

IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY

IN THE ABUJA JUDICIAL DIVISION

HOLDEN AT HIGH COURT 28 GUDU – ABUJA

DELIVERED ON WEDNESDAY THE 2ND DAY OF DECEMBER 2020

BEFORE HIS LORDSHIP; HON. JUSTICE MODUPE.R. OSHO-ADEBIYI

SUIT NO. CV/1869/2019

MOTION NO: M/11605/2020

BETWEEN:

MR. DAVID ANIKOH ---- JUDGEMENT CREDITOR/RESPONDENT

AND

AZMAN AIR SERVICES ----- JUDGEMENT DEBTOR/APPLICANT

RULING

On the 30th of September, 2020, judgment was delivered and entered in favour of the Judgment Creditor/Respondent in Suit No. FCT/HC/CV/1869/2019 against the Judgment Debtor/ Applicant.

The Judgment Debtor/Applicant has now filed the present application, a Motion on Notice No. M/11605/20 dated and filed on 6th day of November, 2020 pursuant to the provisions of Sections 6 (6) and 36 (6) of the Constitution of the Federal Republic of Nigeria 1999 (As Amended) as well as under the inherent jurisdiction of this Honourable Court praying for the grant of the following reliefs:-

1. An order of injunction restraining the Judgment Creditor/Respondent whether by himself, servants, privies or howsoever called from giving effect to the judgment of this Honourable Court delivered in this case on the 30th day of September, 2020 pending the hearing and determination of the Judgment Debtor/Applicant's appeal to the Court of Appeal.

2. An order of this Honourable Court staying execution or further execution of the orders contained in the judgment of this Honourable Court delivered on the 30th day of September, 2020 pending the hearing and determination of the Judgment Debtor/Applicant's appeal to the Court of Appeal.
3. And for such further order(s) or other orders as this Honourable Court may deem fit to make in the circumstances.

The grounds upon which this application is predicated are as follows:

- i. This Honourable Court delivered its judgment in this case on the 30th day of September, 2020 granting all the Judgement Debtor/Respondent's reliefs contained in the writ of summons;
- ii. Dissatisfied with the judgment, Judgment Debtor/Applicant has filed an appeal to the Court of Appeal against the decisions of this Honourable Court delivered on the 30th day of September, 2020.
- iii. The Judgment Debtor/Applicant's Notice of Appeal raises substantial issues of law and jurisdiction.
- iv. The Appeal also raises questions touching on the jurisdiction of this Honourable Court to entertain the matter as constituted and to grant the Plaintiff/Respondent relief.
- v. The Judgment Debtor/Applicant's Notice of Appeal and ground of Appeal raises recondite and substantial constitutional and legal issues that merit grant of this application by this Honourable Court.
- vi. The impecuniosity exhibited by the Judgment Creditor/Respondents is to ensure the execution of the Judgment of this Honourable Court, unless the order for stay of execution is granted, may render otiose the Judgment Debtor/Applicant's exercise of its constitutional right of Appeal.

- vii. The grant of the order of injunction and/or stay of execution will prevent the foisting of a fait accompli or situation of complete helplessness on the Court of Appeal, which would make it impossible to return to the status quo.
- viii. There are special and exceptional circumstances why this application should be granted.
- ix. This Honourable Court has a duty in law to stay the execution of its order nisi granted on the 15th day of September, 2020 having regard to the circumstance of this case which is exceptional in nature.
- x. It is in the interest of justice to grant this motion.

In support of the application the Applicant filed an Affidavit of 16 paragraphs, with one document (Notice of Appeal) as Exhibit AA attached. The learned Counsel for the Applicant in compliance with the Rules of this Court filed a written address.

The material facts in the Applicant's affidavit in support of this application is that by the judgment of this Honourable Court wherein the Court;

- a. Declared the provisions ensconced in Regulation 19.5.1 of the Nigerian Civil Aviation Regulations 2012 Vol. II wrongful, illegal, against public policy and the principle of rescission in contractual transactions under the guise that it is the Appellant's policy.
- b. Ordered the Judgment Debtor/Applicant to pay Judgment Creditor the sum of N5,000,000.00 as damages for breach of contract contrary to the law on assessment of damages in the law of contract.

That the Judgment Debtor/Applicant has appealed the decision of the Honourable Court. That the Judgment Creditor has begun to take steps towards enforcing the judgment even before the expiration of the time for

the Applicant to exercise his right of appeal. That by the Judgment Creditor's own admission, he is impecunious. That the court also found as of fact that the Judgment Creditor/Respondent by his own admission could not afford to obtain another ticket until he receives the refund as he has already "committed all his funds" in getting the ticket for the flight that was rescheduled. That by allowing the Judgment Creditor to execute the judgment before the exhaustion of the Applicant's right of appeal may foist a faith accompli on the Court of Appeal if the appeal succeeds. That there are special and exceptional circumstances why this application should be granted. That this Honourable Court as a fact has the duty in law to stay the execution of the judgment delivered on the 30th of September, 2020 having regard to the circumstances of this case which exceptional in nature and that it is in the interest of justice to grant this application.

In line with the rules of this Honourable Court, learned counsel to the Judgment Debtor/Applicant filed 4page written address dated 6/11/2020 and went on to adopt same wherein counsel distilled an issue for determination, thus:

"Whether in view of the pendency of an appeal against the decision of this Honourable Court, before the Court of Appeal, the existence of which has been brought to the attention of this Court, this Honourable Court is not duty bound to grant this instant application?"

In conclusion, learned counsel urge this Honourable Court to grant the application and stay the execution of its judgment in this case, so as to afford the Court of Appeal an uninhibited and unfettered chance to pronounce on the appeal pending before it.

In opposition to this application, the Judgment Creditor/Respondent filed 40-paragraph counter affidavit dated 13/11/20 deposed to by O. G. Ikhiuwu Esq. Legal practitioner in the Judgment Creditor/Respondent solicitor's law firm (J. O. Seidu & Co). Attached to the said counter affidavit is a document marked "Proof of service". In the affidavit they averred that nowhere in the said judgment of this Court wherein this court mentioned or declared as void the provisions of regulations 19.5.1 of the Nigerian Civil Aviation Regulation 2012. That the court in its judgment ordered the Judgment Debtor/Applicant to pay to the Judgment Creditor/Respondent the sum of N5,000,000.00 (Five Million Naira) only being general damages for breach of contract manifest in the Defendant's last minute rescheduling and cancellation of his flights and non refund of the money paid as airfare and the attendant financial, psychological and mental suffering the Claimant suffered as a result of the actions of the Defendant, amongst other monetary relief. That the judgment of the Court was both declaratory and monetary in nature. That upon the delivery of the Judgment of Court Judgment Creditor/Respondent in a bid to enjoy the fruit of his Judgment commenced the execution and enforcement of the Judgment of the Court "while the Judgment Debtor/Applicant slept over its right of Appeal" by filing motion Ex parte for garnishee. That consequently the order Nisi was served on the 19 garnishees to show cause why the order Nisi should not be made absolute against the garnishees. That it was after the service of the of the order Nisi on the Judgment Debtor/Applicant that it hurriedly filed a Notice of Appeal and a motion for stay of execution just to stop the Judgment Creditor/Respondent from enjoying the fruits of his Judgment. That the Court has already executed and enforced its Judgment by attaching the money standing to the credit of the Judgment Debtor/Applicant with the garnishee before the Notice of

Appeal and stay of execution was filed. The Respondent further averred that the Judgment Creditor is not impecunious as he is current senior officer (3 star rank) with the Nigerian Customs Service and his annual basic salary exclusive of allowance is more than N2, 000,000.00 (Two Million Naira) only, hence he can afford to pay the total judgment sum and accrued interest back to the Judgment Debtor/Applicant in the event that it succeeds on Appeal. That by Exhibit AA attached to the affidavit in support of the motion on notice, the Judgment Debtor/Applicant is appealing against just a part of the Judgment and not the whole. That there is no recondite issue worthy of note in the Judgment Debtor/Applicants Notice of Appeal. That the issue of jurisdiction raised in the Notice of Appeal centres around the issue of the Court nullifying the Nigeria Civil Aviation Regulations 2012 which never came up during trial nor was same evaluated and a finding made on same by the court in its Judgment. That there exists no special or exceptional circumstance for stay of execution. That the payment of the Judgment sum to the Judgment Creditor/Respondent will neither paralyze the pursuit of the Appeal. That the Judgment Debtor/Applicant has not placed any sufficient evidence or material before the court that it is ready to prosecute his Appeal with all diligence and seriousness. That the payment of the Judgment sum will make the Judgment Debtor/Applicant to prosecute the Appeal with diligence and seriousness. That the Court rarely grants stay of execution in monetary Judgments rather the Court will order the Judgment sum be deposited with the Chief Registrar of the High Court, while he goes to pursue its Appeal. That the Judgment Debtor/Applicant being an airline operator has the financial capacity to the Judgment sum to the Judgment Creditor/Respondent or to the Court. That the Judgment Debtor/Applicant has not stated that it does not have the money to pay the Judgment Debt.

That the enforcement of a monetary Judgment commences from the day the Judgment is given. That the balance of convenience is on the Judgment Creditor/Respondent. That the Judgment Creditor/Respondent undertakes to pay the full Judgment sum back to the Judgment Debtor/Applicant in the event that it succeeds on Appeal.

In line with the rules of this court, learned counsel to the Judgment Creditor/Respondent filed a written address and raised three (3) issues for determination to wit;

1. Whether or not the Court can grant an injunction for stay of execution for an already completed act, having executed the judgment, by the attachment of the judgment sum standing to the credit of the Judgment Debtor/Applicant domiciled with the 19 Garnishee Banks.
2. Whether the Judgment Debtor/Applicant has supplied sufficient facts and evidence before the Court as to be entitled to the grant of the stay of execution.
3. Whether or not the Court has the discretionary powers to order the Judgment Debtor/Applicant to deposit the Judgment sum with the Registrar of the Court as a condition for staying execution of monetary judgment.

In conclusion learned counsel urged the court to resolve all the issues in favour of the Judgment Creditor/Respondent and dismiss the instant application same seeking to stop an already completed act and for which no special and exceptional circumstance was shown and in the alternative that the court is inclined to grant a stay of execution counsel urged the Court to exercise discretion in ordering the judgment Debtor/Applicant to within the next 7days pay the judgment sum to the Chief Registrar of the

High Court of the Federal Capital Territory, Abuja who will in turn deposit same in an interest yielding account pending the determination of the appeal.

In response to the counter affidavit of the Judgment Creditor/Respondent, the Judgment Debtor/Applicant replied on points of law and submits that garnishee proceedings is a special procedure, the 1st stage is the award of order Nisi made ex parte and the 2nd is absolute (on notice). That order nisi is just a warning. That completion of Garnishee ends with the payment of the Judgment sum. That by Order 4 (4) Enforcement Procedure Rules 1958 garnishee proceedings can only be initiated 3days after delivery of judgment. That based on this the garnishee proceeding is void and should be struck out. Counsel submitted that it is on record that since 12th November 2020, they have applied for the transmission of the records of proceeding.

Before I proceed into the merit of this application the Judgment Creditor/Respondent's averment in paragraph 17 of his affidavit in support to wit "that the Court has already executed and enforced its Judgment by attaching the money standing to the credit of the Judgment Debtor/Applicant with the garnishee before the Notice of Appeal and stay of execution was filed" this is not the true position as the Order Nisi has not been made absolute by this Honourable Court till date and I do agree with submissions of the counsel to the judgment debtor that Order Nisi is merely a "warning" i.e a conditional order and it remains so until the requisite conditions are perfected.

I have carefully considered the processes filed and submissions of learned counsel on both sides in support of the Motion for stay and in opposition to same, counsel have dissipated so much energy on formulating issues for determination.

It is trite law that a stay of execution of a judgment will only be granted by the court if it is satisfied that there are special or exceptional circumstances to warrant doing so. The reason being that the judgment of a court of law is presumed to be correctly and rightly given until the contrary is proved or established. Courts have refused to make it a practice of depriving a successful litigant of the fruits of his success in court. This is the guiding principles for the grant of a stay of execution as stated by the Supreme Court in **INTEGRATION NIGERIA LTD v ZUMFON NIGERIA LTD (2014) LPELR – 22012 (SC)**.

The Supreme Court in **SPDC (NIG) LTD V. AMADI & ORS (2011) LPELR – 3204 (SC)** on whether a declaratory judgment/order of a court can be stayed by an interim order or by a stay of execution of the declaratory judgment held as follows;

"Now, declaratory judgments are final order which declare the rights of the parties. Such judgments cannot be stayed...Declaratory judgments create a res judicata and can be relied upon as an estoppel. Further orders made along with a declaratory judgment, may be subject to a stay of execution."

Consequently, this court cannot grant stay of execution on the declaratory part of the judgment.

It is also the law that it is not in every case where grounds of appeal raise points of law that a court will make an order for stay of execution. Taking into account the nature of judgment sought to be stayed being monetary judgment. As a general rule, the only ground for stay of execution of

monetary judgment is where the Applicant satisfies the court that if the judgment debt is paid, there is no reasonable probability of getting it back in the event the appeal succeeds. This raises a substantial ground and it can be considered as a special circumstance as provided in **DAILY TIMES V. KUSAMOTU (2002) LPELR – 10993 (CA)**.

In the case at hand the Applicant has not shown that the Respondent will be unable to refund the judgment debt if the appeal succeeds, in his counter-affidavit the Respondent has shown conclusively that he is credit worthy in paragraphs 19 and 20 also in paragraph 39 (a) & (b) where he undertook to pay the full judgment sum back to the Judgment Debtor/Applicant in the event it succeeds on Appeal. The Applicant also averred in paragraph 12 of its affidavit that this application is premised on special and exceptional circumstances. The Applicant has however not stated what those exceptional circumstances are. The reason given by the applicant in their affidavit can hardly support any special circumstance. Bare assertion of poverty simpliciter or impecuniosity of an applicant has never been considered as an exceptional circumstance to warrant the grant of stay of execution of a judgment. **Nwabueze v. Nwosu (1988) 4 NWLR (Pt. 88) 257**. But if there is a plea that the applicant cannot prosecute an appeal, if the judgment debt is paid, and it is established that there are no resources, this could be taken as a special circumstance. It has not been shown in the present application that the applicant has no resources from which they can meet their obligations in the appeal.

The Judgment Debtor/Applicant in their reply on points of law submitted that they have applied for the transmission of record of proceeding. The question to be asked here is at what instance will an appeal be deemed to

have been entered? In **PDP & ORS V. BADAIRE & ORS (2019) LPELR-47063 (CA)** it was held thus;

"With regards to the second ground of the preliminary objection, the records of appeal show that upon the delivery of judgment by the lower Court on the 4th of July 2018, the Appellants caused a notice of appeal to be filed on the 5th of July, 2018 and the records of appeal were compiled and transmitted to this Court on the 25th of July, 2018. The records of appeal were accepted by the Registry of this Court and the appeal was given an appeal number on the said 25th of July, 2018. By the provisions of Order 4 Rules 10 and 11 of the Court of Appeal Rules, the appeal was deemed entered in this Court on that day and from thence onwards, this Court became seised of everything to do with the matter and every application thereafter was to be made to this Court."

That is to say that appeal would be said to have been entered where the records of appeal has been compiled and transmitted to the Court of Appeal, same accepted by the Registry of the Court of Appeal and the appeal given an appeal number. Once it is so entered, an appeal is then said to be pending. The only document in the Court file is the Notice of Appeal with no Appeal No which goes to say that Appeal has not been entered at the Court of Appeal.

On depositing the judgment sum into an interest yielding account prayed by learned counsel to the Respondent, the court of Appeal in **BON LTD V. ADEGOKE (2006) LPELR – 7599 (CA)** held that;

"Another issue to be resolved before taking the issues canvassed by the parties in their written submission is that the applicant did not offer to deposit in an interest yielding account the judgment sum as, according to learned counsel for the respondent required in the

application for stay of money judgment. Counsel relied on Specialist Consult v. Rivers State Government (2000) FWLR (Pt. 91) 1478 at 1491 D-E. I do not think that it is fatal to the application. In the first place, the Court can impose it as a condition for the order of a stay that the applicant deposits the judgment debt in an interest yielding account pending the determination of the appeal...”

Whatever happens, the decision whether to grant a stay or not is discretionary but it must be exercised judicially and judiciously. Thus, in the light of the above and in order to strike a balance between the competing interest of the litigants on the one hand and the need to protect the integrity of the Appellate Court, this application is granted conditionally and I hereby make the following Orders;

1. Application by Judgment Debtor for stay of execution of the Judgment delivered on 30/09/2020 in Suit No. FCT/HC/CV/1869/19 is hereby granted however, the Judgment Debtor Applicant shall diligently compile and transmit to the Court of Appeal within 14 days from today the record of appeal.
2. In the event that the condition for stay of execution herein imposed is not complied with within the 14 days specified above, this Order of stay shall automatically lapse and the Judgment Creditor shall be at liberty to enforce the Judgment forthwith.
3. The Judgment Debtor/Applicant is ordered within 7 days from today to deposit the judgment sum of N5, 239,000.00 (Five Million, Two Hundred and Thirty Nine Thousand Naira) only with the Chief Registrar of this court who will in turn deposit same in an Interest yielding account pending the hearing and determination of the appeal.

Parties: Absent.

Appearances: D. A. Seidu with D. O. Ikhiuwu appearing for judgment Creditor. A. M. Maaji with Aliyu Anas and U. U. Chamo appearing for the Judgment Debtor. Ibrahim Audu appearing for the 3rd Garnishee (UBA) also holding brief of Uchenna Harrison for the 10th Garnishee (Eco bank). Marcel Osigbemhe appearing for the 2nd Garnishee (Access Bank) also appearing for the 4th Garnishee (Stanbic-IBTC). S. J. Hauza appearing for the 13th Garnishee (Polaris Bank). Dr. Christopher Eichie appearing for the 6th Garnishee (GTB). Goodness Omutet appearing for the 4th Garnishee (Fidelity). Emeka Ibeneme for the 8th Garnishee (FCMB). Joshua Ezebialu for the 1st Garnishee (Zenith Bank). U. I. Miduador for the 7th Garnishee (First Bank) also holding brief of Uchenna Otumudia for the 11th Garnishee (Heritage Bank). J. S. Joshua holding brief of Oluwafemi Olawuyi for the 18th garnishee (WEMA). Oluwasen Arinde for 12th Garnishee (Keystone Bank).

HON. JUSTICE M. R. OSHO-ADEBIYI

JUDGE

2ND DECEMBER, 2020