

SUPREME COURT OF NIGERIA
 13TH JUNE, 1995. SC. 223/1994
CORAM:- M.L. UWAI, A.B. WALL, I.L. KUTIGI,
E.O. OGWUEGBU, Y.O. ADIO, JJSC

ANDU MAKINDE (HEAD OF FAMILY)

& 9 OTHERS

.... APPELLANTS/APPLICANTS

AND

DAWODU AKINWALE & OTHERS

..... RESPONDENTS

STAY OF EXECUTION - Dismissal of claim to declaration of title to land - Since this order is not executory - Whether a stay can properly issue. **STAY OF EXECUTION** - Jurisdiction - Land dispute - Maintaining the status quo ante - Stay cannot be granted - Were parcel of land in issue is outside the area litigated upon.

FACTS

The appellants/applicants secured judgment against the respondents in an action for declaration and injunction before the Ogun State High Court, Ilaro. Respondents appeal to the Court of Appeal was partially successful as that court dismissed the appellants' claim. The appellants appealed to the Supreme Court. Respondents started molesting appellants in respect of an area that does not fall within the parcels of land in dispute. Appellants filed an application for stay of execution of Court of Appeal's judgment for an order maintaining the status quo ante and for an injunction.

The Court of Appeal refused the application. The appellants have now brought the application before the Supreme Court. The apex court has to determine whether the appellants' application can be granted given the prevailing circumstances.

HELD (Unanimously dismissing the application per lead ruling of **ADIO JSC**)

Stay of execution - Dismissal of claim

1. An order dismissing a plaintiff's claim to declaration of title to land does not appear to require the defendant to cause any execution of the judgment to be carried out. It may, therefore, be argued that there is no execution of the judgment which is to be stayed. This is because a stay of execution only prevents the plaintiff or beneficiary of the judgment or order from putting into operation the machinery provided by the law for the execution of a judgment or order, as the case may be. An order for stay of execution pending an appeal, therefore, can only be granted in respect of an executory judgment or order. There is nothing, in the case of a judgment or order, which is not executory, to execute in favour of the respondent for which an order for stay can properly

Stay of execution - Jurisdiction

2. As the area, shown in Exhibit “20”, to which the allegations against the respondents by the appellants related was not within the two parcels of land edged green and blue which were the parcels of land in dispute, in the substantive case, this court has no jurisdiction to make an order, in this suit, affecting it. Therefore, if this court makes an order granting the application of the appellants, the order of this court can only, if it is made, affect the parcels of land edged green and blue in Exhibit “20” because they were the parcels of land in dispute in the substantive suit whereas what the appellants want to prevent, in asking for a stay of execution, an injunction or for an order that the status quo ante be maintained were the alleged activities of the respondents in areas outside the parcels of land edged blue and green, respectively. In other words, the order will not be of any real or good use to the appellants, court will not indulge in making a useless order. It has a duty to ensure that does not make an order in vain. (p. 1284 B)

NOTABLE POINT OF INTEREST

ADIO JSC

1. Duty of appellate court to preserve the res

A court from which an appeal lies as well as the court to which an appeal lies has a duty to preserve the res for the purpose of ensuring that the appeal, if successful, is not nugatory. The res, in the present circumstance, which a court of record has an inherent power to preserve, may be tangible or intangible but whichever it is, it is the thing that was in dispute or in controversy between the parties in the substantive suit. (p. 1283 H)

REPRESENTATION

Otumba J. Olu Awopeju with Prince A. O. A. Awopeju for the appellants
Chief A. Fadayiro SAN, with O. Laleye for the respondents

LEAD JUDGMENT BY ADIO JSC

The appellants who are the applicants in this application, brought an action, in the Ogun State High Court, Ilaro Judicial Division, against the respondents for declaration of title, according to Yoruba customary law, to certain parcels of land originally granted by the appellants to the respondents as customary tenants. The parcels of land were edged blue and green respectively, in a survey plan marked Exhibit “20”. The appellants also sought for forfeiture on the grounds of misbehaviour on the part of the respondents; possession of the aforesaid parcels of land; N1,000 damages for trespass; and an injunction to restrain the respondents and their servants or agents from committing further acts of trespass on the said parcels of land. The learned trial Judge gave judgment in favour of the appellants after consideration of the evidence before him and the submissions of the learned counsel for the parties.

Dissatisfied with the judgment, the respondents lodged an appeal to the Court of Appeal. The court below held that the main appeal succeeded.

The judgment of the learned trial Judge was set aside. In its place, the court below made an order dismissing the appellants' claim for declaration of title and injunction. The cross-appeal was also dismissed. Dissatisfied with the judgment, the appellants have appealed to this court.

Subsequently, the appellants brought an application for, inter alia, an order staying execution of the judgment of the court below. The court below refused the application. The appellants have now brought the present application before this court for:-

“(a) An order for a stay of execution of the judgment delivered by the Court of Appeal, Ibadan Division, on the 11th July, 1994, whereby both sets of defendants/appellants/respondents claimed to have been granted the whole of plaintiffs' land comprised in Exhibit “20” which is the subject-matter of the proceeding wherein there was no Counter claim by any of the defendants.

(b) An order that status quo ante be maintained pending the final determination of the appeal herein.

(c) An injunction to restrain both sets of defendants from going into plaintiffs' land outside the parcels of land granted by the plaintiffs as found by the trial High Court, to wit parcels edged Blue and Green respectively, in the aforesaid Exhibit “20”.

The application of the appellants was supported by an affidavit. In it the main allegation made by the appellants against the respondents was that the respondents had persisted in molesting the appellants and their (appellants') tenants outside areas granted them by the appellants as their (respondent's) customary landlords, that is, the parcels of land edged green and blue, respectively, in Exhibit “20” as found by the High Court. Though the respondents in a counter-affidavit denied the allegations, it is however, important to set out the relevant paragraphs of the appellants' affidavit in support of their application, which are as follows:-

“11. In spite of the appeal lodged against the judgment of the Court of Appeal the defendants still persisted in molesting the plaintiffs and their tenants outside the areas granted them by the plaintiffs as their Customary overlords to wit parcels edged green and blue within Exhibit 20.

12. The defendants persisted in claiming the whole of plaintiffs' land by virtue of the judgment of the Court of Appeal delivered on 11th July, 1994, and got the Police Officers in the area to construe the judgment as such notwithstanding the fact that none of the two sets of defendants filed any counter-claim in the action.

26. The claim by both sets of defendants to the whole of our Idota Family land will surely ruin the plaintiffs' family and deprive us of our means of subsistence and the ability to prosecute this appeal.

27. The areas granted by the plaintiffs' Family to the two sets of defendants are the areas edged green and blue within Exhibit 20, the subject-matter of the proceeding.

28. I am sure that pending the determination of the appeal herein both sets of defendants will not be damnified or prejudiced if ordered to confine themselves within the areas of their grants by the plaintiffs at Origo as found by the High Court on two successive occasions.

29. Nobody will be damnified if the status quo ante is maintained pending the determination of the appeal herein.

30. I know as a fact that unless restrained both sets of defendants will continue to parade the judgment of the Court of Appeal as a weapon and charter of ownership of all the land belonging to the plaintiffs, to wit Exhibit 20 which is at present in the Court of Appeal Registry and is also herein relied upon by the plaintiffs/respondents/appellants.

When the application came up for hearing before us, the learned counsel for the appellants made submissions based on the main grounds stated in the affidavit in support of the application, to wit, that inspite of the appeal, lodged against the judgment of the Court of Appeal, the respondents still persisted in molesting the appellants and their tenants outside the areas granted them by the appellants as their (respondents') overlords, that is, the parcels of land edged green and blue in Exhibit "20" and that the respondents persisted in claiming the whole of the appellants' land by virtue of the judgment of the Court of Appeal. The respondents' position, on the basis of the submissions of their learned counsel, was that the appellants' application was misconceived and should be dismissed.

This application has raised some fundamental issues. One was that the court below allowed the main appeal against the judgment of the learned trial Judge. The court below then set aside the judgment of the learned trial Judge and substituted it with an order dismissing the appellants' claim for declaration of title and an injunction. An order dismissing a plaintiff's claim to declaration of title to land does not appear to require the defendant to cause any execution of the judgment to be carried out. It may, therefore, be argued that there is no execution of the judgment which is to be stayed. This is because a stay of execution only prevents the plaintiff or beneficiary of the judgment or order from putting into operation the machinery provided by the law for the execution of a judgment or order, as the case may be. An order for stay of execution pending an appeal, therefore, can only be granted in respect of an executory judgment or order. There is nothing, in the case of a judgment or order, which is not executory, to execute in favour of the respondent for which an order for stay can properly issue. See *Government of Gongola State v. Tukur* (1989) 4 NWLR (Pt. 117) 592. To the extent that the application of the appellants was for a stay of execution of a judgment which the respondents could not cause to be execution, it may be argued that the application of the appellants for a stay of execution was misconceived.

The foregoing is not the end of the matter. A court from which an appeal lies as well as the court to which an appeal lies have a duty to preserve

the res for the purpose of ensuring that the appeal, if successful, is not nugatory. See Kigo (Nigeria) Ltd.v. Holman Bros. (Nig.) Ltd. (1980) 5-7 Sc. 60, at pp. 70-72. The res, in the present circumstance, which a court of record has an inherent power to preserve, may be tangible or intangible but whichever it is, it is the thing that was in dispute or in controversy between the parties in the substantive suit. The question then is whether the present appellant's application is competent bearing in mind what were alleged in the appellants' affidavit, which clearly showed that the complaints against the respondents related mainly and only to the land in Exhibit "20", other than the two parcels of land edged green and blue, respectively, that, were the parcels of land in dispute in the substantive suit. As the area, shown in Exhibit "20", to which the allegations against the respondents by the appellants related was not within the two parcels of land edged green and blue which were the parcels of land in dispute, in the substantive case, this court has no jurisdiction to make an order, in this suit, affecting it. Therefore, if this court makes an order granting the application of the appellants, the order of this court can only, if it is made, affect the parcels of land edged green and blue in Exhibit "20" because they were the parcels of land in dispute in the substantive suit whereas what the appellants want to prevent, in asking for a stay of execution, an injunction or for an order that the status quo ante be maintained were the alleged activities of the respondents in areas outside the parcels of land edge blue and green, respectively. In other words, the order will not be of any real or good use to the appellants. A court will not indulge in making a useless order. It has a duty to ensure that it does not make an order in vain. See Nigerian National Supply Co. Ltd. v. Sabana & Co. Ltd. & Ors. (1988) 2 NWLR (Pt. 74) 23. If the allegations being made by the appellants against the respondents are true, the appellants' remedy, if any, is not an order, in the present suit, for a stay of execution, an injunction or an order that the status quo ante be maintained pending the final determination of the appeal.

The application does not succeed and it is hereby dismissed with N1,000.00 costs to the respondents.

G UWAIS JSC

I have had the opportunity of reading in draft the ruling read by my learned brother Adio, J.S.C. I entirely agree that the application be dismissed with N1,000.00 costs to the respondent.

WALI JSC

H I have had the privilege of reading before now the ruling of my learned brother, Adio J.S.C., and I entirely agree with it.

For the same reasons contained in the Ruling, the application for a stay of execution fails and it is accordingly refused with N1,000.00 costs to the respondents.

KUTIGI JSC

I agree with the conclusion of the ruling just delivered by my learned brother Adio J.S.C. which I read before now. The respondents are without doubt the occupiers of land edged red and claimed by the appellants in the Survey Plan Exhibit 20. The appellants claimed that the respondents are their customary tenants in respect of the areas verged “green” and “blue” respectively, all within the larger area verged “red” in Exh. 20. The Court of Appeal found that the appellants have not established their title to any portion of the entire area verged “red” in Exh. 20 and dismissed appellants’ claims in their entirety.

The judgment on the facts is therefore not capable of being positively executed or enforced against the appellants/applicants. Consequently there is nothing to be stayed (See Government of Gongola State v. Tukur (1989) 4 NWLR (Pt. 117) 592. The application having failed it is hereby dismissed with N1,000.00 costs to the respondents.

OGWUEGBU JSC

I have had the advantage of reading in advance the ruling just delivered by my learned brother, Adio, J.S.C. I agree with him that the application should fail. It is misconceived. I too, dismiss the same with costs against the applicants as ordered by my brother, Adio, J.S.C.