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**ZENITH BANK PLC**

**V.**

**CHIEF ARTHUR JOHN & ORS**

IN THE SUPREME COURT OF NIGERIA

ON FRIDAY, THE 30TH DAY OF JANUARY, 2015

SC.519/2012

**3PLR/2015/151 (CA)**

**OTHER CITATIONS**

(2015) LPELR-24315(SC)

**BEFORE THEIR LORDSHIPS**

WALTER SAMUEL NKANU ONNOGHEN, JSC

SULEIMAN GALADIMA, JSC

NWALI SYLVESTER NGWUTA, JSC

MARY UKAEGO PETER-ODILI, JSC

MUSA DATTIJO MUHAMMAD, JSC

**BETWEEN**

ZENITH BANK PLC - Appellant(s)

**AND**

1. CHIEF ARTHUR JOHN

2. ELDER FRANK ULE

3. CHIEF SILAS OFORJI

(For themselves and on behalf of the entire People of Umorie Community in Ukwa West LGA of Abia State) - Respondent(s)

**REPRESENTATION**

O. Akoni SAN, Prince G. Akitoye, A. O. Utake - For Appellant

**AND**

L. E. Nwosu SAN, A. N. Ayaogu, Z. A. Nwosu - For Respondent

**MAIN ISSUES**

DEBTOR-CREDITOR LAW – GARNISHEE PROCEEDINGS:- Application sought within a separate appeal to prevent the full effect of a Garnishee Absolute order against which there is no substantive appeal – Nature of application – Whether an interlocutory application or a substantive appeal within an appeal – Attitude of Supreme Court thereto

DEBTOR-CREDITOR LAW – GARNISHEE PROCEEDINGS:- Meaning of a Garnishee Order Absolute as an executed judgment and a completed act – Whether an application for stay can be validly ordered against a Garnishee Order Absolute – Proper order for a party to seek once and execution has been levied – Whether the setting aside of a writ of attachment of the execution if actual execution has not been carried out

ENVIRONMENTAL AND NATURAL RESOURCES LAW – LIABILITY FOR ENVIRONMENTAL DAMAGES:- Monetary award made by Court based on admitted liability – Appeal thereon – Implications for garnishee proceedings brought to enforce the judgment – Role of paying banks and Central Bank of Nigeria in frustrating collection of environmental damages awards

BANKING – BANK GUARANTEE:- Terms and conditions of a Bank Guarantee – Bindingness of – Duty of bank thereto – Bank bringing or joining action to prevent the satisfaction of the Guarantee – Attitude of Court thereto

BANKING – BANK GUARANTEE:- Garnishee-Garnishor Proceedings pursuant to a Bank Guarantee – Order attaching a Bank’s account with the Central Bank of Nigeria – Application by Central Bank before a High Court to prevent payment on Bank Guarantee – Where struck out – Whether debtor can make an application for stay of execution of the Garnishee Order Absolute in an appeal before the Supreme Court not flowing from the Garnishee proceedings

BANKING – BANK GUARANTEE:- Duty of a bank pursuant to a Bank Guarantee which conditions and terms have been met – Where bank guarantee made out in satisfaction of a court order to which bank was not a party – Whether bank entitled to bring an application to delay the satisfaction of the bank Guarantee without first obtaining to be joined as a party to the suit which satisfaction gave rise to the Bank Guarantee

ETHICS – LEGAL PRACTITIONER:- Practice of enabling clients with a slew of processes to frustrate the satisfaction of awards made against them – Attitude of Court thereto

PRACTICE AND PROCEDURE - APPELLATE PROCEDURE - RIGHT OF ACTION – THIRD PARTY ACTIONS: When a party is not before the Court – When Orders sought by an Applicant are deemed not founded on a valid right of action due to failure to show relationship

PRACTICE AND PROCEDURE - APPELLATE PROCEDURE - INTERPRETATION OF ORDER 2 RULE 9 OF THE SUPREME COURT- SUBSTANTIVE AND INTERLOCUTORY APPEALS:- Order 2 Rule 9 of the Supreme Court - Whether contemplates Substantive Appeals only – Proper approach

PRACTICE AND PROCEDURE – APPEAL – PRELIMINARY OBJECTION:- Purpose and essence of - Order 2, Rule 9 (1) of the Rules of the Supreme Court – Legal effect of a successful preliminary objection to the hearing of an appeal

PRACTICE AND PROCEDURE - JUDGMENT AND ORDER - STAY OF EXECUTION OF JUDGMENT: Whether an injunction or stay can proceed against a completed event – Whether an injunction or order for stay can proceed against an Garnishee order Absolute

PRACTICE AND PROCEDURE - JUDGMENT AND ORDER - STAY OF EXECUTION OF JUDGMENT: When an Order for stay of execution is valid – Where an order for stay cannot be granted

PRACTICE AND PROCEDURE - JUDGMENT AND ORDER – GARNISHEE PROCEEDINGS:- Nature and effect of Garnishee Orders – Comparison of Garnishee proceedings with Substantive appeals and Interlocutory applications - Whether Stay of execution can proceed against Garnishee Order

PRACTICE AND PROCEDURE - JUDGMENT AND ORDER – APPEALS:- Supreme Court - Whether has jurisdiction to sit over a ruling of the High Court (even by way of an application) without an intervening appellate review of the High Court decision by the Court of Appeal

**MAIN JUDGMENT**

**MARY UKAEGO PETER-ODILI, J.S.C. (Delivering The Lead Ruling):**

The Appellant/Applicant Zenith Bank PLC prays for an order of unconditional stay execution and interlocutory injunction which I shall reproduce verbatim.

1. AN ORDER OF UNCONDITIONAL STAY OF EXECUTION of the Judgment of the Court of Appeal, Port Harcourt Division, Coram Honourable Justice Ali Abubakar Babandi Gumel, Honourable Justice Chioma Egondu Nwosu-Iheme and Honourable Justice Uchechukwu Onyemenam, delivered on Thursday 6th December, 2012 in Appeal No.CA/PH/436/2010: Zenith Bank Plc v. Chief Arthur John & ors affirming the Judgment of the High Court of Rivers State Coram Honourable Justice S. C. Amadi, delivered on Thursday 12th August, 2010 in suit No.PHC/1690/2010: Chief Arthur John & 2 Ors v. Zenith Bank Plc whether by garnishee proceedings or by any other mode of execution or enforcement, pending the hearing and determination of the Applicant's pending instant appeal against the said Judgment before this Honourable Court.

2. AN ORDER OF INTERLOCUTORY INJUNCTION restraining the Respondents, their agents, messengers, privies, representatives, heirs and/or any person(s) acting pursuant to the Respondents' request, instigation and/or instruction (such person(s) being and/or including the Inspector-General of Police, the Commissioner of Police, Rivers State and their officers; the Joint Task Force, Civil Defence Corps etc. or any law enforcement authority howsoever called from attempting, commencing, continuing or concluding any step, action or process which is aimed at and/or has the effect of acting upon and/or giving effect to the Judgment of the Court of Appeal, Port Harcourt Coram Honourable Justice Ali Abubakar Babandi Gumel, Honourable Justice Chioma Egondu Nwosu-Iheme and Honourable Justice Uchechukwu Onyemenam, delivered on Thursday 6th December, 2012 in Appeal No: PH/436/2010: Zenith Bank Plc. V Chief Arthur John & 2 Ors affirming the Judgment of the High Court of Rivers State Coram Honourable Justice S. C. Amadi, delivered on Thursday 12th August, 2010 in Suit No: PHC/1690/2010: Chief Arthur John & 2 Ors v. Zenith Bank Plc whether by garnishee proceedings or by any other mode of execution or enforcement, pending the hearing and determination of the Applicant's pending instant appeal before this Honourable Court.

3. AN ORDER OF INTERLOCUTORY INJUNCTION restraining the Deputy Chief Registrar of the Court of Appeal, Port Harcourt the Chief Registrar or the Deputy Sheriff of the High Court of Rivers State, the Central Bank of Nigeria, their agents, messengers, privies, representatives, and/or any person(s) acting pursuant to the Respondents' request, instigation and/or instruction from attempting, commencing, continuing or concluding any step, action or process which is aimed at and/or has the effect of acting upon and/or giving effect to the Judgment of the Court of Appeal, Port Harcourt Coram Honourable Justice Ali Abubakar Babandi Gumel, Honourable Justice Chioma Egondu Nwosu-Iheme and Honourable Justice Uchechukwu Onyemenam, delivered on Thursday 6th December, 2012 in Appeal No: CA/PH/436/2010: Zenith Bank Plc v Chief Arthur John & Ors affirming the Judgment of the High court of Rivers State Coram Honourable Justice S. C. Amadi delivered on Thursday 12th August, 2010 in Suit No:PHC/1690/2010: Chief Arthur John & 2 Ors v Zenith Bank Plc whether by garnishee proceedings or by any other mode of execution or enforcement, pending the hearing and determination of the Applicant's pending instant appeal before this Honourable Court.

AND for such ORDERS or FURTHER ORDERS as this Honourable Court may deem fit to make in the circumstances.

GROUNDS UPON WHICH THIS APPLICATION IS BROUGHT

1. The Applicant has filed a Notice of Appeal dated 6th December, 2012 on grounds of pure law to the Supreme Court against the Judgment of the Court of Appeal, Port Harcourt Coram Honourable Justice Ali Abubakar Babandi Gumel, Honourable Justice Chioma Egondu Nwosu-Iheme and Honourable Justice Uchechukwu Onyemenam ("The Lower Court"), delivered on Thursday 6th December, 2012 in Appeal NO: CA/PH/436/2010: Zenith Bank Plc v chief Arthur John & ors affirming the Judgment of the High court of Rivers State coram Honourable Justice S. C. Amadi delivered on Thursday 12th August, 2010 in suit No:PHC/1690/2010: Chief Arthur John & 2 Ors v Zenith Bank plc.

2. The Notice of Appeal raises substantial and recondite issues of law which go to the root of the Judgment and have a good chance of success. Some of the issues are:

i) whether the Lower Court was right when it held that the Trial High Court had the requisite jurisdiction to entertain Suit No.PHC/1690/2010: Chief Arthur John & 2 Ors v Zenith Bank Plc?

ii) whether the Lower Court was right to have validated the Trial High Courts hearing of the Respondent's suit No.PHC/690/2010: Chief Arthur John & 2 Ors v Zenith Bank Plc despite being already aware that the subject matter of that action was interconnected with and subject of an application for stay of proceedings before the Court of Appeal, Owerri and also an appeal before the Supreme Court?

iii) Whether the Lower Court was right to have affirmed the Judgment of the Trial High Court which subsequently conflicted with the Ruling of the Court of Appeal, Owerri staying execution of its Judgment (which is the res in the action before the Trial High Court) and also interfered with and purports to pre-empt the decision of the Supreme Court in a pending appeal from the said Judgment of the Court of Appeal, Owerri?

3. The Respondents are an indeterminate number of persons who lack the means to repay the Judgment Sum which is in excess of N1,000,000,000.00 (One Billion Naira) in the event that the Applicants instant pending appeal before this Honourable Court is successful. Thus, the res in this appeal shall be destroyed and a return to status quo will be impossible if the Judgment of the Lower Court delivered on 6th December, 2012 in Appeal No.CA/PH/436/2010 @ Zenith Bank Plc. v Chief Arthur John & 2 Ors affirming the Judgment of the High Court of Rivers State Coram Honourable Justice S. C. Amadi delivered on Thursday 12th August, 2010 in Suit No:PHC/6990/2010: Chief Arthur John & 2 Ors v Zenith Bank Plc is executed and/or otherwise enforced during the pendency of the Applicant's instant appeal to the Supreme Court against the said Judgment of the Lower Court.

4. Further to the preceding paragraph, the applicant will have an empty, pyrrhic and inconsequential victory thus foisting a fait accompli on the Supreme Court in the likely event of the success of the Applicants pending instant appeal at the Supreme Court of Nigeria if the said Judgment of the Lower Court delivered on 6th December, 2012 in Appeal NO.CA/PH/436/2010: Zenith Bank Plc v Chief Arthur John & Ors affirming the Judgment of the High Court of Rivers State coram Honourable Justice S. C. Amadi delivered on Thursday 12th August, 2010 in Suit No: PHC/1690/2010: Chief Arthur John & 2 Ors v Zenith Bank plc is executed and/or otherwise enforced by the Respondents.

5. The Respondents' Counsel, Mr. Lucius E. Nwosu SAN and Mr. Emmanuel Asido, have a predilection for taking steps which are prejudicial to pending proceedings before the Appellate Courts and it is very likely to attempt to execute or otherwise enforce the Lower Courts Judgment unless this application is granted.

6. The Applicant made a similar application for Stay of Execution and enforcement of the Judgment before the Lower Court but it would not be heard before the Record of Appeal was entered in the Supreme Court.

7. The grant of this application will further the interest of justice and the Respondents cannot be prejudiced by the grant of this application in any manner howsoever.

In furtherance of this application, the Applicant filed a 13 paragraph supporting affidavit, a further and better affidavit and a 2nd further better affidavit. A written address filed on 12/5/2014 and a Reply on points of law filed on 2/6/2012 was effected by Olawale Akoni SAN of counsel.

The Respondent filed a Notice of Preliminary Objection on the 11/2/2013, a Counter Affidavit on the 21/3/14 and a Further Counter Affidavit and a written address of the 23/5/2014. The Objection and Grounds are restated below as follows:-

“TAKE NOTICE that the Respondents/Objectors herein shall, at the hour of 0900 Hours on 15th day of July, 2013 fixed for hearing of the Appellant/Applicant's Motion For Stay of Execution or any further adjourned date, by way of Preliminary Objection seek an order of this Honourable Court dismissing the Appellant/Applicant's Motion For Stay as the same is incompetent and constitutes an abuse of this Courts process.

“AND TAKE FURTHER NOTICE that the grounds upon which this application is brought are as follows:-

1. The Respondent's suit at the trial court was sequel to an unconditional Guarantee issued by the applicant which expired in September 30, 2010, except sooner enforced (as was done in this case) upon the dismissal of a third party appeal at the Court of Appeal.

2. The applicant by letter under the hand of their Company Secretary and Legal Adviser admitted liability and the abidingness of the said Guarantee on them after the third party appeal is dismissed.

3. The Respondents issued cheques on the said Guarantee which was dishonoured by the applicant hence an independent suit No.PHC/1690/2010 was commenced thereupon at the Rivers State High Court.

4. The Rivers State High Court found for the respondents and later dismissed the applicants Motion for Stay of Execution. A Writ of Fieri Facias was issued by that Court, executed and chattels attached on the ground.

5. A Garnishee Order Absolute was also issued against the applicant's account at Central Bank which had been served on the bank, and the Central Bank had filed processes at the High Court and the Court of Appeal regarding that.

6. Applicant filed and argued a Motion for Stay of Execution at the Court of Appeal, Port Harcourt which was dismissed.

7. An appeal by the Applicant against the Judgment of the Rivers State High Court enforcing the Guarantee was also dismissed, by the Court of Appeal, Port Harcourt Division.

8. The Central Bank of Nigeria curiously appealed against the Garnishee Order Absolute and the said Appeal No. CA/PH/477/2010 was struck out as being incompetent.

9. The Garnishee Order Absolute is still extant and The Central Bank of Nigeria has filed fresh proceedings at the High Court of Rivers State in Suit No.PHC/1690 now pending before Justice Ogbuji of that Court.

10. The Central Bank of Nigeria similarly in collusion with Shell has filed a fresh application for extension of time for leave to appeal and leave to appeal against the Garnishee Order Absolute, which is now pending, at the Court of Appeal, Port Harcourt Division.

11. By reason of the foregoing, the application filed before this court to stay an execution already levied and extant Garnishee Order Absolute will have the effect of this apex Court exercising jurisdiction over a matter variously pending at the trial Court and those initiated at the Court below by non parties herein which are yet to come before the Supreme Court.

**BACK GROUND FACTS:**

The bone of contention in this application is connected with the dispute in Suit NO.FHC/UM/CS/03/2000 commenced by the Respondent (as Plaintiffs) against Shell Petroleum Development Company of Nigeria Limited ("SPDC") at the Federal High Court, Umuahia ("FHC Umuahia") seeking various monetary reliefs. In a judgment delivered on 17th November, 2005, the Federal High Court Umuahia awarded the sum of N1,849,187,568.00 in favour of the Respondent and against Shell Petroleum Development Company Nigeria Limited.

Being dissatisfied with the Judgment of the FHC Umuahia, SPDC appealed to the Court of Appeal, Port Harcourt (the Lower Court) vide Appeal No.CA/PH/103/2006. SPDC also applied and obtained an Order for conditional stay of execution of the Judgment of the FHC Umuahia. SPDC complied with the Order and provided a Zenith Bank Guarantee ("Zenith BG") dated 28th October, 2009 to cover the Judgment sum pending the determination of SPDC's appeal at the Lower Court. In this Address, Zenith Bank Plc is simply referred to as "the Applicant for convenience".

On 10th June, 2010, the Court of Appeal delivered its Judgment and allowed SPDC's appeal in part and thereby reduced the Judgment sum awarded by the FHC Umuahia from N1,849,187.00 to N1,049,187,658.00. SPDC further appealed to the Supreme Court vide SC.33/2011 against the Judgment of the Lower Court. The said SC.33/2011 remains pending before this Honourable Court. Furthermore, SPDC applied to the Lower Court for a stay of execution of its Judgment and/or stay of enforcement of the Zenith BG pending the determination of SPDC'S Appeal NO: SC.33/2011 to the Supreme Court. The Respondents are parties to that appeal.

During the pendency of SPDC's Appeal No.SC/33/2011 at the Supreme Court and application at the Lower Court for stay of execution, the Respondents instituted Undefended List Proceedings vide Suit No. PHC/1690/2010: Chief Arthur John & Ors v Zenith Bank at the High Court of Rivers State ("Trial Court") to enforce the same Zenith BG which is subject of appellate proceedings. The said suit No. PHC/1690/2010 forms the foundation of the instant appeal SC.519/2012.

The Applicant informed the Trial court of the pendency of SPDC's Appeal No.SC.33/2011 before the Supreme Court as well as SPDC's motion before the Lower Court seeking a stay of execution/enforcement of the Lower Court's Judgment and the Zenith BG pending the determination of SPDC's Appeal No. SC/33/2011 and urged the Trial Court to act prudently by suspending proceedings in suit No.PHC/1690/2010 so as not to interfere with the pending proceedings before the appellate courts especially the motion seeking to suspend enforcement of the Zenith BG. despite being informed, the Trial court proceeded to enter Judgment on 12th August, 2010 enforcing the Zenith BG in favour of the Respondents even when the court of Appeal had not determined SPDC's pending motion to stay enforcement of the same BG.

Being dissatisfied with the above Judgment of the Trial court, the Applicant promptly commenced Appeal No.CA/PH/436/2010 at the Court of Appeal, Despite being aware of the pendensy of the Applicant's appeal, the Respondents swiftly commenced garnishee proceedings and obtained a garnishee Order absolute against the Central Bank of Nigeria in order to enforce the Undefended List Judgment of the Trial Court and thereby foist a fait accompli on the Court of Appeal with regard to the Applicant's pending appeal thereat and earlier pending motion to stay enforcement of the same Bank Guarantee which the Trial Court subsequently enforced.

The Lower Court subsequently delivered its Ruling on 21st February, 2011 and granted SPDC's pending motion to stay enforcement of the same Zenith BG pending the determination of SC/33/2011. The Lower Court ordered a conditional stay of execution of its Judgment in the sum of N1,049,187,658.00 pending the determination of SPDC's SC.33/2011 at the Supreme Court and directed SPDC to provide a bank guarantee to secure the said Judgment sum. In compliance with the Order, SPDC provided a First Bank of Nigeria Plc Guarantee ("First Bank BG") dated 8th March, 2011 in favour of the Respondents for the said Judgment sum of N1,049,187,00.29. The Lower Court eventually dismissed the Applicants CA/PH/436/2010 following which the Applicant further appealed to this Honourable Court and filed the instant application for an unconditional stay of execution. The Applicant's Notice of Appeal herein was amended pursuant to an Order of this Honourable Court on 28th April, 2014.

In the supporting affidavits and counter affidavits are many documents in enhancement of the arguments on either side of the divide.

In the written address of the Applicant learned counsel crafted one sole issue for determination which is as follows:-

Whether the Applicant is entitled to the grant of the orders sought in this application?

Learned counsel for the Respondent, Lucius Nwosu SAN formulated four issues for determination and embedded within are arguments on the Preliminary Objection and the issues are hereunder restated in full:-

**1)**  Whether the applicants' Motion for Stay of Execution is not an abuse of court process having themselves posted a guarantee and holding the same to mean what it says before the Court of Appeal and in particular after admitting in writing by their letter of July 20th, 2010 that they were liable to the respondents on their Guarantee and bound to honour cheques drawn against it 22 days before the High Court Judgment of 12/08/2010 against them and sequel to the failure of SPDC appeal?

2) Whether the Supreme Court has the jurisdiction to grant this application in view of the extant Garnishee Order Absolute made against the Central Bank on 7/9/2010 by the High Court of Rivers State and against which an appeal lodged by the Central Bank to the Court of Appeal has been struck out for incompetence especially in the absence of a further appeal therefrom to this apex Court?

3) Whether the applicant is a part to the litigation and appeal between SPDC and the respondents and if not whether the purported Guarantee procured by SPDC from 1st Bank on 8th day of March, 2011 was capable of cancelling the applicants Guarantee dated 28th October, 2009 which crystallized and was called in on 16th June, 2010 and was itself expressly stipulated at paragraph 4 lines 5 and 6 at page 2 to expire nilly willy on September 30, 2010?

4) Whether or not SPDC fulfilled (which is denied) the Conditional Stay granted it in the Court of Appeal, Owerri on 21/2/2011 (after it had abandoned its motion) is of any relevance in this application?

I am of the firm mind that the sole issue of the Applicant is adequate in the settlement of the questions that have arisen in this application and that is thus:-

*Whether the Applicant is entitled to the grant of the orders sought in the application*?

In pushing forward, their point of view, learned counsel for the Applicant, Olawale Akoni SAN contended that an order for stay of enforcement of a judgment whether by way of garnishee proceedings or other means of enforcement of judgment is the suspension, postponement or halting of the effect of a judgment and is effectively preservative and ensures that the subject matter of an appeal remains available until the appeal is determined. He cited *City Express Bank Ltd v Lagos State Government (2004) 7 NWLR (Pt.872) 258.* That the power to grant the orders sought are conferred on this court under *Section 24 of the Supreme Court Act, Cap 515, LFN 2004* and *order 8, Rule 12 (3) of the Supreme Court Rules*. He cited *Ogbonna v. Ukaegbu (2005) 17 NWLR (Pt.954) 432 at 443; United Spinners Ltd v. Chartered Bank Ltd (2001) 14 NWLR (Pt.732) 195 at 216 etc.*

Learned senior counsel for the Applicant said the underlying consideration in an application like this is the preservation of the res in order to forestall a situation where the court is foisted with a situation of complete helplessness. That the criteria for the grant of this application are that there is a competent appeal and grounds raising substantial legal issues and the existence of special and exceptional circumstances justifying the grant of the application. He referred to *SPDC v. Amadi (2011) 14 NWLR (Pt.1266) 157 at 203; Oyelami v Military Administrator of Osun State (1999) 8 NWLR (Pt.613) 45 at 57; Onuzulike v. Commissioner For Special Duties, Anambra State (1990) 7 NWLR (Pt.616) 253.*

Mr. Akoni of counsel stated that the Notice of Appeal have grounds that raise recondite and substantial issues of jurisdiction and abuse of judicial process. That a resolution of those issues in favour of the Applicant would result in the setting aside of the Judgment of the Lower Court. He cited *Martins v Nicannar Food Ltd & Anor (1988) 2 NWLR (Pt.74) 75 at 89; Alawiye v Ogunsanya (2012) 12 SC (Pt.III) 1 at 30.*

That the Amended Notice of Appeal raise substantial issues of jurisdiction which constitute special circumstances for the grant of this application. He relied on *Kotoye v Saraki (1993) 5 NWLR (Pt.296) 710 at 726; NDLEA v Okorodudu (1994) 3 NWLR (Pt.492) 221 etc.*

For the Applicant [it] was submitted that as indicated in paragraph 28 of the 2nd Further Affidavit that the Applicant is a leading financial institution in Nigeria with a capital base of Twenty Five Billion Naira which evidences demonstrable financial muscle and capacity to pay whatever sum that may eventually be awarded in favour of the Respondents in the event of the appeal failing and so Respondents would not be prejudiced.

In response, learned counsel for the Respondents submitted that the Applicant's Guarantee in question was posted pursuant to the Order of the Court of Appeal, Port Harcourt Division and the Applicant issued their bond of Guarantee, Exhibit AA - 1 which they seem to now want to get around without implementing the terms which is tantamount to the abuse of court process, a situation exacerbated by the admission in writing by the applicants of a letter after the judgment of the Court Appeal, Owerri Division against Shell PDC and after the respondents' call on the Guarantee. That the assurances given to the respondents in the said letter AA - 2 made the Respondents write cheques drawn against the Guarantee which cheques were therefore not honoured. That the conduct of the Applicant thereby rendered the applicant undeserving of the equitable remedy they desire. He cited *Franchal (Nig.) Ltd v. NAB Ltd (2000) 9 NWLR (Pt.671) 1 SC; Zenith Bank v John & Ors (2013) 2 CLRN 123 (CA); Amaefule v State (1988) 2 NWLR (Pt.75) 156 SC.*

Learned Senior Advocate Lucius Nwosu Esq, contended that there is no iota of justice or law supporting the Applicants appeal/application for stay since the judgment appealed against and sought to be stayed was based upon their own admission of liability which is binding on them and from which they cannot resile. He relied on *Section 169 Evidence Act 2011, F.M.H. v C.S.A. Ltd (2009) 9 NWLR (Pt.1145) 193 SC at 214; J.C. Ltd v Ezenwa (1996) 4 NWLR (Pt.443) 391 at 408 - 409.*

For the Respondents was submitted that upon the grant of a Garnishee Order Absolute, attachment or execution as in this instance is complete and the Garnishee becomes liable only to the Garnishor. He cited *Union Bank of Nig. Plc v Boney Marcus Ind. Ltd & Ors (2005) LPELR 3394; (2005) 13 NWLR (Pt.943) 654 SC.*

Mr. Nwosu SAN went on to point out that it is strange that Central Bank of Nigeria appealed against the said Garnishee Order Absolute, clearly acting the script of Zenith Bank, the present applicants who could not appeal that order by operation of law. He said that the said appeal by the Central Bank in CA/PH/477/2010 was on the 7th day of May, 2013 struck out for incompetence of the Notice of Appeal and so there is no appeal in that regard before this court thus rendering the Garnishee Order Absolute intact and extant.

He stated on that granting this application would be another way for this apex court exercising jurisdiction over a matter and party (The CBN) not before the Court. He cited *A.G. Anambra State v Okafor (1992) 2 NWLR (Pt.224) 396 at 430; Badejo v Federal Minister of Education (1996) 8 NWLR (Pt.464) 15 etc; The Terms of the Guarantee.*

For the Respondent [it] was stated that in the said First Bank Counter Guarantee to the applicants, First Bank expressly stated that their liability to the applicants shall not be affected by any other transaction between SPDC and the herein respondent including motions or appeals between SPDC and the beneficiaries of the applicants Guarantee.

That it is noteworthy that the Counter Guarantee surfaced when SPDC applied for the Stay of Execution as shown in Exhibit AA - 6 attached to respondents' further and better affidavit of 23/5/14. That applicants cannot continue to trade with the respondents' money, adjudged to be theirs while applicants are dribbling them with phoney appeals. He cited *Okafor v Nnaife (1987) 4 NWLR (Pt.64) 129 at 137; NNPC v Famfa Oil Ltd (2009) 12 NWLR (Pt.1156) 462 at 481.*

Mr. Nwosu of counsel further contended that the applicant, Zenith Bank Plc was neither a party to the litigation between Shell PDC and Chief Arthur John & Ors at the Court of Appeal Owerri. Also that they were not parties at the High Court either and so having their names grafted in this motion for Stay of Execution filed by Shell PDC upon its appeal failing at the Court of Appeal is illegal and the motion bound to fail as void and a nullity. He cited *S.S. (Nig.) Ltd v. A. S. (Nig.) Ltd (2011) 4 NWLR (Pt.1238) 596.*

Mr. Olawale Akoni SAN for the Applicant making a reply on points of law in line with the Reply on Points of Law filed on 2/6/14 Challenged the Preliminary Objection made by the respondent contending that a Preliminary Objection in an application is not known to law and therefore incompetent. That Order 2, Rule 9 of the Supreme Court Rules did not contemplate for a preliminary objection against an interlocutory application such as this. He cited *SPDC v Amadi (2011) 14 NWLR (Pt.1266) 157 at 192 etc.*

My reaction to the Preliminary Objection will be brief not because it is incompetent in an application for an unconditional stay such as this but because this is one of those instances where the Court is not to operate within the box without room for manouver.

It cannot be correct that Order 2, Rule 9 of the Supreme Court Rules contemplate only substantive appeals and no more.

Order 2 Rule 9:

(1) "A respondent intending to rely upon a preliminary objection to the hearing of the appeal shall give the appellant three clear days notice thereof before the hearing setting out the grounds of the objection and shall file such notice together with ten copies thereof with the Registrar within the same time."

I would want to cite the views of this court in preliminary objection, aims and objectives and when necessary. In the case of *SPDC v Amadi (2011) 14 NWLR (Pt.1266) 157 at 192* where this Court held thus:-

"Preliminary Objection is the procedure to be adopted where a respondent opposes to the hearing of an appeal, the purpose of preliminary objection is to terminate the hearing of an appeal in limine either partially or totally... It must be emphasised that by Order 2, Rule 9 (1) the procedure is adopted only for the hearing of an appeal and not for any other process."

From the same line of thought of the case above, cited is *Contract Resource Nigeria Ltd v. United Bank for Africa Plc (2011) 5 CLRN 17 at 21*, this apex court said:

"The purpose of a preliminary objection is to contend that the appeal is defective or incompetent. If sustained, the appeal would no longer be heard. A successful preliminary objection terminates the hearing of an appeal."

Having referred to the dicta of this court above and situating them to the Objection and surrounding circumstances, it cannot be said that preliminary objections intended only for substantive appeals are to be taken as a blanket situation to which no exceptions exist or peculiarities which have to be viewed in context. In the case in hand, the application sought within the ambit of an extant Garnishee Absolute is in my humble view akin to the position of a legal process at the level of a substantive appeal and is not of the same status as normal interlocutory applications which are seen in the usual run of business of court. To make the point clearer, I shall recast the supporting affidavit to this Preliminary Objection which is as follows:-

AFFIDAVIT IN SUPPORT OF PRELIMINARY OBJECTION  
  
I, ANTHONY AYAOGU, ESQ, adult, male, Christian, Nigerian citizen, Legal Practitioner of No. 27 Ohaeto Street, D/Line, Port Harcourt do hereby make oath and say as follows:-

1. That I am a Lawyer in the Law Firm of Lucius E. Nwosu (SAN), Counsel to the Judgment Creditors/Respondent/Objectors and by virtue whereof, I am familiar with the facts of this suit.

2. I have the consent and authority of my said lead Counsel and Judgment Creditors/Objectors herein to make this oath on their behalf.

3. That the facts deposed to herein are within my personal knowledge.

4. The respondents suit at the trial court was sequel to an un-conditional Guarantee issued by the applicant which expired in September 30, 2010, except sooner enforced (as was done in this case) upon the dismissal of a third party appeal at the Court of Appeal. Copy is attached as Exhibit "AA-1".

5. The applicant by letter under the hand of their Company Secretary and Legal Adviser admitted liability and the bindingness of the said Guarantee on them after the third party appeal is dismissed. Copy is attached as Exhibit "AA -2".

6. The respondent issued cheques on the said Guarantee which was dishonoured by the applicant hence an independent suit No.PHC/1690/2010 was commenced thereupon at the Rivers State High Court.

7. The Rivers State High Court found for the respondents and later dismissed the applicants Motion for Stay of Execution. A Writ of Fieri Facias was issued by that Court executed and chattels attached on the ground.

8. A Garnishee Order Absolute was also issued against the applicant's account at Central Bank which had been served on the bank, and the Central Bank had filed processes at the High Court and the Court of Appeal regarding that. Copy is attached as Exhibit "AA - 3".

9. Applicant filed and argued a Motion for Stay of Execution at the Court of Appeal, Port Harcourt, which was dismissed.

10. An appeal by the Applicant against the Judgment of the Rivers State High Court enforcing the Guarantee was also dismissed, by the Court of Appeal, Port Harcourt Division. Copy of Judgment Order is attached as Exhibit "AA - 4".

11. The Central Bank of Nigeria curiously appealed against the Garnishee Order Absolute and the said Appeal No.CA/PH/477/2010 was struck out as being incompetent. Copy whereof is attached as Exhibit "AA-5".

12. The Garnishee Order Absolute is still extant and The Central Bank of Nigeria has filed a fresh proceedings at the High Court of Rivers State in Suit No. PHC/1690/2010 now pending before Justice Ogbuji of that Court. A Copy is attached as Exhibit "AA - 6".

13. The Central Bank of Nigeria similarly in collusion with Shell has filed a fresh application for extension of Ume for leave to appeal and leave to appeal against the Garnishee Order Absolute, which is now pending, at the Court of Appeal, Port Harcourt Division.

14. By reason of the foregoing, the application filed before this court to stay an execution already levied and extant Garnishee Order Absolute will have the effect of this apex Court exercising jurisdiction over a matter variously pending at the trial Court and those initiated at the Court below by non parties herein which are yet to come before the Supreme Court.

From the materials available, it can be seen that the objection of this Preliminary Objection on the reasons proffered by Mr. Akoni and the judicial authorities cited cannot be for the purpose of this matter. However, I see it better to get into the meat of the application so as to have a full appraisal of what the application is all about and the responsibility of this court when faced with the unusual features that have presented themselves in this application and so, the Preliminary Objection is discountenanced while we go into the Motion before this Court.

To refresh the memory, the Applicant has anchored his prayers on an anxiety that the res be preserved and if not so, the success of the appeal would be a futile act. Also that they had disclosed sufficient special and exceptional circumstances to justify the grant of the application.

The posture of the Applicants, the Respondents reject stating that the Applicant's liability to the respondents is not dependent on the success or failure of SPDC further appeal from the suit between the respondents and SPDC. That the judgment of the Rivers State High Court on the applicants Guarantee arose from an entirely different cause of action through the Guarantee and respondents' dishonoured cheques as against the finding of liability against SPDC by the Federal High Court, Umuahia for environment damages.

The Applicant has anchored the prayer for stay of execution on the fact that the First Bank's Guarantee procured by Shell Petroleum Development Company (SPDC) and the pendency of SPDC's appeal No. SC.33/2011 stay of the Lower Courts judgment ought to be granted.  Interestingly, in no part of the said Guarantee was any reference made to the First Bank Guarantee for its enforceability being dependent on any other event apart from the failure of SPDC's appeal at the Court of Appeal. This Guarantee by the Applicant is a Counter Guarantee different from the subject Guarantee between the Appellant and Respondents to which Applicant is not a party.

I see it necessary to recast some salient parts of this Counter Guarantee of the applicant which is thus:-

Paragraph 2:

"This Guarantee shall become operative and enforceable in the event of the appeal lodged by the appellants to the Court of Appeal being dismissed..."

Paragraph 4:

“This Guarantee shall terminate and all obligations of the Guarantee hereunder shall cease if the Court of Appeal upholds the Appeal whether or not the original Guarantee is returned to the Bank for cancelation. Any demand in respect thereof should therefore reach the Bank promptly upon the final determination of the appeal accompanied by a certified copy of the Judgment of the appellate Court but in any event the validity of this Guarantee shall not extend beyond September 30, 2010 ("the expiry date") except further extended before the expiry date."

The changing faces of the processes that the Applicants are calling into this Motion at hand need be brought out.

Firstly, the First Bank did not issue any Guarantee to the respondents in the Court of Appeal process in CA/PH/103/2006 and so cannot cancel same. Also First Bank was not a disclosed party to the Guarantee issued by the Applicant before us now, the said Guarantee of 28/10/09 which Guarantee had expired on 30th September, 2010.

Secondly, the said Guarantee from First Bank was never given to the party as directed by the order of conditional stay within the 30 days stipulated as dateline. Therefore, the motion for stay of execution and injunction of SPDC filed on 20/5/2013 in SC.33/2011 is an admission of failure to satisfy the conditions in the earlier conditional stay obtained and nearly two years after.

Thirdly, from the origin of this motion before court is seen that neither the present Applicant (Zenith Bank) nor First Bank were parties at the trial Court and the Notices of Appeal did not have them as parties and so, it is strange for the Zenith Bank to be now applying for a stay without a joinder being sought for and obtained.

From all that I am labouring to put across, it is getting clear that prayers are being sought by parties not really before court and orders to be made against whom the Applicant has no relationship such as to produce a cause of action. The case of *S.S. (Nig.) Ltd v A.S. (Nig.) Ltd (2011) 4 NWLR (Pt.1238) 596*, is useful here.

As if the strangeness of the Guarantee, Counter Guarantee being touted are not enough, then is thrown up a fundamental matter of this court being called upon to make an order affecting a Garnishee Order Absolute against which there is no appeal. It is stating the obvious that a Garnishee Order Absolute means an executed judgment and being a completed act, one wonders how an order of stay can either be ordered or carried out. In this regard, I refer to *A. G. Anambra State v Okafor (1992) 2 NWLR (Pt. 224) 396 at 430; Badejo v Federal Minister of Education (1996) 1 NWLR (Pt.464) 15.*

Also to be placed on record, is the fact that the Garnishee Order Absolute against the Central Bank of Nigeria was made by the Federal High Court and it was not appealed against to the Court of Appeal, therefore, what is being asked of the Supreme Court of the present application is for this Court to sit on appeal over a matter directly from the High Court, the power to do so has yet to be revealed as I cannot see the vires for such a procedure. See Section 233 of the 1999 Constitution (as amended) which has provided for Appeal to this Court from the Court of Appeal and not the High Court. I rely also on *Ogoyi v. Umaga (1995) 9 NWLR (Pt.419) 283; Harriman v Harriman (1987) 3 NWLR (Pt.60) 244.*

Indeed, from the various processes thrown in at wheel by the Applicants, some of such processes clearly unconnected with the Respondents and even from different jurisdiction as Port Harcourt High Court and Owerri, its being sought to utilise those court processes to give teeth to the application when what would add up to a suit as known to law, with known parties and subject matter producing a cause of action not really being easily identifiable. I do not see how not to go along with the position of learned counsel for the Respondents that the Garnishee Order Absolute having been made by the High Court against the Central Bank of Nigeria over the applicants deposit execution and attachment have been effectively made within the stipulations of Section 83 - 86 Sheriffs and Civil Process Act in a way as to be said that the stay of execution being sought has been overtaken by events of the completed act of execution. The situation is all the more solidified with the fact that the appeal by the Central Bank to the Court of Appeal over the Garnishee was struck out for incompetence and no new appeal was initiated and so what was left as extant being the Garnishee order Absolute of the High court, an appeal therefrom not available to the Applicant at this stage.

Again of note is that the applicant was not a party to the litigation between SPDC and the respondents and so the applicant's Guarantee earlier referred to can only confer a right of action on the respondents and cannot be used by others.

From all that is going on, it cannot be resisted to say that the applicant is grafting within this application just as in horticulture or agriculture one species of a crop with another to produce something else different a position not envisaged by our law in order to give effect to the application. I have to state at least to decry the practice that has unfolded before this court in this application, documents and arguments seeking to persuade the Court to go along is that of a deployment of tricks of a trade to frustrate or stultify through seductive arguments the right properly inuring to a party. This practice has to stop and a party has to know where to pull the brakes and fulfil obligations it has a duty to do and to comply with Court orders such as the Garnishee Order Absolute. The administration of justice has no room for the dribbling as usually seen in football fields of play while a successful party is made to suffer when justice is on its side. SeeOkafor v Nnaife (1987) 4 NWLR (Pt.64) 129 at 137 NNFC v Famfa Oil Ltd (2009) 12 NWLR (Pt. 1156) 462 at 481.

From the foregoing, I have had no difficulty in reaching the conclusion that this application is not only a wasteful exercise, it is lacking in merit and I will not temporise in dismissing it and I hereby dismiss the application.

I award N300,000 to each of the Respondents to be paid by the Applicant.

**WALTER SAMUEL NKANU ONNOGHEN, J.S.C.:**

I have had the benefit of reading in draft the lead ruling of my learned brother, HON. JUSTICE MARY UKAEGO PETER-ODILI, JSC just delivered. I agree with his reasoning and conclusion that the application has no merit and should be dismissed.

The application is for an order staying execution of the judgment of the Court of Appeal, Port-Harcourt Division delivered on 6/12/2012 in appeal No.CA/PH/436/2010 which affirmed the judgment of the High Court of Rivers State delivered on 12th August, 2010 in suit No.PHC/1690/2010 either by garnishee proceedings or any other mode of execution or enforcement of judgment pending the hearing and determination of the appeal filed by the applicant and also for an order of interlocutory injunction restraining the respondents, their agents, privies, etc from attempting, commencing, continuing or concluding any step, action or process aimed at or giving effect to the said judgment of the Lower Court, pending the hearing of the appeal.

Finally, the application prays the court for an order of interlocutory injunction restraining the Deputy Chief Registrar of the Court of Appeal, Port-Harcourt etc from acting on any request etc of the respondents for the enforcement of the said judgment.

The facts of the case have been stated in detail in the said lead ruling and I do not intend to repeat them herein except as may be needed to emphasize the point being made.

It is not in dispute that a garnishee proceeding is one of the modes or methods of enforcement of a judgment debt and that a garnishee order absolute had been made by a court of competent jurisdiction in this matter. Also not in dispute is the basic fact that there is no appeal against the said order absolute pending in the court below.

It is settled law that once an execution is completed you cannot order a stay of execution of the judgment already executed. To ask for stay of execution of an executed judgment is like offering a dead man medicine intended to cure his ailment. Put another way, closing the stable after the horse had bolted. Such a request is not grantable by a court of law which does nothing in vain.

In a situation where execution had been levied, the proper application is for an order of court setting aside the writ of attachment or execution if actual execution had not been carried out.

The same principle applies to an order of injunction, either interim, interlocutory or perpetual. It cannot be granted to restrain the carrying out of an already completed act!!

Another aspect of the headache occasioned by the application is the fact that the garnishee order absolute was made by the High Court against the Central Bank of Nigeria over the deposits of the applicant with that bank by virtue of which the said deposit has been attached/executed to the extent of the judgment debt. The applicant is therefore not a necessary party to the garnishee proceedings. The Central Bank of Nigeria, a necessary party to the garnishee proceedings appealed against the order absolute which appeal was struck out leaving nothing to be protected.

It is for the above reasons and the more detailed ones given in the lead ruling that I too dismiss the application for lack of merit and I abide by the consequential orders made therein including the order as to costs.  
Application dismissed.

**SULEIMAN GALADIMA, J.S.C.:**

I have been obliged a draft of the Ruling of my learned brother PETER-ODILI JSC just delivered. I agree with the reasoning leading to the conclusion that the application is lacking in merit and should be dismissed.

I too hereby dismiss the application and abide by order made as to costs.

**NWALI SYLVESTER NGWUTA, J.S.C.:**

I have read in draft the exhaustive ruling just delivered by my learned brother, Peter-Odili, JSC and I entirely agree that the application is bereft of merit.

I also dismiss the application and adopt the order on costs.

Application dismissed.

**MUSA DATTIJO MUHAMMAD, J.S.C.:**

I had the priviledge of reading in draft the lead ruling of my learned brother Ukaego Peter-Odili, JSC just delivered.

The underlining principle that must inform our decision in this matter is that an injunction or stay does not proceed against a completed event. The order the applicant herein seeks to stay is a garnishee order absolute which by its very tenor denotes that execution has already been levied against the property to which the order being sought relates. The money, with the garnishee order being made absolute, becomes wholly attached. Learned counsel for the respondents cannot be faulted in this regard. See **Union Bank of Nig Plc v. Boney Marcus Ind. Ltd & Ors (2005) LPELR 3394**.

I further imbibe the more detailed reasonings in the lead ruling in dismissing the unmeritous application. I also abide by the consequential orders made in the said ruling.