IN THE SUPREME COURT OF NIGERIA

Suit No: SC51/2001

Petitioner: Akin Akinyemi
And
Respondent: Professor Mojisola A.O. Soyanwo , Ajepero Estates Limited

Date Delivered: 2006-07-07

Judge(s): Idris Legbo Kutigi , Aloysius Iyorgyer Katsina-Alu , Ignatius Chukwudi Pats-Acholonu ,George Adesola Oguntade ,

Judgment Delivered

This appeal is against the ruling of the Ibadan Division of the Court of Appeal on the 14th of January 2001. The ruling is at pages 57-83 of the record. The motion sequel to which the decision was given, filed on the 15th of February 2000 prayed for the following orders:-

(a) to set aside ex debito justitiae, the writ of execution dated 16th July 1999 issued out of the Oyo State High Court;

(b) to set aside execution of the judgment wrongly carried out on 21st July, 1999 in pursuance of the said writ of execution;

(c) to restrain the respondent from taking further steps in the levying of execution against the properties of the Defendants/Appellants/Applicants; and

(d) to direct the Sheriff of the Oyo State High Court to release the Daewoo Racer car No OYO AE 178 DDA attached pursuant, to the said writ of execution.

The ground for the application was stated to be as follows:-

\"The ground for the application is that the judgment debt was duly deposited with the Deputy Chief Registrar of the Court of Appeal on 15th July 1999 as ordered by this Honourable Court.'

In granting the application, the Court per Adekeye (JCA) at page 80 concluded as follows:-

\"Consequently, this application succeeds. All the reliefs except (c) are granted. The issuance of the writ by the High Court Ibadan on 16/7/99 is set aside, so also is the execution of the same writ on the 21/7/99. The car AE 178 DDA wrongly attached by the bailiff of the High Court Ibadan in the process of execution of the writ shall be and is accordingly released to the applicants.\"

Earlier in the ruling, the lower Court examined relief (c) in considerable details and concluded at page 79 of the record that in view of the subsisting order for conditional stay of execution granted on the 2nd February 1999, granting another order of restraint of the Respondent/Appellant would be merely superfluous.

The Notice of Appeal dated 14th February, 2001 contained two grounds of appeal. In the Appellants\' Brief settled by Chief Akin Olujimi. SAN, the following two issues for determination were formulated:-

'(a) Whether in the absence of an appeal against the order of the High Court directing that the attached car be returned to the custody of the High Court, the Court of Appeal could on a mere application order the release of the car.

(b) Whether the Court of Appeal acted validly in setting aside the execution levied on the Respondent\'s car.'

In the Respondent's brief prepared by Babatunde A. Aiku SAN, only one issue was formulated for determination and it is:-

\"Whether in view of the available materials and the state of the law, the lower Court was right in making an order for the release of the 1st Respondent's Daewoo Racer Saloon Car attached after payment of the judgment debt\"

The Appellant\'s issue (a) raises the question of the jurisdiction of the Court of Appeal over the application. While the Appellant\'s issue (b) is to the same effect as the Respondent\'s single issue. It is whether in view of the circumstances of the case the Court of Appeal was right in setting aside the High Court\'s issuance of the writ of execution on the 16/7/99 and the order of execution made on the 21/7/99.

The focus of the arguments of learned Senior Counsel in both the Appellant\'s Brief filed on the 15/5/2001 and the Appellants Reply Brief filed on 15/4/2005 is that there was no appeal against the order of the Oyo State High Court by which a writ of execution was issued on the 16th of July 1999 for the attachment of the 1st Respondent\'s Daewoo Racer Saloon car. Learned senior counsel referred to the reliefs sought and granted which were not expressed to be granted pending the determination any appeal and submitted that the Court below purported to exercise original jurisdiction in entertaining the motion and which original jurisdiction it does not have. It was further submitted that section 16 of the Court of Appeal Act upon which the lower Court relied to grant the reliefs sought does not vest in that Court any original jurisdiction to entertain the application. On the scope of section 16 of the Court of Appeal Act he relied on Ejehwomu v Edok-Eter Ltd (1986) 5 NWLR (Part 39) 1 at 38 and Ikenna v Bosah (1997) 3 NWLR (Part 494) 439 at 456. It was further contended that the remedy ex debito justitiae bears no application to the facts of this case since it confers no jurisdiction where none is vested.

Learned Senior Counsel for the Respondents, justifying the decision of the Court Appeal relied on section 22(2) of the Sheriffs and Civil Process Act, Cap 407, Laws of the Federation of Nigeria 1990, and submitted that the execution was superseded by payment of the judgment debt of N106,000.00 on 15th July 1999 pursuant to the order of the lower Court. He cited Akpononu v Bakaet Overseas & Ors (1995) 5 NWLR (Part 393) 42 at 66-67 and Total Nigeria Ltd v Electrical & Mechanical Construction Company Ltd (1972) 8-9 SC 64 at 80. Learned Senior Counsel referred to Alhaji Taofeek Alao v African Continental Bank Ltd (2000) 9 NWLR (Part 672) 264 at 281 and submitted that the remedy ex debito justitiae enabled the Court of Appeal to entertain and grant the reliefs sought. It was submitted that there existed special circumstances in the context of Order 3 Rule 3(4) of the Court of Appeal Rules 1981 for the Court\'s entertainment of the application and grant of the reliefs sought. For the meaning of special circumstances, he relied on Kalu v Odili (1992) 5 NWLR (Part 240) 130 at 172.

The facts in a chronological order as can be gleaned from the affidavits, counter affidavits and documents attached thereto are as follows:-

On the 2nd of August 1996 the Plaintiff, who is Appellant herein, obtained judgment against the Defendants who are Respondents herein for the sum of N106,000.00 with interest at the rate of 2% until the final liquidation of the judgment debt. The Respondents appealed and while the appeal was pending, filed a motion for stay of execution at the High Court. On the 10/2/98 the stay sought therein was refused. They brought another application for stay at the Court of Appeal. And on the 2/2/99, by consent of both parties, a conditional stay of execution was granted whereby the Respondents were ordered to deposit the sum of Nl06,000.00 in an interest yielding account at the First Bank of Nigeria Plc, Bank Road Branch, Ibadan in the name of the Deputy Chief Registrar of the Court of Appeal Ibadan with 45 days of the grant of the said order.

On the 17/3/99 before the expiration of the 45 days, the Respondents herein filed another application for variation of the stay earlier granted. By its ruling on the 15/7/99 the Court below refused the variation sought. In the said ruling, the Court stated in unequivocal terms that the 45 days within which to comply with its order of the 2/2/99 had not lapsed since the application for variation filed on the 17/3/99 was less than 45 days. On that same 15/7/99, the Respondent\'s herein deposited the said sum of N106,000.00 in compliance of the Court\'s Order. This was evidenced in Exhibits \"C\" and \"D\" attached to the affidavit in support of the motion.

However, on the 16/7/99 the Appellant applied to the High Court of Oyo State for the issuance of a writ of execution for the attachment and sale of the movable properties of the Respondents and same was issued. On the 21/7/99, the Respondent\'s car was attached by officials of the High Court pursuant to the writ earlier issued. Representations showing evidence of the deposit of the sum of N106,000.00 in the bank in the name of the Deputy Chief Registrar of the Court of Appeal were made to the then Chief Judge of Oyo Stale on whose intervention the car was released to the 1st Respondent. Following this release of the car, application for committal was made to the High Court which accordingly convicted the 1st Respondent and the Sheriff of the High Court for contempt.

The first issue that calls for determination is that of the jurisdiction of the Court of Appeal to entertain the application. The argument of learned Senior Counsel for the Appellant, which substance I have stated above, was premised essentially on this issue of jurisdiction, He did not address the issue raised by the Respondents as to whether section 22(2) of the Sheriffs and Civil Process act Cap 407 Laws of the Federation of Nigeria also confers jurisdiction on the Court of Appeal to entertain the application. As stated in the heading of the motion paper, Section 22(2) of the Sheriffs and Civil Process Act is one of the laws upon which the application is founded.

The said section 22(2) provides:-

\"If the judgment debtor, before the action sale of the of the property, pays or causes to be paid or tendered to the registrar of the Court from which the writ issue or to the bailiff holding the writ, the sum of money and costs inserted or endorsed as aforesaid, the execution shall be superceded, and the property of the judgment debtor shall be discharged and set at liberty.\"

I am persuaded by the argument of Aiku SAN that this provision also confers jurisdiction on the Court of Appeal to entertain the application of the type which is the subject of this appeal. In other words, the aggrieved Defendants/Judgment debtors/Respondents were at liberty either to seek redress by way of an appeal against the issuance of the writ of execution and the attachment of the car or make recourse to the provisions of section 22(2) of the Sheriffs and Civil Process Act Cap 407 Laws of the Federation of Nigeria 1990 to have the order of the High Court set aside. And the application to set aside a wrongful issuance of a writ of execution and a wrongful execution is, like an application for stay of execution, an interlocutory application over which both the High Court and the Court of Appeal have concurrent jurisdiction.

Now, was it proper for the application to be filed at the Court of Appeal instead of its being first filed at the High Court' On this question the relevant provision is Order 3 Rule 3(4) of the Court of Appeal Rules 2002 which states:-

'Wherever under these Rules an application may be made either to the court below or to the Court it shall not be made in the first instance to the Court except where there are special circumstances which make it impossible or impracticable to apply to the court below.'

Thus the application to set aside the issuance of the writ of execution and the execution itself ought ordinarily to have been made at the High Court of Oyo State in the first instance. The question therefore is whether there were special circumstances to justify the application being brought in the first instance at the Court of Appeal' Learned Senior Counsel for the Respondents referred to the special circumstances enumerated in the ruling of the Court below at pages 74 - 75 of the record and the fact of the 1st Respondent\'s conviction by the High Court for contempt as such special circumstances to warrant the application at the Court of Appeal.

I am again persuaded by the argument of Senior Counsel for the Respondents. There has been no appeal against the ruling of the Court of Appeal of the 15/7/99 pursuant to which the Respondent perfected the condition for stay by depositing the sum of N106,000.00 in the bank and so the same remains binding and subsisting. And the car was released in consequence of the stay granted. I am inclined to hold that the trial and the conviction by the High Court of the 1st Respondent for steps he took in compliance with the valid and subsisting order of stay constitutes a special circumstance to justify the filing of the application at the Court of Appeal. I hold, in the light of the above, considerations therefore, that the Court below had jurisdiction to entertain the application.

I shall now proceed to examine the merit of the application which brings me to the second issue for determination. It is to be noted at the onset that there is an appeal against the ruling of Honourable Justice Akinola of the Ibadan Division of the High Court of Oyo State delivered on the 18th of November 1999 by which the 1st Respondent was, along with Mrs. Bamidele Fagbenro, convict for contempt. I would therefore confine myself to the determination of whether as at the 16th and 21st of July 1999 when application was made to the High Court for the writ of execution there was a valid and subsisting stay of execution.

The case of the Appellant on this issue is contained in paragraphs 9, 10, 11, 12, 13 and 14 of his counter affidavit sworn to on the 14/12/2000 at page 46 of the record. See also paragraph 12 of his affidavit sworn to by the Appellant on the 28/7/1999 at page 23 of the record. His assertion in these paragraphs is to the effect that the 45 days granted the Respondents by the Court of Appeal on the 2/2/99 within which to pay the sum of N106,000.00 in the name of the Deputy Chief Registrar into an interest yielding account in the bank lapsed on the 18/3/99 and that as at the 16th and 21st July there was no valid stay of execution, the Respondents having failed to fulfil the condition precedent. He relied on the enrolment of the Order of the Court of Appeal of the 15/7/99 at page 28 of the record which simply dismissed the Respondents\' application.

The case of the Respondents on the other hand is contained in paragraphs 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 and 17 of the affidavit sworn to on the 15/2/2000 at pages 2-3 of the record. The totality of their assertions is that the 45 days granted them by the Court of Appeal on the 2/2/99 within which to deposit the sum of N106,000.00 into an interest yielding account at the First Bank of Nigeria Plc, Bank Road, Ibadan, had not expired on the 15/7/99 when the Court of Appeal in its ruling rejected the application for variation and that on that same 15/7/99, the money was deposited in accordance with the order of the Court. It is their assertion therefore that as at the 16/7/99 and 21/7/99 when the High Court granted the application for and levied execution on the car of the 1st respondent, the condition precedent to the stay of execution had been fulfilled and a valid and subsisting stay of execution in place. They relied on the ruling of the Court of Appeal of the 15/7/99 by which it refused the Respondents\' application for variation at pages 6-15 of the record of appeal.

The enrolment of the order of the Court of Appeal of the 15th of July 1999 at page 28 of the record on which the Appellant relied in support of his position simply ended thus:

\"IT IS ORDERED that this application be and is hereby dismissed\"

It made no reference to the question of whether or not the 45 days within which the Respondents were required to deposit the money had expired.

But the actual ruling itself at pages 6-15 of the record contains two specific references to the question of the 45 days. At page 10 lines 5-8 the Court, per Aloma Mariam Mukhtar JCA (as she then was) stated thus:-

\"I agree that the time given by this Court to comply with its order of 2/2/99 has not lapsed, for the application for variation was made on 17/3/99, less than 45 days.\"

And at page 12, the Court, per Onalaja JCA said:

\"Applying the above to the instant application this Court lacked jurisdiction to review or vary or amend its previous Order of 2nd February 1999 more especially when the Order is still subsisting as the 45 days granted to applicant had not expired before bringing application to vary the said Order.'

The addresses of counsel for the parties on the motion for variation do not form part of the record of appeal. But it does appear from the reaction of the two learned Justices of the Court quoted above that the issue of the expiration of 45 days within which the Applicants/Respondents were to comply with the Order of the 2/2/99 was canvassed by learned Counsel for the parties. It is however clear from the ruling that the Court treated the running of the 45 days from the 2/2/99 as being in abeyance for the duration of the motion for variation from the 17/3/99 when it was filed to the 15/7/99

when it was determined. It was a deliberate pronouncement, of the Court, palpably designed to give the Respondents time to comply with the condition precedent to the operation of the stay and the Respondents complied that same day by depositing the sum as directed. And the pronouncement relates to the stay granted and which was sought to be varied and is therefore relevant. Although the pronouncement was not couched as a coercive order, the Court's intention on the duration of the 45 days is nevertheless clear and has the force of an Order binding on the parties.

It is true that the enrolment of the Order of the Court at page 28 of the record does not contain the Court\'s pronouncement on the 45 days duration and does not therefore reflect the entire decision of the Court. The actual ruling of the Court supercedes its enrolment of Order. It is a settled principle of law that every party to a suit, and indeed every citizen, has an obligation to obey the subsisting Court decision or order in the suit unless and until it is set aside. And the party\'s obligation to obey the decision is without regard to his perception about the irregularity or illegality of the decision as long as it subsists. See Alhaji Audu Shugaba v Union Bank Of Nigeria Plc (1999) NWLR (Part (627) 459 at 477 where this principle was re-enacted. See also Odogwu v Odogwu (1992) 2 NWLR (Part 225) 539; Nigerian Army v Gloria Mowarin (1992) 21 NWLR (Part 235) 345.

The Appellant as a party in the case cannot claim ignorance of this decision of the Court of Appeal on the 15/7/99. He became aware or is deemed to have become aware on the 15/7/99 that the Court decided to keep the running of the 45 days in abeyance during the pendency of the motion for variation from the 17/3/99 to the 15/7/99. And from the uncontroverted evidence on record, he was also aware of the Respondents\' deposit of the sum of N106,000.00 in the bank in the name of the Deputy Chief Registrar, Court of Appeal Ibadan. Yet he ignored the ruling of the Court and the Stay in place and proceeded to initiate processes at the High Court for the execution and attachment of the Respondents\' car.

As I stated earlier in this judgement, I would refrain from discussing details of the application for and the Order for the attachment of the Respondent\'s car because of a pending appeal emanating therefrom.

Suffices however to say that the application for the issuance of the writ and execution on the 16/7/99 when a stay was properly in place was an act of absolute bad faith. At page 70 of the record, the lower Court described the application for the issuance of the writ of execution on the 16/7/99 and the eventual attachment of the car as an abuse of the Court\'s process and I endorse that finding in its entirety.

It is also to be noted that the appeal had been entered in the Court of Appeal which alone was, by virtue of the provision of Order 1 Rule 2(2) of the Court of Appeal Rules 2002 seized of the whole proceedings, including the control of applications for stay of execution. Order 1 Rule 21(2) provides:-

\"After an appeal has been entered and until it has been finally disposed of, the Court shall be seized of the whole proceedings as between the parties thereto, and except as may be otherwise provided in these Rules, every application therein shall be made to the Court and not to the Court below, but any application may be filed in the Court below for transmission to the Court.\"

The clear intendment of the above Rule is the obviation of a situation where the trial or prosecution of a cause or matter is pursued pari passu in both the High Court and the Court of Appeal and thus avoid decisions or orders at cross purposes emanating from the two Courts. The unfortunate feature of this case is that the Respondents were, by the orders of the High Court, being harassed and even punished for steps they took in compliance with a valid and subsisting order of the Court of Appeal. It is a case where the two Courts below were, regrettably thrown into a collision course. Had the learned trial judge of the Oyo State Court taken cognizance of the principle embodied in Order 1 Rule 21(2) of the Court of Appeal Rules, the mischief created by the processes and execution of the 16th and 21st of July 1999 would have been avoided.

For the meaning and effect of entering an appeal see Madam Margaret Ezeokafor v Emmanuel Ezeilo (1999) 9 NWLR (Part 619) 513 at 524 -527. Shodeinde v Registered Trustees Of Ahmadiya Movement In Islam (1980) 1-2 SC 163. Learned Counsel for the Appellant ought, in their role as ministers in the temple of justice, to have advised against the initiation of the processes at the High Court.

On the whole and in view of the foregoing considerations I do not see any substance in the appeal. I fully endorse the decision of the Court below nullifying the issuance of the writ of execution by the Oyo State High Court Ibadan on the 16/7/99 and execution of same writ on the 21/7/99. I accordingly affirm the decision setting aside same. I also endorse the order for the release of car No OYO AE 178 DDA to the Applicants/Respondents.

The result is that the appeal lacks merit and is accordingly dismissed. I assess the costs of this appeal at N10,000.00 in favour of the Respondents.

Judgement delivered by
Idris Legbo Kutigi. J.S.C.

I read in advance the judgment just delivered by my learned brother Tabai, JSC. I agree with him that the appeal lacks merit and ought to be dismissed. It is accordingly dismissed with costs as assessed.

Pronouncement by
Idris Legbo Kutigi. J.S.C.
(Presiding)

Pursuant to Section 294(2) of the Constitution of the Federal Republic of Nigeria

Hon Justice I.C. Pats-Acholonu who participated with us in the appeal agreed at our Conference to dismiss the appeal.

Judgement delivered by
Aloysius Iyorgyer Katsina-Alu. J.S.C.

I have read before now, in draft, the judgment delivered by my learned brother Tabai JSC in this appeal. I completely agree with it and for the reasons given by him, I also dismiss this appeal with N10,000.00 costs in favour of the Respondents

Judgement delivered by
George Adesola Oguntade. J.S.C.

I have had the privilege of reading in draft a copy of the lead judgment by my learned brother Tabai JSC. He has shown ample reasons why this appeal must fail. I entirely agree with him. I think that it is not now necessary to flog this matter in view of the fact that the appellant had in fact deposited the judgment debt into the registry of the Court below on 15-7-1999.

I would also dismiss the appeal. I abide by the order on costs.