

**IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT GARKI, ABUJA.**

**CLERK: CHARITY ONUZULIKE
COURT NO. 10**

**SUIT NO: FCT/HC/CV/480/19
DATE: 12/1/2023**

BETWEEN:

DUKE OIL COMPANY INCORPORATED..... PLAINTIFF

AND

ONTARIO TRADING SA DEFENDANT

RULING

(DELIVERED BY HON. JUSTICE SULEIMAN B. BELGORE)

In this Motion number M/7047/2021 that is filed and dated the 21/10/2021 which is brought pursuant to Order 7 Rule 8, Order 21 Rule 12, Order 32 Rule 5(2) and (3) of the Rules of this Honourable Court prayed for the following orders:

- (1) **AN ORDER** extending the time within which the Defendant/Applicant may apply to vacate and set aside the Judgment of this Court in Suit No. FCT/HC/CV/480/19, delivered on 20th September, 2021, the time allowed by the Rules of this Court having elapsed.

- (2) **AN ORDER** vacating and setting aside the Judgment of this Honourable Court in Suit No: FCT/HC/CV/480/19 delivered on 20th September, 2021 for non-service of the Originating Process on the Defendant/Applicant and want of jurisdiction to entertain and determine the suit.

The eight (8) grounds upon which this application is predicated are as follows:

- (1) The 6 days period allowed by the Rules of this Court to set aside the default Judgment delivered on 20th September, 2021 has elapsed and the Defendant/Applicant has complied with the Rules of Court on default fees.
- (2) The Defendant/Applicant is a Company registered under the laws of Switzerland with the Head Office situate at 7, Place Du Molard, Geneva 1204.
- (3) No leave of Court was sought and obtained to issue and serve the originating processes out of the jurisdiction of this Court.
- (4) The Originating processes were not endorsed in line with the provisions of section 97 of the Sheriffs and Civil Process Act.
- (5) The Originating processes were not properly served on the Defendant/Applicant as required by the Rules of Court.
- (6) As a Corporate entity, the Defendant/Applicant cannot be served by substituted means.
- (7) The proper forum to determine the dispute between the parties is Arbitration under the Arbitration and Conciliation Act, Cap. 19, Laws of the Federation, 1990.
- (8) This Court lacks the powers to entertain the suit in its entirety.

In support of this Motion is an 11-paragraphs affidavit sworn to by one Edirin Oghenejode and a written address, a further affidavit was filed in reply to the counter-affidavit filed by the

Claimant/Respondent with an Exhibit attached and tagged ONTARIO 1 along with a reply address.

Mr. Cornelius Alaje relied on the two affidavits and adopted the two written addresses in support and finally urged the Court to grant their application and set-aside the Judgment delivered on the 20th September, 2021.

He contended while adumbrating in Court that, the application is premised on non-service of the Originating process on the defendant/applicant. He said the purported service in an address in Lagos is improper.

Another argument he proffered is that a Corporate entity like the Defendant cannot be served by substituted means since the exhibit attached to the further affidavit in its face does not speak the same language by not carrying the endorsement “to be served outside jurisdiction” is important and significant.

He finally argued that their prayer one is very clear as it applied for leave of Court to vacate and set-aside the judgment of this Court.

In response; the learned Silk, Mr. Ibrahim Idris SAN as Counsel to the Claimant/Respondent submitted that they have filed a counter-affidavit of 21 paragraphs. It is dated 27/10/2021 and filed same day. Annexed to it are 4 annexures marked A, B, C, D1 – D5 respectively. He relied on all the averments and annexures therein. Also, he referred to his written address and adopted same as his argument in urging the Court to refuse this application as lacking in merit.

By way of adumbration, he submitted that the applicant filed a further affidavit and that further affidavit is incompetent.

His reason is that it was not filed within 7 days. He referred to Order 43 Rule 1 (4) of the Rules. He said it was served on them on the 9/11/2021 while their counter-affidavit was served on them on the 1/11/2021. He concluded therefore that the only valid processes

before this Court is their Motion on Notice and his counter-affidavit.

He submitted further that all the arguments proffered is in respect of the 2nd leg of this application that is non-service. In the main affidavit, no material facts were placed before the Court as to why they did not apply to set-aside within 6 days. He said it is big issue why they did not apply to set aside within 6 days.

He then moved to paragraph 3 of the main affidavit in support and submitted that it violates the provision of Section 115 of the Evidence Act as the deponent did not tell the Court who is his informant and under what circumstances was he informed. The learned SAN now submitted that paragraph 3 is hearsay. He relied on the case of **WILLIAMS & ORS. VS. HOPE RISING VOLUNTARY FUND SOCIETY (1982) NSCC 36.**

Still submitting, he said there must be proof of payment of penalty. None is exhibited before the Court to see. On the issue of endorsement, he submitted that it is domestic affairs of the Court and that none of the parties can be punished for it if the Registrar make a mistake. He cited the case of **B B NIG. LTD VS. OLAYIWOLA & SONS LTD (2005) 3 NWLR (PT. 912) 434.**

On the issue of service, Mr. Ibrahim Idris SAN submitted that a Company can be served not only on its Head office as postulated by the defendant/Applicant's learned Counsel, but could be served as a matter of law anywhere they can be found. He relied on the case of **MOBIL PRODUCING NIG. LTD VS. DAVIDSON (2020) 7 NWLR (PT. 1722) 1.** He finally urged me to refuse this application.

In a short reply on point of law, the defendant/applicant learned Counsel said they were served with the counter-affidavit on the 1/11/2021 and their 7 days started to run from 2/11/2021 and that Sunday was the 7th day which is 7/11/2021 and eventually they filed the further affidavit on the 9/11/2021 which was 7th day by calculation of law.

I have considered this application for extension of time within which to apply to vacate and set aside the Judgment of this Court delivered in this case on the 20th September, 2021.

I have considered all the arguments proffered by both learned Counsel for and against the grant of this application. All their arguments are in record and incorporated. The learned Counsel to the Applicant formulated four issues for determination which are as follows:

- (1) Whether this Honourable Court can exercise its discretion in favour of the Defendant/Applicant by extending the time within which to apply to vacate/set aside the judgment of this Honourable Court delivered on the 20th day of September, 2021.**
- (2) Whether the Judgment of the Honourable Court delivered on 20th September, 2021 ought to be set aside for non-service and/or improper service of the Originating processes and other processes of the Court on the Defendant/applicant.**
- (3) Whether the Judgment of the Honourable Court delivered on 20th September, 2021 ought to be set aside for lack of jurisdiction for failure of the Claimant to seek the required leave of this Honourable Court to issue and serve the Originating processes and whether the failure to properly endorse the originating processes in line with the provisions of Section 97 of the Sheriffs and Civil Process Act does not vitiate the entire proceedings.**
- (4) Whether the Judgment of the Honourable Court ought to be set aside for mis-representation of facts, the Claimant having wilfully failed to call the attention of the Honourable Court to the proper mode of settlement of**

dispute between the parties in line with the agreement between the parties.

On issue one, the Defendant/Applicant learned Counsel submitted that provision of the Rules of this Honourable Court empowers the Court to extend the time within which the Defendant/Applicant may file the instant application to set aside the Judgment of the Court. He referred to Order 32 Rule 5(3) of the Rules of this Court and the case of **AYALOGU VS. AGU (2002) 3 NWLR (PT. 753) 171**.

He submitted further that they have given sufficient and cogent reasons for the delay in filing the requisite application to set aside the Judgment of the Court within the 6 days stipulated by the Rules. That they are not aware of the proceedings of the Court and the Judgment itself. And that they have raised fundamental grounds upon which the Judgment of the Court can be set aside, including issues of lack of jurisdiction of the Honourable Court to entertain the suit, non-service of the processes on the defendant, misrepresentation of facts and improper issuance and service of the Originating processes, all of which are germane to the validity of the case as a whole.

On the part of the learned SAN representing the Claimant/Respondent, it is his argument that in order for this Honourable Court to exercise its discretion in favour of the Defendant/Applicant certain considerations must be satisfied. Referring to paragraph 9 of the supporting affidavit, the learned Silk submitted that, the receipt for payment as provided by the Rules has not been exhibited before the Court as exhibit or annexure to the application. And as such submitted that all the prerequisite to warrant the exercise of the discretion of the Court in the favour of the applicant has not been fulfilled.

I have considered their arguments and submissions on this first issue as I am not prepared to beat about the bush in this Ruling. Order 32 Rule 5(3) of the Rules of this Court which is the most applicable Rule to the instant application provides as follows:

“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 of the default, proof of payment shall be attached to the application for extension of time”

Looking at this provision and comparing it with the application under scrutiny, it is conspicuous that the official receipts of payment for default is clearly missing and could not be found anywhere around the application or Motion paper. No wonder, the applicant’s learned Counsel cleverly ignored to respond to it while he was replying on points of law in Court.

In the case of **AINA VS. ABIODUN & ANOR (2005) LPELR-11197 (CA)**, the Appellate Court held as follows:

“Rules of Court are meant to guide and regulate the practice of law in our Courts and therefore command obedience to ensure equity and fair play. The said obedience is demanded from the parties, Counsel and the Court.....”

Also, in the case of **GOVERNOR OF NASARAWA STATE & ORS. VS. SHEWAZA & ORS. (2017) LPELR-44032 (CA)**, where the Appellate Court while considering a similar application on appeal held thus;

“The point has been made that a Court before which an application to set aside a default Judgment is brought must determine whether the applicant’s case is manifestly unsupportable.....In so doing, the applicant’s defence, which must be exhibited to his affidavit in support of the application set aside the default Judgment, has to be examined by the Court. The requirement that the applicant’s case must not be manifestly unsupportable can only be

judicially and judiciously settled when his defence is also scrutinized.....”

From all the above authorities, the Applicant has failed to fulfil the prerequisite conditions that would make it entitled to the favourable exercise of the Court’s discretion.

The big question now is that do I need to consider the remaining three issues formulated by the applicant, I do not think so.

The reason being that, before the Defendant/Applicant could proceed to the stage of setting aside the Judgment he has to cross the hurdle of extension of time within which he could that successfully.

Unfortunately, he was unable to cross the hurdle as he could not meet with all the conditions that would have made it entitled to the extension of time.

It is therefore, and for all the above reasons that I refused this application.

SIGNED
S. B. Belgore
(Judge) 12/1/23