

UNION BANK OF NIGERIA PLC
V.
AMINU ISHOLA
COURT OF APPEAL (ILORIN DIVISION)
CA/IL/M.97/99

Muritala aremu okunola. (Presided)
PATRICK IBE AMAIZU, J.C.A. (Read the Leading Ruling)
WALTER SAMUEL NKANU ONNOGHEN, J.C.A.

MONDAY, 5TH JUNE, 2000

APPEAL - Stay of execution pending appeal - Application therefor - Monetary judgment - What applicant must show to succeed.

APPEAL - Stay of execution pending appeal - Application for - Ability of respondent to refund judgment debt if appeal succeeds - Assessment of based on respondent's means at time of application - Propriety of. APPEAL - Stay of execution pending appeal - Principles guiding grant of.

APPEAL - Stay of execution pending, appeal - Special or exceptional circumstances for grant of- What constitute.

JUDGMENT AND ORDER - Judgment or order of court - When takes effect.

PRACTICE AND PROCEDURE - Judgment or order of court - When takes effect.

PRACTICE AND PROCEDURE - Stay of execution pending appeal - Application for - Ability of respondent to refund judgment debt if appeal succeeds - Assessment of based on respondent's means at time of application - Propriety of.

PRACTICE AND PROCEDURE - Stay of execution pending appeal - Application therefor - Onus on applicant - What lie needs show to succeed.

PRACTICE AND PROCEDURE - Stay of execution pending appeal - Application therefor - Monetary judgment - What applicants must show to succeed.

PRACTICE AND PROCEDURE - Stay of execution pending appeal- Order of Equitable nature of- Need to exercise same judicially and judiciously

PRACTICE AND PROCEDURE - Stay of execution pending appeal - principles guiding grant of.

PRACTICE AND PROCEDURE - Stay of execution pending appeal – special or exceptional circumstances for grant of- What constitute.

STAY OF EXECUTION - Stay of execution pending appeal - "Special" or "exceptional" circumstances - What constitutes.

STAY OF EXECUTION - Stay of execution pending appeal - Application therefore Onus on

applicant - What he needs establish to succeed.

WORDS AND PHRASES-"*Special or exceptional circumstances*" for grant of execution -
What constitute.

Issue:

Whether the applicant made out a case to warrant a grant of s execution of the judgment of the High Court in his favour pending the determination of his appeal by the Court of Appeal.

Facts:

Pursuant to section 18 of the Court of Appeal Act, the applicant filed on application at the Court of Appeal for an order of the Court of Appeal staying the execution of judgment of the Kwara State High Court, pending the determinations of the applicant's appeal pending before the Court of Appeal, Ilorin Division.

The applicant contended that if stay was not granted the judgment creditor would not be able to refund the judgment debt of N16.5 million in the event event of the appeal succeeding. The applicant undertook to provide a bank guaranteed 1 cover the total sum involved in the judgment.

Opposing the motion the respondent maintained that he was a well-to-do businessman with assets in excess of N50 million "and that he could easily pay back the judgment debt if the appeal succeeds.

Held (*Unanimously granting the application*):

1. *On When judgment or order of court takes effect -*

A judgment or an order of a court of competent jurisdiction takes effect immediately the judgment is delivered or the order is made In that case every court has an inherent power to enforces such a judgment or order of a court It follows that unless a court grant a stay of execution a judgment or an order of court maybe executed immediately the judgment is delivered or the or order made subject, however, to the procedure for carrying out the execution. [*Bank of West Africa Ltd. v. The National Invest Properties Co. Ltd.* (1962) LLR 31 referred to.] (P. 289, *para, B*)

2. *On Principles governing grant of stay of execution pending appeal*

The order of a stay of execution is an equitable remedy and therefore the principles of law and equity should be observed in its determination. It follows that a court discretion to grant a stay of execution must be exercised

judicially and judiciously. [*Nigerian Army v. Mowarin (1992) 4 NWLR (Pt.235) 345 referred to.*] (P. 289, paras. D-E)

3. *On Principles guiding grant of stay of execution pending appeal –*

The guiding principle is that a victorious party must not lightly be deprived of the fruit of his victory unless there are "special" or "exceptional" circumstances to do so. [*Odedeyi v. Odedeyi (2000) 3 NWLR (Pt.650) 655 referred to.*] (P. 289, para. E)

4. *On What constitutes special or exceptional circumstances for grant of stay of execution pending appeal -*

What amount to special or exceptional circumstances are very wide and the category is not closed. [*Odedeyi v. Odedeyi (2000) 3 NWLR (Pt.650) 655 referred to.*] (P. 289, paras. E-F) Per AMAIZU, J.C.A. at pages 289-290, paras. F-A:

"Our apex court has in a number of decided cases charted the course a court should follow in considering an application for a stay of execution. I need not deal with the cases here. I consider it appropriate and necessary however to refer to the observation of Coker J.S.C. in the case of *Vaswani Trading Company v. Savalakh & Co. (1972) 7 NSCC 692; (1972) (Pt.2) 1 All NLR 483* which is the *locus classicus* in the matter of a stay of execution. The observation is as follows:

'When it is stated that the circumstances or conditions for granting a stay should be special or strong we take it as involving a consideration of some collateral circumstances or and perhaps in some cases inherent matters which may, unless the order for stay is granted, destroy the subject matter of the proceedings or foist upon the court, especially the Court of Appeal, a situation of complete helplessness or render nugatory any order or orders of the Court of Appeal or paralyses, in one way or the other, the exercise by the litigant of his constitutional right of appeal, or generally provide a situation in which whatever happens to the case, and in particular even if the appellant succeeds in the Court of Appeal, there could be no return to the *status quo*' ''.

5. *On What an applicant for stay of execution pending appeal now show to succeed-*

The onus is on the person applying for a stay of execution satisfy the court that he is entitled to the grant. In other word the applicant for a stay must

bring out necessary and sufficient facts in his affidavit to show that he is entitled to a stay! para. A)

6. *On Principles guiding grant of stay of execution of monetary judgment -*

Generally, when a respondent is well off and the applicants has not shown that the respondent will not be able to pay back the judgment debt, the court will be reluctant to grant a stay. In the instant case it cannot be said that if the appeal succeeds the respondent would be able to refund the judgment debt to the applicant [Sirpi Alusteel Construction Nig. Ltd. v. Snig Nigearia Ltd. (2000) 2 NWLR (Pt.644) 229; Nwanosike v. 4 NWLR (Pt.290) 68 referred to.] (P. 292, paras. A-B)

7. *On Propriety of assessment of respondent's ability to refund judgment debt as at time of application for stay of execution*

Per ONNOGHEN, J.C.A. at pages 292-293, paras. F-A:

"In a very similar situation this court in *SBN(Nig)plc v.Opanubi* (2000) 2 NWLR (Pt.646) 644 at 649,1

Oguntade, JCA as follows:

'The applicant has deposed that the respondent will be unable to refund the judgment debt paid to the respondent in the event the appeal succeeds. The respondent on the other hand deposed that he is a man of substantial means and can refund the judgment debt if the appeal succeeds. Both parties would appear to have based their assessment-of ability of respondent to refund the judgment debt on respondent means as at this time. It seems to me however that guided by the time frame within which appeals are disposed off at the Supreme court, this appeal may, if it takes its normal turn cannot be determined earlier than five years) I cannot now speculate what respondent's* will be by that time.'

I cannot but agree with my learned brother and adopt his conclusion as mine."

Nigerian Cases Referred to in the Ruling:

Bank of West Africa Ltd. v. The National Investment Properties Co. Ltd

(1962)LLR31

Nigerian Army v. Mowarin (1992) 4 NWLR (Pt.235) 345

Nwakobi v. Nzekwe(1960) SCNLR 458

Nwanosike v. Udosen (1993) 4 NWLR (Pt.290) 684 *Odedeyi v.Odedeyi* (2000) 3 NWLR (Pt.650) 655

SBN(Nig) Plc v- Opanubi (2000) 2 NWLR (Pt.646) 644

Shell Petroleum Dev. Co. v. Omo (1998) 9 NWLR (Pt.567) 672

Sirpi.Alusteel Construction Nig. Ltd. v. Snig Nigeria Ltd. (2000) 2 NWLR 44) 229

Union Bank of Nig. Pic v. Owoniboys Technical Services Ltd., CA/IL/173/M/94 (unreported) suit No. CA/IL/173/M/94 delivered on 15/5/95 *Union Bank of Nig. v. Odusote Bookstore Ltd.* (1994) 3 NWLR (Pt.331) 129

Vaswani Trading Co. v. Savalakh & Company (1972) 12 SC 77

Nigerian Statute Referred to in the Ruling:

Court of Appeal Act, S. 18

Application:

This was an application for an order of stay of execution of the judgment of this high Court given against the appellant pending the determination of the applicant's appeal. The Court of Appeal, in a unanimous decision, granted the in.

History of the Case:

Court of Appeal:

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

Court of Appeal, Ilorin

Names of Justices that sat on the application: Muritala Aremu Okunola,

J.C.A. (*Presided*); Patrick Ibe Amaizu, J.C.A. (*Read the Leading*

Ruling); Walter Samuel Nkanu Onnoghen, J.C.A.

Application No.: CA/IL/M.97/99

Date of Ruling: Monday, 5th June, 2000

Counsel

S. U. Solagberu, Esq. - *for the Applicant.*

Imam Ibrahim, Esq. - *for the Respondent*

AMAIZU, J.C.A. (Delivering the Leading Ruling): This is a motion on notice paying for:

(a) An order of this Honourable Court staying the execution of judgment delivered

in this suit on the 12th day of May, 1999 by Honourable Justice Gbadeyan of the Kwara State High Court, Ilorin Judicial Division pending the determination of the applicant's appeal in the Court of Appeal, Ilorin marked as Exhibit A. £ (b) And for such further order or other orders as this honourable court may deem fit to make in the circumstances of this.

(c) And, further, *Take Notice* that applicant will at the hearing rely in all the court processes including the judgment of this 1 court.

The application is supported by -

- (i) an affidavit of 14 paragraphs sworn to by one Muritala Yusuf
- (ii) a further affidavit dated 9th July, 1999.
- dii) another further affidavit of 14th October, 1999.

In moving the motion, Alawode Esq, of counsel, referred to (i) section 18 of the Court of Appeal Act, under which the application is brought, (ii) paragraph 712 of the affidavit in support, paragraphs 4 & 5 of the further affidavit of 9th July 1999 and paragraphs 4 & 5 of the further affidavit of 9th July., 1999 and paragraph 6 of the other further affidavit dated 14th October, 1999. The learned counsel submitted that the affidavits disclose "special" or "exceptional circumstances to justify the granting of the application. He cited the following cases-

Nwakobi v. Nzekwu (1960) SCNLR 458 at 459

Vaswani Trading Company v. Savalakh & Company (1972)2 All NLR 483

Union Bank of Nig. Plc v. Owoniboy's Technical Services Ltd, CA/ IL/173/M/94 unreported delivered on 15/5/95 by Justice M| Aremu Okunola.

He submitted that a court may grant a stay of execution when there is a likelihood that the judgment debt can be destroyed. The learned counsel referred to the undertaking by the applicant to provide a bank guaranteed bond to cover the total sum involved in the judgment. In the learned counsel's view, this will safeguard the respondent's interest, for, if he eventually wins on appeal he will take both the capital and the interest. Finally, the learned counsel submitted that the averments in the counter-affidavit of the respondent are not firm as to meet the averment of the applicant. He urged the court to grant the application.

In his reply, Ali Esq, SAN, of counsel, referred to the counter-affidavit of the respondent filed on 28/9/99 and a further counter-affidavit filed on 18/10/99. He submitted that an application for a stay of execution must disclose an "exceptional" or "special" circumstance.

He cited -

Union Bank of Nig. v. Odusote Bookstore Ltd. (1994)7NWLR(Pt.331)129 at 148 & 149. In his view, the mode of payment of the judgment debt does not amount to 'exceptional' or 'special' circumstance. He referred to the case of *Sipri Alusteel Construction Nig. Ltd. v. Snig Nigeria Ltd.* (2000) 2 NWLR (Pt.644) 229 And, contended that the only ground for the present application is that the respondent will not be able to pay back the judgment debt if the appeal succeeds: To disprove that fact, the learned counsel referred to paragraphs 5 - 13 of the counter-affidavit and the exhibits annexed thereto. He observed that the asset base of the respondent is more than N50 million. The learned counsel also referred to paragraph 5 of the further-affidavit wherein additional assets of the respondent, were set out. He observed that the averments as to the respondent's asset were not controverted. It is the learned counsel's view that since the affluence of the respondent has not been controverted by the applicant, there is no factual legal basis to support the application. He contended that it is not in every case where Are substantial grounds of appeal that an application for a stay is granted. He refereed cases of -

Sirpi Alusteel Construction Nrg. Ltd. v. Snig Nig. Ltd. (supra). Shell Petroleum Dev. Co. v. Onw (\ 998) 9 NWLR (Pt.567) 672 at 683.

He urged the court to refuse the application.

It is tite that a judgment or an order of a court of competent jurisdiction takes effect Immediately the judgment is delivered or the order is made. In that case every court has an inherent power to enforce such a judgment or order of a court. *Bank of West Africa Ltd. v. The National Investment Properties Co. Ltd.* or (1962) ILR 31 follows that the unless a court grants a stay of execution a judgment or of court may be executed immediately the judgment is delivered or the jade subject however to the procedure for carrying the execution. Represent application is brought pursuant to section 18 of the Court of Appeal act. The section reads:

"An appeal under this part shall not operate as a stay of execution, but the Court of Appeal may order a stay of execution either unconditionally or upon the performance of such conditions as may be imposed in accordance with the rules of court."

It is clear from the above provision that this court has the jurisdiction to grant an application for a stay of execution.

The order of a stay of execution is an equitable remedy and therefore the principle of law

and equity should be observed in its determination. *NigerianArmy or Ors v. Gloria Mowarin* (1992) 4 NWLR (Pt.235) 345. It follows that a court's discretion to grant a stay of execution must be exercised judicially and judiciously. The guiding principle is that, a victorious party must not lightly be deprived of the fruit of his victory unless there are "special" or "exceptional" circumstances to do so a perusal of decided cases in respect of application for a stay of execution show that what amount to special or exceptional circumstances are very wide and its category is not closed. *Alhaji Ishola Odedeyi & Ors. v. Sabitiu Layinka Odedeyi* f{2000) 3 NWLR (Pt.650) 655.

Our apex court has in a number of decided cases charted the course a court should follow in considering an application for a stay of execution. I need not deal with the cases here. I consider it appropriate and necessary however to refer to the observation of Coker J.S.C. in the case of *Vaswani Trading Company v. Savalakh , o.* (1972) 7 NSCC 692; (1972) 2 (53) All NLR 483 which is the *locus classic us* in the matter of a stay of execution. The observation is as follows:

"When it is stated that the circumstances or conditions for granting a stay should be special or strong we take it as involving a consideration of some collateral circumstances or and perhaps in some cases inherent matters which may, unless the order for stay is granted, destroy the subject matter of the proceedings or foist upon the court, especially the Court of Appeal, a situation of complete helplessness or render nugatory any order or orders of the Court of Appeal or paralyse, in one way or the other, the exercise by the litigant of his constitutional right to appeal, or generally provide a situation in which whatever happens to the case, and in particular even if the appellant succeeds in the Court of Appeal there will be no return to the *status quo* ".

The onus is on a person applying for a stay of execution to satisfy the court that this entitled to the grant. In other words an applicant for a stay must bring out necessary and sufficient facts in his affidavit to show that he is entitled to a stay. It is in this light that I now refer to the affidavit in support of this application the averments read as follows -

- "7. That I know as a fact that the notice of appeal raises substantial and arguable point of law.
8. That the applicant, being a financial institution with huge public investment is willing to provide a bank guaranteed bond to cover total sum involved.
9. That the judgment creditor will not be able to refund the judgment of N16.5 million if paid to him and in the appeal event the appeal eventually succeeds.

10. That the stay of execution will not cause injustice to the plaintiff judgment creditor.

In his further affidavit dated 9th July, 1999 the applicant further averred-

"4. That the applicant's Ilorin Branch Manager informed me as follow and I verily believe him and same:

- (i) That the judgment creditor/respondent is already talks or about to take steps to enforce the judgment of the lower court thereon,
- (ii) That unless this application is granted the applicant's deposits with the Central Bank of Nigeria is likely to be attached by the respondent,
- (iv) That if this application is not granted and the applicant deposits with the Central Bank is attached the applicant numerous customers will suffer unjustly.
- (v) That, if any, the fault of the applicant should not be visited on its numerous customers.

5. That I am further informed by the applicant' s Ilorin Branch manager and I verily believe him that the applicant is ready to pay the judgment sum into an interest yielding account in a Bank if ordered by this honourable court or to be paid into the court pending the determination of the appellant's appeal." In answer to the above the respondent averred as follows –

- "5. That I know as a fact that the asset base of my various business is more than fifty million naira.
8. That I am the owner of a 5 storey building at the prime area of Ilorin on Taiwo Road whose worth is N31,600,000.00. A copy of the valuation of the property is attached as Exhibit A.
9. That I am also the owner of a modern mechanic workshop on Taiwo Road worth N21,485,000.00. A copy of the valuation report is attached as Exhibit B.
10. That I am the owner of an independent oil marketing company by name Owo Power Petrol Station that has Petrol Filing Stations at Ilorin and Oro in Kwara State whose value is more than N15,000,000

11. That I also have a motor sales/services premises along Ajasepo road, Ilorin whose worth is N8,508,000. A copy of the valuation v report is attached as Exhibit C.
12. That I also own a metal engineering workshop at Ilorin whose value is N14,120,000. A copy of the valuation report is attached as Exhibit D.
13. That I'm also the owner of Salwal Motors Ltd. whose current value is N5,160,000. A copy of the valuation report is attached as Exhibit E.
14. I have sufficient assets to meet the repayment of the judgment sum if the appeal succeeds..."

The applicant in another further affidavit averred -That I know as a fact and I was informed by the officer of the defendant/applicant, Mr. Orideku and I verily believe him as follows -

- (a) That the plaintiff/respondent is a failed business man and a bankrupt who has been able (*sic*) to pay his meagre (N3,121,504.00) debt to the defendant/applicant as at 15/1/94.
- (b) That the plaintiff/respondent's asset base is not up to fifty million naira as most of his assets are in shambles and desolate.
- (c) That the property along Taiwo Road Ilorin are (*sic*) both subject matter of mortgage to various banking institution, the 5 storey building at Taiwo Road, which had been used to secure an unredeemed mortgage debt to the UBN PLC in a sum running to N3,121,504.00 as at 15/1/97.
- (d) That the metal engineering works motor mechanic workshop services premises along Ajasepo Road, Salwal Motors Ltd. and the Oil Marketing Company called Owo Power Station referred to in the various paragraphs of the counter-affidavit are non functioning, obsolete, empty and in most cases taken over by bushes.

That the assets are not marketable and that those averments claiming them marketable are fabrications to parry the hearing of the appeal g,- on the merit."

Finally, in reply the respondent filed a further counter-affidavit in which he *inter alia* as follows -

That I know as a fact that -

- (i) I am a very successful businessman and not bankrupt as stated in the counter-affidavit. I am not in fact indebted to the applicant in the sum of N3,121,504.00 or any sum at all as stated.
- (ii) My asset base is in fact in excess of the sum fifty million naira because apart

from the properties referred to in my original counter-affidavit, I have a functioning petrol filling station and a functioning motor workshop at Oro, Kwara State etc."

I observed that this court is being called upon to determine this applicant on the above facts. It is obvious that the averments in the respective affidavits in conflict. The conflict can only be resolved by oral testimonies on oath parties/witnesses. This is not possible in this hearing.

Generally, when a respondent is well off and the applicant has nod the respondent will not be able to pay back the judgment debt, the co reluctant to grant a stay. *Sirpi Alusteel Construction Nig. Ltd. v. Snig Nigeria* in (2000) 2 NWLR (Pt.644) 229. Unfortunately for the reasons I have given each it cannot be said in the present case that if the appeal succeeds the respond would be able to refund the judgment debt to the applicant. *Eze Christian M Madam Angela Udosen* (1993) 4 NWLR (Pt.290) 684.

In that case it is my considered view that the only way to resolve the issue is by paying the judgment debt into an interest yielding account in a reputable bank Whoever wins on appeal should claim the judgment sum and the interest.

The application is granted in the following terms - The applicant shall pay the judgment debt into a reputable Bank agreed upon by the parties in there joint names to abide the judgment of this court. I make no order as to costs.

OKUNOLA, J.C.A.: I have read in draft the lead ruling just delivered by my learned brother, Amaizu, JCA. I agree with his ruling and conclusion that conditional stay be granted in the instant case. In the circumstance, I also ordered that judgment debt shall be paid into an interest yielding account with a reputable bank to abide the judgment of this court such that the winner in the end will principal together with interest.

I abide with all the consequential orders including the order as to cost in the leading ruling.

ONNOGHEN, J.C.A.: I have read in draft the lead ruling just delivered by my learned brother P. I. Amaizu, JCA.

I agree with him that it is most equitable in the circumstances of this case to order that the judgment debt be-paid into an interest yielding account with reputable bank to abide the judgment of this court, whoever wins at the end would collect the principal together with the interest.

In a very similar situation this court in *SEN (Nig.) Plc v. Opanubi* (2000)2 NWLR

(Pt.646) 644 at 649, held, per Oguntade, JCA as follows:

"The applicant has deposed that the respondent will be unable refund the judgment debt if paid to the respondent in the event the appeal succeeds. The respondent on the other hand deposed that he is a man of substantial means and can refund the judgment debt if appeal succeeds. Both parties would appear to have based their assessment of ability of respondent to refund the judgment debt on respondents means as at this time. It seems to me however that guided by the time frame within which appeals are disposed off at the Supreme Court, this appeal may, if it takes its normal turn cannot be determined earlier than five years from now. I cannot now speculate what respondent's means will be by that time."

I cannot but agree with my learned brother and adopt his conclusion as mine. conditional stay granted and I abide by the consequential orders made in the lead ruling including the order as to cost.

Application granted