

**IN THE HIGH COURT OF JUSTICE OF THE  
CAPITAL TERRITORY ABUJA  
IN THE ABUJA JUDICIAL DIVISION  
HOLDEN AT MAITAMA - ABUJA**

**BEFORE: HON. JUSTICE O. C. AGBAZA**

**COURT CLERKS: UKONU KALU, GODSPOWER EBAHOR & ORS**

**COURT NO: 6**

**SUIT NO: FCT/HC/PET/51/2016**

**MOTION NO: M/4191/2021**

**BETWEEN:**

**MRS. TIMYA PONFA VONGKUR.....PETITIONER**

**VS**

**ENGINEER PONFA VONGKUR.....RESPONDENT**

**RULING**

By a Motion on Notice with No. M/4191/2021 dated 29/6/2021 but filed on 5/7/2021, brought pursuant to Order 43 Rules 1 and 2, Order 60 Rule 8 of the FCT High Court (Civil Procedure) Rules 2018, Section 36 (1) of 1999 Constitution (As Amended) And under the inherent jurisdiction of the Hon. Court, the Applicant pray the court for the following reliefs;

1. An Order of this Hon. Court setting aside its Order made on the 21<sup>st</sup> day of June 2021 foreclosing the Defence of Respondent/Applicant and adjourned the matter to the 14<sup>th</sup> day of July, 2021 for Adoption of Final Written Address.
2. An Order of this Hon. Court granting leave to the Respondent/Applicant to re-open his Defence by arguing his

Notice of Preliminary Objection dated 29/6/2021 and filed before this Court.

3. And for such further Order(s) as this Hon. Court may deem fit to make in the circumstances.

In support of the Motion is an affidavit of 8 Paragraph sworn to by Abah Jukalt Gloria with three (3) Exhibits attached marked "A" "B" and "C". Also filed a Written Address and adopts the Address, in urging the court to grant in the interest of justice.

In response to the Motion, Petitioner/Respondent filed a Counter-Affidavit of Five Paragraph dated 23/7/2021 and sworn to by Petitioner herself with one annexure attached marked "A" filed a Written Address and adopts the Address, in urging the court to dismiss the Motion.

In the Written Address of Applicant settled by L.T. Jimam, alone issue was submitted for determination and that is;

"Whether the Applicant is entitled to the reliefs he sought before this Hon. Court?"

Answered the questions in the affirmative and submitted that the court has jurisdiction to grant all the reliefs of Applicant. Cited Order 43 Rules 1 and 2 and Order 10 Rule 11 of Rules of Courts and cases of Dike Vs State (2018) 13 NWLR (PT. 1635) 41 Para D – G, Adebisi Vs Adekanbi (2018) 16 NWLR (PT. 1645) 256. He submitted that if Applicant is not allowed to enter his Defence, will amount to denial of fair hearing as envisaged in Section 36 of 1999 Constitution (As Amended). Also referred the Court to

Olayioye Vs Oyelaran (2019) 4 NWLR (PT. 1662) 372 Paras E – H. Further submitted that Applicant in his affidavit has adduced convincing reasons to warrant the exercise of court’s discretion in his favour. Also submitted that its trite law that any Judgment or proceeding obtained or conducted in breach of right to fair hearing is null and void. Cited Wagbatsoma Vs FRN (2018) 8 NWLR (PT. 1621) 221 Para E. That the Applicant, from the depositions in the affidavit is desirous of prosecuting his Defence to Petitioner’s case as same have been filed before court. Submitted that the court has inherent jurisdiction to set aside its Judgment on the basis of the facts stated in the affidavit of Applicant and referred to Exxon Mobil Corp Vs Archianya (2018) 14 NWLR (PT. 1639) 247 – 248. Also submitted that the Applicant inability to enter Defence was caused by Counsel and court should visit the mistake or inadvertence of Counsel on Litigant. Referred to Rasaki Vs Ajijiola (2018) 7 NWLR (PT. 1617) 18.

In the Written Address of Petitioner/Respondent Counsel for Petitioner/Respondent Ese. Bolokor Esq formulated two (2) issues for determination;

1. Whether the Respondent/Applicant is entitled to the reliefs sought.
2. Whether the Respondent/Applicant can pray the court to reopen his Defence when he has not filed a Defence in this suit.

On issue 1, submitted that from the inception of this matter, the Petition for dissolution of marriage, hearing notices and other processes have been served on Respondent by substituted means pursuant to leave of Court

granted. Submitted that the Respondent/Applicant has affirmed in his affidavit that he received Hearing Notice and was represented by Counsel when the matter came up for report of service/mention and also when it was adjourned for Defence. That having been put on Notice that a suit has been instituted against him before this court, he was represented by Counsel on 7/3/2017 and sought an adjournment to file Answer to the Petition which court graciously granted. That he never bother to come to court to find out the position of the matter until he was served with Hearing Notice for Defence and till date he never filed Answer or his Defence to the Petition.

On his reliance on Order 10 Rule 11 of Rules of Court, submitted the Rules are not sacrosanct as it conditions. That having failed to fulfill the conditions prescribed by the Order it becomes impossible for court to exercise its discretion in his favour as there is yet no Answer to the Petition. Also submitted Respondent cannot claim ignorance or mistake of his Counsel as excuse, as he never appeared before court for the years since the suit was instituted.

On the case of Dike Vs State cited, submitted that it does not apply as records of court will show he was served hearing notice and every adjourned date and therefore was afforded fair hearing. Submitted Respondent is not entitled to the reliefs sought. In all of these submission cited some judicial authorities; Dr. N.E Okoye & Anor Vs Centrepont Merchant Bank Ltd (2008) 164 LRCN, 1, Owodunmi Vs Registered Trustee Celestial Church of Christ (2008) All FWLR (PT. 421) 824.

On issue 2, submitted that the Respondent has not entered Defence in this suit. That under the Rules of Court, he has 14 days after being served with a Claim to file and another 14 days to file Defence. That since he was served with the Petition in 2017, has not filed a single process to show he intends to Defend. That he has filed series of Motions to frustrate Petitioner, delay course of justice and waste time of court.

I have carefully considered the affidavit evidence on both side and the submission of Counsel as well as the judicial authorities cited, the court finds that there is only one (1) issue that can be distilled for determination in this instant which is;

“Whether the Applicant has placed before the Court cogent and sufficient facts to warrant the grant of the reliefs sought in the application?

The grant or otherwise of the application of the Applicant is at the discretion of court and in exercising that discretion, the courts are enjoined to exercise it judicially and judiciously. And to be able to do so, the Applicant must place before the court cogent and sufficient facts to rely on. See *Anachebe Vs Ijeoma* (2015) All FWLR (PT. 784) 183 @ 195 Para D – F, the Apex court held:

“The discretion vested in a court is required to be exercised judicially and judiciously as it entails application of legal principles to relevant facts/materials to arrive at a just/equitable decision. It is thus not an indulgence of a judicial whim, but the exercise of judicial judgment based on facts guided by the law or the equitable decision”

In this instant application, the facts relied on by Applicant are in Para (a-v) and 4 of the supporting affidavit. On the other hand, Petitioner/Respondent relied on the facts in Para. 4 (a-i) of their Counter-Affidavit as basis for court to refuse the application.

Now, it is trite that a court of law have jurisdiction to set aside its own judgment or order. And this can only be done where the conditions for doing so have been met by the party seeking such Order to set aside. In *Sanusi Vs Ayoola* (1992) 9 NWLR (PT. 265) 275, the Supreme Court set out the conditions as follows;

1. That the Judgment or Order is tainted with fraud or irregularly obtained.
2. That the Applicant must show good reasons for being absent at the hearing.
3. That the Applicant must show an arguable Defence to the action which is not manifestly unsupportable.
4. That the conduct of Applicant throughout the trial must not be such as is not condemnable but deserving sympathy.

See also *INEC Vs Maduabum* (2008) LPELR – 4316 (CA).

The question here is; whether the Applicant has fulfilled any of the conditions stated above to warrant the exercise of the court's discretion in his favour?

In this instant application, the Applicant stated that, though he was served with Petition and other processes in this suit sometime in 2017, he has not

filed his response to the said Petition due to its incompetency which robbed the court of jurisdiction to hear and determine same. Also stated that on 7/3/2017 when the matter came up for report of service, was absent in court but was represented by Counsel who sought adjournment and Counsel did not inform him of next adjourned date despite several attempts made to liaise with him to know what transpired. He also stated he was not served with Hearing Notice on 5/11/2018, 27/2/2019, 26/3/2019 when the matter came up for Hearing. That he was only given a Hearing Notice of the proceedings of 5/11/2018 and brief Counsel to represent him. That on 14/3/2019 his Counsel appeared in court and the matter was adjourned off record to 10/7/2019 for Defence and on the said date court did not sit and was adjourned to 11/11/2019 and court also did not sit and later adjourned to 15/12/2020. That on 15/12/2020 he was foreclosed from Defence upon application by Petitioner's Counsel and the matter adjourned to 9/3/2020 for Adoption of Address.

He further stated that sometime in October, 2019 gave Notice of Preliminary Objection to a colleague to help him file before this court but failed to file it. Later it was filed and on 25/11/2020 when it came up for hearing, some typographical errors in the Written Address accompanying the application was discovered and the court ordered that it be refiled and the matter was adjourned to 21/6/2021 for hearing the application. That on 21/6/2021, was not in court because of ill-health and asked a Counsel to hold his brief and court struck out all the pending applications. And adjourned the matter to 14/7/2021 for adoption of Final Written Address. That Applicant has refiled same Notice of Preliminary Objection and

seeksthe court to allow him move and argument. That the inability of Applicant to enter Defence and/or take a step in the matter is never intentional. All of these facts are contained in Para 3 (a-t) of the supporting affidavit to his application.

Petitioner/Respondent, on the other hand, stated that at every adjourned date on the matter, Hearing Notices were served on the Applicant and they are before the court. That when Petitioner closed her case on 26/3/2019 and Hearing Notice for Defence served on Applicant that was when he filed Memorandum of Conditional appearance sometime April, 2019. That, though he filed Memorandum of Conditional appearance, up until when he was foreclosed from Defence on 15/1/2020, had not file any process before court.

In the determination of the contentions of the parties, the court shall look at its records and this is empowered to do. See *Agbareh Vs Mimrah* (2008) 2 NWLR (PT. 1071) 378. See also *Okoro Vs Okoro* (2009) LPELR – 8413 (CA). I have looked at the records of court and find that the claim of Applicant that he was not served with Hearing Notice of this suit is not correct. Indeed, at every adjourned date up to hearing of the Petition, the Applicant was served with Hearing Notices. Again there are contradiction of facts. For instance he stated that on 21/6/2021 when the matter came up for Defence, he was not in court because of ill-health and requested a Counsel T.V. Gujor Esq. to hold brief. However, from the records of court it's a different story as the said Counsel he asked to stand in told the court that his car broke down on his way to attend court from Jos as reason why he could not make it to court. The Applicant has not shown seriousness



and not diligent in the prosecution of this matter having been accorded every opportunity to present his Defence. He has not fulfilled any of the conditions set out by law for court to consider and exercise its discretion in his favour. It is on this basis I shall refuse the relief 1 of the application as there must be an end to litigation.

On relief 2, of the application, based on the reasoning of the court in the consideration of the relief 1, I shall refuse the prayer of the Applicant to re-open his Defence. However, in doing so, I shall allow the Applicant move his Notice of Preliminary Objection 29/6/2021 and filed before the court.

Consequently, the Notice of Preliminary Objection of Applicant dated 29/6/2021 and filed before this court is adjourned to 23/2/2023 for Hearing.

This is the Ruling of the Court.

**HON. JUSTICE C.O. AGBAZA**

Presiding Judge.

5/12/2022

**APPEARANCE:**

T.V. GUJOR HOLDING BRIEF OF L.T JIMAM – FOR THE  
RESPONDENT/APPLICANT

ESE BOLOKOR – FOR THE PETITIONER/RESPONDENT