

**IN THE HIGH COURT OF JUSTICE OF THE  
FEDERAL CAPITAL TERRITORY ABUJA  
IN THE ABUJA JUDICIAL DIVISION  
HOLDEN AT JABI – ABUJA**

**BEFORE: HON. JUSTICE O.C. AGBAZA**

**COURT CLERKS: UKONU KALU & GODSPower EBAHOR**

**COURT NO: 11  
SUIT NO: FCT/HC/PET/137/12  
MOTION NO:M/6775/18**

**BETWEEN:**

**MR KINGSLEY O. OGBOE.....PETITIONER/APPLICANT**

**AND**

**MRS DELE TOKUNBO OGBOE.....RESPONDENT**

**RULING**

By a Motion on Notice with No. M/6775/18 dated 4/6/18 and filed same day, brought pursuant to Order iii Rule 4 of Matrimonial Causes Rules, Order 61 Rule 1 of FCT High Court (Civil Procedure) Rules 2018 and under the inherent jurisdiction of the court, the Applicant seek the court the following reliefs;

- (1) An Order of the Hon. Court staying the execution of the judgment of this Hon. Court delivered on the 4<sup>th</sup> day of October, 2013 in Suit No. FCT/HC/PET/137/2012 (especially the aspect relating to the payment or maintenance to the Respondent in the sum of ₦70,000.00 (Seventy Thousand

naira) only per month and payment of the sum of ₦184,600.00 (One Hundred and Eighty –Four Thousand Six Hundred Naira) only as alternative for the release of personal properties of the Respondent) pending the hearing and determination of the appeal already lodged against the judgment at the Court of Appeal.

(2) And the Omnibus relief.

### **GROUND OF THE APPLICATION**

- (i) The Applicant was the Petitioner in Suit No: FCT/HC/PET/137/12 before this Hon. Court in which the court granted certain reliefs to the Respondent.
- (ii) The Appellant/Applicant being dissatisfied with the said Judgment has filed a Motion for leave to appeal out of time and a proposed Notice of Appeal against same to the Court of Appeal, Abuja Division.
- (iii) The grounds of Appeal contained in the proposed Notice of Appeal are arguable and substantial with a high chance of success.
- (iv) Unless Stay of Execution is granted the judgment of the Court of Appeal will be rendered nugatory.
- (v) The application is subject to the discretion of court.

(vi) The Respondent will not be prejudiced if the application is granted.

In support of the Motion is an affidavit of 15 Paragraph deposed to by the Applicant himself with 4 Exhibits annexed and marked "TAI – TA4". Also filed a Written Address in support and adopts the said Address, in urging the court to grant the reliefs sought.

The Motion was duly served on Respondent and in response filed a counter-affidavit on 9/7/18 in opposition deposed to by O.F. Momoh with Exhibit "A", "A1" attached. Also filed a Written Address in support, in urging the court to refuse and dismiss the application

In the Written Address of Applicant, Teslim Agboola, Applicant's counsel, raised only one (1) issue for determination and that is;

"Whether given the circumstances of this case the Hon. Court can exercise its discretion in favour of the Appellant/Applicant by granting this application:.

And submits, Applicant in an application of this nature has the burden to show to the satisfaction of court that there exist special or exceptional circumstances to warrant the exercise of its discretion in his favour. That Applicant, in Paras 4, 5 of his affidavit has shown there exist substantial issues of law to be decide on appeal in which the law to some extent recondite and therefore, stay of execution ought to be granted. Submits grounds 1 – 3 of the proposed Notice of Appeal, the Exhibit "TA2", raises substantial issues of law to be decided and therefore constitute special or

exceptional circumstance. Submits its clear from the affidavit evidence that it will create exceptional hardship on Applicant to comply with the judgment of court will regards to payment of ₦70,000 (Seventy Thousand Naira) only as maintenance sum for Respondent and the only child of the marriage. That the earning capacity of Applicant was not taken into consideration. That Applicant has shown, by his affidavit evidence that special circumstance exists to warrant the court to exercise its discretion in his favour. In all commend the court to several judicial authorities;

Olojede Vs Olayeye (2010) ALL FWLR PT. 551 1503 at 1530.

Vasmani Trading Co Ltd Vs Savalakh & Co 1972 12 SC, 77.

Kigo (Nig) Ltd Vs Holman Bros (Nig) Ltd (1980) 5 -7 SC, 60.

Atayi Farms Ltd Vs NACB Ltd (2003) 4 NWLR PT 810 427 at 457 – 458.

The Registered Trustees of the Acts of the Apostles Church Vs Fatunde (2010) ALL FWLR PT. 510 662 at 674.

University of Ilorin Vs Adesina (No.1) (2008) ALL FWLR PT 400, 709 at 727 – 728.

Robert Vs Chinda (2010) ALL FWLR PT.500 at 1354.

Mbadiwe Vs INEC (2010) ALL FWLR PT 547 745 at 763.

In the Written Address of Respondent, O. F. Momoh of counsel raised five (5) issues for determination;

- (1) Whether the court lacks jurisdiction to entertain the Petitioner/ Applicant's Motion for Stay of Execution.
- (2) Whether granting the Petitioner's application will amount to exercising Appellate jurisdiction by this court over its judgment delivered on the 4<sup>th</sup> of October, 2013.
- (3) Whether granting the Petitioner's application will occasion miscarriage of justice and breach of fair hearing against the Respondent.
- (4) Whether granting the petitioner's application for stay will jeopardize the interest and welfare of the child, then further enhance the wicked, shameful and vindictive conduct of the Petitioner against the child and the Respondent.
- (5) Whether the court has the powers to grant conditional stay by an order directing the Petitioner to pay the judgment sum into an interest yielding account in custody of the Registrar of court.

On issue 1, submits that execution of the judgment has been carried out and will amount to exercise in futility for court to grant the application, referred court to Exhibit "A", "A1" of Respondent and Para 8 – 11 of his counter-affidavit.

On issue 2, submits the averment of Applicant in his Para 7 and 8 of the affidavit and Exhibit "TA4" cannot be presented before court for consideration since court has made pronouncement on prove and disprove

of claim and award of maintenance. That the findings of court is absolute, binding and forecloses further consideration of Applicant's Para 7 and 8 and his Exhibit "TA4". Submits that granting Applicant's application will amount to the court exercise Appellant jurisdiction over its judgment.

On issue 3, submits that by Applicant's Exhibit "TA4" and its attendant averments, has introduced issues not canvassed at trial for Respondent to be afforded opportunity to be heard on same. That what Applicant is expected to show in a sincere and competent application for stay is that substantive appeal has been filed. That proposed Notice of Appeal is unborn and cannot sustain anything in the realm of justice for stay application to be granted. And grating the application will occasion miscarriage of justice as court would have considered what is not required and ignored the obvious absence of the basic requirements. Submits since there is no substantive notice of appeal, nothing to lay hand on in order to consider the issue whether there is triable, recondite or arguable issues have been shown for stay to be granted. Submit is absolute falsehood with intent to mislead court on Applicant's argument that the proposed Notice of Appeal raised special and exceptional circumstances commend the court to F.I. B. Plc Vs City Express bank Ltd (2003) 6 NWLR PT 869 226 at 229. That its clear from the proposed Notice of Appeal, exhibit "TA2", that Applicant is not challenging the competency or jurisdiction of the court.

On issue 4, referred the court to Para 2 of page 10 of Applicant's Exhibit "TA1", Para 3 Page 10 and Paras 3 and 1 of pages 29 and 30 of Exhibit "TA1" and contend the acts of Applicant against the child and Respondent

is reprehensible. Further referred to the court's findings at Para 1 lines 5 – 7, page 28 of Applicant's Exhibit "TA1" and urge court not to allow Applicant use its processes in a bad manner to aid wickedness and further release his venom on the innocent child and Respondent.

On issue 5, submits if the court is mindful of granting the stay it should be conditional so that Respondent will not suffer much prejudice. Urge court to ignore Applicant's Exhibit "TA4", that it's useless vis-a-vis the judgment of court, that the Exhibit "TA4" was never evaluated. That the Exhibit "TA4" purporting to be Applicant's pay slip are for months of June 2012 and Jan 2013 whereas judgment was delivered in October, 2013, that is nine months interval before judgment in October, 2013. That none of the pay slip came after judgment delivered in October, 2013, that they are intended to be used to deceive and mislead the court. Urge court to, whether conditionally granting or refusing the Motion, order Applicant to pay the judgment maintenance sum into an interest yielding account within 30 days.

Having carefully considered this instant application, the affidavit evidence, the submission of both counsel, the annexed Exhibits as well as judicial authorities cited, the court finds that only one (1) issue calls for determination, and that is;

"Whether or not the Applicant has satisfactory shown good grounds to warrant the grant of the reliefs sought"

The law is settled that the grant or otherwise of an application for stay of execution is at the discretion of the court. That exercise by the court must

be done judicially and judiciously taking into cognizance of the facts place before it. See *Anachebe Vs Ijeoma* (2014 14 NWLR PT 1426 168 at 184 Para D – F. Overtime the court have laid down some guiding principles that will guide the court in the proper exercise of its discretion in plethora of cases. Before a court can make an order of stay of exercise thereby asking a successful party or victorious litigant to tarry a while before enjoying the fruit his victory, the Applicant must show;

- (1) That there are a substantial and arguable ground of appeal.
- (2) That there are special and exceptional circumstances to warrant the grant of the application.

See *NNPC Vs Famfa Oil Ltd* (2009) 12 NWLR PT. 1156 464 at 468.

In this instant application, the fact relied on by Applicant is that the appeal raises substantial issues of law that are triable and arguable and stands high chance of success without more. The position of the law, however, is that the fact that are appeal present arguable grounds cannot by itself be a ground for stay. In *Odebiyi Vs Odebiyi* (200) 3 NWLR PT. 659 at 659 – 660 Para A (SC) stated thus;

“Special circumstance through may include strong substantial ground of appeal, this alone may not be enough. A strong and substantial ground of appeal does not necessarily mean the appeal may succeed”.



See also Umejuru Vs Odota (2009) ALL FWLR PT 494 1605 at 1608- 1609 and TSA Industries Ltd Vs Kema Investments Ltd (2006) 2 NWLR PT 964 300 at 305 (SC).

Having considered the affidavit evidence of Applicant in line with the set out guidelines for the exercise of court's discretion to grant or refuse an application of this nature, I find that the Applicant have failed to show to the satisfaction of court any special and exceptional circumstances to warrant the court to exercise that discretion in his favour.

This application is mainly in opposition to maintenance sum of ₦70,000 made by court in favour of Respondent and only child of the marriage in its judgment in this suit on 4/10/2013 to which Applicant exhibited the Exhibit "TA4". First the said Exhibit "TA4" was not part of the processes before judgment was entered in this suit. It was only procured by Applicant several months after judgment. Again, the court has reservation as to the authenticity of the source because it is neither stamped nor signed. The maintenance sum was awarded by court in the exercise of its discretion in line with the Rules, in the absence of any contradicting averments of the Applicant on the issue at that time. What's more, there is no valid notice of appeal before court from the records. What is before court is a proposed notice of appeal to be filed, that is the Exhibit "TA2" of Applicant. An Appeal can only be valid if initiated by filing the appropriate Notice of Appeal. See Clev Josh Ltd Vs Tokimi (2008) 13 NWLR PT. 1104 422 at 427. This is not the case in the instant. There is also nothing before court to show compliance with the provision of Order 61 Rule 2 and 3 of Rules of court which provides;

“An Applicant for stay of execution of a judgment shall pay for the compilation of the records of Appeal with 14 days from the date of the Ruling of the Notice of Appeal and where the cost of compilation is not paid; the Respondent may apply to strike out the application”.

A careful perusal of the processes before court does not reveal this.

In all having considered the affidavit evidence of Applicant, I cannot find any good grounds as enunciated in plethora of judicial authorities to warrant the grant of the relief sought. Accordingly, I am unable to exercise that discretion in favour of the Applicant.

Consequently, the application of Applicant to stay of execution of the judgment of this court delivered on 4/10/2013 fails and it is hereby refused.

**HON. JUSTICE O.C. AGBAZA**

Presiding Judge

6/5/2020

TESLIM AGBOOLA – FOR PETITIONER/APPLICANT

NO APPEARANCE FOR THE RESPONDENT