

SUPREME COURT OF NIGERIA
FRIDAY 17TH MAY, 2002. SC. 86/1997
CORAM:- S. M. A. BELGORE, M. E. OGUNDARE,
E. O. OGWUEGBU, S. U. ONU, U. A. KALGO, JJSC

1. JULIUS OBA FATOYINBO & 2 ORS APPELLANTS
(For and on behalf of Okunrinpo
Family of Oke Ila Ado-Ekiti)

AND

1. MICHAEL DADA OSADEYI
2. LAWRENCE FUNMILAYO AJANA RESPONDENTS
(For and on behalf of the Family of
Orereowu Street, Ado-Ekiti)

COURTS - Power - Stay of execution - Grant - Power to grant or refuse stay of execution of a judgment is discretionary - And must be exercised judicially and judiciously (H1)

COURTS - Discretion - Exercise of - Stay of execution - Court will not normally at the instance of unsuccessful litigant - Deprive a successful litigant of fruits of judgment in his favour (H2)

STAY OF EXECUTION - Grant - Basis - Unsuccessful litigant must show special or exceptional circumstances - Clearly showing the balance of justice in his favour (H3)

STAY OF EXECUTION - Special circumstances - Meaning - Special circumstance is situation that if not addressed - Will destroy subject matter of proceedings - And render nugatory any order of Court of Appeal (H4)

APPEALS - Stay of execution - Grant - Since there are no substantial points of law - That necessitate maintaining the status quo until appeal is determined - Stay will not be granted (H5)

APPEALS - Court of Appeal - Exercise of discretion - Correctness of - The court exercised its discretion judicially and judiciously - In accordance with justice and relevant considerations (H6)

FACTS

Plaintiffs/appellants commenced this action in a representative capacity at the High Court of Ekiti State, Ado-Ekiti judicial division. They sued defendants/respondents claiming inter alia, title to a piece of land, damages for trespass and injunction. Respondents counter-claimed for the same reliefs. At the end of the trial, the court gave judgment in favour of respondents as per their counter-claim. Appellants were dissatisfied with the decision and they appealed to the Court of Appeal, Benin.

While the appeal was pending, appellants applied to the trial court for stay of execution of its judgment pending the determination of the appeal. The learned trial judge heard the application and refused it. The appellants, still not happy, further filed a similar application for stay pending appeal before the Court of Appeal Benin. The application was heard by the Court of Appeal and was also dismissed. Aggrieved further, appellants appealed to the Supreme Court.

ISSUES FOR DETERMINATION

(a) As plaintiffs-appellants are no trespassers on the disputed land; as defendants- respondents did not sue plaintiffs-appellants for forfeiture; as there is evidence that plaintiffs-appellants have been on the land for more than thirty years and as it is clear that it will work hardship on plaintiffs - appellants if they are restrained from going to the land in dispute, whether or not it was right for the lower court to refuse a stay of execution of the judgment on the land.

(b) Whether or not it was right for the lower court to dismiss plaintiffs'-appellants' application for a stay on the ground that plaintiffs-appellants filed no further and better affidavit to the counter affidavit of defendants-appellants indeed plaintiffs - appellants did file one.

(c) Whether the decision of the lower court in dismissing plaintiffs-appellants (sic) is in line and consonance with the affidavit evidence and facts before the lower court."

HELD (Unanimously dismissing the appeal per **KALGO JSC**)

COURTS - Power - Stay of execution - Grant

1. It is now well settled that the power of the courts to grant or refuse stay of execution of a judgment is discretionary but the discretion must however be exercised both judicially and judiciously and not arbitrarily. Such discretion must also take into account the competing rights of the parties to justice.

(p. 1217 A)

COURTS - Discretion - Exercise of - Stay of execution

2. In the exercise of the discretion, the courts will not make a practice of depriving a successful litigant, at the instance of an unsuccessful one, of the fruits of the judgment granted in favour of the former, until a further appeal is determined and the judgment set aside. (p. 1217 B)

STAY OF EXECUTION - Grant - Basis

3. And for an unsuccessful litigant to succeed in an application for stay of execution of a judgment, he or she must show special or exceptional circumstances clearly showing the balance of justice in his or her favour.

This cannot be a strong reason to be considered in an application for stay of execution, since it has long been recognised that the broad basis for the exercise of the power to grant stay is equity and justice between the parties and more importantly that the appeal, if successful will not be rendered nugatory. The respondents have a judgment in their favour which is subsisting, and the land in dispute being a "res" which is not perishable, will still be available after the determination of the appeal. Therefore looking at the contending rights of the parties in this case, a grant of stay of execution will in my view be untenable because the consideration of the convenience of the appellants' alone (i.e. poverty or hardship) cannot be special circumstances within the contemplation of the law. (pp. 1217 B/1220 B)

STAY OF EXECUTION - Special circumstances - Meaning

4. In this particular case and in other applications similar to it, special and exceptional circumstances must be shown by

the applicant to warrant the grant. What constitutes special and exceptional circumstances varies from case to case, and although it is not possible to define exhaustively what could amount to special circumstance this court in the Vaswani v. Savalakh case (supra) at page 487 gave an idea of what it could amount to, when it held that:-

When it stated that the circumstances or condition for granting a stay should be special or strong we take it as involving a consideration of some collateral circumstances and perhaps in some cases inherent matters which may, unless the order for stay is granted, destroy the subject matter of the proceedings or foist upon the court, especially the Court of Appeal, a situation of complete helplessness or render nugatory any order or orders of the Court of Appeal, or paralyse, in one way or the other, the exercise by the litigant of his constitutional right of appeal or generally provide a situation in which whatever happens to the case, and in particular even if the appellant succeeds in the Court of Appeal, there could be no return to the status quo. (p. 1217 G)

APPEALS - Stay of execution - Grant

5. There is no ground of appeal in the notice of appeal which raised any serious or crucial issue of such importance as to “attract the attention” of this court. In my view the grounds of appeal filed though they may be arguable grounds are not grounds of pure law to attract the special consideration of this court. In any case, it is not in every case where the grounds of appeal raise arguable point or points of law that a stay of execution will be granted as each case will be considered on its own merit. But where as in this case, it is not demonstrated that the appeal involves substantial points of law necessitating matters to be kept in status quo until the appeal is determined stay of execution will not be granted. (p. 1219 D)

Court of Appeals - Exercise of discretion - Correctness of

6. From all what I have said above I find that the Court of Appeal has exercised its discretion judicially and judiciously in this case in accord with justice and having regard to all the

necessary and relevant considerations. (p. 1220 F)

REPRESENTATION

A. O. Akande San, with him, Miss H. Esangbedo for the appellants
No appearance for the respondents

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CASES REFERRED TO

Balogun v. Balogun (1969) 1 All NLR 69

Martins v. Nicanner Food Co. Ltd (1988) 2 NWLR (Pt. 74) 75

Nwabueze v. Nwosu (1988) 4 NWLR (Pt. 88) 157

Okafor v. Nnaife (1987) 4 NWLR (Pt. 64) 129

Wilson v. Church (No. 2) (1879) 12 Ch. D. 458

University of Lagos v. Aigoro (1985) 1 NWLR (Pt. 1) 143

Enekebe v. Enekebe (1964) 1 All NLR 102

Ajomale v. Yaduat (No. 2) (1991) 5 NWLR (Pt. 191) 266

Utilgas Nig. & Overseas Gas Co. Ltd v. Pan African Bank Ltd
(1979) 10 SC 105

Vaswani Trading Co. v. Savalakh & Co. (1972) 1 All NLR (Pt. 2) 483

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LEAD JUDGMENT BY KALGO JSC

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This is an interlocutory appeal. It is an appeal from the ruling of the Court of Appeal Benin, delivered on 26th of June 1995.

The appellants were the plaintiffs in the trial court at Ado-Ekiti High Court. They sued the respondents claiming title to a piece of land, damages for trespass and injunction. The respondents counter-claimed for the same reliefs. At the end of the trial, the court gave judgment in favour of the respondents per their counter-claim. The appellants were dissatisfied with the decision and they appealed to the Court of Appeal, Benin. While the appeal was pending, (and it is still pending) the appellants applied to the trial court for stay of execution of its judgment pending the determination of the appeal. The learned trial judge, Adekeye J. (as she then was) heard the application and refused it.

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The appellants, still not happy, further filed a similar application for stay pending appeal before the Court of Appeal Benin. The application was again heard by the Court of Appeal and was dismissed with N500.00 costs in favour of the respondents. They now appealed to this court on three grounds, and formulated three issues

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for determination in their brief of argument. The issues are:-

B *“(a) As plaintiffs-appellants are no trespassers on the disputed land; as defendants- respondents did not sue plaintiffs-appellants for forfeiture; as there is evidence that plaintiffs-appellants have been on the land for more than thirty years and as it is clear that it will work hardship on plaintiffs - appellants if they are restrained from going to the land in dispute, whether or not it was right for the lower court to refuse a stay of execution of the judgment on the land.*

C *(b) Whether or not it was right for the lower court to dismiss plaintiffs’-appellants’ application for a stay on the ground that plaintiffs-appellants filed no further and better affidavit to the counter affidavit of defendants-appellants indeed plaintiffs - appellants did file one.*

D *(c) Whether the decision of the lower court in dismissing plaintiffs-appellants (sic) is in line and consonance with the affidavit evidence and facts before the lower court.”*

The respondents also filed a brief in reply and raised three issues for determination which read:-

E *“1. Whether in the circumstances of two competing claims in respect of title to land, the winning party is not entitled to the immediate enjoyment of the fruits of history.*

F *2. Whether in the circumstances of this case the plea of hardship alone would be enough to deprive the winning party to the fruits of victory as if the winners are not entitled to the plea of hardship as occasioned by their deprivation.*

G *3. Whether in any event, a party who is in contempt of two valid and subsisting orders of court is entitled to the discretion of this court be exercised in their favour while persisting in naked acts of disobedience.”*

H At the hearing of the appeal, the respondent was absent and was not represented by counsel. The appellants’ counsel adopted his brief of argument and urged the court to allow the appeal. The brief of the respondent is deemed argued in accordance with the rules of this court.

I will consider the issues raised by the appellants which I find more appropriate having regard to the grounds of appeal. But in view of the nature of the application which was the subject of this appeal, I intend to consider all the three issues together.

It is now well settled that the power of the courts to grant or refuse stay of execution of a judgment is discretionary but the discretion must however be exercised both judicially and judiciously and not arbitrarily. Such discretion must also take into account the competing rights of the parties to justice. In the exercise of the discretion, the courts will not make a practice of depriving a successful litigant, at the instance of an unsuccessful one, of the fruits of the judgment granted in favour of the former, until a further appeal is determined and the judgment set aside. And for an unsuccessful litigant to succeed in an application for stay of execution of a judgment, he or she must show special or exceptional circumstances clearly showing the balance of justice in his or her favour. These principles of law, inter alia, were enunciated in myriad decisions of this court notably *Vaswani Trading Company v. Savalakh & Company* (1972) 1 All NLR (pt.2) 483; *Balogun v. Balogun* (1969) 1 All NLR 69; *Martins v. Nicanner Food Company Limited* (1988) 2 NWLR (pt. 74) 75; *Nwabueze v. Nwosu* (1988) 4 NWLR (pt. 88) 157; *Okafor v. Nnaife* (1987) 4 NWLR (pt. 64) 129.

In this application, the only evidence before the Court of Appeal was the affidavit evidence of the parties. The appellant filed a twenty-four (24) paragraphs affidavit in support of the application. The respondent filed a thirty (30) paragraphs counter affidavit in opposition to the averments in the affidavit in support. The appellant then filed a further and better affidavit in reply.

As I stated earlier in this judgment, the Court of Appeal has a discretion to grant or refuse stay of execution in the matter but the exercise of discretion must be done judicially and judiciously and not in vacuum. ***In this particular case and in other applications similar to it, special and exceptional circumstances must be shown by the applicant to warrant the grant. What constitutes special and exceptional circumstances varies from case to case, and although it is not possible to define exhaustively what could amount to special circumstance this court in the Vaswani v. Savalakh case (supra) at page 487 gave an idea of what it could amount to, when it held that:-***

“When it stated that the circumstances or condition for granting a stay should be special or strong we take it as in-

volving a consideration of some collateral circumstances and perhaps in some cases inherent matters which may, unless the order for stay is granted, destroy the subject matter of the proceedings or foist upon the court, especially the Court of Appeal, a situation of complete helplessness or render nugatory any order or orders of the Court of Appeal, or paralyse, in one way or the other, the exercise by the litigant of his constitutional right of appeal or generally provide a situation in which whatever happens to the case, and in particular even if the appellant succeeds in the Court of Appeal, there could be no return to the status quo.”

One of the important considerations in an application for stay of execution pending appeal is the preservation of the “res” and the maintenance of the “status quo ante” so that if the appellant succeeds on appeal he/she would not have a hollow judgment. In this case, the “res” is the land in dispute which was granted by the trial court to the respondent. There was nothing in the appellants’ affidavit to show that the land concerned is perishable and this is common ground. Also the averment of the appellants that they have been on the land for a long time was challenged by the averments in the respondents’ counter-affidavit to the effect that during the occupation of their land, there were two suits filed by the respondents against the appellants (suits No. HAD/23/85 and HAD/59/89) and in each case the respondents were successful. This was not expressly denied by the appellants in their affidavits.

In paragraphs 6 and 7 of the supporting affidavit, the appellants averred:-

*“6. That the grounds of appeal raise crucial important and serious issues which will attract the attention of this Honourable Court
7. That our said appeal consequently has fair chances of success.”*

From the record (pp. 28 - 29) the appellants filed a notice of appeal containing only three (3) grounds of appeal which read:-

“1. The lower court misdirected itself in law in dismissing the application of the appellants when from the evidence before the court it was patent that:-

a. applicants were not on the land in trespass.

b. there is no claim for forfeiture of the land which the court of

first instance held respondents granted to appellants,

c. there is evidence before the court that appellants have cultivated the land for over thirty years,

d. there is evidence before the court that it will work hardship on the appellant if the execution of the judgment of the court of first instance is not stayed. B

2. The lower court misdirected itself on the facts in holding that the applicants filed no further and better affidavit to counter what respondents swore to in their counter affidavit when appellants did so and the lower court thereby came to a wrong conclusion. C

3. The decision of the lower court is against the weight of affidavit evidence.”

It is very clear from the above grounds of appeal that grounds 1 and 2 alleged a misdirection of facts and ground 3 is an omnibus ground. ***There is no ground of appeal in the notice of appeal which raised any serious or crucial issue of such importance as to “attract the attention” of this court. In my view the grounds of appeal filed though they may be arguable grounds are not grounds of pure law to attract the special consideration of this court. In any case, it is not in every case where the grounds of appeal raise arguable point or points of law that a stay of execution will be granted as each case will be considered on its own merit.*** See Okafor v. Nnaife (supra) ***but where as in this case, it is not demonstrated that the appeal involves substantial points of law necessitating matters to be kept in status quo until the appeal is determined stay of execution will not be granted.*** See Utilgas Nigeria & Overseas Gas Company Ltd. v. Pan African Bank Ltd. (1979) 10 SC. 105. For similar reasons, a judgment creditor ought not to be deprived of the right to enjoy the fruits of his success, unless there is strong reason making it probable that the judgment is certain to be set aside on appeal. See Nwabueze v. Nwosu (supra); Wilson v. Church (No. 2) (1879) 12 Ch. D. 458. This does not appear to me to be the case here. H

Also in paragraph 20 and 21 of the supporting affidavit, the appellants deposed:-

“20. That if applicants cannot go to their farms on the disputed land they and their families will go into penury and possibly starve to

death.

21. *That if applicants are not allowed to tender their crops on the disputed land they will have no means to exercise their constitutional right of prosecuting their appeal as they have no other source of income.*"

B By these averments the appellants are saying that if stay is not granted to them, and they do not go back to the land, they would suffer poverty and possibly starve to death, and would be unable to prosecute their appeal. ***This cannot be a strong reason to be considered in an application for stay of execution, since it has long been recognised that the broad basis for the exercise of the power to grant stay is equity and justice between the parties and more importantly that the appeal, if successful will not be rendered nugatory. The respondents have a judgment in their favour which is subsisting, and the land in dispute being a "res" which is not perishable, will still be available after the determination of the appeal. Therefore looking at the contending rights of the parties in this case, a grant of stay of execution will in my view be untenable because the consideration of the convenience of the appellants' alone (i.e. poverty or hardship) cannot be special circumstances within the contemplation of the law.*** See *Ajomale v. Yaduat* (No. 2) (1991) 5 NWLR (pt. 191) 266 at 285.

F The Court of Appeal, in its ruling appealed against, considered all the facts in the affidavit evidence before it in the application, and after hearing the submissions of counsel for the parties, found that the appellants have not shown any special circumstances to justify the grant of the application. ***From all what I have said above I find that the Court of Appeal has exercised its discretion judicially and judiciously in this case in accord with justice and having regard to all the necessary and relevant considerations.*** See *University of Lagos v. Aigoro* (1985) 1 NWLR (pt. 1) 143 at 148; *Enekebe v. Enekebe* (1964) 1 All NLR 102. I also find that the refusal of the Court of Appeal to grant stay will not result in destroying the land in dispute nor render any judgment of that court on the pending appeal nugatory. I resolve the 3 issues against the appellants.

In sum, I find no merit in this appeal. I dismiss it and affirm the

ruling of the Court of Appeal delivered on 26th June 1995. As the respondent were absent at the hearing of this appeal, I make no order as to costs.

BELGORE JSC

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I agree with my learned brother, Kalgo J.S.C. that this appeal has no merit. I adopt his reasoning and conclusion as mine. I am also dismissing the appeal with N10,000.00 costs to respondents.

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OGUNDARE JSC

I agree entirely with the judgment of my learned brother Kalgo JSC just delivered. For the reasons given by him in the said judgment I too dismiss this appeal and abide by the order for costs made by D Kalgo JSC. I find no merit whatsoever in the appeal.

OGWUEGBU JSC

I had the privilege of a preview of the judgment just delivered E by my learned brother Kalgo, JSC. I agree with his reasoning and conclusion and for the reasons given in the judgment, I agree that the appeal be dismissed and make no order as to costs.

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ONU JSC

I have had the advantage of a preview of the judgment of my learned brother Kalgo, JSC just delivered. I am in entire agreement with him that the appeal lacks merit and ought there- G fore to fail. I adopt the same as mine and have nothing further to add thereto.

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