

IN THE HIGH COURT OF SIERRA LEONE
COMMERCIAL AND ADMIRALTY DIVISION)
FAST TRACK COMMERCIAL COURT

BETWEEN:

UMARU ZOKER & OTHERS - PLAINTIFFS/RESPONDENTS

32 CANTONMENT ROAD
FREETOWN

AND

LINCON CONSTRUCTION &
& LOGISTICS & ANOTHER
BOTH OF 75^c SMART FARM
OFF WILKINSON ROAD
FREETOWN - DEFENDANTS/RESPONDENTS

RULING DELIVERED BY THE HONOURABLE JUSTICE M.P. MAMI J.A
DATED 18TH DAY OF NOVEMBER, 2024.

COUNSEL

TEJAN-COLE, YILLAH & PARTNERS -FOR THE PLAINTIFFS/RESPONDENTS

OJP LEGAL -FOR THE DEFENDANTS/APPLICANTS

There is an application dated 19th day of March, 2024 by Notice of motion filed by Messrs. OJP Legal solicitors for the defendants praying for the following orders:

1. That this Honourable court grants an interim ex-parte stay of execution of the judgement of the Honourable Justice M.P. Mami J.A. dated 28th February, 2024 for a period of seven (7) during the pendency of this application
2. That this Honourable court grants an interim stay of execution of the judgement of the Honourable justice M.P. Mami J.A. dated 28th February, 2024 in this matter pending the hearing and determination of this application.
3. That this Honourable court grants stay of execution of the judgement of the Honourable Justice M.P. Mami JA dated 28th February, 2024 in this matter pending the hearing and determination of the appeal in the court of appeal.
4. Any further order (s) that this Honourable court may deem fit and just.

This application is supported by the affidavit of Habib Abbess El-Ali a businessman of No.75 Smart Farm Road and the 2nd defendant in this matter with the following exhibits:

Exhibit "A" – A copy of the said originating summons

Exhibit "B" and "C" – A copy of the said drawn up judgement and full text thereof.

Exhibit "D"- A copy of the notice of appeal

Exhibit "E" A copy of the said memorandum and notice of appearance

Exhibit "F" – A copy of the said contract.

Exhibit "J1-9"- Copies of the photographs depicting the said state of the property.

Exhibit "K1-2"- Copies of statement of accounts.

Frederick Ishmael Barber of OJP Legal Solicitors for and unbehalf of the defendants relies on the totality of the facts as contained in the exhibits thereon and submit thus:

- That it is no secret that the contract for the demolition has been completed and the full consideration in light of the contract has also not

been paid. That to now that the judgement creditor the sum of USD\$121,000, which is almost three times the value of the contract between the defendants/applicants and the plaintiffs/respondents as at the time of the consummation of the contract, will thus cripple the business productivity and growth of the 1st defendant.

- That there are challenging times for all, exacerbating an already worn out economy will particularly hamper the 1st defendant in carrying out its operations interalia.
- That the notice of appeal known as exhibit "D" in the affidavit in support discloses that there are *prima facie* good grounds of appeal with prospect of success to warrant a stay of execution.
- That the unique and special circumstances found especially between paragraphs 25 to 39 of the affidavit in support also further show why this Honourable court should grant a stay of execution.
- That the application before the court is made pursuant to Order 46 Rule 1 of the High Court Rules 2007 (HCR), and that this Honourable court is invested with jurisdiction to grant the orders sought for in this application.
- That in regards orders 1 and 2 of the orders prayed for on the face of the application, based on this Honourable court's directions have been dispensed with and spent respectively.
- This he submit it is without prejudice to the same, he shall now move on to order 3 of the prayers as set out on the face of the motion.
- That on orders 3, he submit that on the face of the application he seeks a stay of execution of the judgement of the Honourable Justice M.P. Mami. JA dated 28th February, 2024 in this matter and determination of the appeal in the Court of Appeal. They further that his Lordship's orders where in light of the circumstances born from the provisions in Order 43 Rule 8 of the High Court Rules to wit:

Order 43 Rule 8(1) where any judgment or order directs the payment of money, the court may, for sufficient reason, order that the amount be paid by instalments with interest, and any other order may be made at the time of giving the judgment or at any time towards the same or any other judge and may be reason upon specific cause shown at any time.

He further refers this Honourable court to Orders 1 and 2 of the judgement of this court.

He also submit further that in view of the impending appeal in the court of appeal which is exhibited as exhibit "D" in the affidavit in support, they have approached this court regarding to the procedure and or the fact to the procedure and or the fact akin to this case, noting also that a mere appeal does not operate as a stay.

He also refers to Rule 28 of the court of appeal rules no.5 of 1985 which provides:

- That further to that rule 64 of the Court of Appeal 1985, which he submit materially informs that the High Court is to be the first point of call in the light of the provision in Order 46 Rule 11 of the High Court Rules 2007 in regard to the grant or otherwise of a stay of execution.
- **That Rule 64 of the Court of Appeal Rules provides thus:**
"Except where otherwise provided in these rules or by any other enactment, where any application maybe made either to the court below or to the court below or to the court it shall be made in the instance to the court below, but if the court below refuses the application, the applicant shall be entitled to have the application determined by the court."

That this provision cited interalia vest in this Honourable court's jurisdiction to hear and determine the application for a stay of execution.

He also refers to Order 46 Rule 11 which provides:

"Without prejudice to rule 1 of Order 48, a party against whom a judgement has been given or an order 48, a party against whom a judgement has been given or an order made may apply to the court for a stay of execution of the judgement or order or other relief on the ground of matters which have occurred since the date of the judgment or order, and the court may by order grant such relief and on such terms as it thinks just."

He submit that the operative words are that "the court may" which he submit, invest in this Honourable court a discretion to grant an order for such relief, albeit on such terms as the court thinks fit.

- That Halsbury's Laws of England 3rd Edition, Vol.16 para 51 at page 36 further provides in outlining the nature of the discretion of the court as follows:

"The court has an absolute and unfettered discretion as to the granting or refusing a stay, and as to the terms upon which it will grant it, and will as a rule only grant it if there are special circumstances which must be deposed to in an affidavit unless the application is made at the hearing."

- He refers to Ramily M.R. explanation in Haywood V. Cape (1858) 25 Bear 140 which there is a discretion to be exercised by the court, and how same ought to be exercised.

"The discretion of the court must be exercised according to fixed and settled rules; you cannot exercise a discretion by merely considering what, as between the parties would be fair to be done; What one person may consider fair, another person may consider very unfair; You must have some settled rule and principle upon which to determine how that discretion is to be exercised."

In this regard he further submit that the settled rules and principles, upon which the court is inclined and required to act in the granting or otherwise of a stay of execution, should be time tested principles upon which the court is inclined and required to act in the granting or otherwise of a stay of execution to which are:

- 1. That the applicant has *prima facie* good grounds of appeal and**
- 2. The exercise of special circumstances,**

PRIMA FACIE GROUNDS OF APPEAL

That exhibit "D" in the affidavit in support of the present application is the notice of appeal of the applicants. That the issues that have been raised in the notice of appeal put simply includes the following: -

- (a) That the proper mode of commencement of the action in light of the circumstances ought to have been by writ of summons.
- (b) That it was inequitable in law to require the defendants/applicants to pay the full value or consideration when the work had not been completed nor had the defendants/applicants been fully paid by the G.O.SL in view of the contractual engagement.

- (c) That the requirement for the payment of the judgement sum of United States Dollars USD\$121,000.00 without regard to the fluctuation in foreign currency and other salient permutation was an error in law and unfair
- (d) That the order as to solicitor's costs is unsupported by law and without basis.

ON THE ISSUE OF SPECIAL CIRCUMSTANCES.

He refers this Honourable court to the case of Lucy Decker & Others V. Goldstone Decker (MISC.APP. 13/2002) delivered on the 9th of July, 2002; where the Honourable Mr. Justice G. Gelaga King JA defined special circumstances.

“As circumstances beyond the usual. A situation that is uncommon and distinct from the general run of things.”

He submit that paragraphs 25 to 39 of the affidavit in support discloses the peculiar, exceptional, unique and special circumstances to warrant a stay of execution of the judgement.

He refers this Honourable court to Wilson V. Church (No.2) (1878 W.81) (1879) 12 CH. D.454.

“The court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory.”

He also refers to the case of Linotype-Hell Finance Limited V. Baker WLR 1993 where per Staugton L.J said:

“It seems to me that if a defendant can say that without a stay of execution he will be minded and that it is a legitimate ground for granting a stay of execution.”

That the local authorities on the point viz; Union Trust Bank Limited V. Mohamed Kakay CIV. APP. 04/2019; Leone Construction & General Engineering Services 2018; Firetex International Co. Ltd V. Sierra Leone External Telecommunication & Another MISC. APP19/2002, amongst others

for which he was of the view sufficiently inform and direct the position of the law on matters of this nature.

He submit, with respect that the basis of the grant of the stay of execution in the case of Union Trust Bank Limited V. Mohamed Kakay CIV.APP.04/2019 per Justice Miata Samba J.A (as she then was) (and Justice Sulaiman Bah J.A in support of this position), he stated obiter on the basis of the decision to the grant of a stay which is that if the "Applicant is to pay the judgement sum before the appeal, the Applicant will have no option but to use the depositors money's which said act will not be good for their operation considering their reputation put succinctly, the Applicant's paying the judgment at this stage will ruin its business."

That this is relatable to the present case in that if the applicants were to pay the judgment sum before the Appeal, he will have no option but to use his employee's salary or monies which said act will not be good for their operations, and will thus ruin the Defendant's/Applicant's business.

That in the case of Vitafoam (SL) Limited V. Leone Construction and General Engineering Services, 2018, the basis of the court's granting of the stay of execution was because the enforcement of the judgment dated the 20th July, 2017 and the subsequent orders would destroy the subject matter of the appeal thereby rendering the order of the court of Appeal nugatory and also because the enforcement of the said orders would paralyze the operations of the business (Refers to page 10 of the Honourable Justice Mr. Mohamed Sengu Koroma J.A.)

He submit that this is not a different case to the Applicants.

He refers to the case of Firetex International Co. Ltd V. Sierra Leone External Telecommunication & Anor MISC.APP.19/2002, a case that deals with a stay of execution of a monetary or liquidated judgment, the court ordered a stay of execution interalia because the applicant had some overdraft promise to keep, that the refusal of the stay would further cause financial ruins to the Applicant.

This he submit is not materially different from the present case.

He also submit that it is based on the general standards, as set out in **FATME MOURTADA V. FADEL ABASS MOURTADA**, that the above 'circumstances are circumstances if not considered would lead to injustice'.

That in concluding, based on the facts presented by the parties herein, the authorities cited and the submissions thereon made, that this Honourable court is invited to grant the orders sought for in this application.

In response I. Tommy Esq. counsel for the plaintiff/respondent refers to the originating summons dated 4th August, 2022 for which, solicitors representing the plaintiff herein instituted this action claiming, among other things recovery of the sum of \$121, 000/- (One Hundred and Twenty-one Thousand United States Dollars) and damages for breach of contract. That the background to the agreement is extensively captured in the records of this Honourable court, but it is worth emphasizing the following: -

A memorandum of understanding (MOU) dated 23rd September, 2016 was expressed to be made between the plaintiffs and the defendants herein by which the defendant undertook to pay certain amount of money to the plaintiffs for services to be provided to the defendants/applicants herein as part of the execution of a demolition contract between the defendants/applicants herein and the Government of Sierra Leone. The M.O.U is part of the records.

That the plaintiffs were also required to provide a site engineer during the execution of the demolition contract the plaintiffs also liaised with the relevant government departments for the smooth execution of the contract.

That in opposition to the originating summons, solicitors representing the defendants/applicants herein filed affidavits (primary and supplemental) in opposition sworn to on 23rd January, 2023 and 11th July, 2023 respectively.

The Defendants, including 2nd defendants/applicants herein and a contractor who work with the defendants/applicants company, testified in the proceedings.

That after several months of proceedings, this Honourable court gave judgment dated 28th day of February, 2024.

That the defendants/applicants have come before this court for a stay of the execution of the judgment aforementioned.

That at the thrust of the applicant's case for a stay of execution of the said judgment is as follows:

- That they have filed a notice of appeal which constitutes good grounds; and

- That executing the said judgement could hurt the defendant's business and his personal financial circumstances.

Mr. Tommy refers to the plaintiffs/respondents affidavit in opposition to the application for a stay of execution, was sworn to on the 8th day April, 2024 by the 1st plaintiff herein, and on which the plaintiffs/respondents entirely rely.

He submit as follows:

- That the notice of Appeal filed on behalf of the defendants/applicants herein does not disclose *prima facie* good grounds of appeal
- That the affidavit discloses no special or exceptional circumstances that warrant a stay of execution because there is evidence to support the claim that the defendant's business or personal financial circumstances will be undermined or made worse by reason of the execution of this judgment. In otherwords, there is no evidence that irreparable harm will be caused to the defendant by reason of the execution of this judgment
- That the application is simply aimed at depriving the plaintiff's the fruits of their judgment as there is no doubt that the defendants/applicants herein have received huge funds from the contract that formed the basis of the M.O.U between them and the plaintiffs.
- That this Honourable court has an absolute and unfettered discretion to grant an application for a stay of execution, the court may only exercise such discretion where:
 - (a) That applicant has shown special circumstances that warrant the granting of such an application; and
 - (b) The applicant has filed a Notice of Appeal that discloses *prima facie* good grounds of appeal.
- That the onus is on the applicant to show by affidavit evidence that the two (2) requirements exist (see Firetex International Co. Ltd Vs. Sierra Leone Internal Communication and Sierra Leone Communication Co. Ltd MISC. APP.19/2002).
- The rationale for this reasonably high standard is that in a contested case, the successful party ought not to be deprived of the fruits of a judgment given in his favour. (see: Sierra Leone Shipping Co. V. Albert Gomez & others CIV. APP 63/2005 dated 30th January, 2009 (unreported)).

- That on page 35 of the 3rd edition of Halsbury Laws of England (VOL.16), it is stated as follows: The court has “an absolute and unfettered discretion as to granting or refusing of a stay. So also as to terms upon which it will grant it, and will as a rule, if there are special circumstances which must be deposed to in an affidavit unless, the application is made at the hearing.
- That essentially, the court is also entreated to exercise its discretion in a manner that is just, fair and reasonable and in accordance with established principles. Accordingly, the onus is on the applicant in every case to demonstrate that special or exceptional circumstances exist in his favour.
- That on the issue that the applicants have not shown special circumstances that warrant the granting of such an application.
- He respectfully submit, that the applicants affidavit does not show any special or extraordinary circumstances that warrants a stay of execution of the judgment dated 28th day of February, 2024. That the affidavit and exhibits attached thereto clearly do not disclose any compelling evidence of “special or exceptional circumstances” on the basis of which the application ought to be granted.
- That in paragraphs 25 through to 39 of the affidavit in support sworn to averring on the issue of “special circumstances” which he canvassed should warrant the granting of this application, by this Honourable court.
- That in those paragraphs, the applicants have essentially claimed that the execution of the judgement should be put on hold because the plaintiffs/respondents herein are persons of straw, and that their business could suffer irreparable harm if a stay of execution order was granted.
- That their claim simply bears the question; how would your Lordship’s court assess an adverse impact. If any, on the applicant’s business or his personal financial circumstances when the applicants have provided no evidence about, the applicants personal or business financial status? The exhibits attached to the affidavit in support include no bank statements of the applicant’s company, or evidence of its indebtedness,

if at all. The applicants also claimed to have employees, but there is no evidence of the company's monthly expenditure, its current source of income that supports the operating cost of the business; there is no credible evidence of how an immediate execution could hurt their business.

- That in addition, the plaintiffs have failed to adduce evidence about the financial circumstances of the plaintiffs/respondents that for example should have been whether the plaintiffs/respondents been declared bankrupt, or are they indebted to anyone? Are they on the government of Sierra Leone each transfer scheme for the very poor?
- Do they have assets? that instead the applicants have made wild, unsubstantiated claims in their affidavit in support, in the hope that this Honourable court will rely on blind averments of compelling evidence of special or extraordinary circumstances.
- That in refusing an application for stay of execution in the case **of DESMOND LUKE AND BANK OF SIETTA LEONE (MISC.APP.22/2004 SLCA 3 (14TH JULY 2004)** unreported, the court pointed out the following:

"The dispute here is over the property owned by the respondent and occupied by the applicant, there is no dispute that the property in question belongs to the respondent, conveyed to it by the government in or about 25th July, 2002. The High court confirmed that this was the case. Thus the applicant continues to occupy the said property to date is also not disputed. In the light of finding of facts and conclusion of the trial judge on the status of premises here concerned."

That it would be difficult to see what special circumstances are there to justify a stay of execution after 1st July, 2004.

That as counsel for the respondent submitted, the applicant has no legal or equitable right over the property in the view of the trial judge. (see. **PATRICK KOROMA V. SIERRA LEONE HOUSING COMPANY AND ANOTHER (ABOVE)**). On the evidence before this court, in this application, no special circumstances have been shown.

That accordingly, it is respectfully submitted that there no doubt that the defendants/applicants are indebted to the plaintiffs, the applicant testified in court, that they were aware of the M.O.U between them and the plaintiffs/respondents herein and that some payments were made to the plaintiffs/respondents herein after the M.O.U was executed between the parties.

That at no point did the defendants/applicants challenged the amount of money claimed by the plaintiffs that instead they challenge the legality of the M.O.U as a binding contract and suggested that they were no longer using the M.O.U to regulate their relationship. No evidence was adduced to support that claim though. In addition, the defendants/applications have also confirmed in paragraph 28 of the affidavit in support to the application for a stay of execution, that they have received nearly 80% of the contract sum from the government of Sierra Leone. The plaintiffs/respondents herein in proportion of the amount they have received from the government of Sierra Leone, but they have simply refused to pay the plaintiffs/respondents herein in proportion of the amount they have received from the government of Sierra Leone. Infact, of the more than Le4,000,000,000/00 (Four Billion Old Leones) received by the defendants/applicants, they testified that they only spent Le800,000,000 (Eight Hundred Million Old Leones) to pay the contractor who actually demolished the building.

He submit therefore, that the defendants/applicants have received a substantial amount of funds from which they could have paid the plaintiffs/respondents if they truly wanted to do so, and this application is simply part of an attempt to deprive the litigants of the fruit of their judgment.

That there is no extra ordinary circumstances to warrant a stay of this judgement.

That the notice of appeal filed for and on behalf of the applicants herein discloses no *prima facie* good grounds of appeal, he submit thus:

- That the notice of appeal filed for and on behalf of the applicants does not disclose *prima facie* good grounds of appeal, that at the heart of the notice of appeal are as follows: -

- That the learned trial judge erred in law by failing to strike out the originating summons that commenced this action and accordingly order that the matter be commenced by writ of summons.
- That the learned trial judge erred in law in holding that the defendants were indebted to the plaintiffs by failing to realise that the plaintiffs were commission agents who could have only received payment after payment by the client; the government of Sierra Leone.
- That the learned trial judge erred in law by ordering that the sum of money owed to the plaintiff be paid in United States Dollars.
- That the judge erred in law by awarding two separate costs without stating the reasons.
- He submit, that the totality of the grounds of appeal is weak for the following reasons: -
 - In respect of the alleged failure of the learned trial judge to strike out the originating summons, he submit that there is no evidence before the court (and he relies on the records of proceedings attached to the affidavit in support of this application) even remotely suggesting that the defendants/applicants counsel applied to this Honourable court for the originating summons to be struck out and order that the matter be commenced by a writ of summons.
 - That the defendants fully co-operated with the proceedings and did not raise an objection to the mode of commencing the action.
 - That there is no authority that requires the judge to strike out such a process without an application to do, or where there is no acknowledgement on the part of the court, that there are contentious issue or disputes of facts.
 - That what distinguishes this case from the Dr. Nathalie Koto Eleaday & Anor V. Rosemarie Marke & Others & the Aiah Momah and Sahr Samuel

Nyandemoh cases are that in both cases, the judges acknowledged that there were disputes of facts or contentious issues. In the current case, the principal question before the court was whether the defendants were in breach of the memorandum of understanding expressed to be made between the parties.

- That once the judge concluded that the M.O.U constituted a binding contract, and there was no dispute about the amount of money claimed, by the, the only natural outcome was a declaration that the defendants/applicants herein are indebted to the plaintiffs. There was no acknowledgement or identification of contentious issues, or disputed facts by the judge in respect of the critical matter before the court.
- That in addition, this case was not about a breach of duty or the construction of an enactment or deed; it was for a declaration of a breach of contract.
- That with respect to the alleged error in law for having held that the defendants were indebted to the plaintiffs even though the plaintiffs were commission agents, and could not have only received what was due them, after payment by the client (the government of Sierra Leone), he respectfully submit that in addition of the fact, that the 2nd defendant himself confirmed that the client, the government of Sierra Leone, has respectfully submit, that in addition to the fact that the 2nd defendant himself confirmed that the client, the government of Sierra Leone, has paid Le4,000,000,000 (Four Billion Leones), approximately about 75% of the contract sum was used for the execution of the contract (demolition of the building). Having received in excess of Le4,000,000,000 (Four Billion Old Leones) from the client, the defendants/applicants herein only spent 800,000,000 (Eight Hundred Million Leones) to pay a contractor for the demolition of the building.

Given the amount of funds received from the government of Sierra Leone and the amount paid for the execution of the contract, the defendants/applicants were left with sufficient amount of funds from which they could have satisfied their obligation to the plaintiffs/respondents herein.

In any case, the question before the court, was whether the defendants were in breach of the agreement by having failed to make payments to the plaintiffs/respondents herein in proportion to the amount of funds, received so far, and if by reason of the breach, they were indebted to the plaintiffs/respondents for the entire sum owed to them

That with respect to the alleged errors arising from the court's be paid in United States Dollars, it is worth pointing out that contract sum (as expressed in the M.O.U) was dominated in United States Dollars) the contract document made no provision for the sum to be denominated in Leone.

That it would be plainly incongruous, therefore to make in a currency different that that stated in the M.O.U.

That in any case, at no point did the defendants/respondents herein raise an objection, or challenge it during the proceedings, and more importantly, the amount claimed ultimately did reflect the value of the leave relative to the appreciating Dollar as of the day that he causes of action arose again this was never raised by the defendants/applicants herein during trials.

That finally, it is submitted that to break down the costs awarded to a successful party does not constitute a *prima facie* good ground of appeal as the court has powers to do so.

Order 57 Rules (1) and (2) of the High Court Rules 2007 provides as follows: -

“2(1) The amount of costs to be awarded may be assessed by the court

3. Before any assessment, the parties or their solicitors may briefly address the court on the question of costs.
4. Without prejudice to the powers and discretion of the court, an award, of the shall ordinarily be designed to –
 - (a) Compensate for expenses reasonably incurred and court fees paid by the party in whose favour the award is made; and
 - (b) provide reasonable remuneration for the solicitor of the party of work done by him.
5. In assessing the amount of costs to be awarded to any part, the court may have regard to-

(a)the amount of expense, including travel expenses reasonably incurred by that party or that party's solicitor or both in relation to the proceedings.

That it is most respectfully submitted, that where the applicant for a stay of execution fails to show special circumstances and good grounds of appeal, the court is bound to refuse the application. Although the court is not expected to go into the merits of the appeal at this stage.

He respectfully draws the attention of this Honourable court to the evidence before it that clearly shows that there is no legal or factual basis for the appeal and that this application is meant only to deprive the successful party the fruit of its judgment.

That most of the issues raised in the affidavit and legal submissions are issues that were either raised and dealt with during the trial or were never raised and did not form the basis of the judgment against which the appeal has been filed. He refers to the case of Jalloh V. Turay (CIV.APP. 27/20050) (2010) SLCA 11 (21 May, 2021(unreported), the Honourable court in refusing an application for a stay of judgment, stated as follows:

"It is our considered view, that most of the matters referred to by the appellant/applicants in her affidavit in support and, by Mr. Jenkins-Johnston in his oral submissions as special circumstances were issues that had been dealt with in the trial in the court below, and the court of Appeal; and they will no doubt be argued again in the substantive appeal. It would therefore be best for the appellant/applicant to bring them when the appeal is being argued."

That in their opinion has not been made out in the context of stay of execution

That however, the court is disposed to granting a stay, it is respectfully submitted that is granted on terms that would enable the plaintiffs/respondents herein to easily recover the judgment sum and costs should the appeal fail. (Refers Sierra Rutile and Transcend International Resources Ltd Civ. App.53/2021 unreported)

That counsel for the plaintiff/respondent therefore concludes that the applicants have failed to provide compelling evidence of special or exceptional circumstances that warrant a stay of execution of the judgement of the Honourable court dated 28th day of February, 2024. The applicants have made

some unverified claims about the limited means of the plaintiffs/respondents herein, as well as the adverse implications that the immediate execution of the judgment could have for the defendants and their business.

That none of those claims have been supported by any compelling evidence.

Analysis of the Issues and the Consideration of the Honourable Court.

This court is seised of an application by notice of motion dated 19th day of March, 2024 filed by the defendants/applicants praying for the order as contained therewith to wit:

1. That this Honourable court grants an interim ex-parte stay of execution of the judgement of the Honourable Justice M.P. Mami J.A. dated 28th February, 2024 for a period of seven (7) during the pendency of this application
2. That this Honourable court grants an interim stay of execution of the judgement of the Honourable justice M.P. Mami J.A. dated 28th February, 2024 in this matter pending the hearing and determination of this application.
3. That this Honourable court grants stay of execution of the judgement of the Honourable Justice M.P. Mami JA dated 28th February, 2024 in this matter pending the hearing and determination of the appeal in the court of appeal.
4. Any further order (s) that this Honourable court may deem fit and just.

Turning to the substance of the application, it is necessary to see whether or not this court ought to grant the application for stay of execution of the judgment attached thereto. the reasons adduced in are as contained therein to wit:

Specifically, paragraphs 28 to 39 of the averments in the affidavit in support of the motion, all of which is been detailed earlier in the submission of counsel for the defendants/applicants.

The applicant's contention is that; in addition to the averments and supplication justifying as to why a stay ought to be granted, he has horned is on the fact, that were the court to exercise it discretion in their favour, the court should be mindful of the dissatisfaction which is to be drawn between monetary liquidated judgments, and those of non-monetary or liquidated judgments.

This court is fully seised of the underlying principle that the affidavit in evidence, should show that there is a risk that damages and costs as ordered by the court would not be refunded if the appeal succeed, then such factors would amount to "special circumstances" justifying a stay of execution. Infact this was the court in Linotype Hell Finance Limited V. Baker (1931) 1 WLR considered as a rule, to be stringent a test in today's situation.

This then takes this court further to the underlying question necessary in the determination of applications of such nature; to wit whether special circumstances have been shown by the applicant.

In otherwords, has the applicant make out a strong case of depriving the respondent of the benefit of the judgment he has obtained in his favour

Infact, in Ernest Famer & Another V. Mohamed Lebia 1945 case reported in the Sierra Law Recorder Vol.3 page 66 in the said case the respondent obtained a judgment and an order against the applicant for delivery of possession of premises.

On the issue of "special circumstances" this Honourable court is guided by the underlying principles to wit, that the granting of stay of execution is based in proof of exceptional or special circumstances Rad-v V. Jaber (1950-56) ALR SL 115 in Tuck V. Southern Countries Deposit Bank. (1889) 42 ch D 471 61 LT 348 it was held that the courts should consider all the facts before deciding whether they constitute proper facts for the discretion to be invoked therewith.

As both counsel may be fully seised, the determination of an application for a stay of execution pending appeal necessarily entails the exercise of discretion aimed at maintaining a fair balance of the competing interest of the parties.

Infact, I am reminded and persuaded in this regard by the dictum of Scper Francois (JSC) in Republic V. Court of Appeal ex parte Sidi (1987-88) 2 GLR 170 at 181.

"One must recognise that there two competing interests. First that of the victorious party of whom it was said in the Annot Lyle (1886) 11 PD 114 at 116 per Borden LJ, that the court does not "make a practice of depriving a successful litigant of the fruits of his litigation, and locking up funds to which prima facie he is entitled ..

." pending an appeal the other side of the coin derives its validity from Wilson V. Church (No.2) (1879) 12 Ch. D 454 to which our Joseph V. Jebelle (1963) 1 GLR 387, S.C. owes its origin. That postulates that a person exercising his undoubted right of appeal is entitled to obtain an assurance from the court that the appeal if successful would not be rendered nugatory."

This court has to juggle with such competing interest which will translate into a delicate process of exercising its discretion to either grant or refuse the application. The court of Appeal Rules No.29 of 1985 in my considered view offer no guidelines for the exercise of the discretion, but over considerable period of time, the courts are guided by broad dictates of justice common sense, fair play, and equity

The thrust for the exercise of this discretion should be anchored upon the following:

- (a) * There should have been special or exceptional circumstances disclosed in the affidavit on support of the application, inclusive of situations where the subject matter would be destroyed if the application were not granted or the appellant would be deprived of the means of the appeal would be rendered nugatory.
- (b) * the application invoking the jurisdiction of the court must be competent, the court below must have delivered a decision which the applicant had appealed. Infact, this court is guided and persuaded by the dictum of Wiredu JSC. in the Northern Regional Development 1 GLR 400, C.A.
"It is quite clear from the appropriate time to make an application for a stay of execution is when there exists a judgment or a decision in a suit. In otherwords, the existence of a judgment or a decision in a suit is sine qua non for an application to stay execution; such an application can only be made in the same suit and upon such conditions as when an appeal is pending or where payment of the judgment debt is ordered on instalment basis"
- (c) Judgment or decision apart, the applicant must have a valid appeal pending the applicant must have filed a valid notice of appeal. An invalid appeal cannot bar execution and the court will take invalidity into consideration in determining the application the Court of Appeal Rules No.29 of 1985 preclude the appellant from arguing a ground of appeal not mentioned in the notice of appeal, the court will not and

at the hearing of the application countenance arguments based on a ground of appeal not contained in the notice of appeal.

(d) * An application for stay of execution must establish an interest to be protected from execution, failing which it must fail, the decision must be enforceable by

The thrust of the application for (a) above as stated interalia is anchored upon paragraphs 25 to 35, which in the considered view of this court, has been indepthly analysed by counsel for the plaintiff/respondent, which is in sync with the view of this court, that on all fours does not amount to special circumstances, within the guidelines offered to this court now or the years, it is my considered view, that as it is, the categories of special circumstances are never closed, but is based on the fact and circumstances of each case. The said paragraphs 25 to 39 does not clearly layout such circumstances, which ought be 'over and above the normal run of things', as it verged most times on moral consideration, and in some other rimes appealing to the pity of this court. They are not such that could be considered enough to juggle the delicate balancing interest, to the extent of depriving the plaintiff/respondent of the fruits of his judgment.

Even the authorities cited specifically so Linotype-Hell Finance Ltd V. Baker and relied on by counsel for the defendants/applicants is inapplicable in this regard, as it is distinguishable from the present case, in that in the former a stay of execution was granted, because the court realised that the other party will be financially ruined this no doubt is a judgment for liquidated sums as forcefully submitted by counsel for the defendants/applicants with its succinct genre of guidelines for the exercise of grant of such discretion.

However, this Honourable court apart averments in the affidavit in support, has not been shown by any demonstrable evidence, from the affidavit in support that the 1st defendant or his business is on "knife's-edge" / as it were. I have looked at the cases referred to and relied on by counsel for the defendants/applicants, and note that most of them deal with possession and or recovery of property, and some even on criminal matter. What however counsel for the defendants/applicants has forcefully made quite clear is that plaintiff/respondent has not shown that they will be in a position to refund the sum, where the appeal to succeed, thus rendering it nugatory.

Infact, in my consideration I have sought solace in the dictum of Straughton LJ in the Linotype Hell Finance Ltd V. Baker C.O.A. (1992), which I find very instructive in this regard to wit:

"It seems to me that, if a defendant can say that without a stay of execution he will be ruined and that he has an appeal which has some prospect of success, that is a legitimate ground for granting a stay of execution."

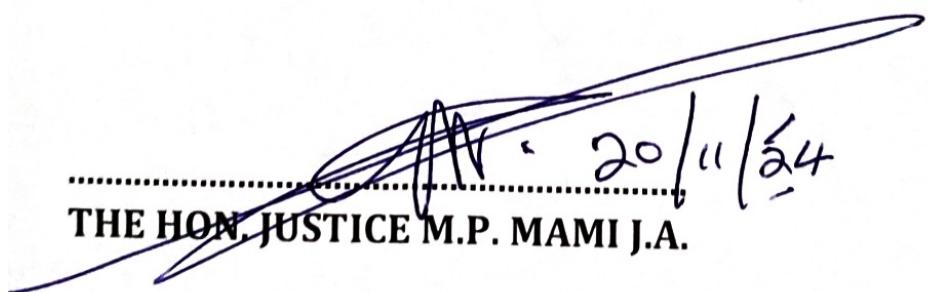
This passage is quoted in paragraph 59/13/1 of the Supreme Court Practice 1991 from Atkins V. Great Western Railway Co. (1886) 2 TLR 400

"As a general rule, the only ground for a stay of execution is an affidavit showing that if damages and costs were paid there is no reasonable probability of getting them back if the appeal succeeds"

This Honourable court will not as pivotal in the exercise of discretion as in this instance, deprive the plaintiff/respondent of the fruit of his judgment, but the court is so fully minded to ensure the status quo is preserved until final determination of the Appeal.

Consequent upon the foregoing, this Honourable court will grant a stay of the judgment dated the 28th day of February, 2024, on the following terms:

- That the solicitor's costs of this application is Le30,000 to be paid to counsel for the plaintiff/respondent**
- The defendant/applicant to provide a bank guarantee from any of the commercial banks in like judgement sum of \$121,000 within thirty (30) working days effective the grant of this order, failing which the stay lapses.**


THE HON. JUSTICE M.P. MAMI J.A.