

**IN THE CHIEF MAGISTRATE COURT OF RIVERS STATE OF NIGERIA
IN THE RUMUODOMAYA MAGISTERIAL DISTRICT
HOLDEN AT RUMUODOMAYA**

**BEFORE HIS WORSHIP B.H. ABE (MRS) ESQ., SITTING AT THE CHIEF
MAGISTRATE COURT 1 RUMUODOMAYA ON TUESDAY THE 28TH DAY OF
JANUARY, 2025**

RMC/SCC/14/2024

BETWEEN

MR. EGBUJIE UGO KENNEDY - **CLAIMANT**

VS.

MR. OBIORA CYRIL UMUNNA - **DEFENDANT**

Matter for Ruling

RULING

Facts

The applicant filed a motion on notice dated 2nd October, 2024, filed same day, praying the Court for the reliefs on the face of the motion paper as follows;

1. An order of this Honourable Court to stay further execution of the judgment of this Honourable Court delivered on the 3rd of July, 2024.
2. An order of this Honourable Court to stay further execution of the judgment through sales of the properties of the appellant/applicant/judgment debtor attached already, as shown in Exhibit B, pending the determination of the appeal.
3. For any other order as this Honourable Court shall deem fit to make in the circumstances.

Attached is an affidavit of 17 paragraphs, wherein the deponent, Obiora Cyril Umunna submitted as follows;

That during the pendency of this case he was in a medical facility, attached is his medical report Exhibit A1, his wife informed the respondent of same. No Court process was pasted at his house or at his place of work where his business is, he did not have access to his phone at the medical facility, the claimant called his wife and she told him he was ill.

The Court's judgment given on the 3rd July, 2024, has been executed, Exhibit B attached, is the inventory of stuff removed from his official address by the Court bailiff. He is now ready to pay the judgment creditor the money he borrowed from him and interest on it. He wants the goods seized to be returned to him.

Attached also is a written address dated 2nd October, 2024 and filed same day, wherein the applicant's counsel posited as follows;

Issue for determination

Whether this Court can grant a stay of further execution of its judgment by stopping the sale of the goods attached already?

He argued thus; that the intention of the judgment debtor is that he was not given fair hearing in this matter. That in the first place he was not aware of the pendency of the case and was not properly served.

The position of the law is very clear as opined in the case of Isokwa Motors (Nig.) Ltd. and United Bank for Africa DLL MJSC 2008 page 108 Ratio 3, the Court held; denial of fair hearing is a fundamental issue and where such denial exists the entire proceedings will be rendered a nullity.

It is our submission that the entire proceedings that led to the judgment is a nullity so we urge the Court to stay further execution pending the outcome of the appeal at the High Court. This point is further reiterated in the case of Iyabo vs. Effiong XI JSC 2007, page 141 ratio 3.

These are the issues of law been canvassed at the High Court, we therefore urge this Honourable Court to stay execution, by stopping the auction sales of the applicant's goods pending the outcome of the appeal.

It is our further submission that the judgment creditor did not comply with sections 21, 22, 23, 24 and 26 of the Sheriffs and Civil Process Act of 2004.

The respondent filed a counter affidavit of 21 paragraphs wherein the deponent, Chinyere Amadi submitted as follows;

That the claimant/respondent never called the defendant/applicant, he had access to his phone and was aware of the proceedings in this suit.

There is no counter affidavit challenging the affidavit of service of the bailiff.

The bailiff of Court served the processes on him. The defence appeared in Court and did not show up again, proof of service of all the Court's processes on the defendant is before the Court, served by substituted service with the leave of Court. The Court's judgment has been executed and cannot be stayed; the defendant cannot seek to stay an executed act. There is no appeal before the High Court, the motion is filed to deny the respondent the fruits of his judgment.

Attached to the counter affidavit is a written address dated the 21st October, 2024, wherein he posited as follows;

Issue for determination;

Whether this application is not liable to be dismissed?

We submit that this application filed by the defendant/applicant is frivolous and only intends to continue to frustrate the claimant from enjoying the fruits of his judgment.

Your Worship, it is incorrect that the defendant was not served with the processes of this Court. The defendant was served with the originating processes of this Court to the final address.

The law is that one of the ways of proof of service of process of the Court is by the affidavit of service of the bailiff of the Court. In fact, affidavit of the bailiff of the Court is prima facie proof of service of a process on a party. We refer this Court to Mohammed vs. Mustapha (1993) 5 NWLR (pt. 292) 222 @ 232; Chellarams Plc. & Anor vs. Adeyemi & Ors. (2018) LPELR – 46016 (CA).

Service by substituted means is another means of effecting service of process of the Court on parties. See Mark vs. Eke (1997) 11 NWLR (529) 501. This position of the law is re-echoed by Article 6 (5) – (8) of the Rivers State Small Claims Court Practice Direction 2024.

Your Worship, the claimant complied with the order of the Court for substituted service on the defendant, which made the defendant send a lawyer to verify the then ongoing proceedings of the Court in this case.

We submit therefore that the submission of the defendant that he was denied right of fair hearing for having not served him the processes of this case is misconceived and we urge this Court to discountenance it.

The law is that the only way to challenge affidavit of service of the bailiff of the Court in a matter is to file a counter affidavit. We refer this Court to Ndule vs. Ibeh (2015) LPELR – 24919 (CA); Ahmed vs. Ahmed & Ors (2013) LPELR 21143 (SC). The defendant failed to file any counter affidavit, thus failed in law to prove otherwise.

We contend that the application for stay of execution cannot be granted without a valid appeal. See Lajidu vs. Lajidu (1991) 1 NWLR (pt. 169) @ 645. There is no valid appeal by the defendant to warrant the Court to grant this application for stay of execution.

Your Worship, the law is that for a Court to grant a stay of execution, the applicant must show special circumstances for his appeal to succeed. See Lajidu vs. Lajidu (supra). The defendant/applicant failed to show any special circumstances to warrant the grant of stay of execution.

Issues for determination by this Court

1. Whether the Court can grant the stay of execution?
2. Whether there is any valid appeal against the Court's judgment in the substantive suit?
3. Whether the applicant was properly served with the Court's processes in the substantive suit?

COURT

The respondent submits that the Court's judgment has been executed, and so the Court cannot grant the stay of execution.

I agree with the respondent, you cannot put something on nothing. If the Court's judgment has been executed what will be left to stay or grant a stay of execution for?

It is this Court's practice to always ascertain proof of service of the Court's summons on the defendant first before commencing with the hearing of any matter before the Court.

The order for substituted service granted by this Court is dated 30th April, 2024, the Court ordered that the defendant/applicant be served with all the Court's processes via substituted service, his WhatsApp number; 08033102354.

The endorsement and return copy of the service is before the Court dated 9th May, 2024, served by the bailiff of Court, Gospel .U. Ntorue.

The defendant/respondent was served also with a hearing notice issued by this Court on the 15th May, 2024, affidavit of service is before me, deposed to by the Court bailiff, Gospel Utorue, served also with the final written address of the claimant's counsel dated 31st May, 2024 via WhatsApp, affidavit of service before the Court deposed to by Gospel Utorue, the Court bailiff.

All these services were effected on the defendant but he never appeared before this Court, nor did he deem it necessary to send a counsel to represent him.

If he is challenging the service of the Court's processes on him by the bailiff, he should have filed a counter affidavit as rightly submitted by the respondent's counsel.

He never informed the Court of his ill health during the pendency of this suit, the Court cannot rely on the medical report filed by the applicant.

It is too late for the Court to grant his application, the Court's judgment having been executed, see Exhibit B; the inventory of the applicant's properties taken by the bailiff of Court, in execution of the Court's judgment.

It is too late for the defendant to opt or offer to pay back the loan he took from the claimant. "He who comes to Equity must come with clean hands; Equity aids the vigilant and not the indolent".

The Court is well aware that without proper service of the Court's processes on the applicant, the Court will not have the jurisdiction to entertain this suit, this is the law.

The affidavit of the bailiff as aforementioned in the service of all the Court's processes; summons, hearing notice and final written address are prima facie proof of the service of the Court's processes, on the defendant/applicant, as rightly submitted by the respondent's counsel. The defendant/applicant cannot complain of being denied fair hearing.

It is not the duty of the Court to look for a defendant, the Court is not a father Christmas, the Court's duty is to ascertain the real issues before parties and not look for parties to a suit.

I sympathize with the applicant if he was truly ill at the time the substantive suit was pending before me, it is not the Court's duty, I must reiterate to look for reasons why the parties or counsels are not in Court.

The defendant cannot deny receiving any of the aforementioned processes of this Court, served on him by the Court bailiff, endorsement and return copies of all the aforementioned service before the Court.

The Rivers State High Court has the jurisdiction to hear appeals from the Rivers State Small Claims Court, such appeals are heard by the most senior Judge of the Small Claims Appellate Court, designated to hear such appeals from the Small Claims Court.

The Appeal is determined by the Judge based on the Records of Appeal and oral clarification of the parties. There is no proof of any appeal filed against the substantive case before me.

It must be noted that the possibility of the res being destroyed or lost or altered so much in character that it can no longer be repossessed by the applicant even if the appeal succeeds constitutes a special circumstance warranting the grant of stay of execution pending appeal. See the case of Kalu Igwe vs. Okuwa Kalu (1992) 11 LRCN 296 at 304 paragraphs 30-40.

In this case the judgment has been executed.

One of the grounds to grant a stay of execution includes;

Wherefore, when the execution of a judgment would render an appeal nugatory, the Court should exercise its discretion to stay execution of such judgment in the interest of justice. See Vaswani Trading Co. Vs. Savalakh & Co. (1972) All NLR 922. See also Kalu Igwe Vs. Okuwa Kalu (supra).

Section 50(3) of the Magistrate's Courts Law No. 2, 2004, provides that this Honourable Court "may order a stay of execution either unconditionally or upon the performance of such conditions as may be imposed by rules of Court made under the provisions of the High Court Law or of this Law". By virtue of this provision, this Honourable Court is clothed with the necessary jurisdiction and power to grant this application where necessary.

It is trite that Courts do not ordinarily grant applications for stay of execution of a judgment in favour of the judgment debtor unless exceptional circumstances are shown, however where a notice of appeal discloses substantial grounds of appeal to be argued on appeal, the Court is justified in granting a stay of execution, relying on the case of *TSA Industries Ltd. vs. KEMA Investments Ltd.* (2007) 7 SCM 99 at 108, 109.

Also see *Leaders & Co. Ltd. Vs. Adetona* (2003) 2 WRN 33.

The pertinent question to ask is as follows;

Has the applicant shown special and exceptional circumstances to compel the Court to grant his application?

It is trite that the possibility of the judgement sum being lost or altered so much in character that it can no longer be repossessed by the applicant even where the appeal succeeds, constitutes a special circumstance which warrants the grant of a stay of execution pending appeal.

Also, the appeal where one is filed will be rendered nugatory and will foist a situation of total helplessness on the appellate Court. See *Vaswani Trading Coy. Vs. Savalak & Co.* (1972) All NLR 922.

Furthermore, the applicant strongly believes the Court will resolve the appeal in his favour.

In *National Pension Commission Vs. F.G.P. Ltd.* (2014) 2 NWLR (Pt. 1391) pg. 354-355 – On special circumstances when an order of injunction/stay of execution pending appeal may be made, the special circumstances under which an order of injunction/stay of execution pending an appeal may be made were laid out as follows:

- a. Where the subject matter of the dispute will be destroyed if the injunction is not granted;
- b. Where a situation of hopelessness will be foisted on the Court especially an appellate Court;
- c. Where execution will paralyse a party's right of appeal;
- d. Where the order of the Court will be rendered nugatory; and
- e. Where execution will prevent a return to status quo if the appeal succeeds.

Also see; *Ndaba Nig. Ltd. Vs. UBN Plc* (2007)9 NWLR (Pt. 1040) 439; *SPDC Nig. Ltd. vs. Amadi* (2011) 14 NWLR (Pt. 1266) 157 referred to, P. 378, paras. B-D.

The grant or refusal of Stay of Execution of judgment by the Court is purely discretionary, though the discretion must be exercised both judicially and judiciously but certainly not arbitrarily. An application for a Stay of Execution must consider both sides of equity for the unsuccessful party and justice for the successful party. It is not a substitute for judgment the trial Court denied the applicant. See *Oladeji Ise Oluwa (Nig.) Ltd. vs. Nigeria Distilleries Ltd.* (2001) 6 NWLR (pt. 709) 427.

When it is stated that the circumstances or conditions for granting a stay should be special or strong, it means it must involve 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 Appellate Court, a situation of complete helplessness or render nugatory, any order or orders of the Appellate Court or paralyse in one way or the other, the exercise by the appellant 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 Appellate Court, there could be no return to the status quo.

This was clearly buttressed in *Vaswani Trading Co. Vs. Savalakh & Co.* (1972) 12 SC 77, (1972) NSCC 692 referred to, p. 688, paras. D-G.

In *Gov. Oyo State vs. Akinyemi* (2003) 1 NWLR (Pt. 800) pgs. 4-7 – in a judgment involving money, the terms upon which the Court would grant a stay of execution are easier to determine than in other judgments where the “res” is perishable or prone to alteration. The terms are:

- a. Whether making the applicant to satisfy the judgment would make his financial position such that he could not prosecute the appeal;
- b. Whether it would be difficult to secure the refund of the judgment debt and costs from the respondent, if the appeal succeeds, for which purpose the financial ability of the respondent is taken into account.

I must reiterate that an applicant in an application for Stay of Execution must show special and exceptional circumstances exist before the Court will grant a stay of Execution, see *Vaswani Trading Coy vs. Savelakh & Co* (Supra) 77.

Where there is an apprehension as to the ability of the respondent (in an application for a stay of execution) to refund the judgment sum if paid to him, the practice of the Court is to exercise its discretion in granting a conditional stay upon the payment of the judgment debt into the Court. However, this discretionary power is to be exercised judicially and judiciously depending on the peculiar facts and circumstance of each case.

Payment of the judgment debt into an interest yielding account will more often meet the justice of the case as the winner in the appeal will not suffer any loss. See *Orient Bank Nig. Plc. Vs. Bilante International Ltd.* (1996) 5 NWLR (Pt. 447) 166 referred to; pp. 18-19, paras. H-B.

In Gov of Oyo state v Akinyemi, Per Adekeye, J.C.A. at page 20, paras. E-G: stated;

“Where a party complains in a monetary judgment that the respondent may not be able to secure a refund of the judgment/debt after an appeal, the Court has a discretion to grant a conditional stay upon the payment of the judgment/debt into an interest yielding account for delivery to who ultimately establishes title after an appeal.

In the instant case, there exist no prima facie arguable appeal.

There is no proof of an appeal filed before the High Court, no Notice of Appeal before the Court as the applicant submitted, hitherto, there is no substantial appeal in favour of granting the stay of execution.

After a careful perusal of the facts herein stated, it is hereby noted that special and exceptional circumstances do not also exist for the Court to grant a stay of execution, the Court will not exercise its discretion judicially in favour of the applicant.

That the applicant has failed to prove special and exceptional circumstances for which the judgment creditor should be deprived of the fruits of his judgment. This should have been deduced on the face of the applicant’s affidavit but unfortunately, the applicant did not prove it via his affidavit.

That the applicant’s application lacks sufficient disclosure of his inability to pay the judgment sum.

The Court I must reiterate will not deprive a successful litigant the fruits of his success, the law perceives every judgment to be correct until set aside. See Vaswani Trading Co. Vs. Savalakh & Co. (supra) SC 77.

The Court will only grant a stay of execution if the High Court being the appellate Court so directs.

This does not alter the applicant’s constitutional right to appeal.

The judgment creditor is advised not to deal with the res in a way that will render the order of the Appellate Court nugatory and foist a situation of total hopelessness on the Appellate Court, where eventually an Appeal is filed.

This Court will not Order that the judgment sum be paid into an interest yielding account for delivery to whoever succeeds at the Appeal, but in the interest of justice and fairness, the Court Hereby Orders that the Respondent should preserve the judgment sum, so that if the Applicant succeeds in his appeal; where eventually he files an Appeal, the appeal will not be rendered nugatory and will not foist a sense of helplessness on the Applicant.

This Court consequently dismisses the application of the Applicant praying the Court to Stay Execution of its judgment given in the substantive suit on the 3rd July, 2024.

The applicant has failed to prove special or strong exceptional circumstances in the grant of his application for stay of execution.

I must reiterate there is No proof of a valid appeal before this Court pending at the High Court.

That the application for a stay of execution is hereby dismissed as being unmeritorious.

That where the timeline to file an appeal has elapsed as provided by the rules of the High Court, the respondent may dispose of the properties of the applicant in order to enjoy the fruits of his judgment in the interest of equity, justice and fairness.

Wherefore, the judgment creditor/respondent must ensure he keeps all his records of sale in response or defence of any action taken by the judgment debtor/applicant.

This is the ruling of the Court.

MRS BARIYAAH .H. ABE
Chief Magistrate
28th January, 2025.

