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

ON WEDNESDAY, 17TH DAY OF FEBRUARY, 2021

BEFORE HON. JUSTICE SYLVANUS C. ORIJI

SUIT NO. FCT/HC/CV/138/2014

MOTION NO. M/9265/2020

BETWEEN

CHUKWUEMEKA SYLVANUS UGWU --- PLAINTIFF

AND

1. PASTOR GBENGA OLAWUMI
2. MRS. BRIDGET AMAMBE **DEFENDANTS**
3. FELIX JOHN
[Acting through his Attorney, Mr. Kingsley Amababe]

RULING

The plaintiff filed this suit vide writ of summons on 9/10/2014. After the trial, the Court delivered judgment on 6/6/2019. The plaintiff's claims against the 2nd defendant were dismissed. The 2nd& 3rd defendants'counter claimagainst the plaintiff was dismissed. The Court entered judgment for the plaintiff against the 1st defendant as follows:

1. A declaration that the plaintiff is the beneficial owner of Plot MF14 situate at DutseSagwari, Bwari Area Council, Abuja.

2. A declaration that the plaintiff is in exclusive possession of Plots BDS67 and MF14 situate at DutseSagwari, Bwari Area Council, Abuja.

3. A declaration that the 1st defendant's acts of forceful entry and pulling down of the plaintiff's existing fence of Plot MF14 situate at DutseSagwari, Bwari Area Council, Abuja amount to trespass.

4. An order of perpetual injunction restraining the 1st defendant, his privies, agents, servants or representatives from further trespassing on Plot MF14 situate at BwariDutseSagwari, Bwari Area Council, Abuja belonging to the plaintiff and in his possession.

5. N1,000,000.00 general damages for trespass.

6. Cost of N100,000.00.

On 21/8/2020, the 1st defendant/judgment debtor [now applicant] filed *Motion No. M/9265/2020* praying the Court for the following orders:

1. An order setting aside the judgment delivered against the 1st defendant in *Suit No. FCT/HC/CV/138/2014* in default of appearance and pleading.

2. Leave to defend the action as per the statement of defence and accompanying documents attached to this application.

3. An order granting stay of execution of the judgment delivered in *Suit No. FCT/HC/CV/138/2014.*

4. And for such further or other orders as this Honourable Court may deem fit to make in the circumstances.

In support of the application, the applicant filed a 43-paragraph affidavit; attached therewith are Exhibits A-D. ChidiIfeonye A. Esq. filed a written address. In opposition, the plaintiff/judgment creditor/respondent filed a counter affidavit of 18 paragraphs on 16/10/2020 with the written address of C. N. NwabuikeEsq. On behalf of the 2nd& 3rd defendants/respondents, Michael B. OmosegbonEsq. filed a written address on 5/10/2020, which he referred to as: *Reply on Points of Law.* At the hearing of the application on 8/12/2020, the counsel for the parties adopted their respective processes.

In the affidavit in support of the motion, Pastor GbengaOlawumi stated that:

1. Upon being served with the processes in this case, he instructed his counsel, Yusuf Hussein, to enter appearance and to file his defence. In paragraphs 5-9, he stated his brief/instruction to his counsel in defence of the plaintiff's claims.

2. His lawyer kept assuring him that he has filed his statement of defence and that he is prepared to defend the case. He told his lawyer to inform him whenever the case is coming up for hearing and when he is to give evidence in Court.

3. He kept reminding his lawyer to update him on the proceedings in Court but the lawyer kept saying that his presence is not needed as he is fully in charge. He did not know that his lawyer did not file any process for his defence.

4. Sometime in April during the lockdown, his lawyer informed him that judgment will be delivered after the lockdown. After the lockdown, his lawyer informed him that the Court has delivered judgment against him and that he needs to appeal the judgment. He did not understand the legal language because he is not a lawyer.

5. His lawyer demanded N500,000 to appeal the judgment. He paid N400,000 as deposit. He then demanded for the judgment and his lawyer promised to give it to him. As his lawyer was not forth coming with the judgment, he approached the registrar of the Court based on the advice of some lawyers; and he was given a copy of the judgment.

6. He discovered from the judgment that same was given against him in default of pleadings and appearance. He was devastated by the act of professional misconduct by his lawyer.

7. He has written a petition to the NBA against his lawyer, which is Exhibit A. He had to brief Messrs ChidiIfeonye& Co. to file an application on his behalf to state his case.

8. He did not trespass into the plaintiff's land. The land that shares boundary with plaintiff's land is Plot BDS/MF/15 belonging to Christ

Liberated People's Assembly, an Incorporated Trustee registered under Part C of the Companies and Allied Matters Act. The Offer of Terms of Grant/Conveyance of Approval in respect of Plot BDS/MF/15is Exhibit B; while the Certificate of Registration of Christ Liberated People's Assemblyis Exhibit C.

9. He is only a Pastor and trustee of the said Church. The plaintiff knows this fact but did not disclose it to the Court. The judgment is to his detriment and absolutely in breach of his right to have his case heard and determined on the merits.

10. He has a good defence to the action. He is ready, willing and able to pursue the matter to its logical conclusion. His statement of defence is Exhibit D.

In the counter affidavit, ChukwuemekaSylvanusUgwu stated as follows:

1. The applicant was served with the processes in this case in 2014. On 1/4/2015, Emeka Smart OkorojiEsq. appeared for the applicant. On 19/11/2015, UwemUmoanwanEsq. appeared for the applicant. On 21/1/2016, P. C. Ihunweze appeared for the applicant. The 3 counsel held the brief of Yusuf Hussein Esq. At this time, no process was filed on behalf of the applicant.

2. On 11/4/2017, the applicant wrote personally to the Court seeking an adjournment to enable him appear to defend this case. The application was granted.

3. On the adjourned date i.e. 25/5/2017, the applicant did not appear in Court and was not represented despite service of hearing notice on him. The case was adjourned to 3/7/2017 for defence.

5. On 3/7/2017, the applicant was absent and his right to defend the case was foreclosed. This paved way for 2nd& 3rddefendants/respondents to commence their defence, which was concluded on 7/11/2017. On the application of the 2nd& 3rd defendants' counsel, the Court adjourned the matter to 6/12/2017 to visit the *locus in quo*.

6. On 6/12/2017, the applicant filed a conditional memorandum of appearance, motion for extension of time and notice of preliminary objection challenging the jurisdiction of the Court.

7. The Court did not sit on 6/12/2017. The case was adjourned off-record to 11/1/2018. On 11/1/2018, counsel for all the parties were in Court and the matter was adjourned to 16/2/2018 for hearing of the applicant's preliminary objection.

8. On 16/2/2018, the applicant and his counsel were absent. Upon the application of the counsel for the other parties, the Court struck out the applications of the applicant.

9. After the visit to *locus in quo* on 30/5/2018, the matter was adjourned for adoption of final addresses. After 11/1/2018, the applicant never showed up till the judgment was delivered.

Issue for determination:

From the affidavit evidence before the Court and the submissions of learned counsel, I agree with ChidiIfeonye A. Esq., learned counsel for the applicant,that the issue for determination is whether considering the circumstances of this case, the 1st defendant's prayers ought to be granted.

Submissions of learned counsel for the judgment debtor/applicant:

Learned counsel for the applicant stated that by Order 10 rules 6 & 11 of the Rules of this Court, 2018, the Court can set aside its judgment if same is delivered in default of appearance or pleading. He referred to **Nigerian Navy &Anor. v. Bassey [2016] LPELR-41415 [CA]** for the guiding principles for setting aside a default judgment. These include: [i] where an applicant has shown good reasons for being absent at the hearing; [ii] the application was brought within the prescribed period; [iii] the applicant has shown that there is an arguable defence to the action which is not manifestly unsupportable; [iv] applicant's conduct throughout the trial is not such as is condemnable; and [v] the respondent will not suffer any prejudice or embarrassment if the judgment is set aside.

ChidiIfeonye A. Esq. submitted that the above decision is on all fours with the present application. The applicant's default in attending Court was occasioned by an irregularity, which is the fact that the counsel he engaged acted unprofessionally by refusing to file the applicant's statement of defence

and did not tell him the true position of the proceedings. He emphasized that the application is predicated on professional misconduct of counsel and misrepresentation of facts by the plaintiff.

The further submission of applicant's counsel is that the judgment delivered by the Court against the applicant was not on its merits. Therefore, the Court has power to set same aside as courts are enjoined to determine cases before them on their merits. He relied on **Nwobodo v. M. O. Nyiam& Associates [2014] LPELR-2668 [CA]** and **Ahmed v. RTA KRCC [2009] All FWLR [Pt. 1014] 109.**Mr.Ifeonye also argued that the Court should not visit the blunder or mistake of the counsel on the applicant. He referred to **Isitor v. Fakorade [2018] All FWLR [Pt. 955] 494** and **SPDC [Nig.] Ltd. v. Kenchez [Nig.] Ltd. [2018] LPELR-45167** in support.

Submissions of learned counsel for the judgment creditor/respondent:

C. N. NwabuikeEsq.argued that the application is an abuse of court process. He stated that it is trite law that upon the pronouncement of the judgment of the court, the court becomes *functus officio*. He submitted that this Court is *functus officio*, judgment having been delivered in this suit.

Learned counsel for the judgment creditor/respondent further submitted that it is the duty of the court to create the atmosphere or environment for a fair hearing of a case but it is not the duty of the court to compel an unwilling party to take advantage of the opportunity to present his case. Any party who

fails or refuses to take advantage of the fair hearing process created by the court cannot turn around to accuse the court of denying him fair hearing. He referred to**Newswatch Communications Ltd. v. Atta [2006] Vol. 139 LRCN 1895.** In the instant case, the applicant was given the opportunity to defend himself but he chose to neglect and abandon the opportunity. Therefore, he cannot at this stage complain that he was not given fair hearing. Counsel reasoned that the court is *"not a slave of time that must wait indefinitely for a party to decide when to come to present his case."*

In respect of prayer 3 for an order for stay of execution of the judgment, Mr.Nwabuike submitted that the prayer for stay of execution of the judgment without a pending appeal against the judgment cannot succeed. He referred to the cases of **Nigerian Breweries Plc. v. Dumuje [2015] 35 WRN 45** and **Okoya v. Santilli [1990] 3 SC [Pt. II] 1.**

Submissions of learned counsel for the 2nd& 3rd defendants/respondents:

The submission of learned counsel for the 2nd& 3rd defendants/respondents is that an application of this nature requires the exercise of judicial discretion by the Court. He referred to the case of **Obijuru v. Ozims [1985] 2 NWLR [Pt. 6] 167** on the factors guiding the power of a court to set aside a judgment obtained in the absence of a defendant. These factors include the reason for the applicant's failure to appear at the trial of the case in which judgment was given. Michael B. OmosegbonEsq.noted that from the record of the Court, Barrister Uwem appeared for the applicant at the trial of this case.

Resolution of the issue for determination:

There is no doubt that applicant's prayer1 - which is an order setting aside the judgment delivered in this suit in default of appearance and pleading- is predicated on the fact that the judgment was a default judgment. The success or failure of prayers 2 & 3 is largely dependent on the decision of the Court on prayer 1. It is therefore necessary to first determine whether the judgment of the Court delivered on 6/6/2019 was a default judgment or a judgment on the merits.

In **Cardoso v. Daniel &Ors [1986] 2 NWLR [Pt. 20] 1,**the Supreme Court held that a judgment is said to be on the merits when it is based on the legal rights of the parties as distinguished from mere matters of practice, procedure, jurisdiction or form. A judgment on the merits is therefore a judgment that determines, on an issue of law or fact, which party is right. A judgment on the merits is a decision rendered on the evidence led by the parties in proof or disproof of issues in controversy between them.

The Supreme Court also held in **U.T.C. v. Pamotei [2002] FWLR [Pt. 129] 1557** that a default judgment is a judgment obtained by a plaintiff in reliance on some omission on the part of the defendant in respect of something which he is directed to do by the rules; or a judgment rendered upon some preliminary or formal or mere technical point or by default and without trial. The Court of Appeal adopted the above decisions in the case of**Ubah v. Okafor [2013] LPELR-21261 [CA].**

In **Bauchi State Government v. Gumau&Anor. [2019] LPELR-4706 [CA],** the processes in the suit at the trial court were served on the appellant. The appellant did not file a formal memorandum of appearance. The matter proceeded to trial and the respondents called 3 witnesses in proof of their case. The appellant was represented in court by counsel at different times in the course of the proceedings. The appellant's counsel sought adjournments of the matter on different occasions and the adjournments were granted by the trial court. It was based on the evidence led by the respondents and on the strength of the final written address of their counsel that the trial court entered judgment on 8/4/2016. TheCourt of Appeal held that the judgment entered by the trial court in the circumstances was a judgment on the merits and not a default judgment.

In the instant case, the depositions in the counter affidavit are correct that the originating processes were served on the applicantin 2014; precisely on 17/10/2014.On 1/4/2015, Emeka Smart OkorojiEsq. appeared for applicant.On 19/11/2015, when the judgment creditor/respondent testified in-chief as PW1, U. U. UmoanwanEsq. appeared for the applicant. On 21/1/2016, P. C. IhunwezeEsq. appeared for the applicant. These counsel appeared holding the brief of Yusuf HesseiniEsq.In the proceedings of 11/4/2017, theapplicant personally wrote a letter to the Court and requested for adjournment. The Court granted the adjournment. The case was adjourned to 25/5/2017 and 1/6/2017 [the dates suggested by the applicant in his letter].

On 6/12/2017, Uwem U. UmoanwanEsq. filed conditional memorandum of appearance on behalf of the applicant, motion on notice for extension of time to file applicant's statement of defence and notice of preliminary objection. When the applications came up for hearing on 16/2/2018, the applicant and his counsel were absent without any reason. The applications were struck out. The final address of the 2nd& 3rd defendants/respondents and that of judgment creditor/respondent served on the applicant did not prompt him and his counsel to attend Court.

I have referred to the above antecedents to show that applicant participated at the proceedings before judgment was delivered. Therefore, the judgment was a judgment on the merits notwithstanding that the applicant chose not to file his statement of defence and adduce evidence. The judgment of the Court determined the rights of the parties based on the evidence adduced at the trial. Therefore, the judgment cannot be set aside as a default judgment.

What I have said so far is sufficient to dismiss the application. However, for the purpose of completeness, I am mindful of the principle restated in**Bauchi State Government v. Gumau&Anor. [supra]** that as a general rule, once a trial court delivers a judgment on the merits, it becomes *functus officio.* In other words, whether the decision in the judgment was right or wrong, the court cannot competently revisit or review it. The exception to this rule is that the decision can be set aside by the trial court under its inherent jurisdiction where it is shown that the decision was reached without jurisdiction; or that

the decision is a nullity due to absence of fair hearing; or that the decision was reached as a result of fraud. See also the case of**Ede v. Mba [2011] 18 NWLR [Pt. 1278] 236.**

In paragraph 39 of the applicant's affidavit, he stated that the judgment is *"absolutely in breach of my right to have my case heard and determined on the merits."*This is a complaint by the applicant that his right to fair hearing was breached by the Court. In **Kano Textile Printers Plc. v. Gloede& Hoff Nig. Ltd. [2002] 2 NWLR [Pt. 751] 420,** it was held that the rule of *audialterampartem* means no more than affording each party the opportunity to be heard. If after affording a party opportunity to be heard and the party fails to avail himself of the opportunity, it is his own funeral. See also**Newswatch Communications Ltd. v. Atta [supra]; [2006] 12 NWLR [Pt. 993] 144**.

From the antecedents of the instant case as shown above, Mr.C. N. Nwabuike is correct that the Court gave the applicant opportunities to present his case but he failed to utilize the oportunities. In the circumstance, the applicant cannot blame the Court for his failure to attend Court to present his case. The applicant cannot be heard to complain that he has not been given fair hearing.

From the depositions in his affidavit,the applicant chose to blame his counsel for the reasons stated therein. He did not blame himself for his failure to exercise due diligence;at least to find out what was happening to his case.

Even when he wrote a letter for adjournment, he did not attend Court on the next date [which he suggested in his letter] or attend Court on a later date to find out what happened to his case. The applications filed on his behalf on 6/12/2017 were also abandoned. Let me refer to two judicial authorities on the position of the law concerning the attitude of the applicant and his counsel.

In **Mosheshe General Merchant Ltd. v. Nigerian Steel Products Ltd. [1987] 2 NWLR [Pt. 55] 110,** it was held that a counsel who has been briefed and has accepted the brief has full control of the case. He is to conduct the case in the manner proper to him, so far as he is not in fraud of his client. He can even compromise the case. Sometimes, he could filibuster if he considers it necessary for the conduct of his case but subject to caution by the court. The only thing open to the client is to withdraw instructions from the counsel or, if the counsel was negligent, sue him in tort for professional negligence. So, in the instant case, the applicant may sue his counsel for professional negligence instead of alleging that he was not given the right to fair hearing.

The second case, which applies to the applicant, is **Gbadeyan v. Unilorin [2014] LPELR-24307 [CA]**, where it was held that even when an applicant had acted promptly in instructing his counsel, the legal burden on him does not lift; it is expected of the applicant to ensure that the counsel carried out the instruction. This follows common reasoning that a litigant who does not follow up his counsel to ascertain if he has taken necessary steps to file his appeal is as well negligent.

Finally, the applicant stated that the land which shares boundary with the judgment creditor is that of Christ Liberated People's Assembly, where he is a Pastor and trustee. The applicant stated that judgment creditor/respondent knew this fact but did not disclose it to the Court. I am of the respectful view that it was the duty of the applicant to disclose this fact. He would have done so if he had filed his statement of defence and adduced evidence in support.The applicant's allegation of non-disclosure of facts or misrepresentation of facts made against the judgment creditor/respondent is not well-founded and cannot constitute a valid ground to setaside the judgment.

In conclusion and from all that I have said, the decision of the Court is that the 3 prayers of the applicant lack merit and aredismissed. I award cost of N25,000 to the judgment creditor/respondent; and cost of N25,000 to 2nd& 3rd defendants/respondents payable by the judgment debtor/applicant.

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HON. JUSTICE S. C. ORIJI
(JUDGE)

Appearance of Counsel:

1. Franklin OlanipekunEsq. for the 1st defendant/judgment debtor/applicant.

2. C. U. AdugbaEsq. for the claimant/judgment creditor/respondent.