

IN THE HIGH COURT OF JUSTICE
FEDERAL CAPITAL TERRITORY OF NIGERIA
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT LUGBE – ABUJA
ON, 12TH MAY, 2014.
BEFORE HIS LORDSHIP:- HON. JUSTICE A. O. OTALUKA.

SUIT NO.:- FCT/HC/CV/2132/13
MOTION NO.:- FCT/HC/M/4188/14

BETWEEN:

MICHAEL OLORUNLEKE:.....PLAINTIFF/RESPONDENT

AND

OLUFEMI AJOMALE:.....DEFENDANT/APPLICANT

Abdulkareem A. With Mahmud Ahmed for the Plaintiff/Respondent.
Osaji Omosegbon (Miss) for the Defendant/Applicant.

RULING ON MOTION ON NOTICE.

Omosegbo: The motion is dated 6th May 2014. Brought pursuant to Or 7 r 1 Or 20 r 3 of High Court of Federal Capital Territory Civil Procedure and Section 210 and 214(2) of Evidence Act 2011 as amended. It is praying the Court to discharge and vacate the earlier orders of foreclosing the right of the defendant to cross examine the PW1. And an order recalling PW1 for cross examination.

And an order postponing the time within which the defendant will open his defence. Attached is a 6 paragraph affidavit. I rely on all averments with exhibits. In compliance with the rules of the Court a written address is attached and I adopt it as my oral argument.

Plaintiff counsel: I seek the Court's leave to reply on points of law because the defendant only served me on the evening of Thursday and the rest have been public holidays.

I oppose the application because it has no merits as it is full of misrepresentation of facts to the Court.

Firstly, there is no existing order of the Court foreclosing the right of defendant to cross examine the plaintiff. The Court is enjoined to make reference to its records of 6th May 2013 as the records of the Court binds the Court and parties. It was on 25th February 2014 that the Court only foreclosed the defence. It is trite law that a party that was given the right to present his case and he neglected to do so cannot come back to the Court to claim lack of fair hearing. Because fair hearing is an opportunity to be heard and not that you must be heard. The correct facts are that the defendant was granted about seven adjournments to open their case but they failed to do that.

The defendant is seeking the discretion of the Court to grant the application but a Court cannot exercise it's discretion outside the facts before it – **Ohwovorione v. FRN (2003) FWLR (pt141) 2019.**

Plaintiff's counsel further submitted that upon non-factual or partial disclosure of the facts no discretion can be exercised – **General & Aviation Services Ltd v. Capt Tahahal (2004) All FWLR (p. 211) 1368 @ 1394 SC.** A misrepresented facts cannot be used to seek the Courts discretion.

Again the defendant is in flagrant disobedience of the Court's order by failing to pay the cost, his hands are dirty and cannot ask for the Courts discretion. I urge the Court to refuse the application with a heavy cost.

Reply on point of law.

The defendant did not file a counter affidavit.

RULING.

The reliefs sought by the application is set out as 1 – 4 in the motion paper. The first relief is asking the Court's discretion to discharge an order that does not exist. The Court makes reference to its record book of 6th May, 2013, pages 512 – 515 of Vol IV.

On the said day, the defendant was physically present but his counsel was absent. The counsel was aware of that date. The plaintiff re-opened his case and testified. The defendant cross examined the plaintiff and the suit was adjourned to 20th May, 2013, for defence to open. On the 20th May, 2013, one S.N. Okechukwu Esq. appeared for defendant without entering a proper appearance by filing a memorandum appearance. The suit was further adjourned to enable him regularise his position. After regularising his papers the Court records show several adjournments at defence instance. A particular incident was recorded on the 11th July, 2013, before the case of plaintiff was called, the defence counsel was reported to have experienced a miscarriage of pregnancy in Court (which turned out to be false) and adjournment was granted in that regard. On the next adjourned date 30th September, 2013, the matter did not proceed because the defence asked for adjournment. It was adjourned to 20th October, 2013. On 20th October, 2013, the defence was not represented. Defendant told the Court that his lawyer is absent without any reason and he asked for adjournment. The application was refused.

The plaintiff for the first time re-opened his case and was cross examined by the defendant. At the close of plaintiff's case, the case was adjourned to 12th November 2013 for defendant to testify.

On 12th November 2013, another counsel Wole Adetoro Esq., represented the defendant and filed a motion to amend the statement of defence. The plaintiff was served with the motion, however, the mandatory 2 days had not expired. The suit was

adjourned to 28th November, 2013. On 28th the Court discovered that the motion paper sought to be moved by defendant had no official number, the suit was further adjourned at the instance of the defence counsel to regularise the processes. The suit was adjourned to 30th January, 2014.

On 30th January, 2014, E. Udo Esq. appeared for the defendant and did not serve the plaintiff with the process. Again the case was adjourned to 11th February, 2014.

On 11th February, 2014, the motion was heard and defence said he was not ready to proceed, the Court adjourned the matter and ordered that the matter must proceed on next adjourned date. He was ordered to pay a cost of N10,000.

On 25th February 2014, the defendant counsel wrote for adjournment, court makes reference to page 428-433 of Vol VI. The court observed that defendant was tactfully asking for adjournment to delay the suit. Party to a suit are only entitled to 2 adjournments and defendant had had more than 7 adjournments in this suit. The Court refused to concede to the letter of adjournment. The defence of the defendant was foreclosed and the matter was adjourned for address having suffered over ten adjournments at the instance of the defence.

On 27th March, 2014, one Blessing Jacob Esq. appeared for the defendant and applied for adjournment stating that Mike Omosogbo was bereaved of a relative and did not file any address. In view of the history of the case, adjournment was refused and his right to file a final address was foreclosed on the application of the plaintiff's counsel and plaintiff was ordered to file his final written address which is to be heard today.

Having laid down the chequered history of this case and the incessant adjournments at the instance of the defence, it is obvious that the defendant exercised his right by cross

examining the plaintiff on 6th May, 2013 and therefore the relief I of this motion paper is a misrepresentation of facts and a ploy to deceive this court. This court holds that relief one is incompetent and is hereby refused and dismissed.

Consequent upon the ruling above in respect of relief I, the relief 2 is also incompetent and is refused based on these fact that PW1 had been earlier recalled and cross examined.

Relief 3 which is consequent upon reliefs 1 and 2 is incompetent and also refused.

The court agrees with the submission of the plaintiff's counsel and holds that:

- 1) That there is no existing order of foreclosure of the defendant cross examining the plaintiff because the defendant had exercised that right.
- 2) Fair hearing is a sumptuous dish for both parties in a suit and must not be inequitably distributed. The defendant has exhausted his right to be heard in the suit.
- 3) He who comes to equity must come with clean hands. Where the defendant has failed to obey the courts order of paying N10,000, he ought not to be heard until he purges himself of the contempt.

The application is an abuse of courts process and is dismissed with a cost of N20,000 (Twenty Thousand Naira).

The court proceeds to hear the motion of the plaintiff.

HON. JUSTICE A. O. OTALUKA
12/5/2014.