

1. ALHAJA SAFURAT OLUFUNKE YAKUBL
2. ALHAJ 1 MOMODIJ OVVDINA

V

1. BAALE SSULAIMAH Y.O. ASHIPA
2. YEKINI ASHIPA
3. MUDASHIRU YARO
4. GANI ASHIPA
5. KOLA OLUSHIN
6. SAKA OWODINA
7. FATAI ASHIPA
8. PERSONS UNKNOWN

COURT OF APPEAL
(LAGOS DIVISION)

CA/L/423/97

GEORGE ADESOLA OGUNTADE J.C.A. (President)

IGNATIUS CHUKWUDI ACHOLONU J.C.A. (Read the Leading Judgment)

PIOUS OLAYIWOLA ADEREMI. J.C.A.

THURSDAY 17TH JUNE.

APPEAL - Stay of execution pending appeal – Discretion of court in respect of - need to exercise wisely

APPEAL - Stay of execution pending appeal - Purpose and rationale for grant of

APPEAL - Stay of execution pending appeal - Whether can be granted for an executed act.

PRACTICE AND PROCEDURE – Stay of execution pending appeal - Purpose and rationale for grant of.

PRACTICE AND PROCEDURE - Stay of execution pending appeal - Whether can be granted for an executed act.

STAY OF EXECUTION- Stay of execution pending appeal – Discretion of court in respect of- Need of exercise wisely.

STAY OF EXECUTION – Stay of execution pending appeal – purpose and rationale for grant of.

STAY OF EXECUTION – Stay of execution pending appeal – weather can be granted for an executed act.

issue:

Whether the exercise of discretion of stay of further execution ought to have been made if there is nothing left to execute, the full execution having been duly carried out as alleged.

Facts:

The appellants' claim before the High Court was for declaration of title, damages for trespass and injunction in respect of a piece and parcel of land.

in the course of trial of the main case counsel for the respondents died and the Ashipa family then briefed one John Rotimi Esq. to file an application for substitution of the said counsel. The trial court in its ruling dismissed the application for charge for counsel. It also dismissed an application to substitute Yekini Ashipa for late Jimoh Oseni Ashipa and Gani Ashipa for late Daura Yaro. This made the respondent to file an appeal and meanwhile filed a motion for stay of proceedings pending the determination of appeal. Notwithstanding that an appeal had been filed and there was a motion for stay of further proceedings the trial court continued with the case of the respondents for not continuing with the matter.

At this stage the respondents, in particular 1st, 5th and 6th respondents, filed another appeal and filed another motion for stay of proceedings. The court went ahead regardless of some interlocutory proceedings filed to checkmate it as it was heedless by hearing the parties to the end of the case. He invited address by counsel to the parties, in the course of this seeming chaotic state of proceedings, the counsel for the 1st, 5th and 7th respondents sought to dismiss the case on the ground that it is statute-barred and the appellants had been guilty of laches and acquiescence. Judgment was ultimately in favour of the appellants. Dissatisfied, the respondents appealed and brought a motion for an order staying the execution of the judgment. The trial court granted an order staying further execution of the judgment of the trial court pending the determination of the appeal filed against it. Dissatisfied with the ruling the appellants appealed to the Court of Appeal.

Held (Unanimously allowing the appeal):

1. On whether an executed act can be stayed - A stay of execution cannot be granted for an executed matter but the court can set aside an execution that is not carried out properly. (P. 157, para E)
2. On the purpose and rationale for stay of execution –
The purpose of stay of execution or further execution is to ensure that an appeal that is worthy and contains substance and then is reasonable probability that the judgment of the lower court may not be upset is protected, in which case the Court of Appeal or any appellate court is not left with a dead baby if the res is destroyed or messed up and renders the appeal useless. The

intention is not and never to punish the successful party by adopting all manners of legal tricks and technicalities to deprive him of his just judgment and fruits of his victory. (P. 158. para. E-F)

3. On Exercise of discretion to order stay of execution –

The discretion to order a stay must be used wisely and the language employed must not be dubious or capable of double meaning or lend itself to varied interpretation. (P. 158, para, F)

Nigerian Cases Referred to in the judgment:

A.C.B. Ltd. v. Oba (1993) 7 NWLR (Pt. 304) 173

Fakoya v. Taiwo (1995)8 (NWLR (Pt. 413) 374

Gbadamosi v. Alete (1993) 2 NWLR (Pt. 273)113

Mbadugba v. Nwosu (1993) 9 NWLR (Pt. 315) 110

Nalsa and Team Association v. NNPC (1991)8 NWLR (Pt. 2 12)652

U.B.N Ltd v. Fajebe Foods (1994) NWLR Pt.344)325

Appeal:

This is was an appeal against the decision of the of the trial court granting stay off further execution. The court of appeal. In a unanimous decision, allowed the appeal .

History of the Case:

Couri oi Appeal

Division of the Court of Appeal to which the appeal wets brought: Court of Appeal. Lagos

Names of Justices that sat on the appeal: George Adesola Oguntade.

J.C.A. (Presided): Ignatius Chukwudi Pats-Acholonu. J.C.A. (Read the Leading Judgment) Pius Olayiwola Aderemi, J.C.A.

Appeal Nu.: CA/L/423/97

Dale of Judgment: Thursday, 17th June, 1999

Names of Counsel: Yusuf Alii. Esq.. SAN (with him. H.T. Fajimite, Esq.. K.K. Eleja, Esq. and T.K.O. Kareem Esq.) -for the Appellants

S.O.O. Olatunbosun — for the Respondents

High Court

Name of the High Court: High, Court. Lagos

Name of the Judge: B . o. Martins J.

Date of Ruling: Wednesday. 1 1th September. 1996

S.O.O. Olaiunbosun- farliu

Counsel

Yusuf Alii. Esq.. SAN (with him. H.T. Fajimite, Esq.. K.K. Eleja, Esq. and T.K.O. Kareem Esq.) -for the Appellants

S.O.O. Olatunbosun — for the Respondents

PATS-ACHOLONU J.C.A. (Delivering the Leading Judgment): This appeal arises from the Ruling of the learned trial Judge in a motion for stay of further execution of Judgment of Honorable Justice Martins delivered on 11/9/96. The Plaintiff appellants had claimed for declaration of Title, damages for trespass and injunction in respect of a piece and parcel of land. In course of trial of the main case in the court below counsel for tin; defendants died and the Ashipa family then briefed one John Rotimi Esq. to file an application for substitution of the said counsel. The learned trial Judge B.O. Martins in his Ruling dismissed the application (or change o! counsel. He also dismissed an application to substitute Yekini Ashipa for late Jimoh Oserii Ashipa and Gani Ashipa for late Daura Yaro. This made the defendants file an appeal and meanwhile filed a motion for stay of D proceeding,-, pending the determination of the appeal. Notwithstanding that an appeal had been filed and there was motion for stay of further proceedings Martins. J continued with the case and. went to close the case of the defendants for not continuing with the mutter. At this stage the defendants in, particular 1st. 5th and 6tf, defendant Respondents filed another appeal and filed yet another motion for stay of proceedings. The court went full ahead regardless of some interlocutory proceedings filed to checkmate him as he was heedless by hearing the parties to the end of the case. He invited address by counsel to the parties. In the course of this seeming chaotic state of Proceedings, the counsel for the 1st. 5th and 7th defendants sough; to dismiss the case on the ground that it is statute-barred and the plaintiffs had been guilty of Laches and acquiescence. Judgment was given to the Plaintiffs. The Respondents in the action as applicants in the court below brought a motion for an order staying the execution of that Honourable Court's Judgment dated 31/ 10/96. The appellants as Respondents filed a counter affidavit rebutting some of the averments contained in the affidavit in support. In his considered Ruling the learned trial Judge held as follows:

"If indeed execution has already been carried out by the Respondents as they claim, the Respondents thus no longer have anything to lose, " if however execution has not been fully carried out it is my opinion that further execution of the Judgment of Lordship Hon. Justice Martins be stayed. This, order is not to be used by the applicants to retake possession which has

been restored to the respondent but to halt further execution of the judgment. In consequence it is ordered that the Plaintiffs, or agents, including the members of the Nigeria " Police are hereby restrained from carrying out any further execution of the judgment of Honourable Justice Martins delivered on 11/9/ 96 pending the determination of the Appeal filed in this case"

Dissatisfied with the nature of the Ruling and due to the turnout of events the plaintiffs now appealed against that order staying further execution of the judgment given earlier on by Martins j., and failed 5 grounds in the notice of appeal from this framed two issue which are:

1. Whether the learned trial judge was right to have granted a stay of further execution in the circumstances of this case when there was nothing more to stay and the prayer granted was not sought for the respondents"
2. Whether the learned trial Judge was right to re-open the issue of trespass in her ruling when same had been decided by her learned brother in the main judgment which is now the subject of yet to be decided appeal filed by the Respondents"

The Respondents' brief is very verbose and seeks to inculcate non essentials of the questions to be answered by the Court. Having understood the facts of the case the real issue to be determined is whether the exercise of discretion of stay of further execution ought to have been made if there is nothing left to execute the full execution having been duly carried out as it is alleged.

On the 1st issue the argument of the counsel for the appellants is that nothing is left to be stayed. In the Certificate of Execution that is Form D signed by the Bailiff the following words appeared ...

"I did on the 12th of November. 1996 deliver full and peaceable possession to the Plaintiff of the premises named therein that is to say possession of the piece or parcel of land lying situate and being Igbo pg. 31 logbo Ayobo Village, Ikeja, Lagos State. Dated 14th of November, 1996".

Was there then a full execution in accordance with the judgment of the court below. A stay of course cannot be granted for executed matter but the court can set aside an execution mat is not carried out properly. This is not the prayer sought here. The appellant counsel in his submission cited the following authorities to show that to ground a stay there must be stated in the affidavit exceptional circumstances that would induce or convince the court to allow the application. In addition there must be substantial grounds of appeal all taken together to make the court accede to the request or prayer for stay. The following cases were cited Mbadughav. Nwosu (1993)9NWLR(Pt.315) 110 at 115; fakoya v. Taiwo(1995) 8 NWLR(Pt.413)374; UBN v. Fajebe Foods(1994)5 NWLR(Pt. 344) 325. The cornerstone of the appellants' case is that there is no more execution to be done because all the necessary execution in the spirit of the writ of fieri facias have been effectively carried out. It is most unfortunate that instead of arguing on the points raised in the issues for determination the Respondent more or less want to argue on the appeals that would be brought there after in this court for determination by the court. It is difficult to make sense out of the Respondents brief as counsel was more or less dwelling on the history of the land in dispute and who possessed it and in one point said that if the judgment was not nullified blood will flow. The whole exercise missed the point in contention.

What is there really to stay further? The court granted a stay of further? execution but was asked for a mere stay of execution and injunction. The appellants argued that the court not being a charitable organisation should have restricted itself to what was of it, and cited *Gbadamosi v. Alete* (1993)2 NWLR (pt. 273)113 of 120 *Nalsa and Team Associative v. NNPC* (1991)8 NWLR(pt. 212)652 at 679 ACB. *Ltd v. Oba* (1993) 7 NWLR(Pt.304)173 of 181. The Respondent In their application asked for the following prayers.

"An order of this Honourable Court staying the Execution of this Honourable Court's judgment dated 11/9/96 in this suit: No ID/11589 and also staying the Execution of all orders made thereunder i. e.

Order Declaring the plaintiffs as the person entitled to the statutory or customary Right of the Land in dispute.

An order Restraining any or All the Defendants /Appellants/Applicant either by themselves, Agent or servant privies from remaining on the Land or trespassing on the land which forms the subject matter of the suit

An order Awarding N4.000.00 costs in favour of the plaintiffs Respondents.

Any consequential order for possession, attachment and or *Fifa* pending the determination of the appeal already filed in the Court of Appeal, Lagos Division, Lagos dated the 27th. day of September. 1996"

In effect they were asked were the court to review the whole judgment and constitute itself into an appellate to rehear the case and give them judgment. This is an intolerable state-of-affair. The court below managed to make the order which is double edged in the following terms.

"If indeed execution has already been carried out by the respondents. As they claim, the Respondents thus no longer have nothing to lose. If however execution has not been fully carried out it is my option that further execution of the judgment of this Lordship Hon. Justice Martins be stayed".

The purpose of stay of execution or further execution is to ensure that an appeal that is worthy and contains substance and there is reasonable probability that the judgment of the lower court may be upset is protected. In which case the court of Appeal or any appellate court is not left with dead baby if the *res* is destroyed or messed up and renders the appeal useless. The intention is to not and never be to punish the successful party by adopting all manner of legal tricks and technicalities to deprive him of his just judgment and fruits of his victory. The discretion to order a stay must be used wisely and the language employed must not be dubious or capable of double meaning or lend itself to varied interpretation. It is important at this point to refer to a portion of the judgment that gave rise to application for suit and injunction.

"I now ask, were the plaintiffs in possession when the defendants entered the land in dispute'.¹ My answer is yes. from the totality of the evidence before me. Have the defendants shown any better title to enable them escape from being liable to the plaintiffs in trespass'. The answer to this is in the negative. The defendants did not deny going on the land. My view is fortified by the various receipts issued by the defendants to these people. See Exhibit T by the 1st defendant. See Exhibits 'J1', 'J2', 'J3', 'J4'. In a claim for a declaration of title the plaintiff can only succeed in obtaining the declaration from the court on the strength of his own case and not on the weakness of the defense. In this case, the plaintiffs have positively proved that they are entitled to the declaration, having regard to the evidence led under 5 ways of proving title or land."

The action was declaratory relief and damages for trespass. By full execution I understand that the losers are no longer on the land. Land is indestructible irrespective of who is in the land for the moment or at any time. It is immutable, it seems to me that the court below in its attempt to bend towards the respondents ostensibly to preserve the *res* made the order complained against. In a proper appeal on the main case if the Respondents succeed in appealing against the judgment the land will revert to them and nothing would have been lost if it is a bare land. The order of the court has, the ungainly features and characteristic of acceding to the prayers of people adjudged to be trespassers. Should they continue to be trespassers on the land? My answer is unequivocal No. It is important to tailor or link the order of the court below with the prayers asked for.

I have to look at the prayers of the Respondent in the court below to decide whether the application is equitable. I have already referred to it above. It does not strike me that they came with clean hands, in the circumstances, it is my view that the order of the court below with regards to the stay and injunction ought not to have been made, I think he should have made an order striking out the application to allow the appeal and set aside the Ruling of the court below and make an order striking out the application. There will be cost to appellant assessed N3.000.00.

OGUNTADE J.C.A.: I have had the advantage of reading in draft the judgment by my learned brother Acholonu, J.C.A. I agree with his reasoning and conclusion. I would also allow the appeal with N3.000.00 costs in favour of the appellant.

A.DEREMI J.C.A.: I have had the privilege of a preview of the judgment just delivered by my learned brother I. C. Pats-Acholonu. J.C.A. I agree with him that the appeal must succeed; consequently I also set aside the Ruling of the court below and order that the application be struck-out. I abide by the consequential order as to cost.

Appeal allowed.