IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY

HOLDEN AT GWAGWALADA

THIS MONDAY, THE 29TH DAY OF JUNE 2020

BEFORE: HON. JUSTICE ABUBAKAR IDRIS KUTIGI – JUDGE

SUIT NO: CV/371/15
MOTION NO: M/668/19

BETWEEN:

STANFORD COMMUNICATIONS NIG. LTD..PLAINTIFF/RESPONDENT

AND

1. **PEOPLES DEMOCRATIC PARTY……DEFENDANT/APPLICANT**
2. **ELDER BOLAJI ANANI……...DEFENDANT/RESPONDENT**
3. **MR. JUDE OKORO……...…DEFENDANT/APPLICANT**

RULING

By a Motion on Notice dated 31st October, 2019, the 1st and 3rd Defendants/Applicants seek for the following orders:

1. **An order of this Honourable Court for leave to set aside the order of this Honourable Court foreclosing the Applicants/Defendants' right to cross examination of the Plaintiff's witness Ann Izi.**

2. **An order of this Honourable court setting aside the order foreclosing the Applicants/Defendants' from cross examining the Plaintiff's witness.**

3. **An order of this Honourable Court recalling the Plaintiff's witness Ann Izi for the purpose of cross examination.**

4. **An order of this Honourable Court allowing the Defendants/Applicants to cross-examine Plaintiff's witness Ann Izi.**

5. **And for such further order(2) as this Honourable Court may deem fit to make in the circumstances.**

The application is supported by a seven (7) paragraphs affidavit. A brief written address was filed in which one issue was raised as arising for determining to wit:

"Whether from the materials placed before this Honourable Court, the applicants has made out a case to merit and/or be entitled to the grant of this application and the exercise of the Honourable Court's discretion in their favour."

The submissions in the address which forms part of the records of court is that the Applicant has furnished cogent reasons to allow the court exercise its discretion in their favour and grant the application.

In opposition, the Plaintiff/Respondent filed a counter-affidavit and a written address in which one issue was raised as arising for determination, to wit:

"Whether the 1st and 3rd Defendants/Applicants application is meritorious and therefore grantable in law."

The submissions which equally forms part of the record of court is to the effect that on the materials, the Applicants have not disclosed sufficient materials to allow for the grant of the application.

At the hearing counsel on either side relied on the processes filed in urging the court to grant the application or dismiss same.

I have carefully considered the processes filed on both sides of the aisle and the real issue is simply whether the applicants have furnished, cogent and sufficient materials allowing for the grant of the application.

Now I had at the beginning stated the reliefs sought by the Applicants. The reliefs are not clear and cannot really be situated within the confines of our Rules of Court.

The reliefs appear to be seeking to set aside the order foreclosing the right to cross examine Plaintiff's witness (PW1) and to recall her for purposes of cross-examination. Let us however start by understanding the import of the reliefs as this will then provide us with a clear pathway to see whether the reliefs are grantable. I start with **Reliefs (1)** and **(2)** seeking to set aside the order of the court foreclosing the right to Defendants to cross examine Plaintiff's PW1.

Now the setting aside of an order of court is not granted on whimsical grounds or as a matter of course. On the authorities, the Applicants must be able to creditably show that the order was obtained for example under a situation of fraud, misrepresentation or incompetence to make that order or that there was a fundamental procedural defect in proceedings leading to the order, or in the absence of the other party, it can be set aside. See **Intercontinental Bank Ltd V. Enterprises Ltd & Anor (2003)FWLR (pt.179)1339; Ayoade V. Spring Bank Plc (2014)4 N.W.L.R (pt.1396)93.**

Did the Applicants disclose any of these in their affidavit? The relevant paragraphs of the Applicants supporting affidavit are as follows:

"5. That I was informed by Emmanuel Enoidem Esq. of counsel handling this matter for the 1st and 3rd Defendants/Applicants on the 18th day of October at about 3:00 pm at Wadata Plaza, Wuse Zone 5, Abuja of the following facts which I verily believe to be true as follows:

a. That on the 2nd day of November, 2017, the plaintiff's witness gave her testimony in chief and on that 2nd day of November 2017, she was not cross examined by the Defendants/Applicants.

b. That on the said 2nd day of November, 2017, the Defendants/Applicants' counsel was not in court due to the leadership crises of the 1st defendant which prevented lawyers from accessing files from the office.

c. That during the period the crises lasted, both staff and lawyers working in the National Secretariat who were handling the matter, were not allowed access to the secretariat.

d. That this Honourable Court made an order foreclosing the Defendants/Applicants form cross examining the plaintiff witness Ann Izi.

e. That the inability to do the cross-examination was not borne out of disrespect to this Honourable Court."

The above paragraphs are clear. None of the precisely delineated reasons allowing the court to set aside its order was streamlined in the entire seven (7) paragraphs affidavit of Applicants.

Even if it is taken at face value that there was a leadership crisis in November 2017, and the counsel did not have access to his files as contended, there is however absolutely nothing on the affidavit stating what prevented him from coming to court. The critical element or point is that of coming to court to explain the situation if the position now being advanced is really true. The bottom line is that there is nothing preventing counsel from coming to court to present or inform court of this challenge. Counsel did not. The foreclosure in this case was in November, 2017 and counsel took a period of more than 2 years to file this application shows the indifference they have always shown in the defence of this action. The records show that the Defendants had more than ample time to take whatever steps they deemed necessary. The trajectory of the facts of this case and as confirmed by their own affidavit show that the Defendants were fully aware of the date of the cross examination but chose to absent themselves for no justifiable reasons.

Indeed from the records, counsel who moved the extant application appeared first in the matter on 7th March, 2016. He never appeared again in all the days the matter came up until when Plaintiff called PW1 on 2nd November, 2017. When PW1 finally concluded her evidence on 7th May, 2018, Counsel for defendants was again not in court; the court however in the interest of justice adjourned the matter to 19th June, 2018 and again to 3rd July, 2018 to enable Defendant's cross examine PW1. From when counsel for the defendants first appeared up to when they were foreclosed, the matter came up not less than ten (10) times. In all these period, the Defendants were served hearing notices but they refused to come to court. It was in these circumstances that the Court foreclosed Defendants' right to cross examine PW1 on 19th June, 2018 and adjourned for defence. It was after the

foreclosure that this same counsel now appeared on 3rd July, 2018 more than 2 years after he last appeared in court.

Under our Rules of Court, **Order 32 Rules 12 (1) and (2)** provides thus:

"12(1) A party shall close his case when he has concluded his evidence. The claimant or defendant may make an oral application to have the case closed.

(2) Notwithstanding the provisions of sub-rule 1 above, the court may *suo-motu* where he considers that either party fails to conclude his case within a reasonable time, close the case for the party."

The above rules are clear. The plaintiff in this case properly closed her case in the circumstances and there is nothing in law saying she must wait till eternity for the defendants to cross-examine her.

I have here carefully gone through the affidavit of Applicants and it is difficult to situate the cogent reasons or explanation as to why the extant application should be availing. The Defendants certainly do not have till eternity to cross-examine PW1. The provisions dealing with fair hearing under the constitution is for the protection of both parties. It will be unfair to construe same as done by the defendants/applicants as conferring a protection to only them or one of the parties to a case. In **Willoughby V I.M Bank (Nig) Ltd (1987) 1 NWLR (pt.48) 105 at 131**, the Supreme Court stated thus:

"…the courts primary function is to do justice between the parties in dispute. One sided justice will amount to injustice… The law is made to ensure justice. Rules of Court are hand maids of justice. It is only by the orderly administration of the law and obedience to the Rules that legal justice can be attained. When a particular decision is against all known Rules, against all known principles, then it is certainly not made in the interest of justice."

All parties are indeed guaranteed the constitutional right to a fair trial within a reasonable time under **Section 36 of the 1999 Constitution** and each party is equally entitled to a fair opportunity to present its case. No party as stated earlier however has till eternity to do so.

To grant this application would clearly occasion further unnecessary delay and cause considerable inconvenience to Plaintiff. It is scandalous and a sad

commentary on the process that a matter of simple indebtedness for a supply done in 2013 and filed in 2015 is still yet to be determined. The Defendants have contributed in no small measure to this delay. The point may be made that the failure to take appropriate steps is the fault of counsel. Now it is true or correct that the general rule is that mistakes of counsel ought not to be visited on litigants but it is not a water tight principle and does admit of exceptions. The law is indeed settled that the principle will not be availing where there is a failure of strategy; where there is mischief or where there is ineptitude or inadequacies on the part of counsel. See **NNPC V Samfadek & Sons Ltd (supra); Bello Akanbi V Alao (supra).**

Counsel in this case did not do the needful as and when required and the plaintiff cannot be made to suffer for their lack of diligence or un-seriousness. The Defendants are equally not free of blame as they themselves were not represented in court on the date of the foreclosure and they also never took any steps to inquire about the status of the case from court or from their lawyer.

The rather easy and convenient excuse to always blame counsel for want of diligence to prosecute a matter can no longer be used in our jurisprudence as a cover for unserious litigants. Litigants must show or exhibit heightened levels of interest when they instruct lawyers to file cases on their behalf.

In **Kano Textile Printers V Gloede & Hoff Nig. Ltd (2002) 2 NWLR (pt.751) 420 at 459,** the Court of Appeal per Salami, J.C.A (as he then was) stated thus:

"A litigant has a duty to check on his counsel if necessary steps are being taken in a case; if he failed to do so, he is as guilty as his counsel and is not entitled to any indulgence."

Similarly in **SCC Nig. Ltd V Our line Ltd (1996) 4 NWLR (pt.444) 561,** the Court of Appeal per Achike JCA (as he then was) also stated as follows:

"The weight of judicial opinion in respect of discretion to extend periods prescribed for doing an act, is that the court should not over-indulge an erring party whenever he says that the error in complying with the court order is that of his counsel or clerk of the counsel. The judicial attitude has been accentuated by dictates of justice which demand that justice should be even handed. It should be two way traffic, to the applicant and the respondent.

What this means is that there may arise, certain circumstances in which the court may take a rigid posture and decline to indulge the party who has defaulted with regard to time in carrying out specific order, or orders of a court.

There is therefore a growing tendency to limit reliance on blunders on counsel and parties."

Indeed the tendency to blame counsel in all manner of situations to achieve particular purposes is no longer fashionable. The courts **must exact** from **parties and counsel utmost diligence** in the prosecution of cases if the early determination of cases is to really make any headway.

There is really nothing on the materials streamlining any ground providing basis to set aside the order of foreclosure and as stated earlier the order of court is not set aside as a matter of course or on no grounds at all.

Now **Relief (3)** and **(4)** seeks for an order recalling the Plaintiff's witness for purposes of cross examination and also allowing Defendants cross-examine Plaintiff witness.

As rightly submitted by counsel to the plaintiff, there is really no provision under our rules for the recall of a witness by the opposition party for the purpose of cross-examination after his or her right to same has been foreclosed.

The right to recall in civil cases is usually available to a party who earlier called the witness to recall the same witness to lead evidence again. The recall is not therefore usually granted as a matter of course or on whimsical grounds; cogent reasons must be advanced to allow the court exercise its discretion in favour of the recall. The application to recall a witness for purposes of cross-examination by the opposing party appears to me strange.

Even in criminal cases where the power to recall is exercisable by the trial court, the power is statutory and even at that, it is at the instance of the party who earlier called the witness to now re-examine him but not for the opposing party to recall a witness for cross-examination when his or her right to same has been foreclosed by the trial court.

The prayer (3) here clearly has no legal basis.

Now if the case vide **Relief(4)** is that the court should allow Defendants to cross examine the witness of Plaintiff, that prayer unfortunately can equally not be granted because the case of Plaintiff has long been closed and the matter adjourned for defence. There has to be a proper prayer for reopening of the case and on which the relief allowing for the cross-examination of Plaintiff witness can be predicated. There is no such relief here so the court can again not see its way to grant this relief too.

The law is settled and the Supreme Court has made it abundantly clear that where a relief is sought, it must not be a matter of speculation or doubt as to what it entails as in this case. A court therefore cannot be expected to make an order which is subject to different interpretation as to whether it meets the relief claimed. Nor has the court a duty to engage in any semantics in the order it makes in an attempt to explain what the party intended to ask for. The guiding principle or rule is that a court must not grant a party what it has not asked for in clear terms and sufficiently proved. See **Joe Golday Co. Ltd. V. Cooperative Development Bank Ltd. (2003) 35 SCM 39 at 105.**

On the whole apart from the absence of clarity with respect to the reliefs sought, there is a complete non disclosure of factual and legal grounds to allow for the grant of the application.

As I round up I call on counsel to the Defendants to act post haste and bring all their witnesses so that this matter can now be concluded without any further delay. It cannot be right or fair that a simple matter relating to alleged simple indebtedness is yet to be concluded nearly five (5) years after it was filed. It is difficult to see how Nigerians will have confidence in the administration of justice if cases of this nature drags on interminably. I leave it at that.

On the whole, the application however fails and it is hereby dismissed.

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Hon. Justice A. I. Kutigi

Appearances:

1. **S.G. Kekere-Akpe, Esq., for the Plaintiff/Respondent**

2. **Ochei. J. Otokpa, Esq., for the 1st and 3rd Defendants/Applicants**