

IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY

IN THE ABUJA JUDICIAL DIVISION

HOLDEN AT JABI – ABUJA

THIS 13TH DAY OF JANUARY, 2022

BEFORE HIS LORDSHIP HON: JUSTICE A. A. FASHOLA

SUIT NO. FCT/HC/CV/1413/2021

MOTION NO: M/7596/2021

BETWEEN

1.TAMARANTARE FRANCIS ALI-ABOZI } **CLAIMANTS/**
2.SWEET OKUNDAYE } **RESPONDENTS**
AND

PREMESOIL LIMITED - - - DEFENDANT/APPLICANT

RULING

The applicant filed a Motion on Notice dated and filed on 5th November, 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 Honourable Court.

The Application is seeking for the following orders:

1. **An Order** setting aside the judgment of this Honourable court in suit number CV/1413/2021 - TAMARANTARE FRANCIS ALI-

BOZI & 1 OR VS PRIMESOIL LIMITED delivered on the 28th October, 2021.

2. For such further order or other order(s) as this honourable court may deem fit to make in the circumstance.

The ground upon which the application is brought is that:

This Honourable court lacked jurisdiction when it entertained the matter and entered judgment in favour of the Respondents.

FACTS OF THE CASE

The Defendant/Applicant avers that vide a writ of summons under the undefended list procedure filed on the 2nd July, 2021, the Respondents instituted the instant suit against the Defendant/Applicant Claiming inter alia, the refund of the sum of **N2,520,000.00 (Two Million, Five Hundred and Twenty Thousand Naira only)** from the Defendant/Applicant being money received as payment for the purchase of two hectares of agricultural farmland situate at Kwali Local Government, FCT Abuja. He avers that as contained in the flier/leaflet given to the claimants/Respondents the refund to an Allottee shall be effected only when an alternative purchaser for same land has been secured by the Allottee and receipts of proceeds from the intended buyer

(total amount of land) and a deduction of 10% of sum deposited by the Allottee, the said condition forms part of the terms and condition of offer contained in the payment Acknowledgment issued to the Respondents, upon filing this suit, the matter was heard on 28th October, 2021 this honourable court entered judgment in favour of the Respondents.

In support of the application is a 11 paragraphs affidavit deposed to by one Sani Yahaya Isa Counsel to the Defendant/Applicant and the exhibits **PSL 1 to PSL 3** attached to the application respectively.

Equally filed along the application is a Written Address dated 5th November, 2021 wherein Defendant/Applicant's counsel formulated a sole issue for determination to wit:

“Whether this Honourable Court can set aside its judgment dated 28th October, 2021 in this suit having delivered same without jurisdiction?.”

Learned Counsel to the Defendant/Applicant argued that this honourable court has the vires to set aside its judgment delivered on 28th October, 2021 as same was given without jurisdiction, counsel submitted that it is trite law that jurisdiction is the live wire of trials and a defect in competence is fatal to adjudication and

renders an entire proceedings invalid, null and void abinitio, he referred this court to the case of **FEDERAL POLYTECHNIC OFFA V. U.B.A. PLC (2014) ALL FWLR (PART 737) 739AT 771, PARA G-A** and the case of **SALEH V. MONGUNO (2006) FWLR (PT.332) 1411**. In canvassing his argument learned counsel to the Defendant/Applicant cited the case of **MADUKULU V. NKEMDILIM (1962) 2 SCNLR 341** Supreme Court held thus:

- i. It is properly constituted as regards numbers and qualifications of members of the bench, and no member is disqualified for one reason or another.*
- ii. The subject matter of the case is within the jurisdiction and there is no feature in the case which prevents the court from exercising its jurisdiction.*
- iii. The case comes before the court initiated by due process of law and upon fulfilment of any condition precedent to the exercise of jurisdiction. He submitted that all three conditions listed above for the exercise of jurisdiction co-exist, a court is said to have competence and jurisdiction, he also referred to the case of **TUKUR V. GOVERNMENT OF GONGOLA STATE (1989)3 NSCC 225**.*

Learned counsel to the Defendant/Applicant argued that claimants/Respondents filed a writ of summons under the undefended list procedure claiming the refund of the sum of **N2,520,000.00 (Two Million, Five Hundred and Twenty Thousand Naira)** from the Defendant/Applicant being money received as payment for the purchase of Two hectares of agricultural farmland situate at Kwali Local Government, FCT, Abuja Claimant/Respondents attached exhibit TSI, referred on this application as Exhibit PSL1 (Flier/leaflet) given to the Claimants/Respondents and Exhibit TS2, referred to this application as Exhibit PSL2 which is the payment Acknowledgment issued to the Claimants/Respondents, learned counsel further referred this court to exhibit TS1 which provides thus:

"Refund are not encourage on this scheme. However, refund to an allottee shall be effected only when an alternative purchaser for same land has been secured by the Allottee and in the following manner:

- i. Receipt of proceeds from the alternative buyer (total amount of land);*

ii. Deduction of 10% of the sum deposited by the allottee upon receipt of proceeds by the alternative buyer of the sale stated in condition (i) above:

The Defendant/Applicant's counsel also referred this court to clause 1.3 under the payment and condition which is TS2 (exhibit PSL2 in this application). He contended that failure of the claimant(s) Respondents to comply with the condition for refund as stated in exhibit TS1 (also PSL1) and TS2 (also PSL2) robbed this honourable court jurisdiction to entertained this suit or the judgment delivered on 28th October, 2021 by this court in the instant suit was entered without jurisdiction being that the claimants/Respondents did not fulfil the condition precedent as clearly stated in exhibit TS1 (also PSL1) and exhibit TS2 (exhibit PSL2), learned counsel referred this honourable court to the case of **SAUDE V. ABDULLAHI (1989) 4 NWLR (PT.116) 387 AT 422** and the case of **UTEK V. OFFICIAL LIQUIDATOR (2009)ALL FWLR (PT.475) 1774 AT 1791, PARA D-F.**

The Defendant/Applicant's counsel submitted that the Claimants/Respondents commenced this suit under the undefended list procedure without the fulfilment of a condition precedent as agreed earlier, being that, this court has inherent jurisdiction to set

aside its own judgment, he also referred to the case of **OLABANJI V. ODOFIN (1996)2 SCNJ 242 AT 247** and **MARK V. EKE (2004) LPELR-1841(SC)**.

Learned counsel to the Defendant/Applicant urged this honourable court to resolved the lone issue for determination in favour of the Defendant/Applicant by setting aside the judgment delivered in this suit on 28th October, 2021 as same was delivered without jurisdiction, being that the Claimants/Respondents have failed to fulfil the condition precedent to the institution of this suit.

The exhibits attached to the application:

1. Exhibits PSL 1 is a payment terms and conditions.
2. Exhibit PSL 2 is a letter of payment Acknowledgment for Prime soil Agricultural Farmland by Aso Saving and Loan Plc to the 1st Claimant/Respondent dated 26th July, 2016.
3. Exhibit PSL 3 is a judgment of this honourable court delivered on 28th October, 2021.

Learned counsel to the Defendant/Applicant relied on the following cases in support of his argument.

1. FEDERAL POLYTECHNIC, OFFA V. U.B.A. Plc (2014) ALL FWLR (PT. 737)739 AT 771, PARA G-A.

2. SHELL NIGERIAN LTD V. DEC OIL & GAS LTD (2011)FWLR (PT. 580) 1350 AT 1365, PARA F-G
3. SALEH V. MONGUNO (2006)FWLR(PT 332)1411.
4. MADUKOLU V. NKEMDILIM (1962)2 SCNJ R 341.
5. DURU V. F.R.N. (2019) ALL FWLR (PT. 985)404 AT 430 PARA E-H.
6. TUKUR V. GOVERNMENT OF GONGOLA STATE (1989)3 NSCC 225.
7. MARK V. EKE (2004)LPELR-1841(SC)

In response to the Defendant/Applicant application, Claimants /Respondents filed a joint counter affidavit with 6 paragraphs deposed to by one Tamarantare Francis Ali-Bozi the first Claimant/Respondent dated 22nd November,2021 and exhibit CA1 attached to the application respectively.

Equally filed along with the joint counter affidavit is a written address dated 22nd November, 2021 wherein learned counsel to the Claimants/Respondents formulated two issues for determination to wit:

- 1. Whether Judgment entered on the undefended list can be set aside by a motion**
- 2. Whether the Defendant/Applicant is not entitled to a refund for money had and received for a consideration that failed.**

In respect of the first issue, learned counsel to the Claimants/Respondents argued on Order 35 Rule 4 of the F.C.T. High Court (Civil Procedure) Rules 2018 provides thus:

"Where a Defendant neglects to deliver the notice of defence and an affidavit prescribed by Rule 3(1) or is not given leave to defend by the suit shall be heard as an undefended suit and judgment given accordingly".

He contended that Defendant/Applicant was served with the Originating Process and 13th October, 2021 was fixed for hearing. On the said date, the Defendant/Applicant did not appear nor file a notice of intention to defend or to file an affidavit containing a defence on the merit, wherein this court adjourned to 28th October, 2021 for judgment and it was delivered on the said date.

Learned counsel submitted that it is trite law that where a defendant failed to file a notice of an intention to defend or affidavit containing a defence on the merit, it is a judgment on merit. He referred this court to the case of **BANK OF THE NORTH LTD. V. INTERA BANK S.A. (1969) LPELR-25428(SC)**.

The Respondents' counsel contended that where an application is made by way of motion to set aside judgment obtained in an action placed on undefended list, the hearing on it should be governed by

Order iii Rule 9 to 14; and it belongs to a different category and not the same as that governed by default Judgment. He also contended that order 35 Rule 3(1) and (2) of the F.C.T. High court (Civil Procedure) Rules 218 provides thus:

- 1. Where a party served with the writ delivers to registrar, before 5 days to the day fixed for hearing, a notice in writing that he intends to defend the suit together with an affidavit disclosing a defence on the merit, the court may give him leave to defend upon such terms as the court may think just.*
- 2. Where leave to defend is given under this Rules the action should be remove from undefended list and placed on the ordinary cause list; and the court may order pleadings, or proceed to hearing without further pleadings;.*

Learned counsel also referred this court to the case of **G.M.O. NWORAH & SONS V. AKPUTA (2010) LPELR-1296(SC)**, he submitted that the Defendant/Applicant intentionally failed to do the needful at the right stage, it is now too late in the day to raise the issue by asking the court to set aside the judgment.

On issue two, learned counsel to the Claimants/Respondents submitted that the essence of claim for money had and received in nature of an equitable remedy is to discourage unjust enrichment.

It is to prevent a defendant from holding on the money that has come into his possession, he also referred to the case of **FIRST BANK OF NIGERIA LTD V. A.P. LTD (1996)4 NWLR (PT. 443) AT 448** B; he contended that the Claimants/Respondents paid monies to the Defendant/Applicant for Agricultural Farmland in Kwali, Abuja FCT since 2016. Therefore, the land was not properly acquired before the sale including the Claimants/Respondents he also referred this court to paragraphs 5(a), (b),(C) and (d) in his joint counter affidavit and exhibit CA2 attached to the counter. Learned Counsel argued that it is trite law where a party who has paid money to another person for a consideration that has totally failed under the contract is entitled to claimed the money back from the other party he relied on the case of **NWAOLISHA V. NWABUFOR (2011)LPELR 2115 (SC)**.

He submitted that the Defendant/Applicant have received the sum of **N2,520,620.00 (Two Million Five Hundred and Twenty Thousand, Six Hundred and Twenty Naira)** from the Claimants/Respondents for the purchase of two hectares of agricultural farmland in Kwali, FCT Abuja since 2016 and the Farmland has not been handed over to the Claimants/Respondents till date. The Defendant/Applicant failed to refund the consideration, learned counsel urged this honourable court to

dismissed the application with cost of **N100,000.00 (One Hundred Thousand Naira)**.

Exhibit attached to the joint counter affidavit.

1. Exhibit CAI is a letter of Re: Demand for immediate Allocation and Handing over of Two Hectares of Farmland under your Prime soil Agricultural Farm scheme in Kwali dated 9th June, 2021.

Learned Counsel to the Claimants/Respondents cited the following cases in his written address.

1. BANK OF THE NORTH LTD V. INTRA BANK S.A. (1969)LPELR – 25428(SC).
2. U.A.C. LTD V. ANGLO CANADIAN CEMENT LTD (1966)N.M.L.R. 349.
3. NWORAH & SONS V. AKPUTA (2010)LPELR – 1296 (SC).
4. FIRST BANK OF NIGERIA LTD V.A.P. LTD (1996)NWLR (PT. 443)AT 448 B;
5. ODUWOBI & ORS V. BARELAYS BANK D.C.O. (1962)LPELR – 2115 (SC).

In response to the joint counter affidavit, learned counsel to the Defendant/Applicant filed a further and better affidavit dated 24th November, 2021, with 9 paragraphs deposed to by one Sani Yahaya Isa counsel to the Defendant/Applicant and a reply on points of law dated same date. Learned counsel to the Defendant/Applicant stated in paragraph 5 of the further affidavit

that the Federal Capital Territory Administration (FCTA) being the initiator of the Agricultural Land Development programme (under which Claimants/Respondents purchased the farmland) properly acquired and same was available at all material time. This is the reasons why Claimants/Respondents went ahead to make payment for the Farmland through Aso Savings and Loans Plc, marketer of the Farmland. He further stated in paragraph 6, 7 of his further affidavit that the Claimants/Respondents were not at any time misled as to the nature of the programme as well as the terms and conditions of the offer, he also stated that the suit was premature being that the conditions of the offer with respect to refund were not complied, as clearly stated in exhibits TS1 and TS2.

In his reply on points of law Defendant/Applicant's counsel stated that this honourable court has the vires to set aside its judgment delivered on 28th October, 2021 in the instant suit by a motion, learned counsel to the Defendant/Applicant cited the case of **MARK & 1 OR V. EKE (2004) LPELR – 1841 (SC)**, he also submitted that the Defendant/Applicant complains of non compliance with the terms and conditions of the offer with respect to refund as contained in Exhibits TS1 and TS2 which is the condition precedent to the institution of this suit, he also contended that the

Defendant/Applicant has proved non compliance with a condition precedent to the institution of this suit that robbed the jurisdiction of this court to entertain this matter. Learned Defendant/Applicant's counsel referred to paragraph 3.6 of the Claimants/Respondent written address which is a clear admission for not complying with the condition precedent to the institution of this suit, he also cited the case of **HAJIA AISAH KAMARIAM MANGUNO V. BLUEWHALES & COMPANY & ORS (2010)LPELR – 4502 (CA) court held thus:**

"A Judgment Obtained under the undefended list procedure is a judgment on merits and can only be set aside on appeal. However, a trial court can set aside its judgment given under the undefended list procedure where the court gave its decision without jurisdiction or where the decision was obtained by fraud."

He also submitted that the Claimants/Respondents failed to comply with the condition for refund as contained in Exhibit TS1 (PSL1) and TS2 (PSL2) these lacks this Honourable court jurisdiction to entertain this suit.

Learned counsel to the Defendant/Applicant contended that the Claimants/Respondents are entitled only to a refund from the Defendant/Respondents upon complying with the terms and

condition of offer as it relates to refund, he also referred this court to exhibit TS1 and TS2, he submitted that it is trite law that parties are bound by the terms and conditions on their contract. He cited the case of **SEYMAC VENTURES LTD V. ESTATE LTD & ORS (2019)LPELR – S1170 (CA)**. Court held thus:

“The law is very well settled to the effect that parties to a contract agreement are bound by the terms contained therein. They are bound by the terms and conditions set down in the documents. It is not the function of the court to make a contract for the parties.”

Learned counsel to the Defendant/Applicant concluded that, the Claimants/Respondents failed woefully in complying with the terms and conditions as agreed upon.

I have considered the submissions of counsel on both sides; it is my considered legal opinion that the instant application raises a lone issue for determination to wit:

Whether on the totality of the evidence and issues before this court, the Defendants/Applicants are entitled to the reliefs sought?

As gleaned from the written address and the application for setting aside of the judgment of this Honourable Court in this suit made by the defendant/applicant, the gravamen of the application is that this Honourable Court lacks jurisdiction to hear and determine the claimant writ of summons marked under the undefended list procedure. The reason being that the claimants failed to comply with the conditions precedent for refund as stated in Exhibit Ts1 and Ts2 and this, according to the learned counsel robbed this Honourable court of the jurisdiction to entertain this matter. He relied on the case **MADUKOLU Vs NKEMDILIM** (supra) amongst others.

It is trite law in determining whether or not a court has jurisdiction to entertain an action, it is the Claimant's originating processes i.e Writ of Summons or statement of claim that has to be considered. See the case of **KOTOYE Vs SARAKI (1994) 7 NWLR (Pt317), SKENCONSULT V UKEY (1981) 1 SC 6.**

The relevant things to be considered by the court in determining the issue of jurisdiction are facts deposed to in the Affidavits, the writ of summons and the statement of claim where one has been filed and served. The defence is not of relevant materials for that

purpose. See **USMAN Vs BABA (2005) 5 NWLR (PT.914) 113**
Ratio 5

A perusal of the writ of summons before this Honourable Court did show that this action was marked and placed on the undefended list and same was served on the defendant/applicant, the applicant did confirmed this much. It is my considered humble legal opinion that this court has jurisdiction to hear and determine this action as presently constituted. Having found that this Honourable court has the requisite jurisdiction, it behoves on me to consider the application for setting aside as made by the defendant/applicant herein. The general principle of law is that a court lacks the jurisdiction to set aside its own decision except as permitted by the common law, such as when decision is a nullity by reason of a breach of procedure or crave of jurisdiction to move the order/decision; or as provided by the rules, such as when judgment is given in default or the court is given the power to discharge the order it has made. See the case of **ONWUKA Vs MADUKA (2002) 18 NWLR (PT 799) 586 at 600-601 paras H-A** Per Ayoola JSC

In this case, it is not in doubt that this action was brought under the undefended suit- for liquidated money demand. It is evident

from the record of this Honourable Court that the Defendant/Applicant was served with the originating process in this suit; however the defendant/applicant failed to file notice of intention to defend on the merit. It is a firm principle of law under the undefended list that in the absence of any compelling facts made out in the defendant's affidavit, a trial court can enter judgment in favour of the plaintiff. **See BATURE V SAVANNAH BANK OF NIGERIA (1998) 4 NWLR (PT 546) 438.**

Order 35 rule 3 of High Court of the Federal Capital Territory Abuja (Civil Procedure) 2018 says *"where a party served with the writ of summons delivers to the registrar, before 5 days to the day fixed for hearing, a notice in writing that he intends to defend the suit, together with an affidavit on the merit, the court may give him leave to defend upon such terms as the court may think just.*

Order 3 rule 4 says *" where the defendant neglects to deliver the notice of defence and an affidavit prescribed by Rule 3(1) or is not given leave to defend by the court the suit shall be heard as an undefended suit and judgment given accordingly".* It is in the record of this honourable court that the defendant despite service of originating processes failed to deliver notice of defence as prescribed and judgment was given by this Honourable court.

It is the position of the law that judgment in the undefended list is a judgment on the merits and cannot be set aside by the judge which entered it. The finding of the court subsists until it is set aside- **AFRIBANK (NIG) PLC V SNC LAWALIN (NIG) LTD (2001)11 NWLR (PT 724) pg 251 at page 262-264 para C-C** per Salami JCA. In all, the defendant/applicant motion dated and filed on 5th November 2021 is lacking in merit, it is hereby dismissed. With N50,000 awarded against the defendant/applicant in favour of the judgment creditor/respondent.

Appearances:

Parties absent.

A.I Mohammed for the defendant/applicant

Ruling read in open court.

Signed
Presiding Hon Judge
13/01/2022