

IN THE HIGH COURT OF JUSTICE
FEDERAL CAPITAL TERRITORY OF NIGERIA
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT APO – ABUJA
ON, 1TH DAY OF NOVEMBER, 2022.
BEFORE HIS LORDSHIP:- HON. JUSTICE A. O. OTALUKA.

SUIT NO.: -FCT/HC/CV/2481/15
MOTION NO.: -FCT/HC/M/4937/2022

BETWEEN:

SALISU NANI ZIGAU:..JUDGMENT CREDITOR/RESPONDENT

AND

FIDELITY BANK PLC:.....JUDGMENT DEBTOR/APPLICANT

Achile E. Sani for the Judgment Creditor/Respondent.

William Okwara for the Judgment Debtor/Applicant.

RULING.

By a Motion on Notice dated the 26th day of April, 2022 and filed the 27th day of April, 2022, the Judgment Debtor/Applicant brought this application praying the Court for the following:

- (a) An order of this honourable Court staying execution/enforcement of the judgment in this suit pending the determination of the appeal.
- (b) And for such other orders or further orders as this honourable Court may deem fit to make in the circumstance.

The Applicant predicted the application on the grounds that:

- i. The judgment in this suit is for the payment of money.

- ii. The Applicant has appealed against the judgment in the exercise of their constitutional right of appeal.
- iii. The grounds of appeal are arguable and substantial.
- iv. The Respondent cannot refund the judgment sum if the appeal succeeds.
- v. Paying the judgment sum to the Judgment Creditor/Respondent will render nugatory any order or orders the Court of Appeal may make.

In the supporting affidavit deposed to by the Applicant's counsel, Okwara Williams, the Applicant averred that being dissatisfied with the judgment of this Court delivered on 29th March, 2022, it appealed against the said judgment to the Court of Appeal. A Notice of Appeal filed at the Appeal Unit of this Court was exhibited as proof of the said appeal.

The Applicant averred that the sum of money awarded against it is such that the Respondent will not be able to refund immediately in the event that the Applicant's appeal succeeds.

In his written address in support of the application, learned Judgment Debtor/Applicant's counsel raised a lone issue for determination, to wit;

“Whether the Applicant has made out a case for the grant of the application?”

He argued, on the issue so raised, that this Court by virtue of Order 46 Rules 1&2, of the Rules of this Court, has the discretionary power to grant an order of stay of execution of judgment pending the hearing and determination of appeal.

He contended that the Applicant in this application, has satisfied all the procedural requirements as prescribed by Order 46 Rules 1 &2.

He referred to **ClevJod Ltd v. Tokimi (2008) 13 NWLR (Pt.1104) 442 at 438** and posited that the Applicant herein has furnished cogent and sufficient facts in the affidavit in support of the application for the exercise of the discretion of the Court in favour of the grant of this application.

The learned counsel submitted that the grant of stay of execution of judgment is predicated on the existence or pendency of an appeal at the Court of Appeal. He argued that this burden has been discharged by the Applicant as an appeal has duly been filed pursuant to the filing of a valid Notice of Appeal.

He referred to **Idris v. Wada (2005) 1 NWLR (Pt.908)612 at 634.**

He conceded that the Judgment Creditor/Respondent is entitled to enjoy the fruit of his victory, but that the Court would grant a stay in the interest of justice where the applicant for a stay of execution is able to show special circumstance why a stay should be granted.

- **Guinea Insurance PLC v. Monarch Holdings Ltd (1996) 3 NWLR (Pt.436)365 at 370.**

He argued that the applicant in the instant case, has established a special circumstance for the grant of this application. On this contention, he referred to paragraphs 3, 4, 5 and 6 of the affidavit in support of the application.

Relying on **Heritage Banking Co. Ltd v. N.U.C. (2014)15 NWLR (Pt.1429)76 an 91,** he submitted that the principles which have been recognised to constitute exceptional circumstance in money judgment are:

- (i) Whether making the Applicant to satisfy the judgment would make his financial position such that he would not be able to prosecute the appeal, and
- (ii) Whether it would be difficult to secure the refund of the judgment debt and cost from the respondent if the appeal succeeds.

He urged the Court to hold that the Applicant has established a special circumstance upon which a stay of execution of judgment pending appeal should be granted.

Learned counsel further argued that the Applicant has raised substantial issues of law in the notice of appeal touching on the award of damages by this Court. He contended that the decision of the Court of Appeal would be rendered nugatory if the applicant is compelled to pay the judgment sum to the Judgment Creditor/Respondent at this stage, as it is clear that the Respondent will be unable to refund the judgment sum to the Applicant.

He urged the Court to grant this application in the interest of justice.

The Applicant subsequently filed a Further and Better Affidavit dated 7th September, 2022 in support of the Motion on Notice.

The Applicant averred therein, that Records have been compiled in respect of its appeal and transmitted to the Court of Appeal and that Appeal No. CA/ABJ/CV/800/2022 has been assigned to the appeal.

The learned Applicant's counsel in his written address in support of the Further and Better Affidavit, raised as the issue for determination;

“Whether in view of the transmission of record of appeal, this honourable Court has the jurisdiction to still proceed with the suit when appeal has been entered?”

He posited in his argument on the issue so raised, that it is a trite principle of law, that once record of appeal has been transmitted, the Court of Appeal becomes seised of jurisdiction pertaining to the entirety of a matter. He contended that in view of the fact of the record having been transmitted to the Court of Appeal, that this Court no longer has the jurisdiction to make any orders that will foist a fait accompli on the Court of Appeal. He referred to **Mohammed v. Olawunmi (1993)4 NWLR (Pt.287)**, and urged the Court to hold that this Court lacks the jurisdiction to further entertain the suit in its entirety in view of the appeal.

Also, in response to an Affidavit of Means filed by the Judgment Creditor/Respondent, the Applicant filed a counter affidavit in opposition thereto.

The Applicant averred that the Respondent does not earn more than N7m per annum as claimed, as there is no payslip or any form of proof to substantiate the claim. That Principal Managers at the Corporate Affairs Commission (the Respondent’s employers) has the salary of N350,000.00 per month, which when every other bills are deducted, the balance will be far less than the judgment sum.

Furthermore, the Applicant averred that the land, which the Respondent attached the Certificate of Occupancy, is far less than the value that was bogusly estimated at N50m, because of its location in the remote area of Ungogo District, in Ungogo Local Government Area of Kano State, and that the said land is outside the jurisdiction of this Court.

The Judgment Creditor/Respondent, in opposition to the application, filed a 7 paragraphs counter affidavit deposed to by one Providence Chinendu, on the 23rd day of May, 2022.

The Respondent averred that the Notice of Appeal filed by the Judgment Debtor/Applicant is bereft of arguable and substantial issues of law. That he is financially capable of liquidating the entire judgment debt in the unlikely event of the Judgment Debtor/Applicant succeeding with its appeal. The Respondent further averred that the judgment of this Court is monetary in nature and that the execution of same would not in any way foist on the Applicant a situation of *fait accompli* if at all the appeal goes in its favour.

The Judgment Creditor/Respondent also filed an Affidavit of Means wherein he averred that the judgment of this Court which the Applicant seeks to stay its execution is a monetary judgment and that the execution of same would not in any way foist a *fait accompli* on the Court of Appeal.

He stated that the money, the subject matter of the said judgment can be paid at any time required and that he is capable of doing so. That he is currently a Principal Manager with Corporate Affairs Commission, Maitama, Abuja where he earns over N7m per annum as salaries and entitlements. That he also has a property in Kano worth over N50m covered by a Certificate of Occupancy issued by the Government of Kano State.

The respondent averred that he is capable, has the means, and shall indemnify the Judgment Debtor/Applicant in the very unlikely event that the judgment of this Court is set aside on appeal.

The learned Respondent's counsel, A.E. Sani, Esq, in his written address in support of the counter affidavit, raised three issues for determination, namely;

- i. Whether the Applicant has disclosed special circumstances to warrant the order for stay?
- ii. Whether an order for stay of execution can be granted where the judgment of a Court involves recovery of money owed the judgment Creditor?
- iii. Whether the Defendant/Applicant is entitled to the relief sought?

Proffering arguments on issue 1, learned counsel posited that the grant of stay of execution is not automatic in the face of a Notice of Appeal. That it is within the discretion of the Court to either grant or refuse same, and that in doing so, the Court is always enjoined to consider the interests of both parties judiciously and judicially since the Court does not make a practice of depriving a successful litigant of the fruits of judgment. He referred to **Nika Fishing Co. Ltd v. Lavina Corp (2008)16 NWLR (pt.9114)509 at 520.**

He contended that the Judgment Debtor/Applicant has not established any special circumstance to warrant the grant of stay in its favour. He urged the Court to hold in the circumstance, that this application lacks merit and to dismiss same.

On issue two, learned counsel posited that the fact that there are arguable grounds of appeal does not automatically entitle an applicant to the grant of a stay of execution particularly where the resis monetary in nature. That the applicant must still show that there are strong reasons for granting a stay. He referred to **Denton-West v.Nwoma (2008) 6 NWLR (Pt.1083)418 at 423.**

He argued that the Judgment Debtor/Applicant not only failed to establish special circumstances to warrant the exercise of the Court's discretion in its favour, but has also by its affidavit and written address utterly failed to establish how it would be impossible to recover the judgment sum from the Judgment Creditor/Respondent in the very unlikely event that it succeeds on appeal.

He further argued that notwithstanding the fact that the Judgment Debtor/Applicant failed to make a strong case for itself, the Judgment Creditor/Respondent went the extra miles to depose to an affidavit of means stating that he is capable, has the means and shall indemnify the Judgment Debtor/Applicant in the very unlikely event that the judgment of this Court is set aside on appeal.

He urged the Court to dismiss this application in its entirety so that the Judgment Creditor/Respondent can enjoy the fruit of his success.

Arguing issue 3, learned counsel contended to the effect that the Applicant has not established any special circumstance; that it has not been diligent so far; that the res would not be destroyed if the judgment of this Court is executed pending appeal; and that the execution of a monetary judgment cannot be stayed when the Judgment Creditor has satisfactorily established the means to pay back in the unlikely event of reversion.

He referred to **SPDC Nig. Ltd v. Okei (2007)7 NWLR (Pt. 1007)1.**

He urged the Court in conclusion, to hold that the Applicant has failed to comply with the provisions of the law in respect of the condition precedent to the grant of an application of this nature,

and to dismiss the application in its entirety with substantial cost.

Without question, the right of appeal is a constitutionally guaranteed right, which cannot be circumscribed or denied of any litigant.

In the same vein, it is a settled position of law, that a successful litigant is prima facie entitled to the fruits of judgment in his favour.

In this connection, therefore, an application for stay of judgment pending appeal is not granted as a matter of course. It is not automatic upon filing an appeal.

In **H.TaiAjomale v. John EthakpemiYaduat&Anor (1991) LPELR-306 (SC)**, the Supreme Court, held per, NnaemekaAgu, JSC, that a stay of execution can only be ordered as a matter of judicial discretion which must be exercised judicially and judiciously.

In **Wey v. Wey (1925)LPELR-3481(SC)**, the apex Court, per Elias C.J.N. (as he then was), held that:

“The grant of stay of execution should be made in ‘very special circumstances’”.

In the instant application before this Court, the only special circumstance which may sway the discretion of this Court in favour of the grant of the application, and which special circumstance arose while this application was pending before this Court, is the entering of the appeal at the Court of Appeal as evident from the Further and Better Affidavit filed by the Applicant.

In the circumstance therefore, it becomes expedient to grant a stay of execution in order not to foist a situation of fait accompli on the Court of Appeal.

The Court is however empowered, where in its discretion, it considers it appropriate or necessary to grant a stay of execution, to make such order of stay either unconditionally, or upon such conditions as it may deem fit. See **H. TaiAjomale v. John EthakpemiYaduat&Anor (supra)**.

In the circumstance therefore, this application succeeds conditionally.

Accordingly, this Court orders as follows:

- a. An order is made staying the execution/enforcement of the judgment in this suit pending the determination of the appeal; subject to the condition that the Judgment Debtor/Applicant pays the judgment sum into an interest yielding account of any commercial bank in Abuja maintained by the Chief Registrar of this High Court FCT, Abuja, within 14 days of the delivery of this ruling.

HON. JUSTICE A. O. OTALUKA
1/11/2022.