

**IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY ABUJA
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT COURT NO. 20 WUSE ZONE 2 ABUJA
BEFORE HIS LORDSHIP: HON JUSTICE A. S. ADEPOJU
ON THE 13TH DAY OF OCTOBER, 2020.**

SUIT NO: FCT/HC/CV/993/16

BETWEEN:

VIP EXPRESS TOURISM LTD----- PLAINTIFF

AND

1. AHMAD ISAH

(Operating under the name and style of Ordinary President and Brekete Family)

2. MRS. ELIZABETH JA'FAR

3. BARRISTER UCHE UWAZURUONYE-

4. DISCOVERY MEDIA LIMITED

5. MULTIMESH BROADCASTING LIMITED

6. BARRISTER PAUL EDEH

7. NATIONAL BROADCASTING COMMISSION.

----- DEFENDANTS

LEVI E. NWONYE (Holding the brief of A.G. William Nwobodo for the Plaintiff

J.C. JAMES for the 1st , 2nd & 6th Defendants.

FAITH CHAMTIBWE-JONATHAN with ROLAND CHIGOZIE for the 3rd Defendant.

RULING

This is a composite Ruling in respect of Motions Nos. **M/8105/2017, M/8106/2017, M/8107/2017 and M/9958/2017**. The Motions with reference No. **M/8105/17 and M/8106/17** are seeking on behalf of the 1st, 2nd, 3rd, and 6th Defendants the following;

1. An Order of the Honorable Court setting aside its Ruling made on 9th May, 2017 in the following terms "The attitude of the counsel to the 1st, 2nd, 3rd, and 6th defendants appear to me to be a conspiracy not to appear before the Court today, that Uche Uwazironye having double spoken by

giving the Court the impression that he is going to seek for a stand down till 2 p.m as directed by the Court.

2. An Order of the court setting aside the award of cost of =N=20.000.00 each against the 1st, 2nd, 3rd, and 6th defendants.
3. And for such further order or order(s) this Honourable Court may deem fit to make in the circumstance.

While motions with reference No. **M/8107/17 and M/9958/17** seek the leave of Court to amend the Statement of defence of the 3rd defendant, and joint statement of defence of the 1st, 2nd and 6th defendants.

The grounds upon which the Applicants rely on to set aside the award of cost against the 1st, 2nd, 3rd and 6th defendants are founded

(1) That the counsel to the 1st, 2nd, 3rd and 6th defendants on proceedings of this Honourable court on the 8th day of May 2017 informed the Court that he was before the Court of Appeal on the 9th of May, 2017. The said Counsel is also the 3rd defendant on record. The court was misled to make the orders sought to be set aside. (2) The Counsel later found out that it would be impossible to conduct his case at the court of Appeal and return to conduct the instant suit before this Honourable court the same day.

(3) The cause list at the Court of Appeal was long and included Election Petition and Criminal matters such that Counsel's matter was conducted at about 3:30 pm on the said date.

"The hearing notice returnable from Court of Appeal on 9th May, 2017 was addressed to Esther Igoche of Counsel who was then Counsel to 3rd defendant and who jointly prosecute the Court of Appeal case with Uche Uwazuruonye Esq. of Counsel to 1st, 2nd and 6th

defendants."

The affidavit in support of the two applications are similar. On the affidavit deposed by Uche Uwazuronye the reason for the absence of counsel to the 1st, 2nd and 6th defendants who is also the 3rd defendant in this suit represented by one Esther H. Igoche was that the learned counsel was before the Court of Appeal in suit No. **CA/A/473/2013** between **Victor Chinedu Okafor Vs. Komolafe M. Titilayo & 3 ORS.** On the 9th of May, 2017. That the hearing notice was addressed to Esther H. Igoche, Counsel to the 3rd defendant on the 5th of May, 2017, to appear on the 9th of May, 2017 for hearing of the pending application at the Court of Appeal. That when this suit came up on 8th May, 2017, he (Barrister Uche Uwazuruonye) mentioned to the Court that he was served with a hearing notice from the Court of Appeal against 9th of May, 2017, which would affect his appearance before the Court on the same 9th May, 2017. That the court directed that he should furnish the Court of with a copy of the hearing notice from the Court of Appeal accompanied with a formal application. That this Honourable Court did not record nor countenance his oral application based on his intention to be at the Court of Appeal on the 9th May, 2017. He exhibited the records of proceedings of the Court as **Exhibits A & B. respectively**, and that when he left the court on the 8th May, 2017, he enquired at the court of Appeal where he discovered that the court of appeal had a total of 17 Appeals including election petitions, criminal appeal, 3 civil application and 12 other motions to be heard. That the Appeal court slated hearing of their Motion as number 8 on the cause list to be heard after hearing the election petition , criminal appeal, 3 Civil appeals and 3 Criminal Motions. He also found out that some Senior Advocates of Nigeria would likely be conducting some of

the election petitions, Criminal and civil appeal and motions such that the hearing of their motions would be delayed. That upon an assessment of the situation he believed that it would be impossible to conduct the case at the Court of Appeal and still be able to appear before this honorable court the same date. That in order not to keep the Court and the opposing Counsel waiting in vain, he applied for an adjournment instead of a stand down of the matter. And that on the said 9th May, 2017, he led Esther Igoche and Amaka Onuoha of Counsel in the conduct of appeal at the court of Appeal. He exhibited a copy of the proceedings at the court appeal as exhibits. And that as anticipated his matter before the court of appeal was heard at about 3.30pm on the 9th of May, 2017. He averred that his application for adjournment was in good faith and not desire to waste the time and resources of the Court and his colleagues on the other side. As stated earlier, the similar affidavit in support of Motion No. **M/8106/17** was deposed to by Esther .H. Igoche, Counsel to the 3rd defendant. The written address in support of the application also contains similar arguments, although settled by different Counsel. The Counsel to the defendants in their respective addresses likened the order of the Court to an Order in default of appearance which the Court has the power to set aside, they placed reliance on the provisions of Order 13 Rule 6 of the FCT High Court Civil Procedure Rules, and urged that the ruling be set aside.

In opposition, the plaintiff/Respondent filed a counter Affidavit of one Samuel Owoseni who averred to the following facts in paragraph 5-14 thereof: That he is aware that this suit was adjourned from 8th to 9th of May, 2017 for definite hearing. On the 8th of May, 2017 which was the day fixed for the hearing of the case, Counsel to the 3rd defendant/applicant served the plaintiff Counsel in the

Court room with a motion on notice to amend the defendant/applicant's statement of defence despite the fact that the case was adjourned to 08/05/2017 for definite hearing over 60 days ago. The defendant/applicant's Counsel waited till the morning of the hearing 08/05/2017 to file and serve the plaintiff with a motion to amend applicant's statement of defence. That the Counsel to the 3rd defendant informed the Court that he intended to move his application before the hearing of the case could proceed. The plaintiff counsel indicated to the court that plaintiff intended to oppose the motion, on account of the 3rd defendant/applicant's motion on notice the case was adjourned. The Court then adjourned the motion on notice to the following day 9th May, 2017 for hearing being the next day for the hearing of the matter. And that just at the moment the court pronounced that the case is adjourned to 9th of May, 2017, Counsel to the 1st, 2nd and 6th defendants rose to inform the court that he had a matter at the Court of Appeal, Abuja and prayed that the hearing of his Motion be stood-down to 2:00pm on the 9th May, 2017. That it is not correct as stated by the deponent in application No. 8105, that she told the Court that she had a matter at the Court of Appeal, Abuja, only Counsel for the 1st, 2nd and 6th defendants did. And sequel to that the Court directed the Counsel to 1st, 2nd and 6th defendants/applicants to write a formal letter to the court asking for a stand down of the Motion to 2:00pm and also provide evidence of its appearance before the Court of Appeal. And on the 9th of May, 2017, the matter was called up in the morning and formally stood down to 2:00pm. At 2:59pm the matter was called up for hearing of the 3rd defendant's motion on Notice, neither the 3rd defendant nor his Counsel was in court to argue the motion, the counsel for the 3rd defendant did not write any letter to notify the Court of

any reason she could not attend Court on the 09/05/2017. The plaintiff's Counsel drew the attention of the Court to the situation. That the Court after considering the facts and circumstances of the case as played on both dates made its finding of fact and accordingly awarded cost against the 3rd defendant and also struck out the motion. That the plaintiff/Respondent will suffer injustice if the application is granted. That the cost was granted to the plaintiff to mitigate its cost for bringing both Counsel from Port Harcourt to Abuja on those two days but prevented from going on with the hearing of the case on account of conspiracy of Counsel to the 1st, 2nd, 3rd and 6th defendants. The learned Counsel to the plaintiff/Respondent filed a written address which he adopted as oral argument in opposition to the application of the defendants/applicants. He formulated two issues for determination by the Court to wit;

1. Whether the application is competent and properly brought before this Court.
2. Whether in the circumstance of this case, the applicants have shown good and reasonable cause that should warrant this Honourable Court to set aside its ruling and Order made on the 9th of May, 2017.

On whether the application to set aside the order of the court is proper and competent the Counsel to the plaintiff/respondent relied on the provision of Order 35 rule 5 of the FCT High Court civil Procedure Rules 2004, and submitted that looking at the motion to set aside the order of the Court as filed by the defendants, the defendants did not comply with the said Order 35 Rule 5 by filing the application over 50 days after the Order was given contrary to within 6 days or such longer period as may be allowed by the Court if just cause is

shown. He further submitted that Order 13 Rule 6 of the Rules of court relied on by the defendants in their written address is misconceived as the defendant is not in default of appearance having filed their memorandum of appearance since rather their failure to appear at the trial or hearing when the matter was called up. The Counsel relied on the case of **ABBAY & ANOR VS. RIVERS STATE HOUSING PROPERTY DEV. AUTHORITY** (citation not provided). *Per Thomas JCA*. The application he submitted are not competent and urged that it be struck out.

On whether the defendants/applicants have in the circumstances of this case shown good and reasonable cause that should warrant this court to set aside its ruling and Order. The Counsel to the plaintiff argued that based on plethora of authorities that a Court can set aside its own Judgment;

(I) *Where the Judgment was given in error.*

(II) *Where the judgment was invalid or based on fraud.*

(III) *Where the judgment was based on wrong or non-existent facts.*

(IV) *Where the court did not exercise its discretion judicially or judiciously etc.*

The plaintiff's counsel submitted that none of the above grounds exists. That for the Court to set aside its rulings and Orders made on the 9/5/2017 the applicant must show good and reasonable cause i.e show the existence of other set of facts or special circumstance that would have persuaded the Court to decide otherwise were the set of fact or special circumstance known to the Court. He further argued that the Ruling/Order which the applicants intend to set aside was not attached to the motion for the Court's proper consideration. That there is nothing to set aside.

The attention of the Court was also drawn to the fact that

that 3rd defendant/applicant counsel did not write any letter to the Court to explain why she would not attend Court on the 09/05/2017, and that assuming she wrote, it was not sacrosanct that the adjournment be granted because the case was fixed for hearing of the applicant's motion at the instance of the applicant's Counsel and that the adjournment letter written by the 3rd defendant was in respect of the 1st, 2nd and 6th defendants.

He submitted that grant of adjournment is at the instance of the court, and must therefore be for good reason. He relied on the case of **UNITED BANK FOR AFRICA PLC VS. MRS LABAKE LAWAL & ANOR(2013) LPELR 1973(CA) PP 15-16 paragraph E-D**. He further argued that cost follow events, that the sequence of the event of the 8th and 9th of May, 2017 warrant the award of cost against the applicant. And that the application is an invitation to the court to review its findings and decision which was based on facts in facie curiae. He urged the court to dismiss the application.

Let me start by saying that this is an application that calls for the discretionary power of the court, such exercise must be based on law and cogent and compelling facts. I have therefore considered the affidavits of deponents in support of the application and the counter affidavit of the plaintiff with the written arguments of respective counsel to the parties. For the purpose of setting the record straight it is pertinent to state the events that culminated into the making of the order which the 1st, 2nd, 3rd and 6th defendants seek to set aside briefly. The court after dismissing an application seeking to dismiss the instant suit at the behest of the 1st, 2nd, 3rd and 6th defendants in its Ruling delivered on the 8th March, 2017 adjourned the hearing of the substantive suit to 8th and 9th of May, 2017. On the 8th of May, 2017 learned Counsel to

the 3rd defendant/applicant served on the plaintiff's Counsel an application for amendment of their pleadings, a situation which led to the adjournment of the matter till following day 9th of May, 2017 for hearing of the application. The Counsel to the 1st, 2nd and 6th defendants however informed the Court of a pending matter at the Court of appeal and sought for a stand down before this court to 2:00pm. He was directed to put the request into writing attaching the hearing notice from the Court of Appeal and serve the counsel on the other side. On the 9th of May, 2017, the learned Counsel rather than writing for a stand down, wrote on behalf of the 1st, 2nd and 6th defendants for an adjournment suggesting different dates in the letter. There was however no letter from Counsel to the 3rd defendant explaining her absence from Court. The hearing of the application was stood down till 2:59pm to enable Counsel to the defendants appear as sought by the Counsel to the 1st, 2nd, and 6th defendants the previous day(8th May, 2017) but alas none of the Counsel appeared hence the making of the Order sought to be set aside. The decision of the Court stemmed out of the attitude of Counsel to the defendants towards the Court. The reason of 3rd defendant appearing at the Court of Appeal on the 9th of May 2017 is well taken by this court, however nothing prevented the 3rd defendant from asking any of his juniors to represent the defendants to take the application which was adjourned till that day at their instance. Instead of appearing with two counsel at the Court of Appeal as he claimed. It is also on record that Counsel on the other side comes all the way from Port Harcourt. One would have also expected the defendant's Counsel to be more considerate when applying for an adjournment. The two days slated for the hearing of the matter were wasted. Furthermore the attitude of Counsel waiting to serve an application on the

opposing side on a day meant for hearing of the substantive suit without any reasonable excuse is highly condemnable. The defendants/applicants have more than 40 days to serve their application on the plaintiff/respondent but waited till when the matter came up for hearing of the substantive suit.

In addition, the application to set aside the Order of the Court was also not brought within a reasonable time as stated in the Rules. It is trite that rules of court are meant to be obeyed. They are not for fancy and are aimed at ensuring speedy trial. Counsel are to be conscious of their duties towards the Court and to their colleagues. Be that as it may, the defendant's Counsel urged that sins of Counsel should not be visited on the litigant.

The Counsel to the defendants have obviously sinned, and be made to atone personally for their conduct. **See the provisions of Order 56 Rule 1(c)** which allows Court to order legal practitioners to personally indemnify the other party for cost incurred by them, the **provisions reads "56 (1) Subject** to the following provisions of this Rule, where in any proceedings cost are incurred improperly, without reasonable cause by undue delay or by any other misconduct or default, the Court may make an Order against any legal practitioner whom it considers to be responsible, whether personally or through a servant or agent (c) directing the legal practitioner personally to indemnify such other parties against costs payable to them"

Consequently, the Order of this Court is hereby reviewed, to read that counsel to the 1st, 2nd, and 6th defendants (**Uche Uwazuruonye**) and Counsel to 3rd defendant (**Esther H. Igoche**) **pay the sum of =N=20,000** jointly and severally to the plaintiff's Counsel.

On the amendments of joint statement of defence filed by the 1st, 2nd and 6th defendants and the 3rd defendant.

The application sought to include the final investigation report made by Consumer protection Council based on the same set of facts that gave rise to this suit. The defendants argued that the facts of the investigation report were not available at the time the defendants filed their statements of defence and the said facts are germane to the final determination of the real issues in controversy in this suit. The plaintiff/respondent's Counsel in opposition to the application filed an address on point of law. I have gone through the written addresses of learned Counsel to the parties. It is trite that an amendment dates back to when the processes and initial pleadings were filed. An amendment of processes which seeks to introduce new facts which were not in existence as at the time of the filing of the original processes, and would change the entire nature or cause of the action will not be allowed by the Court. This is because the Court frowns at piece-meal filing of action.

The document which the defendants seek to introduce was made and procured during the pendency of this matter. There are no facts in the original pleadings of the defendants which support the procurement of this document. I agree with the submission of learned Counsel for the plaintiff that the documents was not in existence as at 16/11/2016 when the 3rd defendant filed his original statement of defence and same applicable to the 1st, 2nd and 6th defendants. This document is also immaterial and inadmissible by the provisions of Section 43(1) (2) of the Evidence Act which provides

- (1) *"A Statement is admissible when such statement gives the opinion of a person as to the existence of any public right or custom or matter of general interest, the existence of which if it existed, the maker would have been likely to be aware"*
- (2) *A statement referred to in this subsection*

(1) of this section shall not be admissible unless it was made before any controversy as to which right, custom or matter had arisen”.

Finally I hold that the defendants have not placed any material facts before the Court to warrant the grant of the application for amendment of their statement of defence, consequently the application is refused.

In the same light the application seeking leave and for extension of time to file the witness statement on oath by the defendant is also dismissed for being incompetent. The applications filed by the defendants in Motion **No. M/8107/17 and M/9958/17** are dismissed accordingly.

SIGNED
HON. JUDGE
13/10/2020.

Matter is adjourned to 11/02/2021 for definite hearing.

SIGNED
HON. JUDGE
13/10/2020.

