IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY

HOLDEN AT JABI ABUJA

DATE: 20TH DAY OF OCTOBER, 2020
BEFORE: HON. JUSTICE M. A. NASIR
COURT NO: 9
SUIT NO: CV/492/2008

BETWEEN:

CHIDA INTERNATIONAL HOTEL LTD ---- PLAINTIFF/DEFENDANT TO COUNTER CLAIM/RESPONDENT

AND

CHARTERED INSTITUTE OF BANKERS
OF NIGERIA ---- DEFENDANT/COUNTER CLAIMANT/APPLICANT

RULING

Before this Court is a motion on notice brought pursuant to the provisions of Order 32 Rule 5(1), Order 43 Rule 1 of the Rules of this Court. The application is praying for the following:

1. An order of this Court setting aside its Order made on the 10/12/2019 striking out suit No. FCT/HC/CV/492/08.
2. An order of this Court relisting suit No. FCT/HC/CV/492/08 which was struck out on the 10/12/2019.
3. And for such further orders as this Court may deem fit to make in the circumstances.

In support of the application is an affidavit of 15 paragraphs deposed to by Deborah Ebiojo Idakwoji Esq. Also in support is a written address dated 10/12/2019. A sole issue was formulated for determination. The issue is:

"Whether having regard to the depositions in the affidavit in support, this Court ought to grant the prayers sought in this application."

Upon receipt of the counter affidavit filed by the Respondent, the applicant filed a further affidavit of 13 paragraphs deposed to by Babayemi Olaniyan Legal Practitioner in the Law firm of Messrs Abdullahi Ibrahim & Co., counsel to the applicant. In support of the further affidavit is a reply on points of law. Both written addresses were duly adopted by **Rotimi Oguneso SAN** on the 6/10/2020.

Learned counsel submitted that when a case is struck out, the right to relist or file the suit afresh is not foreclosed. Consequently, the effect of the order of striking out is to temporarily remove the case from the Court's cause list and it could be brought back by relistment or filing afresh, and same is at the discretion of the Court which must be exercised judicially and judiciously. He cited NDIC vs. Okeke (2011) 6 NWLR (part 1244) 445 at 462, ANPP vs. R.O.A.S.S.D. (2005) 6 NWLR (part 920) 152, CBN

vs. Okojie (2002) 8 NWLR (part 768) 48, Long – John vs. Blakk (1998) 6 NWLR (part 555) 524.

Learned counsel further submitted that in an application seeking to have a suit relisted, the applicant must show good and substantial reasons for the failure to come to Court on the date the suit was struck out, and that the applicant has shown good reasons in the supporting affidavit. Reference was made to Atiku vs. Yola Local Government (2003) 1 NWLR (part 802) 487 at 500, Lamai vs. Orbih (1980) NSCC 188, Adebayo vs. Okonkwo (2002) 8 NWLR (part 768) 1 at 20 – 21. He urged the Court to grant the application.

In opposition, the Respondent filed a counter affidavit of 5 paragraphs deposed to by Rotimi Daniel Adebiyi, litigation Secretary in the law firm of Messrs S.I. Ameh (SAN) & Co. Attached therein are Exhibits A & B. Also in support is a written address which was adopted by **John Itodo Esq.**

Learned counsel raised an issue for determination as follows:

> *"Whether given the facts and circumstances of this case, this application can be granted."*

Learned counsel submitted that an application of this sort is not granted as of right or for the asking, the applicant is under an obligation to place before the Court compelling reasons why the Court should exercise its discretion in his favour. He added that the apex Court has set down the nature of judicial discretion as to be based on facts and circumstances presented to the Court from which it must draw a conclusion governed by law, justice and common sense. Reference was made to **Mamman vs. Salaudeen (2005) 18 NWLR (part 958) 478, Waziri vs. Gumel (2012) 9 NWLR (part 1304) 185.** Learned counsel further submitted that the applicant has taken for granted the judicial powers of this Court in considering an application

of this sort as the supporting affidavit is abysmally bereft of any cogent reason. Counsel said the applicant had ample time since 2016 to prosecute this matter but did not and has failed woefully to place any fact to entitle it to the exercise of the Courts discretion. He cited Ezechukwu vs. Onwuka (2006) 2 NWLR (part 963) 151, A.G. Rivers vs. Ude (2006) 17 NWLR (part 1008) 436, Pemu vs. NDIC (2016) 6 NWLR (part 1507) 190.

It is the submission of counsel that what the Court is enjoined by the provision of the Constitution to do is create a conducive atmosphere for parties to exercise their right to fair hearing, by holding the scales of justice fairly but firmly without fear or favour or affection. He cited Construction Co. Ltd. vs. Imani & Sons Ltd/Shell Trustees Ltd (2006) 19 NWLR (part 1013) 1, Eastern Breweries Plc vs. Inuen (2000) 3 NWLR (part 650) 665. He urged the Court to refuse the application.

Perusing the averments in the supporting affidavit, counter affidavit and further affidavit of the parties in this suit, and the submission of counsel across the divide, the only issue which has arisen for determination is:

"Whether this Court can grant this application in the light of the circumstances of this case."

It is now settled law that a party applying that his matter struck out or dismissed for want of diligent prosecution be relisted must fulfill the following conditions:

a. There must be good reasons for being absent at the hearing.
b. That there has not been undue delay in bringing the application as to prejudice the respondent.
c. That the respondent will not be prejudiced or embarrassed if the order for re-hearing is made.
d. That the applicant's case is not manifestly unsupportable.

e. That the applicant's conduct throughout the case is deserving of sympathetic consideration.

See S & D Construction Co. Ltd vs. Ayoku & anor (2011) LPELR – 2965 (SC).

It was emphasized in Williams vs. Hope Rising Voluntary Funds Society (1982) 13 NSCC page 36 that all of these matters ought to be resolved in favour of the application of the applicant before the judgment/order should be set aside. It is not enough that some of them can be so resolved and others are not.

For the first requirement, for a reason to be good, it must be satisfactory; favourable; not bad in the sense that it is unacceptable; it must be an essential material or important reason. Reasons which are peripheral or strange cannot suffice. In the case of Ikenta Best (Nig) Ltd vs. A.G. Rivers State (2008) 6 NWLR (part 1084) page 612 at 642 the

apex Court put the meaning of 'good reason' more clearly. It held thus:

> *"The reason must be good. In other words, the reason must possess the quality that is satisfactory; favourable, useful or suitable to the application. The reasons must not be bad in the sense that they are unacceptable. Substantial reasons are essential material and important reasons. Reasons which are peripheral or dance around the periphery strangely cannot suffice. The pendulum should weigh in favour of granting the application, and not just enough to balance the weight or on an even keel."*

See also **Ikeme & anor vs. Ugwu (2013) LPELR – 20777 (CA).**

The reason put forward by the applicant in the supporting affidavit is as captured in paragraph 9 therein as follows:

"9. On 10/12/2019, our Rotimi Oguneso SAN informed me of the following facts via telephone conversation, at about 1:00pm which I verily believe to be true and correct as follows:

a. *He was out of the country for some personal matters when he received a call from the chambers on the 9/12/2019.*
b. *That he was shocked that the matter was fixed for the 10th of December and he had no prior knowledge of same.*
c. *Upon checking his diary, it was discovered that the date was never communicated to him and was not aware of same.*
d. *His nonappearance before this Court was not borne out of disrespect, lack of diligence or unwillingness to prosecute the matter, but as a result of the facts listed above."*

Again in the further affidavit, the deponent stated in paragraph 7 thus:

"7. The learned SAN personally handling the matter was unavoidably absent as he had an earlier fixture and was not aware of the 10/12/2019 date. He was not before another Court."

On the 10/12/2019 the date the suit was struck out, **Oluwatomi P.E. Are Esq** appeared with Hauwa I. Madaki for the Counter Claimant/applicant. Counsel informed the Court that the learned senior counsel was absent in Court because he had a fixture in another Court. It is apposite to quote her here. She stated thus:

"The case is for hearing of the Counter Claim. Our learned SAN is not in court and is absent before this Court as he had another fixture in another Court. He is unable to be here. We apply for another short adjournment. The learned SAN is aware."

No document was shown to the Court to indicate that the learned senior counsel had a fixture before another Court. In one breadth the reason being adduced is that the learned SAN was not aware of the date and travelled out of the country, and in another breadth the applicant is saying that the learned SAN had a fixture in another Court. Which version should the Court believe?

It is pertinent to state that P.E. Are Esq who was in Court on the 10/12/2019 announced her appearance for the Counter Claimant. She did not say she was holding the brief of the learned senior counsel.

The law is that once counsel announces appearance in Court whether he is holding brief for another counsel or not, the Court takes it that he is fully mandated and or authorized to conduct the case on behalf of his principal or his client. If however, he is not in a position to do so, it is his duty to state his reasons where upon the Court…shall

decide whether or not the case should in the interest of justice, be adjourned otherwise, the Court would proceed with the hearing of the cause or matter. See Osho & ors vs. A.G. Ogun State (2015) LPELR – 41669 (CA).

In FRN vs. Adewunmi (2007) 10 NWLR (part 1042) 399 at 424, Kalgo, JSC in his usual erudity stated that:

> *"When or where a counsel announces his appearance for a party, it is not for the Court to start an enquiry into his authority and the Court never does so. Once a counsel appears in a case and announces his appearance, the Court assumes that he has the authority of his client for the conduct of the case once he is instructed and he announces his appearance in Court and he is so instructed, it raises a presumption of his authority and he assumes full control of the conduct of his clients case."*

Court's usually and normally take counsel's word for it when counsel announces that he is appearing for a client. See FGN vs. Alioha & ors (2016) LPELR – 40940 (CA).

On the date the matter was struck out, P.E. Are Esq was fully competent to proceed with the case, but she chose not to.

It is settled concept that the exercise of judicial discretion is governed by several factors at the same time. These factors are not necessarily constant, but changes with changing circumstances and time and cannot be regarded as immutable and applicable for all times. See Ibegwura Ordu Azubike vs. PDP & ors (2004) SC 476 and Haliru vs. FRN (2008) All FWLR (part 425) 1697 at 1726 – 1727. The guiding principle for the exercise of discretion being judicial must at all times be exercised not only judicially but also judiciously on sufficient material. See

Ugbona vs. Olisa (1971) All NLR 8, Ideozu vs. Ochona (2006) 4 NWLR (part 970) 364.

In Osho & ors vs. A.G. Osun State (cited supra) Oniyangi, JCA stated thus:

> *"Discretion, they say know no bounds, in its general usage it is that freedom or power to decide what should be done in a particular situation."*

In this instance, the grant of an order to relist is an indulgence. Where no sound reason is given for seeking such, no such indulgence should be granted. See Onwuka vs. NPA (2018) LPELR – 45013 (CA).

From the reasons canvassed in this application can this Court exercise its discretion in favour of the applicant? The answer herein is not farfetched. The applicant has not adduced satisfactory reasons to convince the Court to exercise its discretionary power in its favour. The applicant was not honest in the presentation of facts leading to this

application. In litigation, consistency is the rule. A party is not allowed to approbate and reprobate on one issue. See Comptroller General Customs & ors vs. Gusau (2017) LPELR – 42081 (SC).

I hold that the applicant did not give any good reason for failure to proceed on the 10/12/2019. In this application, no cogent reason was advanced to attract the sympathetic consideration of the Court. Having not satisfied the conditions for the grant of this application, the reliefs seeking to set aside the Order made on 10/12/2019 striking out the suit and an Order relisting the suit are refused and the application is hereby dismissed.

Signed
Honourable Judge

Appearances:

Rotimi Oguneso SAN with him, Mercy Okolo Esq and Deborah Idakoji Esq – For the Counter Claimant/Applicant

S.I. Ameh SAN with him John Itodo Esq, Aisha Saidu (Miss) and A.C. Olatubosun (Miss) – For the Defendant to Counter Claim/Respondent