**SHELL PETROLEUM DEVELOPMENT COMPANY OF NIGERIA LIMITED**

**V.**

**CHIEF ARTHUR JOHN & ORS.**

IN THE COURT OF APPEAL OF NIGERIA

ON MONDAY, THE 21ST DAY OF FEBRUARY, 2011

CA/PH/103/2006

**LEX (2011) - CA/PH/103/2006**

OTHER CITATIONS

3PLR/2011/92 (SC)

(2011) 2 NWLR 236

(2011) LPELR-SC.150/2010

**BEFORE THEIR LORDSHIPS**

ABUBAKAR JEGA ABDUL-KADIR, JCA

HELEN MORONKEJI OGUNWUMIJU, JCA

MOJEED ADEKUNLE OWOADE, JCA

**BETWEEN**

THE SHELL PETROLEUM DEVELOPMENT COMPANY OF NIGERIA LIMITED- Appellants

AND

1. CHIEF ARTHUR JOHN

2. ELDER FRANK ULE

3. CHIEF SILAS OFORJI

(For themselves and on behalf of the entire People of Umuorie Community in Ukwa West Local Government Area Of Abia State)

4. ZENITH BANK PLC.

5. FIRST BANK PLC. Respondents

**ORIGINATING COURT(S)**

FEDERAL HIGH COURT, UMUAHIA, ABIA STATE

**REPRESENTATION**

R. AKINJIDE, SAN WITH IRERHIMIE AND K. OBISIKE - For Appellant

AND

L.E. NWOSU, SAN, WITH E.E ASIDO AND D.E. EKENNA

F.C. GIADOM

L.C. NWUZOR - For Respondent

**ISSUES FROM THE CAUSE(S) OF ACTION**

BANKING AND FINANCE LAW - BANK GUARANTEE AND INSURANCE BONDS: -Banking practices - As sound legal means of securing Court Judgments – Bounden duty of courts to enforce them to the letter at the final conclusion of litigation

ENVIRONMENTAL LAW AND NATURAL RESOURCE LAW: Awards or Compensation for damages to the environment due to oil related activities - Legal hurdles - Relevant considerations

**PRACTICE AND PROCEDURE ISSUES**

COURT - DUTY OF COURT**: -** Bounden duty of Court to protect all rights of litigants as provided by existing laws before it – Stay of execution of court Judgment - Where every superior Court of record has inherent jurisdiction derived from its Judicial powers under Section 6 (6) of the 1999 Constitution of the Federal Republic of Nigeria as well as statutory powers to grant a stay of execution of its own judgment – When court will grant a stay of execution pending appeal of judgment at a higher court – Relevant considerations

APPEAL - RIGHT OF APPEAL**: -**Constitutional right of a litigant to appeal against any decision of a Court that he is not satisfied with – Bank guarantees executed at High Court pending outcome of appeal to Court of Appeal – Whether it is the intention of Court when it orders a party/Appellant to produce Bank Guarantee that the Appellant/Applicant will as a result of that Order, lose its right to file further appeal to the Supreme Court and to seek the Court of Appeal to stay its own Judgment and to stay the realization of the Bank guarantee pending the determination of the Supreme Court appeal

**MAIN JUDGMENT**

**ABUBAKAR JEGA ABDUL-KADIR, J.C.A. (Delivering the Lead Ruling):**

By a Motion on Notice dated 10th June 2010 and filed same, the Appellant/Applicant prays for the following Orders:

1. An order staying execution and or enforcement (whether by garnishee or howsoever) of the judgment of the Federal High Court, sitting in Umuahia per J. T. Tsoho, J., dated 17/11/2005 in Suit No. FHC/UM/CS/03/2000 - Sir Arthur John & Ors v. The Shell Petroleum Development Company of Nigeria Ltd.) as confirmed, by and or, the judgment of the Court of Appeal, Owerri Division dated 10/6/2010 in Appeal No. CA/PH/103/2006, pending the determination by the Supreme Court of the Appellant/Applicant's appeal against the said judgment of the Court of Appeal.

2.   An order or injunction for the preservation of the subject matter and/or preservation of the status quo by the parties pending the determination of the applicant's appeal by the Supreme Court against the judgment of the Court of Appeal, Owerri Division dated 10/6/2010 in Appeal No: CA/PH/103/2006 (The Shell Petroleum Development Company of Nigeria Ltd., v. Sir Arthur John & Ors).

3.   An Order or injunction restraining Zenith Bank, Plc from paying to the Judgment Creditor/Respondent and the Judgment Creditor/Respondent from receiving from Zenith Bank, Plc the Judgment sum stated in the Zenith Bank Guarantee dated 28th day of October, 2009 (or otherwise honouring the said guarantee) pending the determination of this motion and/or the Appellant/Applicants appeal against the aforesaid Judgment of the Court of Appeal.

The grounds for this application are stated as follows:-

1. For the Applicant to pay the judgment sum of One Billion, Eighth Hundred and Forty-Nine Million, One Hundred and Eight-Seven Thousand, Five Hundred and Sixty-Eight Naira (N1,849,187,568.00) will entail disposing its operational assets and folding up its business.

2. The Umuorie community which is the real judgment creditor in this case is an indeterminate number of persons from whom it would be impossible to recover the judgment sum in the event of Applicant's appeal succeeding.

3. The grounds of appeal are substantial and arguable.

4. Applicant is prepared to furnish a banker's guarantee to secure the judgment sum.

5. The Guarantor/Respondent (Zenith Bank, Plc) had furnished a guarantee to the Plaintiffs/Judgment Creditor/Respondents

In moving the application learned Senior Counsel for the Appellant/Applicant Chief R. Akinjide states that the motion on Notice is dated and filed on 10/6/2010 with a 14 paragraphs supporting affidavit, that also filed is a further affidavit of 28/9/10 containing 14 paragraphs with 8 exhibits attached.  That they also filed a 26 paragraph Reply Affidavit deposed to on 28/10/10. That they also filed an 11 paragraph Reply Affidavit deposed to by Onyiyechi Akaga to the Respondent Counter-affidavit filed on 28/1/2010.

Learned Senior Counsel for the appellant/Applicant states that their written address is dated and filed on 21/10/10 in support of the application. That they also filed a Reply Address dated and filed on 2/11/10. Learned Senior Counsel for the Appellant/Applicant adopts the written address and the Reply address and move in terms of the motion papers and urged the Court to grant the application.

Mr. L.E. Nwosu SAN, for the 1st, 2nd and 3rd Respondents states that he is opposing the application and pursuant to the Order of this Court filed a written address on 28/10/10 and it is dated same date. Learned Senior Counsel adopt the written address and reply on their Counter-affidavit sworn to on 21/9/10 particularly Exhibits DE 3 and DE 4 attached thereto.  He also filed a further affidavit on 28/10/10 and rely on Exhibit DE 6 attached thereto.  Learned Senior Counsel also rely on Exhibit DE, 7 also heavily rely on the Applicant further affidavit filed on 28/9/10 especially Exhibit B., Learned Senior Counsel placed reliance on the Applicant's Exhibit C which is the Counter-guarantee by First Bank to Zenith Bank particularly paragraph 2 of the Exhibit, Exhibit "D" of the Applicant's further affidavit of 28/9/10 in which the Judgment of the Rivers State High Court determined the status of the Guarantee between Zenith Bank Plc and the Respondents.  The Notice of Appeal by Zenith Bank against that Judgment in Exhibit "E" to the Court of Appeal  Port Harcourt, Exhibit "F" is the motion for stay of execution brought before the Court of Appeal Port Harcourt, that this Court not being a Court of First Instance cannot be invited to interpret the liability or not on the 1st, 2nd and 3rd Respondents right to sue based on the Guarantee Exhibit "B" and this Court has no Jurisdiction to seat over an appeal of the High Court of Rivers State.  Learned Senior Counsel urged the Court to dismiss the application.

Mr. Giadom Counsel to the 4th Respondent informed the Court that he is not opposing the application.

Mr. Nwuzor, Counsel for the 5th Respondent after the adoption of written address by the Parties applied for an adjournment to enable him contact his client for the process served on them which was not forwarded to him to enable him re-act to the application. The application for adjournment was vehemently opposed by Counsel to the Appellants/Applicants and the 1st, 2nd and 3rd Respondents and the Court ruled refusing the application for adjournment which it considered an abuse of the process of this Court after adoption of addresses for Counsel to apply for adjournment to consult his Client over a process that has been duly served on them before the hearing of the application.

By an Order of this Court the Parties filed written addresses which were subsequently adopted at the hearing of this application. In his written address, learned Senior Counsel for the Appellants/Applicants submitted four Issues for determination. The Issues are:-

a) Has the Appellant/Applicants shown special circumstance and or recondite point of law to warrant stay of execution?

b) Does the fact that SPDC gave a Bank Guarantee pursuant to the Order of this Court of Appeal as a condition for stay of execution of the judgment of the Federal High Court destroy or whittle down the constitutional right of SPDC to appeal to the Supreme Court against the Judgment of this Court of Appeal delivered on June 10, 2010 and consequently the right to apply to this Honourable Court to stay its own Judgment pending the determination of the Supreme Court appeal.

c) Are the conducts of the Plaintiffs/Respondents in seeking to realize the bank guarantee using the High Court of Rivers State with the full knowledge of the pendency of the present application not an abuse of the process of this Court?

d) If (c) is answered in the affirmative, what proper order should your Lordships make in the circumstances?

On the other hand learned Senior Counsel for 1st, 2nd and 3rd Respondents formulated three Issues for determination, the Issues are:-

1. Whether the applicant can at its own whim and caprice make a non-party at the trial or appeal a party  without an application for joinder?

2. Whether the Court of Appeal, Owerri Division can exercise Jurisdiction over the Judgment of the High Court of Rivers State in Suit No. PAC/1690/2010 in view of the Appeals against the Court's decisions severally lodged by the Appellant and Zenith Bank Plc Nos. CA/PH/389M/2010 and CA/PH/380M/2010 respectively.

3. Whether from the conduct of the Applicant the instant application for Stay of Execution is not only in-equitable but a gross abuse of the process of this Court and therefore liable to be dismissed.

I have carefully looked at the Issues submitted for determination by the Appellant/Applicant and the 1st, 2nd and 3rd Respondents and considering the facts and circumstances of this application, the only narrow Issue that calls for determination is stated thus:-

"Whether the Appellant/Applicant has made out a case for the grant of an Order for stay of the execution of the Judgment of this Honourable Court delivered on 10/6/10 in Appeal No. CA/PH/103/2006 pending the determination by the Supreme Court of the Appellant/Applicant's  appeal against the said Judgment."

In respect of the above Issue for determination as formulated by the Court, learned Senior Counsel for the Appellant/Applicant submits that the fact that the Appellant/Applicant SPDC gave a Bank Guarantee pursuant to the Order of this Court as a condition for the stay of the execution of the Judgment of the Federal High Court does not destroy or whittle down the Constitutional right of the Appellant/Applicant SPDC to appeal to the Supreme Court against the Judgment of this Court delivered on June, 10, 2010 and consequently the right to apply to this Court to stay its own Judgment pending the determination of the Supreme Court appeal.

Further learned Senior Counsel for the Appellant/Applicant contends that it is not the intention of this Honourable Court, when it ordered the Appellant/Applicant to produce Bank Guarantee, the Appellant/Applicant will as a result of that Order, lose its right to file a further appeal to the Supreme Court and to seek this Court to stay its own Judgment and stay realization of the bank guarantee pending the determination of the Supreme Court appeal.  Further, learned Senior Counsel for the Appellant/Applicants submits that every superior Court of record has the inherent Jurisdiction derived from its Judicial powers under Section 6 (6) of the 1999 Constitution of the Federal Republic of Nigeria as well as statutory powers to grant a stay of execution of its own Judgment reference made to *MARTINS V. NICANNAR FOOD CO. LTD. (1988) 2 NWLR (PT. 74)  75 at 83; KIGO NIG. LTD. V. HOLMAN BROS LTD. (1980) 517 SC 60 at 67.*That  the bank guarantee (Exhibit SPDC B) is not sacrosanct, the bank guarantee must be read subject to the Constitutional right of appeal of the Appellant/Applicant.  That we have the power to order stay of execution of our own Judgment  including the execution of the said Bank Guarantee on whatever term we deem just and fair pending the determination of the appeal at the Supreme Court as made clear by the binding Judgments of the Supreme Court and the Court of Appeal.

In response to the submissions of the learned Senior Counsel for the Appellant/Applicant, learned Senior Counsel for the 1st, 2nd and 3rd  Respondents referred to the Bank Guarantee dated the 28th day of October 2009, the relevant portion of the Guarantee states:-

Page 1 line 1 -

"Bank Guarantee in favour of the Plaintiffs in suit No. FHC/UM/CS/03/2000......" etc.

Page 1 last paragraph lines 1 & 2

NOW THEREFORE THE BANK do hereby under take to pay the Plaintiffs on the directive of the Court an amount not exceeding the sum of N1,849,187,568.00 ... with interest not exceeding 10% per annum if the appeal of SHELL     PETROLEUM DEVELOPMENT COMPANY     LIMITED fails..."

Page 2 line 1 -

"Payment by us under this Guarantee will only be made upon receipt by us of your written demand accompanied with duly certified judgment of the Court of Appeal, Port Harcourt Division stating that the amount stated above is due and payable by SHELL PETROLEUM DEVELOPMENT COMPANY LIMITED"

Page 2 paragraph 2 line 1 –

"This Guarantee shall become operative and enforceable in the event of the appeal lodged by the appellants to the Court of Appeal being dismissed."

Page 2 paragraph 4

"This Guarantee shall terminate and all obligations of the Guarantor hereunder shall cease if the Court of Appeal upholds the Appeal whether or not the original Guarantee is returned to the Bank for cancellation. Any demand in respect thereof should therefore reach the Bank promptly upon the final determination of the appeal accompanied by a certified copy of the Judgment of the appellate Court but in any event the validity of this Guarantee shall not extend beyond September 30, 2010 ("the expiry date") except further extended before the expiry date".

Learned Senior Counsel to the 1st, 2nd and 3rd Respondents submits the applicant know that Zenith Bank Plc made themselves primary obligors to the Respondents. It became mere "Stake Holders" for the Plaintiffs Respondents with an obligation engaging themselves to pay the stated sum over to the Respondents upon the dismissal by the Court of Appeal of SPDC Appeal accompanied with a certified true copy of the Judgment of the Court of Appeal and Respondents letter of demand. That the Applicants expressly accepted that the Guarantee shall become operative and enforceable on Zenith Bank upon the dismissal of SPDC appeal to the Court of Appeal.  That Zenith Bank Plc have not denied the happening of the enabling  events or the Respondents compliance with the stipulations in the letters of the Guarantee. That Zenith Bank Plc by their letter dated 20th July 2010 Exhibit DE - 6 accepted liability in no uncertain terms.

Further, it is the submission of learned Senior Counsel for Respondents argues that in issuing the Guarantee generously reciting the Court of Appeal and High Court Suit numbers, the Applicants were well aware that it was intended to be filed in Court and used to obtain the equitable order of a conditional stay from the Court of Appeal.  They also know it that it was to be used in denying the Respondents, access to monies adjudged to be theirs. That from page 2 paragraph 4 portion of the letter of Guarantee it would be notice that in the event that SPDC's appeal was upheld by the Court of Appeal, the Guarantee shall automatically terminate and the obligations of the Guarantor hereunder shall cease, learned Senior Counsel for the Respondents submits that it is inequity for the Appellant/Applicant to insist that the Guarantee shall remain in force pending appeal to the Supreme Court, that he that comes to equity must do equity that they cannot take the benefit of the Guarantee and run away from its liability.  Reference made to *OKECCHUKWU V. ANURUBA VS. EBENATOR COMMUNITY BANK AND ANOTHER (2005) 10 NWLR (PT. 933) 321.*

Further learned Senior Counsel for the Respondent contends that whether the Respondents rights under the guarantee was dependent on the Applicant's further appeal or even unlikely success at the Supreme Court, that the answer must negate and this Court cannot be invited to decide on the issue as thought it were sitting at first instance.  That that decision rests squarely on the High Court and which Court in Port Harcourt had in PHC/1690/2010 pronounced thereupon.  
Finally, learned Senior Counsel for the Respondents argues that there is nothing to stay as a Garnishee order absolute has been enrolled against the Guarantors account at the Central Bank of Nigeria Exhibit "DE d5" and the effect is that the Central Bank of Nigeria is now the debtor of the Respondents and that a stay is now only at the instance of the Central Bank of Nigeria and not even the Guarantor.  Learned Senior Counsel urged us to refuse the application and dismiss it.

In the determination of this application for stay of execution it is necessary from the onset to state that there are two Judgments, the Judgment of the Federal High Court, Umuahia delivered in Suit No. FHC/UM/CS/03/2000 in the sum of (one Billion, eight hundred and forty nine million, one hundred and eighty-seven thousand, five hundred and sixty-eight naira) N1,849,187,568.00 - execution of which was stayed by an order of this Court covered by Zenith Bank Plc Bank Guarantee which the 1st, 2nd and 3rd Respondents as Judgment creditors sought to enforce after the determination of the appeal before this Court.

There is also the Judgment of this Court delivered on 10/6/2010 in Appeal No. CA/PH/103/2006 in sum of N1,049,187,658.00 which is on appeal to the Supreme Court of Nigeria.

Now the main boneof contention between the Appellant/Applicant and the 1st, 2nd and 3rd Respondents is whether in spite of the Constitutional right of the Appellant/Applicant to appeal, the Respondent can enforce the Guarantee and collect the sum of money due.

The law is very clear on the right of a litigant to appeal against any decision of a Court that he is not satisfied with, it is a right granted by the Supreme law of the land the Constitution and this right of appeal is not subject to or dependent on any other consideration therefore the fact that the Appellant/Applicant gave a Bank Guarantee pursuant to the Order of Court as a condition for stay of execution of the Judgment of the Federal High Court does not destroy or whittle down the Constitutional right of the Appellant/Applicant to appeal to the Supreme Court against the Judgment of this Court delivered on 10th June 2010 and consequently the right to apply to this Court to stay its own Judgment pending the determination of the Supreme Court appeal.

Certainly it is not the intention of this Court when it ordered the Appellant/Applicant to produce Bank Guarantee that the Appellant/Applicant will as a result of that Order, lose its right to file further appeal to the Supreme Court and to seek this Court to stay its own Judgment and to stay the realization of the Bank guarantee pending the determination of the Supreme Court appeal.

By law every superior Court of record has inherent Jurisdiction derived from its Judicial powers under Section 6 (6) of the 1999 Constitution of the Federal Republic of Nigeria as well as statutory powers to grant stay of execution of its own Judgment. The law is settled that wherever there is a Judgment or decision and a room to appeal - further exists, a Party to the Judgment or decision can approach the Court to apply for the stay of execution of the Judgment or decision pending appeal. Also the applicable principles for the stay of execution of Judgment are well settled.

In the instant application the Appellant Judgment debtor has filed an appeal to the Supreme Court in respect of the Judgment sought to be stayed vide Notice of Appeal dated June 10, 2010 pursuant to Section 233 of the 1999 Constitution of Nigeria.

It has also shown by its affidavit that if the Respondent are allowed to realize the Judgment sum without waiting for this Court to determine if the Applicant is entitled to a stay of execution pending its appeal to the Supreme Court, the Applicant's appeal pending at the Supreme Court would be rendered nugatory and a fait accompli would be foisted on this Court and the Supreme Court.

The Judgment sum is colossal in the sum of N1,049,187,658.00  The Appellant/Applicant has shown by its affidavit that the Respondents who are a Community of indeterminate persons will proceed to share the Judgment sum among themselves and other members of the Umuorie Community and in the likely event that the Applicant's appeal to the Supreme Court is successful, it will be impossible to recover the Judgment sum from the Respondents.

The Applicant has also shown by its affidavit that it had earlier, pursuant to the Order of the Court of Appeal furnished a Bank Guarantee of the Zenith Bank Plc to the Respondents to cover the Judgment sum and is prepared to renew the guarantee to secure the Judgment sum in the unlikely that its appeal to Supreme Court is unsuccessful.  The First Bank of Nigeria Plc furnished a Counter-guarantee to the Zenith Bank Plc.

Now the narrow Issue for determination in this application is whether from the facts and circumstances of this case the Appellant/Applicant has made out a case for the grant of stay of execution of the Judgment of this Court delivered on 10/6/2010. Certainly, from what I have stated earlier on in this Ruling the Appellant/Applicant has filed an appeal before the Supreme Court, it has shown by its affidavit evidence that the outcome of the appeal before the Supreme Court would be rendered nugatory if it should eventually be successful and that it would be impossible to recover the Judgment sum which is in the sum of N1,049,187,658.00 from the Respondents who are a Community of indeterminate persons.

Learned Senior Counsel for the Respondents has vehemently attached this application on the main plank that the Applicant had issued a Bank-guarantee in favour of the Respondents and the Guarantee has matured by the dismissal of the appeal by this Court and that they have proceeded to enforce the Guarantee by way of an action filed at the Rivers State High Court which matter is now before the Court of Appeal Port Harcourt Division, therefore according to the learned Senior Counsel there is nothing to stay.

It should be clear that the fact that a Bank Guarantee is ordered by the Court in favour of the Respondents does not defeat the constitutional right of the Appellant/Applicant to appeal and also its right to approach the Court for stay of execution of Judgment if there exist a pending appeal of that Judgment to the Higher Court and both the appeal and the application for stay of execution of Judgment would be considered and determine on their various merits.    
The Court has a duty to protect all rights of litigants as provided by existing laws before it. Learned Senior Counsel for the Respondents has in most vicious manner condemned the issue of issuing another Guarantee and alluded that both the Appellant/Applicant and the Guarantor of the Judgment sum have no intention of honouring the Guarantee. Here again from the facts and circumstances of this case it is imperative and clear that the Appellant/Applicant opposed the realization of the Bank Guarantee issued by Zenith Bank Plc in order to exercise its Constitutional right of Appeal and also to protect the Judgment sum pending the determination of its appeal before the Supreme Court.

It is pertinent to point out that Bank Guarantee and Insurance Bonds are sound legal means of securing Court Judgments and at the final conclusion of litigation, our Courts are duly bound to enforce them to the letter, therefore, there is nothing to be apprehensive about Bank guarantee or Insurance bond.  
In the final analysis I find merit in this application and it is accordingly granted in the following terms:-

An Order that the execution of the Judgment of this Court in Appeal No. CA/PH/103/2006 dated 10/6/2010 in the sum of N1,049,187,658.00 (One Billion, Forty Nine Million, One Hundred and Eight-Seven Thousand, Six Hundred and Fifty-Eight Naira) be and is hereby stayed on the condition that the Appellant/Applicant (Judgment debtor) provides and give to the Respondents a Bank Guarantee from a reputable Bank in the Judgment sum with interest at 10% per annum within 30 days from today and a copy of the same be filed with this Court.

I make no order as to costs.

**HELEN MORONKEJI OGUNWUMIJU, J.C.A.:** I agree

**MOJEED ADEKUNLE OWOADE, J.C.A.:** I agree