

IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY

IN THE ABUJA JUDICIAL DIVISION

HOLDEN AT MAITAMA, COURT 4, F.C.T., ABUJA.

BEFORE HIS LORDSHIP: HON. JUSTICE O. O. GOODLUCK

MOTION NO. FCT/HC/M/3754/2013

B E T W E E N : s

PASTOR DAVID ADESINA

PLAINTIFF/APPLICANT

AND

- 1. ROYAL BUILDERS LIMITED**
- 2. THE DEPUTY SHERIFF HIGH COURT
OF THE FEDERAL CAPITAL TERRITORY**

DEFENDANTS/RESPONDENTS

R U L I N G

The Plaintiff/Applicant is by a Motion on Notice under reference M/6712/2014 praying this Court for an order to set aside the ruling of this Court delivered on the 21st November, 2011 as well as for an order to relist this suit same having been erroneously struck out by this Court.

Six grounds were identified by the Plaintiff/Applicant's Counsel, Lawrence Erewele Esq. for bringing this Applicant. The grounds in summary are that the Notice of Preliminary Objection under reference M/1362/2013 ought to have been served on the Plaintiff/Applicant before this Court can be seized with jurisdiction.

It is also contended that non service of the Notice of Preliminary Objection on the Plaintiff/Applicant is a breach of the Plaintiff's right to fair

hearing. In support of the application, the Plaintiff/Applicant filed a 42 paragraph affidavit dated 7th August, 2014 deposed to by Pastor David Adesina the Plaintiff/Applicant herein.

The facts disclosed in the affidavit briefly stated are that the Plaintiff's former Counsel vide, Exhibit A, a letter dated 15th November, 2013 applied for this suit to be set down for hearing, however a date could not be fixed by the Court as the file could not be located.

Unknown to the Plaintiff/Applicant, this suit had been struck out when it came up on the 21st November, 2012 following the hearing and determination of the 1st Defendant's Notice of Preliminary Objection.

Plaintiff/Applicant later discovered that service of the Preliminary Objection was effected on the 5th November, 2013 on one Okey at Shop No. 301/302 Banex Plaza instead of Suite BS 219C/302 which was the office address noted in the writ of summons and Motion M/2353/2014. It is further disclosed that from inception of this suit till the time the Preliminary Objection was determined and struck out by this Court, Plaintiff's instructed Counsel, J. I. Akor Esq. did not give the Plaintiff/Applicant any update on this case. It was upon further enquiries by the Plaintiff that they got to know that his former Counsel did not file a counter affidavit to the Preliminary Objection in that he was not served with the process.

Plaintiff contends that his case against the Defendant is not premised on the fact that his properties were attached as Judgment debt alone but because the 2nd Defendant harassed him and his children and even prevented them from going to school.

Plaintiff contends that if this application is allowed he is prepared to argue the notice of Preliminary Objection filed against him. Plaintiff is apprehensive that if this suit is struck out he would be deprived of seeking redress against the 2nd Defendant in the light of the subsisting provisions of the Public Officers Protection Act.

Lawrence Erewele Esq., Counsel for the Plaintiff/Applicant in his written address dated 7th August, 2014 formulated three issues for determination as follows;

1. Whether the Plaintiff/Applicant was properly served with the Notice of Preliminary Objection with Motion No. M/1362/2013.
2. Whether the Plaintiff/Applicant was properly notified of the hearing of the said notice of Preliminary Objection.
3. Whether the Plaintiff/Applicant has pleaded material facts before the Court to entitle it to the grant of the application.

Before considering the issues for determination I find it needful to consider the oral objection raised by the Defendant's Counsel on the 26th

May, 2016. Mr. Stanley Nwafor contends that this Court is acting *functus officio* by entertaining this Motion on Notice, he posit that having struck out this suit, this Court cannot entertain this application. Considering that his submission amounts to a threshold point, I consider it expedient to determine the competence (or otherwise) of this Preliminary Objection first.

Nwafor Esq. commended this Court to the decision in **FIRST BANK OF NIG. PLC v. LODIGIANI (2010) 14 N.W.L.R. (PART 213, EASTERN BREWERIES PLC v. INVEN. 3 N.W.L.R. (PART 650)**. He also noted that execution has already been carried out in this case.

In reaction, the Plaintiff/Applicant's Counsel filed a process titled Applicant's Reply on Point of Law to the 1st Respondent's submission made on the 26th May, 2016.

Learned Counsel for the Plaintiff/Applicant has submitted that a Court has the inherent powers to relist a suit which has been struck out where it has not been heard on the merit. He commended this Court to the decision in **REGISTERED TRUSTEES OF IFELODUN FRIENDLY UNION v. KUKU (1991) 5 N.W.L.R. (PART 1989) page 65**.

Learned Counsel for the Plaintiff/Applicant went on to submit that the **Lodigiani case** cited by the Defendant's Counsel supports the Plaintiff/Applicant's case. He recounted that the Court of Appeal in

dismissing an appeal filed against the ruling of the trial Court to relist a case that had been struck by the trial Court held inter alia that:

“The High Court possesses the inherent discretionary power and jurisdiction to relist a matter which was not heard on the merit but which was struck out of the cause list for any reasons”

Erewele Esq. has submitted that the Preliminary Objection raised by the 1st Defendant/Respondent was not heard on the merit but in default of the Plaintiff/Applicant’s appearance. He submitted that the Plaintiff/Applicant had been precluded from hearing on account of improper service of the hearing notice.

Finally, Erewele Esq. commended the Court to the decision in the Lodigiani case where it was held that: *“Hearing a case on the merit involves the production of evidence by the parties in support of their respective pleadings, the evaluation or assessment of such evidence by the Court and decision by the Court on the issue joined by parties which finally determines their rights”*

I have considered the submissions of both Counsel and I am of the view that the Preliminary Objection is competent and a Court will not be acting functus officio in entertaining an application to determine whether or not to set aside or a striking out order such as in the instant scenario. The

objection of Nwafor Esq. is accordingly overruled. I am of the view and will so hold that this Court has the inherent jurisdiction to consider an application for setting aside its orders, particularly when the Applicant is denying service or an order of striking out is made in default of hearing the aggrieved party.

That said, I can now proceed to consider the submissions of Erewele Esq. on the substantive Preliminary Objection. Three issues have been raised for determination by Plaintiff/Applicant's Counsel, however I am of the view that the lone issue for consideration is whether service of the Preliminary Objection and Hearing Notice on the Plaintiff/applicant is valid and lawful.

I need not rehash the facts in the affidavit in support, I have examined the affidavit evidence of the Plaintiff/Applicant particularly on the fact that the Court process was served on one Mr. Okey David Agbo, a legal practitioner in the Plaintiff's Counsel adjoining office.

Besides, it is noted that the service was not effected on the address reflected for service on the originating process filed by the Plaintiff/Applicant. The fact that there is no certificate of service of the hearing notice in the Court's file in my view and I will so hold is that the Plaintiff/Applicant was not served with the Notice of Preliminary Objection

personally or even on his Counsel who has indicated an address for service.

Erewele Esq. has rightly commended this Court to the decision in **WEMA BANK v. S.O. ODULAJA (2000) 7 N.W.L.R. (PART 663) page 1 at 7** where it was held that: *“Failure to give notice of proceedings to an opposite party where service is required is a fundamental omission which renders such proceedings void”*

He also relied on Order 7 Rules 4 and 7 of the High Court of the FCT, Civil Procedure Rules of 2018.

Applying the foregoing considerations to the instant application, I am inclined to allow the Plaintiff/Applicant’s prayers. The Ruling of this Court delivered on the 21st November, 2013 is hereby set aside for want of jurisdiction.

Leave is hereby granted to the Plaintiff/Applicant to file and serve a counter affidavit to the Preliminary Objection under reference M/1362/2013

O.O. Goodluck,
Hon. Judge.
5th May, 2020.

APPEARANCE

Parties absent

Lawrence Erewele Esq.: For the Plaintiff/Applicant

Defendant is unrepresented.