IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY

HOLDEN AT JABI ABUJA

DATE: 2ND DAY OF MARCH, 2020

BEFORE: HON. JUSTICE M. A. NASIR

COURT NO: 10

SUIT NO: CV/1382/2017

MOTION NO: M/2640/19

BETWEEN:

BERNARD EKWE ---- APPLICANT

AND

1. VICTOR NWADIKE (SP)
2. OLIVER ODIMEGA, (CSP)`
3. INSPECTOR GENERAL OF POLICE
4. OLIVER OTONYO

---- RESPONDENTS

RULING

Before the Court is a motion on notice No. M/2640/19 filed by the applicant Mr. Bernard Ekwe. The motion is brought pursuant to Order 35 Rules 5 and 49 Rules 4 and 5 of the Rules of this Court. The applicant is praying for an

order extending the time within which he may bring an application to relist this suit and for an order relisting this suit. In support of the application is an affidavit of 13 paragraphs and a written address duly adopted by **E.M. Ugwu Esq**. One annexure was attached.

In opposition, **S.E. Onele Esq** of counsel to the 1st – 3rd respondents filed a 14 paragraphs counter affidavit and a written address duly adopted. On his part the 4th respondent filed a 6 paragraphs counter affidavit and a written address adopted by **K.D. Oguru Esq.**

The applicant filed a further affidavit to the 4th respondent's counter affidavit and a reply on points of law to the 1st – 3rd respondents counter affidavit.

It is trite that where an action is struck out for want of prosecution, it can be relisted by a motion on notice. In such a situation, the matter has not totally left the cause list because by the order of striking out, the plaintiff is at

liberty to file a motion to relist the case. See Alor vs. Ngene (2007) All FWLR (part 362) page 1836. In considering the application, the Court shall be guided by the following points as stated in the case of Exparte Ejide (1990) 3 NWLR (part 141) 758.

(a) The reason for the applicants failure to appear when the case was heard.

(b) Whether there has been undue delay in making the application to relist so as to prejudice the respondent.

(c) Whether the respondent would be prejudiced or embarrassed upon an order for relisting being made so as to render it inequitable to permit the case to be reopened.

The applicant in the supporting affidavit has averred that the reason for the absence of counsel on the 12/12/2018 was because sometime in 2018 the lead senior counsel in the matter suffered stroke and was flown

abroad for treatment. Upon his return he discovered that his junior who was attending to the case did not appear in Court and the case was struck out. That it is only recently that the learned senior counsel employed more legal practitioners to assist him in his practice. That the delay which occasioned the striking out of this suit was total inadvertence and out of human control.

The 1st – 3rd respondents averred that C.A.N. Udechukwu Esq had been appearing for the applicant. That the Access Bank deposit slip attached to the application is for NBA Seal and not for default filing fee. And that the date on the Aso Savings Deposit Slip was altered and the slip bears the same serial No. 863743.

The 4th respondent has also averred that this application was filed in January, 2019 but was served on them in April, 2019 and the amount of N3,800.00 paid by the applicant as default fee is grossly inadequate as the amount the applicant ought to have paid is N6,600 for the

33 days delay in filing. That the NBA Seal teller attached to the application is meant to mislead the Court, and therefore it goes to show that default fee for late filing which is a condition precedent has not been complied with.

In the further affidavit, the applicant has averred that the teller attached to the application is an Aso Savings Teller dated 28/1/2019 and that the applicant has paid the balance of the default fee evidenced by the High Court Revenue receipt attached to the further affidavit.

For a start can it be said that this application is proper before the Court, considering the time it was filed? It is trite that by the rules of Court, there is a penalty for late filing of applications. It is not in dispute that the applicant was late in bringing this application. The respondent has drawn the Courts attention to the fact that considering the date the suit was struck out and the filing of this application, the applicant was late by 33 days and therefore the amount which ought to be paid is N6,600.00. This was conceded by

the applicant who effected payment vide Aso Savings High Court teller showing a payment of N3,800 made on the 28/1/2019 and High Court revenue receipt of N3,000 paid on the 22/5/2019 as the balance.

I hold therefore that this application is competent before the Court.

It is true that one C.A.N. Udechukwu Esq was appearing for the applicant at the inception of this suit. He however stopped appearing and the suit was eventually struck out for want of diligent prosecution. The applicant has averred in paragraph 6(b) of the further affidavit that illness of the learned silk and his protracted absence destabilized the firm and brought about an incapacitating loss of competent legal staff.

In Newswatch Communication Ltd vs. Atta (2006) 4 SC (part 11) page 114 at 131, **Belgore JSC** had this to say:

"…Right to be heard is a two edged sword to the plaintiff to be heard timorously and for the defendant to avail itself the rights, Constitutional rights, extended to it by the Court to present its side of the case. The Court must hear both the parties, both parties to the case; but the Court is not a slave of time that must wait indefinitely for a party to decide when to come to present its case. To delay hearing of a case deliberately is an abuse of Court processes which in turn defeats justice."

Now, the law is trite that a grant or refusal of an application of this nature is purely within the province of the discretionary powers of the trial Court. Such discretion must at all times however be exercised not only judicially but also judiciously on sufficient material. The Court in Dada vs. ITC (2005) 11 NWLR (part 936) page 299 held

"In the exercise of judicial discretion the primary objective of the Court must be to attain substantial justice, and acting judicially requires the consideration of the interest of both parties and weighing them in order to arrive at a just and fair decision."

The Court is quick to note that the sins of counsel shall not be visited on the litigant and the Court is interested in doing substantial justice by ensuring that every party is given equal opportunity to present its case before the Court. And justice can only be done if the substance of the matter is thoroughly examined (moreso when the fundamental right of the applicant is alleged to be involved).

The Supreme Court in the case of Cockey Traders vs. General Motors (1992) 23 NSCC page 188 had this to say when it held thus:

"Delay of justice is bad, but denial of justice is worse and outrageous. The denial inflicts pain, grief, suffering and untold hardship on those who rely on impartial administration."

Considering the foregone principles and bearing in mind that the respondents will not be prejudiced by the grant of this application, and most importantly in an attempt at doing substantial justice, this Court is inclined to grant the application. This Court in doing so is not unmindful of the fact that there is a panacea that heals every sore in litigation namely costs, and where this can be applied, then same should be applied. See Iyamabor vs. Omoruyi (2010) LPELR-CA/B/242/2009.

This application will therefore be granted on terms. In effect suit No. CV/1382/17 is hereby relisted on the cause list.

SIGNED

HONOURABLE JUDGE

Appearances:

E.M. Ugwu – for the applicant

S.E. Onele – for the 1st – 3rd respondents

K.D. Oguru – for the 4th respondent