

IN THE HIGH COURT OF JUSTICE OF THE FEDERAL CAPITAL
TERRITORY
HOLDEN AT MAITAMA, ABUJA
ON THE 21ST DAY OF JUNE, 2022
BEFORE HIS LORDSHIP: HON. JUSTICE MARYANN E. ANENIH
PRESIDING JUDGE.

SUIT NO. FCT/HC/CV/2661/2019
MOTION NO. M/1349/22

BARR. BEATRICE OLUKEMI WILLIAMS JUDGMENT CREDITOR/
RESPONDENT

AND

UNKNOWN PERSONS JUDGMENT DEBTOR/RESPONDENT

AND

BIODAK KITCHEN AND VENTURES LIMITED APPLICANT

RULING

Before the Court is a Motion on Notice No. M/1349/22 filed on 7th February, 2022 by the Applicant pursuant to Section 36 of the Constitution of the Federal Republic of Nigeria 1999 (as amended); Order 60 Rules 5 & 8 of the High Court of the Federal Capital Territory (Civil Procedure) Rules 2018. The motion prays the Court for

1. *An Order setting aside the Judgment of this Honourable Court delivered on the 21st day of June 2021 on grounds of misrepresentation, concealment of vital and material facts, non-service of Court processes and lack of jurisdiction.*
2. *An Order vacating the warrant of possession issued by this Honourable Court which was predicated upon the Judgment of this Honourable Court delivered on the 21st day of June 2021.*
3. *An Order of this Honourable Court nullifying the entire proceedings conducted in Suit No: FCT/HC/CV/2661/2019 for lack of jurisdiction.*

4. *An Order of this Honourable Court directing the Judgment Creditor/Respondent to forthwith refund the total sum of Ten Million Naira (N10,000,000.00) received from the Applicant's tenants as rent to Applicant.*
5. *An Order of this Honourable Court directing the Judgment Creditor/Respondent to give account of all the money received from the property (the subject matter of this suit) from 8th November 2021 when the enforcement of the judgment of this Honourable Court was carried out till date and pay over same to the Applicant.*
6. *An Order of this Honourable Court granting the sum of Fifty Million Naira (N50,000,000.00) to the Applicant is general damages.*
7. *And for such further order(s) as this Honourable Court may deem fit and expedient to make in the circumstance of this case.*

The grounds for the application are set out copiously on the face of the motion paper.

The application is supported by a 42 paragraphs affidavit deposed to by Mrs. Abiodun Obakin, with attached Exhibits and a written address. The Applicant also filed a Further Affidavit as well as a Reply address on points of law.

The Judgment Creditor/Respondent in opposition filed a Counter-Affidavit of 16 paragraphs with an Exhibit and a Written Address. She also filed a Further Counter-Affidavit.

The Judgment Debtor/Respondent did not file anything in response to the application.

The sole issue as distilled for determination by the Applicant in its written argument is:

“Whether the Applicant is entitled to the relief sought in the circumstances of this case.”

According to the Judgment Creditor/Respondent, the issues for determination are as follows;

- a) *Whether given the facts and circumstances surrounding this suit vis-à-vis the established fact that the Applicant was not a party to the suit and did not apply to join the proceedings, this Honourable Court has the jurisdiction to entertain the Applicant's application.*
- b) *Whether given the facts and circumstances surrounding this suit vis-à-vis the non-binding and failed Articles of Agreement signed between the Judgment Creditor/Respondent and the Applicant in 2014, this application ought to be granted.*

In a nutshell, the Applicant's averment in its affidavit in support of the instant application is that it had bought the property subject matter of this suit through Aso Savings and Loans Plc from its customer by name of Mr. Baba Kura Umar sometime in 2010. That after the Applicant commenced construction on the said property, it was served with a caveat emptor to the effect that the property was subject to litigation in Suit No. FCT/HC/CV/1319/07 in which Judgment was delivered in favour of the Judgment Creditor/Respondent. That after negotiations the Judgment Creditor/Respondent and the Applicant reached an agreement under which the Applicant paid the Judgment Creditor/Respondent the sum of N8 Million and the Judgment Creditor/Respondent lifted the Caveat to allow the Applicant to continue its construction work on the property. That the Applicant thereafter put buildings on the property but the tenants which it had put in occupation thereof called sometime in November 2011 to inform of the presence of police officers and court officials to levy execution in the course of which N5 Million was collected from each of the Applicant's two tenants.

It is the Applicant's further averment in its affidavit that it later discovered that the Judgment Creditor/Respondent had deliberately suppressed vital and material facts in her affidavit in support of her originating summons for possession in this case and failed to disclose

to this Court that she knew the Applicant and had indeed executed an Article of Agreement with the Applicant in respect of the property subject matter of this suit. That the Judgment Creditor/Respondent failed to bring to this Court's attention that she had collected N8 Million to lift the caveat on the land. That the Judgment Creditor/Respondent deliberately failed to inform this Court that she gave her consent to the Applicant to continue construction on the property subject matter of this suit and that it had been fully developed by the Applicant. That she also deliberately failed to disclose the names of the tenants in occupation of the property whose name plates are on conspicuous parts of the premises. That the Judgment Creditor/Respondent failed to serve the originating processes on the Applicant despite knowing that it was the Applicant that fully developed the property with her consent. That the Judgment obtained in this Court by the Judgment Creditor/Respondent was fraudulent and was obtained *mala fide* and in gross abuse of court process. That the Applicant has been denied its Constitutional right to fair hearing as a result of not being served with the processes in this suit. That had the Judgment Creditor/Respondent not suppressed vital and material facts, this Court would not have entered Judgment on her Originating Summons in her favour.

In her Counter-Affidavit, the Judgment Creditor/Respondent denied the allegations of suppression of vital facts and fraud in obtaining the Judgment of this Court delivered in this suit on 21st June 2021. The Judgment Creditor/Respondent averred that there was no valid sale of the property by Mr. Baba Kura Umar to the Applicant during the pendency of Suit No. FCT/HC/CV/1319/07. That the payment of N8 Million under the Articles of Agreement between the Judgment Creditor/Respondent and the Applicant was not part-payment but merely as an intention to pursue settlement which occasioned the corresponding gesture of lifting the caveat by the Applicant on the land. That the Judgment Creditor/Respondent never transferred any right whatsoever in the property to the Applicant. That the Applicant had reneged from the Article of Agreement entered into between it and the Judgment Creditor/Respondent by failing to honour the terms thereof by compensating the Judgment Creditor/Respondent with the

value of the property so as to execute a formal contract of sale in favour of the Applicant. That there was thus no existing relationship between the Applicant and the Judgment Creditor/Respondent as at the time she filed the Originating Summons in this suit and she had previously indicated intention to refund the N8 Million paid by the Applicant. That the Judgment Creditor/Respondent had disclosed to this Court all facts relevant and material for the determination of her originating summons for possession. That the Applicant was fully aware of the pendency of this suit long before it was determined by this Court. That the Applicant not being a party to this suit lacks the locus standi to apply to this Court to set aside its Judgment delivered on 21st June 2021.

Arguing for the grant of the instant application, learned Counsel to the Applicant submitted in his address that this Court has the inherent power to set aside an order or judgment it earlier made or delivered if same was obtained by fraud, misrepresentation or concealment of facts or was given without jurisdiction. He relied on a plethora of authorities including *NWADIARO & ORS V. PRESIDENT & MEMBERS OF CUSTOMARY COURT OSSOMALA* (2016) LPELR-40925(CA). He argued that an interested or aggrieved party who wants to have a judgment of Court set aside for having been obtained by fraud, concealment of vital facts or lack of jurisdiction can apply to the same court by way of motion on notice without the necessity of filing an appeal. He cited *OLADOSU & ANOR V. OLAOJOYETAN & ANOR* (2012) LPELR-8676(CA). On this Court's power to set aside its decision given under Order 60 of its Rules, Counsel referred this Court to Order 60 Rule 8(1) of the High Court of the Federal Capital Territory, Abuja (Civil Procedure) Rules 2018. He submitted that the Applicant's affidavit in support of this application shows that she deliberately suppressed and fraudulently concealed vital and material facts from this Court in the proceedings involving her Originating Summons in this suit. He therefore urged this Court to set aside its Judgment delivered on 21st June 2021 which is based on such fraudulent proceedings and for lack of jurisdiction.

Arguing par contra, learned Counsel to the Judgment Creditor/Respondent submitted in his address that the Applicant's instant application is grossly incompetent and this Court has no jurisdiction to grant same. He contended that having not been made a party to this suit, the Applicant can only apply to set aside this Court's decision in this case as an interested party by way of an appeal to the Court of Appeal as provided for by Section 243(a) of the Constitution of the Federal Republic of Nigeria 1999 (as amended). He relied on a plethora of decided cases including OTOMIEWO V. UKAVWE & ORS (2020) LPELR-52425(CA) in support of his position. He urged this Court to strike out the instant application as being incompetent. He proceeded to further argue that a calm perusal of the facts and circumstances of this case from the affidavits of parties would establish that there was no contract of sale between the Applicant and the Judgment Creditor/Respondent and as such, no consideration was furnished. He therefore contended that the instant application is lacking in merit and urged this Court to dismiss same.

Upon a careful consideration of the processes filed by the respective parties and the submissions of Counsel in this application, I am of the view that the main issue arising herein for determination has been aptly described by Applicant. In the determination of the instant application therefore, I shall adopt the issue as formulated by the Applicant which is;

Whether the Applicant is entitled to the relief sought in the circumstances of this case.

The competence of the instant application has been challenged by the Judgment Creditor/Respondent to wit; the Applicant's *locus standi* to bring same.

It appears not to be in dispute that the Application at hand to set aside this court's decision of 21st June 2021 in Suit No. CV/2661/2019 is primarily on an allegation that same was obtained by the Judgment Creditor/Respondent on concealment of material facts, misrepresentation and fraud. Although the Applicant also alleges non-

compliance with the rules and lack of jurisdiction on the part of this Court to make such decision, these are essentially based on the establishment of the alleged concealment, misrepresentation and fraud.

The general position of the law is trite that a court of law has inherent jurisdiction or power to set aside its own order or decision which was obtained by fraud or made upon concealment of vital information or facts. – see

CITEC INT’L ESTATE LTD & ORS V. FRANCIS & ORS (2014) LPELR-22314(SC) AT P. 36 PARAS. A-C;

OLUFUNMISE V. FALANA (1990) LPELR-2616(SC) AT PP. 8 – 9 PARAS. D-B;

NWADIARO & ORS V. PRESIDENT & MEMBERS OF CUSTOMARY COURT OSSOMALA (2016) LPELR-40925(CA) AT PP. 39 – 40 PARAS. F-B;

FORSON V. CALABAR MUNICIPAL GOVT & ANOR (2003) LPELR-7273(CA)

and

ACB LTD V. ELOSIUBA (1994) LPELR-22967(CA) AT P. 22, PARAS. B-F.

The steps available to a party seeking to set aside a judgment on the ground of fraud, illegality, misrepresentation or mistake, has been reiterated in several decided cases. These steps include the process of appeal to a higher court that a judgment allegedly obtained by fraud be set aside or by a fresh action before the same court that gave the Judgment/decision to set same aside. – see

VULCAN GASES LTD V. GESELLSCHAFT FUR IND. GASVERWERTUNG A.G (2001) LPELR-3465(SC) AT P. 105 PARAS. A-C;

HALID PHARMACEUTICALS LTD V. SOLOMON (2013) LPELR-22358(CA) AT P. 28 PARAS. A-E;

UDDOH & ORS V. UDDOH (2009) LPELR-8082(CA) AT PP. 26 – 27 PARAS. F-C;

GWOTT V. GWONG & ORS (2017) LPELR-43285(CA) AT PP. 25 – 26 PARAS. C-A

and

REMAWA V. NACB CONSULTANCY & FINANCE CO LTD & ANOR (2006) LPELR-7606(CA) AT PP. 19 – 20 PARAS. C-D.

It has however also been held that a simple motion on notice brought before the court that gave the judgment or decision may sometimes suffice to set aside a judgment obtained by fraud. Although a motion may sometimes suffice, an original action is preferable whenever there are issues of fact to be decided – see

FALAKI & ORS V. FAGBUYIRO & ORS (2015) LPELR-25848(CA) AT PP. 107 – 111 PARAS. B-E;

FASUBA V. ADUMASI & ANOR (2015) LPELR-24548(CA)

and

ADENIYI & ANOR V. ADEWALE & ORS (2018) LPELR-44236(CA) AT PP. 20 – 24 PARAS. D-F.

In **OLADOSU & ANOR V. OLAOJOYETAN & ANOR (2012) LPELR-8676(CA) PP. 22 – 23 PARAS. E – B** the Court of Appeal per Kekere-Ekun JCA (as his lordship then was) held as follows;

“However, where a judgment is obtained by fraud, the person against whom it is obtained has several options: (i) he may apply by way of motion to the Court that gave the judgment to set it aside; (ii) he may appeal against the judgment; and (iii) he may file a separate action for the judgment to be set

aside. See: Remawa vs. N.A.C.B. & F. C. Ltd &Anr . (2007) 2 NWLR (1017) 155.

Where a party is able to establish by any of the above means that the judgment against him was obtained by fraud, the remedy is that the judgment would be declared a nullity and accordingly set aside.

The Court, whether it is the Court that delivered the judgment or the appellate Court cannot, after pronouncing a judgment a nullity on grounds of fraud, proceed to review the same judgment and render a different decision on the merits.”

In this case, the Applicant chose to apply by way of the instant Motion on Notice No. M/1349/22 to this Court to set aside the Judgment of this Court in CV/2661/2019 delivered on 21st June 2021 on grounds of misrepresentation and suppression of material facts.

It is noted that the Judgment in respect of which the Applicant has brought the instant application to set aside, was delivered under **Order 60 of the High Court of the FCT, Abuja (Civil Procedure) Rules 2018**, particularly **Rule 6** thereof. Under **Rule 8(1) of said Order 60**, such a Judgment may be set aside by this Court on such terms as it deems fit.

There is however the vexing issue of the Applicant’s *locus standi* to bring the instant application.

I have carefully perused the records in this Suit No. CV/2661/2019 in which this Court gave its final decision on 21st June, 2021. This is the decision now sought to be set aside by the instant application brought by the Applicant. The parties on record in the said Suit No. CV/2661/2019 are

“BARRISTER BEATRICE OLUKEMI WILLIAMS ... CLAIMANT

AND

UNKNOWN PERSONS DEFENDANTS”

While the Judgment Creditor/Respondent in the instant application was the Claimant in this Suit No. CV/2661/2019, the Defendant is named as ‘Unknown Persons’.

The Applicant in the instant application is ‘BIOBAK KITCHEN AND VENTURES LIMITED’.

It is pertinent to observe that nowhere was the Applicant in the instant application named as a party in this Suit with No. CV/2661/2019. In fact, nowhere was the Applicant mentioned in those processes simpliciter.

Now the law, particularly the Rules of this Court, permits a claimant to sue a defendant as ‘person unknown’ where the name or real identity of the defendant is not known to the claimant at the time of instituting the action in Court. See **Order 13 Rule 9** and **Order 60 Rule 3(c) of the High Court of the FCT, Abuja (Civil Procedure) Rules 2018**. See also **DAVIES & ORS V. ODOFIN & ORS (2017) LPELR-41871(CA) AT PP. 42 – 43 PARAS. D-E** and **DARALKUCHI INTL LTD & ORS V. NAKORJI & ORS (2021) LPELR-56391(CA) AT PP. 12 – 13 PARAS. D-C**.

It thus behoves on a defendant sued as ‘person unknown’ to apply under **Order 13 Rule 10** of the Rules of this Court for leave of Court to substitute his name as defendant. Otherwise, a person who is not named as a party in proceedings brought under **Order 60** (as in this case) could apply to be joined as a defendant to the suit.

On the face of it, there is nothing to indicate that the Applicant is the party sued as ‘Unknown Persons’ in Suit No. CV/2661/2019 or that it at any time obtained leave of this Court to substitute its name as the defendant sued as Unknown Persons in this suit. No such leave for substitution of the Applicant’s name or joinder of the Applicant as a party was sought or obtained from this Court in favour of the Applicant.

‘Parties’, with respect to a court action, are persons whose names appear on the record as Plaintiff or Defendant. A party to an action is therefore a person whose name is designated on record as Plaintiff or Defendant. In its loose sense, the term ‘party’ thus refers to that person by or against whom a legal suit is sought. It must however be noted that all others not named as party in the suit but who may be affected by the suit indirectly or consequently are persons interested and not parties. – see

BELLO V. INEC & ORS (2010) LPELR-767(SC) AT PP. 23 – 24 PARAS. G-C;

DARALKUCHI INTL LTD & ORS V. NAKORJI & ORS (SUPRA) AT PP. 7 – 8 PARAS. D-B

and

TRANS (NIG) ASSURANCE CO. LTD V. A-G, OYO STATE & ANOR (2018) LPELR-44739(CA).

It simply means that the Applicant herein was (and still is) not a party to the Judgment of this Court delivered on 21st June, 2021 in Suit No. CV/2661/2019. Can the Applicant therefore bring a simple motion before this Court to set aside a Judgment to which it is not a party even on allegation of fraud or misrepresentation as in this instant application?

In **SOMIDE V. OGANLA & ANOR (2017) LPELR-42366(CA) AT PP. 28 – 33 PARAS. F-C** the Court of Appeal held that

“The law is trite, that it needs no citing of any authority that, a person who is not a party to a dispute cannot be heard in the dispute. The fact that he is a person interested in the outcome of the Suit is irrelevant. To secure the right to be given an opportunity to be heard, he must be specifically joined as a party to the dispute.”

It is thus a notable position of the law that a party who was not a party to proceedings of a lower court can only appeal against the decision

of that lower court to a higher Court if he seeks and obtains leave from the Court having satisfied the Court that he is an interested party. Failure to obtain such leave of Court to appeal as an interested party renders as incompetent such appeal brought by a party who was not party to the proceedings of the lower court. – see

OKONKWO & ANOR V. UBA PLC (2011) LPELR-23010(SC) AT PP. 6 – 7 PARAS. E-C & P. 14 PARAS. A-D

and

TATA & ORS V. NYECHE & ORS (2021) LPELR-56051(CA) PP. 31-32, PARA. D-D.

It was also unanimously held by the Supreme Court that a person who was sued as an unknown party must obtain leave to file an appeal as an interested party and must disclose his identity. – See the case of **PERSONS, NAMES UNKNOWN V. SAHRIS INTL LTD (2019) LPELR-49006(SC) AT PP. 9 – 12 PARAS. D-D; PP. 27 – 31 PARAS. F-A; P. 35 PARAS. A-E & PP. 36 – 37 PARAS. A-B.**

In the instant case, even if the Applicant is interested in the Judgment of this Court delivered in Suit No. CV/2661/2019, the Applicant is NOT a party in that suit having not been named as such therein. In the circumstances, the options available to the Applicant to set aside the Judgment in Suit No. CV/2661/2019 are limited. The Applicant can appeal as an interested party (where it obtains the requisite leave to do so) against the said Judgment to the Court of Appeal to have same set aside. See

COLE & ORS V. NGEI ABE & ORS (2019) LPELR-49052(CA) AT PP. 10 – 11 PARAS. F-E

and

ZAKARIYAH & ORS V. OLAM (NIG) LTD & ORS (2021) LPELR-56114(CA).

It would also appear that the law posits that the Applicant requires no leave of court to institute a fresh action to set aside the Judgment

strictly on grounds of fraud, the fresh cause of action which the Applicant must establish in such a fresh action being the alleged fraud. – see **OLUFUNMISE V. FALANA (SUPRA)** and **ADENIYI & ANOR V. ADEWALE & ORS (SUPRA)**.

One thing the Applicant however can certainly NOT do in the circumstances is bring a mere application by motion to this Court to set aside a judgment to which the Applicant is not a party. – see **TRANS (NIG) ASSURANCE CO. LTD V. A-G, OYO STATE & ANOR (SUPRA) AT PP. 27 – 35 PARAS. A-D** where it was held by the Court of Appeal per Iyizoba JCA that only parties to a suit can make applications in the suit. It was held **AT PP. 34 – 35 PARAS. A-E** thus;

“This is not an answer to the question whether the attention of the Court to the illegality can be called by the Respondents who were not parties in the suit and who had not applied to be joined in the suit. With all due respect to the Respondents, the Rules do not permit such course of action. It is like putting the cart before the horse or jumping the gun. By Order 13 Rule 16 (3) of the Oyo State High Court (Civil Procedure) Rules the judge may order that the names of any party who ought to have been joined or whose presence before the Court is necessary to effectually and completely adjudicate upon and settle the questions involved in the proceedings be added. The problem here however is that the proceedings had been concluded and judgment delivered by the lower Court. This raises the question whether the Respondents ought not to have gone by way of appeal with an application for leave to appeal as an interested party? However, if this was a case where the lower Court had jurisdiction to set aside its judgment, it could still within its inherent jurisdiction grant the Respondents leave to join as interested parties to enable them file the necessary application. The point is that no such leave was sought and obtained by the Respondents. They were mere interlopers and the lower Court ought not to have heard their application. On this ground alone, this appeal succeeds. All the arguments and contentions of the Respondents both in the lower Court and in this Court can only

arise if they had been properly joined as parties in order to give them the competence to file their application. No useful purpose will be achieved in considering the remaining issues in this appeal as the application was in the first instance incompetent, the applicants not being parties in the suit.”

Tsammani JCA also held in that case **AT PP. 35 – 36 PARAS. F-E** as follows;

“It remained settled therefore that the Respondents who were not parties to Suit No: FHC/IB/CS/5/2013 could not legitimately move the Court to have same set aside.”

I believe the Supreme Court quite settled the matter when it held the position in the case of **BELLO V. INEC & ORS (SUPRA)** that a person who was not named as party to an action but who is affected by the judgment or decision in such action can either accept such Judgment and do nothing or apply for leave to appeal as an interested party to the appellate court. Such a party can not simply bring an application to set such judgment aside. The Supreme Court held **AT PP. 31 – 32 PARAS. A-D** per Mahmud Mohammed JSC (delivering the lead Judgment) as follows;

“However, the judgment of the Court below appeared to have gone even further to state that an application by the person affected may not even be necessary before the judgment may be set aside. This is what the Court said in its judgment at page 453 of the record -

“It is unthinkable as postured by the Appellant that the 2nd Respondent, the PDP, that put the name of the Appellant to INEC, the 1st Respondent would not be affected by a judgment and orders concerning that nomination within the 2nd Respondent whose flag would be flown at the election proper. It is for that crucial position that a joinder of 2nd Respondent needs not be applied for nor granted before the judgment without the 2nd Respondent would be set aside”.

With utmost respect, this is not the correct position of the law on the subject where a Court of law gives judgment or order against a person who is not a party in the case. The remedy of such a person lies in availing himself of the provisions of the 1999 Constitution where Section 243(a) and (b) state –

"243. Any right of appeal to the Court of Appeal from the decision of the Federal High Court or a High Court conferred by this Constitution shall be

a) exercisable in the case of civil proceedings at the instance of a party thereto, or with leave of the Federal High Court or the High Court or the Court of Appeal at the instance of any other person having an interest in the matter, and in the case of criminal proceedings at the instance of an accused person or; subject to the provisions of this Constitution and any powers conferred upon the Attorney-General of the Federation or the Attorney-General of a State to take over and continue or to discontinue such proceedings at the instance of such other authorities or persons as may be prescribed.

b) Exercised in accordance with any Act of the National Assembly and Rules of Court for the time being in force regulating the powers, practice and procedure of the Court of Appeal."

The learned jurist further held **AT PP 33 – 34 PARAS. G-B** thus;

“Whatever prompted the 2nd Respondent to challenge the judgment of the trial Court of 4th April, 2007 of which it was not a party but a party or a person having interest in the matter, ought to have come properly to join in the case as a party before it could have found the appropriate platform to attack the judgment on appeal which could have yielded the same relief of setting aside of that judgment if the grounds for doing so have been established to justify the Court of Appeal granting the relief:

In the instant case therefore, the Applicant's application vide Motion No. M/1349/22 to set aside the Judgment of this Court delivered on 21st June 2021 in this Suit No. CV/2661/2019 is incompetent as the Applicant is not a party to the said Judgment sought to be set aside.

As it is, the Applicant lacks the necessary *locus standi* to bring such an application and this Court consequently lacks the competence and jurisdiction to entertain same. In sum, the instant application with Motion No. M/1349/22 is hereby accordingly struck out.

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Honourable Justice M. E. Anenih

APPEARANCES:

Marvel Akpoyibo Esq appears with Olakunle Lawal Esq, Chiamaka Anagu (Ms) and Frederick Obagwu Esq for the Applicant.

Dr. Olukayode Ajulo Esq appears with Michael Okejinmi Esq and Olalekan Bosede Esq for the Judgment Creditor/Respondent.