

SUPREME COURT OF NIGERIA
25TH JUNE, 1993. SC. 223/1991
CORAM:- S. M. A. BELGORE, O. OLATAWURA, U. OMO,
M. E. OGUNDARE, E. O. OGWUEGBU, JJSC

VINCENT STANDARD
TRADING CO. LTD APPELLANT
AND
1. XTODEUS TRADING
CO. (NIG) LTD
2. CHIEF JUDE OSUDE RESPONDENTS

APPEALS - Exercise of discretion by a lower court - whether to be interfered with - merely because the appellate court would have exercised the discretion differently

APPEALS - Order staying the execution of judgment together with costs - no appeal against costs - whether discretion in making the order - was wrongfully exercised

EVIDENCE - Affidavit evidence - objection to admissibility of uncertified copies of documents - proper stage to raise such objection

EXECUTION - Application for stay - where first reason for the grant is untenable - but the second reason is sustainable - whether the grant will be set aside

EXECUTION - Motion for stay - refused by the trial court - but granted by the Court of Appeal - whether substantial grounds of appeal or special circumstance exist - to justify the grant

FACTS

The plaintiff/Appellant sued the Defendants/Respondents jointly and severally at High Court Onitsha, for the sum of N588,353.70 being the sum left unpaid (plus interest) in respect of goods allegedly sold to the Defendants. Defendants who denied the claim, counter-claimed for the sum of N456,430.00 being sum allegedly due to

them from various transactions between them and the plaintiff. During the hearing certain interlocutory appeals were filed by the Defendants before the Court of Appeal in respect of some orders made by the trial Court which were unacceptable to them. At a stage, the Defendants informed the Judge that they were withdrawing from taking further part in the proceedings. The learned trial Judge continued with the proceedings even after a motion for stay of further proceedings filed by the Defendants at the Court of Appeal was served on him.

Judgment was eventually given as per the plaintiffs claim while the Defendants, counterclaim was struck out without due consideration. The Defendants appealed to the Court of Appeal. Their motion for stay of execution was refused by the trial Judge, but was subsequently granted by the Court of Appeal. The plaintiff being dissatisfied, has now appealed to the Supreme Court against that grant of stay of execution. The apex Court had to determine whether the lower Court exercised its discretion judicially and judiciously. Appellant's counsel sought to raise objection against some uncertified photocopied documents tendered by the Defendants.

HELD (Unanimously dismissing the appeal)

1. Certain paragraphs of the affidavit in support of the motion before the Court of Appeal that are not contradicted are taken as proved. (P.144 15)
2. Where how a deponent came about an averment in his counter-affidavit has not been shown, it cannot be taken as an answer to a point raised in the other parties affidavit. (P.144 L 17)
3. The first reason given by the Court of Appeal in granting stay of execution being by reason of defendants' poverty vis-a-vis the order made on them by the trial Judge earlier in the proceedings to deposit N500,000.00 as a condition for staying further proceedings, is untenable. But as the second reason- that the grounds of appeal are substantial - is sustainable, no case is made out to warrant a disturbance of the lower Court's order for stay of execution. (P.147 L 19)

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4. The propriety of proceeding with the trial after a motion had been filed in the Court of Appeal for stay of further proceedings, the fact of that motion being brought to the notice of the trial Judge and his allowing the plaintiff to reopen his case after the defence, are substantial grounds of appeal raising such special circumstance that will support an application for stay of execution pending appeal. (P.147 L 29)

5. Discretionary order will not be reversed merely because the appeal Court would have exercised the discretion differently, when it is not shown that the lower court acted under a mistake of law or disregard of principle. (P.148 L11)

6. There is no wrongful exercise of discretion in staying the order for costs seeing that the appeal is against the whole judgment which includes the order for costs. (P.148 L37)

7. It is not established that inadmissible evidence was relied upon by the lower Court in reaching its verdict. The Appellant's Counsel cannot raise the objection against the admissibility of some documents at this stage when he failed to do so before Court of Appeal. And those documents were not shown to come within the exception to the general rule about such objections. (P. 150 L6)

REPRESENTATION

Ben. O. Anyaduba, Esq, for the Appellant
Nnaedozie Obiora, Esq, for the Respondents

CASES REFERRED TO

1. Vaswani v. Savalakh (1972) 12 SC 77
2. Balogun v. Balogun (1969) 1 All NLR 349
3. Okafor v. Nnaife (1987) 4 NWLR (pt. 64) 129
4. Annot Lyle (1886) 11 P. D. 114
5. Emmerson v. Ind. Coope & Co. (1886) 55 LJ Cr. 905
6. Martins v. Nicannar (1988) 2 NWLR (pt 74) 75
7. Wey v. Wey (1975) 1 SC 1
8. Shogo v. Musa (1975) 1 NMLR 133
9. Odufaye Fatoke (1975) 1 NMLR 222

10. Dada v. The University of Lagos & Ors. (1971) 1 UTLR 344
11. Utilgas Nigeria & Overseas Co. Ltd. v. Pan African Bank Ltd. (1974) 10 SC 105
12. Wilson v. Church (No. 2) (1879) 2 Ch. D 454
13. Adegbuna v. Ebegbuna (1974) 3 WSCA 23
14. Emefisi & Ors. v. Mbanugwo & Ors. (1970 - 71) 1 ECSLR 100
15. Lijadu v. Lijadu (1991) 1 NWLR 627
16. Saffieddine v. C. O. P. (1965) 1 All NLR 54
17. Enekebe (1964) 1 All NLR 102
18. Kurdoro v. Alaka (1956) 1 FSC 82
19. Awani v. Erejuwa II (1976) 11 SC 307
20. Osenton v. Johnston (1942) AC 130
21. Etim & Ors. v. Ekpe & Anor. (1983) 3 SC 12
22. Obadidua v. Ambrose Family (1969) 1 NMLR 25
23. Akunne v. Ekwuno (1952) 14 WACA 59
24. Alade v. Olukade (1976) 2 SC 183
25. R. v. Hammond (1941) 3 All E. R. 318
26. R. v. Patel (1951) 2 All E. R. 29
27. Jamal v. Saidi & Anor. (1933) II All NLR 86
28. Elkali & Anor. v. Fawaz (1940) 6 WACA 212
29. Alare & Ors. v. Ilu & Ors. (1965) NMLR 66
30. Ojo v. Adejobi & Ors. (1978) 3 SC 65
31. Routledge v. McKay (1954) 1 All E. R. 855; 1 WLR 615

LEAD JUDGMENT BY OGUNDARE JSC

The plaintiff company (who is now the appellant before us) sued the defendants (who are now respondents) jointly and severally claiming the sum of N588,353.70 being the sum left unpaid (together with interest) in respect of goods allegedly sold by the plaintiff to the defendants. The defendants denied the claim and in turn counterclaimed against the plaintiff for the sum of N456,430.00 being the sum allegedly due to them from various transactions between them and the plaintiff. Pleadings having been ordered, filed and exchanged the case proceeded to trial at which 2 witnesses testified in support of plaintiff's claim while one witness testified in favour of the defense and counterclaim.

At the close of the defence, learned counsel for the plaintiff sought leave of court to recall his 1st witness to testify in defense of

the counter-claim. The application was resisted by learned counsel for the defense, but the learned trial Judge, in a ruling, allowed it. Defense counsel promptly appealed against the ruling and moved the trial court for a stay of further proceedings in the action pending the determination by the Court of Appeal of the said appeal. The

5 learned trial Judge in a reserved ruling granted the application for a stay of further proceedings but ordered the defendants to deposit with the High Court Registrar the sum of N500,000.00 "as an undertaking against compensation and to prosecute the appeal timeously."

10 The defendants again appealed to the Court of Appeal against the order that they deposit N500,000.00 with the registrar of the High Court. This was on 1/6/90. By a motion dated 8/6/90 they prayed the trial court to stay the execution of that order pending the determination of the appeal against it. Needless to say that plaintiff's counsel

15 sel opposed the application. On 2/10/90, in a reserved ruling, the application to stay the order was refused. The substantive case was then adjourned to 12/10/90. At this stage, counsel for the defendants informed the trial court that the defense was withdrawing from taking further part in the proceedings. Learned counsel for the plaintiff

20 tiff after having previously led his witness in evidence on the counter claim, later addressed the court and judgment was reserved. On 20/2/90, the learned trial Judge found for the plaintiff on its claim and entered judgment in its favour in the total sum of N588,243.70 as claimed; defendants' counterclaim was struck out.

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The defendants appealed against this final judgment on the following grounds of appeal, to wit:

1. ERROR IN LAW

The learned trial Judge erred in law by proceeding to re-open

30 trial and then give judgment in a cause he had granted an order of stay of proceedings pending the determination of an interlocutory appeal at the Court of Appeal when there was no application for a review of the said order of stay of proceedings already granted.

PARTICULARS OF ERROR

35 (a) On 21/5/90 the Honorable trial Judge granted an application by the appellants for stay of proceedings pending the determination of an interlocutory appeal at the Court of Appeal over procedural irregularity on proof of counterclaim.

(b) The learned trial Judge further ordered the appellants to

deposit the sum of N500,000.00 with the Registrar of Onitsha High Court as an undertaking against compensation and to prosecute the appeal which order the appellants appealed against and med a motion for stay of its execution pending the determination of the appeal.

(c) It was on 2/10/90 that in the course of delivering his ruling on the application for stay of execution that the learned trial Judge Suo motu re-opened the substantive suit already adjourned sine die and proceeded to deliver judgment in the absence of the appellants and their counsel who refused to further participate in the proceedings.

2. ERROR IN LAW

The learned trial Judge erred in law by proceeding to deliver judgment in the above suit when he was served with an application filed by the appellants in the Court of Appeal praying for a stay of proceedings of the main suit pending the determination of the interlocutory appeals already pending at the Court of Appeal.

PARTICULARS OF ERROR

(a) On 6/12/90 the appellants filed an application at the Court of Appeal praying for a stay of proceedings in the suit pending the determination of the interlocutory appeals already lodged in the Court of Appeal.

(b) The said order was served on the Onitsha High Court Registry on the same 6/12/90 who endorsed it for service on the learned trial Judge the same day. It was served the same day on the learned trial Judge to the knowledge of the appellants' counsel

(c) The learned trial Judge did not advert to the said application pending at the Court of Appeal which in law serves as enough stay and proceeded to deliver the said judgment.

3. ERROR IN LAW

The learned trial Judge erred in law by not considering at all the defense of the appellants alongside the documents they tendered before proceeding to give judgment to the plaintiff.

PARTICULARS OF ERROR

(a) The learned trial Judge did not make any specific findings in respect of the documents tendered by the appellants to support their defense when he held that most of the documents were admit-

ted for what they were worth and stopped at that without considering the specific documents and their effect on the case as a whole.

(b) Documents are admitted in proceedings for all purpose.

(c) The learned trial Judge on his own held that certain, documents tendered by the appellants were not pleaded without specifying the documents nor expunging them from the proceedings before deciding for the respondent in disregard of the documents which formed part of the defense of the appellants.

4. ERROR IN LAW

The learned trial Judge erred in law by holding that he could in law suo motu recall the plaintiff/respondent on 7/12/89 at the close of the plaintiff/respondent's case to testify on the defendant's counter-claim when that was not the issue before the Honourable court on that day.

15 PARTICULARS OF ERROR

(a) The issue before the learned trial Judge and on which the parties based their submissions was at what stage the plaintiff/respondent should lead evidence on his reply to the defendants/appellants' counter-claim.

(b) There was no submission on the issue of recalling the plaintiff respondent (P.W.1) as the contention of the respondent's counsel was that by the rules of procedure the respondent should testify on the counter-claim at the end of the appellant's case. The respondent's counsel never applied to recall the respondent.

(c) A plaintiff who willingly did not lead evidence on his reply to the defendants' counter-claim at the appropriate state should not be allowed a second opportunity as a matter of course.

5. ERROR IN LAW

The learned trial Judge erred in law by striking out the appellants' counter -claim on the ground that no leave was obtained before it was filed when issues had already been joined on it and evidence led on the counter-claim.

(a) On 5/6/89 the learned trial Judge ruled on the same issue that proceedings should continue on the counterclaim as the respondent had filed a reply to it.

(b) On 7/12/89 the learned trial Judge suo motu recalled P.W.1 to testify on the appellants' counter claim.

(c) On 21/5/90 the learned trial Judge granted an application

for stay of proceedings to enable the appellants pursue an interlocutory appeal in respect of the procedure in proving the counter-claim.

(d) Throughout the proceedings the learned trial Judge and the parties had always taken it for granted that the counterclaim formed an intrinsic part of the proceedings.

6. ERROR IN LAW

The learned trial Judge erred in law and thereby prejudged the case against the appellants even before the final judgment when he held that he further ordered the appellants on 21/5/90 to deposit the sum of N500,000.00 with the Registrar of the Onitsha High Court in respect of an interlocutory appeal because that is the sum reflected on Exhibit C 1.

PARTICULARS OF ERROR

(a) Exhibit C 1 which was a Bank of Credit and Commerce international Cheque was tendered by the plaintiff on 15/5/89 as a cheque which the 1st appellant issued to the respondent and was later stopped by the 1st appellant.

(b) At the time the learned trial Judge made an order for the deposit of the said sum which he reconfirmed in his judgment trial of the action was still in progress and there was no determination as to who was a judgment debtor or creditor.

(c) The learned trial Judge on his own made such an order for the deposit of the sum when there was no application to that effect by any of the parties.

8. ERROR IN LAW

The judgment is unreasonable unwarranted and cannot be supported having regard to the weight of evidence."

They also moved the trial High Court for a stay of execution of the judgment pending the determination of the appeal against it. The learned trial Judge ruled as hereunder:

"In the circumstance of defendant/applicant having appealed against the judgment and wants a stay of the execution of the judgment. Since it is the principle to preserve the res and also to preserve the capacity to execute the judgment of the Court of Appeal. The rules had required him to pay costs before bringing this application *Wilson v. Church No.2* (1987) 12 CH. D 454 at 458). Since this is not done, the proper order is that he deposits the judgment debt with the Assistant Chief Registrar pending the determination of the

appeal. If he cannot do so obviously the purpose is to deprive the plaintiff of the fruits of his litigation. It means that on being allowed to prosecute the appeal without depositing the judgment debt where he wins the appeal it is all well and good. But where he loses the appeal, the court and winner will be in a position of complete help-
 5 lessness for the appellant cannot pay the judgment debt and costs.

Unless where the above conditions are fulfilled the application (sic) refused:

Following this ruling, the defendants applied to the Court of
 10 Appeal for a similar order, that is, stay of execution of the judgment pending the determination of the appeal against it. The Court of Appeal granted the application and it is against the appellate court's ruling that the plaintiff has now appealed to this Court upon 11 grounds of appeal, four of which were struck out by this Court on 2/
 15 3/92. Written briefs were filed and exchanged, the appellant also filed and served a reply brief. At the oral hearing of the appeal, learned counsel for the parties relied on their written briefs. Mr. Anyaduba, for the plaintiff/appellant submitted that the Court of Appeal acted wrongly in taking into consideration extraneous matter, that is, the
 20 issue of the N500,000.00 deposit order made in the course of the proceedings by the learned trial Judge. He further submitted that the defendants/respondents failed to make out a case for exceptional circumstances before the Court of Appeal.

That the lower court has an inherent power to grant a stay of
 25 execution pending an appeal is not in dispute. What is in dispute is whether, in the circumstances of this case, the court exercised its discretion judicially and judiciously. The principles guiding the court's exercise of its discretion to grant stay of execution have been laid
 30 down in along line of cases some of which are cited in learned counsel's briefs. In *Vaswani v. Savalakh* (1972) 12 S.C. 77, 81-83; (1972) NSCC 692,695 that erudite judge, G.B.A. Coker J.S.C. delivering the decision of this Court observed:

*"When the order or judgment of a lower court is not mani-
 35 festly illegal or wrong, it is right for a Court of Appeal to presume that the order or judgment appealed against is correct or rightly made until the contrary be proved or established and for this reason the Court of Appeal, and indeed any Court, will not make a practice of*

depriving a successful litigant of the fruits of his success unless under very special circumstances (See in this connection the observations of Bowen, L.J. in The Annot Lyle (1886) 11 p. 144 at p.166). We take it that the word "special" in this context is not used in antithesis to the words "common" or "normal" for that would be tantamount to pre-judging the appeal on a determination of an application for a stay of execution. 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 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 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. All rules governing stay of actions or proceedings, stay of executions of judgments or Orders and the like, are but corollaries of this general principle and seek to establish no other criteria than that the court, and in particular the Court of Appeal, should at all times be master of the situation and that at no stage of the entire proceedings is one litigant allowed at the expense of the other or of the court to assume that role."

Earlier, the same Judge had in *Balogun v. Balogun* (1969) 1 All NLR 349,351 said:

"We are in full agreement with the principle that in order to obtain a stay of execution of judgment against a successful party an applicant must show substantial reasons to warrant a deprivation of the successful party of the fruits of his judgment by the court. We are in no doubt whatsoever that where grounds exist on the motion suggesting a substantial issue of law to be decided on the appeal in an area in which the law is to some extent recondite and where either side may have a decision in his favour such substantial grounds as would warrant an interference clearly exist."

The principles are more fully set out in the judgment of this Court in *Okafor v. Nnaife* (1987) 4 NWLR (Pt. 64) 129, 136-137

per Oputa, J.S.C., in these words:

"...What principles will, and should, guide the Courts in applications for a stay of execution? These principles have been reiterated in very many decisions of this court. Perhaps it may be well here to re-emphasize some of them:

- 5 1. *The Courts have an unimpeded discretion to grant or refuse a stay. In this, like in all other instances of discretion, the Court is bound to exercise that discretion both judicially as well as judiciously and not erratically.*
- 10 2. *A discretion to grant or refuse a stay must take into account the competing rights of the parties to justice. A discretion that is biased in favour of an applicant for a stay but does not adequately take into account the respondent's equal right to justice is a discretion that has not been judicially exercised.*
- 15 3. *A winning plaintiff or party has a right to the fruits of his judgment and the Courts will not make a practice at the instance of an unsuccessful litigant of depriving a successful one of the fruits of the judgment in his favour until a further appeal is determined: See the Annot Lyle (1886) 11 PD. 114 at p. 116 C.A. Per Bowen, L.J.*
- 20 4. *An unsuccessful litigant applying for a stay must show "special circumstances or "exceptional circumstances" eloquently pleading that the balance of justice is obviously weighted in favour of a stay.*
- 25 5. *What will constitute these "special" or "exceptional" circumstances will no doubt vary from case to case. By and large, however this Court in Vaswani Trading Company v. Savalakh & Company (1972) 12 S.C. 77 at p. 82 held that such circumstances will involve*
- 30 *"a consideration of some collateral circumstances 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 paralyze, in one way or the other, the exercise by the litigant of his*
- 35 *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"*

6. The onus is, therefore, on the party applying for a stay pending appeal to satisfy the Court that in the peculiar circumstances of his case a refusal of a stay would be unjust and inequitable.

7. The Court will grant a stay where its refusal would deprive the appellant of the means of prosecuting the appeal: *Emmerson v. Ind. Coope & Co* (1886) 55 LJ. Ch. 905.

The above are some of the general rules guiding and governing the Court in the exercise of its discretion to grant an order for stay. These circumstances may not apply generally."

And in *Martins v. Nicannar* (1988) 2 NWLR (Pt. 74) 75, 83, per *Nnamani J.S.C.*, this Court said:

"In his book practice and Procedure of the Supreme Court, Court of Appeal and High Courts of NIGERIA First Edition, para, 44, 29, page 535, Dr. T.A. Aguda, noted a few other applicable principles elicited from the cases over the years, These include,

"(a) The chances of the applicant on appeal. If the chances are virtually nil, then a stay may be refused, *Vaswani Trading Co. v. Savalakh and Co.* (1972) 12 S.C. 77; *Wey v. Wey* (1975) 1 S.C.1; *Olusesan Shogo v. Latifu Musa* (1975) 1 NMLR 133, *Odufaye v. Fatoke* (1975) 1 NMLR 222.

(b) The nature of the subject matter in dispute whether maintaining the status quo until a final determination of the appeal in the case will meet the justice of the case *Dr. T. O. Dada v. The University of Lagos and Ors.* (1971) 1.U.I.L.R 344; *Utilgas Nigerian & Overseas Co. Ltd v. Pan African Bank Ltd* (1974) 10 S.C. 105.

(c) Whether if the appeal succeeds, the applicant will not be able to reap the benefit of the judgment on appeal See *Wilson v. Church No.2* (1879) 2 Ch. D 454, 458.

(d) Whether the judgment is in respect of money and costs whether there is a reasonable probability of recovering these back from the respondent if the appeal succeeds.

Lawrence Ogbobegu Abegbuna v. Janet Omosunde Ebegbuna (1974) 3 W.S.C.A. 23.

(e) Poverty is not a special ground for granting a stay of execution except where the effect will be to deprive the appellant of the means of prosecuting his appeal. *Nwajekwu Eneftsi and Ors v. Michael Nbanugwo and Ors* (1970-71) 1 ECSLR 100.

The Court's discretion to grant stay of execution must be exercised judiciously and it would be so exercised where it is shown that the appeal involves substantial points of law necessitating the parties and issues being in status quo until the legal issues are resolved. Vaswani's case (supra); Utilgas's case (supra). It is clear that this Court
 5 would consider granting a stay of execution where as Coker, J.S.C. put it Vaswani's case "the grounds of appeal filed do raise vital issues of law and there are substantial issues to be argued on them as they are, "In Balogun v. Balogun (1969) 1 All NLR 349 at 351, this Court,
 10 again as per Coker, J.S.C. held that where grounds exist suggesting that a substantial issue of law is to be decided on appeal in an area in which the law is to some extent recondite, and where either side could have a decision in his favour, a stay ought to be granted."

Explaining the seeming conflict between Balogun v. Balogun (supra) and Okafor v. Nnaife (supra), Nnamani J.S.C. observed at page 84 of the report:

*"I am not unaware of the decision of this Court in which the scope for this case [i.e. Balogun v. Balogun] appears to have been restricted. This is Okafor v. Nnaife (1987) 4 NWLR (Pt. 64) 129. With
 20 all respect, I think this Court was swayed in the Nnaife case by the facts of that case which involved continuous acts of trespass. In a case in which a substantial point of law, such as on jurisdiction, does arise Balogun's case would still have full force."*

[Square brackets are mine]

25 I now proceed to consider this appeal in the light of the principles enunciated above. The facts have already been set out. In the affidavit in support of the motion for stay before the Court of Appeal, the 2nd defendant deposed, inter alia, as follows:

30 "8. That our counsel Nnaedozie Obiora advised us and we verily believe him that we have substantial points of law in our grounds of appeal that would make the Court to be favourably disposed to grant our application.

35 9. That the respondent commenced the above action against us claiming the sum of N588, 353.70 being balance on goods purportedly supplied to the 1st applicant.

10. That the 1st applicant counter-claimed against the respondent in the sum of N456, 430.00.

11. That the respondent led evidence to establish its case and closed it without any reference to the counter-claim. 5

12. That at the close of the applicants' case the respondent sought as of right to re-open its case in order to answer the counter-claim. 10

13. That our counsel objected to such a move but was overruled by the learned trial Judge.

14. That we appealed against the ruling and filed an application to stay the proceedings in the main suit pending the determination of the interlocutory appeal. 15

15. That learned trial Judge on 21/5/90 ordered a stay or the said proceedings and further ordered that we deposit the sum of N500.000 'as an undertaking against compensation and to prosecute the appeal. 20

17. That we also appealed against the latter order requiring us to deposit the sum of N500.000. 25

18. That the records in respect of the interlocutory appeal have been lodged at the Court of Appeal along with our briefs of argument. The appeal number of the appeals which the Registrar consolidated is CA/E/206/90. 30

19. That we shall rely on the relevant portions of the records and the briefs of argument in arguing this application. 35

20. That following the appeal against the earlier mentioned order for the deposit of N500.000 we brought an application to stay its execution pending the determination of the appeal.

21. That the learned trial Judge overruled the application on 2/10/90 and suo motu reopened the main suit

22. That our counsel took objection to the suit being reopened
5 by the same learned trial Judge who had stayed the proceedings.

23. That on 21/11/90 the learned trial Judge delivered a ruling on the said objection and maintained that he could in law reopen the suit. The Photostat copy of the said ruling is hereby attached and
10 marked
Exhibit G.

24. That on 26/11/90 we and our counsel withdrew from participating further in the trial to avoid acquiescing and prejudicing the chances of our two interlocutory appeals. The trial Judge then proceeded to receive address from the learned respondent counsel and adjourned the suit, for judgment to 11/12/90. A Photostat copy of the day's proceedings is hereby attached and marked Exhibit H.
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25. That we filed an application on 6/12/90 at the Court of Appeal to obtain an order to stay proceedings in the suit at the lower court. The said application, which is contained in suit No. CA/EI206/90, served on the learned trial Judge through the Court Registrar the
25 same day. The Photostat copy of the affidavit of service is hereby attached and marked Exhibit J.

26. That despite the service of the application on the learned
30 trial Judge he proceeded and delivered the judgment on 21/12/90.

27. That apart from the substantial points of law we lack the ability to pay the judgment debt and still prosecute the appeal.

35 28. That I rely mainly on the Managing Director's salary and allowance payable to me by the 1st applicant to sustain myself.

29. That for over 4 years now the 1st applicant has been having dwindling returns and has not paid me anything. Attached here-

with are the Photostat copies of its tax clearance certificate and Balance Sheet up to the year 1989 as Exhibits K-K1."

Chief Vincent Nwankwo, the Managing Director of the plaintiff company swore to a counter-affidavit, the penultimate paragraphs of which read as follows:

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"3. That paragraph 8 of the affidavit is not true. That I am advised by my solicitors Mr. Ben. O. Anyaduba and Mr. G.O. Nwankwo, and I verily believe them that the appellant's applicants have no substantial point of law on appeal.

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4. That I am further advised by the said Solicitors that the appellants/applicants having withdrawn from taking further part in the proceedings in the lower court, especially when the parties have closed their case in the claim, they, the applicants cannot be heard to complain, and I verily believe them.

5. That I am further advised by the same Solicitors that in as much as the appellants/applicants were the counter-claimants in the case in the lower court, and having voluntarily withdrawn from prosecuting their claim to finality, the counter-claim abates and was properly struck out by the trial judge, and I verily believe them.

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7. That paragraph 25 and 26 of the affidavit is deliberate falsehood. That the applicants did not serve any application for an Order to stay proceedings on the Judge in the court below.

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8. That paragraph 27 of the affidavit is not true. That payment of the judgment debt and cost will not prevent the applicants from prosecuting the appeal. That the applicants own the following landed property viz:

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BUILDING AT LKM 4 ONITSHA/OWERRI ROAD ONITSHA

(a) 4 Storey Building for offices and Warehouses.

(b) Factory Building and offices including plants and machines.

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(c) 3 Duplex buildings at No. 66 Akuzor Road Nkpor with swimming pool and fish ponds.

(d) Factory and residential buildings at applicant's hometown

at Igbo-Ukwu.

(e) The following vehicles are owned by the appellants/applicants:

- (1) Range Rover with Registration No. RV 6181 PE
- (2) Mercedes Benz car with registration No. AN 1066 NE
- 5 (3) Peugeot Station Wagon 504 with registration No. A 5549
- NE (4) Jeep with registration No. LAD 3557
- (5) Volvo with registration No. LA 5800 BE
- (6) Pick-Up (404) with reg. No. AN 1766 NC
- 10 (7) Passat with registration AN 7833 G
- (8) Pick-up (404) with reg. No. AN 1388 ND
- (9) Toyota Crown with reg. No. BD 7343 A

Paragraphs 9-24 of the affidavit in support of the motion before the Court of Appeal stand uncontradicted and will, therefore, 15 for the purpose of this appeal be taken as proved. I do not regard paragraph 7 of the counter-affidavit as an answer to paragraph 25 of the affidavit of the 2nd defendant. It has not been shown how Chief Nwankwo who swore to the counter-affidavit came about the knowledge that the defendants did not serve any application for an order 20 to stay proceedings on the judge of the trial High Court. One would have thought that, if the plaintiff wanted to challenge the averments in paragraph 25 of 2nd defendant's affidavit, he would produce an affidavit from the registrar of the High Court. This was not done. I 25 will therefore consider paragraph 25 also proved. It is not in dispute that judgment was delivered by the trial High Court on 20/12/90, a date subsequent to 6/12/90.

Having now resolved the material conflicts in the parties' affidavit, I like next to consider the reasons given for the lower court's 30 decision to grant stay of-execution pending appeal. Chigbue, J.C.A. delivering the lead ruling of the Court of Appeal (and with which ruling Oguntade and Uwaifo J.J.C.A. concurred) observed:

35 *"The applicant's main contentions in this application are inability to pay the deposit of N500,000.00 coupled with the fact that their grounds of appeal raised substantial points of law."*

After reviewing the principles upon which stay will be granted, the learned Justice went on to say:

"Taking the first point, it is trite law that poverty per se does not constitute a special circumstance See Nwosu's case (supra) and Mar-

tin v. Nicanner Food Co. Ltd. (1988) 2 NWLR (Pt. 74) p. 75. But Nnamani J.S.C. in the same Nwosu's case held that:

'If it is established that there are indeed no resources, this could be a special circumstance.'

From the facts of this case the trial court ordered the applicants to deposit N500,000.00 within 30 days as a condition precedent to the staying of further proceedings pending the determination or appeal against its interlocutory ruling. It vacated this very order when it was appealed against and proceeded to finalize the proceedings and gave judgment. The applicants' case is that they had no such huge sum to deposit and at the same time be able to prosecute their appeal against the order. I think such order for payment of N500, 000.00 in the circumstances it was made was most unreasonable as such sum of money looks very high. To me, it is an indirect way of stultifying the applicants' efforts to appeal contrary to s. 221 of the 1979 Constitution which gives them right to appeal, albeit, when the respondent had not effectively in their counter-affidavit and submission in this court controverted the applicants' allegation of poverty. I agree that the applicants had not (sic) resources to raise such huge deposit and that such inability to raise such sum of money amounts to a special circumstance."

On the second ground relied on for the application, the learned Justice observed:

"The other point canvassed by the applicants is that there exist substantial arguable points of law in their grounds of appeal. I have examined them and found that the main thrust of their argument is that the order for payment of a deposit of N500,000.00 as a condition precedent to the granting of a stay of further proceedings and as was put by the learned trial Judge - as undertaking against compensation and to prosecute the appeal. The grounds look to me substantial enough, as I say that non-stay will render the eventual result of the appeal nugatory - Okafor v. Nnaife (supra), Balogun v. Balogun (1969) 1 All NLR 349; Lijadu v. Lijadu (1991) 1 NWLR (Pt. 169) p. 627 and Utilgas & Overseas Gas Co. v. Pan African Bank Ltd. (1974) 10 S.C. 105."

On these considerations of the two grounds relied on by the defendants, the Court below granted their application for stay of ex-

ecution pending appeal.

Learned counsel for the plaintiff has set out a number of issues for determination in his written brief. Learned counsel for the defendants, for his part set out four issues. The fourth issue would appear, however, to be an objection raised to the competence of the grounds
 5 of appeal contained in the plaintiff's notice of appeal. This objection has at an earlier hearing, been considered by this Court in consequence of which grounds 3, 8, 9 and 10 were struck out. After rejecting the issues covered by these grounds, the following issues as contained in the appellant's brief are now left for consideration, viz:

10 *"3.01 Whether the learned Justices of the Court of Appeal Enugu Division were right and adopted the correct approach when they anchored their reasoning for granting the respondents application for Stay of Execution on an earlier interlocutory order made by*
 15 *Honourable Mr. Justice P.c. Onyia that the respondents should deposit N500, 000.00 as a condition for stay of proceedings and also holding that the respondents inability to raise such sum of money amounted to exceptional circumstances warranting the grant of the application when the said earlier interlocutory order had been over-*
 20 *taken by events and when such application for stay of proceedings was not before them.*

3.02 Whether it was right for the learned Justices of the Court of Appeal Enugu Division to have granted the application for stay of
 25 *execution when the respondents did not show exceptional circumstances to warrant the grant of stay of execution in their favour.*

3.04 Whether the learned Justices of the Court of Appeal Enugu Division were right in granting the application for stay of execution when they failed to consider adequately the appellant's case includ-
 30 *ing the appellant's uncontroverted counter affidavit listed respondents assets refuting their claim of poverty.*

3.05 Whether it was proper for the learned Justices of the Court of Appeal Enugu Division to have granted the application for stay of
 35 *execution when documents exhibited in the accompanying affidavit of the application on which the said ruling was based were mere photocopies of documents some of which were not certified true copies contrary to the- provisions of the Evidence Act.*

3.06 Whether it was proper for the learned Justices of the Court of Appeal Enugu Division were right when they held that the grounds

of appeal were substantial without actually showing how the grounds of appeal were substantial.

3.08 Whether it was right for the Justices of the Court of Appeal to have granted stay of execution of the judgment and costs when there was no appeal against costs in the Court below.

3.09 Whether the learned Justices of the Court of Appeal Enugu Division exercised their discretion judiciously in granting a stay of execution."

The issues as set out above are rather prolix; with the exception of issue 5, they all raise the question of the exercise of the lower court's discretion to grant stay of execution pending appeal, in the circumstances of the case on hand. I shall treat all these issues together.

I have examined the reasons given by the court below in granting defendants' application for stay having regard to the grounds on which that order was sought. The first reason given and relating to the poverty of the defendants vis-a-vis the order earlier in the proceedings made on them by trial judge to deposit N500,000.00 as a condition for staying further proceedings, is, in my respectful view, untenable. Learned counsel for the defendants seems to concede this point in his brief. As the second reason that the grounds of appeal are substantial - is sustainable and sufficient to support the order made. I do not think a case is made out for one, disturbing the order for stay of execution made by the lower court.

I have examined the grounds of appeal to the Court of Appeal against the backgrounds of the proceedings leading to the final judgment of the learned trial Judge and I am satisfied, as the court below also was, that the grounds of appeal raises substantial issues of law such as the propriety of proceeding with the trial after a motion had been filed in the Court of Appeal for stay of further proceedings, and the fact of this motion was brought to the notice of the trial Judge. It is in evidence that the defendants concluded their case on their counter-claim before the learned trial Judge allowed plaintiff to reopen his case and which permission led to two appeals against interlocutory orders made and yet it would appear from the final judgment that the evidence on the counter-claim was not reviewed and evaluated before it was struck-out. A ground of appeal raising this

issue cannot but be substantial. The propriety of allowing the plaintiff to reopen his case after the close of the defence was also questioned. A ground of appeal raising such an issue is, to my mind, substantial. On the whole I am of the same view as the court below that the grounds of appeal are substantial. This, on the authorities, is such
 5 special circumstance that will support an application for stay of execution pending appeal.

It is well settled that an appellate court will not interfere with the exercise of discretion by a lower court unless it can be shown that
 10 the lower court acted under a mistake of law or in disregard of principle, or under a misapprehension of the facts, or that the discretion was wrongly exercised in that due weight was not given to relevant considerations or that the order made thereby will result in injustice
 See: Saffieddine v. C.O.P. (1965) 1 All NLR 54; Enekebe v. Enekebe
 15 (1964) 1 All 102; Kudoro v. Alaka (1956) SCNLR 255; (1956) 1 FSC 82; Awani v. Erejuwa II (1976) 11 S.C. 307. It is not a ground for reversing a discretionary order merely because the appeal court would have exercised the discretion differently. As was put by the House of Lords in Charles Osenton v. Johnston (1942) AC 130, 138
 20 cited with approval by this Court in Saffieddine and Enekebe, among others: *"The appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the origin discretion, had it*
 25 *attached to them, in a different way. But if the appellate tribunal reaches the clear conclusion that there has been a wrongful exercise of discretion in that no weight, or no sufficient weight, has been given to relevant considerations such as those urged before us by the appellant, and then the reversal of the order on appeal may be justified."* If the Court of Appeal's discretion had been based on its first reason only, I would not have hesitated to reverse the discretionary order made but with the second reason which, in my respectful view, is sufficient to sustain the order and which I consider sound, I have decided to affirm the order made.

35 I cannot find any wrongful exercise of discretion in staying the order for costs. The appeal is against the judgment as a whole and this includes the order for costs. If the appeal against the judgment succeeds, as costs follow the event the order for costs will most invariably be set aside along with the judgment. Although, in practice, it is

usually ordered that costs be paid to the judgment creditor's counsel on his giving the usual undertaking, the court below must have its reasons in departing from this usual practice. Simply because I might make a different order is a not sufficient reason for me to reverse the lower court's order staying the order for costs as well. It is not necessary for there to be an appeal against costs before such an order can be made . I turn to Issue 5. Learned counsel for the plaintiff contends that documents attached to the motion papers at the Court of Appeal "were photocopies of documents some of which were not certified contrary to the provisions of the Evidence Act." Learned counsel lists the offending documents in his brief and submits that the court below erred in law in arriving at its decision on such documents.

Learned counsel for the defendants argues in his brief that Issue 5 ought not to have been raised in this appeal. He observes that plaintiff's counsel did not make any serious attempt at the trial of the application for stay in the court below to object to any document annexed to the affidavit in support of the application on the ground that it was not certified. Learned counsel further observes that the only instance where plaintiff's counsel raised the issue of non-certification was in respect of Exhibit A the judgment of the trial court appealed against and he withdrew his objection on discovering that the document was in fact certified. He submits that as the issue of non-certification was not raised before the court below that court would not be expected to base any decision on it. He further submits that as the plaintiff's counsel failed to object to the admissibility of any of the documents annexed to the 2nd defendant's affidavit, the plaintiff cannot now raise the objection in this court. He cites *Chief Bruno Etim & ors v. Chief Okon Udo Ekpe & anor.* (1983) 1 SCNLR 120,(1983) 3 S.C. 12, 36-37 in Support. Going through the proceedings of the Court of Appeal for 27th May, 1991 when learned counsel for the parties addressed that court on the motion before it (see pages 57-58 of the record of appeal), the following appears on page 58 of the record: "*Anyaduba: Exhibit 'A' is not certified. It must be I refer to Obadidua v. Ambrose family (1969) 1 NMLR 25. I now say that Exhibit 'A' is certified.*" He raised no objection to any other document annexed to 2nd defendant's affidavit. The question may be asked: Why did Mr. Anyaduba not object to the other documents exhibited

to the affidavit? Could it be that he found them to be in order, as he found Exhibit A to be? This court is not now in a position to determine the correctness of his complaint before us nor has counsel sought to produce before us the actual documents filed for the use of the Justices of the court below. It has, therefore, not been established
 5 that inadmissible evidence was relied on by the court below in reaching its verdict. In any event, Mr. Anyaduba not having objected to the admissibility of these documents in the court below, he cannot do so in this Court. The law was well put by this Court, per Aniagolu, J.S.C., in Chief Bruno Etim & ors v. Chief Okon Udo Ekpe & anor.
 10 (Supra) at pages 36-38:

*"It is a cardinal rule of evidence, and of practice, in civil as well as in criminal cases, that an objection to the admissibility of a document sought by a party to be put in evidence is taken when the
 15 document is offered in evidence. Barring some exceptions where by law certain documents are rendered inadmissible (consent or no consent of the parties notwithstanding) for failing to satisfy some conditions or to meet some criteria, the rule still remains inviolate that where objection has not been raised by the opposing party to the
 20 reception in evidence of a document (or other evidence - see: Chukwura Akunne v. Matthias Ekwuno (1952) 14 WACA 59, the document will be admitted in evidence and the opposing party cannot afterwards be heard to complain about its admission (see Alade v. Olukade (1976) 2 S.C. 183 at 188-9; for Criminal trials see R.v. Hammond (1941) 3 All E.R. 318; R. v. Patel (1951) 2 All E.R.29).
 25 Such exceptions would, among others, include an*

(i) Unregistered instrument required by law to be registered (see: Abdullah Jamal v. Namih Saidi & Anor (1933) 11 NLR 86; Elkali & Anor v. Fawaz (1940) 6 WACA 212; Idowu Alase and Ors. v.flu H & Ors (1965) NMLR 66);

(ii) unsigned deed of grant (or copy of copy thereof). (Abdul Hamid Ojo v. Primate Adejobi & ors. (1978) 3 S.C. 65;

*(iii) Unstamped instrument or document requiring to be
 35 stamped, unless it may legally be stamped after execution and the duty and penalties are paid (See: Routledge v. Mckay (1954) 1 All E.R. 855 at 856; 1 WLR 615 at 617).*

The contention as to the admissibility of those exhibits to which

objection was not raised is clearly misconceived and entirely without substance. "It is not shown that the documents to which Mr. Anyaduba has in this Court taken objection come within the exception to the general rule. I have no hesitation in resolving Issue 5 against the plaintiff/appellant.

In the net result, this appeal fails and it is hereby dismissed. I⁵ affirm the judgment of the court below granting a stay of execution of the judgment of Onyia, J. given on 20/12/90 in the Onitsha Judicial Division of the High Court of Anambra State in Suit No. 0/87/86, pending the determination of the appeal to the Court of Appeal¹⁰ against the said judgment.

I award N1,000.00 costs of this appeal to the defendants/respondents.

15

BELGORE JSC

I read in advance the draft of the judgment of my learned brother, Ogundare, J.S.C. with which I am in full agreement. The grounds of appeal raise substantial points of law that cannot at this stage be ignored. For this reason alone the appeal ought to be heard²⁰ and order for stay of execution given by the Court of Appeal ought to be upheld. (See Balogun v. Balogun (1969) 1 All NLR 349; Okafor v. Nnaife (1987) 4 NWLR (Pt. 64) 29, and Lijadu v. Lijadu (1991) 1 NWLR (Pt. (69) 627.

For the foregoing and the fuller reasons in the judgment of my²⁵ learned brother Ogundare, J.S.C. which I adopt as mine, I also dismiss this appeal with N1,000.00 as costs to the respondents.

30

OLATAWURA JSC

I had a preview of the judgment delivered by my learned brother Ogundare, J.S.C. I agree with his reasoning and conclusions. I will also dismiss the appeal with costs at N1,000.00 in favour of the³⁵ respondents.

OMO JSC

This appeal is against the exercise by the Court of Appeal of its discretion to grant a stay of execution of the judgment obtained by the respondents in the High Court of Anambra State, Onitsha Judicial Division against the appellant ordering it to pay to the respondents the sum of N588,353.70 in respect of goods sold to it by the respondents. Two main reasons were given by the Court of Appeal for granting the application for stay. The first is respondents' inability to comply with the order made by the trial court for them to deposit N500,000.00 as a condition for stay of further proceedings, on the ground of "poverty", in consequence of which they cannot prosecute their appeal against that judgment. I agree entirely with my learned brother, Ogundare, J.S.C. that this first reason is untenable. I also note that learned counsel for the respondents seems to have conceded this point. The second reason is that the appeal raises substantial grounds of appeal vide Balogun v. Balogun (1969) 1 All NLR 349; Okafor v. Nnaife (1987) 4 NWLR (Pt. 64); 29 (136/137); Lijadu v. Lijadu (1991) 1 NWLR (Pt. 169) 627. The grounds of appeal have been set out in the lead judgment and I do not propose to set them out further here. It is enough for me to agree with my learned brother that some of them are very substantial and raise issues which are deserving of close consideration. Since the order of the Court of Appeal appealed against can be anchored on this ground (reason) alone, I also see no reason for interfering with the exercise of its discretion by the court below.

For these reasons, and the more detailed reasons given by my learned brother, Ogundare, J.S.C. in his judgment, which I have been privileged to read in draft, and I am in full agreement with, I also dismiss this appeal with N1, 000.00 costs to the respondents.

OGWUEGBU JSC

I have had the advantage of reading in draft the judgment just delivered by my learned brother, Ogundare, J.S.C. I agree with his reasons and conclusion. I adopt them as mine. The appeal is accordingly dismissed with N1, 000.00 costs to the respondents.