IN THE HIGH COURT OF JUSTICE
FEDERAL CAPITAL TERRITORY OF NIGERIA
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT APO – ABUJA
ON, 29TH DAY OF SEPTEMBER, 2022.
BEFORE HIS LORDSHIP:- HON. JUSTICE A. O. OTALUKA.

SUIT NO.:-FCT/HC/CV/2635/16
MOTION NO.:-FCT/HC/M/2514/17

BETWEEN:

MR. FRANK EZEIGBO:.....CLAIMANT/RESPONDENT

AND

MR. ANENE IKECHUKWU:…….DEFENDANT/APPLICANT

Stella Amusi for the Defendant.
Claimant unrepresented.

RULING.

By a Motion on Notice dated and filed the 25th day of February, 2017, the Defendant/Applicant brought this application seeking the following orders:

1. An order of this honourable (Court) extending the time within which the Defendant/Applicant can apply to set aside the judgment delivered in this suit on the 19th day of January, 2017, in default of defence and appearance.
2. An order of this honourable Court setting aside its judgment delivered in thissuit on the 19th day of January, 2017, same having been obtained in default of appearance and defence.
3. An order of this honourable Court granting the Defendant/Applicant leave to defend the suit as per the notice of intention to defend filed alongside and exhibited in this application.

4. And for such further or other orders as this honourable Court may deem fit to make in the circumstance in the overall interest of justice.

Deposing to the supporting affidavit on behalf of the Defendant/Applicant, one Mr.IfebunachiOnwe, an associate counsel in the law firm of the Applicant's solicitors, averred that the Defendant/Applicant was served with the originating processes in this suit on the 14th day of December, 2016 and was informed by the Bailiff of Court that the matter was fixed for hearingon the 16thday of December, 2016, which was less than 5 days as prescribed by the Rules of Court.

He averred that the Applicant briefed his counsel on the same 14th December, 2016 in which he was served with the originating processes, to prepare and file the necessary process on his behalf. That when the counsel got to Court on the 16th December, 2016 to find out what transpired in Court, he was informed that the Court did not sit and that his enquiry as to the next adjourned date was not readily answered.

The Deponent averred that he reasonably believed that the Defendant/Applicant would be served with a hearing notice to intimate him of the next adjourned date, and that due to the vacation of Court which commenced on the 19th day of December, 2016, he was not able to immediately prepare and file the notice of intention to defend.

He stated that very early in January, they prepared the notice of intention to defend but that the Defendant/Applicant could not return to Abuja on time to sign the accompanying affidavit as he was in his village in Anambra State taking care of the medical needs of his mother who had some health issues during the Christmas holidays.

That as a result of running around to take care of his mother the Defendant/Applicant broke down and was diagnosed and treated for acute malaria which kept him grounded.

He averred that after the Defendant/Applicant became a bit stabilized and settled, and returned to Abuja, ready to come to Court to sign the affidavit accompanying the notice of intention to defend, he got to Court on the 24th day of January, 2017 with the intention of filing the notice of intention to defend, but decided to check with the Court first to ascertain the next adjourned date in the matter since the Defendant/Applicant was not in receipt of any hearing notice. That he was then told that judgment had already been delivered in the matter on the 19th day of January, 2017.

The Deponent averred that there was no hearing notice served on the Defendant/Applicant intimating him that hearing in the matter had been adjourned to the 19th day of January, 2017, and that judgment was delivered in the matter in default of the Defendant/Applicant's defence.

He stated that the Defendant/Applicant has a very good defence on the merits to the claims of the Claimant in the suit and that the failure of the Defendant to file his notice of intention to defend was borne out of ill health and not out of laxity or disregard to the Rules of this Court.

In his written address in support of the application, learned Applicant's counsel, Mr.ChikeAdaka, raised a lone issue for determination, to wit;

> ***"Whether the Applicant has made out a case for the grant of the reliefs sought in this application?"***

The learned counsel in his arguments on the issue so raised, posited that this Court has powers under its Rules, to set aside

judgment delivered in default of appearance and/or defence of the Defendant at the hearing of the matter. He referred to Order 13 Rule 6, Order 25 Rule 9 and order 35 Rule 5 of the High Court of the FCT, Abuja (Civil Procedure) Rules, 2018.

He contended that the Rules of Court are replete with provisions which enable the Court to set aside its own judgment for default of appearance and/or defence, because the cardinal objective of the Court is always to strive to deliver judgment on the merits after both sides to the case have been heard.

He referred to **Chief L.L.B. Ogolo v. Joseph T. Ogolo (2006) LPELR-2311 (SC)** on the conditions underwhich a Court can set aside its default judgment. He argued that the Defendant/Applicant has satisfied all the conditions stipulated by the Supreme Court in the said case.

Learned counsel contended that the Applicant has by his affidavit evidence shown that the reason for the failure to file a defence within the time prescribed by the Rules was due to ill health of both the Defendant/Applicant and his aged mother, and not out of laxity or disregard for the rules of this Court.

Also, that the Applicant has equally not delayed in bringing this application as same was promptly filed immediately it was learnt that judgment had been delivered in default of appearance and defence by the Defendant/Applicant.

He further contended that the Claimant/Respondent would not suffer any embarrassment or prejudice should the Defendant/Applicant be allowed to defend this suit on the merits.

Arguing further, learned counsel contended to the effect that the failure to serve the Defendant/Applicant with hearing notice in respect of the proceedings of the 19th day of January, 2017,

in which default judgment was entered in favour of the Claimant/Respondent, is a grave and fundamental defect in the proceedings of the said date. He referred to **Ogbueshi Joseph O.G. Achuzia v. Wilson Fidelis Ogbomah (2016)LPELR-40050(SC).**

He urged the Court to incline towards justice, which entails that all parties to a suit ought to be afforded the opportunity to state their side of the case, and grant this application.

Following the filing of a counter-affidavit by the Claimant/Respondent, the Defendant/Applicant filed a 17 paragraphs Further and Better Affidavit and Reply on points of law.

He averred that the return date clearly written on the Writ of Summon served on the Defendant, was 15th December, 2016 and that no hearing notice with a return date of 19th January, 2017, was served on the Defendant alongside the Writ of Summons.

In his Reply on points of law, learned Defendant/Applicant's counsel submitted, on the issue of whether the judgment of this Court in this case, under the undefended list is a default judgment or a summary judgment; that the judgment delivered in this suit on the 19th day of January, 2017, is a default judgement even though same was delivered in a procedure which ordinarily may result in a summary judgment, on the merits if both parties had participated, or were heard on the merits of the case.

He argued that the non-appearance or non-participation of the Defendant in the proceedings that gave rise to the judgment, made the judgment a default judgment. He referred

to**Emmanuel Maduike v. Tetelis Nigeria Limited (2015) LPELR-24288(CA).**

Relying on **Chief Emmanuel Bello v. INEC (2010)LPELR-767(SC),** he posited that the law is equivocal that a default judgment can be set aside by the same Court that delivered it, provided that the defendant shows good cause why same should be set aside.

On whether this Court can set aside its own summary judgment under the undefended list procedure, learned counsel posited that if a summary judgment is entered by a Court on the merits, after having considered and determined that the defendant lacked any real defence to the claims of the Claimant, then it would not be possible to set same aside.

He argued however, that since the fact and the uncontradicted evidence, is that the judgment in this case, was delivered in default of the appearance or defence of the Defendant, same is not a summary judgment on the merits, but a default judgment. He contended that the law is trite that a Court of law, in addition to the powers conferred on it by the provisions of the Rules, also has the inherent jurisdiction to set aside its own judgment given by default of appearance or defence. He referred to **Okafor v. A.G. Anambra State (1991)6 NWLR (Pt.200)659** and **Isijola v. Elaiti State Micro Credit Agency (2014) LPELR-22708(CA).**

On whether this Court has jurisdiction to entertain the application of judgment debtor, having been functus officio, learned counsel posited that this Court has the jurisdiction to entertain this application since the rules of this Court has made adequate provisions for hearing of such applications and since this Court also has the inherent jurisdiction to entertain this type of application.

He referred to **Augustine I. Odigwe v. Judicial Service Commission, Delta State (2010) LPELR-4678(CA).**

He contended that the judgment delivered on the 19th day of January, 2017 was not delivered on the merits, and that as such, this Court has the inherent jurisdiction to entertain this application so as to ascertain whether the reasons for the non-appearance of the Defendant are genuine enough to warrant an order setting aside the default judgment.

On whether the Court was fair in its hearing; learned counsel contended that the proceedings of this Court which took place on the 19th day of January, 2017, was conducted in manifest and obvious breach of the rules of fair hearing and the rights of the Defendant. He argued that the Defendant/Applicant has established that he was not served with any hearing notice intimating him of the fact that hearing in the matter had been adjourned to the 19th day of January, 2017, which means that the proceedings of 19th January, 2017, was conducted without any form of notification to the Defendant/Applicant.

He referred to **Ogbueshi Joseph O. Achuzia v. Wilson Fidelis Ogbimah (supra).**

Learned counsel submitted that the principle of fair hearing entails that a person must be afforded the opportunity of stating his own side of the case before judgment is delivered against him. He argued that the surest way of affording a person of this opportunity to present his own side of the case is to give him notice of the date, time and place where proceedings in the matter affecting him will be conducted, heard and tried.

He referred to **S.B.N. PLC v. Crown Star & Co. Ltd (2003)6 NWLR (Pt.815)1.**

Relying on **Ikechukwu v. Nwoye&Anor (2013)LPELR-22018(SC),**he posited that the current inclination and disposition of the Courts in Nigeria is favourably leaned towards the doing of substantial justice, based on the merit of each case, rather than technical justice.

He urged the Court to discountenance the misconceived arguments of the Claimant/Respondent, and to grant the application, by setting aside the default judgment delivered on the 19th day of January, 2017, to pave the way for a just determination of the suit on the merits, in the overriding interest of justice.

In opposition to the application, the Claimant/Respondent filed a 16 paragraphs counter affidavit deposed to by one Edmund Osunde, Esq, wherein he averred that the Judgment Creditor/Respondent's Writ clearly marked "undefended list", was personally served on the Judgment Debtor on 13th December, 2016 alongside a hearing notice with a return date for 19th January, 2017.

He stated that the Judgment Debtor neglected and failed to file any notice of intention to defend and a defence for over a month and failed to appear in Court or send a representative on the return date, being 19th January, 2017, on which date, the Court, upon proper consideration of the Judgment Creditor's claims, gave judgment in favour of the Judgment Creditor.

In his written address in support of the counter affidavit, learned counsel for the Claimant/Respondent, OnyekachiUmah, esq, raised five issues for determination, namely,

(i) Whether the Judgment of this Court in this case under the undefended list is a default judgment or summary judgment?

(ii) Whether this Court can set aside its own summary judgment under an undefended list procedure?
(iii) Whether this Courthas jurisdiction to entertain the application of judgment debtor having been functus officio?
(iv) Whether the Court was fair in its hearing?
(v) Whether the Judgment Creditor is entitled to cost?

Arguing issues (i)-(iii) jointly, learned counsel posited that it is trite that judgments under the undefended list are summary judgments, and as such, final.

That they are not default judgments.

He argued that default judgment is interlocutory and one borne out of failure to enter appearance or file a defence in a matter in general cause list.

Placing reliance on **Sodipo v. Leminkainen (1986)1 NWLR (Pt.15)220,** he posited that summary judgment is a final judgment of Court and can only be set aside on appeal since it is a judgment given on merit for want of a defence by a defendant.

Learned counsel posited that there are three types of summary judgments, one of which is summary judgment under the undefended list procedure, which is a special procedure of its own class and uniqueness. He referred to Order 21 of the FCT High Court (Civil Procedure) Rules, 2004 (now Order 35 of the High Court of FCT, Abuja (Civil Procedure) Rules, 2018), and **ITB PLC v. KHC Ltd (2006) 15 NWLR (Pt.968) 443 at 4458-459.**

He contended that the judgment in this case which was given under the undefended list procedure, is final and on merit as a summary judgment and not a default judgment, and that such

summary judgment cannot be set aside by this Court who is now functus officio, and that the matter is res judicata.

On the 4th issue of whether the Court was fair in its hearing; learned counsel posited that fair hearing is not an endless wait by a Court, and a party for an indolent party and his representatives. He submitted that equity aids the vigilant and not the indolent.

On issue (v) on whether the Judgment Creditor is entitled to cost; learned counsel argued that the Judgment Creditor has expended money to retain the services of counsel to oppose this incompetent application. That the Judgment Creditor is thus entitled to costs for the unquantifiable and quantifiable energy and resources wasted on this application.

He referred to **International Offshore Construction Ltd and 3 Ors v. Shoreline Lifeboats Nigeria Limited (2003) 16 NWLR (Pt.845**) and**Rewane v. Okotie-Eboh (1960)SCNL 461,** on the propriety of awarding cost of litigation.

He urged the Court not to grant the prayers of the Defendant/Applicant, but to award cost against him.

From the submissions of both the learned Applicant's and Respondent's counsel, the cardinal issue for consideration in the determination of this application, is **whether the judgment of this Court, delivered on the 19th day of January, 2017, coram Hon. Justice I.U. Bello, was a summary judgment or a default judgment?**

Default judgment was defined by the Supreme Court, per Kabiri-Whyte, J.S.C. in **U.T.C. (Nig) Ltd v. Pamotei (1989)2 NWLR (Pt.103)244 at 282-283**, as:

"… a judgment detained by a Plaintiff in reliance on some omission on the part of the defendant in respect of something which he is directed to do by the rules".

Default judgment is therefore, judgment given strictly in default of appearance or pleading. – **Bello v. INEC &Anor (2010) LPELR-767(SC).**

A person, against whom default judgment is given, is allowed in law, to move to set aside the default judgment and to seek liberty to defend the action.

See **Oduola&Ors v. Coker &Ors (1981) LPELR-2254(SC).**

Default judgment is categorized into two;

1. Judgment obtained in default of appearance, which is governed by Order 10 Rules 2-10 of the High Court of the FCT, Abuja (Civil Procedure) Rules, 2018, and;
2. Judgment obtained in default of pleadings, and this is governed by Order 21 of the same Rules of this Court.

Judgment obtained under any of the above orders and rules of this Court, may be set aside by the trial Court on proper application by the defendant pursuant to Order 10 Rule 11 or Order 21 Rule 12 of the Rules of this Court, as may be applicable.

In respect of summary Judgment, the Court of Appeal stated the nature thereof in **Kehinde v.Okparaonu (2013)LPELR-21926(CA),** per Ige, JCA, thus:

"A summary judgment is a procedure for disposing with dispatch, cases which are virtually uncontested. It is also applied to cases where there can be no reasonable doubt that a Plaintiff is entitled to

judgment and where it is inexpedient to allow a defendant to defend for mere purpose of delay".

It follows that a summary judgment, is one on the merits even where there was no appearance or pleadings by the defendant.

Thus, where from the case as presented by the Claimant, the Court is satisfied that the defendant would have no reasonable defence to the claims of the Claimant, and that proceeding to trial would only amount to sheer delay, the Court is entitled to enter judgment summarily for the Claimant, and such judgment is one on the merit and may only be set aside by the appellate Court.

In **NASCO Town PLC &Anor v. Nwabueze (2014)LPELR-22526(CA),** the Court of Appeal, perAugie, J.C.A held that:

"ASummary Judgment is one that is given in favour of a Plaintiff without a plenary trial of the action. Although not preceded by a trial, a summary judgment is one on the merits."

Quoting from Nwadialo's "Civil Procedure in Nigeria", 2nd Ed.; the Court noted that:

"…a summary judgment is based on want of defence to the Plaintiff's claim by the Defendant, and a full trial of the action cannot alter this situation. A summary judgment, therefore, unlike a default judgment, cannot be set aside by the Court that granted it,or any Court. It is only on appeal that this can be done."

In the instant case, the Respondent initiated the substantive suit vide the undefended list procedure (presently governed by Order 35 of the Rules of this Court), wherein he deposed, in his supporting affidavit, to fact of his belief that the Applicant herein

had no defence to his claim. He supported his claim by exhibits which clearly showed the Applicant's admission of the Respondent's claim and his undertaking to pay same.

Although the Defendant/Applicant was entitled to file a notice expressing his intention to defend the suit, if he so wished, the Court is however, empowered by the Rules (Order 35 Rule 4), to hear the suit as an undefended suit and enter judgment accordingly, where, as in this case, the Defendant/Applicant failed to file any notice of intention to defend the suit.

Judgment entered in such circumstance, is not entered on the basis of default of appearance or pleading by the defendant. Rather, it is entered on the basis of the Court's satisfaction, by the evidence before it, that the Claimant is entitled to his claim and that the defendant has no valid or reasonable defence to the Claimant's claim.

That was the scenario that played out in respect of this case.

It follows therefore, that the judgment in this case delivered on the 19th day of January, 2017, is, forall intents and purposes, a summary judgment on the merits, and it is the settled position of the law, that only the appellate Court can set same aside, if necessary.

This Court thus, lacks the jurisdiction to grant the reliefs sought by the Applicant in this application.

This application is therefore, dismissed as this Court is functus officio in relation to this case.

HON. JUSTICE A.O. OTALUKA
29/09/2022