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

BEFORE HIS LORDSHIP: HON. JUSTICE JUDE O. OKEKE FICMC

ON MONDAY THE 16TH DAY OF MARCH, 2020
SUIT NO: FCT/HC/CV/1265/2017

MOTION NO: FCT/HC/CV/M/8864/2019

BETWEEN:

(1) OCHANJA KHAN CONSTRUCTION NIG LTD
(2) MR. ISAH OZIGI
CLAIMANTS/ RESPONDENTS

AND

(1) WELLTOWN STONE NIG LTD
(2) LI QUIJUN
DEFENDANTS/ APPLICANTS

RULING

By a motion on noticed filed on 8/9/2019 and predicated on Order 43 Rule 1 of the Rules of Court 2018 and inherent jurisdiction of the Court, the Defendants/Applicants ("The Applicants") seeks for the following orders:-

1. Leave of this Honourable Court to re-open the defence of the Defendants/Applicants.

   And for such further order(s) as this Honourable Court may deem fit to make in the circumstances of this case.

The application is supported by 3-main paragraph affidavit deposed to by Kemi Funiyi and Written Address of the Applicants' Counsel.

In opposition, the Claimants/Respondents ("The Respondents") on 23/9/2019 filed an 8-paragraph Counter affidavit deposed to by Kelechukwu Ijeudo and Written Address of their counsel.

At the hearing counsel for the parties adopted their Written Addresses as their oral submissions for and against the application. Ruling was then reserved.

In the affidavit in support, the Applicants avered inter alia, that their solicitors law firm suffered adversely due to the economic down turn causing the partner to go to their separate ways and as a result their practice was relocated to Plot 13, 19 Street, DDPA Estate, Airport Road, Warri Delta State in May 2019.

Mr. MacDonald Akhirome of Counsel to the Applicants was unable to appear in this Court on 6/6/2019 due to his inability to make it to Abuja from Warri on the day preceding the date of hearing. The vehicle that was scheduled to convey him to Abuja on 5/6/2019 did not leave Warri until about 12noon due to logistic issues.

Even after leaving Warri, the vehicle broke down in Edo State and it was not until about 3.00pm for that it was repaired.

Due to the insecurity in the Country, the Counsel had to spend the night at Edo State with the intention of continuing the journey the next day being the day of hearing of the case.

The learned counsel informed Dominic Aroyiador, a Colleague to hold his brief but the latter informed him he was away from Abuja at the time.

The Applicants have a good defence to the suit per their Statement of Defence Witness Statements on Oath and documents they intend to rely on which are ready before the Court.

The Respondents will not be prejudiced by a grant of this application.

In his Written Address, Dominic Onyiador Esq of Counsel for the Applicants submitted, inter alia, that the Applicants are desirous of diligently defending the suit to its logical conclusion but could not come to Court on 6/6/2019 due to "unprecedented" circumstances stated in the affidavit in support.

The Court has unfettered discretion to grant the reliefs sought and he craves the indulgence of the Court to exercise its discretion in favour of the application so that the suit can be heard on the merit.

Counsel further submitted that the events leading to the Court foreclosing the Applicants from defending the suit is as a result of error of Counsel which should not be visited on the Applicants who are desirous of contesting the suit to the end. Should the Court refuse this application, the Applicants would have completely lost the opportunity to defend the suit. This would wreck damage to the case of the Applicants.

The Courts are now, more than ever before, posed to doing substantial justice rather than technical justice. He relied on PSYCHMTRO H.M.B. V. EDOSA (2001) 84 LRCN p 715 and ANAKUJO V. ADELEKE (2007) 2 MJSC P1.

He urged the Court to grant the application.

In their Counter affidavit, it was avered on behalf of the Respondents, that the antecedents of the Applicants and their Counsel in this matter is to cause inordinate delay in the speedy dispensation of this matter.

On 6/6/2019 when the matter was slated for defence, neither the Applicants nor their counsel was in Court nor any application made to the Court to explain their abuse.

Consequent upon this, the Respondents Counsel applied and the Applicants were foreclosed from defence.

On same date, parties were ordered to file their Final Written Addresses each party having been given 21 days, to do so.

On 18/6/2019, the Respondents filed their Final Written Address and served same on the Applicants on 21/6/2019.

The Applicants who were aware of the Courts order of foreclosing of their defence on 6/6/202019 did not take any diligent step in seeking leave of the Court for their defence to be re-opened but waited indolently with intent to further waste the time of the Court and the Respondents by filing their application on 18/9/2019.

The Applicants' Counsel had ample time from 6/6/2019 when their defence was foreclose to have timeously filed their application but deliberately waited indolently till 18/9/2019 to file same knowing very well that the case was slated for adoption of Final Written Addresses on 24/9/2019.

To further show the super indolence of the Applicants, the application which was dated 14/8/2019 was not filed until 18/9/2019, all calculated at further "stampeding" the proceedings of 24/9/2019".

The Applicants averments in paragraphs 3(a) to (g) of their affidavit aside being laughable, lend credence to the gross indolence of the defence and the lame excuses is to further cause inordinate delay in this matter. No party in litigation is permitted to hold the Court or the adverse party to ransome. Only a party who has been diligent can bring similar application like the Applicants'.

The Application will definitely prejudice the Respondents' who have in compliance with the Courts order of 6/6/2019 expended mental energy man hours and resources to file and serve their Final Written Addresses since 18/6/2019.

It will be in the interest of justice to dismiss this application with cost for wasting the Respondents' and Courts time.

In his Written Address, Omeiza Zaccheaus Esq. of counsel for the Respondent raised a sole issue for determination thus:-

"Whether the Defendants/Applicants in the circumstance of this case are entitled to the discretion of this Court to reopen their defence".

Treating the issue, the learned counsel submitted, inter alia, that the Applicants' application is misconceived and an attempt at clogging the wheels of justice given that they were given adequate time and opportunity to make their defence which opportunity they frittered away on 6/6/2019 whereupon their right in that regard was foreclosed. Equity aids the diligent and not the indolent which indolence in this case, has been the modus operandi of the Applicants.

By this application, the Applicant and their Counsel are seeking to hold the Court and Respondents to ransome. He referred to BANNA V. TETEPOWER NIGERIA LTD (2006) 7SC (Pt. 1) P1 to contend that the Court have held that no party or litigant is permitted to either hold the Court or the adverse party to ransome or to be waited for perpetually.

Dwelling further, counsel submitted that equity only aids the diligent. The Applicants averments in paragraph 3(a) to (g), of their affidavit in support aside being laughable lend credence to the gross indolence of the defence and lame excuse to further cause delays in this matter as the Applicants had surplus time between the last adjourned date and 6/6/2019 to make preparation to attend Court or communicate a supervening event beyond their control which they failed to do with an intention to further cause delay. Even when they were foreclosed, they had ample time from 6/6/2019 to have made a timeous application to reopen their defence but they deliberately waited till 18/9/2019 knowing full well that the matter comes up for adoption of Final Written

Addresses, on 24/9/2019. To grant the application will be antithetical to the dictates of justice. He referred to NWAKUKUDU V. IBETO (2010) LPELR – 4391 (A).

He urged the Court to dismiss the application.

I have given due consideration to the averments in the affidavit of the parties and submissions of their learned counsel. The cardinal issue that calls for determination is whether or not the Applicants have made out a case to justify a grant of the application.

By this application, the Applicants, seek for an order of Court re-opening their defence of the suit which was foreclosed by an order of the Court made on 6/6/2019. The import of this, is that the Applicants want the Court to set aside its said order of 6/6/2019 and make an order re-opening its defence. The applicants have not in this regard applied to the Court. First to set aside its said Order. They simply want the Court to reopen their defence without seeking to have their order of foreclosure first set aside. By this, the first and fundamental step was not taken by the Applicants. It is improper for the Court to make an order reopening the Applicants defence when the order foreclosing it still subsists and has not been set aside. For this reason alone, this application is incompetent and ought to be struck out.

Assuming but without holding the Applicants took the proper step, in an application to set aside a judgment or order of Court, the Applicant is under a duty to satisfy the Court with regard to the following matter.

(1) The reasons for the Applicant's failure to appear at the hearing or trial of the case
(2) Whether there has been undue delay in making the application to set aside the judgment or order so as to prejudice the party in whose favour the order/judgment subsists.
(3) Whether the party in whose favour the order/judgment subsists would be prejudiced or embarrassed upon such being made
(4) Whether the applicant's case is manifestly unsupportable; and
(5) Whether the Applicant's conduct throughout the proceeding has been such as to make his application worthy of sympathetic consideration.

See: OKAFOR V EZENWA (1992) 4 NWLR (PT. 237) P6. 11; WILLIAMS V. HOPE RISING VOLUNTARY FUNDS SOCIETY 1-2C P145

In this case, with respect to the 2nd and 3rd factors stated above, a look at the records of the Court shows that the Defendants right to defend the suit was foreclosed vide an order of Court made on 6/6/2019 and parties in the same proceeding given time frames within which to file and exchange their Final Written Addresses. The Respondents in compliance with the Courts directive filed their Final Written Address on 8/6/2019 and served it on the Applicant on 21/6/2019. The Applicants filed their instant application thereafter ie on 18/9/2019 and served it on the Respondents on 19/9/2019. By arithmetical reasoning, it took the Applicants about four months after the order of foreclosing was made against them to file and serve their instant application. Can it be said that in the foregoing circumstances that the Applicants are not guilty of delay in filing the application? It is the view of the Court that they are guilty of inordinate delay in filing the application. This is particularly so, as they luxuriated in indolence and only filed the application after the

Respondent's Final Written Address was filed and served on them on 21st June 2019. They only proceeded to file the application after duly reading and digesting the Respondents final Written Address. There is no gainsaying the fact that by so doing, the Respondent stands to suffer a prejudice as rightly canvassed by their learned Counsel.

With respect to the conduct of the Applicants, in this proceeding records of Court show it has not been one of diligence. Records shows that prior to the making of the order of foreclosure against them, when the case came up for cross examination of Pw1 on 16th October 2018 (which date was agreed upon by Counsel for both parties) neither the Applicants nor their Counsel was present in Court to cross examine the Pw1 who was available in Court and ready to be cross examined. The Court was constrained, upon the Respondents' Counsel's applications to foreclose the Applicants' right to cross examine the witness. The case was then fixed for defence, the Pw1 being the Respondent's sole witness.

On 9th January 2019 scheduled for the Applicants to open their defence, they came up with an application seeking for an Order of Court for recall of Pw1 for cross examination. The Court bent backwards and granted the application. Whereupon the Pw1 was cross examined on the next date by the Applicants' Counsel and the witness discharged. The learned Applicants' Counsel in the same proceeding indicated their intention to call a witness in defence. The case was then, with the agreement of Counsel for both parties adjourned to 6th June 2019 for defence by the Applicants.

On the said 6th June 2019, neither the Applicants nor their Counsel appeared in Court to proceed with defence of the case despite being

privy to the fixture for that day. There was no written explanation for their absence placed before the Court. The Court was, in the circumstances, constrained to foreclose their right to defence given their lackadaisical approach to the defence of the case.

It is worthy of mention that the Applicants in their affidavit in support averred stringently that their learned Counsel was not present in Court to proceed with the defence for the reason that the vehicle he was travelling from Warri to Abuja broke down on the road. It needs be stated that even if the said learned Counsel did make it to Court, neither Defendants nor any of their witnesses (whose Witness Statement on Oath are in the file of the Court) was present in Court. The implication of this is that the Applicants would not still have proceeded with their defence if their said Counsel made it to Court on the said 6th June 2019. By the foregoing state of affairs, the Applicants' default in the circumstances cannot be clothed in or justified on the ground of sins of Counsel. The sin here is not just that of Counsel but the Applicants. If their said Counsel for any reason could not make it to Court, the Applicants, if at all they are serious minded with respect to defence of the case would have either come to Court or sent some communication or representative to the Court to explain the reason why their Counsel was absent. There was no such effort by the Applicants.

Beyond these and consistent with the said Applicants' lackadaisical approach to the case, a look at the records of the Court shows that the case has since 18th May 2017 when it was mentioned came up in Court a total of ten times ie on 18/5/2017, 23/10/2017, 30/1/2018, 14/3/2018, 10/5/2018, 26/6/2018, 16/10/2018, 9/1/2019. 17/4/2019, 6/6/2019 and 4/11/2019. Save for the proceeding of 30th January 2018, the Applicants never deemed it necessary to appear in Court as a party to the

proceeding. They were not bothered about the existence of the suit. Out of eleven occasions, they were represented by Counsel only on seven occasions.

The foregoing, undoubtedly show the Applicants' conduct throughout the proceeding as that of an unserious litigant. This is not worthy of the Courts sympathetic consideration.

By reasons of the foregoing, I resolve the sole issue raised above against the Applicants in favour of the Respondents. In consequence, this application fails and only served to further waste the time of the Court. It is dismissed with cost assessed and fixed at N50, 000.00 against the Applicants in favour of the Respondents.

Signed
Hon. Judge
16/3/2020

LEGAL REPRESENTATIONS:

(1). Dominic Anyiadoh Esq for the Defendants/Applicants.

(2). Zacheaus Omeiza Esq for the Claimants/Respondents.