IN THE HIGH COURT OF JUSTICE OF THE FEDERAL CAPITAL TERRITORY
HOLDEN AT MAITAMA ABUJA
ON THE 11th OF APRIL, 2022.
BEFORE HIS LORDSHIP; HON JUSTICE MARYANN E. ANENIH
(PRESIDING JUDGE)

SUIT NO : CV/1855/2009

MOTION NO:M/1754/19

BETWEEN

GREENLAKE INTERNATIONAL LTD…….PLANTIFF/APPLICANT

AND

1. THE HON. MINISTER, FEDERAL CAPITAL TERRITORY
2. FEDERAL CAPITAL DEVELOPMENT AUTHORITY
3. LODIGIANI (NIG) LTD

} DEFENDANT/ RESPONDENT

RULING

Before this court is a motion on notice filed on the 6th December, 2019 and brought pursuant to Order 43 Rule 1 of the High Court of the Federal Capital Territory Abuja (Civil Procedure Rules), 2018, Section 36 of the 1999 Constitution of the Federal Republic of Nigeria (as amended) and under the inherent jurisdiction of this honourable court. The Applicant prays for the following:

1. An order of this Honourable Court relisting suit no CV/1835/2009 between Greenlake International LTD Vs. The Minister, F.C.T & 2 ors which was struck out by this honourable court on the 14th December, 2015.
2. And for such further or other orders as this honourable court may deem fit to make in the circumstance of this case.

The application is supported by a 4 paragraph affidavit, a further affidavit in response to counter affidavit filed on the 21st March, 2022 with attached exhibits and a written address.

In opposition the 3rd Defendant/Respondent filed on the 18th March, 2022 a 22 paragraph counter affidavit with attached exhibits and a written address.

I have considered the application before the court, aforementioned processes and the oral submission of counsel. I am of the view that the issue arising for determination is:

> *"Whether the application for relisting filed by the plaintiff ought to be granted by this court."*

It is trite that the grant or refusal of an application for relisting of a suit that has been struck out is an exercise of judicial discretion. The court in exercising this discretion however must do so judicially and judiciously by relying on the facts and circumstances presented to it from which a conclusion governed by law must be distilled. See

SUNDAY JAMES OLASEINDE & ORS v. THE FEDERAL HOUSING AUTHORITY & ORS (1999) LPELR-6135(CA) (Pg 3-4 paras D-C)

ALHAJI ALIKO DANGOTE v. AFRICAN PETROLEUM PLC & ORS (2012) LPELR-7980(CA) (Pp. 30-31 paras. D)

> *"There is no doubt that the Court in deserving cases is entitled to make order to preserve the Res. The exercise of discretion is a judicial act and is expected to be exercised judicially, namely in accordance with established principles. It is an essential requirement of the administration of justice that the exercise by a judge of his judicial discretion should not only be respected but invariably upheld. There can only be interference where the discretion has been exercised in bad faith, frivolously or vexatiously. The overriding principle in the exercise of discretion by a Court is to maintain a balance of justice between the claimant and the Defendant."*

See also

THE OWNERS OF THE M. V. LUPEX v. NIGERIAN OVERSEAS CHARTERING AND SHIPPING LIMITED (2003) LPELR-3195(SC) (Pp. 18 paras. C)

"Judges and Courts exercise their discretion in accordance with rules of law and justice and not according to private opinion. An exercise of discretion is a liberty or privilege to decide and act in accordance with what is fair and equitable under the peculiar circumstances of the particular case, guided by the spirit and principles of law."

A scrutiny of the record of proceedings in this case shows that the case was struck out for want of diligent prosecution and in accordance with Order 35 Rule 2 of the High Court Federal Capital Territory Abuja (Civil Procedure Rules) 2004.

The principle for relisting a struck out case was considered in the case of :

MADAM FANTA JAURO ATIKU & ANOR v. YOLA LOCAL GOVERNMENT (2002) LPELR-5822(CA) (Pp. 17-18 paras. A) where the court of appeal held as follows:

"It seems the only issue taken and discussed pertains the question, whether the learned trial Judge in refusing the application seeking to have the suit relisted for hearing did exercise his discretion judicially and judiciously. Undoubtedly, the appellants had waited for so long before thinking of taking appropriate steps to apply to have their suit relisted in the cause list of the Court below. It goes without saying that in applications seeking to have struck out suits, relisted the desideratum rests on the following factors:-

(1) Good and substantial reasons for the failure to come to Court on the date the suit was struck out.

(2) Good and substantial reasons for the delay in bringing the application to re-list the suit.

See Williams v. Hope Rising Voluntary Society (1982) 1 All NLR (Pt.2) 1. Quite unjustifiably, the appellants failed to file any application seeking for the indulgence of the Court to have their suit re-listed until two years after it had been so struck out. Appellants' supporting affidavit in the Court below as well as their further affidavit disclosed no substantial reason why the suit should be relisted. Given the above background, the learned trial Judge was in my view, correct in refusing to relist the suit. I couldn't agree more that the learned trial Judge quite rightly exercised his discretion judicially and judiciously. I have no reason to upturn the decision given the obvious fact that this Court will not interfere with the exercise by the lower Court of its

discretion merely, because this Court feels given the state of facts before the lower Court it could have exercised the discretion differently. See University of Lagos v. Olaniyan (No.1) (1985) 1 NWLR (Pt. 1) 156 at 163."

The 3rd defendant has raised the issue of the competence of the plaintiff's application. He contends that this Application before the court was filed about four years after the case was struck out without an application for extension of time.

He referred to Order 49 rule 4 of the High Court of the Federal Capital Territory Abuja (Civil Procedure Rules), 2018 which states:

"The court may, as often as he deems fit and either before or after the expiration of the time appointed by these rules or by any judgment or order of the court, extend the time or adjourn for doing any act or taking any proceedings."

The applicant did not make any effort thereafter to remedy its filing out of time even after it was raised by the respondent. It is settled that the court does not grant orders not sought. See

SENATOR NKECHI JUSTINA NWAOGU v. HON. EMEKA ATUMA & ORS (2013) LPELR-20667(SC) (pp. 22-23 paras E.)

Not even the omnibus prayer would avail the applicant in this instance.

The Applicant has not given the court any just cause to suomoto grant an extension of time on their behalf pursuant to the omnibus prayer. The court will not help a counsel conduct his case, it is trite that equity aids only the vigilant and not the indolent. See

FEDERAL UNIVERSITY OF TECHNOLOGY, YOLA v. BRIGHT CHIBUZO NKIRE (2014) LPELR-24202(CA) (Pp. 34-35 paras. F)

See also

Order 32 rule 5 (1) (2) (3 of the High Court of the Federal Capital Territory Abuja (Civil Procedure Rules), 2018) reproduced hereunder for clarity and which states that:

(1) Where a cause is struck out under Rule 2 of this order either party may apply that the cause be relisted on such terms as the court may deem fit.

(2) A judgment obtained where any party does not appear at the trial may be set aside by the court upon such terms as it deems fit.

(3) A party who fails to file an application to relist a cause struck out or to apply to set aside a judgment within 6 days after the order or judgment was delivered or such longer period as the court may allow shall at the time of filing the application, pay a fee of N200 (two hundred naira) for each day the default. Proof of payment shall be attached to the application for extension of time. (underlining mine).

It is clear from the above provision, that an application to relist a suit struck out for want of prosecution ought to be brought within six days. Thus the underlined portion of Order 32 Rule (5)(3) of the High Court of the Federal Capital Territory Abuja (Civil Procedure Rules), 2018 contemplates leave of court for extension of time to file an application to relist beyond the said six days. However where it is brought outside the six days stipulated, an applicant is obliged to pay default fees and attach proof of payment of same to the application at the time of filing the application to relist.

In the instant case the applicant did not attach proof of payment of default fees to his original motion to relist. By his further affidavit however he contends that he has paid default fees of N75,000 (seventy five thousand naira only) and attached receipt of payment. The instant suit was struck out in December 2015 and the instant application to relist was filed in December 2019 four years after the suit was struck out. It appears the default fees that the applicant purportedly paid was paid on the 11th October, 2021 and not at the time when the application was filed in 2019. This is flagrant breach of specific provisions of the rules of this court which requires that the default fee must have been paid and proof of payment attached at the time of filing the application to relist. Even when the Respondent objected to the failure to pay the requisite default fee the applicant made no effort to regularize this anomaly. See again Order 32 rule 5 (3) of the High Court of the Federal Capital Territory Abuja (Civil Procedure Rules), 2018.

Rules of Court are not made for fancy, they are made to aid the adjudicatory process and ought to be obeyed and complied with. See

CHIEF OF ARMY STAFF & ANOR v. ALI ISAH (2017) LPELR-41979(CA) (Pp. 8-9 paras D)

The payment of default fees does not cure the fundamental defect that the leave of court for extension of time was not obtained before filing the application as required by specific rules of court. To make a bad situation worse, no prayer has been sought from this Court by the applicant to cure this fundamental defect.

In view of the obvious fact that there was no leave to extend the time within which make an application to relist and failure to pay requisite fees, the competence of this application is called to question.

An action, process or application is said to be incompetent when it lacks the legal capacity to discharge the required duty. And it is settled law that an incompetent process is a non-starter. See

OMOLEHIN V. GREAT AJIBAYE INDUSTRIES LTD (2013) LPELR-21373(CA) (Pp. 8. Paras B).

Suffice to say that for the reasons hitherto highlighted the applicant has not complied with the condition precedent to the determination of the instant application. Thus this application is found to be incompetent and accordingly struck out.

Signed

Honourable Judge

Representation

R. O Atabo SAN with R.I Idakoji Esq, A.S Olowosegun Ms, D.P Pan Esq and E.I Ekpe Ms for Plaintiff/Applicant.

J.T Michana Esq for 3rd Defendant/Respondent