

SUPREME COURT OF NIGERIA

13TH JULY, 2001. SC. 89/1999

**CORAM:- A. B. WALL, I. L. KUTIGI, S. U. ONU, S. O. UWAIFO,
E. O. AYOOLA, JJSC**

PROFESSOR V. O. S. OLUNLOYO DEFENDANT/APPELLANT
(Carrying on Business under the name
and style "TEKCON ASSOCIATES")

AND

ADEDAPO ADENIRAN PLAINTIFF/RESPONDENT

INTERLOCUTORY APPLICATIONS - Stay of Execution - Grant of -
Stay will be granted only if the court is satisfied - That there are special
or exceptional circumstances - Which warrant it (H 1)

INTERLOCUTORY APPLICATIONS - Stay of execution - Discretion -
In exercising the discretion to grant or refuse same - The competing rights
of the parties should be considered (H 2)

INTERLOCUTORY APPLICATIONS - Stay of execution - Pendency of
appeal - Special circumstances which have received judicial approval (H
3)

STAY OF EXECUTION - Balance of justice - A litigant must show
special or exceptional circumstances - By pleading the balance of justice
in his favour - To succeed in the application (H 4)

STAY OF EXECUTION - Conditional stay - The courts below rightly
exercised their discretion - In granting a conditional stay - As applicant
did not file any affidavit of means or suggest any other conditions (H 5)

FACTS

The plaintiff/respondent had at the Lagos High Court obtained
judgment against the defendant/appellant on 6th February 1998. The

terms of the judgment were for forfeiture of the tenancy of the defendant in respect of No34/36, St. Finbarr's college Road, Akoka Yaba, possession of the demised premises, mesne profits and interests thereon. The defendant who was dissatisfied filed an appeal at the Court of Appeal, Lagos Division followed by an application to the High court for unconditional stay of execution of the judgment.

The High Court in April 1998 delivered its ruling in which it granted the defendant a conditional stay of execution on certain terms involving payment of the mesne profit. The defendant who was not satisfied with the ruling filed a similar application before the Court of Appeal holden in Lagos which unanimously dismissed the application on 21st June 1999 with costs in favour of plaintiff. The defendant has finally appealed to the Supreme Court.

ISSUE FOR DETERMINATION

"Whether or not the Court of Appeal applied the correct principles in its Ruling by upholding the Ruling of the trial court in the exercise of its undoubted judicial discretion in granting the defendant a conditional stay of execution of its judgment instead of an unconditional stay as sought by the Defendant/Appellant."

HELD (Unanimously dismissing the appeal per lead judgment of **KUTIGI JSC**)

Stay of Execution - Special and exceptional circumstances

1. Now, it is settled that a stay of execution will only be granted if and only if, the court is satisfied that there are special or exceptional circumstances to warrant doing so, because the principle of law is that a judgment of a court of law is presumed to be correct and rightly made until the contrary is proved or established. Court will not therefore make the practice of depriving a successful litigant of the fruits of his success (see for example MARTINS VS. NICANNAR FOOD CO. LTD. (1988) 3 S.C. 429. (p. 2973 E)

Stay of execution - Exercise of discretion

2. A discretion to grant or a refuse a stay must therefore take into ac-

count the competing rights of the parties [see OKAFOR & ORS VS. NNAIFE (supra). (p. 2973 G)]

Stay of execution - Special circumstances

3. And where there is pending appeal as is the situation herein, the special circumstances which have received judicial approval are when execution would:-

- (a) destroy the subject matter of the proceedings;
- (b) foist upon the court a situation of complete helplessness; or
- (c) render nugatory any order or orders of the appeal court;
- (d) paralyse in one way or the other, the exercise by the litigant of his constitutional right of appeal; or
- (e) provide a situation in which even if the appellant succeeds in his appeal, there could be no return to the status quo.

See generally VASWANI TRADING CO. VS. SAVALAKH & CO (supra) DEDUWA VS OKORODUDU (1974) 6 S.C.21. (p. 2973 H)

Stay of execution - A litigant

4. A litigant applying for stay of execution must thus show special or exceptional circumstances pleading eloquently the balance of justice weighing in his favour, even though what constitutes special or exceptional circumstance may vary from case to case. [See OKAFOR VS NNAIFE (supra)]. (p. 2974 C)

Stay of execution - Conditional stay

5. I have also read over and over again the ruling of the Court of Appeal. And guided by the principles recited above I am clearly of the view that the court was right in its observations and conclusion. It is to me doubtless that both the trial High Court and the Court of Appeal properly applied the correct principles of law in the exercise of their undoubted judicial discretion in granting a conditional stay of execution in this case. The applicant who wanted a variation of the conditional stay granted to him by the trial court, did not find it worthwhile to suggest any other term or condition. He did not also give reasons why he cannot meet the

conditions prescribed as he completely failed or refuse to file any affidavit of means. (p. 2975 H)

REPRESENTATION

- B Akinwunmi Adeniran Esq. for the Defendant/Appellant.
P. O. Munis Esq. for the Respondent.

CASES REFERRED TO

- C Egbe v. Enogun (1972) 1 All N.L.R. (pt. 1) 95
Mortune v. Gambo (1979) 3-4 S.C. 54
Mohammed v. Olawunmi (1993) 4 NWLR (Pt. 288) 384
Ojikutu v. Odeh 14 WACA 640
Doherty & Anor. v. Doherty (1964) N.M.L.R. 144
D R.E.A.N. v. Aswani Textiles Ltd. (1992) 2 N.W.L.R. (Pt. 227) 1
Okafor v. Nnaife (1987) 4 N.W.L.R. (Pt. 64) 129
Martins v. Nicannar Food Co. Ltd. (1988) 3 S.C. 429
Shodeinde v. Trustee In Islam (1980) 2 S.C. 165
E Vaswani Trading Co. Ltd. v. Savalakh & Ors. (1972) 12 S.C. 77
Deduwa v. Okorodudu (1974) 6 S.C. 21
Kigo (Nigeria) Ltd. v. Holman Bros. (Nig.) Ltd. (1980) 5-7 S.C. 60
Nwabueze v. Nwosu (1988) 4 NWLR (pt. 88) 257
F Balogun v. Balogun (1969) 1 All NLR 349
U.B.N. v. Oduote Bookstore Ltd. (1994) N.W.L.R. (Pt. 331) 129 at 150

LEAD JUDGMENT BY KUTIGI JSC

- G In a contested suit between the plaintiff and the Defendant herein before the Lagos High court, the plaintiff on 6th February 1998 had judgment entered for him against the Defendant thus:

"Judgment is therefore hereby entered for the plaintiff against the Defendant in terms of the writ of summons and the statement of
H *claim; that is to say:*

(1) Forfeiture of the tenancy of the said premises and the tenancy of the Defendant in respect of the said premises, No. 34/36/, St.. Finbarr's college Road, Akoka, Yaba is hereby forfeited.

(2) *For possession of the demised premises, and it is hereby ordered that the Defendant shall give up possession of the said premises No. 34/36 St. Finbarr's college Road, Akoka, Yaba and deliver up the same to the plaintiff on OR before the 31st day of march, 1998.*

(3) *For mesne Profit, it is hereby ordered that the defendant shall pay Mesne profit or damages for Use and Occupation in respect of the said premises, No. 34/36 St. Finbarr's College Road, Akoka, at the rat of (N500,000) five hundred thousand Naira per annum from 1st January, 1996 until possession of the said premises is given up.*

(4) *The Defendant shall pay interest on all the sums of money due and payable as mesne profit OR Damages for use and Occupation in respect of the said premises at rate of 6% per cent per annum from 1st of January, 1996 until possession is give up."*

Dissatisfied with the judgment, the Defendant filed his Notice of Appeal to court of Appeal, Lagos Division. This was followed up by an application to the trial High Court of unconditional stay of execution of the judgment above. On the 23rd April, 1998, the High Court delivered its considered Ruling in which it granted the Defendant a conditional stay of execution on the following terms:-

"(1) That the execution of the judgment dated 6th of February, 1998 be and is hereby stayed on the following conditions:-

(a) That the defendant/applicant pays the mesne profit or damages as contained in the judgment, namely, a sum of N500,000 per annum from 1st of January, 1996 to 31st of December, 1998 making a total sum of (N 1.5M) one Million, five hundred thousand Naira; within 21 days from today; 2nd of April, 1998.

(b) If the appeal is not finalised by 31st December, 1998, the defendant/applicant shall continue to pay a sum of (500,00) Five hundred thousand Naria per annum with effect from 1st January, 1999 until the appeal is finally disposed of."

Once more the Defendant was not satisfied with the above Ruling. He filed a similar application before the court of Appeal holden in Lagos. The Court of Appeal in it Ruling dated the 21st June 1999, unanimously dismissed the application with N2, 000.00 costs in favour of the

plaintiffs.

Aggrieved by the decision of the Court of Appeal the Defendant has now appealed to this court.

B The parties filed and exchanged briefs of argument as provided by the Rules of Court . At the hearing of the appeal these briefs were adopted by learned Counsel on both sides who also made additional oral submission.

C Mr. Adeniran learned counsel for the Defendant has formulated three main issues in his brief as arising for determination while Mr Morris for the Plaintiff also in his brief submitted only one issue for determination.

D This being an interlocutory appeal in which case I am not permitted to make any observation which might appear to pre-judge the main issue in the substantive suit, I would prefer the plaintiff's single issue which is direct and positive to the Defendant's three which border on the main appeal yet to be decided by the Court of Appeal [see for example EGBE VS. ENOGUN (1972) 1 ALL N.L.R. (PT. 1) 95, E MORTUNE VS GAMBO (1979) 3-4 S.C. 54].

Now, the issues reads thus :-

F *"Whether or not the Court of Appeal applied the correct principles in its Ruling by upholding the Ruling of the trial court in the exercise of its undoubted judicial discretion in granting the defendant a conditional stay of execution of its judgment instead of an unconditional stay as sought by the Defendant/Appellant."*

G The Defendant's main complaint is that the court of Appeal did not properly consider the affidavit evidence before it reached its decision to dismiss the application and consequently he has not had a fair trial. He said by granting him unconditional stay of execution as sought and thereby remaining physically on the property, would be of great advantage to the Plaintiff since the property will thereby be protected. He said the Plaintiff will suffer no prejudice if unconditional stay of execution is granted. A number of cases were cited in support including MOHAMMED VS. OLAWUNMI (1993) 4 NWLR (PT.288) 384, OJIKUTU VS. ODEH 14 WACA 640, DOHERTY & ANOR VS DOHERTY (1964) N.M.L.R. 144.

We were urged to allow the appeal.

The Plaintiff on the other hand submitted that the Defendant had failed to show by affidavit evidence special or exceptional circumstances why the Plaintiff should be deprived the fruit of his judgment in his favour. That the Defendant in this appeal had also failed to show that the court of Appeal erred in law and or on the facts in its determination of the application before it. He said the Defendant neither showed in his affidavit before the Court of Appeal that the Plaintiff would be unable to refund the mesne profit of N500,000 per annum nor his own (Defendant's) inability to pay as ordered by the High Court and confirmed by the Court of Appeal. That the Court of Appeal correctly applied the proper principles to the application and rightly dismissed the Plaintiff's application. We were referred to the following cases amongst others:-

GUINEA INSURANCE VS. MONARCH HOLDINGS (1963) 3 N.W.L.R (PT.227) 365,

R.E.A.N. VS. ASWANI TEXTILES LTD. (1992) 3 N.W.L.R (PT. 227) 1.

OKAFOR VS. NNAIFE (1987) 4 N.W.L.R. (PT.64) 129.

The Court was asked to dismiss the appeal as lacking in merit.

Now, it is settled that a stay of execution will only be granted if and only if, the court is satisfied that there are special or exceptional circumstances to warrant doing so, because the principle of law is that a judgment of a court of law is presumed to be correct and rightly made until the contrary is proved or established. Court will not therefore make the practice of depriving a successful litigant of the fruits of his success (see for example MARTINS VS. NICANNAR FOOD CO . LTD. (1988) 3 S.C. 429, SHODEINDE VS TRUSTEE IN ISLAM (1980) 2 S.C 165, VASWANI TRADING CO LTD. VS SAVALAKH & ORS (1972) 12 S.C.77. A discretion to grant or a refuse a stay must therefore take into account the competing rights of the parties [see OKAFOR & ORS VS. NNAIFE (supra). And where there is pending appeal as is the situation herein, the special circumstances which have received judicial approved are when execution would:-

- (a) destroy the subject matter of the proceedings;
- (b) foist upon the court a situation of complete helplessness; or

- (c) render nugatory any order or orders of the appeal court;
- B (d) paralyse in one way or the other, the exercise by the litigant of his constitutional right of appeal; or
- (e) provide a situation in which even if the appellant succeeds in his appeal, there could be no return to the status quo.

C See generally VASWANI TRADING CO. VS. SAVALAKH & CO (supra) DEDUWA VS OKORODUDU (1974) 6 S.C.21, KIGO (NIGERIA) LTD VS. HOLMAN BROS. (NIG) LTD (1980) 5-7 S.C. 60, NWABUEZE VS. NWOSU (1988) 4 NWLR (PT. 88) 257.

D A litigant applying for stay of execution must thus show special or exceptional circumstances pleading eloquently the balance of justice weighing in his favour, even though what constitutes special or exceptional circumstance may vary from case to case. [See *OKAFOR VS NNAIFE* (supra)].

E I have carefully read the record of proceedings in this appeal. First of all it is instructive to note what the learned trial judge who first heard the motion for stay had to say thus:-

F *"However, the judgment creditor dose not oppose the application being granted on condition that the judgment/debtor pays the judgment debt and subsequent rents in advance. The judgment is in respect of money and possession. The applicant dose not say in the affidavit in support that if the money is paid, the respondent would not be able to refund it, if the applicant should win on appeal.*

G *It is the law that in considering an application for stay of execution, the Court must take into consideration the competing rights of the parties to justice.*

H *See OKAFOR VS NNAIFE (supra), U.B.N. VS ODUSOTE BOOKSTORE LTD (1994) N.W.L.R. (PT.331) 129 AT 150.*

In the circumstances of this case, where the learned Counsel for the defendant/applicant still believes that the case must last for 22 years, I think the only order that can lead to justice in this case is that of condi-

tional stay."

The Court of Appeal in its lead judgment which was read by Aderemi, J.C.A. (and concurred in by the other Justices) also observed as follows:-

"Let me begin by saying that a judgment delivered by a court of competent jurisdiction remains valid until it is set aside. It must also be borne in mind that, generally, the law dose not permit a successful litigant to be deprived of the fruits of his litigation and locking up funds to which prima facie, he is entitled. It therefore follows that to obtain a stay of execution of judgment against a successful party an applicant must show special circumstances or substantial reasons to warrant the deprivation of that party of the fruits of his judgment. See BALOGUN VS. BALOGUN (1969) 1 ALL NLR 349. The court below in the exercise of its judicial discretion upon being faced with an application for unconditional stay of execution granted a conditional stay of execution in the terms stated above. It is these conditions that the applicant wants removed. What are the reasons adduced by the applicant that will justify the variation of the order of the court below? Although the application is supported by a 60 - paragraph affidavit virtually all the paragraphs contain materials which are better employed for the argument of the appeal proper. Only paragraphs 57 and 58 contain materials which, with some strain, can be made use of in this type of application. I have read these two paragraphs over again they do not persuade me to upturn the ruling of the court below. As I have said this type of application calls for a great deal of exercise of judicial discretion. I have looked again at the ruling of the court below and I am satisfied that the exercise of its judicial discretion was founded upon the facts and circumstances presented before it. The conclusion it reached in the ruling was governed by law and equity. There is no basis for up turning the ruling."

I have also read over and over again the ruling of the Court of Appeal. And guided by the principles recited above I am clearly of the view that the court was right in its observations and conclusion. It is to me doubtless that both the trial High Court and the

B did not find it worthwhile to suggest any other term or condition. He did not also give reasons why he cannot meet the conditions prescribed as he completely failed or refuse to file any affidavit of means.

C with N10,000.00 costs against the Defendant/Appellant in favour of the Plaintiff/Respondents.

D **WALI JSC**

I have had the privilege of reading in draft, the lead judgment of my learned brother, Kutigi, J.S.C. and I agree with him that the appeal lacks merit and should be dismissed.

E Having regard to the facts involved in this case, I do not con-
sider the terms upon which the trial Court granted the appellant condi-
tional stay of its judgment to be cumbersome or excessive. The learned
trial Judge, in imposing the terms for the conditional stay applied his
discretion judiciously and judicially. See *Vaswani Trading Co. v. Savalakh*
F & Co. [1972] 12 S.C. 77.

The appellant did not show substantial reasons why the respondent should be deprived unconditionally of the fruits of his judgment by the trial court. See *Barker v. Lavery* [1885] 14 Q.B. 769 and *Deduwa v. G Okorodudu* [1974] 6 S.C. 21.

It is for these and the fuller reasons in the lead judgment of my learned brother Kutigi, JSC. that I also hereby dismiss the appeal with N10,000.00 costs to the respondent.

H

ONU JSC

Having been privileged to read before now the leading judgment of my learned brother Kutigi, JSC just delivered, I agree with him that the appeal lacks merit and ought to fail.

Accordingly, I too dismiss the appeal and make similar consequential orders inclusive of the costs awarded therein.

UWAIFO JSC

I read in advance the judgment of my learned brother Kutigi JSC. I agree with it for the reasons he has given.

I wish to state the facts that led to the judgment sought to be stayed unconditionally. I think by stating the facts of this case, it will help in the understanding of the facts and circumstances the defendant/appellant relies on in his application for stay of execution of the judgment in question. The said judgment was given on 6th February, 1998. By a tenancy agreement dated 21 January, 1994, the plaintiff let out No. 34/36 St. Finbarr's College Road, Akoka, Lagos to the defendant for a period of 2 years certain, effective from January 1, 1994. The tenancy was to expire on 31 December, 1995. The annual rent was N264,000. The defendant paid rent for the 2 years in advance. When the tenancy expired, the plaintiff gave notice of intention to recover possession to the defendant. As the defendant failed to give up possession, the plaintiff commissioned an estate surveyor for a valuation of the current open market rent. This was put at N500,000.00 per annum. An action was instituted for, amongst others, possession and mesne profits of N500,000.00 per annum until possession was given up. Judgment was accordingly given for the plaintiff.

The defendant asked for a stay of execution. The trial court stayed execution in respect of the order for possession but made it conditional upon the payment of the mesne profits of N500,000.00. The defendant desired unconditional stay of execution. That is to say, to remain on the premises without paying any rent or the mesne profits. So

he applied to the Court of Appeal for unconditional stay of execution but this was refused.

Nothing canvassed before this court in the appeal against that refusal has persuaded me that the lower court has not exercised its discretion properly. The argument of the defendant appears to run as follows. The plaintiff who was aware that the defendant had invested over N3 million to establish a Computer School on the said premises got the Lagos State Government to stop all “Renovation works” necessary to start the school. As a result the defendant desires to remain on the premises to protect his investment from being vandalised. In the meantime the plaintiff should withdraw his petition to the Lagos State Government and give him 6 months to complete the “Renovation work.” After that the plaintiff should allow him a few years rent-free to use the premises so as to reimburse him for the N3 million and any additional sum to be committed by him in completing the renovation work. This is more so deserving because a conditional stay upon payment of N500,000.00 per annum “is an act of blackmail” and “a deliberate ploy to turn the court into an instrument of oppression and repression” since the last tenant before him paid only N22,000.00 per annum to the plaintiff. The defendant by constitution has a right to establish that the N528,000.00 he paid to the plaintiff should not be for 2 years but should cover a period of 24 years. Furthermore, the construction of the premises in question cost the plaintiff about N100,000.00 sometime in 1967. This is the gist of the facts and argument presented by the defendant in support of the appeal before us.

I do not find that I can support the defendant that these are facts and argument which would have influenced the exercise of the lower court’s discretion. He has not shown it what way the lower court wrongly exercised its discretion to refuse the stay of execution sought. What is involved in this case is money judgment the execution of which the defendant seeks to stay unconditionally. There can be no argument that a court has a discretion to stay the execution of its judgment or that of another court over which it has supervisory or appellate jurisdiction. But in order to properly exercise that discretion, it does not as a rule have to

base it on matters of defence of law or relief in equity which themselves in appropriate circumstances must be raised in the action itself. There must be special circumstances disclosed by the applicant seeking stay which render it inexpedient to enforce the judgment. The special circumstances which the court will take into account to entitle it to stay B execution of the judgment are, as a general rule, such circumstances which go to the enforcement of the judgment and not those which go merely to its correctness: see *T.C. Trustees Ltd v J.S. Darwen (Successors) Ltd* (1969) 1 All ER 271 at 274.

If, of course, a judgment or order is patently flawed upon a C fundamental vice or obviously null and void on issue of jurisdiction, that could be seen as amounting to a special circumstance upon which an appellate court may base its discretion to stay the execution of such judgment or order. This is on the rationale that a judgment or order D which *ex facie* is shown to suffer from a fundamental vice or to have been given without jurisdiction ought not to be enforced with the unnecessary consequence of hardship imposed on the judgment debtor. This appears to be supported by the new attitude in England. In *Linotype-Hell Finance Ltd v Baker* (1992) 4 All ER 887, Staughton L.J. observed at p.888. E

"In The Supreme Court Practice 1991 vol.1, para.59/13/1 there are a large number of nineteenth century cases cited as to when there F should be a stay of execution pending an appeal. At a brief glance they do not seem to me to reflect the current practice in this court; and I would have thought it was much to be desired that all the nineteenth century cases should be put on one side and that one should concentrate on the G current practice. It seems to me that, if a defendant can say that without a stay of execution he will be ruined and that he has an appeal which has some prospect of success, that is a legitimate ground for granting a stay of execution. The passage quoted in The Supreme Court Practice from Atkins v Great Western Rly Co (1886) 2 TLR 400, 'As a general rule the H only ground for a stay of execution is an affidavit showing that if the damages and costs were paid there is no reasonable probability of getting them back if the appeal succeeds', seems to be far too stringent a test

today.”

The circumstances relied on by the defendant in the present case do not fall within special circumstances which go to the enforcement of the judgment in question. One of the matters that could be taken into account might well be that when the money is paid, the plaintiff will be unable to refund it in case the appeal succeeds: see *Barker v Lavery* (1885) 14 Q.B.D. 769; *Atkins v Great Western Railway Co.* (1886) 2 T.L.R. 400. Or that the appeal has great merit and that to enforce the judgment or order in the meantime will be ruinous to the appellant: see *Linotype-Hell Finance Ltd* (supra). None of these has been shown in the present case. The law that the court does not make a practice of depriving a successful litigant of the fruits of his litigation, and locking up funds to which he is prima facie entitled is still apt here: see *The Annot Lyle* (1886) 11 P.D. 114 at p.116; *Deduwa v Okorodudu* (1974) 6 SC 21 at 25.

For the above reasons and those more fully stated by my learned brother Kutigi JSC I also dismiss this appeal as lacking in merit. I award ₦10,000.00 costs to the plaintiff/respondent.

AYOOLA JSC

I have read in draft the judgment just delivered by my learned brother, Kutigi, JSC. For the reasons he gives, I too would dismiss the appeal with ₦10,000 costs to the respondent.

G

H