IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY, ABUJA
HOLDEN AT ABUJA

ON WEDNESDAY, 23RD SEPTEMBER, 2020

BEFORE HON. JUSTICE SYLVANUS C. ORIJI

SUIT NO. FCT/HC/CV/370/2008

MOTION NO. M/5179/2020

MOTION NO. M/5180/2020

BETWEEN

1. BEN OWEDS NIG. LTD. **2. BERNARD ATANYA**	}	**PLAINTIFFS/JUDGMENT CREDITORS/RESPONDENTS**

AND

HIGH COMMISSION OF THE REPUBLIC OF TRINIDAD AND TOBAGO	}	**DEFENDANT/JUDGMENT DEBTOR/APPLICANT**

AND

ACCESS BANK PLC.	**---**	**GARNISHEE**

RULING

The plaintiffs instituted this suit on 1/2/2008 vide writ of summons wherein they claimed various sums of money against the defendant, which amounted to N3,309,488.00. The Court delivered Judgment in the matter on 28/7/2009 in

favour of the plaintiffs for the sum of N960,000.00. The Court further ordered that the defendant shall pay interest on the said sum of N960,000.00 at the rate of 8% per annum from 31/7/2009 until the sum is fully paid. Cost of N20,000.00 was awarded to the plaintiffs payable by the defendant.

The defendant did not participate in the proceedings and did not file any process in spite of the service of all the processesfiled by the plaintiffs and hearing notices on it. Plaintiffs' processes and hearing notices were served on the defendant by substituted means [that isthrough DHL courier service] by order of the Court made on 30/4/2008.

From the records in the case file, the originating processes were served on the defendant on 7/5/2008; one Comfort B. received the processes. As I noted in the said Judgement, hearing notices were served on the defendant in the course of the proceedings thus: [i] one Comfort received hearing notice on 11/6/2008; [ii] one Monica B. received hearing notice on 31/10/2008; [iii] one Abdul G. I. received hearing notice on 17/11/2008; and [iv] Monica B. received hearing notice on 23/1/2009.

On 5/11/2019, the plaintiffs/judgment creditors filed *Motion Ex Parte No. M/762/2019* for garnishee order *nisi* againstthe defendant/judgment debtor'saccount number 0008985199 in Access Bank Plc. in the sum of N1,764,000.00 being the total judgment sum and interest. The Court granted the garnishee order *nisi* on 19/11/2019 and ordered the garnishee to appear

before the Court on 12/12/2019 to show cause why the order *nisi* shall not be made absolute. From the records in the case file, both the garnishee and the judgment debtor were served with the garnishee order *nisi* on 5/12/2019; one Curtes Chapman received the process on behalf of the judgment debtor. The Court did not sit on 12/12/2019 and the matter was adjourned off record to 21/1/2020.

When the matter came up on 21/1/2020, the Court made the garnishee order *nisi* absolute based on the affidavit evidence of ChisomOkonkwo on behalf of the garnishee that the judgment debtor *"is a customer of the Garnishee and has up to the Judgment sum in its Account with the Garnishee."* The proceedings of 21/1/2020 are in the record of the Court.

On 10/2/2020, the defendant/judgment debtor filed *Motion No. M/5179/2020* for an order staying execution of the garnishee order absolute. On the same date, the judgment debtor filed *Motion No. M/5180/2020* for an order setting aside the processes and judgment delivered in this suit. The Court will first consider *Motion No. M/5180/2020.*

RULING IN RESPECT OF MOTION NO. M/5180/2020

The judgment debtor/applicant prays the Court for the following:

1. An order of the Honourable Court enlarging the time within which the Applicant may apply to set aside the Judgment of the Court delivered on 28/7/2009.

2. An order of the Honourable Court setting aside the Writ of Summons, the Statement of Claim and other accompanying processes against the Applicant in the suit herein.

3. An order of the Honourable Court setting aside the Judgment in the above suit dated 28/7/2009.

4. And for such further order or orders as the Honourable Court may deem fit to make in the circumstance.

The grounds for the application are:

1. The Honourable Court lacked jurisdiction to entertain the matter *abnitio*, the Applicant being a Foreign Diplomatic Mission.

2. Judgment was obtained by the 1st& 2nd Respondents without disclosing material facts to the Court.

3. Breach of the Applicant's right to fair hearing in that she was not served with the Court's processes leading to the judgment under reference.

Godwin Chinukwue, a Practice Assistant in the Law Firm of Eric Oba and Company, deposed to a 4-paragraph affidavit in support of the motion; attached therewith are Exhibits A, B1, B2, C, D1-D4, E & F1-F3. Eric Oba Esq.

filed a written address with the motion. In opposition, Isaac Mazo, a litigation secretary in the Law Office of Festus Akpoghalino& Co., deposed to a counter affidavit of 5 paragraphs. Festus AkpoghalinoEsq.filed a written address with the counter affidavit. At the hearing of the application, both learned counsel adopted their respective processes.

In the affidavit in support of the motion, Godwin Chinukwue stated that:

1. The applicant is a diplomatic presence of the Government of the Republic of Trinidad and Tobago in Nigeria.In the course of its Mission in Nigeria, it engaged the services of the 1st respondent for various activities.

2. Following1st respondent's unsatisfactory performance of its services, the applicant terminated its contract with the 1st respondent. In order to avenge the termination, the 2nd respondent filed a suit against the applicantbased on falsified facts.

3. Throughout the proceedings in this case leading to the judgment dated 28/7/2009, the applicant was not served with the Court processes and only became aware of the proceedings when the garnishee order *nisi* was served in December[2019].

In the counter affidavit, Isaac Mazo stated that:

1. The applicant was served with all the processes and several hearing notices before the judgment but failed or refused to appear in Court.

2. There is no appeal challenging the judgment of the Court since 2009 till date; only the Appellate Court can reverse the decision of this Court.
3. Applicant is not exempted from paying for contracts and commercial services rendered to it.

Learned counsel for the judgment debtor/applicant posited that the applicant is an official representation of the Government of Trinidad and Tobago in Nigeria and it contracted in its capacity as a foreign sovereign. He referred to Article 3[a] of the Vienna Convention on Diplomatic Relations of 1961 to the effect that the functions of a diplomatic mission include representing the sending state in the receiving state. He submitted that the statusofdiplomatic missions and their immunity from civil and administrative jurisdiction of the receiving state are beyond dispute, whatever the nature of the transaction.

Eric Oba Esq. further submitted that both local and international laws accord immunity to diplomatic missions from local jurisdiction. He relied on section 1[1] of the Diplomatic Immunities and Privileges Act, Cap. D9 Laws of the Federation of Nigeria, 2004, which provides:

> *Subject to the provisions of this Act, every foreign envoy and every foreign consular officer, the members of the families of those persons, the members of their official or domestic staff, and the members of the families of their official staff, shall be accorded immunity from suit and legal process and inviolability of residence and official archives to the extent to which they were respectively*

so entitled under the law in force in Nigeria immediately before the coming into operation of this Act.

The applicant's counselalso referred to the cases of **African Reinsurance Corporation v. Fantaye [1988] 13 NWLR [Pt. 32] 811** and **Kramer Italo Ltd. v. Government of the Kingdom of Belgium &Anor. [2004] CLRN 93.**On this issue, Mr.Eric Oba concluded that the Court lacked jurisdiction to entertain the matter as the applicant enjoys immunity from suits and legal process in Nigeria. He urged the Court to set aside its judgment delivered on 28/7/2009.

With respect to the complaint that the applicant's right to fair hearing was breached,Mr.Eric Oba argued that the applicant has established that the court processes were not brought to its attention until the garnishee order *nisi* dated 19/11/2019 was received by Mr. Curtis Chapman, an Administrative Attaché of the applicant. It was contended thatfrom the said judgment,theprocesses were not served onthe applicant personally but were purportedly served through DHL and purportedly received by Monica and Comfort. The processes were not received by any of the applicant's officers or diplomatic agents. This can be contrasted by the service of the garnishee order *nisi*which was received by Mr. Curtis Chapman. He referred to **Essien v. Edet [2004] 5 NWLR [Pt. 867] 519** to support the view that non-service of court process on a party where such service is required renders the entire proceedings void.

For his part, learned counsel for the judgment creditors/respondents stated that the applicant is praying for extension of time to apply to set aside the judgment of the Court delivered over a decade. The motion seeks to invoke the equitable jurisdiction of the Court and ought to be made timeously as delay defeats equity. Festus AkpoghalinoEsq. referred to the case of**A.G. Rivers State v. Ude&Ors. [2006] LPELR-626 [SC].** Counsel posited that the applicant was *"wallowing in the fallacious belief of immunity from litigation on contracts, and now that he knew that he has to appear to defend the garnishee Order decided to frustrate the execution."* He submitted that it is too late in the day for the judgment debtor to make this application.

Mr.Festus Akpoghalinoreferred to the proceedings that led to the judgment of the Court and argued that the Court cannot set aside its judgment entered on merit. This application amounts to the Court sitting on appeal over its decision. In response to the applicant's allegation that the court processes were not brought to its attention until the garnishee order *nisi*was served, the respondents' counsel reasoned that it is the duty of the staff and agents of the applicant to bring the processes received from the Court to its attention. He emphasized that there was proof of service of all the court processes on the applicant and it did not deny the identity of his agents and staff who received the processes. Mr.Festus Akpoghalinorelied on the case of**Ahmad v. Sahab Enterprises [Nig.] Ltd.&Ors. [2016] LPELR-41313 [CA]** to support the submission that service of one hearing notice on a party is sufficient.

In response to the argument that the applicant is immune from suits and legal process, counsel for the respondentsargued that there is no law in civilized societies that will immune any person from paying for services rendered to him or services consumed. He referred to the enactments relied upon by the applicant's counsel and submitted that:*"it is clear from the language of the enactments that only the Agents, members of staff and families of the Applicant that are immune not the Applicant as a Person, the Organization itself can enter into commercial transaction or contract, when it does so, it is expected just and fair to be bound to pay for such services, if it fails to pay, the Courts have the power to entertain the complaint and determine it."* He relied on the case of **ICRC v. Olabode [2009] LPELR-8764 [CA]** in support of his view.

The respondents' counsel stressed that the Vienna Convention on Diplomatic Relations granted immunity to *"Diplomatic Agent"* but the judgment debtor/applicant is not a Diplomatic Agent but *"principal"*. Also, the applicant is not an envoy, agent or a diplomat; therefore, it is not covered by the Diplomatic Immunities and Privileges Act.On this issue of jurisdiction, counsel further argued that the *"issue of jurisdiction was not an issue before the Court at the trial and this Honourable Court has no power to hear any application bothering on a case already concluded for over 10 years on ground of jurisdiction."*

Now, from the first ground of the application and the submissions of both counsel in respect thereof, the issue that calls for resolution is whether the

Court had jurisdiction to entertain the suit that led to the judgment delivered on 28/7/2009 against the applicant,which is a Foreign Diplomatic Mission.

In **African Reinsurance Corporation v. Fantaye [supra]; [1986] LPELR-214 [SC],** the plaintiff/respondent took out a writ on 15/2/1984 in the High Court of Lagos State against defendant/appellant claiming damages for wrongful termination of his appointment. Appellant entered a conditional appearance and took some steps in the matter before 19/4/1984 when it filed a motion for an order to set aside the writ for lack of jurisdiction on the ground that the appellant is an International Organization and as such, enjoys immunity from suits and legal process. The learned trial Judge found that the appellant was an International Organizationrecognised by the Federal Republic of Nigeria as specified in the Diplomatic Immunities and Privileges Act, 1962 and it enjoys immunities, privileges and exemption under the said Act. The learned trial Judge however held that from the facts of the case, the appellant waived its immunity and that the court had jurisdiction to entertain the suit.

The appellant's appeal to the Court of appeal was dismissed by a majority decision by Their Lordships, *Uthman Mohammed* and*LegboKutigi, JJ.C.A. [as they were then]*; while His Lordship,*Nnaemeka-Agu, J.C.A. [as he then was]* dissented and allowed the appeal. Part of the majority decision was that the immunity was waived by the appellant's submission to the jurisdiction of the Lagos High Court. The appellant's further appeal to the Supreme Court was allowed by a unanimous decision. The apex Court held that the appellant did

not waive its immunity and that the High Court had no jurisdiction over the appellant.The suit was therefore struck out. It is necessary to highlight some of the decisions of the Supreme Court on the subject of diplomatic immunity, which is in issue in the instant case,as follows:

1. His Lordship, *KayodeEso, JSC* in the Leading Judgment adopted the decision of *Jenkins, L.J.* in **Baccus v. ServicioNacional Del Trigo [1956] 3 All E.R. 715** that: *"Once it is found on the evidence that the party sued is a department of a sovereign state, albeit itself a corporate body, then the suit becomes, or it becomes apparent that the suit in truth is, one between the plaintiff and the foreign sovereign state, or a part of the foreign state represented by the departmental body concerned."*

2. Waiver [of immunity] is not to be presumed against a sovereign or an organization that enjoys immunity. If anything, the presumption is that there is no waiver until the evidence shows to the contrary. And that evidence must show positively to the contrary. [Per *KayodeEso, JSC*].

3. The basic rule at common law as regards jurisdiction of English Courts over sovereign states was that a foreign sovereign or sovereign foreign state was immune from the jurisdiction of the courts; although the courts would take jurisdiction if the sovereign submitted to their jurisdiction. This has been the position in this Country following the decision of the West African Court of Appeal in 1954 in **John Grisby v.**

Jubwe&Ors. 14 WACA 637. [Per *MuhammaduLawalUwais, JSC [as he then was*].

4. The law is clear that the right to the immunities and privileges may be claimed at any time, and in the case of legal processes, at any stage of the proceedings. It is clear also that waiver of right of any immunity must be express and clear and cannot be implied or inferred by conduct of the person or organization. [Per *DahunsiOlugbemi Coker, JSC].*

5. Before the enactment of the Diplomatic Immunities and Privileges Act No. 42 of 1962, the common law of England was in force in Nigeria. At common law, a foreign sovereign cannot be impleaded in courts of the host country in any legal proceedings either against his person or for the recovery of specific property or damages, and that property which he owns or which is in his possession or control cannot be seized or detained by legal process whether he is a party to the proceedings or not. [Per*Adolphus Godwin Karibi-Whyte, JSC].*

6. His Lordship, *Adolphus Godwin Karibi-Whyte, JSC* also held that the rationale for the general principle is to protect States and International Organizations from the jurisdiction of host countries. The general principles that confer diplomatic immunity against the initiation of proceedings confer an equal immunity against the continuation of pre-existing and hitherto properly constituted proceedings. It is therefore the law that the principle can be invoked even after the conclusion of

the proceedings. As was stated by *Lord Parker, C.J.* in **R. v. Madan [1961] 1 All E.R. at page 591**:

> *"… proceedings brought against somebody, certainly civil proceedings brought against somebody, entitled to diplomatic immunity are, in fact, proceedings without jurisdiction and null and void unless and until there is a valid waiver which, as it were, would bring the proceedings to life and give jurisdiction to the court."*

In **Noah v. The British High Commissioner to Nigeria [1980] LPELR-2063 [SC],** the plaintiff filed an application against the British High Commissioner before the Supreme Court. The Court dismissed the application on two grounds. The first ground was that the Court has no original jurisdiction to hear the case having regard to the provision of section 212 of the Constitution of the Federal Republic of Nigeria, 1979. The second ground was that it is provided in sections 1[2] and 3 of the Diplomatic Immunities and Privileges Act that such an action against a foreign envoy in Nigeria shall be void.

Also, in **Kramer Italo Ltd. v. Government of the Kingdom of Belgium &Anor. [supra],** the plaintiff/appellant on 30/1/1979 was commissioned to build for the Government of the Kingdom of Belgium a residence for the Belgian Ambassador at Eleke Crescent, Victoria Island, Lagos, Nigeria. The appellant instituted an action against the defendants/respondents, i.e. [i] Government of the Kingdom of Belgium; and [ii] The Embassy of Belgium, Lagos, Nigeria claiming the sum of N670,552.07 as reimbursement for

additional costs incurred as a result of the extended period on site and variation instruction arising from the contract.

The defendants/respondents filed an application for an order to set aside the service [of processes] upon them and to strike out the action on the grounds that: [i] at common law, the defendants cannot be impleaded or sued in a Nigerian Court; and [ii] that The Belgian envoy and the several members of the staff comprising the Belgian Embassy are immune from suit and legal process pursuant to the provision of section 1 of the Diplomatic Immunities and Privileges Act. The learned trial Judge [Agoro, J.] held that *"there can be no doubt that a sovereign state should not be impleaded in the courts of another foreign state against its will."* His Lordship declined to exercise jurisdiction and therefore set aside the issue and service of the writ of summons on the defendants on the ground of sovereign immunity.

The plaintiff/appellant's appeal to the Court of Appeal was dismissed by a unanimous decision. The central issue before the Court of Appeal was whether the doctrine of absolute sovereign immunity applies in Nigeria where a sovereign state is engaged in commercial activities. In the Leading Judgment, His Lordship, *Akpata, JCA* held:

> *"Granted that the contract the subject matter of this appeal was a commercial transaction, as canvassed by Mr. Williams, the court lacked jurisdiction to entertain the action of the appellant as against the 2nd respondent because "the Belgian envoy and the several members of the staff comprising the Belgian*

Embassy are immune from suit and legal process pursuant to the provisions of Section 1 of the Diplomatic Immunities and Privileges Act 1962."

In effect on ground of diplomatic immunity the action is incompetent as against the 2nd respondent. It also seems to me that it would destroy the basis of diplomatic immunity from suit and legal process pursuant to the 1962 Act if a foreign sovereign is made answerable in court for the action of his envoy who enjoys diplomatic immunity. The appeal fails. It is dismissed. …"

I have deliberately set out the decisions in the above cases to show that the position of the law on diplomatic immunity as it affects the judgment debtor/applicant in the instant case appears settled. The decisions in the above cases apply to this case. I must add that the idea of diplomatic immunity was developed from one of the consequences of state equality rule which is expressed in the Latin maxim: *par in parem non habet imperium* - meaning: no state can claim jurisdiction over another. In practice, therefore, states cannot as a rule be sued in foreign courts unless they voluntarily submit to the jurisdiction of the court concerned.

In**ICRC v. Olabode [supra]** relied upon by Mr.Akpoghalino, the plaintiff/respondent filed an action against the International Committee of the Red Cross [ICRC], an International Organization recognised by the Federal Republic of Nigeria as specified in the Diplomatic Immunities and Privileges Act, 1962. The claims against the defendant/appellant included the sum of N3,366,747.00 being professional fees for three architectural designs and

drawings made on the defendant's instructions and which were delivered to it and remained unpaid. Appellant is an International Organization recognised by Nigeria as specified in the Diplomatic Immunities and Privileges Act, 1962.

By notice of preliminary objection, the appellant challenged the jurisdiction of the trial court to entertain the suit on the ground that it enjoys immunity from legal process under the Diplomatic Immunities and Privileges Act. The trial court dismissed the objection. The appellant's appealwas unsuccessful. The Court of Appeal held that it is not true as contended by the appellant's counsel that the appellant cannot sue and be sued or be subjected to any legal process for acts done in the course of its business.My Lord, *Uwani Musa Abba Aji, JCA* [as His Lordship then was] held in part that:

> *… It does not sound logical that the Appellant should enter into contractual obligation with individuals or other corporate bodies or groups and will not be sued for breach of obligation on its own part, just because it is an International Humanitarian Organization under the United Nations. This does not accord with common sense, justice and fair play. Therefore, it must treat persons who contracted with them fairly by paying for such contracts. The committee as a separate legal entity is different from its members who enjoy immunity while the committee does not. …"*

My respectful view is that by the immutable and inflexible doctrine of *stare decisis*or judicial precedent, this Court is bound to follow the decisions of the

Supreme Court on the issue under consideration. From the decisions of the Supreme Court, I hold that the judgment debtor/applicant i.e.The High Commission of The Republic of Trinidad and Tobagoenjoys immunity from suit and legal process in Nigeria except it expressly waives its immunity. There is no evidence that the applicant waived its immunity.

I have noted the reasoning of Mr.Akpoghalinoto the effect that when the applicant enters into a commercial transaction or contract, it is fair and just for it to pay for such services and if it fails to pay, the courts should have power to entertain and determine the complaint. I totally agree with learned counsel but the law remains the law. As I said before, the only way the courts in Nigeria will exercise jurisdiction in respect of such complaints against theEmbassy or High Commission, as in the instant case, is where there is express waiver of immunity.It seems to me that this can be achieved by inserting a clause in the contract to the effect that the Embassy or High Commission has waived its immunity from suits arising from the contract.

Before I conclude, let me comment on the arguments of respondents' counsel that: [i] the application to set aside the judgment was not brought timeously; [ii] the Court is *functus officio* since the judgment was entered on the merit; and [iii] the issue of jurisdiction now raised was not raised in the Court before the said judgment was delivered. The position of the law is that due to the fundamental and crucial nature of the competence or jurisdiction of a court to entertain an action before it, the issue can be raised at any stage/time.

See**Ajayi v. Adebiyi [2012] LPELR-7811 [SC];** and **Kanjal v. Ifop [2013] LPELR-22158 [CA].**In **African Reinsurance Corporation v. Fantaye [supra],**it was held that the principle of diplomatic immunity can be invokedeven after the conclusion of the proceedings.I hold that the jurisdiction of the Court to entertain the suit can be challenged at this stage notwithstanding that it was not raised before the Court delivered the judgment under attack.

The law is also well established that a person affected by the judgment of a court which is a nullity is entitled to have the very court or a court of concurrent jurisdiction set it aside *ex debitojustitiae*;for example an order or decision made without jurisdiction. See **Adeyemi-Bero v. Lagos State Development Property Corporation &Anor. [2012] LPELR-20615 [SC];** and **Osalor v. Iwueze [2019] LPELR-47117 [CA].**Therefore, with due respect, the contention of Festus AkpoghalinoEsq.that the Court is *functus officio*and cannot set aside the judgment since it was entered on the merit isnot correct.

CONCLUSION

From all that I have said, the decision of the Court is that the application has merit and is granted. The judgment of the Court delivered on 28/7/2009 and the entire proceedings and processes in *Suit No. FCT/HC/CV/370/2008*are hereby set aside. As a corollary, the garnishee order *nisi*made by the Court on 19/11/2019and the garnishee order absolute made on 21/1/2020 are also set aside.

The above decision renders the consideration of *MotionNo. M/5179/2020* for an order staying execution of the garnishee order absolute made on 21/1/2020 unnecessary.

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HON. JUSTICE S. C. ORIJI
[JUDGE]

Appearance of Counsel:

1. Festus AkpoghalinoEsq. for the judgment creditors/respondents; with I. O. OlarewajuEsq. and UcheOnyechefunaEsq.
2. Eric Oba Esq. for the judgment debtor/applicant.