

IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT COURT 29 GUDU – ABUJA
DELIVERED ON WEDNESDAY DAY THE 1ST DAY OF JULY 2020.
BEFORE HIS LORDSHIP; HON. JUSTICE MODUPE R. OSHO-ADEBIYI
SUIT NO.M /6327/2020

HON. SAMUEL O. GODDAY -----APPLICANT

AND

1. HON. ADAMU O. ENTONU
2. SIDI BELLO RUFAI ----- RESPONDENTS
(HON. JUDGE UPPER AREA COURT, GUDU ABUJA)

RULING

The Applicant via a motion ex-parte, dated and filed the 11th day of March 2020, is praying this Court for leave to be granted the Applicant to apply for judicial review to wit; an Order of Certiorari against the action of the Respondents herein in case No. CR/31/20, and an order staying the judicial action of the Respondents at the Upper Area Court of the Federal Capital Territory, Abuja.

On the next adjourned date, Learned Counsel to the 1st Respondent had rushed to Court before the date fixed for ruling of the motion ex-parte and informed the Court “*we filed a defence whether the court can grant leave or not as facts have been suppressed before this court*”. The Court had in its wisdom, ordered that in the circumstances, the motion ex-parte be upgraded to a motion on notice and parties be served. Applicant informed the Court that he has filed a notice of discontinuance on the

16th of June 2020 and served on the Respondents. The 1st Respondent filed a reply on points of law dated the 17th of June 2020 urging the Court to dismiss the case as issues have been joined by the 1st Respondent in his Counter affidavit. 1st Respondent Counsel relied on the cases of Chief A. Y. Ojikutu Vs. Alh. A.A Ojikutu (1970-1971) NSCQLR P. 664 and Ugwuoke vs. FRSC & Ors (2019) LPELR-46611 (CA)

Having examined the Applicant's application and the 1st Respondent's reply on points of law, the issue to be determined is whether this Court can strikeout or dismiss this present application.

The Applicant in this case filed a motion ex-parte asking for leave of this Court to initiate an application for judicial review/order certiorari against the action of the Respondents in this case. This Court was yet to give its ruling when the Applicant filed a notice of discontinuance. The 1st Respondent is urging this Court to dismiss the suit with cost as opposed to striking out the suit as the 1st Respondent has filed his Counter affidavit to the Originating Summons.

Order 24 Rule 1 of the FCT High Court Civil Procedure Rules provides that:-

“The Claimant may at any time before receipt of the defence or after the receipt, before taking any other proceeding in the action, by notice in writing duly filed and served, wholly discontinue his claim against all or any of the defendants or withdraw any part or parts of his claim. He shall pay the Defendant's costs of action, or

if the action be not wholly discontinued, the costs occasioned by the matter withdrawn.”

In this case, the Court was yet to grant the Applicant leave to initiate the application for judicial review, in essence, the originating summons for judicial review was yet to be served on 1st Respondent. The Respondent filing a counter affidavit to the originating summons before the Court granted leave to the Applicant to initiate the proceeding was in my opinion, jumping the gun as the application for judicial review was not yet before the Court properly for the Respondents to file and serve a counter affidavit to same. It is when leave has been granted and the Respondent served with the originating processes for judicial review that 1st Respondent ought to file his counter affidavit to same. The facts of the case of Ugwuoke vs. FRSC & Ors cited by the Respondent's Counsel is in my view not on all fours with this instant case as in the UGWUOKE's case (supra), parties had exchanged processes and the case was at the stage of parties adopting their written addresses in respect of a claim for the enforcement of the Applicant's fundamental human right. Whereas in this case, the Court was yet to grant leave to the Applicant to initiate the application for judicial review, and the Applicant was yet to serve the Respondent his application. The Respondents filing a counter-affidavit will not preclude an applicant to discontinue his case or for the Court to strike out the case as the Court in TAILOR & ORS V. BALOGUN & ORS (2012) LPELR-19673 (CA) Per MBABA J.C.A. (Pp. 20-21, paras. A-C) held

"Of course, authorities abound to the effect that a suit, that is yet to be fixed for hearing, can be withdrawn, readily, even without the leave of Court, by filing a Notice of discontinuance of the same in the Court

where the suit is pending, and the Notice to discontinue the suit, automatically, brings the suit to an end, from the moment it is filed. The logic for this appears simple: the plaintiff who filed a suit, cannot be compelled to pursue the suit, if he elects to withdraw the same, prior to the fixture of same for hearing and prior to commencement of hearing which would have compromised the rights/interest of the opponent. In the case of EMEGHARA vs. HEALTH MANAGEMENT BOARD, IMO STATE (1987) 2 NWLR (PT.56) 330 at 339-340 this Court held that a Notice of discontinuance is not a motion to be formally argued and that once it is filed, the whole suit is deemed to have come to an end. In that case (above cited), even where the Respondent had filed a motion for the dismissal of the suit after being served with the Notice to discontinue the suit, the appellate Court said that application "was utterly misconceived in that the motion to dismiss was based on a suit which no longer existed, (and that) it was a procedural act in nullity" "A plaintiff may, without leave of Court, discontinue a suit against all or any of the defendants or withdraw any part of his claim before the date fixed for hearing. In such a situation, the notice of withdrawal automatically terminates the proceedings and a formal order striking-out, the suit may be made by the Court"

In this case, the Court is yet to grant leave for the parties to move their application, the proper order this Court would make in this circumstance, is to strike out this case and this case is accordingly struck out. The Respondent urged this court to award cost against the Applicant. It is trite that cost follows events. The Applicant had earlier filed a motion ex-parte for leave to apply for judicial review. 1st Respondent had gotten wind of this process and approached this Court

informing the Court that Applicant had suppressed some facts regarding this case and had filed a defence to the motion ex-parte. This Court had ordered that the said motion ex-parte be moved from ex-parte to notice. The Court had further ordered that parties be served. Respondent had filed his defence and served parties pursuant to this Court's directives. This Court has taken judicial notice of processes filed and served by the 1st Respondent on the orders of the Court and it is only fair that cost be awarded. Consequently, cost in the sum of ₦100,000.00 (one hundred thousand Naira) only, is hereby awarded in favour of the 1st Respondent.

Parties: Parties are absent.

Appearance: Emmanuel Eguwagu, Esq., for the Applicant. D. J. Alfa, Esq., for the 1st Respondent.

**HON. JUSTICE M. R. OSHO-ADEBIYI
JUDGE
1ST JULY 2020**