

COURT OF APPEAL JOS DIVISION
THURSDAY 10TH OF DECEMBER, 1998. CA/J/91m/97
CORAM: G. A. OGUNTADE, D. O. EDOZIE,
R. D. MUHAMMAD, JJCA

1. ALHAJI BALA ABDULKADIRI
2. MALLAM MAGAJI IBRAHIM APPELLANTS
AND
ALHAJI BABA INUWA ALI RESPONDENT

STAY OF EXECUTION - Grant - Basis - Poverty is not a special ground for granting stay - Except where the effect deprives appellant of means of prosecuting his appeal (H1)

STAY OF EXECUTION - Grant - Poverty - Proof - Applicant must prove that he has no resources - To prosecute his appeal - If he pays the judgment debt (H2)

STAY OF EXECUTION - Grant - Basis - Interest of justice is the overriding issue - Substantial ground may constitute special circumstance - If it arises in a decision where stay can be granted (H3)

STAY OF EXECUTION - Affidavits - Averments - Since respondent's averments of his means - To refund judgment debt if appeal fails were not challenged - Stay will not be granted (H4)

FACTS

Plaintiff/respondent filed this action at the High Court of Plateau State Jos, claiming jointly and severally against defendants/appellants for the sum of N131,417 being the outstanding balance due from 1st appellant. 2nd appellant had guaranteed to pay the said sum upon default by 1st appellant. The learned trial Judge entered judgment in favour of respondent. Appellants were not satisfied with the judgment. Hence, they appealed to the Court of Appeal Jos Division.

In the meantime, appellants filed application at the High Court for a stay of execution of its judgment on the ground of their inability to pay the judgment debt. The application was refused by

the court. Consequently, appellants filed an application at the Court of Appeal asking for a stay of execution of the judgment of the trial High Court on the same ground of poverty. Respondent has vehemently opposed the application on the basis that poverty is not a ground to grant a stay of execution.

HELD (Unanimously dismissing the application per

MUHAMMAD JCA)

STAY OF EXECUTION - Grant - Basis

1. The law is that poverty is not a special ground for granting a Stay of execution except where the effect will be to deprive the appellant of the means of prosecuting his appeal.

(p. 3164 B)

STAY OF EXECUTION - Grant - Poverty - Proof

2. In their affidavit in support the applicants deposed that the 1st applicant earns N6.200 per month and has to take care of a family of twenty three, while the 2nd applicant earns N6,000 per month and has a family of nineteen. That they would be unable to prosecute the appeal if they pay the judgment debt. In my opinion a mere statement that an applicant is poor and cannot prosecute the appeal if he pays the judgment debt, without more, will not amount to a special circumstance. The applicant must go further. He has to supply the court with all the facts about his income and the source of his income. It is not sufficient to simply state that one is poor. The applicant must establish that he has indeed no resources. The applicants have failed to establish that they have no resources. The applicants should have supplied the court with more facts to enable the court exercise its discretion in their favour. This is moreso where the respondent in his court-affidavit claimed “that the 1st applicant is a businessman of high repute in Benue State and in particular Makurdi and has the means of paying the judgment debt”. (p. 3164 E)

STAY OF EXECUTION - Grant - Basis - Interest of justice

3. The second reason why the applicants are asking for a stay is that their grounds of appeal raised serious issues of law and fact. A ground of appeal will constitute a special circumstance for grant or stay of execution, only if it arises in a decision where a stay can be granted. It is not every ground of appeal which raises an important or difficult point of law which qualifies as a special circumstance for grant of stay on the ground of being *recondite*.

The fact that a ground of appeal raises a substantial point of law does not in itself constitute a special circumstance. It can only constitute a special circumstance for grant of stay of execution only if it arises in a decision where a stay could be granted. The court must consider the facts and circumstances of the case even though the ground raises difficult or important issue of law. The overriding issue to guide the court is the interest of justice. If the grant of stay will occasion substantial injustice to the respondent, it will be refused. (p. 3165 A/G)

STAY OF EXECUTION - Affidavits - Averments

4. The third ground for which the applicants are asking for a stay is that the respondent would not be able to refund the money if the appeal succeed. The respondent in his counter-affidavit has deposed that he has a landed property at Zaria Road, Jos the value of which is not less than N4 million. He also deposed that he has a Mercedes Benz 230 Station Wagon whose value is over N400,000.00. These averments were not challenged or controverted. With these uncontroverted averments, it is clear that the respondent is a man of means who could refund the judgment debt if the appeal succeeds.

In the final analysis, I find that the application lacks merit. The applicants have failed to establish any special circumstance to enable us exercise our discretion in their favour. The application is hereby refused. (p. 3166 A)

REPRESENTATION

Y.A.H. Ruba Esq. with Nasiru Mohammed Esq., for the Appellants
P.O. Olorunmohunle Esq., for the Respondent

CASES REFERRED TO

- Obaro v. Dantata & Sawoe (1997) 10 NWLR (Pt.530) 676
 Union Bank v. Odusote Bookstore (1994) 3 NWLR (pt.331) 129
 Sony Ebitu v. I.G. Kachala, Appeal No. CA/J/77m/87
 B Babayagi v. Bida (1998) 2 NWLR (Pt.538) 367
 Alalade v. N.B.N. Ltd. (2) (1997) 8 NWLR (Pt 517) 514
 Balogun v. Balogun (1969) 1 All NLR 349
 Martins v. Niccumar Food Co. Ltd. (1988) 2 NWLR (pt.74) 75
 C Nwabueze v. Nwosu (1988) 4 NWLR (Pt.88) 257
 Okafor v. Nnaife (1987) 4 NWLR (Pt.64) 129
 Kigo Nig. Ltd. Holman Brothers Ltd. (1980) 5 - 7 S.C. 60
 Vaswani Trading Company v. Savalakh & Co. (1972) 12 S.C. 77
 Nwabueze v. Obioma Nwosu (1988) 4 NWLR (Pt 88) 257
 D Ajomale v. Yaduat (No. 2) (1991) 5 NWLR (Pt.191) (2) 206

LEAD JUDGMENT BY MUHAMMAD JCA

- The respondent herein was the plaintiff at the lower court. His claim against the applicants, at the Plateau State High Court holden
 E at Jos jointly and severally was for the sum of N131,0417 being the outstanding balance due from the 1st applicant. The 2nd applicant guaranteed to pay the said sum upon default by the 1st applicant on 12th day of December, 1996, the trial Judge Naron J. entered judgment in favour of the respondent. The applicants were not satisfied
 F with this decision, they therefore appealed to this court. They then applied to the trial court for stay of execution of its judgment. The application was refused by the lower court. The applicants then brought a motion on notice to this court asking for the following order:
 G *"An Order for stay of execution of the judgment of the lower court in suit No. PLD/J79/96 delivered on the 12th day of December, 1996 pending the final determination of the applicants' appeal".*

- Moving the motion, Mr. Ruba learned counsel for the applicants referred to the two affidavits filed in support of the motion and
 H submitted that they have established special circumstances to enable the court to grant a stay of execution. He submitted that if the applicants pay the judgment debt, they would not be able to prosecute the appeal. He also submitted that they are challenging the judgment of the lower court on the issue of jurisdiction and fair hearing. He

referred to the grounds of appeal filed and submitted that the grounds of appeal raised serious issues of law. He referred to Obaro v. Dantata & Sawoe (1997) 10 NWLR (Pt.530) 676 at 679 and Union Bank v. Odusote Bookstore (1994) 3 NWLR (pt.331) 129; Para - 1 (1994) 3 SCNJ 1. He urged the court to grant the application.

Opposing the motion, Mr. Olorunmohunle learned counsel for the respondent submitted that the application lacks merit and should be dismissed. He submitted that poverty per se is not a ground for granting a stay. The applicants must place all the facts before the court which the applicants failed to do. He submitted that there is no factual support to the issue or jurisdiction. He referred to paragraphs 9, 12 and 13 of the counter-affidavit which have not been challenged. He referred to the unreported case of Sony Ebitu v. I.G. Kachala, Appeal No. CA/J/77m/87 delivered on 28/3/88 and Babayagi v. Bida (1998) 2 NWLR (Pt.538) 367. He submitted that the applicants are not entitled to the relief sought and the application should be rejected. He also submitted that in the alternative, if the court is minded to grant the application, the applicants should pay the judgment debt into the court. He referred to Alalade v. N.B.N. Ltd. (2) (1997) 8 NWLR (Pt 517) 514 at 520.

The principles guiding the grant or refusal of a stay of execution are well settled. See: Balogun v. Balogun (1969) 1 All NLR 349; Martins v. Niccumar Food Co. Ltd. (1988) 2 NWLR (pt.74) 75; Nwabueze v. Nwosu (1988) 4 NWLR (Pt.88) 257; Okafor v. Nnaife (1987) 4 NWLR (Pt.64) 129 and Kigo Nig. Ltd. Holman Brothers Ltd. (1980) 5 - 7 S.C. 60. The locus classicus on the issue of course is the case of Vaswani Trading Company v. Savalakh & Co. (1972) 12 S.C. 77 where the Supreme Court set down the principles which should guide a court in its consideration and determination of an application for a stay of execution. It was stated at page 81:

"When the order or judgment of a lower court is not manifestly illegal or wrong, it is right for a Court of Appeal to presume that the order or judgment appealed against is correct or rightly made until the contrary be proved or established and for this reason the Court of Appeal and indeed any court, will not make a practice of depriving a successful litigant of the fruits of his success unless under very special circumstances ... When it is stated that the circumstances or conditions 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”.

I will now consider the facts to determine whether or not the appellants have established any special circumstance to enable us to use our discretion to grant a stay of execution of the judgment. The application was supported by a six paragraphs affidavit and a further and better affidavit of six paragraphs.

The reasons why the stay should be granted are contained in paragraph 3. E, F, G, H, I, J and K of the affidavit in support. It was deposed:

“E. That the applicant are the respective bread winners of their families of 23 and 19 members respectively and that their income is about N6.200 and N6,000 respectively per month.

F. That the applicant family can hardly go on three square meal in a day now.

G. That as a result of paragraph (e) and (f) above the applicants do not have the money to liquidate the judgment sum or else they will be financially handicapped to prosecute the appeal.

H. That the applicant’s grounds of appeal raises serious issues of law and fact.

I. That the applicants are prepared and willing to enter into an undertaken to indemnify the respondent in the event of losing the appeal.

J. That the respondent is also the bread winner of a large family of which is obligatory for him to cater for and that if this judgment is executed against the applicants, the respondent will use the same to cater for his large family and there is no reasonable probability of getting the money back if the applicants appeal succeeds.

K. That the applicants are willing and ready to fight the appeal to it’s final conclusion and will never relax over it when a stay of

execution is granted”.

The respondent filed a counter-affidavit in opposition to the application. The relevant paragraphs of the counter-affidavit are paragraphs 3, 5, 7, 8, 10, 11, 12, 13, 14, 15, 16 and 17. They read:-

“3. That paragraphs 3(e), (f), (g), (h). (i), (j) and (k), 4 and 5 or the affidavit are false. B

S. That the 1st applicant is a businessman of high repute in Benue State and in particular Makurdi and has the means of paying the judgment debt.

7. That since the applicants filed their notice of appeal on the 17/12/96. They have not taken any further step to see to the completion of record of proceedings of the lower court. C

8. That since January 1997, the applicants have deprived me the use of my hard earned money in the sum of N131,417.00 (one hundred and thirty one thousand, four hundred and seventeen naira) only. D

10. That I know as a fact that the applicants are out to deprive me the enjoyment of the fruit of my judgment.

11. That I am informed by my counsel P. O. Olorunmohunle Esq whom I verily believe as follows:- E

(a) That the appellants/applicants grounds of appeal raises no substantial point of law.

12. That I have landed property at Zaria Road, Jos, in which my family members and myself stay and the value of same is not less than N4 million. F

13. That apart from the landed property I have a Mercedes Benz, 230 Station Wagon whose value is over N400,000.00

14. That I am in a position to repay the applicants the judgment sum in the event they succeed on appeal. G

15. That I know as a fact that the applicants are not ready to prosecute their appeals.

16. That I will be greatly prejudiced if this application is granted.

17. That it is essential in the interest of justice to refuse this application.” H

It could be seen from the facts deposed in the affidavit in support that the applicants are asking for a stay of execution for the following reasons:-

1. That the applicants are poor and have large families to

support and if they pay the judgment debt they would be financially handicapped to prosecute the appeal

2. The applicants' grounds of appeal raises serious issues of law and fact and;

3. The respondent is also a poor man with a large family and will not be able to refund the money in the event of the appeal succeeding.

The law is that poverty is not a special ground for granting a Stay of execution except where the effect will be to deprive the appellant of the means of prosecuting his appeal. In *Nwabueze v. Obioma Nwosu* (1988) 4 NWLR (Pt 88) 257 at 272 Nnamani J.S.C. stated:-

"In my view there were no exceptional circumstances to justify the grant of a stay of execution in this case. The respondent did not show that he had no resources. In any case poverty simpliciter has never been accepted as an exceptional circumstance. See P.O.P Martins case (supra) but if there is a plea that a person cannot prosecute his appeal if he paid his judgment debt and it is established that there are indeed no resources, this could be a special circumstance".

In their affidavit in support the applicants deposed that the 1st applicant earns N6.200 per month and has to take care of a family of twenty three, while the 2nd applicant earns N6,000 per month and has a family of nineteen. That they would be unable to prosecute the appeal if they pay the judgment debt. In my opinion a mere statement that an applicant is poor and cannot prosecute the appeal if he pays the judgment debt, without more, will not amount to a special circumstance. The applicant must go further. He has to supply the court with all the facts about his income and the source of his income. It is not sufficient to simply state that one is poor. The applicant must establish that he has indeed no resources. The applicants have failed to establish that they have no resources. The applicants should have supplied the court with more facts to enable the court exercise its discretion in their favour. This is moreso where the respondent in his court-affidavit claimed "that the 1st applicant is a businessman of high repute in Benue State and in particular Makurdi and has the means of paying the judgment debt".

The second reason why the applicants are asking for a stay is that their grounds of appeal raised serious issues of law and fact. A ground of appeal will constitute a special circumstance for grant or stay of execution, only if it arises in a decision where a stay can be granted. It is not every ground of appeal which raises an important or difficult point of law which qualifies as a special circumstance for grant of stay on the ground of being recondite. See Ajomale v. Yaduat (No. 2) (1991) 5 NWLR (Pt.191) (2) 206 at 291, Nnaemeka-Agu J.S.C. said:

“For such a ground to constitute a special circumstance, it must arise in a type of decision where a stay can be granted and in relation to the facts and circumstances of the particular case, be such that if it is decided in favour of the appellant some substantial in justice or some irreversible circumstances shall have resulted which would have made it more appropriate had a stay been granted .. In short, it is not every ground which has raised an important or difficult point of law that can suffice as a special circumstance on the ground of recondite. The recondite of a point of law with reference to an application for a stay of execution is not determined in the abstract by reference to the importance or difficulty of the point raised in the ground of appeal per se. Rather it is determined in concrete terms by reference to what the effect of a refusal to stay execution may be on the rights of the appellant, if successful in the appeal. In Balogun v. Balogun (1969) 1 All N.L.R. 349. a matrimonial cause, which is the fons et origo of the ill-comprehended point, the issue was whether payment or rent was part of maintenance for a divorced wife. There an be no doubt that if execution was not stayed and rent was paid as part of maintenance if it turned out on appeal that it ought not have been so, serious difficulties of recovery would have arisen”.

The fact that a ground of appeal raises a substantial point of law does not in itself constitute a special circumstance. It can only constitute a special circumstance for grant of stay of execution only if it arises in a decision where a stay could be granted. The court must consider the facts and circumstances of the case even though the ground raises difficult or important issue of law. The overriding issue to guide the court is the interest of justice. If the grant of stay will occasion substantial injustice to the respondent, it will be re-

fused.

The third ground for which the applicants are asking for a stay is that the respondent would not be able to refund the money if the appeal succeed. The respondent in his counter-affidavit has deposed that he has a landed property at Zaria Road, Jos the value of which is not less than N4 million. He also deposed that he has a Mercedes Benz 230 Station Wagon whose value is over N400,000.00. These averments were not challenged or controverted. With these uncontroverted averments, it is clear that the respondent is a man of means who could refund the judgment debt if the appeal succeeds.

In the final analysis, I find that the application lacks merit. The applicants have failed to establish any special circumstance to enable us exercise our discretion in their favour. The application is hereby refused. The respondent is entitled to costs which I assess at N1,000.00.

OGUNTADE JCA

I have read before now a copy of the lead ruling by learned brother Muhammad J.C.A. I agree that this application lacks merit. I would also dismiss it.

EDOZIE JCA

I had preview of the lead ruling just read by my learned brother Muhammad J.C.A. He has correctly stated the guiding principles for a consideration of an application for a stay of execution of judgment pending an appeal and has also correctly applied the principles to the facts disclosed in the present application and concluded, rightly, in my view that the application lacks substance. I also refuse the application and abide by the orders as to costs. Application dismissed.