

**LEAVE TO SUE A COMPANY IN LIQUIDATION UNDER SECTION 580 OF COMPANIES AND ALLIED MATTERS ACT 2020: IMPERATIVE FOR LEGISLATIVE INTERVENTION**

**ABSTRACT**

*The Companies and Allied Matters Act, (CAMA), 2020, is the foundational Legal framework, for the regulation and management of incorporated Companies in Nigeria. The lifespan of a company incorporated under CAMA, 2020, and the relevant legislations outside Nigeria, can be brought to an end through a procedure known as ‘Winding-up’. Winding-up involves two distinct stages, the liquidation and dissolution stage. At the liquidation stage, the company is still a going concern and still retains its legal personality until it is finally dissolved. Liquidation is the winding up of a company. It is a legal process that applies to companies or partnerships in which a liquidator is appointed to "wind up" the affairs of a company. In other words, the corporate life of the company is brought to an end and the company ceases to exist. The purpose of liquidation is to ensure that all the company's affairs have been dealt with and all its assets realized. The company winding up may be effected by the court or by the shareholders (voluntary); or voluntarily subject to the supervision of the court. Hence, Section 580 of CAMA, 2020, provides that “If a winding-up order is made or a provisional liquidator is appointed, no action or proceeding shall be proceeded or commenced against the company except by leave of the Court given in such terms as the Court may impose”. Thus a company in liquidation can sue and maintain an action in court but no action can be brought against it, except with leave of court. This is however, unjust, and imperative for Legislative Intervention . This article aims to explore the provision of Section 580 of CAMA, 2020. The article also concludes by saying that the purport of section 580 of CAMA, 2020 is unjust, unfairly prejudicial and requires an urgent legislative action. The article therefore recommends that there is an urgent need for an amendment of the said section 580, to eliminate further injustice.*

**Keynotes:** Liquidation, Winding-up of Company by the court, Voluntary Winding-up

**1.0 Introduction**

The Companies and Allied Matters Act (CAMA) 2020, regulates the activities of businesses in Nigeria. The government agency in charge of incorporation in Nigeria is the Corporate Affairs Commission (CAC)<sup>1</sup>. The lifespan of a company incorporated under the Companies and Allied Matters Act 2020, and the relevant legislations outside Nigeria can be brought to an end through a procedure known as ‘Winding-up’. Winding-up involves two distinct stages which are the liquidation stage and the dissolution stage. Winding up a company in Nigeria is a significant decision that involves a structured legal process known as winding up<sup>2</sup>. It suffices to say that at the liquidation stage, the company is still a going concern and still retains its legal personality until it is finally dissolved. Liquidation is a legal process that applies to companies or partnerships in which a liquidator is appointed to "wind up" the affairs of a company.

At the end of the process, the company ceases to exist. The purpose of liquidation is to ensure that all the company's affairs have been dealt with and all its assets realized.<sup>3</sup> When a company

---

**DR. MATTHEW IZUCHUKWU ANUSHIEM & DR. UCHENNA MARYJANE ANUSHIEM**

<sup>1</sup>Resolution Law Firm, ‘ Nigeria: Business Formation And Types Of Incorporations In Nigeria (2021) < <https://www.mondaq.com/nigeria/shareholders/1021414/business-formation-and-types-of-incorporations-in-nigeria--2021>> accessed 16<sup>th</sup> December, 2023.

<sup>2</sup>O. J Jegede, ‘ Nigeria: Current Procedure For Winding Up A Company In Nigeria’ (2023)*Resolution Law Firm*

<sup>3</sup> <https://www.economy-ni.gov.uk/articles/company-liquidation> accessed 16th December, 2022.

gets to the stage of liquidation, and a provisional liquidator or a liquidator is appointed for that purpose, there might be aggrieved interested parties who have sued or have reasons to sue the said company. The law is that such aggrieved person will have to approach the court to obtain the leave of the court before such action can be continued or instituted as the case may be. This cumbersome process has caused untold hardship to litigants especially where there is already an existing case against a company in liquidation at a State High Court and the litigant will have to put his case on hold and apply to the Federal High Court for leave before such case can proceed further. This process will not only cause undue delay in the administration of justice, it also makes litigation costly, there is therefore need for legislative intervention to arrest this state of affairs. This article will examine the process of liquidation and dissolution of a company, and the rationale behind the need for leave of court once a company is undergoing liquidation and a provisional liquidator or a liquidator appointed. The article will make a case for legislative intervention to ameliorate the hardship occasioned by the requirement for leave of court to sue in the circumstances described above.

## 2.0 Liquidation and Winding-up of Company

Liquidation is the first stage of the process of winding-up a company. Liquidation can be defined as the process of closing a business and distributing its assets to claimants.<sup>4</sup> Liquidation comes from the Latin “*liquidaries*” or “*liquefaction*” which means the sale of all of a company’s assets with the end result being that the company is terminated.<sup>5</sup> The aim of liquidation is to make the company’s remaining assets “liquid” in order to meet its liabilities.<sup>6</sup> The Supreme Court, per Muhammad JSC, in *Oredola Okeya Trading Co. & Anor v Bank of Credit & Commerce International & Anor*,<sup>7</sup> held thus, “now, winding-up of a company involves liquidation of the company/corporation so that assets are distributed to those entitled to receive them. Campbell Black, says, liquidation is quite distinguishable from dissolution which is the end of the legal existence of the company”. As stated earlier, winding-up of a company commences with the liquidation of the company and ends with the dissolution of the company. A company can wind-up in any of these three ways: winding-up by the court; voluntary winding-up; winding-up subject to the supervision of the court. We shall briefly highlight winding-up by the court and voluntary winding-up.

### 2.1 Winding-up by the court

According to Black’s Law Dictionary, winding up is the process of settling accounts and liquidating assets in anticipation of a company’s dissolution<sup>8</sup>. It is the process where the lifespan of a company is brought to an end. A petition for winding-up of a company may be granted by the court in any of the following instances:<sup>9</sup>

- i. Special resolution by the company that it be wound-up;

---

<sup>4</sup> Will Kenton, ‘What is Liquidation’ *Investopedia*, <<https://www.investopedia.com/terms/I/liquidation.asp#:~:text=When%20a%20company%20becomes%20insolvent,in%20the%20order>> Accessed on 25 October 2023.

<sup>5</sup> Startup Guide IONOS, *Liquidation of a Company: Definition*, <<https://www.ionos.com/startupguide/grow-your-business/liquidation/>> Accessed on 25 October 2023.

<sup>6</sup> *Ibid.*

<sup>7</sup> (2014) 8 NWLR (pt. 1408) 77.

<sup>8</sup> Isochukwu ‘Winding Up and Liquidation’ <https://isochukwu.com/2017/12/29/company-law-2-8-winding-up-and-liquidation/#:~:text=Definition%20of%20Winding%20up%3A%20Winding,anticipation%20of%20a%20corporation%27s%20dissolution> accessed 16<sup>th</sup> December, 2023.

<sup>9</sup> Companies and Allied Matters Act 2020, section 571.

- ii. Default by the company in delivering the statutory report to Corporate Affairs Commission or in holding its statutory meeting;
- iii. The number of members is reduced below two in the case of companies with more than one shareholder;
- iv. The company is unable to pay its debts;
- v. The condition precedent to the operation of the company has ceased to exist; or
- vi. The court is of the opinion that it is just and equitable that the company be wound-up.

According to the Act, petition for winding-up of a company can be brought by any of the following persons: the company or a director of the company; a creditor; the official receiver; a contributory; a trustee in bankruptcy to, or personal representative of, a creditor or contributory; Corporate Affairs Commission under section 366 of the Act; or a receiver, if authorized by the instrument under which he was appointed.<sup>10</sup> The court may appoint a liquidator or liquidators for the purposes of conducting proceedings for the winding-up and performing such duties as may be referenced by the court, in the case of a vacancy, an official receiver can step in as a liquidator.<sup>11</sup>

The liquidator so appointed at this stage is a provisional liquidator may be appointed between the time of bringing the petition for winding-up and before an order of winding-up is made by the court.<sup>12</sup> The provisional liquidator will act and carry on the functions of a liquidator until a liquidator is appointed. Where a winding-up order is made, a company is said to be in liquidation, and where a liquidator is appointed, all the powers of the directors of the company shall cease except as may be sanctioned by the court.<sup>13</sup>

The Act empowers a liquidator to perform the following functions; bring or defend an action in the name and on behalf of the company; carry on the business of the company in such a manner that it will be beneficial to the company; appoint a legal practitioner or any other professional that might assist him in carrying on his duties; pay creditors.<sup>14</sup> The liquidator also has the power to sell the property of the company; execute in the name and on behalf of the company all deeds, receipts and other documents and to make use of the company's seal.<sup>15</sup> The Act also made provisions for other powers and functions of a liquidator. Once the affairs of a company is fully wound-up, the liquidator shall make an application to court for the dissolution of the company, and once the court makes the order, the company stands dissolved.<sup>16</sup>

## 2.2 Voluntary winding-up

A company can voluntarily wound-up on the following circumstance:<sup>17</sup>

- i. Special resolution of the company;
- ii. Upon the happening of an event provided in the Article of Association for the dissolution of the company by resolution, and the company in general meeting has passed a resolution requiring the company to be wound-up voluntarily.

---

<sup>10</sup> *Ibid*,s.573.

<sup>11</sup> *Ibid*,s.585(1).

<sup>12</sup> *Ibid*,s.585(2).

<sup>13</sup> *Ibid*,s.585(9).

<sup>14</sup> *Ibid*,s.588(1).

<sup>15</sup> *Ibid*,s.588(2).

<sup>16</sup> *Ibid*,s.617.

<sup>17</sup> *Ibid*,s.620.

In voluntary winding-up, liquidator is appointed in general meeting and once appointed, the powers of directors shall cease.<sup>18</sup> After the winding-up process, the liquidator shall call a general meeting wherein he will render final account of the company and Cooperate Affairs Commission is notified, after that, the company stands dissolved.<sup>19</sup>

Section 676<sup>20</sup> made a list of persons who are disqualified from being appointed liquidators of a company whether in winding-up by order of court; voluntary winding-up or winding-up subject to the supervision of the court. These persons are:

- i. An infant;
- ii. Anyone found by the court to be of unsound mind;
- iii. A body corporate;
- iv. An undischarged bankrupt;
- v. Any director of the company under liquidation;
- vi. Any person convicted of any offence involving fraud, dishonesty, official corruption or moral turpitude.

### **3.0 Leave of Court to Sue a Company in Liquidation under Section 580 of CAMA, 2020.**

The Companies and Allied Matters Act (CAMA), 2020, under its section 580 provides thus; “if a winding-up order is made or a provisional liquidator is appointed, no action or proceeding shall proceed with or commence against the company except by the leave of the court given on such terms as the court may impose<sup>21</sup>.” The implication of this statutory provision is that an aggrieved party who has a legal interest or claim against a company undergoing liquidation wherein a court has made an order of winding-up or a company which has appointed a provisional liquidator, such aggrieved party must approach the court to seek the court’s leave before instituting an action against the said company undergoing liquidation. The same leave of court is equally required even when there is already a pending litigation against the company before the winding-up order was made or a provisional liquidator appointed.

Hence, the pending litigation, at whatever stage it is, will be automatically stayed until leave of court is sought and obtained before the pending litigation can continue and be concluded. In *NDIC v Rahman Brothers Ltd*<sup>22</sup>, In this case, two issues were formulated for consideration, one of which was whether the Honorable Court below had the jurisdiction to adjudicate upon the claims made by the Respondent? Arguing the two issues formulated together, appellant’s counsel contends that the Court had no jurisdiction to enter judgment against the Appellant. It is the submission of counsel that though the Court had jurisdiction at the time the suit was filed by the Respondent against Peak Merchant Bank Limited but in due course lost jurisdiction when the banking license of the Bank was revoked and the Respondent failed to obtain leave of the Federal High Court to continue proceedings before the Court below. He cited *Madukolu v Nkemdilim*<sup>23</sup>; *United Bank for Africa v Ademola*<sup>24</sup>. He further submits that until an order of dissolution is made, the legal personality of the bank and its powers to sue and be sued subject

---

<sup>18</sup> *Ibid*,s.627.

<sup>19</sup> *Ibid*,s.631.

<sup>20</sup> Companies and Allied Matters Act, 2020.

<sup>21</sup> *Ibid*, s.580

<sup>22</sup> (2018) LPELR-46781(CA)

<sup>23</sup> (1962) 2 SCNLR 341

<sup>24</sup> [2009] 8 NWLR (PT 1142) 113 at 129, paras A ( C.Â)

to fulfilment of conditions stipulated by law remains intact. Relying on Section 454 of the Companies and Allied Matters Act (CAMA)<sup>25</sup>; *Re: Amolegbe*<sup>26</sup>.

He noted that from the testimony of the Respondent's witness, the Respondent admitted against its own interest that the Bank whom it dealt with was still alive and solely allegedly liable to it, citing *Independent National Electoral Commission v Oshiomole*<sup>27</sup>. He further referred to Section 417 CAMA<sup>28</sup>; *Nwankwo v Yar' adua*<sup>29</sup> to submit that any pending action against a company in liquidation can only be proceeded with/continued subject to the leave of the Federal High Court, further citing *Nigerian Deposit Insurance Corporation v David Barau*<sup>30</sup> Section 567 CAMA<sup>31</sup>; *Commercial Bank Limited in Liquidation v Federal Mortgage Bank of Nigeria*<sup>32</sup>. Counsel urged the Court to literally interpret the relevant provisions of the statutes referred to, citing *Securities and Exchange Commission v Kasunmu*<sup>33</sup>; *Johnson v Mobil Producing Nigeria Unlimited*<sup>34</sup>; *Oyegun v Nzeribe*<sup>35</sup>; *Okorochoa v UBA Plc*<sup>36</sup> and further relied on *Nigerate Limited v Niger State Government*<sup>37</sup>. On the part of the Respondent, counsel referred to Section 40(1) of the Nigeria Deposit Insurance Corporation Act<sup>38</sup> to submit that the Appellant is deemed to have been appointed as liquidator of Peak Merchant Bank Limited by the Federal High Court in order for it to act in a manner as those appointed under CAMA; so that the section makes the Appellant a proper party upon the revocation of the Bank's license.

He noted that no leave of the Federal High Court is required for the Appellant to sue or be sued. Referring to Section 425(1)(a) CAMA, Respondent's counsel submits that there is nowhere it is mentioned that a liquidator appointed by the provision of any law or Acts needs leave of Court for such liquidator to sue or be sued, and it is also not stated in the section that a liquidator appointed pursuant to NDIC Act is a liquidator appointed for the purpose of winding up by Court. It is his submission that the section applies to the provisional liquidator only to the extent of bringing and defending any legal proceeding against the provisional liquidator appointed pursuant to Section 40(1) of NDIC Act.

It is further submitted that Section 425(1)(a) applies only to a liquidator appointed by Court in a winding up suit to seek the sanction of the Court or that of the committee of inspection. It is also the submission of the Respondent's counsel that the issues submitted to the trial Court was on a banker-customer relationship which the State High Court is clothed with requisite banker-customer relationship, relying on *NDIC v OKEM ENT. LTD*<sup>39</sup>. He finally submitted that the purported lack of jurisdiction as canvassed by the Appellant is baseless and unfounded. On

---

<sup>25</sup> CAMA, s.454

<sup>26</sup> [2014] 8 NWLR (PT. 1408) 76 at 101, paras C , E

<sup>27</sup> [2009] 4 NWLR (PT 1132) 607 at 662, paras B , C.

<sup>28</sup> CAMA, 417

<sup>29</sup> [2010] 12 NWLR (PT 1209) 518 at 589, para B

<sup>30</sup> [2017] 7 NWLR (PT. 1565) 501 at 514, paras C ,G, see also T. Nwamara: *The Law of Winding Up of Banks and*

*Companies* (Law and Educational Publishers Limited; 2007), p.181

<sup>31</sup> *Op.cit.*, s.567

<sup>32</sup> [1997] 2 NWLR (PT. 490) 735 at 757 to 758, paras G, A.

<sup>33</sup> [2009] 10 NWLR (PT. 1150) 509 at 537, paras D;

<sup>34</sup> [2010] 7 NWLR (PT. 1194) 462 at 504, paras B;

<sup>35</sup> [2010] 7 NWLR (PT. 1194) 577 at 594, paras G

<sup>36</sup> [2011] 1 NWLR (PT. 1228) 348 at 375, para F

<sup>37</sup> [2008] 12 NWLR (PT. 1103) 111 at 145, para H

<sup>38</sup> Nigeria Deposit Insurance Corporation Act, section 40(1)

<sup>39</sup> [2004] 4 S.C. (PT II) 77

appeal, the Court of Appeal held that the High Court of Lagos State lost the jurisdiction it previously had, when a Provisional Liquidator was appointed for the bank. The respondent ought to have obtained leave, to clothe the Lagos State High Court with jurisdiction to deliver judgement. While delivering the lead judgement, the learned Justice posited thus: “I think, quite seriously, that the law ought to be looked at and if need be, amended, especially as it relates to cases as in the instant suit, where there is pending before a State High Court an action against a bank whose license was subsequently revoked by the Central Bank of Nigeria, and the provision of Section 40 of the NDIC Act is activated. I believe in this age of proactive case management and need for efficient delivery of justice, the need for a party who has instituted an action at the State High Court against the liquidating bank to pause that suit and proceed before the Federal High Court to obtain leave to continue the action against the NDIC as provisional liquidator is needless.

It is so unfortunate that the substantive action commenced by the Respondent in the present suit bothering on the need for the Bank and/or its liquidator to release its title documents pledged to the Bank as collateral for facility granted to it by the Bank, can be defeated solely on the basis of failure to obtain leave of another Court of co-ordinate jurisdiction where the party had properly activated the jurisdiction of the Court before whom its case was pleaded. As the Respondent’s counsel rightly argued, the case before the Court is simply on banker-customer relationship which the State High Court is clothed with requisite jurisdiction. See *NDIC v OKEM ENT. LTD* (supra). I hope one day our legislature will be persuaded to alter the tone of the law as it relates to the peculiar circumstance of the instant case, or better still, the Apex Court of our land, when faced with such set of facts, will be moved to construe the law to allow a party continue an action against the Appellant, as liquidator of a bank whose license has been revoked, without the need for the party to proceed before the Federal High Court to obtain leave.

The Supreme Court In *Dematic Nig. Ltd. v Utuk*<sup>40</sup> highlighted that the automatic stay under Section 580 of the Companies and Allied Matters Act (CAMA) 2020, will be actuated when the following three conditions are satisfied: (i) a winding-up order is made or a provisional liquidator is appointed, (ii) a subsequent independent action is commenced or a pre-existing independent action is continued, and (iii) the action continued or commenced is against the interest of the company. It has been opined that the objectives or the need for the requirement of leave of court before instituting an action or before continuing an action against a company undergoing liquidation are as follows:<sup>41</sup> i) Ensuring the company’s assets are not dissipated on actions; ii) Ensuring some creditors do not gain advantage over other similarly-situated creditors; and iii) Ensuring the winding-up court is in control of the liquidation process.

There have been judicial pronouncements on whether the need for leave of court is required irrespective of the court the action is pending, that is to say, if leave of court is required for the continuation of action against a company in liquidation in, for instance, a state high court. Also the courts have handed down decisions on the appropriate court that leave must be sought, whether it must be the Federal High Court even when the pending action is at the Court of Appeal or the Supreme Court.

---

<sup>40</sup> (2022) 8 NWLR (Pt. 1831) 71.

<sup>41</sup> Kubi Udofia, ‘Adversarial Proceedings against a Company in Liquidation (1)’, *ThisDay* 15 November 2022. <[www.thisdaylive.com/index.php/2022/11/15/adversarial-proceedings-against-a-company-in-liquidation-1%3famp=1](http://www.thisdaylive.com/index.php/2022/11/15/adversarial-proceedings-against-a-company-in-liquidation-1%3famp=1)> Accessed on 27 October 2023.

### 3.1 Continuation of Pre-existing Independent Actions

Where a winding-up order is made or a provisional liquidator is appointed, pre-existing actions or proceedings against a company in liquidation are automatically suspended. A claimant/plaintiff desiring to continue with an action or proceeding against such a company, would require leave of court. Actions or proceedings continued without such leave are void for lack of jurisdiction: *Universal Properties Ltd v Pinnacle Commercial Bank*<sup>42</sup>. In *Obe v Prosperfunds Ltd*<sup>43</sup>, a winding-up order was made against the defendant whilst proceedings were ongoing in a Lagos State High Court (“trial court”). On appeal, the Court of Appeal held that the making of the winding-up order had stripped the trial court of the jurisdiction which it previously had, to entertain the suit against the defendant. Accordingly, leave of court ought to have been obtained, to “re-clothe” the trial court with jurisdiction to continue with the proceedings against the defendant.

The Act also defined “court” in the interpretation section<sup>44</sup> to mean “‘court’ or ‘the court’ used in relation to a company, means the Federal High Court, and to the extent to which application may be made to it as; court includes the Court of Appeal and the Supreme Court of Nigeria.’ The Supreme Court in *FMBN Ltd v NDIC*<sup>45</sup> held that what is prohibited by section 417 (now section 580), except with leave of court, is an action or proceeding pending or instituted in the Federal High Court which was the definition of ‘court’ in section 650 of Companies and Allied Matters Act 1990 (now section 868 CAMA 2020). The apex court in that case, went further to hold that the Court of Appeal erred when it held that leave was required before the plaintiff could proceed with its motion against the respondent in the High Court of Lagos State.

This decision was followed by the Supreme Court in the case of *A.A.D Enterprises Ltd v MV Northern Reefer*<sup>46</sup> wherein the Court held that leave was not required to institute an appeal at the Court of Appeal against a company in liquidation.

On the proper court to apply for leave, the Court of Appeal in *Framan Enterprises Ltd v Spring Bank Plc*<sup>47</sup> held that the appellants cannot prosecute its appeal without the leave of the Federal High Court. More recent decisions on the two issues, that is whether the leave of court is required for the continuation of an action pending in a court other than the Federal High Court, and which court will leave be applied to for the prosecution of appeal in respect to company in liquidation, have departed from the position of the court in the cases cited above. Also in *Obe v Prosperfunds Ltd.*,<sup>48</sup> the suit was already ongoing at a Lagos State high court when an order of winding-up was made against the defendant. The Court of Appeal held that the High Court of Lagos State ceases to have jurisdiction over the matter immediately the winding-up order was made and that the plaintiff ought to have sought and obtain leave of the Federal High Court.

---

<sup>42</sup> [2022] 12 NWLR (Pt 1845) 523, 551B-552B.

<sup>43</sup> (2022) LPELR-57488(CA)

<sup>44</sup> Companies and Allied Matters Act 2020, section 868.

<sup>45</sup> (1999) 2 NWLR (Pt 591) 333 @ 365.

<sup>46</sup> (2009) 12 NWLR (Pt 1155) 255 @ 270.

<sup>47</sup> (2016) LPELR-41394(CA).

<sup>48</sup> (2022) LPELR-57488(CA).

In *Universal Properties Ltd. v Pinnacle Commercial Bank & Ors.*,<sup>49</sup> the summary of the facts are; the 1<sup>st</sup> respondent, as plaintiff commenced an action at the High Court of Lagos State the 2<sup>nd</sup> and 3<sup>rd</sup> respondents and 1<sup>st</sup> and 2<sup>nd</sup> defendants. Judgement was given in favor of the 1<sup>st</sup> respondent who then applied and sold immovable properties of the 3<sup>rd</sup> respondent. The appellant claimed to have interest and mortgage over the property and applied to the trial court to be joined as a party to the suit which application was granted. The appellant then applied to the trial court for extension of time to apply to set aside the sale of the properties which it claimed it has interest in. The application was refused and the appellant appealed to the Court of Appeal. Further appeal was made to the Supreme Court wherein the 1<sup>st</sup> respondent raised a preliminary objection to the hearing of the appeal on the grounds that the appellant failed to seek for and obtain leave of the court in line with the provisions of section 417 of the Companies and Allied Matters Act, 1990 (now section 580 of the Companies and Allied Matters Act, 2020).

In opposition, the appellant argued that it was the 1<sup>st</sup> respondent that instituted the action at the trial court and that an appeal being a continuation of a trial, it does not behoove on the appellant to apply for leave of court pursuant to section 417 CAMA 1990 before commencing an appeal against a suit instituted by a company undergoing liquidation. The appellant further argued that section 417 CAMA 1990 (now section 580 CAMA 2020) is only relevant to matters commenced at Federal High Court and not to matters commenced at State High Court. The Supreme Court held that leave of either the Court of Appeal or the Supreme Court was required before the appeal can be prosecuted. The Court rejected the argument that since it was the company in liquidation that commenced the action at the trial court that there was no need for leave of court to prosecute the appeal.

The Supreme Court in arriving at its decision in *Universal Properties Ltd (supra)*, referred to its earlier decision in *Alex O Onwuchekwa v NDIC (Liquidation of Co-operative and Commercial Bank Nig. Ltd.)*<sup>50</sup> where the apex court equally held that if a winding-up order is made or a provisional liquidator is appointed, no action or proceedings shall be proceeded with the company except by leave of the Court. The case of *Atoju v Triumph Bank Plc*<sup>51</sup> involved arbitral proceedings which were commenced and continued against a bank, after a provisional liquidator had been appointed for the bank. Consequently, part of the proceeding was conducted, and an award was given after the provisional liquidator had been appointed. The Court of Appeal set aside the “entire proceedings” and the award, on the ground that the arbitral tribunal had lost the jurisdiction to continue with the proceedings after the provisional liquidator had been appointed. The propriety of setting aside the entire proceedings is debatable, considering that the proceeding conducted prior to the appointment of the provisional liquidator was untainted. For instance, in *Umoh Motors Ltd v Mercantile Bank Ltd*<sup>52</sup> the court declined to declare the entire suit incompetent, but restricted its declaration to the part of the proceeding which was continued or conducted without leave of court after the defendant went into liquidation.

Where a winding-up order is made or a provisional liquidator is appointed after a court delivers a judgment/ruling but before an appeal is instituted, an appellant must obtain leave before

---

<sup>49</sup> (2022) 12 NWLR (Pt. 1845) 523 @ PP 551-552.

<sup>50</sup> (2002) 5 NWLR (Pt. 760) 317.

<sup>51</sup> [2016] 5 NWLR (Pt 1505) 252

<sup>52</sup> [2008] 3 CLRN 141, 148,



instituting the appeal. If the winding-up order is made or the provisional liquidator is appointed after the appeal has been instituted, leave must be obtained before continuing with the appeal. These scenarios involve a continuation of pre-existing actions/proceedings as opposed to commencement of independent actions. It is settled law that an appeal is a continuation of the suit at the trial court: *MTN Ltd v Corporate Communications Ltd*<sup>53</sup>.

This distinction has no relevance in this instance, considering that leave would still be required if they were viewed as commencement of independent actions. The distinction may gain relevance where an appeal arises from a winding-up petition. Where a company goes into liquidation after the conclusion of proceedings at a trial court but prior to an appeal, the fact that the suit was instituted by the company in liquidation will not absolve an appellant from obtaining leave. In *Universal Properties Ltd v Pinnacle Commercial Bank* (supra), the 1st respondent went into liquidation after conclusion of the suit at the trial court but before an appeal. The appellant contended that no leave was required because the suit at the trial court was instituted by the 1st respondent and as such the appeal was a continuation of the suit commenced by the 1st respondent at the trial court. The Supreme Court rejected this contention and held that the requirement for leave was not excluded merely because the suit at the trial court was commenced by the company in liquidation.

This decision is distinctly correct given that the appellant's appeal was a continuation of a pre-existing independent action. No leave would have been required if the appeal emanated from the 1st respondent's winding-up proceedings which actuated the automatic stay. Furthermore, if the winding-up order or appointment of provisional liquidator was made at the trial court and the appellant had obtained leave in that court, the appellant would not require to further seek for leave to pursue an appeal emanating from the suit. In that scenario, the appeal would be a continuation of the suit at the trial court.

### **3.2 Continuation of the Winding-up and Related Proceedings**

A winding-up proceeding undeniably precedes or pre-exists the automatic stay which it activates. Nevertheless, the automatic stay has no paralytic effect on the winding-up proceeding, as it does on other pre-existing actions. Applying the automatic stay to the winding-up proceeding would be counter-intuitive and self-defeating. It would serve no useful purpose. Rather, it would adversely interfere with the liquidation process which it is meant to support. In *Dematic Nigeria Ltd v Utuk* (supra), a provisional liquidator in a winding-up proceeding applied to the winding-up court for an order voiding a sale by a receiver of the company's assets. The provisional liquidator further asked the court to vest the assets in the provisional liquidator for valuation and protection pending the determination of the winding-up petition. The 1st respondent/winding-up petitioner supported the provisional liquidator's application via an affidavit. The provisional liquidator's application was dismissed and the 1st respondent appealed to the Court of Appeal. The Court of Appeal set aside the trial court's decision and granted the reliefs sought by the provisional liquidator. Dissatisfied with the Court of Appeal's decision, the appellant appealed to the Supreme Court contending, among other things, that upon appointment of the provisional liquidator, the 1st respondent should have obtained leave of court (i) before continuing the winding-up proceeding, and (iii) before appealing against the trial court's decision not to grant the provisional liquidator's application.

---

<sup>53</sup> [2019] 9 NWLR (Pt. 1678) 427, 454G

The Supreme Court rightly held that the 1st respondent did not require leave of the trial court to continue the winding-up proceeding, after the provisional liquidator's appointment. The winding-up proceeding was not an independent action, but the same action which actuated the automatic stay. Similarly, the Supreme Court held that the 1st respondent's omission to obtain leave before instituting the appeal against the trial court's ruling not to grant the provisional liquidator's application, did not offend the automatic stay. The appeal was a continuation of the winding-up proceeding and not a subsequent independent action: *MTN Ltd v Corporate Communications Ltd* (supra). This is further underpinned by the settled law, that a party is not permitted to change the case presented at a trial/lower court, at the appellate courts: *Abba v Abba-Aji*<sup>54</sup>

### 3.3 Commencement of Subsequent Independent Action

The automatic stay suspends the commencement of new actions, or proceedings against companies in liquidation. A claimant would require leave of court, before instituting such actions. In *Omaghoni v Nigeria Airways Ltd*<sup>55</sup>, the winding-up order for Nigeria Airways was made on 9/7/2004. The appellants (as plaintiffs) filed an action against Nigeria Airways on 26/8/2004 and thereafter appealed against a ruling on an application it made in the suit on 15/8/2005. The Court of Appeal set aside the originating processes filed at the trial court on the ground that, having not obtained leave, they were filed without due process of the law. The automatic stay may not be triggered in all instances, where actions involving the company in liquidation are commenced.

The automatic stay only halts actions commenced "against the company". It will be effectuated, when an action is adverse to the company's interest. This is one of the three conditions for the applicability of the automatic stay, which the Supreme Court highlighted in *Dematic v Utuk*. In *Anakwenze v Tapp Industry Ltd*<sup>56</sup>, the court stated that the automatic stay was not applicable because the application in issue did not seek for any relief against the company. Similarly, In *Dematic v Utuk* (supra) the court held that an application by the provisional liquidator to set aside sales of the company's assets by a receiver was not caught by the automatic stay because it was not against the company's interest. Leave will not be required, where an action or proceeding is commenced against a liquidator. Nevertheless, there are at least two Court of Appeal decisions which have erroneously stated the contrary. First, in *NDIC v Visana (Nigeria) Ltd*<sup>57</sup>, the Court of Appeal held that failure by the 1st respondent to seek and obtain leave before filing an action against the appellant (a liquidator) rendered the action incompetent and deprived the court of jurisdiction over the action. Second, in *Utuk v Official Liquidator (Utuku Construction Ltd)*<sup>58</sup> the Court of Appeal nullified proceedings, on the ground that leave of court had not been sought and obtained before instituting proceedings against a liquidator. Contrary to these decisions, Section 580 of CAMA 2020 only suspends actions "against the company". It does not provide immunity for any third party, irrespective of its proximity to the company in liquidation.

### 4.0 Conclusion

---

<sup>54</sup> (2022) LPELR-56592(SC) at p 40A-D.

<sup>55</sup> [2006] 18 NWLR (Pt 1011) 310

<sup>56</sup> (1991) 7 NWLR (Pt 202) 177,192A

<sup>57</sup> (2021) LPELR-54934(CA)

<sup>58</sup> (2008) LPELR-4323(CA),

It has been found by this research that leave of the court is sacrosanct in instituting or continuing a pre-existing action against a company in liquidation. This state of affairs has caused untold hardship on litigants who are shut out of ventilating their grievances especially when the action is already ongoing and along the line the defendant company goes into liquidation. The hardship is more severe when the action is at a state high court just like the case of *Rahman Brothers Ltd. (supra)*, the litigant is expected to bear more expenses by pausing the suit at the state high court and going over to the federal high court to seek for leave before continuing the action, it is not only an expensive adventure but a time consuming one. Another question is what if the Federal High Court in that instance denies leave for the action to continue in state high court? Will the litigant have to institute a fresh action at federal high court and start all over again? What if it is a contractual relationship which the federal high court has no jurisdiction to entertain?

### **5.0 Recommendation**

This article adopts the worries expressed by Obaseki-Adejumo JCA in *Rahman Brothers Ltd. (supra)*, where his *Lordship* posited thus: “I think, quite seriously, that the law ought to be looked at and if need be, amended, especially as it relates to cases as in the instant suit, where there is pending before a State High Court an action against a bank whose license was subsequently revoked by the Central Bank of Nigeria, and the provision of Section 40 of the NDIC Act is activated. I believe in this age of proactive case management and need for efficient delivery of justice, the need for a party who has instituted an action at the State High Court against the liquidating bank to pause that suit and proceed before the Federal High Court to obtain leave to continue the action against the NDIC as provisional liquidator is needless.

It is so unfortunate that the substantive action commenced by the Respondent in the present suit bothering on the need for the Bank and/or its liquidator to release its title documents pledged to the Bank as collateral for facility granted to it by the Bank, can be defeated solely on the basis of failure to obtain leave of another Court of co-ordinate jurisdiction where the party had properly activated the jurisdiction of the Court before whom its case was pleaded. As the Respondent’s counsel rightly argued, the case before the Court is simply on banker-customer relationship which the State High Court is clothed with requisite jurisdiction. See *NDIC v OKEM ENT. LTD (supra)*. I hope one day our legislature will be persuaded to alter the tone of the law as it relates to the peculiar circumstance of the instant case, or better still, the Apex Court of our land, when faced with such set of facts, will be moved to construe the law to allow a party continue an action against the Appellant, as liquidator of a bank whose license has been revoked, without the need for the party to proceed before the Federal High Court to obtain leave.”

Flowing from the above dictum of the Justice, this article thereby calls for legislative intervention to arrest this untold hardship and cumbersome proceeding. To this end, the article therefore recommends an urgent amendment to the Companies and Allied Matters Act 2020 particularly as it relates to section 580, to the effect that pending cases at state high courts should not be affected by the provisions of section 580 of CAMA 2020. Also where a matter is already pending at the Federal High Court before the winding-up order was made or a provisional liquidator appointed, the division of the Federal High Court that made the winding-up should be mandated to takeover the matters and hear and determine same.