

IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY
IN THE APPELLATE DIVISION
HOLDEN AT ABUJA

FRIDAY, MAY 17, 2019

BEFORE THEIR LORDSHIPS:

HON. JUSTICE PETER OYIN AFFEN - PRESIDING JUDGE
HON. JUSTICE ASMAU AKANBI-YUSUF - JUDGE

APPEAL NO: FCT/CVA/285/2018

BETWEEN:

KANMA PROPERTIES DEVT. CO. LTD ... APPELLANT/APPLICANT

AND

NNAEMEKAMADUKAUDEZUE ... RESPONDENT

R U L I N G

THE APPELLANT/APPLICANT(hereinafter referred to as the Applicant) has by a Motion on Notice dated 12th November 2018 and filed on 15th November, 2018 sought for an order varying or reviewing the condition imposed by the Chief District Court, Mpape, Abuja in granting stay of execution in respect of its judgment delivered on 17th September 2018, wherein it awarded the sum of ₦5,000,000.00 in favour of the Respondent (as plaintiff) against the Appellant (as defendant). The Appellant lodged an appeal and applied for stay of execution of the Judgment. The Lower Court [per *His Worship, Mohammed Zubairu*] in a Ruling delivered on 9th November 2018 granted a conditional stay of execution directing the Applicant herein [as Defendant/Judgment Debtor] to “*deposit the judgment sum into an interest yielding account with*

the FCT High Court Chief Registrar pending the determination of the Appeal". By the present application, the Applicant seeks a variation of the conditional stay granted by the lower court by substituting the Order with any of the following Orders, to wit:

- (a) That Respondent should continue to retain the original title document/letter of offer for the Allotment of a 4 Bedroom Duplex at Kanma Homes, Lugbe, Abuja, dated 29/8/2016 as well as possession of the property allotted to Respondent by Appellant/Applicant pending the determination of the Appeal filed by the Appellant/Applicant herein.
- (b) That Respondent shall forthwith deliver or hand over the Original title Document/Letter of Offer for the Allotment of a 4 Bedroom Duplex at Kanma Homes, Lugbe, Abuja dated 29/8/2016 in his Custody/Possession to the Appellant/Applicant to enable Appellant/Applicant deliver or deposit same forthwith with the FCT High Court Chief Registrar pending the determination of the Appeal filed by Appellant/Applicant herein; OR in the Alternative.
- (c) That Respondent shall forthwith directly deliver or hand over the Original Title Document/Letter of Offer for the Allotment of a 4 Bedroom Duplex at Kanma Homes, Lugbe, Abuja dated 29/8/2018 in his custody/possession to the FCT High Court Chief Registrar pending the determination of the Appeal filed by the Appellant/Applicant herein.

The motion, which is supported by an 11-paragraphed affidavit deposed by one *Tivlumun David* [a Litigation Secretary in the Law Firm of Ayo

Ogundele & Co., solicitors to the Applicant] with Exhibits A - E annexed thereto, is predicated on the following grounds:

- (a) The Applicant has filed a Notice of Appeal against the said judgment of the Chief District Court, Mpape, Abuja to the High Court of the Federal Capital Territory, Abuja.
- (b) That pursuant to an Application for a Stay of Execution of the judgment, the Chief District Court, Mpape, Abuja on 9/11/18 exercised her discretion in favour of the Applicant and granted a conditional Stay of Execution of the Judgment pending the outcome of the Appeal filed before the High Court of the FCT, Abuja,
- (c) That as a result of unavailability of funds and immediate cash flow but in lieu of same to submit valuable collateral/security to support the condition of Stay, Appellant/Applicant is willing to hand over/deposit the title document as well as possession of the 4 bedroom Duplex at its Estate, known as Kanma homes, Lugbe Abuja which purchase price is ₦28, 000,000.00 (Twenty Eight Million) only plus infrastructure fee of ₦2,000,000.00 (Two Million Naira) only in the sum total of ₦30,000,000.00 (Thirty Million Naira) only with the FCT High Court Chief Registrar.
- (d) That the said 4 bedroom Duplex located at Kanma Homes, Lugbe Abuja was already originally allocated to Respondent and it is/was also the subject matter of the proceedings before the Chief District Court, Mpape wherein Default Judgment was entered against the Applicant without trial on the merits.

- (e) That the original title document is still in custody and possession of Respondent and Respondent is yet to return same to Appellant/Applicant.
- (f) That the value of the property and purchase price of same as agreed by the Appellant and Respondent at the time the parties concluded the sale transaction in August, 2016 was ₦30,000,000.00 (Thirty Million Naira) only and the purchase price and value of the property are far in excess of the judgment sum of ₦5,000,000.00.
- (g) That varying/reviewing the condition of Stay as prayed or proposed will not lead to injustice or be prejudicial to the Respondent, but it will also meet the justice and equity of the case.

In opposition to the motion, the Respondent filed a counter affidavit dated 11th November 2018 deposed by one *Oluwatoyin Ayeni* [a Litigation Secretary in the Chambers of Respondent's Counsel].

At the hearing of the application on the 7th May 2019, learned counsel for the parties relied on the supporting and counter affidavits respectively and adopted the written addresses filed in support of and in opposition to the application.

We have carefully considered the facts deposed in support of, and in opposition to, the application. The central issue to be determined, as formulated by the Applicant, is: **Whether considering the facts and**

materials placed before the Honourable Court, the Applicant is entitled to the reliefs sought in this application.

In exercising its unimpeded discretion to grant or refuse an order for variation of conditional stay, this court will have to take into consideration the entirety of the surrounding circumstances of the case. **Order 50 Rule 24 (6)** of the High Court of the Federal Capital Territory, Abuja (Civil Procedure) Rules 2018, invests this court with the discretionary power, upon application, to grant or refuse an application for review of an order made by the Lower Court. However, the factors the court would usually consider in exercising its discretion to deprive a successful litigant from enjoying the fruits of his judgment pending the determination of an appeal are predicated on well-known principles of law. See **VASWANI TRADING CO. v SAVALAKH & CO. (1972) 12 SC 77.**

The genesis of the legal dispute between the Applicant and the Respondent was the offer for the allotment of 4-bedroom duplex at Kanma Homes, Lugbe Abuja. The Applicant is an Estate Developer at Kanma Homes, Lugbe where the Respondent applied for a 4 bedroom duplex. The trial court, based on the application of the Respondent, entered judgment in favour of the Respondent and subsequently granted a conditional stay of execution of the judgment.

The Applicant has now applied to this court to vary/review the conditional stay of execution granted by the trial court. In arguing the

application, Learned Counsel for the Applicant stated their willingness to provide valuable security and collateral in lieu of depositing the judgment sum, and maintained that the original title documents of the 4-bedroom Duplex located at the Estate known as Kanma Homes, Lugbe, Abuja which is ₦30,000,000.00, are in the custody and possession of Respondent. This fact is controverted in paragraphs 5(c) and (d) of the counter affidavit. The Respondent's counsel referred to Order 50 Rule 24(5) which prescribes the factors the court should take into consideration in an application of this nature, and submitted that since the Applicant has failed to propose a valid security in lieu of making a deposit, the court ought to affirm the order of conditional stay granted by the trial court.

We take the considered view that the Applicant in this case has not shown that if the order of the trial court is carried out, it would be unable to prosecute its appeal. An applicant who has been granted a conditional stay by the trial court has a heavy burden of proving that the conditions or terms imposed by the court are onerous and deserve to be varied. See **CBN v BECKITI CONST. LTD [2004] 14 NWLR (PT. 893) 293 CA.**

The depositions in paragraphs 5(e) and (f) of the supporting affidavit cannot avail the Applicant in this circumstance. If anything at all, it is deposed in paragraph 5(j) of the supporting affidavit *“that the value, cost or purchase price of the said 4 bedroom duplex is far more in excess of*

~~₦5,000,000.00~~ as it was offered to and accepted its value and purchase by Respondent at ~~₦30,000,000.00~~ in August 2016 and nothing has depreciated its value and purchase price". By this deposition alone, the burden is on the Applicant to establish its lack of funds and to also make a full and frank disclosure of their assets and liabilities. It is by so doing, that this court can exercise its discretion to judicially and judiciously grant the application. See **JOSIAH CORNELIUS LTD v. EZENWA**[1996] 4 NWLR (PT. 443) 391.

The Applicant in this case has not convinced the court that the original title document is with the Respondent, as this was denied in paragraph 5(d) of the counter-affidavit. See **DAILY TIMES v KUSAMOTU (2002) LPELR 10993 CA**. It is the law that the burden of proof rests on an applicant who would fail if he does not adduce cogent reasons to buttress his assertion. The review of a conditional stay of execution is discretionary and it is the duty of courts to determine the competing right of parties in the grant of this application.

The Applicant in this case has not demonstrated any exceptional or special circumstance to warrant the variation of the condition imposed by the trial court. In **HUANG v BELLO [1990] 6 NWLR (PT. 159) 571 at 677**, it was held that an order directing a judgment debtor to deposit the judgment sum with a neutral third party such as the Chief Registrar is a safe equilibrium brokered by the courts in the interest of justice, so that whoever wins on appeal should claim the judgment and the accrued

interest. See also *KOPEK CONST. LTD v EKISOLA [1998] 10 NWLR (PT. 568) 120 at 130.*

The Application for variation fails and the same will be is hereby dismissed. There shall be no order as to costs.

PETER OYINAFFEN

Presiding Judge

ASMAUAKANBI-YUSUF

Hon. Judge

Counsel:

Ayo Ogundele, Esq. for the Applicant

O. O. Aweda, Esq. for the Respondent