

SUPREME COURT OF NIGERIA
5TH JUNE, 2009 SC. 178/2008
CORAM:- A. M. MUKHTAR, P. O. ADEREMI,
C. M. CHUKWUMA-ENEH, J. A. FABIYI,
O. O. ADEKEYE, JJSC

NIGERIAN NATIONAL
PETROLEUM CORPORATION APPELLANT/APPLICANT
AND
1. FAMFA OIL LIMITED RESPONDENTS
2. HON. ATTORNEY-GENERAL
OF THE FEDERATION

STAY OF EXECUTION - Grant of - Determinant factors - Courts should not grant stay unless there are special circumstances - Like likelihood of subject matter of proceedings being destroyed (H1)

COURTS - Judgments - Stay of execution - Exercise of discretion by courts - Proper Manner - It must take into account competing rights of parties to justice - Else it has not been judicially & judiciously exercised (H2)

EVIDENCE - Judgments - Stay of execution - Proof of special circumstances - Onus - It is on the party applying for stay pending appeal - To satisfy the court that in the peculiar circumstances - A refusal would be unjust (H3)

JUDGMENTS - Appeals - Stay of execution - Presumption of correctness of judgment - Which applies subject to rebuttal on appeal - Avails in this case - To prevent depriving a party from reaping his fruit of success (H4)

JUDGMENTS - Stay of execution - Reasonableness of - As the res in this matter is a depleting one - An order for stay will be against reason - Since the 1st respondent is the judgment creditor (H5)

JUDGMENTS - Stay of execution - Status of parties - Effect on the application - The fact that applicant is a Federal Government Agency

- Does not give it any special status (H6)

PRACTICE & PROCEDURE - Stay of execution - Special circumstance - Effect of reconditeness - Even if recondite point is raised - It is not enough as special circumstance and reconditeness must coexist - Which is not the case here (H7)

FACTS

The 1st respondent, as plaintiff, sued the 2nd respondent and the appellant as 1st and 2nd defendants respectively. The claim of 1st respondent was for sundry declarations and an order of perpetual injunction the aim of which reliefs was to contest the compulsory acquisition of 50% of 1st respondent's interest in Oil Mining Lease (OML) 127 by 2nd respondent. After hearing, the trial Court dismissed the suit. Dissatisfied, 1st respondent, appealed to Court Appeal. In its judgment, Court of Appeal declared the purported acquisition as null and void. It reversed the judgment of the trial court and gave judgment to 1st respondent as claimed.

Aggrieved, the 2nd defendant has appealed against the judgment of Court of Appeal. Subsequently, it also filed a motion for a stay of execution of the Court of Appeal judgment appealed against. This is a ruling by the Supreme Court in respect of the application for stay of execution.

ISSUE FOR DETERMINATION

Whether the instant application for stay of execution lacks merits and should be refused.

HELD (Unanimously dismissing the application per ***FABIYI JSC***)
Stay of execution - Grant of - Determinant factors

1. A Court of Appeal should not grant a stay of execution unless there are special or strong circumstances for doing so. There must be some collateral circumstances and in some cases inherent matters which may, unless the order of 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 the order 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. 1655 E)

Stay of execution - Exercise of discretion by courts

2. It must be noted here that a discretion to grant or refuse a stay must take into account the competing rights of the parties to justice. A discretion that is biased in favour of an applicant for stay but does not adequately take into account the respondent's equal right to justice is discretion that has not been judicially and judiciously exercised. (p. 1656 C)

Stay of execution - Proof of special circumstances - Onus

3. An unsuccessful litigant applying for a stay must show special circumstances seriously pleading and showing that the balance of justice obviously weighs in favour of a stay. The onus is on the party applying for a stay pending appeal to satisfy the court that in the peculiar circumstances of his case, a refusal of stay would be unjust and inequitable. (p. 1656 D)

JUDGMENTS - Presumption of correctness

4. The Senior Counsel for the applicant never maintained that the judgment of the court below is manifestly illegal or wrong. For now, I cannot surmise any aspect of the said judgment that is manifestly illegal or wrong. It is therefore right to presume that the judgment of the court below is correct. The presumption is, however, a rebuttable one if the contrary is proved or established. For this reason, the 1st respondent who is the successful litigant should not ordinarily be deprived of the fruits of its success unless under very special circumstances. The 1st respondent, for now, is entitled to enjoy the fruits of its success as ordered by the court below. (p. 1656 G)

JUDGMENTS - Stay of execution - Reasonableness

5. I note that the *res* in the matter is a depleting one. The applicant wants the court to tie the hands of the 1st respondent and allow it to continue to draw on same. In my considered view, an order for stay will fly against the dictates of reason since the 1st respondent is the judgment creditor. Such a stance will be akin to an adjudged trespasser in a land matter being granted an order for stay of execution

to continue his act of trespass. (p. 1657 D)

Stay of execution - Status of parties - Effect on application

6. The applicant, in a rather mundane fashion, tried to say in its affidavit in support that it will be faced with loss of revenue as a Federal Government Agency if the order for stay of execution is refused. Such a ploy points at the realm of sentiment. It must be said pointedly that the fact that the applicant is a Federal Government Agency does not give it any special status. It has equal status with the 1st respondent in the face of the law and before the Court of law. The case of *Gairy v. Attorney-General of Grenada* (supra) at 180 - 181 is directly in point and has persuasive authority. (p. 1657 F)

Stay of execution - Special circumstance - Reconditeness

7. Senior counsel for the 1st respondent felt that even if recondite point is raised, it is not enough as special circumstance and recondity must co-exist. That is as stated by this court in *Ajomale v. Yaduat* (supra) at p. 290. And in this application, no special circumstance has been clearly depicted to warrant a grant of an order for stay of execution pending the determination of the main appeal. (p. 1658A/D)

NOTABLE POINTS OF INTEREST

ADEKEYE JSC

1. *Stay of execution - Determinant factors depend on facts*

The factors to be considered by court as exceptional or special circumstances in granting an application for stay are as highlighted by my learned brother in the leading judgment, I must add that the list is not exhaustive. They depend on the peculiar circumstance of each case. (p. 1669 E)

2. *Financial ability of 1st respondent is a non issue*

The anxiety of the applicant that the 1st Respondent will not be in position to re-compensate it if the appeal succeeds has no strong foundation.

The apprehension as to the ability of the 1st Respondent to re-compensate the applicant if the appeal succeeds is a non issue in that the compensation here is in profit oil, not capable of being quantified immediately in terms of money. (pp. 1671 G/1672 B)

REPRESENTATIONS

O. Soyobo, SAN (with him F. Adegboyega and K. Balogun) for the appellant/applicant

BAM Fashanu, SAN (with him O. Adejojo) for 1st respondent

A. O. Mbamali (Mrs.) DCL (with her D. Achimi, SSC and I. K. Okore, B SSC) for 2nd respondent.

CASES REFERRED TO

Vaswani Trading Co. v. Savalakh & Co. (1972) ALL NLR 922 at. 926 C

Martins v. Nicannar (1988) I NSCC (Vol. 19) 613

Gairy v. Attorney-General of Grenada (2002) 1 AC 167 at 180-181

Okafor v. Nnaife (1987) Vol. 18 NSCC 1195 at 1198-1199

Ajomale v. Yadaut (1991) 5 NWLR (Pt. 191) 266 at 290H

Saraki v. Kotoye (1994) 4 NWLR (Pt. 413) 144

Globe Fishing Industries Ltd. V. Coker (1910) NWLR (Pt. 162) 265 D

Vaswani Trading Co. v. Savalakh & Co. (supra) at page 926

Eronini & Ors. V. Iheuko (1989) 1 N.S.C.C (Vol. 20) 503 at p. 513

Okafor & Ors. V. Nnaife (supra) at p.1197

Okunloye v. Adeniran part 734 page 699 E

S.T.B. Ltd. v. Contract Resources (Nig.) Ltd. 2Q01 11 NWLR part 725 page 518

Josiah Cornelius Ltd v. Ezenwa 2000 8 NWLR part 670 page 616

STATUTES REFERRED TO

Constitution of the Federal republic of Nigeria, 1979, s. 44

Petroleum Act, Cap. P10, Laws of the Federation, 2004, s. 2

RULING DELIVERED BY FABIYI JSC

The 1st respondent felt unhappy with the manner in which the 2nd respondent acquired 50% of its interest in Oil Mining lease (OML) 127. After serving the appropriate notice of intention to commence legal proceedings on the 2nd respondent, the 1st respondent filed an Originating Summons at the Federal High Court in which it sought for the determination of the following questions:- H

“1. A declaration that the President, Vice-President or Officers in the Public Service of the Federation CANNOT grant any Oil Prospecting Licence (OPL) or any interest whatsoever in respect of any

'mineral oils and natural gas in, under or upon the territorial waters and Executive Economic Zone of Nigeria' to any person or persons except under and in accordance with the provisions of the Petroleum Act CAP P. 10 of the laws of the Federal Republic of Nigeria, more especially section 2 (1) (a) (b) and (c) as well as section 2 (3).

B *2. A declaration that by virtue of paragraph 8 of the First Schedule to the Petroleum Act, the first respondent cannot grant an Oil Mining Lease to any other person or persons EXCEPT THE HOLDER OF AN OIL PROSPECTING LICENSE.*

C *3. A declaration that the President, Vice President or Officers in the Public Service of the Federation CANNOT acquire any interest in an Oil Prospecting Licence (OPL) or Oil Mining Lease (OML) except under and in accordance with the provisions of:-*

(a) Paragraph 35 of the first schedule to the Petroleum Act;

D *(b) Section 44 (1) of the Constitution of the Federal Republic of Nigeria.*

E *4. A declaration that the purported acquisition of 50% of the applicants' interest or any interest whatsoever in OML 127 in as much as it was not done in compliance with the provisions of the law and the constitution as stated above is illegal, unconstitutional, null and void and cannot confer any interest whatsoever in OML 127 in the second respondent (that is due process of the law must be followed).*

F *5. A perpetual injunction restraining the second respondent, its assigns, servants privies, subsidiaries, whomsoever, howsoever, whensoever from exercising any right in the said OML 127 or any part or portion thereof."*

G The learned trial judge heard the matter and in his reserved judgment handed out on 31st May, 2006, the suit was dismissed. The 1st respondent herein felt irked with the poise of the learned trial judge. It appealed to the Court of Appeal, herein referred to as the Court below.

H The Court below heard the appeal and in its own reserved judgment handed out on 10th December, 2007 the trial court's decision was set aside. Consequently, the following orders were made:-

"1. The compulsory and arbitrary acquisition of the interest of the appellant by the 2nd respondent as outlined in letters of acquisition dated 27th January, 2005 and 19th April, 2005 is hereby declared illegal, unlawful, wrongful, unconstitutional and thus null and

void.

2. It is hereby declared that the purported acquisition of 50% of the appellant's interest in OML 127 in as much as it was not done in compliance with the provisions of the law paragraph 35 of Cap 10 of the LFN2004 and the Constitution is illegal, unconstitutional, null and void and cannot confer any interest whatsoever in OML 127 in the 2nd respondent, without due process of the law. B

3. An order is hereby made directing the 2nd respondent to return to the appellant all his interest in OML illegally acquired.

4. An injunction is hereby granted restraining the 2nd respondent, its assigns, servants, privies, subsidiaries, whomsoever from interfering with the rights of the appellant in the said OML 127. C

The appellant is awarded costs in the sum of N50,000:00 against the two respondents."

In a ding-dong fashion, the 2nd defendant at the trial court- Nigeria National Petroleum Corporation, appealed against the decision of the court below. Since the appeal has been entered in this court and no further proceedings could be entertained by the court below, the appellant filed a motion on notice dated 10th September, 2008 on 17th September, 2008 praying for the following:- E

"1. An order granting stay of execution of judgment of the Court of Appeal delivered on 10th December, 2007 in appeal No. CA/A/173/2006 pending the determination of the appeal filed by the appellant/applicant before this Honourable Court. F

2. And for such further order or other orders as this Honourable Court may deem fit to make in the circumstances of this case."

Let me stress the point here, for avoidance of doubt, that this ruling is only sequel to arguments canvassed in respect of this application for stay of execution and not more than that. The issues to be determined in the main appeal should not be considered, even remotely. For if same is done, nothing will be left for consideration at the end of the day. G

The application for stay of execution was supported by an affidavit of 37 paragraphs. A host of exhibits were attached. As well, a further affidavit of 44 paragraphs was filed. On behalf of the 1st respondent, a counter affidavit which contains 15 paragraphs was filed in opposing the application. H

On 23rd of March, 2009 when the application for stay of ex-

ecution was taken, O. Soyebó, SAN on behalf of the applicant relied on facts deposed in the main affidavit as well as the further affidavit to fortify the application.

Learned Senior Counsel observed that the court has laid down conditions for a grant of an application of this nature. She cited the cases of *Vaswani Trading Co. v. Savalakh & Co. (1972) ALL NLR 922 at. 926; Martins v. Nicannar (1988) INSCC (Vol. 19) 613*. She observed that special circumstances have been depicted in the affidavit and further affidavit stated above and that the 1st respondent did not make any investment in OML 127. Senior Counsel asserted that the 1st respondent is not viable as it only has 10,000 shares at ₦1.00 (One Naira) per share. She felt that the 1st respondent may not be able to compensate the appellant if the appeal succeeds. Learned Senior Counsel expressed the obvious that if the application is granted, the 1st respondent will still continue to have stake in the management of OML 127. She further observed that in the unlikely event that the appeal fails, the appellant can compensate the 1st respondent.

Senior Counsel submitted that the appeal is arguable as the grounds of appeal are substantial. She felt that an order for stay of execution is warranted in the interest of all the parties and that balance of justice weighs on the side of the applicant. She urged that the application be granted.

On behalf of the 1st respondent BAM Fashanu, SAN relied on the counter affidavit filed on 13th October, 2008. He observed that the applicant has to show special circumstances why stay order should be granted. He maintained that the fact that the applicant is a Federal Government Agency does not give it a special status. He cited the case of *Gairy v. Attorney-General of Grenada (2002) 1 AC 167 at 180-181*.

Senior Counsel pointed it out that the *res* in the matter is a depleting one and the applicant is asking the court to tie the hands of the 1st respondent and allow it to continue to draw on same. He observed that the 1st respondent is the judgment creditor and that none of the parties has the capacity for exploitation of OML 127. He referred to paragraph 13.1 of the counter affidavit and pointed it out that the applicant is not viable and urged the court to find that the applicant is bankrupt. He maintained that the applicant did not at-

tach its audited account and that no special circumstance has been shown. Senior Counsel cited the case of *Okafor v. Nnaife* (1987) Vol. 18 NSCC 1195 at 1198-1199.

Senior Counsel stressed the point that both parties are entitled to justice. He submitted that even if recondite point is raised, it is not enough as special circumstance and recondity must co-exist. He cited *Ajomale v. Yaduat* (1991) 5 NWLR (Pt. 191) 266 at 290H. He urged that the application be refused. B

Mrs. A. O. Mbamali, Learned D. C. L who appeared for the 2nd respondent, aligned herself with the stand taken by the senior counsel for the applicant. On maintenance of *status quo*, she cited *Saraki v. Kotoye* (1994) 4 NWLR (Pt. 413) 144; *Globe Fishing Industries Ltd. V. Coker* (1910) NWLR (Pt. 162) 265; *Olunloyo v. Adediran* (2001) 8 M.J.S.C. 120. She urged that the application be granted as prayed. C D

The principles that should guide courts in application for a stay of execution have been reiterated in many decisions of this court. Basically, a judgment creditor is entitled to have the benefits of the fruits of his judgment. And so, **a Court of Appeal should not grant a stay of execution unless there are special or strong circumstances for doing so. There must be some collateral circumstances and in some cases inherent matters which may, unless the order of 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 the order 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.** See *Vaswani Trading Co. v. Savalakh & Co.* (supra) at page 926. E F G

When a judgment or order 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. For this reason, the Court of Appeal and indeed any court, will not make a practice of depriving a successful litigant the fruits of his success unless under very special H

circumstances as observed by Brown, L.J in *The Annot Lyle* (1886) 11 P.D. at p. 116.

The Courts have an unimpeded discretion to grant or refuse a stay. Like in all other instances of discretion, the court is bound to exercise same both judicially as well as judiciously and not erratically or even capriciously. See *University of Lagos v. Aigoro* (1985) 1 S.C. 265, 271; *University of Lagos v. Olaniyan* (1985) 1 S.C. 259; *Eronini & Ors. V. Iheuko* (1989) 1 N.S.C.C (Vol. 20) 503 at p. 513. In this respect, 'judicious' means (1) proceeding from or showing sound judgment; (2) having or exercising sound judgment; and (3) marked by discretion, wisdom and good sense.

It must be noted here that a discretion to grant or refuse a stay must take into account the competing rights of the parties to justice. A discretion that is biased in favour of an applicant for stay but does not adequately take into account the respondent's equal right to justice is discretion that has not been judicially and judiciously exercised. See Okafor & Ors. V. Nnaife (supra) at p.1197.

An unsuccessful litigant applying for a stay must show special circumstances seriously pleading and showing that the balance of justice obviously weighs in favour of a stay. The onus is on the party applying for a stay pending appeal to satisfy the court that in the peculiar circumstances of his case, a refusal of stay would be unjust and inequitable. Again, see *Okafor & Ors. Nnaife (supra) at p. 1198.*

Perhaps, I need to state it that the above are only some of the general rules guiding and governing the court in the exercise of its discretion to grant or refuse a stay. The points discussed are not exhaustive. Any art of balancing competing interests must be done with utmost sense of responsibility.

The Senior Counsel for the applicant never maintained that the judgment of the court below is manifestly illegal or wrong. For now, I cannot surmise any aspect of the said judgment that is manifestly illegal or wrong. It is therefore right to presume that the judgment of the court below is correct. The presumption is, however, a rebuttable one if the contrary is proved or established. For this reason, the 1st respondent who is the successful litigant should not ordinarily be deprived of

the fruits of its success unless under very special circumstances. The 1st respondent, for now, is entitled to enjoy the fruits of its success as ordered by the court below.

The applicant harped on the point that the 1st respondent is not viable and that if the appeal succeeds, the applicant may not get compensated by the 1st respondent. In the counter affidavit, it was B
deposed that a senior official of the applicant made a press statement that the applicant's finances appear to be in an uncomfortable position. None of the parties attached its current audited account to show that it is buoyant. It is like the pot calling kettle black and vice versa. C
In this type of situation when the position is the same, the law should take its normal course.

The applicant desires that an order should be made to stop the 1st respondent from drawing 50% in the operation of OML 127 as ordered by the court below. The applicant wants to continue to take D
advantage of same. ***I note that the res in the matter is a depleting one. The applicant wants the court to tie the hands of the 1st respondent and allow it to continue to draw on same. In my considered view, an order for stay will fly against the dictates of reason since the 1st respondent is the judgment creditor. Such a stance will be akin to an adjudged trespasser in a land matter being granted an order for stay of execution to continue his act of trespass.*** Refer to *Okafor & Ors. V. Nnaife* E
(supra) at p. 1198-1199.

***The applicant, in a rather mundane fashion, tried to say F
in its affidavit in support that it will be faced with loss of revenue as a Federal Government Agency if the order for stay of execution is refused. Such a ploy points at the realm of sentiment. It must be said pointedly that the fact that the applicant G
is a Federal Government Agency does not give it any special status. It has equal status with the 1st respondent in the face of the law and before the Court of law. The case of Gairy v. Attorney-General of Grenada (supra) at 180 - 181 is directly H
in point and has persuasive authority.*** A court of law deals with law and should never be carried away by sentiments.

Senior counsel for the applicant felt that the appeal has arguable grounds. She did not contend that the arguable grounds relate to recondite point of law. It is not all arguable grounds that equate to

recondite points of law.

Senior counsel for the 1st respondent felt that even if recondite point is raised, it is not enough as special circumstance and recondity must co-exist. That is as stated by this court in Ajomale v. Yaduat (supra) at p. 290.

- B The adjective - recondite is defined in the New Webster's Dictionary, International Edition as 'obscure, little known, difficult to understand'. In Chambers Dictionary, it is defined as complicated, concealed, dark, deep, difficult, hidden, intricate, involved, mysterious, mystical, obscure, profound, secret, formal abstruse, arcane, esoteric; opposite of simple and straightforward. When a party talks of a recondite point of law, it is not just to be stated in general terms. The party must state the point of law that he feels is recondite. Such a stance cannot and should not be left to guess work or conjecture.
- C
- D And since the applicant did not propose any point of law that is complicated, concealed or intricate; the point should be left at bay for now. Even then, it has been shown above that where recondite point of law is established, it must co-exist with special circumstances. ***And in this application, no special circumstance has been clearly***
- E ***depicted to warrant a grant of an order for stay of execution pending the determination of the main appeal.***

Let me make one point more and I shall be done. This is clearly a matter in which parties should make haste and take necessary action to have the main appeal determined at the earliest opportunity.

- F In conclusion, it is my considered view that the application, looked at from all angles, is devoid of merit. And it is hereby dismissed. The applicant shall pay =N=30,000:00 costs to the 1st respondent.

G _____

MUKHTAR JSC

- A well known principle of law governing the application of a stay of execution is that the applicant must disclose exceptional or special circumstances to warrant the grant. It is in the supporting affidavit to the application for an order for the stay of execution that such special circumstances will be found. In this respect I will reproduce the salient depositions in the affidavit in support of this application here below. They are:-
- H

"22. Agbami Oil field has current crude oil production capacity of two hundred thousand (200,000) barrels per day which translates to daily gross earnings of about US\$20 million at current crude oil price of US\$124.00 per barrel.

23. If the 1st Respondent is allowed to assume a 60% equity participation in OML 127, it stands to earn revenue of approximately US\$10 million per day, which translates into US\$3,650,000,000 per annum.

25. The Appellant/Applicant engaged the firm of Legal Standard Consulting and Chimezie L. Nwokohu & Associates based in Abuja to conduct a corporate search at the Corporate Affairs Commission (CAC), Abuja and N. U. Chianakwalam, Esq. of the said firm and Chimezie Nwokohu, Esq. informed me and I truly believe the said counsel that:-

(i) The 1st Respondent is a company incorporated on 3rd September 1991 to principally carry on the business of establishing, maintaining and operating shipping, air transport, and road transport services public and private and all ancillary services;

(ii) The 1st Respondent has a share capital of only ten thousand (10,000) divided into 10,000 share of N1.00 each;

(iii) The last annual returns made by the 1st Respondent to the Corporate Affairs Company's Balance sheet contained in its Audited Financial Statements filed along with the returns showed total assets (less current liabilities of N24,525,402.00) and a loan/liability of N177,624,155.00 leaving a negative net asset of (153,098,753.00).

26. The existence of the 1st Respondent as a going concern is in doubt in view of the non-filing of annual returns for 2004 to date and the recent decision of the CAC to de-register any company that fails to file Annual Returns as at when due.

27. If this application is not granted by this honourable court, the Federal Government would be losing expected revenue from OML 127 amounting to a projected sum of US\$10 million on a daily basis which would have been applied for the benefit of the common good of all Nigerians in the pendency of the Appellant/Applicant's appeal.

28. In the event that the Appellant/Applicant succeeds in its appeal before this honourable court there is no likelihood that it can recover any money made by the 1st Respondent from the 50% eq-

uity participation which the Court of Appeal directed the Appellant/Applicant to return to the 1st Respondent.

29. On the other hand if this honourable court grants this application, the Appellant/Applicant has enormous financial obligation((s) that may arise vis-a-vis the 50% equity participation in OML 127 in the unlikely event that it loses its appeal at the Supreme Court.

30. In addition to the sub-paragraph(s) above, the Appellant/Applicant has an annual revenue well in excess of the revenues receivable from OML 127 with substantial deposits in Nigerian Commercial Banks and reserve.

31. The Grounds of Appeal contained in the Notice of Appeal referred to in paragraph 16 above raise issues which are substantial and recondite.”

In essence, the purport of the above depositions are that the 1st respondent is weak in terms of finances and would not have the wherewithal to pay whatever profit it would have derived within the period between now and the delivery of the judgment of this court in the event of the success of this appeal. That the 1st respondent is not buoyant enough to pay whatever accrues to him does not automatically translate to the fact that the 1st respondent should be deprived of the fruits of its judgment. I hold this view, because of the counter-affidavit of the 1st respondent, the depositions of which read as follows:-

“12.1 With reference to paragraph 25 and 26 of the Appellant/Applicant’s Affidavit, the First Respondent states that it has filed its Annual Returns, (Form CAC 10) at the Corporate Affairs Commission for the periods 2004, 2005 and 2006. Copies of the said Forms CAC 10 as stated above together with the receipt of payment of all of which are hereto attached and marked “Exhibits J 06¹, J 06², J 06³ and J 06⁴ respectively.

12.2 With the filing of the above, the respective interest of both the First Respondent and the Appellant/Applicant in OML 127 is not in any way jeopardized but very well secured.

13.1 Contrary to the assertion of the Appellant/Applicant in Paragraph 30 of its affidavit the First Respondent states that the Appellant/Applicant is a near bankrupt organization as admitted by its Group Managing Director Alhaji Abubakar Lawal Yar’adua in a publication contained in the “THE GUARDIAN” Newspaper of Wednes-

day March 26th, 2008. Extract of the said publication reads as follows:

“NNPC is living on credit and if not for the credit facility, we have up to 90 days within which to pay for the product, it would have been extremely difficult. That is what we live on”.

13.2 I very believe that it will not be in the interest of justice to allow a near bankrupt organization to deprive a successful litigant with no debt burden but with adequate resources to compensate the Appellant/Applicant with Profit Oil on the unlikely event of its success at the Appeal, the fruit of it's success.

13.3 A Certified True Copy of the extract of the publication of *“THE GUARDIAN”* Newspaper dated the 26th day of March, 2008 on pages 1 and 2 of its volume 25 No. 10. 682 is hereto attached and marked *“Exhibit J 07!”* and also that of the *‘VANGUARD’* Newspaper marked Friday the 4th day of April, 2008 on page 6 of its Vol. D 24. No 60557. Extract of which reads as follows; *“N17bn NNPC debt’*. Copy is also hereto attached and marked *‘EXHIBIT J07B’*.

14.1 With reference to Paragraph 31 of the Affidavit of the Appellant/Applicant. I verily believe that there is nothing novel, obtruse, or little known in the matter before the Honourable court as to make it recondite and the Appeal is not arguable.”

It is manifestly clear that the depositions in the applicant's affidavit reproduced supra, have been attacked by the 1st respondent, and the effect, to my mind is that it balances the equation. In other words, if the 1st respondent is financially weak, then the applicant is equally financially weak, as is manifested in the publications. So the question is, who is in a better position to enjoy and maintain the status quo? The 1st respondent I would say, because it has the advantage of the valid judgment in its favour, and the trite law is that a successful litigant must not ordinarily be deprived of the fruit of its judgment. See *Deduwa v. Okorodudu* 1974 6 SC page 21, *Shodeinde v. Registered Trustees of the Ahmadiya Movement in Islam* 1980 1-2 SC. 163, and *Okunloye v. Adeniran* part 734 page 699

As for the principle of the special or exceptional circumstances required by the law, I am not satisfied that the depositions in the supporting affidavit which I have reproduced above are convincing enough to establish the governing principle of law. They have not disclosed good reasons to warrant the exercise of the court's discre-

tion in favour of the applicant. See *Okafor v. Nnaife* 1987 4 NWLR part 64 page 129, and *S.T.B. Ltd. v. Contract Resources (Nig.) Ltd.* 2001 11 NWLR part 725 page 518.

In the instant case it is my firm belief that the application of the appellant/applicant is bereft of the requirement of special or exceptional circumstances, and so the application is devoid of merit. Again, the law enjoins this court to exercise its discretion in an application of this nature judicially and judiciously, and not in accordance with its whims and caprices, to wit it must consider the overall position and circumstances of the case i.e. the effect a grant or otherwise of such application may have on the outcome of the appeal. See the cases of *Vaswani Trading & Co. v. Savalak & Co* 1972 12 SC 77, and *Josiah Cornelius Ltd v. Ezenwa* 2000 8 NWLR part 670 page 616. This court in dealing with this application is exercising its discretion judicially and judiciously. Finally, I fail to see that the grounds of appeal are recondite to warrant the grant of the application for stay of execution.

I have had the opportunity of reading in draft form the lead ruling delivered by my learned brother Fabiyi JSC. I am in full agreement with the reasoning and conclusion reached in the ruling. I also dismiss the application for it lacks merit. I abide by the order of costs made in the lead ruling.

F

ADEREMI JSC

By the application dated 10th September 2008 but filed on 17th September 2008, the appellant/applicant is praying this court for the grant of an order staying the execution of the judgment of the Court of Appeal [Abuja Division] delivered on the 10th of December 2007 in Appeal No. CA/A/173/2006: *Famfa Oil Ltd. V. Hon. Attorney General of the Federation & Anor* pending the determination of the appeal lodged against that judgment in this court. The Court of Appeal, Abuja Division (hereinafter referred to as the court below) had entered the said judgment of 10th December 2007 after taking arguments of counsel for both parties in respect of the appeal lodged against the decision of the Federal High Court, Abuja in Suit No. FHC/ABJ/CS/275/2000 where the 1st respondent as the plaintiff before that court of first instance sought for two reliefs against the re-

spondents as follows: -

(1) A declaration that the purported acquisition by the Federal Government of 40% out of the Famfa's 60% interest in the claimants' Oil Producing Licence (OPL 216) is illegal, unconstitutional and void and of no legal consequence whatsoever and as such, is not capable of divesting from Famfa the said 40% of its participating interest in OPL 216 or any interest whatsoever thereon and cannot confer any right or interest therein in the Nigerian National Petroleum Corporation. B

(2) An order of perpetual injunction restraining the Nigerian National Petroleum Corporation from claiming or exercising any right in or over the present interest of the claimant in the said OPL 216 or any portion thereof. C

Suffice it to say that the court of first instance granted the two reliefs. Between January and April 2005, the 1st respondent again received two letters from the Department of Petroleum Resources notifying him of acquisition of 5/6 and 50% of the interest in 1st respondent's OML 127: No reasons for the acquisition were forwarded to the 1st respondent. After the notice of acquisition the 2nd defendant (NNPC) immediately started carrying out exploration and production activities on the block through the Technical Partners of the 1st respondent without any negotiation with the 1st respondent. In its reaction to this act, the 1st respondent as plaintiff by way of Originating Summons sought the following reliefs: - D E

(1) A declaration that the President, Vice-President or Officers in the Public Service of the Federation CANNOT grant any Oil Prospecting License (OPL) or any Oil Mining Lease (OML) or any Interest whatsoever in respect of any "minerals, mineral oils and natural gas in, under or upon the territorial waters and Exclusive Economic Zone of Nigeria" to any person or persons except under and in accordance with the provisions of the Petroleum Act CAP 10 of the Laws of the Federal Republic of Nigeria, more especially Section 2 (1) (a) (b) and (c) as well as Section 2 (3). F G

(2) A declaration that by virtue of paragraph 8 of the First Schedule to the Petroleum Act, the first Respondent cannot grant an Oil Lease to any other person or persons EXCEPT the HOLDER OF AN OIL PROSPECTING LICENSE. H

(3) A declaration that the President, Vice-President or Officers

in the Public Service of the Federation CANNOT acquire any interest in an Oil Prospecting Licence (OPL) or Oil Mining Licence (OML) except under and in accordance with the provisions of: -

(a) Paragraph 35 of the First Schedule to the Petroleum Act.

(b) Section 44 (1) of the Constitution of the Federal Republic
B of Nigeria.

(4) A declaration that the purported acquisition, interest or any interest whatsoever in OML 127 in as much as it was done in compliance with the provisions of the law stated above is illegal, unconstitutional, null and void and cannot confer any interest whatsoever in OML 127 in the second respondent (that is due process of
C the law must be followed).

(5) A perpetual injunction restraining the second respondent, its assigns, servants, privies, subsidiaries, whomsoever, howsoever,
D whensoever from exercising any right in the said OML 127 or any part or portion thereof.

The trial judge dismissed the reliefs sought by the plaintiff/1st respondent after a full trial. An appeal against the decision of the trial court was lodged with the court below (Court of Appeal) which, after
E taking full arguments from counsel, in a reserved judgment delivered on the 10th of December 2007, allowed the appeal and made necessary consequential orders in favour of the successful plaintiff/appellant.

Being dissatisfied with the said judgment, the present appellant
F who was the second respondent before the court below, has since appealed to this court and brought a similar application on the 20th of February 2008 praying for a stay of execution before the court below. The said similar application filed before the court below on
G the 20th of February 2008 could not be heard by the court below for the reason that the Record of Appeal had been entered in the Registry of this court.

When this application came before us for argument on the 23rd of March 2009, Mrs. Soyebó, learned senior counsel for the
H appellant/applicant (NNPC) in moving the application filed on 17th September 2008 praying for an order staying the execution of the judgment delivered on 10th December 2007 by the court below, relied mainly on the 37 - paragraph affidavit together with the 18 annexures and a 44 - paragraph further affidavit filed on 19th of

February 2009. She submitted that special circumstances have been shown through the aforesaid depositions - by paragraphs 4 -36 of the affidavit and paragraphs 5 - 43 of the further affidavit. Arguing further, she submitted that the depositions have not been contradicted or controverted by the 1st respondent; adding that the 1st respondent has not made any investment in the oil block business and that the share capital of the 1st respondent/company is only N10,000.00. She again submitted, while referring to paragraph 32 of the further affidavit, that the reason for the grant of the concession by the Government is to encourage indigenous participation in oil industry and that this was further expatiated upon by the 1st respondent through paragraph 7.1 of its counter-affidavit filed on 13th October 2008. The depositions of the 1st respondent in its counter-affidavit were responded to by the appellant/applicant in paragraphs 8 - 10 of the further affidavit. On the principles guiding the consideration of this type of application, she referred to the decisions in (1) VASWANI V. SAVALAKH (1972) ALL NLR 922 at 926 and (2) MARTINS V. INCARNAR FOODS (1985) 1 NSCC Vol. 19 at page 613. While finally submitting that Exhibit J04 - a document captioned "Expectation of Secondes", the learned senior counsel urged that the application be granted.

Mr. Fashanu, learned senior counsel for the 1st respondent while relying on the paragraphs of the counter-affidavit of the 1st respondent - particularly paragraphs 3.2, 7.1, 8.3 and 9.1, he submitted that no special circumstances have been shown by the appellant/applicant on its depositions as to warrant the grant of this application notwithstanding that it is a government parastatal, he called in aid of this submission, the decision in (1) AIRY V. A-G GRENADA (2002) AC Vol. 1 167 at 180-181. It was his submission on the issue of preservation of the RES that the RES is a depleting asset which is capable of disintegrating. On the submission that the share capital of the 1st respondent is only N10,000.00, learned counsel referred to paragraph 8.4 of the counter-affidavit - that Profit Oil was never expressed in terms of money and therefore no determinable amount was due to any of the partners, adding that the formula for sharing profit oil between the parties is as contained in Exhibit JO2 attached to the counter-affidavit. He finally urged us to dismiss the application.

Mrs, Mbamali, learned counsel for the 2nd respondent aligned herself with the submissions of Mrs. Soyebo, learned senior counsel representing the appellant/applicant and further submitted that the status quo was what was before the judgment of the court below and that, according to her, should be preserved; she called in aid the
B decisions in *SARAKI V. KOTOYE* (1990) 4 NWLR (pt.143) 411 and *GLOBE FISHING LTD. V. COKER* (1990) 7 NWLR (pt.162) 165; she finally urged that the application be granted.

Mrs. Soyebo, on points of law only, submitted that the status
C quo is as contained in paragraph 12 of the supporting affidavit.

I shall start the consideration of this ruling by first saying, on decided judicial authorities, the granting of a stay of execution is a matter of discretion for the court and any action or conduct calculated to stifle the exercise of such discretion must not be entertained
D by a court of justice. But that discretion being judicial in nature must at all times be exercised not only judicially but judiciously on sufficient materials. It then follows that in order to obtain an order staying execution of judgment against a successful party, an applicant must show substantial reasons to warrant the deprivation of the successful
E party of the point of his judgment by the court. I go further to say that an order for stay will be granted where, from the nature of the case, justice demands that the status quo be maintained until a final determination of the appeal. See *CONSTRUZIONI GENERALI FARSURA COGEFAR - S.P.A. V. NIGERIAN PORTS AUTHORITY &*
F *ANOR* (1972) 12 S.C. 107. Of course, when an appeal raises a substantial issue as to jurisdiction an order of stay of execution will be granted. See (1) *MARTINS V. NICANNER FOODS* (1988) 2 NWLR (pt.74) 75 and (2) *ADEFULU V. OKULAJA* (1993) 2 NWLR (pt.
G 274) 227.

Having set out the principles that must regulate the grant or refusal of an application of this nature, I shall now examine the materials placed before us by the parties. The applicant had deposed that the 1st respondent is a personality of straw in that its share capital is
H just N10,000.00. Should the judgment of this court go against it, it would not be able to pay any judgment debt standing against it. The applicant would like to continue to take 50% in the operation of OML 127. I must continue to bear in mind that the judgment of the court below was and still remains in favour of the 1st respondent.

Also, were the applicant very vigilant, it would have known that the share capital of the 1st respondent was only N10,000.00 from the time the transaction was negotiated. And if it considered the issue of share capital very vital to entering into agreement with the 1st respondent, it would have at that state put an end to the transaction thus freeing itself from any monetary or financial calamity should the business go bad. After all, eternal vigilance is said to be the price of freedom. That, the applicant failed to do. In paragraphs 19 and 20 of the affidavit, the applicant had deposed that the 1st respondent never made any monetary investment in the Oil Block covered by OML 127 and that all investments made up to date were by STAR DEEP and PETROBRAS - these depositions were not challenged or contradicted by the 1st respondent. But in its paragraph 7.1 of its counter-affidavit, the 1st respondent deposed that no known Nigerian company or any company world-wide over undertakes such a highly capital intensive project by itself; rather the usual practice is for such company to enter into financial arrangements with multinationals who themselves make a practice of sharing the risk among themselves; it went further to say that the applicant, though a government parastatal, does not have such expertise or know-how or even the financial capability to solely undertake such a venture. This all-important deposition by the 1st respondent remains undisputed. What more, the 1st respondent in paragraph 8.4 of its counter-affidavit deposed that in accordance with the agreement between the parties PROFIT OIL is never expressed in terms of money but in terms of available crude oil and he exhibited the formula for sharing profit oil between the parties in the document marked Exhibit JO2. I have read Exhibit JO2 and I make bold to say that it represents a complete answer to the contention of the applicant on this point. All I wish to say is that the submissions of the learned senior counsel for the application on this point do not advance the case of her client. I have had a very careful reading of the grounds of appeal, though seemingly arguable, they are a far cry from touching on recondite points of law. Therefore, they cannot, on their own, persuade any court to grant this application. The contention of the learned senior counsel that the share capital of the 1st respondent is a mere N10,000.00 is absolutely inconsequential when considered alone with the deposition of the applicant in paragraph 32 of the further affidavit which is to the effect

that the main reasons for the grant of the concession by the government is to encourage indigenous participation in oil industry. I will say no more on this point at this stage realising as I must do that the substantive appeal is yet to be heard.

B I have had the privilege of reading in draft, the lead ruling of my learned brother, Fabiyi JSC. I agree, in toto, with his reason and conclusion that this application is unmeritorious. For the little contribution I have made above, but most especially for detailed reasoning contained in the ruling of my learned brother, Fabiyi JSC, I shall also C dismiss this application. And I so do. I abide with all the consequential orders contained in the lead ruling including the order as to costs.

CHUKWUMA-ENEH JSC

D I have read before now the judgment of my learned brother Fabiyi JSC, just delivered with which I agree entirely.

I am also of the view that *whether the instant application for stay of execution lacks merits and should be refused*, it is hereby dismissed. I subscribe to all orders in the lead judgment.

E

ADEKEYE JSC

I had a preview of the ruling just delivered by my learned F brother J. A Fabiyi JSC. The antecedent of the application is as stated by my learned brother in the leading ruling. The gravamen of this application is for an order of this court staying the execution of the Judgement of the Court of Appeal delivered on the 10th of December, 2007. The Court of Appeal gave Judgement in favour the 1st G Respondent. As a follow up the applicant also pressed for maintenance of status quo ante bellum. The effect of which will return parties to their status before approaching the court of appeal for intervention. It is trite that courts are not in the practice of granting an application for stay of execution as a matter of course. It is an equitable H remedy granted at the discretion of court exercised judicially and judiciously. Before a court can grant an order of stay of execution thereby asking a successful or victorious litigant to tarry a while before enjoying the fruits of the victory, the applicant must show:-

a) Exceptional circumstance eloquently pleaded

b) Substantial and arguable grounds of appeal which must be
recondite

Vaswani Trading Co V Savalakh 1972 12sc 17, 2NWLR pt 74 pg 75

Balogun V Balogun 1969 1All NLR pg 349

Deduwa V Okorodudu 1974 1All NLR pg 272

Okin Biscuits V Oshe 2001 6NWLR pt 709 pg 369

B

Vincent Standing Trading Co Ltd V Xtodeus Trading Co Ltd 1993
5NWLR P296 pg. 675

Kigo Nigeria Ltd V Holman Bros. (Nig) Ltd 1980 5-7 Sc pg 60

Obi V Elenwoke 1998 6V NWLR pt 534pg 436.

C

Martins V Nicannar Food Co. Ltd 1988

The court which on its part enjoys an unimpeded discretion to
grant or refuse a stay, must take into consideration the competing
rights of the parties to justice. The prospect of the success of the ap-
plication on appeal, and the fact that a winning party has a right to
the fruits of his Judgment.

Vaswani Trading Co V Savalakh 1972 12 SC 17

Okafor V Nnaife 1987 4NWLR pt 64 pg 129

Martins V Nicannar Foods co Ltd 1988 2 NWLR pt 74 pg 75

Union Bank of Nigeria V Qdusote

E

Bookstore Ltd 1994 3 NWLR pt 331 pg 129

The factors to be considered by court as exceptional or special
circumstances in granting an application for stay are as highlighted by
my learned brother in the leading judgment, I must add that the list is
not exhaustive. They depend on the peculiar circumstance of each
case. The factors advanced by the learned senior counsel Mrs Soyabo
for the applicant as special circumstances are as follows:

F

1. That the 1st Respondent, Famfa Oil, is a small fry in the field
of oil exploration as it lacks the expertise to operate in a highly tech-
nical exploration required in Agbami oil block hence it has relied on
Petro Bras and Star Deep.

G

2. The 1st Respondent is not a viable company. It has a nega-
tive asset. While the share capital is N10,000 of N1.00 per share
divided into N10,000

H

3. If the Judgment is not stayed and the 1st Respondent is
allowed to continue oil exploration in the gigantic oil block on the
60% equity participation it will not be in a position to recompensate
the applicant if this appeal succeeds.

4. That the appeal raises substantial issues of law which are recondite.

5. Public interest is of paramount consideration in that the Federal government interest in the oil block which is vested in NNPC is the source of funds for the government to fulfil its obligations to Nigerian citizens.

6. With resources in various banks the applicant has the financial strength, to compensate the 1st Respondent in the event of losing the appeal She supported her submission with cases.

Vaswani V Savalakh (1972) All NLR 922 at 926

Martins V Nicannar Food Ltd 1985 1 NSC Vol 19 at pg 613.

I consider it appropriate to mention some salient facts in this application

1) That there is a valid and subsisting Judgement of court in favour of the 1st Respondent.

2) By virtue of the Deep Water Block allocation to Companies (Bank - in - Rights) Regulations 2003, the Federal Government executed an agreement with the 1st Respondent and the technical partners as the basis for operating any mining lease (OML 127) derived from OPL 216. The participating interests according to the agreement are as follows:-

NNPC 50% Equity

Famfaoil - 10%

Stat Deep Water Petroleum Ltd (Star Deep) 32%

Petro Brasileiro (Nig) Ltd (Petrobras) 8%

3) That Agbami oil field which includes OML 127 is a giant discovery with potential recoverable reserves in excesses of one billion oil equivalent barrels and therefore ranks among the largest single finds to date in Deep Water West Africa. It has a current crude oil capacity of two hundred thousand barrels per day.

The Respondent learned senior counsel Mr Fashanu replied by admitting the limited investment or expertise of the 1st Respondent in the oil industry. He explained that:-

1) Agbami oil block with OML 127 is highly capital intensive. No known Nigeria company including the appellant, has the expertise, technical know - how and financial capability to safely undertake such project. It has to be done on a contractor financed agreement

2) Since the acquisition of OPL 216, the 1st Respondent has

operated through its technical partners Petrobras and Star Deep.

3) The applicant has also since its acquisition of 50% equity participation been carrying out exploration and production through the technical partners of the 1st Respondent Petrobras and Star deep and has entered into financial arrangements with them like the 1st Respondent. All records and publications portrayed the applicant as a near bankrupt company. B

4) There is a farm-in agreement between the parties and the technical partners as regards the production sharing formula.

5) Agbami reserve will take a minimum of 20 - 25 years to exploit C

6) Members to the farm-in agreement are not paid in cash but in profit oil.

7) Profit oil is the quantity of oil allocated to each member under the agreement and it is never expressed in monetary terms. Each member is allocated specific barrels of oil in proportion to its holding every month. D

Mr Fashanu learned senior counsel referred to the decision in the case *Airy V A-G Grenada* 2002 AC Vol. 1 Pg 167 at pages 180 181. He urged the court to dismiss the application. E

Mrs Mbamali learned counsel for the 2nd Respondent associated herself with the submissions of Mrs Soyebo learned senior counsel for the applicant. She canvassed the need to maintain status quo, that is the position of parties before the Judgement of the lower court. She cited cases F

Saraki V Kotoye 1990 4 NWLR pt 143 pg 411.

Globe Fishing Ltd V Coker 1990 7NWLR pt 162 pg 165

In urging this court to exercise its discretion in favour of granting the application. It is apparent from available facts that the applicant will be compensated in terms of allocation of profit oil if the appeal succeeds. The anxiety of the applicant that the 1st Respondent will not be in position to re-compensate it if the appeal succeeds has no strong foundation. Generally speaking, where a Judgment involves money the terms upon which the court would grant a stay of execution are easier to determine than in other Judgements where the Res is perishable or prone to alteration. The court will consider whether it would be difficult to secure the refund of any money involved from the respondent, if the appeal succeeds, for which pur- G
H

pose the financial ability of the respondent is taken into account.

Utilgas V Pan African Bank Ltd (1924) No sc pg 105

Uniport V Kraus Thompson Organisation Ltd 1999 11 NWLR pt 625
pg 91

Governor of Oyo State V Akinyemi 2003 1 NWLR pt 800 pg 1

B The apprehension as to the ability of the 1st Respondent to re-compensate the applicant if the appeal succeeds is a non issue in that the compensation here is in profit oil, not capable of being quantified immediately in terms of money.

C The applicant and particularly the 2nd Respondent, representing the Federal Government canvassed the necessity to maintain status quo ante bellum in addition to the order for stay. I must put in briskly that to grant status quo ante bellum will restore parties to their status pending the decision of the Court of Appeal. This to my mind will have the
D effect of determining this appeal at an interlocutory stage. The appellant/applicant would have achieved its goal in the appeal through the back door and without going through the rigors of arguing the appeal. It is trite that a court must take all precaution not to determine a substantive matter at an interlocutory stage.

E A.g Anambra State V Okafor (1992) 2 NWLR pt 224 pg 396

Egbe V Onogun 1972 1 All NLR pt 1 pg 95

Orji V Zaria Industries Ltd 1992 1 NWLR pt 216 pg 124

General Electric V Akande 1999 NWLR pt 588 pg 532

F Oduntan V General Oil Ltd (1995) 4 NWLR pt 387 pg 1

The issue of public interest as an exceptional circumstance for granting a stay is not a strong wicket in the circumstance of this case. It is now apparent that the applicant will not suffer any monetary loss at the end of day. The grounds of appeal which relate mostly to the
G interpretation of the Petroleum Act and other statutes are not recon-dite. With fuller reasons given in the leading Ruling I agree with the reasoning and conclusion of my learned brother that no special or exceptional circumstance have been made out on which this court can exercise its discretion in favour of granting the application for
H stay of execution. I abide the consequential orders including the order for costs.