

COURT OF APPEAL  
BENIN DIVISION  
14TH. DECEMBER, 1998. CA/B/265M/98  
CORAM:- O. ACHIKE, S. A. AKINTAN, M. MOHAMMED, JJCA.

LONESTAR DRILLING NIG. LTD.                   .....                   APPELLANTS  
AND  
TRIVENI ENGINEERING &                   .....                   RESPONDENTS  
INDUSTRIES & 9 ORS.

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***EVIDENCE*** - Affidavits - Need to comply with the provisions of the Oaths Act - Failure to use exact word prescribed - Will not render affidavit invalid.

***PRACTICE & PROCEDURE*** - Stay of proceedings - Principles to be considered - Applicant's mere apprehension of incomplete realization of its loss - Is not sufficient to warrant the grant.

**FACTS**

Before the Federal High Court Benin, an order for the arrest and detention subject to a condition, of the 4th respondent MV Dubai valour a merchant ship was made by Abutu J. pursuant to the suit filed by the applicant. The case was later transferred to the Lagos Division of same court, where Sanyaolu J. reviewed the order earlier made by Abutu J. The applicant not being satisfied with this counter order appealed against it. The suit was thereafter transferred back to Benin. However, a hearing notice was issued by the Lagos Division of the Court. The learned Chief Judge of that court ordered the production of the 7th to 10th respondents before him who were being detained to enable him address the question of their continued detention.

The applicant reacted to the Chief Judge's order by applying and securing an ex parte order staying further proceedings in the case which was granted pending the hearing and determination of the present motion on notice. It is averred on behalf of the applicant in paragraph 23 of the

affidavit in support as follows:- "I am apprehensive that the Hon. Belgore, C.J. of the Federal High Court is likely, unless restrained by the Honourable Court, to make an order on October 13th, 1998 that will be immensely prejudicial to the applicant's interest in these proceedings."

**HELD** (Dismissing the application per lead ruling of **AKINTAN JCA**, **ACHIKE JCA** dissenting)

***Evidence - Affidavits***

1. In the New Nigeria Bank Plc v. IBW Enterprises Nigeria Limited, case cited in support of the submission that the affidavit in support of the motion failed to comply with the provisions of the Oaths Act, it was held, inter alia, per Rowland, J.C.A that failure of a deponent to comply with the format prescribed in the Oaths Act could render an affidavit incompetent. In the instant case, the deponent concluded his affidavit in support of the motion by saying in paragraph 25 as follows:

*"I depose to this affidavit in good faith."*

instead of using the exact words prescribed in the Oaths Act - viz; I ... do solemnly and sincerely declare that I make this solemn declaration conscientiously believing the same to be true, and by virtue of the provisions of the Oaths Act." In as much as I believe that there is need to comply with the provision of the Oaths Act. I believe that failure to use the exact words prescribed by the Act will not necessarily render an affidavit invalid. Rather, I believe that in deciding whether an affidavit should be declared invalid, it is necessary to examine the words used with a view to determine if there was in fact a substantial compliance with the requirement of the Act. In the instant case, I think that the deponent, by concluding the deposition with the words: "I depose to this affidavit in good faith", he did not meet the exact wording prescribed in the Act, I, however, believe that there is substantial compliance with the requirement of the Act. I therefore hold that the objection raised is not enough to warrant or justify a total rejection of the affidavit. I therefore over-rule that objection. (p. 230 B)

***Stay of proceedings***

2. It is settled law that among the principles to be borne in mind when considering an application for stay of proceedings are:

(1) the action sought to be stayed must be shown not only that it might fail, but that it cannot possibly succeed or that for some reasons, it ought not to go on;

(2) the action is shown to be frivolous, vexatious or an abuse of the process of the court; (3) no cause of action is disclosed; and (4) there is need to preserve the res from being destroyed and consequently to prevent undue hardship. Each of the above conditions, if proved, would therefore constitute special circumstance: See Gomwalk v. Okwuosa (1996) 3 NWLR (pt. 439) 681; Hallmark Bank Ltd. v. Akaluso (1995) 5 NWLR (pt. 395) 306 at 316; and Okorodudu v. Okorodudu (1977) 3 S.C. 21. The facts established in the instant case merely show that the applicant is merely apprehensive that it might not be able to fully realize its loss which was the subject-matter of its claim in the matter. But that apprehension per se is not sufficient to warrant the grant of stay of proceedings. This is because the onus still remains, on the applicant to present its case before the lower court and convince the court of the need to refuse the request. In the instant case, the need by the applicant is to convince the court that it needs not release the detained crew of the arrested 4th respondent ship. (p. 231 B)

**REPRESENTATION**

Olisa Agbakoba, SAN with Messrs. C. O. Ugwor, Esq. S. Onyejose, Esq. and P. Ogwemoh Esq. for the applicant

Chief R. O. Akinjide, SAN with F. Atoyebi Esq. and K. Olapoju Esq. for the respondents

**CASES REFERRED TO**

New Nigeria Bank Plc. v. IBW Enterprises Limited (1998) 6 NWLR (pt. 554) 446 at 453 - 455

Gomwalk v. Okwuosa (1996) 3 NWLR (pt. 439) 681

Hallmark Bank Ltd. v. Akaluso (1995) 5 NWLR (pt. 395) 306 at 316

Okorodudu v. Okorodudu (1977) 3 S.C. 21

**STATUTES REFERRED TO**

Constitution of Nigeria 1979 s. 31(1)

B Oaths Act Cap. 333 LFN 1990 s. 13 and 1st schedule

**LEAD RULING BY AKINTAN JCA**

C This is ruling on a motion brought by the applicant dated 10th October, 1998. The applicant is praying this court, in the motion, for "an order for stay of further proceedings before the Federal High Court sitting at Lagos in Suit No. FHC/B/22897 as per hearing notice dated 5th October, 1998, pending the hearing and determination of this appeal". The 3 grounds given in support of the reliefs ought as set out on the motion paper are:

" (i) *The circumstances of this case show special exceptional and urgent reasons why the proceedings at the Federal High Court, holden at Lagos on Tuesday, 13th October, 1998 should be stayed.*

E (ii) *Unless the proceedings before the Federal High Court sitting at Lagos on Tuesday, 13th October, 1998 are stayed by this Honourable Court, the appellant/applicant will suffer irreparable grievous hardship.*

F (iii) *The applicant has no confidence that he will receive a fair hearing before the Federal High Court sitting at Lagos for the reasons stated in the affidavit in support of this application."*

G The motion is supported by a 19 -paragraph affidavit of urgency and a 25-paragraph affidavit in support, both sworn to by Isha Kanoba. It was opposed by the respondents. To that end, a 45-paragraph counter-affidavit sworn to by Kola Olapoju was filed. The applicant also filed a 26-paragraph reply to the counter-affidavit, also sworn to by Isah Kanoba.

H A brief summary of the facts relied on in support of the motion, as contained in the affidavits filed in support, are that the suit was instituted at the Federal High Court, Benin on August 5, 1997 and that on August 6, 1998, Abutu J. sitting at Benin Judicial Division of the Court, made an order for the arrest and detention of the 4th respondent, MV Dubai Velour, a merchant ship on the condition that the ship be released

upon providing a bank guarantee for the value of the applicant's claim which is N1,435,390,000.00. The case was, on the order of the learned Chief Judge of the Federal High Court, transferred to the Lagos Division of the Court where it was assigned to Sanyaolu, J. of the Lagos Division of the same court.

On August 22nd 1997, Sanyaolu J. sitting at the Lagos Division of the court and upon application by the respondents, reviewed the order earlier made by Abutu, J. in Benin in the case by ordering the release of the ship upon production of a letter of undertaking by Thomas Miller P & I Club for the value of One million US Dollars, an amount said to be less than what was being claimed by the plaintiff/applicant on its writ of summons. The appellant was not satisfied with the order made by Sanyaolu J. was made by Abutu J. on September 30th, 1997. The suit was thereafter transferred back to Benin Division of the Federal High Court and assigned to Egbo-Egbo, J. However, a hearing notice was issued by the Lagos Division of the court (Exhibit IK 12 attached to the affidavit in support of the motion). The parties were, according to the hearing notice, requested to appear in the court on October 13th, 1998 in Lagos. The learned Chief Judge of the Federal High Court had also on October 13th, 1998 ordered the production of the 7th to 10th respondents before him (as per a production warrant, Exhibit IK 13 attached to the motion). But the 4th respondent's ship is presently still being held at Mooring Bouys, Sapele pursuant to the order made by Abutu, J. It is then averred, on behalf of the applicant in paragraph 23 of the affidavit in support, inter alia, thus:

*"I am apprehensive that the Hon. Belgore, C.J. of the Federal High Court is likely, unless restrained by the Honourable Court, to make an order on October 13th, 1998 that will be immensely prejudicial to the applicant's interest in these proceedings."*

The respondents' case, as set out in their counter-affidavit, is that the case was once transferred to Lagos in August 1997 on the defendants' application for the purposes of determining an application for the release of the ship and this was when Abutu J., the learned Judge handling the case in Benin, was on a 5 week vacation. The case was

thereafter returned to Benin Judicial Division of the court. The application for the arrest of the 4th respondent ship was said to have been obtained ex parte and the respondents had to apply to the court by a motion on notice for a release of the ship. This was the application which was determined by Sanyaolu, J. in Lagos while Abutu J. of Benin Division was on vacation. When Abutu J. was transferred from the Benin Judicial Division, he was succeeded there by Egbo-Egbo, J. hence he too had to take over the case.

The plaintiff is said to have prevented the crew of the 4th respondent ship from leaving the ship and their travel documents was said to have been seized by the Immigration Department at the instance of the plaintiff. The respondents' case was that since there was no court order arresting the crew of the ship, an application to enforce their fundamental human rights was filed at the Federal High Court Lagos. That application was handled by Ukeje J. of the Lagos Judicial Division of that court. The learned Judge granted the application and declared that the continued detention of the men is a violation of their fundamental human rights as guaranteed under section 31 (1) of the 1979 Constitution. The Court also ordered the prompt return of their travelling documents in possession of the Immigration Department. The plaintiff was also restrained from further detaining or arresting the ship's crew.

The appellant/applicant was said to be dissatisfied with the aforesaid orders made by Ukeje J. An appeal was filed against it and an application for a stay of execution of the order was also filed. The plaintiff is said to have flagrantly disregarded the order of Ukeje, J. directing that the crew be allowed to disembark from the arrested ship. The application filed for a stay of the order was dismissed by the lower court. As a result of pressure on the government authorities from the embassy of the ship's crew, some of them were released. But the captain and some key members of the ship's crew were still detained. The plaintiff has since applied to join the key members as co-defendants. The application was granted and they were joined as the 5th to 10th defendants/respondents.

After the 5th to 10th defendants had been joined by Egbo-Egbo,

J. of the Benin Judicial Division, the defendants petitioned the Hon. Chief Judge of the Federal High Court to transfer the case from Egbo-Egbo, J. because they believed they would not have justice from the learned judge if he continued with the case. The learned Chief Judge thereafter transferred the case to Lagos and ordered the crew still detained to be produced in his court on October 13th, 1998 so as to enable him address the question of their continued detention. The applicant reacted to the learned Chief Judge's order by applying for an ex parte order staying further proceedings in the case. The ex parte order was granted by this court on October 12th, 1998 pending the hearing and determination of the present motion on notice. C

At the hearing in this court, Mr. Olisa Agbakoba, S.A.N., learned leading counsel for the applicant, submitted, inter alia, that there is a need to preserved the res; i.e. the security granted on August 6th, 1997 for the release of the ship before the case was moved to Lagos where it was varied by another Judge. He referred to the transfer to Lagos which he described as unwarranted movement of the case from Benin to Lagos and submitted that the role played by the learned Chief Judge created a situation whereby the applicant feared that their interest would not be fairly taken care of if a stay of proceedings is not granted. He therefore urged us to grant the prayer. D E

Chief Akinjide S.A.N., learned leading counsel for the respondents, submitted in reply, that there is no valid supporting affidavit and as such the motion is incompetent. He referred, in this respect, to the provision of section 13 and the first Schedule to the Oaths Act (Cap. 333, Laws of the Federation of Nigeria 1990) and submitted that the requirements of the Act were not met. He cited the decision of this court in New Nigeria Bank Plc. v. IBW Enterprises Limited (1998) 6 NWLR (pt. 554) 446 at 453 - 455. He therefore urged us to dismiss the application. F G

In the alternative, he submitted that there is only one Federal High Court and as such it is for convenience that division are created. He submitted further that the order of variation made by Sanyaolu, J. was in order and that there was nothing irregular about it. He also referred to the court order upholding the fundamental human rights of the crew who H

were detained and submitted that the learned Chief Judge was right in making his order for their production in his court with a view to review their continued detention. He therefore urged us to dismiss the application.

**B In the New Nigeria Bank Plc v. IBW Enterprises Nigeria Limited, case cited in support of the submission that the affidavit in support of the motion failed to comply with the provisions of the Oaths Act, it was held, inter alia, per Rowland, J.C.A that failure of a deponent to comply with the format prescribed in the Oaths Act could render an affidavit incompetent. In the instant case, the deponent concluded his affidavit in support of the motion by saying in paragraph 25 as follows:**

*"I depose to this affidavit in good faith."*

**D instead of using the exact words prescribed in the Oaths Act - viz; I .... do solemnly and sincerely declare that I make this solemn declaration conscientiously believing the same to be true, and by virtue of the provisions of the Oaths Act." In as much as I believe that there is need to comply with the provision of the Oaths Act. I believe that failure to use the exact words prescribed by the Act will not necessarily render an affidavit invalid. Rather, I believe that in deciding whether an affidavit should be declared invalid, it is necessary to examine the words used with a view to determine if there was in fact a substantial compliance with the requirement of the Act. In the instant case, I think that the deponent, by concluding the deposition with the words: "I depose to this affidavit in good faith", he did not meet the exact wording prescribed in the Act, I, however, believe that there is substantial compliance with the requirement of the Act. I therefore hold that the objection raised is not enough to warrant or justify a total rejection of the affidavit. I therefore over-rule that objection.**

**H The main point raised in the application is whether the applicant has satisfactorily established a case to warrant the grant of its application for a stay of proceedings. It is necessary to say that the proceeding the applicant wanted us to stay is one relating to the production of the de-**



tained crew of the 4th respondent ship. As already stated above, a stay of execution of the order varying the amount of the bond in respect of the 4th respondent ship has been granted. But the contention of the applicant now is that it is afraid that the learned Chief Judge might released the crew being detained and that if they are released, it might be difficult for the applicant to realize its loss which is the subject matter of the claim. I believe that such fear or apprehension alone is not enough to justify or support a request for an application for a stay of proceedings.

**It is settled law that among the principles to be borne in mind when considering an application for stay of proceedings are:**

(1) the action sought to be stayed must be shown not only that it might fail, but that it cannot possibly succeed or that for some reasons, it ought not to go on;

(2) the action is shown to be frivolous, vexatious or an abuse of the process of the court; (3) no cause of action is disclosed; and (4) there is need to preserve the res from being destroyed and consequently to prevent undue hardship. Each of the above conditions, if proved, would therefore constitute special circumstance: See Gomwalk v. Okwuosa (1996) 3 NWLR (pt. 439) 681; Hallmark Bank Ltd. v. Akaluso (1995) 5 NWLR (pt. 395) 306 at 316; and Okorodudu v. Okorodudu (1977) 3 S.C. 21. The facts established in the instant case merely show that the applicant is merely apprehensive that it might not be able to fully realize its loss which was the subject-matter of its claim in the matter. But that apprehension per se is not sufficient to warrant the grant of stay of proceedings. This is because the onus still remains, on the applicant to present its case before the lower court and convince the court of the need to refuse the request. In the instant case, the need by the applicant is to convince the court that it needs not release the detained crew of the arrested 4th respondent ship. In conclusion therefore, I hold that the applicant has failed to discharge the onus placed on it to warrant the grant of its prayer for a stay of proceedings. I therefore hold that the application must fail. I accordingly dismiss it, with N2,000.00 costs in favour of the respondents. I also order that the interlocutory

order for stay of proceedings granted by this court on 12/10/98 be vacated immediately. I will, however, order an accelerated hearing of the appeal so as to reduce the unnecessary delay being caused by the numerous interlocutory applications now being filed by the parties in the case.

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**MOHAMMED JCA**

On 22/10/98, pursuant to an ex-parte application at the instance of Olisa Agbakoba Esq. S.A.N. this court ordered as follows:-

C *"That a temporary stay of proceedings of suit No. FHC/228/97 now pending at the Federal High Court Lagos pending the determination of the Motion on Notice in this court which is hereby fixed for hearing on 22/10/98 is granted."*

D On 22/10/98 the motion on Notice was moved by the learned Senior Counsel for the applicant. The motion prayed for an:

E *"Order for stay of further proceedings before the Federal High Court sitting at Lagos in Suit No. FHC/228/97 as per hearing notice dated October 5th, 1998 pending the hearing and determination of this appeal."*

F Having carefully gone through the affidavit in support of the motion, the counter affidavit opposing the motion, the further affidavit in support of the application and the respective submissions of the Learned Senior Counsel for the applicant and the respondents, I am of the view that having regard to all the circumstances of this case, I agree with my learned brother Akintan, JCA that this application should be dismissed and an order of accelerated hearing of the appeal itself granted instead. Accordingly, the application is dismissed. However, an order of accelerated hearing of the appeal is hereby granted.

G There shall be N2,000.00 costs to the respondents.

H **PRONOUNCEMENT:** Hon. Justice Okay Achike, who presided at the hearing of the appeal dissented at a conference held on the appeal before this recent appointment as a Justice of the Supreme Court. His view was that the application should be granted with N2,000.00 costs to the applicant.