IN THE HIGH COURT OF JUSTICE FEDERAL CAPITAL TERRITORY

IN THE ABUJA JUDICIAL DIVISION

HOLDEN AT JABI, ABUJA

BEFORE HIS LORDSHIP: HON. JUSTICE D. Z. SENCHI

HON. JUDGE HIGH COURT NO. 12

COURT CLERKS: T. P. SALLAH & ORS

DATE: 30/11/2020

BETWEE: - FCT/HC/CV/1782/2014

DR.(MRS.) LAMI MICHAEL HAMZA …. PLAINTIFF/RESPONDENT

AND

1. **HON. MINISTER, MINISTRY OF FEDERAL CAPITAL TERRITORY, ABUJA**
2. **THE DIRECTOR, FEDERAL CAPITAL TERRITORY ADMINISTRATION**
3. **THE DIRECTOR, LAND ADMINISTRATION**
4. **THE DIRECTOR, ABUJA GEOGRAPHIC INFORMATION SYSTEMS**

DEFENDANTS/ RESPONDENTS

AND

1. **THE NIGERIAN ARMY**
2. **NIGERIAN ARMY CORPS ARTILLERY**

INTERESTED PERSONS/ APPLICANT

RULING

At the end of trial conducted in this matter between the Plaintiff and the Defendants, Judgment was delivered on 27th February,2015 in favour of the Plaintiff by this Honourable Court presided by my learned brother Kolo J. (of blessed memory) before whom the trial was conducted. The 1st and 2ndApplicants herein subsequently filed the instant Motion No. M/938/15 but a decision could not be given on the application before the unfortunate demised of the learned trial judge. The matter was thereafter transferred to this Honourable Court by the Honourable Chief Judge of the FCT High Court.

By the instant Motion No. M/938/15 filed on 24thNovember,2015 brought pursuant to the provisions of Order 25 Rule 9 and Order 35 Rule 5 of the High Court of the FCT, Abuja (Civil Procedure) Rules 2004, Section 36 of the 1999 Constitution of the Federal Republic of Nigeria (as Amended) and under the inherent jurisdiction of this Honourable Court, the 1st and 2ndApplicants seek the following reliefs:-

1. An Order of this Honourable Court granting leave to the Applicant in order to seek for extension of time within which the Applicant can seek leave to set aside the Judgment of this Honourable Court delivered on the 27th day of February, 2015.
2. An Order of this Court setting aside the judgment of this Honourable Court delivered on the 27th day of February, 2015 as same amounts to breach of fair hearing (Audi AltermPartem) of the Applicant's right.
3. An Order of this Honourable Court setting aside the Judgment of this Honourable Court delivered on 27th day of February, 2015 as non-joinder of the Applicant, whose legal right to the land has been affected has occasioned a grave miscarriage of justice.
4. And for such further orders as this Honourable Court may deem fit to make in the circumstances.

The grounds for the application are copiously set out on the face of the motion paper.

In support of the application, the Applicants filed an affidavit of 19 paragraphs with exhibits marked exhibits A,B,C,and D. The Applicants Counsel also filed a written address in further support of their application.
In opposition, the Plaintiff/Respondent filed a 21-paragraphs counter-affidavit attached to which are exhibits and further accompanied same with Counsel's written address dated 4th December,2015.

The Plaintiff/Respondent also filed a Notice of Preliminary Objection No. M/1291/2015 dated and filed on 4th December,2015objecting to the hearing of the Applicants' Motion No. M/938/2015. In support of the Preliminary Objection, Counsel to the Plaintiff/Respondentfiled a written address also dated 4th December,2015.

Although he did not file any written response to the Notice of Preliminary Objection, Counsel to the Applicants replied orally on points of law with leave of Court.The 1st – 4thDefendants/Respondents for their part did not file any response at all to either the application or preliminary objection against it.

ISSUES FOR DETERMINATION:

Counsel to the Applicants formulated a sole issue for determination as follows:-

> *"Whether this Honourable Court has the discretionary power to grant the application of the Applicants for being a nullity and a breach of the right to fair hearing of the Applicant in view of the circumstance of the case."*

Counsel to the Plaintiff/Respondent for his part distilled three issues for the determination of the substantive motion to wit:-

1. Whether the Interested Persons/Applicants have placed good and cogent materials before the Honourable Court to entitle the Court exercise its discretion in its favour.
2. Whether the Interested Persons/Applicants had title to the land in dispute at the time the suit was filed by the Judgment Creditor/Respondents to entitle them to be heard in the proceedings leading to the Judgment in this suit.
3. Whether from the records of the Honourable Court, there is any fraud in the proceedings leading to the Judgment in this suit.

In respect of his Preliminary Objection, Counsel to the Plaintiff/Respondent formulated the following issue for determination:-

> *"Whether the 2nd Interested Person/Respondent (sic) is a person known to law to be entitled to the reliefs sought in this application."*

I am of the opinion that the three issues formulated by the Plaintiff/Respondent's Counsel in his address for the determination of the substantive application can be adequately addressed under the Applicant's sole issue. Consequently, the main issues for determination as I see it are as follows:-

1. Whether the 2nd Applicant is a person known to law to be entitled to the reliefs sought in this application.
2. Whether this Honourable Court has the discretionary power to grant the application of the Applicants for being a nullity and a breach of the right to fair hearing of the Applicant in view of the circumstance of the case.

   Whether the 2nd Applicant is a person known to law to be entitled to the reliefs sought in this application.

The ground upon which the Plaintiff/Respondent's preliminary objection is predicated is stated on the face of the Notice that the 2nd Interested Person/Respondent i.e. the Nigerian Army School of Artillery Corps is not a person known to law and could not have acquired any property or interest therein.
In his written address in support of his preliminary objection, learned Counsel to the Plaintiff/Respondent submitted that anyone approaching the Honourable Court must first establish his legal personality. He posited that the right of action is only conferred on persons and as such only such persons can institute, maintain and defend actions by or against them. He submitted that while the 1st Applicantis a person created by the Constitution and the Armed Forces Act, the 2nd Applicantis

not a person known to law. Counsel argued that there is nothing in the Applicants' affidavit in support of the instant motion to show that the 2nd Applicant acquired legal status to acquire, own land and maintain legal action in Court. He relied on the case ***of FAWEHINMI V. NBA & ORS. (NO. 2) (1989) LPELR-1259(SC)***. He said the 2nd Applicant cannot enforce any rights in this case as it has acquired none. He posited that the contracts entered by the 2nd Applicanti.e. the allocations to it in respect of the land subject matter of the instant application is void. He urged this Court to therefore dismiss this suit and award damages in favour of the Plaintiff/Respondent.

Replying on points of law, learned Counsel to the Applicants submitted that the instant Preliminary Objection is premised on the fact that the 2nd Applicant is a non-juristic person. Counsel relied on the case of ***FAWEHINMI V. NBA (no. 2) (1989) NWLR (PT. 105) P. 558.***

The ground of the Plaintiff/Respondent's Preliminary Objection is quite clear. The Plaintiff/Respondent has, by the instant preliminary objection, challenged the 2nd Applicant's legal personality and has contended that it lacks such competence to bring the instant application.

The law is quite well settled that it is only persons (natural or artificial) with the requisite juristic personality that can initiate a legal action in Court to sue or be proceeded against by being sued. It is only such persons that have the legal capacity in law to be parties to an action initiated before a Court of law. No order or judgment of the Court can be made against a non-juristic person. See the cases of ***AKPAN & ORS. V. UMOREN & ORS. (2012) LPELR-7909(CA)*** *and* ***WORLD MISSION AGENCY INC. V. SODEINDE & ANOR (2012) LPELR-19738(CA)****.*

In the case of ***UBA PLC V. MOHAMMED & ANOR (2011) LPELR-5063(CA)*** it was held that for an action to be

properly constituted so as to vest jurisdiction on the Court, the parties before it must be competent and or juristic person, failure of which will lead to the action being struck out.

The Supreme Court put it very simply in the case of ***THE REGISTERED TRUSTEES OF THE AIRLINE OPERATORS OF NIGERIA V. NAMA (2014) LPELR-22372(SC)***, where it held as follows:-

> *"It is now well settled that a non-existing person, natural or artificial cannot institute an action in Court, nor will an action be allowed to be maintained against a Defendant, who as sued, is not a legal person. Juristic or legal personality can only be donated by the enabling law. This can either be the Constitution or a Statute. If the enabling law provides for a particular name by way of juristic or legal personality, a party must sue or be sued in that name. He cannot sue or be sued in any other name."*

See also the case of ***SHELL PETROLEUM DEVELOPMENT COMPANY & ANOR V. DANIEL PESSU (2014) LPELR-23325(CA)***.

I have looked at the Applicants' processes upon which the Plaintiff/Respondent has relied for his objection. Part of the allegations made in the Applicants' affidavit in support of the instant application is that the 2nd Applicant was allocated the plot (subject matter of the instant application) in 1995 by the then Minister of the FCT and a letter of acceptance was sent to the Minister. Documents were annexed to show this. The position of the Supreme Court in the case of ***FAWEHINMI V. N.B.A. (NO 2) (1989) 2 NWLR PT. 105 P. 558***however is that the mere fact that an entity has been dealt with by others as an existing entity does not confer on it legal capacity to sue and be sued. Thus, the 2nd Applicant still has the onus of establishing its legal personality/capacity to bring

the instant application in the name it has brought it, same having been challenged by the Plaintiff/Respondent. Failure to do so means the instant application by it is incompetent and is liable to be struck out. See the cases of ***SOCIO-POLITICAL RESEARCH DEVELOPMENT V. MINISTRY OF FCT & ORS(2018) LPELR-45708(SC)*** *and* ***FAM-LAB NIG LTD & ANOR V. JAHMARCO NIG LTD & ANOR(2018) LPELR-44730(CA)***.

In the case of ***SOCIO-POLITICAL RESEARCH DEVELOPMENT V. MINISTRY OF FCT & ORS(supra*)** the Supreme Court held as follows:-

> *"In the Notice of preliminary Objection on ground of law filed by the respondents, the followings were given as the grounds of objection.*
>
> *"1. That the plaintiff is not a juristic person in law.*
> *2. That this Honourable Court lacks jurisdiction over this matter."*
>
> *On the writ of summons and statement of claim on pages 1 and 3 respectively, of the record, the Appellant describes itself as: "SOCIO-POLITICAL RESEARCH AND DEVELOPMENT LTD." Whereas in subsequent processes filed by the Plaintiff/Appellant including the processes used at the Court below and the Appeal filed to this Court against the judgment of the Court the Plaintiff/Appellant never described itself again as a Limited Company. It has continued to describe itself simply as "Socio-Political Research Development." It is clear that the Respondents had challenged personality of the Appellant and it is certainly a procedural requirement that whenever issues are joined by parties in pleadings, evidence is required to prove these averments. And it is the person or party whom the burden of establishing that issue lies that must adduce satisfactory evidence. It follows therefore that when there is no such evidence, the issue must necessarily be resolved against the party.*

However, the nature of the evidence that will suffice as to whether in oral or documentary, may well depend on the issue in question and the requirement of the law."

Now the legal personality of the 1st Applicant 'the Nigerian Army' is not in dispute (and with good reason too). The 1st Applicant is very well recognized constitutionally and Statutorily. See the **Constitution of the Federal Republic of Nigeria 1999 (as Amended)** and the **Armed Forces Act**. Judicial notice can be taken of that.

The 2nd Applicant 'Nigerian Army Corps of Artillery' is another matter entirely. The 2nd Applicant's legal personality has been challenged and as such, its legal capacity to bring the instant application before this Court is in issue. The 2nd Applicant did not file a further affidavit to its affidavit in support placing facts of its establishment and legal personality before this Court. The 2nd Applicant did not even file a proper Reply pointing this Courtin the direction of the law under which it was established or created. Learned Applicants' Counsel's oral reply on points of law unfortunately is bereft of anything to support the suggestion that the 2nd Applicant was created by instrument of the law. Having failed to establish its legal personality before this Court, this Honourable Court has no choice but to hold that the 2nd Applicant lacks such legal personality and I so hold. Consequently, the 2nd Respondent/2nd Applicant lacks the legal capacity to commence legal process in a Court of law such as the instant application before this Court. In other words, the 2nd Applicant lacks the capacity to sue and be sued and as such, the instant application brought by it is an aberration, incompetent and liable to be struck out. According, the name of the 2nd Respondent/2nd Applicant is hereby struck out from records of this suit.

However, as the 1st Applicant has the legal personality in law to bring the application, the aforementioned incompetence is personal to the 2nd Applicant alone and does not affect the

entire application. The sole issue is therefore resolved in favour of the Plaintiffs/Respondents against the Applicants/ Respondents
The preliminary objection thus succeeds in part.

Whether this Honourable Court has the discretionary power to grant the application of the Applicants for being a nullity and a breach of the right to fair hearing of the Applicant in view of the circumstance of the case.

Succinctly put, the facts relied upon by the Applicant for its instant application is that it was not a party to the substantive suit No. CV/1782/2014 between the Plaintiff/Respondent and the Defendants/Respondents in which Judgment was delivered on 27th February,2015. A copy of the said Judgment is attached as Exhibit A. That since 1995, Plot No. 362 Katampe i.e. the land subject matter of the Judgment has been that of the (Nigerian Army) property without any disturbance until 2015 when it received a letter of revocation. It alleged that it only became aware of the Judgment in suit No. CV/1782/2014 which deprived it of its ownership of the land when it was served in July, 2015 with a letter of Notice of Revocation by the FCT Administration. Exhibits B, C and D are letter of revocation, letter of allocation and acceptance thereof respectively. The Applicant alleged that its allocation to the plot was never revoked and the Judgment delivered in suit No. CV/1782/2014 is tainted and obtained by fraud and irregularity as the defence Counsel did not call any witness or evidence in that case. The Applicant averred that its right to fair hearing and right to own property has been breached by its non-joinder in suit No. CV/1782/2014. The Applicant went on to say no letter of revocation of its interest was tendered by the defence. That time for applying to this Court to set aside the Judgment has since elapsed and this was ascribed to bureaucratic bottleneck on who to prosecute the matter experienced in its office. That it will be in the interest of

justice to re-open the case and allow the Applicant to be heard.

The Plaintiff/Respondent for her part averred in her counter-affidavit (deposed to by her lawful attorney Bashir Usman) that the land in question was allocated to her by the Minister of the FCT and duly accepted by her. Letters of conveyance and acceptance were attached to the counter-affidavit as Exhibits II and III. That the Applicant was informed through Gazetted circular (attached as Exhibit IV) that the land in question was to be sold as Federal Government property. That the Applicant's interest was terminated by revocation notice in 2005 but was purportedly reinstated in 2008. Certified true copyof processes in suit No. CV/1782/2014 were attached as Exhibit V. That at the time of allocation to the Plaintiff/Respondent, the land was bare. Site plan was annexed as Exhibit VI. The Plaintiff/Respondent averred that there was neither fraud nor collusion by her and the Defendants/Respondents in obtaining the Judgment in this suit No. CV/1782/2014. That the Applicant was aware of the revocation of its title to the land in question and it will not serve the interest of justice to re-open this case.

Arguing in favour of the grant of the instant application, learned Counsel to the Applicant submitted in his written address that it is one which can be granted by this Honourable Court considering the circumstances surrounding the case. He posited that ordinarily, once a Court delivers judgment it becomes *functus officio* and has no power to vary such judgment or order except to correct errors in expressing its intention. Counsel contended that there are however exceptional cases in which the Court may set aside its judgment such as where the judgment is shown to be tainted with fraud or is irregularly obtained. He posited that this Court can set aside its judgment that was obtained by fraud or deception or which amounts to a breach of fundamental right or is a nullity. He relied on the cases of ***EDE V. MBA (2011) 18 NWLR PT. 1278 P. 262 and BELLO V. INEC***

(2010) 8 NWLR (PT. 1196) P. 342. It is Counsel's submission that the Defendants/Respondents' failure to call evidence in defence of the matter was orchestrated and Counsel urged this Court to set aside the Judgment delivered on 27th February,2015 in this suit as it is tainted with fraud. He said the Judgment is a nullity as the Applicant's title/allocation was never revoked. He argued that this Honourable Court was therefore fraudulently deceived into finding for the Plaintiff/Respondent in its Judgment as the procedure for revoking the Applicant's title was never followed. He contended that the Judgment amounts to a breach of the Applicant's right to fair hearing as it was never aware of or made a party tothe pending suit against its interest in the land subject matter of this suit until after Judgment. Relying on the cases of ***IBRAHIM V. UMAR (2012) 7 NWLR (PT. 1300) P. 507 and BELLO V. INEC (supra***),Counsel to the Applicant maintained that the Applicant, though not a party to the proceedings that resulted in the Judgment, can still apply to this Courtto set the said Judgment aside without requiring an appeal.

Counsel to the Applicant continued his argument by submitting in his address that under the Rules of this Court, the Applicant, who is a person interested/affected by the Judgment, is supposed to apply within 6 days to have same set aside. He posited that this time can however be extended in the interest of justice by this Court. He relied on the case of ***KOLAWOLE V. ALBERTO (2002) FWLR (PT.130) P. 1761***. He posited that the Applicant has made out genuine reasons for this Court to grant an extension of time within which the Applicant can ask this Honourable Court to set aside its Judgment same being a nullity and being obtained by fraud as well as constituting a breach of the Applicant's right to fair hearing. In conclusion, Counsel urged this Court to grant the reliefs sought in the instant application.

Arguing against the grant of the application, learned Counsel to the Plaintiff/Respondent submitted that there is no

explanation why the instant application has been brought so late and the Applicant has not presented sufficient material to entitle the Applicant to the exercise of this Court's discretion. He contended that from the evidence on record, the revocation of the Applicant's title to the disputed land was done in 2005 on the orders of the President and this was communicated to the Applicant. He submitted that as at the date of allocation of the land to the Plaintiff/Respondent, the Applicant had no interest in the land to be entitled to a right to defend this suit. He relied on a plethora of decided cases and the provisions of the Land Use Act. He submitted that allegations of fraud are criminal in nature and the standard of proof required is proof beyond reasonable doubt. He relied on Section 135 of the Evidence Act. He said there is nothing to show that there was any investigation into the weighty criminal allegations made by the Applicant in its affidavit in support. He cited the case of ***OGUNDELE & ANOR. V. AGIRI & ANOR (2009) LPELR-2328(SC)***. Counsel submitted that this Court is only left to refer to its records to discover if there is any apparent fraud. It is his position that, on a review of the entire documents before this Court and the affidavit evidence, the Applicant has neither discharged the onus of proof placed on it nor has it met the standard of proof imposed by law. He submitted therefore that the Applicant has failed to disclose any reason for the grant of the instant application and he concluded his address by urging this Court to dismiss same with substantial cost against the Applicant.

In the resolution of the issue before this Court, the Applicant is by the instant application seeking this Court to set aside its own Judgment delivered on 27th February,2015 (per Kolo J) in this suit.

The general position of the law is that once a Court has given a final decision and necessary consequential orders in a matter presented to it for adjudication, it becomes *functus officio* and is precluded from reviewing the form of the judgment or order apart from the correction of typographical

or accidental slips under the 'slip rule'. Once pronounced, the Court cannot substitute a different decision in place of the one which has been recorded. The Court thus lacks the jurisdiction to revisit, re-open or review its own judgment once delivered except under certain conditions. – see the Supreme Court's decision in the cases of ***NIGERIAN ARMY V. IYELA (2008) 18 NWLR (PT. 1118) P. 115*** *and* ***DINGYADI & ANOR V. I.N.E.C.& ORS (2011) LPELR-950(SC)****.* The general rule admits some exceptions.

The Supreme Court held in the case of ***ANATOGU & ORS V. IWEKA II & ORS (1995) LPELR-484(SC)*** as follows:-

> *"The general rule is that the Court has no power under any application in the action to alter or vary a judgment or order after it has been uttered or drawn up, except so far as is necessary to correct errors in expressing the intention of the Court or under the "slip rule".See****ASIYANBI V. ADENIJI (1967) 1 ALL NLR 82, 89; UMUNNA V. OKWURAIWE (1978) 6-7 SC. 1; AGWUNEDU V. ONWUMERE (1994) 1 NWLR (PT. 321****) 375. There are, however, exceptions to this rule some of which are:-*
>
> ***(1)*** *A judgment or order which is a nullity owing to failure to comply with an essential provision such as service of process, can be set aside by the Court which gave the judgment or made the order See****SKENCONSULT (NIG.) LTD. V. UKEY (1981) 1 SC. 6; CRAIG V. KANSSEN (1943) KB 256; FORFIE V. SEIFAH (1958) 1 ALL ER 219 P.C.***
>
> *(2) A judgment or order made against a party in default may be set aside and the matter reopened - see: e.g. Order XLI, Rule 5 of the High Court Rules of Eastern Nigeria.*
>
> *(3) There is jurisdiction to make upon proof of new facts an order supplemental to an original order, e.g. a supplemental order to an order for specific performance that there be an inquiry as to damages*

sustained by reason of the Defendant's delay in completing the agreement, at any rate from the date of the original order for specific performance see ***Ford-Hunt v. Singh*** *(1973) 2 All E.R. 700; (1973) 1 WLR 738.*

(4) *If a judgment or order has been obtained by fraud, a fresh action will lie to impeach the judgment."*

Now the instant application was brought pursuant to the provisions of the erstwhile Civil Procedure Rules of this Court. See **Order 25 Rule 9** and **Order 35 Rule 5 of the High Court of the FCT, Abuja (Civil Procedure) Rules 2004**. These rules specifically empower thisCourt to set aside its Judgment delivered ***in default*** of pleadings and appearance and further deal with how such Judgment may be set aside. This Court may set aside its default judgment upon an application brought within 6 days or such longer period as the Court may allow provided just cause is shown.

The Applicant herein has applied for leave/extension of time to set aside the Judgment of this Court delivered on 27th February,2015 per Kolo J. (of blessed memory) in this suit. It would appear that the Applicant feels that the option to set aside the Judgment as a 'default' judgment is available to it. I think not.

In the instant suit, the Applicant was clearly not a party to the substantive suit which culminated in the Judgment of 27th February,2015. The Applicant admitted this much in paragraph 5 of its affidavit in support of the instant application. The Plaintiff/Respondent and the 1st – 4thDefendants/Respondents were the only parties in this case. Record shows that they were all represented and participated at the trial of the matter. As such, the Judgment delivered by Kolo J. at the end of the trial cannot be considered a default judgment. It is a judgment on the merit which for all intent and purpose can only be set aside on appeal. See the case of ***BELLO V. INEC & ORS (2010) LPELR-767(SC)***. The mere fact that the

Applicantalleges that it had an interest in the matter does not entitle this Court to treat the said Judgment of 27th February,2015 as a default Judgment in so far as the Applicant was (and is still) NOT a party to the suit. It would appear that the only option available to the Applicant in the circumstances is to appeal against the said Judgment as an interested party.

I am not unmindful of the position of the law which provides that a party who is affected by an order of Court which is a nullity can bring an interlocutory application to the same Court to set such orders aside. – see the case of***OYEYEMI & ORS V. OWOEYE & ANOR (2017) LPELR-41903(SC)***. In the instant case however, the reliefs granted in the Judgment of Kolo J. on 27th February,2015 does not in any way mention the Applicant. By looking at the reliefs granted by the Court in the Judgment without more therefore, it cannot be said that the Applicant has been affected by the Judgment or orders made in it. From the state of things, the Applicant will first have to show/establish its interest before going ahead to show why the Judgment ought to be set aside.

I find the case of Supreme Court's decision in the case of ***BELLO V. INEC & ORS (supra)*** to be very relevant to this case. It is on all fours with the instant case on material facts. Interestingly, the Applicant's Counsel has himself relied heavily on it in his submissions.

Briefly stated the facts in the case of ***BELLO V. INEC & ORS (supra*)** is that the appellant (as Plaintiff) had originally filed an originating summons at the Federal High Court, Abuja against the 1stRespondent (INEC) and 2nd respondent (PDP) as the named Defendants. The Appellant subsequently withdrew the suit against the 2ndRespondent and an Amended Originating Summons was filed and served on the 1stRespondent as the sole Defendant. The matter proceeded to trial on the Amended Originating Summons and a considered judgment of the trial Court was delivered in favour

of the Appellant against the 1st Respondent. The 2nd Respondent subsequently filed an application before the Courtseeking (1) an order extending time within which it shall apply to set aside the judgment of the trial Courtand (2) an order setting aside the entire proceedings and the judgment. The grounds of the application were that the 2nd Respondent (as a party in the initial originating summons) was not served, which was a breach of its right of fair hearing. The Federal High Court found for the 2nd Respondent and set aside its Judgment on the ground that it was a nullity. The Appellant appealed to the Court of Appeal Abuja which dismissed the appeal and upheld the trial Court's decision to set aside the Judgment. Aggrieved, the appellant further appealed to the Supreme Court. Ultimately and unanimously allowing the appeal, the Supreme Court made some notable pronouncements in its decision. The apex Courtfound that 2nd Respondent was no longer a party to the suit at the trial Court as its name had been withdrawn and the originating processes amended. The Apex Courtheld that as it was not a party who was named in the suit that culminated in the Judgment of the trial Court, the 2nd Respondent cannot bring an application to set same aside as a default judgment. As the 2nd respondent was not also named in the reliefs granted in that judgment, the Supreme Court held that it cannot approach the same Court that gave the Judgment to set it aside in the manner it did. The only option available to the 2nd Respondent was to apply for leave to appeal against the judgment as an interested party and have same set aside on appeal where the leave is granted. The Supreme Court held per Mahmud Mohammed JSC (delivering the lead Judgment) as follows:-

> *"In the present case, it is not at all in doubt that having regard to the nature of the dispute between the Appellant and the 1st Respondent as contained in the Amended Originating Summons adjudicated upon and determined by the trial Court, the 2nd Respondent being the Political Party that forwarded the name of the Appellant to the*

1st Respondent to contest the election before the alleged disqualification and substitution of the Appellant's name by the 1st Respondent relying on the EFCC list of indicted persons containing the name of the Appellant, indeed qualified as a person having interest in the matter heard and determined by the trial Court in its judgment of 4th April, 2007. As from the date of this judgment, the orders in which were not directly addressed to the 2ndRespondent but specifically beamed at the 1st Respondent which was a party, the 2nd Respondent which was a party to the action, but whose interest is directly in issue, had two options open to it;

1) *It may stay put and decide to abide by the judgment of the trial Court particularly being responsible in the first place of forwarding the name of Appellant to contest the election as its candidate or,*
2) *Apply to the same trial Court for leave to appeal to the Court of Appeal within the time prescribed for appealing against the judgment or after the expiration of that time, apply to the Court of Appeal for extension of time to seek leave to appeal, leave to appeal and extension of time to appeal against the judgment as a person having an interest in the matter."*

The learned jurist further held that

"Whatever prompted the 2nd Respondent to challenge the judgment of the trial Court of 4th April, 2007 of which it was not a party but a party or a person having interest in the matter, ought to have come properly to join in the case as a party before it could have found the appropriate platform to attack the judgment on appeal which could have yielded the same relief of setting aside of that judgment if the grounds for doing so have been established to justify the Court of Appeal granting the relief: I may observe at this stage that the misconceived course taken by the 2nd Respondent in this case is similar to the course adopted by the Plaintiffs

in the case of ***OKOYE V. NIGERIAN CONSTRUCTION AND FURNITURE CO. LTD (1991) 2 NSCC VOL. 22 PART 422*** *also reported in (1991) 6 NWLR (Pt. 199) 501 at 532 where this Courtheld that failure to join as a party a person who ought to have been joined will render the proceedings a nullity on ground of lack of jurisdiction or competence of the Court. Akpata JSC specifically stated the position as follows:-*

> *"In my view, failure to join a necessary party is an irregularity which does not affect the competence or jurisdiction of the Court to adjudicate on the matter before it. However, the irregularity may lead to unfairness which may result in setting aside the judgment on appeal. Setting aside a judgment or making an order striking out the action or remitting the action for a retrial in such circumstance that will not be for lack of jurisdiction or the basis of the judgment being a nullity. The trial Court itself is incompetent to review the judgment; more so another Court of co-ordinate jurisdiction."*

See also ***- LAIBRU LTD. V. BUILDING & CIVIL ENGINEERING CONTRACTORS (1962) 2 SCNLR 118; EKPERE V. AFORIJE (1972) 1 ALL NLR (PT. 1) 220*** *referred to and applied (pp.530 para. H).*

The position of the law is well settled that no cause or matter shall be defeated by reason ofmis-joinder or non-joinder of parties and the Court may in every cause or matter deal with the matter in controversy so far as regards the rights and interest of the parties actually before it. See ***PEENOCK INVESTMENT LTD. V. HOTEL PRESIDENTIAL (1982) 12 SC1."***

On what amounts to default judgment and whether a party who is not party to the suit can apply to have a judgment set aside as default judgment, the Supreme Court further held per Mohammed JSC thus:-

"A default judgment is one given in default of appearance or pleadings against a Defendantor a Plaintiff in a cross-action whose names appear as such Defendant or Plaintiff in the record of the trial Court. In the instant case where the Appellant and the 1st Respondent who were the only parties as Plaintiff and Defendant in the action were present or duly represented by their learned Counsel before the trial Court throughout the proceedings up to the point of judgment in question, that judgment cannot be described as a default judgment. It is clearly a judgment on the merit which in law, can only be set aside on appeal. See ***ALAPA V. SANNI (1967) NMLR 397****. The Courts below are therefore in error in regarding and treating the judgment of the trial Court of 4th April, 2007 as a default judgment capable of being set aside by the trial Court on the application of the party not heard at the hearing.*

Having regard to the circumstances of this case, the appropriate remedy for the 2nd Respondent if it wants to still challenge the candidature of the Appellant in the 21st April, 2007 election, is for it to avail itself of the remedy under Section 243(a) and (b) of the 1999 Constitution as a person having interest in the matter. I may wish to observe at this stage that the cases relied upon by the Respondents in this appeal in support of their submissions that the judgment of the trial Court of 4th April, 2007 was a nullity, are all cases in which persons who were parties to an action and who were therefore entitled to service of the initiating process and other processes or notice of hearing had not been served at all. The cases have no relevance to the present case in which the 2nd Respondent which was not a party in the case was complaining of not being put on notice. In the same vein, the case of ***ADENUGA V. ODUMERU*** *(****2002) 8 NWLR (pt. 821)***

163 *also relied up on by the Respondents where this Courtdecided that a Court of law has no power to make an order against the interest of persons who were not parties before it as such an order is not in law binding on such parties, is also not relevant to the present case as no specific order was made against the interests of the 2nd Respondent in the judgment of the trial Court of 4th April, 2007 as no interest of the 2nd Respondent was made known as at the date of the judgment regarding the nomination of the Appellant to contest the election as the candidate of the 2nd Respondent.*

On the whole, taking into consideration that the main ground upon which the 2ndRespondent challenged the judgment of 4th April, 2007 as being a nullity was the failure of the trial Court to put it on notice for the hearing of the matter.As it has been shown quite clearly from the record of this appeal that the 2nd Respondent was infact not a party in the case, the ground for regarding the judgment of the trial Court as being a nullity has been completely swept away thereby justifying the Appellant's appeal being allowed. The appeal has merit and it is therefore allowed. The Ruling of the trial Court of 20th July, 2007 setting aside the judgment of the trial Court of 4th April, 2007 which decision was affirmed on appeal by the judgment of the Court of Appeal of 17th December, 2008 are hereby set aside. In place of the Ruling and Judgment of the Courts below now set aside, there shall be entered an order striking out the 2ndRespondent's motion filed at the trial Court on 5th June, 2007, asking the trial Court to set aside its judgment of 4th April, 2007, as that Court has no jurisdiction to do so."

From the foregoing decision of the Supreme Court, it is clear that the mere fact that the Applicant claims to have been interested in this suit but was not put on notice of same

before Judgment was delivered on 27th February,2014 is not sufficient reason for this Court to accept the Applicant's invitation, vide the instant application, to assume jurisdiction over its own judgment and set same aside. The option available to the Applicant as a person who claims interest in the subject matter of the said Judgment is to appeal against the Judgment as an interested party. Also, as the Applicant is neither a party to the suit nor is it named anywhere in the reliefs granted by the Court in its Judgment. The procedure of approaching this Court with a simple application to set the orders/Judgment made aside as a nullity is not available to the Applicant. In the circumstances, the Applicant ought to file an application to appeal against the Judgment as an interested party and thereby show its interest or how it has been affected by the orders/Judgment.

It is relevant to note that in its affidavit in support of the instant application to set aside the Judgment, the Applicant made allegations that the Judgment delivered on 27th Februry,2015 by this Court (coramKolo J.) was obtained by fraud.

The unmistakeable position of the law is that a Court of law has the power and inherent jurisdiction to set aside its own Judgment obtained by fraud. See the cases of ***ANATOGU & ORS V. IWEKA II & ORS (SUPRA), ADEYEMI-BERO V. L.S.P.D.C. & ANOR (2012) LPELR-20615(SC)*** *and****OJONG V. NTUI & ORS (2017) LPELR-43729(CA)****.*

However, the procedure for impeaching a judgment obtained by fraud is by filing a fresh and separate action. – see the case of ***ANATOGU & ORS v. IWEKA II & ORS (supra*)**. This is because the issue of fraud must first be tried separately as a distinct issue. This has been firmly established by a long line of decided cases. – see the cases of ***OLUFUNMISE V. FALANA (1990) LPELR-2616(SC)*** *and* ***N.S. ENG. CO. LTD V. EZENDUKA (2002) 1 NWLR (PT. 748) P. 469.***

On the proper manner of impeaching a judgment alleged to have been obtained by fraud, the Court of Appeal held thus in the case of ***HALID PHARMACEUTICALS LTD V. SOLOMON (2013) LPELR-22358(CA)****;*

> *"The proper manner of impeaching a judgment alleged to have been obtained by fraud is by filing a fresh action. The action is regarded as a new action because it requires fresh facts to be presented, and not the old material."*

See also the cases of ***OLADOSU & ANOR V. OLAOJOYETAN & ANOR (2012) LPELR-8676(CA)*** *and* ***ACB LTD V. ELOSIUBA (1994) LPELR-22967(CA)****.*

The issue of fraud (in obtaining the Judgment of 27th February,2015) alleged by the Applicant in the instant application is a cause of action in itself distinct from the cause of action in this suit No. CV/1782/14. By the Rules of this Court, allegations of fraud can only be entertained vide writ of summons. See **Order 2 Rule 2(1)(b) of the High Court of the FCT, Abuja (Civil Procedure) Rules 2018**. In order for this Court to have the competence to entertain the issue of fraud in the Judgment of 27th February,2015 as alleged by the Applicant therefore, a separate and new action must be commenced by way of writ of summons with the allegation of fraud being the only allegation and the setting aside of the Judgment being the main relief. – see again all the foregoing decided cases previously mentioned. In essence, the instant application by motion on notice to this Court to set aside its own judgment on allegations of fraud cannot be granted by this Honourable Court. It is incompetently brought.

Pursuant to all the foregoing, the instant application by the Applicant is ill conceived in law and is liable to be refused. It is incompetent and not one which ought to have been brought before this Court in the first place. In my view, it amounts to

an abuse of the process of this Court and should be dismissed.Accordingly, it is hereby dismissed.

HON. JUSTICE D. Z. SENCHI
(PRESIDING JUDGE)
30/11/2020

Parties:- Absent.
JustinChuwang:- For the Plaintiff
Applicants:-Counsel Absent
Chuwang:-I ask for the cost of N500,000.00
Court:- Cost of N25,000.00 is hereby awarded in favour of the Plaintiff/Respondent against the Applicant.

Sign
Judge
30/11/2020