IN THE HIGH COURT OF JUSTICE FEDERAL CAPITAL TERRITORY

IN THE ABUJA JUDICIAL DIVISION

HOLDEN AT JABI, ABUJA

BEFORE HIS LORDSHIP: HON. JUSTICE D. Z. SENCHI

HON. JUDGE HIGH COURT NO. 13

COURT CLERKS: T. P. SALLAH & ORS

DATE: 17/02/2020

FCT/HC/CV/4320/12
FCT/HC/M/929/19

BETWEEN:-

LAWBREED LTD …. **PLAINTIFF/RESPONDENT**

AND

ADKAN SERVICES (NIG.) LIMITED…… DEFENDANT/APPLICANT

RULING

From the records of this Court, the Plaintiff herein commenced the instant substantive suit against the Defendant by Writ of Summons and Statement of Claim seeking declaratory and injunctive reliefs. Trial commenced with both parties calling a witness each to testify and tender documents in evidence. At the close of evidence of each party, the parties closed their respective cases and the matter was subsequently adjourned for final addresses of Counsel.

The Defendant has however now filed the instant Motion on Notice No. M/929/19 dated and filed on 8th November, 2019 pursuant to the provisions of Order 43 Rules 1 & 2, Order 12 Rule 1, Order 1 Rules 1 & 2 of the Rules of this Court and under its inherent jurisdiction praying for the following reliefs:-

1. Leave of the Honourable Court for the Defendant to re-open its case to enable the Defendant recall its witness

and to tender documents that were pleaded, frontloaded, but mistakenly not tendered before closing the Defendant's case.

2. An order of the Honourable Court re-opening the Defendant's case to enable the Defendant recall its witness and to tender documents that were pleaded, frontloaded, but mistakenly not tendered before closing the Defendant's case.
3. For such other order or orders as this Honourable Court may deem fit to make in the circumstances of this case.

In support of the application, the Defendant/Applicant filed an Affidavit of 4 main paragraphs attached with 2 exhibits marked (Exhibits A and B). Counsel to the Defendant/Applicant also filed a Written Address.

In opposition to the application, the Plaintiff/Respondent filed a Counter Affidavit of 5 paragraphs with a written address of Counsel.

Learned Counsel to the Defendant/Applicant formulated a sole issue for the determination of his application to wit:-

> *"Whether or not the Court can exercise its discretionary power in favour of the Applicant to grant this application."*

The Plaintiff/Respondent's Counsel for his part formulated the sole issue for determination to be:-

> *"Whether having regards to the circumstances of this case, the Defendant's application for leave to re-open its case in order to adduce additional evidence ought not to be refused."*

I have looked at the instant application and arguments of parties in respect of same. A resolution of one of the issues formulated above amounts to the resolution of the other. I

shall therefore adopt the issue as formulated by the Defendant/Applicant. The issue is thus:-

> *"Whether or not the Court can exercise its discretionary power in favour of the Applicant to grant this application."*

Vide its affidavit in support, the Defendant/Applicant averred that it was after its witness had testified, tendered documents in evidence, had been cross-examined and the Defendant/Applicant had closed its case that its Counsel discovered that he had mistakenly not tendered all the documents in this case that the Defendant/Applicant pleaded, frontloaded and served on the Plaintiff/Respondent. That the Defendant/Applicant's Counsel had discovered this after he applied to the Court and obtained a certified true copy of the list of documents tendered in the case. A copy of Defendant/Applicant'sCounsel's application and certified true copy of List of Exhibits tendered in this Courtare annexed as Exhibits A and B respectively. That the documents sought to be tendered are pleaded, frontloaded and relevant to this matter. That the grant of this application will not prejudice the Plaintiff/Respondent.

In its Counter Affidavit, the Plaintiff/Respondent denied the Defendant/Applicant's averments as being incorrect. The Plaintiff/Respondent averred that the Defendant/Applicant's Counsel had applied that the Defendant/Applicant's case be closed after its witness had given evidence and the case was adjourned for adoption of final written address. That at trial, the Plaintiff/Respondent's Counsel had objected to the admissibility in evidence of one of the documents tendered by the Defendant/Applicant.That Counsel to the Defendant/Applicant had withdrawn the document i.e. letter dated 30th March,2011, while his other documents were admitted in evidence. That an application made by the Defendant/Applicant's Counsel to *subpoena* a witness was refused by this Court which refusal has not been appealed against. That the order of this Court directing parties to file written address and adjourning for

adoption of same was neither complied with nor appealed against by the Defendant/Applicant. That the documents which the Defendant/Applicant sought to tender vide the re-opening of this case has not been disclosed. The Plaintiff/Respondent averred that the instant case can be determined without additional documents. That this matter has been on the cause list since 2012 and this application would further delay its conclusion if granted. That the Defendant/Applicant's lead Counsel comes to Abuja from Lagos and granting this application would cause the Plaintiff/Respondent to incur more expenses. That this application would overreach the Plaintiff/Respondent.

In the writing address of the Defendant/Applicant learned Counsel submitted in his address that the affidavit in support is to the effect that Counsel to the Defendant/Applicant mistakenly did not tender some documents. He cited Order 1 Rule 1(2) of the Rules of this Court and posited that this is a case that falls within the purview of the principles of law that states that parties should not be punished for the mistake of their Counsel. He cited the case of ***GREEN PALMS NIGERIA LTD. V. CASAGRANDE LTD (2004) LPELR-24406(CA)***. Counsel submitted that although there are no express provisions that deal with this type of application, it falls within the exercise of the discretionary powers of the Court. He posited that the law allows for the Plaintiff/Respondent to cross-examine the Defendant/Applicant on the documents sought to be tendered. He concluded his submissions by urging this Court to grant the application to ensure justice is done.

Arguing his own sole issue, learned Counsel to the Plaintiff/Respondent submitted in his address that the law is trite that the grant or refusal of an application to re-open a case and recall a witness is at the discretion of the Court acting judiciously and judicially. Such discretion, he posited, is not exercised lightly or as a matter of routine. He submitted that an applicant must satisfy the Court of facts *inter alia* as to why the re-opening of the case and re-call is

necessary. He relied on the cases of ***TIWANI LTD. V. CITYTRUST MERCHANT BANK LTD. (1997) 8 NWLR (PT. 515) P. 140 and WILLOUGHBY V. I.M.B. LTD. (1987) 1 SC 93***. It is Counsel's position that the affidavit in support has not shown why this Court should grant the application as the only fact shown is that documents sought to be tendered were mistakenly omitted during trial. He posited that the issue of mistake of Counsel does not arise in this case and there is nothing to show that the documents sought to be tendered have not been in the Defendant's possession prior to commencement of the suit. He contended that no justification has been shown for refusal to produce the documents nor the purpose they intend to serve. He finally urged this Court to dismiss the application with costs as the Defendant/Applicant has failed to present cogent materials before the Court upon which the Court would exercise its discretion in its favour.

It has been held by the Supreme Court that once a judge delivers final judgment in a matter pending before him, he ceases to be seised of the matter and cannot reopen same. – see the case of ***COMMISSIONER OF LANDS MID WESTERN STATE V. EDO-OSAGIE & ORS (1973) LPELR-885(SC)***. In other words, until final judgment is actually delivered, a Courthas the power to reopen a case pending before it. See also Supreme Court's decision in the case of ***UTIH V. ONOYIVWE (1991) 1 NWLR (PT. 166) P. 166*** where the apex Court specifically held (on the power of Court to re-open a case) that a judge has an unfettered discretion, in deserving cases, to reopen a case even if it had already been adjourned for judgment.

In the instant case, both parties had closed their respective cases. The decision of the Supreme Court in the case of ***WILLOUGHBY V. INTERNATIONAL MERCHANT BANK (NIG.) LTD (1987) LPELR-3495(SC)*** is that:-

"When however parties have closed their cases, it lies in the discretion of the trial Court to allow them to re-open same and call further evidence. This discretion must however be properly exercised not only judicially but judiciously. When both parties have closed their cases the trial Court still has a discretion in the matter but it is a discretion which has to be exercised very reluctantly and with great circumspection bearing in mind any possible disadvantage or unfairness to the opposite party."

It thus behoves the Defendant/Applicant in the instant case, who is seeking to reopen its already closed case and recall its witness, to show good and cogent reasons why this Honourable Court ought to exercise its discretion in favour of granting its application. – see the cases of***NEBO V. FCDA (1998) 1 NWLR (PT. 574) P. 480*** *and* ***ONWUKA V. OWOLEWA (2001) 7 NWLR PT. 713 P. 695****.*

Now, records of this Courtshow that the Defendant/Applicant' Counsel himself closed his case wilfully after his witness had concluded giving testimony at trial. The matter was thus adjourned for address of parties' Counsel. I find the case of ***ALIYU V. ALMU (2013) LPELR-21857(CA)*** very relevant. Just as in the instant case, an application to re-open a case which had been closed by both parties and the matter adjourned for adoption of final written addresses was considered by the Court of Appeal in ***ALIYU V. ALMU (SUPRA)****.* The Court of Appeal held in that case as follows:-

"An application to re-open a case which has been closed by both parties and the matter adjourned for the filing and adoption of written final addresses is no doubt a major interlocutory application.

In ***Nebo v. FCDA (1998) 11 NWLR (pt. 574) page 480****this Court said inter alia of the principles regulating the re-opening of a case closed thus:*

> *"An application by a party to re-open an already closed case is an invitation to the Court to exercise its discretion in his favour in which case the Applicant must disclosedreasons sufficient to persuade the Court to exercise its discretion in his favour."*
>
> *The principle here is similar to when a party who has failed to take a legal step within the time stipulated is now seeking the Court's indulgence to have time extended for him, which must be backed up with convincing reasons to enable the Court exercise its discretion in his favour. Some of the reasons the applicant could canvass include lack of means, mistake, or accident.A party seeking to re-open his closed cased would require the consent of his opponent, in the absence of which he has to depend on the discretion of the Court."*

In the instant case, it is apparent from the affidavit in support of the instant application that the reason being relied on by the Defendant/Applicant for seeking the exercise of this Court's discretion in its favour is the mistake of its Counsel. It is alleged that Counsel to the Defendant/Applicant mistakenly did not tender all documents which the Defendant/Applicant had pleaded, frontloaded and served on the Plaintiff/Respondent. Generally speaking, litigants are not punished for a mistake that is solely their Counsel's and this could constitute a plausible ground for granting an application to re-open a closed case. The Plaintiff/Respondent has however filed a counter-affidavit denying that it was a mistake and that the case can be determined without any further evidence in this matter.

It was held in the case of ***ALIYU V. ALMU (SUPRA)***that an applicant seeking to re-open a case must place before the Court all necessary materials to enable the Court exercise its discretion in his favour and that it is the general practice of

Courts not to punish litigants for the mistake, blunder, negligence or inadvertence of his Counsel. The Court of Appeal further held in that case as follows:-

> *"In the instant appeal Counselto the Appellant had deposed in the affidavit in support of his application seeking for the exercise of discretion of the lower Court to re-open his case which he had closed due to his mistake or inadvertence. The case of the Plaintiff/Appellant was voluntarily close by his Counsel before proving a very fundamental issue of pleadings which he had pleaded in paragraphs 10 and 11 of his statement of claim. It has been deposed to on behalf of the Plaintiff/Appellant that the Defendant/Respondent would not be prejudiced if the Court exercised its discretion by ordering the re-opening of the case.*
>
> *In order to establish that it was a genuine mistake, the Court was referred to the paragraphs of the Statement of Claim where the issue of Islamic Law had been pleaded."*

In view of the affidavit evidence before this Court, it becomes imperative that this Honourable Court knows the exact documents which the Defendant/Applicant's Counsel allegedly mistakenly did not tender at trial and for which the Defendant/Applicant seeks discretionary power of this Court to re-open the case. It is only then that this Court can be said to have considered all the materials it needs to exercise its discretion judiciously and judicially in the matter of this application. The Defendant/Applicant in this case merely averred in its affidavit in support that its Counsel mistakenly did not tender all the documents that it pleaded, frontloaded and served on the Plaintiff/Respondent. The Defendant/Applicant unfortunately did not provide details of the documents which it pleaded, frontloaded and served on the Plaintiff/Respondent but which its Counsel allegedly mistakenly did not tender. The circumstances of these alleged documents are not known and as such, their relevance and whether it was a mistake of

Counsel not to tender them is unknown. The onus is on Defendant/Applicant who is seeking the Court's discretion to place before this Court all necessary materials and make full disclosure of facts to enable the Court exercise its discretion in its favour. – see the cases of **ALIYU V. ALMU (SUPRA)** and ***ALHAJI SULYMAN ALIYU V. LAWAL ALHAJI ALMU (2013) LPELR-21857(CA).*** In the instant case, the Defendant/Applicant has failed to discharge that duty at its own peril.

The Defendant/Applicant has not made full disclosure of facts nor has it placed all necessary facts before this Court for this Court to exercise its discretionary power in favour of the Defendant/Applicant by granting the instant application to re-open the case. The consequence is that this Court is not in a position to grant the application to re-open the case as sought by the Defendant/Applicant in its first prayer. The first prayer ought to be refused.

Having refused the first prayer to re-open the case, the second prayer to re-call the Defendant/Applicant's witness ought also to be refused. It stands to reason that the case, which has already been closed, must be re-opened before any witness can be called.

In sum, the issue for determination ought to be resolved against the Defendant/Applicant and in favour of the Plaintiff/Respondent. The instant application is without merit and ought to be dismissed in the circumstances. Accordingly, the application is hereby dismissed.

HON. JUSTICE D. Z. SENCHI
(PRESIDING JUDGE)
17/02/2020

KhoniBobai:- With me is I.C Ukpani for the Claimant .
Fidelis Imafidon:-For the Defendant.

Sign
Judge
17/02/2020