**IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY**
**IN THE ABUJA JUDICIAL DIVISION**
**HOLDING AT MAITAMA**
**BEFORE HIS LORDSHIP: HON. JUSTICE H. B. YUSUF**

**SUIT NO: FCT/HC/CV/3272/13**
**MOTION NO: FCT/HC/M/1410/19**

**BETWEEN:**

1. DOLIZ BROWN GROUP LIMITED )
2. ENGR. EDDY NDICHIE )……..JUDGMENT DEBTORS/
3. CHIEF OMENIFE A.C. IZUEGBU ) APPELLANTS/APPLICANTS

**AND**

STERLING BANK PLC……..JUDGMENT CREDITOR/RESPONDENT

**RULING**

Sometime on the 1st November, 2019 I dismissed the claims of the Judgment Debtors/Applicants as Plaintiffs and entered judgment for the Judgment Creditor/Respondent bank on its Counter Claims.

I held that the Judgment Debtors/Applicants were indebted to the Judgment Creditor/Respondent for the total loan sum of N162,000,000.00 (One Hundred and Sixty-Two Million Naira) Only with accrued interest.

I also held that the Judgment Creditor/Respondent was entitled to exercise its right of sale on the mortgaged property upon foreclosure of

the Applicants' right of redemption over the said Plot. 594B, 411 Crescent "A" Close, Gwarinpa II Estate, Abuja.

The Judgment Debtors/Applicants were dissatisfied with the Judgment of the Court and therefore appealed to the Court of Appeal vide a Notice of Appeal dated 26/11/2019. The Applicants also filed a motion on notice for order of stay of execution and injunction.

Six grounds were listed and relied upon for bringing the application. Learned counsel urged the Court to deem the grounds as read.

There is a 12-paragraphs affidavit duly deposed to by one Rotimi Adebiyi Daniel, a Litigation Secretary in the Chambers of Senior Counsel to the Applicants. Learned Counsel sought and placed reliance on all the averments contained therein. The Judgment sought to be stayed was annexed as exhibit DB1 and the Notice of Appeal as DB2. Learned Counsel also filed a further and better affidavit in response to the counter affidavit. Learned Counsel to the Applicants adopted his address in support in urging the Court to grant the application.

The application was opposed with a Counter Affidavit of 30-paragraphs deposed to by one Audu Ali, a staff of the Respondent bank and filed on the 29/11/2019. Learned Counsel also adopted his written address in urging the Court to refuse and dismiss the application.

It has been decided by the apex Court in a plethora of decided cases that it's not the habit of Courts to deny successful litigants of the fruit of their labour except in exceptional situations. Thus in **OKAFOR & ORS V.**

**NNAIFE (1987) 4 NWLR (PT.64) 129** Oputa, JSC (of blessed memory) has this to say:

> "**What principles will, and should, guide the Courts in applications for a stay of execution? These principles have been reiterated in very many decisions of this Court. Perhaps it may be well here to re-emphasise some of them:**
>
> **(1) The Courts have an unimpeded discretion to grant or refuse a stay. In this, like in all other instances of discretion, the Court is bound to exercise that discretion both judicially as well as judiciously and not erratically.**
>
> **(2) 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 a stay but does not adequately take into account the respondent's equal right to justice is a discretion that has not been judicially exercised.**
>
> **(3) A winning Plaintiff or party has a right to the fruits of his judgment and the Courts will not make a practice at the instance of an unsuccessful**

**litigant of depriving a successful one of the fruits of the judgment in his favour until a further appeal is determined - See the Annot Lyle (1886) 11 P.D. 144 at p. 116 C.A. per Bowen, L.J.**

**(4) An unsuccessful litigant applying for a stay must show "special circumstances" or "exceptional circumstances" eloquently pleading that the balance of justice is obviously weighted in favour of a stay.**

**(5) What will constitute these "special" or "exceptional" circumstances will no doubt vary from case to case. By and large, however, this Court in Vaswani Trading Company v. Savalakh and Company (1972) 12 S.C. 77 at p.82 held that such circumstances will involve "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."**

**(6) The onus is, therefore, on the party applying for a stay pending appeal to satisfy the Court that in the peculiar circumstances of his case a refusal of a stay would be unjust and inequitable.**

**(7) The Court will grant a stay where its refusal would deprive the appellant of the means of prosecuting the appeal - Emmerson v. Ind. Coope & Co. (1886) 55 L.J. Ch. 905.**

**The above are some of the general rules guiding and governing the Court in the exercise of its discretion to grant or refuse a stay. The above list is not, however,exhaustive."**

Where the judgment sought to be stayed is a monetary Judgment as in this case the conditions recognized as exceptional circumstances are as follows:

1. **Whether or not the Judgment Debtor has resources to pay the judgment debt and be able to prosecute the appeal; and**
2. **Whether the Judgment Creditor would be financially in a position to refund the judgment debt if the Defendant/Judgment Debtor is successful at the Court of Appeal.**

See the case of **GOVERNOR, OYO STATE & ANOR V. AKINYEMI (2003) 1 NWLR (PT.800) 1.**

I have read the processes filed by parties and it would appear to me that the affidavit in support of this application is silent on the above requirements of the Law. However the Judgment Creditor/Respondent adverted its mind to the above principle of Law when it stated at paragraphs 21 – 24 of its Counter Affidavit as follows:

21. That the 1st Judgment Debtor/Applicant is a Contractor of Note handling road contracts all over Anambra State and beyond and has the capacity to pay the judgment sum but has refused to pay same.

22. That the 2nd Judgment Debtor/Applicant guaranteed the loan and in fact mortgaged his property (the mortgaged property)

to the Judgment Creditor to secure the said loan and so has the capacity to pay the loan but has refused to pay same.

23. That the 3rd Judgment Debtor/Applicant is the Chairman of the 1st Judgment Debtor/Applicant , a man of high net worth who also personally guaranteed the loan and is therefore capable of paying back the loan but has refused to do same.

24. That the Judgment Creditor is a first class financial institution and so has the capacity to refund the judgment sum to the Judgment Debtors/Applicants in the most unlikely event that the appeal succeeds.

The above depositions provoked a further and better affidavit from the Judgment Debtors/Applicants where they joined issues with the Judgment Creditor/Respondent. I find paragraph 7 of the Further and Better Affidavit useful in the effective determination of this application and same is hereby reproduced to facilitate ease of understanding:

7.1. That they have seen and read the Counter Affidavit of Audu Ali Esq deposed in opposition to the instant application;

7.2. That contrary to the deposition in paragraph 21, they know as a fact that the ability of the Judgment Debtors/Applicants to execute some of its road construction contracts which often relies on advances from banks and other financial institutions over the years were greatly

hampered by the steps taken by the Judgment Creditor in listing the 1st Judgment Debtor/Applicant in the Credit Bureau as a credit risk entity thereby blacklisting it from accessing needed credit.

7.3. Attached as Exhibit DB4 is a Unity Bank PLC letter dated April 7th, 2017 to the Managing Director of the 1st Judgment Debtor/Applicant declining an Advance Payment Guarantee on the basis of the CRMS report.

A careful analysis of the above averments of the Applicants would reveal that the said Applicants have not effectively controverted the depositions in the Respondent's Counter Affidavit that the Applicants have sufficient funds to pay the Judgment Debt and that if their appeal is successful the Respondent which is a notable financial institution in Nigeria has the capacity to refund the Judgment Debt without any difficulty. Put in another way the Further and Better Affidavit of the Judgment Debtors/Applicants carefully avoided the real issue at stake as the affidavit was silent on whether the payment of the judgment debt will affect their capacity to prosecute the appeal pending before the Court of Court. Similarly the Applicants were also silent on whether the Judgment Creditor/Respondent would be able to refund the Judgment Debt if the Applicants become successful on appeal. This omission is instructive and indeed fatal to the success of this application.

For the purpose of argument all that the Judgment Debtors/Applicants succeeded in doing in to accuse the Judgment Creditor/Respondent of blacklisting the 1st Judgment Debtor/Applicant as a credit risk entity. Exhibit DB4 which is a letter written to the 1st Judgment Debtor/Applicant by Unity Bank and dated 7th April, 2017 was annexed to support Applicants' allegation. However a careful perusal of the exhibit shows that it does no support this allegation. The exhibit merely indicated that the 1st Judgment Debtor/Applicant has two bad loan with the Judgment Creditor/Respondent and advised the 1st Judgment Debtor/Applicant to provide evidence of satisfactory regularization of the facility with the Respondent bank. I do not see how this exhibit serves as an answer to the requirement of the law for stay of execution of monetary judgment.

If the Judgment Debtors/Applicants want the Court to believe that payment of the judgment debt will affect their capacity to prosecute their pending appeal they ought to have deposed to such state of affairs in their affidavit. And in such situation the Applicants have a legal duty to make full and frank disclosure of their assets and liabilities. On that note the 1st Judgment Debtor/Applicant which is a corporate entity ought to annex its current audited report showing its assets and liabilities. It is also mandatory to exhibit statements of account from the 1st Judgment Debtor/Applicant's bankers. It is the holistic review of these documents that will assist the Court to form an opinion on the financial standing of

the 1st Judgment Debtors/Applicant. Unfortunately the 1st Judgment Debtor/Applicant has failed to do that.

In a related development the 2nd and 3rd Judgment Debtors/Applicants who are natural entities did not say anything about their financial situation. There is nothing before the Court detailing their asset and liability. They have also failed to exhibit their statement of account from their respective bankers.

I take the liberty to refer to the case of **MORISON IND. PLC V. CPL IND. LTD (2009) 17 NWLR (PT.1169) 119 AT 133** where the Court of Appeal held as follows:

> **"Now, coming back to the application at hand, has the applicant established special and exceptional circumstances to warrant exercising the discretion in his favour by granting a stay of execution. The judgment sought to be stayed in this application as earlier stated in this ruling is no doubt a money judgment. Generally with respect to money judgment, the following principles govern stay of execution. Hence there should be no order for a stay of execution of judgment where:**
>
> **(a) It has not been shown by the applicant that the respondent will be unable to refund the judgment debt in case the appeal succeeds.**

**(b) The respondent's deposition in his counter-affidavit as to its credit worthiness stands unchallenged; or**

**(c) Where the respective parties express their ability to pay or refund the judgment sum."**

The Court went further to say that:

> **"In the instant application, the main ground relied on by applicant is averred in paragraph 20, to the effect that if the judgment debt is paid it will incapacitate the operations of the applicant and the livelihood of its 59 employees will be jeopardized. The respondent, in paragraph 14 of the counter affidavit, averred that while the application for stay was pending, the applicant commenced and concluded building of a massive bungalow within a year, on its land at No.22 Sunmola Street Mende, Lagos. This has not been denied. The applicant has also not shown that in the event the appeal succeeds, the respondents cannot pay back the judgment sum. See Ladipo v. Aminike Invest. Co. Ltd (1998) 4 NWLR (Pt.546) 496; Igwe v. Amunchenwa (2005) 10 NWLR (Pt.933) 420. The respondent's deposition as to its credit worthiness in paragraph 21 of the counter affidavit stands unchallenged. I**

**have meticulously perused exhibit A10, the 2006 Annual Report and Accounts of the applicant vis a vis paragraph 12 and 13 of the counter affidavit. Paragraph 9 to 12 of the counter affidavit, are to the effect that the operations of the applicant will not be jeopardized in view of page 35 of the annual report. These paragraphs of the counter affidavit have also not been denied. Pages 25, 35 and 5 of exhibit A10, shows that the applicant has about 52M in its general reserve, N8.1 M retained profit after tax and are currently engaged in recapitalization. Hence the applicant is in a very sound financial position to pay the judgment debt. In the instant case, there was no averment in the applicant's affidavit and counsel's submission of any difficulty being encountered regarding the prosecution of the appeal if a stay of execution is not granted… If view of the foregoing, the applicants have not established special and exceptional circumstance to warrant exercising the discretion in their favour."**

In the instant case, the Applicants have not shown by their affidavit that they would have difficulties prosecuting their pending appeal before the Court of Appeal if the judgment debt is paid. On equal note the Applicants have not denied the averment of the Judgment

Creditor/Respondent that as a notable financial institution in Nigeria the Respondent bank is in a good position to refund the judgment debt in the event that the Applicants succeed on appeal. The end result is that the Judgment Debtors/Applicants have not shown any special or exceptional circumstances to warrant the grant of an order for stay of execution.

Arising from the foregoing and taking into account the entire facts and circumstances of this case I form the view that the approach that best suits the justice of this case is to make an order of conditional stay pending appeal. Accordingly the Judgment Debtors/Applicants are hereby ordered to pay the judgment debt into an interest yielding account maintained by the Chief Registrar of this Court pending the outcome of their pending appeal.

The second relief sought by the Judgment Debtors/Applicants is for an order of injunction restraining the Judgment Creditor/Respondent, its agents, officers, servants, privies and or assigns from doing anything or taking any action or step to give effect to the judgment of this Honourable Court delivered on 1st say of November, 2019.

The principle for the grant of an order of injunction is similar to that of stay of execution. However, what is paramount in the determination of this second leg of the Applicants' relief is balance of equities or convenience between parties.

The learned senior counsel to the Judgment Debtors/Applicants have raised a point that it would amount to double jeopardy for the Judgment Debtors/Applicants to pay the cumulative judgment sum of N242,055,888.62 (Two Hundred and Forty-Two Million, Fifty-Five Thousand, Eight Hundred and Eighty-Eight Naira, Sixty-Two Kobo) when in fact and indeed the mortgaged property is effectively in the hands of the Judgment Creditor/Respondent. That the mortgaged property has an open market value of N456,300,000.00 (Four Hundred and Fifty-Six Million, Three Hundred Thousand Naira) while the forced sale value is fixed at N380,000,000.00 (Three Hundred and Eighty Million Naira) Only.

Learned Counsel cited the case of **ANYAEGBUNAM V. ANAMBRA STATE (1995) 9 NWLR (PT.417) 97 and MOFARM FARMS & FOOD IND. LTD V. IBWA (1991) 7 NWLR PT.205) 643** to support his submission. In the former case it was stated inter alia that:

> **"...Where the Judgment Debtor/Applicant for stay has duly established that the value of his security in the hands of the Respondent equals or exceeds his total indebtedness to the Respondent which may therefore be adequate to off-set the judgment debt then an application for stay pending appeal ought to be granted."**

See also **ANYAEGBUNAM V. ANAMBRA STATE (supra)** where it was held as follows:

> **"Where the assets of a judgment debtor in the hands of a judgment creditor are sufficient to meet the judgment debt, a stay of execution will be granted pending appeal on the terms that such assets shall not be disposed of until the determination of the appeal…. There is no doubt that the vital documents of title to the land concerned are all in the custody of the respondent. And from the valuation of the Estate Valuer employed by the appellant, the two properties were valued at N3.2 Million aggregate. The valuation was not challenged by the Respondents. The judgment given in favour of the respondent was for the sum of N1,924,939.40 which Is much less than the estimated value of the properties concerned. The respondents, in my view would have something substantial to hold on to, to realize their judgment in the event of the applicant's appeal not succeeding."**

Like I have stated above what is paramount here in the mind of the Court is balance of convenience between parties. It is now settled law as may be distilled from plethora of judicial authorities that the phrase "balance of convenience" is the disadvantage to one or other side which damages cannot compensate.

In **KOTOYE V. CBN (1989) 1 NWLR (PT.98) 419** the Supreme Court succinctly explained what it means to say that the balance of convenience is in favour of a party when Nnamani-Agu, JSC (of blessed memory) held thus:

> **"It means that more justice will result in granting the application than in refusing it."**

Put in another way balance of convenience means the advantages of granting the injunction will outweigh the disadvantages. And to arrive at the above conclusion two questions must be posed and answered. They are:

**(a) Will the applicant suffer more inconveniences if the application is not granted; and**

**(b) Will the defendant suffer more inconvenience if the injunction is granted?**

I have carefully considered the balance of convenience in this case and I am satisfied that it is in favour of the Judgment Debtors/Applicants. This must be so for two clear reasons:

(1) I have made an order of conditional stay wherein the Judgment Debtors/Applicants were ordered to pay the judgment debt to the Court pending the hearing and determination of the Applicants' appeal; and

(2) The title documents of the mortgaged property are effectively in the hands of the Judgment Creditor/Respondent and it serves as sufficient security in the event that the Judgment Debtors/Applicants' appeal is not successful.

In reaching this conclusion that the balance of convenience is in favour of the Applicants I lean on the case of **T.S.A IND. LTD V. KEMA INVESTMENTS LTD (2006) 1 S.C (PT.3) 9; (2006) 2 NWLR (PT.964) 300** where the Supreme Court re-echoed the need to carefully consider the competing interest of parties in the determination of applications of this nature, to wit:

> **"... this is settled, firstly, that a discretion to grant or refuse a stay of execution/proceeding, must take into account, the competing rights of the parties. See *First Bank of Nigeria Ltd. v. Doyin Investment (Nig.) Ltd. (1989) 1 NWLR (Pt.99) 634 at 639*; per Oputa, JSC, where it was stated that a discretion that is biased in favour of an applicant for a stay, but does not adequately take into account the respondent's equal right to justice, is a discretion that has not been judiciously exercised. See also the comment in the case of *Ajomale v. Yaduat & Anor. (1991) 5 SCNJ 178 at 188, (1991) 5 NWLR (Pt. 191) 266.* Secondly, a stay of execution, is never used as a substitute for obtaining the judgment which the trial court has denied a**

**party. See *Okafor & Ors. v. Nnaife* (supra). A court will not grant a stay of execution of a judgment, for the purpose of enabling a party to obtain the very reliefs which he lost in the action leading to the judgment for which an appeal has been lodged. See *I. C Trustees Ltd. v. I.S. Darwen Ltd (1990) 2 Q.B 296*. In other words, the applicable principle, is to the effect that the court will provide adequate protection to the judgment given to a successful litigant. This is because, a litigant will not be deprived of the fruits of the Judgment in his favour, unless the debtor shows exceptional circumstances for doing so."**

Arising from the above principle of Law it is clear to me that an Order of Injunction restraining the Judgment Creditor/Respondent from disposing the mortgaged property during the pendency of the Applicant's appeal is the only way that the equities between parties can be balanced.

Accordingly, an Order of Injunction is hereby made restraining the Judgment Creditor/Respondent from disposing the mortgaged property pending the hearing and determination of the Judgment Debtors/Applicants' pending appeal before the Court of Appeal, Abuja Division.

Signed
Hon. Justice H. B. Yusuf
(Presiding Judge)
31/01/2020