

IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY

IN THE ABUJA JUDICIAL DIVISION

HOLDEN AT APO

CLERK: CHARITY

COURT NO. 16

SUIT NO:FCT/HC/CV/80/2011

M/7273/18

DATE 22/6/2020

BETWEEN:

ADIN-MILES INTERNATIONAL LTDJ/CREDITOR/RESPONDENT

AND

SENATOR JIM NWOBODOJUDGMENT DEBTOR

IN RE:

SAVANNAH BANK PLC CLAIMANT/APPLICANT

(26 Algiers Street, Wuse Zone 5, Abuja, FCT)

AND

THE SHERIFF, HIGH COURT OF THE FCT RESPONDENT/RESPONDENT

RULING

(DELIVERED BY HON. JUSTICE S. B. BELGORE)

This motion on Notice number M/7273/18 brought by Judgment Creditor/Applicant is dated and filed on the 19/6/18. It is brought pursuant to **Orders 43 Rule 1 of the High Court of the Federal Capital Territory Abuja(Civil Procedure Rules) 2018** and **Section 6(6) of the constitution of the Federal Republic of Nigeria 1999(as amended)** and under the inherent jurisdiction of the court.

It prays solely for an order of this Honourable Court setting aside the order of this court made on the 6th day of December 2017.

The grounds for so praying the court are as follows:

- (1)The claimant on the 18th day of August 2017, filed a motion on notice with motion number M/9048/17 seeking for an order of the court mandating the Sheriff High court of the Federal Capital Territory (FCT) to release to the claimant her properties.
- (2)The claimant on the 7th day of November 2017 subsequently filed another motion on Notice at the process unit of this court with motion Number M/262/17 praying for an order of mandatory injunction directing the Shariff High Court of the Federal Capital Territory to put on hold further auctioning of the properties attached during the execution of the judgment pending the hearing of motion Number M/9048/17 filed on the 18th day of August 2017.
- (3)When the matter came up for hearing on the 15th day of November 2018, the claimant informed this Honourable Court that he has two pending applications which are motion number M/9048/17 filed on the 18th day of August 2017 and M/262/17 filed on the 17th day of November 2017.
- (4)The claimant also informed this Honourable Court that he wished to withdraw motion number m/9048/17 being that it has been taken over by event i.e. the auctioning of the items and same was duly withdrawn and struck out by this Court.

(5)The claimant on that same proceeded to move motion Number M/262/17 which was predicated on the pendency of motion Number/9048/17 that had already been withdrawn and same was granted by this court.

(6)The claimant misrepresented facts as there was no pending motion M/9048/17 as at the time this order of court was made.

In support of this application is a 4 paragraphs affidavits and 4 exhibits A-D. There is also a written address.

Mr. Ezekiel Egbo of counsel to the Judgment Creditor/Applicant moved the application summarily as he placed reliance on all the depositions in the supporting affidavit and exhibits attached before finally adopting his written address as his arguments in support of the grant of the application.

He stated further that they were served with the counter affidavit and written address by the Respondent learned silk which they filed no further affidavit to. He further submitted that their argument for praying the court to set aside its order made on 6/12/17 was that there was no motion number M/9048/17 in existence as same was withdrawn.

On the part of the learned silk, Mr. Njikonje said they filed counter –affidavit dated 25/6/18 with exhibit C attached. He also filed a written address which he adopted as his oral argument against the grant of the applicant’s prayer.

He adumbrated further by referring to the applicant’s exhibit C which is record of proceeding of 6/12/17. He now submitted that this application is an abuse of court process because the applicant did

not oppose the grant of the order he sought to be set aside now. Neither counsel nor their client are permitted to approbate and reprobate. He now cited the authority of **ADEOGUN VS FASHOGBON (2011) ALL FWLR (PT. 516) 485**. He concluded by urging the court to dismiss this application as there must be an end to litigation.

The applicants learned counsel identified a sole issue determination which he couched thus:

“Whether this Honourable court has the inherent power to set aside its order”

Whereas the learned silk for the respondent raised two issues for consideration. They are as follows:

- (1) Whether the Honourable court having delivered Ruling and granted motion Number M/262/17 has not become *functus officio* and whether in appropriate cases the court can oblige the applicant on the procedure adopted by it.**
- (2) Whether the Judgment Creditor/Applicant having participated in the proceeding and indeed acquiesced to the grant of the order of the Honourable court, can be heard to complain especially as the order of 6th December, 2017 was not against it but against the Shariff High Court of the FCT who has not complained.**

Let me quickly put it straight that, the basis or facts behind this application can be seen in the paragraph 3(a-f) of the supporting affidavit which is *parimaterial* with the grounds upon which this application is premised. The belief that the motion number/9048/17 withdrawn by the respondent was the rock upon which motion Number M/262/17 stand.

The collapse of M/9048/17 necessarily means the death of M/262/17 on arrival whether this is true or not, we shall find out later in this ruling.

The respondent vide paragraphs 4(a)(i-iii),5,6,7,8,9 and 11 respectively explained succinctly the reasons behind the filing of the early motion number M/9048/17 and the latter motion number M/262/17 respectively.

It is worthy to note that those evidence was not contradicted by filing a further and better affidavit.

At this juncture, I am prompt to ask this question. Is it true that motion number M/262/17 depended on the motion Number M/9048/17? Does it mean that the motion Notice M/262/17 which is a motion on notice and not ex parte has to depend on the other motion on Notice? This is clearly a misconception of facts from one of the parties to this application.

The gamut of this application as can be gathered from the affidavit evidence in support of this application is that the motion number M/262/17 granted by this court on the 6/12/17 ought not to have been granted. The reason being that, it is the applicant's interest directly or indirectly that will be affected at the end of the day. They will bear the brunt but unfortunately that is the situation for now and it is the cross they have to carry.

Be the above as it may, what is the merit of this application considering the facts and circumstances of this case.

Can the court in the circumstances of this application and available evidence set aside its order made on the 6/12/17?

I think this is the crux of this application.

It is the submission of the applicants learned counsel that the court has inherent power to set aside its order when same was obtained by fraud or deceit. He cited *inter alia* several cases to buttress this point. **EDE VS MBA(2011)18 NWLR(P.T. 1278)249, IGWE VS KALU(2002)14 NWLR(P.T.787)14, IKPONG VS UDOBONG(2007)2 NWLR(P.T.1017)184, VULCAN GASES LTD VS G.F.IND. A.G.(2001) 9 NWLR(P.T. 719) 610.**

He further submitted that the respondent in order to deprive the Judgment Creditor/Applicant the right to enjoy the front of the Judgment suppressed the truth about the lifeless nature of motion number M/9048/17 which was withdrawn before taken motion number M/262/17. The act of the claimant/respondent according to the applicant in moving the court to make an order in this respect is fraudulent, deceitful and nullity.

Equally, he argued that the respondent misrepresented the fact when he said that he was moving motion number M/262/17 pending the determination of motion number M/9048/17 when in fact that motion had been withdrawn and has no leg to stand. He finally said that the fact that he did not oppose the grant of the order can never validate the order as lapse of time cannot validate a void order of court. He cited the case of **AJIBOYE VS ISHOLA(2006)13NWLR (PT.998)628.**

On the part of the learned Senior Advocate of Nigeria representing the Respondent, he submitted that the law

issettled that once a Judge gives a decision or makes an order on a matter, he no longer has the competence or jurisdiction to give another decision or order on the same matter. He called in aid *inter alia* the cases of **MUHAMMED VS HUSSEINI(1998) 14 NWLR(PT.584)108, MICHAEL VS B.O.N.((2015) 12 NWLR (PT.1473)370, NNAJI VS EDE(1996)8 NWLR (PT. 466)332.**

He argued that the fraud and misrepresentation of facts alleged by the applicant must be proven in the affidavits. And that there is nowhere in the applicant's affidavit in support of the motion on Notice where fraud was alleged and particularised in order to bring the law within the exception that a judgment or order can be set aside on grounds of fraud or misrepresentation. He said these facts came up only in the applicant's written address which cannot take place of evidence. He referred to the cases of **BOSA VS YAKASAI(2013)LPELR 22364(CA); OYEKAN VS AKINRINWA (1996)7 NWLR (PT.459) 128; AKIBU VS RACE AUTO SUPPLY LTD(2000) 14 NWLR(PT.686)190.**

Relying on exhibit C which is the record of proceeding of November 15, 2017, the learned Senior Advocate of Nigeria argued that Mr. Njoku did not oppose the two applications. He neither opposed the withdrawal of motion Number M/9048/17 nor opposed the grant of the prayer in motion number M/262/17, he cannot now be heard asking the court to set aside its order validly made on the 6/12/17 as such would amount to approbating and reprobating with the same breath. See **DURUAKU VS NWOKE(2015)15 NWLR (PT.1438)417 ADEOGUN VS FASHOGBON(SUPRA).**

I have considered the submissions and arguments of both learned counsel vis-à-vis the facts of this case. I think this application is brought on misconception of facts regarding the order of the court. The Respondent counter-affidavit vide paragraphs 4(a)(i-iii),5,6,7,8,9 and 11 have correctly and rightly set out the facts. I think it is necessary to set out some paragraphs.

Paragraph 4(a)(i-iii) read thus;

“By a motion on notice dated 16/8/17 but filed on 18/8/17 with motion number M/9048/17, the claimant brought an application against the Judgment Creditor and the Respondent praying the court for the following:

- (i) An order of court mandating the Respondent, that is, the sheriff, High court of FCT to release to the claimant, that is Savannah Bank PLC, the claimant’s properties fully itemised in the schedule to this motion paper, wrongfully attached by the Respondent in execution of the Judgment of this court dated 25/3/15 against the Judgment Debtor.

- (ii) An order of court mandating the Respondent not to auction the said claimant’s properties itemised in the schedule to the motion paper and in the event that the properties –have already been auctioned, the sum of **₦50,000,000.00** as general damages for wrongful attachment and auction of the claimant’s properties.

- (iii) An order of court mandating the Respondent to pay to claimant the sum of ~~₦~~**54.090,000** as special damages for wrongful attachment and auction of the claimant's properties have already been auctioned by the Respondent.

Paragraph 5 says;

“While this motion was pending on 25th day of October, 2017, the Sheriff High Court of the FCT, in flagrant disregard to claimant's pending application, commenced the auctioning of the claimant's properties.

Paragraph 6 states;

“This necessitated the bringing of another motion on notice dated 7/11/17 with motion number M/262/17.

Paragraph 7 read;

“Both motions came up for hearing on November 15, 2017, J.C. Njikonye led me on that date for the claimant/Respondent therein. When the claimant/Respondent sought to move motion No M/262/17, the Honourable court kindly directed the claimant/Respondent's lead counsel, J.C. Njikonye to withdraw the earlier motion i.e motion Number M/9048/17, as it was already over taken by events”

I think this is the point that the misconception started from. The applicant who did not oppose either of the motion on notice whether on facts or point of law now frown at the withdrawal of motion number M/9048/17 before moving the one with M/262/17.

His reason is that the two motion papers are inter depended on each other. How can that be. A motion on notice filed separately as the facts and circumstances in this case dictate cannot be said to depend on each other.

The motion Number M/262/17 prayed the court for a single order to wit:

“ An order of mandatory Injunction directing the Respondent/Respondent , that is, the Sheriff High Court of the FCT to put on hold further auctioning of the properties attached in execution of Judgment in suit subject matter of the motion on notice No M/9048/17 filed on 18th August,2017,pending before the Honourable court.”

I agree with the applicant’s learned counsel that there is error in the way the prayer is couched due to the inadvertenceof the claimant while drafting the motion. Does this inadvertence makes this motion dependable on the M/9048/17. I do not think so.

It was on record that Mr. Njoku informed the court that he had no Objection to withdrawal of motion number M/9048/17 and following the withdrawal and striking out of motion No. M/9048/17, Mr. J.C. Njikonye moved motion number M/262/17.

Again, it is equally on record that Mr. Obinna Ajoku informed the court that he did not file a counter affidavit to motion Number M/262/17 and that he was not opposing the grant of the claimant’s application.

It is now surprising that the same learned counsel who had the opportunity to oppose the said motion by filing a counter affidavit is

now asking the court to set aside that same order he said he had no Objection to. A person cannot approbate and reprobate.

Without much ado, I agree with the learned Senior Advocate of Nigeria that this court is *functus officio* as the exception that can warrant the court to set aside its order is not made out in the affidavit in support i.e fraud and misrepresentation as alleged by the applicant's learned counsel.

In effect therefore, this application lacks in all merit and it is hereby dismissed.

No cost is awarded.

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Suleiman Belgore
(Judge) 22-6-2020.