

SUPREME COURT OF NIGERIA
27TH FEBRUARY, 1994, SC. 110/1995
M.L. UWAI, I.L. KUTIGI, E. O. OGWUEGBU,
U. MOHAMMED, S. U. ONU, JJSC.

BIOCON AGROCHEMICALS (NIG) LTD & OTHERS DEFENDANTS/APPELLANTS/
APPLICANTS

AND

KUDU HOLDINGS (PTY) PLAINTIFFS/RESPONDENTS
LTD & ANOTHER..

APPEALS - Stay of proceedings - Where record of appeal is pending before the Supreme Court -Any application including stay of proceedings - Can directly be made to the Supreme Court.

PRACTICE & PROCEDURE - Stay of proceedings - Whether prayed for before the lower court - As to entitle applicants to move the Supreme Court - For a stay of the High Court proceedings.

PRACTICE & PROCEDURE - Stay of proceedings - Discretion of court - Whether the facts warrant granting of the application.

FACTS

Before the Supreme Court, the appellants/applicants filed a motion on notice praying for enlargement of time to appeal and an order staying further proceedings in the court of trial. Respondents opposed only the prayer for stay of proceedings on the ground that as that application was not made in the lower courts, it cannot now be made before the Supreme Court in view of the provisions of Order 2 Rule 28 Sub-Rules (1) & (4). It was submitted that the applicants have not shown any special circumstance why the proceedings should be stayed.

HELD (Unanimously granting the application per lead ruling of **KUTIGI JSC**)
Stay of proceedings - Whether prayed before the lower court

1. The record shows on page 49 that the applicants in the Court of Appeal prayed under prayer (4), for an order Staying further proceedings before the trial High Court. Clearly on the relevant date 16th March 1995 when the application was heard there was only one application before the Court of Appeal which consisted of six prayers. I am therefore inclined to agree with appel

lants/applicants' counsel that in fact all the six (6) prayers (including prayer (4) for stay of further proceedings), in the application before the Court of Appeal were dismissed by that court in its ruling of 7th June 1995 as could be seen from the conclusion of the ruling above. By bringing the present application the applicants have therefore not in my view violated the provisions of Order 2 Rule 28(4) of the Supreme Court Rules. (p.446 F)

Appeals - Stay of proceedings.

2. I must also add that the true position here now is that this Court has already received the record of appeal compiled by the appellants/applicants and the appeal having been entered in the Cause List; any application thereof including applications for stay of proceedings should be made direct to this Court, (p. 447 A)

Stay of Proceedings - Discretion of court

3. Therefore this being an interlocutory application and without making any observation on the facts which might appear to pre-judge the main issue or issues in the proceedings relative to this application, I am convinced on the facts that this is a proper case in which I can exercise my discretion in favour of the appellants/applicants and make an order staying further proceedings in the court of trial pending the determination of their appeal lodged in this Court. It appears clearly from the affidavit evidence before the court that the Sales Agreement between the Plaintiffs and the Defendants on one hand, and the Letter of Credit issued by the Plaintiffs to the Intervener as assignee on the other hand, both relate to one and the same proceeds of sale of fish. The appeal is ultimately about the refusal of the trial High Court to join the Intervener as a co-defendant. Clearly if that appeal succeeds and the Intervener is ordered to be joined as such, then it would in my view render such an order nugatory if it should turn out that the trial before the High Court has been concluded. Simply stated any act which will tend to render any order of an appeal court nugatory will vigorously be resisted. (p. 447 E)

REPRESENTATION

A. J. Owonikoko for the Applicants/Simon-Hart for the Respondents

CASES REFERRED TO

Gombe v. P.W. (Nigeria) Ltd (1995)6 NWLR (pt. 402) 402 at 421- 422

Mohammed v. Olawunmi (1993) 4 NWLR (Pt. 287) 254 at 283-284

Coker v. Adeyemo (1965) 1 All NLR 120 Nwabueze v. Nwosu (1988) 4 NWLR (Pt. 88) 257

International Agricultural Industries Ltd. v. Chin Bros (1990) 1 NWLR (Pt. 124) 70

Ogunremi v. Dada (1962) 1 All NLR 663

Adewoyin v. Adeyeye (1962) 2 All N.L.R. 108

Ezomo v. A.G. Bendel State (1986) 4 N.W.L.R. (Part 36) 448

RULES REFERRED TO

Supreme Court Rules 1985 0.2 r. 28(1) & (4)

LEAD RULING BY KUTIGI, JSC

The Appellants/Applicants by Motion on Notice prayed for-

1. AN ORDER enlarging the time within which the Appellants/Applicants may file records and Appellants' brief of argument for the purpose of determining the appeal herein.

2. AN ORDER deeming as having been properly filed the Appellants brief of argument dated 4th August 1995 and the records of appeal filed, along with this application as sufficient records for the effectual determination of the appeal herein lodged.

3. AND ORDER staying further proceedings in the court of trial in Suit No. LD/3351/93 pending the hearing and final determination of the appeal lodged in this Court on the 21st day of June 1995.

GROUND FOR THE APPLICATION

(i) Leave to appeal was granted on 21st day of June 1995 and Notice of Appeal was filed same day.

(ii) Records of appeal ought to be compiled and filed by Appellants within 14 days after ground (i) but Judges notes of Appeal could not be obtained within time, thus necessitating this application.

(iii) Application for stay of proceedings in the court of trial was refused by the Court of Appeal along with refusal of leave to appeal ruling (sic) of trial court dated 2nd December 1994.

The motion is supported by a 29-paragraph affidavit sworn to by one Michael Udoh. Paragraphs 3 - 17 read thus -

"3. That on 2nd December, 1994 the learned trial judge refused leave to allow the 4th Appellant & Intervener join as a defendant in this and also to file a counter claim against the plaintiffs (Respondents in this appeal)

4. That a timely application filed in the trial court for appeal the ruling by the Appellants who were dissatisfied with same was struck out due

to lapse of time before it could be taken on 22nd December, 1994.

5. That upon refusal by the High Court the Appellants sought fresh leave in the Court of Appeal to appeal against the ruling by an application dated 9th December, 1994.

6. That on 7th day of June, 1995 the Court of Appeal delivered a ruling whereby the application for leave and other ancillary prayers in the motion papers were all refused and dismissed.

7. That being again dissatisfied with the ruling of the Court of Appeal the Appellants sought leave to appeal against the same to the Supreme Court on 12th June, 1995.

8. That on 21st June, 1995 the Court of Appeal granted leave to Appeal against its said ruling and a notice of appeal was accordingly filed on same day.

Attached herewith and marked Exhibits "S.C.1 and "S. C. 2" are the proposed Notice of Appeal to the Court of Appeal and the Notice of Appeal to the Supreme Court.

9. That trial in the High Court has not opened in this case owing to pending applications in the Court of Appeal for: Leave to Appeal and Stay of Proceedings which have been dismissed.

10. That the refusal of leave and stay of proceedings by the Court of Appeal are amongst the grounds of appeal to this Court.

11. That unless the trial in the High Court is stayed pending the appeal to this Court the 4th Appellant (intervener) whose joinder in the suit by the trial court was refused would be shut out from the proceedings.

12. That the 4th Appellant (intervener) is the undenied irrevocable assignee of the sum of US \$332,250 which is the subject of the plaintiffs (Respondents) claim in the High Court. Attached herewith and marked Exhibit "S. C. 3" is a copy of the instrument of assignment by the Respondents to the 4th Appellant.

13. That the 1st - 3rd Appellants admit and are willing to pay the said sum of US \$332,250 to whoever the Court might find entitled as between the Respondents and the 4th Appellant upon the joinder of the latter in the suit.

14. That the Respondents do not deny having irrevocably assigned the sum in question to the intervener but still refuse to have the intervener to join in the action to effectually and conclusively resolve the competing rights of the parties.

15. That the transaction leading to this suit is by agreement between the parties subject to the exclusive jurisdiction of the Court of Na

mibia but the Respondents have sought to enforce the same in Nigeria to overreach the 4th Appellant and prevent it from getting its due inNambia where the money was contracted to be paid.

16. *That there is a pending order made by the trial court holden a substantial part of the money in dispute in an escrow account kept with the 3rd Appellant to abide the outcome of the case, hence the 4th Appellant could not be paid even though its right to the money is not disputed.*

17. *That A.J. Owonikoko Esq of counsel informed me and I verily believe that unless proceedings in the trial court is stayed, judgment may be entered for the Respondent pending this appeal which will make this appeal nugatory and expose 1st - 3rd Appellants to double jeopardy by having to pay the same money to the 4th Appellant having had and admitted notice of assignment of the subject money to it by the Respondents.”.*

The motion was moved by Mr Owonikoko, Learned Counsel for the Appellants/Applicants, who said he was relying on the affidavit in support of the motion. He said the application for Stay of Proceedings was argued in the Court of Appeal which dismissed same. He referred to prayer (4) of the Notice of Motion on page 49 of the record and also to page 70 will the Court of Appeal “dismissed the application in its entirety”. He referred the Court to the case of Gombe v. P.W. (Nigeria) Ltd. Ors (1995) 6 NWLR (Pt. 402) 402 at 421 - 422.

Responding, Mr Simon-Hart Learned counsel for the Respondents said he was not opposing prayers (1) & (2) above. He was however, opposing prayer (3) for Stay of Proceedings in the Court of trial. He relied on the Counter Affidavit. He said the applicants have not made the same or similar application in the High Court or in the Court of Appeal. He cited Order 2 Rule 28 Sub-Rule (1) & (4) of the Supreme Court Rules 1985 (as amended) and the case of MOHAMMED & ANOR v. OLAWUNMI & ORS (1993) NWLR (Pt. 287) 254 at 283 - 284. It was also submitted that the applicants have not shown any special circumstance why the proceedings should be stayed. He said granting a stay of proceedings would work great hardship on the plaintiffs/respondents who have been waiting for over two years for hearing to commence. It was further contended that the intervener/applicant not being a necessary party to the suit would in no way be prejudiced if stay is refused. The Court was urged to refuse the prayer for stay of proceedings.

Now, Paras. 4 - 13, 16, 17 & 20 of the Counter-Affidavit, follows -

“4. That in its Ruling delivered on the 2nd day of December, 1994 the Lagos High Court, dismissed the 4th Appellants application to join as a

defendant in these proceedings on the ground that the 4th Appellant was not a necessary party to this suit and that the Court had no jurisdiction to hear the 4th Appellant/Intervener's claim in Nigeria.

5. *That the Appellants being dissatisfied with the Ruling of the trial Court subsequently sought Leave to appeal against the said Ruling of the before the Court of Appeal, Lagos.*

6. *That the Court of Appeal in its Ruling delivered on Wednesday the day of June, 1995 dismissed the Appellants/Applicants application for leave to Appeal.*

7. *That the Appellants being dissatisfied with the said Ruling sought leave to Appeal against same and the Honourable Court of Appeal granted the Appellants Leave to Appeal to the Supreme Court on 21st June, 1995.*

8. *That in making their application for Leave to Appeal to the Supreme Court, the Appellants did not request or make any application for lily of proceedings in this suit. Further, the Appellants have also not applied to the trial Court for a stay of proceedings in this suit.*

9. *That the issue of "Stay of Proceedings" was never considered by the Court of Appeal since the only issue canvassed by counsel to the Appellants before it was the issue of "Leave to Appeal".*

10. *That the 1st, 2nd and 3rd Appellants, despite admitting liability on irrevocable Letter of Credit opened in favour of the Respondents in the sum of US \$332, 250, have deliberately refused to make payment thereon and have instead contrived to use these Appeal proceedings to further delay hearing of the Respondents claim against the Appellants in the trial Court.*

11. *That the sum of us \$332,250 due on the Letter of Credit and in which the 4th Appellant claim an interest in, is only a small portion of the entire sum of US \$1,186,823.93 due and owing by the 1st, 2nd and 3rd Appellants to the Respondents, and that the 4th Appellant has no interest in the substantive part of the Respondents claim against the Appellants in this suit.*

12. *That because of the Appellants pending Appeal before the Court of Appeal and this Honourable Court, trial before the High Court had been lily delayed and the Respondents have suffered the postponement of several trial dates including hearings fixed for 1st November, 1994, 21st March, 10th May, 1995 and 11th October, 1995.*

13. *That the Respondents have also suffered the cost and expense of transporting witnesses from Namibia to attend Court and give evidence on the various occasions when the suit had been set down/or hearing.*

16. *That paragraph 15 of the Appellants affidavit in support of their Motion is untrue and a matter of speculation. At no time was the 4th*

Appellant/Intervener privy to the contract for sale of fish, entered into b the Respondents/Plaintiffs and 1st - 3rd Appellants/Defendants, now forming the subject matter of this suit.

17. That paragraph 16 of the Appellants affidavit is only true the
B extent that the trial Court did on the 11th day of November, 1993, order that the proceeds of the sale of fish be deposited into a Prime Deposit Account to carry appropriate interest.

20.- That paragraph 17 of the Appellants affidavit is untrue and misleading by virtue of fact that the 4th Appellant/Intervener has at time
C made claim against the 1st -3rd Appellants/Defendants in this suit, But rather has sought to be joined as a Co-defendant/Counter-Claimant against the Respondents/Plaintiffs claim in this suit, Further, the 4th Appellant cannot claim against the 1st – 3rd Appellants since the 4th Appellant was not privy to the transaction for the sale of the fish forming the sub, matter of this suit. ”

D The Applicants filed a Reply to the Counter-Affidavit which I need not reproduce here.

Prayers (1) & (2) were rightly in my view not opposed by tear counsel for the Respondents since all the parties have a duty to see that the interlocutory appeal is disposed of as quickly as possible to allow substantive suit
E proceed for hearing. The problem here is with prayer for a stay of proceeding which was vigorously opposed by respondents’ counsel.

It was contended that because the applicants did not make, application for stay of proceedings in the Court of Appeal, they cannot validly make the same application in this Court relying on the provisions of Order 2 Rule
F 28(1) & (4) of the Supreme Court Rules. Clearly the record shows on-page 49 that the applicants in the Court of Appeal prayed under prayer (4), for an order Staying further proceedings before the trial High Court. On page 63 the record reads-

G “A. J. Owonikoko for the Applicant A. Simon-Hart for the Respondent Owonikoko: I move in terms of my application”

And Ayoola J.C.A. concluded his leading ruling on page 70 thus -

“In view, a prima facie good cause why the appeal should be heard has not been shown and I would dismiss the application in its entirety”.

H Clearly on the relevant date 16th March 1995 when the application was heard there was only one application before the Court of Appeal consisted of six prayers. I am therefore inclined to agree with appellants/applicants’ counsel that in fact all the six (6) prayers (including for stay of further proceedings), in the application before the Court of Appeal were dismissed by

that court in its ruling of 7th June 1995 as could be seen from the conclusion of the ruling above. By bringing the present application the applicants have therefore not in my view violated the provision of Order 2 Rule 28(4) of the Supreme Court Rules. I must also add that the true position true position here now is that this Court has already received the record of appeal compiled by the appellants/applicants and the appeal having been entered in the Cause B List; any application thereof including applications for stay of proceedings should be made direct to this Court (See COKER v. ADEYEMO & ANOR (1965) 1 All NLR 120.

It is evident from the affidavit and counter affidavit, and the findings of the lower courts too, that the Intervener/ Applicant is the assignee/beneficiary of the Letter of Credit No, ACB/93/0020/BROAD/002 assigned the Plaintiffs/Respondents to the Intervener/Applicant for value, which formed part of the plaintiffs'/Respondents' claim against the Defendants/Applicants. The transaction which is the subject matter of action in the High Court is a contract for the sale of fish in which the Plaintiffs/Respondents were involved as sellers and the Defendants/Applicants as the buyers. When the Defendants and the Intervener sought to join the Intervener as the 4th Defendant, the High Court dismissed the application on the ground, amongst others, that the Intervener was not a necessary party as its joinder will in no affect the Plaintiffs' claim against the Defendants. The Court of Appeal dismissed the application for leave to appeal against the ruling of the High Court by the Defendants and the Intervener but granted them leave to appeal its own Ruling to this court. C D E

Therefore this being an interlocutory application and without making any observation on the facts which might appear to pre-judge the main issue or issues in the proceedings relative to this application, I am convinced on the facts that this is a proper case in which I can exercise my discretion in favour of the appellants/applicants and make an order staying further proceeding in the court of trial pending the determination of their appeal lodged in this Court. It appears clearly from the affidavit evidence before the court that the Sales Agreement between the Plaintiffs and the Defendants on one hand, and the Letter of Credit issued by the Plaintiffs to the Intervener as assignee on the other hand, both relate to one and the same proceeds of sale of fish. The appeal is ultimately about the refusal of the trial High Court to join the Intervener as a co-defendant. Clearly if that appeal succeeds and the Intervener is ordered to be joined as such, then it would in my view render such an order nugatory if it should turn out that the trial before the High Court has been concluded. Simply stated any act which will tend to any order of an appeal court nugatory will vigorously be resisted (see NWABUEZE v. NWOSU F G H

(1988)4 NWLR (Pt. 88). 257, INTERNATIONAL AGRICULTURAL INDUSTRIES LTD. v. CHIKABROS (1990) 1 NWLR (Pt. 124) 70.

The application therefore succeeds and it is allowed. Consequently it is hereby ordered thus -

B (1) Time for filing the record of appeal and Appellants' brief is extended up to today.

(2) The record of appeal and Appellants' brief already filed on 10/8/95 and 8/11/95 respectively are deemed properly filed.

C (3) Further proceedings in the trial High Court are hereby stayed pending final determination of the appeal lodged in this Court.

(4) The Respondents in the application are awarded costs of N 100.00 only.

D **UWAIS CJN**
Also agreed with the lead ruling

E **OGWUEGBU JSC**
I have had a preview of the ruling just delivered by my learned brother Kutigi, J.S.C. I agree with it and have nothing to add.

The application succeeds. I abide by the consequential orders including the order as to costs made in his ruling.

F **MOHAMMED JSC**
I have had the advantage of reading the ruling just delivered by my learned brother, Kutigi, J.S.C. and I agree with him that further proceedings in the trial High Court be stayed pending the final determination of the appeal lodged in this court. I abide by other orders made by my learned brother
G including the award on costs.

H **ONU JSC**
I had a preview of the Ruling of my learned brother, Kutigi, J.S.C. before now and with it I agree.

By way of emphasis, I wish to say that it having been demonstrated on the preponderance of affidavit evidence before this court wherein appeal had been shown to have been entered before now (See Ogunremi v. Dada (1962)1 All NLR. 663; Adewoyin v. Adeyeye (1962)2 All N.L.R. 108 and Ezomo

v. A.G. Bendel State (1986)4 N. W.L.R. (Part 36) 448) and that the Intervener/ Applicant is the assignee/beneficiary of the Letter of Credit No. ACB/93/0020/ BROAD/002 assigned by the Plaintiffs/ Respondents to the Intervener/ Applicant for value and *which* formed part of the Plaintiffs/Respondents' claim against the Defendants/Appellants, thus B interweaving the fate of the Intervener/Applicant's case with that of Appellants/Applicants' vis-a-vis Plaintiffs/Respondents', this is an appropriate case in which to grant the application herein sought. This is the moreso, that the requirements of Order 2 Rules 28(1) and (4) of the Supreme Court Rules have, in my firm view, been clearly satisfied.

For these and the fuller reasons contained in the Ruling of my learned brother Kutigi, J.S.C. I too will grant the application. I make the same consequential orders as contained therein inclusive of those for costs.