

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

BEFORE HON. JUSTICE J. ENOBIE OBANOR
ON THIS 21ST DAY OF JUNE, 2024

SUIT NO.: CV/119/2022
MOTION NO: M/7484/2024
MOTION NO: M/8809/2024

BETWEEN:

TRUSTFUND PENSIONS LIMITED ...JUDGMENT CREDITOR

AND

MRS. JOY U. OTOGO ... JUDGMENT DEBTOR

RULING

DELIVERED BY HON. JUSTICE J. ENOBIE OBANOR

This Court is saddled with the duty of considering two applications. The first one is Motion No: M/7484/2024 dated the 30th day of April, 2024 and filed on the same day by the Judgment debtor and the second one is M/8809/2024 dated and filed on 30th May, 2024 by the Judgment Creditor.

The Judgment Debtor in her Motion No: M/7484/2024 sought the following reliefs:

- 1. An order for stay of Execution of the judgment of this Honourable Court delivered on the 19th day of April, 2024, pending the hearing and determination of the Defendant/Counter-Claimant /Applicant's appeal.*
- 2. An order for such order or further orders as this Honourable Court may deem it fit to make, in the circumstances.*

The application is supported by a 20-paragraph affidavit deposed to by the Judgment-debtor, two (2) Exhibits marked as Exhibits A and B.

In her affidavit, she cited the judgment of this Court between the parties dated April 19, 2024, which mandated her to vacate and relinquish possession of Flat 3, Block A, TTP Uke Housing Estate in Garki, Abuja, to the Judgment creditor to the Judgment creditor.

In seeking a stay of execution pending appeal, she stressed the necessity of preserving her rights pending the determination of the appeal before the Court of Appeal. She emphasized her readiness to comply with any court conditions, including undertaking damages, to secure a favourable ruling. Emphasizing the balance of convenience and her commitment to pursuing the appeal diligently, she concluded that granting her application would not prejudice the opposing party.

In her written address, the Judgment Debtor posed a single question for the determination of this Court which is:

Whether or not the Applicant has made out a good case deserving of the reliefs sought?

Her Counsel argued that under the enabling provisions of the Rules of Court, the Court has the authority to grant an application for stay of execution. He submitted that the FCT High Court Civil Procedure Rules 2018 provides that such applications be brought by motion on notice supported by affidavit stating the grounds for seeking the stay of execution. Citing legal precedents such as MRS. VERONICA A.B. OLOJEDE & ORS V. MR. ADEOLA A.B. OLALEYE & ORS (2010) 4 NWLR (Pt. 1183) 1 at 2, he emphasized that an appeal does not automatically stay execution, requiring the Applicant to demonstrate

the existence of a valid judgment under appeal and arguable grounds therein.

He highlighted paragraphs 8, 9, 10, 11, and 12 of the affidavit, along with Exhibits A and B, which included the Notice and Grounds of Appeal and the judgment of April 19, 2024. These, he contended, provided ample evidence of a valid judgment and an appeal with substantial grounds, crucial to showing potential prejudice if execution proceeds before appeal.

Regarding special circumstances, her Counsel argued that the circumstances warranted a stay to prevent irreparable harm pending the appeal. Quoting legal authorities such as *ELF MARKETING (NIG) LTD V. J.J. OYENEYIN & SONS* (1995) 7 NWLR (Pt. 407) 370, he pointed out that execution could destroy the subject matter, render appellate orders nugatory, or hinder the exercise of constitutional rights.

In conclusion, her Counsel sought the Court's discretion to grant a stay of execution, asserting that the Judgment Debtor had met all necessary legal thresholds and demonstrated compelling reasons to halt execution pending the outcome of the appeal.

The Judgment Creditor in response filed a 16-paragraph Counter-affidavit deposed to by Friday PhillipChorio on 22nd May, 2024 and a Written Address.

According to him, the Judgment Creditor's case is separate from the counterclaim of the Judgment Debtor, noting that the grounds of appeal are solely based on the findings in the counterclaim. He emphasized that the Judgment Debtor had occupied the property

rent-free for 18 years, despite the Court not awarding the Judgment Creditor mesne profits for this period.

He asserted that the Judgment Debtor's Notice of Appeal was filed merely to frustrate the Judgment Creditor and to prolong her stay in the property without paying rent. He believes that granting the application would not serve justice, as the Judgment Creditor would be prejudiced if the appeal fails.

In conclusion, he urged the Court to dismiss the application.

Counsel to the Judgment Creditor adopted the sole issue raised in the Written address of the Judgment Debtor to wit:

Whether or not the Applicant has made out a good case deserving of the reliefs sought?

He argued that the decision to grant or refuse a stay of execution of the Court's judgment lies within the discretionary powers of the Honourable Court, which must be exercised judicially and judiciously and in the interest of justice. He referenced the principle from the case of INTEGRATION (NIG) LTD V. ZUMAFON (NIG) LTD (2014) LPELR-22012(SC) where it was emphasized that a party seeking a stay of execution must present substantial reasons to justify denying the successful party the fruits of the judgment.

He further cited SPDC (NIG) LTD V. AMADI & ORS (2011) LPELR-3204(SC) to highlight that the principles guiding a stay of execution are the same as those for an injunction pending appeal. He argued that the court must consider conditions such as whether the grounds of appeal raise substantial legal issues, whether the application discloses special circumstances, and whether it shows why matters

should remain in status quo to prevent the appeal from being rendered nugatory.

He argued that the main suit and the counter-claim are distinct actions and that the Judgment Debtor had not attacked the main suit's judgment sufficiently to warrant a stay of execution. Therefore, the grounds of appeal did not disclose any substantial issue of law against the main suit's judgment.

He also contended that the application failed to disclose any special circumstances justifying a stay of execution.

He concluded that the purported appeal was a tactic to delay justice and continue occupying the Judgment Creditor's property without payment. Since the court refused the Judgment Creditor's claims for damages in the judgment sought to be stayed, granting the stay would unfairly allow the Applicant to occupy the property without consequences. Therefore, he urged the court to dismiss the application with costs against the Judgment Debtor, asserting that it lacked merit.

In the second Motion M/8809/2024 filed by the Judgment Creditor, the following reliefs were sought:

1. AN ORDER striking out the Judgment Debtor/Respondent's Motion No: M/7484/2024 filed on 30th April, 2024, for lack of jurisdiction to hear same, the said application having lapsed by effusion of time under the Rules of this Honourable Court.
2. LEAVE to proceed to execute the Judgment of the Honourable Court dated 19th April, 2024.

AND FOR SUCH FURTHER OR OTHER ORDERS as the Honourable Court may deem fit in the circumstance.

Supporting the application is a 15-paragraph affidavit deposed to by Friday PhillipChorio, two Exhibits marked as Exhibits 1 and 2, and a Written Address.

The facts deposed to are that the Judgment Debtor filed a motion on 30thApril, 2024, to stay the execution of a judgment dated 19thApril, 2024. The motion was served on the Judgment Creditor on 17thMay, 2024, with a hearing set for 23rdMay, 2024. The Judgment Creditor filed a counter-affidavit and written address on 22ndMay, 2024, within the 7-day period permitted by the court rules.

He further deposed that on 23rdMay, 2024, during the hearing, the Judgment Debtor's Counsel requested more time to file a reply. The Court asked both parties to agree on a new hearing date. The Judgment Debtor's Counsel suggested 8thJune, 2024, which was a Saturday, leading to a rescheduled hearing to 14thJune, 2024. According to the court rules, a stay of execution application must be heard within 28 days of filing; the deadline was 28thMay, 2024, which had passed.

He also mentioned that the Judgment Creditor had applied for a writ of possession on 26th April, 2024, before the Motion No. M/7484/2024 for stay of execution was filed and served. Furthermore, the appeal had not been entered at the Court of Appeal at the time of this application.

The issue formulated in the Judgment Creditor's preliminary objection is *whether the Applicant entitled to the reliefs sought in this application.*

Counsel submitted that the application is based on the clear and specific provisions of Order 61 Rule 3 (1) of the Rules of the Honourable Court, which mandates that an application for stay of execution be treated as urgent and heard within 28 days of filing. He argued that the motion for stay of execution filed by the Judgment Debtor on April 30, 2024, had not been heard by the deadline, making the motion lapse by effluxion of time and removing the court's jurisdiction to hear it.

He emphasized that Order 61 Rule 3(1) imposes a statutory limitation that is binding and allows no discretion, comparing it to strict provisions in election matters. Citing cases like ANPP v. GONI (2012) 7 NWLR (Pt. 1298) 147 at 190 – 191 and UDENWA v. UZODINMA (2013) 5 NWLR (Pt. 1346) 94 at 118 -119, he highlighted that once the statutory limitation of time is exhausted, it cannot be revived by the Court. Therefore, the Judgment Creditor is entitled to proceed with the execution of the judgment, and the Court should grant the application in the interest of justice.

The Judgment Debtor responded by filing a counter-affidavit of 7 paragraphs sworn to by EjiroUbiebor and a written address on 10th June, 2024.

EjiroUbiebor avowed that the preliminary objection was a gross abuse of Court process, aiming to confuse the Court regarding the issues in controversy.

She noted that the Judgment Debtor's Motion on Notice No. M/7484/2024 was filed on 30/04/2024 but there was a delay in serving the Judgment Creditor until 17/05/2024 due to the late receipt of a copy of the certificate of judgment and the CTC of judgment, which latter document was to be exhibited on the application. The Counter-affidavit from the Judgment Creditor was served on the Judgment Debtor on 22/05/2024, just before the original hearing date of 23/05/2024, making the motion not ripe for hearing on that date. The subsequent adjourned date of 14/06/2024 was agreed upon by all parties.

She stated that the computation of time for the motion's validity should begin from the date the CTC of judgment was received. Additionally, Motion No. M/8809/2024, which challenges Motion No. M/7484/2024, constitutes an abuse of court process as it should have been included in the Applicant's earlier Counter-Affidavit.

In the written address, Counsel raised a single issue to wit:

Whether or not the Applicant by filing an application as constituted herein, can be said to have made out a case deserving of the reliefs sought?

He argued that the Motion on Notice No. M/8809/2024, filed on 30/05/2024, constitutes a gross abuse of both the court process and judicial process. He cited AMAEFULE V STATE (1991) 6 NWLR (Pt.75) 156 to illustrate this point.

He pointed out that the Applicant had already responded to the motion for stay of execution by filing a Counter-affidavit.

He argued that the delay in serving the Motion No. M/7484/2024 was due to the late receipt of necessary documents, and the computation of time for determining whether Motion No. M/7484/2024 was filed within the allowed time should begin from the date of issuance and receipt of the judgment documents.

He also noted that the adjourned hearing date of 14/06/2024 was agreed upon by all parties and at the convenience of the court. Having agreed to this date, the Applicant cannot subsequently complain about it, as it would be contradictory. He further argued that the rules of court regarding hearing dates are subject to the court's convenience, citing ABUBAKAR V YAR'ADUA (2008) 4 NWLR (Pt. 1078) 511.

He urged the court to recognize that the Applicant, having agreed to the adjournment, cannot change his position and argue that the date conflicts with court rules.

In conclusion, he urged the court to dismiss the application with punitive costs.

The Judgment Creditor responded by filing a Reply on 14th June, 2024.

Both the Judgment Debtor's application for a stay of execution and the Judgment Creditor's application to strike it out were heard concurrently.

The two issues arising for determination from both applications before this Court are:

1. *Whether the Defendant/Judgment Debtor's application for a stay of execution of this Court's judgment pending appeal should be struck out under the given circumstances.*
2. *Whether from the circumstances of the Judgment Debtor's application, this Honourable Court can justifiably stay the execution of its judgment pending appeal.*

Issue 1

Whether the Defendant/Judgment Debtor's application for a stay of execution of this Court's judgment pending appeal should be struck out under the given circumstances.

The core of the judgment Creditor's preliminary objection is that the Judgment Debtor did not comply with the provisions of Order 61 Rule 3 (1) of the High Court of the Federal Capital Civil Procedure Rules 2018 which states as follows:

3. *(1) Application for stay of execution shall be regarded as an urgent matter and shall be heard within 28 days from the date of filing, and where it is not heard the respondent may apply by motion on notice for leave to execute the judgment.*

It is my view that although the application for a stay of execution is to be regarded as an urgent matter and heard within 28 days from the date of filing, several mitigating circumstances contributed to the delay in hearing the application. The Judgment Debtor has in the counter-affidavit adduced reasons for her failure to ensure that the application was heard within 28 days of the filing.

Moreover, the rule does not mandate an automatic denial of the application if it is not heard within the specified timeframe. The provision allowing the Judgment Creditor to apply for leave to execute the judgment in such cases does not preclude the court from exercising its discretion to hear and consider the application for a stay on its merits. Given these factors, it is in the interest of justice for the court to entertain the Judgment Debtor's application for a stay of execution, despite the delay, to ensure that justice is done in the matter.

It was established in the case of *ISIAKA & ORS v. OGUNDIMU & ORS*(2006) LPELR-1552(SC) by *ALOYSIUS IYORGYER KATSINA-ALU, JSC* at (Pp 16 - 16 Paras B - C) that:

"It is now settled practice that rules of court for doing an act must be obeyed. Where an applicant fails to do an act within a stipulated period, he must explain away the delay to the satisfaction of the court. Where he fails to do so, no indulgence should be granted to him." (Underlined by me for emphasis).

This Court is satisfied with the explanation provided by the Judgment Debtor, which thoroughly elucidated the circumstances surrounding the delay.

In addition, it was held by the Apex Court in *STOWE & ANOR v. BENSTOWE & ANOR*(2012) LPELR-7838(SC)Per *CHRISTOPHER MITCHELL CHUKWUMA-ENEH, JSC* (Pp 18 - 19 Paras G - A) that:

"Although it is trite that the Rules of Court must be obeyed, it must not be lost to Courts that they serve mainly as handmaids to Courts in dispensing justice in our adjudicative system. They should not

therefore serve as stumbling blocks in the Courts way of doing substantial justice in a matter."

The Judgment Creditor contended that the use of "shall" in Order 61 Rule 3 (1) entails that the provision is mandatory and allows no discretion of the Court.

The Supreme Court in interpreting the word "shall" when used in a statute stated in OMATEK COMPUTER LTD v. FBN LTD(2021) LPELR-56812(CA) that:

"Generally, the word "shall" is a word of command and denotes obligation and gives no room for the exercise of discretion to impose a duty. But sometimes, the word is construed as merely permissive or directory to carry out legislative intention in the Rule. Therefore, it is not in all cases where the word "shall" is used in an instrument of a statute that it denotes compulsion. In some cases the use of the word "shall" may be construed as conveying a permissive or directory duty. See EMEJE VS. POSITIVE (2008) LPELR 4102; ATUNGWU VS. OCHEKWU (2013) 14 NWLR (PT. 1375) 605; UBANYARA & ANOR. VS. GANA (2014) LPELR 23235 and AMALGAMATED TRUSTEES LTD VS. ASSOCIATED DISCOUNT HOUSE LTD. (2007) LPELR 454."

I disagree with the Judgment Creditor that the word 'shall' used in Order 61 Rule 3 (1) of the Rules of this Court, indicates a command and leaves no room for discretion. This Court shall exercise its discretion in favour of the Judgment Debtor and shall proceed to consider the application M/7484/2024 of the Judgment Debtor for stay of execution.

Issue 2

Whether from the circumstances of the Judgment Debtor's application, this Honourable Court can justifiably stay the execution of its judgment pending appeal.

The application of the Judgment Debtor, simply put, is for an order staying execution of the judgment of this Court pending appeal.

I must emphasize that the principles governing an application for a stay of execution and an injunction pending appeal are identical. Both are subject to the Court's discretion, which must consider certain conditions when deciding to grant or deny the application. These conditions include:

1. The grounds of appeal must raise substantial legal issues, particularly in areas of law that are novel or recondite.
2. The application must demonstrate special circumstances justifying why the judgment should be stayed.
3. The application must explain why it is necessary to maintain the status quo or preserve the subject matter (res) to avoid rendering the appeal ineffective. See SPDC (NIG) LTD v. AMADI & ORS(2011) LPELR-3204(SC).AMCON & ORS v. NICON INVESTMENT LTD & ORS(2022) LPELR-57520(CA).

Having considered the affidavit of the Judgment Debtor and the Counter-affidavit, I am of the view that the Judgment Debtor has not placed exceptional circumstances to warrant the grant of this application. Moreover, there is no proof that the appeal filed by the Judgment Debtor has been entered and an appeal number issued. It

is trite that an appeal is entered when the record has been transmitted. In the case of *BARA & ORS v. SPDC (NIG) LTD(2023) LPELR-60011(CA)* Per *OLABODE ABIMBOLA ADEGBEHINGBE, JCA* (Pp 19 - 20 Paras E - B)

"In the case of Mohammed v. Hussein [1998] 14 NWLR (Pt. 584) 108 at 139, the Court took the position that there is a distinction between the period when an appeal is deemed brought, that is, when the notice of appeal is filed, and before the record of appeal is forwarded to the Court of Appeal and the time after the record of appeal is received in the Court of Appeal, that is when the appeal is entered. Until the appeal is entered in the Court of Appeal, that Court has no control over the proceedings as between the parties. See Ogunremi v. Dada (1962) 2 SCNLR 417 and Ezomo v. A.G., Bendel State (1986) 4 NWLR (Pt. 36) 448."

In addition, if the appeal is subsequently entered and succeeds, the subject matter will revert back to the Judgment Debtor and so refusal of the application for stay of execution cannot render the decision of the Court of Appeal nugatory.

Courts have been admonished from denying a successful party of the fruits of his success except for a very good reason, hence this Court will not deny the Judgment Creditor of its fruits especially as the Judgment Debtor has not furnished sufficient evidence to enable the Court to exercise its discretion in her favour. See *NWOBODO v. AKKAH(2016) LPELR-40308(CA)*.

On the whole, the application of the Judgment Debtor for stay of execution fails.

Leave is hereby granted to the Judgment Creditor to proceed with the execution of the Judgment of the Honourable Court dated 19th April, 2024.

This is the decision of the Court.

HON. JUSTICE J. ENOBIE OBANOR
Judge

Appearances:

For the Judgment Creditor; Olatunji Salawu, Esq.

For the Judgment Debtor; Benjamin Nwaokenye, Esq