**SIMON EZECHUKWU AND CHIDI ENE**

**V**

**I. O. C. ONWUKA**

COURT OF APPEAL (JOS DIVISION)

THURSDAY, 16TH MAY, 2002

CA/J/42M/2001

**LEX (2002) - CA/J/42M/2001**

OTHER CITATIONS

2PLR/2017/120 (CA)

**BEFORE THEIR LORDSHIP**

OLUDADE OLADAPO OBADINA, JCA (Presided)

ISA ABUBAKAR MANGAJI, JCA (Read the Lead Ruling)

IFEYINWA CECILIA NZEAKO, JCA

**BETWEEN**

SIMON EZECHUKWU AND CHIDI ENE - Appellant

AND

I.O.C ONWUKA - Respondent

**ORIGINATING COURT**

HIGH COURT OF BENUE STATE, MARKUDI JUDICIAL DIVISION (Judgment of the Court delivered on 22nd November, 2000).

**PRACTICE AND PROCEDURE ISSUES**

APPEAL - GROUND OF APPEAL:- When will form basis and justification for an application for stay of execution.

COURT - MOTION:- Features of a valid motion - Where lacking in a motion paper - Attitude of court thereto.

COURT - SUPREME COURT:- Monetary judgment - Enforcement of – Attitude of Supreme Court thereto.

JUDGMENT AND ORDERS – JUDGMENT:- Validity of until reversed – Right of successful party to enforcement thereof.

JUDGMENT AND ORDERS - MONETARY JUDGMENT:- Enforcement of - Attitude of Supreme Court thereto.

JUDGMENT AND ORDERS - STAY OF ACTIONS, PROCEEDINGS, EXECUTION OF JUDGMENTS OR ACTIONS AFTER DUE ATTACHMENT:- Discretionary nature of - Principles for grant of.

ACTION – MOTION:- Features of a valid motion - Where lacking in a motion paper - Attitude of court thereto.

ACTION - STAY OF EXECUTION - Application for - Principle guiding grant of.

ACTION - STAY OF EXECUTION - Execution duly levied according to law - Whether ought to be stayed.

ACTION - STAY OF EXECUTION - Ground of appeal - When will form basis and justification for an application for stay of execution

ACTION - STAY OF EXECUTION - Mandatory judgment - Application for - Whether averment of impecuniosity or poverty can aid applicant

ACTION - STAY OF EXECUTION - EXECUTION DULY LEVIED ACCORDING TO LAW – Whether ought to be disturbed or stayed

ACTION - STAY OF EXECUTION - GROUND OF APPEAL - When will form basis and justification for an application for stay of execution.

**CASE SUMMARY**

ORIGINATING FACTS AND CLAIMS

The plaintiff/respondent sued the defendants/applicants claiming damages for wrongfully pulling down plaintiff’s building, loss of cash and other valuables arising thereunder. The defendants were duly served with the writ and statement of claim, but they failed to enter their defence, whereupon the matter was tried in their absence and judgment was entered in favour of the plaintiff on 22/11/2000. The judgment was subsequently executed on 22/2/2001 and the defendants’ properties were attached.

Dissatisfied with the judgment, the defendants filed a notice of appeal on 29/11/2000, and now brought this application for stay of further execution and auction of the attached goods. The Court of Appeal considered the principles relating to stay of execution of a monetary judgment.

**DECISION(S) APPEALED AGAINST**

The trial Court entered judgment for the Respondent, when the defendant failed to enter a defence against the suit. Subsequently, the properties of the Appellant were attached and were due for auction. Dissatisfied, the Appellant appealed to the Court of Appeal.

**MAIN JUDGMENT**

MANGAJI, JCA (DELIVERING THE LEAD RULING):

On 17th May, 2001, the applicants herein filed this application now under consideration seeking for the orders prayed for and couched in the following terms:

“1. AN ORDER to stay the auction of the properties attached on the 22/2/2001 pursuant to the execution of the judgment of the Makurdi: High Court 4 dated 22nd November, 2000 pending the determination of appeal.

2. To order the release and restoration of the 2nd applicant items that were attached on 22/2/2001.

FURTHER TAKE NOTICE that notice of appeal in this matter has been duly filed and the grounds of appeal raises substantial and vital issues of law to be argued at the hearing of the appeal.

AND FOR such other order(s) as the Honourable court may deem fit to make to preserve (sic) the res in the interest of justice.”

On 14th March, 2002 when the motion came up for argument, Chief Osuman of counsel for the applicants pointed out that the properties he seeks their release had been attached on 22/2/2001. He said the items are mainly stationary and are 2nd applicant’s belongings. Learned counsel relied on the supporting affidavit of 20 paragraphs and the five exhibits accompanying same. As well, learned counsel relied on the further affidavit of 17 paragraphs and three exhibits accompanying it filed on 6/3/02.

Continuing, learned counsel submitted that he was willing to have the judgment debt deposited with this court but was quick to add that the applicants are not sound enough financially to meet the huge financial burden in the judgment debt. He urged that the application be granted.

In reply, Mr. Ulegede for the respondent was of the view that the whole application is misconceived. He placed reliance on the 26 – paragraph counter-affidavit and the further counter affidavit of 3 paragraphs filed on 23/5/2001. The latter counter affidavit was accompanied by two exhibits.

It seems there is yet a further and better counter-affidavit filed on 12/3/2002 containing ten paragraphs. That further and better counter-affidavit was accompanied by few exhibits that are confusingly numbered. While referring to exhibits A, B, C, D and E which accompanied the supporting affidavit to the motion, learned counsel urged this court to discountenance them since they are public documents that have not been certified.

Mr. Ulegede referred to the case of Vaswani Trading Co. Ltd. vs. Savalakh & Co. (2000) FWLR (Pt. 28) 2174; (1972) 12 SC 77 so heavily relied upon by the applicants in moving the motion, and draw a distinction between the application at hand and the Supreme Court case under reference.

He said in the Vaswani case, the property attached was not released as alleged by learned counsel for the applicants.

I am positive, Mr. Ulegede did not read and get the full import of Vaswani case. Neither did he observe quite critically the documents which he said were not certified. Whereas in the Vaswani case the property attached was returned to the applicant as submitted by learned counsel for the applicants albeit in circumstances quite dissimilar from this application, all the documents contested by the respondent’s counsel on the ground that they are uncertified copies of public documents are but the opposite of learned counsel’s stand.

One needs not strain his eyes to observe that all the documents are duly certified. Be that as it may and in a closing remark learned counsel urged that the application be refused.

From all the pieces of evidence on record, the true facts which gave rise to the taking of a writ of summons by the plaintiff/respondent are kept dear to the parties and find no expression in order to afford a casual reader opportunity to realise the issues involved. What is obvious however is that the plaintiff/respondent had a dispute with the defendants (originally they were four in number) about a piece of land at Makurdi. The defendants were so irked by the plaintiff’s assertion of title that they organised some people who pulled down plaintiff’s building. In the process, the plaintiff said that apart from the destruction, his cash which he kept in his room was stolen as well as some of his valuables. He accordingly took out a writ against the defendants claiming some reliefs and filed along with it a statement of claim. That upwards of six months after the receipt of the writ and statement of claim, the defendants failed to respond or file anything.

The leaned trial Judge therefore called on the plaintiff to prove his case which he did. On 22/11/2000 judgment was delivered and plaintiff’s claim was granted. The defendants were not satisfied since in any case they had filed a motion seeking for leave to file in their defence and four days before the judgment their motion was dismissed.

Now having delivered judgment on 22/11/2000, the defendants (sic: plaintiff) took necessary steps and on 22/2/2001 attached the 2nd defendant’s property. Defendants said they applied for stay of auction of the attached property which was granted but that the order for restoration to the 2nd defendant of his property sought for was refused. In the event they now filed this application seeking substantially the same orders they sought for at the court below.

The whole application is predicated on the desire of the applicants to gain an order staying the auction of the 2nd applicant’s property attached on 22/2/2001 in execution of the judgment of the court below dated 22/11/2000. The consequential prayer of course is for this court to order for the release of the attached property to the 2nd applicant.

For the beginning I must emphasise that stay of actions or proceedings, stay of execution of judgment or stay of auction after due attachment and the like are matters of discretion exclusively empowered to the trial court in the first instance. The court however is enjoined to exercise the discretion judicially and judiciously. In all circumstances however the court is the master of the situation. Equally important to note is the attitude of the Supreme Court and this court to judgments ordering monetary payments. Except under very special situations, judgment debts should be settled so that the successful litigants can enjoy the fruits of their success.

But where the dictates of the situation permit judgment debt will be deposited with the court to await the outcome of the appeal.

The Supreme Court has on several occasions restated the principles for the grant of stay of execution. I need here recall what the court emphasised in Vaswani Trading Co. Ltd. vs. Savalakh & Co. (2000) FWLR (Pt. 28) 2174; (1972) 12 SC 77 at page 81 to 82.

“When the order or judgment of a lower court is not manifestly illegal or wrong, it is right for a court of appeal to presume that the order or judgment appealed against is correct or rightly made until the contrary be proved or established and for this reason the Court of Appeal, and indeed any court, will not make a practice of depriving a successful litigant of the fruits of his success unless under very special circumstances. (See in this connection the observations of Bowen, J. J. in The Annot Lyle (1886) 11 P. 114 at p. 116). We take it that the word ‘special’ in this context is not used in antithesis to the words ‘common’ or ‘normal’ for that would be tantamount to pre-judging the appeal on a determination of an application for a stay of execution. When it is stated that the circumstances or conditions for granting a stay should be special or strong we take it as involving a consideration of some collateral circumstances and perhaps in some cases inherent matters which may, unless the order for stay is granted, destroy the subject-matter of the proceedings or foist upon the court, especially the Court of Appeal, 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.”

The first of the applicants’ prayers in their application is for “an order to stay the auction of the properties attached on the 22/2/2001 pursuant to the execution of the judgment of the Makurdi High Court dated 22nd November, 2000 pending the determination of appeal.” In the further affidavit in support filed in this court on 6/3/2002 the deponent stated categorically at paragraphs 6 and 7 as follows:-

“6. That the High Court (lower court) ordered the stay of the execution of the appellants (sic) properties (items) that were earlier on attached.

7. That the ruling suspending the auction is hereby exhibited as exhibit A” True to the deponent’s words the court below had obliged the applicant and a stay of auction was ordered. Said the learned trial Judge:-

“It is my view that from the facts before the court ought to have been passed to the Registry to suspend sales pending the outcome of the motion for stay of execution.

As the applications have by way of motion I feel it will be a judicial indiscretion to go ahead and auction the properties of applicants when the court is informed that the applicants are at Court of Appeal seeking an order to stay execution. It is not the desire of this court to render nugatory the decision of the Court of Appeal over the motion now pending before it.

The court has therefore granted an order suspending the sales of the properties already pending the outcome of the motion for stay of execution before Court of Appeal, Jos.”

It seems the first issue to address in this application is to find what special circumstances there are that make the grant of applicants’ motion imperative. In this respect, I feel it expedient to reproduce here the relevant averments contained in paragraphs 3 to 13 of the affidavit in support of applicants’ motion. They run as follows:-

3. “That sitting at first instance, a Benue State High Court 4 coramed by (sic) the Hon. Mr. Justice I. Hwande delivered a judgment dated 22/11/2000 against the applicants/judgement debtors. A copy of the said judgement (certified) is hereby exhibited and marked Exhibit ‘A’.

4. The said exhibit A was entered in default of defence following the ruling of the Honourable trial court delivered on the 17/11/2000 overruling the applicants application for leave to file their statement of defence out of time, to adduce evidence in their defence.

5. That on the 29/11/2000, this law firm, on behalf of the applicants, filed a notice of appeal on the grounds inter alia that the entire trial was devoid of fair hearing. A copy of the said notice of appeal is hereby exhibited and marked exhibit ‘B’.

6. That on that 29/11/2000, the applicants again filed a motion on notice wherein they prayed the Honourable court (below) for an order of stay of the execution of its judgment (exhibit A). The copy of the motion paper is hereby exhibited and marked as exhibit ‘C’.

7. That on the 21st day of February, 2001 the Honourable court overruled the application for the requested stay of execution and in addition awarded N2,070.00 costs in favour of the respondent/judgment creditor. The said ruling is hereby exhibited and marked as exhibit ‘D’.

8. That following, the High Court refusal to grant the requested stay, the applicants filed a similar application before the Court of Appeal to wit for a stay of the execution of the lower court’s judgment pending the appeal filed at the Court of Appeal.

The motion is slated for hearing on the 23rd May, 2001.

9. That about the time I was in Jos on 22/2/2001 to file the application for the stay referred to in paragraph 8, above, the said judgment, exhibit A was executed and various items including the 2nd applicant’s Station Wagon Peugeout Car, stationeries and books in his Bookshop were attached and taken to the High Court premises.

10. Thereafter, the items attached were advertised for an auction that was slated for 1st March, 2001.

11. That mindful of the impending appeal, the applicants again filed another application before the High Court for stay of the auction of the items attached. The copy of the application is hereby exhibited and marked as exhibit ‘E’.

12. That the said application (exhibit E) was heard on the 10th day of May, 2001 and the ruling fixed for 3rd day of July, 2001.

13. That I know as of fact that, even if all the belongings (personal effects of the applicants including mattresses beds, cooking utensils in their houses) were attached and taken away, the applicants would still not be able to pay the judgment debt from the proceeds of a sale.

14. That the applicants are mere elders of the church with large families and do not readily have the judgment debt to pay.

15. That the tyres, battery and other parts of the 2nd plaintiff’s car will degenerate from the processes of weathering as it is still packed outside the court premises.

16. That most of the stationery that were attached on the 22/11/2000 are seasonal and are therefore relevant during the first term of the various colleges and tertiary institutions.

17. That the numerous stationery (including school books) that were attached by the sheriff of the lower court 22/11/2000 will be stained and torn and will be greatly devalued if not sold soon.

18. That this application is necessary in view of the fact that part execution had already taken place and that the respondent judgment creditor has embarked on an arrangement for the auction of the attached items.”

Let me put one point under focus. At paragraph 6 of the supporting affidavit the deponent thereto averred that the applicants had on 29/11/2000 (i.e. seven days after the judgment was delivered) filed a motion seeking for an order staying the execution of terms of the judgment now on appeal.

He exhibited in support exhibit C being a purported motion on notice.

I shall say why I regard the motion a purported document. In reply and as contained in the further and better counter-affidavit (paragraph 8 thereof) the respondent averred that exhibits B and C relied upon by the applicants were never brought to his attention and that he was seeing the exhibits for the first time. I have every reason to believe the respondent exhibit C so heavily relied upon by the applicants is couched in the following terms:

“TAKE NOTICE that this Honourable Court shall be moved on the........ day of ....... 2000 at the hour of 9 O’clock in the forenoon or so soon thereafter as counsel on behalf of the appellants/applicants may be heard praying the Honourable Court for the following order(s) to wit:

1. AN ORDER staying the execution of the judgment of this Honourable Court dated 22nd of November, 2000.

2. AN ORDER granting leave to the applicants to file grounds of appeal involving law & facts, facts & misdirection.

FURTHER TAKE NOTICE that the grounds on which these prayers are hinged are that the appellants/applicants have on Tuesday 29/1/2000 filed notice and grounds of appeal at the High Court of Justice of this Honourable Court and that the said grounds of appeal raise substantial and vital issues of law to be argued at the hearing of the appeal.

AND FOR such further or other order(s) as the Honourable Court may deem fit to make to preserve the res in the interest of justice.

DATED at Makurdi this 29th day of November, 2000.

E.C.A. Hundu, Esq. Osuman & Company, (Fati Chambers), 29, Osuman Street, Wurukum-Markurdi.”

One striking thing about the above motion on notice is that it is not a signed document. I tried to find if there is any signed copy in this court but am unable to find one. Not even the master file of this court contains one.

So the purported motion is an unsigned document. As well the motion bears no motion number just as it contains no hearing date. All these contain blank spaces. The same vices are visible on all the “motion on notice” contained in the documents forwarded to this court. So when the deponent to the further counter-affidavit said that exhibit B and C were seen by him for the first time he showed be correct. If exhibit C had been filed the fees duly paid would have been reflected. None of the bundles of the motion paper bore evidence of payment of filing fees. Further if it was duly filed a suit number would have been assigned to it. Of course Mr. E. C. A. Hundu who drafted the motion would have signed it. That document in my judgment was hurriedly drafted to support the present application but as nemesis will have it all features which make a motion valid have been inadvertently and through divine intervention left out. Given the averments in the supporting affidavit and the counter-affidavit, the latter is more truthful and indeed the only true version which I believe. I have seen exhibit D which accompanied applicants’ motion on notice. It is a ruling refusing stay of execution dated 21/2/2001. The motion is No. MHC/678M/2000.

In the face of the empty motion paper dated 29/11/2000, I have no reason to ascribe the ruling dated 21/2/2001 as one in respect of the unnumbered and unsigned motion. In any event the ruling as per exhibit D was in respect for a motion for stay of execution of the court’s judgment dated 2/11/2000 unless otherwise proved, the record of court shall be taken as correct. It is remarkable that the judgment sought to be stayed in exhibit C is dated 22/11/2000. I therefore accord no weight to exhibit D. Quite clearly, judgment in suit No. MHC/59/99 was delivered on 22/11/2000 and remained a valid judgment up to 22/2/2001 when execution was levied and is still so until it is reversed. The respondent was right to have applied for an order fifa because he was not under any duty to fold his arms after getting judgment in the hope that applicants might apply for stay of execution.

Applicants have averred to impecuniocity as a ground for the stay sought. That reason is palpably ludicrous. Apart from the fact that poverty is no ground for the grant of stay of execution it will not aid the applicants should their appeal fail.

But the facts deposed to in paragraphs 18 to 22 of the counter-affidavit filed on 21/5/2001 stand wholly undenied. They show how richly God endowed the applicants with material wealth. I may perhaps have to reproduce the averments here: viz:-

18. “That the 1st applicant is the owner of plot No. 5 Igumale Street North Bank Makurdi containing 16 rooms. The 1st applicant occupies 4 of the rooms and rents out the remaining 12 rooms at the rate of N400 each month per room.

19. That the 1st applicant also owns one storey building known as No. 104 Old Lafia Road North Bank, Makurdi. He rented the ground floor to a church known as ‘Embassy of Christ Evangelical Ministry’ and the church pays huge sums as rents.

20. The 1st applicant has three empty plots all located at good places at the North Bank Area of Makurdi which I can show to the court on demand. 1st applicant also operates motor spare parts shop at the North Bank Mechanic Village Makurdi and deals in building materials at the Modern Market, Makurdi where he is an executive member of the Building Material Association Makurdi Branch.

21. The 2nd applicant lives in his personal house of two flats renting out the other one for money. The flats are located at plot No. 109 North-Mission Ward, North Bank, Makurdi.

22. The 2nd applicant is also the Executive Managing Director of Success Bookshops situated at 13, Yogbo Road and Head Office at 50 Old Lafia Road. The execution levied on 22/2/2001 was on his shop at 13, Yogbo Road and he has three (3) days after replenished the shop with new streets.” (sic)

That the applicants are mere elders of the church with large families will not be helpful to them now just as it will not be shall they lose the appeal. As far as matters of fact are concerned therefore, the applicants have failed to convince me that their application has merit. I cannot find any special circumstance which would justify granting any stay either of execution or auction of the already attached property.

Grounds of appeal can also form basis and justification for an application seeking for stay of execution. This is because where the ground of appeal is substantial enough in the area of law which is largely recondite it can form basis for stay of execution or auction. See Okorodudu vs. Deduwa (1974) 6 SC 21 at 25; Nwabueze vs. Nwosu (1988) 4 NWLR (Pt. 88) 257 at 268 to 269. The grounds of appeal contained in the applicants’ notice of appeal revolve around the allegation of lack of fair hearing. Indeed all the three grounds of appeal essentially complained that the learned trial Judge had failed to afford the applicants fair hearing. That in my judgment is not anywhere near special or exceptional circumstance. Whether applicants were denied fair hearing is a matter of fact and there is nothing recondite about any of the three grounds of appeal. Very clearly, refusal to order for stay of auction prayed for will not destroy the subject-matter of the appeal. Indeed, the judgment of the court is monetary. I cannot see any helplessness that can be brought to bear on this court or the court below should the application be refused. Withal the orders which this court may make will by no means be rendered nugatory if the order for stay of auction is refused and I am not told how the orders will be adversely affected anyway.

Neither will the refusal to grant stay paralyse, in one way or the other the exercise by the applicants of their constitutional right of appeal.

The second order prayed for by the applicants is for the release and restoration of the 2nd applicant’s items that were attached on 22/2/2001.

This prayer found support from exhibit C. The argument of the applicants is that when the execution was levied on 22/2/2001 the motion on notice they filed seeking for stay of execution was pending before the court below and to the knowledge of the respondent.

What falls to be determined here appears to be narrow. The whole of the prayer is pitch forked on the averment in paragraph 6 of the applicants’ motion seeking to have the auction of the 2nd applicant’s property attached stayed. That averment showed that a motion on notice was filed on 29/11/2000 contemporaneously with the filing of the notice of appeal by the applicants. It is meant to prove that the applicants’ motion for stay had already been filed and a date for hearing was yet to be assigned when execution was levied on 2nd applicant’s property and accordingly attached.

I have put it beyond doubt elsewhere in this judgment that exhibit C is a non-existent motion. This court and indeed all courts will not place any weight on motion papers that are not signed neither will they accept hook-line-and-sinker documents that do not have features which show that they are indeed genuine and properly filed. My conclusion before as it is now is that on the date execution was levied being 22/2/2001 there was no motion filed seeking for stay of execution. The respondent was therefore perfectly in order when he caused execution to be levied. He was under no duty to suspend enjoying the fruits of his judgment in the hope that the judgment debtor might take some steps to stop its execution. Having therefore levied execution after judgment was delivered about two-and-a-half months and given the clear fact that when attachment was made no application was filed seeking to have the execution of the judgment stayed, reason and prudence dictate that the execution should not disturbed or in any way interfered with. The levying of execution I must emphasise was properly done and having done so what has legally been effected cannot be reversed on the ground only that the applicants needed the attached property restored to them. If they needed execution of the judgment stayed they should have taken correct and timeous steps to ensure their safety.

It is my considered view, in the light of the above discussions that both orders prayed for by the applicants failed. The application accordingly fails as it lacks merit. In the event, it is hereby dismissed in its entirety.

The respondent is entitled to costs in this court which I assess and fix at N5,000.00 to be paid by the applicants.

**OBADINA, JCA:**

I have had the privilege of reading in draft, the ruling of my learned brother, Mangaji, JCA just delivered. I agree with the reasoning and the conclusion that the application lacks merit and should be dismissed.

I too accordingly dismiss the application and abide by the order as to costs.

**NZEAKO, JCA:**

I agree with the ruling just delivered by my learned brother, Mangaji, JCA. I have nothing useful to add. I also dismiss the application and abide the order for costs.

Application dismissed