

**THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY
IN THE ABUJA JUDICIAL DIVISION**

HOLDEN AT APO

THIS MONDAY THE 22ND DAY OF NOVEMBER, 2021

BEFORE: HON. JUSTICE JUDE O. ONWUEGBUZIE

COURT 31 APO

SUIT NO: FCT/HC/097/2021

M/5964/2021

RULING

BETWEEN:

BESSAM OIL LIMITED -----CLAIMANT/RESPONDENT

AND

DR. ISHAYA DARY AKAU-----DEFENDANT/APPLICANT

By a motion on Notice dated 17th September, 2021 and filed on 20th day of September,2021, with motion No: M/5964/2021, brought pursuant to Order 43 Rule 1 of the High Court of the Federal Capital Territory, Abuja (Civil Procedure) Rules, 2018, and Under the Inherent Jurisdiction of this court.

The applicant prays for the following orders:

1. AN ORDER of the Honourable Court Striking out this suit pending the determination of the Appeal on the same Subject matter of the suit pending at the Court of Appeal in APPEAL NO: CA/A/186/2018 BETWEEN

DR.ISHAYA DARY AKAU V.HUMPHREY ENEMAKU ABAH & 4
ORS.

ALTERNATIVELY

2. AN ORDER adjourning the proceedings of this suit *sine die* pending the determination of the Appeal on the Subject pending at the Court of Appeal in Appeal NO: CA/A/186/2018 BETWEEN DR.ISHAYA DARY AKAU V.HUMPHREY ENEMAKU ABAH & 4 ORS.
3. AND FOR SUCH FURTHER or other orders as the Honorable Court may deem fit to make in the circumstances.

GROUND OF THE APPLICATION are as follows:

- a. There is a subsisting judgment given on 29th day of November, 2010 by His Lordship U.P Kekemeke in Suit No. FCT/CV/361/08 on the subject matter of this suit.
- b. This Honourable Court has concurrent jurisdiction with the Court that delivered judgment.
4. There is a pending Appeal before the Court of Appeal in respect of this subject of this suit with Appeal NO: CA/A/186/2018 BETWEEN DR.ISHAYA DARY AKAU V.HUMPHREY ENEMAKU ABAH & 4 ORS.
- c. This Honourable Court cannot sit on appeal on the judgment of a Court of Concurrent Jurisdiction.
- d. This suit cannot be effectively determined while the Appeal on the subject matter is on appeal.
- e. It is in the interest of justice to grant this application.

The application is supported by an 11 paragraphs affidavit deposed to by one AlekeIfechi Esq. a Counsel in the law firm of Counsel to the Defendant/Applicant. It is the case of the Defendant/Applicant that he is aware that the Claimant/Respondent filed this against the Defendant/Applicant claiming amongst others that the sale transaction between the claimant and the Defendant/Applicant is a failed contract, occasioned by the action of the Defendant for purporting to sell a property he had no or defective title. That he is also aware that before the commencement of this suit; a judgment has been given by Hon. Justice U.P Kekemeke in respect of the subject matter of this suit-FCT/HC/CV/361/08A. The copy of the said judgment is attached to the affidavit as Exhibit 'A'. The Defendant/Applicant further averred that there is a pending Appeal in respect to the said Judgment on the same subject matter of this suit. The Notice of Appeal was attached as Exhibit 'B'. That this Honourable Court cannot effectively determine this suit without the decision of the Court of Appeal on the ownership of the property. The Defendant/ Applicant further stated that the appeal if successful will permanently bring to an end the instant suit pending before this Court. That a refusal of this application may render nugatory the Appeal pending before Court of Appeal. That Claimant/Respondent will not be prejudiced by the grant of this application.

Upon receipt of the Affidavit in support of the Defendant/Applicant's motion, the Claimant/Respondent filed and served the Defendant/Applicant a 5 paragraphs affidavit deposed to by one Bernard Ameh a litigation clerk in the law firm of counsel to the Claimant/Respondent dated 28th day of September, 2021 and filed the same day, in opposition to the motion. It is the case of the Claimant/Respondent that there is no valid pending appeal before the Court of Appeal. That ownership of the property subject matter of FHC/HC/CV/361/08 is not an issue before this Honourable Court. The Claimant/Respondent averred that there is no nexus

between the alleged appeal and this instant suit and thus cannot render nugatory the pending Appeal before the Court of Appeal in anyway/manner whatsoever. That the Claimant/Respondent will be greatly prejudiced by the grant of this application hence it is in the interest of justice that same be struck out.

In response to the Counter-Affidavit of the Claimant/Respondent, the Defendant/Applicant filed a 17 paragraphs Further Affidavit deposed by same IfechiAleke Counsel in the law firm of the Counsel to Defendant/Applicant dated 12th day of October, 2021 and filed same day. The Defendant/Applicant averred that he know as a fact that all the depositions in the Claimant/Respondent's Counter-Affidavit are not true. That there is a valid appeal pending before the Court of Appeal. That the Defendant/Applicant on the 13th day of January filed a Notice of Appeal at the Registry of Appeal, High Court of Federal Capital Terristory, Abuja with Appeal NO. CA/A/530/2011 BETWEEN: DR.ISHAYA DARY AKAU V.HUNPHREY ENEMAKU ABAH & 4 ORS.the Notice of Appeal was attached as Exhibit "A".

The Defendant/Applicant further averred that the said Appeal was withdrawn by the Defendant/Applicant and consequently struck out on the 1st day of March 2018 due to technical defect in the Appeal as observed and raised by the Court of Appeal. The ruling of the striking out was attached as Exhibit "B". That on the 5th day of March 2018 the Defendant/Applicant filed another Notice of Appeal with Appeal NO. CA/A/186/2018 BETWEEN: DR. ISHAYA DARY AKAU V. HUMPHERY ENEMAKU ABAH & 4 ORS with the necessary application; 'Application for Extension of Time' which is attached here with as Exhibit "C". That he knows as fact that the Appeal is coming up on the 21st day of October, 2021. That by virtue of paragraph 3 and 6 of the Claimant's Amended Statement of Claim, there is a nexus between the subject matter on appeal and the subject matter before this Court which is property No. 11 Cadastral Street, Wuse 2 Abuja. The

Defendant/Applicant further stated that the foundation of the Claimant's suit bothers on contract of sale of property No. 11 Cadastral Street, Wuse 2 Abuja. That there is a pending Appeal where in the Defendant/Applicant's title in the said property has been submitted for determination. That he knows as fact that this Honourable Court cannot effectively determine this substantive suit without the decision of the Court of Appeal on the ownership of the property. That the success of the Appeal will permanently bring to and end the issue of defective title in the property No. 11 Cadastral Street, Wuse 2 Abuja the *res* in the suit. That the refusal of this application will render nugatory the decision of the Appeal Court on the issue of ownership/title of the defendant in the property at No. 11 Cadastral Street, Wuse 2 Abuja.

Consequent of the response of the Defendant/Applicant in this his Further-Affidavit, the Claimant/Respondent filed and served the Defendant/Applicant with a Further Counter-Affidavit deposed to by one Promise OnyekachukwuNnekwu a litigation clerk in the law firm of the Counsel to the Claimant/Respondent dated 14th day of October, 2021 and filed same day. The Claimant/Respondent deposed that the Plaintiff herein is not a party to the Appeal CA/A/186/2018. That the Defendant has failed to prosecute the Appeal diligently and was the one who withdrew the said application. That there is no nexus between the subject matter of the appeal and this suit. That the judgment in suit No: FCT/HC/CV/861/08 remains valid and subsisting. The Claimant/Respondent further averred that this application is a ploy to delay this suit and to continually deprive the Plaintiff financially and psychologically/emotional stability.

In compliance with the rules of this Honourable Court, the Defendant/Applicant Counsel filed a written address in support of the Application. In his written

address, the Learned Counsel to the Defendant/Applicant formulated two (2) Issues for the determination of this Honourable Court.

1. Whether this Honourable Court can rightly sit on appeal over a subject matter that has been distinctly decided by a court of competent jurisdiction.
2. Whether the Applicant is entitled to the grant of the reliefs sought in this application.

In his argument the Counsel submitted in Issue One that having regard to the facts placed before this Court in the supporting Affidavit and the exhibits attached, this Honourable Court cannot proceed to hear the suit at this stage as doing so will amount to the Court sitting on appeal over a subject matter that has been decided by a court of concurrent jurisdiction. The Counsel submitted that it is trite that a court cannot sit on appeal on the decision of a court of coordinate jurisdiction. That in the absence of a statutory power to do so, it is a settled law that a court has no power to set aside or vary the order of another judge of concurrent and coordinate jurisdiction. It is like sitting on appeal over its own decision. He cited the case of **WITT AND BUSH LIMITED V. DALE POWER SYSTEM PLC (2007) 5-6 S.C 121.**

The learned Counsel submitted that he has demonstrated via exhibits A and B that an appeal is pending in respect to the subject matter of this suit between the Claimant/Respondent and Defendant/Applicant which is contract of sale of a property known as 5-Bedroom Duplex attached 2 Bedroom Guest House Chalet No. 11, Casablanca Street, Wuse 2 Abuja, as such in view of the Claimant's prayer challenging the title of the Defendant/Applicant and which issue in view of the finding of the Court in Exhibit A, and which finding is being challenged on appeal, the instant suit cannot be effectively determined unless the appeal is first heard and determined. That the hearing and determination of this suit by this Honourable Court is tantamount to sitting on appeal over a subject matter that has been held

and determined by a court of same jurisdiction and urge the court to hold that it cannot sit on appeal over this suit.

The Counsel submitted further on Issue two that in the application of this nature, the Court is approached by to exercise its discretion in the grant of the application which is essentially a prayer for an equitable remedy. That in the consideration of an application seeking the exercise of the discretion of a Court, it is elementary law that no one case will constitute a binding precedent but rather all precedents will merely serve as a guide in the exercise of the Court's discretion. He cited **SIRPI ALUSTEEL CONST. (NIG) LTD V. SING NIG LTD (2000) 2 ... (Pt. 644) 229; UNIVERSITY OF LAGOS V. AIGORO (1985) 1 NWLR (Pt. ..) 143; OLORUNTOKI V. JOHNSON (1990) 6 NWLR (Pt. 158) 600 at 606-60.**

The Counsel further submitted that an evaluation of the surrounding circumstances of this case shows that the foundation under which this suit is brought cannot be effectively determined unless the appeal before the Court of Appeal is first heard and determined. That a careful perusal of the Defendant/Applicant's Affidavit in Support of this Application shows that for justice to be done in this substantive suit, the decision of the Court of Appeal in Exhibit B is required to effectively determine the suit. That the instant application is one in which this Honourable Court ought to exercise its discretionary power in granting as refusal of this application may render nugatory the benefits of any judgment of the Appeal Court in favour of the Defendant/Applicant should the appeal succeed. And finally that the Applicant has shown by the affidavit in support that this is a proper case that calls for a grant of the reliefs sought pending the determination of the Appeal in exhibit B and urged the court to so hold.

On the part of the Claimant/Respondent's Counsel having filed his own written address in support of the Claimant/Respondent's Counter-Affidavit in compliance with rules of this Court, formulated two Issues for the determination of this Court.

1. Whether there is a valid pending appeal in respect of SuitNo: FCT/HC/CV/361/08.
2. Whether this Honourable Court can be adjudged to be sitting on an appeal over a subject matter that has been decided by another High Court in the light of the cause of Action in this suit.

In his argument the Counsel submitted that the law is trite that a Notice of Appeal is an originating process is the foundation of the appellate process. That the fundamental nature of the Notice of Appeal means that parties must be careful and endure that it is not defective. This is because a faulty foundation is one that robs the Appellate Court of its jurisdiction. That a defective Notice of Appeal is therefore capable of rendering an appeal incompetent. That in essence an Appellate Court derives the required jurisdiction to entertain an appeal on its merit. He cited **UMEZINNE V. FRN (2018) LPELR-46334(SC)**.

Submitting that My Lord Rhodes Vivour JSC in the case of ***NONYE IWUNZE VS. FRN (2015) 6 NWLR (Pt. 1404) 580*** while addressing the importance of a Notice of Appeal in an Appeal reiterated further that:

“The Constitution confers on the Court of Appeal Jurisdiction to hear and determine appeals.... The Court of Appeal would lack Jurisdiction to hear an appeal if an Appellant fails to comply with Statutory Provisions or the relevant rules of Court. The originating process in all appeals is the Notice of Appeal. Once it is found to be defective, the Court of appeal ceases to have Jurisdiction to entertain an appeal in whatever form.”

He therefore urged this Honourable Court to so hold.

The Counsel submitted that it is law that an appeal to the Court of Appeal is validly commenced and exists once it is brought by the filing of a notice of appeal in the registry of the High court) **SEE ODEY VS. ALAGA & ORS (2021) LPELR-53408 (SC) P 143-144 (PARAS E-B); SEE ORDER 7 RULE 2 COURT OF APPEAL RULES 2016.**

That the provision of Order 7 Rule 2 of the Court of Appeal Rules 2016 relevant to their submission is herein reproduced for case in reference:

“All appeals shall be by way of rehearing and shall be brought by notice (hereinafter called “the notice of appeal”) to be filed in the registry of the court below.....”

The Counsel further that the Defendant/Applicant in this suit has applied for the striking out of this suit based on their claims that there is a pending appeal on suit FCT/HC/CV/361/08 at the Court of Appeal and have substantiated their claims also by attaching to the said application Exhibit B which is the ‘Notice of Appeal’ filed on the 8th of March, 2018 filed at the Court of Appeal Abuja Jurisdiction’s Registry.

Submitting that at this juncture then, it will only be inevitable to ask the question *“whether a Notice of Appeal can ever be validly/properly filed at the Court of Appeal?”*

The Counsel said that the Court of Appeal Per **MOHAMMED LAWAL GARBA, JCA** treating how a Notice of Appeal can be validly filed in the case of **DANSA OIL & GAS LTD & ANOR VS. ACCESS BANK (2020) LPELR – 50069 (ca) PG 3-6 Paras E-C)** the court stated thus:

“... Under Order 7, Rule 2, by the side Note, reference was made to the proforma form 3 which is in the First Schedule to the Rules as the template form in which a Notice of Appeal to the Court shall be as regards the essential contents thereof. A Notice of Appeal which substantially contains the vital information as regards the complaint(s) against the decision appealed against as shown and set out on Form 3, is one which complies with the requirements of Order 7, Rule 2 (1) as to the contents and so prima facie, a valid and competent Notice of Appeal for the purpose of properly invoking the requisite jurisdiction of the Court over an appeal”

The Counsel submitted that the Defendant/Applicant in this suit has failed at invoking the jurisdiction of this Honourable Court by filing his Notice of Appeal at the Court of Appeal in violation of the rules of the court, that this amounts to the fact that the notice of appeal brandished by the Applicant before this court was not validly filed. He urged this Honourable Court to so hold.

Further on the Claimant/Respondent’s submission on the validity of the exhibited notice of appeal, that the judgment in suit FCT/CH/CV/861/08 subject of this alleged appeal was delivered on the 29th of November 2010 and the notice of appeal being relied on by the applicant was filed on the 8th of March 2018. **Section 25 (2) (a) of the Court of Appeal Act** provides for the time within which an appeal of this nature may be brought thus.

“The periods for the giving of notice of appeal or notice of application for leave to appeal are-

(a) In an appeal in a civil cause or matter, fourteen days where the appeal is against an interlocutory decision and three months where the appeal is against a final decision,”

The Claimant/Respondent Counsel submitted that the notice of appeal exhibited to this application was filed more than seven years after the judgment and more than seven years out of time within which to file the said Notice of Appeal, is incompetent and invalid as same was filed out of time, he urged this Honourable Court to so hold.

Assuming but not conceding that the applicant have taken due procedure seeking the leave of the court in order to extend the time which they may appeal against the Judgment of the court, same was not placed before this court and the court cannot speculate as to the existence or not same safe the enrolment of the order of court granting leave is exhibited alongside the said notice of appeal. This court being a court of law, cannot speculate on these facts, a court of law cannot speculate on anything. He cited the cases of ***IKENTA BEST (NIG.) LTD V. ATTORNEY-GENERAL, RIVERS STATE (2008) NWLR (PT.1084) 612 AND EJEZIE V. ANUWU (2008) 12 NWLR (PT.1101) 446.***

Base on the foregoing he humbly submitted that the Applicant has not placed before the court sufficient evidence upon which the court may hold that the notice of appeal brandished before it was valid.

The Claimant/Respondent Counsel submitted that it is settled that what an appeal court has to decide is that whether the decision of the trial court or intermediary court was right or wrong. That the Black's Law Dictionary Tenth Edition defined appeal in page 117 thus:

“A proceeding undertaken to have a decision reconsidered by a higher authority; esp. the submission of a lower court’s or agency’s decision to a higher court for review and possible reversal”.

Also, in the same vein, that the Black’s Law Dictionary tenth edition again defined appeal in page 118 thus:

“To seek review (from a lower court’s decision) by a higher court...”

The Counsel submitted that the question which must then be asked, is whether this Honourable Court has been called in any manner whatsoever to review or reconsider what has been decided by the High Court in suit FHC/CV/361/08?

The Counsel submitted that in order to decide this question of law, the cause of action in this suit must be examined. That the Court in plethora of cases have decided that in determining the cause of action in a suit, the Statement of Claim alone shall be examined without recourse to any of the pleadings of the parties. He relied on the case of ***TEJUOSO VS. ASSET MANAGEMENT CORPORATION OF NIGERIA & ORS. (2015) LPELR- 24677 (CA) (Pt. 15-16) (Paras B-A)*** which held thus:

“Cause of action is determined from the statement of claim. The statement of defence has nothing to do with it. It is from a closer examination of the claim that a cause of action can be determined. See UBN vs. Umeoduagu (2004) 13 NWLR (Pt. 890) 352 where the court held thus: “In determining whether or not pleadings disclosed any reasonable cause of action, the trial Court will only the statement of defence by way of affidavit.”

See also Yusuf & ORS VS. AKINDIPE (2000) 8 NWLR (Pt. 669) 376; DANTATA VS. MOHAMMED (2000) 5 S.C. 1...”

He therefore humbly submit that in order to decide if this suit is seeking a review of an already decided, its Writ of Summon and Statement of Claim must be examined.

The Claimant/Respondent Counsel further submitted that in the substantive suit, the Claimant is seeking for order of the court to declare that the sale transaction between it and the Applicant is a failed contract, which the value of the property has increased and that the payment of the increased value should be paid back to him alongside damages for the loss incurred as a result of the failure of the contract as well as cost in general damages and such incurred in prosecuting this action.

That It must be said at this stage that it is the Defendant that raised the Appeal subsisting in suit (FCT/HC/CV/361/08 as a defense to this suit. To allege then that this suit is a review of that appeal will amount to a huge fallacy which he urges this Honourable Court to discountenance all the submissions of the Applicant in this regard.

He humbly submit that to countenance with the submissions of the Applicant in this regard will then be tantamount to upholding the defense of the Applicant without venturing into the merits of the case which has been brought before this Honourable Court. He urged the court to hold that this suit was not instituted to review the decision of the court in FCT/HC/CV/361/08.

The Counsel concluded that jurisdiction is a mantra in adjudication, it connotes the authority/power of as Court to determine a dispute submitted to it by contending parties in any proceeding, the said authority which the Defendant/Applicant has sought to challenge vide this application. That to put briefly, a Court is competent when:

- (1) It is properly constituted as regards numbers and qualifications of the members of the bench, and no member is disqualified for one reason or another;
- (2) The subject matter of the case is within its jurisdiction, and there is no feature in the case which prevents the court from exercising its jurisdiction: and
- (3) The case comes before the court initiated by due process of law, and upon fulfillment of any condition precedent to the exercise of jurisdiction.

That any defect in competence is fatal, for the proceedings are a nullity however well conducted and decided; the defect is extrinsic to the adjudication. He relied on the case of **DANGANA & ORS. VS. USMAN & ORS (2012) LPELR -25012 (SC)**; also the locus Classicus case of **MADUKOLU VS. NKEMDILIM (1962) LPELR – 24023 (SC)**.

That the law is settled, beyond any equivocation that a party who challenges the jurisdiction of a Court to entertain a matter has the onus to establish that the Court is stripped of the requisite jurisdiction **OUR LINE LTD. VS. S.C.C. NIG. LTD (2009) 17 NWLR (Pt. 1170) 382**. Hence, he humbly submitted that the onus of proof in this application rests on the Defendant/Applicant as he who asserts must prove. That the Applicant in this instant application in its objection to the

jurisdiction of this court to hear this matter on the ground that there is a pending appeal on what he perceived to be the subject matter of this suit relied on an invalid Notice of Appeal filed at the wrong court and well out of time hence failed to substantiate its claim before this Honourable Court.

The Counsel therefore submitted that the Applicant has failed to discharge the burden of proof, thereby not placing before the court sufficient facts as to how this suit has failed to evoke the jurisdiction of this Honourable Court upon which the Court may grant his order. He therefore urged the Court to so hold.

The Defendant/Applicant Counsel in his Reply on Points of Law submitted that this Honourable Court has the power to adjourn a matter sine die if there is no possibility of proceeding in the foreseeable future, i.e there is no prospect of continuing the action at that time. He relied on ***AFRICA INTERNATIONAL BANK LTD VS. UNION BANK OF AFRICA (CA/K/197/2005) 2004) NGCA 7 (22 JANUARY 2014)*** where the Court of Appeal per ***Theresa Ngolika Orji-Abadu, JCA*** admonished that:

“A matter may be adjourned sine die if there is no possibility of proceeding in the foreseeable future, i.e there is no prospect of continuing the action at that time. In a sine die adjournment of this type, the hearing stands open indefinitely and could theoretically be resumed if the situation changed”.

That Suffice it to state with respect Sir, that from the decision of the Court above, adjourning the matter Sine die is like putting the case on indefinite hold and any of the parties in the matter could approach the Registrar of the Court when the reason for adjourning the matter sine die comes to an end to have the matter

fixed for mention or hearing. He further submit that the argument of the Claimant/ Respondent in the above paragraph of their written address that the only order that the Court has Jurisdiction to make is that of striking out the suit for want of Jurisdiction and not of adjourning the suit sine die is misconceived.

That Secondly, the case of ***MOBIL PRODUCING (NIG.) LIMITED VS. AJANAKU & ANOR (2021) LPELR-52566(P30-31) PARAS C-A*** which the Claimant/Respondent cited in support of her argument does not have the same facts or characteristics at this case.

The Counsel therefore submitted that in as much as the case relied upon by the Claimant/Respondent in the argument canvassed in paragraph 2.3 of her written address is a good authority for the issues it resolves, the authority is misconstrued and not applicable to the facts and circumstances of this case. Hence he urged this Court to dismiss the preliminary issue raised by the Claimant/Respondent in its entirety for being misplaced and grant the alternative prayer of the Applicant.

While replying on the issues raised by the Claimant/Respondent, the Defendant/Applicant Counsel submitted on issue one that the Defendant had prior to the filing of Notice of Appeal of 5th March, 2018 with Appeal Number CA/A/186/2018 ***BETWEEN DR. ISHAYA DARY AKAU VS. HUMPHREY ENEMAKU ABAH & 4ORS*** which was struck out on ground of technical defect on the application of the Applicant. Secondly, that the cases cited by the Claimant/Respondent in support of her argument on issue one do not have the same facts as the case before this Honourable Court especially the case of ***Dansa Oil & Gas Ltd & Anor Vs. Access Bank (2020) LPELR-50069 (CA)PP 3-6 (Paras E-C)***.

That assuming without conceding that there is no valid Appeal, the Jurisdiction lies with the Court of Appeal to determine the validity or otherwise of the Notice

and Grounds of Appeal in respect to suit No: FCT/HC/CV/361/08. That issue one raised by the Claimant/Applicant cannot be determined before this Honourable Court. He urged the Court to so hold and discountenance the argument raised in issue one in its entirety.

That on issue two raised by the Claimant/Respondent Counsel, the Defendant/Applicant's Counsel respectfully submitted that, the foundation of the Claimant's suit borders on Contract of sale of Property **NO. 11 CASABLANCA STREET, WUSE 2, ABUJA** which the Claimant/Respondent in her Amended Statement of Claim averred that the Defendant/Applicant purportedly sold property to her when he had no or defective title to. The issue of title is in dispute in this suit. He further submitted that in order to determine whether the Contract between the Claimant/Respondent and the Defendant/Applicant is a failed Contract, this Honourable Court shall first determine the ownership of Property **NO. 11 CASABLANCA STREET, WUSE 2**, and Abuja, which has already been decided. That thus, this Court will be sitting on appeal over the Judgment of suit No: FHC/CV/361/08 if it proceeds to determine the case while an appeal is pending at the Appeal Court on the subject matter.

Finally on issue three raised by the Claimant/Respondent Whether the Applicant is entitled to the grant of the reliefs sought in this application, the Defendant/Applicant Counsel submitted that the Defendant/Applicant has established that there is a pending appeal by the depositions in his affidavit in support of this application. That this fact was never denied by the Claimant, rather it was the competency of the notice and Grounds of appeal which is being challenged by the Claimant. That however, this court is not the appropriate forum

to determine the validity or otherwise of the appeal. He then urged this court to so hold and discountenance the argument of the Claimant/Respondent.

I have critically gone through all the averments and submissions in support and against this application, I have judiciously found the following facts to exist in this suit before this Honourable Court vix:

1. The Claimant in this Suit before this Honourable Court was not a party to the case in **Suit NO: FCT/HC/CV/861/08. Vide “Exhibit A”**

2. The Defendant/Applicant deposed in paragraphs 7, 8 and 9 of his Further and Better Affidavit which reads thus:

a. Para. 7;

“The Appeal was withdrawn by the Defendant/Applicant and consequently struck out on 1st March, 2018 due to technical defect in the Appeal as observed and raised by the Court of Appeal”

b. Para. 8;

“On the 5th March, 2018, the Defendant/Applicant filed another Notice of Appeal with Appeal Number CA/A/186/2018 BETWEEN DR. ISHAYA DARY AKAU V. HUMPHREY ENEMAKU ABAH & 4 ORS.with the necessary application. The Applicant’s Motion for extension of Time dated 5th March, 2018 filed at the Court of Appeal is hereby attached and marked” “Exhibit C”

c. Para. 9;

“I know as a fact that the Appeal is coming up on the 21st October 2021 at the Court of Appeal”

3. This Motion was dated and filed on the 28th day of September and was moved in the court on the 14th day of October, 2021, therefore by virtue of “Exhibit C” and paragraph 9 of the Defendant/Applicant’s Further Affidavit stated above, it suffices to say that there is no appeal pending before the Court of Appeal at the time of hearing this motion, to warrant this Honourable Court to either strike out this suit or adjourn it *sine die*.
4. From the above paragraphs deposed by the Defendant/Applicant reproduced above, it is very clear to me that there is No appeal pending before the Court of Appeal, hence the “**Exhibit A**” remains valid and subsisting and I so hold.
5. Furthermore, the Statement of Claim and the Reliefs sought in this suit are different from the issues in the Notice of Appeal sought to be filed at the Court of Appeal.

It is trite that to hold whether cause of action exist or not, it is the Statement of Claim the Court would look at see the case of **TEJUOSO VS. ASSET MANAGEMENT CORPORATION OF NIGERIA & ORS.**(*supra*). I have looked at the Statement of Claim in this Suit and coupled with the fact that the Claimant/Respondent was not a party to the proceedings in “**Exhibit A**”, I am of the view that this suit has some triable issue to be adjudged by this Honourable Court and this Court is not in any way sitting on appeal on the Suit No: FCT/HC/097/2021 pending before me. Therefore this Court has Jurisdiction to entertain this suit, and I so hold. I leaned my support to the case of **MADUKOLU VS. NKEMDILIM (1962) LPELR – 24023 (SC)**.

To grant this Application at this stage as prayed by the Defendant/Applicant would amount to a great in justice to the Claimant/Respondent in this case.

It is worthy to note that at any stage of this proceedings the Defendant/Applicant furnishes this Court with a Notice of Appeal pending before the court of appeal in respect of this issue, this court may adjourn this suit pending the determination of the suit before the Court of Appeal.

In the final analysis, this Application lacks merit and completely fail. Hence accordingly dismissed.

Hon. Justice Jude O. Onwuegbuzie