

IN THE HIGH COURT OF JUSTICE (APPELLATE DIVISION)
IN THE FEDERAL CAPITAL TERRITORY
IN THE ABUJA JUDICIAL DIVISION

BEFORE THEIR LORDSHIPS:

HON. JUSTICE M. E. ANENIH (PRESIDING JUDGE)

HON. JUSTICE JUDE O. OKEKE (JUDGE)

ON THURSDAY THE 26TH DAY OF MAY, 2016

SUIT NO: FCT/CVA/116/2015

MOTION NO: FCT/HC/CVA/M/1557/2015

BETWEEN:

MRS. JOY ELE SAMUELAPPELLANT/APPLICANT

AND

- | | | |
|---|---|----------------------------------|
| (1). CHIEF LOUIS ONWUGBENU
(SUING THROUGH HIS LAWFUL ATTORNEY
CHINEDU NWOSU CARRYING BUSINESS UNDER
THE NAME & STYLE OF CHINEDU NWOSU & CO). | } |RESPONDENTS/
RESPONDENTS |
| (2). THE DEPUTY SHERIFF OF FCT
HIGH COURT. | | |

RULING

(DELIVERED BY HON. JUSTICE JUDE O. OKEKE (JUDGE))

By a Motion on Notice filed on 14th December, 2015 and brought pursuant to Orders 7 and 45 of Rules of Court 2004 and inherent jurisdiction of the Court, the Appellant/Applicant (“The Applicant”) seeks for the following reliefs: -

“(1). *An Order staying execution of the Judgment of Senior District Court of the Federal Capital Territory Abuja delivered on 9th day of September, 2015 by His worship Hon. Odo Celestine Obinna*

pending the hearing and determination of the Appeal filed at the High Court of the FCT Abuja by the Judgment Debtor/Applicant.

(2). And any further Order(s) the Honourable Court may deem fit to make in the circumstances.”

The application is supported by a 5-paragraph affidavit deposed to by Hannah Hamo and Written Address of the Applicant's Counsel.

In opposition to a grant of the application the Judgment Creditor/Respondent (“The Respondent”) on 12th May, 2016 filed a 15-paragraph Counter Affidavit deposed to by Mr. Chinedu Nwosu along with the Written Address of his Counsel.

The application was heard on 19th May, 2016 with Counsel for the parties adopting their respective Written Addresses as their oral submissions in support of their respective contentions.

In the affidavit in support, it was averred inter alia on behalf of the Applicant that the Senior Magistrate Court Wuse Zone 2 Abuja delivered judgment in the substantive suit in favour of the Respondent on 9th September, 2015. The Applicant applied for a copy of the Judgment and Record of Proceedings but the Registrar of Court informed her it would take one or two weeks for them to be ready. The Registrar however failed to get the documents ready within two weeks citing as reason for that that the District Judge has been transferred to Life Camp and it is difficult to retrieve the record book. A copy of her letter of application was attached as Exhibit A. Part of the decision of the Court as read in open Court is that the Applicant would pay the sum of N2, 400, 000.00 as mesne profit to the Respondent.

She has filed an Appeal against the Judgment wherein she raised recondite and substantial grounds of appeal likely to succeed on Appeal. A copy of it was attached as Exhibit B.

Her findings show the Respondent is not a man with consistent financial ability and may not be able to refund the Judgment sum if same is paid to him and the Applicant eventually succeeds on the appeal.

Her appeal shows special circumstances one of which is the issue that the trial District Judge applied Section 16 of the Recovery of Premises Act in striking out the Applicant's Counter Claim without affording an opportunity for parties to address the Court on the issue thereby denying the Applicant fair hearing.

The Applicant will suffer great injustice if the order for stay pending determination of the Appeal is not granted as her business has suffered set back since she left the Respondents' premises and her ability to prosecute the appeal including payment of professional fee may be affected as she is struggling financially at the moment.

She filed a similar application for stay of execution before the trial Court but same was dismissed in a Ruling delivered on 8th December, 2015 hence she filed the instant application.

In his Written Address, Mr. Friday O. Abu of Counsel for the Applicant raised a sole issue for determination thus:

“Whether this is a proper case where the Court can order a stay of execution pending the determination of an appeal filed by the judgment Debtor/Applicant.”

Treating the issue, learned Counsel answered the question in the affirmative. He referred to **ALAWIYE V OGUNSANYA (2013) 5 NWLR (PT. 1348) P. 597** for the purpose of stay of execution which is to preserve the res pending determination of the Appeal filed by the Applicant especially where it is clear that if the res is tampered with there may be difficulty in restoring or recovering it. He referred to paragraph 3(f) of the affidavit in support where it was averred the Respondent may not be able to pay back the judgment sum if it is paid over to him.

Counsel further contended relying on **AIM. CO (NIG) LTD V VOLKSWAGEN (NIG) LTD (2012) 11 NWLR (PT. 1312) P.408** that the Court has the power to grant a stay of execution. He also referred to **MANHATTAN INVESTMENT LTD V CO-OP DEV. BANK PLC (2009) ALL FWLR** to underscore the contention that the basic principle required for grant of stay of execution is for the Applicant to show that special or strong circumstances exist. That the Applicant having averred that she will suffer greatly and her ability to finance the appeal affected if the application is not

granted, she has shown a special circumstance. The other special circumstances which borders on recondite issue of law are as contained in the Grounds of Appeal.

He prayed the Court to grant the application.

In his Counter Affidavit, it was averred inter alia on behalf of the Respondent that the averments in the paragraphs of the Applicant's affidavit in support of the application are false and aimed at misleading the Court.

Contrary to paragraph 3(VI), the Respondent and his company have great reputation among his peers and professional colleagues having attained the level of a Chartered Estate Surveyor and Valuer in his profession.

The Applicant's Notice of Appeal has not raised substantial issue of law.

Contrary to the averment in paragraph 3(vi) of the Applicant's affidavit, the Applicant is rich and married to a rich husband who works in the Finance Department of "AMAC."

Contrary to the Applicant's averment, the Respondent is an Estate Developer with sound financial base and can easily return the Judgment sum of N2, 400, 000.00 if the appeal succeeds. He is a well known Estate Developer and Chairman of Real Estate Developers in Nigeria (REDAN) with well known and established estate business in Abuja.

The Applicant can be directed to pay the Judgment sum into an interest yielding account.

It is in the interest of justice to dismiss this application.

In his Written Address, Mr. Nwankwo Chichi Emmanuel of Counsel for the Respondent raised a sole issue for determination thus: -

"Whether the Applicant has met the conditions laid down by law for grant of injunction pending appeal and stay of execution of monetary judgment as to be entitled to the exercise of this Court's discretion."

Arguing the issue, learned Counsel submitted inter alia, that the Courts do not ordinarily grant stay of execution of judgments unless there are special or exceptional circumstances compelling them to do so. This is because the Courts are not in the habit of depriving a successful litigant of the fruits of his success in Court. He relied on **AMADI V CHUKWU (2012) 5-6 SC P 122; MARTINS V NICANNER FOODS CO LTD (1988) 3SC P 429; VASWANI TRADING CO LTD V SAVALAKH & ORS (1972) 12 SC P. 77.**

Learned Counsel next referred to the principles which guide the Court's exercise of discretion in an application of this nature and contended that none of the Applicant's Grounds of Appeal raises substantial issue of law in an area that is recondite or novel. None of them raises a core or substantive issue of jurisdiction.

He canvassed that the Respondent is a man of integrity and means having made his mark in his professional endeavour.

Dwelling on the issue of the Applicant not having the financial means to pay the judgment sum, Counsel urged the Court that her husband bought "a very big Perkins Generator" for her saloon and built a new house where she carries on her business. Her husband also works as an Accountant in tenement Department of "AMAC."

Learned Counsel contended that the cumulative effect of the foregoing is that the Applicant failed to establish special or exceptional circumstances that warrant a grant of the relief sought.

These said, learned Counsel next referred to the factors that guide the exercise of Court's discretion in applications for stay of execution of monetary judgments which are: -

- (1). Whether making the Applicant pay the judgment sum would make his financial position such that he cannot prosecute his appeal.
- (2). Whether it would be difficult to secure a refund of the Judgment sum and costs from the Respondent if the appeal succeeds. He referred to **MORISON INDUSTRIES PLC V CPL INDUSTRIES LTD (2009) 1 NWLR (PT.1169) P. 119 and KWARA POLY V OYE BAMJI (2008) 3 NWLR (PT. 1075) P. 459** in the above regard and urge the Court that the Applicant has not, by her averments shown the Respondent

will not be able to refund the judgment sum in the even the Appeal succeeds.

The Respondents on the other hand stated in their affidavit they are estate developers of means who can easily refund the judgment sum, should the need arise. The Respondent having shown his financial ability to refund the judgment sum, this application should be dismissed.

With regard to the Applicant's averment that she will not have the means to prosecute the appeal if she pays the judgment sum, Counsel contended, relying on ***DENTON-WEST V MUOMA (2008) 3NWL R (PT. 1083) P. 418*** that for the Applicant to succeed on that ground she ought to make a full disclosure of her assets and liabilities.

Reliance was also placed in this regard on ***GUINEA INSURANCE PLC V MONARCH HOLDINGS LTD (1996) 3 NWLR (PT. 436) P. 365.***

Concluding, counsel urged the Court that the Applicant has not disclosed any special or exceptional circumstance to warrant a grant of the application. It should be dismissed.

We have carefully weighed the averments in the affidavits of the parties and submissions of their learned Counsel. The crucial issue that arises for determination is whether or not the Applicant on whom the burden of proof lies has made out a case to justify a grant of the application.

The settled position of the law is that the grant or otherwise of an application for stay of execution pending appeal involves an exercise of the Court's discretion which discretion is exercised judicially and judiciously based on the reasons given, materials placed before the Court and peculiar circumstances of the case. In the exercise of the discretion no one case is a precedent for the other lest that marks the end to exercise of discretion. The Courts have however set down some factors which serve as guides to a Court involved in such exercise of discretion. The factors are generally predicated on the general principle that the Court's do not make it a practice to deprive a successful litigant of the fruits of his/her victory in litigation except upon special or exceptional circumstance shown. What however constitutes special or exceptional circumstance varies from case to case. The following factors as laid down in ***VASWANI TRADING CO***

LTD V SAVALAKH & CO (1972) 7 SC P 692 are considered to determine whether the Applicant has shown a special or exceptional circumstance:

- (1). The existence or otherwise of a competent Notice of Appeal where substantial and arguable issues of law have been raised.
- (2). Whether or not the subject matter of litigation will be destroyed if a stay is not granted.
- (3). Whether or not execution of the judgment will foist upon the Appellate Court a situation of helplessness.
- (4). Whether execution will paralyze the exercise by the Applicant of his constitutional right of appeal,
- (5). Whether or not the status quo cannot be returned to should the appeal succeed.
- (6). Whether or not the Respondent will be unable to refund the judgment sum in the event the appeal succeeds and the Appellate Court so orders.
- (7). The competing rights of the parties.

The foregoing are the general factors. Where however the judgment of Court sought to be stayed is monetary in nature, the Court specifically considers the following factors: -

- (1). Whether or not the Respondent will be unable to refund the judgment sum in the event the Appeal succeeds and the Appellate Court so orders.
- (2). Whether or not execution of the judgment will paralyze the exercise by the Applicant of his constitutional right of appeal.
- (3). The competing rights of the parties to justice.
- (4). The need to preserve the res by having the judgment sum paid into Court. See: **UBN LTD V ODUSOTE BOOKSTORE LTD (1994) 3 NWLR (PT. 331) P. 139; JOSIAH CORNELIUS LTD V EZENWA**

(2000) 8 NWLR (PT. 670) P. 616; and NNPC V BCE CONSULTING ENGINEERS (2004) 2 NWLR (PT. 858) P. 484.

In this matter, the Applicant has not exhibited the judgment of the Court the execution of which is sought to be stayed. Ordinarily, this is fatal to the application as the Court cannot exercise its discretion in vacuo. Nevertheless, in the interest of doing substantial justice, a perusal of Notice of Appeal attached to her affidavit in support of the Motion shows the judgment of the Court complained about contains an Order directing the Applicant to pay the sum of N2, 400, 000.00 to the Respondent as mesne profit. It is only by this that the Court can glean the aspect of the judgment sought to be stayed in the circumstances in which the Applicant has not exhibited a Certified True Copy of the judgment the execution of which is sought to be stayed. This being the case the Court is under a duty to consider the factors set out above which guide exercise of discretion where the judgment sought to be stayed is monetary in nature.

In this regard, the Applicant contended as a special circumstance the averment in paragraph 3(vi) of her affidavit that the Respondent is not a man with consistent financial ability and may not be able to refund the judgment sum if same is paid over to him and she eventually succeeds on appeal. She also averred in paragraph 3 (viii) that if the judgment is executed she will not be able to prosecute her appeal as her business has suffered set back since she left the Respondent's premises.

The Respondent in response to the foregoing joined issues with her in paragraph 7 of his Counter Affidavit where he averred the Applicant is rich and married to a rich husband who works in the financial Department of "AMAC." That the Respondent is reputable Estate Developer with the financial muscle to easily return the judgment sum in the event the Appeal succeeds.

The Respondent further in his Written Address contended with regard to the Applicant's plea of impecuniosity that she has not disclosed her assets, properties, incomes and liabilities so as to enable the Court determine if she will not be able to prosecute her appeal if she pays the judgment sum.

We have given due consideration to the foregoing contentions. With regard to the Applicant's plea of impecuniosity, the Court of Appeal in **PAMOL NIG LTD V ILLAH AGRO PROJECTS LTD (2003) 8 NWLR (PT. 821) P. 38**

made the point that the general position of the law is that impecuniosity perse is not a sufficient ground for a grant of stay of execution pending Appeal. That where judgment has been given for payment of money, the Applicant's affidavit in support of his plea of impecuniosity must disclose facts that are full and frank including a complete and accurate account and description of all his incomes, assets, interests and properties as well as his obligations and liabilities. He must satisfy the Court that placing his liabilities and obligations against his incomes and all his assets, he deserves to be granted the relief sought. Consequently, he must not suppress or misrepresent facts but should present facts with candour. See also: **JOSIAH CORNELIUS LTD V EZENWA *supra***.

In this application, a perusal of the Applicant's averment with regard to her plea of impecuniosity shows she has not made out a full disclosure of her assets, properties, incomes and liabilities, etc as prescribed by the Court of Appeal in the above cases. In the circumstances, I agree with the learned Respondent's Counsel that this ground of her application does not avail her.

With respect to the issue of whether or not the Respondent has the financial ability to refund the judgment sum in the event the appeal succeeds and the Appellate Court directs for a refund of it, the Respondent in response to the Applicant's averment that he does not have a stable financial state to refund the judgment sum averred he is a financially strong Estate Developer within jurisdiction. That he has attained the enviable level of being the Chairman of Real Estate Developers in Nigeria. (REDAN) and can easily refund the judgment sum should the need arise. The Respondent having joined issues with the Applicant with regard to his financial muscle to refund the judgment sum, the burden of proof swung back to the Applicant to lead further evidence in rebuttal of his assertion. This she failed to do with the result that it cannot be said she has proved on preponderance of evidence that the Respondent is not in a financial position to refund the judgment sum should the need arise.

The two main factors guiding exercise of Court's discretion in an application for stay of execution of monetary judgment having been resolved against the Applicant in favour of the Respondent, the Court holds the clear view that the Applicant has not established a special circumstance to justify a grant of the relief sought. This being the case, the Court resolves the sole issue raised above in favour of the Respondent against the Applicant. In

consequence, the Court holds this application lacks merit and cannot be granted. It is dismissed with cost assessed and fixed at N25, 000.00 against the Applicant in favour of the Respondent.

SIGNED
HON. PRESIDING JUDGE
26/5/2016

SIGNED
HON. JUDGE
26/5/2016

LEGAL REPRESENTATIONS:

- (1). Mr. Friday O. Abu for the Appellant/Applicant.
- (2). Mr. T. O. S. Nwokolo/Mr. Nwankwo C. Emmanuel for the Respondents/Respondents.