IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY

HOLDEN AT GWAGWALADA

THIS WEDNESDAY, THE 17TH DAY OF FEBRUARY, 2021

BEFORE: HON. JUSTICE ABUBAKAR IDRIS KUTIGI – JUDGE

SUIT NO: CV/1335/14
MOTION NO: M/9139/20

BETWEEN:

JEAN PAUL AND ASSOCIATES CONSULTANCY LIMITED ....JUDGMENT CREDITOR/ RESPONDENT

AND

1. **ODIGBO PROPERTIES LIMITED**
2. **CHIKEZIE ODIGBO** ...JUDGMENT DEBTORS/ RESPONDENTS

AND

KEYSTONE BANK LTD .....GARNISHEE/APPLICANT

RULING

By a motion on notice dated 14th August, 2020 and filed same date in the court's Registry, the Garnishee/Applicant seeks for the followings orders:

1. **An order of the Honourable Court staying the execution of the Order made absolute against the appellant by this Court on 13th July, 2020 pending the determination of the Appeal against the said order.**

2. **And for such order or further order as the Honourable Court may deem fit to make in the circumstance.**

The application is supported by a four (4) paragraphs affidavit with two annexures marked as **Exhibits KB1** (Notice of Appeal) and **KB2** (Application for compilation and transmission of Garnishee proceedings).

A brief written address was filed in which one issue was raised as arising for determination, to wit:

"Whether the Applicant is entitled to the reliefs sought."

The address then dealt with the settled principles governing the grant of an application for stay which forms part of the Record of court and it was contended that the Garnishee/Applicant has satisfied the conditions for the grant of stay of execution pending the determination of the Appeal lodged at the court of Appeal.

At the hearing, **J.O. Anetekhai** of counsel for the Garnishee/Applicant relied on the paragraphs of the supporting affidavit and adopted the submissions in the written address in urging the court to grant the application.

In opposition, the judgment Creditor/Respondent filed a six (6) paragraphs counter-affidavit. A written was filed in which one issue was equally raised as arising for determination as follows:

"Whether the Applicant has made out a case to warrant the grant of his application for stay of execution."

The address dealt first with a threshold issue relating to the competence of the application. It has contended that once the court made the order nisi absolute on 13th July, 2020 that the court became *functus officio* and cannot entertain any application for stay of execution including the extant application. The cases of **Zenith Bank Plc V. John & Ors (2015)LPELR-24315; UBA V. Prima Impex (Nig)Ltd & Ors (2017)LPELR-42015(CA)** were referred to.

On the application for stay proper, the address equally then dealt with the settled principles governing grant of stay of execution which forms part of the Record of

Court and it was contended that on the materials supplied, the Applicant has not met the requirements to allow for a grant of same.

At the hearing, **E.R Opara** of counsel for the Judgment Creditor/Respondent relied on the paragraphs of the counter-affidavit and adopted the contents of the written address in urging the court to dismiss the application.

From the materials and submissions of counsel on both sides of the aisle, the issue to be resolved falls within a very narrow legal compass. Any application for stay of execution must be resolved within the settled principles developed by our courts over a period of time governing the grant or refusal of such applications. The application of these principles and indeed the success of the application is necessarily premised or predicated on the cogency and quality of the facts presented to support the grant of the application.

Before determining whether a case for stay has been made out, it is important to determine first the threshold issue raised as to the competence of the application and whether the court can even stay a Garnishee **order absolute**. The Garnishee/Applicant did not file a reply to address this important question. Counsel was equally silent on this issue in his oral address. Let me briefly situate the history of the case without being overly too detailed. I will only highlight the relevant facts.

Now the very root of the extant action is situated within the context of a **Garnishee proceedings** which has properly defined and streamlined processes.

This court, on 13th November, 2017 gave judgment in favour of present judgment Creditor against the Judgment debtors in the sum of **₦5,520,000(Five Million, Five Hundred and Twenty Thousand Naira)**.

Subsequently, on 11th December, 2018 the court upon application by the Judgment Creditor recorded a **Garnishee Order Nisi** against certain identified financial institutions on record including the present or extant **Garnishee/Applicant**. They were then served with the order nisi together with a return date. Let me quickly state that all the other Garnishees were during the course of the proceedings

discharged having sufficiently shown cause why the garnishee proceedings should not continue against them.

The present applicant filed an affidavit to show cause. In the Ruling of this court on 13th July, 2020 and having carefully evaluated the affidavit filed and reached the conclusion that it lacked credibility, the court made the order nisi absolute against the extant Garnishee/Applicant under which they were ordered forthwith to pay the Judgment Creditor the amount of debt due from then to the Judgment Debtors, or so much of it as is sufficient to satisfy the Judgment Debt together with the cost of the Garnishee proceedings. See **Fidelity Bank Plc V Francis Okwuowulu & Anor (2013) 6 NWLR (pt.1349) 197**.

This then led to the filing of the extant application. The questions that immediately then arise are these: Can a stay of execution be logically made against the garnishee order absolute? What is the legal import of the garnishee order absolute?

A very important principles to underscore is that an injunction or stay does not operate against a completed act or event. The garnishee order absolute sought to be stayed by its very nature and properly understood denotes that execution has already been levied against the property to which the order being sought relates. The **money**, with the garnishee order nisi being made absolute becomes wholly attached.

Indeed in law, upon the grant of the Garnishee order absolute, attachment or execution as in the instant case is completed and the Garnishee becomes liable only to the Garnishor. See **Union Bank of Nig. Plc V. Boney Marcus Ltd & ors (2005) LPELR – 3394; (2005) 13 NWLR (pt.943) 654 SC; Zenith Bank Plc V John & ors (2015) LPELR – 24315 (SC)**.

As a logical corollary, with the **Order Absolute** been recorded, that effectively then ends the matter in that the party against whom the Order Absolute is made is liable to pay the amount specified in the order to the judgment creditor. The court at that point becomes *functus officio* as far as that matter is concerned in that the judge who decides the matter on the authorities is precluded from again considering the matter even if new evidence and argument are presented to the

court. See **CBN V. Auto Import Export (2013) 2 NWLR (pt.1337) 80; UBN Plc V Boney Marais Ind. Ltd (2005) 13 NWLR (pt.943) 654**.

In sounding the final death knell of this application, it is important to call in aid the decision of the Supreme Court in **Zenith Bank Plc V. John & Ors (2015) LPELR-24315(SC)** where the court per Odili JSC stated as follows:

"…It is stating the obvious that a Garnishee Order Absolute means an executed judgment and being a completed act, one wonders how an order of stay can either be ordered or carried out. In this regard, I refer to A.G Anambra State V Okafor 2 NWLR (pt.224) 396 at 430; Badejo V Fed. Min. of Education (1996) 1 NWLR (pt.464) 15."

On the basis of the above decisions of our Superior Courts, it would appear that the extant application is undermined or compromised and constitutes an abuse of process as rightly submitted by counsel to the Judgment Creditor. The only point to add is that while there cannot be an appeal against an Order Nisi, an appeal against the Order Absolute can be made before an Appellate Court as done here. This should ordinarily be the end of the matter but since both parties however dealt with the merits of the application, let me out of abundance of caution address the substance even if it may turn out to be entirely an academic exercise in view of the clear pronouncements referred to above.

Now an order of stay of execution on the authorities is not granted as a matter of course. The power which inheres in court to grant the application is both equitable and discretionary. Like all equitable discretions, it is required to be exercised judicially and judiciously having regard to all the materials placed before the court, and the dictates of justice where an applicant has exercised his constitutional right of Appeal. See **Ajomale V. Yaduat (No.2) (1991)5 N.W.L.R (pt.191)266 at 274.**

The grant is usually based on the Applicant showing the existence of special or exceptional circumstances warranting the suspension or stay of execution of the judgment given in favour of the respondent who was successful in the litigation and who is thereby ordinarily entitled to the enjoyment of the fruits or benefits of his success in the said judgment. Thus the policy or attitude of court is not to deprive a successful litigant from the enjoyment of the fruits of his victory unless

proof of these special or exceptional circumstances showing that the balance of justice is in favour of grant of stay of execution. See **Vaswani V. Savalakh& Co 1972)12 SC 77, (2000) FWLR (pt.28) 2174.**

The party applying has the burden to satisfy the trial court that in the particular situation or circumstances of his case and on the balance of convenience, he is entitled to the discretionary order of stay to be exercised or made in his favour and a refusal to so order would be unjust and inequitable. In this regard, it is the balance of hardships rather than the convenience of the party applying that is considered as a basis for the grant of stay. The consideration of the convenience of the applicant without regard to equal consideration of the right of or convenience of the other party i.e the respondent will be an unjust and inequitable exercise of discretion. **See Ajomale V. Yaduat (No.2 (1991)5 N.W.L.R (pt.191)266, (2003) FWLR (pt.182)1913; Akibu V. Oduntan (1991)2 N.W.L.R (pt.171)1; Enabulele V. Agbonlahor (1994)4 N.W.L.R (pt.342)112.**

The key question here is whether the applicant has by the materials crossed this threshold of disclosing special and exceptional circumstances. In addressing this question, it is to the materials I must take my bearing from.

It may be pertinent before doing so to refer to the immortal pronouncement of the Apex Court in **Vaswani V. Savalakh (Supra)** as to what constitutes or qualifies as special or exceptional circumstances that would warrant a grant of stay of execution. The court stated that special or exceptional circumstances, which vary from case to case are such that involve a consideration of some collateral circumstance and perhaps in some cases inherent matters which may unless, the order of stay is granted, destroy the subject matter of the proceedings and foist upon the court especially the Court of Appeal, as in the instant case, 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. **See also Okafor V. Nnaife (1987)4 N.W.L.R (pt.64)129 (2002) FWLR (pt.134)604; Utilgas Nigerian and Overseas Gas Co. Ltd V Pan African Bank Ltd (1974)1 AII NLR (pt.2)47, (1974)10 SC 105; Balogun V. Balogun (1969)1 AII NLR 349.**

The above are some of the applicable principles. As stated earlier, the next task is to apply these principles to the facts of this case and then resolve the key question whether the Applicant has creditably established entitlement to the relief of stay of execution sought.

Now the basis of the application as can clearly be discerned from the affidavit in support are as follows:

"3: That Abubakar Bala Danmamman counsel to the Applicant informed me in our office on 3rd August, 2020 at about 3:30pm and I verily believe same as true and correct as follows:

a. That this court made order absolute against the applicant on 13th July, 2020.

b. Being dissatisfied with the decision of the court decide to appeal same.

c. That the appeal was entered and the said notice of appeal is hereby attached and marked as Exhibit "KB1"

d. That we have put an application to the Registry of this court for the compilation and transmission of records to the Court of Appeal. The Application is hereby attached and marked as Exhibit "KB2"

e. That it will serve the overall interest of justice and equity to grant the prayers in the application.

f. That the balance of convenience is weighted in favour of the applicant

g. That the applicant will suffer irreparable loss if this application is not granted.

h. That the Respondents will not be prejudiced if this application is granted."

There is really nothing in the above affidavit of **Applicant** clearly streamlining the special circumstances putting the court in a commanding height to grant the extant

application. Yes, the Applicant may have referred to a notice of appeal filed but how that constitutes special or exceptional circumstances was not defined. It is settled law that special circumstance may include strong, weighty and substantial grounds of appeal. But this alone may not suffice. That a ground of appeal is weighty, strong, substantial and arguable does not necessarily mean that the appeal may succeed. See **Odedeyi V Odedeyi (2000) 2 SC 93 at 95**. Therefore a strong and substantial ground of appeal alone may not be enough to found special and exceptional circumstances. So the substantiality of a ground of appeal is not fool proof for granting a stay. Even where the grounds of appeal are substantial, it does not automatically entitle an applicant to a grant of stay, particularly where the *res* is money. See **Fasel Services Ltd V N.P.A (2001) 11 N.W.L.R (pt.723) 35 at 41Cand F.C.M.B V A.I.B (Nig.) Plc (2000) 8 N.W.L.R (pt.667) 42 at 52**; the applicant must still show that there are strong reasons for granting a stay and a court must consider other factors before reaching a final decision on the question of stay. These factors include the conduct of the applicant and the balance of convenience. It is against these factors that the Court eventually decides the manner in which to exercise discretion on a grant or refusal of stay. See **Odedeyi V Odedeyi (supra) and Momoh V Vab Petroleum Inc. (supra) at 164.**

I have carefully examined the notice of Appeal **Exhibit KB1**. While not sitting as a Court of Appeal over my decision, I do not think on a calm evaluation that the said grounds are such that would constitute the collateral circumstances stated in **Vaswani V Savalakh (supra)** on the basis of which a stay of execution can be granted. The Notice of Appeal contains just two (2) grounds and they are variously described as errors in law but in substance the complaints dealt with the evaluation and ascription of probative value to the affidavit evidence before the court. As much as I have sought to be persuaded, I do not accept that the grounds of appeal can be said to relate to any difficult area of the law in which the principles are not well settled or that there is a dearth of judicial authorities. Indeed there exist a legion of judicial authorities dealing with the issues raised and the law well settled in that area. I do not therefore think that the grounds of appeal disclose any substantial or weighty points or issues of law.

I only need repeat at the risk of sounding prolix that even where the notice contains substantial points, it does not automatically inure or lead to a grant to stay. It has

to be a weighty and substantial point in an area that is to some extent recondite and either side could have judgment in his favour. See **Balogun V. Balogun (1969)1 AII NLR 349 at 351.** I do not see what is recondite, difficult or novel raised by the extant appeal. See **Lijadu V. Lijadu (supra) at 646.**It is also noteworthy here to refer to the salient decision of the Supreme Court in **Agbaje V. Adelekan (1990)7 N.W.L.R (pt.164) at 593** where the Court per Akpata JSC (of blessed memory) stated as follows:

"…It is not every case where the appeal genuinely raises a substantial issue that a stay would be granted unconditionally. The fairness in so doing still has to be borne in mind."

The point to underscore is simply that it is not enough to state that the notice of appeal contain substantial, arguable and recondite issues of law. There is nothing magical about these words and the mere mention of them does not automatically mean a court would grant the application. The Applicant must relate the grounds of Appeal to the facts and nature of the case itself and show for example that unless a stay is granted, the appellant would end up having the subject matter of the dispute destroyed or foist upon the Court of Appeal a situation of complete helplessness or render nugatory any orders the court of Appeal may make or paralyses one way or the order the exercise of the appellants constitutional right in that even assuming he succeeds on appeal, a return to the *status-quo* would be impossible. This certainly is not the case here.

The applicant has clearly not made a case on any of the above grounds or any cognisable ground for that matter for grant of stay of execution.

Furthermore, it must be noted that the judgment in this case is predicated on a monetary claim. An applicant for stay of execution in situations of this nature has thrust upon himself serious responsibilities beyond empty and sterile averments if the court is to intervene and deny a successful litigant the fruit of his victory. In **Josiah Cornelius Ltd V Ezenwa (supra) 616 at 625,** the Court of Appeal per Aderemi J.S.C (as he then was) provided an instructive insight to conditions for the grant of stay of execution in monetary judgment as follows:

"As I have said, the respondents/applicants have brought this application to stay the execution of the judgment delivered by this Court on 20th March, 2000. The substratum of what is sought to be stayed is money judgment. The law is now well settled by plethora of decided cases that the only ground for granting a prayer for stay of execution of money judgment is an affidavit which convincingly shows that if the money is paid over to the successful party there is no reasonable probability that the sum would not be paid back should the appellate Court reverse the judgment on which the money judgment was predicated. It must also be remembered that a Court of law does not make the practice of depriving a successful litigant of the fruit of his litigation and thereby locking up funds to which, *prima facie,* he is entitled pending the determination of the appeal. See Barker V Lavery (1885) 14 Q.B.D. 796, The Annot Lyle (1886) 11 P.D. 144 at 116 and Deduwa & ors. V Okorodudu & ors (1974) 1 All N.L.R. (pt.1) 272."

The averments by Applicant in the entirety of the paragraphs of the supporting affidavit do not aggregate or denote convincing fact(s) that if the judgment debt is paid over to the judgment creditor, there is no reasonable probability that the sum will be paid back in the event the appeal is successful.

The failure of the Garnishee to meaningfully address this point appear to me fatal. As already alluded to, this factor is material in deciding whether to grant or refuse to grant an application for stay of execution of a money judgment. Indeed the principle is settled that where the judgment is a monetary sum and the plaintiff or judgment creditor is capable of paying back is a decisive factor in refusing to grant a stay of execution.

As a logical corollary, a stay of execution would not be granted if an Applicant is unable to prove as in the extant case that the respondent will not be able to pay back the money if they succeed on appeal. See **Kano Textiles Mills V Glo Ltd (2002) 44 WRN 44 at 49.**

The bottom line is that there is nothing in the affidavit of the Garnishee/Applicant denoting special and exceptional circumstances to warrant grant of stay. In **Odedeyi V Odedeyi (2000) 2 SC 93,** the Apex Court per Belgore J.S.C (as he then was) stated thus:

"The guiding principle is that a victorious party must not lightly be deprived of the fruit of his victory. Having won his case, he under normal circumstances ought to be allowed the execution of that Judgment unless a special circumstance is advanced to justify stay of execution. Special circumstance is very wide and its category is not closed. ***However "special circumstance" though may include strong and 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;*** **certainly the court must be wary of such ground so as not to prejudge the substantive appeal. In cases where the** ***res*****, the substantive matter of the appeal is at risk of destruction if a stay is not granted, or its nature may be altered as to make it irreversible to its original state; or if it is monetary, and the victorious party is a man of straw, and may not be able to redeem the money should the substantive appeal be decided against him, the court in its decision will grant a stay of execution pending the determination of the appeal''.**

None of the circumstances stated in the above instructive scenario painted by the revered Jurist arise in this case.

One more important point before I round up. The new provision of **Order 61 and Rule 2 of the High Court of FCT Civil Procedure Rules 2018** provides as follows:

"An applicant for stay of execution of a judgment shall pay for the compilation of the records of appeal within 14 days from the date of filing a notice of appeal and where the cost of compilation of records is not paid, the respondent may apply to strike out the application or discharge the order if already granted."

In this case, the notice of appeal, **Exhibit KB1** was filed on 14th August, 2020. The application made vide **Exhibit KB2** for compilation of record is equally dated 14th August, 2020. There is no indication on **Exhibit KB2** that it was processed or even received at the Appeal Unit of the High Court. There is no stamp of the court on this process.

There is really nothing before this court to show or prove that the Applicant complied with this provision by paying for the compilation of the Record of Appeal within 14 days after the filing of the Notice of Appeal. When the attention of counsel to the Applicant was drawn to this provision, he had no answer or response. Indeed if they had compiled, a receipt showing payment for the compilation of Record would have sufficed.

What the Applicant has done was simply to file the Appeal and the application for stay and then simply go to sleep. It was the usual deliberate and dilatory interventions hitherto utilised by counsel to deny the judgment creditor of the enjoyment of the fruits of his judgment using unfairly the instrument of the appeal and an application for stay as a cover.

This new progressive and salutary intervention by the Rules was inserted to stop this calculated mischief. The simple idea is that filing a notice of appeal and application for stay is not sufficient any longer. An applicant must now exhibit manifest seriousness and diligently pursue his appeal by paying for compilation of records and transmission of same to the Court of Appeal. With the payment and compilation of Records, the Appeal process has effectively now been set in motion and the usual tactics to delay Appeals and frustrate the execution of judgments would hopefully now be reduced to the barest minimum. The failure by Applicant to comply with the provision also gravely undermines the extant application.

On the whole, whether it is on the basis that the extant application constitutes an abuse of process or whether on the merits, it lacks substance, the consequence is legally and factually the same. The application clearly lacks merit and it is accordingly dismissed.

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Hon. Justice A.I. Kutigi

Appearances:

1. **Opara E.R Esq., for the Judgment Creditor/Respondent**

2. **J.O. Anetekhai, Esq., for the Garnishee/Applicant.**