

**IN THE HIGH COURT OF JUSTICE OF THE
FEDERAL CAPITAL TERRITORY ABUJA
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT JABI - ABUJA**

BEFORE: HON. JUSTICE O. C. AGBAZA

COURT CLERKS: UKONU KALU & GODSPOWER EBAHOR

COURT NO: 11

SUIT NO: FCT/HC/CV/223/2015

MOTION: M/9681/2018

BETWEEN:

NIGCHA NIGERIA LIMITED.....PLAINTIFF

VS

1. SNECOU DREDGING LTD

2. CHUDE REGINALD EJEKWE

3. CHIEF NICHOLAS UKACHUKWU.....DEFENDANTS

RULING

By a Motion on Notice dated 19/10/2019, and filed same day, with Motion No: M /9681/18 and brought pursuant to Order 7 (2) (3), Order 10 Rules (2) (11), Order 21 Rules 12 of the FCT High Court (Civil Procedure) Rules (hereinafter called the Rules) 2018, Section 36 of the Constitution of Federal Republic of Nigeria 1999 (As Amended) and under the inherent jurisdiction of this Hon. Court, the Applicant prays for the following reliefs:-

- (1) An Order of the court setting aside the Judgment of this court dated 24/10/2018 on grounds of fraud and non-service of the Plaintiff's Writ of Summons and particulars of claim on the 1st and 3rd Defendants.

- (2) An Order of the court setting aside the service of the Plaintiff's Writ of Summons and the Statement of Claim on the 1st and 3rd Defendants as the 1st Defendant was served through a wrong person and the 3rd Defendant was not served.
- (3) An Order of the court granting leave to the 1st and 3rd Defendant to file defence to the Plaintiff's claim and defend this Suit upon proper service of the Plaintiff's court processes on the 1st and 3rd Defendants.
- (4) An Order of the court extending the time within which the 1st and 3rd Defendants will file their Joint Statement of Defence to defend the Plaintiff's Suit upon proper service on the 1st and 3rd Defendants the Plaintiff's Writ of Summons and particulars of claim.
- (5) Omnibus Relief.

In support of this application, 34 paragraph affidavit sworn to by Esther Dimeh, and a Written Address. Also filed is a further and better affidavit filed on 6/11/2018 with one (1) Exhibit marked as annexure "A; and a Written Address. And upon receipt of the counter-affidavit, filed on 14/11/2018, a further affidavit of 19 Paragraph with two (2) Exhibits sworn to by Chidinma .I. Obilor and a Written Address.

Responding, the Judgment Creditor/Respondent filed a 17 paragraph counter-affidavit sworn to by Catherine Joseph with three (3) Exhibits

attached marked "CJ1", "CJ2" and "CJ3", and also filed is a Written Address in opposition. On receipt of the Applicant's further affidavit, filed a further counter-affidavit on 27/11/2019 deposed to by Catherine Joseph of 14 paragraph and a Written Address.

On 6/2/2020, both Counsel adopted their respective processes in urging this court to grant and/or refuse this application.

In the Written Address of Applicant, in the main, settled by K.C. Okpo Esq, four (4) issues was formulated for determination;

- (1) Whether the 1st/3rd Defendants were served with the processes of the court.
- (2) Whether this court has jurisdiction to hear this case against the 1st and 3rd Defendants when they were not served the processes of this court.
- (3) Whether there is fraud and connivance by the Plaintiff and 2nd Defendant by deliberately keeping away the pendency of this Suit to the knowledge of the 1st/3rd Defendants.
- (4) Whether this Judgment can be termed a default judgment.

The issues raised in the further affidavit bothers on the already formulated issues.

In the Written Address of the Judgment Creditor/Respondent settled by Chiemelie N. Onyia, in the main, two (2) issues was formulated for determination;

- (a) Whether the Applicant is entitled to the intervention of the court by an order setting aside the judgment of this Hon. Court delivered on the 24/9/2018.
- (b) Whether leave should be granted to the Applicant to file a defence in this matter after Judgment has been delivered by this Hon. Court?

There was no issues formulates to the Written Address in support of the further counter affidavit of the Respondent.

Having carefully considered this instance application, the affidavit, submission of both counsel and judicial authorities cited, I find that only One (1) issue calls for determination, which is;

“Whether in the face of the affidavit evidence before the court, the Applicant has shown sufficient grounds to warrant the grant of this application”

The grant or otherwise of the prayer sought by the Applicant is at the discretion of the court which the court must exercise judicially and judiciously. And to be able to do so, the Applicant must place before the court cogent facts to rely on. In *Anachebe Vs Ijeoma* 92015) ALL FWLR (PT.784) 183 @ 195 Para D – F. The Supreme Court held.

“The discretion vested in court is required to be exercised judicially and judiciously, as it avails application of legal principles to 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”.

The courts overtimes in reaffirming that it has inherent powers to set aside its own judgment, in doing so, set out guidelines, which the court will consider in that exercise of its discretion to do. See Babale Vs Eze (2012) ALL FWLR (PT.635) 287. Monsuru Davies & Ors Prince Tajudeen Odofin & Ors (2017) LPELR – 41871 (CA); Per George Will JCA Pg 49 Para B – F, held that;

- (a) When the judgment is obtained by fraud or deceit either on the court or one or more of the parties.
- (b) When the judgment is a Nullity.
- (c) When it is obvious that the court was misled into giving judgment under mistaken believe that the parties consented to it.
- (d) When the judgment is giving in the absence of jurisdiction or when the procedure adopted was such as to deprive the decision or judgment of the character of a legitimate adjudication.

In instant application, it is the contention of the Applicant, that there was no service of the processes on the 1st/3rd Defendants as claimed by the Respondent. Also that there is no proof of service by substituted means on the 3rd Defendant and that there was fraud in obtaining the judgment of the court by the Respondent. All of these are contained in Paras 6, 7, 8, 9,

10, 17, 24 and 25 of the Applicant supporting affidavit and Paras 3, 4, 9, 10, and 12 of the further affidavit of the Applicant dated 14/11/2019.

On the other hand, the Respondent contend that the 1st and 3rd Defendants were served at the Registered office of the 1st Defendant, while the 2nd Defendant was served on the 2nd Defendant by substituted service by pasting at the office of the 1st/3rd Defendants by order of the court. These facts are contained in Paras 4, 5 , 7 and 8 of the Respondent counter-affidavit filed on 28/11/2019, also by Paras 5, 6 and 7 of the further counter-affidavit of the Respondent filed on 27/11/2019.

In all of these, the contention of the parties' borders on the issue of jurisdiction, clothing the court with powers to entertain and determine matter as stated in Plethora of judicial authorities. See *Madukolu Vs Nkemdilim* (1962) 1SC NLR 62. To determine these contending claims of the parties, the court must consider its records and this the cur is empowered to do. See *Agbareh Vs Mimra* (2008) ALL FWLR (PT.407) 559 @ 585 D – F.

On a careful perusal of the processes leading to the judgment, sought to be set aside by the Applicants and the processes of this instant application, it is clear, that the 1st Defendant a Corporate body was duly served in accordance with the law and the 2nd Defendant was also served pursuant to leave of court granted for substituted service, the proof of affidavit of service sworn to by the court Bailiff are as contained in the process in proof of service on 1st and 2nd Defendants.

In respect of the 3rd Defendant , who by law should be served personally, there is no proof of service on him as required by law, nor was there any proof of service or orders of court for substituted service on the 3rd Defendant.

Consequent upon the finding of the court that no service was not effected on the 3rd Defendant as prescribed by the law, the question is, can the court be said to be fully clothes with jurisdiction to determine the matter in the absence of the party to the proceedings as it did. My simple answer is No. Service on the 3rd Defendant through the 1st Defendant's Registered Office cannot by any stretch of imagination be termed proper service, when the 3rd Defendant is not a corporate body. What the law requires is personally service or leave of court, for substituted service and in this case none exist.

On whether this judgment can be termed default judgment, this entitling the Applicant to have it set aside, default judgment has been define the court in the case of Chief Emmanuel Bello Vs INEC (2010) LPELR – 767 (SC) Per Adekeye JSC as

“.....is one given in default of appearance.....(Any judgment in default of pleadings or appearance is not a final judgment since both parties were not heard on the merit of the case. The judgment was obtained by failure of the Defendant to follow certain Rules of procedure. Where a Court has not pronounced a judgment on the merit or by consent, such a judgment may be set aside by any trial court in the Judicial Division, where the judgment was obtained”.

In this instance, the Applicant relies on Order 10 Rules (2) & (11) and 21 Rule (12) in making this application and also seeking leave of court for extension of time to file their Statement of Defence.

Against, this the Respondent contend that by the Applicant filing a Joint Statement of Defence, is proof of service of the originating Processes, basics of which the 1st/3rd Defendants prepared and filed their Joint Statement of Defence.

Again, I have perused the process and find that in further support of their contention that service was not effected in line with the procedure, they, the Applicant sought and applied to obtain records, consequent upon receipt of the letter from Respondent Counsel of the Judgment of the court with its demands on them. These facts is contained in Para 5 of the Applicant further affidavit in support filed on 14/11/19 with Exhibit "A" attached.

The Respondent on the other hand by their Para 6 of their further counter affidavit confirm their service was effected on the 1st Defendant at their Registered Office. No mention of service on the 3rd Defendant anywhere rather, that the service was made through the 1st Defendant office. This court has found that the service on the 3rd Defendant through this means is not proper.

In consequent of all of these, this judgment quite rightly can be termed a default judgment, qualifying the Applicant to make this instant application to set aside and for leave to file Statement of Defence to defend.

The court having found that there was no proper service on the 3rd Defendant and holding that this is a case of default judgment, it's the court firm view that the issue of allegation of fraud by the Applicant should be of no moment, are matter for trial on the merit.

In conclusion, the court having so found that the 3rd Defendant was not properly served with the Originating Processes as required by the law and Rules of Cloth this court with the jurisdiction to hear, and determine this case, holds that the Applicant has sufficient shown that this court has the vice in line with the laid down guidelines to grant this instance application.

Accordingly, this application succeeds. Reliefs 1, 2, 3, 4 and 5 hereby granted as prayed.

HON JUSTICE O.C AGBAZA

Judge

13/5/2020

K.C. OKPO - FOR THE DEFENDANT/APPLICANT

O.S. EMEJULU WITH BASILIA A. IGWEOGU ESQ FOR THE RESPONDENT/
JUDGMENT CREDITOR.