RECENT DEVELOPMENTS IN NIGERIAN MARITIME LITIGATION.

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Recently, there had been some positive and negative developments in Nigerian maritime litigation that in my view, maritime legal practitioners, Judges/Justices and those interested in Nigerian maritime law and practice should become aware of and guard against or take necessary steps to overcome so that the interests of their clients would be protected and advanced and our maritime lawyers and maritime jurisprudence and justice can grow and be enhanced. I intend to address only two of them namely, the service of a writ in an admiralty action in rem on foreign based shipowners and the proper legal status of ex parte order of arrest of ship or other property and their adverse effect on the growth of Nigerian maritime law and practice, the recent developments in which I want to share my experiences and views.

1. The Service of Admiralty Writs in rem on foreign-based shipowners.

The service on a ship or other property, of a writ in an admiralty action in rem, is governed mainly by **Order 6 rules 1, 2 and 3 of the Admiralty Jurisdiction Procedure Rules, 2011 (AJPR)**. However, these rules are silent on the specific mode of service of such writ in rem on the owners of the ship or other property who are residing outside jurisdiction (that is to say outside the territorial jurisdiction of the Court or Nigeria) but who/which are joined as co-defendants. Nonetheless, **Order 5 rules 1 and 2 of AJPR** provide that such a writ 'shall' specify a relevant person in relation to the maritime claim concerned as a defendant either *by reference to the ownership of or other relevant relationship with the ship or other property* concerned and 'shall' be in Form 1 in the schedule to the AJPR. The expression 'relevant person' is not defined in the Interpretation **Order 1 rule 5 of AJPR**, but **section 26 of the Admiralty Jurisdiction Act, 1991** defines the expression in relation to a maritime claim as meaning *'a person who would be liable on the claim in a proceeding commenced in an action in personam'*. It is submitted that such a person can only be a natural person or an artificial person which can be liable in an action *in personam* (say in tort or contract) other than a ship or maritime cargo or freight which can be liable in an action in rem. It is also submitted that since wherever the word 'shall' is used in an enactment, it is usually interpreted as 'mandatory' or 'must' (**See Bamaiyi v. AGF (2001)12NWLR (Pt.727) 468 and Odedo v. INEC (2008)17NWLR (Pt.117) 554),** the implication of **Order 1 rule 5 AJPR** is that a writ of summons in an admiralty action in rem must apart from having a ship or other property as a defendant, have a natural person or an artificial person (other than a ship or other property) as a defendant. The admiralty practice has always been to sue the ship in her name for example **'The M/V MI7'** as the 1st Defendant and join her owners as the 2nd Defendant by name if known, or just as for instance, **'The Owners of the M/V MI7'**. Where the shipowner is resident outside Nigeria, the addresses for the service of the writ in rem on the ship and shipowner will normally be on the Master at the location of the ship within Nigerian jurisdiction namely (and using the current example), 'C/O The Master, The M/V MI7, Tin Can Island Port, Apapa Lagos' and not the foreign address of the foreign shipowner.

In the unreported admiralty action in rem Suit **No. FHC/L/CS/994/07: M/T 'Ane (Ex M/T Leste) & Anor v. M/V/ 'Dalmar Majuro' & The Owners of the M/V Dalmar Majuro**, the Plaintiffs claimed 'jointly and severally against the Defendants the sum of USD7,000,000.00,

being damages for collision damage done by the M/V DALMAR MAJURO to the 1st Plaintiff vessel, cost of replacement of body parts, towage, dry docking costs and other consequential losses arising therefrom'. In order to obtain a security for the satisfaction of this claim, the Plaintiffs arrested the 1st Defendant by a Motion ex parte. The address for the service of the writ of summons on the Defendants was 'The Defendants, C/O The Master, M/V Dalmar Majuro, Berth 14, Apapa Port, Lagos.' After the arrest of the 1st Defendant/ship, the Defendants brought an application to strike out the suit and vacate all orders so far given in the suit inter alia on the grounds that the Plaintiffs did not obtain the leave of the Federal High Court 'to issue the Writ of Summons and Statement of claim on the 2nd Defendant who is admittedly ordinarily resident outside the jurisdiction of the Court because the Plaintiff pleaded in the statement of claim 'that the Defendants do not reside within jurisdiction and have no known or realizable assets within the jurisdiction of the Honourable Court other than the 1st Defendant vessel'. The Defendants also argued that the action filed by the Plaintiffs was both in rem and *in personam* the statement of claim having stated that the owners of the 1st Defendant sued as 2nd Defendant is outside the jurisdiction of the Court and consequently the leave of court was necessary for the issuance of the writ and a concurrent writ ought to have been issued and so marked for service on one of the parties by virtue of **sections 97 and 99 of Sheriffs and Civil Process** Act for the suit to be proper. The Plaintiffs contended otherwise and stated that that leave of court was not required under Order V rule 1 of AJPR , 1993 once the action is in rem.

In its Ruling dated 14/7/10, the Federal High Court, Lagos held inter alia as follows:-

1. The averment in the statement of claim that the defendants were duly registered in Panama and Majuro is an admission that the defendant (sic) is resident outside the jurisdiction of the Court.
2. The Plaintiffs' argument that leave was not required under Order V rule 1 of the AJPR (1993) once the action is in rem would have been on a strong wicket had the action been founded only in rem, but it was not the case because the action was not only against a ship or other property but also an action *in personam* against the owners of the vessel resident outside the jurisdiction of the court.
3. Much as the issuance of the writ on the 1st Defendant-a vessel would not require leave of court to issue, leave under the Sheriffs and Civil Process Act is required for the issuance of the writ against the 2nd Defendant-owners of the ship in an action *in personam*.
4. The Plaintiffs' writ was a concurrent writ which ought to have been so marked but not marked and failure to endorse the writ was a nullity. Relying on the Supreme Court's case of **Arabella v. Nigeria Agric Corp (2008)11NWLR (Pt.1097) 182 at 206**, the learned trial Judge struck out the suit and discharged all orders so far made in the suit.

With due respect to the learned trial Judge, the averments in the statement of claim that the defendants were duly registered in Panama and Majuro and that the defendant (sic) were resident outside the jurisdiction of the Court are not evidence or admissions until they are proved at trial because pleadings (statement of claim) are not evidence until proved and subjected to the fire of cross-examination. **See Nika Fishing Co Ltd v. Lavina Corp (2008)6-7SC (Pt.II) 200 at 218 (SC); Ajuwon v. Akanni (1993)9NWLR (Pt.316) 182 at 200 (SC); Akanni v. Adigun (1993)7NWLR (Pt. 304) 218.**

Moreover, according to the Rules, a writ of summons cannot be described as a concurrent writ unless and until so issued and marked.

It is also submitted that what determines whether or not leave would be required to issue and to serve a writ of summons outside the jurisdiction is not the nationality or location of the Defendant or whether it/he is resident outside jurisdiction but the address for service of the Defendant as stated on the Writ of Summons. It is the address for service on the writ of summons that determines whether the service of the writ of summons is required to be and would be effected, within or outside jurisdiction and if leave of Court to issue and to serve it outside jurisdiction, is required.

In **Caribbean Trading & Fidelity Corp v. NNPC (2002)14NWLR (Pt.786)133 at 147 and 151 Ayoola JSC** held:

> '*On the facts of this case I am of the same view as the trial court judge and the court below that the originating summons which bore on its face an address for service within Nigeria was, prima facie, properly issued because on the face of it, it was not a summons to be served out of jurisdiction."*

See also the unreported judgment by the Hon. Justice OJ Okeke in **Suit No. FHC/L/CS/703/2009: The Incorporated Trustees of Indigenous Shipowners & Ors v. The M/Y Makhambet & 2 Ors.** It is pertinent to state here that even though the cases dealt with originating summons, the principles stated in them are equally applicable to writ of summons beause they are both originating processes.

It is not the Defendant but the Plaintiff, who supplies the address of service of the writ on the Defendants. In **SC Eng Nig v. Nwosu (2008)3NWLR (Pt.1074) 288 at 312**, it was held that a failure to give a defendant's address in a writ of summons cannot in all cases render the writ void where there is evidence that the defendant was served at an address within the court's jurisdiction. It was also held that 'the reason for requiring that the address of a defendant be correctly inserted on a writ is that if it is not so stated and the writ of summons is not accompanied by a statement of claim containing the defendant's address, it will be impossible to determine whether or not the court has jurisdiction to determine the action' and such a writ would be liable to be set aside.

It is submitted that it will be absurd for a Plaintiff to have put the address of the service of the writ of summons in an admiralty action in rem, on the defendant within the Court's jurisdiction and at the same be seeking the leave of the court to issue and to serve the writ outside jurisdiction. If leave is sought and granted in such a situation, will the writ be served outside jurisdiction on the basis that the statement of claim states that the defendant is a foreigner based abroad at an address not stated in the statement of claim or at the address within jurisdiction that stated on the writ of summons? That will clearly be absurd. On the other hand, if a Defendant is ordinarily resident within jurisdiction but the address for service of the writ on it is stated to be outside jurisdiction, leave to issue and serve the writ must be obtained and vice versa. All *actions which are aimed at the person* requiring him to do or not to do or to take or not to take an action

or course of conduct are actions *in personam* whilst all actions in which the subject-matter is itself sought to be affected and in which the claimant is enabled to arrest the ship or other property and to have it detained until his claim has been adjudicated upon or until security by bail has been given for the amount or for the value of the property proceeded against where that is less than the amount of the claim, are actions *in rem*. **See Rhein Mass Und See GmbH –v- Rivway Lines Limited (1998) 5NWLR (Pt. 549) 265 at 277/278.[SC]; NPA v. Panalpina (1973) 5SC 77; Satyan 1 v. IMB Ltd (2002) 5NWLR (Pt. 760) 397 at 414.** It is further submitted that it is only in respect of an action *in personam* where the address for service of the Defendant is outside jurisdiction that it will be required in line with the principles enunciated in **the Arabella case**, to obtain leave to issue and leave to serve the writ *in personam* on the defendant and endorse it for service, outside jurisdiction and if one of the defendants is within and another is outside jurisdiction, mark one of the writs as a concurrent writ.

Furthermore, the law is that a writ of summons which commences an action in rem cannot be served outside the jurisdiction. **See 'Maritime Law' by Christopher Hill 5th Edition, page 93 and The White Book Service 2003 paragraph 2D-7 at page 325.** So, it is wrong and would be wrong, to demand that leave of court should be obtained for the issuance and service of such a writ in an admiralty action in rem when such leave is only required for writs of summons in an admiralty action in personam for service outside jurisdiction.

Nevertheless, the Form used for initiating the suit is the Form for commencing admiralty actions, the Defendants were sued jointly and severally, the reliefs claimed was such that gave rise to a statutory maritime lien under **Section 2(3)(a) and (u) of Admiralty Jurisdiction Act, 1991 ('AJA")** as a claim for damage done by a ship (whether by collision or otherwise) or a maritime lien under **Section 5(3)(b) AJA,** both of which can be a proper basis for the arrest of the ship. It is always prudent to join as a co-defendant with the ship, the owners of the ship at the time the cause of action arose and or was filed because by **Order 5 rules 1 and 2 of AJPR (Order IV rule 1, AJPR, 1993**) such a writ 'shall' specify a relevant person in relation to the maritime claim concerned as a defendant either *by reference to the ownership of or other relevant relationship with the ship or other property* concerned and 'shall' be in Form 1 in the schedule to the AJPR and joining the shipowner does not turn the action into both an admiralty action in rem and an admiralty action *in personam*.

What is more, **Order 6 rule 12 of the Federal High Court Civil Procedure Rules, 2009** states that:-

> *'Where service is to be made upon a person residing out of, but carrying on business within the jurisdiction in his own name or under the name of a firm through an authorized agent, and the proceeding is limited to a cause of action which arose within the jurisdiction, the Writ or other document may be served by giving it to the agent, and the service shall be equivalent to personal service.'*

The purport of this rule in my view, is that a shipowner residing outside jurisdiction but is carrying on business within jurisdiction in his name or under the name of a firm through an authorized agent (as in trading his ship within jurisdiction through his agent, the Master) who is a defendant to a suit which arose within the jurisdiction, can be served with the writ of summons in an admiralty action in rem by giving it to the Master and such would be the same as personal

service. The Master is the servant and agent of the shipowner or a demise charterer or bare-boat charterer as the case may be, and who acts on behalf of and can bind either of them. In this regard, the Master signs bills of ladings, receives and discharges cargo and collects freights on behalf of the shipowner or bareboat charterer as the case may be. Besides the above, **Section 16(4) AJA** states that:

> *'A person who does anything or carries out any duty under the provisions of this Act or under the provisions of any law in force in Nigeria in respect of any ship in the territorial waters of Nigeria shall by so doing that thing or carrying out that duty constitute himself the agent of the ship'*.

It cannot be rightly said that the Master does not do anything or carry out any duty under the Admiralty Jurisdiction Act and the Nigerian Ports Authority Act, which is one of the laws in force in Nigeria. Moreover, **Order 6 rule 1 of AJPR** allows service of the writ in an action in rem on the sued ship by delivering it to the Master of the ship. In most cases, after the writ in an admiralty action in rem and a warrant of arrest have been served on the Master of the ship, he would not keep them with him but will quickly scan or send them by email to the shipowners or by telegraph. It will therefore not require leave of Court to issue or serve the 2nd Defendant in the **M/T Ane** case whose address for service is within jurisdiction or/and is trading with his ship within jurisdiction in its name or through an authorized agent such as the Master, even though like the foreign registered 1st Defendant, the 2nd Defendant owners are resident abroad.

The rationale behind service is to bring the suit to the notice of the defendant and make him to become aware of the suit against him and decide whether or not to defend same (**See Panache Communications Ltd v. Aikhomu (1994)2NWLR (Pt. 327)420 at 431**) and the Master being the agent and servant of the shipowners or bareboat charterer in respect of their ship's activities and trade in Nigerian waters, the service of the writ of summons in an action in rem meant for the shipowner or bareboat charterer on the Master, should suffice as a proper service on the shipowner or bareboat charterer just as it suffices as proper service on the ship.

Another reason why I disagree with the judgment in the said case of **M/T Ane** is that even if the service of the writ of summons on the shipowners was wrong (but without conceding same), it is submitted that the service of the writ of summons on the ship not being wrong, only the service of the writ on the owners ought to have been set aside and the suit should not have been struck out by the learned trial judge but retained and allowed to proceed against the ship alone the writ in rem served on which ship was properly issued and served. This is because the issuance and the service of writs are separate matters and a writ may be properly issued but wrongly served and vice versa. **See Nwabueze v. Okoye (1988) 4NWLR (Pt.91) 664 at 685;Adegoke Motors Ltd v. Adesanya (1989)3NWLR (Pt109) 250 at 270**. Besides the above point, the law is that when a ship or other property is within the jurisdiction of the Court (12 nautical miles from the baselines which makes up Nigerian territorial waters in international law), the service of such a writ and an arrest warrant can be properly effected on the ship or other property at her location, otherwise the Plaintiff should not bring an admiralty action in rem but an admiralty action in personam against the owners or other necessary parties. **See Chiladakis v. Owners of M/V Rinio [No.2] (1987)3NSC 120.** Consequently, the admiralty action in rem writ and the arrest warrant served on the **Mt Ane** within jurisdiction, should not also have been declared a nullity by his Lordship.

2. **The proper legal status of ex parte order of arrest of ship or other property.**

This is another area of maritime litigation where a controversy has arisen by the recent Ruling of the Federal High Court, Lagos in **Suit No. FHC/L/CS/1552/2011 Shield Petroleum Co Nig. Ltd v. The M/T 'YM Saturn' and Owners of M/T 'MY Saturn' delivered on 20/1/12 (unreported).**
By an admiralty action in rem dated 23/12/11, the Plaintiff sued the Defendants jointly and severally for:-

> "The sum of US$7.5m (Seven and a half Million United States Dollars) as general and special damages for breach of contract and/or duty and/or arising out of an agreement relating to the carriage of Plaintiff's 13,255,106 metric tons of Premium Motor Spirit/Unleaded gasoline ('PMS') from off-shore Lome onboard and by the 1st Defendant vessel on or about 8/9/11 and to the use of the 1st Defendant, by a bill of lading number 1 dated 8/9/11, the endorsee of which the Plaintiff is.
>
> Interest on the sums of US$2,433,475.65 and N480,684,507.38 at the rate of 18% per annum with effect from 23/12/11 and continuing at the said rate per annum until judgment or sooner payment and interest at the rate of 7.5% on the judgment or settlement debt until final and full payment."

Based on a Motion Ex Parte dated 23/12/11 and argued the same day, the said Court on 23/12/12 granted an order inter alia for a warrant of arrest in respect of and to arrest and detain the 1st Defendant at BOP Jetty, Apapa or elsewhere within the limits of Nigerian territorial waters subject to and until such a time as the Defendants shall provide a sufficient, unconditional and acceptable bank guarantee issued by First Bank of Nigeria Plc or Zenith Bank Plc to secure and satisfy the reliefs sought against them in the suit by the Plaintiff. Rather than furnish the directed bank guarantee and get the 1st Defendant released, the Defendants decided to file a Motion on Notice dated 3/1/12 for an order for the unconditional discharge of the ex parte order dated 23/12/11 arresting the 1st Defendant vessel 'YM Saturn' on the grounds that:-
'i). The Plaintiff intentionally suppressed and/or concealed material facts in its ex parte application for the arrest of the vessel, which if the Court had known, may have played in the mind of the court to refuse the said application, and
ii) An applicant for an ex parte order has an onerous duty to disclose all facts within its knowledge to the court at the time of making the application'. In their written address, the Defendants relied on the case of **Onyemelukwe & Ors v. Attamah (1993)5NWLR (Pt.293)350 at 364 w**here it was held that 'The law is that the court will deal very strictly with a party applying ex parte for an injunction and who had misrepresented or suppressed material facts. It is not excuse for such a party to say that he was not aware of the importance or materiality of the facts which were suppressed or misrepresented**"; Dongote v C.S.S. Plateau State (1995)7NWLR (Pt.408) 448 at 459; Adewale Construction Co Ltd v. IBWA (1991)7NWLR (Pt.204) 498 at 506 and Sasegbon's Laws of Nigeria First Edition Vol 17 (PtII) 1131 paras 2519-2521**.

In its Written Address in support of its counter-affidavit in opposition to the said Motion, the Plaintiff contended that the only facts it had the onerous duty to disclose at the time of making the application for the ship arrest without which the Court would issue the warrant of arrest, were as stated in **Order 7 rule 1(3) and rule 1(6) of the Admiralty Jurisdiction Procedure Rules, 2011** which it fully and frankly disclosed in the affidavit in support of the Ex parte Motion for the ship arrest prompting the Court to grant the arrest application. The Plaintiff also submitted that none of the cases relied on by the Defendants dealt with an application to set aside an ex parte order of ship arrest obtained in an admiralty action in rem pursuant to the special rules in **Order 7 rule 1 AJPR and/or section 7 of the Admiralty Jurisdiction Act**, the cases cited dealt with applications to set aside ex parte mareva injunction or interim injunction granted in general civil suits in order to maintain status quo pending the hearing and determination of the Motion on Notice for interlocutory injunction and so were distinguishable. The Plaintiff also contended that mareva (or freezing) injunction, Anton Piller injunction and ex parte injunction, (which are general civil procedural interim reliefs that like an arrest of a ship in admiralty matters or causes, are sought and obtained ex parte and the cases on them cited by the Applicants herein), have been held by the Court of Appeal to have no part to play in the arrest of a ship and relied on the cases of **M/V Da Qing Shan & Ors v. Assan Oil Mills Ltd. The Da Quing Sahn No 1. Vol. 4 NSC 153 at 159. (CA); Satyan 1 –v- Ivory Merchant Bank Limited (2002) 5NWLR (Pt.760) 397 at 414/5 CA; M/V/ "Da Qing Shan" v. Pan Asiatic Commodities Pte Ltd (1991) 8NWLR (Pt.209) at 368**. The Plaintiff also stated that it was because ex parte order of ship arrest differs from ex parte interim injunction that in the case of **The Owners of the M.V. Lupex v. Nigerian Overseas Chartering & Shipping Limited NSC Vol. 5 (1993-1995) 182 at 198-199,** the Court of Appeal refused to vacate an order of arrest of a ship sought on the basis that it was obtained through suppressed facts and misrepresentation of facts (just as had been wrongly claimed by the Applicants in the instant case) which is a common ground for setting aside ex parte interim injunctions in non-admiralty matters. The Plaintiff also submitted that the issues in contention between the parties could not be properly determined at that interlocutory stage based on the application but are for trial and depend largely on the main issues which had been pleaded by the Plaintiff in its statement of claim in the substantive suit and controverted in its counter-affidavit and there was a great risk that in determining the application, the Court would make findings of facts on vital issues or make comments and observations which might prejudice or compromise or may decide the main issues in and merits of the substantive action thereby knocking the bottom out of the substantive claim and relied on the cases of **Mortune v. Gambo (1979)3-4SC 54 at 56; Ojukwu v.Governor of Lagos State (1986)3NWLR (Pt.26) 39; NNSC v. Sabana (1988)2NWLR (Pt.74) 23 at 39/40; Odutola Holdings Ltd v. Ladejobi (2006)12NWLR (Pt.994) 312; the Ruling of his Lordship Hon. Justice M.B. Idris in Suit No. FHC/L/CS/857/10: M/T Skagica v. The M/T Beco Voyager & Anor delivered on 8/10/10 (unreported).**

The Plaintiff also contended that under **Order 26 rules 8 to 12 of the Federal High Court Civil Procedure Rules ('CPR')**, unlike an ex parte order of arrest of a ship or other property, an order of ex parte interim injunction may be varied or set aside upon an application by any person affected by it filed within 7 days after service of it and it would not last for more than 14 days after the person affected by the order had applied for the order to be varied or discharged or for more than 14 days after the application to vary or discharge has been filed. This meant that since the ex parte warrant of arrest was served on the ship on 23/12/11, by 3/1/12 when the Motion to

set it aside by the Defendants was filed, it was already 11 days and so 4 days out of time and the application was incompetent without a prayer for extension of time to bring it under the said Order 26. The Plaintiff also submitted that unlike in non-admiralty matters, such ex parte applications for a warrant of arrest in respect of a ship or other property were not accompanied by Motions on Notice because they were not regarded as prayers for interim injunctions and relied on **Citi Trust Merchant Bank Ltd v. Fostok Fisheries Ltd NSC Vol. 5 (1993-1995) 204 at 206.** Another submission made by the Plaintiff was that by **Order 1 rule 3(2) AJPR,** the application of the Civil Procedure Rules to an admiralty cause, was subject and inferior to and was governed by the provisions of the AJPR and so the provisions of Civil Procedure Rules relating to ex parte interim injunction could not override the provisions of AJPR relating to ex parte arrest of a ship or other property because the phrase "subject to" used in **Order 1 rule 3(2) AJPR**, was an expression of limitation and implied that what a section or subsection was "subject to" shall govern, control and prevail over it and relied on **Tukur –v- Government of Gongola State (1989) 4NWLR (Pt117) 517 at 580); Aqua Limited-v-Ondo State State Sports Council (1988) 4NWLR (Pt91) 622** and therefore submitted that the phrase "subject to" in **Order 1 rule 3(2) AJPR** implied that the application of the Civil Procedure Rules including **Order 26** thereof, to admiralty causes and matters, shall be governed, controlled, prevailed over by, inferior to or is affected and liable or subservient to, the **AJPR rule 1(3) and rule 1(6) of Order 7.**

In their reply on points of law which was not in writing and served on the Defendants before the hearing and which Defendants protested against, the Defendants submitted inter alia that whether the case was admiralty or any other area of law, a party would make full and true disclosure and that an order of arrest was an injunction.

In its Ruling delivered on 20/1/12, the learned trial Judge stated inter alia as follows:-

> *"An 'injunction' is the discretionary process of preventive and remedial justice, whereby a person is required to refrain from doing a specified meditated wrong, not amounting to a crime. It is either (1) interlocutory, i.e. provisional or temporary, until the coming in of the Defendant's answer, or until the hearing of the cause; or (2) perpetual, i.e. forming part of a decree made at a hearing upon the merits, whereby the Defendant is perpetually inhibited from the assertion of a right, or perpetually restrained from the commission of an act contrary to equity and good conscience.*
> *Black's Law Dictionary defines an 'injunction' as a Court order commanding or preventing an action,*
> *"In a general sense, every order of a Court which commands, or forbids is an injunction; but in its accepted legal sense, an injunction is a judicial process or mandate operating in personam by which, upon certain established principles of equity, a party is required to do or refrain from doing a particular thing. An injunction has also been defined as a writ framed according to the circumstances of the case, commanding an act which the Court regards as essential to justice, or restraining an act which it esteems contrary to equity and good conscience; as a remedial writ which Courts issue for the purpose of enforcing their equity jurisdiction; and as a writ issuing by the order and under the seal of a Court of equity"*
> *See HOWARD C. JOYCE, A Treatise on the Law Relating to Injunctions 1, at 2-3(1909).*

From the above, I have no doubt in my mind that the order of arrest made ex parte by this Court was an order of injunction interim or interlocutory which can be set aside by the Court."

Treating the ex parte order of ship arrest as an order of interim injunction, which the Court could exercise its discretion to discharge where there has been a suppression or misrepresentation of facts, the learned trial Judge granted the application and discharged the ex parte warrant of arrest of the 1st Defendant on the basis of suppression and/or misrepresented facts.

With the greatest respect to the learned trial Judge, it is this writer's view that based on the grounds that will be shown hereunder, the Ruling is wrong, misleading and that the warrant of arrest should not have been discharged.

Order 1 rule 5 of AJPR states as follows:-

"Arrest" means the detention of ship by judicial process to secure a maritime claim, but does not include the seizure of a ship in execution or satisfaction of a judgment;"

Taking only the highlighted portion of the definition of 'arrest', it is clear that it is not provided in that rule or AJPR that an interim or interlocutory injunction is used in admiralty actions in rem to detain a ship by judicial process or a court order in order to obtain a security for a maritime claim and that security is given for the release of a ship (whose clearance is) restrained by injunction. The Court of Appeal which is a higher court than the Federal High Court in the hierarchy of courts in Nigeria has judicially pronounced that *the arrest of a ship is likened to a sequestration*. The sole purpose of arresting a ship is to ensure that the judgment in the action will be satisfied in favour of the plaintiff and so the Court of Appeal held that the arrest of a ship is likened to sequestration, that is the detention of a property by a court of justice for the purpose of answering a demand which is made. **See M/V 'Da' Qing Shan v. Pan Atlantic Commodities Pte Ltd (1991) 8NWLR (Pt.209) 354 at 366.** So likening a ship arrest to an interim or interlocutory injunction in wrong in law**.** A Plaintiff's arrest of a ship or other property through a court order to obtain a pre-judgment security to satisfy any judgment the Plaintiff may obtain after the trial of its claim in court or settlement and the release of the arrested ship or other property upon its owner providing an acceptable security whilst the trial of the case goes on, are at the centre of admiralty actions and are some features of admiralty actions *in rem*, which distinguish admiralty actions *in rem* from other civil causes and matters**.** The law is that if the Plaintiff has shown that its action is in rem and applies to Court for a warrant of ship arrest disclosing a strong prima facie case (as in the **Shield's** case), the Court will normally order the arrest warrant and the Admiralty Marshal will execute it and the sole purpose of arresting a ship is to ensure that a judgment given in the action in favour of the Plaintiff will be satisfied by keeping the ship in his custody. What a prudent owner of the arrested ship should do is to post a bank guarantee as directed by the Court to secure the Plaintiff's claim so as to obtain the release of its ship unless he has other justifiable grounds such as jurisdiction on the basis of which he can get the suit struck out and the ship released from arrest without furnishing the directed security.

Furthermore, **Order 1 rule 3 of the AJPR** states that the AJPR **shall** ("must") apply to every admiralty cause or matter brought in the Court pursuant to the Admiralty Jurisdiction Act and that the Federal High Court Civil Procedure Rules, 2009, shall apply **subject to** the provisions of the AJPR. AJPR are rules made to govern specific and special situations or matters and causes namely, admiralty matters and causes and where a particular procedure has been prescribed as a method for commencing an action, that procedure is to be followed. **See Din v. AGF (1988)4NWLR (Pt87) 147**. In my humble opinion, since ***Order 1 rule 5 AJPR*** has defined what a ship 'arrest' is, the learned trial Judge should not have gone outside the AJPR in determining what an arrest (of a ship) is as his Lordship had done. If his Lordship had followed **Order 1 rule 3 AJPR,** his Lordship would have applied the definition of 'arrest' under **Order 1 rule 5 of AJPR** (which is a statutory definition) rather than going outside it to import a definition into the **Shield's** case and comparing and equating arrest with and as an injunction. What his Lordship did is with due respect, wrong also because it is a well settled principle in the interpretation of statutes that where a word has been defined in a statute (as 'arrest' in **Order 1 rule 5 of AJPR**), the meaning given to it in the definition must be adhered to in the construction of the provisions of the statute unless the contrary intention appears from the particular section or the meaning is repugnant in the context in which the definition is used. **See Section 3 Interpretation Act; Ejoh v. IGP (1963)1AllNLR 250.** As held in **Abioye v. Yakubu (1991)5NWLR (Pt.190) 130 at 234,** the Supreme Court held that where the word to be construed in a statute has been assigned a meaning in the definition section of the statute, the intention of the law maker is that the meaning so assigned is to be given to that word in that statute unless the subject or context renders the meaning repugnant or will result in manifest absurdity. In **Apampa v. State (1982) 6 S.C. 47** where the Supreme Court per Aniagolu J.S.C. said that:

"In dealing with this appeal, I agree with the view expressed by the Court of Appeal that in the search for the meaning of the expression "person employed in the public service" as contained in sections 85 and 88 of the criminal code one need not look elsewhere than the meaning ascribed to it in the definition section of the same code. In particular, it is not necessary to go over to the United Kingdom in search of their definition and cases decided on it, unless their own provision of the law is identical to ours. Also **Karibi-Whyte JSC** in **Anyah & Ors. V. Iyayi Suit No. S. C 52/1988;** said it is well settled that where a word or phrase has been defined in an enactment, that meaning must be restricted to the words so defined in the statute, the definition governs. So, it is submitted that unless the context otherwise requires, the Court must stick to the meanings given specific words and expressions defined under this rule in construing them and applying to resolving admiralty disputes in admiralty matters before it. It is humbly submitted that a contrary intention does not appear from **Order 1 rule 5 AJPR** and the meaning of 'arrest' is not repugnant in the context in which the definition of 'arrest' is used in **Order 1 rule 5 AJPR** and so the learned trial Judge should have applied that statutory meaning of 'arrest' to this case instead of visiting other irrelevant and unnecessary sources that misled his Lordship into concluding that an order of arrest of a ship and injunction interim and interlocutory, are the same.

Moreover, on a proper construction of the whole of the special AJPR especially **Order 11 rule 1, Order 1 rule 5 and Order 7 rules 1(3) and 1(6)** thereof, an ex parte order of arrest of a ship is not equivalent to but different from and is granted and set aside based on different requirements and grounds from an ex parte interim injunction that is made and set aside under **Order 26** of the general **Federal High Court (Civil Procedure) Rules, 2009.** The features of ex parte or interim

injunction are not unsettled but have already been judicially decided by the Supreme Court in the case of **Kotoye v. CBN (1989)1NWLR (Pt.98) 419** and they differ from the features of an ex parte arrest of a ship in an admiralty action in rem. An interim or interlocutory injunction operates in personam which is clearly stated in the Black's Law Dictionary quoted and relied on by the learned trial Judge, whereas ex parte order of arrest of a ship operates in rem. Interim or interlocutory injunction and setting it or them aside on the basis of suppressed and/or concealed facts are governed by the general **Federal High Court (Civil Procedure Rules) 2009 (Order 26)** which Rules by **Order 1 rule 3(2) Admiralty Jurisdiction Procedure Rules, 2011,** apply to admiralty proceedings subject to the latter Rules. By **Order 56 of the Federal High Court (Civil Procedure Rules) 2009,** it is only where no specific procedure is given in the **Admiralty Jurisdiction Procedure Rules, 2011, that the Federal High Court (Civil Procedure Rules) 2009** or **its Order 26** shall apply with necessary modification so as to comply with the admiralty subject matter that the Admiralty Jurisdiction Procedure Rules, 2011 deal with, but there is no such lacuna in the AJPR to warrant the application of Order 26 of the general Rules.

The Court of Appeal had held in several cases that mareva injunction, Anton Piller injunction and ex parte injunction, which are general civil procedural interim reliefs that like an arrest of a ship in admiralty matters or causes, are sought and obtained ex parte have no part to play in but are anathema to the arrest of a ship. See **M/V Da Qing Shan & Ors v. Assan Oil Mills Ltd. The Da Quing Sahn No 1. Vol. 4 NSC 153 at 159. (CA); Satyan 1 –v- Ivory Merchant Bank Limited (2002) 5NWLR (Pt.760) 397 at 414/5 CA; M/V/ "Da Qing Shan" v. Pan Asiatic Commodities Pte Ltd (1991) 8NWLR (Pt.209) at 368; The Owners of the M.V. Lupex v. Nigerian Overseas Chartering & Shipping Limited NSC Vol. 5 (1993-1995) 182 at 198-199.**
In reply to the contention of the Appellant that the order made by the Lagos High Court in LD/444/93 was concealed from the Federal High Court and that concealment was enough to warrant the setting aside of the order ex parte or arrest of the ship made by the Federal High Court, the Court of Appeal held in **Satyan 1 v.IMB Ltd (2002)5NWLR (Pt. 760) 397 at 414-415**

" *The order of the Lagos State High Court is one of injunction while the ex parte order made by the Federal High Court inter alia deals with the arrest and detention of the ships. In M/V 'Da Qing Shan' & Ors v. PAC Pte Ltd (1991)8NWLR (Pt.209)354 this Court (Enugu Division) held that the principles for granting an ex parte injunction are not for consideration, in other words, they are anathema to the issues of arrest and detention of a ship'.*

So also in **M/V 'Da Qing Shan' & Ors v. Assan Oil Mills Ltd (The DA Qing Shan No1)1990-93NSC Vol 4 151 at158** the Court of Appeal held:

'The case of Bank Mellat v. Nikpour (1985)FSR 87 (Fleet Street Reports) which he most kindly brought to our attention in a transcript is not, I am afraid, remotely relevant. I have read it. It deals with a Mareva injunction granted on insufficient disclosure. That has nothing to do with this case. Mareva injunction, Anton Piller injunction and ex parte injunction on which we were fully addresses by Mr. Oduba have no part to play in arrest of ship. In effecting a warrant of arrest there must be a tangible res in existence such as a ship or some cargo; see The Kaleten (1914) 30 TLR. But as I said before, once bail is secured for the tangible res, the bail becomes the tangible res.'

Unlike ex parte interim or interlocutory injunction in non-admiralty matters, ex parte applications for a warrant of arrest in respect of a ship or other property are not accompanied by Motions on Notice because they are not regarded as prayers for interim injunctions and relied on the Court of Appeal's decision in **Citi Trust Merchant Bank Ltd v. Fostok Fisheries Ltd NSC Vol. 5 (1993-1995) 204 at 206.** In failing to consider, follow and apply in the Plaintiff's favour and dismissing the Defendants' Motion dated 3/1/12, these relevant decisions of the Court of Appeal cited to it by the Plaintiff, his Lordship clearly violated the rule of judicial precedent. By not also following his Lordship's previous decision in **M/T Skagica v. The M/T Beco Voyager & Anor delivered on 8/10/10 (unreported)** which is binding on his Lordship until overruled, his Lordship violated the same sacred doctrine.

Stare decisis or doctrine of judicial precedent means to abide by former precedents where the same points came again in litigation. It presupposes that the law has been solemnly declared and determined in the former case. It thus precludes the Judges of the subordinate Courts, from changing what has been determined. Thus under the doctrine of stare decisis, lower Courts are bound by the theory of precedent. **See Osakue v. Federal College of Education (Technical)Asaba (2010)2-3SC (Pt.III) 194 at 179; University of Lagos v. Olaniyan (1985)1NWLR (Pt.1) 156** at 170. In fact in the case of **AG Ogun State v. Egenti (1986)3NWLR (Pt.28) 265 at 272,** it was held that it was not for a lower Court to question or say that a decision of a higher Court was reached *per incuriam* because that was the privilege of a higher court after reconsidering its former decision. Also apposite is what Esho Jsc said in **Dr. Okonjo v. Dr. Mudiaga Odje (1985)10SC 267 at 268** that 'In the hierarchy of the courts in this country as in all other free common law countries, one thing is clear, however learned a lower court considers itself to be and however contemptuous of the higher court that lower court is, the lower court is still bound by the decisions of the higher court. I hope it will never happen again whereby the Court of Appeal in this country or any lower Court or that matter, would deliberately go against the decision of this court, and in this case, even to the extent of not considering the decisions when those of this court were brought to the notice of that court. This is the discipline of the law. This is what makes the law certain and prevents it from being an ass.' Also in the case of **Dalhatu v. Turaki (2003)7SC 1 at 10, Katsina-Alu JSC** (as he then was) said about the High Court of the Federal Capital Territory, Abuja that 'The conduct of the learned trial Judge I.U. Bello is to say the least most unfortunate. This Court is the highest and final Court of appeal in Nigeria. Its decisions bind every Court, authority or person in Nigeria. By the doctrine of *stare decisis*, the courts below are bound to follow the decisions of the Supreme Court. The doctrine is sine qua anon for certainty to the practice and application of law. A refusal therefore by a judge of the court below to be bound by this Court's decision is gross insubordination (and I dare say such a judicial officer is a misfit in the judiciary**.** Under the rule of *stare decisis*, a lower Court such as the Federal High Court herein, is bound by its own judgment until it is overruled by a higher court in the judicial hierarchy**. See African Newspapers of Nigeria Ltd v. FRN (1985)2NWLR 137.** The judgment of the lower Court in

the Skagica case which followed the judgments of the Supreme Court and Court of Appeal on the matter, has not been overruled and so it is submitted that the Court was wrong in law in not following it and applying it in the Shield's case to dismiss the Defendants' application as it did in **the Skagica case**. I had highlighted the statements and attitude of the appellate courts to *stare decisis* and the failure of lower courts to follow their decisions so as to reveal the seriousness of the matter. Even for lawyers, they get embarrassed and often regarded by clients as liars when after having advised their clients on their matters on the basis of the law as interpreted and decided by the appellate courts, the decisions in their cases go against the decisions of the appellate courts. It is my humble opinion that if the learned trial Judge had complied with and applied the principle of judicial precedent in the **Shield's case**, his Lordship would not have wrongly held that a ship arrest was equivalent to an interim or interlocutory injunction that his Lordship could set aside on the basis of alleged suppression or misrepresentation of facts.

I thank you for listening.

Mr. M.I. Igbokwe, SAN.
5/12/12.
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