IN THE HIGH COURT OF FEDERAL CAPITAL TERRITORY
IN THE FEDERAL CAPITAL TERRITORY JUDICIAL DIVISION
HOLDEN AT JABI FCT ABUJA

BEFORE HIS LORDSHIP: HON. JUSTICE BABANGIDA HASSAN

SUIT NO: CV/876/2019

BETWEEN:

AYOBAMI AROTIBA……PLAINTIFF/RESPONDENT

AND

1. **KHALID ABUBAKAR**
2. **SERENE CLIMATE LIMITED** } **…….JUDGMENT DEBTORS/APPLICANTS**

RULING

The judgment debtor/applicant filed this motion on notice with No. M/2203/2021 which was dated the 2nd day of March, 2021 and seeks for the following orders:

1. An order for an extension of time to the judgment debtors/applicants to apply to set aside the judgment delivered on the 1st day of June, 2020.
2. An order of the Honourable Court setting aside the judgment delivered on the 1st June, 2020 against the judgment debtors/applicants in this suit for lack of service.
3. And for such further order(s) as the Honourable Court may deem fit to make in the circumstances.

The motion is supported by twenty-five paragraphed affidavit, and attached to it is an exhibit marked as EXH. 'KA', and they are accompanied by a written address of counsel.

The judgment creditor/respondent filed a counter affidavit out of the prescribed period provided by the Rules of this Court, and upon an objection by the counsel to the

judgment debtor/applicant, the counsel to the judgment creditor/respondent withdrew the counter affidavit, however, prayed to the court to grant his leave to argue on points of law orally, and the counsel to the judgment debtor/applicant did not object, and the former was so allowed to proper argument on points of law orally.

The counsel to the judgment debtor/applicant, having listened to the argument of the counsel to the judgment creditor/respondent responded that the judgment creditor/respondent has breached the provision of Order 43 Rule 3 of the Rules of this court which prescribes seven days within which the judgment creditor/respondent should have filed his counter affidavit in opposition to the application, and that which the judgment creditor/respondent has not done and therefore further submitted that the submission of the counsel to the judgment creditor/respondent being oral is incompetent and is an abuse of court process, and the court will not accept any preposition other than the one provided by the Rules of this court, and urged the court to discountenance it.

Now before going into the substance of this application, it is pertinent to look at the propriety or otherwise of the judgment debtors/applicants' response to the argument made by the counsel to the judgment creditor/respondent orally. This is because if the court takes the argument of the counsel to the judgment debtors/applicants as a better argument, then there will be no need in considering the argument of the counsel to the judgment creditor/respondent orally.

Thus, Order 42 Rule 1(3) of the Rules of this court provides:

> **"Where the other party intends to oppose the application, he shall within 7 days of the service on**

him of such application, file his written address and may accompany it with a counter affidavit".

By the above quoted rule, it can be inferred to mean that the judgment creditor has had from the 31st day of March, 2021, when the motion on notice and other accompanying processes were served on him, to file his counter affidavit within seven days, and this he has not done.

The non-compliance on the part of the judgment creditor/respondent to file his counter affidavit within the prescribed time may be treated as an irregularity. See Order 5 Rule 2 of the Rules of this court which provides:

"where at any state in the course of or in connection with any proceedings there has by reason of anything done or left undone been a failure to comply with the requirements as to time, place, manner, or form, such failure may be treated as an irregularity. The court may give any direction as he thinks fit to regularise such steps".

Based upon the above quoted rule, I so, treat the non-compliance by the judgment creditor/respondent to file his counter affidavit within 7 days as an irregularity.

As I have said earlier and as it is on record that the judgment creditor/respondent, having withdrawn his counter affidavit, prayed to the court for a leave to argue on points of law orally, to which the counsel to the judgment debtors/applicants expressed no objection to the granting of the leave, and the court allowed the counsel to the judgment creditor to so proffer the argument orally. Now, can the expression of no objection be treated by this court as a waiver to the irregularity? See the case of **Ademetan V. I.T. RCCG (2016) All FWLR (pt 821) p. 1506 at 1522, paras. F-G** where the Court of Appeal, Lagos Division

held that where a party is aware of non-compliance or where a writ is defective, it is the duty of the party to act timely to apply to strike out the suit before taking further steps in the proceedings. When the appellant noticed surmised irregularity, it ought to take necessary steps to avoid being roped by waiver. In the instant case, the judgment debtors/applicants' counsel, having raised the objection for the non-compliance on the part of the counsel to the judgment creditor and upon the application for leave to argue on points of law orally, and to which there was no objection on the part of the counsel to the judgment debtors/applicants, it is deemed that the counsel to the judgment debtors/applicants acquiesced to the irregularity. See the same case of **Ademetan V. I.T. RCCG (supra) at page 1522, paras. G-H** where the Court adopts the definition of waiver as is defined in the Black's Law Dictionary, 5th Edition as intentional or voluntary relinquishment of a known right, the renunciation, repudiation, abandonment or surrender of some claim, right, privilege or opportunity to take advantage of some defect, irregularity or wrong. In the instant case the failure on the part of the counsel to the judgment debtors/applicants to insist on his objection, and for the fact that he did not object to the application of the counsel to the judgment creditor/respondent to proffer an argument on points of law orally, certainly he has waived or acquiesced his right, and to this, I so hold. See the case of **Adelusi V. Governor, Lagos State (2016) All FWLR (pt 826) p. 464 at pp. 467 – 468; paras. H-F per Ikyegh. JCA.**

In the circumstances, the later objection raised by the counsel to the judgment debtors/applicants by referring to order 43 Rule 1 (3) of the Rules of this court does not hold water as he cannot be allowed to approbate and

reprobate, having conceded to allow the counsel to the judgment creditor/respondent to proffer an oral argument on points of law, and to this, I also so hold.

The next question that arose is:

Whether this irregularity can nullify this proceedings?

I quickly make reference to the case of **Gambari V. Amope (2018) All FWLR (pt 925) p. 29 at pp. 43 – 44; paras. H-A** where the Court of Appeal, Ilorin Division held that it is not every irregularity that automatically nullifies an entire proceedings, particularly where the irregularity did not in any way materially affect the merits of the case, or occasion a miscarriage of justice or where in any case, it is much too late in the day for a party to complain about such irregularity.

In the instant case, it is too much late in the day for the counsel to the judgment debtors/applicants to complain again that the non-compliance with Order 43 Rule 1 (3) of the Rules of this court renders the oral argument of the counsel to the judgment creditor/respondent incompetent. The argument of the counsel to the judgment debtors/applicants goes to no issue and is hereby discountenanced.

It is in the affidavit of the applicant that sometime in July, 2018 one Musa Ibrahim Yusuf approached the applicant to help and purchase a Mercedes Benz for his friend which the applicant did not know whether it was the judgment creditor or not, and that the applicant has had an agreement with Musa Ibrahim Yusuf for the purchase of Mercedes Benz 350 SUV 2016 Model, and after the agreement Musa Ibrahim Yusuf transferred the sum of N6,000.00 into the account of the applicant, and it was on condition that Musa Ibrahim Yusuf would give the balance

after delivery, and few days after transaction of the money to him, Musa Ibrahim Yusuf called and told the applicant not to purchase the car and should wait for further directives from Musa Ibrahim Yusuf, and later called the applicant and instructed that the applicant should not return the money to anybody, and since then Musa Ibrahim Yusuf disappeared and refused to pick the applicant's call.

It is deposed to the fact that the applicant did not know the judgment creditor in respect of the Mercedes Benz transaction, and sometime in January, 2020 a process of this court was served upon him by a substituted means which contained the writ of summons, affidavit in support of the writ and exhibits.

It is stated that he was not served with any date of the hearing of the suit.

In his address, the counsel to the judgment debtor/applicant raised this question for determination in this applicant, to wit:

> **Whether the Honourable Court has power to grant the relief sought by the applicant?**

The counsel submitted that this court has the power to grant the application of this nature and he relied on Order 21 Rule 12 of the Rules of this court, and further submitted that the judgment was given on the 1st of June, 2020 without serving the hearing notice on the applicants, and he cited the case of **Mark V. Eke (2004) 5 MJSC** to the effect that the service of process on a defendant is very fundamental to the issue of the jurisdiction and competence of the court to adjudicate, and where judgment is a nullity, the process affected by it is entitled ex dibito justitie to have it set aside. The court can set it aside even suo motu and the person affected may apply by motion and not necessarily by way of appeal, and he urged the court to so hold. He cited the

case of **Ataguba & Co. V. Gura (Nig) Ltd (2005) 6 NJSC** to the effect that when a defendant in an undefended suit was properly served, he has a duty to disclose his defence to the action. The counsel submitted that the judgment debtors/applicants were not properly served, and as such the action under the undefended list could not have begun, and he cited the case of **Tsokwa Motors Nig. Ltd V. UBA (2008) 2 NJSC 197** where it was held that non service of process on a party properly so called will render proceedings on such unserved process null and void. He argued that process of court include Hearing Notice or any other means of communicating date to the defendant, and this, the judgment debtor/applicant has not been communicated with the date for the hearing and the judgment in this suit by any means, and he urge the court to so hold.

Upon giving the counsel to the judgment creditor/respondent the leave to argue on points of law, he cited the case of **Mohammed V. Wammako (supra)** and argued that where an averments in an affidavit do not seem to prove the purpose upon which they were deposed to, there is no need in filing a counter affidavit. He submitted that the gravement and according to relief (b) of the judgment debtors' application is that the judgment is based upon lack of service, and while in paragraphs 14 and 15 of their affidavit, they have admitted that they were served. To him, when there is inconsistency on the motion or the affidavit, the other party needs not to file a counter affidavit.

The counsel argued by way of raising objection to the appearance of the counsel to the judgment debtors/applicants on the ground that Order 9 Rule 1 (1) of the Rules of this court which requires the counsel to file a

memorandum of appearance upon being served with the originating process, and to him, in the absence of memorandum of appearance or conditional appearance that the processes filed by the counsel is incompetent and he relied on the case of **Nigerian Navy & Anor. V. Bassey (supra)** and he urged the court to so hold that the motion is incompetent due to the absence of memorandum of appearance, and also the processes are incompetent, and he cited the case of **Ashiru V. INEC (supra)** to the effect that a deposition need to be sworn in before a Commissioner For Oath, and it is his contention that the deponent of the affidavit in this application did not sign it before a Commissioner on Oath which that makes the affidavit incompetent. To him, what is in the affidavit is a photocopy of the signature and not the original of the signature which was not subscribed to before a Commissioner For Oath, and therefore, to him, the processes are incompetent.

The counsel to the judgment creditor/respondent contends that the motion is incompetent by the designation of the parties where it is put plaintiff/respondent, and to him, the judgment creditor is not made as a party as this is a post judgment application.

The counsel argued that the conditions for setting aside a judgment under the undefended list have not been followed by the applicants, and he cited the case of **Muhammadu Abubakar Rimi Sabon Gari Market Ltd V. Okeke (supra).** He also cited the case of **Ifeanyichukwu T.B. Ltd V. O.C.B. Ltd (supra)** to the effect that a judgment delivered under the undefended list is a judgment on merit that can only be set aside on appeal or by an action alleging fraud, and to him, therefore this court becomes funtus officio, and he referred to some judicial authorities. He further submitted that under the undefended list

procedure it behooves upon a defendant who is desirous on defending the suit to file notice of intention, to defend and to be supported by an affidavit which the judgment debtors/applicants refused to do so despite the service of the undefended list on them, and he urged the court to thrash the application in the judicial dustbin as it is vexatious and lacking on merit.

Now, let me formulate the issue for determination in this application, to wit:

Whether the applicant is entitled to the reliefs sought?

In trying to answer the above question, let me also narrowed down the crux of this application, that is to say, the judgment debtors/applicants seek for the order of this court setting aside the judgment entered against them dated the 1st day of June, 2020 on the ground that they were not served with hearing notices informing or notifying them of the date of hearing.

It is the law that where a judgment is obtained under the undefended list, the party against whom it was so given may apply to that court to set it aside on ground of irregularity. However, the defendant applying for the setting aside of the judgment given under the undefended list procedure must specify in the motion the nature of the irregularity, and in the affidavit in support, the circumstances under which the irregularity arose. See the case of **Darivis Invest. Ltd V. Hallmark Bank Plc (2010) All FWLR (pt 537) p. 768 at 788; paras. F-G.** In the instant case, the gravement of the judgment debtors/applicants is that the suit with No. CV/876/2019. (the instant case) between the parties was heard and judgment entered without service on the judgment debtors/applicants; and counsel cited the case of **Ataguba & Co. V. Gura (Nig.) Ltd (supra)** to the effect

that an action began under the undefended list is no less a trial between parties and when a defendant is properly served, he has a duty to disclose his defence to the action, and the counsel further cited the case of **Tsokwa Motors (Nig.) Ltd V. UBA (supra)** to the effect that non service of process on a party properly so called will render proceedings on such unserved process null and void, and he submitted that process include hearing notice or any other means of communicating date to the defendant, and the judgment debtors/applicants have not being communicated with the dates for the hearing. The judgment debtors/applicants on their affidavit stated in paragraph 14 by the deponent that sometime in January, 2020, a process of the court in this suit was served on him vide substituted means, and the process of the court contained only the writ of summons, affidavit in support of writ of summons and other exhibits, and also in paragraph 15 the deponent stated that he was not served with any date for the hearing of the suit aforesaid. While it is the contention of the counsel to the judgment creditor/respondent that there is inconsistency in the affidavit of the judgment debtors/applicants in those paragraphs 14 and 15, and therefore, to him, there is no need in filing a counter affidavit by the judgment creditor/respondent.

Now looking at paragraphs 14 and 15 of the affidavit in support that the judgment debtors/applicants expected to be served with a Hearing Notice after the service of the writ of summons accompanied by an affidavit and some documents by fixing a date for the hearing. If that is their position, certainly they are wrong as this is not the position of the law. The position of the law is that on the date fixed for adjournment or hearing in an undefended list procedure,

the only business of the day is the determination of the claim. The absence of the defendant or counsel on his behalf will not cause a delay in the hearing. See the case of **Onadeko V. UBN Plc (2015) All FWLR (pt 250) p. 63 at 80, paras. A-B.** See also the case of **Belhope Plastic Ind. Ltd V. F. Ema Nerame Tech. Co. Ltd. (2010) All FWLR (pt 509) p. 518 at 530; para. A** to the effect that by the provisions of Order 23 Rule 3(1) Rules of the High Court of Rivers State, 1987 (which is equivalent to Order 35 Rule 3(1) of the High Court of the Federal Capital Territory, Abuja, 2018) the defendant is required to deliver to the Registrar of the trial court within five days before the date fixed for hearing the notice of his intention to defend the claim of the plaintiff. In the instant case, the judgment debtors/applicants in paragraph 14 of their affidavit in support of this application stated that sometime in January, 2020, they were served with the writ of summons and the accompanying affidavit and exhibits, however, they did not deem it appropriate to approach the registrar of this court to deliver their notice of their intention to defend the action and they so waited for a hearing notice to be served to them, certainly the applicants are taken as having admitted the respondent's claim, that is to say their neglect to file the notice was taken to be their passive way of making it known that they did not intend to defend the respondent's claim; and to this, I so hold.

Now, the question that arose in that circumstance is:

> **Whether it was necessary to notify the judgment debtors/applicants who failed to file notice of their intention to defend the suit where undefended hearing is rescheduled to another date?**

Before finding an answer to the above question, let me observe that the judgment creditor/respondent filed an application, that is motion exparte, which sought for the

leave of this court to serve the judgment debtors/applicants by a substituted means and the leave was granted on the 23rd January, 2020 and the matter was adjourned to the 3rd day of March, 2020 for hearing, and the service of the writ of summons and the accompanying affidavit was confirmed to have been effected by the judgment debtors/applicants in their affidavit in support of this application, and the court adjourned the matter for hearing. On the date fixed for hearing being the 3rd day of March, 2020, the court heard the matter and on the 1st day of June, 2020 the judgment was delivered. Therefore in giving an answer to the above question, I refer to the case of **N.S.C. Ltd V. Mojec Int'l Ltd (2005) All FWLR (pt 262) pp. 493 – 494; paras. G-D per Ikongbeh JCA:**

> **"Now, if on the return date the defendant would not have been allowed to participate in the hearing because it was yet to file the notice of intention to defend, why would It have become necessary to notify it of a rescheduling of the undefended hearing to another date? Had it not already adequately indicated that it did not desire to defend? Would that not be negating the very purpose for which the rules have been formulated? Why should the proceedings in such undefended hearing be set aside merely because the defendant, who still had not indicated that it intended to defend and had not been given leave to defend and, therefore, had no business in the matter, was not notified of the rescheduled hearing? As was seen earlier on, up to 02/10/2002, when the undefended suit came up again, the defendant still had not filed its notice or made any attempt to be allowed to defend"**

In my view, the defendant/appellant was not, in the circumstances of this case, a person who should necessarily have been served hearing notice for the rescheduled hearing on 02/10/2002. It was given all notices to which it was entitled to be given. It was notified of the pendency of the suit against him and the retails of its nature. It was notified that on 31/07/2002 the suit would be heard as an undefended suit. It was in short, given every opportunity to take step to be heard. It failed to take the opportunity. I cannot, therefore, agree with counsel on his behalf that it was denied fair hearing. I agree with Mr. Salman that it cannot, in the circumstances of this case be heard to complain that it was denied a hearing. That complainant would have been open to it only if it had filed a notice of intention to defend at least five days before 31/07/2002 as commanded by Order 23, Rule 3(1) of the High Court Rules, or even before the rescheduled hearing date. Different considerations might have come into play if by the time of the rescheduled hearing it had taken steps to be let into defend. With respect, alleging denial of hearing, in the circumstances is sheer mischief making on the part of the defendant. Ample opportunity was given to it to take steps to be heard. It refused to take it."

In the instant case, the judgment debtors/applicants having given an opportunity from the 3rd day of March, 2020 when the order for substituted service was given to the next date of adjournment being the 6th day of April, 2020, and subsequently to the 1st day of June, 2020 when the judgment was delivered, and they did not file their notice of

intention to defend the suit, certainly the opportunity was given to them and they refused that opportunity and therefore, they cannot complain of lack of or denial of hearing, and to this, I so hold.

The judgment debtors/applicants alleged in their affidavit in support of this application and more particularly in paragraph 21 that the said judgment creditor amended, out of fraud, the judgment sum from N6,000,000.00 (Six Million Naira) to N6,600,000.00 (Six Million, Six Hundred Thousand Naira), which they are alleging fraud, that is to say, on the claim the judgment creditor added the sum of N600,000.00 instead of only N6,000,000.00, and to him, that was a fraud, and therefore the judgment creditor has obtained judgment by fraud. If this is the position, the judgment debtors/applicants came before this court seeking to set aside the judgment dated the 1st day of June, 2020 by way of filing a motion on notice. To my mind, the judgment debtors/applicants have taken a wrong step since they alleged that the judgment creditor/respondent has obtained a judgment tainted with fraud having added the sum of N600,000.00. To this, I refer to the case of **Obaro V. Hassan (2013) All FWLR (pt 687) p. 687 at 703; paras. A – B** where the Supreme Court held that the principles of fair hearing embodied in the maxim 'audi alteram partem' have no application on cases tried under the undefended list. Thus, judgment handed down under the undefended list certainly one on the merits and can only be set aside on appeal or by yet another action in the case of allegation of fraud. In the instant case, the judgment debtors/applicants having complained of fraud, they should have filed a fresh action and not this application, and to this, I so hold.

On the whole, and in the circumstances of this application I do not see merit in it and coupled with the

wrong step taken by the judgment debtors/applicants, and the application is hereby refused accordingly. I answer the question for determination in the negative.

Hon. Judge
Signed
30/5/2022

Appearances:

Tunde Ogundaini Esq appeared for the judgment creditor/respondent.