

IN THE HIGH COURT OF JUSTICE OF THE FEDERAL CAPITAL TERRITORY
HOLDEN AT MAITAMA, ABUJA
ON THE 8TH DAY OF JULY, 2022
BEFORE HIS LORDSHIP: HON. JUSTICE MARYANN E. ANENIH
PRESIDING JUDGE.

SUIT NO. FCT/HC/CV/2774/2017

MOTION NO. M/6734/2021

G-PRODUCTIONS LTD JUDGMENT CREDITOR/APPLICANT

AND

MR. EMMANUEL SHOON PATRICK JUDGMENT DEBTOR/APPLICANT

RULING

Before the Court is a Motion on Notice No. M/6734/2021 filed on 12th October, 2021 by the Judgment Debtor/Applicant pursuant to Section 36(1) of the 1999 Constitution of the Federal Republic of Nigeria (as amended) and Order 10 Rule 11 of the High Court of the Federal Capital Territory Abuja (Civil Procedure) Rules 2018. The motion prays the Court for

1. *An Order setting aside the Judgment of this Court delivered on the 23rd November 2017 for being a nullity.*
2. *An Order directing the Claimant/Respondent to forthwith serve the Originating Processes in this matter on the Defendant/Applicant to enable him file his defence.*
3. *And for such further orders as this Honourable Court may deem fit to make in the circumstances.*

The grounds for the application according to motion paper are as follows;

1. *Lack of service of the Originating processes on the Defendant/Applicant herein.*

2. *Lack of service of Hearing Notice on the Defendant/Applicant herein.*
3. *That the Judgment of this Court delivered on 23rd November, 2021 was obtained by fraud and misrepresentation by the Claimant/Respondent.*
4. *That this Honourable Court has the vires to set aside the Judgment for being a nullity.*
5. *That the Honourable Court is a Court of substantial justice and not a Court of technicality.*

In support of the motion is a 25 paragraphs affidavit deposed to by the Judgment Debtor/Applicant himself, Mr. Emmanuel Patrick Shoon, with attached Exhibits and a written address.

The Judgment Creditor/Respondent reacted by filing a Counter affidavit on 20th October, 2021 accompanied by a written address.

The Judgment Debtor/Applicant (hereinafter simply referred to as the 'Applicant') subsequently filed a Further and Better Affidavit on 22nd October 2021 with an Exhibit and written address in reaction to which the Judgment Creditor/Respondent ('Respondent') filed a Further Counter Affidavit and further written address on 25th October, 2021.

On 29th October 2021, the Applicant filed two affidavits to wit; another 'Further and Better Affidavit' as well as a 'Further Further and Better Affidavit'.

In further reaction, the Respondent filed four more counter-affidavits namely; (1) a 'Further and Better Counter-Affidavit' of 1st November, 2021 with Exhibits; (2) a 'Further Further and Better Counter-Affidavit' of 2nd November 2021; (3) a 'Better Further Further and Better Counter-Affidavit' of 24th January 2022; and (4) a 'Better Better Further Further Better Counter Affidavit' of 24th January 2022.

In summary, the facts upon which the Applicant has based his instant application as contained in his affidavit in support is as follows;

The Applicant avers that the Respondent who knows the Applicant, his house and office very well had commenced this suit against the Applicant sometime in 2017 but deliberately did not serve the Applicant with any originating or hearing process to deny the Applicant the opportunity of defending this suit. That the service of the originating processes and hearing notices which the Respondent purported in this suit is a misrepresentation and fraudulent claim. The Applicant avers that he only knew about this suit and its Judgment of 23rd November 2021 against him when his attention was drawn to same on 7th October 2021 by his Counsel who had seen an application filed by the Respondent to dismiss another suit filed by the Applicant. Attached as Exhibits 1 and 2 are application of the Respondent and Writ of Summons in that other Suit No. CV/2657/2020. That the Applicant filed that suit against the Respondent when the Respondent engaged the Police to harass and intimidate the Respondent for debt recovery which is the subject matter of the instant suit in which this Court had delivered Judgment.

The Applicant further averred in his affidavit that the Respondent deliberately and fraudulently misled this Court into not serving the Applicant because he (Applicant) has a strong defence to the suit in which Judgment was delivered. That upon becoming aware of this suit and the Judgment delivered in it, the Applicant applied via Exhibit 3 through his solicitors for copies of the originating and other relevant processes. That despite obtaining the Judgment (which was never served on the Applicant) in this suit by fraud and misrepresentation, the Respondent had continued using the Police to extort money from the Applicant. That the Respondent's case that led to the Judgment in this suit was built on pure falsehood, gross misrepresentation of facts and fraud. The Applicant avers that he is yet to be served with the originating processes in this suit to which he has a strong defence. That the delay in bringing the instant application to set aside the Judgment of this Court delivered on 23rd

November, 2017 is as a result of his ignorance of this case and Judgment and as such, he is neither guilty of delay nor dereliction of duty.

Via its Counter-Affidavit, the Respondent denied the Applicant's averment and proceeded to aver that all the originating processes in this suit were served on the Applicant and there was no misrepresentation or fraud. That the Applicant has been aware of the pendency of this suit and Judgment as far back as 2017. That the Applicant Counsel in this suit had filed a fundamental rights action in response to which the Respondent had served a counter-affidavit informing of the Judgment in this suit. That the Judgment in this suit was neither obtained by misrepresentation of facts nor by fraud and neither was the Applicant extorted by the Police. That the Applicant delayed and was derelict in his duty of bringing this application timeously. That the Applicant had been arrested by the Police for various criminal offences.

Further facts were averred by the Applicant in his 3 further affidavits to which the Respondent reacted to by averring to further facts in its 5 further counter-affidavits.

In his address, Counsel to the Applicant formulated a sole issue for determination which is as follows;

“Whether in view of the non-service of the Originating processes and Hearing Notice in this suit the Judgment obtained therefrom ought to be set aside or not.”

For his part, the Respondent's Counsel distilled the sole issue for determination in his address thus;

“Whether the Judgment Debtor's application ought to be granted”.

A summary of Counsel to parties' submissions in their respective addresses is as follows.

It is the Applicant's Counsel's submission that the non-service of the originating processes on the Applicant is not only irregular but incompetent and liable to be set aside. He contended that proper service of a process is fundamental to the assumption of jurisdiction and relied on KIDA V. OGUMOLA (2006) 13 NWLR PT. 997 P. 377 amongst other cases. Counsel posited that where there is failure of proper service on a defendant, the Court's jurisdiction cannot be activated and where Judgment is delivered, it would be set aside for being a nullity. He cited the case of NJEOMANA V. UGBOMA & ANOR (2014) LPELR-22494(CA). He argued that the affidavit in support of the instant application shows that there was no service or proper service of originating processes on the Applicant in this suit particularly as the Respondent deliberately and mischievously chose not to serve the Applicant despite knowing his proper address. He submitted that this Court ought therefore to set aside all orders made in this suit including its Judgment for being a nullity.

The Respondent's Counsel for his part submitted that the Applicant has in his affidavit failed to satisfy the conditions for the grant of his application to vacate the order of this Court. He relied on N.A. WILLIAMS V. HOPE RISING VOLUNTARY SOCIETY (1982) ALL NLR P. 8. He contended that the Applicant has failed in his duty to place sufficient materials before the Court to assist it in exercising its discretion. He further submitted that the Applicant's application as presently constituted is incompetent as it is not in accordance with the law. He urged this Court to dismiss the application as there is no good reason shown for granting same.

I have considered the processes filed in the instant application and the submissions of Counsel. I am of the view that the main issue arising herein for determination has been appropriately couched by the Respondent. I shall therefore adopt the issue as formulated by the Respondent in the consideration of this application. With slight modification, the issue is as follows;

Whether the Judgment Debtor/Applicant's application ought to be granted.

The records before this Court in this case show that the Respondent had instituted the substantive action under the Undefended List Procedure against the Applicant. The records again show that the Applicant did not file any notice of intention to defend and affidavit as required by the Rules of this Court. This Court in its Judgment delivered on 23rd November 2017 in this case found that the Applicant had been served with the originating processes but the suit remained undefended. This Court accordingly entered Judgment for Respondent for part of its claim under the Undefended List.

The Applicant has now brought the instant application over three years after to set the said Judgment of this Court aside.

The Respondent has challenged the competence of the instant application.

First of all, the Respondent contends that the Applicant did not bring the instant application timeously.

I have observed earlier that the instant application has been brought by the Applicant under the provisions of Order 10 of the extant 2018 Civil Procedure Rules. **Order 10 Rule 11** of said Rules allows for the setting aside by this Court of its Judgment entered in default of appearance of a defendant upon an application by such defendant *provided the application is brought within reasonable time*.

As I have stated earlier, the record shows that this suit No. CV/2774/2017 was commenced under the undefended list procedure and Judgment was entered thereunder.

I believe it is a very well settled principle of law that a Judgment under the Undefended List Procedure is a judgment on the merit and is **NOT** a default judgment. Unlike a default Judgment, a Judgment on the merit such as one under the Undefended List cannot be set aside on a whim by the Court that delivered it. – see

MARK & ANOR V. EKE (2004) LPELR-1841(SC) AT P. 23 PARAS. A-C;

REMAWA V. NACB CONSULTANCY & FINANCE CO LTD & ANOR (2006) LPELR-7606(CA) AT P. 25 PARAS. A-C

and

HALID PHARMACEUTICALS LTD V. SOLOMON (2013) LPELR-22358(CA) AT P. 29 PARAS. B-G.

It is therefore clear that **Order 10** of the Rules of this Court cannot apply to the Judgment of this Court of 23rd November 2017 now sought to be set aside by the Applicant. It is not a default judgment and the Applicant cannot apply under **Order 10 Rule 11** to have same set aside. The Applicant fell in error by bringing the instant application to set aside the Judgment under **Order 10** and it is therefore irrelevant whether the application was brought by the Applicant within reasonable time (in compliance with **Order 10 Rule 11**).

Now it has been held by the Supreme Court that so long as a judgment was obtained on merit such as one under the undefended list, a trial Court will not have the jurisdiction to set aside its judgment even if there was a mistake. – see **MARK & ANOR V. EKE (SUPRA) AT PP. 23 – 24 PARAS. G-B.**

Relying on a plethora of authorities, the Court of Appeal per Aboki JCA held as follows in the case of **HALID PHARMACEUTICALS LTD V. SOLOMON (SUPRA) AT P. 29 PARAS. B-G;**

“It is trite that a judgment delivered under the undefended list procedure is a judgment on the merit. It can only be set aside on appeal. However, the trial Court has inherent powers to set it aside where there is an allegation that the judgment was obtained by fraud. This is because fraud if established would nullify the judgment.”

One of the grounds upon which the Applicant has made the instant application to this Court to set aside its own Judgment of 23rd November 2017 is that same was obtained by the fraud and misrepresentation of the Respondent. Although the Applicant alleged non-service of originating processes on him, it is pertinent to note that that the recurring theme in his affidavit in support (and indeed his further affidavits) is his averment that the process requiring service on him was marred by misrepresentation and fraud which resulted in the Judgment of this Court.

On the issue of service of processes on the Applicant, it is also pertinent to note that this Court in its Judgment of 23rd November 2017 held quite unequivocally that

“The Defendant was duly served with the originating processes.”

Ordinarily this Court cannot reopen the issue of whether there was service on the Applicant as it is *functus officio* in respect thereof. In order to empower this Court to competently revisit the issue, the Applicant must establish the alleged misrepresentation and fraud perpetrated on this Court by the Respondent (particularly in respect of service of the originating processes) towards obtaining the Judgment of 23rd November 2017. – see **REMAWA V. NACB CONSULTANCY & FINANCE CO LTD & ANOR (SUPRA) AT PP. 19 – 20 PARAS. C-D.**

It is thus trite law 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;

and

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

On the steps available to a party seeking to set aside a judgment on the ground of fraud, illegality, misrepresentation or mistake, it has been held that the procedure is either the process of appeal to a higher court that a judgment allegedly obtained by fraud be set aside or 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 (SUPRA) 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 (SUPRA) AT PP. 19 – 20 PARAS. C-D.

It has nevertheless also been held that a party who wishes to set aside a judgment obtained by fraud may also approach the same Court that delivered it by motion. – see **OLADOSU & ANOR V. OLAOJOYETAN & ANOR (2012) LPELR-8676(CA) AT PP. 22 – 23 PARAS. E – B** and **FASUBA V. ADUMASI & ANOR (2015) LPELR-24548(CA).**

Generally therefore, 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. It is however imperative to note that 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**

and

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

In the instant case, the Applicant chose to apply by way of the instant Motion No. M/6734/22 to this Court to set aside its Judgment in this suit delivered on 23rd November 2017 on grounds of misrepresentation and fraud by the Respondent. I have mentioned that although the Applicant alleged non-service of originating processes on him, he copiously alleged misrepresentation and fraud in obtaining the Judgment against him from this Court without service.

The Respondent however alleged that the Applicant was served with the necessary court processes in this suit and indeed relied on an affidavit of bailiff of this Court to the effect that the Applicant was served with originating processes before Judgment was delivered against him by this Court. The Applicant however insisted that he was not served and continued to allege fraud and misrepresentation in the service.

Outside of the affidavit in support of the instant application, the Applicant has seen it fit to file 3 further affidavits in support all alleging various facts in respect of fraud and misrepresentation on the issue of service. The Respondent itself filed 5 further counter-affidavits aside of its Counter-Affidavit. All in all, there are a total of 10 affidavits of facts before this Court on the issue of fraud and misrepresentation. There are therefore

issues of fact to be considered by this Court in this application. With all the limitations of affidavit evidence, it is clear that a simple motion would not be appropriate to determine the issue of fraud and misrepresentation before this Court in this application. – see **FALAKI & ORS V. FAGBUYIRO & ORS (SUPRA)**.

The case of **HALID PHARMACEUTICALS LTD V. SOLOMON (SUPRA)** appears to have similar facts as the instant case before this Court. In that case the Appellant had sued the Respondent under the undefended list procedure for a sum of money. The Respondent was said to have been served with the Court Processes by substituted means in accordance with the *ex parte* order of the trial Court. After judgment was entered in favour of the Appellant, the Respondent's properties were attached and sold by the Bailiffs in satisfaction of the Judgment debt. The Respondent by a motion on notice sought orders *inter alia* to set aside the order of substituted service and the execution thereof on allegations bothering on fraud. The trial Court consequently set aside its judgment. Dissatisfied with the decision, the Appellant appealed to the Court of Appeal. In its decision, the Court of Appeal held that the appeal had merit and same was accordingly allowed. The Court of Appeal held that the proper manner of impeaching a judgment alleged to have been obtained by fraud in the same Court is by filing a fresh action. The Court of Appeal held per Aboki JCA (delivering the lead Judgment) **AT P. 30 PARA. A** as follows;

“A Court action for any claim which is based on an allegation of fraud must come before the Court by way of a writ of summons and not by way of a motion on notice.”

The Court of Appeal further held per Abiru JCA as follows **AT P. 32 PARAS. A-D**;

“It is trite law that the options opened to a party seeking to set aside a judgment on the ground of fraud in the same Court that entered the judgment or in a Court of coordinate jurisdiction is to commence a fresh action, and not to proceed by way of a motion. The rationale

for this is obvious. An allegation of fraud is criminal in nature and it is settled that an allegation of a criminal nature, be it in a civil or criminal proceeding, must be proved beyond reasonable doubt Nnachi V. Ibom (2004) 16 NWLR (Pt 900) 614, All Nigeria Peoples Party V. Independent National Electoral Commission (2010) 13 NWLR (pt 1212) 549 and Adewale V. Olaiifa (2012) 17 NWLR (pt 1330) 478. This entails averment and proof of fresh facts and circumstances and this can only be properly done in a fresh action.”

In view of the avalanche of allegations of fact contained in the multiple affidavits before this Court which issues of fact this Court must determine on the allegations of fraud and misrepresentation, it is clear that the procedure of approaching this Court by the instant motion to set aside its Judgment of 23rd November 2017 is not proper. The Applicant’s option lies on appeal to the Court of Appeal to set aside this Court’s Judgment on allegation of fraud. If the Applicant wishes to approach this same Court that delivered the judgment to set same aside on his allegations of fraud and misrepresentation, he ought to do so by a fresh action considering the circumstance.

The instant application to this Court to set aside its Judgment delivered on 23rd November 2017 on grounds of fraud and misrepresentation based on the issues of fact placed before this Court is thus improper. The application is therefore incompetent and it is accordingly struck out.

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Honourable Justice M. E. Anenih

APPEARANCES:

Henry O. Chichi Esq appears with Boniface Adagonye Esq, TolulopeD. Odubanjo (Ms) and Deborah I. Awojuola (Ms) for the Judgment Creditor/Respondent.

Douglas Najime Esq appears for the Judgment Debtor/Applicant.