of the evidence of PW1, the Alkalo of Eboe Town. It does not appear that counsel saw the evidence the witness gave under cross-examination at page 20 of the Record. Witness said as follows:

> "It was after allocation to the defendant that the plaintiffs were allocated. The defendant was first allocated land before the plaintiffs."

Can any piece of evidence be clearer than the above? Will counsel still argue in light of the above evidence that the Court of Appeal was wrong in its view that "the allocations to the appellants were later in time''? I do not want to go to other areas as I am fully satisfied with the evaluation of the evidence by the Court of Appeal. I must say that learned counsel for the respondent touched the point in his Statement of defence, and he is right.

That takes me to the issue in respect of the Court of Appeal giving judgment to the respondent. Learned counsel for the respondent made efforts to justify the order made by the Court of Appeal. He called in aid the Court of Appeal Rules, the English Rules of the Supreme Court and Halsbury's Laws of England including the Privy Council decision in the Nigerian case of *Ibeneweka v Egbune* (supra). With respect, I do not agree with him. I agree with learned counsel for the appellants. It is clear and very loud law that courts of law do not grant reliefs not sought by the parties. As a matter of fact, the respondent merely reacted to the reliefs of the appellants and did not make any counterclaim of ownership of the suit land. If the respondent made a counterclaim perhaps the appellants could have got another opportunity to react to it. I say this because I do not believe that a plaintiff's claim in a Statement of Claim will convey exactly the same content in his defence to a counterclaim. In the latter, the plaintiff is the defendant and his defence may not be exactly his claim. A plaintiff is denied fair hearing if the court gives judgment to the defendant without hearing from the plaintiff. The natural justice principle of *audi alteram partem* will be breached, as it was breached by the Order of the Court of Appeal in this appeal. In the circumstances the Court of Appeal was clearly in error when it made the following Order at page 141 of the Record:

> "This appeal therefore succeeds. We set aside the judgment, findings, determinations and orders of the Trial Court. In their stead, we find for the defendant and declare that the suit land in question belongs to the defendant, Joseph Bassen."

In the Nigerian case of *Dung v Chollom* (1992) 1 NWLR (Pt 220) 633, it was held that in an action for declaration of title to land, a dismissal of the plaintiffs claim does not, in the absence of a counterclaim, amount to judgment for the defendants. See also *Kodilinye v Odu* (supra).

The above apart, the decision of the Court of Appeal, with the greatest respect, did not consider one vital aspect of the case and it is that the suit land is not properly identified. In the circumstances, the Court of Appeal was not in a position to make a declaration for the respondent that the "suit land in question belongs to the defendant, Joseph Bassen". As the suit land is not identified, the Court of Appeal cannot, I repeat, so declare the "suit land in question" for the respondent. Although the Amended Statement of Claim averred that each of the plaintiffs was granted a plot of land, there is no evidence of the identity of each plot of land. All the appellants gave evidence to the following effect:

> "I have a plot of land at Eboe Town or I have a landed property at Eboe Town."

This evidence is vague, nebulous and lacks specificity as to the description of the land, either in terms of beacons if need be, or other identifiable boundaries. Even PW1, Landing Jarju, the Alkalo of Eboe Town, was not specific as to the dimensions of the plots of land he allocated to the appellants. Eboe Town is not a hut or a village consisting of huts. It is a town and that is the nomenclature given to it. And so I use it. I see at page 3 of the Record, a sketch plan showing a plot of land at Eboe Town acquired by Demba Bah and fifteen others; a plan which was referred to in the first claim of the appellants. I do not know the usefulness of the plan. It does not appear to be in evidence. Even if it is in evidence, I do not see sixteen plots in the plan. Although learned counsel for the appellants submitted that the identity of the land is not in issue, (a submission that I may not now accept) it materially affects the decision of the Court of Appeal giving judgment to the respondent as owner of the suit land, which identity is not known.

The above apart, I am with learned counsel for the respondent who submitted that with the Amended Statement of Claim, the identity of the land in relation to each of the appellants becomes an issue. That is a good one; a very good one indeed. This is clear from the averments in

paragraphs 1, 2, 3, and 10 of the Amended Statement of Claim. One of my brothers consistently took up the position with counsel for the appellants. It has now dawned on me that the point is most relevant to the order made by the Court of Appeal granting the suit land to the respondent. He knew where he was going but I was not quick in following him. Learned counsel for the respondent urged the court not to disturb the declaration of the Court of Appeal that the suit land belongs to the respondent. A plaintiff is the best Judge of what he wants from the Court and the same can be said for a defendant who puts up a counterclaim. The plaintiff's decision on it by way of the claim or relief sought is complete and final; and so the court, not even the final court of appeal in the land such as ours, has the jurisdiction to give him more than what he claims. Of course, the court has the jurisdiction to give the plaintiff less than what he has claimed, but certainly not more. I should go a bit further. A Court of Law has no jurisdiction to give plaintiff what he has not asked from the Court because the law assumes, and correctly too for that matter, that he did not ask for it because he did not need it. If a Court grants a party a relief he did not ask for, it will be embarrassing to him, good or bad. A Court embarking on such journey will be involving itself in speculation or conjecture, a function it clearly lacks. This principle of law is as old as Hale and almost as old as the hills and seas of The Gambia and it is counterproductive, and retrogressive to change it midstream. It is too late in the day to change the style of the parade by a wrong exchange of the baton. The parade will go into disarray. That will be bad, way bad indeed. There is no cause for that. A Court which does that exposes itself to an attack of bias and that is one big slap that Courts of Law should avoid. More fundamentally, the decision of the Court of Appeal amounts to re-writing the Civil Procedure Rules of the High Court relating to filing of claims in a Court of Law. Have the Courts the jurisdiction to make laws for the parties or for themselves? Is that not tantamount to usurpation of the powers of the law makers? Is that not a violation of the separation and division of powers in The Gambia Constitution? As the answers are clear, I need not provide them. If a defendant needs a relief from the court, against the plaintiff, he must do so by way of a counterclaim. If he does not file a counterclaim the Court cannot grant him any relief outside the relief sought by the plaintiff. In this appeal the respondent did not ask for title or ownership of the suit land by way of a counterclaim. It is therefore not the business of the court to

hold that the suit land belongs to him. Title to land is the highest relief in property law which can only be granted to a party who asks for it, upon proof. It cannot be granted to a party who does not ask for it; gratis. Did the defendant forget that important relief at the stage of preparing the Statement of Defence? If he forgot, it is too late in the day for this Court to remind him by way of giving him a golden handshake that he does not deserve. Where there is no relief there is no remedy. I do not want to use the Latin maxim.

And I should also say that rejecting the decision of the Court of Appeal is not a technicality but one of doing real justice in the case. Considering the fact that the basis of litigation is a valid cause of action founded on reliefs, it is not comfortable to say that it is a technicality. And what is more, I am not quite sure whether this is an appropriate case to apply the principles of public interest by the Court. I very much doubt it. Public interest or public policy is an unruly horse in any jurisprudence, and Courts must be very reluctant or loathe in applying it. You never know where the angry horse will take you; hopefully, not into a mirage where a return journey will be difficult, if not impossible. Let this Court not find itself in such a situation where it cannot administer justice to the parties before it. Let that day not come. The court is not Father Christmas that doles out gifts to children during the festive season just for the asking or the prompting in recent times, and particularly with the biting economy punctuated by the racing daily inflation, Father Christmas himself is getting more miserly with his gifts; talk less of a Court of law which does not heard gifts to give out to litigants.

In sum, the appeal is dismissed in part and allowed in part also. It is dismissed in respect of the Court of Appeal allowing the appeal of the respondent. The appeal is however allowed in respect of the Judgment of the Court of Appeal declaring the respondent owner of the suit land. As the respondent did not counterclaim, he is not entitled to the order given by the Court of Appeal.

MAMBILIMA JSC: I have had the opportunity of reading the lead judgment by my brother Jones Dotse, JSC. I agree entirely with the conclusions he has reached and the reasoning behind the same. I however wish to make a contribution on the opinion expressed by the Supreme Court of Ghana in the case of *Hanna Assi (No.2)* in which the

Court granted a relief that was not asked for. This is a profound departure from the traditional role of Courts of Law which is to adjudicate upon matters referred to it and where same is proved, to grant the remedies sought. And as Date-Bah observed in *Hanna Assi (No.1) v Gihoc* granting a relief not claimed it is like 'giving remedies to a person who has not sued." It would appear from paragraph 185 of Halsbury's Laws of England that under English law, a Court has a general power to make a declaration "whether there be a cause of action or not, and at the instance of any party who is interested in the subject matter of the declaration, and although a claim to consequential relief has not been made…" Some of their Lordships in Ghana could have found solace in such provisions to make a declaratory order which flows logically from findings of fact in a case.

In this jurisdiction, it has been accepted that in an action for declaration of title to land, a dismissal of the plaintiff's claim does not, in the absence of a counterclaim amount to judgment for the defendant. *Gyang Dung v Chung Chollom* (1992) 1 NWLR 633. While it could be argued that there is nothing to stop this Court from venturing into the adventurous waters as our colleagues in Ghana did, we should exercise great caution lest we plant a minefield, since decisions of this Court are binding on Lower Courts. Lack of precise criteria as to when to exercise such discretion may be tempting to some judicial activists to grant remedies to all and sundry simply because they have been dragged to court. I am thus in total agreement with the sentiments of my brother, Dotse JSC, on this point.

SAVAGE, CJ, I have read the lead judgment of my learned brother Dotse JSC in this appeal. I agree with his reasoning and conclusion dismissing the appeal in part. I only wish to make two contributions to the judgment. The first issue outstanding in the determination of this appeal is whether a court is entitled to grant to a party a relief not claimed in the litigation before it. The second is whether in an action for declaration of title to land the area of land being claimed should be clearly shown or delineated in an attached plan. The facts have been comprehensively stated in the judgment of Dotse JSC. I adopt the facts as reproduced and stated by him in their entirety.

It is now settled that the onus lies on the plaintiff claiming title to land to satisfy the court that he is entitled on his evidence to a declaration of

title. The plaintiff, as my brother has just explained, must rely on the strength of his own case and not on the weakness of the defendant's case. If this onus is not discharged, the weakness f the defendant's case will not help him and the proper judgment is for the defendant. Such a judgment, however, decrees no title to the defendant, he not having sought the declaration. In the instant appeal the failure of the defendant to counterclaim does not automatically confer title to him. Our legal system is replete with authorities that a judge has no power to make an order or grant a relief which has not been asked by the plaintiff in his pleading. The Supreme Court of Nigeria once explained fully the absence of jurisdiction to grant such a relief in the case of *Etim Expenyong And Others v Inyang Effionce Nyong And 6 Others* (1975) 2 SC 71 in the following words:

> "…as the reliefs granted by the Learned Trial Judge were not those sought by the applicant he went beyond his jurisdiction when he purported to grant such reliefs. It is trite law that the Court is without the power to award to claimant that which he did not claim. This principle of law has, time and again, been stated and restated by this Court that it seems to us that there is no longer any need to cite authorities in support of it. We take the view that this proposition of the law is not only good law but good sense. A Court of law may award less but not more than what the parties have claimed. A fortiori the Court should never award that which was never claimed or pleaded by either party. It should always be borne in mind that a court of law is not a charitable institution, its duty, in civil cases is to render unto everyone according to his proven claim."

In light of this proposition I am, in like manner, unable to accede to the decision of the Court of Appeal in the grant of a relief not asked for by the defendant.

The other point why the decision of the Court of Appeal must fail is the fact, as highlighted by Dotse JSC in his lead judgment, that both the plaintiffs and the defendant failed to explain by any degree of exactitude the identity and measurement of their land. In the case of *Madam Jenrade Aweni v Apostle Joseph O. Olurunkosebi* (1991) 17 NWLR it was held that:

> "The first duty of a plaintiff who comes to court to claim a declaration of title is to show the court clearly the area of land to which his claim relates. Where the area of land is not identified with certainty, the claim is bound to fail." *Epi v Agbedon* (1992) 1 ALL NLR 307 at 374 followed."

In our present case there is no evidence by the plaintiffs/appellants or supportive and positive pieces of evidence from witnesses of the defendant/respondent to establish the actual location, the limits and exactitude of the parcel of the land in dispute. There were no adequate particularities of its boundaries. What is involved in the case is not simply to prove that a grant of land was made to the appellants earlier than the one granted to the respondent. What is expected of the appellants is to prove by preponderance of evidence, apart from the grant so established, the exact location with convincing description and accurate delimitation of the land they are claiming to be theirs. If the area is not ascertained then the claim must fail and must be accordingly dismissed. See the case of *Oyetunji v Akanni* (1985) 5 NWLR (Pt 42) 461; Baruwa v Ogonsola 4 WACA 159; *Odufia v Afia* 6 WACA 216; Kwadzo v Adjei 10 WACA 274 and *Louwo v Eniola* (1967) NMLR 339.
It for the above reasons and the more detailed reasons contained in the lead judgment that I dismiss the appeal in part and allow it in part too. The Court of Appeal was right in dismissing the respondent's appeal regarding the appellants' claim. It was however wrong to make a declaration of title to the land on behalf of the respondent when the latter did not ask for it.

AGIM Ag. JSC. I have read the judgment just rendered by my learned brother Jones Dotse JSC. I agree that the Court of Appeal rightly set aside the findings and Judgment of the Trial Court and wrongly declared title to the Suitland for the respondent. After perusing the record of this appeal and the statement of claim and defence of each party before us, I observed that the pleadings and the evidence throw up two very fundamental issues that need to be considered. These issues concern

1. The identity of the Suitland.

2. The joint claim of the appellants for declaration of title to a parcel of land not jointly owned by them.

I thought of ignoring these issues since they do not form part of the grounds of appeal here and none of the parties to this appeal raised them in their statement of claim and defence. However, I considered that the issues are of fundamental importance in that they strike at the very root of the case before us. Take the issue of the identity of the land for example. It is not only a requirement of proof of the plaintiffs claim, it is also a requirement for enforceability of the Court's Judgment and Orders in respect of the land. If the identity of the Judgment land is uncertain, the Judgment is incapable of enforcement. As was restated by the Nigerian Court of Appeal in Nwogo v Njoku (1990) 3 NWLR (Pt 140) 571 at 582 and at holding 8, "the purpose of establishing the exact boundaries of the land in dispute in an action for declaration of title to land, trespass and injunction are:-

(a) To enable the parties and any other persons claiming through them to know precisely the area of the land to which the judgment or order relates for the purpose of enforcement of the decision of the court; and
(b) To obviate the possibility of future litigation of that particular area of land as between the same parties and their privies.

Certainty of the identity of the land in dispute is therefore necessary for the mutual benefit of both the plaintiff and the defendant." It is an established principle of administration of justice as stated by the Nigerian Supreme Court in *Woluchem v Wokoma* (1974) 3 SC 31 and the West African Court of Appeal in *Ukejianya v Uchendu* 12 WACA 45 at 171 - 172, that Courts should not issue unenforceable orders, for a Court like nature will not act in vain. So as admonished by the same Court in *Alhagi Imam Abubakri & Ors v Abdul Smith & Ors* (1973) 6 SC 31, Courts should desist from making unenforceable orders. It held at page 44 per Elias JSC (as he then was) thus – "we are also of the view that, even if the appellant's allegations are taken as established, this Court should not make an order which is unenforceable or of no avail…"

Having decided not to ignore these issues on account of their fundamental importance, it became necessary to consider if this court can deal with these issues since they have not been raised in this appeal. This Court can do so by virtue of Rule 8 (7) (b) of the Rules of the Supreme Court which states that this court shall not, in deciding an appeal, confine itself to the grounds set forth by the appellant or be precluded from resting its decision on a ground not set forth by the appellant. Sub rule (8) of the same Rule 8 provides that where the Court intends to rest a decision on a ground not set forth by the appellant in his notice of appeal or on any matter not argued before it, the court shall afford the parties reasonable opportunity to be heard on the ground or matter without re-opening the whole appeal. It is in keeping with Rule 8 (8) of the Rules of the Supreme Court that counsel to both parties were called upon to address this Court on these issues.

Learned Counsel for the appellant conceded that the joint claim for declaration of title to a parcel of land as couched in paragraph 10 (1) of the statement of claim could not be maintained because as averred in the preceding paragraphs of the said statement of claim and as the evidence show, the appellants are not joint owners of a parcel of land but at different times acquired and occupied their separate parcels of land. Learned Counsel then sought for and was allowed an adjournment to 25th June 2008 to apply formally for an amendment of the statement of claim. He filed a motion on notice applying for the said amendment. Learned Counsel for the respondent said he was not opposing the application. This court in exercise of its general powers under Rule 25 (3) of the Rules of the Supreme Court granted the said application and the claim in paragraph 10 (1) of the statement of claim became amended to read

> "By reason of the defendants' acts, the plaintiffs each suffered loss and damage. And each of the plaintiffs claims against the defendant for –
>
> 1. A declaration that he is the owner of the plot of land in his occupation which plot of land is situate at Eboe Town and his part of a tract of land edged red on the sketch plan attached to the Writ of Summons issued on 6th day of January 1993."

The effect of this and other amendments in the statement of claim is that the appellants no longer jointly claim for one land, but separately claim for their respective parcels of land in the area verged red in the sketch plan attached to the statement of claim. The incongruity between the claim in paragraph 10(1) and the rest of the statement of claim and between that claim and the evidence became resolved.

On the issue of the identity of the Suitland and the larger area owned by the defendant, learned counsel for the appellants maintained that the Suitland was properly identified. He further submitted that the parties never raised the issue of the identity of the land as they were ad idem on that and as such both the Trial Court and the Court of Appeal were dealing with a non issue. He further submitted that the identity of the Suitland can be an issue only if the defendant makes it so. He referred this Court to the Nigerian cases of *Fatuade v Onwuamanam* (1990) 2 NWLR (Pt 132) 322 and *Nwogo & Ors v Njoku & Ors* (1990) 3 NWLR (Pt 140) 571. On his part, learned counsel for the respondent started by saying that there was no dispute as to the identity of the Suitland and therefore it is not an issue but further in his submission turned to say that now with the amendment there is an issue as to the identity of the separate plots. In light of these submissions it becomes necessary to first determine if the identity of the Suitland was in issue in this case. The submission of learned counsel for the appellants that the identity of the Suitland will be in issue only if, the defendant in his statement of defence makes it one raises the question, when does the identity of a Suitland become an issue? The Nigerian Court of Appeal decision in *Nwogo & Ors v Njoku & Ors* (supra) relied on by counsel for his submission answered this question thus –

> "The identity of the land in dispute will be in issue if, and only if, the defendant in his statement of defence makes it one, that is, if he specifically disputes either the area or the size or the location or the features shown on the plaintiffs plan. When such is the case, then the identity of the land becomes an issue."

I think that this statement of law is too general and does not have regard to the law that in a civil case the plaintiff has the legal burden to prove his case on preponderance of evidence and so can only succeed on the

strength of his case and cannot rely on the weakness of the defendant's case. This principle of law which is statutorily prescribed on Section 143 (1) of the Evidence Act 1994 is the subject of restatement in a long line of cases including *Jeng v George Stowe Co Ltd*. (No 1) (1997-2001) GR 444 at 448 – a decision of The Gambia Court of Appeal. The duty of the plaintiff to prove his case includes the duty to plead in the statement of claim facts that disclose a cause of action and that when proven entitle him to judgment for the reliefs claimed. As the Court said in *Nwogu v Njoku* (supra), it is not a general rule that whenever the evidence tendered by the plaintiff is unchallenged and uncontradicted, the plaintiff is automatically entitled to judgment. The evidence adduced must bear relevance to the facts pleaded and the issues joined. Kolawole JCA in that case at page 581 stated the point more clearly thus –

> "It must be remembered that a plaintiff may lose his case where the defendant has not even appeared to challenge or contradict the evidence tendered if such evidence does not support the facts pleaded or where the statement of claim itself is contradictory or defective."

In an action for declaration of title and or other reliefs concerning land, part of the duty of the plaintiff to prove his claim includes the duty to accurately identify the Suitland. It is trite law as restated by the court in *Nwogu v Njoku* the Supreme Court of Nigeria in *Maberi v Alade & Ors* (1987) 4 SCNJ 102 and in *Ugbo v Aburime* (1994) 9 SCNJ 213, that where a plaintiff in an action for declaration of title fails, as in this case, to prove the boundaries, dimension or extent and features of the Suitland, he has failed to prove his case and the claim will be dismissed. The duty to accurately identify the land requires the plaintiff to plead in the statement of claim facts which clearly describe the identity of the Suitland. If the statement of claim does not clearly identify the Suitland, then the duty of the plaintiff to prove the identity of the Suitland will certainly not be achievable. So the identity of the Suitland becomes an issue not only when the defendant disputes it, but also where the facts in the plaintiff's statement of claim do not describe its limits, extent and salient features so as to make it easily ascertainable and put it beyond doubt. Having so stated I will now proceed to determine if identity of the Suitland was in issue in this case. The identity of the Suitland remained in issue and unresolved throughout the trial. It is clear from the nature of

the rival claims of the appellants and the respondent to ownership of the Suitland and the evidence that the identity of the Suitland was in dispute. It is surprising that this obvious fact was not given much attention by the parties and the Trial Court. Learned Counsel for the appellants in his address during trial alluded to it when he submitted that "there is no dispute about the identity of the Suitland. The identity of the land that is obscure is that of the land called Sinana. His case is that the Suitland is within Sinana. The Alkalo to who he went for his allocation denied the knowledge of the land which the defendant owned and encompassing the Suitland." The uncertainty concerning the Suitland was created by the appellants ab initio in their statement of claim. In paragraphs 1 and 2 therein the appellants aver that they and other persons were each allocated separate plots of land at Eboe Town. In paragraph 10 (1) of the statement of claim as amended in this Court, each appellant is claiming that his own portion of land is part of the tract of land edged red on the sketch plan attached to the Writ of Summons. There are no facts in the statement of claim showing the dimension, boundary and the features of the portions of land allocated to each appellant and the persons mentioned in paragraph 1 of the said statement of claim. There is nothing in the statement of claim defining the area owned by the respondent as distinct from that owned by each appellant. The sketch plan attached to and filed along with the Writ of Summons and statement of claim did not define the boundaries and extent of each of the lands held by the appellants and other persons. There is nothing in the plan showing the portions held by each appellant in the area verged red. As the Nigerian Supreme Court held in *Awote & Ors v Owodunni & Anor* (1987) 5 SCNJ, in an action for declaration of title to land, where the parties have lands abutting each other, it is necessary for the plaintiff to show and prove the precise boundary features along the common boundary of each land.

Even the dimensions and boundaries of the area verged red being part of a larger area land is not indicated in the plan. The features like fence, houses and other structures mentioned in paragraphs 1-5 of the statement of claim as existing in each of the portions of land is not indicated in the plan. It is clear from the foregoing that the statement of claim did not identify the Suitland. The identity of the Suitland was further made an issue by the statement of defence of the respondent. The respondent in paragraph 2 of his statement of defence averred that the

Suitland is locally called "Sinana ricefields" and that it has always been owned and occupied by his grandfather and later his father Emmanuel Bassen. The respondent admits in paragraph 6 of the statement of defence that the appellants built houses, fences and other structures in the Suitland while he was away on posting to the provinces. If paragraphs 3 and 4 of the statement of claim are read together with paragraphs 1, 6 to 17 of the statement of defence it becomes clear that the Suitlands (the lands owned and occupied by the appellants) are less than the area claimed by the respondent as belonging to his family and himself. So that what the defendant describes as Suitland in his statement of defence is an area larger than the lands the Alkalo of Eboe Town allocated to each appellant. The appellants are not claiming title to lands outside the portions allocated to them. So the pleadings of both parties put the identity of the Suitlands in issue. As the Nigerian Supreme Court held in *Akeredolu & Ors v Akinremi and Ors* (1989) 1 SCNJ 102 where the Suitland consist of a smaller portion of land sold out of a larger portion, the limits of the said smaller portion must be clearly identified by the party who claims for a declaration of title to such Suitland.

I will now proceed to consider whether the evidence adduced on behalf of the appellants sufficiently identify the Suitlands, making them easily ascertainable therefrom. Contrary to the averment of the appellants in paragraphs 3 and 4 of their statement of claim, the evidence of the appellants and their witnesses disclose that the respondent was first allocated land in an area in Eboe Town by the Alkalo of Eboe Town who testified at the trial as PW1 on behalf of the appellants. The said Alkalo subsequently allocated to each appellant at separate times a portion of land adjoining the land already allocated the respondent. What has led to this case is that the respondent is alleged to have exceeded the area allocated to him by PW1 and occupied adjoining portions of each of the appellant's lands claiming that such portions are part of the land allocated to him. According to the appellants, the respondent has committed several acts of trespass on their respective lands in pursuance of this claim of ownership. This is clearly pictured by the testimony of the said PW1, Landing Jarju (Landing Bojang). He testified that "part of the land given to the defendant was given to the plaintiffs. In other words, the land given to the plaintiffs was in the same location with the defendant." He further clarified that "what I said was that when I

allocated the land to the defendant he did not fence it but he later fenced it together with the place I allocated to the plaintiffs. The defendant has added part of the land not allocated to him… It was after allocation to the defendant then the plaintiffs were allocated. The defendant was first allocated land before the plaintiffs." The 4th appellant had also testified that each of them had separate plots and that at the time of the allocation of the land to him, there were no boundaries. His said testimony is as follows: - "As for Badjie's plot I saw a house there but not in others near to mine. There were no boundaries at the time of allocations of the land to me." The above testimonies clearly left unresolved the issue of the exact limits and identity of the plots of land held by each appellants and the respondent. The sketch plan attached to the writ of summons and the statement of claim was never tendered in evidence and is therefore of no evidential value. The mere fact that a sketch plan is attached to and filed along with the originating processes does not render it evidence upon which the Court can rely on to determine the identity of the Suitland. A party who seeks to rely wholly on a survey plan or sketch plan as evidence of the identity and limit of the Suitland must ensure that it is formally tendered and admitted. It can only be relied on and used by all the parties and the court in the case if it is admitted as evidence by the court. I think that the appellants may have annexed the sketch plan to the Writ of Summons and Statement of Claim in compliance with Order IV of Schedule II of the Rules of the High Court Cap 6.01 Vol. II Laws of The Gambia 1990 which state inter alia that where a plaintiffs seeks as in this case to restrain any defendant by injunction, he or she may in the Writ of Summons or in any pleadings refer to and briefly describe any documents the content of which he intends to rely on and annex copies of such documents to the Writ or pleadings or may state any reason for not annexing such copy or copies. The purpose of this order is to ensure that the plaintiff gives the defendant adequate notice of the document he intends to rely on at the trial. There is nothing in Order IV of Schedule II of the Rules of the High Court making the annexed paper part of the evidence in the case.

In any case even if the sketch plan is countenanced as evidence of the identity of the land owned by the appellants, it would not be of any help in resolving the issue of the identity of the respective plot of land held by each party in this case for the following reasons:-

1. The sketch plan states that it shows a plot of land at Eboe Town acquired by Demba Bah and 15 others. The pleadings and the evidence state that separate plots of land were acquired by each appellant at different times in the same area. Exhibits 1-15 show that the plot of each appellant is numbered differently. Yet the plan does not indicate those numbers.
2. There is nothing in the plan to indicate who the 15 others are.
3. It is still a sketch plan and so does not contain any detail particulars to differentiate the parcel of the land held by each appellant.
4. The sketch plan contain no details to show the physical features of acts of possession like the building, fences and other developments by the appellants and features of the respondent's acts of trespass in the respective parcels of land as stated in the testimonies of each appellant. The appellant had relied heavily on their physical developments of their respective plots. The features of these developments are not shown on the sketch plan. The parts of their lands trespass into by the respondent should have been indicated in the plan. The law was correctly stated by the Supreme Court of Nigeria in *Anyanwu v Mbara & Anor* (1992) 6 SCNJ I22 when it held that the features in the disputed land relied on by a party must be shown on his plan. If he fails to do so, such evidence will be regarded as being unsatisfactory.
5. The sketch plan rather increases the uncertainty concerning the identity of the Suitland. As the Supreme Court of Nigeria held in *Nwoke & Ors v Okere & Ors* (1994) 5 SCNJ 02 a plan should show the dimension, boundaries and any salient features of the land to accurately identify it.

Exhibit 2, which certifies the allocation of a piece of farm land by PW1 to the respondent and his siblings did not state the extent of the land allocated to them. Equally there is nothing in the evidence to indicate the extent of the land allocated to each appellant by PW1. Yet PW1 testified that the lands he allocated to the appellants are not within the area he

had earlier on allocated to the respondent. I think that it is of utmost importance that a document or any instrument conveying or allocating any title or interest in land should define the land, conveyed or allocated therein. The decision of Nigerian Supreme Court in *Dabup v Kolo* (1993) 12 SCNJ 1 that a certificate of occupancy should define the dimension of the land covered by it to assist in showing the identity of the land is useful guide here. If the area, extent and limit of the land conveyed or allocated is not stated in the allocation paper or certificate then the identity of the land is uncertain. There is therefore nothing in the entire evidence of the appellants defining the Suitlands. Their limits and identities cannot therefore be ascertained from the totality of the evidence adduced by the appellants.

The evidence of the respondent further puts the identity of the Suitlands in issue. He and his witnesses consistently testified that his family, starting with his grandfather have owned and occupied Sinana for over 100 years. That the plots of land occupied and developed by the appellants and others are in Sinana. He identified Exhibit 2 as the certificate PW1 gave to them when he approached the later for a change of name of owner of Sinana from his father's name Emmanuel Bassen. PW1 confirms that the defendant was in occupation of land in that area before the allocation of plots of lands to the appellants. He also stated that the area he allocated to the respondent in exhibit 2 does not include the lands of each appellant. Yet as I have said exhibit 2 does not state the extent of the land already allocated to the respondent. To identify the area of land owned by him, the respondent formally tendered exhibits D4 and D5 (sketch plans). Exhibit D4 states that it is a "sketch plan showing the land owned by Emmanuel Bassen." Exhibits D5 is another sketch plan indicating that it is showing a plot of land at Eboe Town for agricultural purposes owned by Emmanuel Bassen. These two plans do not show the parts of Sinana that are the Suitlands in this case. None of the appellants is mentioned in them except Omar Jallow who is mentioned in Exhibit D5. Furthermore, the plans conflict with each other. Whilst Exhibit D4 gives the impression that the land is between developed plots of land held by Ebrima Jobe, Alberr, Lawrence Mendy, John Mendy and Ya Kaddeh Bass, Exhibit D5 shows a plot of land for agricultural purposes lying between rice fields and swamps. The impression I have from the two plans is that they refer to two different lands: Exhibit D4 appears to depict a residential land, while Exhibit D5

depicts an agricultural land. Yet the evidence of traditional history of ownership by the respondent and his witnesses refer to one land. There is no evidence on record to explain the difference between the two plans. Let me state here that the mere mention of the name Sinana does not amount to sufficient identification of the land. As the Nigerian Supreme Court held in *Odiche v Chibogwu* (1994) 7-8 SCNJ 317 the mere mention of the name of the land is not enough. The description and boundaries of the land must be proved accurately. This decision followed its earlier decision in *Okedare v Adebara & Ors* (1994) 6 SCNJ 254 that the precise boundaries must be proved with certainty and the expression "Land in Jebba" is not enough to identity the disputed land. So both the Suitlands and the larger area called Sinana are not accurately identified.

Having dealt with the state of the evidence on the identity of the Suitlands, I will now proceed to consider how the Trial Court and the Court of Appeal dealt with the issue of the identity of the Suitland.
The Trial Court in the early part of its judgment dealt with the representative nature of the claim. The Trial Court refused to countenance the claims of the unnamed parties represented by the appellants for the reasons that, each of the appellants and the other persons got their allocations at different times, they are not members of the same family, no authority to represent them was produced and that the evidence did not even show their plots of land. If the Trial Court ignored the claims of the unnamed parties because amongst other things the "evidence did not show their plots of land," then it should equally have discountenanced the claims of the appellants (named parties) since there was equally no evidence of the plots of lands held by each appellant. Rather the Trial Court proceeded to rely on evidence of allocation of plots of land by PW1 to each of the named parties (appellants) as evidence of the identity of their plots of land. As the portion of the judgment of the Trial Court at pages 60-67 of the record show, the Trial Court relied on receipts acknowledging payment of rates by each applicant to Kanifing Municipal Council for plots owned by them, and other records at the said council. These rate receipts and the other records of the said council do not identify the respective plots of land. These receipts and other records are Exhibits 1-15. They do not describe the limit and extent of the plots of land of each appellant. This is quite apart from the fact that the evidence show that the numbers were

allocated by Kanifing Municipal Council without visiting, inspecting and surveying the land area in each plot. It is clear from the evidence that upon allocation of a plot by the Alkalo, to any of the parties herein, he or she went to the Kanifing Municipal Council with the allocation paper to register same. He or she is then assessed and required to pay an amount. Upon payment he or she is issued with a documentary acknowledgment of the payments and a plot number is allocated to the holder and indicated in the receipt. The Council also enters the particulars of such holder of the plot in its register of plot. The allocation of such number is not the result of a physical inspection or survey of the plot of land in question. The plot numbers confirm that each appellant was allocated a plot of land by PW1. Those numbers which are based on the allocation paper and not the actual land do not resolve the issue of the limit of each person's land as allocated by PW1. They do not show the limits and extent of the Suitlands especially as there is no survey plan showing such plots with the numbers, or any description of the area and site of such plots. The plot numbers are allocated on the basis of allocation papers that do not define the land allocated therein. The allocation of plot numbers on the basis of such allocation papers cannot cure the uncertainty of the extent, location and boundary of the land to which the number relates.

The Court of Appeal in its Judgment did not give the impression that it considered that the identity and limit of the Suitlands was in issue. It is implicit in the portions of its Judgment that the Court of Appeal took the view that the Suitland was in the same portions of land allocated to the respondent by PW1 and later again allocated by the same PW1 to the appellants. The court of Court of Appeal also held on the evidence that even before the purported allocation of the land by PW1 to the respondent, the land had for long been in the occupation of the father of the respondent. It reversed the findings of the Learned Trial Judge that the appellants own the Suitland and rather held that the land belonged to the respondent.

The appellants in this case did not discharge the legal burden on them to prove the identity of the Suitlands and therefore failed to prove their claim. It is trite law as I had earlier stated that where a claimant for declaration of title, injunction or other relief concerning a certain land fails to prove its identity, then the claim is liable to be dismissed. It is for these reasons that I uphold the decision of The Gambia Court of Appeal

setting aside the decision of the trial High Court. The claims of the appellants in their Writ of Summons and statement of claim are hereby dismissed.

In light of the foregoing, I do not see the need to consider the issues raised for determination in the statements of case of the respective parties except the contention of the appellant that the Court of Appeal was not right in declaring that the Suitland belonged to the respondent. The appellants based this contention on the sole ground that the respondent did not counterclaim for declaration of title of the Suitland. I prefer to say that since the identity of the limits and nature of the Suitland is not certain, the Court of Appeal should not have declared the title of the respondent to such Suitland.

The declaration of the respondent's title to the Suitland cannot therefore stand and is hereby set aside. I do not think it would serve any useful purpose to go ahead to consider the question of whether a Court can declare title in favour of a defendant who did not counter-claim for a declaration of title.

Appeal dismissed in part and allowed in part.
FLD.

KANIFING MUNICIPAL COUNCIL

V

INTERNATIONAL BANK FOR COMMERCE LIMITED

COURT OF APPEAL OF THE GAMBIA
(Civil Appeal NO. 25/2006)

25th July 2008

AGIM PCA, OTA JCA, WOWO Ag. JCA

Action – Cause of action – meaning – When same accrues – Determining factors.

Court – Improper procedure – Objection not raised by parties – Cause of action – Determining factors – Interpretation of statute – Approach adopted – Jurisdiction – Exclusion of Courts jurisdiction – Express Constitutional and/or Statutory exclusion – Construction of statute – Approach to – Standard of proof – Criminal and civil causes.

Criminal Procedure Code – Section 145(1) CPC - Import of – Section 145(4) of the CPC.

Interpretation of Statutes – Approach to - Effect of Section 3 Licenses Act Cap 92:01 – Effect of Section 22(1) & (2) Cap 92:01 – Meaning of Section 145(1) of the CPC – Rationale of Section 145(1) of the CPC – Cumulative effect of Section 19(2) Licenses Act and Section 145(4) of the CPC – Statutes – Clear and unambiguous words - To be given their ordinary meaning in context – Object of a Statute – How to determine same - Effect of Section 3 Cap 92:01 – Constitution provisions – Purport of Section 132(1) of 1997 Constitution

Statutes – Primary objective of Licenses Act Cap 92:01 - Effect of Section 145(1) of the Criminal Procedure Code.

Practice & Procedure – Improper procedure – Where no objection raised by Parties - Enforcement – Methods available to recover unpaid license fees – Interpretation of statute – Approach adopted - Standard of proof – Criminal and civil cases distinguished - Jurisdiction of Courts – Exclusion of it – Impropriety thereof.

Words & Phrases – Cause of action – Meaning of.

Held, *allowing the Appeal (per Agim PCA, Ota JCA, Wowo Ag. JCA concurring)*

1. Since none of the parties took objection to this, this Court will treat the error in procedure as a mere irregularity that should not vitiate the entire proceedings. This is in line with the current judicial trend that Courts pay heed to the substance of a case rather than on forms, formalities and technicalities, reliance upon which could lead to outright injustice. [*The State v Abdoulie Conteh* (2002-2008) 1 GLR 150, *Antoine Banna v Ocean View Resort Ltd. & Ors* (2002-2008) 1 GLR 1 referred to]

2. The primary objectives for the establishment of the Licensing Authorities, to which the Kanifing Municipal Council, the appellant belongs, one of which is to collect revenue for the local authority by way of license fees.

3. The object of the Act is to identify those doing business within the municipality, to regulate their activities and generate revenue for the Council.

4. It is incontrovertible that the Kanifing Municipal Council is a Licensing Authority statutorily empowered to raise revenue for the local authority by way of collection of license fees within the municipality. The municipality is therefore entitled to be paid such fees.

5. A person entitled to any payment is at liberty to take any lawful measure to enforce such payment. Methods of enforcement adopted by the council usually include recovery by debt collectors, administrative action, public funds recovery actions, criminal or civil process. The appellant, the Kanifing Municipal Council therefore have the discretion to recover either through the civil or criminal process or even administratively as the case may be.

6. By the provision of Section 22 (1) & (2) of the Licenses Act, it recognizes the administrative avenue as a means of collection of

license fees. It permits the Minister by an order published in the Gazette, to prescribe arrangement for the license fees to be collected by an officer of the Government of The Gambia or by another licensing authority after due consultation with the Municipality. The Act therefore recognizes alternative means of recovery or enforcement of its provisions. What the council usually does is that, they engage the services of private debt recovery consultants to recover their license fees. It is not right therefore, to contend that because Section 19(1) and (2) of the Licenses Act makes the non-payment of licensing fees by a person a criminal offence and also gives the criminal court the power to order payment three times the license fees after conviction of the offender that the Municipal Authority is restricted to recovery only by means of a criminal action.

7. A statutory body vested with the statutory mandate of recovery of revenue must be at liberty to exercise its rights of revovery through any avenue or channel most advantageous to it. If criminal action which requires a stricter burden of proof were to be the only avenue of recovery, the danger is then that if the victim fails to discharge the burden of proof and the culprit is discharged and acquitted, the victim would be precluded from recovery of the amount owed which according to section 19 (2) can only be paid upon a conviction, even where there is abundant evidence of the debt owed. This certainly could not be the intention of legislature. I hold the view that the mere fact that section 19 (2) mandates the court after a due criminal trial and conviction thereof, to order the culprit to pay three times the license fees due to the Municipality, is a recognition by the Act, that the breach of the statutory duty by the offender occasioned damage to the municipality requiring compensation.

8. Section 145(1) of the Criminal Procedure Code (CPC) provides for payment of compensation to victims of crime in lieu of damages or by monetary reliefs available to them by civil action. The penalization or criminalization of an act or omission by a statute does not exclude the right of the victim of such act or omission from enforcing his right by civil action.

9. The rationale behind the provision of Section 145(1) of the CPC (as amended) is that if the criminal court can conveniently determine the civil remedy that can be recovered by the victim of a crime, that it should not be precluded from doing so. This provision is in line with common sense and substantial justice as well as the current judicial trend that courts should adopt procedures that will save time and money. It alleviates the rigors and expenses and the unnecessary delay that a separate civil trial commenced after the criminal trial would occasion.

10. Implicit from the phraseology of these provisions is that in spite of having received compensation in the criminal trial, the victim of an offence is still at liberty to institute civil action on the same matter and be compensated therein. However the Court in awarding compensation in the subsequent civil action must take cognizance of the compensation awarded in the criminal trial. [*Mohammad Sissoho v Inspector General of Police* (2002-2008) 1 GLR 356 referred to]

11. The phrase "cause of action" constitutes the fact or combination of facts which gives rise to a right to sue. It consists of the wrongful act of the defendant which gives the plaintiff his cause of complaint and the consequent damage.

12. When facts establishing a civil right or obligation and facts establishing infraction or trespass on the right and obligation exist side by side, a cause of action is said to have accrued. [*Folobi v Falobi* (1976) 1 NMLR 169; *Adesokan v Adeyorolu* (1977) 3 SCNJ 1; *Lam v Baldeh & Ors* (1997-2001) GR 976 referred to]

13. It is to the writ of summons and statement of claim that the court must revert in determining whether there is a cause of action. It is the entire circumstances as disclosed in the statement of claim and not just a part of the circumstances stated therein which gives rise to a right to sue for a particular relief or reliefs. Each of the facts giving rise to the cause of action should have come into being before the suit commenced. If not the suit will be premature

and incompetent. [*Adesokan v Adegorolu* (1997) 3 SCNJ 1 referred to]

14. It is not within the interpretative jurisdiction of a court to read into a provision words that are not there. The Court in interpreting or applying provisions of statutes has a duty to pay heed to the text of every provision and take account of the words as they stand. It should not add any words. [*Mabinuori v Ogunleye* (1970) ALL NLR 17 referred to]

15. Section 132(1) of the 1997 Constitution vest in the High Court the jurisdiction to hear all cases apart from the matters stated in Section 127 therein to be within the exclusive original jurisdiction of the Supreme Court. The recovery of trade license fees is not such a matter as stated in Section 127 of the Constitution. It is therefore within the jurisdiction of this Court as prescribed by Section 132 (1) of the 1997 Constitution.

16. It is trite that an exclusion of the jurisdiction expressly vested by the Constitution or statue on a Court cannot be implied. Such exclusion must be expressly stated.

17. The provisions of Section 19 (1) & (2) of the Licenses Act Cap 92:01 Laws of The Gambia are clear and unambiguous and therefore must be given their ordinary and natural grammatical meaning. [*Alimi Lawal v G.B. Ollivant (Nig) Ltd* (1997) 3 SC 124 referred to]

18. **I**n determining the general object of legislation or the meaning of its language the meaning that best accords with common sense must be preferred to one that would produce an unreasonable result or an absurdity. [*Ikike v Legal Practitioners Disciplinary Committee* Vol. 22 NSCOR 1063 referred to]

19. Since the standard of proof in criminal and civil cases is different, there is the tendency that a person may fail to prove her case in the criminal case which is a higher burden and at the same time

succeed in proving her case in civil suit. [*The State v Abdoulie Conteh* (2002-2008) 1 GLR 150 referred to]

Cases referred to:

A/G Kara State v Olawale (1999) 1 NWLR (Pt 272) 645
Adesokan v Adeyorolu (1977) 3 SCNJ 1
Alese v Aladetuyi (1995) 6 NWLR (Pt 403) 527
Alimi Lawal v GB Ollivant (Nig) Ltd (1997) 3 SC 124
Antoine Banna v Ocean View Resort Ltd. & Ors (2002-2008) 1 GLR 1
Bryant v Collection of Customs (1984) 1 NLR 280
Charles Hodges v State Compensation Insurance fund & Anor (2001) MTW CC 1
Esher in Read v Brown (1888) 2 QBD 128
Falobi v Falobi (1976) 1 NMLR 169
Hunter v Chief constable of West Midlands Police (1982) HC 529
Lam v Baldeh & Ors (1997-2001) GR 976
Lonvlo Ltd v Shell petroleum Co. Ltd (No. 2) (1982) AC 173
Mabinuori v Ogunleye (1970) ALL NLR 17
Mohammad Sissoho v Inspector General of Police (2002-2008) 1 GLR 356
State v Abdoulie Conteh (2002-2008) 1 GLR 150
Tkike v Legal Practitioners Disciplinary Committee Vol. 22 NSCQR 1063 at 1071
United Democratic Party (No. 3) & Ors v Attorney General (No. 3) & Ors (1997-2001) GR 810

Statutes referred to:

Constitution of the Republic of The Gambia 1997 Section 22(2) (a), 127, 130(4), 132(1), 149(2) (b), 193(3) (e), 231(1) & (2)
Criminal Procedure Code Cap 12:01 Laws of The Gambia 1990 Section 145 (1), (4)
Licenses Act Cap 92:01 Vol. 15 Laws of The Gambia 1990 Sections 3, 9, 11(2), 12, 19(1) & (2), 22(1) & (2)

Book referred to:

Law Dictionary, Barroon, 2nd Edition

APPEAL from the Ruling of the High Court delivered on 25th May 2008 striking out the plaintiff's suit on the ground that it did not disclose a reasonable cause of action. The facts are sufficiently stated in the opinion of Ota JCA.

J. R. Sallah-Njie for the appellants
M. N. Bittaye for the respondent

OTA JCA. The appellant Kanifing Municipal Council sued the Respondent, International Bank for Commerce (Gambia) Limited (IBC) in the High Court of The Gambia by way of writ of summons issued on the 3rd day of December, 2002, in civil suit No. 248/2002, wherein Appellant claimed against the Respondent inter alia as follows:

1. The sum of D100, 000 being the amount due to the plaintiff for the payment of Trade License for the year 2002 and unpaid contrary to the Licenses Act Cap 92.01 Volume XL Laws of The Gambia 1990.
2. The sum of D200, 000.00 being the amount of arrears due to the plaintiff for the payment of Trade License for the year 2001 contrary to the Licenses Act Cap 92.01 Laws of The Gambia 1990.
3. Costs.
4. Such further or other orders as this Honorable Court shall deem fit.

Pleadings were filed and exchanged. The Appellant filed a statement of claim dated the 27th day of November 2002, the Respondent filed a statement of defence dated the 19th day of March 2003 and thereafter, Respondent filed a motion dated the 23rd day of June, 2003, and filed on the 25th of June, 2003, seeking for a dismissal of the suit in limine, on 2 grounds namely.

1. That the statement of claim discloses no reasonable cause of action against the defendant.
2. That the suit is otherwise incompetent.

This application is supported by a 4 paragraph affidavit, sworn to by one Amadou Kunjo resources officer of the Respondent, on the 25th of June 2003, attached thereto is exhibit AK1. For their part, the Appellant filed an affidavit in opposition of 7 paragraphs, sworn to by one Faburama Jammeh, legal clerk, on the 23rd of May 2006. When this application came up for hearing before the High Court on the 23rd of May, 2006, counsel on both sides declined to offer any arguments; rather they adopted the argument they preferred in another case, civil suit number 259/2007, between the Appellants and Social Security and Housing Finance Co-operation, then pending before the same High Court on the same issue. In her Ruling delivered on the 25th of May 2006, the Learned Trial Judge held that the word ''shall'' in Section 19 (1) of the licensing Act, "clearly indicates that a person liable must be criminally liable. There is no indication that civil proceedings can be instituted to ensure compliance with Section 19(1) in addition to or as an alternative. In light of such clear intention the court cannot presume that there is authority to institute civil proceedings. If the Plaintiff wants authority to institute civil proceedings, then they must seek the relevant amendment to Section 19(1) by an Act of the National Assembly, that means an Amendment by statute not by bye-laws or otherwise".

In conclusion, Learned Trial Judge held that no reasonable cause of action against the defendant had been disclosed by the statement of claim and proceeded to strike out the suit as being incompetent. Being dissatisfied with this decision, the appellant herein, appealed to this court via notice of appeal filed on the 6th of June 2006, on the following grounds as contained in the Amended notice of appeal filed on the 23rd of November 2007:-

1. That the Learned Trial Judge erred in law when she held that the writ of summons and statement of claim disclosed no reasonable cause of action when Section 3 of the Licenses Act Cap 92.01 of the Laws of The Gambia which makes it mandatory for the appellant to recover such licenses fees.
2. That the Learned Trial Judge misdirected herself on the meaning and effect of section 3 of the Licenses Act Cap 92.01 of the Laws of The Gambia on the issue of which process or

procedure the appellant needed to follow in recovering licenses fees.

3. That the Learned Trial Judge misdirected herself when she failed to appreciate that because the appellant has a statutory mandate to recover the said license fees, it has civil right of claim in respect thereof and thereby has a cause of action in recovering same.
4. That the Learned Trial Judge was wrong in law when she held that the only option open to the plaintiff is by instituting criminal proceedings against defaulters.

The appellants filed their brief of argument on the 23rd of November 2007, wherein appellants Counsel Touray formulated 2 issues for determination to wit.

1. Whether by virtue of the provisions of the licensing Act the appellant does not have a statutory right to recover license fees within its municipality.
2. Whether the appellants are limited to only the criminal process in enforcing the provisions of the licensing Act.

On the first issue the appellants contended that Section 3 of the Licenses Act Cap 92.01 of the Laws of The Gambia, established a right in the appellants to collect license fees, and Section 19(1) of the License Act which creates an offence for failure to pay the said tax is complimentary to Section 3. Counsel Touray submitted that it is a matter of discretion on the part of the appellant what form of action whether criminal or civil to pursue as section 19 does not preclude the pursuance of any form of civil remedy. Furthermore, that Section 231(2) of the Constitution confers on the appellants all the rights and powers for the enforcement of the rights granted to it by Section 193(3) (e) of the Constitution of The Republic of The Gambia. Counsel also referred the Court to the provisions of Sections 149(2) (b) and 22(2) (a) of the Constitution.

On the second issue Counsel submitted, that in light of his argument in issue 1, that it is obvious that the appellant is not limited to only the criminal process in enforcing the provisions of the Licenses Act as regards the payment of license fees. Therefore, the ruling is erroneous and cannot be supported and should be set aside.

For their part the Respondents filed their brief on the 7th of July 2008, wherein learned counsel for the respondents, Counsel Amie Bensouda, formulated one issue for determination to wit "whether the statement of claim in civil suit number 259/2002 discloses reasonable cause of action against the Defendant/Respondent." Counsel contended that the clear and unambiguous meaning of Sections 9, 11(2), 19(1) and (2) of the Licenses Act Cap 92.01 Laws of The Gambia 1990, is that any person committing a breach of any of the provisions of the Act shall be guilty of an offence and shall be liable on summary conviction to a fine or imprisonment with or without hard labour. She submitted, that the Licenses Act does not expressly or impliedly indicate that civil proceedings can be instituted to either ensure compliance with the Act or to recover license fee. Counsel contends that the Licenses Act is made by parliament and is consistent with the powers given to the National Assembly vide Section 193(3) (e) of the Constitution. That sections 231(1) and (2) of the constitution as well as Sections 149(2) (b) and 22(2) (a) of the constitution are not applicable to this case. She relied on the case of United Democratic Party (No. 3) & Ors v Attorney General (No. 3) and Ors (1997-2001) GR 810 at 812 and urged the court to dismiss the appeal with substantial costs.

I have considered the totality of the argument preferred by counsel on both sides in their respective briefs of argument. I have also taken into consideration the issues for determination formulated by counsel in the said brief. I find that the issues are in substance the same. However I prefer issue No. 2 formulated by the appellants and the lone issue formulated by the Respondent. I adopt these issues as mine and will proceed to treat them seriatim as follows:

1. Whether the appellants are limited to only the criminal process in enforcing the provisions of the Licenses Act.
2. If the answer to 1 above is in the negative whether the statement of claim in civil suit number 259/2002 discloses reasonable cause of action against the Defendant/Respondent

However before determining these issues, I find a need to observe here that the Trial Court failed to follow the proper procedure, when at the Courts sitting on Tuesday 23rd May 2006, the court conceded to the

application of counsel in this case to use the argument preferred by counsel in civil suit No. 259/2002, between the Appellants herein, and Social Security and Housing Finance Cooperation, in determining the motion of the 23rd of June 2003, without first consolidating the two applications. It is my humble view that since there is some common question of law in each of the actions which could be conveniently disposed of in the same proceedings that the two proceedings ought to have been consolidated, if the proceedings in one were to be adopted in the other. The Trial Court failed to do this. In spite of the foregoing observation, since none of the parties took objection to this fact, this court will treat the error in procedure as a mere irregularity that should not vitiate the entire proceedings. This is in line with the current judicial trend that Courts pay heed to the substance of a case rather than on forms, formalities and technicalities, reliance on which could lead to outright injustice. See *The State v Abdoulie Conteh* (2002-2008) 1 GLR 150 and Antoine Banna v Ocean View Resort Ltd. & (2002-2008) 1 GLR 1. The above said and done, let us now consider the substance of this appeal.

ISSUE 1

Whether the appellants are limited to only the criminal process in enforcing the provisions of the License Act.

I find it convenient to commence this exercise from paragraph 3.2 and 3.3 of the Respondents brief, wherein the Respondent submitted thus 3.2 “it is our submission that the words of the Licenses Act, Cap 92.01, Laws of The Gambia, and in particular Section 9, 11(2) 19(1) and (2) of the said Licenses Act are clear and unambiguous. It is trite law that where words are clear and unambiguous they must be given the plain and ordinary meaning. We urge the Court to hold that the plain and ordinary meaning of Sections 9, 11(2), 19(1) and (2) of the said Licenses Act is that any person committing a breach of any of the provisions of the Act shall be guilty of an offence and shall be liable on summary conviction, to a fine and or imprisonment with or without hard labour.

3.3. It is to be noted that the Licenses Act clearly and expressly indicates that a person must be criminally liable. There is no single provision in the Licenses Act that expressly or impliedly

> indicates that civil proceedings can be instituted to either ensure compliance with the Act or to recover license fee. The Act further provided vide Section 19 (2) that in the event that any person required by law to pay license fee fails or neglects to pay the same, criminal proceedings are to commence against the person and if convicted, the Court, in addition to other punishment which it may inflict, shall order the convicted person to pay into the court to the credit of the appropriate licensing Authority an amount not exceeding three times the proper license fee for one year payable in respect of the calling on account of which the conviction was obtained".

Now it is obvious from the record of proceedings in this case as well as that in Civil Appeal No. 26/2006 (i.e. civil suit No. 259/2000) which proceedings the parties adopted in their argument of the motion before the lower court, that the provisions of the Licenses Act Cap 92.01 Laws of the Gambia 1990, particularly Section 3 and 19 thereof, came under heavy scrutiny and contention, both at the trial nisi prius and in this appeal. There is no gainsaying the fact that the Kanifing Municipal Council is a creation of statute. The operations and activities of the Kanifing Municipal Council are therefore regulated within the ambits of the enabling statute which is the Licenses Act Cap 92.01 Laws of The Gambia 1990. It is therefore to this enabling statute that the court must of necessity have recourse in a bid to determining the ambits of the operations of the Municipality. Section 3 of the Licenses Act Cap 92.01 provides thus:-

> "Every person following or exercising any of the callings enumerated in column 1 of the second schedule to this Act within the area of jurisdiction of any Licensing Authority whether jointly with any other calling or otherwise and whether on his own behalf or on behalf of any other person or firm, shall take out a license so to do, and shall pay therefore the license fee at the rate set out in column II of the said schedule applicable to the area in which he is following or exercising such calling, and such fees shall be paid into and form part of the revenue of the local authority constituting the licensing authority".

From the foregoing provision, it is incontrovertible that the Kanifing Municipal Council is a Licensing Authority statutorily empowered to raise revenue for the Local Authority by way of collection of license fees within its municipality. This function of the Kanifing Municipal Council is recognized by Section 193(3) (e) of the constitution of the Republic of The Gambia, 1997. It is also obvious from item 48 of the 2nd schedule to the licenses Act that Bankers, to which calling the Respondents belong, is one of those under an obligation to pay license fees to the municipality. The bone of contention between the parties is the ways and means or method by which the municipality proceeds to recover the said license fees. In respect of their contentions on this issue the parties have beamed considerable search light on the provisions of Sections 19 (1) and (2) of the Licenses Act. Whilst the Respondent maintained both at the trial nisi prius and in this appeal, that Sections 19 (1) and (2) criminalized the wrong of non-payment of License fees the only option therefore open to the appellants is to pursue their cause of recovery through the criminal and not civil process, the Appellants on the other hand, take the stance, that in as much as section 19 (1) creates a criminal offence, the municipality however has a discretion as to how to exercise its rights either by way of criminal or civil proceedings.

It is imperative for me therefore to consider the provisions of Section 19 of the Licenses Act which provides thus:-

> "Any person carrying on or exercising without a license any of the callings enumerated in column I of the second schedule to this Act for which a license fee has been prescribed or, if a licensee, contrary to the conditions of his license and any person otherwise committing a breach of any of the provisions of this Act shall be guilty of an offence and shall be liable, on summary conviction to a fine not exceeding five hundred dalasis or to imprisonment with or without hard labour for a term not exceeding six months or to both such fine and imprisonment.''

And its subsection (2) provides that:

> ''Upon any conviction for trading without a license under sub section (I) of this section, the court in addition to any other punishment which it may inflict, shall order the convicted person to pay into the court to

> the credit of the appropriate licensing Authority an amount not exceeding three times the proper license fee for one year payable in respect of the calling on account of which the conviction was obtained".

From the foregoing provisions of Cap 92.01, and as rightly submitted by learned counsel for the Respondents in paragraph 3.2 of the Respondents' brief of argument, that any person committing a breach of any of the provisions of the Act shall be guilty of an offence and shall be liable, on summary conviction to a fine and or imprisonment with or without hard labour. The Act therefore criminalized the offence of non compliance with its provisions. This leads us directly to the next question which is whether the mere fact that the Licenses Act imposed penal remedy for non payment of license fees, deprived the Appellants of the right of recovery through any other process. It is my view that we must not loose sight of the primary objectives for the establishment of the Licensing Authorities, one of which is to collect revenue for the local authority by way of license fees. The revenue of the municipality includes license fees. The object of the Act is to identify those doing business within the municipality, to regulate their activities and generate revenue for the Council. The duty owed therefore is to the members of the local authority via the municipality. The Appellant is vested with the statutory right to collect license fees (see Section 3 of the Licenses Act). The Municipality is therefore entitled to be paid such fees. A person entitled to any payment is at liberty to take any lawful measure to enforce such payment. Methods of enforcement adopted by the Council usually include recovery by debt collectors, administrative action, public funds recovery actions, criminal or civil process. Let me say here that the wrong of non-payment of license fees is an act or omission which gives rise to both criminal and civil remedies. This is because the license fees are statutory debts owed the Appellant by the Respondent. The victim of the wrong, the appellants herein, therefore have the discretion to recover either through the civil or criminal process or even administratively as the case may be, which avenue it is obvious that the Appellants herein explored by their demand for payment by service of trade invoice license on the respondent which caused the respondent to pay D100, 000 dalasis to the appellants leaving the balance allegedly owed. This fact is clearly borne out of the pleadings filed in this case. It is imperative, in

determining whether or not Parliament intended other areas of enforcement of the duty, that proper regard must be paid to any administrative procedure created for the enforcement of that duty. It is my considered view that the License Act itself by its Section 22 (1) and (2) recognizes the administrative avenue as a means of collection of license fees. In that it permits the minister by an order published in the Gazette, to prescribe arrangements for the license fees to be collected by an officer of the Government of The Gambia or by another licensing Authority after due consultation with the municipality. The Act therefore recognizes an alternative means of recovery or enforcement of its provisions. What councils like the municipality usually do is that they engage the services of private debt recovery consultants to recover their license fees. It is not right therefore for the Respondent, to contend and for the Trial Court to uphold the contention, that because section 19 (1) makes the wrong a criminal offence and because section 19 (2) gives the criminal Court the mandate to order payment of three times the license fees accrued after a conviction of the offender, that the appellant is therefore restricted to recovery only by means of a criminal action. This contention is not only wrong in law but stands to defeat one of the purposes for which the municipality was established. I hold this view because apart from the fact that the burden and standard of proof are not the same, in criminal and civil trials, the triable issues and reliefs in the two types of trials are also not the same. Consequently, it is possible for the plaintiffs claim in a civil suit to succeed, while a subsequent criminal prosecution on the same set of facts will fail to secure a conviction. This Court expressed this view in the case of *The State v Abdoulie Conteh* (supra). See also *Hunter v Chief Constable of West Midlands Police* (1982) HC 529 at 541,544 and 575, *Bryant v Collection of Customs* (1984) 1 NLR 280 at 284-285, *Charles Hodges v State Compensation Insurance Fund & Anor*. (2001) MTW CC 1. I hold the firm view that a statutory body vested with the statutory mandate of recovery of revenue must be at liberty to exercise its rights of recovery through any avenue or channel most advantageous to it. If criminal action which requires a stricter burden of proof were to be the only avenue of recovery, the danger is that if the victim fails to discharge the burden of proof and the culprit is discharged and acquitted, the victim would be precluded from recovery of the amount owed, even where there is abundant evidence of the debt owed. This certainly could not be the intention of legislature. I

hold the view that the mere fact that Section 19 (2) mandates the Court, after a criminal trial and conviction, to order the culprit to pay three times the license fees due to the Municipality, is a form of recognition by the Act, that the breach of the statutory duty by the offender occasioned damage to the Municipality requiring compensation. This in itself vests a right of recovery in civil remedies on the Municipality. I say this because implicit in the provisions of section 145 (1) of the Criminal Procedure Code Cap 12.01 Laws of The Gambia 1990 (CPC), as amended by Section 2 of the Criminal Procedure Code (Amendment decree) No. 86 of 1996, which provides for payment of compensation to victims of crime in lieu of damages or monetary reliefs available to them by civil action, is that the penalization or criminalization of an act or omission by a statute does not exclude the right of the victim of such act or omission from enforcing his right by civil action.

Section 145 (1) (as amended by Decree no. 86 of 1996) provides thus:-

> "When any accused person is convicted by any Court for any offence not punishable with death and it appears from the evidence that some other person, whether or not he is the prosecution or a witness in the case, has suffered material loss or personal injury in consequence of the offence committed and that substantial compensation is, in the opinion of the court, recoverable by that person by civil suit, such Court may in its discretion and in addition to any other lawful punishment, order the convicted person to pay to that other person such compensation as the Court deems fair and reasonable."

The rationale behind the provision of section 145 (1) of the CPC (as amended) is that if the criminal court can conveniently determine the civil remedy that can be recovered by the victim of a crime, that it should not be precluded from doing so. This provision is in line with common sense and substantial justice as well as the current judicial trend that Courts should adopt procedures that will save time and money. It alleviates the rigors and expense, not to talk of the unnecessary delay that a separate civil trial commenced after the criminal trial would occasion. This provision which is akin to that of section 19 (2) of the Licenses Act does not preclude civil action, but makes provision for compensation of any

loss suffered by a victim of a criminal action in lieu of a civil action. This is clear from the provision of section 145 (4) of the CPC which states "At the time of awarding any compensation in any subsequent civil suit relating to the same matter, the court hearing the civil suit shall take into account any sum paid or recovered as compensation under this section." Implicit from the phraseology of this provision, is that in spite of having received compensation in the criminal trial, the victim of an offence is still at liberty to institute civil action on the same matter and be compensated therein. However, the Court in awarding compensation in the subsequent civil action must take cognizance of the compensation awarded in the criminal trial. See the decision of this court in Mohammad Sissoho v Inspector General of Police (2002-2008) 1 GLR 356.

It is for the above reasons that in as much as I agree with the Learned Trial Judge and the Respondents, that sections 9, 11 (2) and 19 (1) and (2) of the licenses Act imposed criminal liability for non-payment of license fees, I however disagree with them that the only option therefore open to the Appellants is to pursue their cause by means of a criminal action. To hold this narrow and restricted view of the extent of the power of recovery available to the Appellants would defeat the due course of justice. More to this is the fact that, the Act itself does not preclude civil proceedings as a means of recovery. The Respondents submitted in paragraph 3.3 of Respondents brief of argument "that there is no single provision in the Licenses Act that expressly or impliedly indicates that civil proceedings can be instituted to either ensure compliance with the Act or to recover License fee". They however lost sight of the fact that there is also nowhere in the Act where civil action is precluded. I find that the Lower Court was therefore wrong to impute words into the provisions of the License Act. I find in light of the totality of the foregoing, and with due respect, that the Trial Court therefore misdirected itself when it held thus:

> "There is no indication that civil proceedings can be instituted in addition to or as alternative to section 19 (1). In light of such clear intention to take criminal action indicated by Section 19 (1), the court cannot presume that there is authority to institute civil proceedings. If the plaintiff wants authority to institute civil proceedings, then they must seek the relevant amendment of section 19 (1) by an Act of the National Assembly – that means an Amendment by Statute not Bye – Laws or otherwise".

It appears to me that the Learned Trial Judge in reaching her conclusions fell into the error of relying on the general principle propagated by the house of lords in the case of *Lonrho Ltd. v Shell Petroleum* Co. Ltd. (No. 2) 1982 AC 173. In that case, Lonrho sought compensation from the defendants, their competitors in the oil trade, they alleged that they (Lonrho) had suffered heavy losses because they complied with order in council prohibiting trade with the illegal regime in South Rhodesia, while the defendants flagrantly flouted those sanction orders. Lord Diplock, with whom the rest of the House concurred, reasserted the "general rule" that liability for violation of a statute is as follows:-

> ''…Where an Act creates an obligation, and enforces the performance in a specified manner … that performance cannot be enforced in any other manner … where the only manner of enforcing performance for which the Act provides is prosecution for the criminal offence of failure to perform the statutory prohibition for which the Act provides, there are two classes of exceptions to this general rule."

The first exception propagated by the House of Lords is "where on the true construction of the Act is apparent that the obligation or prohibition was imposed for the benefit or protection of a particular class of individuals. The second exception arises "where the Statute creates "a public right" and a particular member of the public suffers particular direct and substantial damage other than and different from that which was common to all the rest of the public. It is imperative for me to say straight away here that the Lonrho case is not applicable to the instant case because the facts of the Lonrho case are completely different from this one. The rational for the Lonrho decision is that the orders in council prohibiting trade with Rhodesia were designed to bring down the illegal regime and not to benefit or protect traders such as Lonrho. In the case instant, the object of the licenses Act is to enforce the activities of the municipality. The Municipality which is statutorily mandated to collect license fees is therefore at liberty to enforce its operations whichever way it chooses. Furthermore, I find a need to admonish that Courts must exercise a lot of caution in placing reliance on English decisions especially where local legislations have made it abundantly clear that a

different intention was anticipated. In the present case the combined effects of section 3, 19 (2) and 22 (1) & (2) of the licenses Act as well as section 145 of the CPC (as amended) show clearly that the intention of legislature was not that the Municipality should be restricted to only the criminal action in the enforcement of its activities.

Issue No.1 is therefore resolved in favour of the Appellant on these premises

ISSUE 2

If the answer to ISSUE 1 is in the negative whether the statement of claim in civil suit number 259/2002 discloses a reasonable cause of action against the Defendant/Respondent?

The phrase cause of action constitutes the fact or combination of facts which gives rise to a right to sue. It consists of the wrongful act of the defendant which gives the plaintiff his cause of complaint and the consequent damage. When facts establishing a civil right or obligation and facts establishing infraction or trespass on the right and obligation exist side by side, a cause of action is said to have accrued. See the Supreme Court of Nigeria cases of *Falobi v Falobi* (1976) 1 NMLR 169 and *Adesokan v Adegorolu* (1997) 3 SCNJ 1 at 16. A cause of action has also been described by Lord Esher in *Read v Brown* (1888) 2 QBD 128 CA as "every fact that would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court" see also the case of Lam v Baldeh & Ors (1997-2001) GR 976 it is trite learning that it is to the writ of summons and statement of claim that the Court must revert in determining whether there is a cause of action. It is the entire circumstances as disclosed in the statement of claim and not just a part of the circumstances stated therein which gives rise to a right to sue for a particular relief(s). Each of the facts giving rise to the cause of action should have come into being before the suit commenced. If not the suit will be premature and incompetent. See *Adesokan v Adegorolu* (supra). In the instant appeal, the Appellants filed a statement of claim dated the 27th day of November 2002 at the lower court (see pages 3 and 4 of the record of proceedings) wherein the Appellants alleged inter alia as follows:-

1. The Plaintiff is and was at all material times the local government authority for the Kanifing Municipality in Serrekunda, Kombo Saint Mary's Division, The Gambia.
2. The Defendant is and was at all material times in the business of Banking with its head office at No. 11A Liberation Avenue, Banjul and branches with the Kanifing Municipality.
3. By virtue of The Licenses Act Cap 92.01 Volume IX Laws of The Gambia 1990, the defendants are required at all material times to pay for and be issued license for each of their businesses operating within the Plaintiff's Municipality at the beginning of each year. The said Licenses Act is hereby pleaded.
4. The Plaintiffs had also on the 19th and 29th day of January 2001 served on the defendants a trade license invoice for the amount of D100, 000.00 (one hundred thousand dalasis) respectively for their Serrekunda and Bakau Branches. The said notice is hereby pleaded.
5. The Defendant has failed and/or refused to pay for the said license as per the trade license invoice issued and mentioned supra, whilst at the same time operating illegally within the Plaintiff's Municipality and despite repeated demands to do so.
6. The Plaintiffs had again on the 30th day of April 2002 served on the defendants a trade license invoice for the amount of D200, 000.00 (two hundred thousand dalasis) for their branches at Serrekunda and Bakau.
7. The defendant then made a payment of D100, 000.00 (One hundred thousand dalasis) and thereby leaving a balance of D100, 000.00 (One hundred thousand dalasis) which they have still failed and/or refused to pay.
8. The plaintiffs had also caused their legal representative to write a letter to the defendant demanding the payment of the said amount of D300, 000.00 (three hundred thousand dalasis) but to no avail. Letter dated the 27th day of May 2002 is hereby pleaded.
9. The defendant still failed and/or refused to pay license for the operation of their said business on their branches within the Plaintiff's Municipality to date.

The Plaintiff's claim is for:

1. The sum of D100, 000.00 being the amount due to the Plaintiffs being the balance due for the payment of Trade License for the year 2002 contrary to The Licenses Act Cap 92.01 Volume XL Laws of The Gambia 1990.
2. The sum of D200, 000.00 being the amount of arrears due to the Plaintiff for the payment of Trade License for the year 2001 contrary to the Licenses Act Cap 92.01.
3. Costs.
4. Such further or other orders as this Honourable Court shall deem fit.

I have already held in issue number one that the Appellant is a statutory body mandated by Section 3 of the Licenses Act Cap 92.01 to raise revenue by collection of license fees in the Kanifing Municipality. The allegation in the statement of claim is that the Respondent which is a Bank operating branches within the Kanifing Municipality is required by the Licenses Act to pay for and be issued license for each of their businesses operating within the Municipality. That the Appellants had on several dates and times served trade license invoices on the Respondents, that the Respondents made part payment of the amounts owed the Appellants but have failed or refused to pay the balance, which necessitated the Appellants to commence this action against the Respondents at the Lower Court after making due demands for payment.

It is my humble view that once the statement of claim has alleged that the Appellants have a right to collect license fees within its municipality and that the Respondents who operate several branches of its banking business within the Kanifing Municipality is under an obligation to pay license fees to the Appellants, but has defaulted in the payment of said license fees without lawful consent or permission thereby infracting on the rights of the Appellants, that a cause of action arose in this suit and I so hold.

In light of the totality of the foregoing I will allow this appeal. The decision of the High Court of The Gambia entered in CS No. 248/2002, on the 25th of May, 2006, is hereby set aside. This case is referred back to the High Court for trial before another High Court Judge. Costs of D10, 000 is awarded to the Appellants.

Agim PCA: The present Appeal has its origins in civil suit no. 26/2006 commenced in the High Court by the Appellants herein (Kanifing Municipal Council) against the Respondents herein, (Social Security and Housing Finance Corporation), vide writ of summons issued on the 23rd day of December 2003 in CS No. 259/02, which the Appellants claimed against the Respondents inter alia as follows:-

1. The sum of D100, 000.00 (One hundred thousand dalasis) being the amount due to the plaintiff for the payment of Trade License as parastatals operational fees for the years 1992/93 to 2002 contrary to the Licenses Act (Amendment of second schedule) Order 1992.
2. Costs.
3. Such further or other orders as to this Honourable court shall deem fit.

Pleadings were duly filed and exchanged. The Plaintiffs/Appellant herein filed a statement of claim dated the 11th day of December 2002. For their part the defendants filed a statement of defence on the 19th day of March 2003. Thereafter, the defendants/Respondents herein filed a motion dated the 27th day of June 2003, praying for the Court to dismiss this action in limine on the following grounds:-

(1)That the statement of claim discloses no reasonable cause of action against the Defendant.
(2)That the suit is otherwise incompetent.

The application is supported by a 4 paragraph affidavit sworn to by one Adama Touray, legal clerk of Amie Bensouda, attached thereto is Exhibit AT1. The Plaintiff/Appellant for their part filed an affidavit in opposition of 7 paragraphs, sworn to by one Faburama Janneh, legal clerk, sworn on the 23rd day of May, 2006. The Learned Trial Judge heard arguments on this application on the 23rd of May 2006. She delivered her Ruling in respect thereof on the 25th of May, 2006, wherein the Learned Trial Judge dismissed the suit in limine, on grounds of incompetence, on her conclusions that since Section 19 (1) of the Licensing Act prescribed penal sanctions for the breach of the statutory duty of payment of licensing fees, that criminal action was the only redress open to the

Appellants. In her own words at page 35 of the record of proceedings "in light of such clear intentions to take criminal action indicated by Section 19 (1), the Court cannot presume that there is authority to institute civil proceedings. If the plaintiffs want authority to institute civil proceedings, then they must seek the relevant amendment to Section 19 (1) by an Act of the National Assembly – that means an Amendment by Statute not by Bye- Laws or otherwise." Following this decision the Appellants filed a Notice of Appeal filed on the 6th of June, 2006 upon the grounds reproduced in the lead judgment herein.

I read the draft of the judgment rendered by my Learned Sister, Esther A. Ota JCA. I agree with her reasoning and conclusions.

The expressed object of the Licenses Act Cap 92:01 Vol. XXXI of the Laws of The Gambia 1990 is to regulate trading and to provide for the licensing of certain trades, professions and occupation. It is implicit from the entire tenor of this Act particularly Sections 3 and 21 of the Act that it is also an object of the Act that the Local Government and Area Councils should raise revenue from the commercial activities going on within their domain. To realize their objects, the Act vested on the respective Councils the power to regulate the trading activities in their domain by the issuance of trade licenses. For this purpose such council is described as the Licensing Authority within its domain. Section 3 of the Act provides that every person carrying out any of the commercial enterprises listed in Column I of the Second Schedule of the Act shall take out a license to do so and shall pay therefore a license fee at the rate specified in Column II of the Second Schedule of the Act. It goes further to state that such fees shall be paid into and form part of the revenue of the local authority constituting the licensing authority. Section 3 of the Act therefore makes license fees a source of revenue for the Council and by virtue of that provision, license fees as due from any person carrying business within the area of jurisdiction of any licensing authority form part of the revenue of the Local Government or Area Council constituting such Licensing Authority.

The defendant is a banker carrying on banking business in Banjul, Bakau and Serekunda. The defendant in paragraph 2 of its statement of defence state that it operates "two branches in the Kanifing Municipality at Bakau and Serekunda." It thereby conceded that Bakau and

Serekunda are within the area of jurisdiction of Kanifing Municipality as alleged by the plaintiff. The business of bankers is listed as item 48 in Column I of the Second Schedule of the Act. The defendant in paragraphs 2, 6 and 8 contended that it was liable to pay license fees to the defendant in respect of its operations in Kanifing Municipality under the Licenses Act. The defendant has been paying a license fee of D100, 000 per year for operating in Kanifing Municipal Area. The plaintiff has brought this suit contending that the defendant is liable to pay D100, 000 for each branch of the defendant in its area and not D100, 000 for its entire operation and claimed for amounts representing what it demands the defendant should have paid to cover its two branches in Kanifing Municipal Area. The issue that fell for determination in that suit and upon which the entire suit was to be resolved was whether within the terms of the Licensing Act the plaintiff was entitle to collect license fees for each branch of the defendant or one license fee for its activities in the Kanifing Municipal Area. The Trial Court never had the opportunity to determine this issue because the defendant by a motion on notice raised an objection in demurer contending that the plaintiff's statement of claim discloses no reasonable cause of action against the defendant and thus the suit is otherwise incompetent. The ground for the objection as stated in paragraph 3 of the affidavit in support of the motion and as canvassed in its argument of the objection is that license fees under the Licenses Act is not recoverable by civil proceedings. Both sides argued this point. The Trial Court upheld the objection on that ground and struck out the suit. Dissatisfied with that decision, the plaintiff has brought this appeal before us contending that it can recover license fees by civil action.

The Trial Court relied on Sections 3 and 19 of the Act for her decision. These provisions remained the basis of arguments by the parties in their brief. My Learned Sister, with commendable brilliance, has given their application in this case a very careful consideration. Let me add my own voice in support. I will start my consideration of this issue by asking the following questions as a compass for direction.

1. Is there anything in Section 3 of the Act prescribing how the Licensing Authorities shall recover unpaid license fees?
2. From the entire tenor of the Act, can it be said that the Act provided for or contemplated a particular method of collection of license fees.

3. Did the Act contemplate that the criminalization of non-payment of license fees should preclude the Licensing Authority from recovering unpaid license fees?

The answer to the first issue herein is that there is nothing in Section 3 of the Act prescribing how a Licensing Authority should recover unpaid license fees. With respect to the second issue it is clear from the entire tenor of the Act that it did not provide or contemplate a particular method of collection of license fees. The nearest it came to dealing with arrangements for collecting of such fees is in Section 22 of the Act which states that –

(1) "A Licensing Authority may, with the approval of the Minister, make arrangements for license fees to be collected on its behalf by an officer of the Government of the Gambia or by another Licensing Authority.
(2) Such arrangements may include provision for the deduction of an agency commission by the authority collecting such fees, which shall be deducted before the fees are paid to the Licensing Authority in accordance with Section 21 of this Act.
(3) The Minister may, by order published in the Gazette prescribe what arrangements shall be made under subsections (1) and (2) of this Section. Provided that before making such order the Minister shall consult the Licensing Authority or Authorities concerned."

This provision serves also to show that the Act did not provide for or intend that license fees must be collected by a particular procedure. The Learned Trial Judge in her ruling stated that "the law in Section 19(1) regarding the procedure to be followed when there is non-payment and to ensure payment is clear." I have read Section 19 (1) over and over and cannot find such a provision therein. The Learned Trial Judge read into Section 19 (1) words that it does not contain. It is not within the interpretative jurisdiction of a court to read into a provision words that are not there. The Courts in interpreting and applying statutes have a duty to pay heed to the text of every provision and take account of the words as they stand. It should not add any words. As the Nigerian Supreme Court held in *Mabinuori v Ogunleye* (1970) ALL NLR 17 to do so will amount virtually to amending the provision. This will amount to legislation, an exercise that a Court cannot and has no power to do. The act deals with

regulation of trading activities in the area within the jurisdiction of a Licensing Authority. It is not license fee collection arrangement. It is an offence creating section. The offence is committed once a person carries on business without license or fails to pay license fee for any year. Such default of a year constitutes an offence, distinct from a default for another year. There is nothing in the Act suggesting that the criminalization of non-payment of license fees precludes the Licensing Authority from using any other measures or arrangements including civil actions to recover unpaid license fees. It has been argued before us that by virtue of Section 19 of the Act, criminal prosecution is the only means of enforcing payment of license fees. Section 19 of the Licenses Act in its subsections (1) and (2) provides thus:-

> (1) "Any person carrying on or exercising without a license any of the callings enumerated in column I of the second schedule to this Act for which a license fee has been prescribed or, if a licensee, contrary to the conditions of his license and any person otherwise committing a breach of any of the provisions of this Act shall be guilty of an offence and shall be liable, on summary conviction to a fine not exceeding five hundred dalasis or to imprisonment with or without hard labour for a term not exceeding six months or to both such fine and imprisonment.''
>
> (2) ''Upon any conviction for trading without a license under sub section (I) of this section, the Court in addition to any other punishment which it may inflict, shall order the convicted person to pay into the Court to the credit of the appropriate Licensing Authority an amount not exceeding three times the proper license fee for one year payable in respect of the calling on account of which the conviction was obtained".

I have not seen anything in these provisions stating or suggesting in any way that criminal prosecution is the only method of enforcement of payment of license fees and I am not inclined to read such words or meaning into that provision. What Section 19(2) did is to vest the Court, in the exercise of its criminal jurisdiction, and upon convicting a person, accused of an offence contrary to Section 19(2), in addition to any other punishment which it may inflict, the power to order the convict to pay

compensation, of an amount three times the amount due as license fee for the year of default. It is clear from the provisions of Section 19(2) that the primary object of that provision is the determination of the guilt of the accused. The jurisdiction to order the payment of the amount stated therein, is only exercisable after the determination of the guilt of the accused for an offence under Section 19(1). This provision is in line with the whole tenor of Gambia Criminal Law to provide for the jurisdiction of a Court to order compensation for a person who suffers loss as a result of the offence of another. It is not a substitute for other recovery measures. See *I.G.P. v Momodou Sissoho* (supra). It is unreasonable to suggest that such compensation schemes in our penal statutes now constitute a hindrance to other means of remedy for losses suffered as a result of an offence. If such a victim like the appellant herein chooses to only recover the debt due to it and not set in motion a criminal process against the defaulter, it will be preposterous and against the current trend of encouraging restorative approach to justice to insist that the appellant must prosecute the defaulter if it must recover the fees. There is nothing in Section 19(2) saying or even suggesting that unpaid license fees cannot be recovered by civil process unless the offender is prosecuted and convicted for such non-payment.

Section 132(1) of the 1997 Constitution vest in the High Court the jurisdiction to hear all cases apart from the matters stated in Section 127 therein to be within the exclusive original jurisdiction of the Supreme Court. The recovery of trade license fees is not such a matter as stated in Section 127 of the Constitution. It is therefore within the jurisdiction of this Court as prescribed by Section 132 (1) of the 1997 Constitution. The decision of the Trial Court herein seeks to exclude this jurisdiction. It is trite that an exclusion of the jurisdiction expressly vested by the Constitution or Statute on a Court cannot be implied. Such exclusion must be expressed in a statute. This inveterate and hallowed principle has been the subject of unanimous judicial restatement in a long line of cases across jurisdictions.

There is nothing in the Licenses Act or any other statute expressly excluding the jurisdiction of the High Court to entertain civil proceedings for the enforcement of payment of license fees or the recovery of unpaid license fees. Therefore such exclusion as the Learned Trial Judge implied from the provision of Sections 3 and 19(1) or any provision of the

Licenses Act is in violation of Section 132(1) of the 1997 Constitution and is therefore illegal, unconstitutional and a nullity.

For all of the above reasons, I also allow this appeal. The ruling of the Trial Court in Civil Suit No.248/02 K. No.12 delivered on 25th May 2006 is hereby set aside. In keeping with the provisions of Section 130(4) of the Constitution which empowers this Court to exercise all the powers vested in the Court from which this appeal is brought when hearing and determining an appeal, I hereby declare that the said Civil Suit No.248/02 K No.12 discloses a cause of action as a civil suit to recover trade license fees can lie. The application to dismiss the claim for non disclosure of cause of action is hereby dismissed.

Wowo Ag.JCA: I have had the privilege of reading in advance the lead judgment read by my Lord E. Ota JCA. I entirely agree with her reasoning and conclusions. The claim of the plaintiff in the Lower Court which have been stated in the lead judgment and I see no need to restate them here. The Respondent after filing a statement of defence later filed a motion on notice before the Lower Court for the following orders:-

1. The Statement of claim discloses no reasonable cause of action against the defendant.
2. The suit is otherwise incompetent.

The Respondent relied mainly on the provision of Section 19(1) & (2) of the Licenses Act Cap 92:01 Vol. XXXI Laws of The Gambia 1990. The Lower Court while dismissing the Appellant's claim came to the conclusion that by virtue of Section 19(1) no civil proceedings can be instituted against the Respondent and that the only option open to the Appellant is to institute a criminal action against the Respondent. The provisions of Section 19(1) and (2) are clear and unambiguous and therefore must be given their ordinary and natural grammatical meaning. See *Alimi Lawal v G.B. Ollivant (Nig) Ltd* (1997) 3 SC 124. Similarly in determining the general object of legislation or the meaning of its language in any particular provision, it is obvious that the intention which appears to be most in accord with convenience, reason, justice and legal principles should, in all cases, be preferred to one that would produce an

unreasonable result or an absurdity. See *Ikike v Legal Practitioners Disciplinary Committee* VOL. 22 NSCQR 1063 at 1071.

The contention of the Respondent at the Lower Court was that the Appellant can only enforce their right to recover their debt by instituting a criminal action. This contention is a fact that the Respondent must prove. Section 19(1) and (2) which the Respondent relied on does not expressly or impliedly states so. Therefore it is clear that the Respondent failed to prove that civil remedy is not open to the Appellant. See Section 141(2) Evidence Act 1994.

According to Barron's Law Dictionary 2nd Edition Page 117 ''Debt'' is defined as "Money, goods or services owing from one person to another, an absolute promise to pay a certain amount on a certain date or an obligation of one person to pay or compensate another." By virtue of Section 3 Cap 92:01 the payment of licensing fee by the Respondent to the Appellant is an obligation and therefore it is a debt when due. Since it is a debt, the issue is whether the creditor can seek civil remedy to recover his debt. I respectfully state that there is no law that I am aware of that denies a person or authority from recovering a debt by civil proceedings. It is my view therefore that the Respondent has four options to follow when the debt is due. The first option is to institute a criminal action, the second option is to institute a civil action, the third option is to institute both criminal and civil action together and the fourth is administrative process. I state clearly that the institution of civil proceedings does not in any way deprive the Appellant from instituting criminal proceedings against the Respondent because the crime is alleged to have been committed after the debt is due and the Respondent refused or neglects to pay.

I also agree with my Lord E. Ota JCA when she rightly pointed out that the standard of proof is different between the criminal and the civil process. Since the standard of proof is different, there is the tendency that a person may fail to prove her case in the criminal case which is a higher burden and at the same time succeed in proving her case in a civil suit. See *State v Abdoulie Conteh* (supra) where this Court expressed a similar view.

In view of the above, I respectfully disagree with the Lower Court that the only remedy open to the Appellant to recover their debt is to institute criminal proceedings because this will seriously defeat the course of

justice as rightly pointed out in the lead judgment. In my opinion, a cause of action means a factual situation the existence of which entitled one person to obtain from the court a remedy against another person. Put differently, it is the act on the part of the defendant which gives the plaintiff his cause of complaint. See *Alese v Aladetuyi* (1995) 6 NWLR (Pt 403) 527 at 531 and A.G Kwara State v Olawale (1993) 1 NWLR (Pt 272) 645.

It is trite law that it is the writ of summons and statement of claim the Court must look into in determining whether there is a cause of action in a suit. The Appellant as plaintiff in the Lower Court filed a nine paragraphed statement of claim. I need not restate the nine paragraphs since it has been clearly stated in the lead judgment. But I will straight away say that from perusing the nine paragraph statement of claim, it is clear that the Appellant is demanding her debt owed by the Respondent and the Respondent has refused or neglected to pay. So clearly there is a cause of action against the Respondent. In light of the foregoing, I will allow this appeal. The decision of the High Court of the Gambia in Suit No.248/2002 entered on the 25th May 2006 is hereby set aside. The case is hereby referred back to the High Court for trial before another High Court Judge.

Appeal Allowed.
FLD.

MOMODOU M LEIGH v MOSHAM FISHERIES; AMADOU SAMBA

SUPREME COURT OF THE GAMBIA
(Supreme Court No. 3/2004)

3rd July 2008

Savage CJ, Mambilima JSC, Tobi JSC, Dotse JSC, Agim Ag. JSC

Appeal – Concurrent findings of fact – Instances when findings can be disturbed by the Supreme Court.
Contract – Jurisdiction of Court – Contractual relationship between counsel and client.
Court – Concurrent findings – Instances when findings can be disturbed by the Supreme Court.
Document – Construction of documents.
Interpretation – Literal and grammatical meaning of words in a document.
Practice & Procedure – Interpleader summons – Procedure to be adopt.
Words & Phrases – Meaning of the Latin maxim quid plantatur solo solo cedit.

Held, *dismissing the appeal (per Savage CJ, Mambilima JSC, Tobi JSC, Dotse JSC, Agim Ag. JSC concurring)*

1. The Court cannot hear any case at the pleasure of counsel and his client. The Court has no Jurisdiction to go into the contractual relationship between counsel and his client and enforce a contract in a matter that is not brought before the court for adjudication. That is clearly outside the adjudication of the Court. Unless it comes as an action and a relief sought accordingly.

2. The Court is bound to give the document its clear literal and grammatical meaning obtained from the face of the document. By this interpretation or Construction, the Court brings clearly to the fore, the Intention of the makers of the document, without muffing it.

3. Whatever is affixed to the soil belongs to the soil. The term "land" includes building thereon. [*Francis v Biotype* (1936) 13 NLR all; *Esenin v Edifice* (1964) ALL NLR 395; *Oslo v Olayioye* (1966) NMLR 329 referred to]

4. The Supreme Court will not disturb the concurrent findings of the High Court and the Court of Appeal, unless the findings are perverse. A perverse finding is a finding not borne out from the evidence before the Court. It is a finding which ignores the evidence before the Court. [*Aja v Okoro* (1991) 7 NWLR (Pt 203) 200; *Onamode v ACB Ltd* (1997) NWLR (Pt 480) referred to]

5. Interpleader Summons are creations of statute under relevant High Court civil procedure rules. It is therefore imperative that counsel in interpleader proceedings must comply with rules of civil procedure. What must be noted is that, there are prescribed and printed forms for the Sheriff or anybody acting on his behalf to use for such proceedings.

Statutes referred to:

The Gambian Constitution 1997 Sections 100, 120

Rules of Court referred to:

The Supreme Court Rules of 1999 Rule 17(4)

APPEAL from the Judgment of the Court of Appeal wherein Itam JCA held that what the Sheriff attached in pursuance of the Order for attachment was the land or premises together with all things thereon.

A. Joof-Conteh for the appellant
A.A.B. Gaye Esq. for the respondent

TOBI JSC. The facts of this case, as admitted by the Learned Trial Chief Justice and which resulted in the interpleader proceedings are simple and straightforward. It all started in a fishing vessel, MV TULUPAN No. 5. The appellant was employed in MV TULUPAN as a Fisheries

Inspector, whose duty was to check the tonnage of fish caught and the determination of whether the right size of nets were used. He earned D1500 per month. On 11th July 1990, appellant was assigned additional duties as a deckhand. He was to pack the fish in cartons and put them in the freezer. He was also to help pull the net. Five days later, and precisely on 16th July, 1990, he was asked to work as a winch man. He had not done the work of a winch man. He was told that if he refused to work as a winch man, he would have no lunch. As appellant needed his lunch badly, he succumbed to the threat. In the course of operating the machine, appellant was injured. He sustained fractures and dislocations. He sued the 1st respondent for negligence. The Learned Trial Chief Justice gave him judgment. He was awarded damages. Omosun CJ said at pages 46 and 47 of the Record that:

> "It is my judgment that the plaintiff has established a case of negligence against the defendant. I turn to the issue of damages. The plaintiff has asked for D500, 000 as damages for negligence. I make an award of D200, 000. He also asks for D2, 000,000 damages for pain and injuries. I will make him an award of D4, 500 being three months salary from the date of the accident – 16th July, 1990. I will award interest at the rate of 12½% from the date of the issue of the writ of summons till this day of the judgment and thereafter the statutory rate of interest applies until the judgment debt is satisfied. I award costs of D2, 500 to the plaintiff to be paid by the defendant."

In order to execute his judgment, the appellant caused a writ of fifa to issue. The Sheriff levied execution on Seafood Processing Plant which was in the premises of the 2nd respondent. The 2nd respondent filed an Interpleader Summons claiming that he owned the premises which housed Seafood Processing Plant. The Learned Trial Judge, Janneh J (as he then was) held that the Sheriff attached the property inclusive of what was on the land as a Seafood Processing Plant and never differentiated implement, equipment and machinery from the land. He held that the claimant, the interpleader, is the owner of the premises/property inclusive of the buildings and structures and also the things and articles on the land including the implement, equipment and machinery. He accordingly ordered the release of the same from attachment and delivery to the claimant.

An appeal to the Court of Appeal was dismissed. Delivering the judgment of the Court Itam JCA said at page 102 of the Record:

> "For the foregoing reasons, I feel compelled to agree that what was attached was the land or premises stated in Exhibit C together with all things thereon. For the avoidance of doubt, I see no iota of evidence whatsoever on the printed record to support the contention that what the claimant bought was an empty plot and that the plant was brought on the land by the Company in which the claimant was the majority shareholder."

Dissatisfied, the appellant has come to the Supreme Court. The appellant formulated two issues for determination:

> "1. What was in fact attached?
> 2. Who owned what was attached?"

Learned counsel for the appellant, Mr. M. Drammeh, holding brief for A. Joof-Conteh, submitted on Issue No. 1 that the Court of Appeal was wrong when it held that what the Sheriff intended to attach was the land or premises including the Seafood Processing Plant together with all things thereon. Relying on Exhibit C, learned counsel argued that there is no evidence of the Sheriff intention to attach any other items as held by the court. In accordance with practice, the appellant pointed out to the Bailiff the processing plant which was attached, and not the premises, learned counsel contended. Still on Exhibit C, learned counsel submitted that a court cannot add or subtract from anything in a document but must interpret its content accordingly. According to counsel, the Court of Appeal exceeded its power in interpreting Exhibit C. Learned counsel submitted that the Court of Appeal was wrong in assuming that what was to be sold was linked with what was attached when that was not the issue to be determined. He contended that the Court of Appeal was in error in the interpretation of Exhibit C. The date of sale was not an issue for the Court to determine, counsel opined. Learned counsel submitted that the Court of Appeal was wrong in shifting the burden of proof on the appellant who was not the claimant. It was the responsibility of the 2nd respondent/claimant to call the Bailiff to explain whether it was his

premises that was attached or the Seafood Processing Plant in the premises or whether any other items in the premises were also attached.

On Issue No.2, learned counsel contended that the Court of Appeal was wrong when it did not deal with the proof of ownership of the Seafood Processing Plant. Right through the proceedings the 2nd respondent did not adduce any evidence that he owned the Seafood Processing Plant and so there was not one iota of evidence of ownership, counsel argued. He claimed that the only evidence was that of the appellant who said on oath that when he visited the Fisheries Department he saw in the computer that the Seafood Processing Plant belonged to the 1st respondent, evidence which according to counsel, was not challenged. He urged the Court to allow the appeal.

The respondents did not file their statement of case as required by Rule 17 (4) of the Rules of the Supreme Court. Although the Rules provide for two weeks for the respondents to file their statement of case, this Court granted four weeks for them to do so, thereby using its discretion as provided for in Rule 17 (4). This was way back on 6th February 2008. When the matter came up for mention on 23rd June 2008 counsel holding the brief of A.A.B. Gaye informed the court that the statement of case was not filed because the respondents had not perfected the brief of counsel. The matter was adjourned to 26th June 2008 for counsel to file the statement of case or withdraw his appearance. Mr. Gaye came to court and asked for an adjournment to enable him file the statement of case. The court refused the application on the ground that it lacked merit. This court or any other court for that matter, cannot hear any case at the pleasure of counsel and his client. This Court or any other court for that matter has no jurisdiction to go into the contractual relationship between counsel and his client and enforce a contract in a matter that is not brought before the Court for adjudication. That is clearly outside the jurisdiction of the Court, unless it comes as an action and a relief sought accordingly. Contractual relationship between counsel and his client is a business for them. The application was refused and the matter was adjourned to 3rd July 2008 for Judgment.

I realize that counsel calls his statement of case "Appellant's Brief." There is no such expression or language in the Rules of the Supreme Court, 1999. I think the appropriate Rule is Rule 17 which provides for a statement of the appellant's case. While I may concede that the statement of case could perform similar function as brief, in some

jurisdictions like Nigeria, which provides for the brief system, counsel should call a spade its correct name of spade and not a machete because it is not. Even their constructions are different. I take it that the Appellant's Brief so named is the Statement of the Appellant's Case. I will so use it.

Learned counsel for the appellant has made so much storm in respect of the interpretation given by the Court of Appeal to Exhibit C. Let me reproduce it here for ease of reference. It is written in the long hand of a signatory I cannot decipher and is signed for the Sheriff of The Gambia and reads:

> "I seized, attached and took into my hands your Seafood Processing Plant situated, located at Old Jeshwang and pointed to me by the Plaintiff (M.M. Leigh) at Old Jeshwang K.S.M.D. The Gambia and whereas you fail to settle the amount due and payable to the plaintiff (M.M. Leigh) the Seafood Processing Plant will be sold after three solid calendar months as from this 13th day of July 1995. Date of sale will be the 13th day of October 1995 prompt or soon thereafter."

Interpreting Exhibit C, Itam JCA, said at page 101 of the Record:

> "On the first issue for determination I see no difficulty or confusion whatsoever as to what was attached. On a proper construction and appreciation of the Writ of Attachment which is Exhibit C at page 67 of the printed records, it is crystal clear that what the Sheriff attached or thought he was attaching was the Defendant/1st Respondent's Seafood Processing Plant situated, located at Old Jeshwang, K.S.M.D. pointed out to him by the Plaintiff/Appellant. The same applies to what was to be sold after three solid calendar months."

In the interpretation or construction of a document, the court is bound to give the document its clear literal and grammatical meaning obtained from the face of the document. By this interpretation or construction, the court brings clearly to the fore, the intention of the makers of the document, without muffing it. In view of the fact that courts of The Gambia cannot struggle for power or hegemony with the Legislature in the field of law making under Section 100 of the Constitution of the Republic of The Gambia 1997, their role is to interpret the Laws of The

Gambia under section 120 of the Constitution in line with the intention of the Legislature.

Was the Court of Appeal correct in its interpretation of Exhibit C above? My answer is an unequivocal yes. It is also clear to me that what the Sheriff attached was the "Seafood Processing Plant situated, located at Old Jeshwang K.S.M.D." Exhibit C does not say more. It does not say less too on the Seafood Processing Plant. The exhibit clearly zeroed on it as the property attached. I therefore cannot fault the Court of Appeal.
Learned counsel for the appellant devoted quite some part of his statement of case in drumming into our ears that the Court of Appeal was wrong in holding that what the Sheriff intended to attach was the land or premises including the Seafood Processing Plant. How did the Court of Appeal come about this expression of "intended" which is causing all the palaver in this appeal? I can trace the history to pages 101 and 102 of the Record where the Court of Appeal said, and I quote the Court in some detail:-

> "For purposes of clarity and ease of understanding, I will refer to some of the relevant findings on this issue by the Court below, which have not been challenged, attacked or controverted either in the grounds of appeal or otherwise, to wit:-
>
> (a) The judgment Creditor/Respondent (i.e. the Appellant) in turn gave evidence of the attachment of the fish processing factory and the preservatory cooler by the Sheriff's Bailiff – page 63 lines 27-28.
> (b) The interpleader summons and the affidavits in support contemplated that the property attached is the landed property situate at Old Jeshwang in which fish processing was carried on – p. 64 lines 6-8.
> (c) In my view when the Sheriff attached the "Seafood Processing Plant" he intended to attach the landed property inclusive of everything upon the Land and not only articles or things that are severable and or removable from the Land, page 65 lines 1-4.

(d) This re-inforces my conclusion that to the Sheriff the Land or premises and the Seafood Processing Plant were one and the same – page 65 lines 14-16
(e) The Court's view is that the Sheriff attached the premises/property inclusive of what was on the Land as the Seafood Processing Plant and never differentiated implement, equipment and machinery from the Land – page 66 lines 20-22."

As it is, the word "intended", which is causing all the trouble is contained in (c) above. The Court of Appeal was quoting what the Learned Trial Judge said at page 65 of the Record. Let me quote the Judge at the expense of prolixity:

> "In my view when the Sheriff attached the Seafood Processing Plant he intended to attach the landed property inclusive of everything upon the land and not only articles or things that are severable and or removable from the land."

The Court of Appeal pointed out in its judgment that the finding on (c) was not challenged, attacked or controverted either in the grounds of appeal or otherwise. Is the Court of Appeal correct in its conclusion that the finding in (c) was not challenged, attacked or controverted either in the grounds of appeal or otherwise? I think not. In Ground 1 of the Notice of Appeal in the Court of Appeal, appellant complained that "the Learned Judge misconstrued the evidence before the court and came to the wrong decision." The particulars stated as follows:

> "Whereas the Claimant bought the premises, it was an empty plot, and the Learned Judge did not take into account the fact that the plant was brought to the land by the company in which the claimant was the majority shareholder."

The above ground and particulars apart, learned counsel argued Exhibit C as an issue in the Court of Appeal when he said inter alia:

> "The foundation of this appeal is based on Exhibit C which can be found at pages 10 and 67. The words of Exhibit C are clear and

> unambiguous. It stated "I seized, attached and took into my hand your Seafood Processing Plant, situated, located at Old Jeshwang and pointed to me by the Plaintiff (M.M. Leigh). The Learned Trial Judge instead of looking at Exhibit C and giving it a strict interpretation fell into the same trap. Instead of looking at what was seized, he laid more stress on the date of the article … If the Bailiff had wanted to attach the premises, he would have said so in clear terms. He knew what he attached. He spelt it out in no uncertain terms. In spite of this, the Learned Judge ignored the explicit words of attachment in Exhibit C and went on to capitalize on the date of sale."

It is clear from the above that the Court of Appeal was clearly in error in coming to the conclusion that the finding (c) was not challenged, attacked or controverted. Counsel for the appellant did all the three either put together or put separately. It is common knowledge and common agreement that the Seafood Processing Plant is on the premises of the 2nd respondent. 1st respondent, said under cross-examination at page 57 of the Record:

> "The suit I filed was against Mosham Fisheries Company. I went to the premises. It was stated that the premises belongs to Amadou Samba."

This appeal touches on or relates to the common law maxim put in the Latin phraseology of *quid plantatur solo solo cedit* which means whatever is affixed to the soil belongs to the soil. Land, the material of earth, created by the Almighty God, is the simplest object of the largest property in any Legal System, including that of The Gambia. In this respect, the term "Land" includes buildings thereon. And so, the maxim applies in most common law jurisdictions (if I may so naively restrict my knowledge), subject only to the defence of equitable reliefs in appropriate cases. The maxim has been applied in a number of cases. In *Francis v Ibitoye* (1936) 13 NLR 11, Graham Paul J said:-

> "In these circumstances I am asked to hold that the plaintiff can recover from the landowner the cost of the building. I know of no authority for such a claim nor could plaintiff's counsel refer me to any. It is trite law that a building erected in the circumstances I have indicated becomes the property of the landowner without any

obligation upon him to recompense the builder. The maxim quid plantatur solo solo cedit applies without any qualification."

See also *Ezeani v Ejidike* (1964) All NLR 395 and *Oso v Olayioye* (1966) NMLR 329.

In the circumstances, it is my humble view that the Seafood Processing Plant affixed to the land of 2nd respondent belongs to him and cannot therefore be attached by the appellant in fulfillment of the judgment debt. It is good law that the Supreme Court will not disturb concurrent findings of the High Court and the Court of Appeal, unless the findings are perverse. A perverse finding is a finding not borne out from the evidence before the court. A perverse finding is a finding which ignores the evidence before the Court and on a frolic. As I do not see any perversity in the findings of the two Courts, I am bound by them. And here, I do not attach any importance to the wrong finding by the Court of Appeal that Exhibit C was not challenged because it is not material to the live issue in the appeal but merely peripheral to it.

The appeal is accordingly dismissed.

SAVAGE, CJ I have read in advance the judgment just delivered by my learned brother Tobi JSC in which the issues for determination in the appeal are pointedly discussed and firmly determined. I agree with the reasoning and conclusions reached in the judgment. The appellant, an employee of M.V TULU PAN owned and operated by the first responded company, was injured during the course of his work. He sued the 1st respondent for negligence and judgment was entered in his favour by the trial judge Omuson C.J. (as he then was). An order of D200, 000.00 was made for damages for negligence; an award of D4, 500 being three months salary from the date of the accident – 16th July 1990 for damages for pain and injuries. Interest at the rate of 12 ½ % from the date of the issue of the writ of summons till the date of the judgment and thereafter the statutory rate of interest to be applied until the judgment debt is satisfied. A cost of D2, 500 was also awarded to the plaintiff. In execution of this judgment the Sheriff attached the plant which was in the premises of the 2nd respondent. In the event the 2nd respondent interpleaded claiming that he owned the premises which housed the plant. In a well

considered judgment the trial judge Janneh J (as he then was) held that the Sheriff attached the premises, the land and what was on the land and failed to differentiate between on the one hand the machinery, equipment and the land on the other hand. He held that the claimant in the interpleader is the owner not only of the land including the buildings and structures but also all articles on the land including the implement, equipment and machinery.

On appeal to the Gambia Court of Appeal by the plaintiff/appellant the judgment of the trial judge was confirmed. This is a second appeal by the plaintiff/appellant to attempt to dislodge the judgment in favour of the 2nd respondent and a third attempt to dispute his claim. On a careful survey of the evidence led in the case I also hold that the plaintiff/appellant has yet again failed in his bid to do so. It is now settled (apart from certain exceptions) that whatever is affixed to the ground in such a manner that to remove it will completely affect the land is deemed to belong to the land. I agree entirely with my brother Tobi JSC when he anchored his judgment on this principle of land law expressed in the Latin maxim Quid quic plantatur solo solo cedit. The Seafood Processing Plant as he rightly held, in line with the Trial Court and Court of Appeal, is so affixed to the land of the 2nd respondent that it certainly cannot be attached by the appellant in fulfillment of the judgment debt. It must be finally mentioned that the Supreme Court has held times without number that it will not disturb concurrent findings by the two Courts below unless they are shown to be perverse. See *Aja v Okoro* (1991) 7 NWLR (Pt 203) 200; *Onamide v ACB Ltd* (1997) NWLR (Pt 480) 123. In the instant case the concurrent findings of the two Courts below cannot be faulted and the Court has no reason to interfere with them.

MAMBILIMA JSC. I have read the lead judgment by my brother Niki Tobi, JSC. The facts of this case are not in issue. After perusal of the evidence on record and the judgments of the High Court and the Court of Appeal, I endorse the judgment of the Court of Appeal. It is my considered view, upon perusal of the judgment of the Court of Appeal, the Appellants grounds of appeal and the issues formulated for the determination of this Court that the outcome of this appeal hinges on the interpretation of exhibit C on page 67 of the record. Through this

document, the Sheriff of The Gambia informed the defendant who is Mohsam Fisheries Company Limited:–

> "I seized attached and took into my hands your Seafood Processing Plant situated, located at Old Jeshwang and pointed to me by the plaintiff."

It is not in dispute that the land on which this Seafood Processing Plant lies belongs to the claimant Mr. Amadou Samba; and that the said Mr. Samba is the majority shareholder in Mohsam Fisheries Limited. In attaching the property, the Sheriff was acting in accordance with the writ of fifa whose copy appears on page 6 of the record. In this document, the Sheriff is commanded that:–

> "…IN THE NAME OF THE REPUBLIC, that of movable property of MOHSAM FISHERIES COMPANY LIMITED C/O AMADOU SAMBA of 34 Wellington Street, Banjul within the jurisdiction of the Court if the same be sufficient, and if not, then the immovable property of the said MOHSAM FISHERIES COMPANY LIMITED you cause to be made the sum of D209, 500." (Emphasis mine)

My understanding of the command to the Sheriff is that the Sheriff was first to attach the movable property of the company and only attach the immovable property of the company if the movable property did not satisfy the judgment debt of D209, 500. In this respect therefore, the Sheriff had clear instructions on the nature of the property he was to attach.

From the affidavits in support and in opposition to the interpleader summons, it is clear that the land on which the processing plant is situated belongs to the claimant. The position of the law is as stated by my brother Niki Tobi in the lead judgment that land includes buildings thereon. Though a shareholder in Mohsam Fisheries, Mr. Samba is a separate entity and his property cannot ordinarily be attached to satisfy the debt of the company. The evidence of the judgment creditor on page 57 of the record is that:–

"….The freezing factory is made of cement blocks. He also said the freezer is a building, it is like a factory. The fish processing factory were attached and also the preservatory cooler were also attached."

In cross-examination, the judgment creditor testified that he had evidence from the computer showed that all the implements were owned by "Mosham". This evidence was not produced in court to prove or show the nature of implements owned by the company. In compliance with the writ of fifa, the Sheriff ought to have listed the movable property which he attached. At the end of the day, there was no proof before the court that the property attached belonged to the company. The court of appeal was on firm ground when it found that what was attached under exhibit C is the claimant's property inclusive of all that was thereon.

This appeal should be dismissed.

DOTSE JSC. I have had prior knowledge of the contents of the lead judgment just delivered by my brother Tobi JSC and also had discussions with my sister Mambilima JSC on the opinion expressed by her in this appeal. I agree entirely with the statement of the facts, the law and the conclusions reached therein. What I wish to emphasize is that, Interpleader Summons are creations of statute under relevant Rules of Procedure of the High Court. It is therefore imperative that counsel in interpleader proceedings must comply with rules of civil procedure. I observe that "exhibit C" on page 67 of the appeal record, described as document of attachment in the index to the appeal record does not satisfy the requirements of such a document. What must be noted is that, there are prescribed and printed forms for the Sheriff or anybody acting on his behalf to use under such circumstances. "Exhibit C" as it is now, is terribly lacking not only in substance but also in form.

Finally, I wish to comment on the fact that, once the claimant herein, even though his claim of title to the attached property succeeds by virtue of this judgment, the fact still remains that he has admitted being a majority shareholder of the Company which employed the Appellant. It was as a result of the injuries sustained that the Appellant initiated Civil Suit No. 200/90 L. No. 5 in The Gambia High Court, against the 1st Respondents, herein, Mosham Fisheries Company Limited. Since the judgment delivered by Omosun C.J. (as he then) was in favour of the

Appellant on 28th February, 1995 in the above instituted suit is still valid and subsisting, I will urge counsel for the Appellant to get back to the Rules of Procedure and substantive law in order for the Appellant to enjoy the benefits under the said judgment.

Having said this, I also agree that the appeal in this case must fail, and is accordingly dismissed.

Appeal Dismissed.
FLD.

FIRST INTERNATIONAL BANK v GAMBIA SHIPPING AGENCY

COURT OF APPEAL OF THE GAMBIA
(Civil Appeal 24/2002)

20th November 2007

Agim PCA, Anin-Yeboah Ag. JCA, Dordzie, Ag. JCA

Appeal – Raising fresh issue(s) – Where issues raised involve substantive issue(s) of law – Where additional evidence would be required to determine the issues raised – Where it introduces new line of defence – Special circumstances to be established by a party before new issues can be raised on appeal.

Court – Appeal – Fresh issue(s) on appeal - Raising of issues not considered at the Trial Court – Special circumstances – What constitutes same.

Evidence – Affidavit – Where not denied – Admission by a party needs no further proof.

Party – Fresh issue(s) on appeal - Special circumstances – Duty of party seeking to raise fresh issue on appeal – Attitude of Court thereto – Affidavit – Averments not denied.

Practice & Procedure – Fresh issue(s) on appeal – Duty of party seeking to raise same – When issues sought to be raised change the basis upon which the case was fought at trial – Facts that are admitted – Need no further proof.

Held, dismissing the application (*per Agim PCA, Anin-Yeboah Ag. JCA, Dordzie, Ag. JCA concurring*)

1. It has been established by a line of authorities that a party seeking to raise fresh issues on appeal must establish the following special circumstances: -

    (i) That the new issue involves a substantial point of law (substantive or procedural).

(ii) That there are facts in the records of appeal which will enable a complete determination of the issue raised without the need for further evidence as would have been the case if the issue had been raised at the trial nisi prius.

(iii) That the respondent would not have been able to offer any evidence in rebuttal or answer to the issue of it had been raised at the Trial Court. [*Fadare & Ors v Attorney General of Oyo State* (1982) 13 NSCC 52; *Barkole v Pelu* (1991) 8 NWLR (Pt 211) 530; *Djukpan v Orovuyoube & Anor* (1967) 1 ALL NLR 134; *Oputa v Ezeani* (1963) 1 ALL NLR 149; *Management Enterprises Ltd v Otusanya* (1987) 2 NWLR 179; *Agnes Deborah Ejiofodomi v Okonkwo* (1982) 11 SC 74 referred to]

2. It is the duty of the applicant or party applying to raise such fresh issue to establish special circumstances that make it imperative that he be allowed to raise and argue such fresh issue to avoid grave injustice. [*Asho v Ape* (1998) 6 SCNJ 139 referred to]

3. Where a party did not deny the averment or paragraphs of an affidavit, those paragraphs clearly remains admitted as establishing the facts alleged therein. [*Antoine Banna v Ocean View Resort* (2002-2008) 1 GLR 1 referred to]

4. An application of this nature will be refused where the new issues seek to change the premise upon which the case was fought at the trial nisi prius [*Vor v Loko* (1988) 2 NWLR 430 referred to]

5. Such an application will be refused if the new issues raised introduce a new line of defence completely different from the issues fought by the parties in the Court below.

6. Where an application to raise new issues on appeal involves substantive issues of law, then such application will not be granted. [*Akpene v Barcklays Bank of Nigeria & Ors* (1979) 1 SC 168]

7. Where additional evidence would be required to determine the new issues, then leave to argue it will be refused. [*Agnes Deborah Ejiofodomi v Okonkwo* (1982) 11 SC 74; *Management Enterprises Ltd v Otusanya* (1987) 2 NWLR 179 referred to]

8. The Courts have held that such an application will be refused if point of law could have with reasonable diligence been raised at the Trial Court. [Bankole v Pelu (1991) 8 NWLR (Pt 211) 530 referred to]

Cases referred to:

Agnes Deborah Ejiofodomi v Okonkwo (1982) 11 SC 74
Antoine Banna v Ocean View Resorts (2002-2008) 1 GLR 1
Akpene v Barcklays Bank of Nigeria & Ors (1979) 1 SC 168
Asho v Ape (1998) 6 SCNJ 139
Attorney General Lagos State v Dosunmu (1989) 3 NWLR 555
Barkole v Pelu (1991) 8 NWLR (Pt 211) 530
Djukpan v Orovuyoube & Anor (1967) 1 ALL NLR 134
Ejiofodomi v Okonkwo (1982) 3 NSCC 422
Fadare & Ors v Attorney General of Oyo State (1982) 13 NSCC 52
Gamstar v Musa Joof (2002-2008) 1 GLR 103
John Holt & Co. Ltd v Fajemirokun (1961) ALL NLR 513
Management Enterprises Ltd v Otusanya (1987) 2 NWLR 179
Oputa v Ezeani (1963) 1 ALL NLR 149
Vor v Loko (1988) 2 NWLR 430

Statute referred to:

The Land Use Act of 1978 Section 36 (2)

Rules of Court referred to:

The Gambia High Court Civil Procedure Rules Order 2 Rules 7 & 9
The Rules of the Supreme Court of England Order 59, Rule 10(5)

APPLICATION by the appellant for leave to raise fresh issues not raised at the Trial High Court in Civil Suit No.105/2002 G No. 8. The facts are sufficiently stated in the opinion of Agim PCA.

H. Sisay-Sabally Esq. with *S.M. Tambadou Esq*. for the appellant
I.D. Drammeh Esq. with *C.E. Mene Esq* and *Y. Senghore Esq*. for the respondent.

AGIM PCA. Civil Suit No.105/2002 G. No. 8 was heard and determined at the High Court on the undefended list. After considering the affidavit in support of the writ of summons and the notice of intention to defend and accompanying affidavits, the Learned Trial Judge, entered judgment in favour of the plaintiff against the defendant as claimed on the writ of summons on the 16th December 2002. Being dissatisfied with the decision, the defendant appealed to this Honourable Court by a notice of appeal filed on 16th December 2002 by Sheriff Marie Tambadou Esq. who represented the 2nd defendant throughout the trial. It is this notice of appeal that commenced this civil appeal No.24/2002. The 1st defendant filed a separate notice of appeal against the said judgment. His notice of appeal was filed on the 23rd of December 2002, by Mariam Denton who represented him throughout the trial. Beyond filing this notice of appeal, the 1st defendant has done nothing in furtherance of the appeal. This notice of appeal is however irrelevant in appeal No.24/2002. The record of this Court shows that at some point, the respondent herein had to apply to this Court for the dismissal of this Civil Appeal No.24/2002 for lack of prosecution. The appeal of the 2nd defendant like that of the 1st defendant had fallen into a deep slumber. This Court dismissed the said Civil Appeal No.24/2002 for lack of prosecution. The 2nd defendant applied for the suit to be relisted. This application was filed by a new Counsel, Hawa Sisay-Sabally Esq. for the 2nd defendant. She also applied for leave to file additional grounds of appeal. The appeal was relisted. Leave to file additional grounds of appeal was granted. But it was pointed out to her by this Court, that she cannot argue any of the additional grounds of appeal without leave of Court, since they all raise fresh issues. This was because C.E. Mene Esq., Learned Counsel for the respondent indicated his intention to object to the granting of the application for additional grounds of appeal for the reason that they raise fresh issues. This Court felt that she can still seek for leave to argue the

new issues as disclosed in the additional grounds during the argument of the substantive appeal. Subsequently Hawa Sisay-Sabally sought the indulgence of this Court to take up the issue separately before the argument of the substantive appeal. This was allowed by this Court, in spite of the protestations of Learned Counsel for the respondent, Messrs Drammeh and Mene. The appellant now filed this motion on notice dated 28th November 2006 applying for the leave of this Honourable Court to raise new issues or fresh points not earlier taken before the High Court by the appellant in Civil Suit No.105/2002 G No.8. The application is supported by an affidavit of 7 paragraphs deposed to by Bennett Edet, Company Secretary to the appellant. The appellant also filed an additional affidavit of 4 paragraphs deposed to by one Marie Paul Colley, a personal Assistant in the office of Learned Counsel for the appellant. The respondent filed an affidavit in opposition deposed to by its Managing Director Thomas Nilsen.

I must commend both Counsel for the industry and erudition they have demonstrated in their respective written brief on this matter. Their well laid out and illustrated arguments are quite instructive and very helpful. Hawa Sisay-Sabally Esq. for the appellant has argued that to avoid a grave miscarriage of justice, this Court should grant the appellant leave to raise and argue the issues or points that were not raised or considered at the trial nisi prius. Counsel's grounds for the application are that the respondent would not have had an answer to the issue of the Trial Court's jurisdiction and the competence of the suit against the appellant, if these and the other issues had been raised at the trial, all the materials necessary for this Court to decide these issues are on record and that no new line of defence is being introduced by the appellant. She had submitted earlier that the issues sought to be raised are directly linked to the additional grounds of appeal filed by the appellant for which leave has already been granted by this Court. She referred to Order 59 Rule 10(5) of the Rules of the Supreme Court of England as the source of the power of this Court to grant this kind of application. She restated the guiding principles as laid down in that rule. She relied on the cases of Fadare & Ors v A.G Oyo State (1982) 13 NSCC 52 at 53, Bankole v Pelu (1991) 8 NWLR (Pt 211) 530.

Ida Drammeh Esq. for the respondent, on her part has argued that in considering the application of the appellant, this Court must bear in mind

that this appeal arose from an undefended list trial and the appellant was not given leave to defend by the Trial Court. She argued further that at the trial, the appellant's response to the claim on the undefended list is that the 1st defendant entered into an agreement with the respondent under which the 1st defendant agreed to make installmental payments to the respondent. The 1st defendant had been making strenuous efforts to settle the matter and that in light of these circumstances it has no liability to pay any debt. She contended that the new issues sought to be raised and argued are totally at variance with above position of the appellant at trial. She referred to Order 11 Rules 7 & 9 of the High Court, John Holt & Co. Ltd v Fajemirokwu (1961) All NLR 513 at 516 and Gamstar v Musa Joof (2002-2008) 1 GLR 103. She also argued that the case at the trial was fought on the basis of the affidavits before the Court and these new issues were not part of the affidavits. She argued further that even though this Court has the discretion to grant such an application, Courts have always been averse to allowing arguments on points of law not raised in the Trial Court unless a refusal will result in injustice. She referred to Ejofodomi v Okonkwo (1982) 3 NSCC 422 at 430. According to Counsel, the circumstances of this case dictate that this application be refused because the new issues are not substantial or procedural points of law and therefore further evidence will need to be adduced on the basis of which they will be considered, that the appellant wants to change the basis on which the matter was determined at the Trial Court and that the appellant has not shown any special circumstances to warrant a grant of this application. She also relied on Supreme Court Practice 1979 Vol. I page 896 and Bankole v Pelu (supra).

Hawa Sisay-Sabally Esq. for the appellant in her reply on point of law submitted that non disclosure of a cause of action affects the jurisdiction of the Court and that an issue touching on jurisdiction can be raised at any time. She referred to the cases of A.G Lagos State v Dosunmu (1989) 3 NWLR 555 at 556-567 and Madukolu v Nkemdilim.

I have considered the affidavit evidence, the record of appeal and the argument of both Counsel. I am in agreement with both Counsel that issues or points not raised or tried or considered at the Trial Court cannot be raised on appeal unless special circumstances exist that make it obvious that unless the Appellate Court allows the appellant to raise and argue the issue, a grave injustice will be occasioned. It has been

established by a line of authorities that such special circumstances must include the following:-

1. That the new issue involves a substantial point of law (substantive or procedural);

2. That there are facts in the records of appeal which will enable a complete determination of the issue raised without the need for further evidence as would have been the case if the issue had been raised at the trial nisi prius and

3. That the respondent would not have been able to offer any evidence in rebuttal or answer to the issue if it had been raised at the Trial Court.

In addition to *Fadare & Ors v A.G of Oyo State* (supra) and *Bankole v Pelu* (supra) cited by both Counsel, the decisions of the Nigerian Supreme Court in the following cases of *Djukpan v Orovuyoube & Anor* (1967) 1 All NLR 134; *Oputa v Ezeani* (1963) 1 All NLR 149; *Management Enterprises Ltd v Otusanya* (1987) 2 NWLR 179; *Agnes Debora Ejiofodomi v Okonkwo* (1982) 11 SC 74 as well as several others are very instructive illustrations of this principle.

It is the duty of the appellant who applies to raise such fresh issue to establish special circumstances that make it imperative that he be allowed to raise and argue such fresh issue to avoid grave injustice. See *Asho v Ape* (1998) 6 SCNJ 139 at 150. The question that naturally arises at this juncture is whether the appellant in this case has established any such special circumstance to warrant the success of his application. I think that the best approach to answering this question is to find out the case each of the parties puts forward at the trial. The facts of the respondent's case are contained in paragraphs 4 – 21 of the affidavit of Sten Hedemann in support of the writ of summons at pages 7 – 9 of the records of appeal. The 1st defendant was contractually bound to produce to the respondent original bills of lading before taking delivery of consignment of vegetable oil supplied to it by suppliers in France. The respondent is agent for the vessel owners that transported the goods to The Gambia. On the arrival of the goods, the 1st defendant wanted delivery of the goods but could not produce the original bills of lading.

Whereupon the 1st defendant undertook in writing to inter alia indemnify the respondent its principals and servants against all claims which may result from the delivery effected without the bills of lading. The undertaking is in indemnity forms (Exhibit SH1 and SH2). The appellant signed Exhibits SH1 and SH2 as joint undertakers that the goods will be paid for by the 1st defendant. The relevant portions of exhibits SH1 and SH2 read thus:-

> "Not being able to present to you original bill of lading made out to ourselves or endorsed to our order, we hereby undertake to indemnity you, your principals and servants against all claims which may result from the delivery effected without surrendering this document.
>
> We particularly guarantee you, your principals and servants against any demand or action which may be undertaken against you, either by the shipper or by the holder of the original Bill of lading or any other person, where ever the demand may be made and at whatever Court action is taken.
>
> We undertake to pay you on demand, all expenses, fees, custom duties, freight etc. which may be due, or may appear to be due and chargeable to the said goods.
>
> We are aware that this indemnity is not limited in time or value.
>
> We furthermore undertake to surrender to you one fully accomplished Bill of lading as soon as one of the originals will be in our possession
>
> WE JOIN IN THE ABOVE GUARANTEE with full understanding that there is no limitation of valuation of time to this indemnity."

The respondent wrote demand letters (Exhibit SH4 herein) to the 1st defendant and appellant. The relevant portion of the letter dated 26th March 2002 is as follows:-

> "Referring to meeting in your office, we regret to inform you that suppliers have now demanded immediate settlement of the out standings with Brotherhood from us.

We therefore kindly ask you to settle the account, as per your commitment on above mentioned letter of indemnities and produce the Original Bills of Ladings on or before 1st April 2002.

Thanks for your understanding."

The respondent's Solicitors also wrote demand letters to the 1st defendant and appellant.

Paragraphs 4 – 20 of the affidavit of Sten Hedemann in support of the writ of summons states thus:-

"By a contract contained in exchanges of correspondent and or evidenced by Bills of Lading, a company in France agreed to supply and the 1st defendants agreed to purchase twenty container loads of vegetable oil in two shipments.

The 1st defendant and the said company in France agreed that upon the arrival of the goods at the Banjul Port and payment of the price of the said goods, the 1st defendant would be handed the Bills of Lading covering the goods and the 1st defendant would then be able to take delivery of the goods.

The total value of the said goods was 128, 708.00 Euros. The 1st defendant was to be responsible if the said goods arrived at the Banjul Port.
On or about the 2nd day of November 2001 the vessel bringing the first consignment of the said goods arrived at the Banjul Port.

To enable the 1st defendant take delivery of the said goods, the 1st defendant was required to produce to the plaintiff who was acting at all material times for the vessel owners that transported the goods to The Gambia, the original Bill of Lading covering the said goods.

The 1st defendant to whom the said consignment of vegetable oil was consigned did not have in its possession the original bill of lading covering the said cargo.

In order to be able to take delivery of the said consignment of vegetable oil, the 1st defendant signed an indemnity dated the 3rd day of November 2001. The said indemnity was also signed by the 2nd defendant. A copy of the said indemnity is now produced and shown to me marked "SH1".

The plaintiff handed over the said consignment to the 1st defendant on the basis of the said indemnity.

Neither the 1st defendant nor the 2nd defendant have handed over the original Bill of Lading to the said cargo to the plaintiff nor have they paid the price of the said cargo.

On or about the 25th day of November 2001 the vessel SUZANNE DELMAS arrived in The Gambia carrying a second cargo of 10 containers of vegetable oil from Antwerp, Belgium.

The 1st defendant to whom the said second consignment of vegetable oil was consigned again did not have in its possession the original bill of lading covering the said cargo.

In order to be able to take delivery of the said consignment of vegetable oil, the 1st defendant signed a second indemnity dated the 26th day of November 2001. The said indemnity was countersigned by the 2nd defendant. A copy of the said second indemnity is now produced and shown to me marked "SH2".
The plaintiff handed over the said consignment valued at 128,708.00 Euros to the 1st defendant on the basis of the said indemnity.

Neither the 1st defendant nor the 2nd defendant have handed over the original Bill of Lading to the said cargo to the plaintiff.

On the 22nd day of October 2001, the 1st defendant issued a cheque for the sum of D490, 000.00 to the plaintiff as part guarantee for releases of the said goods. The plaintiff presented the said cheque to the Bank for clearance twice, and each time the cheque was returned unpaid and charges were incurred by the plaintiff during these

transactions. A copy of the said returned cheque and bank notifications are now produced and shown to me marked "SH3".

The plaintiff by letters has demanded the outstanding amount due under the said indemnities. The 1st defendant made only part payment of the amount due and the sum of 119,863.14 Euros still remains due and outstanding.

I am also aware that the plaintiff has demanded the balance outstanding under the said indemnities by letters and has caused its solicitor to demand same but the defendants have failed to pay any part thereof. A copy of the said letters in a bundle are now produced and shown to me marked "SH4"."

How did the appellant respond to the above facts? The appellant, as 2nd defendant filed a notice of intention to defend accompanied by an affidavit sworn to by one Abubacarr Suwareh. The appellant did not deny any of the paragraphs of the affidavit in support of the writ of summons reproduced above. Those paragraphs constitute the cause of action in the suit that was heard on the undefended list. Those paragraphs clearly remained admitted as establishing the facts alleged therein. See the decision of this Court in *Antoine Banna v Ocean View Resort* (supra). So the appellant admitted the relevant facts that constitute the cause of action in Civil Suit No.105/02 G No. 8.

The appellant in paragraphs 2 and 3 of the said affidavit in support of its notice of intention to defend expressly acknowledged the debt due from them to the respondent, that the 1st defendant had reached an agreement with the respondent for monthly installmental payments to be made to the respondent, that the 1st defendant was making strenuous efforts to settle the matter and that in the circumstances the appellant does not owe the plaintiff anything as claimed or at all and has a good defence. The appellant did not raise any issue about Exhibits SH1 and SH2, the demand letters from respondent's solicitor to the 1st defendant and appellant (exhibit SH4) and the 1st defendant's returned cheque (exhibit SH3). The Learned Trial Judge expressed the view that the affidavit of Abubacarr Suwareh on behalf of the appellant "is a clear admission of the plaintiffs claim". The Learned Trial Judge proceeded to

strike out the notice of intention to defend and the accompanying affidavits filed by the 1st defendant.

The new issues now sought to be raised and argued by the appellant as contained in the additional grounds of appeal are as follows:-

1. There was no cause of action against the appellant, as such the Trial Judge should not have entered judgment against them.

2. The Trial Court lacks jurisdiction in the absence of a cause of action against the appellant.

3. The Trial Judge having made Exhibits SH1 and SH2 an issue in his ruling of 16th December 2002, did not properly evaluate their content so as to connect the appellant to the said documents.

4. The Trial Judge failed to take into consideration the ostensible authority of the person alleged to have signed Exhibits SH1 and SH2 on behalf of the appellant.

Having considered the case put forward by the appellant and respondent at the Trial Court and the new issues sought to be raised by the appellant I hold that a careful scrutiny of the new issues sought to be raised shows that the appellant is seeking to introduce a case totally different from or inconsistent with the case he put forward at the trial. At the trial he stated that the 1st defendant arranged with the respondent to pay the money by monthly installments and the 1st defendant has been making strenuous efforts to pay. So in the circumstances his liability to pay does not arise. There is nothing on record to suggest that the appellant challenged or raised any concerns about the indemnity forms when the respondent's solicitor wrote a demand letter to it relying on them. This was before the matter was commenced at the Trial Court. At the trial, the appellant admitted the facts stated in the affidavit in support of the writ. In light of the above, I do not think that the appellant will be allowed, on appeal, to turn around and deny the basis of the debt he had acknowledged as due from them. An application of this nature will be

refused where the new issues seek to change the premise upon which the case was fought at the trial nisi prius. See *Vor v Loko* (1988) 2 NWLR 430, were the parties fought the case all through on the issue of ownership of the land according to the applicable Customary Law from the High Court all the way to the Supreme Court. His appeal to the Supreme Court was on the lone ground that they had a right over the land and by virtue of Section 36(2) of the Land use Act 1978. This was an entirely new point being raised for the first time at the Supreme Court. In effect the appellants were abandoning the case they had pursued in the Courts below i.e. that they were owners in possession of the land in dispute and now base their case in the Supreme Court on the fact that they were occupiers of the land for agricultural purposes. The application for leave to raise and argue this issue at the Supreme Court was refused. See also *Bankole v Pelu* (1991) 8 NWLR (Pt 211) 524 where the Court held that such an application will be refused if the new issues raised introduce a new line of defence completely different from the issues fought by the parties in the Court below.

The state of the affidavit evidence at the trial nisi prius and the admission by the appellant of the relevant facts constituting the cause of action render the new issues sought to be raised as frivolous. In view of the admissions, it will be engaging in an idle past time to argue that the affidavit in support of the writ of summons did not disclose a cause of action. For what is admitted needs no further proof. See decision of this Court in Antoine Banna v Ocean View Resort (supra). Paragraphs 4 – 21 of the said affidavit contain the relevant facts which disclose a cause of action against the appellant. Exhibits SH1 and SH2 (the written contracts) on which the claim is based support the facts in the affidavit and exhibits 3 and 4.

An application to raise new issues will not be granted if it involves substantive issues of law. See *Akpene v Barclays Bank of Nigeria & Ors* (1979) 1 SC 168. It is obvious that further evidence will be needed to determine these issues. Where additional evidence would be required to determine a new issue, leave to argue it will be refused. See *Agnes Deborah Ejiofodomi v Okonkwo* (1982) 11 SC 74 and *Management Enterprises Ltd v Otusanya* (1987) 2 NWLR 179. The appellant has not given any reason why these issues were not raised at the Trial Court. These issues could have with reasonable diligence been raised at the

Trial Court. In *Bankole v Pelu* (supra) it was held that such an application will be refused if the point of law could, with reasonable diligence, have been raised at the Trial Court.

The judgment appealed against is one obtained on the undefended list, on the state of the affidavits on record in accordance with Order 2 Rules 7 & 9 Rules of the High Court. The present application seeks to subvert Order 2 Rules 7 and 9 by seeking a reopening of the hearing so as to raise matters that are still not in evidence and were not before the Trial Court on the return date, which matters were at all times available to the appellant who could have, with reasonable diligence, deposed to them in the affidavit in support of the notice of intention to defend. This application is a clear abuse of process.

Finally, I find it difficult to conceive how the appellant can competently raise these new issues when it did not appeal against the order striking out its notice of intention to defend and accompanying affidavit. That portion of the Courts decision remains valid and binding in the absence of an appeal against it. In light of the foregoing, this application is dismissed. The appellant shall pay D3000.00 as cost to the respondent.

Yeboah Ag. JCA - I agree

Dordzie Ag. JCA - I agree

Application Dismissed.
FLD.

THE STATE

v

CARNEGIE MINERALS LTD; ANDREW CHARLES NORTHFIELD

COURT OF APPEAL OF THE GAMBIA
(Civil Appeal No. 2/2008)

17th July 2008

Agim PCA, Ota JCA, Wowo Ag. JCA

Appeal – Stay of Execution – Purpose of - Stay of proceedings – Purpose of – Duty on party seeking same – Affidavit in support – What ought to be deposed to – Requirement for the grant.

Court – Interlocutory applications – How determined - Court and counsel restricted to issues raised by the application – Court not to deal with substantive matters at interlocutory stage – Speedy trial – Expeditious hearing of cases – What amounts to reasonable time – Exercise of Court's discretionary power – Guiding principles – Status of – Stay of proceedings – Purpose of – Stay of Execution – Purpose of – Content of affidavit in support – Compliance with Section 90 of Evidence Act – Facts not controverted regarded as admitted – Administration of justice – Effect of application intended to obstruct justice.

Evidence – Affidavit evidence – Facts not controverted – Admitted as such – Affidavit – Compliance with Section 90 of Evidence Act – Affidavit evidence – Proof of Relief sought by same.

Practice & Procedure – Interlocutory applications – Court to refrain from dealing with substantive matter – Stay of proceeding – Burden placed on party seeking same – Affidavit – Facts to depose to – Principles Guiding grant of – Court mandated to refuse application where to do so would occasion a miscarriage of justice.

Stay of Execution – Purpose of – Burden on party seeking stay – Requirements for the grant – Guiding principles – Affidavit in support - Facts to depose to therein.

Held, *refusing the application (per Agim PCA, Ota JCA, Wowo Ag. JCA concurring)*

1. It is judicially settled by a long line of cases across jurisdictions that a Court should not in the determination of an interlocutory matter in a proceedings determine any issue in the main case or appeal that is pending unless where the parties either expressly or by conduct have invoked the jurisdiction of the court to determine the main case at an interlocutory stage and there is sufficient material or evidence before the Court to enable it to do so.

2. Very often the same party who invited the Court to do so turns around to challenge on appeal to exercise of the jurisdiction he or she had invoked because it is to his or her disfavor. The courts have deprecated this course of action and have repeatedly refused to countenance such challenge. Such a challenge is only available to a party who played no role in causing the Court to invoke such jurisdiction. The Court must remain the master of its proceedings and not allow parties to drag it here and there and even into the domain of illegality.

3. The applicant's burden to justify the grant is a very heavy one. In fact, I am of the view that it is heavier than the burden on the applicant for stay of execution of a judgment pending appeal or other interlocutory reliefs.

4. The universal judicial attitude is to avoid anything that prevents the expeditious or speedy hearing of cases. The challenge here is that in some situations the requirement of justice demands that proceedings be stayed pending an appeal. In such cases, if the Court refuses to stay proceedings, injustice can occur or fair hearing rules will be violated.

5. Principles guiding the Court's in the exercise of their discretion to grant an application for stay of proceedings include the following:
    (a) That there must be a competent appeal;
    (b) The pending appeal must be arguable;

(c) The applicant must establish special and exceptional circumstances to warrant a grant of the application;
(d) The court must consider the competing rights and balance of convenience of both parties;
(e) Where the issue of jurisdiction is raised in the pending appeal, the court should grant a stay of proceedings. However, this issue of jurisdiction should be genuinely raised;
(f) The action should not be an abuse of court process;
(g) The grant of an application for stay will be refused where it will unnecessarily delay and prolong the proceedings;
(h) It is also the duty of the applicant to show that it is imperative that the proceedings must be stayed pending the determination of the appeal by placing sufficient material before the court to enable it exercise its discretion in his favour.

6. The principles set forth are however, mere guidelines. The Court retains the unimpeded discretion at all times to deal with each application on the basis of its peculiar facts, so that even if the above listed criteria are fully satisfied, the court can still refuse the application.

7. In an application for stay of execution pending appeal, what is sought to be protected is the right to appeal or the appeal. The objective of the order of stay is to prevent the result of the appeal being rendered nugatory or the appeal process being stultified. [*Momodou K Jobe v Tijan Touray* (Unreported) Judgment of Court of Appeal; Hisham Mahmoud v Karl Bakalovic (2002-2008) 2 GLR 515 referred to]

8. In an application for stay of proceedings pending an appeal, what is sought to be protected by the application may not necessarily be only the appeal. In most situations, the applicant seeks to protect some right in the trial proceedings and also the right of appeal such that if the proceedings continue the applicant's right or interest in the trial proceedings will be prejudiced and the result

of the appeal rendered nugatory. The dominant consideration will be whether the continuation of the trial proceedings will prejudice some right of the applicant in the trial or occasion a miscarriage of justice in the trial and render the result of the appeal nugatory or stultify the appeal process. It is therefore important that in an application for stay of proceedings pending appeal, the Court should first find out what the applicant seeks to protect by the application, as this will determine what the Court should regard as the most important consideration in deciding to grant or not to grant the application. [*Saraki v Kotoye* (1992) 9 NWLR (Pt 264) 156 referred to]

9. Dispositions in an affidavit which offend provisions of the Evidence Act are inappropriate and incompetent. Section 90 of the Evidence Act 1994 provides that an affidavit shall not contain extraneous matter by way of objection prayer or legal argument or conclusion.

10. It is trite law that where facts in an affidavit are not challenged or controverted by another affidavit, they must be regarded as admitted and acted upon as such. [*Antoine Banna v Ocean View Resort Ltd* (2002-2008) 1 GLR 1 referred to]

11. The Courts will not issue or allow any process that has the effect of obstructing the due process of administration of justice. An order of stay of proceedings or stay of execution of a judgment pending trial or appeal can only be made where it will facilitate or help the course of Justice.

12. In an application for stay of proceedings, the accompanying affidavit must disclose sufficient material to warrant a grant of the application. [*Meridien Biao Bank Gambia Ltd v Social Security and Housing Finance Corporation* (1997-2001) GR 311; *Jawara v Raffle* (1997-2001) GR 768 referred to]

13. Where an application will occasion unnecessary delay and more delay will be condoned by its grant, it would invariably lead to a

miscarriage of justice. This cannot be countenanced by the Court and same will be refused.

14. In a case fought purely on affidavit evidence on both sides, in order to obtain the relief sought, the applicant's affidavit must prove the relief sought. [A.G of Anambara State v A.G Federation & 34 Ors Vol. 22 NSCQR 572 referred to]

Cases referred to:

A.G of Anambara State v A.G Federation & 34 Ors Vol. 22 NSCQR 572
Antoine Banna v Oceon View Resorts (2002-2008) 1 GLR 1
Hisham Mohamed v Kari Bakalovic (2002-2008) 2 GLR 515
Lang Conteh v T.K Motors (2002-2008) 2 GLR 23
Momodou K Jobe v Tijan Touray (Unreported) judgment CA No. 32/2005 delivered 3rd March 2008
Nigerian Industries Ltd v Olaniyi (2006) 13 NWLR (Pt 998) 537
Ousman Tasbasi v Abdourahman Jallow (2002-2008) 2 GLR 77
Williams v Willaims (2002-2008) 2 GLR 491
Saraki v Kotoye (1992) 9 NWLR (Pt 264) 156

Statute referred to:

The Evidence Act of 1994 Section 90

REPEAT APPLICATION for stay of further proceedings pending an appeal against the Trial High Court's ruling of 17th April 2008 striking out the prosecution's ex-parte motion for substituted service and ordering its amendment to a motion on notice to all parties involved in the case. The facts are sufficiently stated in the opinion of Agim PCA.

E. Fagbenle DPP for The State
C. E. Mene Esq. for the Respondent

AGIM PCA. On the 18th of February 2008, the respondent herein and one Carnegie Mineral Ltd were jointly charged at the High Court with the Commission of certain criminal offences. The respondent who is the 2nd accused in that case was served with the information. The 1st accused,

Carnegie Mineral Ltd could not be served the said processes. The respondent who was at the time of the commencement of the said criminal case, the General Manager of the 1st accused, refused to accept service on behalf of the 1st accused. On the 7th April 2008, when the case came up at the High Court, the Director of Public Prosecution orally applied for leave of the Court to serve the 1st accused through the 2nd accused. This was objected to by learned counsel for the respondent. In the subsequent ruling following argument by counsel on this matter, the Trial Court ordered the learned Director of Public Prosecution to bring the application formally within two days from the date of the ruling being 8th April 2008. The Trial Court advised learned Counsel for 2nd respondent that "in the event they wished to file a response in reaction to the DPP's formal application of substituted service, they should do so today". The appellant proceeded to file an ex-parte application for leave to serve the 1st accused by substituted means. During the hearing of the application ex-parte, learned Counsel for the respondent who was in court insisted that the respondent be put on notice of the application as he will want to be heard in respect of some facts in the affidavit in support of the application which he considered prejudicial to his defence in the criminal case against him. The Trial Court in its ruling of 17th April 2008 stated that "the prosecution is therefore ordered to amend the ex-parte motion to a motion on notice to all parties involved in the case. The Court further orders that the DPP will file his motion on notice on or before the end of Monday, the 21st April 2008. Counsel for the 2nd accused will file his response, if he so desires, on or before Wednesday, the 23rd April 2008 before 1:00 pm. The motion ex-parte is hereby struck out in view of the ruling of the Court."

Dissatisfied with this ruling, the appellant has appealed to this Court by a notice of appeal filed on the 22nd April 2008. The appellant applied to the trial High Court for an order staying further proceedings in the said Criminal case pending the final determination of the said appeal. This application was heard and refused by the trial High Court. The appellant has now also applied to this Court for the same order that was refused by the trial High Court. The application is supported by an affidavit exhibiting the notice of appeal and the ruling refusing the 2nd application. The respondent deposed to and filed an affidavit in opposition to which is annexed his letter of offer of employment and the letter terminating his employment.

I have considered the affidavit and exhibits before us and the argument of counsel. I think that the issue that arises for determination is whether it is in the interest of justice to grant this application. In the course of arguing this application, learned DPP veered off several times into dealing with matters touching on the pending appeal. We kept bringing him back to the confines of this application. I think there is need to caution here that it is important that counsel, in arguing this kind of application, should restrict their arguments to the requirements of that application and should not deal with matters that concern the pending appeal. This amounts to an invitation to a Court to determine the substantive appeal while dealing with the interlocutory application for stay or other interlocutory reliefs. It is judicially settled by a long line of cases across jurisdictions that a court should not in the determination of an interlocutory matter in a proceedings determine any issue in the main case or appeal that is pending unless where the parties either expressly or by conduct have invoked the jurisdiction of the court to determine the main case at an interlocutory stage and there is before the Court sufficient material or evidence to enable it do so. The law that a Court should not deal with any aspect of a substantive matter at the hearing of an application for interlocutory reliefs applies also to the parties. Very often the same party who invited the Court to do so turns around to challenge on appeal the exercise of the jurisdiction he or she had invoked because it is to his or her disfavour. The Courts have deprecated this course of action and have repeatedly refused to countenance such challenge. Such a challenge is only available to a party who played no role in causing the Court to invoke such jurisdiction. The Court must remain the master of its proceedings and not allow parties to drag it here and there even into the domain of illegality. The Court must remain a good referee and should not allow any play outside the touchline or against the rules. A referee will no longer be regarded as effective when he or she allows parties to play outside the touchline or against the rules.

Coming back to the real issue in controversy, I think that in applications for stay of proceedings pending appeal, the applicant's burden to justify the grant is a very heavy one. In fact, it is in my view heavier than the burden on the applicant for stay of execution of a judgment pending

appeal or other interlocutory reliefs. This is because a stay of proceedings pending appeal delays the trial proceedings and has in some situations completely aborted the trial proceedings. Against the background of our experience of unduly long period of heavy appeals, the difficulty in proceeding when the trial finally resumes, the fact that a person's ability to recollect events fade with the passage of time, the frequent change in the Constitution of our Trial Courts, we would be very circumspect in ordering a stay of proceeding. This is more so as the process is prone to abuse by a party who for one inordinate reason or the other desires that the proceedings do not continue. It is a fundamental requirement of justice that a case be heard within a reasonable time. The universal judicial attitude is to avoid anything that prevents the expeditious or speedy hearing of cases. The challenge here is that in some situations the requirements of justice demand that proceedings be stayed pending an appeal. In such cases, if the Court refuses to stay proceedings injustice can occur or the fair hearing rules will be violated. The Court is therefore confronted with the difficulty of resolving the conflict between an expeditious trial and the demands of substantial justice or a fair trial. The safe path that the Courts have adopted is to insist that in each situation all these demands must be met before an order of stay of proceedings can be made. The courts have overtime evolved several cumulative criteria to guide the judicial and judicious exercise of their discretion in dealing with this kind of application. The Learned Trial Judge, Sallah Wadda J in her ruling on the first application by the appellant clearly and with commendable brilliance, laid out these criteria as have evolved through the cases. She reproduced the ratio in Nigerian Industries Ltd v Olaniyi (2006) 13 NWLR 537 (Pt 998) that:-

> "The guiding principles in the exercise of the discretion as to whether or not to grant an application for stay of proceedings include the following:
>
> (a) That there must be a competent appeal;
> (b) The pending appeal must be arguable;
> (c) The applicant must establish special and exceptional circumstances to warrant a grant of the application;
> (d) The Court must consider the competing rights and balance of convenience of both parties;

(e) Where the issue of jurisdiction is raised in the pending appeal, the Court should grant a stay of proceedings. However, this issue of jurisdiction should be genuinely raised;
(f) The action should not be an abuse of Court process;
(g) The grant of an application for stay will be refused where it will unnecessarily delay and prolong the proceedings;
(h) It is also the duty of the applicant to show that it is imperative that the proceedings must be stayed pending the determination of the appeal by placing sufficient material before the Court to enable it exercise its discretion in his favour."

The foregoing have been the subject of judicial pronouncements in a host of recent local decisions including *Lang Conteh v T.K.* (2002-2008) 2 GLR 23; *Momodou K. Jobe v Tijan Touray* (Unreported) judgment CA No. 32/2005 delivered 3rd March 2008; *Hisham Mahmoud v Kari Bakalovic* (2002-2008) 2 GLR 515; *Williams v Williams* (2002-2008) 2 GLR 491; *Ousman Tasbasi v Abdourahman Jallow* (2002-2008) 2 GLR 77. The common thread running through all the cases is that these principles are not mandatory or exhaustive parameters that the Courts must follow in all cases. They are mere guidelines. The Court retains the unimpeded discretion at all times to deal with each application on the basis of its peculiar facts so that even if the above listed criteria are fully satisfied by an application, the Court can still refuse the application. What is important is that it must be clear from the decision of the Court that the refusal is the result of a proper exercise of discretion in pursuit of substantial justice. There is no doubt that the above judicially evolved criteria apply to all applications for stay of proceedings or execution of judgment pending appeal. But I must caution here that the approach of the Courts in applying them to the two types of applications cannot be the same. The judicial approach in applying them in an application for stay of proceedings pending appeal should be different stay of execution pending appeal. To use the same approach in all situations can result in an improper exercise of discretion. This is because of the difference in the nature of each type of application for stay. In an application for stay of execution pending appeal what is sought to be protected is the right of appeal or the appeal. The objective of the order of stay is to prevent the

result of the appeal being rendered nugatory or the appeal process being stultified. So that in this kind of application, the most dominant or dominating consideration as held by this Court in *Momodou K. Jobe v Tijan Touray* (supra) and *Hisham Mahmoud v Karl Bakalovic* (supra) relied on by Sallah-Wadda J in her ruling on the 1st application is whether the execution of the judgment while the appeal is pending would yield the above stated results.

In an application for stay of proceedings pending an appeal, what is sought to be protected by the application may not necessarily be only the appeal. In most situations, the applicant seeks to protect some right in the trial proceedings and also the right of appeal. In such situations if the proceedings continue the applicants right or interest in the trial proceedings will be prejudiced and the result of the appeal rendered nugatory. In this kind of situation the dominant consideration will be whether the continuation of the trial proceedings will prejudice some right of the applicant in the trial or occasion a miscarriage of justice in the trial and render the result of the appeal nugatory or stultify the appeal process. So it is therefore important that in an application for stay of proceedings pending appeal, the Court should first find out what the applicant seeks to protect by the application for that will determine what the court should regard as the most important consideration in deciding to grant or not to grant the application. In the case of *Saraki v Kotoye* (1992) NWLR (Pt 264) 156 at 190 the Nigerian Supreme Court granted a stay of proceedings to protect a right or interest in trial proceedings and the right of appeal against the interlocutory decision of the trial High Court refusing to admit certain evidence. The Court held that "a stay of proceeding is necessary where the admission or rejection of a piece of evidence is crucially relevant to the case of the party seeking the admission or rejection of the evidence. The stay is to enable the determination of whether the evidence sought to be tendered is admissible." … Although Obaseki JSC criticized the granting of interlocutory applications for stay of proceedings pending the determination of the appeal in rulings in respect of rejection of evidence, the Learned Justice of the Supreme Court would appear to have qualified his observation by limiting it to the wisdom of leaving the prosecution of issues or points that can be taken advantageously after the final decision of the High Court till the High Court had given its final

decision and appeal against the decision lodged. Thus where the issues are so crucial and critical to the case of the party whose evidence has been rejected, it will be prudent to exercise the right of appeal.'' According to Ogundare JSC at page 202 "for there may be cases where a wrongly rejected evidence may be all that a party relies on in support of its case and without which it would be futile for him to continue his opponent's case. In such a case, I cannot see why he must be prevented from proceeding to test the correctness of the decision to exceed such evidence before proceeding with the trial."

What right or interest does the applicant seek to protect by this application. The appellant/applicant stated the reason for this application in paragraph 14 of the affidavit of Abdourahman Bah in support of the application thus:–

> "That unless the proceeding is stayed, the trial proceedings will waste precious judicial and public time if the two respondents jointly charged were not tried together."

Before I go further, I will like to observe that this deposition in an affidavit is inappropriate and incompetent being an opinion, an argument and also a conclusion. Section 90 of the Evidence Act 1994 provides that an affidavit shall not contain extraneous matter by way of objection, prayer or legal argument or conclusion. The gist of the argument of the learned DPP is that this application seeks to ensure that the 1st and 2nd accused in the criminal case are not tried separately. According to the learned DPP, this will be the result if the trial proceedings continue while the appeal before us is yet to be determined. He concluded by saying that it will amount to a waste of public time and money if the same set of witnesses, exhibits and evidence have to be presented twice in separate trials of each accused. So the most dominant consideration in the circumstances of this application is whether a continuation of the trial proceedings while this appeal in this Court is pending will result in a separate trial of the accused and a concomitant waste of time and resources and render nugatory the pending appeal.
I will now consider the facts as disclosed in the affidavits of all the parties to find out if a continuation of the trial proceedings will yield that result.

It is clear from the facts before this Court, particularly the ruling of the Trial Court of 17th April 2008 that the Trial Court ordered that the applicant's application for leave to serve the 1st accused by substituted means be put on notice to the respondent so that it can be argued on 23rd April 2008. This order is yet to be obeyed by the applicant who has instead appealed against it and filed this application for a stay of the said proceedings. This effectively brought the proceedings to a halt. The question that follows at this juncture is, if the proceedings were to continue what would be the likely result. Considering the way things are, I think that if the proceedings were to continue, the applicant will have to file a motion on notice for leave to serve the respondent by substituted means. The respondent may upon being served file an affidavit in reply to the affidavit of the applicant if he so desires. After such service the application will be argued and decided. The purpose of the application is to get the information serviced on the 1st accused so that the joint criminal trial of the two can proceed. The notion underlying the order that the respondent be put on notice by the application is to ensure that he has an opportunity to answer any deposition in the applicant's affidavit that he considers adverse to him. The question that follows here also is whether the fact that the respondent is put on notice will prevent the grant of the application for leave to serve by substituted means and frustrate the trial of the 1st accused. I do not think so. This is because the respondent has stated in paragraph 26 and 28 of the affidavit in opposition that it has been clear at all times that he was not opposing the application but merely wanted to answer some averments in the applicants affidavit that he considers will be prejudicial to his case if left unanswered. In paragraph 26 of the said affidavit in opposition, the respondent stated thus:–

> "When the application for substituted service came up before the Trial Court on the 17th day of April 2008, my Counsel Mr. C.E. Mene informed the Court that he was not in a position to oppose the application being made by the State but he wished to respond to two averments made in the affidavit in support of the application which averments related to me."

This paragraph and paragraph 28 of the affidavit in opposition filed on 30th June 2008 were not challenged or denied by the applicant who filed

a further affidavit on the 8th of July 2008. The applicant will therefore be taken to have admitted these said paragraphs of the affidavit in opposition as establishing the facts alleged therein. For it is trite law that where facts in an affidavit are not challenged or controverted by another affidavit, they must be regarded as admitted and acted upon as such. See the decision of this Court in *Antoine Banna v Ocean View Resort Ltd* (supra). In light of the above facts it is clear that it was likely that the application would have been granted. This would have enabled service of the information to be effected on the 1st accused and the joint trial of the accused would have proceeded. I fail therefore to see how the continuation of the trial proceedings will result in a separate trial of each of the accused. I agree with the submission of learned counsel for the respondent that if this application is refused the substituted service of the information on the 1st accused will be effected and that this will enable the proceedings move forward. It is obvious that it is this application for stay of proceedings that is frustrating the process to effect service of the information on the 1st accused by substituted means. The Courts will not issue or allow any process that has the effect of obstructing the due process of administration of justice. An order of stay of proceedings or stay for execution of a judgment pending trial or appeal can only be made where it will facilitate or help the course of justice.

The next question to consider here is whether a continuation of the trial proceedings will render the result of the pending appeal nugatory or stultify the appeal process. There is no doubt that if the trial proceedings continue, the 1st accused will be served with the information and the joint trial of the two accused will proceed. This is the very objective the pending appeal seeks to realize. A continuation of the trial proceedings will no doubt render the continuation of the pending appeal an unnecessary academic exercise. In this kind of situation it cannot be said that the appeal process is stultified or rendered nugatory. In my opinion, an appeal process or result can only be regarded as negated or stultified where the objective of the appeal is frustrated. This is not the case here. Continuing the trial proceedings will help the Courts of justice since it will help achieve the ends of the appeal and avoid time wasting and resources in barren disputations. It is with a view to avoiding that kind of situation that the Nigerian Supreme Court adviced in *Saraki v Kotoye* (supra at 205) that litigants should not rush to the Appellate Court to test

and challenge rulings of the High Court on the smallest issue arising in the trial of cases at the High Court. It is important that in exercising the constitutional right of appeal against interlocutory decisions of a Trial Court, a party should take care to ensure that the issue in contention is crucially relevant to and has a serious bearing on the cause of the trial as well as on the outcome of the proceedings. If it is a trifling legal issue that can be taken up generally with the appeal against the final decision of the Trial Court at the end of the case or that will not prejudice the case of either party or that can be resolved subsequently in the trial proceedings, it will be undesirable to appeal against a ruling on such issue and even more undesirable to apply for a stay. Arguable as the point may be if it is not crucially relevant to the case of the applicant this Court will not order a stay of proceedings.

It is for the above reasons that I refuse this application. It is accordingly dismissed. Costs shall await the course of the pending appeal.

OTA JCA. The facts of this case have been exhaustively canvassed by my learned brother Agim PCA in the lead judgment he just delivered and which lead judgment I have had the liberty of perusing, I will therefore not be labour myself with it. Suffice it to say, that the singular issue that has emanated in this application is whether the Appellants application for stay of proceedings is justifiable judging by the peculiar circumstances of this case.

This application is a direct fall from the appeal lodged in this Court by the Appellants on the 22nd day of April 2008, against the orders of the Trial Court contained in its Ruling of 17th April 2008 wherein the Learned Trial Judge, in her infinite wisdom, ordered the Appellants to make their ex-parte application for substituted service inter-partes by service of same on the 2nd accused person/Respondent. Consequent upon this Order, an application for stay of proceedings was made. The Learned Trial Judge refused to indulge them and they have now come to this Court seeking for the same relief.

Now case law, both foreign and local shows that a stay of proceedings or execution as the case may be, cannot be had just for the asking. My learned brother in his lead judgment, has set out, with admirable clarity,

the standards required for a grant of a stay of proceedings and the principles antecedent for a grant of such an application as adumbrated in the Nigerian Supreme Court case of *Nigerian Industries Ltd. v Olaniyi* (2006) 13 NWLR 537, rightly canvassed by Sallah Wadda J in her Ruling at the Court below. It is trite learning that in an application such as this one, the accompanying affidavit or affidavits must therefore disclose sufficient material to warrant a grant of the application. See *Meridien Biao Bank Gambia Ltd. v Social Security and Housing Finance Corporation* (1997-2001) GR 311 and *Jawara v Raffle* (1997-2001) GR 768-769. The learned DPP for the Appellants argued this application relying on the 16 paragraphs affidavit sworn to by one Abdourahman Bah on the 11th day of June, 2008, as well as the further affidavit of 8 paragraphs, sworn to by the same Abdourahman Bah on the 8th of July 2008. I have taken the liberty of perusing the affidavits filed in support of this application, and I find that they are seriously devoid of the essential ingredients for the grant of such an application as I find nothing therein that could sway me to countenance this application with favour or grace, bearing in mind the stringent nature of the suit from which this application emanated, which is a criminal case, and which by its very nature is requiring of a speedy trial as a man's liberty is, for all intents and purposes, in jeopardy. The learned DPP has made great work of his argument that a grant of the stay would facilitate the proceedings, in that it will stall the proceedings at the lower courts whilst his appeal against the Trial Courts Ruling of 17th April 2008 is heard, thus ensuring that the two accused persons are tried together, saving precious time, public money, not to mention the succor that such a joint trial of the two accused persons would give to the witnesses who will be saved of the certain inconvenience of having to attend Court repeatedly, if the two accused persons were tried separately.

With all due respect to the learned DPP, I find his line of argument unmaintenable in the face of the totality of the evidence before the Court. I do not see how a stay of proceedings in the peculiar circumstances of this case can remotely be canvassed as a means of achieving a speedy trial and dispensation of justice. Rather the mere application for stay of proceedings which has hung as a sword of Damocles over the proceedings at the Lower Court has by its very nature of operating as a stay occasioned serious delay of the proceedings. I say this because if not for the application for stay of proceedings, the trial at the lower court

would have proceeded with the two accused persons. This was the natural effect of the order of the 17th April 2008.

I find that this application for stay has occasioned unnecessary delay and more delay will be condoned by a grant of same invariably leading to a miscarriage of Justice. It is for these reasons that I agree with my Learned brother that any process that will occasion a miscarriage of justice cannot be countenanced by the Court. It is also for this reason and the more detailed reasons given by my Learned brother Agim PCA in his lead judgment that I also dismiss the appellant's application.

WOWO Ag. JCA: I have had the opportunity of reading in draft the ruling read by my learned brother Agim PCA. I agree with his reasoning and conclusions. The trial of facts in this case was by affidavit evidence. The Appellant/Applicant and the Respondent deposed to copious affidavits and affidavits in oppositions in support of their case. Since this is a case which is purely based on affidavit evidence, in order to obtain the relief sought here for a stay of proceedings, the Appellant/Applicant must prove the relief sought. See the Nigerian Supreme Court case of *A.G of Anambra v A.G Federation & 34 Ors* Vol. 22 NSCQR 572 at 577. I have looked at the affidavit in support of the Appellant/Applicant motion and the further affidavit he relied on in order for this Court to exercise its discretion in the State's favour. With respect, I did not see how the refusal of this application will waste precious judicial and public time. Worse still, the Appellant/Applicant did not state in his affidavit in support how it would waste precious judicial and public time. It is therefore clear that the affidavit in support of the Appellant/Applicant motion and the further affidavit cannot warrant a favourable exercise of this Court's discretion in the State favour and the application for stay of proceedings is refused.

Application refused.
FLD.

MAMADI JABBAI v THE GAMBIA RED CROSS SOCIETY

COURT OF APPEAL OF THE GAMBIA
(Civil Appeal No. 27/2001)

13th March 2006

Agim JCA, Paul Ag. JCA, Yamoa Ag JCA

Action – Estoppel - Whether can ground or create a cause of action.
Contract – Contract of employment – Temporary employment – Nature of salary of servant – Formation of a contract –Ingredients necessary to make a valid contract – When contracting parties are said to be ad idem – What constitutes a term of the contract – Fundamental term of the contract – Variation of contract terms – How made or done – Clause allowing party to vary – Waiver – Consequence of.
Equity – Equitable doctrine – Meaning of ''pacta sunt sarvanda''.
Evidence – Estoppel – As a rule of evidence – As a cause of action.
Labour Law – Employment – Nature of temporary employment.
Practice & Procedure – Waiver – Effect of waiver on a party who waives his rights and benefits – Consequences of – Estoppel – Plaintiff relying on estoppel.
Words & Phrases – Waiver – Meaning of – Equitable maxim – 'Pacta sunt sarvanda' – Estoppel – Meaning of.

Held, allowing the appeal (*per Agim JCA, Paul Ag. JCA, Yamoa Ag JCA concurring*)

1. A contract is an agreement between two or more parties which creates reciprocal legal obligation or obligations to do or not to do a particular thing, and for a valid contract to be formed, there must be mutuality of purpose and intention.

2. An agreement will not be binding on the parties to it until their minds are at one both upon matters which are cardinal to the specie of agreement in question and also upon matters that are

part of the particular bargain. [*Chief Okubile & Anor v Oyagbola & Ors* (1990) 4 NWLR (Pt 147) 725 referred to]

3. There are five ingredients that must be present in a valid contract, namely: offer, acceptance, consideration, intention to create legal relationship and capacity to contract. And for a contract to exist in law, all the five ingredients must be present. [*Orient Bank (Nig) Plc v Bilante international Ltd* (1997) 8 NWLR (Pt 515) 37 referred to]

4. The salary of a servant constitutes a fundamental term of the contract. The master has a duty to disclose how much salary is to be earned by the servant and when the salary is payable.

5. Temporary employment are for stated periods, each temporary employment stands on its own and creates separate and fresh rights and obligations between the parties to the contract. If at the onset of the employment it was made clear to the employee that he was only engaged on a temporary basis and for a stated period, the employer can refuse to renew his temporary contract for a further temporary period and the refusal to renew may be considered a substantial or acceptable reason and be considered fair by the court. [*Terry v East Sussex County* (1977) 1 ALL ER 67; *Fay v North Yorkshire County Council* (1986) 1 ICR 133 referred to]

6. The law is that parties to a contract may effect a variation of the terms of the contract by modifying or altering its terms by mutual agreement. No change in the terms of an employee's contract may be made without his consent, such consent may be expressed in writing or orally.

7. Even where there is power to vary the terms of contract, the law is that an express power to vary the terms of a contract can only be enforced where it was clearly specified. [*Lee v Gec Plessey Telecommunications* (1993) 1 RLR 383 referred to]

8. Generally, where the conditions necessary for the formation of a contract are fulfilled by the parties thereto, they will be bound by it. [*Union Bank of Nigeria Ltd v Professor Albert Ojo Ozigi* (1994) 3 NWLR (Pt 333) 385 referred to]

9. It is settled law that where parties to an agreement are ad idem on all terms of the agreement, such agreement voluntarily entered into must be honoured in good faith. The Court will apply the equitable doctrine of pacta sunt servanda. [*Jadesimi v Egbe* (2003) 10 NWLR (Pt 527) 1; *Nicon v Power and Industrial Eng. Co. Ltd.* (1986) 1 NWLR (Pt 14) 1 referred to]

10. Waiver is the intentional and voluntary surrender or relinquishment of a known privilege or right by a party entitled to the same which, at his option, he could have insisted upon.

11. The concept of waiver presupposes that a person who is to enjoy the benefit or who has the choice of two benefits is fully aware of his right to the benefit or benefits, but he either neglects to exercise his right to the benefits, or where he has a choice of two, he decides to take one but not both. [*Fasade v Babalola* (2003) 11 NWLR (Pt 830) referred to]

12. If a person, having full knowledge of the rights, interest, profits or benefits conferred upon or accruing to him by and under the law, but he intentionally decides to give up all these, or some of them, he cannot be heard to complain afterwards that he has not been permitted the exercise of his rights or that he has suffered by his not having exercised his rights. Such a person would be held to have waived those rights. [*Fasade v Babalola* (2003) 11 NWLR 830; *Ariori v Elemo* (1983) 1 SCNLR 1 referred to]

13. Where a right or benefit conferred on a party is waived by that party, such a waiver creates an estoppel against the said party. He cannot be heard to complain thereafter that he was denied the advantage of benefiting from those benefits and rights. [*Obonna A.G. of Imo State* (1992) 1 NWLR (Pt 220) 647; *Shanu v Afribank*

PLC (2002) 17 NWLR (Pt 795) 185; *Ariori v Elemo* (1983) 1 SCNLR I referred to]

14. Estoppel is both a rule of evidence and of substantive law. [*Canada's Dominion Sugar Co. Ltd. v Canadian National (West Indies) Steamships Ltd* (1947) AC 46 at 56 per Lord Wright referred to]

15. It is settled law that a plaintiff may raise estoppel in his statement of claim in the High Court where pleadings are required or in some form in civil proceedings in the Magistrates, District or Sharia Courts. [Per Aniagolu JSC in *Mogo Chinwendy & Nwanegbo Mbamali & Anor* (1980) 3-4 SC 31 at 48]

18. As a rule of substantive law, estoppel does not only estop, it may also create a right and thereby give rise to a cause of action.

Cases referred to:

Arion v Elemo (1983) 1 SCNLR 1
Cave v Mills (1862) 7 H & N 913
Canada & Dominion Sugar Co Ltd v Canadian National (West Indies) Steamships Ltd (1947) AC 46
Central London Property Trust Ltd v High Trees House Ltd (1956) 1 ALL ER 256
Combe v Combe (1961) 1 ALL ER 767
Chinwendu v Nwanegbo Mbamali & Anor (1980) 3-4 SC 31
Fasade v Babalola (2003) 11 NWLR (Pt 830) 26
Fay v North Yorkshire County Council (1986) 1 ICR 383
Jadesimi v Egbe (2003) 10 NWLR (Pt 827) 26
Lee v Gec Plessy Telecommunications (1993) 1 IRLR 383
Moorgate Merchantile Co. Ltd. v Twitchings (1976) 1 Q B 225
Nicon v Power and Industrial Eng. Co. Ltd. (1986) 1 NWLR (Pt 14) 1
Ogbonna v A.G. Imo State (1992) 1 NWLR (Pt 220) 47
Shamu v Afribank PLC (2002) 17 NWLR (Pt 795) 185
Terry v East Sussex County Council (1977) 1 ALL ER 567
*Tool Metal Manufacturing Co Ltd. v High Trees House Ltd (*1956) 1 ALL ER 657

Union Bank of Nigeria Ltd. v Professor Albert Ojo Ozigi (1994) 3 NWLR (Pt 333) 385
W. J Alan & Co. Ltd. v El Nasr Export & Import Co (1972) 2 ALL ER 127

Statute referred to:

The Evidence Act Section 157

Books referred to:

Chitty on Contract 24th Edition
Cheshire, Fifoot and Furmston Law of Contract 11th Edition
Tolley, Employment Handbook, 8th Edition
Strout, Judicial Dictionary 4th Edition

A.N.D Bensouda for the appellant
O.A.S Jammeh for the respondent

Paul JCA. The Appellant as Plaintiff brought an action in Kanifing Magistrate Court against the Respondent who was defendant, and claimed as follows:

1. One half of his salary from March 1996 to October 1997 at D500 per month.
2. Three quarters of his salaries for the months of November and December 1997 at D750 per month.
3. Interest on each month's salary at the rate of 22% per annum till date of payment.
4. Damages for breach of contract.
5. Costs.

After taking the evidence of the parties and their witnesses the Principal Magistrate gave Judgment in favour of the plaintiff for the sum of D11, 000 with costs of D200. The Defendant/Respondent was dissatisfied with the judgment of the Learned Principal Magistrate and appealed to the High Court. The High Court allowed the appeal and reversed the decision of the Learned Principal Magistrate. Aggrieved and dissatisfied

with the decision of the High Court, the Appellant has now appealed to this Court. The appellant filed the following grounds of appeal:

a) The Learned Trial Judge erred in law when she held that the appellant relied on estoppel to prove his claim.

Particulars

i) The plaintiff's cause of action was for arrears of salary owned to him and damages for breach of contract.
ii) The plaintiff's cause of action was not founded upon estoppel.
iii) It is clear from the Learned Magistrates' Judgment that she was relying on estoppel as a rule of evidence and not as a cause of action.

b) The Learned Judge erred in law and misdirected herself by applying wrongly the principle of law as applied in Combe v Combe (1961) 1 All ER 767.
c) The judgment is against the weight of evidence.

In the Appellant's brief of argument, learned Counsel for the Appellant Mrs A.N.D. Bensouda formulated the following issue for the determination:

> "The main issue for determination in this appeal is whether the plaintiff's case was for arrears of his salary and breach of contract or on estoppel by conduct".

Mr O.A.S Jammeh, learned Counsel for the Respondent on the other hand did not formulate any issue for determination by the Court but argued the issue formulated by the Appellant. The Appellant also filed a reply to the Respondent's brief. The Appellant's case as put forward before the Trial Court was that he was employed by the Respondent on 1st October 1995 as a relief worker at a salary of D1, 000 per month on contract on temporary basis with an option of renewing the contract every three months. The first three months ran from October 1995 to 31st December 1995. He was given a letter of appointment which was destroyed by water. According to Exhibit "A", the Appellant would be

written to upon renewal of his contract. His contract was further renewed but the renewal was verbal. He continued to work on the original salary of D1, 000 per month until sometime in March 1996, but without a formal renewal of his contract. By Exhibit "B" dated 20th May 1997, the appellant's contract was renewed further for the period of 1st January 1997 to 31 December 1997. In March 1996, he was called with his team of ten persons by the Superior who informed them that they would not be paid full salaries because UNHCR did not transfer funds to the Respondents but would be refunded later. He said he received D500 per month for the rest of 1996 and from January 1997 to October 1997. By Exhibit "C," dated 1st November 1997, the Appellant was suspended indefinitely over an alleged missing quantity of rice and informed that during the period of his indefinite suspension, and until the termination of his annual contract in December 1997 with the Respondent, he would be put on half salary i.e D250 per month. The Appellant was terminated with effect from 31st December 1997 according to Exhibit "D" dated 8th January, 1998. Thereafter, the Appellant, on the 17th February 1998 wrote to the Respondent and demanded the balance of his salary from March 1996. The Respondent allegedly responded that they were informed by the Program Officer at Basse that UNHCR had not yet transferred funds to the Respondent and that they would be paid as soon as funds were transferred.

I agree and adopt the lone issue postulated by the Appellant's Counsel for the determination of the instant appeal.

In dealing with this issue, Counsel for the Appellant submitted that the Appellant's cause of action was that the Respondent unilaterally breached the terms of their agreement with the Appellant by paying him D500 from April 1996 to October 1997 instead of D1,000 per month, and later after suspending him, by paying him D250 per month from November 1997 to December 1997. Learned Counsel submitted that the Appellant was not cross-examined on the above assertions, neither was any evidence given in rebuttal and that the effect of this is that the Appellant's evidence is deemed admitted with the consequence that the following is established:

a) That the Appellant was employed by the Respondent on a salary of D1, 000 per month.

b) That he was being paid D1, 000 per month.
c) That in March 1996 he was informed that he and others would not be paid in full.
d) That it was the Respondent that decided that his salary would not be paid in full.
e) That the Respondent promised to refund the balance of the salary later.

According to Counsel for the Appellant, the question was whether the original agreement to pay the Appellant D1, 000 per month was varied. That it was never the Appellant's case that his cause of action arose out of the supervisor's promise to refund the balance. That the fact that the salary was not paid in full constituted the breach of contract. That whether or not the supervisor promised the refund of the balance is immaterial as it does not affect the Appellant's right to the balance of his salary. That the only use of that piece of evidence is to show how and why the Appellant started receiving half his salary and also in order that he would not be taken as having agreed to vary the agreement. Counsel referred to the view of the authors of Chitty on Contract, 24th Edition, Paragraph 1376 that:-

> "A mere unilateral notification by one party to the other, in the absence of any agreement, cannot constitute a variation of a contract."

Counsel submitted further that the notification given to the appellant that thenceforth he would receive half salary until further notification was a unilateral act. That they only continued working since they were also informed that they would be refunded. That, in fact, there was no variation of the terms, only that the payment was deferred or it could be described as payment by installment. That reliance on Section 157 of the Evidence Act was wrong because the Respondent did not deny or attempt to deny that the promise to refund was made. That Section 157 is only used to debar a party from proving that a state of affairs which he led the other party to rely on to his detriment was not so. That Section 157 is only a rule of evidence. Counsel contends that having established that there was a contract between the Appellant and the Respondent and that the agreement was breached by payment of half salary and later one quarter salary, the onus was on the Respondent to establish a legal

justification for the reduction. That the only evidence given by the Respondent were the agreements between the Respondent and UNHCR. She submitted that it is not a legally recognized defense to a breach of contract and that there is evidence that the Appellant was neither a party to that contract nor was he made aware of it. That the Appellant wrote Exhibit "E" to find out why his salary was reduced and that was the opportunity the Respondent had to formally notify the Appellant of the existence of that contract but they failed to do so. That in any event, the Appellant's contract was never conditioned on the availability of funds from UNHCR or any other organization.

For the Respondent, it is contended that a contract did exist to which the Respondent was privy and that agreement between UNHCR and the Respondent gave rise to a completely new agreement which the Appellant accepted when the variation in his salary was made known to him. That the Appellant is rightly estopped by conduct when he continued to receive the reduced salary with knowledge that the funding agency, UNHCR was not in a position to pay him at the rate of D1, 000 per month. He submitted that the High Court was right in relying on Section 157 of the Evidence Act and that no formal communication was necessary because the Appellant knew that D500, instead of D1,000 was to paid to him from April, 1996 to October 1997. Learned Counsel submitted that whatever the terms of the contract may be, the Appellant has effectively waiver his right to claim any difference in his salary when it was reduced from D1, 000 to D500 and that he cannot subsequently turn around and claim any such difference.

Counsel referred to the cases of W.J Alan & Co Ltd v El Nasr Export & Import Co. (1972) 2 All E.R 127; Angles v Metropolitan Ry. Co (1972) 2 All ER 147 and Tool Metal Manufacturing Co. v Tungsten Electric Co (1955) 2 All ER 657. He submitted that the Respondent is not a commercial entity but a charitable and relief organization whose existence depends on door support and therefore, wrong to suggest that the Respondent's contractual obligations cannot be subjected to "third-party" or donor contingencies. He submitted that the Appellant only chose to institute proceedings for the salary differentials when he was implicated in certain undesirable conduct in the cause of his employment. He submitted that the principle enunciated in the Central London Property Trust Ltd. v High Trees House Ltd (1956) 1 All ER 256 by Lord Denning M.R applies to this case but was wrongfully used as a

cause of action by itself, and that the High Court rightly set aside the decision of the Trial Court for that reason.

It can be seen from the Record that the High Court based its decision on the doctrine or estoppel when it observed that:-

> "… it is a well-established principle of law that the doctrine of estoppel operates only by way of defence and not as a cause of action. This principle was made clear in *Combe v Combe* (1951) All E.R 767. The distinguished authors, Cheshire, Fifoot and Furmston in their work titled 'Law of Contract, 11th Edition at page 96, commented on the decision in *Combe v Combe* viz: 'This striking metaphor should not be sloppily mistranslated into a notion that only the defendant can rely on the principle. There is no reason why a plaintiff should not rely on it provided that he has an independent cause of action.''

The Learned Judge then went on to hold that there was no independent cause of action because the breach of contract was based on the promise made by the Appellant's superior that the appellant would be refunded and concluded thus:

> "I am of the considered view that the Respondent placed reliance on the promise of the supervisor to prove his claim in the Court below. In my judgment therefore, having regard to the authority of *Combe v Combe* (supra) the Respondent could not have relied on estoppel to prove his claim.''

In the resolution of the sole issue postulated by the Appellant in the instant appeal, it is necessary to consider if there was a contract between the Appellant and the Respondent; whether there was a variation of such contract; whether there was a breach of the contract and a waiver thereof and the concept of estoppel by conduct so as to determine the Appellant's cause of action.

A contract is an agreement between two or more parties which creates reciprocal legal obligations to do or not to do a particular thing, and for a valid contract to be formed, there must be mutuality of purpose and intention. The meeting of minds of the contracting parties is the most crucial and overriding factor or determinant in the law of contract. An

agreement will not be binding on the parties unless it can be said that the parties are ad idem upon matters which are cardinal to the specie or agreement in question and also upon matters that are part of the particular bargain. See *Chief Okubile & Anor v Oyagbola & Ors* (1990) 4 NWLR (Pt 147) 723. There are five ingredients that must be present in a valid contract, namely; offer, acceptance, consideration, intention to create legal relationship and capacity to contract. For a contract to exist in law, all the five ingredients must be present. See *Orient Bank (Nig) PLC v Bilante International Ltd* (1997) 8 NWLR (Pt 515) 37. In the instant case, it is clear from the Record that all five ingredients were present in the relationship between the Respondent and the Appellant when the Appellant was employed by the Respondent on 1st October 1995. It is of no legal consequence that the offer of employment as shown in Exhibit "A" is described as one of temporary employment. The obligations, incidents and consequences are the same in law. And for a valid contract to come into existence, there must be agreement on the fundamental terms. In the sphere of master and servant relationship, it cannot be disputed that the salary of the servant constitutes a fundamental term of the contract. It is in the nature of that relationship that the servant must be told how much his salary will be. The master has a duty to disclose how much salary is to be earned by the servant and when same is payable. In the case at hand, the evidence before the Trial Court as borne out by the record, was that the Appellant earned the sum of D1, 000 per month on his temporary employment from 1st October 1995 to 31 December 1995. There was no evidence that the salary earned by the Appellant was disclosed in his offer of employment which he did not tender because, according to him the letter was allegedly destroyed by flood water.

The evidence before the Trial Court was that the Respondent promised to renew his contract every three months in writing. As I understand temporary employments, each temporary employment stands on its own and creates separate and fresh rights and obligations between the parties to the contract. If at the outset of the employment it was made clear to the employee that he was only engaged on a temporary basis and for a stated period, the employer can refuse to renew his temporary contract for a further temporary period and the refusal to renew may be considered a substantial or acceptable reason and be considered fair by the Court. See *Terry v East Sussex County*

Council (1977) 1 All ER 567*; Fay v North Yorkshire County Council* (1986) 1 ICR 133.

In the instant case, the Appellant continued work after December 31st 1995 when his first employment on a temporary ended. He was not given any written offer of further temporary employment as intimated to him by Exhibit "A" dated 19th December 1995. There was evidence that he remained in the employ of the Respondent from January 1996 to March 1996 and earned the sum of D1, 000 per month. This can only mean that the Respondent was further offered to continue to work for the Respondent, albeit orally, and the offer was accepted by the Appellant by his continuing to work. It is safe to conclude that the five ingredients which must be present for there to be a valid contract were indeed present in the further renewed temporary but oral contract. It is inconsequential that there was no written letter of employment. In any event, the fact of the Appellant's further contract is not in issue. It would appear from the records that the Appellant continued to work until November 1996 without a written renewal when his employment was terminated. There was evidence that he received salary in December 1996. There was no documentary evidence as to how much was earned by the Appellant for the months of April and May 1996 although he claimed that he earned D500 per month for the two months. It would also appear that the Appellant's employment was no longer limited to a three monthly period from January 1996 to November when it was terminated. The further renewal of his temporary appointment from 1st January 1997 to 31st December 1997 (a one-year period) seems to lend credence to this supposition. In light of the foregoing, it is clear that there was a contract between the parties during the period from 1st January 1996 to 31st December 1996.

The next issue to consider is whether there was a variation of the contract in terms of the fundamental term as to salary. 'Variation' in the context of the instant case, means change in the amount earned by the Appellant per month. The law is that parties to a contract may effect a variation of the terms of the contract by modifying or altering its terms by mutual agreement. No change in the terms of an employee's contract may be made without his consent. Such consent may be express or by the employee agreeing to the change orally. See Tolley's Employment Handbook, 8th Ed., paragraph 10.21 page 54. The evidence before the

Trial Court was that the Appellant was called in March 1996 by the Supervisor together with ten other members of his team who informed them that they would not be paid full salaries because UNHCR did not transfer funds to Respondent, but that the staff would be refunded later, and that as a result of this information he received the sum of D500 per month thereafter until October 1997. This piece of evidence was not rebutted, and the Trial Court believed the Appellant's evidence that they were so informed. But can it be argued with any measure of optimism that this notification constitutes variation of the contract between the parties? I cannot assent to the argument that it constitutes a variation. In my view, it does not constitute an agreement to change the amount earned by the Appellant every month. Properly understood, it means that the Appellant would continue to earn his monthly salary of D1, 000 but would be paid the half of it later. This is why he continued to "plough" in hope. In any event, there cannot be any talk of variation except by mutual agreement of the parties to a contract. According to the learned authors of Chitty on Contracts 24th Edition, paragraph 22:029 page 1083, ''a mere unilateral notification by one party to the other, in the absence of any agreement, cannot constitute a variation of contract.''

I accede to the submission of the learned Counsel to the Appellant that what transpired between the supervisor and the Appellant (and his team) was merely a unilateral notification of the deferment of payment of the other half of his salary and not an agreement to a reduction of the amount earned by him. Besides, there is no evidence of power in the Respondent to vary the terms of the contract with the Appellant unilaterally. Even where there is power to vary, the law is that an express power to vary the terms of a contract can only be enforced where it was clearly specified. See *Lee v Gec Plessey Telecommunications (*1993) 1 IRLR 383. Exhibit "K" which is the Respondent's Contract of Service Rules, does not make provision for such a power to vary a term of the contract. If what took place in March 1996 was not a variation, it follows that the Appellant's continued work or earning of D500 per month did not constitute an agreement to vary. Generally, if the conditions necessary for the formation of a contract are fulfilled by the parties thereto, they will be bound by it. See *Union Bank of Nigeria Ltd. v Professor Albert Ojo Ozigi (1994) 3 NWLR (PT 333) 385*. It is settled law that where parties to an agreement are ad idem on all terms of the agreement, it is valid in law and an agreement voluntarily entered into must be honored in good faith.

This is also embodied in the doctrine of equity, 'pacta sunt servanda', for equity will not allow the law to be used as an engine of fraud. Equity looks at the intent rather than form and will impute an intention to fulfill an obligation. See *Jadesimi v Egbe* (2003) 10 NWLR (Pt 827) 1*; Nicon v Power and Industrial Eng. Co Ltd. (*1986) 1 NWLR (Pt 14) 1. As shown by the records, the Appellant earned the sum of D1,000 per month from January 1996 to March 1996, and in the absence of evidence showing that he was not entitled to continue to earn that amount throughout the period of his contract for the rest of the year 1996, it is not out of place, and neither will it be perverse to hold that he was entitled to be paid the same amount during the currency of the contractual period, so that failure to so pay him amounts to a breach.

I come now to the question of waiver. Do the facts of this case support the submission of learned Respondent's Counsel on waiver? The answer must be in the negative. Waiver is the intentional and voluntary surrender or relinquishment of a known privilege or right by a party entitled to the same which, at his option, he could have insisted upon. It is a curious phenomenon and is in certain circumstances available to a plaintiff. It is also available to a defendant. The concept of a waiver presupposes that the person who is to enjoy the benefit or who has the choice to two benefits is fully aware of his right to the benefit or benefits, but he either neglects to exercise his right to the benefits, or where he has a choice of two, he decides to take one but not both. The exercise has to be a voluntary act. See *Fasade v Babalola* (2003) 11 NWLR (Pt 830) 26*.* There is little doubt that a man who is not under any legal disability should be the best judge of his own interest. If, therefore, having full knowledge of the rights, interest, profits or benefits conferred upon or accruing to him by and under the law, but he intentionally decides to give up all these, or some of them, he cannot be heard to complain afterwards that he has not been permitted the exercise of his rights or that he has suffered by his not having exercised his rights. Such a person would be held to have waived those rights or to put it in another way estopped from raising the issue. See *Fasade v Babalola* (supra) and *Ariori v Elemo* (1983) 1 SCNLR 1. He cannot be heard to complain thereafter that he was denied the advantage of benefiting from those benefits and rights. See *Ogbonna v A.G. of Mo State* (1992) 1 NWLR (Pt 220) 647*; Shanu v Afribank PLC* (2002) 17 NWLR (Pt 95) 185 *and Ariori v Elemo* (supra).

I am unable to see how it can be said that the Appellant waived his right to the second half of his salaries. Indeed, he was entitled to insist on being paid full salaries when he was approached and informed that he would be paid later. He may well have protested and sued under the contract for breach of contract and for damages. He did not do any of these because he had hope that he would be paid later. If the argument advanced on waiver is that the Appellant waived his immediate right to insist on being paid full salaries when they were immediately due and to sue for breach and damages, but continued to work, it could hold water. But to argue that his consent to a deferred payment of his half salaries constituted a waiver of his right to his full salaries demonstrates a lack of appreciation of the meaning of the concept of waiver on the part of the Respondent's Counsel. That argument to my mind is inept and falls flat on its face together with the cases cited in support thereof.

Let me now deal with the submission on estoppel. The word "Estoppel" appears to be French in origin. According to Stroud, Judicial Dictionary, 4th Ed. Vol. 2 Page 943, "Estoppel" commeth of a French Word 'Estoupe' from whence the English word 'Stopped', and it is called estoppel, or conclusion, because a man's own act or acceptance stopped or closeth his mouth to allege or plead the truth." In *Cave v Mills* (1862) 7 H & N 913 at 927-928, Baron Wilde explained what he described as the common sense origin of estoppel as follows:-

> "A man shall not be allowed to blow hot and cold, to affirm at one time and deny at another, making a claim on those whom he has deluded to their disadvantage and founding that claim on the very matters of the delusion. Such a principle has its basis in common sense and common justice, and whether it is called 'estoppel' or by any other name, it is one which Courts of law in modern times most usefully adopt."

Estoppel is both a rule of evidence and of substantive law. In *Canada & Dominion Sugar Co. Ltd. v Canadian National (West Indies) Steamships Ltd* (1947) AC 46 at 56, Lord Wright observed as follows:

> "Estoppel is a complex legal notion, involving a combination of several essential elements - the statement to be acted on, action on the faith of it, resulting detriment to the actor. Estoppel is often described as a

> rule of evidence, as indeed, it may be so described. But the whole concept is more correctly viewed as a substantive rule of law".

As a rule of evidence, estoppel is generally regarded as a weapon of defence, not of offence, as a shield, not a sword. This is why it is often the defendant who uses estoppel in his favour as a shield. It is also the reason why it is often said that it cannot be the basis of a cause of action even where a plaintiff relied on it in proof of his case. But it is now settled that a plaintiff may raise estoppel in his statement of claim in the High Court where pleadings are required or in some form in civil proceedings in the Magistrates, District or Sharia Courts. See *Aniagolu JSC in Mogo Chinwendu v Nwanegbo Mbamali & Anor* (1980) 3-4 SC 31 at 48 were his Lordship expressed the view that ''as a rule of substantive law, estoppel does not only estop, it may also create a right and thereby give to a cause of action.

In *Moorgate Merchantile Co. Ltd. v Twitchings* (1976) 1 QB 225 at 241, Lord Denning in expressing the opinion that estoppel should be classified simply as a principle of equity said that:-

> "Estoppel is not a rule of evidence. It is not a cause of action. It is a principle of justice and of equity. It comes to this: When a man, by his words or conduct, lets another to believe in a particular state of affairs, he will not be allowed to go back on it when it would be unjust or inequitable for him to do so".

The complaint by the Respondent in the Court below was that the Learned Trial Judge erred in law when she held that a claim can be proved by estoppel. In other words, that estoppel can be used as a sword, and not a shield. It is also clear that the decision of the Court below was based on the proposition that the Appellant herein relied on estoppel to prove his claim, which the Court relying on the authority of *Combe v Combe* (supra) held he could not do unless he had an independent cause of action.

From what has been said above, it is clear that estoppel by conduct can give rise to a cause of action even if as a principle of equity. It is thus clear that the decision of the Court below does not represent the correct position of the Law. Since the Learned Trial Magistrate accepted the evidence of the Appellant that his supervisor promised that one half of his

salaries would be paid to him later, I can see nothing wrong in her reliance on Section 157 of the Evidence Act in holding that the Respondent was estopped from denying the truth of the promise made by the supervisor. She was perfectly entitled to rely on the Section. And from the present state of the Law, the Appellant was entitled to found his cause of action on the said promise. But taking a hard look at the Appellant's case, can it be said that his cause of action in the Trial Court was founded on estoppel? The answer is an emphatic No! It was clearly founded on a breach of contract which, contrary to the view of the Lower Court, constituted an independent cause of action. Does the contention by learned Respondent's Counsel that the Appellant's case was based on estoppel have any validity? The answer is an emphatic No!

In view of what has been said earlier on, the Appellant is not equally estopped by conduct from claiming one half of his salaries because he continued to work at a reduced salary because he acted upon the representation and promise made to him by the Respondent's supervisor. On the submission that the agreement between the UNHCR and the Respondent gave rise to a completely new agreement which the Appellant accepted when the so-called variation in his salary was made known to him, that argument cannot stand as there is no evidence on record showing that it was disclosed to the Appellant. Furthermore, his contract of employment was not dependent upon availability of funds from a third party (UNHCR). There is no evidence of novation whereby the Respondent and UNHCR agreed to transfer the agreement between them so that the appellant can be said to be as good as a party to the said agreement as to bind him. The appellant remaining in the employ of the Respondent in the face of the new agreement between the Respondent and UNHCR cannot, in the circumstances, be taken to mean acceptance by conduct, on his part to be so bound in the absence of evidence of a distinct request on him by the Respondent and UNHCR to be bound. See Chitty on Contract 23rd edition paragraph 1053 at page 1053.

An employer is under a duty to disclose certain information to his employee and in a case such as the instant one, a defense of absence of funds from a third party can only avail the Respondent if at the outset of the current contract with effect from 1st January 1996, there was evidence of full disclosure of the third-party funding. There is no evidence on record also of such disclosure in the subsequent renewal from 1st January, 1997

to 31 December 1997. There is also no evidence of privity of contract between the Appellant and UNHCR neither was it canvassed in this appeal. On the whole, the solitary issue canvassed in this appeal is resolved in favor of the Appellant. This Court is not called upon to express an opinion on the issue of the Appellant's suspension from work on an allegation of crime, leading to his termination. I shall therefore restrain myself from expressing one.

Accordingly, this appeal succeeds. The Judgment of M.Y. Sey J, delivered at the High Court in Banjul in Civil Suit No. 55/99 on the 20th day of June 2001, is hereby set aside and I affirm the Judgment of her Worship H.C. Roche of the Kanifing Court in case No. K.466/98 delivered on the 30th day of November 1999.

I award D10, 000 costs in favor of the Appellant against Respondent.

Agim Ag PCA. I agree

Yamoa JCA. I agree

Appeal Allowed.
FLD.

FELIX THOMAS v ANNETTE IBKENDANZ

COURT OF APPEAL OF THE GAMBIA
(Civil Appeal 37/06)

31st January 2007

Agim JCA, Dordzie Ag. JCA, Anin-Yeboah Ag. JCA

Action – Ex-parte applications – How determined.
Court – Record of proceedings – Status of – Power of Court to grant ex-parte injunction – Distinction between a Judge acting in Court and in Chambers.
Injunction – Ex-parte injunction – Power of Master to grant same.
Judicial Officers – Master – Jurisdiction and power.
Jurisdiction – Limitations and powers of Master.
Practice & Procedure – Ex-parte injunction – Power of Court to grant ex-parte injunction – Judge acting in Court and in chambers – Distinguished – Master acting as a judge in chambers – Power to grant injunction and its limitations – Record of proceedings – Status of.
Public Officers – Difference between a Judge acting in Court and in Chambers.
Words & Phrases – Judicial power – Definition and meaning of.

Held, *allowing the appeal; Ex-parte order of injunction set-aside (per Agim JCA, Dordzie Ag. JCA, Anin-Yeboah Ag. JCA concurring*)

1. The record of proceedings of a Court are binding and sacrosanct. [Halifa Sallah & Ors v The State (2002-2008) 2 GLR 375 referred to]

2. An ex-parte injunction can be granted by a Court for extremely urgent reasons. Such discretionary power to grant must however be exercised judiciously. [*Kotoye v C.B.N.* (1989) ALL NLR 76 referred to]

3. When the Judge acts in Court, he acts coram publico. The statement of Hurley J is very instructive on this as handed down in the *Pierre Sarr Njie case* (1960-61) 1 SLLR 125.

4. Judicial power of Courts is not just the powers to decide on the dispute between parties in accordance with the relevant law but also the power to enforce those decisions.

5. The Master does not exercise judicial power which is soley vested in the Courts. When she sits in chambers, she sits as a Judge and not as a Court.

6. The master exercising the powers of a Judge in Chambers can deal with applications for injunctions in Chambers. The injunction can be granted upon an application properly brought under Order 26 but which does not fall within the purview of Order 12 Courts Act Cap 6:01 Vol. II Laws of The Gambia.

Cases referred to:

Akainyah & Anor v The Republic (1968) GLR 554
Araba Badjie v Ass Mboob (unreported) Judgment No. 29/88 delivered on 24th November, 1988
Halifa Sallah & Ors v The State (2002-2008) 2 GLR 375
Hudart, Parker & Co Proprietory Limited v Moorehead (1909) 8 CLR 330
Kotoye v CBN (1989) All NLR 7
Jawara v Gambia Airways
Shell Co of Australia Ltd v Federal commissioner of Taxation (1931) AC 275

Statutes referred to:

The Courts Act Cap 6:01 Vol. II Laws of The Gambia 1990
The Constitution of The republic of The Gambia 1997
The Supreme Court practice of 1991 Volume 1

Rules of Court referred to:

The High Court Rules Cap 6:01 Vol. 1 Laws of The Gambia 1990 Order 6 Rule 1, Order 12 Rule 1, Order 26

APPEAL against the ex-parte order of injunction granted by the Master of the High Court on the 14th June 2006. The facts are sufficiently stated in the opinion of Anin-Yeboah Ag. JCA.

I Drammeh for appellant
L S Camara for respondent

ANIN-YEBOAH Ag. JCA. On 14th June 2006, The Master of the High Court granted an order of interlocutory injunction restraining the appellant herein together with his agents etc from "carrying out further construction, or engaging in any act whatsoever" on the land which was the subject matter of the dispute between the parties. It is the appellant's dissatisfaction with this Order that led to the present appeal. The appellant filed two grounds of appeal, the first was later amended. From these grounds the issues for determination were stated to be:–

1. Whether the Master has power to grant injunctions?
2. Whether the Master has powers of a Judge in chambers?
3. Whether the order of the 14th of June 2006 was granted?

We are satisfied that the issues as stated by the appellant satisfactorily reflect the issues to be resolved in the determination of this appeal.

The gravamen of this appeal is the question of the jurisdiction and powers of the Master and the procedure adopted in granting the said order. The facts of the dispute between the parties are of no moment then to the resolution of the issues herein raised and so this Court will dispense with their narration. Suffice it to say that at the time this Order was made, the appellant had fourteen days and this period had not yet elapsed. The third issue which is more straightforward will be dealt with first. The appellant states that there is nothing in the record of proceedings before the Master showing that a motion was moved by the respondent for the said order. A certified true copy of the handwritten notes of the Master has been attached to this appeal. Nothing in these

notes shows that such a motion was moved. The respondent did not file anything before this Court claiming the contrary. The fact that the notes are handwritten and certified as a true copy rules out the responsibility of anything having mistakenly been left out in its preparation.
Section 29 of the Courts Act Cap 6:01 Vol. II Laws of The Gambia 1990 states that:-

> "In every case, civil or criminal, minutes of the proceedings shall be drawn up and shall be signed by the Judge or Magistrate presiding, and such minutes, with notes of the evidence taken at the hearing or trial, shall be preserved as the record of the Court."

Recording of proceedings in cases is thus mandatory. Subsection (2) of the same section also provides as follows:-

> ''Such minutes and notes of evidence or a copy thereof, purporting to be signed and certified as a true copy by the judge or magistrate presiding or by the Registrar of the Supreme Court, shall at all times, and without further proof be admitted as evidence of such proceedings and of the statements made by the witnesses.''

In line with the foregoing, the attached proceedings are to be deemed a true reflection of what took place before the Master. It will be correct to state then that no proceedings took place before the Master which culminated in the order in question. The record of proceedings of a Court is binding and sacrosanct. See *Halifa Sallah and Ors v The State* (2002-2008) 2 GLR 336. The issue is not just that the record does not show that a motion was moved. Noting on record shows the reasons for the order. Whether it had been granted ex parte as the order itself implies or even if the Master had in the exercise of some power granted it suo motu, the record should have reflected this and his reasons for the grant. This Court cannot therefore speculate on the basis for the Order and the manner in which it was made. An ex-parte injunction can only be granted for extremely urgent reasons. Such power to grant must be exercised judiciously. It is only the stated reasons which will show whether, in spite of denying the other party his right to be heard on the motion, the Court had exercised its discretion judiciously. This has been stated ad nauseum

by the Courts. See the Nigerian Supreme Court case of *Kotoye v CBN (1989) All NLR 76.*

The Record of proceedings shows that the Master vacated a similar ex-parte order he had earlier granted on 24th May 2006. This was done on 6th June 2006 and about eight days later he grants the same ex-parte order without recording the proceedings. One can only borrow the words of counsel for the appellant and describe the Master's actions as "curious". It is our considered opinion that the proceedings, not reflecting how this ex-parte Order of injunction came into being, as mandatorily required by Section 29(1) of the Courts Act, it is fatally flawed and ought to be set aside. We accordingly do so.

The first issue relates to the Master's power to grant injunctions and the second to whether she has the powers of a Judge in chambers. The two will be taken together. Section 6A subsection (2) a of the Courts Act Cap 6:01 states: -

> "The Master shall transact all businesses and exercise all such authority and jurisdiction as may be transacted and exercised by a Judge in Chambers."

It is the contention of the appellant that The Master cannot act as a Judge whether in Court or in chambers. Counsel made reference to Constitutional provisions relating to the judicature. The appellant's position, in sum, is as follows:

> "Judicial power is vested in the Courts, including a Court martial. The High Court is duly constituted by a single judge. A judge is appointed by presidential warrant and takes an oath. One of the prescribed qualifications for appointment as a High Court Judge is that a person, after holding the position of a Master for minimum of five years qualifies to be appointed as a Judge. A Master does not take the oath of a Judge and is not appointed by presidential warrant. The conclusion then is that the position of Master is separate and distinct from that of a Judge."

All this is correct. In conclusion, the appellant contends that since the High Court is duly constituted by a single judge, it is only a judge which can exercise the powers of the High Court. It is only the Court that can exercise judicial powers and hand down decisions such as handing down injunctions. For all the above reasons the Master therefore cannot act as a Judge whether in Court or Chambers. The *Pierre Sarr Njie case* found in (1960-61) 1 SLLR 125 and referred to us by Counsel for the appellant is instructive here. The Court at page 135 per Hurley JA stated that:–

> "There is a well-known distinction between the Judge in chambers and the Court. Both the Court and the Judge conduct litigious business but when the Court conducts it, it is coram publico and when the judge conducts it, it is not. Then the Judge and not the Court exercises certain powers or performs certain duties ancillary to the jurisdiction over litigious matters or of an administrative nature…Thus the litigious jurisdiction of the Court is exercised by the Court coram publico and by the judge non coram publico; and it is the Judge, and not the Court, who exercises power and performs powers ancillary to the litigious jurisdiction."

Thus when the Judge acts in Chambers, he acts non coram publico and exercises powers ancillary to the litigious jurisdiction. This will apply mutatis mutandis to the Master when she is acting as a judge in chambers. Can it be said that Section 120(2) which vests the exercise of judicial power in the Courts precludes the Master from exercising the jurisdiction conferred on her under subsection (2)(a) of Section 6A of The Courts Act 6:01? The Constitution does not define "judicial power". One cannot have recourse to a definition in the British Constitution because there is no such thing. The High Court of Australia defined "judicial Power" in the case of *Huddart, Parker and Co. Proprietory Limited v Moorehead (*1909) 8 CLR 330 at page 357 per Griffiths C.J as follows:-

> "The power which every sovereign authority must of necessity have to decide controversies between its subjects or between itself and its subjects, whether the rights relate to life, liberty, or property. The exercise of this power does not begin until some tribunal has power to

> give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action."

Judicial power appears then to be not just the power to decide on the disputes between the parties in accordance with relevant law but also the power to enforce these decisions. The Privy Council in *Shell Co of Australia Ltd v Federal Commissioner of Taxation* (1931) AC 275 approved this definition. See the Ghanaian Court of Appeal case of *Akainyah & Anor v The Republic (*1968) GLR 554. The Ghanaian Supreme Court in the case of *The Republic v Court of Appeal and Ors: Ex-parte Agyekum* 1982-83 GLR 688 at 695 adopted this meaning of "judicial power" and held that Section 4(1) of National Redemption Council Decree (NRCD) 172 which stipulates that "the Commissioner shall have exclusive jurisdiction to determine boundaries of Stool lands and to hear and determine questions or disputes relating thereto'' did not give the said Commissioner judicial power. This was because after determining questions or a dispute relating to land he had no power to enforce his decision or compel its observance. A party to such a dispute could only go to the Courts which, in the exercise of its judicial power could mulct the disobedient party in damages, grant an injunction or cite for contempt if its order is not obeyed.

It is clear from the provisions of Section 6A (2)(a) of Cap 6:01 that in exercising her jurisdiction thereunder, the Master will have no power to enforce her decisions. It is our considered opinion that in exercising this jurisdiction, the Master does not exercise judicial power which is solely vested in the Courts. When she sits in chambers, she sits (as is stated in section 6A "as a judge and not as the Court. It is our opinion that when the Master considers an ex-parte application she is not usurping the power of the Court as stated in Section 120(2) of the Constitution or Order 12 rule 1, she is only exercising the function of a judge as arises under Order 26. Section 3(3) of Cap 6:01 states that:-

> "Subject to any law to the contrary the several officers of the Supreme Court shall have the same jurisdiction, powers and authorities as the several officers performing analogous functions in the Supreme Court of Judicature in England immediately before the eighteenth day of February 1965."

This Section allows one to fill in the gaps regarding the jurisdiction, powers and authorities of the officers mentioned therein if any arise by a consideration of the jurisdiction of their counterparts in England if the need arises subject to any Gambian law to the contrary. A consideration of the extent of the jurisdiction and powers of the Master in this jurisdiction may call for a consideration of the jurisdiction of her counterpart in England as a helpful guide. See this Court's decision in the case of *Araba Badjie v Ass Mboob Civil Appeal 29/88* given on 24/11/88 where the earlier case of Jawara v Gambia Airways was discussed and the Court stated that Section 3 of The Courts Act may be used to flesh Section 6A (2)(a) and (b) with more detail if the need arises. Does the Master's counterpart in England exercise the powers of a judge in Chambers? The Supreme Court Practice of 1991 Vol. 1 page 556 which discusses the position of the Master gives an affirmative answer. Order 32 Rule 11 of the English rules spells out the jurisdiction and limits of the Master when he sits as a Judge in Chambers. The Master in England generally cannot grant injunctions except in a few instances. The present situation, that is, the grant of an injunction in a land case is not one of those instances. Further, Section 3(3) of the Courts Act does not in any way give the Master in The Gambia power to grant an injunction (such as the one presently appealed against) which her counterpart in England cannot grant. In order to resolve the first issue in this case, one has to first decide whether a judge has power to grant injunctions in Chambers? If he has, then, the Master exercising the powers of a judge in Chambers can also deal with injunction applications in Chambers. Order 12 of The Courts Act Cap 6:01 is entitled injunctions etc Rule 1 states in part that:-

> ''In any suit which it shall be shown to the satisfaction of the Court that any property which is in dispute in the suit is in danger of being wasted, damaged, or alienated by any party to the suit, it shall be lawful for the Court to issue an junction to such party…''

That section makes reference to the COURT. It is clear from this that the Court can grant injunctions to prevent waste, damage to or alienation of land in dispute. The Constitution in Section 24(2) provides as follows:-

''All proceedings of every Court and proceeding relating to the determination of the existence and extent of civil rights or obligation before any other authority including the announcement of the decision of the Court or other authority, shall be held in public.''

Order 6 Rule 1 of the First Schedule of The High Court Rules also provides that the sittings of the Court are to be held in public. Both the Constitution and Order 6 make exceptions which are not applicable to this case. The conclusion is that a Court is required by law with a few exceptions to sit in public. As this Court has had occasion to state before, these provisions have made the trial of cases orally and in open court a characteristic feature of the administration of civil justice in this jurisdiction. This way the fairness of proceedings becomes open for all to see. See the case of Araba Badjie v Ass Mboob (supra).

The Judge however, can sit in chambers and consider ex-parte applications and summons by virtue of Order 26, Rules of The High Court entitled Applications and Proceedings At Chambers which permits certain applications and proceedings to be heard and held in chambers by the Judge (and not the Court as is required in Order 12 which deals with injunctions). It is clear that injunctions which are clearly and separately dealt with under Order 12 and which are to be granted by the Court were not in the contemplation of the draftsman when Order 26 was being drafted. That being so they would fall within proceedings before the Court which have to be held in public. That is not to say that a Judge can never grant an injunction in chambers. When an ex-parte application which does not fall under Order 12 is properly brought under Order 26, a Judge can grant the appropriate injunction if the justice of the matter calls for it.

The answer to the question asked earlier will then have to be in the affirmative but with a limitation. A Judge can grant an injunction upon an application properly brought under Order 26 but which does not fall within the purview of Order 12 in chambers.

It is my considered opinion that, in the same vein, the Master can only grant the same group of injunctions as defined above. The ex-parte injunction Order made by the Master on 14th June 2006 having to do with land, and therefore properly falling under Order 12 and not under Order 26 was made without jurisdiction.

For all the above reasons, the ex-parte Order of injunction granted by the Master is hereby set aside.

Agim PCA. I agree
Dordzie Ag. JCA. I agree

Appeal Allowed.
FLD.

CHRISTOPHER E. MENE; AFRIWOOD COMPANY LIMITED

V

JOSEPH H. JOOF

COURT OF APPEAL OF THE GAMBIA
(Civil Appeal No. 11/2007)

21st July 2008

Agim JCA, Ota JCA, Agyemang JCA.

Action – Slander or libel – What plaintiff needs to set out.

Appeal – Appellate Court – Instances when the Court will interfere with exercise of discretion by a Lower Court.

Court – Jurisdiction – Granting relief not sought by a party – Amendment – Ordering amendment suo-motu – Discretionary power of Court – Statement of claim – Failure to allege material facts – Where the claim is incurably bad – Extraneous matters considered by Court – Cause of action – Where the claim discloses no cause of action – Abuse of process – What amounts to.

Jurisdiction – Appellate Court – Interference with exercise of discretion by Lower Court – Relief – Granting relief not sought by a party – Amendment – Court ordering amendment suo motu – Statement of claim – Where the claim is incurably bad.

Parties – Action – Slander or libel – What party needs to set out – Whether proper to plead material facts and evidence to prove same – Whether plaintiff needs to establish that words spoken of him were malicious or false – Application – Whether mandatory to state rule under which same is made – Particulars – Improper for a party who filed pleading to seek for further particulars.

Pleadings – Can the Court order an amendment suo-motu – Court granting amendment prejudicial to other party – Court's exercise of discretionary power to grant amendment – Purport of Order XXIII Rule 14 of The Gambia High Court Rules – Statement of claim – When incurably bad – Procedure adopted by Court – Only material facts need be pleaded and

not evidence to prove same – Where same discloses no cause of action – Steps the Court will take.

Practice & Procedure – Appellate Court – Interference with exercise of discretion by a Lower Court – Amendment – Discretionary power of Court to grant an amendment – Statement of claim – Failure to allege material facts – Where the claim is incurably bad – Extraneous matters considered by Court – Cause of action – Where the claim discloses no cause of action – Abuse of process – What amounts to.

Held, *allowing the appeal (per Agim JCA, Ota JCA, Agyemang JCA concurring)*

1. An Appellate Court has the jurisdiction to set aside and overturn the exercise of discretion by a Trial Judge where that discretion was exercised in accordance with wrong or inadequate materials, or that the Court acted under a misapprehension of fact, in that it gave weight to irrelevant matters or omitted to take relevant matters into account. [*Blunt v Blunt* (1943) AC 518 HC; *Ballmoose v Mensah* (1984–1986) 1 GLR 724 referred to]

2. A Court has no power to hand out reliefs not sought by a party. [*Ayanboye v Balogun* (1990) 5 NWLR (Pt 151) 392; *Sadiq v Bundi* (1991) 8 NWLR (Pt 210) 433; *Ladoke v Olabayo* (1992) 8 NWLR (Pt 261) 605 referred to]

3. The Court could suo-motu order an amendment where such would inter alia, enable all matters of controversy to be placed before the Court. [See Order XXIV Rule 1 of The Gambia High Court Rules Cap 6:01]

4. Where the Court orders an amendment suo motu and same would operate to make sustainable, an otherwise unmaintainable action, which would necessarily be prejudicial to the defendant, it heralds the descent of the impartial judicial umpire into the arena of controversy.

5. It is trite that Courts in proper exercise of their discretion, will allow an amendment in a number of circumstances provided that no

surprise results thereby. Consequently, no party is allowed to set up an entirely new case, prejudice the opponent's case or put him to disadvantage in a manner that cannot be compensated by costs or otherwise. [*Yeboah v Bafour* (1971) 2 GLR 199 referred to]

6. It is settled law that in an action seeking relief for alleged slander or libel, the words complained of must be set out.

7. It is trite law that, only material facts must be pleaded and not the evidence to prove them. Yet with regard to actions founded on defamation, the prerequisite of a maintainable action is that the words complained of be set out or if the action was grounded on an innuendo, that the meaning assignable thereto by the group to which it was published be set out.

8. When a claim is so fluid and lacking in necessary content as to need the assistance of the Court to reconstruct in order to be able to bring same before it, the Court ought to strike same out and not order an amendment [*Deegbe v Nsiah* (1984-86) 1 GLR 545 CA; *Thomas v Olufosoye* (1986) 1 NWLR 664 referred to]

9. In order to strike out a suit for not disclosing a cause of action, the Court will not consider matters extraneous to the statement of claim. However, the Court was not so constrained when considering whether a suit was frivolous, vexatious or an abuse of the Court's process. [*Lawrence v Lord Norreys* (1890) 2 AC 210; *Rep of Peru v Peruvian Guano Co*. (1887) 36 ChD 489 referred to]

10. A complaint of abuse of the process of the Court may be laid in a suit as a tort before the conclusion of the proceedings in respect of which the matters complained of arose. [*Speed Seal Products Ltd. v Paddington & Anor* (1986) 1 ALL ER 91; *Grainger v Hill* (1838) 4 Bing NC 212 or 132 ER 369*; Castro v Murray* (1875) 10 CREX 213 referred to]

11. It is a tort to use legal process in order to accomplish a purpose other than that for which it was designed and thereby cause damage. As a tort, it is one in respect of which remedy may be had for twisting of the ends of justice.

12. The Court has an inherent jurisdiction not to permit its processes to be used for an improper end. Consequently, the Court may strike out a suit for that reason. [*Okofoh Estates Ltd. v Modern Signs Ltd.* & Ors (1995-96) 1 GLR 310 referred to]

13. A plaintiff in an action for libel or slander needs to establish that the words spoken of him were malicious or false**.** Legal malice is presumed by the law. The plaintiff must plead falsity and malice which are defined as a wrongful act done intentionally and without cause and excuse.

14. Where a Court has found or held that a statement of claim discloses no cause of action and is an abuse of the process of Court, the order or decision it can proceed to make will depend on the law under which the application is made.

15. The general rule is that a party need not state in the motion paper the rule under which an application is made, it is however important that such rule be mentioned when arguing the application in Court.

16. The purport of Order XXIII Rule 14 of The Gambia High Court Rules Cap 6:01 is that the Court is given the power to order for further pleadings to be filed.

17. Particulars are needed to clarify and narrow the issues so as to afford the other party to appraise the real issues in controversy. This will enable the defendant know the specific case to meet and not be taken by surprise. [*The Roy* (1882) 17 PD 117 referred to]

18. Where the statement of claim fails to allege material facts, no cause of action is disclosed. Further particulars cannot be ordered to supply the missing material facts so that it can then disclose a

cause of action. [*Bruce v Oldham Press Ltd* (1936) 1 KB 697; *Pinsor Llyods v National Provincial Foreign Bank* (1941) 2 KB 72 referred to]

19. Where a party omits to set out details which he ought to have given and his opponent does not apply for particulars, he is entitled to give evidence at the trial of any fact which supports the allegation. Such opponent cannot object to the admissibility of such evidence. [*Joseph Oguntokun v Amodu Rufai* (1945) 11 WACA 55; *Wolley v Broad* (1892) 2 QB 317 referred to]

20. It is also improper for a party who filed pleadings to apply for further particulars as such particulars of allegations of matters on which the burden of proof lies on the party cannot be ordered. [*James v Randnor County Council* (1890) 6 TLR 240 referred to]

21. Further particulars or pleadings cannot form the basis of an amendment of pleadings. They merely amplify and explain what is already pleaded. They do not constitute an amendment of the pleading but rather supplement and form part of the pleading they amplify. [*Arhold and Buther v Bottornley* (1908) 2 KB 151, *Nwobodo v Onoh* (1984) NSCC 1 referred to]

22. In civil suits the Court acts as an umpire holding the balance between the parties and its function is not inquisitorial, it does not often interfere with the conduct of a case but leaves the parties to adopt their own procedure in doing so. [*Shokunbi v Mosaku* (1969) NMLR 54; *Luigi Ambrosini Ltd. v Bakare Tanko & Anor* (1929) 9 NLR 8 referred to]

23. It is not the duty of the Court to amend a pleading on behalf of a party without an application by that party. [*Cropper v Smith* (1883) 26 CHD 710; *Malomo v Olushola* (1995) 15 WACA 164 referred to]

24. It is settled law that where a Court proposes to amend any proceedings of its own motion, the Court must first of all invite

both parties to address it on the contemplated amendment. [*Ajoke v Oba & Anor* (1962) 1 ALL NLR 73 referred to]

25. The Supreme Court of The Gambia held in *Fatou Badjie & Ors v Joseph Bassen* (2002-2008) 2 GLR 141 per Tobi JSC that "it is loud and very clear law that Courts of Law do not grant reliefs not sought by the parties". His Lordship went further to say that "A Court of Law has no jurisdiction to give a party what he has not asked from the Court because the law assumes, and correctly too for that matter that he did not ask for it because he does not need it.

26. When a Court grants a party an order or relief not asked for, it violates the requirement of fair hearing in two ways. Firstly, such an order violates the fair hearing rule of audi alteram patem in that the other party was not heard before it was made. Secondly, by such an order, the Trial Court steps into the arena of conflict to help the plaintiff repair his case or make a case that he failed to make. Throughout the proceedings, a Court must conduct itself in such a manner as to remain impartial and be seen as impartial.

Cases referred to:

Ajoke v Oba & Anor (1962) 1 ALL NLR 73
Arhold and Buther v Bottornley (1908) 2 KB 151
Arrow Nominees Inc v Blacklege (2000) 2 BCLE 167 at 193
Ayanboye v Balogun (1990) 5 NWLR (Pt 151) 392
Ballmoose v Mensah (1984-1986) 1 GLR 724
Blunt v Blunt (1943) AC 518 HC
Bruce v Oldham Press Ltd (1936) 1 KB 697
Cropper v Smith (1883) 26 CHD 710
Castro v Murray (1875) 10 CR EX 213
Dawson v The Times Publishing Co. (1924) 1 KB 675 CA
Deegbe v Nsiah (1984-86) 1 GLR 545 CA
Fatou Badjie & Ors v Joseph Bassen (2002-2008) 2 GLR 141
Goldsmith v Sperrings (1977) 1 WLR 478
Grainger v Hill (1838) 4 Bing NC 212 or 132 ER 369
James v Randnor County Council (1890) 6 TLR 240

Joseph Oguntokun v Amodu Rufai (1945) 11 WACA 55
Ladoke v Olabayo (1992) 8 NWLR (Pt 261) 605
Lawrence v Lord Norreys (1890) 2 AC 210
Luigi Ambrosini Ltd. v Bakare Tanko & Anor (1929) 9 NLR 8
Malomo v Olushola (1995) 15 WACA 164
Nwobodo v Onoh (1984) NSCC 1
Okofoh Estates Ltd. v Modern Signs Ltd. & Ors (1995-96) 1 GLR 310
Pinsor v Llyods v National Provincial Foreign Bank (1941) 2 KB 72
Republic of Peru v Peruvian Guano Co. (1887) 36 ChD 489
Sadiq v Bundi (1991) 8 NWLR (Pt 210) 433
Shokunbi v Mosaku (1969) NMLR 54
Speed Seal Products Ltd. v Paddington & Anor (1986) 1 ALL ER 91
The Roy (1882) 17 PD 117
The State (No. 1) v Darboe (No. 1) (1997-2001) GR 777
Thomas v Olufosoye (1986) 1 NWLR 664
Wolley v Broad (1892) 2 QB 317
Yeboah v Bafour (1971) 2 GLR 199

Statutes referred to:

Courts Act Cap 6:01 Vol. II Laws of The Gambia 1990 Section 3(1), 55
Constitution of The Republic of The Gambia 1997 Section 24
Interpretation Act Cap 4 Vol. I Laws of The Gambia 1990 Section 32 (a)
Halsbury's Laws of England, 4th Edition Vol. 28 P.9 at 16
Halsbury's Laws of England, 4th Edition Vol. 36 P.29 at 38

Rules of Court referred to:

The Gambia Court of Appeal Rules Rules 12 & 13
The Gambia High Court Civil Procedure Rules Cap 6:01 Order 17 Rule 3
Schedule II, Order 23 Rule 14, 17, Order 24 Rule 1
Order 23 Rule 14

Books referred to:

Clerk & Lindsell on Torts, 18th Edition, P.1154
Fidelis Nwadialo, on Civil Procedure in Nigeria, 2nd Edition 2000 407-416
Street, on Torts 8th Edition

Jowitt's Dictionary of English Law, 2nd Edition Vol. 2

J Joof Esq. for the appellant
B. Carrol Esq. for the respondent

AGYEMANG Ag. JCA. On or about 23 September 2009 an action described as HC/332/05/CO/60/D1 was commenced at the High Court for a number of reliefs. The plaintiffs in that action were Groothandel J.A. de WIT B.V as first plaintiff, and Bijvoet BV as second plaintiff. There were six defendants including the second appellant herein as third defendant. The suit was to recover the sum of four million Euros being the amount allegedly outstanding in respect of goods supplied by the plaintiffs to the defendants. The amount allegedly due to the second plaintiff was the sum of one million Euros. The suit further sought a number of other reliefs including the tracing of the said monies owed to the plaintiffs into the "assets, properties, bank accounts of the defendants and also of their affiliates, associates, other business interests…" To that end, the plaintiffs sought the lifting of the veil of incorporation of the defendants, including the third defendant therein in order that the monies allegedly owed to the plaintiffs may be recovered.
Clearly then it was not simply a suit for the recovery of debt, but one that was also predicated upon matters suggesting fraudulent dealing of the defendants including the third defendant, against the interest of the plaintiffs therein. The writ was taken out by the respondent herein J.H.Joof Esq., who styled himself "Legal Practitioner for the Plaintiffs".
On 27th September 2005, the respondent herein applied ex parte for, and obtained several interim orders against the defendants in that action including the furnishing of good and sufficient security by the defendants in default of which they were to suffer inter alia, attachment of their properties and Bank accounts operated by them in The Gambia. On 6th October 2005, the High Court stayed execution of the ex parte orders and ordered that the application for attachment of the defendants properties be heard inter partes.
On 10th October 2005, one M. van Tuijl, as counsel instructed by the second appellant herein wrote to the first and second plaintiffs in that suit, complaining about the interim orders sought against the third defendant therein and, threatening legal action against those two parties, demanded a reversal by the plaintiffs of the orders that had adversely

affected the third defendant. In that letter, the second plaintiff in that suit was described as F. Byvoet International B.V whose address was given as 'S-Gravenhekje 1a, 1011 Amsterdam. Upon receipt of the said communication, one D.A.J. Sturhoofd of Vink and Partners a law firm, wrote to Mr. Van Tuijl, denying that the second plaintiff described as F. Byvoet International BV had been involved in the institution of an action against the third defendant in Africa as set out in Van Tuijl's letter, and rejecting any liability of the said Company flowing from that action. There followed a series of letters exchanged among the said lawyers and one Mr. Dr wit who allegedly admitted commencing an action against the defendants. He however denied instructing the lawyer by whom the action was brought on behalf of the second plaintiff. On 26th October 2005, the first appellant herein wrote to the respondent herein on behalf of the second appellant herein who was the third defendant in the suit HC/332/05/CO/60/D1. The letter was titled: Re: Civil Suit No. HC/332/05//CO/60/D1- Groothandel J.A. De Wit B.V and Anor. v Rene Wissink and 5 Others: Your Unauthorised Actions In The Name Of 2nd Plaintiff. By this letter, the first appellant informed the respondent that it was his information and instruction that the respondent had not been instructed to institute an action against the second appellant and moreover, had not been given any power of attorney so to do by the second plaintiff. The first appellant thus notified the respondent herein that by reason of the interim orders obtained against the second appellant which had led to substantial loss of about D20, 000,000, the second appellant intended to commence legal action against him unless the respondent took steps to "take the necessary steps to reverse the present unacceptable turn of events without delay." The respondent replied to this and alleged that he had been properly instructed by one Mr. Jaap de Wit to institute the action. On 14th November 2005, D.A.J. Sturghoofd of Vink and Partners wrote as the solicitor of Byvoet International BV regarding the action taken by the respondent on behalf of that company, and in it, reiterated that the said company had given no instructions to the respondent to bring an action on its behalf. The said solicitor ordered the respondent to "terminate the proceedings with respect to (his) client immediately" and bring same when done, to his attention.

On 23 November 2005, the respondent herein filed a motion praying for leave to amend the writ of summons described as

HC/332/05//CO/60/D1 and to strike out the name of the second plaintiff therefrom. On 31st March 2006, the second appellant herein commenced an action against the said J. A. Dewit, the respondent herein, and one Michelle Jarra claiming inter alia, damages for "negligence, fraudulent misrepresentation, unlawful interference with the plaintiff's properties and disruption of the plaintiff's business and/or wrongful use of the court process". In that suit described as HC/097/CO/019/B1 which is still pending before the High Court, particulars arising out of the allegation that the respondent instituted the action on behalf of the second plaintiff and another without having been instructed so to do, or authorized so to do by the alleged second plaintiff therein Bijvoet B.V and the loss flowing therefrom were pleaded. These are the matters that gave rise to the institution of an action described as HC/171/C6/CO/022/B1, by the respondent herein against the first appellant as first defendant and the second appellant as second defendant. In that action, the respondent herein as plaintiff sought the following reliefs:-

1. Damages for injurious falsehood;
2. Damages for wrongful interference with the plaintiff's reputation and Business;
3. Damages for negligence and recklessness;
4. Damages for Libel and slander;
5. Damages for abuse of Court process;
6. Further or other relief;
7. Interest;
8. Costs.

In his statement of claim, the respondent herein listed activities and achievements of alleged distinction that were his portion. He then averred that the defendants therein had by themselves or at their instance or instigation uttered libelous and slanderous statements, in and out of court, publishing same to "various persons". The import of the said statements was that Orders including that of relating to the attachment of properties he had lawfully obtained from the Court on 27/9/05 as varied by the order of 6/10/05 and also of 10/10/05, were obtained by himself fraudulently or negligently. He further alleged that there were scurrilous remarks made about him as well. The respondent herein alleged that he had commenced an action on the instructions of one Jaap de Wit who

had instructed him to institute an action for himself and a Company known as Bivoet BV and whom he had no reason to doubt after seeing correspondence indicating that Bivoet BV had supplied tomato paste to some of the defendants.
The respondent also alleged that the defendants recklessly caused a suit to be instituted against the plaintiff in respect of matters in which he had acted as legal practitioner, adding that the first defendant had failed to exercise due care, skill or competence in doing his work and advising his client in filing that suit. The appellants herein, filed a motion which sought two prayers: that the suit be dismissed on the grounds that:

1. The writ of summons and statement of claim (did) not disclose a cause of action against the first and second defendants.
2. The suit (was) frivolous, vexatious and an abuse of the process of the High Court.

The Court heard arguments on both sides and dismissed the application holding that the action was not maintainable as it stood. The Court went further to hold that the relief seeking damages for slander and libel was the only one with the potential to disclose a cause of action and directed the plaintiff/respondent to amend his claim by providing further and better particulars of the matters that would sustain that relief and the action. It is against the said Orders of the Court that this appeal has been brought with the following as the grounds of appeal:

1. That the Learned Trial Judge erred in law in giving the respondent an opportunity to file an amended Statement of Claim instead of dismissing the respondent's suit for non-disclosure of a reasonable cause of action against the first appellant and/or second appellant

Particulars of Error

a) The respondent's writ of summons and statement of claim did not disclose a reasonable cause of action against either the first appellant and/or the second appellant and the Learned Trial Judge ought to have dismissed the respondent's suit on the basis of the writ of summons and the statement of claim before the Court;

b) The Learned Trial Judge had no power to order the respondent to amend his statement of claim in order to save the suit from being dismissed at that stage of the proceeding;
c) There was never any application before the Court for such amendment;
d) The Court made the said order for amendment in favour of the respondent which order he never sought from the Court.

2. The Learned Trial Judge erred in law in refusing to dismiss the respondent's suit against the first appellant and/or the second appellant for being frivolous, vexatious, and an abuse of the process of the Court when:
   a) The said suit is clearly frivolous, vexatious, and an abuse of the process of the Court;
   b) The Court had made a finding that the respondent was raising as issues in the suit (which he cannot do) matters arising from a suit that is still pending before another judge of the High Court and which matters the Court held it cannot make a pronouncement on;
   c) The said suit is in respect of matters on which the first appellant has immunity as counsel for the second appellant;
   d) The suit is predicated on a purported falsity or maliciousness of a civil action brought by the second appellant against the respondent amongst others which other civil suit is still pending before the High Court.

Out of these issues, the first appellant who appeared in person and also for the second appellant formulated two issues:

a) Whether the Learned Trial Judge was right in ordering the respondent to file an amended statement of claim instead of dismissing the respondent's suit for non-disclosure of a reasonable cause of action after argument had been concluded on the said issue and when there was never any application by the respondent for leave to amend his statement of claim before the Court;

b) Whether the Learned Trial Judge was right in refusing to dismiss the respondent's suit against the first appellant for being frivolous, vexatious and an abuse of the process of the court after having held that the suit as it stood was an abuse of the process of the Court which the Court should not allow.

Before I go ahead to consider the merits of this appeal, I must first have regard to whether or not it was brought out of time as canvassed by the respondent. With regard to this, I am in complete agreement with the appellants that Section 32 (a) of the Interpretation Act Cap 4 which sets out computation of time in this jurisdiction excludes the day of the event for which time is allocated. The said provision of Cap 4 reads: "A period reckoned by days from the happening of an event or the doing of any act or thing, shall be deemed to be exclusive of the day on which the event happens or the act or thing is done…" That is to say, that the 24th of January 2007 being the date of the Order the subject of this appeal, it is excluded in the computation thus bringing the appeal within the fourteen-day period prescribed by Rules 12 and 13 of The Gambia Court of Appeal Rules.

I intend to make short work of this appeal as the issues involved are not complex. With regard to the first issue, there is no gainsaying that after the Learned Trial Judge had found merit in the arguments of the applicant, and had indeed observed that the suit as was could not be maintained, she had no discretion to order an amendment in order to sustain same. The respondent in his brief canvassed the fact that the grant of an amendment is discretionary and so ought not to be tampered with by an Appellate Court. That principle of law and practice cannot be faulted. It is however trite learning that the appellate court has the jurisdiction to set aside and overturn the exercise of discretion by a trial judge where that discretion was exercised in accordance with wrong or inadequate materials, or that the court acted under a misapprehension of fact in that it gave weight to irrelevant matters or omitted to take relevant matters into account. See *Blunt v Blunt* (1943) AC 517 at 518 HL; *Ballmoos v Mensah* (1984-86) 1 GLR 724. In the present instance, the trial judge exercised her discretion wrongfully for its effect was not to bring all the matters of controversy before the court which is one of the two main purposes for the grant of an amendment under Order 24 Rule 1

of the High Court Civil Procedure Rules Cap 6:01 Schedule II Laws of The Gambia, but to cure an otherwise incurable defect in order to sustain an action that the Court held was not maintainable as it was. The first appellant who also represents the second appellant in this appeal, in their joint brief of argument, adverted the mind of the Court to some authorities of persuasive effect*: Ayanboye v Balogun* (1990) 5 NWLR (Pt 151) 392 SC 19*; Sadiq v Bundi* (1991) 8 NWLR (Pt 210) 433*; Ladoke v Olabayo* (1992) 8 MWLR (Pt 261) 605*.* The first appellant argued that the Trial Court had no jurisdiction to hand out reliefs not sought by a party. This was because the record reveals that in the instant case, the respondent did not make an application for the order of amendment that was handed down so benevolently by the Learned Trial Judge.

It is my view that the said cases cited by the appellants are not apposite to the present dilemma for unlike reliefs sought or granted by the court, regarding amendments, the Court could suo motu order same where such would inter alia, enable all matters of controversy to be placed before the Court. See Order XXIV Rule 1 Schedule 2 of the High Court Rules Cap 6:01 Laws of The Gambia 1990. Yet it is my view that this was not a proper circumstance for the exercise of such discretion. Where such an order would operate to make sustainable, an otherwise unmaintainable action, it would necessarily be prejudicial to the defendants, thus heralding the descent of the impartial judicial umpire into the arena of controversy.

It is trite learning that the Court in the proper exercise of its discretion will allow an amendment in a number of circumstances provided that no surprise results thereby, it will not lead to the setting up of an entirely new case, prejudice the opponent's case or put him to disadvantage in a manner that cannot be compensated by costs or otherwise. See *Yeboah v Bafour* (1971) 2 GLR 199 CA*.* In the instant case, the Court ordered an amendment of the plaintiff's claim and further gave a direction on how same was to be effected. After declaring that the statement of claim did not disclose a cause of action, the Learned Judge directed that with regard to the issue of libel and slander which she indicated potentially revealed a cause of action, (my emphasis), certain matters were to be pleaded to provide further and better particulars of the matters complained of. The Court then listed certain matters by way of direction of what was necessary in pleading in order to sustain that claim. These were answers to the following:

1. Where was the statement that the High Court order was obtained fraudulently and negligently made? The location and the specific mode in which the statement was contained should be stated;
2. Which defendant made the statement;
3. To whom was the statement made;
4. When was the statement made;
5. What were the other scurrilous remarks;
6. Where were the other scurrilous remarks made;
7. Who made them;
8. Where in The Gambia were they made;
9. To whom were they made;
10. In which foreign country were they uttered or written.

With regards to the issue of libel, the Learned Judge also directed that the following questions should be addressed:

1. To whom were they made;
2. When specifically were they made;
3. What specific document or documents were they contained in.

The Court also indicated that by the amendment the proper parties be brought before the court.

It is settled law that in an action seeking relief for alleged slander or libel, the words complained of must be set out. As this was not done, and in this case, the conduct complained of was not clear to the court from the pleadings, nor even the proper parties at fault, the court which had held that the statement of claim did not disclose a cause of action ought not to have aided the plaintiff by recourse to an amendment directed from the Bench in order to sustain his suit.

The respondent has argued that he was not required to plead evidence but facts. That principle of law is trite, for only material facts must be pleaded and not the evidence to prove them. Yet with regard to actions founded on defamation, the prerequisite of a maintainable action is that the words complained of be set out or if the action was grounded on an innuendo, that the meaning assignable thereto by the group to which it

was published be set out. The respondent is a lawyer of many years' standing and alleged distinction as he was eager to point out in pleading. That being the case, he ought not to have filed a pleading so fluid and lacking in necessary content as to need the assistance of the Court to reconstruct his claim in order to be able to bring same before it. See *Deegbe v Nsiah* (1984-86) 1 GLR 545 CA. That the Learned Judge found the plaintiff's statement of claim to be incurably bad and in need of reconstruction by an amendment is clear from the words of the Learned Judge that "…if the plaintiff files the amended statement of claim as required by the Court, the Court will strike out the present statement of claim which will in effect amount to striking out the plaintiff's case in total…" It is my view that in ordering further and better particulars not applied for, to bring about an amendment that would sustain an action she ruled was otherwise unmaintainable for not disclosing a cause of action and for being vexatious, the Learned Judge misused the said procedure. This is because the purpose of that procedure is to supply information to enable the applicant know his opponent's case in order that he might prepare his case to meet it and to limit the issues for trial. It is not for curing a defect in a party's case or to encourage fishing by an opponent. See Halsbury's Laws of England 4th Ed. Vol. 36 29 at 38; *Aga Khan v The Times Publishing Co., Dawson* v *The Times Publishing Co* [1924] 1 KB 675 CA.

But was the learned judge right in the first place to have ruled that the suit as obtained did not disclose a cause of action and was an abuse of the process of the Court? The Learned Judge in arriving at that conclusion had regard to the statement of claim and also to the affidavits and other extraneous matters which were canvassed in argument as she was entitled to do. As rightly pointed out by the first appellant, whilst the Court may not consider matters extraneous to the statement of claim in order to strike out a suit for not disclosing a cause of action, the Court was not so constrained in the exercise of its inherent jurisdiction where it considered whether a suit was frivolous, vexatious or an abuse of the Court's process. See per *Lord* Herschel in *Lawrence v Lord Norreys* (1890) 2 App. Cas 210 at 219 HL*; Republic of Peru v Peruvian Guano Co* (1887) 36 Ch D 489.

Can the finding of the Learned Trial Judge that the suit was an abuse of process be sustained? Further, when does a Court find a suit frivolous,

vexatious and an abuse of its process? Jowitt's Dictionary Of English Law 2nd Ed. Vol. 2 defines a frivolous and vexatious action as when the party bringing it is not acting bona fide and merely wishes to annoy or embarrass his opponent or when it is not calculated to lead to any practical result. A complaint of abuse of the process of the court may be laid in a suit as a tort before the conclusion of the proceedings in respect of which the matters complained about and regarding which redress is sought. See the English Court of Appeal case of *Speed Seal Products Ltd v Paddington & Anor* (1986) 1 All ER 91*; Grainger v Hill* (1838) 4 Bing NC 212, 132 ER 769. As a tort, it is one in respect of which remedy may be had for the twisting of the ends of justice. The Learned author of Street on Torts 8th Ed. 439 also expressed the view that "… it is a tort to use legal process in its improper form in order to accomplish a purpose other than that for which it was designed and thereby cause damage". See also *Goldsmith v Sperrings* (1977) 1 WLR 478 per Lord Denning that ''a legal process "is diverted from its true course so as to serve extortion or oppression; or to exert pressure so as to achieve an improper end…" The complaint may also be alleged in an application to strike out a suit upon certain matters which may or may not be extraneous to a party's pleading. The Court has inherent jurisdiction not to permit its processes to be used for improper ends and may strike out a suit for that reason. See *Okofoh Estates Ltd v Modern Signs Ltd & Ors* (1995-96) I GLR 310.

I have before now set out the facts leading to the suit filed by the plaintiff before Roche J and out of which arose the orders that are the subject of this appeal and the writ of summons and statement of claim are described as Exhibits AF1 and AF2 respectively. The first fifteen paragraphs do not give sufficient information regarding the claim before the Court; the first eight indeed appear to be self-laudatory. The appellant succinctly described same as an indulgence in self praise by the respondent.

With regard to the other paragraphs, the respondent sought to pin joint and several liability on the first appellant acting as solicitor to the second appellant and the latter in an action grounded on defamation, injurious falsehood, interference to his reputation and business among others. As the Learned Judge rightfully pointed out, the matters contained in the

pleading in support of the claim of the plaintiff therein, were contained in a case that was still pending before another Judge and requiring determination in that forum. In answer to the matter raised by the appellants and the Learned Trial Judge that the matters the suit relies on are sub judice and so cannot be relied on as complaints in a fresh action, the respondent replied that as his action was not grounded in malicious prosecution - the circumstance in which the prosecution must have determined in favour of the plaintiff - his action need not be so determined. With respect I find no merit in that argument. The reliefs sought by the plaintiff therein (the present respondent), apart from the tort of abuse of the Court's process, the matters pleaded were by their very nature, predicated upon the falsity of the statements attributed to the defendants, a matter that could not be pronounced upon by another judge in a fresh suit when the suit that raised the matters complained of was still undetermined. I consider it unfortunate that this court has been dragged into making statements on the merits of matters contained in the suit of the second appellant herein that gave rise to the action out of which this appeal has been brought. However the Court cannot, especially as the respondent based his action on matters arising out of the pleading of the second appellant in suit No. HC/097/06/CO/019/B1, make any meaningful determination without a necessary foray (fearfully and cautiously undertaken) into the perilous waters of a case yet undetermined before a Judge.

The antecedents of the suit laid by the second appellant against the present respondent arises out of an earlier suit described as HC332/05/CO/60/D1 filed on behalf of a Company described in the writ of summons as Groothandel J.A. de Wit as first plaintiff, and Bijvoet BV as second plaintiff. As aforesaid, in instituting that action and in securing the attachment of the second appellant's properties, the respondent herein styled himself as legal practitioner for the plaintiffs. It was because of the matter of the attachment of the second appellant's properties on the application of the two plaintiffs, one of which was struck out from the action after it repudiated any involvement in the institution of the action that procured those orders, that suit numbered HC/097/06//CO/019/B1 was commenced. In asking the court by a fresh action to find that the respondent had suffered defamation of his character and injury in his business among other things, the respondent alleged the very matters

that gave rise to the second appellant's suit against him and provided for him a cause of action. Since the respondent in his suit made only a nebulous reference to "scurrilous remarks verbally in Court and outside'' by the appellants "or at their instance or instigation" without more, the only matters of any real significance in his pleading were the matters pleaded by the second appellant in his pending suit being the matters that allegedly led to the second appellant suffering loss following the alleged wrongful attachment of his properties.

Assuming that it was maintainable, the fresh action of the plaintiff (the present respondent) may have had the effect of getting a Court of co-ordinate jurisdiction to make findings of fact that could be contradicted by findings in the second appellant's action thus creating mischief. In any case, as aforesaid, it is unclear how the Court could have granted the reliefs sought by the respondent when the allegations made against him and other defendants in the second appellant's suit had not been determined and held to be false. I say this because although a plaintiff in an action for libel or slander need not establish that the words spoken of him were malicious or false as legal malice is presumed by the law, he must plead falsity and malice which are defined as a wrongful act done intentionally and without just cause and excuse. See Halsbury's Laws of England 4th Edition. Vol. 28 paragraph 9.

In the peculiar circumstance of the instant case, it would to my mind, be injudicious for the court to hear the respondent's case upon a presumption of the appellants' malice that is negated and/or called into question by the matters pleaded by the second appellant in his pending action against the respondent. Given all the circumstances, the suit begun by the respondent herein, appears to be an exercise aimed at twisting the ends of justice, designed to frustrate the second appellant, or perhaps to so frighten the second appellant and his lawyer as to prevent them from continuing an action that would bring matters connected to the order of attachment to the fore.

To my mind the suit before Roche J which inter alia personally attacked the professional integrity of the first appellant and even attempted to ground an action in negligence against him regarding advice he allegedly gave the second appellant towards the institution of his suit against the respondent, was in the light of the antecedent matters recounted, clearly an abuse of the court's process, frivolous and vexatious within the

meaning alluded to earlier. See Jowitt's Dictionary of English Law (supra).

Moreover, it seems to me that the respondent did not advert his mind to, or perhaps refused to consider the trite matter of learning that participants in court proceedings enjoy absolute privilege and immunity. As clearly stated in Clerk & Lindsell on Torts 18th Ed. 1154 at 22.93-94**,** "…With regard to judicial proceedings, 'neither party, witness, counsel, jury, or judge can be put to answer civilly or criminally for words spoken in office' the rule is not confined to actions of defamation but applies whatever cause of action is sought to be derived from what was said or done in judicial proceedings unless perhaps the gist of the action is an abuse of the process of the Court. The authorities are clear, uniform and conclusive that no action of slander or libel lies whether against Judges, counsel, witnesses or parties for words written or spoken in the ordinary course of any proceedings before any Court or tribunal recognized by law…It is not merely with respect to the hearing in open court that there is absolute privilege, but also with regard to every step taken in the conduct of a legal proceeding".

I conclude that for all the reasons advanced by the Learned Trial Judge and for those I have set out to buttress, it is my view that the suit instituted by the respondent herein apart from not disclosing a cause of action, was manifestly vexatious and an abuse of the Court's process. Having arrived at the same conclusion, the Learned Trial Judge as I have laboured to show, ought to have struck out the pleadings thus dismissing the action. She erred when she suo motu made the order for amendment. The appeal thus succeeds. An order is made setting aside the orders made by Roche J and dismissing the suit. Costs of D15, 000 is awarded against the respondent.

AGIM PCA: I have read the draft of the Judgment just rendered by my learned sister, Agyemang Ag. JCA. I agree with all her reasoning and conclusion. Let me however emphasise the point that the Trial Court should have dismissed Suit No. HC/121/06/22/B/ following her finding that the suit disclosed no cause of action, was vexatious and an abuse of the process of court.

The Trial Court in its judgment held that "From what has already been stated by the court supra, it is clear that out of the 26 paragraphs in the

statement of claim only paragraph 16 might potentially disclose a cause of action against the defendants. Paragraph 16 as it stands does not adequately disclose facts which disclose a cause of action against the defendants". Following this holding, the Trial Court suo motu proceeded to:-

(1.) Order that the plaintiff file further particulars of libel and slander in support of paragraph 16 of the statement of claim.
(2.) Give the plaintiff the opportunity to advice himself concerning the above holding and the order for further particulars.
(3.) Order the plaintiff to, within 14 days. "File an amended statement of claim containing the further particulars requested by the court, and which disclose a cause of action against the defendants or against any defendant he choose to Sue"
(4.) Order that "if the plaintiff files the amended statement of claim which will in effect amount to striking out the plaintiffs claim in total".
(5.) Order that "The case will now be adjourned to give the plaintiff the opportunity to file the amended statement of claim before the court will make an order striking out the present statement of claim".
(6.) Hold that "The court is however not disposed to dismiss the plaintiffs claim in the absence of evidence to justify same."
(7.) Also hold that "in the amendment to be filed, the court is hoping that the proper parties if any would be made parties, and that the issue raised are actionable by fresh action such as this one. Otherwise the plaintiff's claim apart from not disclosing a cause of action, would amount to an abuse of the process of the Court. The Court should not allow that and hence this opportunity given to the plaintiff to advice himself and make the necessary amendments if he so choose to do."

The appellants in their brief have contended that the Trial Court upon finding that the statement of claim disclosed no cause of action and is an abuse of process should have dismissed the suit and was wrong in proceeding to make the above orders and holdings numbered 1-7 above. The respondent in his brief contends that the Trial Court was right in proceeding to make those orders and holdings. Where a court has found

or held that a statement of claim discloses no cause of action and is an abuse of the process of Court, the kind of order, or decision it can proceed to make will depend on the law under which the application is made. In our present case, the defendant did not state on the motion paper or in his argument of the motion in court the law under which the application was made. Although it is settled beyond argument that an applicant need not state on the motion paper, the law under which the application is made, it is however important that such law be mentioned when arguing the application in Court. The general rule that a party need not state on the motion paper the rule under which an application is made cannot in my opinion relieve the party of the duty to state such law or rule during the argument of this kind of application, because the Rules of the High Court Cap 6:01 Vol. II Laws of The Gambia which govern the practice and procedure of the High Court contain two provisions for this kind of application. The first provision is contained in Order XVII schedule II Rule of the High Court, is described as demurer in the marginal note and is headed "Dismissal of Suit on grounds of Law" and it provides that:-

1. Where a defendant conceives that he has a good legal or equitable defence to the suit so that even if the allegations of the plaintiff were admitted or established, yet the plaintiff would not be entitled to any decree against the defendant, he may raise this defence by a motion that the suit be dismissed without any answer upon questions of fact being required from him.
2. For the purpose of such application the defendant shall be taken as admitting the truth of the plaintiff's allegations and no evidence respecting matters of fact, and no discussion of questions of fact, shall be allowed.
3. The Court on hearing the application, shall either dismiss the suit or order the defendant to answer the plaintiffs allegations of fact, and shall make such order as to costs as shall be just."

The other provision is Order XXIII Rule 17 schedule II of the said Rules of the High Court which provides that:-

"The Court may at any time, on the application of either party strike out any pleading or any part therefore, on the ground that it discloses

no cause of action, or no defence to the action as the case may be, or on the ground that it is embarrassing, or scandalous, vexations, or an abuse of the process of the court, and the court may either give leave to amend such pleading, or may proceed to give judgment for the plaintiff or defendant, as the case may be or may make such other order, and upon such terms and conditions, as may seem just."

The provision relied on by the defendant in making its application will determine the approach of the Court and the kind of power it can exercise in the determination of the application. Under order XVII Rule 3, the Court can only make one of two orders as follows, an order dismissing the suit or an order that the defendant answer the allegations in the statement of claim. When it comes to the conclusion that the defendant has a good legal and equitable defence to the suit, so that even if the allegations of the plaintiff were admitted or established, the plaintiff would not be entitled to any decree against the defendant, it must dismiss the suit without more. It cannot order amendment of the statement of claim so as to enable it disclose a cause of action as happened in this case. Under Order XXIII Rule 17 it has a wider jurisdiction and can make any order as may seem just including an order allowing the amendment of the pleadings in question.

The question that needs to be determined here is under which of the above provisions the defendants applied at the trial nisi prius for the suit to be dismissed. Since the defendant did not state the law under which he made the application, this question can in my opinion be determined by considering the orders prayed for and the nature of the arguments by the parties. The defendant in his motion paper prayed that the Trial Court "may be pleased to make the following orders:-

1. Dismissing this suit against the defendants on the grounds that
   (a) The writ of summons and statement of claim does not disclose a cause of action against the first and second defendants.
   (b) The suit is frivolous, vexations and an abuse of the process of this Honourable Court.
2. Such further orders as this Honourable Court may deem fit to make in the circumstances."

The affidavit in support of the application deposed to several facts not contained in the statement of claim. In arguing his application at the Trial Court, learned counsel for the defendants maintained that in dealing with prayers 1(a) on the motion paper only the writ of summons and statement of claim should be considered but that in dealing with prayer (b) on the motion paper, the Court can go beyond the statement of claim. His exact submission is that "in determining whether this suit is an abuse of the process of the Court, the Court can go beyond the pleadings and rely on affidavit evidence and other matter of fact before the Court." Prayer 1(b) can only lie under XXIII Rule 17 of schedule II of the Rules of the High Court. The Trial Court in determining the application did not state the law under which it made the said orders and holdings earlier listed herein. Obviously it could not have made those orders and decisions under Order XVII. One can rightly presume from the nature of the Orders and holdings that the Trial Court acted under Order XXIII which enables a Court to inter alia give leave to amend the pleadings of the parties and make such order as may seem just.

The respondent contends in his brief that Section 55 of the Courts Act and Order XXIII Rules 14 and 17 and Order XXIV Rule 1 Sch. II of the Rules of the High Court Cap 6.01 Vol. II Laws Of the Gambia 1990 give the Trial Court the power to make the said Orders. Before I go further let me make some observations on the reliance placed on Section 55 of the Courts Act by learned counsel for the respondent.

Section 55 provides for the power to make rules of Court for the High court and subordinate courts and the power of the Chief Justice to make rules for the guidance of the police and other persons engaged in crime investigation as to the taking of statements from accused persons and witnesses. There is nothing in Section 55 empowering the High Court to make the orders and decisions in question in this appeal. Contrary to the submission of learned counsel for the respondent, Section 55 did not vest in the High court all the jurisdiction and powers conferred on the High Court of Justice in England as at 18th February 1965. It is Section 3 (1) of the Courts Act which provides that the High Court shall have the jurisdiction and powers provided by the Constitution and all the jurisdiction, powers and authorities which were vested in or capable of being exercised by Her Majesty's High court of Justice in England immediately before the 18th February 1965. It is not enough to refer to a local Statute vesting the Gambia High Court with the jurisdiction and

powers of the High court in England. The English statute which defines the jurisdiction of the English High Court must be provided, so as to enable the Court here to find out if the matters in issue are such that are subject to the jurisdiction and powers of the English High Court. Learned counsel for the respondent has not referred us to the provisions of any English Statute which vests the English High Court with the power to make the kind of orders made by the trial High Court. Furthermore, I do not see any reason for the application of English law here since the matters in issue here are provided for in Order XXIII Rules 14 and 17 of our Rules of the High Court. Since our local law clearly vest jurisdiction on the Gambia High Court to deal with such matters there is no basis for recourse to the jurisdiction of the High court in England. Section 3 (1) of the Law of England (Application) Act Cap 5 Vol. 1 Laws of The Gambia 1990 stipulates that "all Acts of Parliament of the United kingdom declared to extend or apply to the Gambia, which had effect as part of the law of the Gambia immediately before the eighteenth day of February 1965 shall continue to be in force so far only as the limits of the local jurisdiction and local circumstances permit and subject to any existing or future local Act. The decision of the Supreme Court of the Gambia in *Pa Njie Girigara and Sons Ltd v Ace Ltd*. though dealing with the application of an English Statute of General Application in the Gambia is a useful guide here. In that case the Court held that there can be no recourse to an English Statute of General Application if the matter in issue is provided for by local law. It was on that basis that the Court held that the Gambia Court of Appeal erred in relying on the English Bills of Exchange Act of 1882 in awarding interest to the plaintiff when Section 7 of the Law of England (Application) Act clearly provided for such award of interest.

Was the Trial Court right in law to have made those orders and decisions?

I will start with the order that the plaintiff file further particulars or pleadings in respect of paragraph 16 of the statement of claim. This order was made to enable paragraph 16 of the statement of claim disclose a cause of action for libel and slander. I do not think that further particulars can be ordered for such purpose. The power to order further pleadings is vested on the Trial Court by Order XXIII Rule 14 which states that:-

"The Court, if it considers that the statement of claim and defence filed in any suit insufficiently discloses and or fixes the real issues between the parties, may order such further pleadings to be filed as it may deem necessary for the purpose of bringing the parties to an issue."

It is clear from the provisions of this rule that further pleadings or particulars of pleadings can be ordered only for the purpose of sufficiently disclosing or fixing the real issues between the parties. The said provisions did not say that such particulars can be ordered for the purpose of making the statement of claim disclose a cause of action. The order for further pleadings proceeds on the basis that the statement of claim discloses a cause of action. Particulars can only be ordered in respect of pleadings in which all the material facts are alleged. Particulars are needed to clarify and narrow the issues so as to afford the other party the chance to appraise the real issues in controversy. This will enable the defendant know the specific case to meet and not be taken by surprise. Where the statement of claim fails to allege material facts, no cause of action is disclosed. Further particulars cannot be ordered to supply the missing material facts so that it can then disclose a cause of action. As was held in the English case of *Bruce v Oldham Press Ltd.* (1936) 1 KB 697, such a statement of claim should be struck out and not supplemented by particulars. In the case of *Pinson Llyods v National Provincial Foreign Bank* (1941) 2 KB 72 at 75, the English Court held that:-

"The proper function of particulars is not to state the material facts omitted in the statement of claim in order, by filing the gaps, to make good an inherently bad pleading. Their function is to put the opposite party on his guard and prevent his being taken by surprise at the trial of an action."

The Trial Court was therefore clearly in error of law when it ordered further particulars to state material facts omitted in the statement of claim so as to make it disclose a cause of action. It lacks the power to do so. The order for further particulars is wrong in law for the further reason that it was made suo motu without the application of either party to the suit. There is no doubt that the discretionary jurisdiction to make such order is vested in the Court by order XXIII Rule 14 of the Rules of the High Court.

But by the nature of the concept and the notion underlying same it will violate the requirement of fair hearing that a court should remain an impartial arbiter throughout the case and should not step down into the arena to help any side to the case. As stated in *The Roy* (1882) 17 PD 117 at 121 further particulars or pleadings are details of the allegation made in pleadings or the case set up by the pleadings which more clearly define and delimit the issues to be tried. The further particulars are supplied for the benefit of the party against whom the pleading is filed. It is for that party to apply to the court to order the pleader to file further particulars of general or vague allegations in the said pleadings to avoid being taken by surprise at the trial and limit inquiry at the trial to matters set out in the particulars. In *Joseph Oguntokun v Amodu Rufai* (1945) II WACA 55 at 66 and 67, the West African Court of Appeal held that "where a party omits to set out details which he ought to have given and his opponent does not apply for particulars, he is entitled to give evidence at the trial of any fact which supports the allegation." Such opponent cannot object to the admissibility of such evidence. As held in the English case of *Woolley v Broad* (1892) 2 QB 317 if the opponent applies for and obtains particulars, the issue is limited, for the pleader is then bound by his particulars and cannot, at the final give evidence of matters not included in these particulars.

In our present case it is the defendants who should have applied for the order for further particulars. They did not. The plaintiff also did not and could not have applied for the Order because such an order is not available to the party who filed the pleading in question. As held in *James v Radnor County Council* (1890) 6 TLR 240 further particulars of allegations of matters on which the burden of proof lies on the plaintiff cannot be ordered. Furthermore, since neither party applied for an order of further particulars, the Trial Court lacked the power to make the order. The Supreme Court of The Gambia held in *Fatou Badjie & ors v Joseph Bassen* (2002-2008) 2 GLR 102 per Tobi JSC that "it is a loud and very clear law that Courts of Law do not grant reliefs not sought by the parties". His Lordship went further to say that "a Court of Law has no jurisdiction to give a party what he has not asked from the Court because the law assumes, and correctly too for that matter that he did not ask for it because he does not need it.

Apart from the general law, Order XXIII Rule 17 specifically requires that any order made on the ground that the suit discloses no cause of

action or that it is an abuse of Court process can only be made on the application of either party. When a Court grants a party an order or relief not asked for, it violates the requirement of fair hearing in two ways. Firstly, such an order violates the fair hearing rule of audi alteram patem in that the other party was not heard before it was made. The Supreme Court in *Fatou Badjie & Ors v Joseph Bassen* (supra) dealing with a similar situation where the Gambia Court of Appeal made an order not asked for held that ''a plaintiff is denied a fair hearing if the Court gives judgment to the defendant without hearing from the plaintiff. The natural justice principle of audi alteram patem will be breached, as it was breached by the Order of the Court of Appeal in this appeal." Secondly, by such an Order the Trial Court stepped into the arena of conflict to help the plaintiff repair his case or make a case that he failed to make. Throughout the proceedings, a Court must conduct itself in such a manner as to remain impartial and be seen as being impartial. It should not make a case for the parties. If should not act as a legal adviser to the parties. According to the Supreme Court per Tobi JSC in *Fatou Badjie v Joseph Bassen* (Supra), a Court which grants relief or makes an order not asked for by any party exposes itself to an attack of bias and that is a big slap that Courts of Law should avoid. For the above reasons, it is clear that the Order for further particulars violates Section 24 of the 1997 Constitution which requires that Courts shall be impartial and independent. The Order is therefore unconstitutional and consequently void. Another feature that renders the said order for further particulars bad in law is its speculative nature. This order is a typical example of speculative adjudication. According to Tobi JSC in *Fatou Badjie & Ors v Joseph Bassen* (supra), a Court that grants a relief to a party who did not ask for it will be involving itself in speculation or conjecture, a function it clearly lacks. This is exactly what the Trial Court did in this case. According to the Trial Court, the Order was made to enable paragraph 16 of the statement of claim to disclose a cause of action. The Court started speculating by saying that "paragraph 16 might potentially disclose a cause of action against the defendants. Paragraph 16 as it stands does not adequately disclose facts which disclose a cause of action against the defendants and hence the Court's order supra for further particulars". The Trial Court further said "paragraph 16 is in respect of the plaintiff's claim for libel and slander. That means that out of the 8 reliefs being claimed by the plaintiff only relief IV in respect of damages for libel and slander might

have the potential of being adjudicated upon by this Court". The Court then concluded its speculation by warning that if the further particulars show that the libel and slander alleged are in respect of proceedings pending before another Court properly seized of those proceedings, then this Court will be restricted, if not prevented from making any pronouncement regarding matters pertaining to those proceedings as they remain pending." A court has no power to indulge in this kind of speculative adjudication. When a Court indulges in such speculation it can no longer be regarded as an impartial Court. Speculative adjudication is clearly a travesty of justice.

Let me now deal with the order for amendment of the statement of claim. The purpose for the order is to enable the statement of claim to be amended to incorporate the further particulars ordered so that it can disclose a cause of action against the defendants. There was clearly no basis for that order in law. Further particulars or pleadings cannot form the basis of an amendment of pleadings. As the Nigerian Supreme Court held in *Nwobodo v Onoh* (1984) NSCCl 16 they do not constitute an amendment of any pleading. They merely amplify and explain what is already pleaded. They therefore supplement and form part of the pleading they amplify. See *Arhold and Buther v Bottornley* (1908) 2 KB 151 at 155. The procedure of further pleadings is a special procedure provided for in Order XXIII Rule 14 of the Rules of the High Court which prescribes what order the Court can make if it considers that the statement of claim and defence filed in any suit do not sufficiently disclose and fix the real issues between the parties. It provides that the Court may order further pleadings to be filed as it may deem necessary for the purpose of bringing the parties to an issue. It did not empower the Court to order an amendment of the pleading to incorporate the further particulars. The use of the word "may" before the word 'order' in the said provision serves to confer on the Court the discretion to order or refuse to order the filing of further particulars and not a discretion to make any other type of order like an amendment of pleading. The Court can only order or refuse to order the filing of further particulars under Order XXIII Rule 14 and nothing more. Where the court orders that further particulars be filed, the party so ordered states them in a separate document (form) bearing the title and number of the case and usually headed ''Further and Better Particulars". When the document is filed the particulars therein

naturally become incorporated into the part of the pleading stating those facts. They therefore form part of the pleadings and are governed by the same Rules. Fidelis Nwadialo's book, Civil Procedure in Nigeria, 2nd edition 2000 pages 407-416 offer a useful guide here.

Power must be exercised in accordance with the law creating it. If that law prescribes how if should be exercised, then it is that procedure that must be followed and no other. The order to amend the statement of claim so as to include the further particulars is clearly in violation of order XXlll Rule 14. The order for amendment, like the further particulars it seeks to incorporate is also speculative. The order of amendment was made in furtherance of the order for further particulars. Now that I have held that the order of further particulars is wrong in law, it follows that the basis of the amendment ceases to exist. By virtue of order XXlll Rule 17, any order on the ground that a suit discloses no cause of action or is an abuse of process can only be made on the application of a party. The Trial Court therefore acted wrongly in issuing the order for amendment without an application from the parties. Order XXlV Rule 1 which enables the Court to suo motu order amendments generally cannot apply here in view of the following:-

1. Order XXlV Rule 1 enables the Court to order amendment of errors and to order amendment to facilitate the determination of issues in controversy. It did not say the Court can order amendment of a statement of claim to enable it disclose a course of action.

2. It applies to proceedings generally. Order XXlll Rule 17 applies specifically to amendment of pleadings following a finding that a statement of claim discloses no cause of action or is an abuse of Court process.

Order XXlll Rule 17 being a special provision overrides order XXlV Rule 1 which is a general provision. It is for all of the above reasons that I also allow this appeal. I also dismiss suit No. HC/21/06/CO/22/B1.

OTA JCA. I have read in advance the judgment of my learned brother Agyemang Ag. JCA. I must commend my brother for the resource that

went into that work. I agree entirely with the views expressed and the conclusions reached. I however wish to add my voice to what has already been said by my learned brother in respect of the paramount issue in this appeal, which to my mind is "whether the Trail Judge was right in law when she ordered an amendment of paragraph 16 of the statement of claim after coming to the conclusion that the statement of claim disclosed no reasonable cause of action." The facts of this case have been most admirably and explicitly set out by my learned brother in his lead judgment. I will therefore revisit only the portions of it that are absolutely necessary for the purpose of this short concurring comment.

Suffice it to say that pursuant to Order XXIV Rule I schedule II of the Rules of the High Court, the Court may at any stage of the proceedings either of its own motion or on application of either party order any proceeding to be amended whether the defect or error be that of the party applying to amend or not and all such amendments as may be necessary or proper for the purpose of eliminating all statements which may lead to prejudice, embarrassment or delay the fair trial of the suit and for the purpose of determining in the existing suit, the real question or questions in controversy between the parties, shall be made. Every such order shall be made upon such terms as to costs or otherwise as shall seem just.''

The Trial Court therefore has a discretionary power to order amendments either of its own motion or on application of either party before it. It is however trite law that a Court in the exercise of its discretionary powers must do so judicially and judiciously. It is obvious that Roche J in her Ruling of the 24th January 2007 took advantage of the Courts discretionary power to order amendments suo motu. The poser here however is whether the Court exercised its power judicially and judiciously in the circumstance.

In answering this question, we must look at the principle that must guide a court in ordering an amendment. In the case of *The State (No.1) v Darboe (No.1)* (1997-2001) GR 777, this Court approved the statement made by Bowen J in *Cropper v Smith* (1883) 26 CHD 710 that "… it is well established principle that the object of Courts is to decide the right of the parties, and not to punish them for mistakes which they make in the conduct of their cases by deciding otherwise than in accordance with their rights. I know of no kind of error or mistake which if not fraudulent or intended to over reach, the court ought not to correct, if it can be done

without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy and I do not regard such amendment as a matter of favour or grace." It is therefore perfectly in order and within the power of the Court to amend proceedings suo motu, provided the amendment does not raise any issue of fact not already brought out either by the evidence or the pleadings, it is not fraudulent or intended to overreach, and the other party will not suffer an injustice thereby.

In light of the totality of the foregoing, it is my humble view that the Trial Court failed to exercise its discretionary power of amendment either judicially or judiciously when it embarked on the order of amendment in the impugned Ruling especially in light of the prayer that gave birth to the said Ruling as per the motion of 28th May 2006, for the following orders:-

a. Dismissing this suit against the defendants on the grounds that:-

    (a) The writ of summons and the statement of claim do not disclose a cause of action against the 1st and 2nd defendants.
    (b) Such suit is frivolous, vexations and an abuse of process of this Court.
    (c) Such further or other orders as this Honourable Court may deem fit to make in the circumstances.

After hearing arguments in this case, the Learned Trial Judge did great and commendable analysis of the application in her ruling clearly reaching the conclusion that the writ of summons and statement of claim do not disclose a cause of action against the Respondent herein, and that the suit was an abuse of process. After reaching this clear cut conclusion, I find it inexplicable that after such analogies and conclusion, the Trial Judge instead of dismissing the suit, suddenly did a dramatic summersault by ordering an amendment of paragraph 16 of the statement of claim. It is my considered view that having found that the process disclosed no cause of action and was in any event an abuse of process, the only option open to the Court was to dismiss the suit as prayed by the Appellant herein. See *Thomas v Olufosoye* (1986) 1 NWLR 664 at 683.

The stance adopted by the Learned Trial Judge was prejudicial to the cause of the Appellants herein. For the Learned Trial Judge did not merely order an amendment, she went a step further to stipulate what material facts she desired to be included in the pleadings. It is settled law that in an action seeking relief for alleged slander or libel, the words complained of must be set out expressly in the pleadings. This was not done in this case. The Court having as a result thereof concluded that the statement of claim did not disclose a cause of action, ought not to have aided the plaintiff/Respondent herein by ordering an amendment in an attempt to cure the incompetent process.

In my opinion, the Learned Trial Judge descended from her exalted position as an impartial umpire into the arena of conflict and engaged in serious combat on the side of one party as against the other. In a civil suit, the Court acts as an umpire holding the balance between the parties and its function is not inquisitorial, it does not often interfere with the conduct of a case but leaves the parties to adopt their own procedure in doing so. See *Shokunbi v Mosaku* (1969) NMLK 54 at 57 and *Luigi Ambrosini Ltd. v Bakare Tanko & Another* (1929) 9 NLR 8. By its action, the Trial Court put the cause of the Appellant in serious jeopardy. It is an event I find highly prejudicial.

More to this is the fact that under the power of the Court to order an amendment suo motu, the court should not force upon a party an amendment for which he has not asked, therefore it is not the duty of the Court to amend a pleading on behalf of a party without an application by that party. See *Cropper v Smith* (supra) and *Malomo v Olushola* (1995) 15 WACA 164. It is settled law that where a court proposes to amend any proceedings of its own motion, the Court should first of all invite both parties to address it on the contemplated amendment. In the case of *Ajoke v Oba & another* (1962) 1 ALL NLR 73 at 82, the Supreme Court of Nigeria expressed similar views when it declared that "… prudence, requires that it should be an invariable rule of practice for the Judge to invite the parties to address him before he amends the writ or pleadings of his own motion". A Court does not therefore amend pleadings on behalf of a party without an application by that party. Rather the duty of the Court is to do substantial justice between the parties and to make any formal amendments in the claim such as to the capacity in which a party sues.

Furthermore, the action at the Lower Court commenced by the Respondents is clearly an abuse of the process of that court in that it is frivolous and vexatious. See *Castro v Murray* (1875) 10 CREX 213. This conclusion was also reached by the Learned Trial Judge in her ruling. The seriousness of any application alleging an abuse of the process of the Court cannot be over emphasized. Courts universally have always taken a very strict stance against any attempt by one party to use its process to inflict injustice to or oppress the other party. The Court whose process is being abused has an inherent jurisdiction to cure its process of that abuse. Thus the universal trend is that once a Court finds a suit to be an abuse of its process, the Court will dismiss that suit. In *Arrow Nominees Inc v Blacklege* (2000) 2 BCLC 167 at 193, the Australian Court of Appeal was of this view when it held that "… where a litigant's conduct puts the fairness of the trial in jeopardy, where it is such that any judgment in favor of the litigant would have to be regarded as unsafe, or where it amounts to such an abuse of the process of the Court as to render further proceedings unsatisfactory and to prevent the Court from doing justice, the court is entitled, indeed I would hold board, to refuse to allow that litigant to take further part in the proceedings and (where appropriate) to determine the proceedings against him. The reason, as it seems to me, is that it is no part of the Court's function to proceed to trial if to do so would give rise to a substantial risk of injustice. The function of the Court is to do justice as between the parties; not to allow such process to be used as a means of achieving injustice. A litigant who has demonstrated that he is determined to pursue proceedings with the object of preventing a fair trial has forfeited his right to take part in the trial. His object is inimical to the process which he purports to invoke".

It is in light of the totality of the foregoing and for the more detailed reasons contained in the lead judgment that I also allow this appeal.

Appeal Allowed.
FLD.

OUSMAN BALDEH; RAID AZIZ v MOMODOU TIJAN JALLOW

COURT OF APPEAL OF THE GAMBIA
(Civil Appeal No. 6/2001)

1st March 2006

AGIM PCA, PAUL Ag. JCA, YAMOA Ag. JCA

Action – Negligence – What plaintiff needs to establish – Tortfeasor – Vicarious liability – Whether an action against either master or servant precludes action against the other – Judicial discretion – Whether Appellate Court will interfere with exercise of discretion by Lower Court.

Court – Power of – Order XXXIV Rule 3 High Court Rules – Service of process – What amounts to – Failure to serve a party – Effecting service of process on counsel – Service of notices – Procedure adopted by Courts – Proceedings – When to presume regularity of same – Absence of a party from proceedings – Duty expected of litigants and counsel towards the Court – Appeal – When Appellate Court will interfere with exercise of Trial Court's discretion – Motion – When moved.

Constitutional Law – Fair hearing – What amounts to – Purport and meaning.

Evidence – Presumption of law – Driver of a vehicle is presumed to be the agent or servant of the owner – Statement of defence – Whether proper for a party to file without calling or adducing evidence – Civil causes – Onus on party required to produce or adduce evidence – A party failing, neglecting or refusing to call evidence.

Judgment & Orders – Default judgment – Conditions for setting aside same – Conditions must all be resolved in favour of applicant – Affidavit in support of motion to set aside what it should contain.

Pleadings – Admissions – Facts admitted need no further proof – Evidence – Whether proper for a party to file statement of defence without calling or adducing evidence – Onus on party required by law to adduce evidence.

Practice & Procedure – Service of Court process – What amounts to – Service of notices – Proof of service – Court – Presumption of regularity of proceedings – Service of process – Service on Counsel – Motion –

When moved – Default judgment – Affidavit in support of application to set-aside – Service of court process – Effect of failure to serve – Duty expected of litigants and counsel towards Court.
Words & Phrases – Oui fait per allium, facit per se – Meaning of – Fair hearing – What amounts to.

Held, *dismissing the appeal (Agim PCA, Paul Ag. JCA, Yamoa Ag. JCA concurring*)

1. The phrase "qui facit per allium, facit per se'' correctly expresses the principle on which vicarious liability is based – the master is liable though guilty of no fault himself. It is the relationship of master and servant that itself gives rise to the liability and not the old fiction that the master had impliedly commanded his servant to do what he did. [*Hern v Nichols* (1700) 1 Salk 289; *Nettleship v Weston* (1971) 2 QB 691; *I.C.I. Ltd v Shatwell* (1965) AC 656 referred to]

2. A plaintiff in an action for negligence must, in order to succeed, establish the liability of the wrong doer and prove that the wrong doer is a servant of the master and that the wrong doer acted in the course of his employment with the master. [*Young v Edward Box Co. Ltd* (1951) TLR 789 referred to]

3. The law regards both master and servant as joint tortfeasors. Lord Denning L. J. (as he then was) held as follows in the case of *James v Manchester Corporation* (1952) 2 QB 852 at 870 - "In all these cases it is of importance to remember that when a master employees a servant to be something for him, he is responsible for the servant's conduct as it were his own. If the servant commits a tort in the course of his employment, then the master is a tortfeasor as well as the servant."

4. Being joint tortfeasors, the person injured is at liberty to sue anyone of them separately or may sue both jointly, their liability being joint and several. [*Broom v Morgan* (1953) 1 QB 597 referred to]

5. Where the injured person sues one of them separately and succeeds, this is not a bar to an action against the other who would, if sued, have been liable as a joint tortfeasor in respect of the same damage.

6. For an action based on vicarious liability in a claim for negligence against a natural or juristic person to succeed, the servant of the natural or juristic person who is the principal tortfeasor must be joined in the action and his liability established before his master can be found vicariously liable. In other words, for a master to be successfully sued vicariously in respect of the tortuous act of his servant, the servant must be made a party to the action. [*Ifeanyichukwu Osondu Co. Ltd. v Soleh Boneh (Nig) Ltd* (1993) 3 NWLR (Pt 280) 246; *Management Enterprises Ltd & Anor v Jonathan Otusanya* (1989) 2 NWLR (Pt 55) 77 referred to]

7. The law is that facts admitted in a pleading may be taken as established without proof. When parties have agreed about a particular matter in their pleadings, such matter need not be proved and such an agreed fact is taken as established. What is admitted need not be proved and parties are bound by their pleadings. [*Ndiakaere & Ors v Egbuonu & Ors* (1941) 7 WACA 53; *Agbanelo v Union Bank (Nig) Ltd*. (2000) 2 SCNQR 415; Section 75 of the Evidence Act 1994 and Order 23 Rule 7 of the High Court Civil Procedure Rules Act 1994 referred to]

8. There is a presumption that a vehicle is being driven by the servant or agent of the owner which presumption is rebuttable. In other words, when the facts of the relationship between the owner of a vehicle and the driver are not fully known, proof of ownership may give rise to a presumption that the driver was acting as the owner's agent. [*Odebunmi v Abdullahi* (1997) 2 NWLR (Pt 485) 526; *Kuti v Balogun* (1978) 1 SC 52 referred to]

9. Pleadings are not tantamount to evidence and only evidence before the Court would be acted upon. [*Shell B.P. & Anor v Abedi* (1994) 1 SC 23; *International Bank for West Africa Ltd. v Imano & Anor* (2001) 5 NSCQR 717 referred to]

10. Civil cases are decided on a preponderance of probabilities and the onus of adducing evidence is on the person who would fail if such evidence were not produced. The nature of proof in a given case is dictated by the particular circumstances of the available evidence.

11. Where a party (Defendant) took no part in a proceeding or offered no evidence in his defence as in the case at hand, the evidence before the court goes one way and there would be nothing on the other side of the imaginary scale or balance against the evidence of the (plaintiff) other party. [*Ogunjumo v Ademolu* (1995) 4 NWLR (Pt 389) 245; *Nwabuoku v Ottih* (1961) 2 SCNLR 232 referred to]

12. A fair hearing is a hearing that does not contravene the principle of natural justice. [*Deduwa v Okorodudu* (1956-1984) Vol. 8 Digest of Supreme Court Cases 206 referrred to]

13. When a defendant fails to appear on the date fixed for hearing of a case, the plaintiff may be allowed to proceed and prove his case and obtain judgment. Such a judgment in default may however be set aside at the discretion of the Trial Court on the application by the defendant upon showing sufficient cause for being absent. [*Kekuta Buwaro v Gloria Eziakomwa* (1999-2001) GR 91]

14. A Trial Court will only be satisfied that a party has been served a process of court by referring to the case file for the affidavit of service. [*Public Finance Securities Ltd. v Jefia* (1998) 3 NWLR (Pt 543) 602; *Muhammed v Mustapha* (1993) 5 NWLR (Pt 292) 222 referred to]

15. It is always good practice and desirable for the Trial Court to state its satisfaction with the proof of service of Court process on the party in default of appearance.

16. There is in law, a presumption of regularity in the trial judge proceeding with a case in the absence of a defendant where the Court is satisfied that service of a process has been effected on the defendant and the defendant, has not complained that he was

not served. [*Okesuji v Lawal* (1991) 1 NSCC Vol. 1 (Pt 1) 226 referred to]

17. The authorities are in favour of the view that it is good rule of practice to serve the parties in the suit because it is asking too much to say that once a counsel always a counsel. [*Mahoney v Mahoney* (1995/96) GR 77 referred to]

18. The fact remains that so long as counsel to a party in an action remains on the record as representing the party, service on that counsel is equally good as service. [*R v Justices of Oxfordshire* (1893) 2 QB 149 referred to]

19. Contemplated in fair hearing is that, in the determination of the rights or obligations of parties by a Court of Law or Tribunal, or any other authority vested with powers to determine questions of law affecting the rights of an individual, the parties involved must be given equal opportunity to be heard in respect of the matter before the court or such tribunal. It also means that the parties must have equal facilities or they be placed in a position to obtain equal facilities in the trial process.

20. The requirement of the law is that a party cannot be allowed to dictate the pace at which a civil trial is conducted by his failure to attend court, in particular where he is on notice and fails to excuse his absence. A defendant who aims at holding the Court to ransom by his repeated absence from court without any reason is certainly not entitled to any indulgence. [*Kekuta Buwaro v Gloria Eziakomwa* (1999-2001) GR 91 referred to]

21. In exercise of its discretion in favour of an applicant wishing to set aside its judgment entered in default of appearance, the Court must be satisfied by the applicant upon certain conditions which must all be resolved in favour of the applicant before the judgment can be set aside [*Egonu v Egonu* (1978) 1-12 SC 111; *Ugwu & Ors v Aba & Ors* (1961) 1 ALL NLR 438; *Williams & Ors v Hope Rising Voluntary Funds Society* (1982) 1 ALL NLR (Pt 1) 5 referred to]

22. The normal practice is for counsel to move a motion before the Court can entertain it. Without a motion being moved by counsel, the law is that the Court should not consider it on its merit. [*Atser v Gachi* (1997) 6 NWLR (Pt 510) 609 referred to]

23. The affidavit supporting the motion to set a judgment in default of appearance should state the circumstances under which the default has arisen, and should disclose the nature of the defence. [White Book (1982) Vol. I 156 referred to]

24. Where service of process is required, failure to serve is a fundamental vice and a person affected by an order of court but not served with the process is entitled ex-debito justitiae, to have the order set aside as a nullity and that such an order of nullity is a necessity because due service of process is a sine qua non to the hearing of any trial in view of the principle of audi alteram partem, [*Sken Consult v Ukey* (1981) 1 SC 6 referred to]

25. Both the parties and counsel have a responsibility to be present throughout the proceedings in a case and where due to unforeseen circumstances their absence is unavoidable, the Court is entitled to be extended the courtesy of be duly informed. Otherwise they absent themselves at their own peril.

26. It is well settled that if judicial discretion has been exercised bonafide, uninfluenced by irrelevant consideration and not arbitrarily or illegally by the Lower Court, the general rule is that an Appellate Court will not ordinarily interfere. The guiding principle in this respect is that the discretion must at all times be exercised not only judicially but also judiciously. [*University of Lagos v Aigoro* (1985) 1 NWLR (Pt 1) 143; *Saffiedine v C.O.P.* (1965) 1 ALL NLR 54; *Mahoney v Mahoney* (1995/1996) GR 77 referred to]

Cases referred to:

Agbanelo v Union Bank (Nig) Ltd. (2000) 2 SCNQR 415

Alhaji Sonko v Sona Mballow (Unreported) Judgment No. 1/94 delivered 22nd May 1995
Atser v Gachi (1997) 6 NWLR (Pt 510) 609
Broom v Morgan (1953) 1 QB 59
Deduwa v Okorodudu (1956-1984) Digest of Supreme Court Cases Vol. 8 206
Egonu v Egonu (1978)11-12 SC 111
Hern v Nichols (1700) 1 Salk 289
I.C.I. Ltd v Shatwell (1965) AC 656
Ifeanyichukwu Osondu Co. Ltd. v Soleh Boneh (Nig) Ltd (1993) 3 NWLR (Pt 280) 246
International Bank for West Africa Ltd. v Imano & Anor (2001) 5 NSCQR 717
James v Manchester Corporation (1952) 2 QB 852
Kekuta Buwaro v Gloria Eziakomwa (1999-2001) GR 91
Kuti v Balogun (1978) 1 SC 52
Leigh v Luis Diaz D Losada & Anor (1994) GR 233
Mahoney v Mahoney (1995/96) GR 77
Management Enterprises Ltd & Anor v Jonathan Otusanya (1989) 2 NWLR (Pt 55) 77
Morgans v Launchbury (1973) AC 127
Muhammed v Mustapha (1993) 5 NWLR (Pt 292) 222
Ndiakaere & Ors v Egbuonu & Ors (1941) 7 WACA 53
Nettleship v Weston (1971) 2 QB 691
Nottingham v Aldridge (1971) 2 QB 739
Nwabuoku v Ottih (1961) 2 SCNLR 232
Odebunmi v Abdullahi (1997) 2 NWLR (Pt 485) 526
Ogunjumo v Ademolu (1995) 4 NWLR (Pt 389) 245
Okesuji v Lawal (1991)1 NSCC Vol. 1 (Pt 1) 226
Public Finance Securities Ltd. v Jefia (1998) 3 NWLR (Pt 543) 602
R v Justices of Oxfordshire (1893) 2 QB 149
Saffiedine v C.O.P. (1965) 1 ALL NLR 54
Shell B.P. & Anor v Abedi (1994)1 SC 23
Sken Consult v Ukey (1981) 1 SC 6
Ugwu & Ors v Aba & Ors (1961) 1 ALL NLR 438
University of Lagos v Aigoro (1985) 1 NWLR (Pt 1) 143
Williams & Ors v Hope
Young v Edward Box Co. Ltd (1951) TLR 789

Statutes referred to:

The Evidence Act 1994 Section 75
The Gambia 1997 Constitution Section 24(1) (b)
The High Court Civil Procedure Rules Order 23 Rule 7, Order 34 Rules 3, 5; Order 52 Rule 5

APPEAL from the Trial High Court's ruling of 15th February 2001 refusing to set aside the Judgment entered in default of appearance. The facts are sufficiently stated in the opinion of Paul Ag. JCA.

J. R. Sallah-Njie for the appellants
M. N. Bittaye for the respondent

PAUL Ag. JCA. By a Writ of Summons issued on the 3rd day of July 1995, the Respondent in this appeal as plaintiff, instituted an action in negligence before the High Court claiming from the applicants as defendants, damages for loss of limb, pain and suffering, interest, further and other reliefs and costs. The Respondents case is that on the 13th day of February 1993 he boarded a DAF Commercial Passenger Bus with registration Number G2A 5048 from Latrikunda, Kombo Saint Mary bound for Banjul. The 1st Appellant as 1st defendant was the driver of the bus and he was employed by the 2nd appellant as 2nd defendant who owned the bus. Upon arriving at his destination at Hagan Street, Banjul, the Respondent had the consent of the 1st appellant (the driver) to alight from the bus. But as he was alighting, the 1st appellant pressed a button and the door which was operated by pressure, automatically closed thus trapping the dress of the Respondent. Consequently the Respondent was dragged along the road as the bus moved on. Other passengers and passersby shouted for the 1st Appellant to stop the bus. Eventually the dress of the Respondent tore off and he fell on the ground and was run over by the bus. The Respondent was admitted at the Royal Victoria Hospital from 13th February 1993 to 11th April 1994 where his right leg was later amputated.
The Appellants answer in their Statement of Defence was not a complete denial of all the averments in the statement of claim. They admitted that it all materials times. The 1st Appellant was the driver employed by the

2nd Appellant, of the DAF Commercial Passenger bus with registration number G2A 5048 owned by the 2nd Appellant. They admitted that on the 13th day of February 1993 the Respondent was a passenger of the 1st appellant traveling from Kombo Saint Mary bound to Banjul. They admitted that the police visited the scene of the accident and rushed the Respondent to the Royal Victoria Hospital in Banjul where the Respondent was examined and admitted from 13th February 1993 to 11th April 1994. They admitted that as a result of the accident the Respondent sustained severe injuries of the right leg according to the medical examination report. They admitted that the plaintiff's right leg was consequently amputated at the Royal Victoria Hospital. They, however, averred that any injuries sustained by the Respondent resulted from his own negligence. According to them, upon arriving at Hagan Street but a few meters from Hagan/Cameroon Street junction, the 1st appellant stopped behind three other vehicles which had already stopped for a few seconds awaiting traffic signal for them to move on. It was a no-parking area where buses were not permitted to stop for passengers to alight. During the brief stop the Respondent forced his way to alight and at which time the traffic Warden had already signaled and the bus started moving again. The Respondent attempted to jump out of the bus but fell down with one hand still holding on to the door and was dragged along for about four meters. The Appellants subsequently filed a motion dated 24th September 1997 for leave to amend their statement of defence but the motion was not moved.

After suggesting a number of adjournments, the case ultimately came before Ikeire J. for hearing on 6th March 1998 the date fixed by agreement of both counsel. The Respondent gave evidence and was thoroughly cross-examined by the Appellant's Counsel on 27th July 1988. The case was adjourned to 13th November 1998 for continuation of hearing. Neither the Appellant's nor their Counsel attended Court on that date. The case suffered further adjournment thereafter, on 8/12/98, 9/2/99, 24/2/99 and 11/3/99. The Court ordered service of hearing notice on the Appellant on 9/2/99. Neither the Appellants nor their Counsel turned up in Court on all dates subsequent to service of notice of hearing on them. The Respondent closed his case on 11th march 1999 and his Counsel applied for Judgment pursuant to order 34 Rule 3 Schedule II of the Rules of the High Court. The Respondents Counsel addressed the Court on 10th may 1999. The Learned Trial Judge in his judgment found

for the Respondent and granted all his reliefs. The Appellant's attempt to have the judgment against them set aside by the Learned Trial Judge failed when their application was dismissed on 15th February 2001. Aggrieved by the Judgment of 18th June 1999 and the Learned Trial Judge's ruling of 15th February 2001 refusing to set aside the default judgment, the Appellants have appealed to this Court. The notice of appeal contained five grounds. Briefs of arguments were duly filed and exchanged. The appellants abandoned their fifth ground of appeal and formulated two issues for determination out of the remaining four grounds namely:

> "1. Was the Learned Trial Judge right in holding that the second Appellant was vicariously liable in negligence, when there was no proof of the legal requirements needed to found vicarious liability.
>
> 2. Was the Learned Trial Judge right in refusing to set aside his Judgment considering the circumstances of this case."

The Appellant having abandoned their fifth ground of appeal, it is hereby struck out accordingly. The Respondent adopted the two issues as formulated by the Appellants as he had not framed any issue. The Appellants filed a reply to the Respondent's brief. On the first issue it was submitted for the Appellants that though the Appellants did not call evidence at the trial the onus was still on the Respondent to prove his case and that, that onus was not discharged. Citing the case of Morgans v Lannedbury (1973) AC 127 and Nottingham v Aldridge (1971) 2 QB 739 Learned Counsel submitted that the Respondent in his evidence merely stated that the vehicle is owned by Riad Aziz (the 2nd Appellant) and nothing more and that there was absolutely no evidence that the driver (1st Appellant) was the servant or agent of Riad Aziz (2nd Appellant) or that he was acting in the course of his employment or was driving for and on behalf of Riad Aziz. That the evidence of the Respondent fell for short of the legal requirements needed to found vicarious liability. Counsel submitted further that since vicarious liability was not proved, the 2nd Appellant ought not to have been held liable merely because he was said to be the owner of the vehicle. Learned Counsel to the Respondent, however, contended that it is trite law that

admission made in the pleadings need not be proved at the trial, relying on Order 23, Rule 7 Schedule II of the High Court Rules and the case of Leigh v Luis Diaz De Losada & Ors (1994) GR 233 at 250. It is his contention that it is clear from the pleadings that the Appellants admitted the employed/employee relationship between the 1st and 2nd Appellants' Learned Counsel submitted that issue 1 cannot be resolved in favour of the Appellants because is view of the admission made in the pleadings on this issue, it is taken as established at the final. That the case of Morgans v Launchbury (supra) and Nottingham v Aldrige (supra) cited and relied upon by the Appellants are irrelevant in deciding the legal principles on this issue which falls to be determined on procedural rather than substantive law.

This issue is centered on the doctrine of vicarious liability. The phase qui facit per allium, facit per se correctly expresses the principle on which vicarious liability is based – the Master is liable though guilty of no fault himself. It is the relationship of Master and servant that itself gives rise to the liability and not the old fiction that the master had impliedly commanded his servant to do what he did. It would appear from the judgment of Sir John Holt C.J in *Hern v Nichols* (1700) 1 Salk 289 and Lord Denning in *Nettleship v Weston* (1971) 2 QB 691 at 700 that the doctrine is based on public policy or, as Lord Pearce opined in *I.C.I Ltd v Shatwell* (1965) PC 616 at 685 ''on social convenience and rough justice." The liability of the master is dependent on the plaintiff being able to establish the servant's liability for the tort and also that the servant was not only the master's servant but that he also acted in the course of his employment. A plaintiff must, in order to succeed in such an action, establish the liability of the wrong-doers and prove that the wrong-doer is a servant of the master and that the wrongdoer acted in the course of his employment with the master. In *Young v Edward Box Co. Ltd* (1951) TLR 781 it was stated that:

> "In every case where it is sought to make a master liable for the conduct of his servant the first question is to see whether the servant was liable. If the answer is yes, the second question is to see whether the employer must shoulder the servant's liability.''

It must be borne in mind that the law regards both master and servant as joint tortfeasors. See *James v Manchester Corporation* (1952) 2 QB 852 870 where Denning L.J (as he then was) held that:-

> "In all these cases it is of importance to remember that when a master employes a servant to do something for him, he is responsible for the servant's conduct as it were his own. If the servant commits a tort in the course of his employment, then the master is a tortfeasor as well as the servant"

Being joint tortfeasors, the person injured is at liberty to sue anyone of them separately or may sue both jointly, their liability being joint and several. See *Bream v Morgan* (1953) 1 QB 597. Where he sues one of them separately and succeeds, this is not a bar to an action against the other who would, if sued, have been liable as a joint tortfeasor in respect of the same damage. In motor traffic cases, the driver of the offending vehicle may be sued together with the owner of the vehicle if it established that the driver was as the material time driving the vehicle in the course of and within the scope of his employment. See *Morgan v Launchbury* (supra). In some cases a plaintiff perceives the driver as a man of straw and the owner as a more promising source of recompense and as such, sues one only the owner, but since it is a finding of liability against the servant that results in the master's liability, it is better that the servant be made a party to the action. For an action based on vicarious liability in a claim for negligence against a natural or juristic person, the principal tortfeasor must be joined in the action and his liability established before his master can be found vicariously liable. In other words, for a master to be successfully sued vicariously in respect of the tortuous act of his servant, the servant must be made a party to the action. See *Ifenyichukou Osondu Col Ltd. v Sole Bonch (Nig) Ltd* (1993) 3 NWLR (Pt 280) 251; *Management Enterprises Ltd & Anor V Jonathan Othsanya* (1987) 2 NWLR (Pt 55) 77 at 190. In the case at hand the Respondent correctly sued the driver and the owner of the vehicle together. The Appellants are, however, contending that the Respondent did not discharge the onus placed on him to establish that the 2nd Appellant is the owner of the car and that the driver (1st Appellant) is his servant acting in the course of his employment or as his authorized agent driving for and on his behalf. The facts of this case as stated in

Paragraph 2 of the Respondent's statement of claim is that "at all material times the 1st defendant was the driver, employed by the 2nd defendant, of a Daf Commercial Passenger bus G2A 5048 owned by said 2nd Defendant. The Appellants averred in paragraph 2 of their Statement of Defence that the "defendants admit paragraph 2 of the statement of claim.

Thus, it is clear that the Appellants formally admitted the facts as averred in paragraph 2 of the Respondent's statement of claim. The Law is that facts admitted in a pleading may be taken as established without further proof. Clearly, when parties are agreed about a particular matter in their pleadings, such matter need not be proved as that fact is deemed established. This is all the more so in view of the fact that parties are bound by their pleadings. See the case of *Ndiakrere & Ors v Egbwnu & Ors* (1941) 7 WACA 53; *Agbanele v Union Bank* (Nig.) Ltd (2000) 2 SCNR 415 and Section 75 of the Evidence Act 1994. Furthermore, it is provided in Order 23 Rule 7 Schedule II of the Rules of the High Court that:-

> "The defendant's pleading or defence shall deny all such material allegations in the petition as the defendant intends to deny at the hearing. Every allegation of fact, if not denied specifically or by necessary implication, or stated to be not admitted shall be taken as established at the hearing."

In fact the Respondent went further and said under examination in chief that:

> "I know Ousman Baldeh (1st Appellant). He was the driver of Daf Commercial Passenger bus G2A 5048. The vehicle is owned by Riad Aziz, the 2nd defendant.''

The Respondent was thoroughly cross-examined by Counsel for the Appellants and he was not contradicted on these pieces of evidence. In any event, there is a rebuttable presumption that a vehicle is being driven by the servant or agent of the owner. In other words, when the facts of the relationship between the owner of a vehicle and the driver are not fully known, proof of ownership may give rise to a presumption that the driver was acting as the owner's agent. See *Odebunmi v Abdullali* (1997) 2 NWLR (Pt 489) 526; *Kuti v Balogun* (1978) 1 SC 52. In

the instant case, the appellants were unable to rebut this presumption. It can be inferred from the circumstances of the case that the 1st Appellant (Driver) was acting in the course of his employment or that he was an authorized agent driving for and on behalf of the 2nd Appellant (Driver) at the time of the incident. From the cold records before the Court, it is clear that the car under the control of the 1st Appellant (Driver) was described as a Commercial Passenger bus owned by the 2nd Appellant. The Respondent was a passenger boarding the bus from Latrikunda Kombo Saint Mary's bound to Banjul. There were other passengers in the bus at the time of the incident. The Appellants admitted these facts in paragraphs 2, 4 and 6 of their statement of defence. It is common knowledge that commuter or commercial buses ply the root from Kombo Saint Mary to Banjul and if the bus under the control of the 1st Appellant was a commercial bus it would not be wrong to presume or infer that the 1st Appellant acted in the course of his employment and not on a frolic of his own.

This is a case in which the Appellants filed their Statement of Defence but did not lead or adduce evidence in rebuttal other than that deduced from cross-examination of the Plaintiff by Counsel for the Appellants. Pleadings are not tantamount to evidence and the only evidence before the Trial Court was the evidence of the plaintiff. See *Shell B. P. & Ors v Abedi* (1994) 1 SC 23; *International Bank for West Africa Ltd. v Imeno & Ors* (2001) 5 NSCQR 717. Civil cases are decided on a preponderance of probabilities and the onus of adducing evidence is on the person who would fail if such evidence were not produced. Even then, the nature of proof in a given case is dictated by the particular circumstances of the available evidence. Where a defendant fails to take part in a proceeding or offered no evidence in his defence as in the case in hand, the evidence before the Court goes one way and there would be nothing on the other side of the imaginary scale or balance as against the evidence of the plaintiff. In such a case, the onus of proof placed on the plaintiff is properly discharged. See Ogunjume v Ademolu (1995) 4 NWLR (Pt 389) 254 *Nwa buwku v Ottih* (1961) 2 SCNLR 232.

The Learned Trial Judge was therefore right when he stated that in the absence of any evidence from the defence (appellants) rebutting the evidence of the plaintiff (Respondent) he believed the evidence of the plaintiff (Respondent) and held that the plaintiff (Respondent) had proved

his claim on minimum evidence. Issue No.1 is accordingly resolved in favour of the Respondent.

The second issue is whether the Learned Trial Judge was right in refusing to set aside his judgment considering the circumstances of the case. It was argued for the appellants that Paragraph (b) of Sub Section (1) of Section 24 of the Constitution of the Republic of The Gambia 1997 provides that "where proceedings are commenced for the determination of the existence of any civil right or obligation, the case shall be afforded a fair hearing within a reasonable time". Counsel submitted further that a fair hearing is a hearing that does not contravene the principles of natural justice and referred the Court to the case of *Dedawa v Okoridudu*, (1956-1984) Digest of Supreme Court Cases Vol. 8 206. Learned Counsel's contention is that the Learned Trial Judge contravened the second principle of natural justice embodied in the audi alteram partem rule by not affording the Appellants an opportunity to be heard before judgment was pronounced against them. Counsel however conceded that this fundamental principle of law is subject to other provisions of the law and Rules of Court such as Order 34 Rule 3, Schedule II of the Rules of the High Court which confers on the Court a discretion to give judgment in default of appearance of the defendant upon proof of valid service. Learned Counsel submitted that proof of service is fundamental before such discretion may be exercised. It is counsel's further submission that since the Appellants were represented by Counsel throughout the proceedings, service ought to be effected on Counsel. She argued that defendants (appellants) Counsel was not notified of the hearing date as the hearing notice was served on the appellants thus resulting in breakdown of communication and failure of the Appellants' Counsel to appear in Court. Learned Counsel contended that the Learned Trial Judge failed to advert his mind to this fact in exercising his discretion and that an exercise of discretion under Order 34 (supra) must take into consideration all the circumstances of a case, that the Learned Trial Judge only considered the instances of non-appearance on the part of the appellants, and failed to consider the conduct and non-appearance of the Respondent. Learned Counsel referred to a part of the record of proceedings where the trial Judge stated as follows:-

> "Since this case has suffered several adjournments at the instance of the plaintiff and since the venue of the Court has been changed it is

> necessary that the defendants should be served with hearing notice for the next hearing date."

She contended that the said hearing notice was not served on Counsel when it was them that the appellants were represented by Counsel at the time. Learned Counsel then submitted that considering that Counsel for the Appellants was not served with the hearing notice and was therefore, not aware of the hearing dates, and that the case had suffered several adjournments at the instance of the Plaintiff and that the venue of the Court had changed several times, the Respondent was not entitled to a discretion under Order 34 Rule 3 and therefore judgment ought not to have been entered in his favour. Learned Counsel also referred to Order 34 Rule 5 Schedule II of the Rules of the High Court which provides that:-

> "Any judgment obtained against any party in the absence of such party may on sufficient cause shown be set aside by the Court upon such terms as may seem fit."

Learned Counsel submitted that Rule (5) recognizes one of the twin principles of natural justice, audi alteram patem, and that where a party has shown sufficient course, the Court ought to exercise its discretion in that party's favour and set aside its judgment so as to ensure that he is heard and that the case is determined on its merits. In support of her submissions, Learned Counsel cited and relied on the cases of Evans v Bertlam (1937) All ER 646 and Alhaji Sonko v Sona Mballow, Civil Appeal No. 1/94 of 22nd May 1995. Learned Counsel contended that the appellants filed an affidavit in support of their application to set aside the judgment of the Court and that the facts deposed to therein clearly gave cogent reasons for the non-appearance of the Appellants and further raised the defence of contributory negligence at paragraph 9 thereof. Counsel submitted that the Learned Trial Judge ought to have considered whether the appellants had a prima facie defence to the case of the plaintiff and by failing to do so seriously misdirected himself. She submitted that in applying the principles guiding the Court when considering an application to set aside a judgment in default of appearance as contained in the ruling complained of, the Learned Trial Judge misdirected himself by not considering the total circumstances of the case. Learned Counsel finally submitted that the circumstances of

this case justified the exercise of the Court's discretion to set aside the judgment of the Court in favour of the Appellants and that the Learned Trial Judge was in error in so refusing to set aside his Judgment thereby denying the Appellants their constitutional right to fair hearing.

On the other hand, the Respondent contends that the Learned Trial Judge exercised his powers correctly under Order 34 rules 3 and 5, Schedule II of the Rules of the High Court by entering judgment in favour of the Respondent. Counsel submits that the Appellants did not show sufficient cause to warrant the setting aside of the judgment given against them especially in view of the fact that the phrase ''on sufficient cause being shown'' is the overriding consideration in such instances. It is counsel's contention that paragraph (6) of subsection (1) of Section 24 of the Constitution of the Republic of the Gambia is inapplicable to the instant case as it is subject to the laws governing default judgment under Order 34 Rule 3 Schedule II to the Rules of the High Court. Finally, counsel contended that the Appellate Courts accord the highest respect to the exercise by a Lower Court of its discretion although it is not precluded from reviewing same when it offends against the law and is not exercised within permissible parameters. Learned Counsel cited and relied on the case of Mahoney v Mahoney (1995/96) GR 77 at 81 (per Nanlois JA) and concluded that the appellants failed to show that the exercise of the Lower Court's discretion offended any law or that it was done capriciously or arbitrarily.

Learned counsel contended that no authority was cited in support of the proposition that failure to serve the notices on a party's Counsel constituted a breach of any law. Referring to the case of Mahoney v Mahoney (supra), Counsel argued that it good practice to serve the parties in the suit because it is asking too much to say that once a counsel, always a counsel, and that in any even the Court below found as a fact that Counsel for the Appellants conducted an exhaustive cross-examination of the Respondent at the end of which the case was adjourned for further proceedings.

According to learned counsel, the distinguishing factor between this case and the case of Alhaji Sonko & Ors v Sona Mballow (supra) relied on by the Appellants is that in the latter case, the Court found as a fact that the Appellants were never served with the notice of hearing whereas in the instant case the Appellants admitted service of the notice of hearing on them. On the contention that the Learned Trial Judge did not and ought

to have considered whether the Appellants had a prima facie defence, learned Counsel submitted that the Learned Trial Judge did consider whether the Appellants have a good defence but was not so satisfied, and considered the issue of the Motion to amend the Statement of Defence by the Appellants and held that the Appellants failed in their duty to move their own motion. Learned Counsel contended that even though the Appellants denied in Paragraph 9 of their Statement of Defence that the 1st Appellant's negligence resulted in the Respondent injuries and further alleged that the Respondent's injuries were caused by his own negligence, the Appellants failed to give particulars of the Respondent's negligence. It was therefore submitted that on the basis of this thin defence, the Learned Trial Judge was right in holding that the Appellants did not have a good defence.

Learned Counsel submitted that the law requires the applicant in an application to set aside a default judgment to file an affidavit stating facts showing a defence on the merits but that in the affidavit in support of the Motion to set aside the judgment, the Appellant's deposition in paragraph 9 stating that the plaintiff against all the advice of the driver and several other passengers on the vehicle, jumped out of the vehicle and thereby got himself injured," contradicted with the Appellants' averment in paragraph 6 of her statement of defence that "save that there were cries and shouts from passengers within the bus the driver would not have noticed there was an accident for the driver to stop the bus." Learned Counsel finally submitted that the Learned Trial Judge was right in his ruling on the 15th of February 2001 that he was not satisfied that the Appellants had a good defence to the suit and that the instant appeal lack merits and should be disallowed.

It is beyond doubt that a Trial Court is vested with powers under Order 34 Rule 3 Schedule II of the Rules of the High Court to proceed with a case in the absence of a party. Consequently, when a defendant fails to appear on the date fixed for hearing of a case, the plaintiff may be allowed to proceed and prove his case and obtain judgment. Such a judgment in default may however be set aside at the discretion of the Trial Court on the application by the defendant upon showing sufficient cause for being absent. Order 34 Rules 3 and 5 state as follows:

''Subject to the previous of Order 52 Rule 5 of this Schedule if the plaintiff appears and the defendant does not appear or sufficiently excuse his absence, or neglects to answer when duly called, the court may, upon proof of service of the Summons, proceed to hear the cause and give judgment on the evidence adduced by the plaintiff or may postpone the hearing of the cause and direct notice of such postponement to be given to the defendant.

Any judgment obtained against any party in the absence of such party may on sufficient cause shown be set aside by the Court upon such terms as may seem fit"

It is perhaps pertinent to note that Order 52 Rule 5 provides for the procedure on default of appearance by a defendant in any action brought by a money lender or an assignee of a money lender for the recovery of money lend by the money lender or the enforcement of any agreement or security relating to any such money. The instant case is unrelated to money lending and Order 52 Rule 5 is therefore inapplicable. The record of this appeal at page 39 shows quite clearly that the instant case came up for hearing on 6th March 1998, the date fixed by consent of Counsel to the parties on 13th February 1998. The Respondent gave evidence and was exhaustively cross-examined by the Appellants Counsel on 27th July 1998. By agreement of Counsel the case was adjourned to 13th November 1998 for continuation of hearing. Neither the appellants nor their Counsel attended Court on 13th November 1998. Even though the Respondent was also absent from Court, he was represented by Counsel. There was no suggestion or indication in the records that the absence of the Appellants' Counsel was explained or excused through a letter to the Court or otherwise. The case suffered further adjournments thereafter, on 8th December 1998, 9th February 1999, 24th February 1999 and 11th March 1999. The Court ordered service of hearing notices on the Appellants on 9th February 1999. Neither the Appellants nor their Counsel turned up in Court on all dates subsequent to service of notice of hearing on them. The Respondent closed his case on 11th March 1999 and his Counsel in the absence of the Appellants and their Counsel, applied for judgment pursuant to Order 34 Rule 3, Schedule II of the Rules of the High Court. The Respondent premised his application on the persistent absence of the defendants. The Court was satisfied that

they were served with hearing notices and there was proof of service on file. There was no reason for their absence. Their Counsel did not appear either. A Trial Court will only be satisfied that a party has been served a process of Court by referring to the case file for the affidavit of service as rightly stated in *Public Finance Securities Ltd. v Jafia* (1993) 3 NWLR (Pt 543) 602. Although the Learned Trial Judge did not record that he was satisfied that the Appellants were served with notices of hearing, he recorded the explanation of the Clerk of Court that the defendants (Appellants) were served with the hearing notices and that there was proof of service and no reason was given excusing their absence from Court. However, it is stated in his Judgment that ''at the close of the case for the plaintiff (Respondent), the defendants (Appellants) were not in Court to defend the case. Their Counsel was also not in Court. No reason was given for the absence of the defendant or their Counsel." That the Learned Trial Judge captured this point in his Judgment only shows that he was satisfied with the issue of service of the notices. It must however, be pointed out that it is good practice and desirable for the Trial Court to state his satisfaction with the proof of service of Court process on the party is default of appearance.
In any event, there is a presumption of regularity where the Learned Trial Judge proceeds with a case in the absence of a defendant upon being satisfied that service of process has been effected on the defendant and the defendant, as the instant case, has not complained that he was not served. See *Okesuju v Lawal* (1991) 1 NSCA Vol. 22 (Pt 1) 226. In the instant case, the appellants did not complain of lack of service of hearing notice on them. Their contention is that where parties are represented by Counsel service ought to be effected on Counsel and not the parties. Learned Counsel for the Appellants has not cited any authority which supports this proposition and I do not think it has any validity. On the contrary, the authorities are in favour of the view that it is a good rule of practice to serve the parties in the suit because it is asking too much to say that once a Counsel, always a Counsel. See the case of *Mahoney v Mahoney* (1995/96) GR 77 at 81.

Were the Appellants denied fair hearing? Was the natural justice principle of audi alteram partem breached by the Learned Trial Judge? The answers must be in the negative. The concession by the learned Counsel for the Appellants that the principle of audi alteram partem is

subject in the Rules of Court such as order 34, Rule 3, Schedule II of the rules of the High Court files in the face of the contention that the Appellants were denied hearing in all the circumstances of this case. In my view, the complaint of lack of fair hearing does not hold water. Contemplated in fair hearing is that in the determination of the rights or obligations of parties by a Court of Law or tribunal, or any other authority vested with powers to determine questions of law affecting the rights of an individual, the parties involved must be given equal opportunity to be heard in respect of the matter before the Court or such tribunal. It also means that he parties must have equal opportunities or they be placed in a position to obtain equal opportunities in the trial process. It cannot be seriously contended by the appellant that they were denied fair hearing in the circumstances of this case. As opined by Lartey JA in *Kekuta Buwaro v Gloria Eziakomwa* (1999–2001) GR 91 at 95 in affirming the powers conferred on the Trial Court by Order 34 Rule 3 Schedule II of the Rules of the High Court:-

> "… I know of no rule of procedure, and none was brought from mention which states that a Court is obliged to give notice to a defendant who chooses to be absent from the trial before it can proceed to deliver judgment."

This opinion represents the correct legal position. The submission of learned Counsel for the Appellants therefore falls like an emasculated balloon. The observation of the Trial Court that the case had suffered several adjournments at the instance of the plaintiff and that the venue of the Court was changed does not alter the requirement of the Law that a defendant cannot be allowed to dictate the pace at which a civil trial is conducted by his failure to attend Court, in particular where he fails to excuse his absence. A defendant who aims at holding the Court to ransom by his repeated absence from Court without any reason is certainly not entitled to any indulgence. See *Kekuta Buwaro v Eziakomwa* (supra). That is all the more so when the Court, after making the observation that several adjournments were granted at the instance of the plaintiff and there having been a change in the venue of the Court, directed that the defendants be served with fresh hearing notice and they were in fact served.

The Learned Trial Judge in his ruling of 15th February 2001 relied on the case of *Egonu v Efanu* (1978) 11-12 SCM which sets out only two guiding principles or conditions that need to be resolved in favour of an applicant wishing to set aside a default judgment. These conditions were more were fully set out by Idifle J. in *Ugwu & Ors v Aba Ors* (1961) 1 All NLR 438 and restated by him in the Nigerian Supreme Court case of *William & Ors v Hope Rising Voluntary Funds Society* (1982) 1 All BLR (PT 1) 5 as follows:

1. The reasons for the applicants' failure to appear at the hearing or trial of the case in which judgment was given in his absence;
2. Whether there had been undue delay in making the application to set aside the judgment so as to prejudice the party in whose favour the judgment subsists;
3. Whether the latter party (i.e. in whose favour the judgment subsists) would be prejudiced or embarrassed upon an order for re-hearing of the suit being made, so as to render such a course inequitable;
4. Whether the Applicants case is manifestly unsupportable, and
5. That the applicants conduct throughout the proceedings, i.e. from the service of the Writ upon him to the date of judgment has been such as to make his application worthy of sympathetic consideration."

As Idifle JSC said in the above cited case, all the five considerations or conditions must be resolved in favour of the appellants before the judgment could be set aside. It is not enough that some of them can be resolved in their favour. From the events which have been stated earlier and the facts as found by the Learned Trial Judge, it is manifest that none of the most applicable and important considerations can be resolved in favour of the appellants. In his well considered ruling of 15th February 2001, the Learned Trial Judge considered conditions (1) and (5) extensively before coming to the conclusion that the appellants failed to show sufficient cause to warrant the discretion of the Lower Court being exercised in their favour. From the record it is difficult to consider condition (2) on whether there had been under delay in making the application to set aside the judgment of 18th June 1999 so as to prejudice the Respondent in whose favour the judgment subsists. It must be

remarked that this is because from the dates shown on the judgment itself to the dates on the face of the motion seeking to set aside the judgment, neither the Court nor the Appellants' Counsel was careful and particular as to exact dates. For instance, the judgment of the Lower Court bears two dates, namely 18th June 1999 and 17th June 1999. Similarly, the motion to set aside is dated the 10th day of June 1999. It is inconceivable that the motion to set aside should pre-date the date of the judgment which is seeks to set aside. It is expected that the Court and Counsel should exercise more care in this regard.

It may be argued that the determinant date is the date of filing of process which, in any event, is not apparent on the record. The stamp showing that the motion was received on 1st July 1999 is only relevant for the purpose of showing that filing fee was paid to the accounts department on that date and not that the process itself was filed same date. Even more mind boggling is the fact that the affidavit filed in support of the motion, purportedly accompanying the motion at filing is stated to have been sworn to on the 13th of July 1999. Can this suggest that the motion and the supporting affidavit were filed separately? It certainly suggests so. The Learned Judge considered the relevant principles of the affidavit filed in support of the motion to set aside and the arguments advanced by the learned appellant's counsel and came to the conclusion that he was not satisfied that they have a good defence. The Court averted its mind to the issue of the appellant's motion to amend their statement of defence, which motion was not moved.

The normal practice is for Counsel to move a motion before the Court can entertain it. Without a motion being moved by Counsel, the law is that the Court should not consider its merits. See the case of *Atser v Gacdi* (1997) 6 NWLR (Pt 510) 604. In my opinion, the Lower Court was right not to countenance the appellants' motion to amend their statement of defence.

The affidavit supporting the motion to set aside a judgment in default should state the circumstances under which the default has arisen, and should disclose the nature of the applicant's defence. See the White Book (1982) Vol. 1 page 156. I am in agreement with Learned Counsel for the Respondent that Paragraph 9 of the affidavit in support of the motion to set aside the judgment complained of is in contradiction with paragraph 6 of the Appellant's statement of defence and can at best be said to be an afterthought defence. It is quite clear from the appellant's

statement of defence dated 5th August 1998 that the appellant did not plead the matters deposed to in paragraph 9 of the aforesaid affidavit. Besides, other than the mere denial stated in paragraph 8 of their statement of defence of the averment in paragraph 9 of the statement of claim alleging negligence on the part of the 1st appellant, the appellants did not provide particulars of the Respondent's negligence.

Indeed, I have no reason to disagree with the Learned Trial Judge's conclusion that the appellants' case is manifestly unsupportable. Learned Counsel for the appellants raised heavy storm in her brief that the Learned Trial Judge misdirected himself in not considering the total circumstances of the case in applying the principles guiding the Court when considering an application to set aside a judgment in default of appearance and that his failure to set aside his judgment was a denial of fair hearing. This argument must fall by the way side.

It is needless to state that where service of process is required, failure to serve is a fundamental vice and a person affected by an order of Court but not served with the process is entitled ex debito justitiae, to have the order set aside as a nullity and that such an order of nullity is a necessity because due service of process is a sine qua non to the hearing of any trial in view of the principle of audi alteram partem. See the case of *Sken Consult v Ukay* (1981) 1 SC 6. The case of Alhaji Sonko v Sona Mballow (supra) cited by the appellants is not helpful to their case as it was held in that case that the validity of the proceedings in the Court below was greatly emasculated owing to lack of service of notice of hearing on the appellants therein. In the instant case the failure of appellants to appear was not due to lack of service of notice on them. In my view both the parties and Counsel have a responsibility to be present throughout the proceedings in a case and where due to unforeseen circumstances their absence is unavoidable, the Court is entitled to be extended the courtesy of being duly informed. Both the appellants and their Counsel are to blame for their failure to attend Court on all dates subsequent to the 27th July 1988 when the case was adjourned for continuation of hearing.

It is beyond controversy that the issue under consideration is one which deals with the exercise of discretion by the Learned Trial Judge in refusing to set aside his Judgment of 18th July 1999 on the application by the Appellants. The entering of Judgment on the 18th June 1999 antecedent to the motion to set aside was filed involved an exercise of discretion by the trial Judge. It is well settled that, if judicial discretion has

been exercised bonafide, uninfluenced by irrelevant considerations and not arbitrarily or illegally by the Lower Court, an Appellate Court will not ordinarily interfere with its exercise. The guiding principle in this respect is that the discretion must at all times be exercised judicially and judiciously and rely on sufficient materials. See *University of Lagos v Aigoro* (1985) 1 NWLR (Pt 1) 143 at 148; *Saffidiene v C.O.P* (1965) 1 All NLR 54 at 56 and *Mahoney v Mahoney* (supra).

Having regard to all the circumstances of the case, I am of view that the exercise of discretion by the Learned Trial Judge is within permissible parameters and as such does not warrant any interference or review by this Court. I therefore hold that the Learned Trial Judge had exercised his discretion judicially and judiciously not only in entering judgment for the Respondent but also in refusing to set aside that judgment on the application by the appellants.

For the various reasons alluded to in this judgment I find that there is no merit in this appeal. Accordingly, the appeal is dismissed. The Judgment and ruling of 18th June 1999 and 15th February 2001 respectively is hereby affirmed. The Respondent is entitled to costs of D2, 000.

Appeal dismissed.
FLD.

HALIFA SALLAH; OMAR JALLOW; HAMAT BAH v THE STATE

COURT OF APPEAL OF THE GAMBIA
(Civil Appeal Nos. 4/2005 & 5/2005)

21st December 2005

Savage JCA, Agim JCA, Izuako Ag. JCA

Appeal – Brief of Argument – Nexus between grounds of appeal and issues for determination – Record of proceedings – Correctness of – Duty of party challenging it – Distinct role of Appellate Courts in civil and criminal appeals – Evidence on Record – Arguments must be based on record before the Court.

Court – Grounds of Appeal – Issues formulated therefrom –Technicalities – Treatment of same by Courts – Plea taking – Accused keeping mute or refusing to answer to his plea – What Court ought to do in such situation – Non-service of information on accused person prior to arraignment – Obiter Dicta – Whether it could form the basis of an appeal – Allegation of bias – Proof of – How to establish same – Test adopted by the Court in considering allegation of bias – Appellate court – Arguments must be based on recorded evidence – Record of proceedings – Steps a Court should take to correct same following successful challenge by a party – Interpretation of Statutes – Generous and purposive construction of fundamental rights provision should be adopted – Discretionary power of Court – Exercise of – In relation to fundamental rights guaranteed by the Constitution.

Criminal Law & Procedure – Arraignment of accused – Essential requirements – Information/charge – Where not served on accused prior to arraignment – Service of Information on accused – Failure to serve – Steps available to accused – Principle of Fair Hearing – Accused person – Right to have knowledge of the Information against him – Rights of the accused – Disclosure of prosecution's case to the accused.

Interpretation – Constitution – Fundamental rights provisions should be given generous and purposive construction.

Practice & Procedure – Incompetent brief of Argument – Issues not formulated from grounds of Appeal – Consequence of – Technicalities –

Attitude of Court thereto – Plea taking – Whether appropriate for Court to enter "Not guilty'' for an accused who keeps mute – Non-service of Information on accused person – Option available to accused – Non-service of Information – Time and procedure for raising objection – Role of Appellate Court in civil and criminal appeals – Fair hearing – Whether failure to serve information on an accused person contravenes the principle of fair hearing – Record of proceedings – Duty of party challenging correctness – Bias – Proof of – What is required of party alleging same – Allegation of bias – How established by party alleging same – Suspicion of bias – Attitude of Court thereto – Test adopted by the Court in considering allegation of bias – Record of proceedings – Time and procedure to follow for corrections to be effected on the record of proceedings.

Public Officer – Impartiality of Judges – Role expected of them – Official acts – When appropriate to presume regularity of.

Words & Phrases – Technicalities – Meaning of – Omnia Prae Sumuntor rite et salamnoter esse acta donec probator – Meaning and effect of – Bias – What amounts to.

Held, *dismissing the appeal (per Savage JCA, Agim JCA concurring, Izuako Ag. JCA dissenting)*

1. Arguments in a brief should be based not on grounds of Appeal but on the issues formulated from the grounds of appeal.

2. Such an important objection should have been raised or taken in limine by way of preliminary objection or demurrer proceedings and not at the last stage of counsel's rejoinder on points of law when the respondent would have no opportunity to respond to the matter.

3. The recent trend in the attitude of Courts is to do substantial Justice without undue adherence to technicalities. Justice can only be done if the substance of the matter is examined. Reliance on technicalities may lead to injustice.

4. For a valid arraignment of an accused, three essential requirements must be satisfied. These consists of the following

i) The accused must be placed before the Court unfettered unless the court shall see cause otherwise to order;
ii) The charge or information shall be read over and explained to the accused to the satisfaction of the Court by the Registrar or other officer of the Court; and
iii) The accused shall then be called upon to plead thereto (unless, of course, there exists any valid reason to do otherwise such as objection to want of service where the accused is entitled by law to service of a copy of the information and the Court is satisfied that he has not been duly served therewith).

5. The Latin maxim of "Omnia prae sumuntor rite et salamaiter esse acta donec probator in contrarium" is applicable and it is upon which ground it will be presumed that judicial and official acts have been done rightly and regularly until the contrary is proved. [*Peter Lockman & Anor v The State* (1979) 5 SC 99; *James Edun & Ors v I.G.P* (1966) 1 ALL NLR 117 referred to]

6. The decision of the Trial Court to enter a plea of not guilty for an accused who keeps mute or refuses to take a plea upon arraignment is subjective and not objective. In other words it is left to the discretion of the Judge which when exercised judicially and judiciously will not be challenged. [*Solanke v Ajijola* (1968) 1 ALL NLR 46; *University of Lagos v Aigoro* (1985) 1 NWLR (Pt 1) 143; *Dumurren v Asuni* (1967) 1 ALL NLR 94 referred to]

7. There are several options open to an accused person who complains of non-service of the information against him. He could have taken a cue from the Court and request for his constitutional right to be represented by counsel of his choice; he could have asked for an adjournment and or could have asked for the Information in order to prepare for his defense on time. Non-service of the Information therefore did not, by any stretch of the imagination, occasion a breach to his right to a fair hearing.

8. In this jurisdiction one could take his plea after the charge is read and later request for the information in order to prepare his defense. Almost invariably this will be granted and the arraignment would not be seen as null and void.

9. The distinct role of an Appellate Court is succinctly explained per Nnaemeka-Agu JSC in the case of *Kim v State* (1992) 4 NWLR 25 thus - "in civil appeals the role of the Appellate Court is to see whether on the case made and brought by the parties, the decision of the Court below is correct. On the application of this test any substantial fault detected by the Appellate Court will result in the appeal being allowed. But in criminal appeals the position is different. Quite apart from cases of fundamental faults which are in a category of their own, before an appellate Judge in a criminal appeal can rightly allow an appeal he has to be satisfied that there is not only a substantial fault but also that it had led to a miscarriage of justice."

10. Where the failure to serve the accused person with the information does not occasion any miscarriage of justice, it does not affect the validity of the arraignment and consequently the right to fair hearing has been breached.

11. The record of proceedings of a Court are presumed by law to be correct until the contrary is proved. A party who challenges the correctness must swear to an affidavit setting out the facts or part of the proceedings omitted or wrongly stated in the record. Such affidavit must be served on the Trial Judge and or on the Registrar of the court who would then if he desires to contrast the affidavit, swear to and file a counter affidavit. [*Elikiyaya v COP* (1992) 4 NWLR referred to]

12. It is settled law that an appeal must always be fought on the basis of facts contained in the record of proceedings and not on obiter dicta or other remarks made by the Trial Judge which do not appear in the records [*Udo Akpan v The State* (1987) SCNJ 112 referred to]

13. The Ordinary grammatical meaning of bias is slant, personal inclination or preference, a one sided inclination.

14. An allegation of bias against a Judge can only be sustained when it can be said that the Judge has a particular or propriety interest which he parades recklessly and parochially in the adjudication process to the detriment of the party he hates and to the obvious advantage of the party he likes.

15. The Courts are not concerned with whether the adjudicator was actually biased but whether there was likelihood of bias which is determined by considering all the circumstances of the case.

16. The test for bias is whether a reasonable suspicion of bias is formed from the objective stand point of a reasonable person and not from the subjective stand point of an aggrieved party, a suspicion of bias reasonably and not fancifully entertained by a reasonable mind. [*Rumo & Ors v The State* (1986) 3 NWLR (Pt 728) 340 referred to]

17. The basic evidential rule is that he who asserts must prove the correctness of his assertion. The burden also rests upon the party who would fail assuming no evidence had been adduced on either side. [*Are v Adisa* (1967) NMLR 304 referred to]

18. In order for a party to show that justice was not seen to be in a case, it is necessary for that person to point to some factor on which the doing of justice depended and then show the factor was not visible to those present in Court [*Akinfe v The State* (1983) 3 NWLR (Pt 85) 729; *Odunsi & Ors v Odunsi* referred to]

19. Allegation of bias on the part of a Trial Judge, other than on the basis of pecuniary interests must be supported by clear, direct, positive, unequivocal and solid evidence from which real likelihood of bias could reasonably be inferred and not mere suspicion.

20. The attitude of Courts to mere suspicion of bias is sufficiently captured in the statement of Oputa JSC in *Akoh & Ors v Anuh*

(1988) 3 NWLR (Pt 85) 696 at 720 where his Lordship was of the view that ''to invite the Court to start considering bias and want of fair hearing on mere speculation and doubtful inferences of learned counsel is inviting us to embark upon a sea which has no shore. We will decline that in invitation."

21. The contents of the record of an appeal should be certain before written arguments of the appeal are filed. All matters concerning the omissions or any other defects or errors in the record should be settled before arguments. The party challenging the records should apply to the Court of Appeal on the basis of an affidavit challenging the record for an amendment to correct the omission. The respondent may file an affidavit in opposition thereto. The Court may choose to call evidence to resolve any irreconcilable differences between the affidavit or may decide that it is not necessary to do so. In the end, the Court may find one affidavit more credible than the other. If the Court is satisfied, after considering the affidavits, such further evidence (where called for) and hearing both sides, that the alleged facts did take place but were omitted from the record of the Trial Court, it will proceed to order an amendment of the record of appeal to include the omitted matters. It is only after such determination by the Court, that the appeal can be ripe for argument.

22. It is trite law, that all arguments in an Appellate Court must be based on the evidence on record. Allegations of events not forming part of the record of appeal are incompetent. [*Udo Akpam v The State* (1987) SCNJ 112 referred to]

23. The various tests administered by Courts in dealing with questions of bias by judicial or quasi judicial offices have one common objective - that justice must not only be done but must be seen to be done.

24. Section 216 of the Criminal Procedure Code vests in an accused person the right to have knowledge of the information against him before being taken to Court and asked to plead, the intendment being that those who stand accused before the Court are afforded

sufficient time and materials with which to prepare one's defence. [*The Republic v Bernard Georges* (2002) 2 CHR 477 referred to]

Izuako Ag. JCA. (*dissenting*).

1. No Court exercises any manner of discretion when considering provisions on the fundamental rights of the people guaranteed in a written constitution.

2. The plea is taken by the accused personally and is of major importance in the criminal process – "where it is not taken in accordance with the requirements of the law, the trial will be a nullity. [*Alake v The State* (1991) 7 NWLR (Pt 567) 581 referred to]

3. Full disclosure of the entire prosecution's case ought to be made to the accused right from the very beginning. In a review of several criminal cases in Commonwealth jurisdictions, the Hon. Justice Bwana identified seven principles emerging from these authorities as underpinning the need for full disclosure:-

1. That disclosure constitutes one of the important elements of fair trial in this new legal culture of transparency and accountability.
2. Disclosure is not limited only to what is provided in Criminal Procedure legislations, but rather what is, entrenched in the Constitution. In that respect and should there be inconsistency between the two, then the provisions of the criminal procedure law which are inconsistent with those of the Constitution are invalid to the extent of that inconsistency. Therefore disclosure may be effected in summary trial situations as well.
3. The disclosure should be done well in time before the accused pleads so that he has adequate time and materials to prepare his defence.
4. That disclosure is part of the due process requirement, which is essential for a fair and impartial trial.
5. The disclosure should include the list of witnesses; their

statements; documentary and expert evidence to be used during the trial; the police docket; notes; etc. which are relevant to the case.

6. Disclosure may be denied on those grounds specified in the Constitution. However it is not for the prosecution to deny outright. Should it think that certain pieces of evidence are not to be disclosed then such fact should be made to the Trial Court which, in turn, objectively will have to decide, basing its decision on a balance of probabilities. The prosecution should not be allowed to be judge in its own cause. There can be no "blanket disclosure" – restrictions acceptable in a democratic society have to be respected, having regard to the particular circumstances of each case. Therefore what a fair trial might require in a particular case depends on the circumstances of that case.
7. Where the prosecution is in possession of a witness or documents which tends to prove the innocence of the accused person, then such witness or documents must be made available either to the Court or to the accused.

Cases referred to:

A.H.S. Hassen Mohammedali and S.A. Hassen Mohammedali v The State (1994)
Adzaku v Galenku (1974) GLR 198-206
Akinfe v The State (1988) 3 NWLR (Pt 85) 729
Akoh & Ors v Anuh (1988) 3 NWLR (Part 85) 696
Alake & Anor v The State (1994) 7 NWLR (Pt 2Q) 567
Attorney General v Sallah (1970) CC 54
Chief JOB Ehokohmwan v Prince Iluobe & Ors (2002) 2 NWLR (Pt 750) 15
Demurren v Asuni (1967) 1 ALL NLR 94
Denge v Yusuf Ndakwoji (1992) NWLR (Pt 216) 221
Dedunwa v Okerodudu (1976) 9-10 CS 329
Eckersley v Mersey Docks and Harbour Board (1984) 2 QB 667
Egri v Uperi (1973) 11 SC 299
Elikiyoya v C.O.P (1992) 4 NWLR
James Edun & Ors v I.G.P (1966) 1 ALL NLR 117
Kim v State (1992) 4 NWLR 25

Kujore v Otun Banjo (1974) 10 SC 173
Mensah Gyimah v The Republic (1971) 2 GLR 147
Metropolitan Properties Co (GC) Ltd v Lannon & Ors (1969) 1 QB 557
Odunsi v Odunsi (1979) NSCC 57 at 59
Ohe v Enenwali (1976) 2 SC 23
Pangamaleza v Kiwaraka (1987) 7 LR 140
President of the Republic of South Africa v South African Rugby Football Union (1999) 4 SA 147
Peter Lockman & Anor v The State (1979) 5 SC 99
R v Camborne Justice; Ex-parte Pearce (1955) 1 QB 41 DC
R v Barnsley Licensing Justices; Ex-parte Barnsley and District Licensed Victuallers Association (1960) 2 QB 167
R v Justices of County Cork (1910) 2 1R 271
Republic v Constitutional Committee Chairman; Ex-parte Barimah & Anor (1968) GLR 1050
Re: JRL Ex-parte CSL (1986) 161 CLR 342
Re: Ebner, Ebner v Official Trustee in Bankruptcy (1999) 161 DLR 557
Republic v Rajabou & Ors (1989) TLR 44
Rex v Sussex Justices; Ex-parte MacCarthy (1924) KB
Ruttennessey (1978) 68 Cr App 416
State v Scholtz (1977) 1 LRC 67
The State v Ebrima Barrow CC No. 26/2000
University of Lagos v Aigoro (1985) 1 NWLR (Pt 1) 143
Z. Pangamazela v J Kiwaraka (1987) TLR 141

Statutes referred to:

Crime and Disorder Act 1998
Criminal Procedure Code (Amendment) No. 5 of 1992 Sections 175, 216, 217, 219, 223
Constitution of The Republic of The Gambia 1997 Section 24
Evidence Act of 1994 Section 156 (1)
Service of Prosecution Evidence Regulations 2000

Rules of Court referred to:

The Gambia Court of Appeal Rules Section 6 (1)

Book referred to:

Archbold Criminal Pleading: Evidence and Practice 2002.

Halifa Sallah for 1st appellant
O.N.M.O. Darboe, A.A.B. Gaye, R.Y. Mendy, L. Camara, N. Chongan, K. Sillah-Camara, Mai N.K. Fatty and C. Gaye for the 2nd appellant in 4/2005 and appellant in 2/2005
M. Wood for the Respondent.

SAVAGE JCA. On 18 November 2005, the Respondent prepared, settled and fixed information charging the appellants with offences contained therein. On the same day they were arraigned before the Honourable Justice M A Paul to plead to the charges. The appellants refused to plead to the charges on the grounds that they were not informed of the charge(s) against them and that they would want the matter to be transferred to another judge whose impartially is not in issue. This is because in the recent past they (particularly the 1st and 3rd Appellants) had made some incriminating remarks about the said Learned Judge. However, after the Registrar read the charges to the appellants, which they said they understand, the Learned Trial Judge entered a plea of NOT GUILTY for all of them notwithstanding their refusal to plead. He then ordered that the appellants be remanded in prison custody pending further orders of the court. Dissatisfied with the entire proceedings of the 19th November 2005, the appellants now appeal to this Honourable Court on three original grounds of appeal, and an additional ground of appeal by leave of the Court. It could be recalled that by an order of this Honourable Court the appeals of the appellants in Criminal Appeal No 4/2005 and 5/2005 were consolidated. The three Grounds of Appeal are the following:

1. The Learned Trial Judge erred in Law in entering a plea of not guilty for the appellants when there was evidence before him that the Appellant's objection to the taking of their plea was not out of malice
2. The Learned Trail Judge wrongly assumed jurisdiction over the Appellants when

a) The appellants have not put themselves upon the Court for trial
b) The issue of the Learned Trial Judge's impartiality was questioned and contested and the said issue has not been given any serious consideration by the Learned Trial Judge.

3. The Learned Trial Judge wrongly exercised his discretion in refusing to grant bail to the Appellant when the offences for which they stand charged are bailable. Finally we have the Additional Ground which is that:
4. The entire proceedings of 18th November 2005 were a nullity in that the Appellants were denied rights to fair hearing guaranteed to them by the constitution.

The 1st Appellant, Halifa Sallah, based his arguments on the above grounds of appeal without formulating an issue or issues therefrom. In like manner the Respondent in her brief argued the Grounds of Appeal without formulating issues for the determination of the Court which usually flows from the Grounds of Appeal. The 2nd and 3rd Appellants, on the other hand, through their counsel, Ousainou A.N.M. Darboe, submitted two issues in their brief of argument for the determination of the Court as follows:

1. Has the 2nd and 3rd Appellants right to a fair hearing been breached.
2. Was it right for the Learned Trial Judge to continue presiding over the case of the Third Appellant when he contested the impartially of the presiding Judge.

At the oral hearing of the appeal on 15th December 2005 learned counsel for the second and third defendants herein adopted his brief of argument and made oral submissions in support thereof. In this regard he referred to three authorities which came to his mind since the filing of the briefs. The first one which he says is on issue No. 2 is the case of Pangamaleza v Kiwaraka (1987) TLR 140. This talks of employing delaying tactics in refusing to take a plea. But, according to him, in the instant case there is nothing to show that the 3rd Appellant herein, Mr. Hamat Bah, is playing delaying tactics. The other case is that of Republic v A. Rajabou and

Others (1989) TLR 44. The third case is Metropolitan Cos FJC Ltd v Lennon and Ors (1969) 1 QB 577 and especially at 599 and in particular the dictum of Lord Denning on a ground of likelihood of bias. He submits further on this point that it is not the state of the mind of the judge that is of importance but the external manifestations. He submits also that all the exchanges between the Learned Judge and the 3rd Appellant represent the former's state of mind. The moment the issue of the Judge's impartiality was raised, he should have excused himself from the matter, he continued. Contrary to the Learned Judge's assertion that this is the first time he is aware of an accused person asking that he be tried by another Judge, Learned Counsel Darboe retorted that even in our jurisdiction such a request had been made in the past. He referred the Court to the case of The State v Ebrima Barrow CC 26/2000 in which The State wrote to the Chief Justice requesting the matter to be transferred to another Judge. They could not have done so in the instant case because of the peculiar circumstances. If the case had commenced and the appellants were free, they would have filed a motion supported by an affidavit explaining the reasons for the transfer of their case to another Judge. He finally urged the court to decide the issue and the appeal be allowed so that the appellants can be tried by another Judge. The application he said is done to strengthen the confidence of every Gambian in the Criminal Justice system and has nothing to do with the person of the Honourable Mr. Justice Paul. For her part, M. Wood for the Respondent adopted Respondent's brief filed on 12th December and made reference to Section 175 (a) (b) (c) as amended by Criminal Procedure Code Amendment No.5 of 1992.

On points of law, Mr. Darboe straightaway applied that the brief of The State be struck out as being incompetent. This is so, according to him, because the Respondent's brief does not contain issues formulated from the Grounds of Appeal; instead the arguments are based on the Grounds of Appeal. To this end he urged the Court to dismiss the brief of the Respondent and treat the matter as if there is no reply to the brief of the 2nd and 3rd Appellants. He refers in aid to the case of Chief J.O. Ehikohmwan v Prince Iluobe & Ors (Pt 750) 2 NWLR 15 Holding 6 & 7. Holding 6 states that issues not formulated from any of the grounds should be struck out. In the circumstances, he finally submits, there will only be one uncontested brief.

Before I get into the Appeal proper I wish first of all to deal with this last issue which refers to the nexus between grounds of appeal and issues for determination which flows out of the grounds. I agree with Learned Counsel for the 2nd and 3rd Appellants that arguments in a brief should be based not on Grounds of Appeal but on the issues formulated from the grounds. It was the practice before the introduction of brief writing for arguments to be based on grounds of appeal but now they must be related directly to the formulated issues for determination and not on the grounds which should then fade away. Although in Jurisdictions which have made it mandatory by statute and whose approach in this regard we have adopted, there is no rule which provides a penalty for deviation from this method. There have nevertheless been several authorities and pronouncements to the effect that once issues for determination have been formulated, the arguments of the appeal must be based on those issues only. However, I will not strike out the respondent's brief for failing to meet this fundamental requirement in brief writing. It is my humble view that such an important objection should have been taken in limine by way of preliminary objection in demurrer proceedings and not at the last stage of counsel's rejoinder on points of law when the Respondent would have no opportunity to reply on the matter. Strangely enough, the Respondent's council filed her brief and served the appellant's long before the later filed their briefs. Learned counsel to the 2nd and 3rd appellants had enough opportunity to attack the respondent's brief as bereft of any issue(s) for determination in the manner herein before explained. Instead, learned counsel applied to adopt his brief and proceeded to make oral submissions of certain issues contained therein and those that had come to his mind after filing the brief on behalf of the 2nd and 3rd appellants. By the same token, albeit for a different reason, the 1st Appellant's brief which was prepared and filed by him will also not be struck out. This is because after the Court granted his prayer to adopt his brief, the Respondent's counsel did not raise the issue at the oral hearing. Besides, the attitude of the Courts nowadays is to do substantial justice without undue adherence to technicalities.

Justice can only be done if the substance of the matter is examined. Reliance on technicalities may lead to injustice. I think it is convenient to dispose firstly of the issue of the Learned Trial Judge entering a plea of ''not guilty'' for the appellants when there was evidence before him that the appellants objection to the taking of their plea was not out of malice.

Section 216 of the Criminal Procedure Code Cap 12.01 provides as follows:-

> "The accused person to be tried before the Supreme Court (now High Court) upon an information shall be placed at the bar unfettered, unless the court shall see cause otherwise to order, and the information shall be read over to him by the Registrar of the Supreme (now High Court) or the Judge and explained if need be by the Registrar or the Judge and interpreted by the interpreter of the court and such accused person shall be required to plead instantly thereto unless when the accused person is entitled to service of a copy of the information and the Court is satisfied that he has in fact not been truly served".

It is clear that for a valid arraignment of an accused person, three essential requirements must be satisfied. These consist as follows:

i) The accused must be placed before the court unfettered unless the court shall see cause otherwise to order;
ii) The charge or information shall be read over and explained to the accused to the satisfaction of the Court by the Registrar or other officer of the Court; and
iii) The accused shall then be called upon to plead thereto (unless, of course, there exists any valid reason to do otherwise such as objection to want of service where the accused is entitled by law to service of a copy of the information and the court is satisfied that he has not been duly served therewith).

With this background I will now examine the arraignment of the appellants in issue in this appeal. All of them were arraigned on 18th November 2005. Below is the record of proceedings on the arraignment of the 1st Appellant, Mr. Halifa Sallah:

Friday 18th November 2005
Before Hon. Justice M.A. Paul
Case called

Accused persons present

Mrs. M. Wood (PSC) for The State
No appearance for the accused persons.

Court to 1st accused: you do not have a lawyer?

1st Accused: I do not know why I am here. I do not have a lawyer. I have not been told what I have been charged with.

Court: The Registrar shall read the information to you and explain them adequately so as to give you adequate notice of why you have been brought here and what the charges against you are.

Court to Registrar: You may read the information to the accused person and explain to them and let them take their plea.

Registrar: Read Count 1 and explains to the 1st accused accordingly.

Court to 1st Accused: Do you understand the charge as read and explained to you?

1st Accused: I understand the charge.

1st Accused: I do not want to plead as yet. I will prefer not to be tried by the person presiding. My reason is that if I have any question that I not be heard impartially then it is better for me to request to be heard by another judge so that justice will be seen to be done. This is not to say that I wish to question the power of the judge. I have right to be tried by an impartial or independent tribunal. I am not saying that this tribunal is not impartial or independent but I am bound to accept the verdict of the court.

Court: In all my experience as a lawyer and as a Judge I had never seen a situation where an accused person elects or picks and choose before which Judge he should appear or be tried. I hereby enter a plea of *Not Guilty* in his favor.

Count III
Registrar reads count III and explained to the accused persons.

Court to 1st Accused: do you understand the count as read.

1st Accused: Yes, I understand but I maintain my position that I will not plead.

The Trial Judge in this instant case and as we shall see during the arraignments of the 2nd and 3rd Appellants invoked the provisions of section 223 and entered a plea of not Guilty when the 1st Appellant refused to plead. This Section states in part:

> "If any accused person being arraigned upon any information stands mute of malice or neither will nor by reason of infirmity can answer directly to the information, the Court if it thinks fit shall order the registrar of the Supreme Court or other officer of the court to enter a plea of "not Guilty" on behalf of such accused person and the plea so entered shall have the effect as if the accused person had actually pleaded the same.''

The 1st Appellant in his brief explained that he refused to plead because he was not served with a copy of the information since he is entitled to it. Additionally the Trial Judge, in his view, entered a plea of not guilty when his refusal to plead according to section 223 was not borne out of malice. He contends that all the facts before the Trial Judge revealed that he was simply demanding for his entitlement to be served with the information upon which he was being arraigned before making up his mind. With due respects to the 1st Appellant, this is not the situation in the record which this Court shall be restricted to. Apart from stating that he had not been told what he'd been charged with when asked by the court whether he had a lawyer, he explained in purely unequivocal terms that he did not want to plead since he wanted to be tried by another person so that justice will be seen to be done. It is evident from the record that the charge was read to him, and he admitted understanding the charge but would not plead until brought before an independent tribunal. The object is clearly not on the issue of not being served with the information.

In this regard I wish to draw attention to the provisions of Section 156 (1) of the 1994 Evidence Act which states as follows:

> "When any judicial or official act is shown to have been done in a manner substantially regular, it is presumed that formal requisites for its validity were complied with."

The arraignment of the 1st Appellant was both a judicial and an official act. In my view it was carried out in a manner which was substantially regular. In my humble view the well established maxim of law, *omnia praesumuntor rite et salamniter esse acta donec probator in contrarium*, upon which ground it will be presumed that judicial and official acts have been done rightly and regularly until the contrary is proved seems fully applicable in the present case. See the case of *Peter Lockman & Anor v The State* (1979) 5 SC 99 *and James Edun & Anor v I.G.P* (1966) 1 All N.L.R. 171 at 211.
Additionally, the fact that the record does not show that he kept mute out of malice cannot automatically render the arraignment of the 1st Appellant invalid. Without doubt the law allows the Trial Court to be satisfied that this is the case before entering a plea of Not Guilty for such a person. I am of the view that the test is subjective and not objective. In other words it is left to the discretion of the Judge which, if exercised judicially and judiciously, which I reckon he must have done, this Court cannot interfere even if it would have exercised the Court's discretion differently. See the case *Salanke v Ajiola* (1968) 1 All NLR 46 at 52*; University of Lagos v Aigoro* (1985) 1 NWLR (PT 1) 143; *Demurren v Ansuni* (1967) 1 All NLR 94 at 101. I therefore hold that the arraignment of the 1st appellant was perfectly in order and valid.

I come now to the legality or otherwise of the arraignment of the 2nd and 3rd Appellants namely Omar Jallow and Hamat Bah. We turn first to the record. The record with respect to the arraignment of the second appellant reads thus at page 5:

Count II
Registrar reads II and explains same to the 2nd accused appellant.

Court to 2nd Accused: Do you understand the charge as read?

2nd Accused: Yes, I understand

Court: How do you plead?

2nd Accused: I cannot plead because since I was arrested I have not been served with anything up to my standing here.

Court: I enter a plea of Not Guilty for you.

Count III
Registrar reads count III and explains it to the accused persons.

Court to second Accused: Do you understand the count as read?

Court: How do you plead?

2nd Accused: I maintain my position as I stated earlier.

Court: I enter a plea of Not Guilty in your favour.
The record of proceedings of 3rd Appellant is found in page 3 of Criminal Appeal No. 5/2005. Part of it reads thus:–
Court to Accused: Are you not represented by counsel?

Accused: I do not have legal representation as yet. I do not know what I am charged with.

Court: You will shortly know you are charged with

Registrar: Reads the count on the Information and explains to the accused.

Court: Do you understand the charge as read

Accused: Yes I understand

Court: How do you plead?

Accused: I cannot take plea. My Lord I want to make comments as raised by Honourable Sallah. That is as a result of comments I made in

the National Assembly last year regarding the AMRC which was a subject of Parliamentary Inquiry and my Lord as a former official of that institution and the outcome of the preliminary report which was presented in Parliament by a select committee in May/June this year and the finding of the parliamentary report and having participated as a former member of Parliament and extensively in the Debate and the Committee's investigation is ongoing. Because of this I don't think I will get a fair trial. I want some other Judge to try me.

On this issue of whether the second and third appellant's right to a fair hearing have been breached, which counsel to the said appellant' said springs from Grounds 1, 2(a) and the Additional Ground of Appeal, he made the following submissions:

That at the time both appellants were arraigned up to the time of settling the brief none of the two appellants was served with the information. He submits that service of the information is a sine-qua-non and because of this section 216 of the Criminal Procedure Code enjoins the court to postpone the taking of the plea when an accused raises the issues of non service. Service of this information affords an accused person to take objection to any formal defect on the face thereof immediately the Information is read and not later (refers to Section 219 of the Code). The cumulative effect of sections 216, 217 and 219 of the Code which the Learned Trial Judge did not advert his mind to, he argues, makes service of the information on an accused person mandatory and that failure to do so constitutes a breach of Section 24 of the Constitution which guarantees the accused person a fair hearing within reasonable time and also the right to be given adequate time and facilities for the preparation of his defence as in Section 24 (3) (c) which includes a decision to apply for the quashing of the information pursuant to section 219 of the CPC. He argued that the Learned Judge's decision to enter a plea of not guilty for the second and third appellants has in the circumstances of the case no basis in law, whilst admitting that Section 223 of the CPC allows the court to enter a plea of Not Guilty on behalf of an accused person who stands mute out of malice, counsel submits that this was not the case in the present situation as both the second and third appellants informed the court that they were not served with the Information as required by law. As a result he submits that the second and third appellants have not

put themselves upon the court for trial and refers to the dictum of Tobi JCA (as he then was) in *Alake and Anor v The State* (1991) (Pt 205) 7 NWLR 567 at 587.

The Respondent's counsel explained that although the second appellant complained of not being served with anything, she submits that the law is silent about what happens when an accused person is not served with the information. She suggests that the matter could be left to the discretion of the Court. She explained that the Learned Trial Judge rightly invoked Section 223 of the CPC since the statements uttered by the appellants is indicative of the fact that they stood mute out of malice. According to her, fair hearing includes engaging a lawyer of their choice, amongst other things, which the appellants refused to consider.

I will begin with the third appellant. Like the first appellant he stated that he did not know what he was being charged with. The charge was then read to him and he understood it but when asked to plead he also questioned the impartially of the Judge to try him following some remarks he said he made at the National Assembly against the person of the judge. It is clear that his grouse is not about not being served with the information but the impartially of the judge and, according to him, that is why he could not plead. I think any objection regarding the failure to serve an accused the Information should be forcefully explained when he is asked to plead. Clearly there is substantial regularity in his arraignment. He was asked whether he was represented; the charge was read over to him by the Registrar. He said he understood the charge. It is my humble opinion that the Learned Trial Judge was therefore correct to invoke Section 223 and enter a plea of Not Guilty in his behalf if only because he did not raise any objection regarding the fact that he was not served with the Information. There were other options open to him. He could have taken a cue from the Court and request for his constitutional right to be represented by counsel of his choice, he could have asked for an adjournment and he could have asked for the Information in order to prepare for his defence on time. I therefore hold that his arraignment was proper and valid and did not by any stretch of the imagination occasion a breach to his right to a fair hearing.

The second accused said he could not plead since he had not been served with anything up to the time of his arraignment. But to say this

after you had been arraigned and the charge read over to you and afterwards asked to plead and you raise this point is clearly not enough. In this jurisdiction one could take his plea after the charge is read and later request for the Information in order to prepare his defence. Almost invariably this will be granted and the arraignment would not be seen as null and void. It is important here to refer to the distinction in the roles of the Appellate Court in civil and criminal appeals. In *Kim v State* (1992) 4 NWLR 25 *Nnaemeka*-Agu JSC succinctly explained that:-

> "In civil appeals the role of the appellate court is to see whether on the case made and brought by the parties, the decision of the Court below is correct. On the application of this test any substantial fault detected by the Appellate Court will result in the appeal being allowed. But in criminal appeals the position is different. Quite apart from cases of fundamental faults which are in a category of their own, before an appellate judge in a criminal appeal can rightly allow an appeal he has to be satisfied that there is not only a substantial fault but also that it had led to a miscarriage of justice."

This is to be found in Section 6 (1) of The Gambia Court of Appeal Rules and which has no parallel in civil appeals. His Lordship at pages 45 – 46 para H-A further said that:

> "The result of all cases, either here or in England is that whereas all successful civil appeals are predicated on the establishment of a substantial error, because of the proviso, a successful criminal appeal demands that the Appellate Court be further satisfied that the mistake or error led to a miscarriage of justice."

Applying this principle to the second appellant or even the first and third appellants, and assuming, without conceding, that the failure to serve the Information gave rise to a substantial fault, this fault cannot be said to have led to a miscarriage of justice in light of the fact that the three requirements for a valid arraignment have been complied with. As I remarked earlier, the Information must be given to the accused even if he did not request for it either on the date of arraignment or so soon thereafter for him to prepare for his defence by anticipating what the witness will say and/or tender for the plaintiff/respondent in proof of their

case. I therefore hold that the failure of serving the second appellant with the Information does not occasion any miscarriage and consequently does not affect the validity of the arraignment of the second appellant. Like the first and third appellants I hold that the arraignment of the 2nd appellant is valid. On the whole therefore and for the reasons advanced, the second and third appellants were not denied their right to fair hearing as enshrined in the 1997 constitution since the arraignments have been found and held to be valid.

The next issue for determination is whether it was right for the Learned Trial Judge to continue presiding over the case of the third appellant when the latter contested the impartially of the presiding judge. I will therefore discuss their arguments together even though the first appellant is not represented. The issue of the impartially of the presiding Judge refers to the question of Bias or the likelihood of bias. Mr. Sallah, in his brief, raised concerns regarding the impartiality of the Judge. "There was ample evidence in the way the Court proceeded that I could not feel safe in the hands of the Court." He said a review of page four lines 20-32 of Criminal Appeal No 4/2005 indicates that the Trial Judge never gave serious consideration to the questions he raised regarding a matter before the Select Committee in Public Enterprises of the National Assembly regarding the person of the judge which had been published in the press. The third appellant also doubted that the Learned Trial Judge would afford him a fair hearing in view of the comments he made about the AMRC which led to the Select Committee of the National Assembly to produce a preliminary report implicating the Learned Trial Judge. Learned counsel for the second appellant said such apprehension that the third appellant will not receive an unbiased and an impartial treatment is not imaginary, frivolous or flimsy. Referring to the persuasive view of Anan J (as he then was) in *Republic v Constitutional Committee Chairman: Ex-parte Barimah and Anor (*1968) GLR 1050 at 1053 counsel quoted an excerpt therefrom:-

> "The test of bias, in this respect is objective and it is the view that a right minded person would take if he accepted the matter of fact out forward by the appellant and the basic rule of fair and impartial administration of justice requires that justice should not only be done

> but should manifestly and undoubtedly be seen to be done. Bias in this respect may be actual or anticipated.

He refers the Court to page 4 lines 10 to 13 where the Learned Trial Judge said:

> "Let me again remark that it smacks of impertinence for an accused person to suggest to a Court that he does not want a particular Judge to try him…"

Counsel refers to the phrase "it smacks of impertinence" as suggesting hostility and refers to *Denge v Yusufu Ndakwoji* (1992) (Pt 216) NWLR 221 Holdings 1 and 2 where personal hostility may give rise to bias. On the whole the safest thing to do is for the trial judge to pull out of the case on the mention of bias. Such a course of action would be necessary to the parties. He finally urged the Court to resolve the issue in favour of the third appellant.

I will comment on one issue raised before I analyse the issue of bias or the likelihood of being biased. This when the third appellant deposed to an affidavit contesting the records of proceedings to the effect that the sentence," I know many of you don't like me," alleged to have been said by the Learned Trial Judge had been omitted from the record. A similar issue came up for determination in *Elikiyoya v COP* (1992) 4 NWLR. It was held per Akpabio JCA that "the record of proceedings of a Court is presumed by law to be correct until the contrary is proved. A party who challenges the correctness must swear to an affidavit setting out the facts or part of the proceedings omitted or wrongly stated in the record. Such affidavit must be served on the trial judge and or on the Registrar of the Court who would then, if he desires to contest the affidavit, swear to and file a counter affidavit." In the instant case the affidavit was served on the Respondent's counsel and not on the Judge and or Registrar. All the same, it is now settled that an appeal must always be fought on the basis of facts that appear in the record of proceedings and not on obiter dicta or other remarks made by the Trial Judge which do not appear in the record. Where the record of proceedings is not fairly representative of what actually took place in Court, appropriate steps must be taken to

make it truly representative before being presented to this Court for hearing and determination.

I now come to the issue of bias or likelihood of bias. In *Akinfe v The State* (1988) 3 NWLR (Pt 85) 729 Eso JSC described bias as "showing an act of partiality." The ordinary grammatical meaning of bias is slant, personal inclination or preference, a one sided inclination. In charges of bias the integrity, honesty or fidelity of purpose and the judge's traditional role of holding the balance in proceedings are questioned. He is branded or seen as one who leaves his exalted, respected and traditional arena of impartiality to descend unfairly against one of the parties outside all known canons of judicial discretion. The Judge is said to have a particular interest, a propriety interest which cannot be justified on the scale of justice as he parades that interest recklessly and parochially in the adjudication process to the detriment of the party he hates and to the obvious advantage of the party he likes. The act of bias is not formalized, it is not concretized but from the generality of the conduct of the Judge the possibility of bias is overt. In other words as far as the party is concerned there is a possibility or probability of bias and that the anticipated conduct of the Judge should be nipped before it materializes or flourished to his detriment or disadvantage.

When considering allegations of bias, the Courts are not concerned with whether the adjudicator was actually biased but whether there was likelihood of bias which could be determined from all the circumstances of the case. The test is whether there is a reasonable suspicion of bias should be looked at from the objective stand point of a reasonable person and not from the subjective standpoint of an aggrieved party, a suspicion of bias reasonably and not fancifully entertained by reasonable minds. See *Ikomu & Ors v The State* (1986) 3 NWLR (Pt 728) 340. The basic evidential burden as always is that he who asserts must prove the truth or correctness of his assertion. The burden also rests upon the party who would fail assuming no evidence had been adduced on either side *(Are v Adisa* (1967) NMLR 304). In the context of our situation, it is the one alleging the bias. In order for a party to show that justice was not seen to be done in a case it is necessary for that person to point to some factor on which the doing of justice depended and then show the factor was not visible to those present in Court.

In *Odunsi & Ors v Odunsi* (1979) NSCC 57 at 59 where an allegation of bias was upheld by the Federal Court of Appeal (as it was then called) Sowemimo JSC (as he then was) on appeal to Supreme Court said:

> "With regard to the ground on which the Federal court of Appeal sought to make an order of transfer, we think the Court should have been very weary of making such an Order on the mere allegation of bias which is not supported in any of the documentary evidence presented before the Court. It is not enough for counsel to allege that the client entertains some hidden fears of not getting justice but such allegation should be one of substance. In our view, The Federal Court of Appeal has misconstrued the principles of law which are applicable in a case where an aggrieved person alleges bias or likelihood of bias."

This is almost akin to the situation in our case. Apart from the altercation in the record of proceedings between the first and third appellants and the Judge there is no other evidence presented to the court to verify the authenticity of the appellants' assertion. The first appellant said something against the person of the Judge which he said was published in a Newspaper but we have not seen the Newspaper. It should not be assumed that we are following the National Assembly sittings in Newspaper. We need the evidence. The third appellant spoke about comments he made at the National Assembly about AMRC where the learned Judge worked before his elevation to the Bench. And that as a result of his comments a Select Committee of the National Assembly was set up and that the report of the committee of May/June this year implicated the Learned Trial Judge. But again, this report was not brought to our notice, nay, not even a document on the composition of the select committee etc. was exhibited. What we have in the proceedings were mere allegations without evidence. Allegation of bias on the part of a Trial Judge, other than on the basis of pecuniary interest, must be supported by clear, direct, positive, unequivocal and solid evidence from which real likelihood of bias could reasonably be inferred and not mere suspicion. Even the question and answers between the Learned Judge and the third appellant leaves some doubt in the minds of people. In line 24 for instance we have the following:

''Court: Where you a member of the Select Committee which was set up to investigate me?

Accused: No

Court: Did you say the Committee found me guilty of any wrong doing?

Accused: I did not say so. It is not what I said.

Court: Do you think I will accept to take your case if those statements you made are true?

Accused: I reserve my comments.''

These exchanges were made after the third appellant stated in line 20 that the Honourable Trial Judge was indeed implicated. Clearly in such circumstances the Court in the absence of further solid and clear evidence may find it difficult to decide the issue of the likelihood of bias. It is probably matters of this type that Oputa JSC envisaged when in the case of *Akoh and others v Anuh* (1988) 3 NWLR (Pt 85) 696 he said at page 720 that:

> "To invite the court to start considering bias and want of fair hearing on mere speculation and doubtful inferences, learned counsel is inviting us to embark upon a sea which has no shore. We will decline that invitation."

I will also refuse such an invitation. There must be positive evidence for the court to base its findings from. In sum therefore I find and hold that the charge of bias or likelihood or bias has not been proven and therefore I hereby dismiss the appeal as lacking any merit.

AGIM JCA. I have read the very erudite lead judgment of my learned brother, Savage JCA in its draft form. I am in complete agreement with the judgment, the reasoning and conclusion therein. However, I will like to make the following additions.

The procedure adopted in this case by the Appellant in Criminal Appeal No. 5/2005 in challenging the record of the appeal is very irregular and rendered the challenge incompetent. The said appellant filed an affidavit contesting the record of proceedings on 6th December 2005. On the 12th December 2005, the Respondent filed an affidavit in opposition thereto. The respondent's brief was filed on the 13th December 2005. The 1st Appellant's brief was filed on the 15th December 2005. During his adoption and oral amplification of his written brief in Court, Learned Counsel for the appellant in Criminal Appeal No. 5 drew this Court's attention to the irreconcilable state of the affidavits on the content of the record of appeal and indicated the need to call further evidence to resolve same. The 1st Appellant in Criminal Appeal No. 4/2005 argued at the last two lines of page 6 of his brief that the Learned Judge did indicate that he is hated by Gambians. It is noteworthy that the same 1st appellant filed no affidavit challenging the record of appeal in Criminal Appeal No. 4/2005 which does not contain any such fact. The trial of the issue of the exact content of the record of appeal after parties have filed and or adopted their brief of arguments is in my view belated. The contents of the record of an appeal should be certain before written arguments of the appeal are filed. All matters concerning the omissions or any other defects or errors in the record should be settled before argument. The party challenging the records should apply to the Court of Appeal on the basis of an affidavit challenging the record for an amendment to correct the omission. The respondent may file an affidavit in opposition thereto. The Court may choose to call evidence to resolve any irreconcilable differences between the affidavits or may decide that it is not necessary to do so. In the end, the Court may find one affidavit more credible than the other. If the Court is satisfied, after considering the affidavits, such further evidence and hearing both sides, that the matter was omitted, the Court order that the record be corrected by virtue of the power vested on it to amend defers or errors in the record of appeal under Rule 35 of The Gambia Court of appeal Rules. It is only after this determination by the Court that the appeal can be ripe for argument.

This approach helps to ensure that all the matters that the parties consider relevant to the appeal are contained in and form part of the record of appeal before argument commences. It is trite principle of law that all arguments in an appeal Court must be based on the evidence on

record. Allegation of events not forming part of the record of appeal is incompetent. See *Udo Akpan v The State* (1987) SSCNJ 112. In light of these very settled principles it becomes very difficult to conceive how in the absence of such an amendment by this Court, the allegations in the affidavit can become part of the record of appeal to be used in the appeal. It follows therefore that neither parties nor the court can rely on such affidavit for the appeal. This court cannot at this stage or after briefs of argument have been filed and or adopted deal with this issue. It is belated. The last two lines of page 6 of the brief of the 1st appellant in Criminal Appeal No. 4/2005 are incompetent. The same fate befalls the 2nd paragraph of page 6 of his brief wherein he alleged that a review of lines 20-32 of page 4 of the record indicate that he raised questions regarding a matter before the Select Committee on Public Enterprises of the National Assembly concerning the Learned Trial Judge which had been published in the press. As he himself subsequently conceded, this is not contained in the record of appeal.

I will also like to dilate further the question of non-service of the information on the respective appellants before their arraignment by the Court. According to the appellants in their written briefs, they were not served with the information, the Court was bound to postpone the arraignment immediately the issue of want of service was raised by virtue of Section 216 Criminal Procedure Code (CPC), the appellants are entitled to service of the information by virtue Sections 216, 217 and 219 of the CPC, and that the failure to serve them with the information violated the rights guaranteed them by Section 24(1)(a) and (3)(c) of the Constitution. The appellants contended further that the decision of the Learned Trial Judge to enter a plea of not guilty for the appellants has no foundation in law, that they did not refuse to plead out of malice, the service of the information is condition precedent to the invocation of Section 223 of the CPC and that their said arraignment is not in accordance with law. The 2nd appellant in Appeal No. 4/2005 and the appellant in Criminal Appeal relied on the opinion of Tobi JCA (as he then was) in *Alake & Anor v The State* (1994) 7 NWLR (Pt 205) 567 at 587 for their submission.

There is nothing in the CPC or in any other statue stating that an accused must be served with the information before arraignment in the High Court. Part VA of the CPC provides for the commencement of

Criminal Proceedings in the High Court. Section 175 (C) as amended by the CPC (Amendment) Act 1992 stipulates that responsibility of the prosecution to deliver to the Registry of the Court all documents and things which according to the summary of evidence are intended to be put in evidence at the trial. Nowhere is it stated that the information must be served before arraignment.
It is provided in Section 216 of the Criminal Procedure Code that:

> ''The accused person to be tried before the Supreme Court upon an information shall be placed at the bar unfettered, unless the Court shall see cause otherwise to order, and the information shall be read over to him by the Registrar of the Supreme Court or the Judge and explained if need be by the Registrar or the Judge or interpreted by the Interpreter of the court, and such accused person shall be required to plead instantly thereto, unless, where the accused person is entitled to service of a copy of the information, he shall object to the want of such service, and the court shall find that he has not been duly served therewith.''

It is not stated therein that all accused persons must be served with the information. Neither is it stated therein that the accused must be served with the information before he is arraigned. It is clear from the wordings of Section 216 of the CPC that ordinarily the accused is not entitled to service of the information. That is why the Section requires him to plead instantly to the charge after it is read over, explained and as the case maybe, interpreted to him. The accused must so plead unless he or she is entitled to service of a copy of the information and he or she objects to want of service and the Court finds that he has not been duly served therewith. Under this provision, it is for the accused to show that he or she is entitled to service of a copy of the information. The appellants failed to discharge this burden. The requirement of service of a Court process is in all cases provided for and regulated by statute or Rules of Court. If the intendment under the Criminal Procedure Code is that at all times an accused person is entitled to service of the information before arraignment, this would have been expressly or impliedly stated. In the United Kingdom, there is the Service of Prosecution Evidence Regulations 2000 made under the Crime and Disorder Act 1998 expressly placing a duty on the prosecution to serve the charge and

accompanying documents on the accused after the first hearing at the Crown Court. See paragraph 1-12 page 14 of Archbold Criminal Pleading, Evidence and Practice 2002. Even here, the duty to serve is made to arise after the first hearing and not before. Desirable as it is that the information be served on the accused before arraignment, it is not mandatory. This Court will take judicial notice of the practice in criminal cases in this and indeed other common law jurisdictions in West Africa whereby the accused, in most cases, is arraigned without the charge having first been served on him. This is the usual practice that has remained unchallenged so far. The practice is for the accused to be personally served after arraignment or if he is represented by Counsel during arraignment in Court. In many cases accused persons are rushed to Court to comply with the provision of Section 19(3) (b) of the Constitution which requires that persons detained upon reasonable suspicion of committing a crime be released or taken to Court within 72 hours. What took place at the Court before is not unusual in the context of the prevalent practice and the express provisions of the CPC.

I find that the appellant were not entitled to the service of the information's before arraignment. If the appellants were entitled to service of the information before arraignment, then the Learned Trial Judge would have been obliged by law to suspend the arraignment and deal with the objection to want of service. Since they are not entitled to service, Section 216 CPC makes it obligatory for them to plead instantly to the charge read over and explained to them.

The appellants have the fundamental and constitutional right to insist to be represented by a legal practitioner of their choice. If they had so requested, the Learned Trial Judge would have been obliged to adjourn the case to enable them secure legal representative. The appellants are leading national politicians. In fact 1st appellant in Appeal No. 4/2005 is a National Assembly Member. The appellant in Criminal Appeal No. 5/2005 is a former member of the National Assembly. They are not ordinary and or illiterate persons.

Each of the appellants refused to answer directly to the information. In such circumstances, Section 223 CPC empowers the Learned Trial Judge enter a ''not guilty'' plea for each of them. By virtue of the said Section, such pleas so entered shall have the same force and effect as if such accused person had actually pleaded the same. Section 225 of the CPC provides that if the accused pleads not guilty or if a plea of not

guilty is entered in accordance with Section 223, the Court shall proceed to try the accused person(s). Therefore, the Learned Trial Judge clearly acted in accordance with the above procedure as prescribed in Sections 216, 223 and 225 of the CPC. I find that the arraignment of the appellants in the Court below was in accordance with law and did not violate their right to fair hearing.

Let me now also consider the question of the ability of the Learned Trial Judge to be impartial in the trial of the appellants. This was raised by the 1st appellant in Criminal Appeal No. 4/2005 and appellant in Criminal Appeal No. 5/2005. 1st appellant in Criminal Appeal No. 4/2005 gave no reasons. Appellant in Appeal No. 5/2005 gave reasons, on which basis he stated at paragraph 3.3 of his brief that "he entertains a reasonable suspicion of bias, on the part of the Learned Trial Judge". The respondent has argued that the facts in the record do not show the existence of a real likelihood of bias and that mere suspicion of bias cannot suffice.

Once again we are confronted with the problem of dealing with a conflict between two competing public interests. The one is the right of a party to be heard by an impartial adjudicator. The other is that the Judge should not be subjected to harassment by unbridled allegations of bias.

Over time and through the cases, the Courts have developed two approaches or tests in dealing with the question of bias by judicial or quasi judicial bodies in situations where there is no actual bias. These approaches have one common objective - that justice must not only be done but manifestly be seen to be done.

> (1) The first test called the reasonable suspicion or reasonable apprehension test postulates that upon reasonable suspicion of bias, the Judge should give the benefit of doubt to his irrational accusers and excuse himself from the case unless it is quite clear from the surrounding facts that the accused is being dilatory to delay the trial.

This is the test espoused in *Z. Pangamaleza v J. Kiwaraka* (1987) TLR 141 at 147 by the Tanzania Court of Appeal and cited in the Appellants' brief. See also *Eckersley v Mersey Docks and Harbour Board* (1894) 2 QB 667 at 670-671 CA which is a notable example of the earlier cases that laid down this rule. The danger inherent in this approach is obvious. It means that every judge will be disqualified from trying a case on mere

vague suspicions of whimsical, capricious and unreasonable people or irrational accusers. Such an unregulated situation will render the Judge vulnerable and erode his independence of adjudication, a sine-qua-non for a fair trial system. The Ghanaian Court in *Adzaku v Galenku* (1974) GLR 198-206 held that such an approach will enable a party to choose his own judge; a situation which will drive a wedge into the fabric of our whole judicial system.

(2) The second approach is called the real likelihood or real danger test which postulates that to disqualify a person from acting in a judicial or quasi judicial capacity, a real likelihood of bias must be shown to exist. A mere suspicion or reasonable suspicion of bias is not enough. See *R v Camborne Justice: Ex-parte Pearce* (1955) 1 QB 41 DC, *R v Justice of County Cork* (1910) 2 IR 271 and *R v Barnsley Licensing Justices: Ex-parte Barnsley and District Licensed Victuallers' Association* (1960) 2 QB 167 at 187 where the English Court per Devlin Ltd set the seal on this rule. See also *Rex v Sussex Justices: Ex-parte McCarthy* (1924) 1 KB DC and *Metropolitan Properties Co. (GC) Ltd v Lannon & Ors* (1969) 1 QB 557 at 585-587.

The preponderance of judicial decisions of national Courts favour this test. See the Ghanaian Supreme Court decision of *Attorney General v Sallah* (1970) CC 54 where this approach was adopted. See again the Ghanaian case of *Adzaku v Galenku* (supra) for a very historical and classical exposition of this rule. See also *Republic v Constitutional Committee Chairman: Ex-parte Barimah II* (1968) GBR 1051 at 1053. This is also the rule adopted in Nigeria. See the Nigerian Supreme Court decision in the following cases: -

(ii) *Odunsi v Odunsi* (1979) NSCC 57 at 59
(iii) *Kujore v Otun Banjo* (1974) 10 SC 173
(iv) *Ohe v Enenwali* (1976) 2 SC 23
(v) *Deduwa v Okerodudu* (1976) 9-10 SC 329
(vi) *Egri v Uperi* (1973)11 SC 299

The allegation of bias must be supported by facts. A mere or reasonable suspicion of bias without more is not enough. There must exist facts showing the circumstances which gave rise to a real likelihood of bias.

See *Adzaku v Galenku* (Supra), *Rec v Justices of Queens Co*. (1908) 2 IR 285 at 296 and *Republic v Constitutional Committee Chairman* (Supra) at 1053. There is no mandatory check list of facts that can give rise to a real likelihood of bias like the Ghana Supreme Court said in *Attorney General v Sallah* and the Nigerian Court of Appeal said in *Denge v Usuyfu Ndakwoji* (1992) 1 NWLR 221 at 233-234 holdings 1, 2 and 3. Whether such likelihood exists will depend on the peculiar circumstances of each case. See also the English Court of Appeal in *Locabail UK Ltd v Bayfield Properties Ltd* (1999) 1 CHRL 155. I prefer to apply the real likelihood of bias test to this case as it accords with the unanimity of current and sound judicial reasoning.

With respect to the allegation of 1st appellant in Appeal No. 4/2005 that the Learned Trial Judge will not be impartial in his trial, no reason was given by him for such allegation. In light of the foregoing authorities the Learned Trial Judge acted rightly in disregarding his objection.

With respect to the appellant in Appeal No. 5/2005, he stated in his brief that he entertains a reasonable suspicion of bias. This is not sufficient to disqualify a Judge from continuing to try a case. See *Republic v Constitutional Committee Chairman: Ex-parte Barimah II* (Supra) where the Court held that "a mere suspicion of bias, however reasonable it might appear, is not sufficient". See also *Adzaku v Galenku* (Supra). In *Locabail (UK) Ltd v Bayfield Properties Limited* (supra), the English Court of Appeal held that "in the face of an objection by a party alleging a real danger of bias, a Judge would be wrong to yield to a tenuous of frivolous objection as he would be to ignore an objection of substance". It relied on the following decisions: -

(1) *President of Republic of South Africa v South African Rugby Football Union* (1999) 4 SA 147(c) (SA cc), (1999) 2 CHRLD 382.
(2) *Re: JRL: Ex-parte CJL* (1986) 161 CLR 342 at 352 (Australian High Court).
(3) *Re: Ebner, Ebner v official Trustee in Bankruptcy* (1999) 161 DLR 557, 568 (Aus. AFC).

It is the submission of Learned Counsel for the appellant in Appeal No. 5/2005 that the Learned Trial Judge betrayed a hostile disposition by the use of the words "it smacks of impertinence". I do not see how such

words convey a hostile disposition. Assuming they do, this cannot support a charge of bias. See Adzaku v Galenku (supra) where the Court held that the allegation that a Magistrate exhibited violent temper in the course of trial and said many unpleasant things about the defendant without more cannot support a charge of bias. Let me also point out here that even if the remarks that he knows that many Gambians do not like him is part of the record, it will not change the situation. How does that show bias against the two appellants? It is meaningless. In *Adzaku v Galenku* (supra), a situation closely similar to this arose. The Court had described a fetish priest in the District as fraudulent. The defendant, a fetish priest was defending a suit against his claims that he was a fetish priest. The Court held it raised reasonable suspicion without more. The Learned Trial Judge was therefore right when he refused to yield to the objection of the appellant in Criminal Appeal No. 5/2005. For these and the reasons stated in the lead judgment of my Learned brother, I also dismiss this appeal.

IZUAKO Ag. JCA: (*Dissenting*) Unfortunately, I did not have the opportunity of a conference with my learned brother judges on the panel hearing this appeal. I did not have the opportunity either of seeing the draft of the lead judgment before it was read this morning. I however present a minority judgment. I have read through the documents filed in this appeal. I have similarly studied the grounds of appeal and the briefs of the appellants and the respondent. Let me state straightaway that I adopt the narrative of my learned brother A. K. Savage JCA, on the facts and circumstances leading to this appeal. I also adopt his views on the matter of non-formulation of issues in this appeal by the respondent.

I agree that two vital issues arise for determination here as follows:

1. Whether the right to fair hearing of the appellants had been breached.
2. Whether the Learned Trial Judge ought to have reclused himself when the appellants contested his impartiality.

As to the first issue, it has been canvassed before the Court that:

''At the time of arraignment of the three appellants and up till the time of hearing this appeal, none of the appellants were served with the information against them.''

The record of proceedings shows that each appellant complained about not having been told what offences they were being arraigned for. The record also shows that when this issue was raised by each appellant, the Court nevertheless when on to direct the Registrar to read the information to each appellant and to ask them to plead. The appellants have argued that they were entitled to be served with the information against them prior to their arraignment. The 2nd and 3rd appellants contend further that it is only when an accused person is served with Information as provided for by Section 216 of the Criminal Procedure Code that he can proceed to exercise his rights under Section 217 and Section 219 of that Code. They further submitted that by the combined effect of the Sections 216, 217 and 219 of the Code, service of the information upon an accused person prior to arraignment becomes mandatory in order that he may have the opportunity to invoke, if need be, Section 217 or Section 219. The information when served before arraignment would form the basis of any objections under Sections 217 and 219 that the accused may wish to raise. All the three appellants have submitted that the failure of the Trial Judge to address the non-service on them of the information prior to their arraignment amounted to non-compliance with the provisions of the Criminal Procedure Code and also a violation of the right to fair-hearing guaranteed under of Section 24(1) of the Constitution. Specifically, Section 24(3) guarantees an accused person the right to be given adequate time and facilities for the preparation of his defence.

The respondent's counsel has submitted that in spite of not addressing the appellant's complaint that they have not been told why they were in court, the court had observed the provisions of Section 216 of the Criminal Procedure Code. She submitted further that what the Court does upon acknowledging such a complaint was entirely at the discretion of the Trial Judge. The respondent's counsel cited the case of Mensah Gyimah v The Republic (1971) 2 GLR 147 at 154 in support of the assertion that the Appellate Court cannot substitute its own view of how a discretion is to be exercised with that of the Trial Judge. In arguing the additional ground of appeal, Merley Wood, Principal State Counsel

for the State/Respondent stated in her brief that "admittedly the information they should have been provided which was not given to them but that did not vitiate the entire arraignment."

In view of the foregoing arguments on all sides, can it be said that the right to fair hearing under Section 24(1) and 24(3) of the Constitution of the Republic of The Gambia has been violated in this regard?

It is agreed by all sides that the Information ought to have been provided to the appellants before their arraignment in court. The said Information, it is further agreed, was not so provided. What then is the purpose of the provision of Section 216 of the Criminal Procedure Code that the Information be made available to the accused person? The Criminal Justice System aims to reduce crime as well as prosecute and punish offenders. But in doing so, it requires that consideration be given to the extent of individual freedom and the issues of fair treatment. Our trial procedures reflect key ethical principles and are underpinned by a concept of fair treatment continually reinforced by international standard-setting instruments and most importantly by our constitution in the guarantees of the fair-hearing provision of Section 24. It is against this backdrop that a person actually caught in the act of committing an offence will be presumed innocent until his guilt is proved beyond reasonable doubt. It is also in the same light that a person accused of committing an offence ought at the earliest opportunity to be informed of such an accusation.

Criminal prosecution must lay its cards – all facing upwards - on the table. It is an incompetent prosecution process which seeks to spring surprises on persons brought before the law. In acknowledging that the appellants ought to have been served with the Information of the alleged offences before their arraignment, but were not so served, the respondent's counsel coveys a shocking betrayal of the rights of the appellants to fair hearing when she submits that the failure did not vitiate the arraignment.

It is not difficult to see that Section 216 of the Criminal Procedure Code in vesting the accused person with the right to have knowledge of the information against them before being taken to Court and asked to plea, intends that those who stand accused before our Courts are afforded sufficient time and materials with which to prepare their defence. In the case of *The Republic v Bernard Georges (2002)* 2 CHRP 477 at 518*,* the Constitutional Court of Seychelles in examining how the country's

Constitution ought to be interpreted quoted with approval the generous interpretative rationale adopted in a list of cases among and them is the case of *Attorney General of The Gambia v Momodou Jobe* (1984) AC 670 thus:

> "A Constitution and in particular that part which protects and entrenches fundamental rights and freedoms to which all persons in the State are to be entitled, is to be given a generous and purposive construction".

And the Namibian case of *State v Scholtz* (1997) 1 LRC 67-79 80.

> "The interpretation should be … generous rather than a legalistic one, aimed at fulfilling the purpose of a guarantee and securing for individuals the full benefit of the Charter's protection."

The Hon. Justice Bwana in a review of several criminal cases from Namibia, South Africa, The Gambia and other Commonwealth jurisdictions was of the view that full disclosure of the entire prosecution's case ought to be made to the accused right from the very beginning. He identified seven principles (reproduced below) as emerging from these authorities as underpinning the need for full disclosure:-

1. That disclosure constitutes one of the important elements of fair trial in this new legal culture of transparency and accountability.
2. Disclosure is not limited only to what is provided in Criminal Procedure legislations, but rather what is, entrenched in the Constitution. In that respect and should there be inconsistency between the two, then the provisions of the criminal procedure law which are inconsistent with those of the Constitution are invalid to the extent of that inconsistency. Therefore disclosure may be effected in summary trial situations as well.
3. The disclosure should be done well in time before the accused pleads so that he has adequate time and materials to prepare his defence.
4. That disclosure is part of the due process requirement, which is essential for a fair and impartial trial.

5. The disclosure should include the list of witnesses; their statements; documentary and expert evidence to be use during the trial; the police docket; notes; etc. which are relevant to the case.
6. Disclosure may be denied on those grounds specified in the Constitution. However it is not for the prosecution to deny outright. Should it think that certain pieces of evidence are not to be disclosed then such fact should be made to the Trial Court which in turn will have to objectively decide the issue of disclosure. The prosecution should not be allowed to be judge in its own cause. There can be no "blanket disclosure" – restrictions acceptable in a democratic society have to be respected, having regard to the particular circumstances of each case. Therefore what a fair trial might require in a particular case depends on the circumstances of that case.
7. Where the prosecution is in possession of a witness or documents which tends to prove the innocence of the accused person, then such witness or documents must be made available either to the Court or to the accused.

In continuing the examination of the issue of whether the appellants' right to fair hearing was breached, I note that in spite of acknowledging that the appellants were denied the rights conferred on them by Section 216 of the Criminal Procedure Code, counsel for the State/Respondent submitted that the Learned Trial Judge had a discretion to exercise upon the protest of the appellants and that it was entirely up to him as to how he exercised the said discretion. Nothing in my view could be further from the intendment of Section 216. More to that, no Court exercises any manner of discretion were the fundamental rights of people guaranteed in a written Constitution are concerned.
The case of *Alake v The State* (1991) 7 NWLR 567 at 589 highlights the significance of the plea in criminal trials.

> "The plea is taken by the accused personally and is of major importance in the criminal process … Where it is not taken in accordance with the requirements of the law, the trial will be a nullity".

In light of this, there is no question that the respondent's submission on this issue must be discountenanced. In not addressing the concerns of the appellant as to service of the information against them, the Court had unwittingly acquiesced in the denial of the appellants' rights to fair hearing under Section 24(3) of The Constitution." It is therefore not proper for the Trial Court to enter pleas of not guilty on behalf of the appellants under Section 223 of the Criminal Procedure Code when they refused to plead. I agree with the appellants submissions that they had not put themselves upon the Court for trial because the proper course would have been for the Learned Trial Judge to direct that the appellants be served immediately with the information and to grant an adjournment for them to take their pleas.

In the Mauritian case of *A.H.S. Hassen Mohammedali and S.A. Hassen Mohammedali v The State* (1994) the Supreme Court in deciding that it was proper that the defence obtain copies of material statements from the Director of Public Prosecutions quoted with approval the dictum of Lawton L.J. in *Ruttennessey* (1978) 68 Cr App Review 416 at 426 thus:

> "The Judge for their part will ensure that the Crown gets no advantage from neglect of duty on the part of the Prosecution."

As to the second issue in this appeal on whether the Learned Trial Judge ought to have reclused himself when the appellants contested his impartiality, it is necessary at this point to refer to the record of proceedings. The record in respect of Appeal No. 4 at page 4 and Appeal No. 5 at pages 3 and 4 reveal the doubts and concerns expressed by the 1st and 3rd appellants about the impartiality of the Trial Court. In fact the said pages reveal also a protracted, unhealthy and unnecessary exchange between the Court and the appellants. From these exchanges, it can be gleaned that the 1st and 3rd appellants had in their capacity as National Assembly members made comments on the floor of Parliament affecting the integrity of the trial judge. In Appeal No. 5, the proceedings of 18th November 2005 in the High Court span a little more than two type-written pages. About two thirds of these proceedings running into one and a half pages are devoted to exchanges between the 3rd appellant and the Trial Judge and comments by the said Judge about the issue of impartiality which the 3rd appellants had raised.

A Judge in my view is the moderator of judicial proceedings, an umpire, and a referee. His role consists in seeing that the rules of engagement in Court proceedings are adhered to. He is the wise listener who intervenes as little as possible as he guides the proceedings in observance of procedural and substantive matters of law to arrive at the justice of the case. At the conclusion of the case, and after due considerations of facts and law, he gives a judgment which must be unbiased. But sometimes it happens that a Judge would find himself descending from that high pedestal into the arena. The Judge from the deepest recesses of his heart may seek to do justice as his judicial oath demands but public confidence in the process is even more critical than his best intentions. In the judicial tradition, our inclinations are usually weighed on the side of restoration of confidence in the judicial system to people who appear before us. In the case of *Denge v Ndakwoji* (1992) 1 NWLR 221 at 233 Ndoma-Egba JCA, delivering the lead judgment of the court held that "The safest thing to do is for a Trial Judge to pull out from the case on mention of bias. Such a course of action would be reassuring to the parties". The Learned Justice continued that "the proof of the presence of actual bias is unnecessary in an allegation of bias against a judicial tribunal. It is enough to establish a real likelihood that in the circumstances of the case, a Judge would be biased."

Does this then mean that on every occasion that a litigant or an accused, raises the issue of bias, the judicial officer must quickly scurry away and recluse himself? I do not think so. In the Ghanaian case of *Republic v Constitutional Committee Chairman: Ex-parte Barimah II & Anor*, Anan J sitting in the High Court of Kumasi held that to succeed, the applicant must show the existence of a real likelihood of bias or interest on the part of the chairman. A mere suspicion, of bias however reasonable, it might appear was not sufficient. He continued that the test of bias in this respect was objective and it was the view that a right-minded person would take if he accepted the matters of fact put forward by the applicant. Also in the English case of *Metropolitan Properties Co. (GC) Ltd. v Lannon & Ors,* Lord Denning MR in examining an allegation of bias against the Chairman of a Housing Tribunal said "there must be circumstances from which a reasonable man would think it likely or probable that the Justice or Chairman, as the case may be, would or did, favour one side unfairly at the expense of the other. The Court will not inquire whether he did in fact favour one side unfairly. Suffice it that

reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence and confidence is destroyed when right-minded people go away thinking "the judge was biased." In the Nigerian case *Umar Mohammed v The Nigerian Army* (2001) CHR 470 at 481, the Court of Appeal held that "the duty of a person charged with the conduct of a criminal trial is not only to be an impartial arbiter but also to be seen to be such. Where the Judge manifests subjective bias by his utterances in the conduct of the case, an accused person cannot be said to have had a fair trial. To vitiate the proceedings, it is sufficient for the accused person to establish a real likelihood of bias." In light of these judicial opinions, it is troubling to observe the unsavoury exchanges between the 3rd appellant and the Trial Judge in Appeal No. 5 which I have reproduced below:-

> Court to Accused: Are you not represented by counsel?
> Accused: I do not have legal representation as yet. I do not know what I am charged with.
> Court: You will shortly know what you are charged with.
> Registrar: Read the count of the information and explains to the accused.
> Court: Do you understand the charge as read?
> Accused: Yes, I understand
> Court: How do you plead?
> Accused: I cannot take plea. My Lord, I want to make comments as raised by Hon. Sallah. That as a result of comments I made in the National Assembly last year regarding the AMRC which was a subject of Parliamentary inquiry and my Lord as a former official of that institution and the outcome of the preliminary report which was presented in Parliament by a select committee in May/June this year and the finding of the preliminary report implicate you and having participate as a former member of parliament and extensively in the debate and the Committee's investigation is ongoing. Because of this, I don't think I will get a fair trial. I want some other Judge to try me.
> Court to Accused: Were you a member of the select committee, which was set up to investigate me?
> Accused: No
> Court to Accused: Did you say that the committee found me guilty of any wrongdoing?

Court to accused: Do you think I will accept to take your case if those statements you made were true?
Accused: I reserve my comments
Court: The accused person had been told why he has been brought to court as the information preferred against him has been read to him and he has told the Court that he understands. In view of the accused person's position that he cannot make a plea because he wants to be tried by another Judge, I hereby enter a plea of NOT GUILTY for him. Let me again remark that it smacks of impertinence for an accused person to suggest to a Court that he does not want the particular Judge to try him because of certain privileged statements, which he said he made against the person of the Judge on the floor of the National Assembly. Let me also say that the accused had not been brought to this court because of such statements. I think it is only a matter of integrity and conscience on the part of the Judge after all. Let me say that the position of a judge who is alive to his oath of office is vulnerable in every jurisdiction under the sun and a judge must be able to acquire the capacity to absorb attacks, verbal or otherwise from members of the public. Anybody can say anything about the person of a judge. Whether or not such statement are true is another matter altogether. If as an adjudicator, I am unable to accept or tolerate the things people say, no matter their motivation, whether actuated by unworthy motives or otherwise, then I am unable to perform my judicial duties. Then I am disqualified. In my conscience and in the integrity of my heart this situation has not yet arisen. If it had arisen I will recluse myself from this matter. I myself believe in this maxim that justice must not only be done but manifestly seen to be done. I do not think that it is in the place of an accused person to say so in any event and nothing has transpired in this court that should put the accused person in so much apprehension. This is a Court of law and of justice and no more.

Mrs. Wood: My instructions are that investigations are ongoing and to ask for a date convenient to the court.
Court: This matter is in the event hereby adjourned to 19th December 2005 for hearing.

Accused person is to be remanded in prison custody.

It is to be noted from the above that the 3rd appellant complained about not knowing what he was charged with. The Court ignored that complaint and merely remarked to the appellant then in the dock that "you will shortly know what you are charged with". The charge was then read and the appellant refused to plead. He instead referred to comments already raised by the 1st appellant. He went on to say that having participated in Parliamentary proceedings following comments he made on the AMRC in Parliament whose select committee came out with a preliminary report implicating the Judge, he did not think he would get a fair trial. The Judge at some stage asked the appellant in the dock whether he thought that he the Judge would accept to "take your case if those statements you made were true" and the 3rd appellant replied. "No comment" The Judge then enter a "not guilty" plea for the appellant. Immediately after the said judge then accused the appellant of impertinence for suggesting he did not want to be tried by him. The Judge launched into comments about a Judge's ability to absorb attacks, verbal or otherwise and about tolerating what people said about his person no matter their motivation whether actuated by unworthy motives or otherwise. As I have observed earlier, the Judge's comment about attacks to his person and a Judge's oath of office and integrity which take up most of the record of proceedings of the 18th November 2005 leaves much to be desired. I believe the judge talked too much. I agree with the submission of learned counsel for 2nd and 3rd appellants that accusing the appellants of impertinence for expressing anxiety that the Judge may be biased does convey a degree of anger and hostility which we cannot wish away or ignore.

It is my respectful view that in the circumstances of this appeal, the appellants and the Trial Judge in their exchanges have referred to previous occasions where the Judge's integrity was questioned in Parliament with a least two of the appellants participating in the said parliamentary proceedings. Much as there is nothing to show any bias on the part of the Trial Judge, and notwithstanding the fact that the Judge did say he had nothing against appellants there is enough likelihood of bias gleaned from the language of the Court and the exchanges referred to above to warrant that the Judge recluse himself from the trial of the three appellants. As reiterated in the judicial authorities cited above, it is not the conscience or integrity of the heart of the Judge that matters; it is rather the perception of right-thinking people.

Therefore, it is my view that the failure to serve the appellants with the Information before their arraignment was a breach of Section 24(3) of the Constitution of The Gambia thereby occasioning a substantial miscarriage of justice. Also a real likelihood of bias exists in the trial of the three appellants by the Hon. Justice Paul. The appeals of the three appellants ought to succeed and the arraignment of November 18th 2005 nullified. The criminal trials should be sent to another Judge in order to restore public confidence in our judicial system.

Appeal dismissed.
FLD.

THOMPSON HOLIDAYS LTD v BANNA BEACH HOTEL LTD

COURT OF APPEAL OF THE GAMBIA
(Civil Appeal No. 15/2003)

13th March 2006

Agim JCA, Yamoa Ag. JCA, Anin-Yeboah Ag. JCA

Court– Trial Court – Part heard case – Whether to be continued by a new Judge – Interpretation of Statutes – Ordinary meaning of words used – Literal interpretation.

Interpretation of Statutes – Rules of interpretation – Every word used must be given its ordinary interpretation – Object of a Statute – Derived from plain and unambiguous expressions used therein – Meaning of the word ''shall continue'' – Clear and unambiguous words – No rule of interpretation can be used to vary or contradict same – Literal Interpretation – Words in a Statute – Words deemed to have the same meaning wherever it appears in the Statute unless to ascribe that meaning would lead to an absurdity.

Held, *appeal allowed (per Agim JCA, Yamoa Ag. JCA, Anin-Yeboah Ag. JCA concurring)*

1. Where there were no conflict in evidence and parties agreed, then a subsequent Judge could continue to hear a case started by a previous Judge. [Halsbury's Laws of England Hailsham Edition Vol. 26 page 158 footnote (a).]

2. The reason(s) for enacting the provisions of Section 13 of Legal Notice, No. 39 of 1995 included the bid to help along the cases stalled by the unavailability of Judges who start them and to see to their speedy disposal.

3. It is a cardinal rule of interpretation that the use of a word in a Statute must be read as intending to mean the same wherever it appears in that legislation unless the contrary is indicated or unless attributing the same meaning will lead to absurdity.

4. The first cardinal rule of interpretation is that every word unless used in a technical sense, ought to be given its ordinary or literal interpretation, as legislators are generally presumed to intend what they actually convey by the words they use [*The Queen in the prosecution of J.F. Pemsel v Commissioners of Income Tax* (1888) 22 QBD 296 referred to]

5. The underlying principle is that the meaning and intention of a statute must be derived from the plain and unambiguous expressions used therein rather than from any notions which may be entertained by the Court as just and expedient.

6. In certain circumstances and only when words are such that interpreting them in the ordinary sense may give absurd results or be otherwise inconsistent, then the intendment of the law in relation to its raison d'être may become relevant in applying the meaning that will avoid absurdity. [*Ministry of Housing and Local Government v Sharp* (1970) 2 QB 233; *Barnard v Gorman* (1941) AC 378 referred to]

7. The Oxford English "Dictionary meaning of the word" continue reads thus: persist in, maintain, not stop, resume or prolong, recommence. Therefore not using the ordinary meaning of "shall continue" to be imperative, thus commanding performance, and to mean completing what a previous judge had started in view of the reason d'être of the legislation, will rather lead to absurdity and not be within the intendment of the makers of that legislation.

8. Where the words of an Act of parliament are clear, there is no room for applying any rule of interpretation which are merely presumptions in cases of ambiguity. [*Croxford Universal Insurance Co. Ltd. v Greshman Fire Insurance Society* (1936) 2 KB 253 referred to]

10. The golden rule is that the words of a statute must prima facie be given their ordinary Meaning. We must not shy from an interpretation which will reverse the previous law, for the purpose

of a large part of our statute law is to make lawful that which would not be lawful without the statute. Judges are not called upon to apply their opinions of sound policy so as to modify the plain meaning of statutory words. [*Nokes v Doncaster Amalgamated Collieries* (1940) AC 1014 referred to]

Cases referred to:

Banjul Breweries Ltd V Momodou Jarju (Unreported) C.A. No. 22/2000
Barnard v Gorman (1941) AC 378
Bolton v Bolton (1949) 2 ALL ER 908
Croxford Universal Insurance Co Ltd v Gresham fire and Insurance Society (1936) 2 KB 253
Esseng v Bank of the North (2001) 6 NWLR (Pt 789) 398
Heydon's Case (1584) 3 Co. Rep 7a
Ministry of Housing & Local Government v Sharp (1970) 2 QB 233
Owners of the Steamer Janet Quinn v Owners of the Motor Tanker Forest Lake (1966) 3 ALL ER 833
P.B. (Nig) PLC v O.K. Contract Point Ltd. (2001) 9 NWLR (Pt 717) 80
Re: British Reinforced Concrete Engineering Co Ltd (1929) 45 TLR 186
The Queen in the Prosecution of J.F. Pemsel v Commissioners of Income Tax (1888) 22 QBD 296

Statutes referred to:

Halsbury's Laws of England, 3rd Edition Vol 9 para 356 at 830
Interpretation Act Cap 4 Vol. I Laws of The Gambia 1990 Sections 3, 11(d), 14
Legal Notice No. 39 of 1995 Section 13

Books referred to:

Bennion on Statutory Interpretation 2nd Edition
Maxwell on the Interpretation of Statutes 10th Edition
Oxford English Dictionary

I.D Drammeh for the appellant
AAB Gaye (Esq) and A Bensouda for the respondent.

YAMOA Ag. JCA. This is a Judgment in respect of an interlocutory appeal against the ruling of the High Court delivered on 10/6/06 by Paul J, regarding the hearing of Civil Suit No 142/2000. In the said ruling, the Learned Judge ordered the said action in respect of which hearing had commenced before Itam J (as he then was), to be heard de novo. The matters that brought the said Order of the High Court into being are that this action which had first been before Ihekire J, and then Itam J (as he then was) was assigned to Paul J for hearing. The history of this case is somewhat contorted, for it has not been without incident. The hearing of this case commenced before Itam J (as he then was) with Sheriff Marong, Managing Director of the respondent Company giving evidence. He sought to tender some documents which were rejected by the Court and marked Rejected A, B, and C. Dissatisfied with the ruling of the Court, the respondent herein lodged an appeal before this Court on the question of the admissibility of the said documents. While the said appeal was pending in this court, the said Judge was elevated to this court and the matter was reassigned to Paul J for hearing. On 20/3/03 the matter was adjourned by Paul J for continuation of the hearing upon the application of counsel for the appellant. When the matter was further adjourned on 19/5/03, the Learned Judge said it was "for further hearing''.

On 10th June 2003, Mr. A.A.B. Gaye, counsel for the respondent announced that he intended to start hearing of the case de novo. Making reference to the ruling of Itam J aforesaid, he anticipated an objection from learned counsel for the appellant. He was not to be disappointed, for the opposing counsel did object to the hearing of the suit de novo, drawing the attention of the Court that an appeal had been lodged in respect of the said ruling of Itam J. The decision of counsel to start the case de novo she said, was intended to, and would have the effect of overreaching the effect of that ruling and the appeal.

Learned counsel for the appellant, referring the Court to the provisions of Section 13 of Legal Notice 39 of 1995, urged that its provisions for the continuation of hearing by the Judge seized of the matter after hearing had previously commenced before another Judge, were mandatory and had to be complied with. Lead counsel for the respondent contended at that stage that the effect of the said provision of the Legal Notice 39 had been nullified by this court presided over by Gelaga-King JA. He

however later informed the Court that this was not the case, as no decisive pronouncement had been made on the subject by this court.

In his ruling on the matter, Paul J said that Legal Notice 39 of 1995 was not to be read as mandatorily requiring a judge to whom a part-heard case had been assigned to continue with the hearing. The word "shall" he said, could be given a permissive interpretation. This was because he maintained that the rationale for that provision was for the speedy disposal of cases. In his view therefore, so long as expedition was achieved by the way a Judge handled the matter, the goal had been realised. The Judge to whom the case was assigned under Section 13 of the Legal Notice he said, was under no compulsion to complete what another had started. Advocating that it was 'desirable' for the Court which started a case to continue with the case to completion" he cited the case of *Banjul Breweries Ltd. v Momodou Jarju* Civil Appeal No. 22/2000*;* as instructive, and said that if parties did not agree that their case be continued by another Judge, then the Court whose duty it was to ensure that justice was done, had to commence hearing de novo. He thus ruled that hearing commence de novo. The next day, being the 11th of June 2003, the appellant lodged the present appeal before this Court.
The matters that followed are of some consequence and cannot go without mention. They are contained in the supplementary record of proceedings requested for, and supplied to the Court as to the proceedings that followed the ruling the subject of this appeal. According to learned counsel for the appellant, on the day of the ruling, the appellant applied to the Court for a stay of proceedings to enable an appeal against that decision to be brought before this Court. The said application was dismissed. The next day, when the Notice of appeal was filed, counsel informed the Court of the pendency of the appeal and also, of a repeat application before this Court for the stay of proceedings pending the hearing thereof. The Court, in spite of these, went ahead and commenced hearing de novo. In the course of it, the Judge admitted the documents rejected in the ruling of Itam J which is the subject of the appeal that had been brought to the notice of the Court before the Judge's ruling to commence hearing de novo.

The grounds of the present appeal are predicated on the following:

1. That the Learned Trial Judge was wrong to have refused to give effect to the clear and unambiguous provisions of Section

13 of Legal Notice No. 39 of 1995 of the Rules of the High Court.

2. The Learned Trial Judge was wrong in law to have ordered the trial de novo of the suit when it was clear at all times:
    i. That the application was intended to overreach the ruling of Itam J (as then was) delivered in the said suit on the 18/12/02 and the respondent's appeal against the said ruling;
    ii. That there was no good reason for making the said application.
    iii. That the case was assigned to Paul J before the said date and was first mentioned before the said judge on 20/3/03, thereafter, the Learned Trial Judge had adjourned the said suit for continuation of hearing;
    iv. That the application to start the case de novo was not made until 10/6/03 and after an earlier application on the 19/5/03 for an adjournment because the witness who was giving evidence was suffering from jet-lag.
    v. That no or no good reason was advanced for the trial de novo.
3. The Learned Trial Judge misconstrued and misapplied the Judgment in the case of Banjul Breweries Ltd v Momodou Jarju Civil Appeal No. 22/2000;
4. In failing or refusing to give effect to Section 13 of Legal Notice No. 39 of 1995 of the Rules of the High Court, the Learned Trial Judge was reading the said provisions with glosses and interpolations which were not contained in the said section;
5. The said ruling was wrong and otherwise erroneous.

In the appellant's brief the following issue was formulated:

> ''Whether the Learned Judge was right or had jurisdiction to make an order for the case to be started de novo.''

Learned counsel for the appellant contended that the Hon. Justice Paul had no jurisdiction to order a trial de novo in the face of the mandatory

provisions of Section 13 of Legal Notice 39 of 1995, amending the High Court Rules. Counsel averred that the said provision did not allow for the permissive interpretation adopted by the court, in that the word "continue" was used in respect of this amendment to Order 32 of the High Court Rules. The said amendment she said, introduced a new rule under the provisions on the trial of cases and was intended for the judge to whom a part-heard case was assigned, to resume hearing after the break and conclude the matter. Learned counsel for the appellant contended that the case of Banjul Breweries (supra) that the learned judge purported to rely on, did not in fact support the position taken by the judge as it distinguished between the preferred practice of starting the hearing of cases de novo before the enactment of Section 13 of Legal Notice 39 and the position after that provision. It was her contention that the Court whose decision she said had been misconstrued and is applied by the Learned Judge, recognized that the cases cited in that case and which spoke in favour of a trial de novo were of reduced significance in this jurisdiction by reason of the said provision of the Legal Notice.

In any case, she averred, even if the authorities in the Banjul Breweries' case supported the viewpoint of the Learned Judge, the circumstances of those cases differed from the present position. The said circumstances include the fact that the present case had a legal mandate whereas those cases cited had not; in those cases, there was the need to resolve conflicts in evidence, the present case had not travelled far, and the continuing Judge could form his opinion on the credibility of PW1 who was giving evidence before Itam J (as he then was). Counsel further contended that the Learned Judge in giving Section 13 of Legal Notice 39 the interpretation that he did, read the said provision with glosses and interpolations that were not contained therein. Finally, she canvassed the argument that trials de novo had to be done upon stated reasons and ought not to be used to overreach the other party when a ruling did favour the applying party. This procedure, she contended was not only dangerous for the dispensation of justice, but was not warranted by any rule of law or procedure.

The respondent formulated the following issue which in substance is not different from the one set out by the plaintiff was raised:-

''Whether it was within the powers of Honourable Justice M.A. Paul to order that the matter assigned to him from Itam J (as he then was) be started de novo.''

It was the contention of learned counsel for the respondent that this whole case turns on the interpretation to be given Section 13 of Legal Notice 39 of 1995. Thus learned counsel launched into an exposition on the interpretation of statutes, urging upon this court that the said provision, Section 13 of Legal Notice 39 was not, as expounded in *Heydon's case* (1584) 3 Co. Rep. 7a, intended to make changes in the existing common law but had to be construed to cure the mischief that the common law did not provide for within the intendment of the lawmakers. Learned counsel stated that the common law position as obtained before the making of Legal Notice 39 Section 13 was, as succinctly put in Halsbury's Laws of England 3rd Edition Volume 9 para 356 at pp 830 that*:* "Where during proceedings and after some of the witnesses has been called, the presiding judge dies, another judge may at the request of the parties preside at the continuation of the same hearing if there is no conflict of the evidence and after reading the shorthand notes of the evidence, and the witnesses who have given evidence need not be recalled". This position, they urged was distilled from a number of cases cited in the Banjul Breweries' case: *Coleshill v Manchester Corporation* [1928] 1 KB 776*; Re British Reinforced Concrete Engineering Co. Ltd's Application* [1929] 45 TLR 186*; Bolton v Bolton* [1949] 2 All ER 908. Counsel's contention is that from all the cases cited, the position was that where a Judge could not continue with the hearing of a case, the Court could not continue where he had left off unless both counsel had agreed that it should do so. Counsel averred that although there was a mischief which had not been provided for in the common law, being that where for reasons other than physical incapacity such as where the Judge left the jurisdiction nor ceased to be a High Court judge, and a case he had started hearing had not been concluded, there was a difficulty. They alleged however that the lawmakers had made no provision to cure that mischief. Counsel canvassed the position that Section 13 of the Legal Notice 39 could not change the contents of the main legislation as it was subsidiary legislation and could not override the enabling Act itself. For this proposition, they relied on passages in Bennion on Statutory

Interpretation 2nd Edition at page 152 that "unless the enabling Act so provides, delegated legislation cannot override any Act and certainly not the enabling Act itself. Indeed it is taken not to be authorised to override any rule of the general law". Counsel also relied on an excerpt Maxwell on the Interpretation of statues that "…they must not be in excess of statutory power authorizing them, nor repugnant to that Statute or to the general principle of law". Counsel furthermore submitted that Section 13 could not be construed out of consonance with the constitutional provisions on fair hearing in respect of the parties' right to have their case heard by one Judge to completion. The duty of the Courts they urged, was to find the truth of a matter and in that pursuit, the Judge should have latitude in the trial cases without being fettered in the manner in which he will reach an impartial decision.

It was the contention of counsel therefore, relying on dicta contained in Essang v Bank of the North [2001] 6 NWLR (Part 789 397 pp A-C) *and* also P.B. (Nig) PLC v O.K Contract Point Ltd [2001] 9 NWLR (Part 717) 80 at 90 pp E-F that the word "shall" appearing in Section 13 of Legal Notice 39 had to be given a permissive interpretation rather than a mandatory one, seeing that the apparently mandatory word "shall" has in certain circumstances in order to achieve justice, been held not to be restricted to a mandatory interpretation. In conclusion, counsel submitted that the ruling of the High Court was proper, being in consonance with the general law and constitutional rights of the parties to a fair hearing. Counsel stated that in that regard, it was irrelevant that the decision had the effect of overreaching the decision of Itam J.

There is no gainsaying that the present appeal is predicated upon the interpretation of Section 13 of Legal Notice No. 39. In that exercise, I have adverted my mind to some pertinent matters to be discussed shortly. I have chosen to first address the issue of the common law position on the hearing of cases by a new Judge when the judge seized with it is incapable by reason other than of death, to continue with the hearing the case. In my view there was no clear rule, for it cannot be gainsaid that there was no uniformity in the cases cited by the respondent which were mentioned obiter in Banjul Breweries' case: *Coleshill v Manchester Corporation* [1928] 1 KB 776; *Re British Reinforce Concrete Engineering Co Ltd's Application* [1929] TLR 186; *Bolton v Bolton* [1929] 2 All ER 908; nor did those and other cases deal with situations such as brought about the present circumstance, or

contemplate the frequent departure of Judges that happens so frequently in this jurisdiction.

The dictum of Scrutton LJ *in Coleshill's case* on the matter was obiter, and although he thereby frowned upon the practice of having a Judge continue were another left off (except where the evidence was taken on commission or in an examination), he did not declare it wrong, offensive or otherwise contrary to any recognized common law position. The sentiments he expressed were it seems to me, more a statement of opinion than the exposition of a principle of common law. In the case of *Owners of the Steamer Janet Quinn v Owners of the Motor Tanker Forest Lake* [1966] 3 All ER 833, the Court was confronted with a dire situation. Apart from the absence of the Judge by reason of retirement, there was the evidence of a witness who had since died and so could not be retaken. In those dire circumstances and assisted by both obliging counsel, faced no doubt with an uncommon situation, the Court ruled that it would preserve the said evidence which had been taken on commission. It seems then that a certain principle as was stated in Hailsbury's Laws of England Hailsham Ed. Vol. 26 para 87 at page 158 footnote (a) evolved, that where there were no conflicts in evidence and parties agreed, then a subsequent judge could continue to hear a case started by a previous Judge. I hardly consider it a statement of the common law position on the matter precluding any other and so fail to see how counsel arrived at the conclusion that but for the agreement of counsel, every matter left unfinished by another judge must be heard de novo by the next Judge to whom it is assigned. Be that as it may, I am not surprised that there appears to be a dearth of authorities on the issue of the inability of a Judge to hear a case to conclusion, save in the circumstances of death. This in my view, is because the situation confronting this jurisdiction that gave cause and which paved the way for the coming into being of Section 13 of Legal Notice 39 is not a common occurrence in respect of which the common law would, if it were otherwise, have no doubt a clear answer. There must be a reason for the coming into being of Section 13 of Legal Notice 39, and it is not, in my judgment, what was stated by counsel in the respondent's brief – that it was intended to restate the common law position, but rather to remedy this dire circumstance of a serious backlog of cases in this jurisdiction which has been caused by a number of factors. Chief among these factors is the incidence of Judges who are engaged on contract for

limited periods and who more often than not, regrettably leave the jurisdiction without completing part-heard cases. The practice of some Judges starting de novo results in inevitable delay and frustration of parties and witnesses and is an undesirable situation not prevalent in many jurisdictions.

In my opinion, whatever the reasons for bringing that provision into being, the reasons included the bid to help along the cases stalled by the unavailability of Judges who start them, and to see to their speedy disposal. The very language of the said provision in my view speaks for itself; and in my judgment, it commands a certain course of action to be taken by the succeeding judge in respect of such cases – a matter that deserves no other interpretation than the literal meaning of the words "shall continue". It is interesting that in his ruling, Paul J stated the mischief for which the legislation was made quite correctly i.e. the delay in the disposal of cases, but proceeded to give a permissive interpretation to the word "shall" such as will give it similar import as the word "may" regarding the continuation of hearing by a succeeding Judge.

However, it is a cardinal rule of interpretation that the use of a word in a statute must be read as intending to mean the same wherever it appears in that legislation unless the contrary is indicated or unless attributing the same meaning to the word will lead to absurdity. Section 13 of Legal Notice 39 reads: "Order XXXll of Schedule ll of the Rules is amended by adding a new Rule 3 immediately after Rule 2 as follows:

> ''Where a Judge is unable for any reason to complete the trial of any suit or matter, the Chief Justice shall assign the suit or matter to another judge who *shall* continue the case and give judgment at the end of the proceedings" (my emphasis).

In my view, the word "continue" is not, contrary to the view of counsel for the appellant (and for which reason she applied herself to providing the dictionary meaning thereof), what is at stake here. The reasoning of Paul J upon which he ordered the trial de novo was not that he did not appreciate the word "continue", but that he interpreted the word "shall" as permissive, and not mandatory, so that in his view, the Judge had a choice, only if counsel were in agreement, to continue with the hearing, otherwise, the Judge, in his view was not compelled to continue the hearing where the previous Judge left off. Indeed, he was of the view

that for proper administration of justice, it was preferable for the trial to be conducted de novo. If for the sake of argument, the makers of the legislation intended a permissive interpretation of the word "shall" for the conduct of the case by a succeeding judge, would they also have intended the same interpretation for the first "shall" involving the Chief Justice's duty of assigning the case? Did the makers of the Rules perhaps intend that the Chief Justice in such a situation had a discretion whether or not to assign the case standing over from another Judge to a new Judge? In my judgment that interpretation would be absurd, and if so, the makers must have intended the use of the word "shall" to be imperative, rather than permissive as also in the other "shall" appearing in the same paragraph as the first, which placed no discretion in the Chief Justice in what to do with a part-heard case standing over from an unavailable judge.

The first cardinal rule of interpretation is that every word, unless used in a technical sense, ought to be given its ordinary or literal interpretation, as legislators are generally presumed to intend what they actually convey by the words they use. There is a glut of authority regarding this position. See *The Queen in the Prosecution of J. F. Pemsel v Commissioners of Income Tax* (1888) 22 QBD 296 where it was held that "the underlying principle is that the meaning and intention of a statute must be collected from the plain and unambiguous expressions used therein rather than from any notions which may be entertained by the court as just and expedient." That is the position, except in certain circumstances and only when the words are such that interpreting them in the ordinary sense may give absurd results, or be otherwise inconsistent. Then the intendment of the law in relation to its raison d'être may become relevant in applying the interpretation that will avoid absurdity. In those cases, other approaches to construction of Statutes may be used. Denning in *Ministry of Housing & Local Government v Sharp [1970] 2 QB 233* and in his book "The Closing Chapter" at page 98 advocated for the purposive approach. In other circumstances where the words read in context may appear nonsensical, they may be said to bear a meaning other than the ordinary and be construed accordingly, per *Lord Romer in Barnard v Gorman* [1941] AC 378 at 396 HL.

Where there is ambiguity in the words used the approach adopted in *Heydon's case (1554) 3 Co Rep. 7a* and urged upon this Court by

learned Counsel for the respondent is that, the mischief meant to be cured by the statute must be ascertained to arrive at the intended meaning of the words used. It appears that Paul J's excursion into interpreting the word "shall" other than in its ordinary imperative meaning seems to have been predicated upon a supposition that such a course was called for, for he said in his ruling:-

> "The position a Court adopts at any particular time or in any circumstance very much depends on the nature of the enactment and its purpose and the peculiar facts and circumstances of each case".

I do not however consider Heydon's case or any of the circumstances before now discussed relevant in the present exercise with which the court is occupied, as the words used in the statue which Paul J purported to interpret, are clear and unambiguous. But even if for the sake of argument it were said that the words used were ambiguous such that the mischief rule had to be adhered to, I am in no doubt that the correct interpretation to be accorded that position would be the same: that is, that a succeeding Judge was compelled to continue where the last Judge left off and had no discretion in the matter. I have before now said, (a matter in respect of which the respondent is in agreement), that there was no settled common law position regarding the situation of frequently departing judges with unfinished hearing of cases such as obtains in this country with such regularity, although the preferred practice advocated was trial do novo where the Judge had died.

It is my view then that Section 13 of Legal Notice 39 was meant to cure the mischief which was the delay in trials thus the Chief Justice was thereby mandated to assign the case to a new Judge, and that Judge was in turn mandated to continue where the last Judge left off. Any other interpretation in light of the mischief sought to be cured (which the Lower Court recognized), would render the legislation ineffective to cure the said mischief, except where it so pleased a Judge, thus rendering it unnecessary. Surely such an interpretation must be avoided particularly where the ordinary meaning of the words used will effectively address the legislation's raison d'être. The cases cited by learned counsel for the respondent urging a permissive interpretation are, with respect unnecessary. I must also state that this Court in commenting on this vexed question of whether or not Judges can continue cases started by

various Judges albeit obiter in the Banjul Breweries case, recognized that Section 13 of Legal Notice 39 had changed the position it deemed preferable (that is that each Judge start and complete his own cases and form his own impressions), and asserted that the common law cases that would have been persuasive on this point, were whittled down in effect by reason of the said provision. Perhaps it is a good thing that there was no issue raised in the court below that called for a decisive pronouncement by this court in that case. The sentiments stated in that case remain thus sentiments and ought to be given the quietus. The relevant words contained in Section 13 of Legal Notice 39 of 1995 are "shall continue". I must say that the learned counsel for the appellant's provision of the Oxford English Dictionary meaning of "continue" is helpful after all. It reads "persist in, maintain, not stop, resume or prolong, recommence after a pause, be a sequel to …" The word "shall" is by ordinary usage where it seeks the performance of a thing, imperative in meaning. It is my view, that in face of the clear literal meanings of the two words "shall continue", the excursion of the Judge into murky waters in which he rendered the very existence of Section 13 of Legal Notice 39 superfluous was unnecessary. This is because in my view, not using the ordinary meaning of "shall continue" to be imperative thus commanding performance, and to mean completing what a previous Judge had started in view of the raison d'être of the legislation, will rather lead to absurdity and not be within the intendment of the makers of that legislation.

The Learned Judge in his ruling apparently relied on authorities which were undisclosed in holding that it is not every time that the word "shall" ought to be interpreted to be imperative, but that where circumstances called for such, a permissive construction may be possible. But what necessitated a construction beyond literal interpretation in circumstances especially in view of the Court's recognition that the mischief sought to be cured was the removal of delay in the hearing of cases? In this regard it is pertinent to recall the observation of Scott LJ in *Croxford v Universal Insurance Co. Ltd v Gresham Fire and Insurance Society* [1936] 2 KB 253 at 280 CA that:-

> "Where the words of an Act of Parliament are clear, there is no room for applying any of those principles of interpretation which are merely presumptions in cases of ambiguity."

But counsel for the respondent, alleging that the existing common law was in support of de novo hearing of part-heard cases by new Judges said that in any case, Legal Notice 39 being a subsidiary legislation cannot change the existing law or override the main Act under which it is made. This behoves me to have a discussion on the import and force of Legal Notice 39, an amendment to the High Court Rules which itself a subsidiary legislation. Is that position correct in the instant case? I think not. Legal Notice 39 no doubt seeks by the literal interpretation of, "shall assign" in relation to what must be done with the case left part-heard by a departed Judge, and also "shall continue" in relation to the conduct thereof following such assignment, to see to the disposal of cases left unfinished by departed Judges. Even if the existing common law provided for a situation contrary to what is contained in Legal Notice 39 (and I have not found it to be an established fact), did the fact that the said amendment to the Rules of Court were made by the Rules of Court Committee and not Parliament, make it incapable of changing that position? I think not. See Halsbury's Laws of England Vol. 36 para 484 page 732 where it is stated that "subordinate legislation, if validly made, has the full force and effect as a statue."

Moreover, Section 11(d) of the Interpretation Act Cap 4, states that subsidiary legislation duly published in the Gazette shall have the force of law. No argument of validity or otherwise has been canvassed and is not an issue here. Furthermore, Section 14 of Cap 4 thereof declares that any act done under subsidiary legislation made under any power contained in an Act is deemed to be done under that Act, or in pursuance or execution of the powers of or under the authority thereof, and that Act even if repealed does not affect the validity of the Acts done under the subsidiary legislation. See also Section 13 of Cap 4. There is no doubt then that in The Gambia, the Rules of the High Court Schedule II, made as subsidiary legislation under Section 72 of the repealed Supreme Court Ordinance (Cap 5 of 1955) and saved by Section 56 of Cap 6:01 Courts Act as amended, have the same force as an Act passed by Parliament, and in so far as any provision thereof is not inconsistent with the repealing Act Cap 6:01, has the power to alter even existing common law if it was designed to achieve that purpose. In that light, where a literal interpretation of its provision would achieve that purpose, it must be adhered to. "The golden rule is that the words of a statute must prima facie be given their ordinary meaning. We must not shrink from an

interpretation which will reverse the previous law; for the purpose of a large part of our statute law is to make lawful that which would not be lawful without the statute…judges are not called upon to apply their opinions of sound policy so as to modify the plain meaning of statutory words.'' See *Nokes v Doncaster Amalgamated Collieries* [1940] AC 1014 at 1022.

In my view then, Section 13 of Legal Notice 39, an amendment which introduced an addition to the part of the High Court Rules (subsidiary legislation) headed "Trial" is effective, not being inconsistent with the parent Act, to provide for the situation it was intended to take care of which is to compel the continuation of hearing of a part-heard civil case left over from a previous Judge by a succeeding Judge to whom it is assigned. This was so even if it altered the existing common law position. It did not give a discretion to such a Judge as to whether or not to continue or start hearing afresh. The Learned Judge then in my view erred when he decided to hear the case de novo upon interpreting Section 13 of Legal Notice 39 as giving him a discretion as to how to handle the unfinished case assigned to him. This then brings me to a discussion of the repercussion of that ruling of Paul J, the subject of this appeal being: the significance of events after the fact, before now set out. Following the said ruling, the Learned Judge, as previously mentioned, went ahead and started hearing de novo. In the process, he admitted documents that had been rejected by the previous Judge sitting in that same Court which ruling was the subject of an appeal before this Court. The Learned Judge did this in spite of the following: the fact of the appeal against Itam J's ruling was brought to his attention as per the supplementary record exhibited by the appellant. The fact that the Learned Judge's ruling was also a subject of appeal and furthermore, that a motion for stay of proceedings pending the hearing of the appeal (after he had refused an earlier application), had been filed before this Court were also brought to his attention. Without considering what might be determined by this court regarding the appeal against the Learned Trial Judge's decision to start hearing de novo, what the result would be, if the appeal already lodged before this Court against the ruling of Itam J was reversed or upheld by this Court, the rejected documents were admitted by the same Court with a new Judge.

It is my view and I have said so in no uncertain terms that the Learned Judge's decision to hear the case de novo was erroneous, as contrary to

Section 13 of Legal Notice 39. But it was also, in my judgment, dangerous, for it created the situation in which this court was rendered impotent and indeed redundant, for whether or not the appeal succeeded or failed would, in face of the orders made by the succeeding judge in disregard of the appeal, be of no moment. It is not for nothing that our jurisprudence allows for the appellate process, and it is important that at all levels respect be had for the work of other courts particularly the Appellate Court, so as not to make the whole process a laughing stock. This situation is made possible in circumstances as obtained in this case where the appellate court was called upon to sit over matters already overtaken by events arising out of the decision of a lower court judge having the effect of aiding one party to overreach the other.

I cannot help but note that in the respondent's brief, counsel asserted that it did not matter that the ruling of Paul J had the effect of overreaching the ruling of Itam J (as he then was). This in my view is what may offend the constitutional right to a fair hearing, and not, as is canvassed by counsel for the respondent, the practice of continuing with the hearing in accordance with the law while the Appellate Court was left to determine the question placed before it by an aggrieved party.

For all the reasons discussed, I find merit in the appeal. Accordingly, the order of the court below is hereby set aside. In consequence, the proceedings before Paul J after his ruling to start hearing de novo are hereby declared null and void. The appeal is thus allowed. Costs of D10, 000 is awarded to the appellant.

Appeal Allowed.
FLD.

THE STATE v ISAAC CAMPBELL

COURT OF APPEAL OF THE GAMBIA
(Civil Appeal No. 2008)

4th August 2008

Agim PCA, Ota JA, Wowo Ag. JA

Appeal – Notice of appeal – Filing of same – Condition precedent to an application for stay of proceedings pending an appeal – Need to exhibit notice of appeal.

Court – Stay of criminal proceedings – Application by way of motion on notice supported by an affidavit – Discretionary power to grant or refuse application for stay – Duty to exercise the discretion judiciously – Nature of facts that warrant a favourable grant – Consequence of a favourable grant.

Jurisdiction – Stay of proceedings – Source of power to entertain application for stay – Application by way of motion on notice supported by an affidavit.

Party – Submission of counsel is not a substitute for non-existent evidence.

Practice & Procedure – Evidence – Improper for counsel to lead evidence in his submission or address – Stay of proceedings in a criminal trial – Application by way of motion on notice supported by an affidavit – Need to exhibit notice of appeal – Effect of a favourable grant – Exercise of Court's discretion in determining whether to stay criminal proceedings pending appeal – Nature of facts that warrant a favourable grant.

Stay of proceedings – Grant of application – Not granted just for the asking – Nature of facts that warrant a favourable grant.

Held, unanimously allowing the appeal (*per Agim PCA, Ota JA, Wowo Ag. JA concurring)*

1. It is trite law that the Court to which an application for stay of proceedings pending appeal is made has the discretionary power to deal with it one way or the other.

2. The Court has a duty to exercise such discretion properly. A discretion can only be proper if it is judicially and judiciously exercised.

3. A discretion is judicially and judiciously exercised if it is done with regard to what is right and equitable in the peculiar circumstances of the case, the relevant law and is directed by the reasoning. In other words, it is not the indulgence of a judicial whim, caprice or arbitrariness, but the exercise of sound judicial judgment based on facts and guided by law or the equitable decision of what is just and proper under the circumstances.

4. The starting point in a proper exercise of discretion to determine an application for stay of proceedings is for the Trial Court to find out if the applicant has put before the Court sufficient facts to warrant a grant of such application. It is the legal duty of the applicant to put before the Court such facts. A Court cannot and should not issue an order for stay of its trial proceedings pending an interlocutory appeal against its decision just for the asking. Such a relief is never granted as a matter of course. To do so will amount to an improper exercise of discretion.

5. The discretion to grant the application cannot be exercised on the basis of just any facts. The decision to grant the application must be based on facts that show that it is just, equitable and legal to do so.

6. Important factors to consider include the following:-

    1. That a competent and arguable appeal is actually filed and pending before the application for stay of proceedings was made.

    2. That a continuation of the trial proceedings will prejudice some right of the applicant in the trial or occasion a miscarriage of justice in the trial.

3. That a continuation of the trial proceedings will stultify the appeal process or nugate the result of the appeal in the event of a successful appeal.

4. That the appeal is not only arguable but involves serious or substantial legal issues that cannot await the final determination of the trial and be taken up generally with the appeal against such final decision or that will prejudice the case of either party or that cannot be resolved subsequently in the trial proceedings.

5. That the stay of the trial proceedings will not unduly delay or frustrate the trial proceedings.

6. That the application is not an abuse of the process of court.

7. An order for stay of trial proceedings pending an interlocutory appeal should not be taken lightly. It has far reaching consequences for all the parties and for the administration of justice. As earlier said an applicant for such an order must adduce sufficient and relevant facts to support the application. It is therefore important that he approaches the court by way of a motion on notice supported by an affidavit to enable him adduce evidence of such facts. If he makes the application orally, then he will not have the opportunity to put those facts before the Trial Court. That is what happened in this case. It is a self-imposed disability. The Court must deal with the application as presented and lacks the power to speculate as to the existence of the facts that have not been placed before it. It has no power to go in search of those facts in the determination of such an application.

8. The filing of a competent notice of appeal is a condition precedent to applying for an order for stay of proceedings pending appeal. The application for the order of stay pending appeal proceeds on the basis that an appeal is pending. That is why the Court is asked to make an order pending the determination of that appeal. *A fortiori*, such an order can only be made if an appeal is pending. In the absence of an appeal, an application for stay of

proceedings pending appeal is incompetent and the Court will lack the jurisdiction to entertain and determine such an application. See the Nigerian case of *Martins v Nicannar Foods Ltd & Ors* (1988) 2 NWLR (Pt 74) 75 at 82 and *Tika Tore Press* (1968) 1 ALL NLR 210. An application for stay pending an appeal on the basis of assurance by learned counsel that the applicant intends to appeal or is appealing is incompetent.

9. The filing of an appeal has to be proved by exhibiting the notice of appeal already filed. The mere ipse dixit of counsel at the bar that the notice of appeal has been filed is of no moment and does not amount to proof of the filing of such notice of appeal. An assurance from counsel that the record of proceedings are being prepared for the appeal does not prove the existence of an appeal.

10. A party who wants to rely on the fact that record for an appeal are being prepared must exhibit along with the affidavit in support of the motion for stay, documentary evidence of payment for the preparation of the record or other documentary evidence that such records are being prepared. In any case, such evidence is not useful for the purpose of showing that an appeal has been filed. Evidence that the record of appeal is being prepared merely serves to show a diligent pursuit of the processing of an already filed appeal. It was therefore wrong for the Learned Trial Judge to have held that the appeal is a reality because she is aware that the record is being typed for the appeal.

11. The submission of counsel in Court cannot take the place of evidence that does not exist. It is not within the province of counsel to lead evidence in his address or submission.

12. The address or submission of counsel must be based only on the admitted evidence before the Court and nothing else. There was clearly no basis for holding that the record is being typed for the appeal.

13. The peremptory manner the Learned Trial Judge dealt with this matter without showing any sensitivity to the demands of justice in such a case leaves much to be desired. As the Nigerian Court of Appeal per Akanbi JCA (as he then was) said in *Ogiri v Olorik* (1991) 4 NWLR (Pt 184) 254:-

> "…in the exercise of the discretionary power to order a stay of proceeding the courts have always acted as in deed they have always been enjoined to do, with great circumspection and extreme caution. Often times it causes unnecessary delay and as justice delayed is justice denied, any attempt to halt the courts' proceedings or to suspend to the exercise of its jurisdiction must not be treated or viewed with levity and no application for stay which will be prejudicial to or cause injustice to the plaintiff ought to be granted. See also *Norton v Norton* (1907) 2 CH 22."

14. An order staying proceedings has the potential to send a wrong signal on the effectiveness of the legal system to meet the legitimate public expectation of law enforcement. It creates a climate of impunity for crime and renders the criminal process hopeless. As this Court said in the case of *The State v Carnegie Mineral Ltd & Anor* (2002-2008) 2 GLR 272, "the Courts will not issue or allow any process that has the effect of obstructing the due process of administration of justice. An order of stay of proceedings or stay of execution of a judgment pending trial or appeal can only be made where it will facilitate or help the course of justice."

15. The Courts particularly a High Court, being a Superior Court of record must take deliberate steps to ensure that their decisions on matters with far reaching consequences on the delivery of justice are well considered. It does not help the image of the Courts if matters like this are treated with such levity as the Trial Court displayed in the determination of the oral application for stay of proceedings pending appeal.

16. It is beyond argument that an order setting aside the decision of the Trial Court naturally arises from the decision allowing the

appeal. It is preposterous to suggest, as the respondent has done in his brief, that since there is no ground of appeal contending that the appellant is entitled to such an order, it cannot lie.

Cases referred to:

AG Anambra State v AG Federation & 34 Ors Vol. 22 NSCQR 572 at 577
Camara v Vare (1997-2001) GR 50
First International Bank v Gambia Shipping Agency Ltd (2002-2008) 2 GLR 258
Hisham Mahmoud v Karl Bakalovic (2002-2008) 2 GLR 515
Kotoye v Saraki (1995) 5 SCNJ 1
Lang Conteh v T.K. Motors (2002-2008) 2 GLR 23
Martins v Nicannar Foods Ltd & Ors (1988) 2 NWLR (Pt 74) 75 at 82
Minteh v Danso (No.1) (1997-2001) GR 216
Momodou K. Jobe v Tijan Touray (2002-2008) 2 GLR (Unreported) decision of Court of Appeal
Nigerian Industries Ltd. v Olaniyi (2006) 13 NWLR (Pt 998) 537
Norton v Norton (1907) 2 CH 22
Ogiri v Olorik (1991) 4 NWLR (Pt 184) 254
Ogunremi v Dada (1962) ALL NLR 663
Ousman Tasbasi v Abdourahman Jallow & Anor (2002-2008) 2 GLR 77
Tika Tore Press (1968) 1 ALL NLR 210
The State v Carnegie Mineral Ltd & Anor (2002-2008) 2 GLR 272
Williams v Williams (2002-2008) 2 GLR 491

A.S Umar (PSC) for the appellant
B. S. Conteh (Esq) for the respondent.

AGIM PCA. Following the ruling of the Trial High Court on 1st February 2007 dismissing an objection by way of motion on notice to quash the information filed against the respondent herein in Criminal Case No.HC/402/06/CR/0811/30, the said Trial Court adjourned the case to 12th February 2007 for the arraignment of the respondent. On this day, before the plea of the respondent could be taken, Learned Counsel for the respondent informed the Court that the respondent intends to appeal against its ruling of 1st February 2007 and for that reason urged the court to stay proceedings in the case. The appellant objected to this application, insisting that plea be taken and that the appeal appears to

be a mere ruse to delay the trial of the respondent. The attention of the Trial Court was drawn to the fact that since the information was filed, four months had been spent on preliminary issues without the case moving forward and that the respondent has not shown how taking the plea will prejudice him. Learned counsel contended that taking the plea will render the result of his appeal nugatory. The Trial Court per M. Monageng J ordered a stay of the criminal proceedings in the following words:-

> "I am aware of the fact that Justice should not only be done but be seen to be done. Preliminary applications are allowed in law and once they are entertained by the Lower Court, an appeal from either party becomes a reality. The basis of the preliminary objection was resistance to take a plea. The ruling of this court went against the accused and he has a right to appeal my decision. I am aware that the record is being typed specifically for the appeal, to that extent the appeal is a reality. It would serve no purpose for the plea to be taken at this stage. The proceedings shall be stayed and the parties should ensure the appeal is expedited."

Dissatisfied with this ruling, the appellant on the 13th February 2007 filed a notice of appeal containing the following grounds of appeal:-

> "The Learned Trial Judge erred in law when she ordered stay of proceedings in a Criminal case on the basis of a mere declaration of intention by the Respondent that it will appeal the ruling of the Court.
>
> The Learned Trial Judge erred in law and in fact when she held that the appeal by the Respondent was a reality simply because she was aware that the records of proceedings were being typed for the purpose of an appeal.
>
> The Learned Trial Judge erred in law when she refused to take the plea of the Accused/Respondent on Monday 12th February 2007."

On the order of this court, both parties have filed and exchanged briefs of argument. Both sides at the hearing of this appeal adopted their briefs. The appellant in its brief raised three issues for determination as follows:-

"Whether oral declaration of counsel that it will appeal a ruling of the Court suffices for the Court to grant stay of proceedings without more.

Whether the knowledge that the record of the Court was being typed for the purpose of an appeal dispenses with the requirement of filing an.

Whether in view of section 216 of Criminal Code the Trial Court was right in staying proceeding instead of taking plea when there was no other pending objection in law against the information."

The respondent in his own brief agreed substantially with the statement of facts in the appellant's brief and also raised its own three issues for determination as follows:-

"Whether it is within the power of the Trial Court to order that proceeding be stayed after hearing oral application for stay in the presence of the Appellant's Counsel?

What is the Propriety of the second relief sought by the Appellant when the same is not derived from the grounds of appeal.

Whether the decision of the Trial Court to stay proceedings after hearing oral application for stay in the presence of the Appellant's Counsel occasioned miscarriage of justice to entitle the Appellant to any of the reliefs sought on his Notice of Appeal dated 13th February 2007."

After considering the record of this appeal, the very terse ruling of the Trial Court, the grounds of appeal, the issues for determination and the arguments in the respective briefs, I think that the issues that have arisen for determination are:-

1. Whether the Learned Trial Judge properly exercised her discretion in ordering a stay of the criminal proceedings.

2. Whether the second relief sought for by the appellant in its notice of appeal is competent and available in law.

It is trite law that the Court to which an application for stay of proceedings pending appeal is made has the discretionary jurisdiction to deal with it one way or the other. It has a duty to exercise such discretion properly. A discretion can only be proper if it is judicially and judiciously exercised. A discretion is judicially and judiciously exercised if it is done with regard to what is right and equitable in the peculiar circumstances of the case, the relevant law and is directed by conscionable reasoning of the Trial Judge to a just result. In other words, it is not the indulgence of a judicial whim, caprice or arbitrariness, but the exercise of sound judicial judgment based on facts and guided by law or the equitable decision of what is just and proper under the circumstances. The starting point in a proper exercise of discretion in determining an application for stay of proceedings is for the Trial Court to find out if the applicant has put before the Court sufficient facts to warrant a grant of such application. It is the legal duty of the applicant to put before the Court such facts. A Court cannot and should not issue an order for stay of its trial proceedings pending an interlocutory appeal against its decision in the proceedings just for the asking. Such a relief is never granted as a matter of course. To do so will amount to an improper exercise of discretion. The discretion to grant the application cannot be exercised on the basis of just any facts. The decision to grant the application must be based on facts that show that it is just, equitable and legal to do so. A long line of judicial decisions across jurisdictions, including the very recent decision of this Court in *The State v Carnegie Mineral Ltd & Anor* (2002-2008) 2 GLR 272 have established the type of facts that must be adduced by the applicant to justify a grant of such application. The facts enumerated in the above case as the most important facts a Court should take into consideration include the following:-

1. That a competent and arguable appeal is actually filed and pending before the application for stay of proceedings was made.

2. That a continuation of the trial proceedings will prejudice some right of the applicant in the trial or occasion a miscarriage of justice in the trial.

3. That a continuation of the trial proceedings will stultify the appeal process or nugate the result of the appeal in the event of a successful appeal.

4. That the appeal is not only arguable but involves serious or substantial legal issues that cannot await the final determination of the trial and be taken up generally with the appeal against such final decision or that will prejudice the case of either party or that cannot be resolved subsequently in the trial proceedings.

5. That the stay of the trial proceedings will not unduly delay or frustrate the trial proceedings.

6. That the application is not an abuse of the process of court.

In light of the foregoing, it becomes necessary to ask if the Trial Court considered if the applicant had adduced sufficient facts to warrant a grant of the application before it proceeded to grant the application. The ruling of the Trial Court is in nine lines and the basis for granting the application is stated therein as follows:-

> "I am aware that the record is being typed specifically for the appeal, to that extent the appeal is a reality. It would serve no purpose for the plea to be taken at this stage."

This is followed by the last sentence containing the order of stay. There is nothing in this terse ruling showing that the Trial Court did address its mind on the need to find out if the applicant has adduced sufficient facts or that the applicant has indeed adduced such facts to warrant a grant of the application. Since it did not address its mind to that need, it did not find out if those facts existed. Upon the mere indication by learned counsel for the respondent at the bar that the respondent intends to appeal against the ruling of 12th February 2007 and that the record of the appeal is being typed, the Trial Court ordered a stay of the trial

proceedings. The respondent adduced no facts to support his oral application in Court for stay of the trial proceedings. My impression is that he had no genuine need for the equitable relief of an order of stay of proceedings pending appeal. It was merely a stratagem to prevent his arraignment. He adduced no facts to show that there was a genuine need to order the stay of the trial proceedings. Such an application coming on the heels of an earlier decision of the Trial Court dismissing the respondent's application to quash the information, showed desperation to prevent his trial from taking off. The respondent did not file an appeal against the decision dismissing his objection on 1st February 2007. On the 12th of February 2007 he merely expressed an intention to appeal. If indeed the respondent wanted to appeal, the period of 11 days was sufficient for him to have filed a notice of appeal against the ruling. He and his counsel were in court on 1st February 2007 when the matter was adjourned to 12th February 2007 for his plea to be taken. He had reasonable opportunity to file a motion on notice praying for an order to stay the trial proceedings and adduce affidavit evidence of relevant facts in support of the motion. An order for stay of trial proceedings pending an interlocutory appeal should not be taken lightly. It has far reaching consequences for all the parties and for the administration of justice. As I said earlier, an applicant for such an order must adduce sufficient and relevant facts to support the application. It is therefore important that he approaches the Court by way of a motion on notice supported by an affidavit to enable him adduce evidence of such facts. If he makes the application orally, then he will not have the opportunity to put those facts before the Trial Court. That is what happened in this case. It is a self-imposed disability. The Court must deal with the application as presented and lacks the power to speculate as to the existence of the facts that have not been placed before it. It has no power to go in search of those facts in the determination of such an application.

The filing of a competent notice of appeal is a condition precedent to applying for an order for stay of proceedings pending appeal. The application for the order of stay pending appeal proceeds on the basis that an appeal is pending. That is why the Court is asked to make an order pending the determination of that appeal. *A fortiori*, such an order can only be made if an appeal is pending. In the absence of an appeal, an application for stay of proceedings pending appeal is incompetent and

the Court will lack the jurisdiction to entertain and determine such an application. See The Nigerian case of *Martins v Nicannar Foods Ltd & Ors* (1988) 2 NWLR (Pt 74) 75 at 82 and *Tika Tore Press* (1968) 1 ALL NLR 210. An application for stay pending an appeal on the basis of assurance by learned counsel that the applicant intends to appeal or is appealing is incompetent. The filing of an appeal has to be proved by exhibiting the notice of appeal already filed. The mere *ipse dixit* of counsel at the bar that the notice of appeal has been filed is of no moment and does not amount to proof of the filing of such notice of appeal. An assurance from counsel that the record of proceedings are being prepared for the appeal does not prove the existence of an appeal. A party who wants to rely on the fact that records for an appeal are being prepared must exhibit along with the affidavit in support of the motion for stay, documentary evidence of payment for the preparation of the records or other documentary evidence that such records are being prepared. In any case, such evidence is not useful for the purpose of showing that an appeal has been filed. Evidence that the record of appeal is being prepared merely serves to show diligent pursuit of the processing of an already filed appeal. It was therefore wrong for the Learned Trial Judge to have held that the appeal is a reality because she is aware that the record is being typed for the appeal. Furthermore, there was no documentary evidence that any such record is being typed apart from the oral submission of learned counsel for the respondent in Court. So what informed the awareness of the Trial Court that such records were being typed? The awareness is not founded on any fact. The submission of counsel in Court cannot take the place of evidence that does not exist. It is not within the province of counsel to lead evidence in his address or submission. The address or submission of counsel must be based only on the admitted evidence before the Court and nothing else. There was clearly no basis for holding that the record was being typed for the appeal.

The peremptory manner the Learned Trial Judge dealt with this matter without showing any sensitivity to the demands of justice in such a case leaves much to be desired. As the Nigerian Court of Appeal per Akanbi JCA (as he then was) said in *Ogiri v Olorik* (1991) 4 NWLR (Pt 184) at 254:-

> "…in the exercise of the discretionary power to order a stay of proceeding the courts have always acted as in deed they have always been enjoined to do, with great circumspection and extreme caution .. Often times it causes unnecessary delay and as justice delayed is justice denied, any attempt to halt the courts' proceedings or to suspend to the exercise of its jurisdiction must not be treated or viewed with levity and no application for stay which will be prejudicial to or cause injustice to the plaintiff ought to be granted.''

See also the case of Norton v Norton (1907) 2 CH 22. What the Learned Trial Judge did was to order a stay of the criminal trial perpetually. I agree with Learned Principal State Counsel, that this kind of order sends a wrong signal regarding the effectiveness of the legal system to meet the legitimate public expectation of law enforcement. It creates a climate of impunity for crime and renders the criminal process hopeless. As this Court said in *The State v Carnegie Mineral Ltd & Anor* (2002-2008) 2 GLR 272, "the Courts will not issue or allow any process that has the effect of obstructing the due process of administration of justice. An order of stay of proceedings or stay of execution of a judgment pending trial or appeal can only be made where it will facilitate or help the course of justice." Impunity or the perception of it is the greatest challenge to our criminal justice system and its prevention is one of the dominant notions that underlie our criminal law. The Courts by the nature of their constitutional role and status dominate the administration of justice in our Society. The Courts supervise other agencies of administration of criminal justice by their judicial decisions. So whatever the Courts do have a profound and far reaching effect on the Society. My experience is that Courts can, through judicial indiscretion constitute the major cause of impunity in our Society. Impunity or the perception of it is the best indicator of a failed criminal justice system. As stated by the newspaper commentator on the Voyage of the Zong, concerning the danger of impunity, "a community makes a crime general, and provokes divine wrath, when it suffers any member to commit flagrant acts of villainy with impunity. It is hardly possible for a State to thrive where the perpetrator of crime is allowed to go without trial and glory in the infamy and carry the reward for it."

The Courts particularly a High Court, being a Superior Court of record must take deliberate steps to ensure that their decisions on matters with

far reaching consequences on the delivery of justice are well considered. It does not help the image of the Courts if matters like this are treated with such levity as the Trial Court displayed in the determination of the oral application for stay of proceedings pending appeal. In light of the foregoing this appeal is allowed.

With respect to the second issue for determination herein, it is beyond argument that an order setting aside the decision of the Trial Court naturally arises from the decision allowing the appeal. It is preposterous to suggest, as the respondent has done in his brief, that since there is no ground of appeal contending that the appellant is entitled to such an order, it cannot lie. This court can make an order setting aside the decision of the Trial Court once it has allowed an appeal. Since the appeal is allowed this Court can also order that the accused take his plea before the Trial Court. This is the natural result of an order setting aside the decision of the Trial Court. The reliefs sought by the appellant clearly derive from the determination of this appeal on the grounds stated in the notice of appeal. Having allowed this appeal, it is hereby ordered that the Ruling of the trial High Court be set aside and the accused take his plea.

OTA JA: I have had the opportunity of perusing in draft the lead judgment just delivered by my learned brother Agim PCA and I agree entirely with his reasoning and conclusions reached. My brother has admirably set forth in detail(s) the facts of this case. I shall therefore be making references to only the aspects thereof that are absolutely necessary for the purposes of this short concurring comment.

Suffice it to say that the Trial Court as per Monageng J. granted a perpetual stay of proceedings of a criminal suit commenced at the High Court and styled HC/402/06/CR081/40, on the oral application of counsel for the Respondent herein, without more. It is this event that precipitated into the present Appeal filed by the Appellant herein. The need for the exercise of caution in the grant of any order for stay, be it stay of execution or stay of proceedings, cannot be over-emphasized. Courts across jurisdictions have times without number sounded this warning. This is because justice demands that a case be heard and disposed of, within a reasonable time. This duty becomes even more heightened when the proceedings sought to be stayed is that of a criminal case. This is due to the fact that such a case, by its very nature demands a speedy determination. A stay of proceedings operates to delay the proceedings

at the Lower Court. In some cases such a stay has been known to be abused by a party to such an extent that it operates to abort the entire proceedings. Thus the caution that inasmuch as justice may occasionally demand that the proceedings of a case be stayed pending an appeal against an interlocutory decision, the Court must however exercise its discretion to make such an order judicially and judiciously in the interest of substantial justice. A judicial and judicious exercise of this discretion demands that Courts operate upon principles which serve as requisite guidelines for the grant or refusal of such applications. These principles have been stated and re-stated in a long line of cases, one of which is the recent decision of this Court in *The State v Andrew Charles North Field* (supra). These principles include but are not limited to the following:-

1. That there must be a competent Appeal.
2. The pending appeal must be arguable.
3. The applicant must establish special and exceptional circumstances to warrant a grant of the application.
4. The court must consider the competing rights and balance of convenience of both parties.
5. Where the issue of jurisdiction is raised in the pending appeal, the court should grant a stay of proceedings.
6. However, this issue of jurisdiction should be genuinely raised.
7. The action should not be an abuse of the Court's process.
8. The grant of an application for stay will be refused where it will unnecessarily delay and prolong the proceedings.
9. It is also the duty of the applicant to show that it is imperative that the proceedings must be stayed pending the determination of the appeal by placing sufficient material before the court to enable the exercise of its discretion in his favour.

In practice, an applicant for stay of proceedings strives to satisfy these conditions vide the affidavit in support of the application and accompanying exhibits. It is therefore to the affidavit that recourse must of necessity be had in a bid to determine the application since the affidavit must prove the relief sought before it is granted. See *AG Anambra State v AG Federation & 34 Ors* Vol. 22 NSCQR 572 at 577.

The poser at this juncture is therefore "Did the Respondent herein satisfy these attendant conditions to warrant a grant of the stay of proceedings? My answer to this poser is an emphatic no. I say this because an application for stay of proceedings is commenced vide a formal application. Such an application is made by way of motion on notice accompanied by an affidavit stating the grounds (that is) relied on. See the Nigerian case of *Ogunremi v Dada* (1962) ALL NLR 663.

It is abundantly clear from the record of proceedings that the Learned Trial Judge had absolutely no ground upon which she based the grant of the stay. There was no formal application before her, therefore there was no affidavit from which she could decipher the bonafides or not of the orders sought. What the Learned Trial Judge did was to act purely upon an oral application for stay made by counsel for the respondent. Counsel's submissions do not constitute the requisite facts for the nature of the orders sought, and should not therefore be relied on as the basis for the grant of such an order.

Furthermore, a stay of proceedings is also predicated upon the pendency of an appeal. The aggrieved party must have appealed against the order of the Court before such an order is considered. The order takes effect upon pronouncement, so that without an appeal pending, there would be nothing in the way of the court to proceed with the case. Therefore, the pendency of an Appeal before the grant of a stay is fundamental since it is the very foundation of the stay sought. That is why the Supreme Court of Nigeria held in the case of *Kotoye v Saraki* (1995) 5 SCNJ 1, that there cannot be a stay of proceedings pending the determination of an appeal, when in fact the appeal in question is non-existent or has been aborted. It is thus incontrovertible that a party seeking to stay the proceedings of a court must demonstrate that he is challenging the decision of the court by filing an Appeal against same. It is in honour of this very fundamental requirement, that an applicant for stay would in practice exhibit a notice of Appeal disclosing competent grounds of appeal, vide the affidavit in support of the application, along with the judgment or order sought to be stayed and where an application had earlier been refused a certified copy of the ruling refusing it.

Suffice it to say that the totality of the record of proceedings has demonstrated that the Learned Trial Judge failed to give cognizance to this paramount requirement for a grant of this order. It is obvious from the tenor of her order that there was no Appeal pending against the order

of the 1st of February 2007, in respect of which the proceedings was stayed. The Learned Trial Judge acted in spite of the absence of an appeal. She turned a deaf ear to the sound protestations of the learned state counsel, that a mere declaration of intention to file an appeal should not stop the case from proceeding. The Trial Court therefore acted purely on speculations and not facts. I say this because the mere fact that the respondent's counsel indicated his intention to file an appeal and the mere fact that the record of proceedings was being typed is not a guarantee that the respondent would actually eventually file an appeal. More to this is the fact, that even if the respondent were to eventually file an appeal, the mere fact that he filed the appeal is not a *sine qua non* to the grant of a stay. The position of the law as enunciated in a plethora of cases is that the mere fact that the Appeal is filed and that the grounds thereof disclose triable issues, is not on its own sufficient for a grant of a stay. This is because the Court still has to consider each case on the basis of its peculiar facts, so that even if all the principles set forth as guides for the determination of such an application are met, the Court can still refuse the application provided in so doing, it is clear, that the Court exercised its discretion judicially and judiciously in the interest of substantial justice. See *Minteh v Danso* (No.1) (1997-2001) GR 216, *Camara v Vare* (1997-2001) GR 50, *Williams v Williams* (2002-2008) 2 GLR 491 and *Ousman Tasbasi v Abdourahman Jallow & Anor* (2002-2008) 2 GLR 77.

It is my considered view that the approach of the Learned Trial Judge in granting the said stay was, to say the least, high-handed and extremely speculative. By this approach she fell into the grave error of granting a perpetual stay of proceedings pursuant to an order that was not challenged, in that there was no appeal challenging it. She also granted the order upon no parameter, as there was no affidavit filed. It is not the duty of a Court to speculate, but to act upon facts placed before it for a proper determination of the issues raised in every given case.

It is for the above reasons and the more detailed reasons given by my brother Agim PCA in his lead judgment, that I also allow this appeal. I also set aside the order staying the proceedings in criminal case no HC/402/06/CR-81/40 and order that the accused takes his plea.

WOWO Ag. JA. I have before now had a preview of the lead judgment of my learned brother Agim PCA and I agree that the appeal has merit.

The gist of the matter in this case is that on the day before the plea of the respondent could be taken, counsel for the respondent informed the court that the respondent intends to appeal against its ruling of 1st February 2007 and for that reason urged the court to stay proceedings in the case. Despite the objection of the Appellant, the Lower Court ordered a stay of the criminal proceedings. Dissatisfied with the ruling, the appellant filed a notice of appeal on the 13th February 2007. I do not wish to state the grounds here as they have already been stated in the lead judgment. I wish to state that the Courts have over time evolved several cumulative criteria to guide the judicial and judicious exercise of their discretion in dealing with this kind of application. The guiding principles in the exercise of the discretion whether to grant an application for stay of proceedings were set out in the case of *Nigerian Industries Ltd. v Olaniyi* (2006) 13 NWLR (Pt 998) 537 to include the following:

a) That there must be a competent appeal.
b) The pending appeal must be arguable.
c) The applicant must establish special and exceptional circumstances to warrant a grant of the application.
d) The Court must consider the competing rights and balance of convenience of both parties.
e) Where the issue of jurisdiction is raised in the pending appeal, the Court should grant a stay of proceedings. However, this issue of jurisdiction should be genuinely raised.
f) The action should not be an abuse of the Court's processes.
g) The grant of an application for stay will be refused where it will unnecessarily delay and prolong the proceedings.
h) It is also the duty of the applicant to show that it is imperative that the proceedings must be stayed pending the determination of the appeal by placing sufficient material before the Court to enable it exercise its discretion in his favour.

The above criteria has been the reiterated in a long line of recent decisions including *Lang Conteh v T.K. Motors* (2002-2008) 2 GLR 23, *Momodou K. Jobe v Tijan Touray* (Unreported) Judgment of the Court of Appeal, Hisham Mahmoud v Karl Bakalovic (2002-2008) 2 GLR 515. At all times, a Court retains the unfettered discretion to deal with each

application on the basis of its peculiar facts so that even if the above criteria are fully satisfied by an applicant, the Court can still refuse the application. What is important is that it must be clear from the decision of the Court that the refusal is the result of a proper exercise of discretion in pursuit of substantial justice. See *The State v Carnegie Mineral Ltd & Anor* (supra). From the Ruling of the Lower Court, it seems to me that the basis for granting the respondent application is as follows:-

> "I am aware that the record is being typed specifically for the appeal, to that extent the appeal is a reality. It would serve no purpose for the plea to be taken at this stage."

There is no doubt in my mind that the respondent did not file any notice of appeal before the Lower Court granted the stay of proceedings. It therefore means that one of the basic requirements for granting stay of proceeding namely that there must be a competent appeal is missing. Granting a stay of proceedings without filing an appeal will definitely foist a situation of perpetually stalling the criminal trial. I posit that the application of counsel for the respondent asking for a stay of proceedings when he was aware that he had not filed his appeal is an abuse of court process. The Court has an inherent jurisdiction to prevent its process from being abused. See the decision of this Court in *First International Bank Ltd v Gambia Shipping Agencies Ltd* (2002-2008) 2 GLR 258. There being no pending appeal, the application is incompetent and the Court lacked jurisdiction to entertain the application. Moreover, as observed by Agim PCA in *The State v Carnegie Mineral Ltd & Anor* (supra), "in this kind of situation the dominant consideration will be whether the continuation of the trial proceedings will prejudice some right of the applicant in the trial or occasion a miscarriage of justice in the trial and render the result of the appeal nugatory or stultify the appeal process." The respondent at the Lower Court did not adduce any facts to support his oral application for stay of proceedings. I therefore wonder how the Lower Court exercised its discretion in his favour.

In view of the foregoing, the appeal is allowed. It is hereby ordered that the Ruling of the Lower Court ordering a stay of the criminal proceedings be set aside and that the accused should take his plea.

Appeal allowed.

FLD.

MOMODOU D. JALLOW & ORS v FAAMA SAINEL

COURT OF APPEAL OF THE GAMBIA
(Civil Appeal No. 49/2006)

28th July 2008

Agim PCA, Ota JA, Wowo Ag. JA

Appeal – Raising of issues – Power of Court of Appeal to do so suo motu – Ground of Appeal – Alleging error or misdirection – Requirement that particulars of error in law be stated – General ground of Appeal in criminal and civil appeals – Distinction – Specific findings of facts.
Rules of Court – Court of Appeal – Compliance with Rule 12(2) and (4).
Words & Phrases – Error – Meaning of – Wrong or erroneous judgment – Meaning of.

Held, *striking out the appeal (per Agim PCA, Ota JA, Wowo Ag. JA concurring*)

1. Rule 12(4) of The Gambia Court of Appeal Rules permits this Court to deal with this issue and strike out the grounds of appeal on its own motion or on application by the respondent.

2. Generally, the argument of an appeal is an invitation to the Court hearing the appeal to determine the appeal on certain grounds as stated in the notice of appeal.

3. The Court in determining the appeal is entitled to proceed to deal with all such issues without regard to the fact that the parties or any of them omitted to raise any of such issues. It therefore falls within the province of the Court to deal with all the issues touching on the grounds of appeal that have an effect on the determination of the appeal. The hearing and determination of the issues involves essentially a complete scrutiny of the grounds of the appeal.

4. It is beyond dispute that the phrase "wrong in fact and in law" in the context used therein, means the same thing as "error in fact and in law''.

5. A wrong or erroneous judgment means one rendered contrary to law or fact or upon a mistaken view of law or fact or upon a mistaken conception or application of the law or incorrect belief as to the existence or effect of matters of fact.

6. Grammatically, ordinarily and literally the word wrong can also mean error or erroneous and in the context it is used in the 1st ground of appeal it means that the Trial Court erred in fact and in law. At pages 1481 – 1482 it states that when something is wrong it can also mean that it is not correct or is a mistake. It states that to go wrong is to make a mistake.

7. The new Cambridge Advanced Learners Dictionary at page 412 states the meaning of the word "erroneous" as "wrong or false impression" and the word "error" as "mistake or fault", it also defined the phrases, "error of judgment" as "a wrong decision".

8. A ground of appeal that alleges that a judgment is wrong or erroneous in fact and in law without stating the particulars of error is clearly vague and unarguable and must be struck out.

9. The ground of appeal is a notice to the respondent of the case he is to meet in the appeal. It defines the issues in controversy in the appeal so that the respondent is not taken by surprise.

10. The requirement that particulars of the error in law alleged in the ground be stated is a requirement of fair hearing and jurisdiction. The requirement of particularization of errors is to ensure adequate notice of the matters in controversy so that the respondent is not ambushed or disabled by vague and general statements. The jurisdiction of the Appellate Court is limited to the issues contained in the grounds and the particulars of error. See *Edward Graham v Lucy Mensah* (2002-2008) 1 GLR 22 and Haro Co. Ltd & Ors v Ousman Jallow (2002-2008) 1 GLR 128.

11. In criminal appeals, reference to the omnibus ground of appeal ought to be couched as follows:- 'that the judgment is against the evidence or that it is unreasonable or perverse having regard to the evidence.'

12. In Civil appeals, reference to the omnibus ground of appeal ought to be couched as follows:- 'that the judgment is against the weight of evidence.'

13. The basis of the distinction between the general ground of appeal in a criminal appeal and in a civil appeal is founded on the law that the burden and standard of proof in a criminal case is higher than that in a Civil Case. Whereas with the former, the burden is on the prosecution to prove its case beyond reasonable doubt, in the later the burden is on the plaintiff to prove his or her case on a balance of probabilities or preponderance of evidence. See Sections 143 and 144 of the Evidence Act 1994.

14. No other general or omnibus ground of appeal in civil appeals shall be permitted save the general ground that the judgment is against the weight of the evidence.

15. The implication of a general ground that the judgment is against the evidence in a civil appeal is that the appellants are calling upon this Court to review the judgment of the Trial Court according to the burden and standard of proof in a criminal case, that is, beyond reasonable doubt. Such a ground in civil appeal is as absurd as it is incongruous as it invites this court to determine this appeal on fundamentally wrong principles. The ground is clearly not arguable. The compass charting the direction for the journey is wrong 'ab initio'. Since the direction is wrong, the destination is bound to be wrong.

16. It is trite law that a finding of fact against which there is no ground of appeal remains valid and subsisting.

17. Each of the findings of fact reproduced and attacked in the appellant's joint address should have been the subject of a

complaint in a distinct ground of appeal. This was not done. They cannot therefore rely on the omnibus ground. The notice of appeal is rendered without any grounds of appeal and is therefore incompetent.

20. Appeals generally are creatures of statute. Failure to comply with the statutory requirements prescribed by the relevant laws, under which such an appeal may be competent and properly before the Court will deprive such Appellate Court of jurisdiction to adjudicate on the Appeal.

Cases referred to:

Edward Graham v Lucy Mensah (2002-2008) 1 GLR 22
Haro Co. Ltd & Ors v Ousman Jallow (2002-2008) 1 GLR 128

Statutes referred to:

Evidence Act 1994 Sections 143, 144

Rules of Court referred to:

The Gambia Court of Appeal Rules Rule 12(4)

APPEAL against the Judgment of the High Court per Roche J delivered in Civil Suit No. 187/1997 on the 4th day of May 2006 wherein the 1st appellant herein was held to be negligent. The facts are sufficiently stated in the opinon of Agim PCA.

S.W. Riley (Esq) for the Appellant
B. S. Touray (Esq) for the Respondent

AGIM PCA. This is an appeal against the Judgment of the Gambia High Court per Roche J delivered in Civil Suit No. 187/1997 on the 4th day of May 2006. The notice of appeal which commenced this appeal contains the following grounds of appeal:-

1. The Learned Trial Judge was wrong in fact and in law when she found that the 1st appellant was negligent even though the act of negligence was not proved.

2. The Learned Trial Judge was wrong in fact and in law when she found that vicarious liability was established by either the pleadings or the evidence.

3. The Judgment of the Learned Judge cannot be supported having regard to the evidence.

The appellant argued grounds 1 and 3 and abandoned ground 2. In the joint address of the 1st and 2nd appellant, Learned Counsel for the appellants stated that – "I do not intend to argue ground 2 of the Grounds of Appeal." Since the appellant has abandoned this ground, it will be struck out. Accordingly, the second ground of appeal is hereby struck out.
The appellants argued grounds 1 and 3 together, framing one issue for determination as follows:-

> ''Whether the Learned Trial Judge, upon a balance of probabilities, arrived at a correct conclusion that 1st appellant was negligent to warrant the award she made in favour of the respondent.''

On the basis of the said grounds 1 and 3 the appellants argued this sole issue in their joint address. The entire address was essentially an attack of the following findings of the Trial Court.

1. "Therefore the evidence on the side of the plaintiff as to how the accident occurred is not reliable. Although Pw1 was consistent in his allegation that the 1st defendant was negligent, he contradicted his own allegation while under cross-examination by counsel for 3rd defendant as stated earlier above; he is contradicted by his own evidence in chief in exhibit 7 and he is contradicted by exhibit 6 which was tendered on behalf of the plaintiff."

2. "The plaintiff was approaching from the opposite direction and if she was matured enough to exercise the necessary prudence, she could have seen the vehicle approaching before she attempted to cross the lane on which the vehicle was approaching from but she was not matured enough and could not have been negligent."
3. "If the defendant was driving at a low speed giving him adequate control of the vehicle, he could have avoided the collision. This is not a case where the victim dashed out and met up immediately with the vehicle. This is a case where the victim dashed out, proceeded a distance before meeting up with the vehicle. Therefore if the driver of the vehicle was alert, attentive and in control of his vehicle at a low speed, he would have avoided the collision."
4. "The Court is of the opinion that since the plaintiff was not approaching from the same side of the road as the vehicle, if the 1st defendant (who was the driver of the vehicle) was attentive enough he could have avoided the collision."
5. "The Court has no doubt that an injury such as the one suffered by the plaintiff and which according to Exhibit 9 caused the shortening of her leg by 1.5 cm must have caused the plaintiff a lot of pain and suffering. Any child of the tender age of 6 years who was hit by a moving vehicle will no doubt suffer pain. It is therefore the opinion of the Court that the plaintiff is entitled to damages for pain and suffering leading to the subsequent shortening of her leg."

These findings are reproduced and attacked at paragraph 4 page 3, paragraph 5 page 4, paragraph 6 page 5, paragraph 7 page 6 and paragraph 9 pages 8 – 9 of the joint address of the appellants. The respondent also adopted the sole issue for determination as framed by the appellant and replied to the arguments of the appellants in respect of the above findings of the Trial Court.

Upon consideration of the grounds of appeal, the issue for determination and the arguments of both counsel, I wonder if the appellants can competently attack the above specific findings of the Trial Court the way they have done in their joint address on the basis of grounds of appeal Nos. 1 and 3. The Trial Court on the basis of the

above and other findings of facts held that the negligence of the 1st appellant was proved by the respondent. The appellants in grounds 1 and 3 of their grounds of appeal and their joint address contend to the contrary. The question that skirts my mind is whether the appellants can do so without any grounds of appeal attacking the judgment in a specific way or in any material particular? The notice of appeal contains no ground of appeal against any of the above specific findings of fact or other decision on specific points. It is beyond argument that the above grounds of appeal are general in terms. Is it correct, permissible and competent in law for the appellants to argue as in their joint address on the basis of these grounds?

The respondent replied to the arguments of the appellants in their joint address and urged that the appeal lacks merit and should be dismissed without raising this issue. I have raised this issue *'suo mote'* without calling on the parties to address it. I have adopted this approach for the following reasons. Firstly, Rule 12(4) of the Gambia Court of Appeal Rules (GCA) permits this Court to deal with this issue and strike out the grounds of appeal on its own motion or on application by the respondent. Secondly the question whether the attack of the specific findings of the Trial Court can be sustained on the basis of the above grounds of appeal naturally arises from the determination of the appeal as argued by the appellant. Generally, the argument of an appeal is an invitation to the court hearing the appeal to determine the appeal on certain grounds as stated in the notice of appeal. It therefore falls within the province of the Court to deal with all the issues touching on the grounds of appeal as will have effect on the determination of the appeal. The Court in determining the appeal is entitled to proceed to deal with all such issues without regard to the fact that the parties or any of them omitted to raise any of such issues. The hearing and determination involves essentially a complete scrutiny of the grounds of the appeal. Finally, this Court has in *Edward Graham v Lucy Mensah* (2002-2008) 1GLR 22, *Haro Co. Ltd & Ors v Ousman Jallow* (2002-2008) 1 GLR 128 and other cases held that by virtue of Rule 12(4) of GCA Rules this Court can *'suo motu'* raise issues for determination. I have no reason to depart from these decisions.

The first ground of appeal is not only general in terms, it is also vague. It alleges that "the Learned Trial Judge was wrong in fact and in law" without stating either the ground itself or under a separate heading the

particulars of the error of law as required by Rule 12(2) of the GCA Rules which provides that "if the grounds of appeal allege misdirection or error in law, particulars of the misdirection or error shall be clearly stated." Although the word "error" is not used therein, it is beyond dispute that the phrase "wrong in fact and in law" in the context used therein, means the same thing as "error in fact and in law''. A wrong judgment or decision is an erroneous judgment or decision. A wrong or erroneous judgment means one rendered contrary to law or fact or upon a mistaken view of law or fact or upon a mistaken conception or application of the law or incorrect belief as to the existence or effect of matters of fact. Grammatically, ordinarily and literally the word wrong can also mean error or erroneous and in the context it is used in the 1st ground of appeal it means that the Trial Court erred in fact and in law. The new Cambridge Advanced Learners Dictionary at page 412 states the meaning of the word "erroneous" as "wrong or false impression" and the word "error" as "mistake or fault", it also defined the phrases, "error of judgment" as "a wrong decision". At pages 1481 – 1482 it states that when something is wrong it can also mean that it is not correct or is a mistake. It states that to go wrong is to make a mistake.

A ground of appeal that alleges that a judgment is wrong or erroneous in fact and in law without stating the particulars of error is clearly vague and unarguable and must be struck out. See the decisions of this Court in *Edward Graham v Lucy Mensah* (supra) and *Haro Co. Ltd v Ousman Jallow* (supra) which held that grounds of appeal couched exactly the same as the one here violates Rule 12(2) GCA Rules and were incompetent for not stating the particulars of error in law. The requirement that particulars of the error in law alleged in the ground be stated is a requirement of fair hearing and jurisdiction. The ground of appeal is a notice to the respondent of the case he is to meet. It defines the issues in controversy in the appeal so that the respondent is not taken by surprise. The requirement of particularization of errors is to ensure adequate notice of the matters in controversy so that the respondent is not ambushed or disabled by vague and general statements. The jurisdiction of the appellate court is limited to the issues contained in the grounds and the particulars of error. See the decisions of this Court in *Edward Graham v Lucy Mensah* (supra) and *Haro Co. Ltd & Ors v Ousman Jallow* (supra).

The third ground of appeal is the omnibus ground of appeal. The general or omnibus ground of appeal differs with the nature of appeal. The proper and valid omnibus ground of appeal in a criminal appeal states for example that the judgment is against the evidence or that it is unreasonable or perverse having regard to the evidence. In a Civil appeal, the proper or valid omnibus ground of appeal states that the judgment is against the weight of evidence. This distinction is founded on the law that the burden and standard of proof in a Criminal Case is higher than that in a Civil Case. Whereas with the former the burden is on the prosecution to prove its case beyond reasonable doubt, in the latter the burden is on the plaintiff to prove his or her case on a balance of probabilities or preponderance of evidence. See Sections 143 and 144 of the Evidence Act. Therefore this ground is not a valid ground of appeal in a civil appeal. It would have been appropriate in a criminal appeal. Rule 12(4) GCA prescribes that no other general or omnibus ground of appeal in civil appeals in this Court shall be permitted "save the general ground that the judgment is against the weight of the evidence". The implication of the said ground of appeal is that the appellants are calling upon this Court to review the judgment of the Trial Court according to the burden and standard of proof in a criminal case, that is, beyond reasonable doubt. Such a ground in civil appeal is as absurd as it is incongruous as it invites this Court to determine this appeal on fundamentally wrong principles. The ground is clearly not arguable. The compass charting the direction for the journey is wrong 'ab initio'. The direction is wrong, a fortiori, the destination is bound to be wrong.

Rule 12(4) GCA Rules prescribe that any ground of appeal or any part thereof which is not permitted thereunder may be struck out by this Court of its own motion or on application by the respondent. In light of the foregoing, this Court is minded to strike out the first and third grounds of appeal. The said grounds are hereby struck out. All the issues and arguments based on them are rendered redundant and are hereby struck out. See the cases of *Haro Co. Ltd v Ousman Jallow* (supra) and *Edward Graham v Lucy Mensah* (supra). Even if the appellant had properly couched the omnibus ground permitted in a civil appeal, to wit, that the judgment is against the weight of evidence, it cannot sustain the arguments in the written address in the absence of grounds of appeal attacking the specific findings of facts by the Trial Court. Each of the findings of fact reproduced and attacked in the appellant's joint address

should have been the subject of a complaint in a distinct ground of appeal. This was not done. They cannot therefore rely on the omnibus ground to argue against such findings in their address. This is because it is trite law that a finding of fact, against which there is no ground of appeal, remains valid and subsisting. In *Haro Co. Ltd v Ousman Jallow* (supra) this Court in dealing with this kind of situation held that "the nature and scope of an omnibus ground of appeal in a civil case is that it covers the totality of the evidence and questions the appraisal and evaluation of all evidence adduced. It does not question specific findings of facts and decisions or conclusions of law on specific issues."

Since there is no appeal against these findings, the omnibus ground of appeal will serve no useful purpose in this appeal. This Court in *Edward Graham v Lucy Mensah No.1* (supra) held that "the failure of an appellant in his grounds of appeal to attack the very basis or material findings in the decision of the Trial Court is fatal to an appeal. Without doing so in the grounds, he cannot do so in his brief." In light of the foregoing, the notice of appeal is rendered without any grounds of appeal and is therefore incompetent. Consequently the notice of appeal commencing Civil Appeal No. 49/2006 and the entire appeal are hereby struck out.

The appellant shall pay cost of D20, 000 to the respondent.

J. WOWO Ag. JA: The Respondent as plaintiff filed an action against the Defendants who are the Appellants in this Court, and judgment was granted in favour of the respondent in the Lower Court. Dissatisfied, the Appellants have come to this Court and have filed a notice of Appeal which contains the following grounds:

1. The Learned Trial Judge was wrong in fact and in law when she found that the 1st Appellant was negligent even though the act of negligence was not proved.

2. The Leaned Trial Judge was wrong in fact and in law when she found that vicarious liability was established by either the pleadings or the evidence.

3. The judgment of the Learned Judge cannot be supported having regard to the evidence.

The Appellant formulated one issue for determination as follows:–

> "Whether the Learned Trial Judge upon a balance of probabilities arrived at a correct conclusion that the 1st appellant was negligent to warrant the award she made in favour of the Respondent."

The Respondent adopted and argued the same issue in his brief. Meanwhile the Appellants have abandoned ground 2 of their brief and argued only grounds 1 and 3. Since the Appellants abandoned ground 2 of their brief, ground 2 is thereby struck out.

Appeals generally are creatures of statute therefore failure to comply with The statutory requirements prescribed by the relevant laws, under which such may be competent and proper before the Court will deprive such appellate court of jurisdiction to adjudicate on the Appeal. See the Nigerian case *Tiza v Begha* Vol. 22 NSCQR 642 at 645. The Grounds of Appeal filed by the Appellant respectfully disclose no legally recognizable complaint against the judgment of the trial judge as rightly pointed out by my Learned brother Agim PCA. Rule 12(4) of Gambia Court of Appeal Rules provides that no ground which is vague or general in terms or which discloses no reasonable Ground of Appeal shall be permitted save the general ground that the judgment is against the weight of the evidence. The Gambia Court of Appeal in *Edward Graham v Lucy Mensah* (supra) applied Rule 12(4) of the Court Rules and struck out grounds of appeal that were found to be vague and general. Ground 1 of the Appellant appeal clearly violates Rule 12(2) of Gambia Court of Appeal Rules in the sense that it did not state the particulars of the error of law and fact alleged therein. Failure to comply with the statutory requirements of Rule 12(2) of Gambia Court of Appeal Rules deprived this court of jurisdiction to adjudicate on the Appeal. See *Tiza v Begha* (supra) where Musdapher JSC stated that:-

> "Failure to comply with the statutory requirement prescribed by the relevant laws, under which such may be competent and proper before

the Court will deprive such Appellate Court of jurisdiction to adjudicate on the appeal."

Since the first Ground of Appeal did not comply with Rules 12(2) GCA, it is hereby struck out and the issues and arguments based on the first ground are incompetent and therefore the Court lacks jurisdiction to adjudicate on it. The third ground is the general or omnibus ground of appeal. I have read the lead judgment of my learned brother Agim PCA and I agree entirely that the 3rd Ground of Appeal is not appropriate in a Civil Appeal and that it would have been appropriate in a criminal appeal. Since my learned brother extensively analysed this issue I do not wish to comment further. In light of the foregoing, the third ground of appeal is also struck out and all the issues and argument based on the third Ground of Appeal are hereby struck out. The notice of appeal is rendered without any grounds of appeal and is therefore incompetent and consequently the notice of appeal commencing civil appeal No. 49/2006 and the entire appeal are hereby struck out.

OTA JA I agree

Appeal struck out.
FLD.

FIRST INTERNATIONAL BANK LTD No. 2

v

GAMBIA SHIPPING AGENCY LTD. (AS AGENT FOR DELMAS LINE)

COURT OF APPEAL OF THE GAMBIA
(Civil Appeal No. 24/2002)

20th November 2007

Agim PCA, Anin-Yeboah Ag. JA, Dordzie Ag. JA

Action - Liability of primary debtor – Guarantor - Liability of – Contingent on liability of primary debtor.

Appeal – Notice of appeal - Appellant not to be heard on any ground not in the notice of appeal or additional grounds of appeal – Judgment – Part not appealed against remains binding and Subsisting - Amendment of grounds of appeal – Number of amendments allowed –- Formulation of issues – Best practice - Issues for determination in appeal must arise from grounds of appeal – Raising fresh issue - Refusal of application to raise fresh issues - Not a bar to application in relation to other fresh issues – Leave to argue an issue as an additional ground of appeal different from leave to raise and argue it as fresh issue.

Court – Jurisdiction - When to raise issue of - Can only be raised and argued as a fresh issue on appeal with leave of Court - Source and basis of Court of Appeal's discretion to allow fresh issue on appeal - Leave to argue an issue as an additional ground of appeal different from leave to raise and argue it as fresh issue - Source of practice and procedure of High Court in civil proceedings – Legislation - Principal legislations prevail over subsidiary legislation in the event of conflict - The Gambia Court of Appeal (GCA) Rules - When silent on an issue – Undefended List – Nature of cases - Proper procedure.

Judgment & Orders - Part not appealed against remains binding and subsisting.

Jurisdiction - When and how to raise issue of – Fresh issue - Can only be raised and argued as a fresh issue on appeal with leave of Court - Writ of summons - Validity of.

Practice & Procedure - When to raise issue of jurisdiction – Issues of jurisdiction can only be raised and argued as a fresh issue on appeal with leave of Court - Leave to argue an issue as an additional ground of appeal different from leave to raise and argue it as fresh issue - The Gambia Court of Appeal (GCA) Rules in respect of a situation - When silent on an issue - Source and basis of Court of Appeal's discretion to allow fresh issue on appeal - Writ of summons – Validity of - Source of practice and procedure of High Court in civil proceedings - Forms in the Schedule to Rules - Use of - Conflict between the Forms and the Rules - How resolved – Principal legislations prevail over subsidiary legislation in the event of conflict – Undefended List – Procedure - Notice of intention to defend – Affidavit in support of.

Party - Position on appeal must be consistent with position taken at trial – Doctrine of precedent - Observance of.

Held, *dismissing the appeal (per Agim PCA, Anin-Yeboah and Dordzie Ag.JA concurrig)*

1. There is no law precluding an appellant from amending the grounds of his or her appeal as many times as he or she deems necessary before judgment. So long as the respondent is not prejudiced thereby.

2. The appellant framed no issues from grounds 2 and 3 of the Notice of Appeal, which it argued together in its brief. Even though the practice of arguing appeals in the Court of Appeal on the basis of issues distilled from the grounds of appeal is not provided for in our Gambian Court of Appeal Rules, this Court has encouraged it in appeals before it as a desirable practice. Although nothing precludes an appellant from arguing his or her appeal on the basis of the grounds of appeal, parties should cultivate the better practice of arguing the appeal on the basis of issues distilled from the grounds of appeal like the Learned Counsel for the appellant had done in respect of other grounds of appeal.

3. This issue is clearly outside the scope of the sole additional ground of appeal. The appellant did not seek and obtain the leave of this Court to argue this ground of objection that is not founded

on any ground of appeal as is required by Section 12 (5) of the Gambia Court of Appeal Rules which provides that the appellant shall not without the leave of this Court urge or be heard in support of any grounds of objection not mentioned in the notice of appeal. It follows therefore that issue No. 2 and the arguments in support thereof are incompetent and invalid. The issue and the arguments thereon are hereby struck out.

4. These are the issues which this Court specifically considered and on the basis of which it ruled refusing the application for leave to raise and argue them as fresh issues. So the ruling did not preclude the appellant from applying for leave to raise any other fresh issue that it may want to raise in the course of the appeal. Furthermore, the issues raised from the sole additional ground of appeal bear no similarity to the former fresh issues the appellant wanted to raise.

5. I agree with the submission of Learned Counsel for the appellant in the appellant's reply brief that the issue of jurisdiction can be raised at any stage of a case, even for the first time on appeal.

6. Let me add that if it is being raised as a new issue on appeal, it must be raised in accordance with law. This Court has restated in a number of cases that it cannot be raised and argued, without the leave of this Court, as a fresh issue being first sought for and obtained. See the decisions of this Court in *Bourgi Company Ltd v Withams MV & Anor* (2002-2008) 2 GLR 38 and in *Gamstar Insurance Company Ltd v Musa Joof* (2002-2008) 1 GLR 103.

7. Rule 42 of the GCA Rules prescribes what should be done in situations where the GCA Rules make no provisions concerning any situation. It provides that were no other provision is made by these Rules, the procedure and practice for the time being in force in the Supreme Court of England shall apply in so far as it is not inconsistent with these rules.

8. Order 59 Rule 10(5) of the Rules of the Supreme Court of England vests in the Court of Appeal the discretion to allow or not to allow a point not taken at the trial to be presented for the first

time in the Court of Appeal. See Supreme Court Practice 1979 Vol. I Part 1 Page 896 at paragraph 59/10/6 which explains the approach of the English Court of Appeal in applying Order 59 Rule 10(5) of the Rules of the Supreme Court of England.

9. The leave to argue it as an additional ground of appeal is different from leave to argue it as a new issue on appeal. Specific leave to raise fresh issue on appeal is required and cannot be satisfied by mere leave to file additional grounds of appeal. See the decision of this Court in *Gamstar Insurance Company Ltd v Musa Joof* (2002-2008) 1 GLR 103. Since the appellant did not obtain the leave of this Court to argue the ground as a fresh issue on appeal, the additional ground of appeal, the issues derived therefrom and the arguments in support thereof are incompetent and invalid and are hereby struck out.

10. There is nothing in the Rules of the High Court requiring that a writ of summons must be signed by the Chief Justice or any other judge as a *'sine qua non'* for the valid commencement of any civil proceedings.

11. It is the Rules of the High Court Cap 6:01 Vol. II Laws of The Gambia 1990 that prescribe the practice and procedure to be followed by the High Court of The Gambia in Civil proceedings. While Schedule I of the Rules applies to both Civil and Criminal Proceedings, the second schedule applies to only Civil Proceedings. See Order 1 Rule 1 First Schedule and Order 1 Rule 1 Second Schedule of the said Rules.

12. Rule 6 of Legal Notice No. 39 of 1995 which repealed Order 2 Rule 1 Second Schedule of the Rules prescribes how a civil suit shall be commenced. It provides that "every suit shall be commenced by a writ of summons which shall be accompanied by a written statement of claim which shall comply with Order XXIII." It does not require that the writ should be signed by the Chief Justice or any other Judge or Officer. The requirement that a writ be issued by the Registrar of the High Court prescribed in Order 2 Rule I before the amendment, is removed by the amendment. It is

not contained in Rule 6 of Legal Notice No. 39 of 1995 that repealed Order 2 Rule I. The result of the amendment is that a civil suit is validly commenced once a writ of summons is filed by a party. There is no need for the writ of summons to be signed or issued by any Judge, Registrar or other officer of Court for it to be valid. It is valid upon filing without more.

13. The forms in the third Schedule of the Rules are not sacrosanct. Order II Rule 4 of the first schedule to the Rules state that the forms may be used in all matters, causes and proceedings to which they are applicable with such variations as circumstances require. The forms must therefore be used with such adaptation and variations as will bring them into conformity with the provisions of the Rules in the First and Second Schedules.

14. This is because in the event of a conflict between any of the forms and the provision of the Rules, the latter will prevail. The forms are made pursuant to the Rules and are meant to give effect to the Rules. The forms are subsidiary to the Rules.

15. The principle of interpretation as to conflict between subsidiary and principal legislations applies with equal force here. This inveterate principle states that in the event of such a conflict, the principal enactment prevails over the subsidiary.

16. The processes relevant to proceedings on the undefended list are the writ of summons, the affidavit in support and the notice of intention to defend and accompanying affidavit. The statement of claim even if filed as in this case, is not relevant and cannot be relied on in an undefended list proceeding.

17. The appellants' position on appeal is not consistent with its position at trial. He is trying to set up a new case on appeal. A party cannot on appeal change the premise of his case.

18. Appellant cannot to be heard on any ground not in the notice of appeal or additional grounds of appeal. The above contention on

appeal is therefore incompetent and not valid for this Court's consideration.

19. Rule 12(5) GCA Rules states that an appellant shall not, without leave of the Court, urge or be heard in support of any ground of objection not mentioned in the notice of appeal. The appellant has not obtained the leave of this Court to argue this issue of the *'locus standi'* of the plaintiff to institute Civil Suit No.105/2002 G.No.8.

20. The Trial Court held that the effect is that there is no accompanying affidavit. Since the appellant did not appeal against this part of the Trial Court's decision, it is valid and subsisting and binds all the parties to the suit including the appellant.

21. The affidavits having been effectively struck out, their contents can no longer be in issue. Their contents cannot be relied on in considering the merits of the case at the Trial Court. This is because it is illogical to accept that an affidavit is struck out and at the same time seek to rely on contents of the affidavit. Once a process is struck out by order of Court, it ceases to be of any effect and use in the trial proceedings including the appeal stage.

22. It is clear that Order 2 Rule 9 requires the affidavit in support of the notice of intention to defend to contain facts disclosing a defence to the action on the merits. It is obvious that it is not possible for a party to defend an action without replying or responding to the facts stated by the plaintiff in his affidavit. It is beyond argument that if the defendant's affidavit does not contain facts responding or replying to the facts in the plaintiff's affidavit, the law will treat the facts in the plaintiff's affidavit as admitted.

23. The facts contained in the plaintiff's affidavit form the basis of his claim, while the facts in the defendant's affidavit show the grounds of defence upon which he intends to rely. This Court had held in *Gamstar Insurance Co. Ltd v Musa Joof* (supra) that the exercise of discretion by the Trial Court to try or not try the suit on the

undefended list must be based upon a consideration of the affidavits filed by both sides.

24. Where Counsel's attention has been drawn to a decision of this Court departing from her previous decisions on a point, it is not correct for Counsel to continue to rely on such previous decisions in deliberate disregard of the new decision on the point. It is good practice to honourably concede where it is obviously necessary to do so instead of engaging in barren arguments. Counsel will be perfectly within her rights to analyse the decision and urge this Court to depart from it on grounds that it is decided per incurium or will lead to manifest injustice. Counsel can even distinguish it from the present case and argue that it is not applicable to the present case. Counsel has not done any of these. She simply ignored and disregarded a decision that represents the current state of the law on the point. This certainly is not permissible in law and must be deprecated as unhelpful to administration of justice.

25. This Court has restated in a plethora of her decisions that unchallenged, uncontroverted and un-denied paragraphs of an affidavit like all evidence must be regarded as admitted by the adverse party and the Court has a duty to act on such un-denied evidence as establishing the truth of the facts alleged therein for what is admitted need no further proof.

26. It is a trite and elementary principle of the law on Guarantee that a guarantor is as liable for the debt as the primary debtor. His liability being contingent on the liability of the primary debtor, once the indebtedness of the primary debtor under the guarantee is established the guarantor remains as liable as the primary debtor to pay the debt.

Cases referred to:

Akanni v Odegide (2001) 9 NWLR (Pt 879) 575
Antoine Banna v Ocean View Resorts Ltd (2002-2008) I GLR 1
Bourgi Company Ltd v Withams MV & Anor (2002-2008 2 GLR 38

Egolum v Obasanjo (1999) 5 SCNJ 82 at 120
Gamstar Insurance Company Ltd v Musa Joof (2002-2008) 1 GLR 103
Magaji v Balat (2000) 8 NWLR (Pt 876) 499
Shell International Petroleum BP v F.B.I.R (2004) 3 NWLR (Pt 859) 46

Statutes referred to:

Rules of the Supreme Court of England Order 59 Rule 10(5)
Supreme Court Practice 1979 Vol.1 Part 1
The Gambia Court of Appeal Rules Cap 6:02 Vol. I Laws of The Gambia Rules 12(5), 42
The Gambia High Court Rules Cap 6:01 Laws of The Gambia Order 1 Rule 1 First Schedule, Order 1 Rule 1 Second Schedule, Order 2 Rule 4, 7, 8, 9, Form 19 of the Third Schedule
Legal Notice No. 39 of 1995 Rule 6

APPEAL against the Judgment of the Gambian High Court per Belgore J (as he then was) delivered on the 16th of December 2002 in Civil Suit No.105/02 G. No. 8 following hearing on the undefended list. The facts are sufficiently stated in the opinion of Agim (ORG) PCA.

H. Sisay-Sabally Esq. for the appellant
I*.D. Drammeh Esq*, *C.E. Mene Esq, and Y.Senghore Esq.* for the respondent.

AGIM (ORG) PCA. This is an appeal against the Judgment of the Gambian High Court per Belgore J (as he then was) delivered on the 16th of December 2002 in Civil Suit No.105/02 G. No. 8 following hearing on the undefended list. The notice of appeal which commenced this appeal was filed on the same 16th December 2002 and contains the following grounds of appeal:-

1. The Learned Trial Judge was wrong to give judgment to the plaintiff as he did having regard to the claim on the writ of summons and the statement of claim.

2. The Learned Trial Judge fell into error when he held that the averments contained in the affidavit of Abubacarr Suwareh sworn

to on the 22nd October 2002 and attached to the Notice of Intention to defend filed on the 23rd October 2002 on behalf of the appellant is a clear admission of the plaintiffs claim which error caused him to wrongly award judgment against the appellant.

3. The Learned Trial Judge erred in law when he held that the averments contained in the affidavit of Abubacarr Suwareh sworn to on the 22nd October 2002 on behalf of the appellant did not disclose any defence against the plaintiff's claim.

4. The said ruling was otherwise wrong and erroneous.

The appellant applied for and was granted leave by this Court to file additional grounds of appeal. Subsequently it applied for leave to argue the fresh issues raised by each of the three additional grounds of appeal. This Court on the 21st June 2007 refused the application. The additional grounds of appeal were thereby rendered redundant and therefore struck out. On the 6th of July 2007, the appellant, without prior leave of this Court being first sought for and obtained, filed an additional ground of appeal as follows:–

1. Learned Trial Judge had no jurisdiction to proceed and enter judgment for the plaintiff in Civil Suit No. 105/2002 G. No. 8 initiated by a writ of summons issued by the President of The Gambia Court of Appeal on behalf of the Chief Justice.

Along with the above additional ground of appeal, the appellant filed its brief wherein it indicated that it intends to seek the leave of this Court before adopting the brief. On the 8th July 2007, it also filed a motion on notice seeking the leave of this Court to file the additional ground of appeal and to deem it as properly filed. On the 18th July 2007, Counsel to the respective parties agreed that the said motion be determined on the basis of the arguments in the respective briefs of the parties. The motion is supported by an affidavit deposed to by one Marie Paul Colley, personal assistant to Learned Counsel for the appellant. The respondent who did not file an affidavit in opposition, opposed the application on the ground that leave had previously been granted the appellant on the 20th November 2006 to file and argue certain grounds of appeal and urged

that the leave now being sought by the appellant should not be granted. I am not impressed by the reason adduced by the respondent for opposing this application. The ground now sought to be argued by the appellant is not one of the additional grounds of appeal in respect of which leave was obtained on 20th November 2006. There is no law precluding an appellant from amending the grounds of his or her appeal as many times as he or she deems necessary before judgment. So long as the respondent is not prejudiced thereby. Both parties have even argued the merit of the said ground in their respective briefs. The respondent replied to the arguments of the appellant on this ground. There is clearly no basis for the respondent's objection to this application. Rule 12(5) of the GCA Rules vests in this Court the discretion to allow or refuse the appellant to amend the grounds of appeal. The additional ground of appeal sought to be argued is not a frivolous one. It raises a triable issue of jurisdiction of the Trial Court to entertain and determine Civil Suit No.105/02. The respondent has not alleged that it will suffer any injustice if the application is granted. In the circumstance, I will grant this application. The appellant is allowed leave of this Court to argue the additional ground of appeal filed on 18th July 2007. The said additional ground of appeal is deemed as properly filed and served. The appellant in its brief raised the following issues for determination:-

1. Whether the President of The Gambia Court of Appeal has any legal authority to issue a writ of summons on behalf of the Chief Justice.

2. Can the President of The Gambia Court of Appeal enter a suit for hearing in the "undefended list" and mark the writ of summons accordingly.

3. Was the writ of summons validly issued and marked as being on the undefended list prior to service.

4. Whether the plaintiff paid the sum of Euro 119,863.14 to the suppliers or original holders of the Bills of Lading.

The appellant has indicated in its brief that issues Nos. 1, 2 and 3 arise from the sole additional ground of appeal and issue No. 4 arise from ground 1 of the notice of appeal. The appellant framed no issues from grounds 2 and 3 of the notice of appeal, which it argued together in its brief. Even though the practice of arguing appeals in the Court of Appeal on the basis of issues distilled from the grounds of appeal is not provided for in our Gambian Court of Appeal Rules, this Court has encouraged it in appeals before it as a desirable practice. Although nothing precludes an appellant from arguing his or her appeal on the basis of the grounds of appeal, parties should cultivate the better practice of arguing the appeal on the basis of issues distilled from the grounds of appeal like the Learned Counsel for the appellant had done in respect of other grounds of appeal.

Learned Counsel for the respondent has submitted that issues 1, 2 and 3 do not arise from the sole additional ground of appeal. The submission is not correct in respect of issue Nos. 1 and 3. It is correct in respect of issue No. 2. The complaint in the said additional ground is that the Trial Court lacked the jurisdiction to proceed to try Civil Suit No.105/2002 G. No. 8 on the basis of a writ of summons issued by the President Gambia Court of Appeal on behalf of the Chief Justice. Implicit in this complaint is that the President Gambia Court of Appeal lacks the power to issue a writ of summons and so a writ of summons issued by him or her cannot form the basis of a valid exercise of jurisdiction to try a Civil Suit initiated thereby. It is clear from the express words of the second issue and the arguments in support thereof that the appellant contends that the entry of the suit for hearing in the undefended list and the marking of the writ of summons accordingly do not comply with Order 2 Rules 7 and 8 Schedule II of the Rules of the High Court Cap 6:02 Vol. II Laws of The Gambia 1990. This issue is clearly outside the scope of the sole additional ground of appeal. The appellant did not seek and obtain the leave of this Court to argue this ground of objection that is not founded on any ground of appeal as is required by Section 12(5) of the Gambia Court of Appeal Rules which provides that the appellant shall not without the leave of this Court urge or be heard in support of any grounds of objection not mentioned in the notice of appeal. It follows therefore that the second issue and the arguments in support thereof are incompetent and invalid. The issue and the arguments thereon are hereby struck out. See the decisions of this Court in *Antoine Banna v Ocean View Resort*

Ltd & Ors **(**2002-2008**)** 1 GLR 1 and *Gamstar Insurance Co. Ltd v Musa Joof* (2002-2008) 1 GLR 103.

Learned Counsel for the respondent has also contended that the issues raised from the sole additional ground of appeal are clearly intended to circumvent the ruling of this Court on 21st June 2007 dismissing the appellant's earlier application to raise and argue certain fresh issues. I find no merit in this argument of the Learned Counsel for the respondent. The application that this Court dismissed in its ruling of 21st June 2007 is not one to raise fresh issues at large. It was an application to raise specific fresh issues that had already been filed and reproduced in paragraph 5 of the affidavit of Bennett Edet in support of the appellant's motion as follows:-

> "(a) There was no cause of action against the appellant and as such the Trial Judge should have entered judgment against them.
>
> (b) The Trial Court lacked jurisdiction in the absence of a cause of action against the appellant.
>
> (c) The Trial Judge having made exhibits SH1 and SH2 an issue in his ruling of 16th December, 2002 did not properly evaluate their content so as to connect the appellant to the said documents.
>
> (d) Trial Judge failed to identify the person and ostensible authority of the person alleged to have signed SH1 and SH2 on behalf of the appellant."

These are the issues which this Court specifically considered and on the basis of which it ruled refusing the application for leave to raise and argue them as fresh issues. So the ruling did not preclude the appellant from applying for leave to raise any other fresh issue that it may want to raise in the course of the appeal. Furthermore, the issues raised from the sole additional ground of appeal bear no similarity to the former fresh issues it wanted to raise. They are completely different from these issues. So the ruling of this Court on 21st June 2007 refusing the appellant leave to raise the fresh issues reproduced above cannot be

relied on to stop the appellant from raising and arguing the issues raised from the sole additional ground of appeal. These issues, though new, cannot circumvent that ruling in any way. I agree with the submission of Learned Counsel for the appellant in the appellant's reply brief that the issue of jurisdiction can be raised at any stage of a case and even for the first time on appeal. Let me add that if it is being raised as a new issue on appeal, it must be raised in accordance with law. This Court has restated in a number of cases that it cannot be raised and argued without the leave of this Court to raise and argue it as a fresh issue being first sought for and obtained. See the decisions of this Court in *Bourgi Company Ltd v Withams MV & Anor* (2002-2008) 2 GLR 38 and in *Gamstar Insurance Company Ltd v Musa Joof* (supra).

The Gambia Court of Appeal Rules (GCA) make no provision for how issues not raised and or determined at the Trial Court can be raised and argued as fresh or new issues in this Court. In the circumstances, we must have recourse to Rule 42 of the GCA Rules which prescribes what should be done in situations where the GCA Rules make no provisions concerning any situation. It provides that where no other provision is made by these Rules, the procedure and practice for the time being in force in the Supreme Court of England shall apply in so far as it is not inconsistent with these Rules. Order 59 Rule 10 (5) of the Rules of the Supreme Court of England vests in the Court of Appeal the discretion to allow or not to allow a point not taken at the trial to be presented for the first time in the Court of Appeal. See Supreme Court Practice 1979 Vol. I Part 1 Page 896 at paragraph 59/10/6 which explains the approach of the English Court of Appeal in applying Order 59 Rule 10(5) of the Rules of the Supreme Court in England which provides that:-

> "A point not taken at the trial, and presented for the first time in the Court of Appeal ought to be most jealously scrutinized. A Court of Appeal ought only to decide in favour of an appellant on a ground there put forward for the first time if it be satisfied beyond doubt, first, that it had before it all the facts bearing upon the new contention as completely as would have been the case if the controversy had arisen at the trial; and next, that no satisfactory explanation could have been offered by those whose conduct is impugned if an opportunity for explanation had been afforded them in the witness box.''

The appellant who had previously applied to this Court for leave to argue some other fresh issues in this appeal should be aware of the procedure to be followed to raise and argue fresh issues at the appeal stage of a case. The leave to argue it as an additional ground of appeal is different from leave to argue it as a new issue on appeal. Specific leave to raise fresh issue on appeal is required and cannot be satisfied by mere leave to file additional grounds of appeal. See the decision of this Court in *Gamstar Insurance Company Ltd v Musa Joof* (supra). Since the appellant did not obtain the leave of this Court to argue it as a fresh issue on appeal, the additional ground of appeal, the issues derived therefrom and the arguments in support thereof are incompetent and invalid and are hereby struck out. In addition to the law that the issues were incompetently raised and argued, I find no merit in the arguments of Learned Counsel for the appellant on these issues. This is because there is nothing in the Rules of the High Court requiring that a writ of summons must be signed by the Chief Justice or any other judge as a *'sine qua non'* for the valid commencement of any civil proceedings. It is the Rules of the High Court Cap 6:01 Vol. II Laws of The Gambia 1990 that prescribe the practice and procedure to be followed by the High Court of The Gambia in Civil proceedings. While Schedule I of the Rules applies to both Civil and Criminal Proceedings, the second schedule applies to only Civil Proceedings. See Order 1 Rule 1 First Schedule and Order 1 Rule 1 Second Schedule of the said Rules. Rule 6 of Legal Notice No. 39 of 1995 which repealed Order 2 Rule 1 Second Schedule of the Rules prescribes how a Civil Suit shall be commenced. It provides that "every suit shall be commenced by a writ of summons which shall be accompanied by a written statement of claim which shall comply with Order XXIII." It does not require that the writ should be signed by the Chief Justice or any other Judge or Officer. The requirement that a writ be issued by the Registrar of the High Court prescribed in Order 2 Rule I before the amendment, is removed by the amendment. It is not contained in Rule 6 of Legal Notice No. 39 of 1995 that repealed Order 2 Rule I. The result of the amendment is that a Civil Suit is validly commenced once a writ of summons is filed by a party. There is no need for the writ of summons to be signed or issued by any Judge, Registrar or other officer of Court for it to be valid. It is valid upon filing without more. Form 19 in the third Schedule which provides for the signature of a judge at the foot of the writ of summons is therefore in conflict with Rule

6 of Legal Notice No. 39 of 1995. It is also in conflict with Order 2 Rule 2(1) of the Second Schedule of the Rules which provides that the writ of summons shall contain the name and place of abode of the plaintiff and of the defendant so far as they can be ascertained, the subject matter of the claim, the reliefs sought for and the date and place of hearing. The signature of a Judge is not prescribed as part of the content of the writ of summons. The Forms in the third Schedule of the Rules are not sacrosanct. Order II Rule 4 of the first schedule to the Rules state that the forms may be used in all matters, causes and proceedings to which they are applicable with such variations as circumstances require. The forms must therefore be used with such adaptation and variations as will bring them into conformity with the provisions of the Rules in the first and second schedules. This is because in the event of a conflict between any of the forms and the provision of the Rules, the latter will prevail. The Forms are made pursuant to the Rules and are meant to give effect to the Rules. The Forms are subsidiary to the Rules. The principle of interpretation as to conflict between subsidiary and principal legislations applies with equal force here. This inveterate principle states that in the event of such a conflict, the principal enactment prevails over any subsidiary legislation. For guidance see the decisions of the Nigerian Supreme Court in *Egolum v Obasanjo* (1999) 5 SCNJ 82 at 120 and the Nigerian Court of Appeal decisions in *Magaji v Balat* (2000) 8 NWLR (Pt 876) 499 and *Akanni v Odegide* (2001) 9 NWLR (Pt 879) 575. In light of the foregoing, the signature on the writ at page 3 of the record of appeal is mere surplusage and has no bearing on the validity of the writ of summons which has clearly complied with Rule 6 of Legal Notice No. 39 of 1995 and Order II Rule 2(1) of the second Schedule to the Rules. The contentions by Learned Counsel for the appellant that the writ of summons was signed by The President of the Court of Appeal instead of the Chief Justice and that the writ of summons is invalid therefore are redundant and otiose. The appellant in its brief stated that issue No. 4 herein arises from the first ground of appeal in the notice of appeal which is reproduced at page 1 of this judgment. This ground does not contain a valid complaint against a judgment following a hearing of a suit on the undefended list. The writ of summons that commenced Civil Suit No.105/2002 G. No. 8 is accompanied by an affidavit and a statement of claim. The processes relevant to proceedings on the undefended list are the writ of summons, the affidavit in support and the notice of intention to

defend and accompanying affidavit. The statement of claim even if filed as in this case, is not relevant and cannot be relied on in an undefended list proceeding. See Order 2 Rules 7 and 9 of the Second Schedule of the Rules which states thus:-

> "7. Whenever application is made to the Court for the issue of a writ of summons, other than for the purpose of starting civil proceedings against the State in respect of a claim to recover a debt or liquidated money demand and such application is supported by an affidavit setting forth the grounds upon which the claim is based and stating that in the deponent's belief there is no defence therein, the Court shall, if satisfied that there are good grounds for believing that there is no defence thereto, enter the suit for hearing in what shall be called the "Undefended List," and mark the writ of summons accordingly, and enter thereon a date for hearing suitable to the circumstances of the particular case.
>
> "9. If the party served with the writ of summons and affidavit do not within not less than five days before the date fixed for hearing notify the Registrar of the Supreme Court that he intends to defend the suit and send with such notification an affidavit setting forth the grounds of defence upon which he intends to rely, then and in such case, unless the Court be satisfied that he has got a good defence to the action on the merits, or has disclosed such facts and may be deemed sufficient to entitle him to defend, the suit may be heard as an undefended suit, and judgment may be given by the Court without calling upon the plaintiff to summon witnesses before it to prove his case formally.''

In our present case the Learned Trial Judge rightly relied only on the writ of summons and accompanying affidavit, the notice of intention to defend and accompanying affidavit in his judgment. In light of the provisions of Order II Rules 7, 8 and 9 Second Schedule to the Rules, I cannot fathom how the appellant can validly complain against a judgment in a proceeding on the undefended list on the basis of a statement of claim. This Court held in *Gamstar Insurance Co. Ltd v Musa Joof* (supra) that the statement of claim is not relevant in proceedings on the undefended list. I have no reason to depart from that decision. I am bound by it. Such a ground would have been a valid complaint in a trial on pleadings where

the defendant contends that the writ of summons and statement disclose no cause of action. That is not the case here. Therefore I hold as inappropriate and invalid issue No. 4 which derives from the said ground one of the notice of appeal and the submission of Learned Counsel for the appellant that "on the pleadings alone it is not disclosed (sic) who the suppliers of the goods were and whether any demand was made by them for settlement of the purchase price of the goods or the sum of Euro 119,856.14. It is also not disclosed in the pleadings that the plaintiffs paid the suppliers. Page 4, 5 and 6 of the Record of Proceedings contain the statement of claim which does not in any way show that the plaintiff/respondent has settled any claim arising from the alleged transactions."

Issue No. 4 and the arguments in support thereof contradict the position of the appellant during trial in the affidavit of Abubacarr Suwareh in support of the appellant's notice of intention to defend contained in pages 24 and 25 of the record of appeal, where it is stated on behalf of the appellant that the 1st defendant and the respondent herein had reached an agreement for the 1st defendant to make monthly installment payments to the plaintiff and that the 1st defendant had been making strenuous efforts to settle the issue between it and the respondent. The same appellant is now contending on appeal that there is no evidence that the respondent had paid the suppliers of the goods and so lacked the capacity or the right to claim or sue for the purchase price of the goods. The appellants' position on appeal is not consistent with his position at trial. He is trying to set up a new case on appeal. A party cannot on appeal change the premise of his case. The above contention on appeal is therefore incompetent and not valid for this Court's consideration. See the decision of this Court in *Antoine Banna v Ocean View Resorts Ltd.* (supra). See also the decision of the Nigerian Court of Appeal in *Shell International Petroleum BV v F.B.I.R* (2004) 3 NWLR (Pt 859) 46.

I agree with the submission of Learned Counsel for the respondent that issue No. 4 and the submissions of Learned Counsel for the appellant thereon have no relationship with ground one of the notice of appeal. While the ground of appeal challenges the judgment on the basis of the writ of summons and the statement of claim, issue No. 4 and the submissions based thereon challenge the judgment on the ground that there was no evidence to show that the plaintiff paid Euros 119,863.14 to

the Suppliers of the goods. Issue No. 4 and arguments also challenge the standing of the respondent to sue for the purchase price. Ground one of the notice of appeal contains no such complaint. There is no ground of appeal in this appeal raising such an issue. The said issue No. 4 and the submissions based on it are clearly incompetent and invalid. See Rule 12(5) GCA Rules which states that an appellant shall not without leave of the Court urge or be heard in support of any ground of objection not mentioned in the notice of appeal. The appellant has not obtained the leave of this Court to argue this issue of the *'locus standi'* of the plaintiff to institute Civil Suit No.105/2002 G.No.8.

I have also considered the arguments of Learned Counsel for the appellant in support of grounds 2 and 3 of the notice of appeal and the respondent's reply thereto. I agree with the Learned Counsel for the respondent that the said grounds 2 and 3 cannot competently be maintained since the appellant did not appeal against the ruling of the Trial Court striking out the notices of intention to defend and the accompanying affidavits filed at the Trial Court by the defendants. The Trial Court had, before the order striking out the said notices of intention to defend and affidavits, held that the affidavit of the 1st defendant in support of his notice of intention to defend was fatally defective as it was not properly sworn. The Trial Court held that the effect is that there is no accompanying affidavit. Since the appellant did not appeal against this part of the Trial Court's decision, it is valid and subsisting and binds all the parties to the suit including the appellant. The affidavits having been effectively struck out, their contents can no longer be in issue. Their contents cannot be relied on in considering the merits of the case at the Trial Court. This is because it is illogical to accept that an affidavit is struck out and at the same time seek to rely on contents of the affidavit. Once a process is struck out by an Order of Court, it ceases to be of any effect in the trial proceedings including the appeal stage. I find the proposition by Learned Counsel for the appellant that the defendant's affidavit in support of the notice of intention to defend is not an answer or a reply to the plaintiff's affidavit in support of the writ of summons in the undefended list absurd and in total disregard of the clear provisions of Order 2 Rules 7 and 9 Schedule 2 of the Rules of the High Court and the decision of this Court in *Gamstar Insurance Co. Ltd v Musa Joof* (supra). It is clear that Order 2 Rule 9 requires the affidavit in support of the notice of intention to defend to contain facts disclosing a defence to the

action on the merits. It is obvious that it is not possible for a party to defend an action without replying or responding to the facts stated by the plaintiff in his affidavit. It is beyond argument that if the defendant's affidavit does not contain facts responding or replying to the facts in the plaintiff's affidavit, the law will treat the facts in the plaintiff's affidavit as admitted. See *Gamstar Insurance Co. Ltd v Musa Joof* (supra). The facts contained in the plaintiff's affidavit form the basis of his claim, while the facts in the defendant's affidavit show the grounds of defence upon which he intends to rely. This Court had held in *Gamstar Insurance Co. Ltd v Musa Joof* (supra*)* that the exercise of discretion by the Trial Court to try or not try the suit on the undefended list must be based upon a consideration of the affidavits filed by both sides.

In that case, this Court departed from its earlier decisions in *Sissoho v T.K. Motors Ltd and General Paints Co. Ltd v Louis Brown* relied on by Learned Counsel for the appellant for her submission. She said nothing about the decision of this Court in *Gamstar Insurance Co. Ltd v Musa Joof* cited and copiously relied on by Learned Counsel for the respondent. It is noteworthy that appellant filed a reply on points of law to the respondents brief but omitted therein to reply on the point of law that appellant counsel's said submission cannot be valid in light of this Court's decision in the above case departing from its earlier decisions in the cases cited by her. She still said nothing on the point even when she adopted her brief in open Court. Her approach encourages a violation of the very fundamental and hallowed principle of judicial precedent which is the foundation of our judicial system. Where Counsel's attention has been drawn to a decision of this Court departing from its previous decisions on a point, it is not correct for Counsel to continue to rely on such previous decisions in deliberate disregard of the new decision on the point. It is good practice to honourably concede where it is obviously necessary to do so instead of engaging in barren arguments. Counsel will be perfectly within her rights to analyse the decision and urge this Court to depart from it on grounds that it is decided per incurium or will lead to manifest injustice. Counsel can even distinguish it from the present case and argue that it is not applicable to the present case. Counsel has not done any of these. She simply ignored and disregarded a decision that represents the current state of the law on the point. This certainly is not permissible in law and must be deprecated as unhelpful to administration of justice.

The appellant in its brief also submitted that the affidavit of Abubacarr Suwareh in support of the notice of intention to defend does not show any admission of the plaintiff's claim. She further submitted along the same line that paragraphs 2 and 3 of the said affidavit of Abubacarr Suwareh which stated the efforts and payments made by the 1st defendant to the plaintiff cannot be regarded as an admission of the plaintiff's claims. I have perused the said affidavit of Abubacarr Suwareh and the affidavit in support of the writ of summons. Paragraphs 3 – 17 of the affidavit in support of the writ of summons state that the 1st defendant, under an international sale of goods contract with suppliers in France, had an obligation upon arrival of the ship carrying the goods at Banjul Port to produce to the plaintiff's principal, the shippers of the said goods the original bills of lading covering the goods before taking delivery of the goods. Paragraphs 5 and 11 of the said affidavit specifically state that the 1st defendant had an obligation under the contract to pay the price of the goods before receiving the bills of lading covering the goods. Paragraphs 4, 5, 9, 10, 13, 14 and 15 of the said affidavit state that the 1st defendant was unable to produce the original bills of lading covering the said cargo. It signed indemnity agreements with the plaintiff to enable it take delivery of the goods without presenting the bills of lading. In the agreement, 1st defendant undertook to indemnify the plaintiff, its principals and servants against all claims that may result from the delivery of the goods to it without it having first produced the original bills of lading. The 2nd defendant, a commercial bank signed the indemnity agreements as guarantor and thereby guaranteed the plaintiffs, its principals and servants against any demand or action which may be made or brought against it by the shipper or by the holder of the original bill of lading or any other person. The 2nd defendant also undertook to pay the plaintiff on demand all expenses, fees, custom duties, freight, etc which may be due or may appear due and chargeable to the said goods and to surrender to the plaintiff one fully accomplished Bill of Lading as soon as one of the originals comes into the 2nd defendant's possession. These agreements are contained in documents respectively headed "INDEMNITY FORM", and referred to in the said affidavit as exhibits SH1 and SH2. See pages 11 and 12 of the records of this appeal. Paragraphs 7 and 13 of the said affidavit state that on the basis of this indemnity agreement, the plaintiff handed over the said two consignments each of which is valued at 128,708.00 Euros to the 1st

defendant. Paragraph 15 of the said affidavit state that as further collateral for the release of the goods to the 1st defendant without it producing the original bills of lading, the 1st defendant on 22nd October 2001 issued a cheque for the sum of D490, 000.00 which cheque was presented for payment by the plaintiff twice and was returned unpaid with attendant charges. This is clearly confirmed by the returned cheque and Standard Chartered Bank Gambia Limited debit notes at page 20 of the record of this appeal. Paragraph 14 of the said affidavit states that the defendants have not handed over the original bills of lading nor paid the price of the said consignment. Paragraph 16 and 17 of the affidavit state that that 1st defendant made part payment of 119, 863.14 Euros, the outstanding balance remained unpaid and that it has incurred legal and other costs in connection with the recovery of the above part payment of 119, 863.14 Euros. The said paragraph 16 also states that the plaintiff by letter demanded the balance remaining unpaid. The bundle of letters is attached to the affidavit as exhibit SH3 and is at pages 14 – 19 of the record of this appeal. The plaintiff wrote a letter dated 26th March 2002 to the Managing Director of the 2nd defendant referring to their earlier meeting in his office and stating that suppliers of the goods have now demanded immediate settlement of the outstanding balance owed by 1st defendant. The plaintiff further stated thus:-

> "We therefore kindly ask you to settle the account as per your commitment on above mentioned letter of indemnities and produce the original Bills of lading on or before 1st April 2002".

The plaintiffs Solicitor wrote letter with reference No. 240/GSA/91/1B of 12th April 2002 to the 2nd defendant's Managing Director in the same vein and making the same demand. The same letters were also written to the 1st defendant. This is the case disclosed in the affidavit in support of the writ of summons. The question that arises for determination at this juncture is whether the 2nd defendant did not admit or admitted the above facts in the affidavit in support of the writ of summons. I will now proceed to consider the affidavit of Abubacarr Suwareh in support of the notice of intention to defend. It is a short affidavit containing 5 paragraphs with only paragraphs 3, 4 and 5 responding to a 22 paragraph affidavit in support of the writ of summons. It is noteworthy that 19 paragraphs of the said affidavit in support of the summons copiously state the facts of

the case, supported by attached documentary evidence including guarantees signed by the 2nd defendant and demand letters written to the 2nd defendant. Since the said affidavit is short I have reproduced all the paragraphs here as follows:–

1. "I am the deponent herein and I have the authority of the second defendant to depose to the matters herein.

2. That I am informed by the Deputy General Manager of the second defendant and I verily believe the same to be true that the first defendant and the plaintiff had reached an agreement for the first defendant to make monthly installment payments to the plaintiff.

3. That I am further informed by the said Deputy General Manager that the first defendant has been making strenuous efforts to settle the issue between the plaintiff and the first defendant.

4. In the circumstances, the second defendant does not owe the plaintiff anything as claimed or at all and has a good defence to this case.

5. I believe it will be in the interest of justice to place this case on the general cause list."

The 2nd defendant did not deny the facts in the affidavit in support of the writ of summons. These facts form the basis of the claims in the writ of summons. It did not deny signing the indemnity agreements between the plaintiff and 1st defendant (exhibits SH1 and SH2) as guarantor. The 2nd defendant said nothing about its obligations under those agreements. It said nothing about the demand letters written to its Managing Director. The contents of the letter of 26th March 2002 from the Managing Director of the plaintiff to the Managing Director of the 2nd defendant are particularly noteworthy. At the risk of repetition I have reproduced its short content here as follows:–

> "Referring to the meeting in your office, we regret to inform you that suppliers have now demanded immediate settlement of the outstandings with Brotherhood from us.

We therefore kindly ask you to settle the account, as per your commitment on above mentioned letter of indemnities and produce the Original Bills of Ladings on or before 1st April 2002.

Thanks for your understanding."

The 2nd defendant said nothing in response to this very relevant letter and the plaintiff's solicitor's letter that followed. The 2nd defendant did not in any way deny paragraphs 1 – 20 of the affidavit of the Managing Director of the plaintiff in support of the writ of summons. This Court has restated in a plethora of its decisions that unchallenged, uncontroverted and un-denied paragraphs of an affidavit like all evidence must be regarded as admitted by the adverse party and the Court has a duty to act on such un-denied evidence as establishing the truth of the facts alleged therein. For what is admitted need no further proof. See for example the decisions of this Court in *Antoine Banna v Ocean View Resort* (supra) and in *Bourgi Company Ltd v Withams MV & Anor* (supra). In addition to the fact that the affidavit in support of the writ of summons was uncontroverted, paragraph 2 and 3 of the affidavit clearly acknowledge the fact of the indebtedness of the 1st defendant as a result of its transactions with the plaintiff. In light of the depositions in the affidavit in support of the writ of summons in response to which the said paragraphs 2 and 3 of Abubacarr Suwareh's affidavit were made, it can rightly be concluded that those paragraphs clearly admitted the plaintiff's claim. The Learned Trial Judge was therefore right to have held that the said paragraphs are a clear admission of the plaintiff's claim.

The contention of Learned Counsel for the appellant that the efforts and payments by the 1st defendant to the plaintiff in respect of the debts due under the transaction had nothing to do with the 2nd defendant negates the trite and elementary principles of the law on guarantee that a guarantor is as liable for the debt as the primary debtor. His liability being contingent on the liability of the primary debtor, once the indebtedness of the primary debtor under the guarantee is established the guarantor remains as liable as the primary debtor to pay the debt.

In light of the foregoing, I find no merit in the appellant's submissions in support of grounds 2 and 3 of its notice of appeal. The appeal therefore

fails on these grounds. In the premises, this appeal fails and is hereby dismissed. The judgment debt and interest accrued thereon currently held *'in custodia legis'* by the Master of the High Court shall be paid forthwith to the respondent herein.

The appellant shall pay cost of D20, 000 to the respondent.

YEBOAH Ag. JA I agree

DORDZIE Ag. JA I agree

Appeal Dismissed.
FLD.

CHRISTIANA WILLIAMS v MELVILLE WILLIAMS

COURT OF APPEAL OF THE GAMBIA

3rd July 2007

Agim (ORG) PCA

Court – Execution of court processes - Stay of execution – Grant of - Unimpeded discretion to grant or refuse same – Triable grounds of appeal – Important determinant for the grant of a stay – Right of appeal not to be frustrated –Self help can prevent grant of stay.

Judgment & Orders – Enforcement of - Responsibility for – Sheriffs and bailiffs – Processes to be executed strictly in accordance with Rules of Court.

Practice & Procedure – Sheriffs and bailiffs –- Sole responsibility for enforcement of processes – Processes to be executed strictly in accordance with Rules of Court - Right of appeal not to be frustrated.

Words & Phrases – Meaning of "process" – Sheriff and Civil Process Act.

Held, *allowing the appeal (per Agim PCA)*

1. Courts are supposed to encourage and facilitate the execution and realization of their judgments, orders and other processes and not frustrate them.

2. Courts should not grant a stay of execution pending appeal for the sole reason that there is a notice of appeal which discloses triable and substantial issues of law and or fact. There is however, no doubt that this is an important determinant of whether a stay should or should not be granted. This is because a stay pending appeal cannot be granted where there is no appeal or there is a frivolous appeal. Whereas a frivolous appeal can prevent the application for stay of execution from being granted, a triable and substantial appeal alone cannot help it to be granted. It has to combine with the under mentioned factor to be able to secure the

grant of stay of execution. See *Minteh v Danso (No.1)* (1997 – 2001) GR 216.

3. The most important determinant of the question of stay or no stay of execution of a judgment pending appeal is whether there is any feature that will render the appeal process or resulting judgment nugatory.

4. Courts have an unimpeded discretion to grant or not grant a stay of execution of a judgment pending appeal. Each case has to be dealt with on its own peculiar facts. The emphasis should be to do justice. See the decision of this court in *Lang Conteh & Ors v T.K. Motors* (2002-2008) 2 GLR 23.

5. There is nothing to show that if this application is not granted the appeal process or judgment will be rendered nugatory. Ordinarily, I should refuse such an application at this juncture. However, I have considered that to do so in this case will lead to injustice in the light of the peculiarities of the case which include the fact that the respondent engaged in self help and with malice afore thought tried to subvert the appeal process, that this matter touches on the very delicate subject of the emotional, moral and physical condition of the children and that what is of paramount importance in this kind of case is the child's interest during the pendence of this appeal and not the rights of their parents.

6. Where a Court for very compelling reasons, orders that children who have been living with their caring mother for a very long time like in this case, should be custodied by their father, the process of executing such an Order must have regard to the fondness and affection that exist between the children and their mother. The execution of the said Order must not be violent as this will inflict emotional and psychological shock, dislocation and confusion on the child. The execution must be carried out in such a way as to minimize emotional trauma on the child.

7. The responsibility to enforce the order or process of the Court is vested by Section 7 of the Sheriffs and Civil Process Act on the Sheriff and bailiffs.

8. All processes of Court shall be executed strictly in accordance with Rules of Court and directions of the Court. This is a statutory requirement prescribed in Section 6 (2) of the Sheriffs and Civil Process Act.

9. The word "process" as used therein includes judgment and any other legal process by which a judgment is enforced. The processes of enforcement are provided for in the Sheriffs and Civil Process Act and in the second schedule to the rules of the High Court.

10. The principle underlying these provisions is to ensure that due process is followed throughout the judicial process and this enables the Courts to be in effective control of their proceedings to avoid chaos and disorder. It will not help the reputation of the Courts if every judgment creditor resorts to self help in executing his judgment.

11. The right to appeal is a constitutional right. It encompasses the right to do all such lawful things as will facilitate and protect the appeal. An application to the Court of Appeal for stay of execution pending appeal is part of the right of appeal. Anything done to pre-empt it or that has the effect of pre-empting it certainly is aimed or is likely to frustrate the effective exercise of the right of appeal. This Court as well as any other Court should not condone such gross abuse of its process.

Cases referred to:

Bentsi-Entchill v Bentsi-Entchill (1979) 2 GLR 303
Camara v Vare (1997 – 2001) GR 58
Lang Conteh & Ors v T.K. Motors (2002-2008) 2 GLR 23
Minteh v Danso (No.1) (1997 – 2001) GR 216
Odoguwu v Odoguwu (1992) 2 SCNJ 357

Statutes referred to:

Sheriiff and Civil Process Act Sections 6(2), 7

Rules of Court referred to:

The Gambia High Court Rules Second Schedule

REPEAT APPLICATION for stay of execution of the Judgment of the High Court pending appeal after the refusal of an earlier application by A.M.A. Dordzie J. The facts are sufficiently stated in the opinion of Agim PCA.

AGIM PCA. On the 7th June 2007, the Gambian High Court, per Hon. Justice A.M.A. Dordzie delivered judgment in Civil Suit No.HC.249/06/MF/090/CO dissolving the marriage between the applicant and respondent and inter alia ordered that the respondent herein should have custody of the children of the marriage. The same day, the applicant appealed against the said judgment and applied to the Trial Court for a stay of execution of the judgment particularly the order that the respondent should have custody the children. The Trial Court heard and refused this application. Hence this application to this Court filed on the 14th June 2007. It is supported by the applicant's affidavit of 26 paragraphs which is accompanied by the notice of appeal against the judgment of 7th June 2007, the motion on notice and accompanying affidavit that was heard and refused and the judgment appealed against. The application is further supported by the applicant's additional affidavit of 12th June 2007 and a further additional affidavit of one Marie Paul deposed to on 26th June 2007. The respondent filed an affidavit of 24 paragraphs in opposition on the 25th June 2007.

I have considered the affidavit evidence in this case as well as the arguments of Counsel on both sides. Both sides have concerned themselves more with the matter of custody of the children with little or no regard to the question of whether this is an appropriate case for the grant of a stay of execution of the judgment pending appeal, the real issue in controversy in this application. The challenge inherent in dealing with an application for stay of execution of a judgment ordering custody is the high risk of inadvertently straying into matters in the pending

appeal. I will try hard to deal with this challenge in this case. Courts are supposed to encourage and facilitate the execution and realization of their judgments, orders and other processes and not frustrate them. For this reason, Courts should not grant a stay of execution pending appeal for the sole reason that there is a notice of appeal which discloses triable and substantial issues of law and or fact. There is however, no doubt that this is an important determinant of whether a stay could or should not be granted. This is because a stay pending appeal cannot be granted where there is no appeal or there is a frivolous appeal. Whereas a frivolous appeal can prevent the application for stay of execution from being granted, a triable and substantial appeal alone cannot help it to be granted. It has to combine with the under mentioned factor to be able to secure the grant of stay of execution. See *Minteh v Danso (No.1)* (1997–2001) GR 216. The most important determinant of the question of stay or no stay of execution of a judgment pending appeal is whether there is any feature that will render the appeal processor resulting judgment nugatory. The fundamental importance of the above two factors have remained the subject of consistent and unanimous judicial restatements. See *Camara v Vare* (1997–2001) GR 58. Through the cases, other factors have equally been considered by the Courts in the exercise of their discretion. Most importantly, it has been emphasized that the Courts have an unimpeded discretion to grant or not grant a stay of execution of a judgment pending appeal. Each case has to be dealt with on its own peculiar facts. The emphasis should be to do justice. See the decision of this Court in *Lang Conteh & Ors v T.K. Motors* (2002 – 2008) 2 GLR 23.

In our present case, there is no doubt that the grounds of appeal disclose triable issues. But there is nothing to show that if this application is not granted the appeal process or judgment will be rendered nugatory. Ordinarily, I should refuse such an application at this juncture for this reason. However, I posit that to do so in this case will lead to injustice in light of the peculiarities of this case which include the fact that the respondent engaged in self help and with malice afore thought tried to subvert the appeal process, that this matter touches on the very delicate subject of the emotional, moral and physical condition of the children and that what is of paramount importance in this kind of case is the child's interest during the pendence of this appeal and not the rights of their parents. The relevant facts of the case as disclosed by the affidavit evidence are as follows. The children, namely, Winston (14 years), Karin

(11 years) and Silas (7 years) have lived with the applicant (their mother) since October 2005, when she separated from the respondent, their father by leaving the matrimonial home. Between October 2005 and 7th June 2007 is about one year and eight months. During this period, she alone provided for their moral and material well-being. She put them in the good schools they are now attending. There is nothing in the affidavit evidence to even suggest that the applicant was not caring for them while they lived with her. Having lived for so long with their mother, they may have developed fondness for her which makes them feel more emotionally and psychologically secure with her. This compassionate and affectionate relationship is essential for the full development of the child's own character, personality and talents. See *Bentsi-Entchill v Bentsi-Entchill* (1979) 2 GLR 303 at 309. Where a Court for very compelling reasons, orders that children who have been living with their caring mother for a very long time like in this case, should now be custodied by their father, the process of executing such an order must have regard to the fondness and affection that exist between the children and their mother. The execution of the said order must not be precipitated as this will inflict emotional and psychological shock, dislocation and confusion on the child. The execution must be carried out in such a way as to minimize emotional trauma on the child.

On the 7th June 2007 shortly after the Trial Court refused the application for a stay of execution pending appeal, the respondent rushed to the children's school and removed them from there while lessons were ongoing. The children did not attend school for two days. This action of the respondent certainly does not portray him as a father who loves and cares for his children. For if he was a caring father, he should not have caused the children to be absent from school for two days. In paragraphs 4 and 5 of his affidavit in opposition, he stated that he personally executed the judgment because he apprehended that the applicant might refuse to obey the order to release the children to his custody. I do not think that there is any basis for this fear. Respondent was represented by Counsel and should have sought advice from his Counsel on how to enforce the judgment. The responsibility to enforce the order or process of the Court is vested by Setion 7 of the Sheriffs and Civil Process Act on the Sheriff and bailiffs. The respondent is certainly not a sheriff or bailiff. All processes of Court shall be executed strictly in accordance with Rules of Court and directions of the Court. This is a

statutory requirement prescribed in Setion 6(2) of the Sheriffs and Civil Process Act. The word "process" as used therein includes judgment and any other legal process by which a judgment is enforced. These processes of enforcement are provided for in the Sheriffs and Civil Process Act and in the Second Schedule to the Rules of the High Court. The principle underlying these provisions are to ensure that due process is followed through the judicial process and that the Courts are in effective control of their proceedings to avoid chaos and disorder. It will not help the reputation of the Courts if every judgment creditor resorts to self help in executing his judgment. Learned Counsel for respondent has argued that what took place was undesirable but albeit lawful and valid. I think that what took place is undesirable as it is unlawful and unconstitutional. The right to appeal is a constitutional right. It encompasses the right to do all such lawful things as will facilitate and protect the appeal. An application to the Court of Appeal for stay of execution pending appeal is part of the right of appeal. Anything done to pre-empt it or that has the effect of pre-empting it certainly is aimed or is likely to frustrate the effective exercise of the right of appeal. This Court as well as any other Court should not condone such gross abuse of its process.

For all of the above reasons, I will grant this application as a way of saying no to self help and to discourage the recurrence of such desperation. See for guidance the Nigerian Supreme Court decision in *Odoguwu v Odoguwu* (1992) 2 SCNJ 357. The motion is granted as prayed. The children shall remain in the custody of the applicant pending the determination of the appeal against the judgment of the Trial Court. The respondent is free to visit the children every Saturday and Sunday from 11 a.m. till 5 p.m. The children shall visit and stay with the respondent during school holidays. The respondent shall remain responsible for the children's school fees and upkeep. These Orders shall last till the determination of the said appeal.

I make no order as to costs.

Appeal allowed.
FLD.

SUNDIATA TRADING COMPANY LIMITED

v

STANDARD CHARTERED BANK LIMITED

COURT OF APPEAL OF THE GAMBIA
(Civil Appeal No. 1/2006)

22nd November 2006

Agim PCA.

Court – Jurisdiction - Power to raise and decide suo motu issue of - Application to the Court of Appeal for stay pending hearing of same in the High Court is incompetent - Nature and basis of power of an Appellate Court to grant stay pending appeal.

Jurisdiction – Court – Power to raise and decide suo motu issue of jurisdiction – Hierarchy of Courts - Appeals – Stay of execution - Application to the Court of Appeal for stay pending hearing of same in the High Court is incompetent - Nature and basis of the power of an Appellate Court to grant stay.

Stay of Execution – Court - Nature and basis of power of an Appellate Court to grant stay.

Held, *refusing the application (per Agim PCA)*

1. Being a matter of jurisdiction, this Court can raise and decide it *suo motu* at any stage of the case, especially as it is simply and straightforward.

2. An application for stay of execution of a Magistrates Court judgment cannot be made to the court of Appeal in the absence of an appeal from the decision of the High Court to this Court. It is clear from Section 130 (1) of the 1997 constitution that appeals lie from decisions of a High Court to the Court of Appeal. Appeals from Magistrates Court lie to the High Court by virtue of Section 132 (2) of the Constitution.

3. The power of an Appellate Court to entertain and determine applications for stay of execution pending appeal is based on the supposition that such an appeal is pending before it. The power is part of the compendium of discretionary powers of the Court to deal with interlocutory matters in a substantive matter before it and capable of affecting the matter before it. It is part of its inherent ability to control proceedings before her. So another Court before whom such proceedings are not pending lacks the jurisdiction to interfere, save in accordance with law. This is clear from the provision of Rule 31 GCA Rule which gives this Court the power to entertain and deal with this kind of application when an appeal to this Court has been filed against the decision of a High Court. The exercise of the power is predicated on the existence of an appeal to this Court.

Rules of Court referred to:

The Gambia court of Appeal Rules Rule 31

APPLICATION made before the Court of Appeal for stay of execution of the decision of the Banjul Magistrates Court given on 8th August 2005 whilst same was due for hearing at the High Court. The facts are sufficiently stated in the opinion of Agim PCA.

E.E. Chime Esq. for the appellant/applicant
I.D. Drammeh Esq. for the respondent

AGIM PCA. Apart from the fact that the applicant has not shown due diligence in pursuing the hearing of this application before this Court, I do not see any legal basis for this application to this Court. The applicant dissatisfied with the decision given by the Banjul Magistrates Court on 8th August 2005, appealed against it to the High Court. The motion for stay of execution of the decision pending appeal came before the High Court for hearing. Neither the applicant nor his counsel was present. The motion was therefore struck out. Instead of applying for a relistment of the motion or filing a fresh application before that Court, the applicant applied for a stay of execution of the Banjul Magistrates Court judgment to this Court. The applicant did not appeal against the decision of the

High Court striking out his application. Clearly, this application to this Court is not founded on any appeal to this Court. The question that naturally flows from these facts is whether an application for a stay of execution of a Magistrates Court judgment can be made to The Gambia Court of Appeal in the absence of any appeal from a decision of the High Court. Although neither party raised this issue, being an issue of jurisdiction, this Court can raise and decide it *suo motu* at any stage of the case, especially as it is simply and straightforward.

Having thus stated I will now proceed to deal with the question raised above. My answer to this question is that an application for stay of execution of a Magistrates Court judgment cannot be made to the court of Appeal in the absence of an appeal from the decision of the High Court to this Court. It is clear from Section 130 (1) of the 1997 constitution that appeals lie from decisions of a High Court to the Court of Appeal. Appeals from Magistrates Court lie to the High Court by virtue of Section 132 (2) of the Constitution. The power of an Appellate Court to entertain and determine applications for stay of execution pending appeal is based on the supposition that such an appeal is pending before it. The power is part of the compendium of discretionary powers of the Court to deal with matters interlocutory in a substantive matter before it and capable of affecting the matter before it. It is part of its inherent ability to control proceedings before her. So another Court before whom such proceedings are not pending lacks the jurisdiction to interfere, save in accordance with law. This is a clear from the provision of Rule 3 of The Gambia Court of Appeal Rules (GCA) which gives this Court the power to entertain and deal with this kind of application when an appeal to this Court has been filed against the decision of a High Court. However, the exercise of the power is predicated on the existence of an appeal to this Court.

In the absence of such an appeal, this Court lacks the jurisdiction to entertain this application or proceed further therein. The application is hereby struck out. I make no order as to costs.

Appeal Struck Out.
FLD.

NASSER H. FARAGE v SINGAM INVESTMENT COMPANY LIMITED

COURT OF APPEAL OF THE GAMBIA
(Civil Appeal No. 53/99)

12th June 2006

Agim PCA

Appeal – Grounds of Appeal - Omnibus ground - Reliance on same to attack specific findings of facts.

Court – Court of Appeal - Source of power to order for stay of execution pending appeal to Supreme Court – Stay of Execution - Judicial and judicious exercise of its discretion - Conditions for grant of stay of execution of judgment pending appeal - Application of case law.

Jurisdiction - Court of Appeal - Source of power to order stay of execution pending appeal to Supreme Court - Importance of adhering to judicially established criteria in exercising discretion to grant or refuse a stay.

Party - Omnibus ground cannot be relied on to attack specific findings of facts - Guidelines for the application of case law – Application for Stay of execution - Impecuniosity per se not a ground for stay of execution of a judgment.

Practice & Procedure – Appeal - Omnibus ground cannot be relied on to attack specific findings of facts - Conditions for grant of stay of execution of judgment pending appeal - Impecuniosity per se not a ground for stay of execution of judgment - Application for stay of execution of judgment pending appeal will fail in the absence of an appeal disclosing triable issues.

Stay of Execution - Source of power of Court of Appeal to order stay of execution pending appeal to Supreme Court - Conditions for grant of stay of execution of judgment pending appeal - Impecuniosity per se not a ground for stay of execution of judgment - Application for stay of execution of judgment pending appeal will fail in the absence of an appeal disclosing tribal issues. .

Held, *striking out the application (per Agim PCA)*

1. The power of this Court to order stay of execution of a judgment pending the determination of an appeal to the Supreme Court is derived from Rule 22(1) of the Rules of the Supreme Court 1999. It is a discretionary power which this Court has to exercise judicially and judiciously. Rule 22(1) does not prescribe how this power is to be exercised.

2. The Courts in The Gambia have over time established guidelines for the exercise by the Courts of its discretion. Like this Court stated in *Lang Conteh & Ors v T.K. Motors* (2002-2008) 2 GLR 23, adherence to these principles helps in ensuring that the exercise of discretion is not based on vague and irrelevant considerations. So that although this Court has an unimpeded discretion in the exercise of its power (in the sense that it can refuse an application which has complied with the judicially established criteria or grant one without reason) it is good practice and in the interest of justice to base such exercise on some reasonable factual or legal criteria. The restatement of these principles by Gambian Courts, in similar applications has rendered these principles sacrosanct, as defining a judicial standard of a general nature to be applicable in similar circumstance. This has resulted mainly from the practice of judicial precedent.

3. The principles guiding the exercise of the Court's discretion in this kind of application as distilled from several decisions of the Court are well laid out in *Lang Conteh & Ors v T.K. Motors* (supra). These include: -

    1. The Court should not make it a practice to deny a successful litigant the fruits of his success and thus lock up the funds to which he is prima facie entitled, merely because the judgment debtor has appealed.
    2. On the other hand, a party appealing is entitled on proper considerations to the protection of the Court as regards execution of the impugned judgment so that his success at the end should not be rendered nugatory. So unless special circumstances exist that can render the appeal nugatory, the stay will not be granted.

5. It is trite law that impecuniosity of the applicant per se is not a ground for the grant of a stay. The Court can only grant the stay for this reason if execution is likely to paralyze in one way or other the ability of the judgment debtor to appeal against the judgment. See the decisions of this Court in *Lang Conteh & Ors v T.K. Motors* (supra) and in *Meridien Biao Bank Ltd v SSHFC* (1997-2001) GR 534. The applicant has not alleged that the execution of the judgment will impair his ability to appeal. In any case there is nothing in the applicant's affidavit showing that he is incapable of paying the said judgment debt.

6. An application for stay of execution pending appeal presupposes the existence of a valid appeal. The applicant must show that the grounds of appeal disclose triable or substantial issues of law and fact. If he fails to do so the application is likely to fail. The Courts are enjoined not to allow a recalcitrant judgment debtor who does not want to comply with the judgment to use the process as a smokescreen to abuse the process of Court. The only way of convincing the Court that the applicant is not abusing the appeal process is by grounds of appeal disclosing triable issues.

7. It is difficult to see how ground 5 the omnibus ground can remain valid in the absence of an appeal against those findings and issues. See *Edward Graham v Lucy Mensah* (2002-2008) 1 GLR 22 and *Haro Company Ltd v Ousman Jallow* (2002-2008) 1 GLR.

Cases referred to:

Edward Graham v Lucy Mensah (2002-2008) 1 GLR 22
Haro Company Ltd v Ousman Jallow (2002-2008) 1 GLR 128
Jawara v Raffle (1997-2001) GR 767
*Lang Conteh & Ors v T.K. Motors (*2002-2008) 2 GLR 23
Meridien Biao Bank Ltd v SSHFC (1997-2001) GR 534

Rules of Court referred to:

Rules of the Supreme Court 1999 Rules 22 (1)

APPLICATION for stay of execution of the Judgment rendered by the Court of Appeal in Civil Appeal No. 53/99 pending an appeal to the Supreme Court. The facts are sufficiently stated in the opinion of Agim PCA.

S.B.S Janneh Esq. for the appellant/applicant
I.D. Drammeh Esq. for the 1st & 4th respondents

AGIM PCA. On the 6th of March 2006, this Honourable Court rendered judgment in Civil Appeal No. 53/99 wherein the defendant/respondent herein referred to as applicant was ordered as follows:

1. To forthwith pay the plaintiff/appellant herein referred to as respondent) the sum of US $1,495,163.65 being the unpaid balance of the purchase price of textile goods supplied to the applicant by the respondent.

2. To pay to the respondent simple interest of the said debt of US$1,495,163.65 at the rate of 25% per annum from the 1st of May 1993 till date of judgment.

3. To pay the respondent interest on the judgment debt at the rate of 4% per annum from the date of judgment until the judgment is fully satisfied.

4. To pay the respondent nominal damages of D20, 000.00.

5. To pay the respondent cost of D35, 000.00.

Dissatisfied with this judgment, the applicant filed a notice of appeal on the 5th April 2006. On the 25th of May 2006 the applicant filed this motion on notice dated 24th May 2006 applying to this Honourable Court for an order to stay execution of its said judgment of 6th March 2006. The motion is supported by an affidavit of 10 paragraphs deposed to by Ousman Sulayman Barrow, a clerk in the law office of Learned Counsel to the applicant. Accompanying the affidavit are Photostat copies of the said judgment and notice of appeal marked OS1 and OS2 respectively.

The respondent filed an affidavit in opposition containing 13 paragraphs and deposed to on 1st June 2006 by Mustapha Fofana on the authority of the respondent. It is accompanied by money transfer instruction, photocopy of The Gambia High Court order in Civil Suit No. 682001, photocopies of writ of summons and statement of claim in Civil Suit No. 60/2001 marked as MF1 and MF2 respectively. The applicant filed an affidavit in reply on 6th June 2006 deposed to by Ousman Sulayman Barrow, it is accompanied by the photocopy of the statement of defence in Civil Suit No. 60/2001 marked OB1. On the 7th June 2006, S.B.S Janneh Esq. Learned Counsel for the applicant moved his motion for stay of execution pending further appeal to the Supreme Court. He argued in support that: The conditions for a stay must not be onerous as to amount to a refusal; a stay should be granted to prevent the appeal being rendered nugatory in the event it succeeds; these are the main principles, but there are other considerations; there are many authorities concerning stay of execution but *Jawara v Jabbi* (No. 2) (1997-2001) GR 534 is recommended. The respondent no longer reside in The Gambia; the Shanghai Textiles and import Corporation, the applicant's overseas principals have no assets or business in The Gambia; in law neither the China State Corporation nor the Shanghai Corporation can own Singam Investment Gambia ltd, being a Gambian registered company. They cannot be held accountable for the liabilities of Singam Investment Limited. The Shanghai and China Corporations do not have assets here. China which is very distant runs the Communists Legal System which our Courts are not familiar with; Paragraph 6 of the applicant's affidavit is not denied; it lists the applicant's landed properties which he is willing to offer as collateral security for the realization of the judgment in the event of failure of this appeal; if the appeal fails the respondent has a chance of realizing the judgment debt by selling the said properties; the interlocutory injunction of the Gambian High Court in another case against the applicant concerning the properties of the applicant notwithstanding, the properties remain unattached because the order is interlocutory and is not the final judgment; post judgment attachment has priority over interlocutory or interim attachments; even if the applicant is ordered to pay the judgment debt into Court, he cannot because he does not have the money to do so. This can be deduced from the fact that the applicant has offered his properties as collateral; the balance of convenience is in favour of the applicant.

Learned Counsel for the respondent, I.D. Drammeh Esq. opposed the said application. She stated that if the Court is minded to grant a stay, it should consider the fact that the judgment debt is $1,495,163.65 that interest was equally awarded, that if all these are put together, the resulting sum will certainly be more than $2 million the value the applicant put on his properties. She further submitted that the respondent is not aware that the applicant has any other properties within jurisdiction, that the applicant collects rents from properties listed in the affidavit in support of his application, that if this Court is minded to attach the applicant's properties as security for the judgment debt in case the appeal fails, that this Court should also order that the rents be paid into an account to be opened by the Master of the High Court.

The power of this Court to order stay of execution of a judgment pending he determination of an appeal to the Supreme Court is derived from Rule 22(1) of the Rules of the Supreme Court 1999. It is a discretionary power which this Court has to exercise judicially and judiciously. Rule 22(1) does not prescribe how this power is to be exercised. The Courts in The Gambia have established guidelines for the exercise by the Courts of this discretion. Like this Court stated in *Lang Conteh & Ors v T.K. Motors* (2002-208) 2 GLR 23, adherence to these principles helps in ensuring that the exercise of discretion is not based on vague and irrelevant considerations. So that although this Court has an unimpeded discretion in the exercise of its power (in the sense that it can refuse an application which has complied with the judicially established criteria or grant one without reason) it is good practice and in the interest of justice to base such exercise on some reasonable factual or legal criteria. The restatement of these principles by Gambian Courts, in similar applications has rendered these principles sacrosanct, as defining a judicial standard of a general nature to be applicable in similar circumstance. This has resulted mainly from the practice of judicial precedent. However, in the exercise of their discretionary jurisdiction Courts must always call to mind the classical statement of Sir Vahe Bairahian in his book Synopsis No. 2 page 50 relied on by this Court in *Lang Conteh & Ors v T.K. Motors* (supra). It states that administration of law consists in the application of principles to a particular combination of circumstances. Case law is a re-interpretation of principles proceeds on lines of common sense. The combination of circumstances in a given case is the context in which a certain principle is applied. If in another

case there is the same combination of circumstances, the same principle will be applied by analogy. If the combination is not the same but is sufficiently similar, the principle may be applied when there is no legally relevant distinction between the combination in the previous case and that in the later case, or the principles may have to be extended or modified to make if applicable. But dissimilar cases should be decided differently. The principles guiding exercise of discretion in this kind of application, as distilled from several decisions of the Court are well laid out in *Lang Conteh & Ors v T.K. Motors* (supra). These include: -

1. The Court should not make it a practice to deny a successful litigant the fruits of his success and thus lock up the funds to which he is prima facie entitled, merely because the judgment debtor has appealed.

2. On the other hand, a party appealing is entitled on proper considerations to the protection of the Court as regards execution of the impugned judgment so that his success at the end should not be rendered nugatory. So unless special circumstances exist that can render the appeal nugatory, the stay will not be granted.

The applicant must allege and prove by his affidavit the existence of special circumstances. According to this Court in *Jawara v Raffle* (1997-2001) GR 767, the special circumstances warranting a grant are not set in stone and each case is normally decided on its own merit. In our present case, the applicant in his affidavits alleged two special circumstances as the basis for his application. The first one is that it would be impossible for the judgment debtor to retrieve the judgment debt if paid to the respondent should the appeal succeed. According to the applicant, the officials and owners of the respondent are no more resident in The Gambia. See paragraphs 4, 5 and 7 of the affidavit in support of the motion. I find as a fact that the said allegations are admitted. The respondent in those paragraphs of its affidavit confirmed the fact that Shanghai Textile Import and Export Corporation in China owns and operates the respondent as her Gambian subsidiary. The payments for goods supplied by the respondent were made by applicant to the bank of Shanghai Textile Import and Export Corporation in China.

From the above admitted facts it becomes clear that it would be impossible for the judgment debtor to retrieve the judgment debt if paid to the respondent should the appeal succeed. The applicant would suffer irreparable loss rendering the success on appeal a pyrrhic victory.
The applicant has offered his realty as security for the realization of the judgment debt in case the appeal fails. See paragraphs 6 and 9 of the affidavit in support of the motion. The respondent has drawn the attention of this Court to the existence of an interlocutory injunction of the Gambia High Court in Civil suit No. 68/2001 restraining the applicant herein from alienating or attaching the said properties. I agree with Learned Counsel for the applicant that the said order, exhibit MF2 accompanying the affidavit in opposition cannot prevent an attachment on the Order of this Court in realization of a final judgment from taking effect. The execution of the monetary judgment will take priority. By its express terms, that Order cannot bind this Court. The offer of realty realities as security is a special circumstance that supports the grant of this application. It guarantees the realization of the judgment debt if the appeal fails.

Learned Counsel for the respondent had applied for an Order of this Court that the rents currently accruing to the applicant from the properties listed in exhibit 6 of the affidavit in support of the motion by paid into Court to be kept in an interest yielding account opened by the Master of the High Court. This application is no opposed by the applicant. Learned Counsel for respondent had also submitted that the total monetary value of the judgment debt exceeds $2 million, the value the applicant put on his said realty. At page 23 of exhibits OS1, the judgment accompanying the applicant's affidavit, it is indicated therein at page 23 that before the matter went to Court, the applicant had in writing admitted owing the respondent $400, 000 out of the claimed debt of $1,495,163.65. Throughout the trial and up till now the applicant made no effort to pay all or any part of he acknowledged debt. The applicant has not explained why even this admitted amount cannot be paid, while he continues on appeal to dispute the other part of the judgment debt. In this kind of applications the Court is bound to consider the entire history of the case and the overall conduct of the applicant. The failure of the applicant to pay even what he has admitted without reason shows want of bona fide.

Learned Counsel for the applicant also submitted that even if the applicant is ordered to deposit the judgment debt in Court he cannot do so because he does not have the money to do so. According to him this fact can be deduced from the fact that he has offered his realty as security. If he had the money to pay he would not have offered the said properties as collateral. This submission is not valid in law. It is trite law that impecuniosity of the applicant per se is not a ground for the grant of a stay. The Court can only grant the stay for this reason if execution is likely to paralyze in one way or other the ability of the judgment debtor to appeal against the judgment. See the decisions of this Court in *Lang Conteh & Ors v T.K. Motors* (supra) and in *Meridien Biao Bank Ltd V SSHFC* (1997-2001) GR 534. The applicant has not alleged that the execution of the judgment will impair his ability to appeal. In any case there is nothing in the applicant's affidavit showing that he is incapable of paying the said judgment debt. Accompanying the motion for stay of execution is the notice of appeal, commencing Civil Appeal No. 53/99(OS2). Throughout the submission of Learned Counsel for the applicant, he never referred to the grounds of appeal therein. An application for stay of execution pending appeal presupposes the existence of a valid appeal. The applicant must show that the grounds of appeal disclose triable or substantial issues of law and fact. If he fails to do so the application is likely to fail. The Courts are enjoined not to allow a recalcitrant judgment debtor who does not want to comply with the judgment to use the process as a smokescreen to abuse the process of Court. The only way of convincing the Court that the applicant is not abusing the appeal process is by grounds of appeal disclosing triable issues. Learned Counsel for the applicant has not shown that the grounds of appeal in OS2 disclose triable issues of fact. Now that he has not done so, the Court will proceed to look at the said grounds of appeal to find out if they are substantial. In doing so, the Court is not deciding the appeal at this stage. See *Meridien Biao Bank Ltd v SASH* (supra), *Jawara v Raffle* (supra) and *Lang Conteh v T.K. Motors* (supra). Having considered the grounds of appeal in OS2, I am of the view that, save for ground 5, they are vague general and disclose no reasonable complain against the judgment contrary to Rule 8 (2) (f) and (5) of the Rules of the Supreme Court 1999. See the decisions of this Court in *Edward Graham v Lucy Mensah* (2002-2008) 1 GLR 22 and *Haro Company Ltd v Ousman Jallow* (2002-2008) 1 GLR 128 were similar grounds of appeal

framed exactly like the ones here were held to be vague, general and disclosing no reasonable complain in violation of provisions similar to the above cited rules.

As the Judgment (OS1) shows, several findings of facts and decisions on credibility of witnesses were made by this Court. At pages 29-36 specific points of law on interest and damages awardable were made. It is difficult to see how ground 5 the omnibus ground can remain valid in the absence of an appeal against those findings and issues. See *Edward Graham v Lucy Mensah* (supra) and *Haro Company Ltd v Ousman Jallow* (supra). The grounds of appeal therefore do not disclose any triable issue. While so deciding, I still bear in mind the fact that the appeal remains subsisting to be dealt with by the Supreme Court. So that deciding the application on this reason alone will not meet the justice of the case. The foregoing notwithstanding, the balance of convenience favours a grant of this application on terms. Accordingly, I hereby order as follows: -

1. That the Judgment of this Court in Civil appeal No. 53/99 is hereby stayed pending the determination of the appeal to the Supreme Court.

2. That title to the land, buildings and appurtenances thereto situate at No. 25 Wellington Street, Banjul, 11 Russell Street, Banjul, 99 year leasehold SR. No. K89/99 Fajara Kombo Saint Mary and the applicants permanent home at Cape Point Kombo St. Mary are hereby attached and shall be sold if at the determination of the appeal to the Supreme Court it is no longer possible for any reason for the applicant to pay the judgment debt forthwith.

3. The applicant shall within 14 days of this Order, pay into Court the sum of US$400,000.00 (four hundred thousand United States of America Dollars) to be kept by the Master of the High Court in an interest yielding account.

4. The applicant shall within 7 days of this Order, execute and deposit in this Court's Registry, a guarantee in respect of the realization of the judgment debt citing the said realty mentioned herein as collateral.

Unless conditions 3 and 4 are satisfied as herein stated, the Order for Stay shall cease to have effect. I make no order as to cost.

Application granted on terms.
FLD.

MOMODOU CORR v AWA CORR & ANOR

COURT OF APPEAL OF THE GAMBIA
(Civil Appeal No. 26/2006)

26th March 2007

Agim PCA

Appeal – Extension of time – Permanent foreclosure to make an application for extension of time.
Court – Jurisdiction – When and how issue to be raised – Lack of jurisdiction – Consequence of.
Jurisdiction - Issue of – When and how to be raised - Lack of jurisdiction Consequence of – Incompetence of matter.

Held, *striking out the application (per Agim PCA)*

1. It is trite that an issue of jurisdiction can be raised at any time and in any manner without further ado. See the decision of this Court in *Antoine Banna v Ocean View Resorts Ltd.* (2002-2008) 1 GLR 1.

2. Rule 14(1) of the Gambia Court of Appeal Rules (GCA) stipulates that "…no appeal shall be brought after the expiration of fourteen days in the case of an appeal against an interlocutory decision…" It is clear that 14 days after 22nd May 2006, expired on the 5th June 2006. As at 7th June 2006 when the notice of appeal was filed, 16 days had expires after the filing. The appellant took no steps to apply for extension of time to appeal and up to date has not done so. Owing to the undue delay in making the application, the appellant is completely foreclosed from making such an application. This is because Rule 14(4) of the GCA Rule provides that "no application for enlargement of time in expiration of one month from the expiration of the time prescribed within which an appeal may be brought can be entertained."

3. In light of the foregoing, it is clear that Civil Appeal No. 27/2006 is incompetent. It is not initiated in accordance with law and therefore this Court lacks the jurisdiction to entertain same. See our decision in *Banna Beach Hotels Ltd v Thompson Holiday Ltd*.

Cases referred to:

Antoine Banna v Ocean View Resorts Ltd. (2002-2008) 1 GLR 1.
Banna Beach Hotels Ltd v Thompson Holiday Ltd

Rules of Court referred to:

The Gambia Court of Appeal Rules Cap 6:02 Vol. II Laws of The Gambia Rule 14(1) & (4)

APPEAL against the interlocutory decision of the High court overruling the preliminary objection of the defendant to the jurisdiction of the High Court to entertain the claim. The facts are sufficiently stated in the opinion of Agim PCA.

I.D. Drammeh Esq. for the 1st & 4th respondents

AGIM PCA. As exhibit AWJ1B, the ruling of the High Court in Suit No.HC/006/05/CL.002A shows, the date of the ruling is 22nd May 2006. This is restated in the opening paragraph of exhibit AWJ2, the notice of appeal which commenced this civil appeal No. 27/06. This notice of appeal was filed on the 7th June 2006 at 10:45 a.m. It is clear from exhibit AWJ1, that the ruling was an interlocutory decision of the High Court overruling the preliminary objection of the defendant in the suit to the jurisdiction of the High Court to entertain the claim. This Civil Appeal No. 27/2006 is therefore clearly an appeal against an interlocutory decision of the High court. The plaintiff at the lower Court who is the respondent herein, applied to this Court to dismiss this appeal for want of prosecution because the appellant has done nothing beyond filing this appeal to ensure that the appeal is prosecuted. During argument of the motion before me this morning, she has also contended that the appeal was filed out of time. It is clear that she has exceeded the terms of the prayer on her motion paper by relying on further grounds for the striking

out of the appeal beyond the reason of want of jurisdiction. Since this raises the fundamental issue of jurisdiction to deal with civil appeal No. 27/2006, I will suspend every other issue and consider it first notwithstanding that it is raised during the hearing of this motion and in this manner. This is because it is trite that an issue of jurisdiction can be raised at any time and in any manner without further ado. See the decision of this Court in *Antoine Banna v Ocean View Resorts Ltd*. (2002-2008) 1 GLR 1.

The indisputable facts are that the interlocutory ruling of the High Court was delivered on the 22nd May 2006 and the notice of appeal against that decision was filed on the 7th June 2006. Learned Counsel for the applicant has referred me to Rule 14(1) of the GCA Rules which stipulate that "…no appeal shall be brought after the expiration of fourteen days in the case of an appeal against an interlocutory decision…" It is clear that 14 days after 22nd May 2006, expired on the 5th June 2006. As at 7th June 2006 when the notice of appeal was filed, 16 days had expires after the filing. The appellant took on no steps to apply for extension of time to appeal and up till date having done so. However, as it is now and owing to the undue delay in making the application the appellant is completely foreclosed from making such an application. This is because Rule 14(4) of the GCA Rule provides that "no application for enlargement of time in expiration of one moth from the expiration of the time prescribed within which an appeal may be brought". In light of the foregoing, it is clear that Civil Appeal No. 27/2006 is incompetent. It is not initiated in accordance with law and therefore this court lacks the jurisdiction to entertain same. See our decision in *Banna Beach Hotels Ltd v Thompson Holiday Ltd*.

Accordingly, this appeal is hereby struck out. The appellant shall pay cost of D10, 000.00 to the respondent/applicant herein.

Appeal struck out.
FLD.

HISHAM MAHMOUD V KARL BAKALOVIC

COURT OF APPEAL OF THE GAMBIA
(Civil Appeal No. 53/99

5th August 2008

Agim PCA, Ota JA, Wowo Ag. JA

Appeal – Court of Appeal - Constituted by a single Judge – Right of appeal – Full Bench of the Court of Appeal – Stay of execution pending an appeal.

Court – Jurisdiction – Issue of - When to raise same – Reliefs – Not specifically claimed - Stay of execution - Pending appeal – Decision of single Judge of the Court of Appeal - Favourable grant not made just for the asking - Entitlement of successful litigant to the fruits of judgment – Appellant's constitutional right of appeal – Proper exercise of discretion - Striking a balance between the two - Need to establish special circumstances – Paramount consideration for grant of stay – Abuse of process.

Jurisdiction – Court of Appeal - Right of appeal – From decision of a single Judge of the Court of Appeal – Stay of execution pending appeal.

Party – Stay of execution – Need to establish special circumstances - Entitlement of successful litigant to the fruits of judgment – Appellant's constitutional right of appeal – Striking a balance between the two.

Practice & Procedure – Right of appeal – Decision of a single Judge of the Court of Appeal - Full Bench of the Court of Appeal – Application for Stay - Favourable grant not made just for the asking.

Judgment & Orders – Due execution of judgment – Acts calculated to frustrate same – Self help.

Stay of Execution – Pending appeal – Application for - Decision of single Judge of the Court of Appeal – Order not made just for the asking – Need to establish special circumstances – Impecuniosity not a ground for stay - Paramount consideration for grant of stay - Self help – Ground for refusal of stay.

Held, *striking out the application (per Agim PCA, Ota JA, Wowo Ag. JA)*

1. Section 129 (2) of the Constitution of the Republic of The Gambia 1997, by its proviso, empowers a party aggrieved with the decision of a single judge of the Court of Appeal, to appeal the decision to a bench of three justices of Appeal.

2. Since the Appellant has a constitutional right of appeal from the decision of a single Judge of appeal to a bench of three justices of the same Court, this Court therefore has the inherent jurisdiction to determine an application for stay of the impugned decision pending said appeal.

3. Since the Gambia Court of Appeal Rules (GCA) are silent on the procedure of commencing such an application, this Court can have recourse to English rules of procedure which apply to the proceedings of this Court by virtue of Section 16(9) of the Law of England application Act Cap 5 Vol. I Laws of The Gambia 1990. It follows therefore that since order 59/14/1 of the Supreme Court Practice 1995 provides that applications to the full Bench of the English Court of Appeal shall be by way of renewal of application, that the instant application which is by way of a renewal is properly before the Court.

4. However an order of stay of execution cannot be had just for the asking. This an equitable remedy which the court must grant judicially and judiciously taking into consideration the competing rights of the parties.

5. The Court must, in the exercise of its discretion weigh the entitlement of a successful litigant to the fruits of his judgment as against the appellant's constitutional right of appeal in order to strike a balance between the two.

6. Courts of law should not therefore make it a practice of depriving a successful litigant of the fruits of his success unless under very special circumstances.

7. Special circumstances have been held to include the following –

a. The destruction of the subject matter of the appeal rendering the appeal nugatory.
b. That the applicant would suffer irreparable loss rendering the success on appeal a pyrrhic victory.
c. It would be impossible for the judgment debtor to retrieve the money paid to the victorious party should the appeal succeed.
d. The grounds of appeal disclose triable and substantial issues of law and fact.
e. The execution will paralyze in one way or the other the ability of the judgment debtor to exercise his constitutional right of appeal.

8. However I make haste to add here that the mere fact that the grounds of appeal discloses substantial issue of law and for determination without more, is not sufficient for the grant of a stay. The paramount consideration must be that there are features to show that execution would stultify the appeal process or render the resultant judgment nugatory. See *Camara v Vare* (1997-2001) GR 50, *William V Williams* (2002-2008) 2 GLR 491. There must therefore be existing special circumstances that call for the grant of such an application.

9. The impecuniosity of an applicant for stay alone, without more, has been held in a plethora of cases not to be a sine qua non for the grant of a stay. See *Frachal Nig Ltd & Anor v Nigeria Arab Bank Ltd* (2000) 6 SCNJ 38 at 60, *Lang Conteh v T.K. Motors* (2002-2008) 2 GLR 23.

10. The seriousness of any application alleging an abuse of process of the Court cannot be overemphasized. Across all jurisdictions, Courts universally take an uncompromising stance against any attempt by one party to use its process to inflict injustice or oppress the other party. The Court whose process is being abused has an inherent jurisdiction to cure its process of that abuse. Thus, the universal trend is that once a Court finds a suit or process to be an abuse of its processes, the Court should dismiss it. Our Courts in The Gambia are not left behind in this

age long war against abuse of Court processes as is demonstrated by case law across the jurisdiction, showing an unrelenting and dogged stance against this practice. It is a trend which is on the high prevalence. We must strive to combat such abuses in a bid to maintain the sanctity and dignity of our noble and most revered profession. See *Ousman Tasbasi v Abdourahman Jallow & Anor* (2002-2008) 2 GLR 77, *Williams v Williams* (2002-2008) 2 GLR 491. *The O'Corporation Ltd v Kabo Air Limited & Anor* (2002-2008) 1 GLR 353, *Christopher E. Mene & Anor v Joseph H. Joof* (2002-2008) 2 GLR 316.

11. Abuse of process is defined in Jowett's Dictionary of English Law 2nd Ed. Vol. 2 as a frivolous and vexations action as when the party bringing it is not acting bona fide and merely wishes to annoy or embarrass his opponent or when it is not calculated to lead to any practical result.

12. In the final analysis, even if this application had exhibited the salient features requisite for a grant of such an application (which is however not the position here), it would still be unmaintainable, as the appellant has by his conduct demonstrated a determination to frustrate the due execution of the said judgment. He has engaged in self help activities to defeat the ends of justice, backing same up with a series of application for stay of execution, successfully putting the due execution of the judgment in jeopardy whilst the substantive appeal languishes comatose in a near forgotten land. This is not justice. I will not condone it.

13. It is trite learning, that a Court cannot grant a relief that is not specifically claimed. See the decision of the Supreme Court of The Gambia per Tobi JSC in *Fatou Badjie & Ors v Joseph Bassen* (2002-2008) 2 GLR 141.

Cases referred to:

Arrow Nominees Inc. v Blacklege (2002) 2 BCLC 167 at 193
Camara v Vare (1997-2001) GR 50
Christopher E. Mene & Anor v Joseph H. Joof (2002-2008) 2 GLR 316

Fatou Badjie & Ors v Joseph Bassen (2002-2008) 2 GLR 141.
Frachal Nig Ltd & Anor v Nigeria Arab Bank Ltd (2000) 6 SCNJ 38 at 60
Goldsmith v Sperrings (1977) 1 WLR 478
Lang Conteh v T.K. Motors (2002-2008) 2 GLR 23
Ousman Tasbasi v Abdourahman Jallow & Anor (2002-2008) 2 GLR 77
The O'Corporation Ltd v Kabo Air Limited & Anor (2002-2008) 1 GLR 353
Williams v Williams (2002-2008) 2 GLR 491.

Statutes referred to:

The Constitution of the Republic of The Gambia 1997 Section 129 (2)
The Gambia Court of Appeal Rules Rule 32
The Law of England Application Act Cap 5 Vol. I Laws of The Gambia 1990 Section 16(9)

APPEAL against the Ruling of the single Judge of the Court of Appeal per Agim PCA refusing the repeat application for stay of execution of the High Court Judgment dated 30th July 2007. The facts are sufficiently stated in the opinion of Agim PCA.

V. Andrews Esq. for the Appellant
A. Sissoho Esq. for the Respondent

AGIM PCA. The events that have brought the parties herein, thus far has its roots in a suit styled Civil Suit No. 71/99 commenced in the High Court of The Gambia, by the respondent herein, as plaintiff, against the appellant herein, as defendant. At the trial *nisi prius*, the Learned Trial Judge Paul J (as he then was) entered judgment on the 30th day of July 2007 in favour of the respondent herein as against the appellant. The Learned Trial Judge ordered that the plaintiff/respondent herein re-posses the leasehold property situate at Manjai-kunda K.S.M.D. and demised by lease SR. No. K392/1990 and the defendant/appellant herein was to re-convey the said leasehold property to the plaintiff/respondent. The judgment also placed an injunction on the defendant/appellant, his servant and agents not to sell, alienate or dispose of or lease the said property or any part thereof, and awarded costs of D10, 000 to the plaintiff/respondent. Being dissatisfied with the

judgment of the Trial Court, the appellant lodged an appeal at the Court of Appeal vide notice of appeal filed on the 14th of August 2007. Thereafter, the appellant applied to the High Court for a stay of execution of the impugned judgment. The application was refused by the High Court vide a ruling delivered on Tuesday the 26th day of February, 2008. The Appellant further applied to the Court of Appeal pursuant to Rule 32 of The Gambia Court of Appeal Rules, for an order staying the execution of the said judgment pending the determination of the appeal.
This application was refused on Wednesday the 7th day of May 2008, by Emmanuel Akomaye Agim (ORG) – PCA, sitting as a single Justice of Appeal. It is in dissatisfaction of the said ruling that the Appellant filed a Notice of Interlocutory Appeal on the 14th of May 2008 in Misc. Appeal No. 2/2008 pursuant to the proviso to Section 129(2) of the 1997 Constitution upon the following grounds.

> "That the Learned Justice of appeal was wrong when he held that "the conclusion of the Court here is that the exceptional circumstance must be such that is likely to destroy the subject matter of the appeal rendering the Appeal nugatory or a pyrrhic victory" in that there are other considerations shown by the appellant which under the circumstances are so exceptional that execution of the judgment would create a grave injustice.''

Particulars

''The plaintiff in exhibit RN1 indicated he could only be contacted by mail. There is no indication at all that he was contacted or he is aware of the judgment.

1. The Learned Justice of Appeal failed to avert his mind to paragraph 20 f the affidavit sworn to on 5th March, 2008, by Fatma Mahmoud when he held that there was nothing in the affidavits filed on behalf of the applicant that even suggests that if the execution of the said judgment is not stayed, Civil Appeal No. 54/2007 would be rendered nugatory.

As an antecedent to the interlocutory Appeal (supra) the appellant filed a motion on notice dated the 13th of May 2008 for the following orders.

1. An order granting stay of execution f the judgment of the High Court by Paul J in Civil Suit No. 71/99 between the parties herein pending the determination o an Appeal against the decision of the Hon. Justice E.A. Agim (PCA) sitting as a single judge of the Court.

2. Such further and other as the court shall deem just under the circumstances.

This application is supported by an 11 paragraph affidavit sworn to by one Fatima Mahmoud on the 14th day of May, 2008, attached thereto is exhibit FM1, Notice of Interlocutory Appeal. The Appellant swore to a further affidavit of 5 paragraphs sworn to by one Sally Drammeh on the 30th day of May, 2008, attached thereto is Exhibit SAD, a power of Attorney executed by the appellant in the United Kingdom. The appellant also swore to an affidavit in reply to the affidavit in opposition sworn by Fatima Mahmoud on the 15th day of July, 2008.
For his part the respondent filed an affidavit in opposition of 28 paragraphs sworn to by Respondent's attorney Riad Nachif, on the 10th day of July, 2008.
The Court ordered that written briefs be filed. The appellant filed his brief on the 17th of July 2008 and thereafter the respondent filed his on the same 17th July 2008.

The grounds for this application as borne out of paragraphs 5, 6, 7, 9, 10 and 11 of the affidavit of Fatma Mahmoud (supra) is that the Appeal filed by the appellant discloses triable issues. That appellant's family has lived in the property in issue for over 13 years. That the deponent is already 55 years, has no income, and that vacating the premises in issue would work hardship on her family especially her granddaughter as they would have to rent an alternative accommodation, since the house they own has long term tenants whom they cannot summarily evict. That the appellant who lives in the UK is also experiencing some financial difficulty. That unless a stay is granted the appellants appeal would be rendered nugatory. In the appellant's brief of argument, learned counsel for the appellant formulated two issues for determination.

1. Whether the Appellant's application is an abuse of process.
2. Whether the appellant having exercise his constitutional right of appeal this court ought not to stay execution pending the determination of such appeal.

She submitted for the appellant, that the application is not an abuse of process as it is commenced pursuant to Rules 31 and 35 of the GCA (Gambia court of Appeal) Rules, as well as the proviso to Section 129 of the Constitution of The Gambia 1997. That since the GCA Rules have not prescribed the procedure to be adopted in making such an application to its full bench, the parties are at liberty to adopt procedures that are consistent with the administration of justice. That the English Court of Appeal provides vide order 59/14/1 of Supreme Court Practice 1995 that such an application shall be by way of renewal application. It is also contended on behalf of the appellant on issue 2, that the interim order of stay ought to be granted whilst the Interlocutory Appeal for stay is being dealt. Counsel submitted further that a determining factor of such an application was whether the appeal would be rendered nugatory. Appellants counsel relied on Vaswani Trading Co. v Sanvalakh 1 ACLA 445, Michael Olasumomi Balogun v Doras Oluwale Balogun 2 ACLA 55.

The Respondent opposed this application vide his 28 paragraphs affidavit in opposition, wherein he contends, that the actions of appellant and his counsel, tantamount to an abuse of the process of the court in that they deliberately prevented execution from taking place by making false proposals and negotiations, only to turn around and file an appeal to the full bench of the court. That this application lacks merits. That the house is value at D300, 000 per annum, that appellants family have been living therein rent free and Appellant's mother runs a shop in the premises from which she makes financial gains. Counsel for the respondent Mr. A. Sissoho, contended in the respondent's brief, that the appellant has failed to disclose any grounds for the grant of this application in the affidavit he filed in support of this application. That the manner the applicants acted prior to the appeal to the full bench of the Appeal Court is tantamount to an abuse of the process of the Court as evidenced in paragraphs 11, 12, 13, 14, 15, 16, 17 and 18 of the affidavit in opposition, in that the acts of the Agent and purported Attorney of the appellant prevented him, the respondent, from getting possession of the

property and in the process the respondent suffered damages as averred in paragraphs 25, 26 and 27 of the affidavit in opposition which stand unchallenged and are therefore admissions in law. That the affidavit in reply to the affidavit in opposition filed by the appellant contain bare denials and are therefore admissions in law. Counsel urged the Court to award the respondent D300, 000 mesne profit, two thousand Euros for his air ticket and costs of D50, 000 pursuant to Rules 35 and 36 of the GCA Rules. Counsel relied on the following authorities for his argument: Meridien Biao Bank Gambia Ltd V SSHFC (1997 – 2000) GR 305, Williams v Williams (2002-2008) 2 GLR 491, Ousman Tasbasi v Abdourahman Jallow & Anor (2002-2008) 2 GLR 77 and O'Corporation Limited v Kabo Air Limited (2002-2008) 1 GLR.

I have considered the totality of this application namely, the affidavits filed in support and that in opposition as well as the contentions in the respective briefs filed on behalf of both parties. I have also given due heed to the issues formulated for determination in the appellant's brief to wit:-

1. Whether the appellant's application is an abuse of process.
2. Whether the appellant having exercised his constitutional right of appeal, this court ought not to stay execution pending the determination of such appeal.

Though the respondent failed to formulate any issues for determination he however canvassed the issues (supra) in his brief of argument under headings that he styled as grounds in the said brief. Whilst not gainsaying the fact that these issues are borne out of this application, I however prefer to determine this application under one issue which to my mind is the real issue in controversy and which resolves all the issues raised in this application, to wit "whether the grant of a stay of execution is justifiable in the circumstances of this case." This court undoubtedly has the inherent power to grant a stay of execution of the impugned judgment pending the determination of Misc. Appeal No. 2/2008 filed in the Court of Appeal against the Ruling of the Single Judge of Appeal, Agim PCA, dated 7th May 2008. I say this because Section 129 (2) of the 1997 Constitution of the Republic of The Gambia, by its proviso, empowers a party aggrieved with the decision of a single Judge of the Court of Appeal, to appeal against the decision to a bench of three

Judges of Appeal. Section 129 (2) of the 1997 Constitution provides thus:-

> "The Court of Appeal shall be constituted by three Judges of the Court.
> Provided that a single judge of the Court may exercise the powers of the Court in any interlocutory matter, subject to an appeal from his or her decision to a bench of three Judges of the Court."

Implicit from this provision is that since the Appellant has a constitutional right of appeal from the decision of a single Judge of appeal to a bench of 3 Judges of the same Court, that this court therefore has the inherent jurisdiction to determine an application for stay of the impugned decision pending said appeal. I agree with the appellants when they contended in their brief that since the GCA Rules are silent on the procedure of commencing such an application, that the Court can have recourse to English rules of procedure which apply to the proceedings of this court by virtue of Section 16(9) of the Law of England Application Act Cap 5 Vol. II Laws of The Gambia 1990. It follows therefore that since order 59/14/1 of the Supreme Court Practice 1995 provides that applications to the full Bench of the English Court of Appeal shall be by way of renewal of application, that the instant application which is by way of a renewal is property before the Court. However, an order for stay of execution cannot be had just for the asking. It is an equitable remedy which the Court must grant judicially and judiciously taking into consideration the competing rights of the parties. The Court must, in the exercise of its discretion, weigh the entitlement of a successful litigant to the fruits of his judgment as against the appellant's constitutional right of appeal in order to strike a balance between the two. Courts of Law do not therefore make it a practice of depriving a successful litigant of the fruits of his success unless under very special circumstances. In the case of *Vaswani Trading Co. v Savalakh & Co* (1972) 1 ALL NLR (Pt 2) 483 the Supreme Court of Nigeria put it aptly:-

> "Courts of Law do not make it a practice of depriving a successful litigant the fruits of his success unless under very special circumstances. This involves a consideration of some collateral circumstances and perhaps in some case inherent matters which may, unless the order for stay is granted, destroy the subject matter of the

proceedings or foist upon the Court, especially the Court of Appeal a situation of complete hopelessness or render nugatory any order or orders of the Court of Appeal or paralyzes in one way or the other the exercise by the litigant of his constitutional right of appeal or generally provide a situation in which whatever happens to the case and in particular even if the appellant succeeds in the Court of Appeal there could be no return to the status quo."

From the foregoing it is incontrovertible that there must be in existence special circumstances that would sway a court to grant such an application. There is no statutorily prescribed guideline as to what constitutes special circumstances. However, in a plethora of cases dealing with similar provisions, the Courts in this jurisdiction have established guidelines for the exercise of this discretion. These principles, although not exhaustive, are useful guidelines in the exercise of this discretion by virtue of their continued re-statement by Courts thus rendering them sacrosanct. Invariably, application of these principles will depend on the peculiar circumstances of each case. Special circumstances have been held to include the following:-

1. The destruction of the subject matter of the appeal rendering the appeal nugatory.
2. That the applicant would suffer irreparable loss rendering the success on appeal a pyrrhic victory.
3. It would be impossible for the judgment debtor to retrieve the money paid to the victorious party should the appeal succeed.
4. The grounds of appeal disclose triable and substantial issues of law and fact.
5. The execution will paralyse in one way or the other the ability of the judgment debtor to exercise his constitutional right of appeal.

See *Ceesay v Bruce* (1997-2001)1 GR 698 at 702, *Camara v Vare* (1997-2001) GR 50, *Jawara v Raffl*e (1997-2001) GR 769, *Minteh v Danso (No.1)* (1997-2001) GR 216, *Meridien Biao Bank v SSHFC* (1997-2001) GR 534*, Lang Conteh & Ors v T.K. Motors* (2002-2008) 2 GLR 23. It is therefore to the affidavits filed in this application that recourse must of necessity be had in a bid to ascertaining the justification or not of the relief sought. I have taken the liberty of perusing the three affidavits filed

by the appellant in furtherance of his application, and I find as already stated in this ruling that the grounds of this application include the allegation that the Appeal filed by the Appellant, discloses triable issues amongst others. These facts are contained in Paragraphs 5, 7, 9, 10 and 11 of the affidavit of Fatima Mahmoud sworn to on the 14th of May 2008. For the purpose of this exercise, I find a need to reproduce the said paragraph. They state thus:–

5. "The Lower Court made no provision as to time limit within which the Applicant should vacate the said property even though we have occupied the property as our dwelling home for over 13 years.

7. That I have been informed by Counsel V Andrews and I verily believe same to be true that the Applicant has substantial grounds of appeal in that the Learned Trial Judge wrongly excluded evidence which he had previously admitted at the time when the Applicant could not call other evidence thereby denying the Applicant an opportunity to a fair hearing.

10. That I am over 55 years old and have little source of income, the Applicant works in the United Kingdom but is also facing financial difficulties and vacating the property will create hardship on the family especially my granddaughter as we will have to rent alternative accommodation and find storage for our things which we do not have the financial means to do at this moment.

11. That we have no alternative accommodation. The family has a house but that has long term tenants whom we cannot summarily evict and one of my daughters is staying with her children in one apartment and the other lives with me with her child also.

12. Unless a stay is granted pending the Applicant's appeal to the full Bench of this court any decision in the appellants favour by the Full Bench granting stay would be rendered nugatory as execution would have been levied and we would have been evicted from our home.

The poser here is do the foregoing averments disclose sufficient special circumstances to warrant a grant of the stay sought. In paragraph 7, the appellant alleges that the grounds of the appeal he filed disclose triable issues. I have also perused the said grounds of appeal and I find that they disclose triable issue. However I make haste to add here that the mere fact that the grounds of appeal discloses substantial issue of law and for determination without more, is not sufficient for the grant of a stay. The paramount consideration must be that there are features to show that execution would stultify the appeal process or render the resultant judgment nugatory. See *Camara v Vare* (supra) see also *William v Williams* (supra). There must therefore be existing special circumstances that would call for the grant of such an application. I find that the other allegations in paragraphs 5, 9, 10 and 11 of the Appellants affidavit do not constitute special circumstances to warrant a grant of the application. I say this because the fact that the Appellant's family have lived in the said premises for 13 years (Para 5) cannot be canvassed as a ground for a grant of this application. Nor can the fact of the eviction of the Appellants family in the event of execution and the alleged hardship resultant thereof (Para 9) be advanced as a special circumstance to warrant the stay. This is due to the fact that the eviction of the Appellants family from the said premises is a natural consequence of the execution of the impugned judgment and cannot therefore be a basis for the stay sought, since the eviction and consequent displacement of the said family do not constitute the destruction of the subject matter or res of the suit or appeal, nor are they factors that can be canvassed as sufficient to stultify the appeal or render it nugatory.

Then there is the allegation that the Appellant has no alternative accommodation. Suffice it to say that the Appellant's deposition in this respect as is contained in paragraph 10 of her affidavit (supra) is contradictory to say the least. In one breath the deponent alleges that the Appellant has no alternative accommodation, in another she alleges that the only accommodation they have is on long term lease. The appellant cannot aprobate and reprobate. It is clear from the foregoing deposition that the appellant has an alternative accommodation in The Gambia. The mere fact as alleged, that the accommodation is under a long time lease and is in that event perhaps not available to the appellant at this moment, is not sufficient reason to grant this application thereby depriving the respondent of the fruits of his victory especially as the

record of proceedings has demonstrated that the respondent who is a very old man, lives abroad and is desirous to come home to The Gambia, but has no alternative accommodation in The Gambia. To allow the appellant who has alternative accommodation in The Gambia to continue to occupy the adjudged premises in this event will run contrary to substantial justice. Furthermore, the mere fact that the quest for an alternative accommodation would inconvenience her family is not a maintainable ground for the grant of the relief sought. Similarly, Appellant's contention vide paragraph 9 of the affidavit (supra) to the effect that both himself and his family are facing financial difficulties cannot sway me to countenance this application with either favour or grace. I say this because this allegation contradicts the deposition in paragraph 10 of the same affidavit, wherein the deponent has categorically deposed to the fact that the family has a house which is on long term lease to tenants. This begs the question as to how a person who has a house rented on long term basis from where he obviously collects rent, and who has been living rent free in the adjudged premises, and as contended by Respondent in paragraph 27 of the affidavit in opposition whose family runs a shop in the adjudged premises and makes financial gains there from, can turn around and contend that he is so indigent that he cannot raise the money to pay for an alternative accommodation in the event of execution. This whole allegation to my mind urges on subtlety and cunning, designed to mislead. In any event, if the Appellant is presently indigent, that allegation has not been proved. It is my considered view that it behooved the appellant to make full disclosure of his means and assets and their value. This will enable the Court ascertain his capabilities or otherwise. This Court expressed this same view in *Minteh v Danso No.1* (supra). As the case lies in the absence of cogent proof of the means of the Appellant, this court cannot countenance the bare allegations as contained in his affidavit. Besides as I have already held, these reasons are frivolous and cannot sustain a grant of the stay of execution sought, as the impecuniosity of an applicant for stay alone, without more, has been held in a plethora of cases not to be a sine qua non for the grant of a stay. See *Frachal Nig Ltd & Anor v Nigeria Arab Bank Ltd* (2000) 6 SCNJ 38 at 60 and *Lang Conteh v T.K. Motors* (supra).

Then there is the question of the conduct of the Appellant and that of the learned counsel for the appellant, prior to the commencement of this application for stay. The allegation as to the conduct of these parties is as clearly borne out of paragraphs 8 and 23 of the affidavit in opposition wherein the respondent contends that the repeated applications for stay of execution constitute an abuse of the process of the court, as it is aimed at frustrating the execution of the impugned judgment. That this fact is clearly borne out by the conduct exhibited by both the appellant and his counsel, in that after the 1st application for stay was made to the Court of Appeal and was refused by Hon. Justice Agim PCA, sitting as a single Justice of Appeal, the appellant, his counsel, as well as his family, made several appeals to the respondent and his counsel who had already commenced execution of the said judgment through the Sheriff's Department, to grant them a grace of one week within which to vacate the adjudged premises. That as a result of these pleas, the respondent and his counsel agreed to their proposal, and it was agreed in consequence thereof that appellants counsel, would hand over the keys of the adjudged premises to the respondent's counsel, on the 14th of May, 2008. That on the 14th day of May, 2008, when respondents counsel called appellants counsel concerning the keys to the premises, she informed him that she had just filed an Appeal to the full bench of the Court of Appeal. It was therefore submitted for the respondent in the respondent's brief that this constitutes an abuse of process.

The parties have copiously canvassed this issue in their affidavits and have advanced arguments thereof in their respective briefs. The fever pitch anxiety which this topic has generated is palpable from the totality of the tenure of this application and I cannot therefore resist the urge of adding my voice in a bid to resolving same. The seriousness of any application alleging an abuse of process of the Court cannot be overemphasized. Across all jurisdictions, Courts universally take an uncompromising stance against any attempt by one party to use its process to inflict injustice or oppress the other party. The Court whose process is being abused has an inherent jurisdiction to cure its process of that abuse. Thus the universal trend is that once a Court finds a suit or process to be an abuse of its processes, the Court would dismiss it. Our Courts in The Gambia are not left behind in this age long war against the abuse of court processes as is demonstrated by case law across the

jurisdiction, showing an unrelenting and dogged stance against this practice. This trend which is on the high prevalence and we must strive to combat abuses of process in a bid to maintain the sanctity and dignity of our noble and most revered profession. See *Ousman Tasbasi v Abdourahman Jallow & Anor* (2002-2008) 2 GLR 77, *Williams v Williams* 2002-2008) 2 GLR 491. The O'Corporation Ltd v Kabo Air Limited & Anor (2002-2008) 1 GLR 353, Christopher E. Mene & Anor v Joseph H. Joof 2002-2008) 2 GLR 316.

The appellants filed an affidavit in reply in a bid to counter the allegations of fact contained in the affidavit in opposition. Suffice it to say that the said affidavit in reply is a pathetic response to the facts alleged in the affidavit in opposition. I say this because most of the averments in the affidavit in reply are bare denials and do not specifically answer the allegations of fact in the affidavit in opposition. In as much as the appellant has a constitutional right of appeal to the full bench of the Court of Appeal from the decision of a single Justice of Appeal, a fact conceded by the respondent in his brief, however, the conduct demonstrated by the appellant's family, as well as Appellants counsel, prior to the exercise of appellant's lawful right of appeal, is one that smacks of abuse of the process of this Honourable Court.

Abuse of process is defined in Jowett's Dictionary of English Law 2nd Ed. Vol. 2 as a frivolous and vexations action as when the party bringing it is not acting bona fide and merely wishes to annoy or embarrass his opponent or when it is not calculated to lead to any practical result. In *Goldsmith v Sperrings* (1977) 1 WLR 478, Lord Denning defined abuse of process as follows - "a Court's process is abused when, it is diverted from its true course so as to serve extortion or oppression; or to exert pressure so as to achieve an improper end. When it is so abused, it is a tort, a wrong know to law." See also the *O'Corporation Ltd v Kabo Air & Anor* (supra)**.** The conduct of a litigant has also been held to constitute an abuse of the process of the court where such conduct is geared at preventing a fair trial. See decision in *Arrow Nominees Inc. v Blacklege* (2002) 2 BCLC 167 at 193. Implicit from the foregoing is that a Court's process is said to be abused when it is not used in good faith, when it is used to twist the ends of justice and to work injustice and oppression on the other party.

It appears to me that the appellant herein as well as his counsel by their conduct prior to this application demonstrated a clear intention to prevent the execution of the said judgment thereby frustrating the due course of justice. I say this because it is abundantly clear from the evidence before me that after the Ruling of the 7th day of May was delivered by Agim PCA, refusing the appellants application for stay, that the respondent and his counsel immediately commenced the process of lawful execution through the Sheriff's department. This process was however thwarted by pleas from the appellant and his family, as well as their counsel, for a 1 week grace within which the appellant would vacate the premises. This agreement between the parties stalled the execution process in that the Respondent acceded to their pleas and discontinued the process of execution. However, evidence has demonstrated that instead of vacating the adjudged premises as promised, the appellant turned around, filed an appeal to the full bench of the Court of Appeal and commenced the instant application for stay of execution pending the outcome of the said appeal. It appears to me that the conduct of the appellant is demonstrative of guile, cunningness and deception. She obviously parried the said execution with vain promises of intention to vacate the said premises within one week, by so doing, he bought the requisite time within which to file the necessary process to frustrate the said execution. The appellant's actions most certainly do not exhibit good faith.

The appellant contends in his affidavit in reply that appellants counsel never promised to hand over the keys of the adjudged premises to the respondents counsel on the 14th of May, 2008. It is my candid belief that this event does not absolve appellants counsel from the professional responsibility placed upon her shoulders, when the Appellant decided to renege on the agreement to vacant the adjudged premises within one week, to have informed the respondents counsel of her intention to file an appeal in view of the fact that there was an understanding, albeit informal, between the parties that the appellant vacates the said premises within the agreed time. In my considered view, that appellant's counsel owed the respondent counsel that duty in the peculiar circumstances of this case. Good practice and good conscience demanded that counsel exhibit this sense of duty. By failing to disclose this fact to the respondent's counsel, appellants counsel put herself in the unfortunate position of being seen as having aided the appellant in his quest to obstruct the ends of justice. As the case lies, the conduct of

the appellant is to say the least, demonstrative of the twisting of the ends of justice and the workings of injustice and oppression on the respondent. These acts by themselves constitute an abuse of the process of this Honourable Court and is a good ground for the refusal of this application. This Court has in recent times adopted this same stance in a plethora of cases. One of which is the case of *Williams v Williams* (supra). In that case the High Court of The Gambia granted custody of three children to the respondent. As at the date of the grant of the custody, the children were resident with the appellant, their mother. The appellant applied for stay at the High Court which was refused. Thereafter, the respondent of his own motion proceeded to the children's school and personally abducted them from there in flagrant disregard of the due and lawful process of execution as prescribed in the Sheriffs and Civil Process Act. The appellant subsequently applied for stay of execution to this Court. This Court granted the application for stay even though the application was lacking in the essential ingredients for a grant of such an application, purely due to the conduct of the respondent. The Court held thus per Agim (ORG) PCA:–

> ''In paragraphs 4 and 5 of his affidavit in opposition, he stated that he personally executed the judgment because he apprehended that the applicant might refuse to obey the order to release the children to his custody. I do not think that there is any basis for this fear. Respondent was represented by Counsel and should have sought advice from his Counsel on how to enforce the judgment. The responsibility to enforce the orders and process of the Court vests by Section 7 of the Sheriffs and Civil Process Act on the Sheriff and bailiffs. The respondent is certainly not a sheriff or bailiff. All processes of Court shall be executed strictly in accordance with rules of Court and directions of the Court. This is a statutory requirement prescribed in Section 6 (2) of the Sheriffs and Civil Process Act. The word "process" as used therein includes judgment and any other legal process by which a judgment is enforced. These processes of enforcement are provided for in the Sheriffs and Civil Process Act and in the second schedule to the Rules of the High Court. The principle underlying these provisions is to ensure that due process is followed throughout the judicial process and this enables the Courts to have effective control of their proceedings to avoid chaos and disorder. It will not help the reputation

of the Courts if every judgment creditor resorts to self help in executing his judgment. Learned Counsel for respondent has argued that what took place was undesirable but albeit lawful and valid. I think that what took place in undesirable as it is unlawful and unconstitutional. The right to appeal is a constitutional right. It encompasses the right to do all such lawful things as will facilitate and protect the appeal. An application to the Court of Appeal for stay of execution pending appeal is part of the right of appeal. Anything done to pre-empt it or that has the effect of pre-empting it certainly is aimed or is likely to frustrate the effective exercise of the right of appeal. This Court as well as any other Court should not condone such gross abuse of its process.

For all of the above reasons, I will grant this application as a way of saying no to self help and to discourage the recurrence of such desperation."

Another case worthy of mention is that of *Ousman Tasbasi V Abdourahman Jallow & Anor* (supra). In that case after the judgment of the High Court was delivered, the respondents on their own entered the undeveloped portion of the land and commenced the development of the land, in flagrant disregard of the due and lawful process of execution. After the respondents were served with a motion for stay of execution of the judgment, they continued in their self help activities in contempt of the process of Court. This Court in granting the order for stay of execution on terms more onerous than the one previously granted by the High Court, held that "self help enforcement of the possession order of Court is illegal and smacks of lawless and disorderly conduct." Courts in other jurisdictions have also adopted similar stance against the abuse of their processes. A case in point is the case of *Arrow Nominees Inc. v Blacklege* (supra) where the Australian Court, in condemning the unconscionable conduct of a litigant declared thus:-

"But where a litigant's conduct puts the fairness of the trial in jeopardy, where it is such that any judgment in favour of the litigant would have to be regarded as unsafe, or where it amounts to such an abuse of the process of the Court as to render further proceedings unsatisfactory and to prevent the Court from doing justice, the Court is entitled,

> indeed I would hold board, to refuse to allow that litigant to take further part in the proceedings and (here appropriate) to determine the proceedings against him. The reason, as it seems to me, is that it is not part of the Courts function to proceed to trial if to do so would give rise to a substantial risk of injustice. The function of the court is to do justice as between the parties, not to allow such process to be used as a means of achieving injustice. A litigant who has demonstrated that he is determined to pursue proceedings with the object of preventing a fair trial has forfeited his right to take part in the trial. His object is inimical to the process which he purports to invoke."

In the final analysis, even if this application had exhibited the salient features requisite for a grant of such an application (which is however not the position here), it would still be unmaintainable as the appellant has by his conduct demonstrated a determination to frustrate the due execution of the said judgment. He has engaged in self help activities to defeat the ends of justice, backing same up with a series of application for stay of execution, successful putting he due execution of the judgment in jeopardy whilst the substantive appeal languishes comatose in a near forgotten land. This is not justice. I will not condone it. It is on these premises and in the light of the totality of the foregoing, that I hold that this application lacks merits. It is accordingly dismissed. I order the appellant to vacate the said premises within one week hereof.

The respondent is asking for the sum of D300, 000 as mesne profit and two thousand Euros for his air ticket vide the respondents brief. The manner in which these reliefs are sought runs contrary to the rules of practice, for it is trite learning, that a Court cannot grant a relief that is not specifically claimed. See the decision of the Supreme Court of The Gambia per Tobi JSC in *Fatou Badjie & Ors v Joseph Bassen* (2002-2008) 2 GLR 141. These claims are therefore refused. However since costs follow the cause, the appellant shall pay costs of D25, 000 to the respondent.

OTA JA I agree

WOWO JA I agree

Appeal dismissed.
FLD.

JOSEPH SARJUKA JOBE V JACK ALDERLIFSTE

COURT OF APPEAL OF THE GAMBIA
(Civil Appeal No. 11/2004)

10th December 2007

Agim PCA

Jurisdiction – Service of process – Procedure to adopt for service outside The Gambia.
Court – Power of the Court – Public officer – Court can not compell a public officer to do what he has no duty in law to do.
Practice & Procedure - Procedure to adopt for service outside The Gambia.

Held, *striking out the application (per Agim PCA)*

1. Order VIII Rule 10(2) of Schedule II of the Rules of the High Court mandatory require that the processes meant for service out of jurisdiction be forwarded by the Chief Justice to the Minister (Secretary of State) responsible for external affairs with a request for transmission for service through the proper diplomatic channel.

2. There is nothing to show that the processes were sealed as required by the said Rule 10 (2) of Order VIII. The power to forward the processes is vested in the Chief Justice and not the Registrar. The officer to whom it should be forwarded is the Minister and not the Permanent secretary. The Permanent Secretary will have no mandate to carry out the order of this Court when the law has clearly stipulated who should do that. It will therefore be wrong to cause him to appear here to give an account of an action he has neither the power nor a duty in law to carry out.

Gambian Statutes referred to:

The Gambia High Court Rules Order VIII Rule 10(2) of Schedule II

Hawa Sisay-Sabally Esq. for the appellant

AGIM PCA. It is clear from Exhibit 'A' accompanying the appellant's motion ex parte that the notice of appeal and other processes in this appeal were forwarded by the Principle Registrar of this Court to the Permanent Secretary of the Department of State for Foreign Affairs on the 27th August 2007. On the 30th October 2007, she wrote another letter to the said Permanent Secretary requesting him to confirm in writing as to whether these processes had been served. I must express here my dissatisfaction with the way and manner this whole matter has been treated by the Registrar of this Court. The Order for service out of jurisdiction was made on 21st March 2007. It took the Registrar 5 months to act on the order and another two months to send a reminder. This attitude shows lack of diligence and contributes, in no small measure, to the problem of delay in the judicial process. I seize this opportunity to call upon the Registrar and his or her staff to be alert and alive to their obligations as Court staff.

Order VIII Rule 10 (2) of Schedule II of the Rules of the High Court mandatorily require that the processes meant for service out of jurisdiction be forwarded by the Chief Justice to the Minister (Secretary of State) responsible for External Affairs with a request for transmission for service through the proper diplomatic channel. In our present case, this procedure was not complied with. It is the Registrar of this Court that forwarded the processes to the Permanent secretary. There is nothing to show that the processes were sealed as required by the said Rule 10(2) of Order VIII. The power to forward the processes is vested in the Chief Justice and not the Registrar. The officer to whom it should be forwarded is the Minister and not the Permanent secretary.

In light of these fundamental flaws this application cannot be granted. The Permanent Secretary will have no mandate to carry out the order of this Court when the law has clearly stipulated who should do that. It will therefore be wrong to cause him to appear here to give an account of an action he has neither the power nor a duty in law to carry out. For the above reason this application is refused. However, the Principal Registrar of this Court is hereby ordered to take immediate steps to compile the relevant processes in this appeal, take them to the Chief Justice for sealing, signature and forwarding to the Minister of State for Foreign Affairs. This kind of situation does not help the image of the

Judiciary as a facilitator of access to justice. I will say no more on this matter. This appeal is adjourned to 14th December 2007 at 11 a.m. for situation report.

Application struck out.
FLD.

BABOU CISSE v ELI OSAKA

(BY HER ATTORNEY EDMUND SHONUBI)

COURT OF APPEAL OF THE GAMBIA
(Civil Appeal No. 53/99)

6th December 2006

Agim PCA

Appeal – Power of Court of Appeal – Striking out an appeal for lack of diligent prosecution – Dismissing an appeal for lack of diligent prosecution – Source of the Court of Appeal's power to exercise the powers of the Trial High Court – Duty on applicant after filling a notice of appeal – Absence of the record of proceedings – Effect of – Response of the Court to a party who fails to produce the record – Settlement of record – Validity of the record in the absence of settlement.

Court - When is the Court of Appeal fully constituted – Instances when the Court of Appeal is duly constituted by a single Judge – Consequence of a single justice of Appeal presiding over a matter – Status of the powers exercisable by the Court sitting as a full panel – Difference in powers of the Court when constituted by a full panel or a single Judge – Constitution of Court of Appeal dependant on whether the matter is interlocutory or substantive – Definition of ''interlocutory matter'' – Power of Court of Appeal – Striking out an appeal for lack of diligent prosecution – Dismissing an appeal for lack of diligent prosecution – Source of the Court of Appeal's power to exercise the powers of the Trial High Court.

Jurisdiction - Constitution of Court of Appeal dependant on whether the matter is interlocutory or substantive – Definition of ''interlocutory matter'' - matter'' – Power of Court of Appeal – Striking out an appeal for lack of diligent prosecution – Dismissing an appeal for lack of diligent prosecution – Source of the Court of Appeal's power to exercise the powers of the Trial High Court.

Party – Compilation of Record – Duty of appellant to request for same – Due diligence practice.

Practice & Procedure - Compilation of Record – Duty of appellant to request for same - Power of Court of Appeal – Striking out an appeal for lack of

diligent prosecution – Dismissing an appeal for lack of diligent prosecution – Source of the Court of Appeal's power to exercise the powers of the Trial High Court - Absence of the record of appeal – Effect of – Response of the Court to a party who fails to produce the record – Settlement of record – Validity of Record in the absence of settlement.

Held, *striking out the appeal (per Agim PCA)*

1. The Court of Appeal at all times sits as the Court of Appeal whether constituted by a single judge or as a full panel of three judges. It is no where stated in the Constitution, any Statute or Rules of Court or Practice where a distinction is drawn between the status of the powers exercisable by the Court sitting as a full panel and those exercisable or exercised by the Court constituted by a single judge save that appeals lie from the decision of the single judge to the full Court. Rule 23 of The Gambia Court of Appeal Rules (GCA) which expressly prescribed the power of this Court to dismiss appeals for lack of diligent prosecution did not provide that the power can only be exercise by the Court constituted by a full panel. The difference in the powers exercisable by the Court sitting as a full panel and those exercisable when it sits as a single judge is limited to whether it is an interlocutory matter or a substantive matter. This is clear from the proviso to Section 129 (2) of the 1997 Constitution.

2. Clearly this application is an interlocutory matter. Interlocutory in the sense that it –
    (i) It is predicated on the pendency of an appeal.
    (ii) It does not seek to determine the merit of the appeal.
    (iii) Even if it is granted, the appeal can be resorted to in appropriate cases."

3. The power of this Court to strike out an appeal for lack of diligent prosecution is not expressly spelt out in any part of The Gambia Court of Appeal Act and Rules.

4. It is correct that the Registrar of the Court below has not summoned either parties for the settlement of records and has not

directed the appellant to pay any sum within any time for the preparation of records. It is only when the appellant has disobeyed a summons or directive as above of the Registrar that the Registrar can now certify that the appellant has not complied with Rules 16(4) and 17 GCA Rules. It is also upon such certification that an application for dismissal can be brought under Rule 23 GCA Rules

5. Even though The Gambia Court of Appeal Act and Rules do not expressly provide for an order striking out an appeal for lack of diligent prosecution in the circumstances of this case, it is trite law that in such a situation a Court has the power to make such order, as the justice of the case demands provided it is expressly asked for.

6. By virtue of Section 130 (4) of the Constitution this court can exercise al the powers vested in the High Court from which the appeal is brought which include the power to make any order in the interest of justice as provided for in Schedule 1 Order IV Rule 6 of the Rules of the High Court.

7. The absence of settlement of records does not affect the validity of the records. Any omissions can be resolved by the preparation of supplementary records. See *Lang Conteh v T.K. Motors* (2002-2008) 2 GLR 23 and Essays on Civil Proceedings Vol. 4.

8. An appellant desiring a diligent prosecution of his appeal should contemporaneous with or immediately after filing his or her notice of appeal, send to the Registrar of the Trial Court, a written application requesting him to compile and transmit the record for the prosecution of the appeal. This is the practice in many jurisdictions. Although there is no law prescribing this procedure or requirement of a written application, it is a due diligence process that lawyers have cultivated over time to remind the Registrar of his duty concerning the record of appeal proceedings immediately the notice of appeal is filed to galvanize him into action. This practice has developed as a response to the general

failure of the Registrar of the Trial Court on his own to promptly do what he is supposed to do once the notice of appeal is filed.

9. Like the Nigerian Supreme Court held in *Engineering Enterprises of Niger Contractor Co of Nigeria v A.G. of Kaduna State* (1987) ALL NOR 396, where the appellant cannot produce the records of appeal on which his appeal is based, the correct order to make is to strike out the appeal until the appellant can produce the records of appeal.

Cases referred to:

Engineering Enterprises of Niger Contractor Co of Nigeria v A.G. of First International Bank Ltd. v Gambia Shipping Agencies Ltd (2002-2008) 2 GLR 258
Kaduna State (1987) ALL NOR 396
Lang Conteh v T.K. Motors (2002-2008) 2 GLR 23
N.A.B. Kotoye V L.B.N & Ors (1989) 2 SCNJ 31
Tabbaa v Lababedi (1974) 4 SC 139

Statutes referred to:

The Constitution of The Gambia 1997 Section 129, 130

Rules of Court referred to:

The Gambia Court of Appeal Rules Rules 16, 17, 23

APPLICATION for the striking out of Civil Appeal No. 26/2005 on which the motion for stay of execution granted on the 17th November 2006 is being sustained. The facts are sufficiently stated in the opinion of Agim PCA.

I.D. Drammeh and Y. Senghore for the Applicant
A.A.B. Gaye for the respondent

AGIM PCA. Judgment was rendered at the trial nisi prius by the High Court in favour of the applicant herein against the respondent herein.

The respondent was ordered to quit and deliver possession of the applicant house at Kotu and pay accrued rents and mesne profits to the applicant. On the 26th April 2005, the respondent appealed against said judgment and filed a motion for stay of execution of the judgment. Meanwhile the respondent remained in occupation of the applicant's house and did not pay any part of the rents or mesne profits. See Paragraphs 3 – 10 of the affidavit in support of the motion for striking out the appeal, the notice and grounds of appeal, exhibits ES1 and ES2 and affidavit in opposition. As a result of the pendency of this motion for stay of execution of the judgment, the applicant has been unable to realize the fruits of his judgment. Meanwhile it has enabled the respondent to continue to occupy the applicant's house without paying. Whilst this situation persisted, the respondent did nothing to ensure that his appeal is heard. He did not apply for or deposit money for the preparation of the record of his appeal. The respondent preoccupied himself with prosecuting his motion for stay of execution which was finally granted on 17th November 2006. The failure of the respondent to take steps to cause the Registrar of the High court to prepare and transmit the record of appeal to this Court made the applicant to believe that Civil Appeal No. 26/2005 and the motion for stay were meant to avoid the realization of the judgment and foist a state of helplessness. To save himself from this state of helplessness, the applicant has brought this application to strike out the appeal on the basis of which the motion for stay of execution is being sustained.

From the affidavits and counter affidavits and arguments of Learned Counsel on both sides the following issues arise for determination:-

> "Whether the Court of Appeal constituted by a single Judge has the jurisdiction to entertain and determine an application to dismiss or strike out an appeal for lack of diligent prosecution.
>
> Whether this application for the striking out of an appeal for lack of diligent prosecution is proper in law.
>
> Whether the circumstances of this case are substantial or compelling enough to warrant the striking out of the appeal for lack of diligent prosecution.''

Learned Counsel for the respondent argued that only the full panel of this Court can entertain and determine this application because the power to dismiss appeals is reserved in the full Court and an order striking out an appeal may have the effect of ending the appeal finally. Learned Counsel for the applicant argued in reply that The Gambia Court of Appeal Rules do not make a distinction between the powers the court can exercise as a full panel and those it can exercise as a single judge. I agree with the submission of Learned Counsel for the applicant. The Court of Appeal at all times sits as the Court of Appeal whether constituted by a single judge or as a full panel of 3 judges. There is nowhere in the Constitution, Statutes or Rules of Court where a distinction is drawn between the status of the powers exercisable by the Court sitting as a full panel and those exercisable or exercised by the Court constituted by a single judge save that appeals lie from the decision of the single judge to the full Court. Rule 23 of the Gambia Court of Appeal Rules (GCA) which expressly prescribed the power of this Court to dismiss appeals for lack of diligent prosecution did not provide that it can only be exercise by the Court constituted by a full panel. The difference in the powers exercisable by the Court sitting as a full panel and that exercisable when it sits with a single judge is limited to whether it is an interlocutory matter or a substantive matter. This is clear from the proviso to Section 129 (2) of the 1997 Constitution. It states thus: -

> "The Court of Appeal shall be constituted by three Judges of the Court.
> Provided that a single Judge of the Court may exercise the powers of the Court in any interlocutory matter; subject to an appeal from his or her decision to a bench of three judges of the Court.''

Clearly this application is an interlocutory matter. Interlocutory in the sense that it –

(i) It is predicated on the pendency of an appeal.
(ii) It does not seek to determine the merit of the appeal.
(iii) Even if it is granted, the appeal can be resorted to in appropriate cases."

See the definition of the word "interlocutory" in *N.A.B. Kotoye v L.B.N & Ors* (1989) 2 SCNJ 31. Although this appeal has not been entered in this

Court, the application is still an interlocutory matter. Having arisen in respect of a pending appeal and this matter being an interlocutory one, the Court constituted by a single Judge can entertain and determine.

Learned Counsel for the respondent has argued that the proper application should have been one of dismissal of the appeal under Rule 23 of the GCA Rules. He submitted that this kind of application is not provided for in the Rules. This Court being a creature of statute can only do things as prescribed by statute. Therefore it cannot strike out an appeal for lack of diligent prosecution. It can only dismiss it. He also submitted that the applicant did not state under what law the application is made. That the applicant has not even alleged that the respondent has not complied with Rules 16(4) and 17 of the GCA Rules. Learned Counsel further submitted that the applicant realizing that it cannot validly apply for a dismissal, rather opted for a striking out. Learned Counsel for the applicant submitted that this Court is not constrained to act under Rule 23 GCA Rules. It can also grant other orders as the one sought here. She relied on Section 130 of the constitution.

I agree with Learned Counsel for the respondent that –

1. This application is not brought in accordance with Rule 23 GCA Rules.

2. The power of this Court to strike out an appeal for lack of diligent prosecution is not expressly spelt out in any part of The Gambia Court of Appeal Act and Rules.

Rules 16(4) and 17 GCA Rules respectively require the Registrar of the High Court to summon the parties for settlement of records and the appellant to within such time as the said Registrar directs deposit with the Registrar a sum fixed to cover the estimated expense for making up and forwarding the records of appeal. It is correct that the Registrar of the Court below has not summoned either party for the settlement of records and has not directed the appellant to pay any sum within any time for the preparation of records. It is only when the appellant has disobeyed a summons or directive as above of the Registrar that the Registrar can now certify that the appellant has not complied with Rules

16(4) and 17 GCA Rules. It is also upon such certification that an application for dismissal can be brought under Rule 23 GCA Rules.
Although this application is a specie of the type of application contemplated under Rule 23 GCA Rules, it is clearly not brought under the said Rule 23. It depicts a different kind of situation that the GCA Rules did not contemplate. Where the applicant simply files an appeal and obtains a stay of execution and thereafter reclines to wait for whenever the Registrar will summon the parties to attend settlement or act on the latter's direction to pay for record, this can, and has often resulted in a situation where the appellant frustrates the realization of the judgment without any corresponding interest in the prosecution of the appeal because he is enjoying like in this case, the occupation of the premises without any payments. Such appellants who are not summoned for completion of records or not directed to pay for records can do nothing save wait for the Registrar to do so. It is clear here that they are relying on the problems of the Registrar to sustain an underserved enjoyment of what they lost in Court to the frustration of the judgment creditor and the due process of law. Even though The Gambia Court of Appeal Act and Rules do not expressly provide for an order striking out an appeal for lack of diligent prosecution, it is trite law that in such a situation a Court has the power to make such orders as the justice of the case demands provided it is expressly asked for. See *Tabbaa v Lababedi* (1974) 4 SC 139. This court in *First International Bank Ltd. v Gambia Shipping Agencies Ltd* (2002-2008) 2 GLR 258 made this same Order in similar circumstances. I am bound by this decision. I have no reason to depart from it. I also agree with the submission of Learned Counsel for applicant that by virtue of Section 130 (4) of the Constitution this Court can exercise all the powers vested in the High Court from which the appeal is brought which include the power to make any order in the interest of justice as provided for in Schedule 1 Order IV Rule 6 of the Rules of the High Court.

The notice of appeal and motion for stay of execution were filed on 26th April 2005. It is now over one year and 7 months since then. The appellant did not apply to the Registrar for records to be prepared. The usual practice across jurisdictions is for the appellant immediately after filing the notice of appeal, to serve on the Registrar a letter requesting for records to be compiled. See the decision of this Court in *Lang Conteh &*

Ors v T.K. Motors (supra) as the respondent cannot be prejudiced in any way. The absence of settlement of records does not affect the validity of the records. Any omissions can be resolved by the preparation of supplementary records. See *Lang Conteh v T.K. Motors* (2002-2008) 2 GLR 23 and Essays on Civil Proceedings Vol. 4.

The respondent has not given any reason for his failure to do anything to ensure that the records are produced and forwarded to this Court. The argument of Learned Counsel for the respondent that they were busy arguing the motion for stay of execution which took an unduly long time for through no fault of theirs is to my mind of no moment. I do not see how the delay in determining the motion for stay of execution prevented them from going to the Registrar to get the records produced. There is nothing in the records of this Court to show that something is being done or about to be done concerning the production of the records. The argument that it is the fault of the Registrar is over flogged and become meaningless against the background of many years of poor service standards of the Registries. It is common knowledge that most of the court officials are not conversant with the Rules of Court and so do not even understand the scope and implication of their duties. As alluded to by this Court in *FIB Ltd. v Gambia Shipping Agencies Ltd*. (supra). "The situation is made worse by the admission of Learned Counsel for the appellant in court that the appellant has up till now not even applied in writing to the High Court Registrar for the production and transmission of the records of the trial proceedings to this Court. An appellant desiring a diligent prosecution of his appeal should contemporaneous with or immediately after filing his or her notice of appeal, send to the Registrar of the Trial Court a written application requesting him to compile and transmit the records for the prosecution of the appeal. This is the practice in many jurisdictions. Although there is no law prescribing this procedure or requirement of a written application, it is a due diligence process that lawyers have cultivated over time to remind the Registrar of his duty concerning the records of appeal immediately the notice of appeal is filed to galvanize him into action. This practice has developed as a response to the general failure of the Registrar of the Trial Court on his own to promptly do what he is supposed to do once the notice of appeal is filed. Due to ignorance of The Gambia Court of Appeal Rules, many of them do not even know what course of action to take once they have received a notice of appeal. These are notorious facts that we cannot afford to

ignore. The Court has taken judicial notice of this situation. To prevent appeals from being frustrated by such failure to respond to the notice of appeal, appellants interested in a diligent prosecution of their appeal should take steps to cause the Registrar to do his duty to produce and transmit the records of appeal.

Like the Nigerian Supreme Court held in *Engineering Enterprises of Niger Contractor Co. of Nigeria v A.G. of Kaduna State* (1987) ALL NLR 396, where the appellant cannot produce the records of appeal on which his appeal is based, the correct order to make is to strike out the appeal until the appellant can produce the records of appeal. In the circumstances it will bring administration of justice to disrepute to allow a situation where the appellant prevents the judgment from being executed while the appeal is comatose. I therefore have no reason to refuse this application. Accordingly, Civil Appeal No. 26/2005 is hereby struck out for lack of diligent prosecution.

Appeal Struck out.
FLD.