

**SUPREME COURT OF NIGERIA**

5TH JUNE, 1998. SC. 97/1997

**CORAM:- M. L. UWAIS CJN, I. L. KUTIGI, E. O. OGWUEGBU,  
S. U. ONU, A. I. IGUH, JJSC.**

CHIEF D. S. YARO ..... APPELLANT/APPLICANT

AND

AREWA CONSTRUCTION LTD.

(In Receivership under Alhaji J. A. A. Adeniyi

as Receiver/Manager) ..... RESPONDENTS

2. UNITED BANK FOR AFRICA LTD.

3. ALHAJI MUDI YABO MOHAMMED

(Joined by Order of Court.)

---

***STAY OF EXECUTION*** - Executory relief - Where the courts did not grant any executory relief in respect of the property in dispute - There is nothing to be stayed.

***STAY OF EXECUTION*** - Dismissed claims - For the purpose of maintaining the status quo pending the determination of appeal - Stay of execution is not an appropriate remedy - The applicant's claims having been dismissed.

**FACTS**

The plaintiff/appellant/applicant in the Kano High Court claimed declaratory reliefs and damages against the 1st and 2nd defendants/respondents in respect of the property known as plots 157/159 Club Road, Kano. Both defendants counter claimed separately. The learned trial judge in a reserved judgment dismissed the claims of the plaintiff while the counter claims succeeded. The plaintiff's appeal to the Court of Appeal failed in respect of his claims which were dismissed by the trial judge. His appeal against the award of N100,000.00 general damages made in favour of the 2nd defendant also failed, while his appeal succeeded in respect of the counter claim of the 1st defendant. The court

accordingly dismissed the counter claim of the 1st defendant.

Dissatisfied with the confirmation by the Court of Appeal of the dismissal of his claims by the trial court, the plaintiff lodged an appeal to the Supreme Court. The plaintiff unsuccessfully applied to the Court of Appeal for stay of execution of that judgment pending the determination of the appeal to the Supreme Court. The plaintiff has now further applied to the Supreme Court for the same order. When the application came up for hearing on 26/1/98 the court was intimated that the property in question had been sold by the 1st defendant/respondent to one Alhaji Mudi Yabo Mohammed who was then made a party to the proceedings as the 3rd respondent by the order of the court.

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

***Stay of Execution - Executory relief***

1. On reading through the papers filed in this application, there is no doubt that what the applicant wants to be stayed is any order affecting the ownership and or possession of the property Nos. 157/159 Club Road, Kano, subject matter of the dispute in the case. But as rightly submitted by learned counsel for the respondents, there was no executory relief granted by the courts in respect of the property in dispute, the plaintiff/applicant's claims having been dismissed in their entirety. I agree with them that there is nothing to be stayed in respect of the property in dispute.<sup>5</sup> (p. 1491 D)

***Stay of execution - Dismissed claims***

2. I equally agree with them too, that for the purpose of maintaining the status quo and preserving the res, pending the determination of the appeal, which is what the applicant actually wants, stay of execution is not an appropriate remedy, as there is no judgment to be executed, the plaintiff/applicant's claims being dismissed (see AKUNNIA V. A-G- ANAM

---

<sup>5</sup> See also *Makinde v. Akinwale* (1995) 10 KLR 1280 where a similar decision was reached by the Supreme Court

BRA STATE (1977) 5 SC. 161). I am therefore clearly of the firm view that since the remedy is a wrong one, the relief sought is not the kind we would grant. It is therefore dismissed. (p. 1491 F)

## **NOTABLE POINTS OF INTEREST**

### **KUTIGIJSC**

*1. Property in dispute is not to be interfered with while an appeal is pending*

I must however sound a note of warning. Although this application for stay of execution has failed, we all know by now that the appellant/applicant has appealed against the judgment of the Court of Appeal to this Court. The appeal is still pending. The parties herein must therefore in their own interest realize that they should not in any way interfere with the property in dispute pending the determination of the appeal by this Court even though an appeal does not operate as a stay of execution. (See IKABALA & ORS. v. OJOSIPE (1972) 4 SC. 86). Thus as rightly submitted by Mr. Sofola, SAN., because an appeal is pending, the property is caught by the doctrine of lis pendens and it cannot be over-emphasized that any purchaser of a pendete lite does so at his or her own risk, if the judgment should be over turned on appeal (see OGUNDIANI V. ARABA & ANOR. (supra). As the saying goes "a word is enough for the wise!". (p. 1492 A)

### **IGUHJSC**

*2. Order for a stay of execution - What it connotes*

An order for a stay of execution essentially prevents the plaintiff or a beneficiary of a judgment or order from putting the machinery of the law into operation in the matter of the execution of the judgment. It can only be granted in respect of executory judgments and orders and not otherwise. There has to be a positive judgment for execution before such an order can conceivably arise. Accordingly there cannot be a stay of execution of a judgment or order which does not admit of any execution but merely declares a legal status or right or proclaims the existence or otherwise of a legal relationship but, does not involve an order enforce-

able by execution against a party to the action. It may thus be said that a defendant who has filed an appeal against a declaratory judgment or order or a judgment or order which is not executory or involve enforcement against a party cannot apply for a stay of execution of such judgment or order which by its very nature has no coercive effect and threatens no one. See Okoya and others v. Santilli and others (1990) 1 N.S.C.C. 367 at 380 and 404, Government of Gongola State v. Tukur (1989) 3 N.S.C.C. 214 at 218 etc. (p. 1496 B)

**C**  
**PRESENTATION**

Kehinde Sofola SAN with Abubakar Idris for appellant/applicant

B. Aluko Olokun with Sulu-Gambari for 1st respondent

B. E. Azoroh for 2nd respondent

**D** F. R. A. Williams (Junior) for 3rd respondent

**CASES REFERRED**

Ogundiani v. Araba (1978) 6-7 SC. 55

**E** Okoya v. Santilli (1990) 2 NWLR (Pt. 131) 172

Gongola State v. Tukur (1989) 4 NWLR (Pt. 117) 592

Akunnia v. A-G Anambra State (1977) 5 SC. 161

Ikabala v. Ojosi (1972) 4 SC 86

**F** Government of Gongola State v. Tukur (1989) 3 N.S.C.C. 214 at 218

**LEAD RULING BY KUTIGI JSC**

By Motion on Notice the appellant/applicant prays for the following orders:-

**G** *"(a) an order for enlargement of time within which to apply for stay of execution of the judgment of the lower court;*

*(b) an order staying execution of the judgment delivered by the Court of Appeal on 11th July 1996 pending the hearing and determination of the appeal lodged in this Honourable Court; and*

**H** *(c) such further and or other orders as this Honourable Court may deem fit to make in the circumstances."*

The motion was supported by an affidavit, a Further and Better Affidavit,

and a Reply Affidavit, a reaction to the Counter-Affidavit depose to on behalf of the 1st respondent on 23rd October, 1997.

Paragraph 2, 3, 4, 6, 8, 11, 12, 13, 14, 16, 17, 18, 21, 22, 25 & 27 of the affidavit read as follows:-

*"2. That on the 11th day of July, 1996, the Court of Appeal B delivered judgment in the above matter dismissing the appeal of the appellant. A copy of the said judgment is herewith attached and marked "A".*

*3. That the appellant being dissatisfied with the said judgment promptly filed a Notice of Appeal against the said judgment to the Supreme Court. Copies of the Notice of Appeal and the receipt for filing same are attached herewith and marked "B" and "B1" respectively. C*

*4. That the appellant at the same time promptly filed in the Court below an application for a stay of execution of the said judgment pending the hearing and determination of the appeal. D*

*6. That the said application was subsequently heard on 22nd January, 1997 and ruling thereon was reserved sine die.*

*8. That no hearing notice as to when the ruling was to be given E in the matter was given.*

*11. That upon a search conducted at the Registry, I discovered that ruling on the appellant's motion for stay of execution was delivered on 10th March, 1997 in the absence of all the parties and their counsel in the matter. Attached herewith and marked "C" is a copy of the said ruling. F*

*12. That I am informed by Mr. Kehinde Sofola, SAN. the leading counsel to the appellant and I verily believe that important points of law are involved in the appeal and that the appellant has a very good chance of success in the appeal. G*

*13. That I am further informed by the said Mr. Kehinde Sofola, SAN. and I verily believe that unless a stay of execution pending the hearing and determination of the appeal is granted, the appeal will be rendered nugatory in the most likely event of it being successful. H*

*14. That this Court will be faced with a fait accompli unless the stay applied for is granted.*

16. That the 'res' in this matter is the property known as Plots Nos. 157/159 which has always been in the possession of the appellant.

17. That the appellant has expended huge sums of money in renovating the property in dispute since he was let into possession of same quite apart from huge sums of money paid by him for the purchase of same.

18. That the said property, the subject matter of this suit, has long been encumbered by third party interests.

21. That unless a stay of execution is granted pending the hearing and determination of the appeal, the "res" will be destroyed and all the appellant will obtain, in the most likely event of the appeal being successful, will be a mere barren judgment.

22. That unless a stay is granted, the respondents would take steps to have the property in dispute sold off thereby foistering on the Supreme Court a situation of complete helplessness and rendering nugatory whatever orders this Honourable Court might subsequently make.

25. That it is in the interest of justice that the application for a stay of execution of the decision of the court below is granted pending the hearing and determination of the appeal herein.

27. That I honestly and reasonably believe that the respondents herein would not be prejudiced in any way if this application is granted."

Paragraphs 3-13 of the Further and Better Affidavit also read thus:-

"3. That the pending application for stay of execution of the judgment delivered by the Court of Appeal was filed in this Court on 11th July, 1997 and immediately served on all parties.

4. That the said application was then fixed for hearing on 26th January, 1998.

5. That despite due service of the application, it was only the 1st respondent who reacted thereto through one B. Aluko-Olokun of Counsel.

6. That on the said day the matter came up for hearing, Mr. M. E. Azoro of Counsel of the 2nd respondent filed their counter-affidavit and also intimated the court that he then had instructions to appear for

both respondents.

7. That it was during the course of the proceedings that counsel for the said respondents informed the court for the first time that the property, the subject-matter in dispute, has been sold to one Alhaji Mudi Yabo Mohammed of 32, Bye-Pass Road, Sokoto, the third respondent B herein.

8. That as a result of the above information, this Honourable Court ordered that the said Alhaji Mudi Yabo Mohammed be joined as a party to the proceedings.

9. That the applicant has informed me and I verily believe that since the inception of this action, he has been in possession of the property, the subject-matter of the dispute in this case, and has continuously exercised maximum overt acts of ownership and possession over same without any let or hindrance from anybody. C D

10. That I am further informed by the applicant and I verily believe that the purported sale of the property to Alhaji Mudi Yabo Mohammed is a ruse calculated at pulling wool across the face of the court.

11. That the alleged wrongful, purported sale of the property on 9th August, 1996 was less than a month after the delivery of the Court of Appeal's judgment while the alleged settlement of indebtedness of the 1st respondent to the 2nd respondent was claimed to be in December, 1996, some five months later. E F

12. That the alleged wrongful purported sale clearly took place during the pendency of the proceedings in court in this case.

13. That the respondents will not suffer any prejudice by the grant of this application."

The 1st respondent filed two counter-affidavits on 23/10/97 and 23/1/98 respectively. In the first counter-affidavit it is stated as follows:- G

"3. The 1st respondent has fully repaid the amount by which it was indebted to the 2nd respondent.

4. By a letter dated 18/12/96 the 2nd respondent acknowledged H that the 1st respondent is no more indebted to it. A copy of the said letter is exhibited hereto and marked as Exhibit E. The 1st defendant is no more under receivership.

5. *The 1st respondent raised the money by which it paid off its indebtedness to the 2nd respondent by selling the property No. 157/159 Club Road, Kano in Kano State of Nigeria on 9/8/96.*

B 6. *The fore-going facts in paragraphs 4 and 5 above were disclosed to the applicant in the counter-affidavit which the 1st respondent filed in response to the affidavit of the applicant in support of its motion for stay of execution at the Court of Appeal.*

C 7. *The losses which the applicant may suffer if the appeal to the Supreme Court succeeds and this motion is refused can be adequately compensated by award of costs.*

8. *That the 1st respondent has suffered greatly as a result of this case which has as at now lasted for over ten years by paying large sums of money as interest to the 2nd respondent."*

D In the second counter-affidavit it is also stated thus:-

"5. *The 1st respondent sold the property after the Court of Appeal has given judgment in the appeal before it and before the appellant filed his notice of appeal to the Supreme Court. The appellant had behaved as if he was not going to appeal against the judgment of the Court of Appeal.*

The 2nd respondent on its own part also filed a counter-affidavit. Paragraphs 6, 7, 9, 10, 13, 14, 15, 17, 18, 22, 23 and 24 read:-

F "6. *That on the 2nd of December, 1992, the Kano High Court No. 5 presided over by the Honourable Justice C. N. O. Ubbaonu entered judgment for the respondents in this appeal and especially awarded N100,000.00 (One hundred thousand Naira) as general damages to the 2nd respondent and cost assessed at N5,000.00 (Five thousand naira)*

G *only.*

7. *That the said award was subsequently affirmed by the Court of Appeal, Kaduna Judicial Division in its judgment delivered on the 11th of July, 1996.*

H 9. *That after the dismissal of the appeal of the appellant on the 11th of July, 1996, the appellant filed a motion before the Court of Appeal, Kaduna, dated 3rd October, 1996, seeking to stay the execution of the judgment of that court pending the determination of the appeal to the*



Supreme Court.

10. That the said motion was heard and dismissed by the Court of Appeal, Kaduna, on 10th March, 1997.

13. That as against the 2nd respondent and the judgment debt plus amounting N105,000.00 (One hundred and five thousand Naira) B only, the applicant has not shown the nature of the res he wants the court to preserve pending the hearing and determination of the appeal before this Honourable Court.

14. That paragraph 23 of the applicant's supporting affidavit is wholly untrue and misleading in that it is the 1st respondent that sold the property in question on the 9th of August, 1996, after the judgment of the Court of Appeal and before the present application and appeal before this Honourable Court were filed. C

15. That on Wednesday, the 15th day of October, 1997, at about 2.35 p.m. in my office and in the normal course of my duties, I was informed by B.B. YAVALA, the Deputy General Manager of the 2nd respondent in charge of Debt Recovery North and I verily believe him to be true that the 1st respondent has fully liquidated its indebtedness to the 2nd respondent. D E

17. That after the payment stated in paragraph 15 and 16 above, the 2nd respondent released the title documents to the property situate at Nos. 157/159 Club Road, Kano to the 1st respondent. F

18. That as a result of facts set out in paragraphs 15, 16 and 17 above, the 1st respondent is no longer under any receivership.

22. That the grant of a stay of execution would greatly prejudice the respondents and especially the 2nd respondent since it will lose the business it would have done with the judgment debt. G

23. That the execution of the judgment of the court will not render nugatory any decision arrived at by the Supreme Court.

24. That it will be in the overriding interests of justice to refuse this application." H

When the motion came up for hearing on 26/1/98, Mr. Mike Azoroh counsel for the respondents intimated the court that the property in question Nos. 157/159 Club Road, Kano had been sold by the 1st

respondent to one Alhaji Mudi Yabo Mohammed of 32 Bye-Pass Road, Sokoto, on 9/8/96. Under the circumstances and in view of the nature of the order sought, Mr. Sofola, SAN., for the applicant applied to make Alhaji Yabo a party to the proceedings. The application was granted. He was ordered to be served with the motion papers in the application. He was also ordered in the interim not to sell or in any way whatsoever part with the property before the determination of the application. The application was then adjourned to 10/3/98 for hearing.

On 10/3/98 in view of the depositions in the respondents' counter-affidavits to the effect that the 1st respondent has fully liquidated its indebtedness to the 2nd respondent and that after the payment the 2nd respondent released the title deeds or documents to the property situate at Nos. 157/159 Club Road, Kano to the 1st respondent, Mr. Sofola, SAN., withdrew the motion against the 2nd respondent (U.B.A.) herein. There being no opposition, the motion against the 2nd respondent was then struck-out. We were thus left with the motion against the 1st respondent and the 3rd respondent (Alhaji Yabo) who was joined by our order on 26/1/98 as stated above.

Moving the application, learned counsel for the appellant said he was relying on the affidavit, Further and Better Affidavit and Reply Affidavit. He said the judgment of the Court of Appeal sought to be stayed was delivered on 11/7/96 while the Notice of Appeal was filed within time on 4/10/96. He then referred to the counter-affidavits of the 1st respondent and submitted that it was wrong for it to have sold the property in question when the case is still pending in court. He said if there was a sale at all, then no title passed to the purchaser as the doctrine of lis pendens would apply. He cited the case of OGUNDAINI v. ARABA & ANOR. (1978) 6-7 SC. 55. It was also submitted that since the counter affidavits did not give particulars of sale such as date of sale, purchase receipt, copy of certificate of occupancy or consent of government to sell, the reasonable conclusion was that there was no sale at all and that it was only an attempt to pull the wool across the face of the court. He said the 3rd respondent though served with the motion papers did not deem it fit to challenge applicant's affidavits as he has filed no counter-affidavit.

The court was urged to grant the application as prayed.

Responding Mr. Aluko-Olokun, learned counsel for the 1st respondent submitted that because the judgment of the Court of Appeal confirmed the dismissal of plaintiff/appellant/applicant's case by the trial High Court, there was nothing to be executed and therefore there was nothing to be stayed by this Court. That the remedy being sought is a wrong one. He said the applicant ought to have come by way of injunction and not for a stay of execution when there was nothing to be executed. He said the property in question was sold after the judgment of the Court of Appeal and before the appellant/applicant filed the Notice of Appeal. When pressed by the Court to produce any evidence of sale, counsel replied that he had nothing more to say. He urged the court to dismiss the application. B C

Mr. Williams (Junior) learned counsel for the 3rd respondent also submitted that this is not a case where a stay of execution can be granted. That the plaintiff/applicant went to the High Court and had his claims dismissed. As no executory relief was granted, there is nothing or no judgment to be stayed. The court was referred to a book, Civil Procedure in Nigeria by Fidelis Nwadialo, SAN., paragraph 33.87 at page 728 and the cases of OKOYA v. SANTILLI (1990) 2 NWLR (Pt. 131) 172; and GONGOLA STATE v. TUKUR (1989) 4 NWLR (pt. 117) 592. D E

He said the judgment of the Court of Appeal is not an executory judgment and therefore the relief claimed is not one that this court can grant. We were urged to dismiss the application. F

Mr. Sofola, SAN., in reply referred to the judgments of the Court of Appeal, Exhibit A, at page 15 and that of the High Court, Exhibit AA, at pages 84 & 143 - 144 which he read out, and submitted that they are positive orders made by the High Court which orders the Court of Appeal confirmed, they are therefore executory. G

Now, let us examine carefully the judgments of the two lower courts in order to ascertain their final orders. H

Clearly the judgments of both the High Court and the Court of Appeal (respectively Exhibit AA and Exhibit A) show that the plaintiff/applicant claimed jointly and severally against the two defendants/respon-

dents. Each of the two defendants also counter-claimed individually against the plaintiff.

As for the claims of the plaintiff the learned trial judge said on page 139 of Exhibit AA as follows:-

B *"As I have held that the plaintiff has failed to prove his claims on the balance of probabilities, the plaintiff's claims against the 1st and 2nd defendants are hereby dismissed."*

For the counter-claims of the 1st and 2nd defendants/respondents, the High Court on pages 143-144 also said:-

C *"The counter-claim of the 1st defendant succeeds as follows:-*

D *1. The plaintiff should render account of all monies he collected from the tenants he put at Nos. 157/159 Club Road, Kano and pay same to the 1st defendant. The account to be rendered should start from May, 1985 to date of judgment.*

*2. The plaintiff should vacate the premises and stop collecting rent from the tenants at No.s 157/159 Club Road, Kano from the date of this judgment.*

E *3. The Plaintiff should pay N1 million N1,000,000.00) general damages to 1st defendant.*

*The plaintiff's claims against the 2nd defendant is also dismissed.*

F *The Plaintiff should also pay N100,000.00 (One hundred thousand naira) to the 2nd defendant for breach of contract."*

Dissatisfied with the judgment of the trial court, the plaintiff/applicant appealed to the Court of Appeal, Kaduna Judicial Division. In a unanimous judgment the Court of Appeal in its lead judgment (Exhibit A) said on pages 15-16 thus:-

G *"From all I have said in this judgment I am of the view that the trial judge correctly dismissed the appellant's claims before him and the appeal in respect of that aspect of his judgment is hereby dismissed. The trial judge was also right in awarding the sum of N100,000.00 as general*  
H *damages to the 2nd respondent and I dismiss the appeal as it relates to that award.*

*As for the counter-claims of the 1st respondent it is my view that the 1st respondent failed to prove its claim and the trial judge was wrong*

*in giving judgment in its favour. Accordingly the appeal succeeds in that respect and the judgment of the trial court in favour of the 1st respondent in its counter-claim is hereby set aside and the counter-claim is dismissed."*

From the extract of judgment above it is obvious that the Court of Appeal confirmed the dismissal of all plaintiff's claims. It also dismissed all 1st defendant's counter-claims. The counter-claims of the 2nd defendant were also dismissed except the N100.000.00 (one hundred thousand naira) award of general damages for breach of contract which the High Court made to it. Thus if there is anything to be stayed in the judgment of the Court of Appeal, it is this N100.000.00 award made against the plaintiff/applicant in favour of the 2nd respondent. But as I have earlier stated in this judgment, Mr. Sofola, SAN., learned counsel for the applicant had at the hearing of this application on 10/3/98 withdrawn the motion and or application against the 2nd respondent. We granted the application and there and then struck-out the motion against the 2nd respondent.

**On reading through the papers filed in this application, there is no doubt that what the applicant wants to be stayed is any order affecting the ownership and or possession of the property Nos. 157/159 Club Road, Kano, subject matter of the dispute in the case. But as rightly submitted by learned counsel for the respondents, there was no executory relief granted by the courts in respect of the property in dispute, the plaintiff/applicant's claims having been dismissed in their entirety. I agree with them that there is nothing to be stayed in respect of the property in dispute. I equally agree with them too, that for the purpose of maintaining the status quo and preserving the res, pending the determination of the appeal, which is what the applicant actually wants, stay of execution is not an appropriate remedy, as there is no judgment to be executed, the plaintiff/applicant's claims being dismissed (see OKOYA V. SANTILLI (supra); GONGOLA STATE V. TUKUR (supra); AKUNNIA V. A-G-ANAMBRA STATE (1977) 5 SC. 161). I am therefore clearly of the firm view that since the remedy is a wrong one, the relief sought is not the kind we would grant. It is therefore dismissed.**

I must however sound a note of warning. Although this application for stay of execution has failed, we all know by now that the appellant/applicant has appealed against the judgment of the Court of Appeal to this Court. The appeal is still pending. The parties herein must therefore  
 B in their own interest realise that they should not in any way interfere with the property in dispute pending the determination of the appeal by this Court even though an appeal does not operate as a stay of execution. (See IKABALA & ORS. v. OJOSIPE (1972) 4 SC. 86) thus as rightly  
 C submitted by Mr. Sofola, SAN., because an appeal is pending, the property is caught by the doctrine of lis pendens and it cannot be over-emphasised that any purchaser of a pendete lite does so at his or her own risk, if the judgment should be over turned on appeal (see OGUNDIANI V. ARABA & ANOR. (supra). As the saying goes "a word is enough for  
 D the wise!"

In conclusion, I order as follows:-

- (a) Time within which to apply for stay of execution of the judgment of the court below is extended up to today.
- E (b) Stay of execution of the judgment of the Court of Appeal delivered on 11/7/96 is hereby refused and dismissed.
- (c) Costs of N1,000.00 (one thousand naira) is awarded to each of the 1st, 2nd and 3rd respondents.

F

### UWAIS CJN

I have had the advantage of reading in draft the ruling by my learned brother Kutigi, J.S.C. I entirely agree with his reasoning and conclusion. I have nothing more to add.  
 G

I too accordingly, hereby dismiss the application and adopt the consequential order contained in the ruling of my learned brother Kutigi, J.S.C.

H

**OGWUEGBU JSC**

I have had the privilege of a preview of the draft of the ruling which has just been delivered by my learned brother Kutigi, J.S.C. I agree with his conclusion and the orders made.

The appellant/applicant who was the plaintiff in the High Court of Kano State claimed declaratory reliefs and damages against the 1st and 2nd defendants/respondents in respect of the property known as Plots 157/159 Club Road, Kano. Both defendants counter-claimed separately. The learned trial judge in a reserved judgment dismissed the claims of the plaintiff. The counter-claims succeeded. The plaintiff's appeal to the Court of Appeal failed in respect of his claims which were dismissed by the trial judge and succeeded in respect of N100,000 general damages awarded to the 1st respondent against him. His appeal against the award of N100,000 general damages made in favour of the 2nd respondent failed.

Having appealed to this court against the judgment of the Court of Appeal, the plaintiff/appellant brought the application the subject of this ruling for an order staying execution of the judgment of the court below delivered on 11-7-96 pending the hearing and determination of the appeal lodged in this court.

It is clear from paragraph 16 of the affidavit in support of the motion that the res the subject of litigation between the parties is the property known as Plots Nos. 157/159, Club Road, Kano. It is also the subject matter of the present application. As I said earlier in this ruling, the claims of the plaintiff/appellant/applicant were dismissed by the trial judge and the judgment was affirmed by the court below. That judgment is not executory in the sense that it did not declare the rights of the parties and proceeded to enjoin the defendant not to act in certain way.

I have not seen anything in the judgments of the courts below in so far as the claims of the appellant/applicant are concerned that needs to be enforced against him. A stay of execution only prevents a plaintiff or beneficiary of the judgment or order from putting into motion the machinery of the law and an order for a stay of execution pending appeal can only be made in respect of executory judgment or order. The judg-

ment in the present proceedings is not executory. See Government of Gongola State v. Tukur (1989) 4 N.W.L.R. (Pt. 117) 592, Akunnia v. Attorney-General of Anambra State & Ors. (1977) 5 S.C. 161 at P. 177 and Okoya & Ors. v. Santilli & Ors. (1990) 2 N.W.L.R. (Pt. 131) 172.

B There is therefore nothing to "stay".

In the result, for these reasons and the fuller reasons in the lead judgment I too will dismiss the application. I abide by the order as to costs made in the said judgment.

C 

---

### ONU JSC

Having had the advantage of reading in advance the Ruling of my learned brother Kutigi, JSC just delivered, I agree with his conclusion  
D that this application be and is hereby dismissed.

I wish to add to the leading Ruling by way of expatiation that I am of the firm view having regard to the materials placed before us by the applicant that there is nothing left as res to stay. The applicant's case  
E was dismissed by the trial court and the court below affirmed that decision, leaving only the monetary award of N100,000.00 to be determined at the trial as the singular bone of contention.

Even if the applicant's appeal eventually succeeds, the monetary  
F award can only result in compensation in his favour and no more.

It is for these and the many other reasons proffered in the leading Ruling of my learned brother Kutigi, JSC that I too dismiss this application as lacking in merit. I abide by the consequential orders made including the costs awarded.

G 

---

### IGUH JSC

I have had the privilege of reading in draft the leading ruling just  
H delivered by my learned brother, Kutigi, J.S.C. and I agree entirely that this application is devoid of substance and ought to be dismissed.

The application has arisen as a result of the dismissal on the 11th day of July, 1996 of the appeal of the appellant/applicant by the Court of



Appeal Kaduna Division in this action. The Kano High Court had on the 1st day of February, 1992 dismissed the plaintiff/appellant/applicant's claims against the defendants/respondents in their entirety. The trial court further entered judgment for the defendants/respondents in respect of their counter-claims against the appellant/applicant. B

Dismissing the appeal of the plaintiff/appellant/applicant, the Court of Appeal concluded thus -

*"From all I have said in this judgment I am of the firm view that the trial judge correctly dismissed the appellant's claims before him and the appeal in respect of that aspect of his judgment is hereby dismissed. C  
The trial judge was also right in awarding the sum of N100,000.00 as general damages to the 2nd respondent and I dismiss the appeal as it relates to that award.*

*As for the counter-claim of the 1st respondent it is my view that D  
the 1st respondent failed to prove its claims and the trial judge was wrong in giving judgment in its favour. Accordingly the appeal succeeds in that respect and the judgment of the trial court in favour of the 1st respondent in its counter-claim is hereby set aside and the counter-claim is dismissed." E*

Following this confirmation by the Court of Appeal of the dismissal of the plaintiff/applicant's claims by the trial court, he has now lodged an appeal to this court against the said decision of the Court of Appeal. He has further filed this application which, in the main, is for a stay of execution of the judgment of the Court of Appeal pending the determination of the appeal lodged in the cause. F

I think I ought to point out at this stage that from the contents of the affidavit in support of the application, the res or the subject matter in issue between the parties is the property known as Plots numbers 157/ 159 Club Road Kano. It is this property that is the subject matter of this application for a stay of execution pending appeal. No where in the said application is a stay of execution in respect of the pecuniary award of N100,000.00 general damages to the 2nd defendant/respondent against H  
the plaintiff/appellant/applicant prayed for. It is with these background facts that I will now consider this application.

In the present case, the plaintiff/appellant/applicant filed declara-

B
 tory claims with general damages against the respondents and had his entire claims in respect of the property in issue dismissed. In so far, therefore, as the claims before the court were concerned, no executory reliefs were granted in favour of any of the parties concerning the res or the landed property in dispute.

C
D
 An order for a stay of execution essentially prevents the plaintiff or a beneficiary of a judgment or order from putting the machinery of the law into operation in the matter of the execution of the judgment. It can only be granted in respect of executory judgments and orders and not otherwise. There has to be a positive judgment for execution before such an order can conceivably arise. Accordingly there cannot be a stay of execution of a judgment or order which does not admit of any execution but merely declares a legal status or right or proclaims the existence or otherwise of a legal relationship but, does not involve an order enforceable by execution against a party to the action.

E
F
 It may thus be said that a defendant who has filed an appeal against a declaratory judgment or order or a judgment or order which is not executory or involve enforcement against a party cannot apply for a stay of execution of such judgment or order which by its very nature has no coercive effect and threatens no one. See Okoya and others v. Santilli and others (1990) 1 N.S.C.C. 367 at 380 and 404, Government of Gongola State v. Tukur (1989) 3 N.S.C.C. 214 at 218 etc.

G
 On the facts of this case, it is plain that this is a case in which a stay of execution may not be granted in the absence of an order in the judgment which is enforceable against the appellant/applicant. In other words, there being no judgment to execute, the relief claimed in the present motion cannot be one which this court can grant. This application, if I may say with respect, therefore seems to me misconceived.

H
 It is for the above and the more detailed reasons contained in the leading judgment of my learned brother, Kutigi, J.S.C. that I, too, dismiss this application. I abide by the order for costs therein made.