

COURT OF APPEAL
LAGOS DIVISION
3RD MAY, 1999. CA/L/300M/97

CORAM:- A. OGUNTADE, M.A. SANUSI, I. C. NZEAKO, JJCA

RAKOL CLINIC & MATERNITY HOSPITAL LTD. APPELLANT
AND

1. SUPREME FINANCE & INVESTMENT CO. LTD.

2. DR. TAJUDEEN KOLAWOLE RAHEEM RESPONDENTS

***APPEALS** - Fair hearing - Default judgment - Complaints by the appellants that they were not given an opportunity to be heard - The Courts are wont to listen to such complaints - As it is an important point of law.*

***EVIDENCE** - Affidavit - Which has not been countered - Facts deposed to in such an affidavit - Would be deemed to be true.*

***STAY OF EXECUTION** - Application - For stay of execution pending appeal - Vital principles - Which guide the courts in determining such an application.*

***STAY OF EXECUTION** - Application - For stay of execution - Special circumstances - When found to exist.*

FACTS

The appellant/applicant by a motion on notice filed at the Court of Appeal prayed for inter alia, an order staying the execution/further execution of the judgment of the High Court of Lagos State pending the determination of the appeal filed against the ruling of the said Court wherein the court dismissed the applicant's application for an order setting aside the said judgment.

The motion is supported by an affidavit of 30 paragraphs. The

respondents though served did not file any counter-affidavit. The appellants/Applicants who were the defendants in the High Court due to inadvertence were not aware of the trial date of the substantive suit. They were thus absent at the trial where judgment was given against them. They filed an application to set aside the judgment. On the date the application was to be heard, their principal counsel was engaged at the Supreme Court, and after refusing application for adjournment, the applicants' counsel in court was not called upon to move the motion, rather it was dismissed.

Execution of the judgment was levied and the goods taken into the custody of the deputy sheriff. The applicants filed a motion to stay further execution at the High Court pending appeal. That Court rather than hear the application gave it a long adjournment and made an order permitting the Bailiffs to complete the execution. Hence the applicants applied to the Court of Appeal.

HELD (Unanimously allowing the application per leading Ruling of **NZEA KOJCA**)

Evidence - Affidavit

1. There is the fact that this motion has not been opposed. The facts deposed to in the affidavit have not been countered by the Respondents despite the fact that they were duly served. Facts deposed to in an affidavit would be deemed to be true, if not countered by the opposite party which had the opportunity to counter them but failed to do so.

See Egbuna v. Egbuna (1989) 2 NWLR (pt. 106) 773. Alagbe v. Abimbola (1978) 2 SC. 39 at 40. (p. 1368 B)

Appeals - Fair hearing

2. It is to be noted that if it is, that the substantive suit was decided in the absence of the Appellants/Applicants, and then, they were not given an opportunity to be heard on their motion to re list after prayer for adjournment was refused by the court before their motion to relist the suit was struck out, in such situations the courts are wont to listen to such complaints as the appellant make. For, such complaints touch on the funda-

mental human rights of the citizen entrenched in the 1979 Constitution of this land. This is an important point of law. (p. 1368 E)

Stay of execution - Application

3. In considering this application, I have kept in mind the vital principles which guide the courts in determining when to grant or refuse an application for stay of execution pending appeal:-

(1) That there is an appeal pending.

(2) The Courts do not make the practice of depriving a successful litigant of the fruits of his success, except under special circumstances. See Martins v. Niccanar Food Co. (1988) 2 NWLR (pt. 74) 75, Vaswani Trading Co. v. Savalakh & Co. (1972) 12 SC 77. (p. 1369 E)

Stay of execution - Special circumstances

4. Special circumstances have been found to exist by the Courts where "arguable point of law", or "substantial point of law" (such as issue of jurisdiction) have been raised on appeal. Balogun v. Balogun (1969) 1 ALL NLR 349, Akinsanya v. U.B.A. (1986) 4 NWLR (pt. 35) 273 etc. Applying these principles to the matter in hand, there is an appeal. The appellants complain therein that when the trial Judge refused it application for adjournment sought because the principal counsel to handle the case was in the Supreme Court, it simply dismissed the applicant's motion without calling on the junior counsel who was in Court to proceed, it would seem to me that that could be a complaint about fair hearing, a breach of the applicant's constitutional right. There would thus be an arguable point of law. (p. 1369 G)

REPRESENTATION

Ben Mbeke, Esq. for the Appellant

Respondents absent

CASES REFERRED TO

Egbuna v. Egbuna (1989) 2 NWLR (pt. 106) 773

Alagbe v. Abimbola (1978) 2 SC. 39 at 40

Martins v. Niccanar Food Co. (1988) 2 NWLR (pt. 74) 75

Vaswani Trading Co. v. Savalakh & Co. (1972) 12 SC 77.

Balogun v. Balogun (1969) 1 ALL NLR 349

Akinsanya v. U.B.A. (1986) 4 NWLR (pt. 35) 273

B

LEAD RULING BY NZEAKO JCA

By a motion on notice filed on 3rd July, 1997, the applicant-judgment debtor prayed this court for four orders. The orders related to three rulings delivered by the High Court on 19/5/97, 2/6/97 and 16/6/97. The orders sought are as follows:-

1. *An order staying the execution of the judgment of the lower court delivered in this matter pending the determination of the appeal already filed at the Court of Appeal against the ruling of the said court delivered on the 19th day of May, 1997. Wherein the court dismissed the applicant's application for an order setting aside the said judgment.*

2. *An order suspending and staying the force and effect of the ruling of the lower court delivered in this matter on the 19th day of May, 1997 wherein the said court dismissed the applicant's application for an order setting aside the judgment of the court delivered in this matter pending the determination of the appeal already filed at the Court of Appeal against the said ruling of 19/5/97.*

3. *An order staying the execution of the orders made on 2/6/97 and 16/6/97 by the lower court directing the bailiffs of the Lagos High Court to complete the execution of the judgment in this matter pending the determination of the appeal filed in the Court of Appeal against the ruling of the lower court delivered on 19th May, 1997 wherein the said court dismissed the applicant's application for an order setting aside the said judgment.*

4. *An order of injunction restraining the Judgement Creditor/Respondent by itself, its servants, officers, privies and or agents or any one else whomsoever including the Deputy Sheriff and or his officers, servants or agents including bailiffs of the Court or any one else whosoever from taking any steps or any further steps whatsoever in giving effect or further effect to the writ of fierifacias and notice of attachment*

already issued out in this matter or any other such writ and/or from enforcing the same or giving any force or effect to the ruling of the lower court delivered on the 19th day of May, 1997 wherein the said Court dismissed the applicant's application for an order setting aside the judgment of the court delivered in this matter, pending the determination of the appeal already filed at the Court of Appeal against the said ruling of 19th May, 1997."

The motion is supported by an affidavit of 30 paragraphs. The relevant paragraphs being paragraph 4 to paragraph 26 which set out the reasons for the orders sought by the applicant.

The prayers are for stay of further execution pending appeal. At the hearing of the motion, the respondents were not in Court, though served.

They did not also file any counter-affidavit.

Learned Counsel for the applicant Ben Mbeke Esquire then moved his application. He urged that since the Respondents did not file a counter-affidavit and did not oppose the motion, though duly served, this Court should accept the facts deposed to in the Applicant's affidavit and grant his prayers. What the Applicants are seeking in practical terms, is an order restraining the sale of their goods already attached. The goods are presently in the custody of the Sheriff. Counsel urged that they should not be sold since they remain substantial security, till the determination of the appeal.

He also urged that the appeal raised substantial points of law. The relevant paragraphs of the affidavit in support show as follow:-

That due to inadvertence, the Appellants/Applicants who were the defendants in the lower court were not aware of the trial date of the substantive suit and were absent at the trial where judgment was given against them.

That the Court struck out their motion to set aside the judgment in the circumstances set out as follows in the affidavit:

"6. Because of the antecedents of this matter, our principal partner in chambers, Kola Awodein decided to argue the said motion by himself.

7. Unfortunately, when the said motion came up for hearing on 19th day of May, 1997, our said principal counsel had another matter at

the Supreme Court Abuja in Suit No. SC/21/97 between Chief M. A. Ajao v. Atkhilor. Now shown to me and marked exhibit KAI is a copy of the hearing notice for the said matter.

B *8. Instead of writing to court from our chambers, we felt it would be more honourable for counsel to appeal and respectfully ask for a short adjournment for our said principal.*

C *9. I was then assigned to go to court on the said 19th May, 1997 to request the court for a short adjournment as the application was also coming before the court the first time.*

10. I appeared on the said date and asked for an adjournment for our said principal counsel. The court refused my application for an adjournment and without calling me to move the motion, proceeded to dismiss the said motion.

D *11. I would have been in a position to move the said motion if the court had called on me to do so after it had refused my application for an adjournment."*

What the foregoing tried to bring out is that the appellant was neither
E heard in the main suit nor in the motion for stay. The reasons are set out above. With regard to the main suit, the absence of the appellant was due to inadvertence, not knowing the hearing date. In respect of the motion to re list, it was that their Principal Counsel was at the Supreme Court,
F and after refusing the application for adjournment sought because the principal counsel was engaged in the Supreme Court, the joinder counsel in court was not called upon to move the motion. Rather the Court proceeded to dismiss it.

G Execution of the judgment delivered by the Hon. Justice C. O. Olufawo of the High Court of Lagos State on 2/7/96 had been levied and the goods are presently with the deputy Sheriff.

The Appellant/Applicant deposed additionally in paragraphs 14, 15, 16, 17, 20, 21, 22, 23, 24, 26 and 27 thus:-

H *"14. The said appeal raises some strong, substantial and arguable points of law and it has a very good chance of success.*

15. I know from my experience as a Legal Practitioner that the said ruling of 19th May, 1997 has the effect of leaving the plaintiff at

liberty to sell the attached goods, and/or attach more goods belonging to the Applicant pursuant to the said judgment delivered in this matter.

16. We, therefore, immediately filed another application at the lower court for a stay of execution and/or further execution of the said judgment pending the determination of the appeal referred to in paragraph 13 above. Now shown to me and marked Exhibit KA4 is a copy of the said motion dated 2/6/97.

17. I was informed by Ben Ibeke of counsel and I verily believe him that when the said application came up for hearing on 16/6/97, the court, rather than hear the said application adjourned the same to 22/9/97 and made an order directing the Bailiffs of the Lagos High Court to carry out the order made by the same court on 2/6/97 permitting them to complete the execution of the judgment in this matter.

20. I know from my experience as a legal Practitioner that the said orders of 2/6/97 and 16/6/97 and the usually long adjournment given to the said application for a stay of execution pending appeal by the lower court would have the effect of refusing and defeating the purpose of the said application foisting on the Court of Appeal, a fait accompli.

21. This application is intended to preserve the res of this matter pending the determination of the appeal.

22. Unless this application is granted, the Plaintiff would sell the attached properties and attach more properties belonging to the Applicant, destroy the res and render the appeal nugatory thereby foisting on the Court of Appeal, a state of helplessness.

23. The issue of absence of fair hearing raised in the appeal is so fundamental that it goes to the competence and jurisdiction of the court that it is only right that the effect of the said ruling be stayed by granting this application.

24. This application seeks to preserve the res and keep the matters strictly in status quo pending the determination of the appeal.

26. The applicant is desirous of prosecuting the appeal most expeditiously and diligently and I verily believe that the appeal has a great chance of success.

27. The applicant intends to move the Court of Appeal for a

departure from the rules so that the appeal may be heard on the bundle of documents that would form the Record of Appeal which are quite small and can be easily complied."

The Appellant/Applicant also filed a further affidavit on 25/11/98
B exhibiting the records of proceedings from the High Court on 19/5/97, 2/
6/97 and 16/6/97 as Exhibit KA5.

**There is the fact that this motion has not been opposed.
The facts deposed to in the affidavit have not been countered by the
C Respondents despite the fact that they were duly served. Facts
deposed to in an affidavit would be deemed to be true, if not coun-
tered by the opposite party which had the opportunity to counter
them but failed to do so.**

*See Egbuna v. Egbuna (1989) 2 NWLR (pt. 106) 773. Alagbe
D v. Abimbola (1978) 2 SC. 39 at 40.*

This Court would, in the premises accept as true, the affidavit
evidence set out above. For, having been duly served according to the
Court's records, the Respondents have had an opportunity to counter the
E affidavit if they so wished.

**It is to be noted that if it is, that the substantive suit was
decided in the absence of the Appellants/Applicants, and then, they
were not given an opportunity to be heard on their motion to re list
F after prayer for adjournment was refused by the court before their
motion to relist the suit was struck out, in such situations the courts
are wont to listen to such complaints as the appellant make. For,
such complaints touch on the fundamental human rights of the
citizen entrenched in the 1979 Constitution of this land. This is an
G important point of law.**

Looking at the record of proceeding on 2/7/96 annexed as part
of Exhibit KA5 to the "Further Affidavit" of the Appellant/Applicant, filed
on 25/11/98, there is no indication in the Judge's notes whether the de-
H fendants, now the Appellant/Applicant had notice of the trial on 2/7/96.

I have also looked at the Court's Records for 19/5/97, 2/6/97,
16/6/97 being part of the said Exh. KA5 (supra).

The court refused the prayer to adjourn because according to her, the

counsel on whose behalf the prayer was made "had" never appeared in" the case. Then there is the submission of the learned Counsel for the applicant that he has a substantial point of law to urge on the appeal. That seems to be so in the light of the above.

I have had a look at the grounds of appeal annexed as Exh. KA1 B to the Applicant's motion.

The combined effect of the 3 grounds and their particulars is a complaint that the learned trial Judge failed to accord the applicant the opportunity of being heard on its motion to relist the suit decided in his absence after his application for adjournment was refused. The un rebutted C affidavit evidence seeks to buttress the complaint. It raises an issue of law that is important.

As long winded as this motion is, and also its supporting affidavit, after reading them, and hearing counsel for the applicants, the applicants' prayer can be put into a few words. It is simply that execution D which had commenced, be stayed in a manner that the applicant's goods which have been seized and are in the Deputy Sheriffs Custody may not be sold. Rather, that they be held as security pending the determination E of the appellant/applicant's appeal.

In considering this application, I have kept in mind the vital principles which guide the courts in determining when to grant or refuse an application for stay of execution pending appeal:- F

(1) That there is an appeal pending.

(2) The Courts do not make the practice of depriving a successful litigant of the fruits of his success, except under special circumstances.

See Martins v. Niccanar Food Co. (1988) 2 NWLR (pt. 74) G 75, Vaswani Trading Co. v. Savalakh & Co. (1972) 12 SC 77. Special circumstances have been found to exist by the Courts where "arguable point of law", or "substantial point of law" (such as issue of jurisdiction) have been raised on appeal. Balogun v. Balogun H (1969) 1 ALL NLR 349, Akinsanya v. U.B.A. (1986) 4 NWLR (pt. 35) 273 etc.

Applying these principles to the matter in hand, there is an

appeal. The appellants complain there-in that when the trial Judge refused it application for adjournment sought because the principal counsel to handle the case was in the Supreme Court, it simply dismissed the applicant's motion without calling on the junior counsel who was in Court to proceed, it would seem to me that that could be a complaint about fair hearing, a breach of the applicant's constitutional right. There would thus be an arguable point of law.

Another point being taken into account in considering this motion is the nature of what the applicant's prayer seeks to stay. It is to stop the sale of the goods of the appellant which are in the possession of the Deputy Sheriff, not in the appellant's possession.

Is stayed, I believe that, as submitted by the learned counsel for the appellant, the goods constitute security for the prosecution of the appeal and remain to be reaped should the appeal fail and/or the appellants persist in not settling the judgment debt.

All the foregoing considered, including that this application is not opposed I should think that this is an appropriate case to grant a stay of further execution upon the terms which I shall set out anon.

It is ordered that further execution of the judgment of Olufawo J. of the High Court of Lagos State, Ikeja delivered on 2/6/96 be stayed pending the determination of the appeal filed 2/6/97.

The Appellant/Applicants' goods already seized in execution of the judgment of Olufawo J. of the High Court of Lagos State Ikeja delivered on 2/6/96 and pursuant to the orders of the said court made on 19/5/97, 2/6/97 and 16/6/97 shall not be sold but shall remain with the Deputy Sheriff of the High Court of Lagos State, Ikeja pending the determination of the appeal herein.

This order is made on the condition that Appellant/Applicants shall diligently pursue the said appeal.

There will be no order as to costs.

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OGUNTADE JCA

I read before now a copy of the lead ruling by my learned brother Nzeako J.C.A. I entirely agree with her reasoning. I would also grant a stay of further execution pending the determination of the appeal to this court. I make no order as to costs.

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SANUSI JCA

I read in draft the judgment just delivered by my brother Nzeako J.C.A., I am in complete agreement with the reasoning and conclusion reached. This is an example of a case in which an application for stay of execution should be granted in view of the fact that the unchallenged affidavit evidence contained averments which in my view provided special or exceptional circumstances see Egbuna v. Egbuna (1989) 2 NWLR (pt. 104) 773.

Also the appellant has raised serious and recondite issue of law touching on jurisdiction. I think it is only fair and will serve the interest of justice the more, if stay of further execution is ordered. I also make such order pending the time the appeal is determined in this court. I decline to make any order on cost.

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