

IN THE COURT OF APPEAL
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT ABUJA
ON FRIDAY, THE 7TH DAY OF OCTOBER, 2022
BEFORE THEIR LORDSHIPS:

HAMMA AKAWU BARKA
BIOBELE ABRAHAM GEORGEWILL
BATURE ISAH GAFAI

- **JUSTICE, COURT OF APPEAL**
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APPEAL NO: CA/ABJ/PRE/CV/995/2022

BETWEEN:-

ACADEMIC STAFF UNION OF UNIVERSITIES

- **APPLICANT**

AND

FEDERAL GOVERNMENT AND 1 OR

- **RESPONDENTS**

RULING

DELIVERED BY HAMMA AKAWU BARKA, JCA

The instant application filed on the 28th of September, 2022 and brought pursuant to **Sections 6 (6) (B), 36 (1) and 243 (3) of the 1999 Constitution as amended**, and pursuant to **Order 6 Rules 1(1), 10 (1) of the Court of Appeal Rules 2021** and under the inherent jurisdiction of this court, for:

- i. An order granting the Applicant leave to appeal against the interlocutory ruling of the National Industrial Court per

CA/ABJ/PRE/CV/995/2022 OF APPEAL

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paid



Honourable Justice P. I. Hamman in suit no: NICN/ABJ/270/2022 between the **FEDERAL GOVERNMENT OF NIGERIA & 1 OR. VS. ACADEMIC STAFF UNION OF UNIVERSITIES** delivered on Wednesday 21st day of September, 2022.

- ii. An order staying execution of the order of the National Industrial Court Honourable Justice P. I. Hamman in suit no: NICN/ABJ/270/2022 between the **FEDERAL GOVERNMENT OF NIGERIA & 1 OR. VS. ACADEMIC STAFF UNION OF UNIVERSITIES** delivered on Wednesday 21st day of September, 2022 per pending the hearing and determination of the interlocutory appeal.
- iii. And any other order or orders this Honourable Court may deem fit to make in the circumstance of this case.
- iv. And further take notice that the appellant/applicant shall at the hearing of this application rely on the affidavit sworn to by Samuel Ameh on behalf of the Applicant.

The grounds upon which the application is founded are:

- i. The court below coram Honourable Justice P. I. Hamman in suit no: NICN/ABJ/270/2022 between the **FEDERAL GOVERNMENT OF NIGERIA & 1 OR. VS. ACADEMIC STAFF UNION OF UNIVERSITIES** delivered ruling in an

interlocutory application brought by the Claimants/Respondents.

- ii. The applicant by virtue of **Section 243 (3) of the 1999 Constitution as amended** requires the leave of court to appeal against the decision.
- iii. The applicant is bringing this appeal both on grounds of law and on grounds bothering on Fundamental Human Rights.
- iv. Applicant's Counsel out of the abundance of caution, has brought this application to obviate any doubt associated with the nature of the appeal.
- v. The applicant is still within time to bring this application for leave.
- vi. This honourable court should not shut out the defendant and thousands of its members desirous of ventilating their grievances pursuant to **Sections 6 (6)(B) and 36 (1) of the 1999 Constitution as amended**.
- vii. It is in the interest of justice to grant this application.
- viii. The ruling of the court per Honourable Justice P. I. Hamman in suit no: NICN/ABJ/270/2022 between the **FEDERAL GOVERNMENT OF NIGERIA & 1 OR. VS ACADEMIC STAFF UNION OF UNIVERSITIES** delivered on 22nd September, 2022 affects the fundamental rights of the applicant and its members to fair hearing, inter alia and it would be in the interest of justice to stay the execution of same pending the hearing and determination of the Appeal arising thereto.

ix. Further take notice that at the hearing of this applicant; the Applicant shall rely on the proposed Notice of Appeal and the affidavit accompanying the said application.

The application is supported by a 17 paragraphed affidavit deposed to by one Samuel Ameh, a senior litigation and research assistant with the law firm of Falana and Falana Chambers, Abuja. Also hinged on the motion papers is exhibit 1 the ruling of the lower court, exhibit 2 the proposed Notice of Appeal and a written address in support of the application also filed on the same 28/09/2022.

In opposing the application, the Respondents filed a counter-affidavit contained in 17 paragraphs deposed to by one Okechukwu Nwamba a State Counsel in the Federal Ministry of Justice, also filed along with the Counter-affidavit is a copy of the motion on notice argued before the lower court, which ruling generated the instant application and a host of other documents all relating to the motion filed before the lower Court.

There is also filed a written address in support of the Respondent's Counter-affidavit in opposition to the applicants affidavit filed on the 04/10/2022, Respondent's also filed additional authorities on 06/10/2022.

On the 6th of October, 2022 being the date scheduled for the hearing of the application, Mr. Falana SAN, learned counsel for the Applicant, applied to withdraw prayer two in the motion papers, urging the court to grant his application per prayer one. Mr. Igwe, SAN, the Learned Counsel appearing for the

Respondents relied on the counter affidavit filed, adopted the written address also filed by him in urging the court to refuse the application. Both Senior Counsel adumbrated on their respective positions, with Mr. Igwe vehemently contesting the applicants oral application seeking to withdraw prayer 1, in the applicants motion, contending that issues having been joined, the court must of necessity rule on same.

In the written address filed in support of the application, the learned counsel for the applicant proposed two issues for resolution, to wit:

- i. Whether this honourable court can grant leave to the Appellant/Applicant to appeal the ruling of the National Industrial Court in suit no: NICN/ABJ/270/2022 between **FEDERAL GOVERNMENT OF NIGERIA & 1 OR. VS. ACADEMIC STAFF UNION OF UNIVERSITIES**. And
- ii. Whether this honourable court can make an order staying the execution of the order of the National Industrial Court suit no: NICN/ABJ/270/2022 between **FEDERAL GOVERNMENT OF NIGERIA & 1 OR. VS. ACADEMIC STAFF UNION OF UNIVERSITIES**.

On the first issue, Learned Counsel made reference to the provisions of **section 243 (3) (a) of the Constitution of the Federal Republic of Nigeria as amended** and **Order 6 (1) (a) and Rule 2 of the Court of Appeal Rules, 2021** to submit that this court is clothed with the vires to grant the instant application.

It is also his submission that the applicant being desirous of challenging the judgment of the National Industrial Court, imperatively has to seek the leave of court to file his appeal; other than grounds of fundamental rights. In support of the proposition counsel cited a host of cases including **Skye Bank Plc. Vs. Iwu (2017) 16 NWLR pt. 1590.**

On the second issue it is the submission of the Learned senior counsel relying on **Ogunremi Vs. Dada (1962) 1 ALL NLR 670** and the case of **Sodeinde Vs. Registered Trustees of Ahmadiya Movement in Islam (1980) 1-2 (SC) 163 @ 170** to submit that this court is vested with the vires to stay the execution of the orders of the Learned Trial Judge being appealed therein as a party aggrieved in order to preserve the res and/or their legal right can approach the same court or an appellate court for an order staying the same order or judgment.

Further submitting counsel argued that the court can grant an order of stay of proceedings/execution even where an appeal has not been filed, reliance was placed on the case of the **NDLEA Vs. Okorodudu (1997) 3 NWLR Pt. 492 221 @ 243.**

In conclusion Learned senior counsel urged the court to grant the application.

On his part, Learned senior counsel for the respondent, proposed four issues needing determination, which are as follows:

- i. Whether this Honourable court has jurisdiction to entertain the Appellant's motion on notice dated 23rd September, 2022 and filed on 23rd September, 2022 having regards to the competency or otherwise of the said application.
- ii. Whether the Appellant has approached this honourable court with dirty hands and therefore, not entitled to the equitable discretion of this honourable court?
- iii. Whether the grant of the Appellants prayer for stay of execution of the order of the National Industrial Court suspending the prolonged strike action by the Appellant will lead to illegality and therefore, ungrantable by this honourable court?
- iv. Whether the Appellant/Applicant has jurisdiction to entertain the Appellants motion on notice dated 23rd September, 2022 and filed 23rd September, 2022 having regards to the competency or otherwise of the said application?

With respect to the first issue, counsel submitted upon the authority of *Drexel Energy and Natural Resources Ltd. & 2 Ors. Vs. Trans International Bank Ltd.* (2008) 18 NWLR Pt. 1119 399 @ 419 amongst others, that jurisdiction is the center pin of the entire litigation, and posited that the commencement of a suit is very fundamental to the issue of jurisdiction, for where a court purports to exercise jurisdiction which it does not have the proceedings before it and its judgment will amount to a nullity, and relied on **Contectna International Ltd. Vs. Churchgate**

Nigeria Ltd. & Annor (2010) 12 (SC) Pt. 11 140, submitting on the incompetency of the application with regards to the motion filed, Counsel argued that the motion is incompetent and ought to be struck out, he relied on Order 6 Rule 4 of the Court of Appeal Rules, 2021 to submit that the applicants motion was filed to this court without first being filed before the trial court.

On this, counsel cited the case of **Adeniran Vs. Olusokun II (2019) 8 NWLR Pt. (1673) 98** amongst others. He emphatically insisted that the applicant having failed to first file the application before the lower court before approaching the court of appeal makes the entire application incompetent.

With regards to the second issue, it was contended by Senior Counsel that the Applicant approached this court with dirty hands and cited instances of disobedience of court orders of the National Industrial Court and other instances related thereto to argue that the applicant being dented with disobedience of orders of the National Industrial Court should not be given a hearing. He cited on this, the cases of **Enakwe Vs. I.M.B Nigeria Ltd. (2006) 19 NWLR Pt. (1013) 146 @ 180** as well as the **Military Governor of Lagos State & Ors. VS. Ojukwu (1986) ALL NLR 233**, counsel urged the court to refuse the application for stay of execution.

On the third issue, Learned senior counsel argued that prayer two of the Appellants seeks to enthrone illegality, he drew the court's attention to the provisions of **sections 18 (1) and (2) of the Trade Disputes Act** to posit that courts do not encourage illegality on the principle of *ex tui causa non oritur action*.

With regards to the last issue, it was submitted that the applicant have failed to show any special circumstance and thereby failed to satisfy the conditions for the application of the grant. In that regard it was argued that applicant failed to show any special circumstance and cited the case of **Amadi Vs. Chukwu (2013) 5 NWLR Pt. 1347 301**. The learned senior counsel also alluded to the absence of arguable grounds in the Appellants proposed Notice of appeal, absence of balance of evidence and justice against the applicant, and concluded that the cases cited and relied upon by the learned counsel for the applicant are of no use to the applicant, and thereby urged the court to refuse the application.

Accordingly, I have accorded the submissions of the senior counsel in the matter due consideration, and it is my humble view, that the substance of the entire application centers on whether applicants application can be granted in the circumstance.

In dealing with the preliminary issue as to whether the applicants withdrawal of prayer 2 can be countenanced, in view of the argument posited that parties had joined issues on the issue, I am unable to agree with Mr. Igwe that applicants cannot even at that stage withdraw their prayer, and accordingly the prayer to withdraw prayer one seeking for order staying the execution of the order of the National Industrial Court per Hon. Justice P.I. Hamman in suit No. NICN/ABJ/270/2022, between **Federal Government of Nigeria & 1 or vs. Academic Staff Union of Universities** delivered on Wednesday the 21st day of September, 2022 having been withdrawn is hereby struck out.

The application in the circumstance remains to be considered on the basis of whether this court can grant the Applicant leave to appeal the interlocutory ruling of the National Industrial Court of Nigeria, made on the 21st day of September, 2022 between the two combatants.

In that regard, I consider the starting point as being **section 240 of the Constitution of the Federal republic of Nigeria 1999 as amended**, to the effect that this court is imbued with the power and jurisdiction to entertain appeals from the National Industrial Court of Nigeria, amongst other courts of the land. **Section 243 (3) of the Constitution** which provides that:

An appeal shall only lie from the decision of the National Industrial Court to the Court of Appeal as may be prescribed by an Act of the National Assembly;

Provided that where an Act or Law prescribes that an appeal shall lie from the decisions of the National Industrial Court to the Court of Appeal, such appeal shall be with the leave of the Court of Appeal.

I understand this constitutional provision as demanding that before any decision of the National Industrial Court of Nigeria will lie on appeal to the Court of Appeal, the leave of the Court of Appeal must be sought. The case of **Skype Bank Plc vs. Iwu (2017) 16NWLR (pt. 1590)** cited by the applicants appears to be the locus classicus on the matter. All I am trying to say here is that the requirement for leave of this court is only subjected to the provisions of **section 24 of the Court of Appeal Act** for which a clear understanding thereof permits envisages application

for leave to be made to this court, but peradventure, the application is made before the lower court, the timing circumscribed by **section 24 (2) of the court of Appeal Act** may be enlarged. The argument therefore that **Order 6 Rule 4 of the Court of Appeal Rules, 2021** had been breached, and all the authorities cited in that regard, is not available to the Respondents.

Now worrisome, is the failure of the applicants herein to obey the judgment of the lower court, thus leading the learned counsel for the Respondent to draw the attention of the court to that fact, contending that the applicants are seeking for order of this court with dirty hands, and in that regard, the case of the **Military Governor of Lagos State vs. Ojukwu** was cited and relied upon. Our attention was also referred to the case of **Mobil Oil Nig. Ltd vs. Assan (1995) 8NWLR (pt. 412) 129 @ 150**, where the Supreme Court held that:

"Chief FRA Williams, SAN referred the court to the cases of Huang & Ors. v. Bello & Ors. supra and Restico Nigera Ltd. V. Societe General Surveillance SA supra. These are Court of Appeal decisions and were in my view rightly decided. What the court below was saying in both cases was that where a person is appealing against a matter in which he had suffered a defeat and asked for a stay of execution pending the determination of the appeal, he would not be liable in contempt merely because he had not obeyed the order which he is appealing against or which he wants stayed pending the appeal"


Afe Babalola SAN, in his treatise, pointed out that in exceptional cases there can be lawful disobedience of an injunctive order,

opining that; there are exceptions to the rule that any person against whom an order is made must obey it. Also in **Odogwu v. Odogwu (1992) 2 NWLR (PT 225) P 539 at 554** the Supreme Court held that the common law rule precluding persons in disobedience of the order of court against them from being heard in respect of the matters which they stand in disobedience permits of an exception where the order disobeyed was made without jurisdiction or where the party in disobedience is challenging the validity of the order.

In view of this state of the law, I am inclined to granting the application for leave to appeal the decision of the National industrial Court of Nigeria delivered on the 2nd day of September, 2022 as prayed on the condition that the order of the lower court is obeyed immediately.

In conclusion, my lords permit me to express the view that I have known Mr. Falana, SAN for a long time as an advocate of the rule of law, and obedience to lawful orders made by courts of the land. He has championed that cause in numerous cases. I challenge him to aid the obedience of lawful court orders made.

In conclusion, prayer one in the motion papers is granted as prayed, and Applicant granted 7 days to file his notice of appeal before the court below.



HAMMA AKAWU BARKA
JUSTICE, COURT OF APPEAL

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SIGN..... 
MTAH CHIAMAKA BLESSING HIGHER EXECUTIVE OFFICER
DATE 12/09/2022

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APPEARANCES

Femi Falana, SAN with Femi Adedeji Esq. and Abubakar Marshall Esq. for Appellant.

J.U.K Igwe, SAN with Senator (Dr.) Ita Enang, Chukwulo Moedu Esq, Senator Osita Izunaso, Matthias Agboni Esq, C.M. Edozie Esq, Valentine Nonso Esq for the Respondents.

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