

**IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY ABUJA
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT COURT NO. 11 JABI, FCT – ABUJA**

BEFORE: HON. JUSTICE O.C. AGBAZA

COURT CLERKS: UKONU KALU & GODSPOWER EBAHOR

COURT NO: 11

SUIT NO: FCT/HC/CV/33/2017

MOTION NO: M/58/19

BETWEEN:

PRAISE FOUNTAIN SCHOOLS LTD.....JUDGMENT CREDITOR/RESPONDENT

AND

MRS JEMIMAH FEREL TAFIDA.....JUDGMENT DEBTOR/APPLICANT

RULING

By Motion on Notice with No. M/58/19 dated 8/4/19 and filed same day, brought pursuant to order 10 Rule 11, Order 43 Rule 1 of FCT High Court (Civil Procedure) Rules 2018, Order V11 Rule 2 of the Judgment (Enforcement) Rules, 2004 and under the inherent jurisdiction of this Hon. Court, the Applicant seek the following Orders:-

- (1) An Order of this Hon. Court staying the sale of the proceeds of execution levied on the Defendant/Judgment Debtor/Applicant's properties on the 4th day of April, 2019 as contained in the inventory and Notice of Sale.

- (2) An Order of this Hon. Court setting aside the execution levied on the Defendant/Judgment Debtor/Applicant's properties on the 4th day of April, 2019 as contained in the inventory and Notice of Sale.
- (3) An Order of this Hon. Court setting aside the Judgment delivered by this Hon. Court on the 7th day of March 2019 in this Suit in default of appearance, defence and for fraudulent misrepresentation.
- (4) And the Omnibus Relief.

The grounds upon which the application is brought are:-

- (i) The Defendant/Judgment Debtor/Applicant was not served with the Originating Processes in this Suit and Hearing Notices.
- (ii) The Judgment obtained in this Suit was obtained in default of the appearance and pleadings of the Defendant/Judgment Debtor/Applicant.
- (iii) The judgment obtained in this Suit was obtained by virtue of fraudulent misrepresentation of facts in relation to this Suit.
- (iv) The Hon. Court has the vires to regulate the sale of property under a levied execution .
- (v) The Hon. Court has the vires to set aside execution undertaken vide a default judgment obtained by fraudulent misrepresentation.

In support of the Motion is an affidavit of eight (8) Paragraph deposed to by the Applicant herself with three (3) Exhibits annexed and marked "JFT 1", "JFT 2"

and “JFT 3”, relied on all the averments including the attached Exhibits. Also filed a Written Address in support and adopts same.

The Judgment Creditor/Respondent was served with the Motion on 20/5/19 and in reaction filed a counter-affidavit of 35 Paragraph on 22/5/19 deposed to by Judgment Creditor/Respondent himself with Exhibits attached and marked “A – H”. Also filed a Written Address and adopt the said Address, in urging the court to dismiss the application with substantial cost.

In response to the counter-affidavit of Judgment Creditor/Respondent, filed a reply on point of law dated 28/5/19 but filed on 31/5/19.

The Deputy Sheriff, FCT High Court who was named 2nd Respondent in the Motion, though duly served with the Motion on 10/4/19, did not file any response to the application and was not represented in court.

In the Written Address of Applicant, Anthony O. Chukwurah of counsel submitted three (3) issues for determination;

- (1) Whether the Hon. Court has the vires of set aside its own judgment given vide fraudulent misrepresentation of facts by the Plaintiff and/or in default of appearance by the Defendant.
- (2) Whether the Hon. Court has the vires to set aside the execution carried out by the 2nd Respondent, Deputy Sherriff High Court of FCT.

- (3) Whether the Hon. Court has the vires to stay the sale of the properties attached vide the execution carried out by 2nd Respondent, Deputy Sheriff High Court of the FCT.

And submit on issue 1, that this court has the power to set aside a judgment given in absence of a party and in default of pleadings, that such judgment is not final judgment but default judgment which this court has power to set aside. Submit, from the affidavit of Applicant, in particular, Para 2 and 6, it is contended that Applicant was not served with the Court processes and therefore had no knowledge of the existence and pendency of this Suit and couldnot enter appearance to defend the Suit on the merit. That knowledge of existence of the Suit arose when execution was levied against her moveable properties. Submits further, that facts upon which the court was convinced to give judgment in favour of Plaintiff/Judgment Creditor was based on fraudulent misrepresentation of facts and that if the true position of the facts was made known to court, the court would have taken a different position in the judgment delivered on 7/3/19. In all of these submission, commend the court to the following cases; Emordi Vs Kwento (1996) 2 NWLR PT 433, 656, UTC Nig Ltd Vs Pamotei (1989) 2 NWLR PT 105, 244, Bello Vs INEC (2010) 8 NWLR PT. 1196, 342, Afegbai Vs AG, Edo State (2001) 14 NWLR (PT.733, 425.

On issue 2, submits that if the court finds infavour of Applicant on issue 1, can validly set aside the execution carried out by 2nd Respondent, refer to case of Saleh Vs Monguno (2006) 15 NWLR PT 1001, 316 and submits that in view of the facts stated in the affidavit, in particular with regard to non-service of processes of court prior to the default judgment, the court can safely set aside the judgment since the non-service and the fraudulent misrepresentation of

facts affect the competence of the court and the said judgment, refer to Leedo Presidential Motel Ltd Vs Bank of the North Ltd (1998) 10 NWLR PT 570 353 at 381 – 383.

On Issue 3, submit by virtue of Order VII Rule 2 of Sherriff and Civil Process Act, Judgment (Enforcement) Rules, this court has the general power to regulate sale which includes but not limited to staying such sale based on challenge on competence of the judgment which execution was levied.

In the Written Address of Respondent, Gabriel Esegine; Counsel for Respondent, formulates two (2) issues for determination;

- (1) Whether this Hon. Court can set aside its own judgment in default of appearance and pleadings in the face of clear evidence of service of court process and Hearing Notices on the Defendant but failed, neglected and refused to attend court.
- (2) Whether this Hon. Court can set aside the execution or stay the sale of the proceeds of execution carried out by the 2nd Respondent Deputy Sherriff High Court of FCT where the allegation of fraud or misrepresentation alleged by the Defendant is false and totally misleading.

On issue 1, submit that the court cannot set aside its own judgment in default of appearance and pleadings in the face of clear evidence of service on Defendant. That Applicant's contention that she was not served or aware of proceedings against her is deliberate falsehood and attempt to mislead the court because the records of court shows she was served with the processes before assumption of jurisdiction by court, and refer to case of Bojoga Vs Govt. FRN

(2008) 1 NWLR PT 1067 85 at 125 – 126 Paras H – B. Submits further the contention of Applicant that she was not served or aware of court's proceedings against her cannot be substantiated or justified in law in the face of clear evidence of proof of service by Bailiff of Court. That once a Bailiff had deposed to affidavit of service that he had effected service as ordered by court or required by the Rules, the court will accept it as good service, refer to Tuayo Holdings Ltd Vs Niger Transport Ltd(2007) FWLR PT 356 800 at 809 Paras B – D, IBWA Vs Sasegbon (2001) 16 NWLR PT 1059 195 at 218 Para H, 218 – 219 Paras E – A, AG, Anambra State Vs Okeke (2002) 12 NWLR PT 782, 575. Further submits once a party had fulfilled all obligations imposed by law to the likelihood or probability of getting the processes of court to the attention of Defendant, as in the instant, the Defendant cannot nullify or seek to set aside the proceedings on account of it being proceeded in his absence. That where a party was duly put on notice of proceedings against him and had every opportunity to be heard but elects not to defend or failed to appear, he will be deemed to have waived his rights and cannot be heard to complain of the course the proceedings took in his absence, refer to Ezomo Vs Oyakhire (1985) 1 NWLR PT 2, 195.

On issue 2, and on Applicant's contention that that the Judgment of court was procured on grounds of fraud and misrepresentation by Plaintiff based on Exhibit "JFT3", submit that Exhibit "JFT3" was attached as Exhibit "C" in Para 10 of Plaintiff's affidavit in support of "Undefended List" and so Plaintiff/Respondent placed the issue of Exhibit "JFT 3" before the court at the hearing of the matter and not true that he conceal it as claimed. Further that Plaintiff have stated in his affidavit in support of undefended list repeated in Para 21 – 30 of his

counter-affidavit that at the time Exhibit "JFT 3" was made, Plaintiff had not discovered the fraud perpetrated by Defendant by selling total different land from the one shown to him which necessitated a petition to Police. That Exhibit "JFT 3" cannot stand and cannot be binding on Plaintiff since Defendant having fraudulently deceived the Plaintiff to alter his position to part with his money for particular land of his choice and turn around to give him different land which he would not have parted with his money, if he was shown at the time of payment. That the remedies open to Plaintiff, in law, is to either rescinds the contract when he petitions Defendant to Police and request for his money to which Defendant gave undertaking to pay but never did. Submits that Plaintiff having elected to rescind the contract, Exhibit "JFT3" relied on by Defendant to allege fraud against Plaintiff cannot stand and the court cannot set aside the execution or stay the proceeds of sales of properties levied. That this application is meant to delay and deprived Judgment Creditor the fruit of his labour and its trite that a victorious party must not be deprived of the fruits of his victory, refer to Afegbai Vs A.G. , Edo State (2001) 14 NWLR PT 733, 425, Kwara Poly Vs Oyegbamiji (2008) 3 NWLR PT 1075 459 at 468.

In his reply on point of law filed on 31/5/19, Applicant's counsel submit that the counter-affidavit of Respondent was deposed to out of time in contravention of Order 43 Rule 1 (23) of Rules of this court, that by Order 36 Rule 4, any step taken by party outside the period stipulated by the Rules is done in futility and may be null and void except where leave of court to extend time to do same is first obtained. Submits Exhibit "A" of Applicant was never served on Applicant prior to the commencement of this Suit. Submit its not the duty of Bailiff of court to serve private correspondence of persons and that Exhibit "A" is not a

process of court nor does its service form part of the contemplated duties envisaged by Section 7 – 13 Sheriff and Civil Process Act. Further submit that certificate of service attached to Exhibit "A" speaks volumes and confirm it was never served on Applicant. Further that the certificate of service marked Exhibit "B", "D", "E" and "F" signed by Bailiff of court does not meet the requirement of Order 7 Rules 13 of Rules of Court which provides for deposition of affidavit of service as prima facie evidence of service, and they are not affidavit of service and even if they were, they are not in the prescribed form and cannot support the judgment of court, refer to Martin Sahroder & Co Vs Major & Co Ltd (2002) FWLR PT 128 1304 at 1317. That affidavit to be used in court must be sworn in accordance with Section 109 Evidence Act, that Exhibit "B", "D", "E", "E", and "F" are not sworn.

I have carefully considered the submission of both counsel for and against the grant of this application, the affidavit evidence, the judicial authorities cited as well as the annexed exhibits and find that in this application, only one (1) issue can be distilled for determination and that is;

"Whether the Applicant has made out cogent ground for the grant of the reliefs sought".

The grant or otherwise of an application to set aside the judgment of court is at the discretion of court. And in the exercise of that discretion the court must do so judicially and judicially. And to be able to do so, the Applicant must place before the court cogent facts to rely on. See the case of Anachebe Vs Ijeoma (23015) ALL FWLR PT 784 at 189 where the Apex Court stated;

“The discretion vested in a court is required to be exercised judicially and judiciously as it entails application of legal principles of relevant facts/materials to arrive at a just/equitable decision. It is thus not an indulgence of a judicial whim but the exercise of judicial judgment based on facts and guided by the law or the equitable decision”.

See also Williams Vs Hope Rise Voluntary Fund Society (1982) ANLR, 1. Over time the court have stated the grounds upon which it may set aside its own judgment, they are;

- (1) When the judgment is obtained by fraud or deceit, either in the court or if one or more of the parties, such a judgment can be impeached or set aside by means of an action which may be brought without leave; or
- (2) When the judgment is a nullity. A person affected by an Order of Court which can properly be discharge as a nullity is entitled ex-debit justitae to have it set aside; or
- (3) When it is obvious that the court was misled into given a judgment under a mistaken belief that the parties consented to it; or
- (4) When the judgment was given in the absence of jurisdiction; or
- (5) When the procedure adopted was such as to deprive the decision or judgment of the character of a legitimate adjudication.

See the case of Babale Vs Eze (2012) ALL FWLR PT 635 287 at 300. See also Igwe Vs Kalu (2002) ALL FWLR PT 122, 1 at 4 – 5. Therefore, an Applicant

praying the court to set aside its own judgment must satisfy the court of any of the aforementioned ground. In this instant, the Applicant seeks the court to set aside its own judgment relying on the following grounds.

- (i) That the judgment was given in the absence of jurisdiction; and
- (ii) That the judgment was obtained by fraudulent misrepresentation of facts.

The contention of Applicant, in the main, is that she was not served with the originating process and other processes in this Suit that the judgment obtained in this Suit was obtained in default of appearance and pleadings and also that the judgment obtained in this Suit was obtained by virtue of fraudulent misrepresentation of facts. Against this, the Respondent had contend that the Applicant's claim that she was not served with the originating processes of this Suit or aware of the proceedings against her is deliberate falsehood to mislead the court because records of court shown she was served with the originating processes and hearing notices before the court assume jurisdiction.

It is trite law that the court is entitled and indeed has the power to refer and look at its records in the consideration of any matter before it. See the case of *Agbareh Vs Mimra* (2008) 2 NWLR PT 1071, 378 (SC). It is also law that the court is bound by its records and not expected to go outside it. See the case of *Adamu Vs State* (2018) ALL FWLR 925, 48. See also *C.O.P. Vs Tabin* (2009) 10 NWLR PT 1148, 62.

In this instant case, I have looked at the records of court in the consideration of the contention of Applicant that she was not served with the originating

processes of this Suit and Hearing Notices. And from the records, it will be recalled that the Plaintiff/Respondent, consequent upon his application on 18/5/17, was granted leave of court on 18/5/17 to serve the Writ of Summons and other processes in this Suit on Defendant/Applicant by substituted means to wit: by pasting at her last known Address being Plot 882, Kutunku Compensation lay out Gwagwalada, Abuja. And in compliance with the Order of Court as evidence by proof of service by Bailiff of court, the Applicant on 9/6/17 was served with the Writ of Summons and other processes of this Suit. From the records of court also, there is proof of service by Bailiff of Court that the Applicant was served with hearing notice on 29/6/17 against 4/7/17 when the matter was heard and yet another hearing notice served on Applicant on 2/3/18 against 7/3/18 when judgment in this Suit was delivered. What is more, the Applicant has by her affidavit evidence in support of her application confirmed that she lives at Plot 882, Kutunku Compensation Layout Gwagwalada, Abuja; same address the Bailiff of court served the Applicant the Originating Processes and other processes as well as Hearing Notices. Therefore the contention of counsel that the Applicant was never served with the Originating Process and other processes of this Suit as well as hearing notices is not tenable. I am, therefore, not in agreement with the submission of counsel on this point.

On the contention that the certificate of service as proof of service marked Exhibit "A", "B", "D", "E", and "F" signed by Bailiff of court does not meet the requirement of Order 7 Rule 13 of the Rules. Granted that the Rules provides for deposition of affidavit of service, the certificate of service by Bailiff of court is in substantial compliance with the Rules. It serves as proof that the processes has been served on the Applicant. See the definition of "Certificate of Service"

in Black Law Dictionary Eight Edition at page 241. In any event by Order 5 Rule 1 (1) of the Rules of Court, failure to comply with the requirements of the Rules shall not nullify the proceedings.

On the issue that it's not the duty of Bailiff of court to serve private correspondences of persons, that Exhibit "A" is not a process of court nor does its service form part of the contemplated duties envisaged by Section 7 – 13 Sheriff And Civil Process Act. I do not also agree with the submission of Learned Counsel. Section 7 – 13 of the Sheriff And Civil Process Act, though spelt out some of the duties of the Sheriff, the Act and indeed no statute precludes the Sheriff from serving a private document. Anyone, in the view of court can so do. On Exhibit "A", that it's not a process of court. As earlier stated, the Bailiff of court or any other person could have served the Exhibit "A". In effect, the duties of Bailiff of court is not restricted to serving only court process. See Section 11 of the Sheriff And Civil Process Act.

On the contention of counsel that the counter-affidavit of the Respondent was deposed to out of time in violation of Order 43 Rule 1 (3) of the Rules of Court and leave of court was not sought to file the counter-affidavit out of time. I have looked at the records of court and find that Learned Counsel for Applicant is not correct in his submission. The Order 43 Rule 1 (3) provides.

“Where the other party intends to oppose the application, he shall within 7 days of the service on him of such application, file his Written Address and may accompany it with a counter-affidavit”.

From the records of court, the Applicant's Motion was served on the Respondent on 20/5/19 and in line with the Rules, the Respondent filed his counter-affidavit on 22/5/19, that is two clear days after service of the Motion was effected on the Respondent which goes to show clearly that the Respondent was within the period prescribed by the Rules to file his counter-affidavit.

On the second ground relied upon by Applicant in bringing this application that the judgment was obtained by fraudulent misrepresentation of facts. It is trite law that fraud by its nature is a criminal conduct and its standard of proof is proof beyond reasonable doubt. The Applicant in proof of fraud on part of the Respondent drew the attention of the court to her Exhibit "JFT3" stating that the facts were misrepresented to court deliberately on the part of the Respondent. I am of the view, that this assertion of the Applicant is not sufficient proof on the standard required to show that fraud was committed by the Respondent. First, the said Exhibit "JFT 3" of Applicant is same document annexed to the Respondent counter-affidavit and marked as Exhibit "C". Therefore, the Respondent did not conceal the document. Again, this is a matter brought under the "Undefended List" Procedure and the Applicant was given ample time in line with the Rules of court to present her defence but failed and/or neglected to do so and cannot at this point turn around to assert fraud on the part of the Respondent which, in any case, was never proved. And it is trite law that where a party on notice, is absent from court or fails to utilise opportunity given to him to present his case, he cannot allege breach of fair hearing. See the case of Compact Manifold & Energy Services Ltd Vs Pazian Services (2018) All FWLR PT 951 1781 at 1788. See Ado Vs State (2017) All FWLR PT 897 1938 at 1948 (SC).

From all of these, it is the finding of the court that this application by the Applicant lacks merit and should fail. It is hereby dismissed.

I made no order as to cost.

HONOURABLE JUSTICE O.C. AGBAZA

(Presiding Judge)

29/1/2020

ANTHONY .O. CHUKWURAH – FOR THE DEFENDANT/APPLICANT

GABRIEL ESEGINE – FOR THE PLAINTIFF/RESPONDENT

NO REPRESENTATION FOR THE 2ND RESPONDENT.

