

IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT COURT NO. 4, MAITAMA ON THE
8TH DAY OF NOVEMBER, 2021

BEFORE HIS LORDSHIP: HON. JUSTICE U. P. KEKEMEKE

SUIT NO. FCT/HC/CV/3164/2017

COURT CLERKS: *JOSEPH ISHAKU BALAMI & ORS.*

BETWEEN:

**FIRST BANK OF NIGERIA PLC ... PLAINTIFF/JUDGMENT
CREDITOR/RESPONDENT**

AND

**1. RISSUN NIGERIA LIMITED } DEFENDANTS/JUDGMENT
2. CHIEF ERIC OGUOMA } DEBTORS/RESPONDENTS**

**3. AZUIKE UCHENNA DEFENDANT/JUDGMENT
DEBTOR/APPLICANT**

RULING

The 3rd Defendant/Judgment Debtor/Applicant's Motion dated 11th day of February, 2021 but filed on 12/02/2021 is brought pursuant to Order 21 Rule 12 of the High Court of the Federal Capital Territory, Abuja (Civil Procedure) Rules, 2018 and

Section 6(6)(b) and 36(1) of the 1999 Constitution and under the inherent jurisdiction of the Court. It prays the Court for:

- (1) An Order granting leave to the 3rd Defendant/Applicant to apply to set aside its Judgment delivered on the 28/01/2019 as same was made in error of fair hearing.

- (2) An Order of Court setting aside and or vacating its Judgment delivered by this Court on the 28th day of January 2019.

Learned Counsel to the 3rd Defendant/Judgment Debtor/Applicant relied on the grounds for the application, which are on the face of the Motion paper. He further relied on a 29 paragraph Affidavit filed in support of the application deposed to by Anthony Chukwuka Ugwuanyi of No. 13, Ihiala Street, Area 2, Garki, Abuja.

He deposed that an enrolled Order and Motion on Notice of Imo State High court were pasted at No. 7, Idemmili Avenue, Federal Housing Estate, Owerri, Imo State.

Pursuant to the above, the 3rd Defendant/Applicant became aware of the suit. That he became aware of the Judgment of this Court as it was attached. That from the time of the arousal of this cause of action and proceedings, the 3rd Defendant was resident in the United Kingdom as a citizen. That he had no knowledge of this suit.

The Certified True Copy of the British Passport showed that he has no travel history in Nigeria at the material time. It is marked Exhibits B1-B19. He also attached Bank Statement and a Court Summons in the UK at the material time. They are Exhibits C1-C3.

That he did not execute Claimant/Respondent's Exhibit FBN 1 (the Tripartite Legal Mortgage dated 30th day of June, 2014) and Exhibit FBN 5 (the purported letter from the 3rd Defendant dated 17/06/2014 to the Claimant or any letter.

That he did not issue any Power of Attorney or Letter of Authority or any instrument at all empowering any person to act on his behalf. That the 3rd Defendant was not served with

any process. That no picture of pasting was done or exhibited by the bank. That contrary to the deposition in Exhibit D1 that the 3rd Defendant/Applicant was personally served with the Originating Process on 16/01/2018, Exhibit F shows that the 3rd Defendant/Applicant undertakes to defend the suit. That setting aside this Judgment will not occasion any hardship on the Claimant/Respondent as it is in the interest of justice.

Learned Counsel to the Claimant/Respondent rely on the 56 paragraph Counter Affidavit. That the Motion dated 12/02/2021 is the third post-judgment application on the same subject matter and prayers. That there is no defence shown by the 3rd Defendant/Applicant's Affidavit. That the Applicant rushed to file another case in Imo State after service on him of the processes instead of defending this suit.

That service of the Originating Processes was effected on the Applicant on 16/01/2018 and Judgment delivered on 28/01/2019, a year after. That service was effected on the Applicant in accordance with the Order of Court. That the Applicant was aware of this suit. The copy of the other suit is PBN2.

The 3rd Judgment Debtor/Applicant filed a Notice of Preliminary Objection and a Reply on Points of Law in response to the Claimant/Respondent's Counter Affidavit.

Order 43 Rules 1 – 4 of the High Court of the Federal Capital Territory, Abuja (Civil Procedure) Rules, 2018 states the processes that are recognized in an application such as this:

- (1) Motion.
- (2) Affidavit in Support.
- (3) A Written Address which may be accompanied by a Counter Affidavit.
- (4) An Address in Reply on Points of Law.

Therefore, the process titled "3rd Defendant/Judgment Debtor/Applicant's Preliminary Objection" is unfounded, it is accordingly discountenanced. I have however considered paragraph 12.00 to 30.00 which is the alleged Reply on Point of Law. I have also considered the Written Addresses of Counsel.

This is an application for setting aside the Judgment of this Court made in default of appearance and defence. Order 21 Rule 12 of the Rules of Court states:

“Any Judgment by default whether under this order or this rule shall be final and remain valid and may only be set aside upon application to the Court on the grounds of fraud, non-service or lack of jurisdiction upon such terms as the Court may think fit.”

By the above provision, this Court has power to set aside a default Judgment given in the absence of a party. See **EMORDI vs. KWENTOH (1996) 2 NWLR (PT. 433) 656 SC.**

However, in considering an application to set aside a Judgment obtained in default of appearance, the Court must consider the following:

- (1) Whether the Applicant has good reasons for being absent at the hearing.

- (2) Whether he has shown that there is a good reason for the delay in bringing the application.
- (3) Whether the Respondent will not be prejudiced or embarrassed if the order of rehearing is made.
- (4) Whether the Applicant's case is manifestly unsupportable.
- (5) Whether the Applicant's conduct throughout the proceedings is deserving of sympathetic consideration.
- (6) Whether Judgment was given in excess of what was due and claimed.
- (7) Whether the Judgment is tainted with fraud or irregularly obtained.

All the above must be resolved in favour of the Applicant before the Judgment can be set aside.

See **WILLIAMS vs. HOPE RISING VOLUNTARY FUNDS SOCIETY (1982) 1-2 SC 145.**

ARO vs. LAGOS ISLAND L.G.C (2002) 4 NWLR (PT. 757) 385.

AFONJA COMMUNITY BANK NIG. LTD vs. AKPAN (2002) 16 NWLR (PT. 792) 154.

**OGOLO vs. OGOLO (2006) 5 NWLR (PT. 972) 163
SC.**

It is also the law that an Applicant for an order to set aside a default Judgment need not satisfy all the above conditions if he can show convincingly that he was not notified of the hearing date.

See **S.P.D.C NIG. LTD vs. NIGER OPTICAL SERVICE CO. (2004) 7 NWLR (PT. 872) 420.**

The 3rd Defendant's main ground for the application is that he was not served with the Originating Processes. Learned Counsel to the 3rd Defendant has argued in his Written Address that his non-appearance at the trial was occasioned by non-service of the Originating Processes on the 3rd Defendant/Applicant.

That the bulk of the evidence relied on by this Court to arrive at the Judgment, which is Exhibit A3 attached to this application is irregular. He canvassed further that the Motion for substituted service ought to contain facts showing that attempts have been made to serve the party personally but

for some circumstances without control, such service was not effected.

From the record of this Court, an application for substituted service was moved under the Rules of Court on the 2nd day of November, 2017 and same was granted.

Leave was granted to the Claimant/Applicant to issue and serve the Originating Summons and all its accompanying documents in the suit on the 3rd Defendant/Respondent outside the jurisdiction of this Court at Plot B58, New Owerri, Imo State or No. 7 Awo-Idemmili Avenue, Federal Housing Estate, Owerri – Imo State.

That the processes in this suit meant for the 3rd Defendant/Respondent, which includes the Originating Summons and all its accompanied documents and processes be served on the Respondent by substituted means through a Courier Service by delivering same to the 3rd Defendant or any adult at Plot B58 New Owerri – Imo State or by pasting same at No. 7 Awo-Idemmili Avenue, Federal Housing Estate, Owerri – Imo State.

By Order 7 Rule 11 of the Rules of Court, where service of an Originating Process is required and the Court is satisfied that prompt service cannot be effected, the Court may upon application make such order for substituted service as may seem just. Where it appears to the Court either after or without an attempt at service that for any reason prompt service cannot be conveniently effected, the Court may make an order for substituted service as done by this Court.

It is therefore wrong in law for the 3rd Defendant's Counsel to contend that attempt must first be made to serve the 3rd Defendant personally before an application for substituted service can be granted.

Pursuant to the Order of Court, the Originating Processes were served on the 3rd Defendant by substituted means. I shall produce the relevant portion of the Proof of Service sworn to by the Bailiff of Court in respect of his suit.

“On 16th January, 2018, I served upon the 3rd
Defendant Court Order, Originating Summons,

Affidavit in support of Originating Summons, exhibits, hearing date, etc.

That I served the processes said above on the 3rd Defendant through substituted means vide Courier Service (DHL) at No. 7, Awo Idemmili Avenue, Federal Housing Estate, Owerri, Imo State.

The DHL printout of receipt is attached.”

I have also read Exhibit FBN W2 which is a Writ of Summons filed in Imo State High Court on the 1/03/2018 shortly after the 3rd Defendant was served with the Originating Processes of this Court in respect of the same subject matter.

I have gone through Exhibit B1-B19. I have seen the said signature in the British Passport. I have also compared it with the signature in Exhibit FBN W2a, the Written Statement on Oath deposed to by the 3rd Defendant at the High Court of Imo State on the 1/03/2018 attached to the Claimant's Counter Affidavit to the Motion. I have also perused the signature on the DHL Printout attached to Proof of Service.

There seems to be three different signatures. The 3rd Defendant claimed not to be the author of the signature in the DHL Printout, which shows he received the Originating Processes but is mute as to who signed his Statement on Oath in Imo State High Court.

He who asserts must prove. The 3rd Defendant is also a Nigerian. He has not availed the Court his Nigerian Passport. Affidavit of Service is a *prima facie* proof of service. The 3rd Defendant/Applicant has not shown cogent and convincing reasons to rebut that position of the law.

In the circumstance of this case, it is my view and I respectfully hold that the 3rd Defendant/Applicant has not shown any good reasons for being absent at the hearing despite being notified of the hearing.

The 3rd Defendant further contended that the bulk of the evidence relied upon to arrive at the Judgment are irregular. From the first issue and the Exhibits examined, it is clear the 3rd Defendant has different signatures. The 3rd Defendant/Applicant is not alleging fraud, but irregularity.

Nevertheless, the 3rd Defendant has not proven the said irregularities. The 3rd Defendant/Applicant's case is manifestly unsupportable. The Judgment has been registered in Imo State High Court for execution.

The Claimant/Respondent will be prejudiced and embarrassed if an order of rehearing is made. The application lacks merit and it is dismissed.

HON. JUSTICE U. P. KEKEMEKE
(HON. JUDGE)
08/11/2021

Parties absent.

Nnaemeka Adukwu, Esq. for the 3rd Defendant/Judgment
Debtor/Applicant.

COURT: Ruling delivered.

(Signed)

Hon. Judge

08/11/2021