

IDOWU OLUWADARE

V.

- 1. UNIVERSITY OF ILORIN**
- 2. VICE CHANCELLOR, UNIVERSITY OF ILORIN**
- 3. THE REGISTRAR, UNIVERSITY OF ILORIN**

COURT OF APPEAL
(ILORIN DIVISION)

CA/IL/76/2007

SOTONYE DENTON-WEST. J.C.A. (Presided)

IGNATIUS IGWE AGUBE. J.C.A. (Read the Leading Ruling)

CHIMA CENTUS NWEZE. J.C.A.

TUESDAY. 20TH JANUARY, 2009

A PPEAL - Appeal from Court of Appeal to Supreme Court – When lies as of right - When leave required -
Section 233(2) and (3) of the 1999 Constitution.

A PPEAL - Injunction pending appeal - Discretionary power of court to grant How exercised.

A PPEAL - Injunction pending appeal - Grant of - Principles guiding.

A PPEAL - Injunction pending appeal - Order of- Effect of.

A PPEAL - Injunction pending appeal - Order of – Essence of

A PPEAL - Injunction pending appeal - Power of Court of Appeal to grant – Source of - Sections 15 and 17, Court of
Appeal Act.

APPEAL -Injunction pending appeal – Relief of- When may be sought.

APPEAL -Injunction pending appeal – Special circumstances that will warrant grant of - What amounts to.

APPEAL - Injunction pending appeal - Stay of execution pending appeal - Relief of - Difference between both.

APPEAL - Right of appeal - Types of- Right of appeal from Appeal to Supreme Court - How exercised – Whether two notices of appeal need be filed - Section 233(2) and (3) of the 1999 Constitution.

APPEAL - Stay of execution pending appeal – Special circumstances that will warrant grant of- What amounts to.

APPEAL - Stay of execution pending appeal - Grant of – principles guiding - Effect of.

APPEAL - Stay of execution pending appeal – Power of Appeal to grant - Source of- Sections 15 and 17, Court of Appeal Act.

COURT - Judgment of court - Frustration of by unsuccessful party - Attitude of court thereto.

INJUNCTION - Injunction pending appeal –Discretionary power of court to grant - How exercised.

INJUNCTION - Injunction pending appeal - Grant of- principles guiding.

INJUNCTION - Injunction pending appeal – Order of-Effect of.

INJUNCTION - Injunction pending appeal – Order of-Essence of.

INJUNCTION - Injunction pending appeal- Power of Court Appeal to grant –source of-sections 15 and 17, Court of Appeal Act.

INJUNCTION –injunction pending appeal –Relief of – When may

INJUNCTION - Injunction pending appeal – Order of-Effect of.

INJUNCTION - Injunction pending appeal – Order of-Essence of.

INJUNCTION - Injunction pending appeal- Power of Court Appeal to grant –source of-sections 15 and 17, Court of Appeal Act.

INJUNCTION –injunction pending appeal –Relief of – When may be sought.

INJUNCTION-injunction pending appeal- Special circumstances that will warrant grant of - What amounts to.

JUGEMENT AND ORDER - Judgment of court - Frustration of by unsuccessful party- Attitude of court thereto.

JUGEMENT AND ORDER -injunction pending appeal - Grant of –principles guiding.

JUGEMENT AND ORDER - Injunction pending appeal - Order of-Effect of.

JUGEMENT AND ORDER - Injunction pending appeal - Order of-Essence of.

PRONOUNCEMENT- Proper step for counsel where in doubt ground of appeal couched is of law or mixed law and facts in appeals to Supreme Court.

PRACTICE AND PROCEDURE - Appeal from Court of Appeal to Supreme Court-When lies as of right -
When leave required -section(2) and (3) of the 1999 Constitution.

PRACTICE AND PROCEDURE - Judgment of court- Frustration of by Unsuccessful party - Attitude of court
thereto.

PRACTICE AND PROCEDURE - Injunction pending appeal Dictionary power of court to grant - How
exercised.

PRACTICE AND PROCEDURE- injunction pending appeal - Grant of –principles guiding.

PRACTICE AND PROCEDURE-Injunction pending appeal - Order of-Effect of.

PRACTICE AND PROCEDURE - Injunction pending appeal - Order of-Essence of.

PRACTICE AND PROCEDURE- Injunction pending appeal- Power of Court Appeal to grant –source
of-sections 15 and 17, Court of Appeal Act. PRACTICE AND PROCEDURE-injunction pending appeal –Relief
of – When may be sought.

PRACTICE AND PROCEDURE-injunction pending appeal- Special circumstances that will warrant grant of -
What amounts to.

PRACTICE AND PROCEDURE-- Right of appeal - Types of- Right of appeal from Appeal to Supreme Court - How
exercised – Whether two notices of appeal need be filed - Section 233(2) and (3) of the 1999 Constitution.

PRACTICE AND PROCEDURE- Stay of execution pending appeal – Special circumstances that will warrant
grant of- What amounts to.

PRACTICE AND PROCEDURE- Stay of execution pending appeal - Grant of – principles guiding - Effect of.

PRACTICE AND PROCEDURE- Stay of execution pending appeal – Power of Appeal to grant - Source of-
Sections 15 and 17, Court of Appeal Act.

STAY OF EXECUTION - Stay of execution pending appeal – Special circumstances that will warrant grant of-
What amounts to.

STAY OF EXECUTION- Stay of execution pending appeal - Grant of – principles guiding - Effect of.

STAY OF EXECUTION- Stay of execution pending appeal – Power of Appeal to grant - Source of- Sections 15 and
17, Court of Appeal Act.

WORDS AND PHRASES-“Special circumstances” for grant of Stay of execution pending appeal - What amounts
to.

Issues:

1. Whether in the circumstances of this matter, the applicant ought to be granted an order of respondents from
taking the benefit of the judgment Court of Appeal.

2. Whether the applicant's applies the Supreme Court against the decision of the court of appeal to the Supreme Court against the decision of the court of Appeal can be granted by the court as sought by him.

Facts:

The applicant was expelled from the 1st respondent on the recommendation of the 1st respondent's student. Disciplinary committee on the ground of examination malpractice.

By the laws establishing the 1st respondent. The applicant was entitled to appeal to the Governing Council of the first respondent against the decision of the Students Disciplinary committee. The applicant did appeal to the 1st respondent Governing council. But while the appeal was pending, the applicant wants to the federal. High Court to challenge his expulsion and judgment was given in his favour.

The respondents' appeal to the Court of Appeal failed. The respondent further appealed to the Supreme Court, which set aside the decision of the Court of Appeal on the ground that the claim of the applicant was within the domestic domain of the 1st respondent and that the applicant's suit was premature because he had not exhausted the mechanism for the resolution of conflicts within the 1st respondent before he commenced the same. The Supreme Court further held the applicant's suit was determined without jurisdiction by the trial court. Consequently, the Supreme Court struck out the suit.

The applicant, without adhering to the hint of the Supreme Court, went back to the Federal High Court, went back to the federal High Court to relitigate the same suit. He claimed N5 million damages, an order that respondent should accord his right and privileges as a student and an other for release of his result. His entire claims were granted. The respondents once again appealed and filed an application for stay of execution of the judgment particularly the monetary aspect of it.

The Court of Appeal ordered stay of execution of the judgment of the federal high court on the on the condition that the respondents the judgment debt in an interest yielding account pending the judgment of the Court of Appeal. The respondent complied with the order. The Court of appeal subsequently heard the appeal. It allowed the respondents appeal and stuck out the applicant's suit on the ground that it was premature.

The applicant was dissatisfied with the judgment of le Court of Appeal. He filed a notice of appeal which had five grounds of appeal on law. Subsequently, he field another notice of appeal which included the original five grounds of appeal and five additional grounds of appeal which included grounds of the misdirection and grounds of mixed law and facts.

Thereafter, the applicant sought an order of injunction restraining the respondents from giving effect to the judgment of the court of appeal, and leave to appeal to the Supreme Court.

Held (unanimously granting the application in part)

1. On Power of court of Appeal to grant injunction and and stay of execution pending appeal -

By the provisions of sections 15 and 17 of the court of Appeal Act, Cap. C36, Laws of the Federation of Nigeria, 2004, the Court of Appeal has powers to grant injunction and stay of execution of its judgment pending appeal against its decision to the Supreme Court. (P. 21, Para. D)

2. On Essence of order of injunction pending appeal-

The essence of an order of injunction pending appeal, like stay of execution of a judgment, is the protection of an established legal right. Accordingly, once there is such legal right it would be foolhardy to an application for injunction pending appeal. [Green (1987) 3 NWLR (Pt. 61) 480; Oniah v. (1989) 1 NWLR (Pt. 99) 514; Iyinoga v. Government of Plateau State (1994) 8 NWLR (Pt. 360) 73referred to.] (P. 21, paras. 1-'H)

3. On Exercise of discretionary power of court to grant injunction pending appeal-

An order of injunction pending appeal, like stay of execution of a judgment, is not granted of course but at the discretion of the court upon the Consideration of the balance of the competing rights and interests of the parties and justice. In order therefore to be entitled to an injunction pending an appeal, there must be cogent, substantial and compelling reasons to warrant the deprivation of the victory of the successful party. The fact must be disclosed in the affidavit in support of the application for injunction otherwise, the application shall fail.[Vaswani Trading Co. v. savalakh & Co NLR(Pt.2)483;Mobil oil(Nig.)Ltd.v.Agadaigbo(1988)1 2 NWLR (Pt. 77)383; Martines v. Nicannar Food Co.Ltd.(1988) 2 NWLR (Pt.74) 75;Balogun v. Balogun NWLR (1969)1 All NLR 349;olounloyo v. Adeniran(2001)14 NWLR(Pt.734) 699; Okafor v. Nnaife (1987)4 NWLR (Pt. 64) 129 referred to.] (Pp.22, paras. A-D; F)

4. On Principles guiding grant of injunction pending appeal -

An applicant seeking for injunction pending appeal, must first show that he has the legal right to be protected from the judgment he seeks to stay or restrain the respondents from enforcing. In the instant case, the applicant has not shown that he has any legal right to the judgment sum now deposited in the court's treasury in view of the judgment of the court of appeal, which struck out the applicant's suit for want of jurisdiction. The applicant has thus not shown that there is anything to stay or restrain by way of injunction (Pp. 26, paras. B-C; 32, Para.B)

5. On Principles guiding grant of injunction, or stay of execution pending appeal-

An injunction or stay of execution pending appeal will only be granted if the court is satisfied that there are special or exceptional circumstances to warrant doing so, because the principle of law is that a judgment of a court of law is presumed to be correct and rightly made the contrary is proved or the establish. Furthermore, there must be a

disclosure of substantial and arguable grounds of appeal which must be exhibited to the motion papers, and which grounds should have the chances of success.[*Olunloyo v. Adeniran*(2001)14 NWLR (Pt.64)129 referred to.](Pp.22, paras.E-F; 23, paras.A-B)

6. On what amounts to special circumstances that will warrant grant of injunction or stay of execution pending appeal -

The special circumstances for granting stay of execution or injunction pending appeal are when execution would:

- (a) destroy the subject matter of the proceeding;
- (b) foist upon the court a situation of complete helplessness;
- (c) render nugatory any order or order of the appeal court;
- (d) paralyse in one way or the other the exercise or by the litigant of his constitutional right of appeal;

- (e) Provide a situation in which even if the appellant succeeds in his appeal, there could be no return to the status quo.

[*Olunloyo v. Adeniran* (2001) 14 NWLR i Pi referred to.] (Pp. 22-23, paras. G-A)

7. On when injunction pending appeal may be sought- An injunction pending appeal may be employed where a court gave a declaratory judgment in favour of a plaintiff and the defendant appeals against it. This is because a declaratory judgment can not be enforced by execution. Thus the remedy unsuccessful litigant in such case is not a stay of execution but an injunction pending appeal. [*Okoya v. Santilli* (1990) 2 NWLR (Pt. 131) 172; *Shodehinde v. Registered Trustees of Ahmadiyya movement* (2001)' FWLR (Pt. 58) 1065 referred to.] (P. 26, paras.D-F)

8. On Effect of order of injection or stay of execution pending appeal rendering appeal –

The legal effects of an order of stay of execution and an injunction pending appeal is the same; both of them being aimed at suspending temporarily the legal rights of the judgment creditor or successful litigant pending the outcome of an appeal. The same principle of law applies for an application for either relief. However the different between the two of execution interlocutory reliefs lies in the fact that whereas stay of executor judgment of the court, an order for injunction pending appeal is relevant where the judgment

appealed is against and sought to be suspended is declaratory. In the instance case, the order made by the court by the court of appeal on 16th July, 2008 was neither declaratory nor executory as it only struck out the claims of the applicant or the respondent nor was there any order that was capable of being enforced by either party so as to warrant an injunction being ordered to restrain such party. [Osho v. A.-g., Ekiti State (2002) 2 NWLR (Pt. 752) 628; Yarov. Arewa Construction Ltd. (1998) 7 NWLR (Pt. 558) 368 referred to.] (Pp. 26-27, paras. G-E) AGUBE, J.C.A. at pages 27-28, paras: G-B

"In this case, this court dismissed the appeal of the applicant leaving the respondents by a lower court and affirmed by this court pending the appeal upon the respondents depositing the sum of five Million Naira awarded the applicants by the lower court which has been adjudged to have acted without jurisdiction. It follows therefore, that there is nothing to stay or restrain by way of injunction. See the case of Government of ' NWLR (Pt. 117) 592 where the Supreme Court held that the judgment of the court of appeal that the claims, brought the suit to an end and there was nothing to say even when there was a pending appeal in the Supreme Court from the Court of appeal that subsequently granted the appellant's appeal."

9. On When appeal from Court of Appeal to Supreme Court lies as of right and when leave required-

Section 233(2) and (3) of the 1999 Constitution provide for when appeals lie as of right of the Court of Appeal or the Supreme Court. The grounds of appeal are of law where the appellant has absolute right and leave of the appellate court for the appeal to be valid. However, where the grounds of appeal are of mixed law and fact, either the Court of Appeal or the Supreme Court is imperative for the said grounds to be competent and valid. [Ojemen v. Momodu II (1983) 1 SCNLR 188 referred to.] (Pp. 28-29, paras. H-C)

10. On Exercise of right of appeal from the Court of appeal to Supreme Court –

By the provisions of section 233(2) and (3) of the Constitution, different rights of appeal to the Supreme Court exist. The appeal may be on grounds of mixed law and facts or of only facts which require the leave of court, or appeal on grounds of law alone which requires the leave of court and will entail no leave. Thus, in the exercise of the two different rights of appeal, two different appeals ought to be filed. It is, however, and indeed the practice to commence the two appeals by one notice of appeal where the required leave is sought and obtained in respect of the appeal on facts or mixed law and facts. In other words, when one files a notice of appeal accompanied by grounds of appeal on law and grounds of appeal on facts or mixed law and facts within time, he may apply for leave to argue grounds of

facts or mixed law and facts, and the notice of appeal will then be deemed to be a notice filed also for those grounds requiring leave. In the instant case, the applicant acted rightly, when he filed a second notice of appeal in which he incorporated both his original grounds of appeal and the additional grounds of misdirection and mixed law and facts in respect of which he sought leave of court. (Pp. 30-31, paras. A-D)

NOTABLE PRONOUNCEMENT:

On Proper step for counsel where in doubt whether ground of appeal couched is of law or mixed law and facts –

Per AGUBE, J.C.A. at page 29, paras. C-E:

"The courts and indeed lawyers, sometimes find it difficult to discern whether a ground of appeal is on facts alone or of mixed law and facts and have accordingly formulated principles to distinguish between the two types of grounds of appeal which is not our business here to consider but the courts also in their wisdom have admonished lawyers who are in a quandary as to whether the grounds of appeal couched by them are grounds of law alone or mixed law and facts to seek leave of the court to obviate the unpleasant consequences of their grounds of appeal being declared incompetent and accordingly struck out"

12. On Attitude of courts to attempt by unsuccessful party to frustrate judgment of court -

The courts have always ensured that a successful party in the litigation process enjoys the fruits of victory and any attempt by the unsuccessful party or opponent to frustrate the victorious party has always been resisted with all judicial might. [Lijadu v. Lijadit (1991) 1 NWLR (Pt. 169) 627; Okafor v. Nnaife (1987) 4 NWLR (Pt. 64) 129 referred to.] (Pp. 21-22, paras. H-A)

Nigerian Cases Referred to In the Ruling:

Akeredolu v. Akinremi (No. 2) (1986) 2 NWLR (Pt.25)710 Akinbode v. Chief Registrar (2003)3 NWLR (Pt.808)585 Asims (Nig.) Ltd v. L.B.R.B. Dev. Auth. (2002)8 NWLR (Pt.769)349

Balogwi v. Balogun (1969) 1 All NWLR 349 Coker v. U.B.A. Pic (1997) 2 NWLR (Pt. 490)641Dome v. Ogiri (1997)1 NWLR(Pt.481) 322 Ekpenyong v. Nyong (1975) NSCC 28 Gov., Gongola State v. Tnkur (1989) 4 NWLR(Pt.117)592 Green v. Green (1987) 3 NWLR (Pt. 61) 480 In Re:M.V. Litpex (1993) 2 NWLR (Pt. 278)670 Irhabor v. Ogaiamien (1999) 8 NWLR (Pt.616)517Iyimoga v. Governor of Plateau State (199-360)73

Lijadit v. Lijadu (1991) 1 NWLR (Pt. 169) 627 Martins v. Nicannar Food Co. Ltd. (1988) 2 NWLR (Pt.74)75 Mobil Oil (Nig.) Ltd v. Agadaigho (1988) 2 NWLR (Pt.77)383 Ojemen v. Momodu 77(1983) 1 SCNLR 188 Okafor v. Naife

(1987) 4 NWLR (Pt. 64) 129 Okoya v. Santilli (1990) 2 NWLR (Pt. 131) 172 Olowu v. Building Stock Ltd. (2004) 4 NWLR(Pt.864)445 Ohmloyo v. Adeniran (2001) 14 NWLR (Pt.734)699 Onia v. Onyia (1989) 1 NWLR (Pt. 99) 514 Orakosini v. Menkiti (2001)9 NWLR (Pt. 719)529 Osho v. A.-G., Ekiti State (2002) 2 NWLR (Pt.752)628 Shodehinde v. Regd. Trustees of Alunadiyya M FWLR(Pt. 58) 1065 Specialist Consult v. River State (2002) FWLR wove v. Afolayan (2004) 38 WRN 35 U.B.A. Ltd. v. Nwora (1978) N.S.C.C. 519 Yaswani Trading Co. v. Savalakh & Co. (1972)1 All NLR (Pt. 2)483 Yaro v. Arewa Construction Lid. (1998) 7 NWLR (Pt.558)368

Foreign Case Referred to in the Ruling:

American Cyanamid Co. Ethnicon Lhl. (1975)1 All E.R. 504

Nigeria statutes referred to in the Ruling:

Constitution of the Federal Republic of Nigeria. 1999. S.233 (1)(2)(3)

Court of Appeal Act. Cap. C36, Laws of the Federation of a. 2004. Ss. 15 and 17

Books Referred to in the Ruling:

Civil procedure in Nigeria, 2nd Ed., 2000 by Fidelis Xuadialo 917. Injunction and Enforcement of Orders by Afe Babalola^{1st} Pp 237-238.

APPLICATION

This was an application for injunction against the judgment of the court of Appeal pending determination of the applicant's appeal to the Supreme Court and for leave to appeal to the Supreme Court on grounds of mixed law and facts. The Court of Appeal, in a unanimous decision, granted the applicant leave to appeal but refused to grant the order of injunction sought.

History of the Case:

Court of Appeal:

Division of the Court of Appeal to which the application was brought: Court of Appeal, Ilorin

Names of justices that sat on the application: sotonye Denton-West, J.C.A (Read the leading ruling); Chima

Centus Nweze, J.C.A. Appeal No.: CA/IL/76/2007Date of Ruling: Tuesday, 20th January, 2009 Names of

Counsel: O.A. Ayodele, Esq. (with him, O.F. Jbadiaru [Miss]) -for the Applicant K.K. Eleja, Esq.

(with him, A.S. Ishola) -for the Respondents

CounSel:

Ayodele. Esq. (with him, O.F. Obadiaru [Miss]) - for the Applicant

K.K.Eleja, Esq. (with him, A.S. Ishola) -for the Respondents

Nigerian Weekly La\v Reports 7 December 2009

That I was informed by Dare Akanbi, Esq; Acting

Director of legal unit of 1st respondent. On the 17th of

September, 2008 that the respondents have the necessary -
wherewithal to pay any damages tht may be awarded_
by the Supreme Court, even if it allows an appeal to her
on this matter;

6. That I was informed by the said Dare Akanbi, Esq; as foretasted that the 1st respondent has competing needsfor her funds and that it will work injustice on her to tie her funds down in the circumstance-.That I also know as a fact that the respondents have ;
perpetual succession and could always be contacted as
occasion warrants;
7. That I know as a fact that it is in the interest of justice
to refuse the application."

In the further and better affidavit in support of the motion the applicant through Yekeen Rasheedat Eleja (Mrs.) reacted to the counter- affidavit of the respondents as follows:

4. That I know as a fact that the certified the judgment of this honourable court was released on 23rd July, 2008 after this application been filed. Now shown to me is a copy marked as - *exhibit ID 1*.

That 5 I know as fact that the judgment of this honourable court was an order striking out the applicant's case before the trial court which included damages deposited in the registry of that court.

- 6 That I know as a fact that the respondent herein did not voluntarily deposit the said damages but as a result of the conditional order of stay of the trail court dated 7th February, 2007 which was affirmed by this honourable court. Shown to me is a court. Shown to me is a copy of the said order marked as *exhibit ID 2*.

8. That I know as a fact that the notice of appeal against the judgment of this honourable court filed and duly served is equally hereby shown tome and marked as .

Exhibit ID 3.

That I have perused the counter-affidavit to this application sworn to on 22nd September, 2008 and I say as follows:

- a) Paragraph 4-10 thereof are true.
- b) The monetary part of judgment of the trial court having been deposited into an interest yielding account by the lower court ,paragraphs 4, 5, 6, 7 and 8 of the applicant in the event that his appeal is allowed by the apex court.
9. That I know as a counsel the respondents will not be prejudiced by the grant of this application as they will entitled to the principal and interests on the money in the registry if they win at the apex court.

..

10. That I swear to this affidavit utmost good faith believing same to be true in accordance with oaths Act.” yet in the further counter-affidavit, the respondents in reaction to the above averments of the applicant stated thus:-

4. That I still know as a fact based on the content of the further and better affidavit, that it will still work injustice on the respondents to grant this application

5. That I also know as fact that the respondents voluntary deposited the sum as ordered by this federal High Court to show that they intend prosecuting the appeal diligently and timeously.

6. That I know as a fact that a grant of this application will expose the respondents to liability that as not been pronounced upon by a court of law;

7. That I also know as a fact that the respondents have perpetual succession and could always be contacted as occasion warrant;

8. That I know as a fact that interest of justice will be best served if this application is refused in it entirety.”

Now, a look at the grounds of appeal marked exhibit ID 3 will be the motion paper will reveal that grounds 1, 2, 3, 4, 5, 6, 7 and 9 complains of errors in law committed by this court which lead to perverse decision or miscarriage of justice. While grounds 7 and 8 complain of misdirection which led to wrong decisions and miscarriage of justice ground 10 on the other hand, that the judgment is against the weight of evidence.

Ground one in particular, is hinged on the breach of the appellant/applicant fundamental to fair and just hearing when he was not allowed to address the court on a ground of objection raised *suo motu*.

This ground alone, is *ex facie*, substantially meritorious as it raises substantial and arguable constitutional issue with the likelihood of success in the Supreme Court.

However, since the appellant/applicant seeks for an order of injunction, he must first of all show that he has the legal right to be protected from the judgment he seeks to stay or restrain the respondents from enforcing. In this connection, I have searched through the entire gamut of the affidavit in support and the further and better affidavit and there is no reasonable averment in any of the paragraphs to show that the appellant/applicant has any legal right to the judgment sum now deposited in the court treasury in view of the judgment of this court striking case for want of jurisdiction.

In *Okoya v. Santilli* (1990) 2 NWLR (Pt. 131) 172; Agbeja delivering the lead judgment of the Supreme Court, oppositely held that:

"An injunction pending appeal may also be employed where a court gave a declaratory judgment in favour of a plaintiff and the defendant is appeals against it. This is because declaratory judgment cannot be enforced by execution. Thus the remedy of an unsuccessful litigant in such a case is not a stay of

execution but an injunction pending appeal.”See *Shodehinde v. the Registered Trustee of Ahmadiyya Movement in Islam* (1980) 1 - 2 S.C.163; *Ratiscoe (Nig.) Ltd v. S.G.S.* (1990) 6 NWLR (Pt.158) 608. Onnoghen, J.C.A. (as he then was) when confronted with a similar situation in which we have found ourselves had cause to pronounce on the legal effects of stay of execution and injunction and their differences in the case of *Osho v, Attorney - General Ekiti State* (2002) FWLR (Pt. 100) 1308 at 11328 (2002) 2 NWLR (Pt. 752) 628 at 656 thus:

"I will like to say that the legal effects of an order of stay of execution and an injunction pending appeal are the same; both of them being aimed at suspending temporarily the legal rights of the judgment creditor or successful litigant pending the outcome of an appeal. It is also trite that the same principles of law injunction. See the case of *Government of Gongola state v. Tukur* (1989) 4 NWLR (Pt. 117) 592 where the Supreme Court held that the judgment of the Court of Appeal that the Federal High Court had no jurisdiction to entertain the claim, brought the suit to an end and there was nothing to stay even when there was a pending appeal in the Supreme Court from the Court of Appeal that subsequently granted the stay of execution after dismissing the appellant's appeal.

With the above decisions of the Supreme court and the fact that the applicant has not shown that the balance of convenience is in his favour, has not entered into an undertaking to indemnify the respondents in damages should he fail in the Supreme Court and most especially, as the respondents have given unchallenged evidence in paragraphs 5, 6, 7 and 8 of the further as follows:-

5. That I also know as a fact that the respondents voluntarily deposited the sum as ordered by this Federal High Court to show that they intend prosecuting the appeal diligently and timorously;
6. That I know as a fact that a grant of this application will expose the respondents to liability that has not been pronounced upon by a court of law.
7. That I also know as a fact that the respondents have perpetual succession and could always be contacted as occasion warrants;
8. That I know as a fact that interest of justice will be best served if this application is refused in its entirety." it is clear that the applicant has not met all the requirements for the grant of injunction pending appeal assuming there was even any order of this court that is worth restraining. Accordingly issue no1 is resolved in favour of the respondents.

On Issue No. 2 which is whether or not the level of this honourable court will be granted based on the provisions of the Constitution and the Rules of this honourable court to appeal in this case, section 233 (1) of the 1999 Constitution which was relied upon by the applicant provides for the exclusive jurisdiction of the Supreme Court to hear and determine appeals from the Court of Appeal. It would appear that the

substance of the applicant's prayer two relates to subsections (2) and (3) of section 233 of the constitution which provide for when appeals shall be as of right or with leave of the court of appeal or the Supreme Court. Where for instance, the grounds of appeal like the ones filed by the applicant/appellant are of law alone the appellant has absolute right and may not seek leave of either this court or the supreme court for the ground of appeal to be valid. See: *ojemen & ors. V. H.R.H momodu II (the ojirua of irua)* (1983) 3 SC 173 (1983) 1 SCNLR 188. On the other hand, where the grounds are of mixed law and fact, the leave of either the court of appeal or the Supreme Court is imperative for the said grounds to be competent and valid.

The court and indeed lawyer, sometimes find it difficult to discern whether a ground of appeal is on facts alone or of mixed law and facts and have accordingly formulated principles to distinguish between the two type of grounds of appeal which is not our business here to consider but the courts also in their wisdom have admonished lawyers who are in a quandary whether the grounds of appeal couched by them are ground of law alone mixed law and fact to seek leave of the court to obviate the unpleasant consequence of their ground of appeal being declared incompetent and accordingly struck out. This is where the authorities of *irhabor v. ogaiamien* (1999) 8 NWLR (pt. 616) 517 at 525 *orakosim v menkiti* (2001) 5S.C (pt. 1), 72 at 80 – 81, (2001) 9 NWLR (pt. 719) 529 and in *Re lupex* (1993) 2 NWLR (pt. 278) 670 at 683 per tobi, J.C.A (as he then was), cited by the applicant are on very sound ground. The submission of the applicant's counsel and the dicta of the supreme Court and indeed the Court of Appeal that it is safer to obtain leave under Section 233(3) of the constitution for any ground of Appeal alleging a misdirection of law if for nothing, out of an abundance of caution and that it is because, as explained in the above decision, by the very nature of what misdirection is, it is variably happens that the particulars of an alleged misdirection will ultimately involve a consideration of issues and question of fact, aptly supported the applicant's application. As been noted before, grounds 1, 2, 3, 4, 5, 6, 7 and 9 complain of error in law in which case by section 233(2) 1999 constitution, the appellant/applicant can appeal as of right without seeking leave of the court. However, since the self-same ground 7 and 8 complain of both errors in law and misdirection by the court leave of this court or the Supreme Court ought to be sought in order for those grounds to be competent and validly argued. By the provisions of section 233(2) and 233(3), it is clear that two different rights of appeal accrue to an appeal accrue to an appellant. In order words, where as in this case, the appeal is on grounds of law, mixed law and facts and of facts only as exemplified in g 6, 7, 9; and grounds 7 and 8; and finally grounds10, two different appeals (one on grounds of law alone) which will entail no leave; and the other on mixed grounds of law and facts sought to be filed differently. See: *Coker v. U.B.A.* (1997) 2 S C N J 1 3 0 at 1 4 5 and 146, (1997) 2 NWLR (Pt. 490) 641; where the Supreme held that an appeal under section 233(2) is different from appeal under section 233(3). Although it is permissible and indeed the practice to bring the two by one notice of appeals where the required leave is sought and obtained in respect of the second category of

appeal.

The learned author of the text "*Civil Procedure in Nigeria*" second edition 2000 (Fidelis Nwadialo) at page 917 commenting on this position of the law cited the decision of the Supreme Court in *Azeez Akeredolu & Ors v. Lasisi Akinremi*(1986) 4 S.C 325 at 374 - 5, (No. 2) (1986) 2 NWLR (Pt. 25) 710 where the apex court held *inter alia*;

"Where in a single case therefore, some grounds are on law alone and others on mixed law and facts or on only facts there are strictly speaking two separate appeals each requiring its own notice of appeal. That is in theory. But in fact and practice it will look a bit awkward for one appellant to fill two notice and the grounds of law and mixed law and fact or may all filed. Since the grounds of appeal on law do not require leave, an application for leave to cover the other grounds will then be deemed to be supported by the notice of appeal already filed.

Where an appellant files a notice of appeal on law and grounds of appeal on facts or mixed of law and facts within time, he may apply for leave to argue grounds of facts or mixed law and facts and the original notice of appeal will then be deemed to be a notice filed also for those grounds requiring leave".

With the greatest respect, this is what the appellant/applicant has done in this case. It will be recalled that the appellant/applicant on the 17th day of July, first filed five grounds of appeal which all complained of errors of law committed by this court and in paragraph six of the said notice of appeal of same date stated that additional grounds should be filed after the record of appeal/judgment was obtained.

Thus, in another notice of appeal dated 23rd day of July 2008 and filed on the 29th day of July, 2008 the appellant incorporated five additional grounds included grounds of misdirection and mixed law and facts. I am not oblivious of the fact that the applicant did not specify whether the grounds for which he seeks leave are grounds of law alone or mixed law and fact as this omission by itself does not render the application incompetent particularly as he has stated in one of the grounds for the application that it is to ensure that the appeal to the apex is without hitch and view of the decisions of the Supreme Court cited above, prayer two of this application is well grounded.

According, I hold that what the applicant has done is right in law and is even a mere surplusage particularly as most of the grouse of the appellant are on errors of law which alone confers the right of appeal as guaranteed him by section 233(2) of 1999 Constitution and since appeal is a constitutional right which can not be denied the applicant who has done all that the law requires him to do by filling this application for leave to appeal, even if there is an error which is more or less technical in nature this court can be magnanimous toward is plight to grant prayer two of the motion. That prayer is an innocuous one which ought not to be opposed by the respondents.

In essence, Issues No. 2 is resolved in favour of the applicant and on the whole, the application succeeds in part. Prayer 1 is therefore refused while prayer to is granted. Leave is hereby granted the appellant/applicant to

4. I know as a fact that this honourable court. The appeal of the appellants/respondents to July, 2008. The judgment has not been made to the appellant as at the time of preparing -application:

5. I know as a fact that the appellant is dissatisfied with the said decision and has evinced his disagreement in notice of appeal filed and dated 17th July 2008; (2009) 17 NWLR **Oluwadare v. L'nilorin** (Agube J.C.A)_

I was told by Oluwaseun Ayodele Esq., applicant who I verily believe as follows:-

- i. That this application is necessary to ensure that the res of this case which includes money awarded is preserved pending the hearing and determination of the appeal filed to me Supreme Court.
- ii. That the grounds of appeal are fundamental, germane and raise substantial issues of law which has great and tremendous chances of success on appeal;
- iii. That the release of the money deposited in the registry of this (sic) will ensure that his appeal in the likely event of being successful will not be rendered nugatory.

6. It is in the interest of justice to grant this application.

7. I swear to this affidavit in good faith believing same to -e true in accordance with the Oaths Act." In opposing the motion, the appellants/respondents deposed to E a ten paragraphed counter-affidavit and a further counter-affidavit following the applicants further and better affidavit which was deposed to in reaction to the counter-affidavit of the respondents.

F In view of the contentious nature of the application, parties Were ordered file written addresses in support of their positions Which they obliged and on the 20th day of October, 2008 when the motion came for hearing Learned counsel on behalf of the respective parties adobted the addresses so filed.

Increase dated 9th October, 2008 and filed on the 10th October, 2008 the applicant's counsel formulated two issues for

G. determination thus:-

"1. Whether or not this honourable court will exercise its Jurisdiction judicially and judiciously by granting the Application for injunction pending appeal; in the Circumstances of this case?"

Issue Number 2

H. Whether or not the leave of this honourable court

Will be granted based on the provisions of the constitution and rules of this court to appeal in this case."

On his part, the learn counsel for the respondents also formulated two issues couched as follows:-

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- i. Whether in the circumstances of this matter, the respondent/applicant ought; to be

Granted an order of injunction restraining the appellants/respondents from -taking the benefits of a judgment of this court delivered on 16th July.2008; and

- ii. *Whether the respondent/application for leave to appeal to the supreme Court against the decision of this court dated 16th July, 2008 can be granted by this honourable "*

Arguing issue number one of the applicant's issues, O.A.

Ayodele, Esq in the address submitted in sum that this honourable court has the jurisdiction to temporarily suspend the execution and / or enforcement of an order of dismissal or striking out of the suit pending the determination of the appeal in a higher court by the provisions of Section 17 of the Court of Appeal Act and by ID3 the notice of appeal filed against the judgment of this honourable Court He urged the court to hold that statutorily, execution of the judgment has been obtained. He further urged the court to hold that a further application for stay of execution and/or injunction pending appeal, will further enhance the application in view of the fact that this honorable court which struck out the case also has the power to order a suspension of the execution of the order of striking out pending appeal.

Shodehinde v. Registered Trustees of A In-Islam (2001) FWJLR (Pt. 58) 1065. 1065 of the above submission.

Relying again on the case of Special Consult v. Rivers State Governor (2002): L Governor (2002) FWLR (Pt. 91) 147S a: "Injunctions and Enforcement of Orders" by Afe Babalola 1st edition at 237 to 238; he submitted that even if the judgment debtor is a public corporation, institution, parastatal or ministry, the court will order the payment of the judgment debt into an interest yielding account as a condition for stay of e.xeciinv;

He alluded to the order of the trial court affirmed that ought not to be disturbed in the light of their appeal which is continuation of the case between the parties.

Learned counsel has been field within time and the grounds of appeal raise formidable and substantial legal issues with chances of success .

The res in the case is the order of this court striking out the suit of the applicant which applicant is asking the court to defer the enjoyment of any right, privilege or success which must have accrued to the respondent, he submitted.

Citing the dictum of Idigbe, J.S.C in the Shodehinde's case, effect that this court can stay the doing of the dismissal

pending the appeal if there are reasonable grounds and that the monetary aspect of the judgment is only an adjunct, he referred again to section 233(1) and 233 (2) of the Constitution of the Federal Republic of

Nigeria to submit that the application is competent without leave being sought and that because of some of the grounds of appeal, leave is been sought. He therefore urged us to hold that the applicant

Has fulfilled all the requirements for the grant of the application in Order to maintain the status quo as the appeal in the event of success will not be rendered nugatory.

On issues number 2, learned counsel adopted the submission on issues no. 1 in respect of the competence of exhibit ID3 the notice and grounds of appeal filed against the decision of this court. He maintained that the fact that some of the grounds of appeal would require leave does not render the notice of appeal incompetent same having be field under S. 233 (1) of the Constitution. He cited.- Irhobor, v.Ogiaiamien (1999) 8 NWLR (Pt. 616) 517 at 525 and Orakosim v. Menkiti (2001) 5 SC (Pt. 1) 72 at 80 81; (2001) 9 NWLR (Pt.719)529 and also Re:M. V. Lupex(1993) 2 NWLR (Pt. 278) 670 as 681 per Tobi, J.C.A. (as he then was), on the need to seek leave to appeal where counsel is not sure of the nature of grounds of appeal. He further submitted that the fact that a particular law is not stated on a motion paper to predicate a particular prayer will not make the prayer unavailable so far it is one supported by law. Akinbode v.Chief Registrar (2003) 3 NWLR (Pt. 808) 585: Asims Nigeria L.t.d. v. L.B.R.B. Development Authority (2002)8 NWLR (Pt.769)349 AND 362 were al referred to back up the submission.

Citing again, U.B.A. U.S.A. Ltd. & Or.s. v. (1978) N.S.C.C. 519 he contended that the fact that the notice of appeal has been redeem the grounds of appeal that needs leave in order them to be competent. On the whole, he urges us to grant the application.

Reacting to the above submissions, the learned counsel for the respondents drew the court's attention to prayer 2 of the applicant's motion which according to him shows that the applicant has not had

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any appeal pending before the Supreme Court what he is now seeking from this court.

He noted that for an order of injunction pending appeal to be properly grounded before this court there must be but that in this case even if the court were to be disposed to granting the injunction the lack of a pending appeal as afflicted the application. On this ground alone, the learned counsel urged this court will be justified to refuse or dismiss the application.

. On the merits of the application, learned counsel for the respondents submitted that from the circumstance appellants/respondents ought not to be prevented from taking the benefits of the judgment of this honourable court delivered on 16th July, 2008, as there is no justification for the respondents to be deprived from getting back their money deposited in the treasury of this honourable court, the Judgment of the lower court having been set aside.

It was submitted further by the learned counsel that injunction is not granted as a matter of course but upon applicants satisfying certain conditions meant to establish a legal right of the applicant that the court will protect and that once there is no such legal right in the present case.

Citing Iyimoga v. Gov., Plateau State (1994) 8 NWLR (Pt.360)73 at 103 paras. F - H Per Orah, J.C.A., he maintained that the applicant must be able to show the court that he has the right to the money being sought to be preserved in the treasury there is nowhere in his affidavits the applicant has been able to demonstrate that the just determination of the appeal would depend on the preservation of the money.

On the other hand, the respondents have expressly and convincingly shown their willingness and ability to pay whatever damages that may be awarded against them in the applicants should succeed at the Supreme Court.

The learned counsel also asserted that the grant of injunction is at the discretion of the court which discretion will take into consideration the competing rights of the parties to the justice. Osho v. Att.Gen. Ekiti State (2002) FWLR (R 100) 1308 at 1331, (2002) 2 V 628 was relied upon to further submit that the right of r to justice is preferred to that of the applicant in the application when paragraphs 4. 5. 6 and 9 of the counter 4. 6 and 8 of the further counter-affidavit which deposition therein have not been challenged are taken into consideration.

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Referring finally to Doma v. Ogiri (1997) 1 NWLR (Pt.481)322 at 349 paras. E-F; American Cyanamid Co. v. Ethicon L.t.d. (1975) NWLR(Pt.864)445 and olowu v. Building Stock Ltd(2004)4 NWLR (Pt. 864) 445 having submitted that the court should take judicial notice that the applicant has not disclosed in his affidavit that irreparable damage would be occasioned if the application is not granted, urged us to dismiss the application for it is in the interest of justice and by reason that there is no pending appeal yet.

On the authorities of Shodehinde v, Registered Trustees and specialist Consult v. Rivers State Governor (Supra), he contended and urge us to discountenance them as they were gravely misconceived particularly since Shodehinde's case is authority for holding that for the application to be granted, there must be appealing appeal.

Arguing issue number 2 of the respondents' issues, learned counsel for the respondents relied on Timoye v. Afolayan (2004) 38 WRN 35 and Doma v. Ogiri (1997) 1 NWLR (Pt. 481) 322 at 345 posit that parties are bound by the prayers contained in the motion papers which prayers must be specific as to the particular reliefs they seek and where a party is not specific in his prayers the court will not have the requisite power to grant same.

It was submitted that in this case the applicant has left the court in darkness as to the particular reasons for seeking leave of the court to appeal to the Supreme Court and it is not the duty of court to tie down the applicant to a particular prayer. Referring again to prayer 2 Of the motion, he submitted that it is difficult if not impossible to

determine the reason for the application for leave to appeal to the Supreme Court. Citing the case of Ekpenyong v. Nyong & Ors. (1975) NSCC 28 at 32 - 33 paras. 50-51 he argued further that it would be too charitable of this honourable court for the applicant to be granted leave to appeal to the Supreme Court without any verifiable and justifiable reason. Accordingly, learned counsel for the respondents took the view that the cases of Irhabor v. Ogaïamu orakosin v. Menkiti (supra) are inapplicable to the applicant's case because a party to an application as in the above cited case is expected to state the very requisite leave he seek instead of coming by a general leave to appeal. He urge the court to refuse the application.

I have carefully considered the submissions of learned counsel on both sides and the issues formulated and I am of the

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Candid view that the issues formulated by the respondent counsel are more apposite to the determination of the app the court. Before resolving the issues, it is necessary to have a resume of the gist of this case.

The facts of this case are straight forward and are simply that the applicant herein had commenced proceedings in the federal Court, Ilorin sometime in 1999 before T'soho, J. for the enforcement of his fundamental rights on the expulsion order slammed by the respondents on the ground of examination malpractice.

It would appear that after interrogation by the students Disciplinary Committee (SDC), he was found liable and was recommended for expulsion. By the laws establishing the 1st respondent herein, the applicant was entitled to appeal to the Governing Council of the 1st respondent against the. S.D.C. While his said appeal was pending and without awaiting the outcome thereof, the applicant went to the Federal High court to challenge his said expulsion and judgment was given in his favour.

The appeal by the respondents to this court failed and on further appeal, the Supreme Court set aside the decision of the Court of Appeal on the ground that the claim of the applicant was within the domestic domain of the 1st respondent and that having not exhausted the internal mechanisms for the resolution of conflicts within the 1st respondent, the applicant jumped the gun and accordingly the suit was declared premature and determined without jurisdiction by the lower court and was struck out by the Supreme Court.

It would appear that without adhering to the of the Supreme Court the applicant went back to the Federal High Court in suit No. FHC/IL/CS/16/2006 to re-litigate the same claim for which the Supreme Court struck out his suit and the court per Nnamani, J. in his judgment granted the entire applicants' claim in these terms at page 197 of the record of proceeding.

"The court grants the reliefs as follows:

- (1) N5 Million damages jointly and severally against the defendants herein in favour of the, plaintiff for wrongful and unconstitutional" expulsion from the 1st defendant's university.

(2) *Court orders the defendant to accord his full fledged rights and privileges of student.*

3) Court orders the release of plaintiff's result to him without further delay."

Aggrieved by this decision, the respondents appealed to this court and while the appeal was pending brought an application for stay of execution of the judgment particularly the monetary aspect thereof.

The ruling of this court refusing to vary the terms of the earlier application for conditional stay where by the lower court ordered the respondent to deposit the judgment sum of N5,000.000(5 Million naira) in an interest yielding account to abide the judgment of the court of appeal is reported in(2008) All FWLR(Pt.441) 839 with 1.1. Agube, J.C.A. dissenting. This court subsequently hard the appeal and in a unanimous judgment, same and set aside the judgment of the lower court. The case of the applicant was again struck out for being premature. Now, there is no doubt that by the provisions of sections 15 and 17 of the court of Appeal Act, 2004, this court has the powers to grant injunction and stay of execution of its judgment pending the appeal against its decision to the supreme court. The pertinent question to be answered however, is what aspect of the judgment of this court is the applicant seeking the respondent to be restrain from giving effect to, pending the determination of the appeal against it?

This brings me to the resolution of the issues. On the first question which is whether in the circumstance of this case the can be granted an injunction restraining the appellants/respondents from taking the benefits of the judgment of this honourable court delivered on 16th day of July,2008, it is trite as has been argued by counsel for the respondents that the essence of an order of injunction pending appeal, like stay of execution of a judgment, like stay of execution of a judgment is the protection of an established legal right and once there is no such legal right it would be foolhardy to grant such an application. See Green v. (1987) 3NWLR (Pt. 61) 480and Oniah v. Onyia(1989)1 NWLR (Pt.99)514 the case of Iyinoga v. Governor of plateau state (1994)8 NWLR(Pt.360)73 at 103.

Again, the court have always restrain every nerve to ensure that a successful party in the litigation process enjoys the fruits of his victory and an attempt by the unsuccessful party or opponent to frustrate the victorious party has always been resisted with all judicial might. See Lijadu v. Lijadu (1991)1 NWLR (Pt.169)627 a644;

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Okafor v. Nnaife (1987) 4 NWLR (Pt. 64) 129

It is also settled law that an order of injunction pending appeal like stay of execution of a judgment is not granted as a matter of course but at the discretion of the court upon the consideration of the balance

of interests of the parties and justice. See *Vaswani v. Trading Co v. Savalakh & Co. (1972) 1 All NLR (Pt. 2)483* at 688; *Mobil Oil (Nig.) Ltd v. Agadaigho(1988) 2 NWLR (Pt.77)383* *Martines v. Nicannar Food Co. Ltd. (1988) 2 NWLR (Pt. 74)75.*

In order therefore to be entitled to an injunction pending an appeal there must be cogent, substantial and compelling reasons to warrant the deprivation of the victory of of the successful party. These facts must be disclosed in the affidavit in support of the application for injunction; otherwise, the application shall fail. See Balogim v. Balogun (1969) 1 All NLR 349. In this wise he courts, have set down pre-conditions for the grant of an injunction or stay of execution pending appeal as was exemplified in the celebrated case Olunloyo v. Adeniran (2001)14 NWLR (Pt.734) 699, (2001) 37 WRN 1, where the Supreme court, per Kutigi, J.S.C. (as he then was) stated the current position of the law inter alia at page 7 lines 20 - 40 thus:-

"Now, it is settled that a stay of execution will only be granted if and only if the court is satisfied that there are special or exceptional circumstances to warrant doing so, because the principle of law. Is that a judgment of a court of law is presumed to be correct and rightly made until the contrary is proved or established....."

Discretion to grant or refuse a stay must therefore take into account the competing (see Okafor & Ors. v. Nnuif(supra). And where there is a pending appeal as is the situation herein, the special circumstances which have received judicial approved are when execution would:-

- a) Destroy the subject matter of the proceedings;*
- b) Foist upon the court a situation of complete helplessness*
- c) Render nugatory any order or orders of the appeal court*
- d) Paralyse in one way or the other the exercise by the litigant of it constitutional right of appeal; or*
- e) Provide situation in which even if the appellant succeeds status quo."*

It must also be added that one of the pre-conditions that must be fulfilled before a court can exercise its discretion to grant an injunction pending appeal is the disclosure of substantial and arguable grounds of appeal which must be exhibited to the motion paper and which grounds should have the chances of success.

The crucial question to be answered in this case, is whether from the supporting and further and better affidavits and the notice and grounds of appeal annexed to the applicant's motion paper, he has furnished this court with sufficient particulars of special and exceptional circumstances to warrant the exercise of this court discretion in his favour? A perusal of the averments in the affidavit in support would reveal the following facts:-

"Paragraphs 5:1 was told by Oluwaseun Ayodele Esq;

Counsel to the applicant who I verily believe as follows:-

- I. *That this application is necessary to ensure that the res of this case which includes money awarded is preserved pending the hearing and determination of the appeal filed to the Supreme Court.*
 - II. *That the grounds of appeal are fundamental, germane and raise substantial issues of law which has great and tremendous chances of success on appeal;*
 - III. *That the release of the money deposited in the registry of this (sic) will ensure that his appeal in the likely event of being successful will not be rendered nugatory.*
6. *It is in the interest of justice to grant this application." It is pertinent to note that the respondent in their counter affidavit*

Reacted to the averments of the applicant as follows:-

4. *That I know as a fact based on the foregoing that it will work injustice on the respondents to grant the application;*
5. *That I know as a fact that a grant of the application will expose the respondents to liability that has not been pronounced upon by a court of law;*