

SUPREME COURT OF NIGERIA
8TH JUNE, 2012. SC. 311/2009
CORAM:- A. M. MUKHTAR, F. F. TABAI, S. GALADIMA,
N. S. NGWUTA, O. ARIWOOLA, JJSC

CHIEF J. S. AMADI & ORS APPELLANTS
AND
MR. EDMUND CHUKWU & ORS RESPONDENTS

STAY OF EXECUTION - Application for - Basis for grant - Applicant must show exceptional circumstances - As courts do not usually deprive litigant of his success in a judgment (H1)

COURTS - Stay of execution - Grant - Court has discretion to grant or refuse stay - And the discretion must be exercised judicially and judiciously (H2)

STAY OF EXECUTION - Application - Affidavit in support - Validity - Stay will not be granted - Since the affidavit did not disclose any special circumstance (H3)

FACTS

Plaintiffs/appellants/applicants instituted this action at the High Court of Rivers State, Port Harcourt wherein they claimed inter alia for, a declaration of customary right of occupancy, damages and perpetual injunction restraining defendants/respondents from trespassing on the land in dispute between the parties. Respondents on their part counter-claimed for similar reliefs as claimed by appellants.

After the hearing, appellants' claims were granted while respondents' counter-claims were dismissed. Respondents who were dissatisfied filed appeal at the Court of Appeal, Port Harcourt. The court set aside judgment of the trial court by dismissing appellants' claims and granting respondents' counter-claims. Being aggrieved, appellants filed their notice of appeal on 23/06/2009. However much later on 03/12/2010, appellants filed an application for stay of execution of the judgment of the Court of Appeal.

HELD (Unanimously dismissing the application per

ARIWOOLA JSC)

STAY OF EXECUTION - Application for - Basis for grant

1. It is already settled, that a stay of execution will only be granted by the court, if and only if it is satisfied that there are special or exceptional circumstances to warrant doing so. The reason being that, the law is that a judgment of a court of law is presumed to be correct and rightly given until the contrary is proved or established. It follows therefore that courts will not make it their practice of depriving a successful litigant of the fruits of his success in court.

However, for an unsuccessful litigant to succeed in an application for stay of execution of judgment, such applicant must show clearly that there exists special or exceptional circumstance showing the balance of justice in his/her favour.

(pp. 2380 F/2381 B)

Stay of execution - Grant

2. It is also now settled that the power of the court to grant or refuse stay of execution of a judgment is discretionary, which discretion must, of course, be exercised both judicially and judiciously but certainly not arbitrarily. In exercising such discretion, the court is enjoined to take into account the competing rights of the parties involved in the case. (p. 2381 A)

STAY OF EXECUTION - Application - Affidavit in support

3. It is interesting to note that the further affidavit in support of this application was filed on 18/11/2011 ten (10) months after the Respondents filed their counter affidavit on 18/01/2011. The facts deposed in the counter affidavit were not controverted or contradicted by the applicants. Neither were they denied. After a careful look through the affidavit evidence in support of this application and the grounds of appeal contained in the Amended Notice of Appeal, I am unable to see, in the slightest any special or exceptional circumstance to warrant the exercise of the court's discretion in favour of this

application to order stay of execution of the judgment of the court below. (p. 2383 C)

NOTABLE POINT OF INTEREST

ARIWOOLA JSC

1. Stay of Execution - What constitutes special circumstances

Indeed, in a situation where there is pending appeal against the judgment, as in the instant case, the following special circumstances have received judicial approval when execution of the judgment would:-

- (a) Destroy the res or subject matter of the proceedings;
- (b) Foist upon the court a situation of complete helplessness;

or

- (c) Render nugatory any order or orders of the appeal court;
- (d) Paralyse in one way or the other, the exercise by the litigant of his constitutional right of appeal or
- (e) Provide a situation in which even if the appellant succeeds in his appeal, there could be no return to the status quo. (p. 2381 C)

REPRESENTATION

S. Larry Esq. with T. Tabai (Miss), R. Pereo-Tubo Esq., L. Nepte (Miss), E. Egalase (Mrs), A. Anyah Esq., for the Appellants/Applicants
Eberechi Adele Esq., for the Respondents

CASES REFERRED TO

Martins v. Nicannar Food Co Ltd (1988) SC 429
Shodeinde v. Trustees in Islam (1980) 2 SC 165
Vaswani Trading Co. Ltd. v. Savalak (1972) 12 SC 77
Okafor v. Nnaife (1987) 4 NWLR (Pt. 64) 129
Deduwa v. Okorodudu (1974) 6 SC 211
Kigo Nig Ltd v. Holman Bros (1980) 5-6 SC 60
Nwabueze v. Nwosu (1988) 4 NWLR (Pt. 88) 257
Olunloyo v. Adeniran (2001) 11 SCM 195
LSDPC v. Citymark (1998) 7 NWLR (Pt. 63) 681
Elf Marketing Nig Ltd v. J. L. Oyeneyin & Sons (1995) 7 NWLR (Pt. 407) 370

LEAD JUDGMENT BY ARIWOOLA JSC

This is an application dated 2nd day of December, 2010 but

filed on 3rd day of December, 2010. The Appellants are the Applicants seeking the following Orders:

"1. An order staying execution of the judgment of the Court of Appeal, Port Harcourt Division in Appeal No. CA/PHC/281/2001 delivered on 23rd April, 2008 pending this appeal.

B *2. And for such further order(s) as the Honourable court may deem fit to make in the circumstances"*

C In supporting of the application is an affidavit of 15 paragraphs deposed to by one Udo Abahia, a Litigation Secretary in the Law firm of Larry S. & Co. of counsel to the Applicants. Attached to the application are various documents marked Exhibits AA, BB, CC and CC1 respectively. Also in support is a further affidavit of 4 paragraphs deposed to by the same Udo Abahia who deposed to the original affidavit. Attached to the further affidavit is a copy of an Amended D Notice of Appeal in this case filed on 15/6/2010. The document is marked Exhibit DD.

This application was opposed by the Respondents and they filed a counter affidavit so to do. The said counter affidavit of 9 paragraphs was deposed to by one Mr. Sunny Chukwu who described himself as E a principal, member of Rumu-Chukwu family of the Respondents to the appeal. A document attached to the said counter affidavit is marked Exhibit A.

F When arguing the application, Mr. Larry of counsel to the applicants submitted that there is substance in the appeal with good grounds. He referred specifically to ground six (6) of the Grounds of Appeal and submitted that the affidavit in support disclosed exceptional circumstances to enable the court to grant the stay of execution sought. He referred in particular, to paragraphs 5, 6, 7, 8, 9 and G 10 of the supporting affidavit. He also referred to paragraph 3 of the further affidavit filed on 18/11/2011 to which the Amended Notice of Appeal is attached. Learned applicants' counsel submitted that the facts contained in Exhibit AA attached to the application answered the allegation in paragraph 5 (e) of the counter affidavit of the Respondents. He urged the court to grant the application and stay the H execution of the judgment of the court below.

In response, learned counsel to the Respondents, Mr. Adele referred to the counter affidavit they filed to oppose the application. He relied on all the facts deposed to therein. Learned counsel sub-

mitted that the judgment being appealed against is a Declaratory Judgment which under our law should not be stayed. He submitted further that once a person has been adjudged a trespasser, a stay of execution order ought not to be granted to such a person. Otherwise, to grant a stay will enable such a person to continue in trespass. He cited, *Akibu v. Oduntan* (1991) 2 NWLR (Pt.171) 1, *Tukur v. Government of Gongola State* (1989) 4 NWLR (Pt.117) 592. Learned counsel submitted that the application lacks merit. He contended that the affidavit filed in support does not contain any special circumstance to warrant the grant of stay of execution. He submitted that the appellants ought to have prayed for accelerated hearing of the appeal rather than a stay of execution order. He urged the court to dismiss the application.

The applicants herein were the plaintiffs at the trial court where they had claimed the following:

(a) A declaration that the plaintiffs are entitled to the customary right of occupancy over the entire piece and parcel of land situate at Rumuwokerebe Rumukwurusi in the Port Harcourt Judicial Division and known as and called EKWU APAMINI.

(b) A declaration that the Defendants as customary tenants under native law and custom of the plaintiffs have forfeited for misconduct, all their rights in the land known as and called EKWU APAMINI.

(c) Damages of N100,000.00 (One hundred thousand Naira) for unlawfully harvesting economic trees and farming on the said land in dispute in defiance of the plaintiffs.

(d) Possession of that portion of EKWU APAMINI shown and verged of green on the plan filed herewith.

(e) Perpetual injunction restraining the Defendants whether by themselves, agents, servants or otherwise howsoever from any or any further acts of trespass in and over EKWU APAMINI land or any part thereof.

The Respondents herein were the Defendants who had a counter claim before the trial court for the following reliefs:

(a) A declaration that the Defendants are entitled to the customary right of occupancy over all the parcel of land called and shown as OKPORO RUMUCHUKWU FAMILY LAND verged red, in the Defendants survey plan No. ONC/91/R37/LD of 23/12/91 including

particularly the area in dispute verged blue in the same plan.

(b) Perpetual injunction restraining the plaintiffs, their agents servants and privies, from any further trespass to or interference howsoever with the Defendants' proprietary and possessory interests in the said land.

B (c) N 100,000.00 (one hundred thousand Naira) only damages for trespass already committed by the plaintiffs on the said land.

The matter went to trial. At the conclusion of the hearing in its reserved judgment, the trial court found in favour of the Plaintiffs/
C Appellants/Applicants. The plaintiffs claim to customary right of occupancy was granted among others, while the Respondents counter claim was dismissed. Dissatisfied with the decision of the trial court, the Respondents went to the court below on appeal against the judgment of the trial court delivered on 08/01/2001. Parties filed and
D exchanged their respective briefs of argument. After the appeal was heard, in its reserved judgment delivered on 23/4/2008, the court below allowed the appeal, set aside the judgment of the trial court and dismissed the plaintiffs/applicants' suit No. PHC/120/91. The Defendants/Appellants/Respondents' counter claim was granted with
E costs in favour of the Respondents herein. It is note worthy that the applicants' Notice of Appeal to the judgment of the court below was filed on 23/6/2009, subsequently amended on 15/6/2010. (See Exhibits AA, BB, CC and CC1 as the judgment of the trial court, Judgment of the court below, Original Notice of Appeal and the Amended
F Notice of Appeal to this court respectively). As earlier noted, the instant application for stay of execution was filed by the Appellants on 3/12/2010.

***It is already settled, that a stay of execution will only be
G granted by the court, if and only if it is satisfied that there are special or exceptional circumstances to warrant doing so. The reason being that, the law is that a judgment of a court of law is presumed to be correct and rightly given until the contrary is proved or established. It follows therefore that courts will
H not make it their practice of depriving a successful litigant of the fruits of his success in court.*** See Martins Vs NICANNAR FOOD CO LTD (1988) SC 429, Shodeinde Vs Trustees in Islam (1980) 2 SC 165, VASWANI Trading Co. Ltd. Vs. Savalak & Ors (1972) 12 SC 77

It is also now settled that the power of the court to grant or refuse stay of execution of a judgment is discretionary, which discretion must, of course, be exercised both judicially and judiciously but certainly not arbitrarily. In exercising such discretion, the court is enjoined to take into account the competing rights of the parties involved in the case See Okafor & Ors Vs

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

However, for an unsuccessful litigant to succeed in an application for stay of execution of judgment, such applicant must show clearly that there exists special or exceptional circumstance showing the balance of justice in his/her favour. Indeed, in a situation where there is pending appeal against the judgment, as in the instant case, the following special circumstances have received judicial approval when execution of the judgment would:-

- (a) Destroy the res or subject matter of the proceedings;
- (b) Foist upon the court a situation of complete helplessness;

or

- (c) Render nugatory any order or orders of the appeal court;
- (d) Paralyse in one way or the other, the exercise by the litigant of his constitutional right of appeal or

(e) Provide a situation in which even if the appellant succeeds in his appeal, there could be no return to the status quo.]

See generally, Vaswani Trading Co. Vs Savalakh & Co. (Supra); Deduwa Vs Okorodudu (1974) 6 SC 211; Kigo (Nigeria) Ltd Vs Holman Bros (1980) 5-6 SC. 60 Nwabueze Vs Nwosu (1988) 4 NWLR (Pt.88) 257. Therefore, an applicant for a stay of execution has a duty to show clearly and convincingly that special or exceptional circumstances exist, making the balance of justice to weigh in his/her favour. It is however conceded that what constitutes special or exceptional circumstance may vary from case to case. See Professor Olunloyo Vs Adedapo Adeniran (2001) 11 SCM 195 at 198 Okafor Vs Nnaife (supra). In the instant case, the applicants relied on the facts deposed in paragraphs 5,6,7,8,9 and 10 of the Affidavit and paragraph 3 of the further affidavit in support of this application. The said facts relied on are as follows:

"5. That the applicants have appealed against the judgment of the court of appeal to this court on six original grounds and have

applied to deem its amended notice of appeal filed on 15th June, 2010 wherein a fresh point bordering on incomplete record is being raised vide ground six thereof. The original notice of appeal and the said amended notice of appeal are hereby attached and marked Exhibits cc and CC1 respectively

B *6. That the records of appeal have been compiled and trans-
mitted to this Honourable court.*

*7. That the court of Appeal decided the appeal before it upon
incomplete records in that:*

C *(i) The evidence of the PW1 Chief Jonathan Sam Amadi given
under cross-examination was excluded from the printed record be-
fore it as can be seen at pages 53-52 of the record and*

*(ii) the evidence of PW3 Abel Nnanna “in Chief” is excluded
from the printed records as can be seen at pages 90-97 thereof.*

D *8. That the appeal before this Honourable court has prospect
of success.*

*9. That the Land the subject matter of this appeal is essentially
a farmland from which the Applicants derive their livelihood.*

E *10. That the respondents are now indiscriminately carving out
parts of the land on sale to third parties who are progressively chang-
ing the face of the disputed land by building rather than farming
thereon.”*

Paragraph 3 of the further affidavit also relied on specifically
by the applicant states thus:

F *“3 That the Appellants/Applicants’ Amended Notice of Appeal
dated the 15th of June, 2010 was deemed properly filed on the 21st
of June 2011. (The said Amended Notice of Appeal is hereby at-
tached and marked Exhibit “DD”).”*

G In responding to the above affidavit evidence, the Respon-
dents denied vehemently paragraphs 7, 8, 9, 11, 12, 13 and 14 of
the applicants’ affidavit in support of this application. In paragraph 5
(a), (b) and (e) of the counter affidavit, the Respondents state, inter
alia, as follows:

H *“5(a) That the land in dispute in this litigation is not “essentially
farm land” as being falsely claimed by the Applicants in paragraph 9
of their affidavit in support. The truth is that the land is our ancestral
homestead land which has been in our possession from time imme-
morial. The land comprises mainly our residential and recreational*

land...

(d) *That on the contrary, it is the applicants who have for many years threatened and intimidated us over the undeveloped portions of the land in dispute by actually selling portions thereof to third parties even during the pendency of this litigation.*

(e) *For example, during the pendency of this litigation the Applicant sold a portion of the undeveloped part of the land in dispute to a third party called Mr. Victor Ozioko who constructed a Petrol Filling Station thereon called "VIC-EZ" Energy, Services Limited. That Petrol Station is in operation till date.*"

It is interesting to note that the further affidavit in support of this application was filed on 18/11/2011 ten (10) months after the Respondents filed their counter affidavit on 18/01/2011. The facts deposed in the counter affidavit were not controverted or contradicted by the applicants. Neither were they denied. After a careful look through the affidavit evidence in support of this application and the grounds of appeal contained in the Amended Notice of Appeal, I am unable to see, in the slightest any special or exceptional circumstance to warrant the exercise of the court's discretion in favour of this application to order stay of execution of the judgment of the court below.

Without any further ado, I am of the firm view that the application is lacking in merit and substance. It deserves to be and is hereby dismissed. There shall be costs of N30, 000.00 to the Respondents against the Applicants.

MUKHTAR JSC

I have had the opportunity of reading in advance the lead judgment delivered by my learned brother Ariwoola JSC. The application for stay of execution before this court is definitely devoid of merit. It has not met the principles governing the grant, in that no special or exceptional circumstance has been shown in the supporting affidavits, and the grounds of appeal are not favourable to the grant. It seems what the appellants/applicants want to do is to deprive the respondents of the fruit of their judgment, which this court will not condone. This court in considering the application will exer-

cise its discretion judicially and judiciously. See *Incar (Nig.) PLC v. Bolex Ent. (Nig.) Ltd* 1996 8 NWLR part 469 page 687.

I am in complete agreement with my learned brother that the application should be dismissed, and I so dismiss it also. I abide by the consequential orders made in the lead judgment.

B

NGWUTA JSC

I read before now the lead ruling delivered by my learned brother, Ariwoola, JSC just now, and I agree with the reasoning and conclusion therein contained.

The general principle of law is that a judgment creditor is entitled to the full benefit and fruits of his judgment by the Court and nothing less. See *LSDPC v. Citymark* (1998) 7 NWLR (Pt. 63) 681. A stay of execution of a judgment is a discretionary relief. The Court will exercise its discretion in favour of an applicant who has shown by his affidavit evidence special circumstances to warrant a grant of his application. See *Elf Marketing Nig Ltd v. J. L. Oyeneyin & Sons* (1995) 7 NWLR (Pt.407) 370. Special circumstances involve a consideration of some collateral factors and some inherent matters such as preservation of the subject matter of litigation; the need not to foist upon the Court, especially an appellate Court; or a situation of complete helplessness; or to avoid rendering nugatory any order or orders of the appellate Court or to ensure that if the appeal is allowed there could be a return to status quo ante. See *Vasbrani Trading Co v. Savalakh & Ors* (1972) 111 NLR (Reprint) 922 at 976. The applicant failed to provide a special circumstance to warrant the exercise of the Court's discretion in his favour. I agree that the application is devoid of merit and also dismiss same with N30,000.00 costs to the respondent.

H