**FIRST CITY MONUMENT BANK PLC**

**V.**

**TAMSTEL NIGERIA LIMITED AND OTHERS**

IN THE COURT OF APPEAL OF NIGERIA

THE 13TH DAY OF APRIL, 2017

CA/PH/53M/2014(R)

**LEX (2017) - CA/PH/53M/2014(R)**

OTHER CITATIONS

3PLR/2017/132 (CA)

(2017) LPELR-42509(CA)

**BEFORE THEIR LORDSHIPS**

THERESA NGOLIKA ORJI-ABADUA, J.C.A

CORDELIA IFEOMA JOMBO-OFO, J.C.A

BITRUS GYARAZAMA SANGA, J.C.A

**BETWEEN**

FIRST CITY MONUMENT BANK PLC (Formerly known as First Inland Bank Plc) - Appellant(s)

AND

1. TAMSTEL NIGERIA LIMITED

2. REAL DREDGING AND MARINE LIMITED

3. ETEKAMBA NSA

4. ALALA MINES LIMITED

5. BUZ AND COMPANY

6. FIRST BANK OF NIGERIA PLC

7. VICTOR BUZUGBE  
  
AND  
  
IN RE: In the matter of the attachment of the Goods and chattels of the Judgment Debtor/ Applicant on the 4th day of February, 2014 by the Sheriff, High Court of Rivers State, Port Harcourt and the Deputy Sheriff, High Court of Rivers State, Port-Harcourt.

1) THE SHERIFF, HIGH COURT OF JUSTICE RIVERS STATE, PORT HARCOURT

2) THE DEPUTY SHERIFF, HIGH COURT OF JUSTICE, RIVER STATE, PORTHARCOURT   
 -2nd Set of Respondents - Respondent(s)

**ORIGINATING COURT**

HIGH COURT OF RIVERS STATE, PORT HARCOURT DIVISION (S. H. Aprioku, J., Presiding)

**REPRESENTATION/LAWYERS**

M. A. ESSIEN, SAN with, O.U. ULASI, Esq. and C.E. IGWEAGU, Esq. For Appellant

AND

ISAH SEIDU, Esq. for 1st Respondent

HELEN OVONLE with O. S. IGBEDION for 2nd Respondent

No legal representation for the rest Respondents. For Respondent

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

DEBTOR AND CREDITOR LAW:- Judgment creditors seeking to levy execution of the judgment of court by attaching the goods and chattels of the judgment debtor — Where judgment creditors begin selling off the goods and chattels of the debtor in spite of the fact that debtor had a pending application before the court, for stay of execution – Appeal arising thereupon – How treated

**PRACTICE AND PROCEDURE ISSUES**

ACTION - DUTY OF PARTY(IES) - Duty of plaintiff to ensure the presence of a crucial party in Court.

ACTION - MISJOINDER/NON-JOINDER OF PARTY(IES) - Whether a cause or matter can be defeated by reason of non-joinder or misjoinder of parties.

JUDGMENT AND ORDER - EXECUTION OF JUDGMENT - Persons entitled to the benefits and liabilities of a judgment - Duties and liabilities of the Sheriff in relation to execution of judgment.

JUDGMENT AND ORDER - EXECUTION OF JUDGMENT - Whether the Sheriff/Bailiff/Officer charged with execution of judgment can be sued by the Judgment Debtor or Judgment Creditor.

JUDGMENT AND ORDER - STAY OF EXECUTION OF JUDGMENT - Guiding principles for the grant of a stay of execution.

JUDGMENT AND ORDER - STAY OF EXECUTION OF JUDGMENT - Position of the law on the execution of a judgment when there is an application for stay of execution of a judgment or ruling.

JUDGMENT AND ORDER - STAY OF EXECUTION OF JUDGMENT - Purpose for granting stay of execution.

JUDGMENT AND ORDER - STAY OF EXECUTION OF JUDGMENT - What is meant by special circumstances that will warrant the grant of a stay of execution.

JUDGMENT AND ORDER - STAY OF EXECUTION OF JUDGMENT - Whether a party can apply for stay of execution of a judgment in the absence of a pending competent appeal.

JUDGMENT AND ORDER - STAY OF EXECUTION OF JUDGMENT - Whether the court can deny a successful litigant of the fruits of a judgment entered in his favour.

**CASE SUMMARY**

ORIGINATING FACTS AND CLAIMS

The 1st and 2nd sets of Respomdents being the judgment creditors sought to levy execution of the judgment of the trial court by attaching the goods and chattels of the judgment debtor—the Applicant. Thereafter, the Respondents began selling off the goods and chattels of the Applicant. This was done in spite of the fact that the Applicant had a pending application before the court, for stay of execution.

Dissatisfied, the Applicant filed the present application, praying the Court of Appeal to restrain the 1st and 2nd sets of Respondents from further levying execution of the judgment of the trial court; staying further levying of execution of the said judgment; suspending the levying of execution of the judgment, and declaring null and void the execution levied.

**DECISION(S) APPEALED AGAINST**

The trial Court entered judgment in favour of the 1st and 2nd sets of Respondents whereupon they took steps to levy execution of the judgment by attaching and selling off some of the goods and chattels of the Appellant. This was done while the Appellant’s application for a stay of execution of the judgment of the trial court was pending. Dissatisfied, the Appellant appealed to the Court of Appeal.

**ISSUE(S) FOR DETERMINATION ON APPEAL**

*BY APPLICANT:*

1. Whether the execution levied on the Applicant while the application for stay of execution was pending was not invalid and incompetent.

2. Whether from the circumstances the Honourable Court can set aside the execution that was carried out pursuant to the Writ of Fifa that was issued for the sum of N221,571,100.00.

3. Whether the Honourable Court can stay further execution of the judgment of the Lower Court.

**MAIN ISSUES**

THERESA NGOLIKA ORJI-ABADUA, J.C.A. (DELIVERING THE LEAD RULING):

The Applicant filed the present application on the 5th March, 2014 seeking the following reliefs:

(1) An order restraining the 1st Respondent and the 2nd set of Respondents from further levying execution of the Judgment of the High Court of Rivers State, Port Harcourt in suit No. PHC/381/2008 between Tamstel Nigeria Limited v. Real Dredging and Marine Limited, Etekamba Nsa, First Inland Bank Plc, Alala Mines Limited, Buz & Company, First Bank of Nigeria Plc and Victor Buzugbe delivered on 15th day of May, 2008 by Honourable Justice S.H. Aprioku.

(2) An order staying further execution of the Judgment of the High Court of Rivers State, Port Harcourt in suit No. PHC/381/2008 between Tamstel Nigeria Limited vs. Real Dredging and Marine Limited, Etekamba Nsa, First Inland Bank Plc, Alala Mines Limited, Buz & Company, First Bank of Nigeria Plc and Victor Buzugbe delivered on 15th day of May, 2008 by Honourable Justice S.H. Aprioku.

(3) An order staying further execution and or suspending the sale of Appellant’s Chattels and property in the inventory (Exhibit 'H'), which were attached, seized and carted away by the 2nd set of Respondents on the 4th day of February, 2014 in purport of the execution of a Writ of Attachment and Sale of Goods and Chattels dated the 4th day of June, 2013 pursuant to the said judgment with judgment sum of N221,571,100.00 (Two Hundred and Twenty-one Million, Five Hundred and Seventy-one Thousand, one Hundred Naira).

(4) An order setting aside the entire execution conducted by the 1st Respondent and the 2nd set of Respondents, pursuant to the said Judgment of 15th May, 2008, on the 4th of February, 2014 and the Writ of Attachment and Sale of Goods and Chattels issued against the Applicant dated the 4th day of June, 2013.

(5) An order releasing the chattels and property in he inventory (Exhibit "H") which are presently in the custody of the 2nd set of Respondents.

(6) An order declaring null and void the execution levied against the Applicant by the 1st Respondent and 2nd set of Respondent on the 4th day of February, 2014 as same was done fraudulently.

(7) And for such further order or other orders as this Honourable Court may deem fit to make in the circumstances.

The application was anchored on the grounds that:

1. Judgment was entered on behalf of the 1st Respondent by the High Court of Rivers State, Port Harcourt in suit No. PHC/381/2008 between Tamstel Nigeria Limited vs. Real Dredging and Marine Limited, Etekamba Nsa, First Inland Bank Plc, Alala Mines Limited, Buz & Company, First Bank of Nigeria Plc and Victor Buzugbe delivered by Honourable Justice S.H. Aprioku of the Rivers State High Court, Port Harcourt on the 15th day of May, 2008 in the sum of N62,400,000.00 (Sixty-Two Million, Four Hundred Thousand Naira) with interest at the rate of 17% per annum until judgment sum is paid.

2. By a Notice of Appeal dated 16th May, 2008 the Applicant challenged the said judgment.

3. The Appeal was struck out on 3rd day of June, 2013 for non-payment of appropriate filing fees.

4. The Applicant filed fresh Motions for leave to appeal and for stay of execution. The motions were struck out on 30th January, 2014 by this Honourable Court due to some irregularity.

5. The Applicant subsequently filed Motions dated 31st January, 2014 for leave to Appeal and for stay of execution at the Court of Appeal.

6. The 1st Respondent and the 2nd set of Respondents were aware of the applications dated 31st January, 2014 which were pending before the Court of Appeal.

7. The 1st Respondent and the 2nd set of Respondents despite being aware of the pending application for leave to Appeal and Stay of Execution proceeded to levy execution on the Applicant's goods chattels and property on the 4th of February, 2014.

8. The judgment sum upon which the writ of attachment dated 4th June, 2013 issued was fraudulent.

**Particulars**

I. The judgment sum was N62,400,000.00 with interest at a rate of 17% per annum with effect from 15th May, 2008 till judgment sum is liquidated.

II. The writ of attachment was for the sum of N221, 571,100.00 as at the 4th day of June, 2013.

III. The amount for which the writ of attachment as issued was fraudulent and bogus.

9. The fraudulent sum upon which the execution and attachment were purportedly carried out has rendered the said execution, attachment and all other steps taken by the 1st Respondent and the 2nd set of Respondents as incompetent and void ab initio and liable to be set aside."

The factsbuttressing the prayers are as averred in the 33 paragraph affidavit deposed to by one GodsPower Omokwe, the Senior Legal Officer of the Applicant and as shown in the Exhibits attached thereto.

Also in support of the Motion are Further Affidavit of 9 paragraphs filed on the 28th March, 2014 deposed to by one Collins Chikere Esq; a 2nd Further Affidavit of 10 paragraphs sworn to by Oluchukwu Ulasi Esq, a Legal Practitioner in the Law Firm of the Applicant's Learned Senior Counsel, filed on the 25th February, 2016 a 3rd Further Affidavit of 20 paragraph deposed to by the same Oluchukwu Ulasi Esq; filed on 14/11/2016. Pursuant to the order this Court, the Applicant filed its Written Address in support of the Motion on the 14th November, 2016. 

The 1st Respondent did not file a counter-affidavit but rather opposed the application on grounds of law. It then filed its Written Address on Points of Law on the 3rd December, 2016.

The rest Respondents did not file any counter-affidavit nor written addresses.

The issues propounded by the Applicant for determination herein are thus:

1. Whether the execution levied on the Applicant while the application for stay of execution was pending was not invalid and incompetent.

2. Whether from the circumstances the Honourable Court can set aside the execution that was carried out pursuant to the Writ of Fifa that was issued for the sum of N221,571,100.00.

3. Whether the Honourable Court can stay further execution of the judgment of the Lower Court.

The learned Senior Counsel for the Applicant, Mrs, M. A. Essien, S.A.N; in the argument in support dealt with issues one and two together as they are intertwined. She submitted that despite the pending application, the 1st Respondent and the Sheriff's Office executed the judgment as articulated in paragraphs 10, 15, 16, and 18 of the affidavit in support, and, Exhibit H.

The Learned Senior Counsel placed reliance on the decision in Vaswani Trading Company vs. Savalakh Company (1972) NSCC page 692 at page 698 where a Motion for Stay of Execution was pending before the Supreme Court when the Respondents therein executed the judgment. The Supreme Court held that the action was an abuse of Court process and one which tended to stifle the exercise of the Supreme Court's discretion. The LearnedSenior Counsel then contended that a party who has been served with an application for stay of execution should not execute the judgment or deal with the *res* in such a manner as to render the application for stay nugatory. She further relied on UBA vs. Fajebe Foods (1994) 5 NWLR Part 344 page 325 and 345-346 paragraphs D-A; Vulcan Gases Ltd vs. G. F. Ind. A-G. (2001) 9 NWLR Part 719 page 610 at 652 paragraphs B-C; and, stressed that fraud, in whatever form it presents itself, vitiates anything it taints, therefore, the execution that was carried out based on the Writ of Execution was fraudulent and ought to be set aside.

The Learned Senior Counsel made reference to paragraphs 7-9 of the affidavit in support and Exhibits C, D, E, F, and G, and, submitted that the judgment sum was N62,400,000, therefore, the sum of N221,571,100.00 upon which the Writ of Fifa was issued was bogus and fraudulent. She computed the time from the date of the 15th of May, 2008 when the judgment was delivered and entered in the sum of N62,400,000.00 with interest at the rate of 17% per annum with effect from the said 15/5/2008 to the date of 4th June, 2013, when the Writ of Fifawas issued, and, submitted that it was a period 5 years and 26 days. She contended that the simple interest at the rate of 17% per annum on the judgment sum for that period of 5 years and 26 days came to N53,793,168.00. She explicated that if the interest sum is added to the judgment sum, the sum would come to a total of N116,193,168.00 but, curiously, execution was levied for the sum of N221,571,100.00 as indicated in paragraph 13 of the affidavit in support and the same was not refuted by the 1st and 2nd Respondents.

The Learned Senior Counsel pointedly argued that the execution was clearly fraudulent and that fraud rendered the Writ of Execution fundamentally defective and incompetent, therefore, all the steps taken pursuant to the same are a nullity. The execution was fraudulent and a nullity *ab initio*. It was further argued that despite having levied execution, the 1st Respondent/Respondent still commenced Garnishee proceedings at the High Court of Rivers State which the Applicant had equally applied to be set aside as shown at paragraph 8 of the 3rd Further Affidavit filed on 14/11/2016, and, Exhibit M. She then urged that these issues beresolved in favour of the Appellant/ Applicant.

On the third issue, "Whether this Court can stay further execution of the judgment of the Lower Court, the Learned Senior Counsel, cited the cases of American Cyanamid vs. Ethicon Ltd (1975) A. C. 396; Ojukwu vs. Governor of Lagos State (1969) (sic) 1 NWLR 39; Vaswani Trading & Co. vs. Savalakh & Co. (1972) All NWLR 483; Comex Ltd vs. N.A.B. Ltd (1997) 3 NWLR Part 496 page 643 and Martins vs. Nicannar (1988) 2 NWLR Part 74 page 745, and, submitted that grant of stay of execution is discretionary which the Court must exercise judicially and judiciously having regards to the facts and circumstances of each case. The Court is guided primarily by the need not only to preserve the subject matter of the appeal but also the need to preserve the Applicant itself who must live in order to exercise its constitutional right of appeal. The Learned Senior Counsel further placed reliance on the decisions in Obeya Memorial Specialist Hospital V. A-G, Federation (1987) 2 NSCC page 961 and Owena Bank Nig. Plc. vs. Olagunji (1999) 13 NWLR Part 634 page 268 and emphasised that in considering an application of thisnature, the Court must be satisfied that (i) there is a valid pending appeal which raises substantial and arguable issues; (ii) special and exceptional circumstances must exist; (iii) the Court will also consider the balance of convenience and (iv) undertaking to pay damages.

On the fact of valid pending appeal which raises substantial and argued issues, it was submitted that there is a valid Notice of Appeal filed alter extension of time was granted on the 31st October, 2016. Exhibit N attached to the 3rd Further Affidavit in support was referred to which the Learned Senior Counsel argued, raised several substantial and arguable issues of law and fact. She stated it is not the duty of the Court at this stage to enquire into the merit of the appeal. Once the Court is satisfied that there are strong arguable grounds of appeal, then the need to preserve the substance of the appeal becomes imperative.

The Learned Senior Counsel touched on the special circumstances demonstrated in this matter to warrant unconditional stay particularly the facts averred at paragraphs 13 (ii) and 13 (iii) of the 3rd Further Affidavit in support where it wasshown that the 1st Respondent /Respondent will be unable to repay the judgment sum if it is given to it. She stated that the grounds of appeal are *prima facie* arguable and raised substantial grounds of law based on Exhibit N. She relied on the principles in Sirpi Alusteel Constr. (Nig.) Ltd Vs Snig Nig. Ltd (2000) 2 NWLR Part 644 page 231 at 238-239.

The third circumstance is that the amount involved is a colossal sum of money. The Learned Senior Counsel further drew the attention of this Court to the case of Imani & Sons Ltd vs. Bill Construction Co. Ltd (1999) 7 NWLR Part 609 page 135 at 142, paragraph F, per Oguntade, J.C.A, (as he then was). Further, she stressed that there is evidence before this Court that the appeal, although struck out on grounds of inadequate filing fees, had been entered with Briefs duly filed. She referred to paragraph 26 and Exhibit K attached to the affidavit in support, and, paragraph 5 of the 3rd Further Affidavit, and, stated that the appeal would have been disposed of by now but for the issue of filing fees raised as a consequence of Ibeabuchi vs. Ikpoko (supra). The learned Senior Counsel, further stressed thatdespite the pending applications for stay of execution, the 1st Respondent commenced Garnishee proceedings in utter contempt of the process of this Court averred at paragraphs 6-9 of the 3rd Further-Affidavit and Exhibits L and M. The Learned Senior Counsel also referred to Nigerian Brewies vs. Dumuje (2016) 8 NWLR Part 1515 page 536 at 609-616where this Court held *inter-alia* that it is an abuse of Court process for a person to commence Garnishee proceedings when an application for stay of execution is pending. She, therefore, urged this Court to grant a further stay of execution pending appeal.

The 1st Respondent did not file a counter-affidavit, but, rather opposed the application on points of law only. The 1st Respondent's Written Address as ordered by this Court on 31/10/2016, was filed on 9/12/2016, and was adopted at the hearing of this application. The application was vehemently opposed for being incompetent on the ground that the Applicant increased the number of the parties on the motion paper contrary to the number of the parties contained in the Notice of Appeal.

Learned Counsel for the 1st Respondent, Isah Seidu, Esq; highlightedthat the Applicant increased the number of the Respondents suo motu by making the 2nd set of Respondents parties to the instant application. He placed reliance on the case law expressed in Bulama Mallam Sanusi vs. Bulana Modu (1994) 5 NWLR Part 347 page 732 at 739 paragraph C; and Ijebuzor vs. Nwabueze (1998) 8 NWLR Part 560 page 148 at 161 paragraph F where it was held that Counsel has no right to foist on a Court parties who are not originally parties in the matter. Such a unilateral action is against all known principles of justice.

He contended that there is no evidence before the Court that the 2nd set of Respondents were not parties to the original suit to quality as Respondents in the instant application. Therefore, the unilateral approach of the Applicant without any order of Court to the same effect renders this application incompetent ab initio and liable to dismissal. He argued that this application negates the provisions of Order 6 Rule 2(1) of the Court of Appeal Rules, 2011 and the same should be dismissed in limine. He further referred to the case of Obi vs. Etiaba (2015) 6 NWLR Part 1455 page 377 at 389-390 paragraph E-B; and 399 paragraphs A-C

In the alternative, the 1st Respondent's Learned Counsel referred to paragraphs 5, 6 and 7 of the affidavit in support of the Applicant's Motion filed on 5/3/2014 where the Applicant conceded that at the time of filing this application, it had pending, an application for leave to appeal yet to be argued and granted. He then made reference to the cases of Famu and 2 ors vs. Kassim and 2 Ors (2012) 11 SC pages 68-69 and Dayo Adeleye Mining & Consulting Ltd vs. North-South Extractive Company Limited (2009) ALL FWLR Part 422 page 1127 at 1149 where Supreme Court held that the prayer for stay of execution is rather premature as it has no basis, that is to say, a lis extant upon which it can be raised. He argued that there is no pending appeal in the matter, the same having been dismissed on 21/6/2011. Regarding the contention that the application for extension of time to seek leave to appeal, etc, indeed for trinity prayers, is yet to be heard and granted, learned Counsel argued that the first condition for the said application to stand is flawed. The law is trite that where there is no pending appeal in a matter, an application for stay of proceedings or execution will not be granted, for being incompetent, and, misconceived.

It was further argued that this application has no basis having regards to grounds 3, 4, 5, 6 and 7 of the application and paragraphs 5, 6 and 7 of the affidavit in support of the said application.

He contended that it is a grievous conduct to seek for the stay of proceedings of a trial Court which is contingent on filing a Notice of Appeal while leave to file such an appeal is yet to be granted. Therefore, the application being grossly incompetent on the face of it, should be dismissed in limine by this Court.

The Applicant filed a Reply on Points of Law on 21/12/2016 and, then argued in respect of the number of the Respondents on the Motion paper, that Exhibit N, the Notice of Appeal, before the Court shows the Respondents to the appeal. It was submitted that it is trite that when the allegations of the nature set out in the Appellant's application are made, those persons should be served (to observe the principles of fair hearing) and, that is why the application has a different heading relating to them thus:

"IN RE: IN THE MATTER OF THE ATTACHMENT OF THE GOODS AND CHATTELS OF THE JUDGMENT DEBTOR/APPLICANT ON THE 4TH DAY OF FEBRUARY, 2014 BY THE SHERIFF, HIGH COURT OF RIVERS STATE, PORT HARCOURT, AND THE DEPUTY SHERIFF, HIGH COURT OF RIVERS STATE, PORT-HARCOURT."

It was contended that the Notice of Appeal is clear as to who the parties thereto are, therefore, the cases of Sanusi vs. Modu (supra); Ifebuzor vs. Nwabueze (supra) and Obi vs. Etiaba (supra)are inapplicable and quoted out of context.

In respect of the contention that there was no pending Notice of Appeal filed by the Applicant as at the time of filing this application, it was responded that extension of time to appeal against the final judgment was sought and granted on the 31st October 2016. It was stated that an application is deemed argued on the day it is moved, therefore, what is material is that as at the time of moving of this application, the extension of time has been granted and there is a valid pending appeal. It was further stressed that what is material is the position as at the time the application is moved rather than when it was filed. The Learned Senior Counsel argued that the cases relied upon by the 1st Respondent in this respect are equally inapplicable in that the Applicant has filed its Notice of Appeal and the Appeal is valid and remains pending before this Court. Thus, the Applicant's application is competent and has no defects whatsoever.

Now considering the preliminary issues raised by the 1st Respondent regarding raising the number of the parties in the instant application contrary to the numbers shown in the Notice of Appeal, it is imperative to observe that the present application relates to the execution levied on the Applicant's goods, chattels and property on the 4th of February, 2014 at the instance of the 1st Respondent and the 2nd set of Respondents. Some of the orders sought in the present application are thus; "an order setting aside the entire execution conducted by the 1st Respondent and the 2nd set of Respondents, pursuant to the said judgment of 15th May, 2008, on the 4th of February, 2014 and the Writ of Attachment and Sale of Goods and Chattels issued against the Applicant dated the 4th day of June, 2013; an order releasing the Chattels and property in the inventory (Exhibit "H'') which are presently in the custody of the 2nd set of Respondents; and, an order declaring null and void the execution levied against the Applicant by the 1st Respondent and 2nd set of Respondents on the 4th day of February, 2014 as same was done fraudulently.

It is, therefore, prudent at this juncture to take cognisance of the decision of this Court in ABC Merchant Bank (Nig.) Ltd. vs. Panalpina World Transport (Nig.) Ltd. (2005) 4 NWLR Part 915 page 374, per Aderemi J.C.A; (as he then was) where it was expressed that a judgment Creditor and a Judgment Debtor are the persons respectively entitled to the benefit of, and liable under an enforceable judgment or order. The Sheriff who is an officer of the Court in the performance of his duty in relation to execution of judgment has as his duties and liabilities generally under the Writ in three fold, namely;

1. To the judgment Creditor, to obey the Writ and any lawful instructions that has been given to him;

2. To the judgment Debtor, not to do any act he is not authorised so to do;

3. To the Court, to make a return on the Writ if he is required so to do.

The case of Domine vs. Grimsdall (1937) AER 119 was referenced therein and in which it was established thatit is the law that the Sheriff or Bailiff or the officer charged with execution of judgment can be sued by the Judgment Debtor or Judgment Creditor for:

a) Illegal execution, e.g; an error in the levy;

b) Irregular execution e.g, levy by an unauthorised officer or;

c) Excessive execution.

The officer charged with the execution can also be sued by the Judgment Creditor for failing to protect his/her interests. See Slated vs. Hawley (1845) 15 M & W 757 and Pitch vs. King (1844).

It is evident in the instant proceeding that grave allegations of wrongful or illegal and excessive execution were made against the 1st Respondent and the 2nd set of Respondents. The Supreme Court, in Adisa vs. Oyinwola (2000) 10 NWLR Part 674 page 116, succinctly held that it is the duty of the plaintiff to bring to Court a party whose presence is crucial to the resolution of his case. Where he failed to do so, the appellate Court would strike out the action or order a retrial of the action. The essence being that only the plaintiff can decide on the person he believes he has right of relief against and then institute an action against him before the Court, though a person whose interest may be affected by the outcome of the case may apply to join as a co-defendant.

See Alhaji Salisu Ibrahim vs. Adaji Ojonye (2011) LPELR-CA/K/350/2016.

The same principle applies to applications by Applicants to set aside an execution of judgment already levied by the Judgment Creditor via the Sheriff or Bailiff of the Court. In Fabunmi vs. Oyewusi (1990) 6 NWLR Part 159 page 737, it was held that the Deputy Sheriff is the agent of the Judgment Creditor for the purposes of levying execution of the Judgment of the Court.

Also, in Re The Debtor vs. Goacher (1979) 1 All E. R. 870, it was held that the Sheriff is not simply an agent of the Judgment Creditor but has wider responsibilities which includes duties towards the official receiver or trustee in bankruptcy. As an agent of the Judgment Creditor, his name may also be mentioned in the application for setting aside an execution of judgment already levied by him. It is trite law mere joinder of his name will not vitiate or void the process. However, since the Sheriff, the Deputy Sheriffs and the Baliffs were named as the officers critical to the entire process of execution of the judgments of the Court and since they can be sued for wrongful, illegal and excessive execution, it does not matter whether the proceeding was commenced by way of Motion with their names mentioned therein. The execution was allegedly levied while the Applicant's Motion on Notice for an order of stay of execution Court is presumably pending before this Court. See also the case of Bello vs. INEC (2010) 8 NWLR Part 1196 page 342 where the Supreme Court expressed that it is settled that no cause or matter shall be defeated by reason of misjoinder or non-joinder of parties and the Court may in every cause or matter deal with matter in controversy so far, as regards the rights and interests of the parties actually before it.

The misjoinder is an irregularly that does not affect the competence or jurisdiction of the Court to adjudicate on the matter. On this premise I resolve the first limb of the 1st Respondent's objection in favour of the Applicant.

The second limb of the objection is that as at the time of filing the Motion for stay of execution by the Applicant on the 5th March, 2014, there was no pending appeal which absolutely rendered their said Motion filed pending appeal incompetent. To resolve this, it may be necessary hereat to beam on the decision in Intercontractors vs. UAC (1988) NWLR Part 76 page 303, per Karibi-Whyte, J.S.C; where it was stated that every judgment takes effect on pronouncement. A Judgment Debtor seeking to stay the execution must show that he is challenging the judgment, or is asking for time to comply with the terms of the judgment. If it is a challenge of the judgment, a Notice of Appeal ought to have been filed, or will, on undertaking, be filed. See Oladapo V. ACB (1951) 13 WACA 110. See also the decision of this Court in Shinning Star Nigeria Ltd & anor vs. A. K. S. Steel Nigeria Ltd & ors (2010) LPELR CA/L/558M/2009, per Saulawa, J.C.A; where the Supreme Court case of Oladapo vs. ACB (supra) was referred to. It was recognised that although the general principle is that for an application for stay of execution or proceedings to be worthy of being granted, it must be predicated upon certain grounds which include that there must have been filed a valid and pending appeal, however, an application for stay could be granted in exceptional circumstances without any pending appeal.

Further, in the case of Nigerian Agricultural Co-operative Bank Ltd. vs. Ozoemelam (2016) LPELR-26051 (SC), the Supreme Court, per Ngwuta, J.S.C; reiterated the principle that an application for stay of execution pending the determination of appeal presupposes that an appeal had been filed before or simultaneously with the application. After all, a major consideration in the application is whether or not there are arguable grounds of appeal. Be that as it may; in exceptional or appropriate circumstances, the order for stay may be granted when the appeal had not been lodged upon an undertaking to file the Notice of Appeal without delay. See NDLEA vs. Okorodudu (1997) 3 NWLR Part 492 page 221; Fatoyinbo vs. Osadeyi (2002) 5 SC Part 11 page 1.  
All these established that even with or without a pending Notice of Appeal, an application for stay of execution can be considered by the Court where there is an undertaking by the Applicant to file the Notice or there is already pending, an application for leave to appeal or for extension of time to appeal which is a clear manifestation of the Applicant's eagerness or intention or a seeming undertaking to file the Notice of Appeal the moment the order of the Court granting leave or extension of time to appeal is made therein.

In the instant application, the Applicant in paragraph 10 of its 3rd Further Affidavit in support of this Motion filed on 14/11/2016 averred that on the 31st October, 2016, and consequent upon the extension of time to appeal against the judgment of the lower Court granted by this Court, the Applicant filed a Notice of Appeal on the 1st November, 2016 attached as Exhibit "N" thereto.

What matters is the state of events at the time of considering the application or granting the order for stay of execution. At the time of consideration of this application, there was already filed, a Notice of Appeal by the Applicant pending before his Court.

In Nwabueze vs. Nwosu (1988) NWLR Part 88 page 257, the Supreme Court held the Court has discretion to grant stay of execution on being satisfied that there are exceptional circumstances which warrant the exercise of the Court's discretion in the application's favour. This is so whether there is an appeal pending or not. All these evidently emasculated the contentions of the 1st Respondent under the second limb of its objection, and, as such, this Court is presented with no further option than to overrule the preliminary objection raised by it. Accordingly, the preliminary objection raised by the 1st Respondent is hereby disallowed.

In considering the first and second issues raised by the Applicant, that is to say, "Whether the execution levied on the Applicant while the application for stay of execution was pending was not invalid and incompetent, and "Whether from the circumstances the Honourable Court can set aside the execution that was carried out pursuant to the Writ of Fifa that was issued for the sum of N221,571,100.00, recourse should be had to the principle laid down in Vaswani Trading Co. vs. Savalakh and Co. (1972) All N.L.R 922 where the Writ was executed and possession wrested from the applicants whilst their Motion to the Court for a stay of execution was pending and awaiting a date to be assigned by the Court for the hearing of the application. The Supreme Court held that in the circumstances of the case, the action of the Respondents constitute an abuse of the process of the Court and that it was idle for the Respondents to argue that they were not aware of the pending proceedings in the Court. The Supreme Court further remarked that they were so aware, and even if that were not so the law clearly makes the Deputy Sheriff their agent in these matters by virtue of Order 11 Rule 29 of the Judgments(Enforcement) Rules, Cap. 189. The Supreme Court compared the scenario therein with the circumstances in Shekoni vs. Ojoko (1954) 14 W.A.C.A page 504 where the West African Court of Appeal, per Foster-Sulton, P, observed that: "In view of the fact that there was an appeal pending in a suit involving ownership of the land which is the subject of the present suit the proper course for the learned trial Judge to have adopted would have been to adjourn the case pending determination of the appeal with liberty to either side to apply for the hearing to be continued. To do otherwise would work an injustice to the appellants in the event of their appeal in Ekiti Divisional Native Court Suit No. 2 of 1949 being successful, as they could not then renew their claim in their present suit."

In the present application, the Applicant at paragraphs 5, 6, 7, 8, 9, 10, 11 and 12 chronicled the procedural steps it took immediately after the judgment of the lower Court was delivered on the 15th May, 2008 in challenging the said judgment and the Motions it later filed on the 4th June, 2013 and 31st January, 2014 respectively for leave to appeal and for stay of execution annexed thereto as Exhibits B, B1, C and D. It also demonstrated how it wrote Exhibits E and F, being letters dated the 30th January, 2014 and 3rd February, 2014 intimating the 2nd set of Respondents of the pendency of its Motions for leave to appeal and stay of execution and that despite being aware of the pendency of the applications filed by it before this Court, the 1st Respondent and the 2nd set of Respondents still proceeded to levy execution against the Applicant pursuant to the Writ of Fifa dated the 4th June, 2013. Exhibit B was the initial Notice of Appeal dated the 16th May, 2008 but which was struck out by this Court on the 3rd June, 2013 for payment of insufficient filing fees at the lower Court.

It is, indisputably, situations such as this that titillated the Supreme Court in Vaswani case (supra) and other cases to declare them as constituting abuse of process of the Court. Section 3 of the Sheriff and Civil Process Act provides for the appointment of the Sheriff.

However, the office and functions of the Sheriff are usually carried out by the Chief Registrar of each State Court while a Deputy Chief Registrar or Chief Magistrate is appointed to perform the functions of a Deputy Sheriff. It is instructive to note that neither the 1st Respondent nor the 2nd set of Respondents filed a counter-affidavit challenging the facts asserted in the Applicant's affidavits in support of its Motion. They did not deny the pendency of the Motion for stay of execution filed by the Applicant at the time they proceeded to levy execution of the judgment. The locus classicus on execution during pendency of Motion for stay, i.e. Vaswani case (supra) entrenched that to levy execution of judgment over which an appeal and Motion for stay are pending in the Court is an abuse of Court process.

Furthermore, Exhibits A and A1 indicate that the judgment sum was N62,400,000 (Six Two Million Four Hundred Thousand Naira only with 17% interest per annum on the judgment sum and N10,000.00 (Ten thousand Naira) cost against each of the defendants. Paragraphs 12 and 13 of the affidavit in support of this Motion portrayed that the Writ of Fifa dated the 4th June, 2013 contained the sum of N221,571,100.00 (Two Hundred and Twenty One Million Five Hundred and Seventy One Thousand, One Hundred Naira) only, instead of the judgment sum of N62,400,000.

In paragraph 13, it was further explained from the 15th May, 2008 when the judgment was delivered till the 4th June, 2013 when the Writ of Fifa was issued, it was a period of 5 years and 26 days and when the simple interest rate of 17% per annum is computed for that period of 5 years and 26 days on the said judgment of N62,400,000.00, the interest sum alone would come to a total of N53,793,168.00 and if added to the judgment sum, would have brought the total to N116,193,168.00, and not the sum of N221,571,100.00 stated on the Writ of Attachment.

Then, on the 4th February, 2014, the Bailiffs acting under the instructions of the 2nd set of Respondents levied execution on the chattels and property of the Applicant at its Aba Road Branch, Garrison, Port-Harcourt, Rivers State in a bid to recover the said sum of N221,571,100.00 as per Exhibit G, the Notice of Attachment.

However, it is surprising that neither the 1st Respondent nor the 2nd set of Respondents deemed it necessary to file a counter-affidavit refuting these allegations of grave nature levelled against them. These horrendous and piercing facts remain unchallenged before this Court. They depict that the sum levied is in excess of the original judgment award of N62,400,000.00 together with the 17% per annum interest on the judgment sum for the period of 5 years and 26 days, the judgment sum remained unliquidated.

The Writ issued by the 2nd set of Respondent at the instance of the 1st Respondent demanded an amount in excess of that which was due under the judgment. The execution issued was for a larger amount than was actually due,yet the 1st Respondent and 2nd set of Respondent did not give a hoot to immediately save their utterly discredited and shattered images by filing a counter-affidavit to straighten the facts. No explanation was offered as to why the phony and spurious figures were stated in Exhibit G. I totally agree that the bogus sum in excess of the judgment sum was deliberately stated in Exhibit G. This, undoubtedly, would have the effect of rendering Exhibit G null and void and, I so hold. In the face of the foregoing, I hereby resolve issues 1 and 2 in favour of the Applicant.

Regarding the third issue, i.e., "Whether the Honourable Court can stay further execution of the judgment of the lower Court", it is trite that when it comes to issue of stay of execution the Court of Appeal and indeed any Court as stated of the Supreme Court in Vaswani Case (supra) will not make the practice of depriving a successful litigant of the fruits of his success unless under very special circumstances.

However, in Odedeyi vs. Odedeyi (2000) 3 NWLR Part 650 page 655,the Supreme Court, per Belgore, J. S. C.,(as he then was) expounded that "the special circumstances" that can be advanced to justify a stay of execution is very wide and its category is not closed. 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 subject matter of the appeal, is at the 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 discretion will grant a stay of execution pending determination of the appeal.

The word "special" or strong is taken 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.

It has been restated in a plethora of cases by the apex Court that the purpose of a stay of execution, proceedings or injunction is to preserve res and to maintain the status quo pending the determination of appeal.

The Court's discretion to grant stay of execution must be exercised judiciously and it would be so exercised where it is shown that the appeal involves substantial points of law necessitating the parties and issues being in status quo until the legal issues are resolved. In Ajomale vs. Yaduat (2) (1991) 5 NWLR Part 191 page 266, the Supreme Court stated that a stay may, in appropriate cases be granted on basis of balance of hardship; not on mere convenience of one Party.

In Shell Petroleum Development Company of Nigeria Limited vs. Ojiowhor Monday Amadi & Ors (2011) LPELR-3204 (SC), the Supreme Court reiterated that in exercising its discretion in an application for stay of execution the Court is enjoined to consider some conditions in granting or refusing the application, some of which are: (1) The grounds of appeal must raise substantial legal issues in an area of law that is novel or recondite; (2) The application must disclose special circumstances why the judgment should be stayed; (3) The application must disclose why matters should be put in status quo or preserve the res so as not to render the appeal nugatory.

It further stated that in considering whether the ground of appeal discloses substantial issue of law to be determined, it is not the duty of the Court at this stage to consider whether the appeal will succeed or not. It is sufficient if the ground raised a point of law on the face of it.

Also in Shinning Star Nigeria Limited & Anor vs. A.K.S Steel Nigeria Limited & Ors 2016 LPELR-4957 (CA), it was stated that granting an application for stay of execution or proceeding must be predicated upon the ground that there must have been a valid pending appeal.

However in Oladapo vs. ACB Ltd (1980) 13 WACA 110, NBN Ltd vs. NET Ltd (1986) 3 NWLR Part 31 page 667 it was held an application for stay would be granted in exceptional circumstances without any pending appeal which was asserted by the Applicant that a valid Notice of Appeal was filed after extension of time was granted to it on the 31st October, 2016 which has attached as Exhibit 'N' to the 3rd further Affidavit in support of this application. The grounds stated therein appear to me to have raised substantial and arguable issues of law and fact. Grounds 1, 2, 3 and 4 of the Applicants Grounds of Appeal and Exhibit 'N' obviously raised issues of law and fact. If Order 35 Rule 4 of the Rivers State High Court (Civil Procedure) Rules, 2010 authorised the High Court to award not less than 10% per annum and the 1st Respondent claimed post judgment interest at the rate of 10% per annum until the judgment debt is liquidated, but the trial Court awarded 17% in excess of what was claimed by the Claimant, then a lot of explanations in law need to be made at the time of hearing the appeal.

The law permitting a Court of law to award more than is claimed must be presented by the party arguing in support.

Also, where the *res* is established to be likely destroyed, damaged, or annihilated before the final determination of the substantive matter, the Court shall grant a stay. Further, in Sirpi Alusteel Construction (Nig.) Ltd vs. Snig (Nig.) Ltd (supra) cited by the Applicant's Senior Counsel, this Court laid down some of the conditions that ought to be considered thus:

(1) Whether if the appeal succeeds, the Applicant will not be able to reap the benefit of the judgment on appeal. See Wilson vs. Church (No. 2) (1978) 12 (H. 1) 454, 458 and (2) where the judgment is in respect money and costs whether there is a reasonable possibility of recovering them from the Respondent if the appeal succeeds. See Lawrence Ogobegu Ebegbuna vs. James Omotunde Ebegbuna (1974) 3 WSCA 23. It was noted therein that poverty is not a special ground for granting a stay of execution except where the effect will be to deprive the Appellant of the means of prosecuting his appeal. The Court seised with the question as to whether or not to grant a stay will look at the surrounding factors; the Court must by force of circumstance i.e. of necessity aim at preserving the res if it is capable of destruction or ruination should it change hands. Generally in the case of money judgment where the Applicant makes out a case convincing the Court that the Respondent will be unable to pay should the appeal be successful, the Court will be guided by prudence to invariably grant a motion for stay. In the Applicant's 3rd Further Affidavit, the Applicant averred that its assets and properties are still in the custody of the 2nd sets of Respondents and this is seriously affecting the business and operations of the Applicant. If further execution is allowed, it will have further adverse effect on the operation of the Applicant. The judgment sum of N62,400,000.00 plus interest at the rate of 17% per annum is a colossal sum of money. The 1st Respondent will be unable to pay the judgment sum if it is given to it. It is necessary to point out that all these facts were not debunked by the 1st Respondent and 2nd set of Respondents.

After thorough examination and assessment of the facts and circumstances of this application, this Court is of the candid opinion that the conditions for grant of this sort of application exist herein and, I so hold. Consequently this application is hereby granted as follows:

1. The 1st Respondent and the 2nd set of Respondents are here restricted by the Order of this Court from further levying execution of the judgment of this High Court of Rivers State, Port Harcourt in suit No. PHC/381/2008 between Tamstel Nigeria Limited vs. Real Dredging and Marine Limited, Etekamba Nsa, First Inland Bank Plc, Alala Mines Limited, Buz & Company, First Bank of Nigeria Plc and Victor Buzegbu delivered on 15th day of May, 2008 by Honourable Justice S. H. Aprioku.

2. An Order staying further execution of the judgment of the High Court of Rivers State, Port Harcourt in Suit No. PHC/381/2008 between Tamstel Nigeria Limited vs. Real Dredging and Marine Limited, Etekamba Nsa, First Inland Bank Plc, Alala Mines Limited, Buz & Company, First Bank of Nigeria Plc and Victor Buzegbu delivered on 15th day of May, 2008 by Honourable Justice S. H. Aprioku.

3. An Order is hereby granted staying further execution and or suspending the sale of Appellant's Chattels and property in the inventory (Exhibit 'H'), which were attached, seized and carted away by the 2nd set of Respondents on the 4th day of February, 2014 in purport of the execution of a Writ of Attachment and Sale of Goods and Chattels dated the 4th day of June, 2013 pursuant to the said judgment with judgment sum of N221,571,1000.00 (Two Hundred and Twenty-One Million, Five Hundred and Seventy-One Thousand, One Hundred Naira).

4. The entire execution conducted by the 1st Respondent and the 2nd set of Respondent pursuant to the said judgment of 15th May, 2008, on the 4th of February, 2014 and the Writ of Attachment and Sale of Goods and chattels issued against the Applicant dated the 4th day of June, 2013 is hereby set aside for constituting abuse of process of the Court.

5. It is hereby ordered that the chattels and property in the inventory (Exhibit 'H') which are presently in the custody of the 2nd set of Respondents be released to the Applicant.

6. The execution levied against the Applicant by the 1st and 2nd set of Respondents on the 4th February, 2014 is hereby declared null and void.

I make no order as to costs.

**CORDELIA IFEOMA JOMBO-OFO, J.C.A.:**

I agree

**BITRUS GYARAZAMA SANGA, J.C.A.:**

I agree.