

**IN THE HIGH COURT OF JUSTICE FEDERAL CAPITAL TERRITORY
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT MAITAMA – ABUJA**

**BEFORE HIS LORDSHIP: JUSTICE SALISU GARBA
COURT CLERKS: FIDELIS T. AAYONGO & OTHERS
COURT NUMBER: HIGH COURT TWO (2)
CASE NUMBER: FCT/HC/M/7753/2019
DATE: 24TH JANUARY, 2020**

BETWEEN:

MRS. COMFORT PATRICK - PLAINTIFF

AND

ROTIMI OLU & CO. - DEFENDANT

Parties absent.

J.J. Momoh for the Claimant appearing with I.B. Osagiede Esq.

O.F. Ekengba for the Defendants/Applicants

Claimant's Counsel – The matter is slated for ruling. We are ready to take the ruling.

Defendant/Applicant's Counsel – From the hearing notice served on us, the matter is for ruling and continuation of hearing.

Court – From the record of this court in this matter of last adjourned date (29/10/2019) the matter was adjourned for ruling and continuation of hearing.

R U L I N G

This ruling is predicated on an application on notice dated 1/7/2019 with Motion No. M/7753/2019 brought pursuant to Section 6 (a) and (b), Section 36(1) of the Constitution of Federal

Republic of Nigeria 1999 and under the inherent jurisdiction of this court.

In the application, the Defendant/Applicant seeks the order of this court for the following:

1. An Order re-listing Motion No. M/2618/19 for hearing, to enable same be determined on the merit.
2. And for such further or other orders as this Honourable Court may deem fit to make in the circumstances.

The grounds upon which the application is brought are as follows:

1. That the Applicant is desirous of having their own side of the case be heard.
2. That the Applicant's counsel Oladimeji Ekengba appeared in the National and state Houses of Assembly Election Petition sitting in Asaba, Delta State in PETITION NO: EPT/DT/THR/05/2019 on 26th June, 2019 and was billed to come back to Abuja the same day for the trial of this case on 27th June, 2019 but was involved in a minor accident on his way to the airport in Asaba, which made him to shift his flight to 27th June, 2019 at 8:20 a.m. with the believe that he would be able to make it to court.
3. That unfortunately Oladimeji Ekengba flight for 27th June 2019 was delayed for technical/weather reason till 1:30 p.m.
4. That all effort by Oladimeji Ekengba to reach other counsel in Chambers to hold his brief of 27th June, 2019 proved

abortive as all the counsel were all busy in various courts of record within and outside jurisdiction.

5. That at the time Oladimeji Ekengba got to the court on 27th June, 2019, the matter had been called and Applicant's Motion on Notice had been struck out for want of diligent prosecution.
6. That this Application is necessary as the Claimant will not be prejudice in anyway.
7. That this Application is necessary for the interest of justice and fair hearing.
8. That it will be in the interest of justice if the re-list Motion No. M/2618/19 for hearing to enable same be determined on the merit.
9. That the Defendant is willing and ready to defend the suit.

In support of this application is a 12-point supporting affidavit dated 1/7/19 deposed to by Femi Popoola who works in the law firm of Messrs Joe Agi, SAN & Associates. Reliance is placed on all the points of the affidavit. Learned counsel to the Defendant/Applicant filed a written address dated 1/7/19 wherein counsel submitted an issue for determination, thus:

“Whether it is just and equitable in the circumstances of this application to grant the relief sought”

On this sole issue, it is the submission that it is the law that where a motion is struck out and not dismissed, a party may apply to the court for an order re-listing the said motion for purpose of it being

determined on the merit. See EASTERN BREWERIES PLC v INUEN (2000) 3 NWLR (Pt 650) 662 at 673 Para G.

It is submitted that the Defendant/Applicant's affidavit in support of this application has disclosed sufficient reasons to warrant the grant of this application, particularly as the claimant will not suffer any injustice in the circumstances. See case of ANYAFULU v AGAZIE (2005) 3 NWLR (Pt 912) 416 at 432 Paras F – G; and Section 36(1) of the Constitution of Federal Republic of Nigeria 1999 (as amended). Court is urged to grant the application.

In opposition to this application, the Claimant/Respondent counsel did not file any counter affidavit, however, counsel to the Claimant/Respondent made an oral reply on points of law.

In his submission he stated that on 27/5/19 the Defendant were in court and both parties agreed on 27/6/19 on which date the Defendant failed to be in court. Counsel went on to submit that it is trite that once a party is giving an opportunity to do certain act and failed to utilize same, the party cannot complain of fair hearing. See OGUNTAYO v ADELEYE (201) 2 WRN (SC) 1 at 56. Court is urged to refuse the application.

I have carefully considered the processes filed and submission of counsel on both sides. It is trite that a suit struck out may be re-listed with leave of the court if the circumstances warrant doing so.

A cursory perusal at the 12-point affidavit in support of this application shows that there were sufficient and cogent reason

for this court to exercise its discretion in favour of the Defendant/Applicant; more so, the Claimant/Respondent have failed to proffer reason on how the grant of this application will prejudice or cause injustice to her.

I hold the firm view that it will be in the interest of justice to grant this application.

Accordingly, the application is granted. Motion No. M/2618/19 is hereby re-listed for hearing to enable same be determined on the merit.

(Sgd)
JUSTICE SALISU GARBA
(PRESIDING JUDGE)
24/01/2020

Defendant/Applicant's Counsel – We thank the court for the ruling
Claimant's Counsel – We also thank the court for the ruling.

(Sgd)
JUSTICE SALISU GARBA
(PRESIDING JUDGE)
24/01/2020