

SUPREME COURT OF NIGERIA

10TH JULY, 1998. SC. 27/1992

**CORAM:- A. B. WALI, M. E. OGUNDARE, U. MOHAMMED,
S. U. ONU, A. I. IGUH, JJSC**

CITYMARK (WEST AFRICA) LIMITED PLAINTIFF/
RESPONDENT

AND

LAGOS STATE DEFENDANT/APPELLANT
DEVELOPMENT & PROPERTY
CORPORATION

JUDGMENTS - *Benefits* - A judgment creditor is entitled to the full benefits and fruits of his judgment by the court - And nothing less.

JUDGMENTS - *Ability to make down payment* - Of the judgment debt - An undertaking by counsel which clearly amounts to an admission of the appellant's ability to pay - Is binding.

STAY OF EXECUTION - *Equitable Orders* - The Court of Appeal - Possesses far reaching powers to make just and equitable orders - With a view to preserving the res.

STAY OF EXECUTION - *Terms before appeal court* - Court of Appeal Act, section 18 - Powers of the Court of Appeal under it - Are not fettered by the terms of the grant at the lower court.

STAY OF EXECUTION - *New terms* - The Court of Appeal was right to prescribe new terms - Quite distinct from those stipulated by the trial court - So long as they were given within the confines of the law.

STAY OF EXECUTION - *Court of Appeal - Jurisdiction* - To make an order for a stay of execution on terms which may differ from those imposed by the trial High Court - May only be exercised at the instance of

the applicant in the court below.

STAY OF EXECUTION - *Special circumstances - The court has a discretion to grant it - If there are exceptional and special circumstances - To warrant a deprivation of the successful party of the fruits of his judgment - But the onus is on the applicant to establish this.*

STAY OF EXECUTION - *Counter affidavit to the applicant's motion - The Court is entitled to consider such facts put before it - With a view to exercising its discretion judicially and judiciously.*

FACTS

Before the High Court of Lagos State, the plaintiff/respondent on the 9th day of November, 1989, obtained judgment against the defendant/appellant in the sum of N7,787,500.00 with N2,000.00 costs. The defendant having appealed against the said decision moved the trial High Court for a stay of execution of the judgment pending the determination of the appeal. This application was on the 6th day of March, 1990 granted on the following terms inter alia: That the judgment debt be deposited by the applicant in an account to be opened with the Bank of Credit and Commerce International (Nigeria) Limited, Lagos in the joint names of the parties, and that the plaintiff/respondent shall lodge with the chief Registrar of the High Court a Bank Guarantee from the same bank in the sum of the judgment debt.

Being dissatisfied with the aforesaid terms, the defendant subsequently moved the Court of Appeal for better conditions for the grant of its prayer for stay of execution. In its application, the defendant proposed the following conditions and/or terms: That half of the judgment debt be paid to the plaintiff against a guarantee to be given by the plaintiff to return same with interest at the CBN'S ruling rate in the event of the appeal being successful and; that the defendant do give Bank Guarantee in respect of the other half of the judgment debt to pay the sum due under that guarantee with interest thereon at CBN'S interest rate prevailing at the relevant time to the plaintiff in the event of the appeal being unsuc-

cessful. The defendant further deposed in their affidavit inter alia, that they will be hard put to put down physical cash for the amount of the judgment debt. The plaintiff opposed the application. The plaintiff proposed in its counter-affidavit that the judgment debt be paid to it and that it would in turn issue an insurance guarantee to be obtained from a consortium of insurance companies to cover any repayment of the amount in the event of the defendant's appeal succeeding. In its ruling, the Court of Appeal held that the proposal contained in the counter-affidavit of the respondent is a more satisfactory financial arrangement. The defendant has now appealed against this decision to the Supreme Court raising three issues.

ISSUES FOR DETERMINATION

"1. Can the Court of Appeal vary the conditions of stay granted by the trial court at the instance of a Respondent to that application who has not appealed against the terms as set by the trial court.

2. On an application for better conditions for stay from the High Court to the Court of Appeal, can the Court of Appeal impose more stringent terms and conditions than those set by the trial court?

3. What, having regard to the facts of this case, should be the appropriate order and conditions the court should impose for granting stay to the defendant."

HELD (Unanimously dismissing the appeal per lead reasons for judgment of **IGUH JSC**)

Stay of execution - Equitable orders

1. The combined effect of the above provisions of the law and the Rules seems to be that the Court of Appeal, without doubt, possesses very far reaching powers to make just and equitable order or orders in the best interest of the administration of justice with a view to preserving the subject matter in dispute between the parties. These just and equitable order or orders, in so far as applications for a stay of execution are concerned, include those which, in all the circumstances of the case, tend to preserve the res or the subject matter in dispute between the parties and thus prevent any acts which will destroy the subject matter of

the proceedings or foist upon the court, a situation of complete helplessness, or render nugatory, any judgment, order or orders of the Court of Appeal or provide a situation in which whatever happens to the case, and, in particular, even if the appellant succeeds in the appeal, there would be no return to the status quo.³ See Vaswani Trading Co. v. Savalakh and Co. (1972) 12 S.C. 77 at 81 - 82. (p. 1769 B)

Stay of execution - Terms before appeal court

2. Accordingly, it is not the law, that the Court of Appeal in arriving at its decision in an application for a stay of execution pending an appeal must necessarily be confined to the order made by the trial court in order to exercise its discretion or come to a conclusion one way or the other. The powers of the Court of Appeal under section 18 of the Court of Appeal Act, 1976 which are in pari materia with Section 24 of the Supreme Court Act 1960 are not in any way fettered by the terms of the grant in the lower court in an application for stay; and the Court of Appeal may entertain an application for a stay of execution by a person who is dissatisfied with the terms on which he was granted such a stay by the lower court. (p. 1969 F)

Stay of execution - New terms

3. I think the Court of Appeal was absolutely right in the exercise of its discretion to prescribe new terms or conditions, quite distinct and different from those stipulated by the trial court, so long as such new terms or conditions were given in the interest of and within the confines of the law, justice and equity. (p. 1770 C)

Stay of execution - Court of Appeal

4. While, however, the Court of Appeal has the necessary jurisdiction to make an order for a stay of execution on terms or conditions which may

³ In the cases of Jossien Holdings Ltd. v. Lornamead Ltd. (1995) 1 KLR 56 and Funduk Engineering Ltd. v. McArthur (1995) 4 KLR 944 the Supreme Court decided on when a stay of execution will be granted.

differ from those imposed by the trial High Court in granting a similar prayer, the jurisdiction may only be exercised at the instance of the party who had sought the order for stay in the court below. (p. 1770 E)

Stay of execution - Special circumstances

5. The court has a discretion to grant a stay of execution if it is satisfied that there are exceptional and special or substantial reasons or circumstances to warrant a deprivation of the successful party of the fruits of his judgment. See Micheal Balogun v. Dorcas Balogun (1969) 1 All N.L.R. 349 at 351. The Onus is on the party applying for a stay of execution to satisfy the court that in the special circumstances of his case there are some special and exceptional reasons which make the granting of a stay desirable. See Vaswani Trading Company V. Savalakh and Co., (supra). (p. 1771 C)

Stay of execution - Counter affidavit to the applicant's motion

6. In the present case, however, the respondent made no application to the Court of Appeal for any stay. It merely filed a counter-affidavit to the applicant's motion in which averments of facts were deposed to. These facts were neither challenged nor controverted. In my view, it cannot be seriously argued that the Court of Appeal is not entitled to consider such facts put before it with a view to exercising its discretion judicially and judiciously, taking into account the parties' competing rights to justice. See Okafor v. Nnaife (1987) 4 N.W.L.R. (part 64) 129. (p. 1771 F)

Judgments - Benefits

7. The general position of the law is that a judgment creditor is entitled to the full benefits and fruits of his judgment by the court, and nothing less. The maxim is that equity follows the law. I can see no equity in all the circumstances of this case by the apportionment of the financial burden and/or risk in respect of any devaluation of the judgment debt in equal shares as between the parties or in any other proportion whatever. As was rightly observed by the court below, this will tantamount to a debtor

shifting his debt to a creditor under the guise of equitable sharing of some risk. I agree that there is neither equity in this conception nor does it amount to a sound or acceptable commercial practice. (p. 1773 D)

B *Judgments - Ability to make down payment*

8. On the issue of whether or not the appellant would be able to make down payment of the judgment debt, attention must be drawn to the undertaking of learned counsel for the appellant in the trial court. This is contained in the ruling of the learned trial Judge where he observed thus-

C *"Professor Kasunmu -S.A.N., learned counsel for the Applicant/ Defendant also argued in the alternative, that the applicant could pay the judgment debt to the respondent, on terms that the respondent gives a bank Guarantee from a first class Bank, which guarantee should incorporate payment of interest."*

D The above undertaking which clearly amounts to an admission of the appellant's ability to pay the entire judgment debt to the respondent binds the appellant and would easily have influenced both courts below
E in their decisions. I therefore agreed with the court below that the best arrangement in the circumstances is payment of the whole judgment debt by the appellant to the respondent and for the respondent to obtain guarantee bond for the refund of the sum involved with interest from any
F two of the insurance companies in the respondent's further counter-affidavit. (p. 1773 G)

NOTABLE POINT OF INTEREST

ONUJSC

G *1. Stay of execution - Ground of appeal*

Be it noted, however, that it is not always whenever a ground of appeal raises a difficult (recondite) point of law that it constitutes a special circumstance for which a stay of execution can be ordered. Similarly, it is
H not in every case where the grounds of appeal raise arguable points of law that a stay of execution will be ordered. See Okafor v. Nnaife (1987)4 NWLR (part 64) 129; Ajomale v. Yaduat (No.2)(1991)5 NWLR (part 191) 266 and Lijadu v. Ligadu (1991)1 NWLR (part 191)730.(p.1776 G)

REPRESENTATION

Appellant - unrepresented

Chief (Mrs.) C. J. Aremu for the respondent

CASES REFERRED TO

- Vaswani Trading Co. v. Savalakh and Co. (1972) 12 S.C. 77 at 81 -82, B
Deduwa v. Okorodudu (1974) 6 S.C. 21 at 24-26,
Kigo (Nigeria) Ltd v. Holman Bros (Nigeria) Ltd (1980) 5-7 S.C. 60
Oyeti v. Soremekun (1963) 1 All N.L.R. 349 at 351 C
Cogefar SPA v. Nigeria Ports Authority (1972) 1 All N.L.R. (part 2) 509
William v. Busari (1973) 2 S.C. 19
Balogun v. Balogun (1969) 1 All N.L.R. 349 at 351
Nwabueze v. Nwosu (1988) 4 N.W.L.R. (part 88) 257
Construzioni Generali S.P.A. v. Nigerian Ports Authority (1972) 12 SC. D
107 at 111
Guiseppe De Geronimo v. Guiseppe Jannuzelli (1924) 5 NLR 77
Okafor v. Nnaife (1987) 4 NWLR (part 64) 129
Ajomale v. Yaduat (No.2) (1991) 5 NWLR (part 191) 266 E
Lijadu v. Ligadu (1991) 1 NWLR (part 191) 730

STATUTES AND RULES REFERRED TO

- Court of Appeal Act, 1976 s.18 F
Court of Appeal Rules, Order 1 Rule 20 (4) (5) (8)
Supreme Court Act, 1960, s. 4

BOOK REFERRED TO

- Aguda - Practice and Procedure - the Green Book, Article 44.31 page G
536

LEAD JUDGMENT BY IGUH JSC

On the 20th day of April, 1998, I dismissed this appeal and then H
indicated that I would give my reasons for so doing today. I now proceed
to do so.

In suit No. LD/2123/87, the plaintiff, on the 9th day of Novem-

ber, 1989, obtained judgment against the defendant in Lagos Judicial Division of the High Court of Lagos State in the sum of N7,787, 500.00 with N2000.00 costs. The defendant having appealed against the said decision moved the trial High Court for a stay of execution of the judgment pending the determination of the appeal. This application was on the 6th day of March, 1990 granted on the following terms-

"1. *The amount of N7,787,500.00 (Seven Million, Seven Hundred and Eight-Seven Thousand, Five Hundred Naira) be deposited by the applicant in an account to be opened with the Bank of Credit and commerce International (Nigeria) Limited, Lagos in the joint names of the applicant and respondent on or before 6th day of April, 1990; the condition being that whoever wins on appeal, shall be entitled to the amount deposited.*

2. *That upon compliance with condition (1) above , the plaintiff /respondent shall lodge with the Chief Registrar, High Court, Lagos on or before the 6th day of April, 1990, a Bank Guarantee from the Bank of Credit and Commerce International (Nigeria) Limited, Lagos in the sum of N7,787,500.00 (Seven Million, Seven Hundred and Eight-Seven Thousand, Five Hundred Naira) to repay to the application / defendant herein the sum of N7,787,500.00 should the appeal lodged succeed.*

3. *That the respondent's solicitor-namely N.A. Dabiri & Co. be said the sum of N2,000.00 awarded as costs, and the same to enter into undertaking on or before the 6th day of April, 1990 to refund the sum of N2,000.00 if the appeal succeeds.*

4. *That Upon fulfillment of conditions 1 and 2 above , execution as to damages be stayed; and on fulfillment of condition 3 above, execution as to costs be stayed or both stay of execution, as the case may be, pending the determination of the appeal against the aforesaid judgment."*

Being dissatisfied with the aforesaid terms, the defendant subsequently moved the court of Appeal for better conditions for the grant of its prayer for stay of execution. In its application, the defendant urged the Court of Appeal to grant the stay on the following conditions and/or terms-

"1. That half the judgment debt be paid to the plaintiff against a guarantee to be given by the plaintiff to return same with interest at the Central Bank's (CBN's) ruling rate as may be fixed from time to time in the event of this Court deciding the appeal in favour of the Defendant.

2. That the Defendant do give Bank Guarantee in respect of the other half of the judgment Debt to pay the sum due under that guarantee with interest thereon at CBN's interest rate as may be fixed from time to time to the plaintiff in the event of the appeal being determined in favour of the plaintiff."

In the affidavit in support of its application, the defendant deposited inter alia as follows-

"7. That the Applicant being dissatisfied with the ruling of 6th March, 1990 in respect of the stay is now seeking a variation of the said order to the effect that the applicant gives a bank guarantee to cover the judgment debt in lieu of depositing the said sum in a joint account as directed by the Lower Court.

8. That the applicant will be hard put to put down physical cash for the amount of the judgment debt.

9. That I am further informed by the said General Manager and I verily believe that the applicant's Company operates mainly in the provision of social amenities and residential accommodation at very low cost to the masses and that the payment of cash to the magnitude of the judgment debt will cripple its activities in this field.

10. That I am informed by the said General Manager of the Applicant and I verily believe that the order of Lower Court in the terms made is unfair to the applicant, it was made in a manner that will enable the plaintiff/Respondent utilize the amount ordered to be paid in by the Defendant /Applicant as a source of the instrument of guarantee from Bank for Credit Commerce and Industry.

11. That the appeal has a good chance of succeeding.

12. That the Respondent will not be prejudiced if this application is granted.

13. That it will be in the interest of justice if this application is granted."

The plaintiff, in its counter-affidavit, deposed inter alia as follows -

"2. That as stated in paragraph 8 of the Judgment Debtor's affidavit before the lower court, the **ONLY GROUND** on which it requested a stay of execution was its allegation or mere speculation of poverty on the part of the Judgment Creditor who, the Judgment Debtor stated, will find it difficult if not impossible to refund the judgment sum should the Judgment Debtor win on appeal.

3. That it was in response to the said speculation by the Judgment Debtor that the Judgment Creditor had to procure a bank Guarantee from its Bankers, Bank of Credit and Commerce International (Nigeria) Limited at a cost of 1% of the judgment sum (i.e. N77,870.00 Seventy-Seven Thousand, Eight Hundred and Seventy Naira only) apart from other collaterals which the Judgment Creditor had to provide at enormous costs in terms of legal expenses and corporate time, the said Debit Advice of the Bank being here with annexed as Exhibit "A".

4. (a) That the business of Judgment Creditor had been adversely effected since 1984 when the breach of a N29.5 million contract by the Judgment Debtor led inter alia to the temporary withdrawal of the Foreign Technical Partners of the Judgment Creditor from Nigeria upon their losing confidence due to the acts of the Judgment Debtor and some State Governments over contracts.

(b) That the amount of US\$570,000 owed by the Judgment Creditor to its Foreign Technical Partners which was initially equivalent to N570,000 approx before 1985 rose to N1,890,519 in 1986 and had metamorphosed due to the continuous depreciation of the Naira and the passing of time to N4,232,649 in 1989 in annual leaps as follows

Year	<u>Naira</u>	<u>Loss due to Depreciation</u>
	<u>Equivalent</u>	<u>Of The Naira Exchange Rate</u>
	N	N
1986	1,890,519	1,515,669
1987	2,360,256	469,737
1988	3,051,381	691,125
1989	4, 232, 649	1,181,268

The confirmation of these facts vide a certification statement by

the Auditors to the Judgment Creditor (Messrs. Ogunbajo Okebule and Co.- Chartered Accountants) is herewith annexed as Exhibit "B".

(c) That although the said Foreign Technical Partners had through their appointed Nigeria Attorney and Solicitor threatened to wind up the Judgment Creditor in October 1989, upon the Judgment Creditor obtaining judgment in November 1989, it was able to bargain with the said Foreign Technical Partners who, later confirmed their faith in the Nigerian Judiciary and agreed to a discount of 5% off the book value of the debt (that is, they agreed to a settlement of N2,116,325 instead of N4,232,649) on the condition that the Judgment Creditor pay N750,000 latest in July 1990 (due to their own unavoidable financial obligations) and issue them with reference shares for the balance of N1,366,325, upon which they would resume their technical partnership with the company but failing which they would revert to the status quo and institute winding up processes.

(d) That letters from the said Nigeria Attorney and Solicitor are annexed hereto as Exhibits "C" and "D" respectively.

5. That the Judgment Creditor will suffer irreparable harm if the judgment sum is not paid to the Judgment Creditor.

6. That on the other hand, if the judgment sum is paid to the judgment creditor in keeping with the wordings of the Bank Guarantee which was exhibited at the lower court and a copy of which is herewith annexed as "E" the judgment creditor will be able to gain over N2 million in debt reduction as contained in 4(c) hereof, beef up its working capital and regain its corporate buoyancy within less than one year of the payment of the judgment sum.

7. That the judgment Creditor is willing , if so required by the Honourable Court of Appeal (and the Bankers to the Judgment Creditor have equally confirmed their readiness) to undertake to refund the judgment sum at a fixed and referably statute-backed interest rate as opposed to the current erratic and unstable market rates in the Nigerian Finance Market if the Judgment Debtor should ever win on appeal and, in that connection, here with annexed as Exhibit "F" are pages I and 14 of Business Concord of 24th April, 1990 carrying stories and confirmations

by Bankers and banks that the recent wave of high interest rates is prone to fluctuation and is unreliable."

The plaintiff prayed that the judgment debt paid to it against a guarantee to be given by an Insurance Company.

B In urging this variation on the court below, learned counsel for the defendant submitted that in view of the large size of the amount involved, it was more equitable for the parties to bear equally, the risk involved in the purchasing power of the Naira. In his view, this purchasing power of the Naira would have drastically fallen by the time this
C appeal would have been decided some three years hence.

The plaintiff, for its own part, opposed the proposals urged upon the court by the defendant. The contention was that its capacity to repay the judgment debt in the event of the appeal succeeding was overwhelming.
D It asserted that the defendant was in real estate business which at all material times was booming at its peak and that the defendant also controlled a "great chunk" of the estate business in the Lagos State. The plaintiff, therefore, proposed that the judgment debt be paid to it. The
E plaintiff further proposed that it would in turn issue an insurance guarantee to be obtained from a consortium of insurance companies to cover any repayment of the amount in the unlikely event of the defendant's appeal succeeding.

F In its ruling, the Court of Appeal held as follows-

"The proposal contained in the counter-affidavit of the respondent is to my mind a more satisfactory financial arrangement, i.e. the payment of the whole sum by the applicant who in my view has the resources on the affidavit evidence before me. A repayment with a guarantee from the respondent that such money will be refunded with interest at the end of the appeal at CBN's ruling rate at the time of the judgment."
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*I do not entertain the fear that the insurance company cannot guarantee such an amount of money to be paid now. Having regard to
H liquidity problem, a bank or two may not be in a position to guarantee an amount of over N7 million to a single customer. It is in that light that I would depart from the normal practice of using banks to guarantee the sum and use other financial institutions like insurance companies which*

have been in business for sometime.

I am inclined to grant the stay of execution on condition that the applicant pays the whole sum to judgment creditor and the sum paid by the applicant be guaranteed by two of the insurance companies to be agreed on by the parties. And upon such agreement reached as to any two of the insurance companies listed in paragraph 3 of the further and better counter affidavit sworn to on the 19th day of October, 1990 by the Chairman and Managing Director of the respondent company, a formal order would have to be drawn up later."

It is against this decision of the Court of Appeal that the defendant has now appealed to this court. I shall hereinafter refer to the defendant and the plaintiff in this judgment as the appellant and the respondent respectively.

Pursuant to the Rules of this court, the parties through their learned counsel filed and exchanged their written briefs of argument. In the appellant's brief of argument, the following three issues are identified as arising for the determination of this appeal, namely,

"1. Can the Court of Appeal vary the conditions of stay granted by the trial court at the instance of a Respondent to that application who has not appealed against the terms as set by the trial court.

2. On an application for better conditions for stay from the High Court to the Court of Appeal, can the Court of Appeal impose more stringent terms and conditions than those set by the trial court?

3. What, having regard to the facts of this case, should be the appropriate order and conditions the court should impose for granting stay to the defendant."

The respondent, for its own part, submitted two issues in its brief of argument as arising in this appeal for the determination of this. These are-

"(a) Whether the Appellant herein could validly challenge the exercise of the discretion vested in the Court of Appeal by the Court of Appeal Act, 1976 and Order 1 Rules 4,5 and 8 of the Court of Appeal Rules, 1981.

(b) Whether the Rules of Justice and Equity would allow a party

adjudged to be a judgment debtor by a Superior Court of Record to dictate terms and stipulate conditions which discharge him of his obligation under the law."

I did closely examine the two sets of issues identified in the
B respective briefs of the parties and was of the opinion that the raised on
behalf of the appellant appeared more consistent with the ground of ap-
peal filed. They appeared, however, to be interrelated and to revolve around
the question whether or not the grant of the day of execution ordered by
C the Court of Appeal was justifiable, having regard to the particular cir-
cumstances of the case. I propose in these reasons for judgment, there-
fore, to consider all three issues together.

On issue 1 as formulated in the appellant's brief, attention must
be drawn to Section 18 of the Court of Appeal Act, 1976 which provides
D as follows -

*"An appeal under this part shall not operate as stay of execu-
tion, but the Court of Appeal may order a stay of execution either uncon-
ditionally or upon the performance of such conditions as may be imposed
E in accordance with the Rules of Court."*

There are also the provisions of order 1, Rule 20 sub Rules 4, 5
and 8 of the Court of Appeal Rules which, to some extent, are relevant to
the issue under consideration and state as follows -

F *Rule 20(4) The Court shall have power to draw inferences of
fact and to give any judgment and make any order which ought to have
been given or made and to make such further or other order as the case
may require, including any order as to costs.*" (Underlining for empha-
sis).

G *Rule 20(5) The powers of the court under the forgoing provi-
sions of this rule may be exercised notwithstanding that no notice of
appeal or respondent's notice has been given in respect of any particular
part of the decision of the Court below, or by any particular party to the
H proceedings in that court, or that any ground for allowing the appeal or
for affirming or varying the decision of the court is not specified in such
a notice; and the court may make any order, on such terms as the court
thinks just, to ensure the determination on the merits of the real question*

in controversy between the parties." (Underlining for emphasis).

Rule 20 (8) The Court shall have power to make orders by way of injunctions..... and such other necessary orders for the protection of property or person pending the determination of an appeal to it even though no application for such an order was made in the Court below." B
(Underlining for emphasis).

The combined effect of the above provisions of the law and the Rules seems to be that the Court of Appeal, without doubt, possesses very far reaching powers to make just and equitable order or orders in the best interest of the administration of justice with a view to preserving the subject matter in dispute between the parties. These just and equitable order or orders, in so far as applications for a stay of execution are concerned, include those which, in all the circumstances of the case, tend to preserve the res or the subject matter in dispute between the parties and thus prevent any acts which will destroy the subject matter of the proceedings or foist upon the court, a situation of complete helplessness, or render nugatory, any judgment, order or orders of the Court of Appeal or provide a situation in which whatever happens to the case, and, in particular, even if the appellant succeeds in the appeal, there would be no return to the status quo. See Vaswani Trading Co. v. Savalakh and Co. (1972) 12 S.C. 77 at 81 -82, Deduwa and others v. Okorodudu and others (1974) 6 S.C. 21 at 24-26, Kigo (Nigeria) Ltd v. Holman Bros (Nigeria) Ltd (1980) 5-7 S.C. 60 etc. C D E F

Accordingly, it is not the law, that the Court of Appeal in arriving at its decision in an application for a stay of execution pending an appeal must necessarily be confined to the order made by the trial court in order to exercise its discretion or come to a conclusion one way or the other. The powers of the Court of Appeal under section 18 of the Court of Appeal Act, 1976 which are in pari materia with Section 24 of the Supreme Court Act 1960 are not in any way fettered by the terms of the grant in the lower court in an application for stay; and the Court of Appeal may entertain an application for a stay of execution by a person who is dissatisfied with G H

the terms on which he was granted such a stay by the lower court. So, in Oyeti v. Soremekun (1963) 1 All N.L.R. 349 at 351 this court stated the position as follows-

It appears to us that the power of this court under Section 24 of the Act is in no way fettered by the fact that a previous application to the High Court has been granted in the High Court "

In this connection, it ought to be borne in mind that the application before the Court of Appeal dated the 13th March, 1990 was, at all events, made directly to that court in its own original jurisdiction specifically praying for "an order for stay of judgment of the High Court dated 9th November, 1989." It was not an application for a review or a variation of the order made by the trial court; neither was it an appeal against the order of the trial court in the application for stay. **I think the Court of Appeal was absolutely right in the exercise of its discretion to prescribe new terms or conditions, quite distinct and different from those stipulated by the trial court, so long as such new terms or conditions were given in the interest of and within the confines of the law, justice and equity.**

Without doubt, an applicant may, if he so desires, seek more favourable conditions in the Court of Appeal if he consider that the conditions laid down by the High Court are onerous or, for any other reason, are found to be unreasonable. See Oyeti v. Soremekun (supra). **While, however, the Court of Appeal has the necessary jurisdiction to make an order for a stay of execution on terms or conditions which may differ from those imposed by the trial High Court in granting a similar prayer, the jurisdiction may only be exercised at the instance of the party who had sought the order for stay in the court below.** See Cogefar SPA v. Nigeria Ports Authority (1972) 1 All N.L.R. (part 2) 509 where this court per Coker, J.S.C. stated as follows-

"We are in agreement with Learned Counsel for the Applicants that Section 24 of the Supreme Court Act does give this Court the power to order a stay of execution on terms or conditions which may differ from those imposed by the court below in granting a similar prayer."

A little later in its judgment, this court continued thus-

"However, the party who had applied for a variation of the terms and conditions (as in this case) was the party who had applied for the stay of execution The court held, but at the instance of the party who had applied for a stay of execution, that it would exercise its jurisdiction to vary the conditions imposed on granting a stay of execution by the High Court even if such variation would tantamount to annulling those conditions."

The courts have over the years evolved standard principles to be considered in granting an application for stay of execution of the judgment of courts pending an appeal. **The court has a discretion to grant a stay of execution if it is satisfied that there are exceptional and special or substantial reasons or circumstances to warrant a deprivation of the successful party of the fruits of his judgment. See Micheal Balogun v. Dorcas Balogun (1969)1 All N.L.R. 349 at 351. The Onus is on the party applying for a stay of execution to satisfy the court that in the special circumstances of his case there are some special and exceptional reasons which make the granting of a stay desirable. See Vaswani Trading Company V. Savalakh and Co., (supra) Nwabueze v. Nwosu (1988)4 N.W.L.R. (part 88) 257, Government of Gongola State v. Tukur (1989)4 N.W.L.R. (part 117) 529 etc.** These standard principles are not now in issue in the present appeal.

I have already indicated with regard to issue I that the Court of Appeal may vary the conditions of stay granted by a trial court. The appellant however pressed further for a determination as to whether the Court of Appeal could entertain an application for a stay from a respondent who did not appeal against the terms imposed by the trial court. **In the present case, however, the respondent made no application to the Court of Appeal for any stay. It merely filed a counter-affidavit to the applicant's motion in which averments of facts were deposed to. These facts were neither challenged nor controverted. In my view, it cannot be seriously argued that the Court of Appeal is not entitled to consider such facts put before it with a view to exercising its discretion judicially and judiciously, taking into account the parties' competing rights to justice. See Okafor v. Nnaife (1987)**

1772 Citymark (W. A.) Ltd. v. LSDPC (1998) 7 KLR Iguh JSC
4 N.W.L.R. (part 64) 129). I therefore had no difficulty in resolving
issue I against the appellant.

With regard to issue 2, I have also stated that the Court of Appeal
was entitled to impose any fresh terms and conditions for the stay it
B granted so long as such terms met the equities of the case. See too Wil-
liam v. Busari (1973) 2 S.C. 19. Accordingly, issue 2 was also resolved
against the appellant. I will now turn to issue 3.

Issue 3, in effect, poses the question whether or not the terms
C and conditions imposed by the Court of Appeal in granting the stay of
execution were appropriate, having regard to all the facts and circum-
stances of the case. In this regard, the main complaint of learned counsel
for the applicant was that in view of the large size of the money involved
in the judgment debt, it was more equitable for the parties to bear equally,
D the risk involved in the fluctuating purchasing power of the naira pending
the final determination of the appeal. It was his submission that by the
time the appeal would be decided in two or three Year's time by the Court
of Appeal, the purchasing power of the naira would have fallen consider-
E ably.

There is, in opposition, the respondent's counter-affidavit which
contained copious facts as to its ability to repay the entire judgment debt
to the applicant in the unlikely event of the substantive appeal succeed-
F ing. For the avoidance of doubt, it was also prepared to guarantee this
repayment by a solid Insurance Company of undisputed integrity and
acceptance rather than a bank, having regard to liquidity problems and
the enormous amount of N7 Million which would be due to a single
customer. It deposed that the applicant was in real estate business which
G was booming at all material times inspite of difficulties in the other Sec-
tors of the economy and collected enormous high rents in various part of
Lagos like Victoria Island and Ikoyi. The respondent therefore urged the
court to order direct payment of the judgment debt to it against the guar-
H antee it proposed which could not be faulted.

Dealing with these proposal, the Court of Appeal, per the leading
ruling of Ademola, J.C.A., stated as follows-

"The argument proffered by professor Kasunmu that both parties

should bear the loss of the depreciation of the value of money which is the raison d'etre of his proposal is to say the least unacceptable to any man with the least knowledge of financial matters.

Put in a simple terms, what professor Kasunmu is saying is that a creditor must share with his debtor any loss in the value of money which my arise before such a debtor fulfils his obligation at a later date. In other words, not only will the debtor pay less of what he owed, but the debtor pay less of what he owed, but the creditor must assist him now to pay that less money at a future date. This is not business nor any sound financial proposal."

I agree entirely with the above observations of the Court of Appeal and find myself unable to fault them. I think, with great respect to learned appellant's counsel, that what it appears he did lose sight of was the fact that the respondent was fully entitled to the entire judgment debt awarded from the date of the judgment and that this judgment was presumed correct and binding until set aside on appeal.

The general position of the law is that a judgment creditor is entitled to the full benefits and fruits of his judgment by the court, and nothing less. The maxim is that equity follows the law. I can see no equity in all the circumstances of this case by the apportionment of the financial burden and /or risk in respect of any devaluation of the judgment debt in equal shares as between the parties or in any other proportion whatever. As was rightly observed by the court below, this will tantamount to a debtor shifting his debt to a creditor under the guise of equitable sharing of some risk. I agree that there is neither equity in this conception nor does it amount to a sound or acceptable commercial practice.

On the issue of whether or not the appellant would be able to make down payment of the judgment debt, attention must be drawn to the undertaking of learned counsel for the appellant in the trial court. This is contained in the ruling of the learned trial Judge where he observed thus-

"Professor Kasunmu -S.A.N. Learned counsel for the Applicant/Defendant also argued in the alternative, that the applicant could

pay the judgment debt to the respondent, on terms that the respondent gives a bank Guarantee from a first class Bank, which guarantee should incorporate payment of interest."

The above undertaking which clearly amounts to an admission of the appellant's ability to pay the entire judgment debt to the respondent binds the appellant and would easily have influenced both courts below in their decisions. I therefore agreed with the court below that the best arrangement in the circumstances is payment of the whole judgment debt by the appellant to the respondent and for the respondent to obtain guarantee bond for the refund of the sum involved with interest from any two of the insurance companies in the respondent's further counter-affidavit.

In this regard, the respondent deposed in paragraph 4 of its further counter-affidavit as follows-

"(4) That the Insurance Companies mentioned in paragraph 3 of this further and Better-Counter-Affidavit are all viable and bouyant Insurance Companies with financial International reputation and each and every one of them can adequately refund the judgment debt with interest in the unlikely event of the appeal being decided in favour of the judgment debtor /applicant."

There can therefore be no difficulty, in choosing any two of the listed Insurance Companies since each of them can adequately refund the judgment debt with interest as deposed.

It is for the above reasons that I dismissed this appeal on the 20th April, 1998 and affirmed the decision of the court below with costs to the respondent against the appellant which I assessed and fixed at N10,000.00.

WALI JSC

I have the privilege of reading in draft, the lead Reasons For Judgment of my learned brother Iguh JSC, I agree with it and I adopt the same as mine.

It is for these same reasons ably stated by my learned brother

Iguh, JSC in the lead Reasons for Judgment that I also dismissed the appeal on 20/4/98 . I abide by the consequential orders in the lead Reasons For Judgment, including that of costs.

OGUNDARE JSC

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When I dismissed this appeal on 20th day of April, 1998 I indicated then that I would give reasons for my judgment today.

I have had the advantage of the reasons given by my learned brother Iguh JSC for he too dismissing the appeal. I subscribe to the reasons given by him which I adopt as mine. It was for those reasons that I too dismissed the appeal with N10,000.00 costs to the Respondent.

MOHAMMED JSC

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On the 20th of April, 1998, this appeal was argued before this court. After reading the respective briefs of counsel for the appellant and the respondent, and listening to the oral arguments in elaboration of the submissions made in those briefs, I dismissed this appeal and indicated that I would give my reasons later.

I have had the privilege of reading the reasons given by my learned brother, Iguh, JSC., for dismissing the appeal. I adopt those reasons as mine and have nothing more to add. The appeal is dismissed. I affirm the decision of the court below and award N10,000.00 costs to the respondent.

ONU JSC

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The appeal was dismissed and as was then indicated by me, I now proceed to give my reasons. I am in full agreement with my learned brother Iguh, JSC who has admirably set out the facts which surround affidavits and the law as to what considerations govern the conditions for the grant or refusal of stay of execution, with particular reference to those vested, as in the hand, in a court of Appeal (the Supreme Court,) to vary these conditions imposed by the High Court and the Court of Ap-

peal. In doing so, it is settled law that it (the Court of Appeal) can also vary its own conditions of granting stay although it must be by the party who originally brought the application for stay. See Construzioni Generali S.P.A. v. Nigerian Ports Authority and Anor. (1972) 12 SC. 107 at 111; B Aguda - practice and Procedure - the Green Book, Article 44,31, page 536; Guiseppe De Geronimo v. Guiseppe Jannuzelli (1924) 5 NLR 77 and court of Appeal (Enugu Division) Suit No. CA/E/152/87; Bourdex Ltd v. S.C.O.A. (Nigeria) Ltd dated 7/12/87. As can be seen in the instant appeal, it was not the party which brought the application for stay (i.e. the Defendant/Appellant herein) that is asking for variation of the conditions; rather, it is the plaintiff / Respondent. C

Be that as it may, in the case of Michael Balogun v. Dorcas O. Balogun (1969)1 All NLR 349 this court in ordering a stay of execution D agreed that the onus is on an applicant to show substantial reasons to warrant deprivation of the successful party of the fruit of his judgment by the court. In the above case, this court went on to hold:

There grounds exist on the motion, suggesting a substantial issue of law to be decided on appeal in an area in which the law is to some extent recondite" stay of execution must be granted. See also Kigo (Nigeria) Ltd. v. Holman Bros (Nigeria) Ltd & Anor. (1980) 5-7 SC. 60." E The general rule is to maintain the status quo between the parties, which involves the exercise of discretion involving a consideration of the chances F of the applicant succeeding on appeal. See Intercontractors v. U.A.C. (Nigeria) Ltd (1988) 2 NWLR 303; Odufuye v. Fatoke (1973) NMLR 222; Balogun v. Balogun (supra); Martins v. Nicannar Food CO. Ltd (1988)2 NWLR (part 74)75; Wilson v. Church (No.2) 12 Ch.D. 454 etc. G Be it noted, however, that it is not always whenever a ground of appeal raises a difficult (recondite) point of law that it constitutes a special circumstance for which a stay of execution can be ordered. Similarly, it is not in every case where the grounds of appeal raise arguable points of H law that a stay of execution will be ordered . See Okafor v. Nnaife (1987)4 NWLR (part 64) 129; Ajomale v. Yaduat (No.2) (1991)5 NWLR (part 191) 266 and Lijadu v. Ligadu (1991)1 NWLR (part 191)730.

In the appeal herein, the three issues identified in the appellant's

brief as arising for our determination are:

"1. Can the Court of Appeal vary the conditions of stay granted by the trial court at the instance of a Respondent to that application who has not appealed against the terms as set by the trial court.

2. On an application for better conditions for stay from the High Court to the Court of Appeal, can the Court of Appeal impose more stringent terms and conditions than those set by the trial court?

3. What, having regard to the facts of this case, should be the appropriate order and conditions the court should impose for granting stay to the defendant."

In my view, a consideration of all the three issues taken together will dispose of the matter herein. As I had occasion to point out elsewhere in this judgment, the court below was right in exercising its undoubted discretion by stipulating new conditions quite distinct and separate from those granted by the court below. In this regard, I find the provisions of Section 18 of the Court of Appeal Act, 1976 relevant. The section, which to all intents and purposes, is in pari materia section 24 of the Supreme Court Act Cap. 75 Laws of the Federation of Nigeria stipulates:

"An appeal under this part shall not operate as a stay of execution, but the Court of Appeal may order a stay of execution either unconditionally or upon the performance of such conditions as may be imposed in accordance with the rules of court."

See also Oyeti v. Soremeku (1963) 1 All NLR 346 and Cogefar S.P.A. v. Nigerian Ports Authority (supra). In the latter case Coker, JSC at page 511 stated as follows:

"We are in agreement with learned counsel for the Applicants that Section 24 of the Supreme Court Act does give this court power to order a stay of execution on terms or conditions which may differ from those imposed by the court below in granting similar prayer."

In Oyeti v. Soremeku (supra) this court observed at page 351 of the Report:

"However, the party who had applied for a variation of the terms and conditions (as in this case) was the party who had applied for the

stay of execution This court held, but at the instance of the party who had applied to stay execution that it would exercise its jurisdiction to vary the conditions imposed on granting a stay of execution by the High Court even if such variation would tantamount to annulling those conditions."

Section 24 of the Supreme Court Act, Cap. 424 (ibid) provides as follows:-

"An appeal under this part shall not operate as a stay of execution, but the Supreme Court may order a stay of execution either unconditionally or upon the performance of such conditions as may be imposed in accordance with rules of court."

See also the provisions of Order 1 Rule 20 (4) (5) and (8) of the Court of Appeal Rules (ibid) which state as follows:-

"Rule 20 (4) The court shall have power to draw inferences of fact and to give any judgment and make any order which ought to have been given or made and to make such further or other order as the case may require, including any order as to costs.

Rule 20 (5) The powers of the court under the foregoing provisions of this rule may be exercised notwithstanding that no notice of appeal has been give in respect of any particular part of the decision of the court below, or by any particular party to the proceedings in that court, or that any ground for allowing the appeal or for affirming or varying the decision of the court is not specified in such a notice; and the court may make any order, on such terms as the court thinks just, to ensure the determination on the merits of the real question in controversy between the parties.

Rule 20 (8) The court shall have power to make orders by way of injunctions and such other necessary orders for the protection of property or person pending the determination of an appeal to it even though no application for such an order was made in the court below," (Underlining above is for emphasis).

What in effect the above provisions spell out, are aimed at conferring far-reaching and undoubted powers on the court below to make equitable orders in the best interest of the administration of justice for preserving

the res which are the subject-matters in controversy between parties before it and in the parties best interest. See Vaswani Trading Co. v. Savalakh (1972)12 SC.77; (1972)1 All NLR (part 2) 483 and Badejo .v. Federal Ministry of Education (1996)8 NWLR (part 464) 15. Thus, the court below when, after weighing carefully the application of the appellant/applicant for a variation of the learned trial Judge's judgment against him in the sum of N7,787,500.00, arrived at a correct view when he said inter alia as follows:-

"The question before me is which of these proposals would meet the justice of the case. Applicant's counsel has not been able to satisfy me nor did he avert (sic) his mind as to why there (sic) were not able to meet the conditions given in the court below, nor did he tell me how the proposals now placed before the court is an improvement on what the learned Judge in the court below has given.

The argument proffered (sic) by Professor Kasunmu that both parties should bear the loss of the depreciation of the value of money which is the raison d'etre of his proposal is to say the least unacceptable to any man with the least knowledge of financial matters.

Put in a simple term, what professor Kasunmu is saying is that a creditor must share with his debtor any loss in the value of money which may arise before such a debtor fulfils his obligation at a later date. In other words, not only will the debtor pay less of what he owed, but the creditor must assist him now to pay that less money at a future date. This is not business nor any sound financial proposal."

I cannot agree more.

Consequently, when the learned Justices concluded their Ruling in the following words to wit:

"I am inclined to grant the stay of execution that the applicant pays the whole sum to the judgment creditor and that sum paid by the applicant be guaranteed by two of the insurance companies to be agreed on by the parties. And upon such agreement reached as to any two of the insurance companies listed in paragraph 3 of the further and better counter affidavit sworn to on the 19th day of October, 1990 by the Chairman and Managing Director of the respondent's company."

They were perfectly right.

I see no reason to interfere with this view which accords with mine and I so hold.

It was for these reasons and the fuller ones contained in the leading reasons for judgment expressed by my learned brother Iguh, JSC that I dismiss this appeal on 20th April, 1998 and affirmed the decision of the court below with the consequential order inclusive costs as awarded.

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