

**IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY**  
**IN THE ABUJA JUDICIAL DIVISION**  
**HOLDEN AT GUDU – ABUJA**  
**DELIVERED ON THE THURSDAY 26TH DAY OF JANUARY, 2023.**  
**BEFORE HIS LORDSHIP; HON. JUSTICE MODUPE OSHO-ADEBIYI**  
**CHARGE NO.CR /19/2018**  
**MOTION NO: M/10277/2022**

**COMMISSIONER OF POLICE -----COMPLAINANT/APPLICANT**  
**FCT Police Command Abuja**  
**AND**  
**EPHRAIM EMEKA UGWUONYE ----- DEFENDANT/RESPONDENT**

**RULING**

Before this court are two (2) separate applications filed by the parties. The two motions were taken together in a consolidated hearing and this Ruling is in respect of both motions which will be dealt with separately. The Complainant/Applicant's Motion dated 27/08/2022 is brought pursuant to Section 36, 6(6) of the Constitution of the Federal Republic of Nigeria (as amended) 1999 and under the inherent jurisdiction of the Court. The Motion prays the Court for:

1. An order of this honourable court to grant leave for the Complainant/Applicant to move an application to set aside the order of this honourable court foreclosing his case made by the honourable court on the 14<sup>th</sup> of July, 2022.
2. An order vacating or setting aside the order foreclosing the complainant/Applicant counsel from concluding his evidence through his last witness Insp. (Paul Chaffi) IPO.

And for such further order(s) as the honourable court may deem fit to make in the circumstance of this case

The application is supported by a 34-paragraph affidavit deposed to by H. E. Ochai, a lawyer attached to Nigeria Police FCT legal section C.I.D Abuja. Attached are two documents; a page of a diary (Exh A) and Court processes titled "Notice of additional evidence pursuant to section 379(2) of the Administration of criminal justice Act, 2015 (Exh B) and written address. The deponent averred that the prosecutor and his last witness the (IPO) Inspector Paul Chaffi were in court on the 11/5/2022 but the defence objected to his testimonies as his name was not among the list of witnesses before the court and on that day the honourable court made an

order for the prosecutor to add the name of his last witness and serve on defence before the next adjourned date of 21/6/2022. That the prosecutor in compliance with the court directives/order, filed additional list of witness to include Inspector Paul Chaffi and served the Defence Counsel in their office before the 21/6/2022, when the application for foreclosure was made by the Defence. That the prosecutor E.O Ochayi Esq after proceeding of 11/5/2022 mistakenly recorded 28/6/2022 and 14/7/2022 for the sister case respectively instead of 21/6/2022. That their absence from court on 21/6/2022 was due to the inadvertent omission of the date in the prosecutor's diary and not deliberate. That the refusal of his last witness Inspector Paul Chaffi on the 11/5/2022 from given his testimony and subsequent directive/order of the court for them to file and serve the defence again the same document, was in error, as a similar document was earlier filed and served on the former defence counsel Ifeanyi Chukwu Esq since 10/5/2019. That the application made by the defence counsel to foreclose the prosecutor's case was made (Malafide) in bad faith. That the prosecuting counsel's inadvertent omission of entering 21/6/2022 date in his diary should not be allowed to suffer the case of his complainant as litigants should not be allowed to suffer inadvertent or mistake of his counsel. That it will be just for the Honourable court to set aside its earlier order foreclosing the prosecutor's case on the 14/7/2022 in the interest of justice. That they undertake to be diligent in prosecuting this case hence forth. That absence of both prosecutor and his last witness or letter to explain why they were not in the court on 21/6/2022 which resulted in the foreclosure was never intentional or deliberate.

Learned counsel in his written address raised a sole issue for determination to wit;

“Whether from the circumstances of this case the honourable court has the inherent power to set aside/vacating the court's order made on 14/7/2022”.

Summarily, counsel submitted that the honourable court has inherent power to set aside, vacate or discharge its order that was made without jurisdiction as there is no fair hearing, and the facts were concealed and misrepresented by the adverse party. Counsel further submitted that it is trite law that litigants should not be allowed to suffer due to inadvertent omission or mistake of his counsel as their Exhibit 'A' clearly showed that the date of the case was inadvertently omitted or not recorded by the prosecuting counsel in his diary which necessitated the application of the Defence to foreclose them on the 21/6/2022 while they

were absent from proceeding. Counsel also submitted that the sin of counsel, characterised by negligence or inadvertence, must not be visited on a litigant, except in extreme circumstance where it is established that the litigant has deliberately or tacitly aided or contributed to the condemnable dereliction on the part of counsel. Counsel submitted that the right to fair hearing is a fundamental constitutional right guaranteed by the constitution of the Federal Republic of Nigeria 1999 and a breach of it, particularly in trials vitiates such proceeding and render same null and void. That hearing cannot be said to be fair if any of the parties is refused hearing or denied the opportunity to be heard or to present his case of calling witnesses. It is the counsel's contention that the oral application made by the Defence counsel to foreclose the case of the prosecution on the 21/6/2022 was never contemplated by the Administration of criminal justice at 2015 i.e. from section 1 to the last section 495 of the Act as the court was misled by the Defence counsel to foreclose the prosecution's case without having recourse to the court order/directives to the prosecutor to file notice of additional list of witness which was compiled with despite earlier service of similar document on the Defence. Counsel urged that the order of foreclosure be vacated or set aside in the overall interest of criminal trials. Counsel relied on the following authorities amongst others; **FRN VS CHIEF MIKE OZEKHOME (SAN) 2021 LPELR 54666 (CA); UBA PLC VS MAGAMANIGERIA LIMITED & ANOR (2013) LPELR 20685 (CA); F.P.CO LTD VS NDIC (2007) 9 NWLR (PT-1039) 216; SAMBA PETROLEUM LTD & ANOR VS UNITED BANK FOR AFRICA (UBA) & 2 ORS (2010) 43 NSCQR 119 @ 137 and ADEYANJU VS WAEC (2002) 13 NWLR (PT-785) 479 @ 500, PARAS D-E (CA)**

Learned Counsel to the Defendant/Respondent filed an 8 paragraph counter affidavit deposed to by one Lovelyn Oluomachi Samuel, a legal practitioner in the law firm of Jeph C. Njikonye, SAN & Co., the counsel representing the Defendant in this case in opposition to the Complainant/Applicant's motion on notice for setting aside the order of foreclosure. The deponent averred summarily that from the record of this Honourable court and contrary to the deposition in the Applicant's affidavit that on 11/5/2022, Mr. E. O. Ochayi, represented the Complainant and applied for adjournment on the ground that his witness was not in court. That the basis of this Honourable Court ruling of 14/7/2022 foreclosing the Complainant was the want of diligent prosecution on the part of the Complainant, his lack of preparedness having sought for nine (9) adjournments on several occasions and not "on

misled application of the defence counsel," as averred by Applicant's. That this court has become functus officio with respect to the issues brought to this court by the Complainant/Applicant in this motion. That it is in the interest of justice that this application be dismissed.

In their written address, learned counsel to the Defendant/Respondent raised two (2) issues to wit;

1. "Whether the complainant/applicant has made out a case warranting the court to set aside its order of 14/07/2022.
2. Whether the honourable court having delivered its ruling with respect to the granting of order as prayed with respect to the defendant's application of may 11, 2022 has not become functus officio.

Summarily, learned counsel submitted that there is nothing in the well-considered ruling of this Honourable Court of 14/7/2022 indicating that any of the facts relied upon by the court in making the order was suppressed or concealed and none of the facts upon which the decision of this Honourable Court was based has been controverted by the Applicant in its affidavit in support of this motion on notice. Citing the case of **OKON UDOH AKPAN V. THE STATE (1991) 3 NWLR (PT. 182) 646**, Counsel submitted that based on the opinion of the Supreme Court in that case, this court was on a firm ground in closing the case of the Prosecution and the prosecution has not placed before this court, sufficient materials warranting the court to set aside its well-considered ruling. Counsel submitted that it is settled law that once a judge gives a decision or makes an order on a matter, he no longer has the competence or jurisdiction to give another decision or order on the same matter. That the only option left for an aggrieved party is to appeal the order. Thus, this application by the Complainant/Applicant to set aside the order made by the same court is not only functionless but legally untenable and indefensible. Counsel submitted that once a party mismanage the opportunity given to him to present its case like in this case, he cannot complain of his breach to fair hearing. That the Applicant demonstrated gross misapprehension of the provision of the ACJA upon which this court relied on to foreclose the prosecution which is that where the defendant appears and the prosecution does not appear, the court shall make such order as the justice of the case requires, citing **Section 353(1) of Administration of Criminal Justice Act**. Counsel urged the court to dismiss this application for being otiose, vexatious, terminally flawed and a gross abuse of the process of this Honourable Court with substantial cost. Counsel relied on the following authorities amongst

others; HERITAGE BANKING LIMITED V. N.U.C. (2014) 15 NWLR (PT. 1429) 76; MOHAMMED V. HUSSEINI (1998) 14 NWLR (PT. 584) 108; AYOADE V. STATE (2020) 9 NWLR (PT. 1730) 577 and NWOBIKE V. F.R.N (2022) 6 NWLR (PT. 1826) 293

I have gone through the processes filed by respective counsel and listened to their arguments and I have also read the record of proceedings. I find as follows: -

1. That the order for the prosecutor to add the name of his last witness and serve on defence was not made on 11/5/2022 as averred by the deponent but rather on 6/4/2022.
2. That it was only the prosecutor who was in court on 11/5/2022 wherein he sought for adjournment on the ground that his last witness was writing exams with open university. The defence counsel objected but the court obliged prosecutor and case was adjourned to 21/6/2022.

The Prosecution have been absent in Court on several occasions leading to the delay in the trial of this case. The decision to reopen a case foreclosed is at the discretion of the Court. On the 11/5/2022, the Prosecuting Counsel was in Court when the matter was adjourned to 21/6/12022 for continuation of hearing. It is on record. The prosecution has exhibited a page from his diary bearing the 20/6/2022 and 21/6/2022 in proof that he did not record the adjournment for 21/6/2022 but mistakenly recorded it for 28/6/2022 and recorded 14/7/2022 for the sister case. However, prosecuting counsel did not exhibit the said page entry of 28/6/2022 from his diary before this court. The application for foreclosure was made on 21/6/2022 and ruling was delivered 14/7/2022. The conduct of the Prosecution is not worthy of sympathetic consideration. The Prosecution's case was foreclosed on 14/7/2022, he was in Court on that date but failed, refused and or neglected to file a Motion to relist till 1/9/2022 that is 2 months and 6 days gap. There has been undue delay in bringing this application. This said last witness of the prosecution was in court on the 6/4/2022 to give evidence but hearing could not go on as the defence counsel objected to his giving evidence on the grounds that his name was not on the proof of evidence. The prosecution has averred in paragraph 12 that after they had filed and served notice of additional evidence/witness on the defence as ordered by court they now realized that similar document was earlier filed and serve on the former defence counsel on 10/5/2019. This shows the unpreparedness of the prosecuting counsel. The said earlier notice of additional witness is attached as

exhibit B to this motion. Defence counsel did not controvert nor challenge this averment in their counter affidavit.

Nevertheless, this court in exercise of its discretion will be gracious and magnanimous to give the Complainant/Applicant the last opportunity to defend this suit in the interest of justice as justice is not only to the parties involved but to the general public. And the “fair hearing” concept is not subjective or based on sentiments but on objective views or opinion of a dispassionate reasonable man sitting among the audience in court as to whether all the parties were accorded adequate and equal opportunity to present their cases before the court as held in **DIDE & ANOR. V. SELEILETIMIBI & ORS. (2008) LPELR-4037(CA)**. It is a well established principle of law that a client should not be punished for the sins of his counsel. In **Trans Nab Ltd. v. Joseph (1997) 5 NWLR (Pt. 504) 176/197** the court held that thus;

*"It is not only where there are procedural irregularities that a mistake of counsel is not visited on litigants ..."*

Again, in **Akanbi v. Alao (1989) 3 NWLR (Pt. 108) P.118 at 142-143** the court held;

*"If there is lapse in his office, his clerks forgetting to file some papers, he forgetting the date of hearing or such like procedural errors, of course, the client should not be made to suffer."*

Therefore, this Court will consider the principle that the “sins of the counsel should not be visited on the litigants” and adjourn this case for the last time for prosecution to call their last witness and close their case. This Court will not entertain any further adjournments by the prosecution. Accordingly, the order made by this Honourable Court on 14/7/2022 foreclosing the prosecutor from calling his last witness is hereby set aside.

Having ruled that the order of foreclosure is set aside, the court cannot then delve into ruling on the no case submission as doing so will amount to exercise in futility. Ruling on the no case submission is suspended.

**Parties:** Defendant is present.

**Appearances:** H. E. Ochai appearing for the prosecution., holding brief of E. O. Ochayi. Daniel A. Edeadi appearing with L. O. Samuel for the defendant.

**HON. JUSTICE M. OSHO-ADEBIYI**  
**JUDGE**  
**26<sup>TH</sup> JANUARY, 2023**