

IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT GUDU - ABUJA
ON TUESDAY THE 2ND DAY OF MAY, 2023.
BEFORE HIS LORDSHIP; HON. JUSTICE MODUPE OSHO -ADEBIYI
SUIT NO. CV/268/2016
MOTION NO: M/1528/2022

BASELINE FABRICATION LIMITED ----- PLAINTIFF/RESPONDENT

AND

- 1. NIGUS INTERNATIONAL INVESTMENTS LIMITED**
- 2. PRINCE MALIK ADO-IBRAHIM -----DEFENDANTS/APPLICANTS**

RULING

The Defendants/Applicants by a motion on notice dated and filed 17/11/2022 prays the Court for the following;

1. An order of this Honourable Court setting aside the proceedings of 5th April, 2022 for non-service of hearing notice on the Defendants.
2. And such further order(s) that this Honourable Court may deem fit to make in the circumstance.

The grounds upon which this application is brought are;

1. Hearing notice for the Court sitting of 5th April, 2022 was not served on the Defendants.
2. Following the demise of the former Presiding Judge Hon. Justice C. U. Ndukwe (of blessed memory) sitting in Kuje, the Defendants were not notified in any way that the matter had been reassigned to this Honourable Court.
3. The Defendants only got to know that the matter had been reassigned and now pending before this Court upon receipt of the Plaintiff's final written address and hearing notice for the scheduled sitting of 24th November, 2022 which was delivered directly to the Defendants' address.
4. The Plaintiffs final written address and hearing notice for the scheduled sitting of 24th November, 2022 are the only processes and/or notice that have been received by the Defendants in this matter following the reassignment to this Honourable Court.
5. The proceedings of 5th April 2022, indicated in the Plaintiffs final written address to be the date when PW 1 testified and tendered

numerous documents, was conducted in the absence of the Defendants and without notice to them.

6. The interest of justice will be better served by the setting aside of the entire proceedings of 5th April, 2022 to give equal opportunity to the Defendants to participate in the trial.

Learned Counsel to the Defendants/Applicants relied on the 6 paragraph Affidavit in support of the application and 5 paragraph reply affidavit deposed to by Tajudeen Ayeni, a litigation secretary of J-K Gadzama LLP the law firm representing the Defendants/Applicants, wherein the deponent averred that the defendants were not served with hearing notice or in any way notified of this Honourable Court's sitting of 5th April, 2022 when PW 1 testified or any previous hearing notice for sitting before this Court. That following the demise of the former Presiding Judge Hon. Justice Ndukwe (of blessed memory), the Defendants were not notified in any way that the matter had been reassigned to this Honourable Court. That the Defendants initially took steps to confirm the status of reassignment of the matter from the registry of the FCT High Court in Maitama but were informed that they will be duly notified in due course. That the Defendants had also followed up with the Plaintiffs former counsel Mike Enahoro Ebah, Esq. on the status of reassignment of the matter at the time. That the Defendants only got to know that the matter had been reassigned and now pending before this Honourable Court upon receipt of the Plaintiffs final written address and hearing notice for the scheduled sitting of 24th November, 2022 which were delivered directly to the Defendants' address at No. 33, Ahmed Musa Crescent, Jabi, Abuja. That the Plaintiffs' final written address and hearing notice for the scheduled sitting of 24th November, 2022 are the only processes and/or notices that have been served on the Defendants since the reassignment of this matter from the court of the former Presiding Judge Hon. Justice C. U. Ndukwe (of blessed memory). That even the hearing notice for 24th November, 2022 delivered to the Defendants was addressed care of (c/o) Chidiebere Nwachukwu, Esq. That the said Chidiebere Nwachukwu, Esq. indicated as c/o in the hearing notice appears to be the Plaintiffs current Counsel and does not represent the Defendants. That the proceedings of 5th April 2022, indicated to be the date when PW 1 testified and tendered numerous documents, was conducted in the absence of the Defendants and without notice to them. That the

Defendants are desirous of participating in the examination in chief of the Plaintiff's witness(es) including exercising the right of objection to the admissibility of the Plaintiff's documents (where desirable) before they are admitted in evidence. That the Defendants were also not served with the Notice of change of Plaintiffs' Counsel from Mike Enahoro Ebah, Esq. to Chidiebere Nwachukwu, Esq. The interest of justice will be better served by setting aside of the entire proceedings of 5th April, 2022 to give equal opportunity to the Defendants to participate in the trial. In the reply affidavit deponent further averred that the said Anthony E. Enechukwu who supposedly acknowledged receipt of hearing notices, including for 5th April 2022, has since left the employment of the 1st Defendant and did not bring the said hearing notice to attention of any of the Defendants. That the 2nd Defendant is an individual and no hearing notice was personally served on him as a Party and none was served on him through his former Counsel on record. That there is no order for substituted service of hearing notice or any process whatsoever on the 2nd Defendant who is an individual. That the 2nd Defendant never authorized anybody whatsoever, including Odiachi Fidel and Anthony Enechukwu, to receive any hearing notice or process whatsoever on his behalf and none was brought to his attention by any of the persons, who supposedly received the previous hearing notices prior to the hearing notice for 24th November, 2022. That the Defendants in exercise of their right to counsel of their choice have since filed a notice of change of counsel on 17th November, 2022 changed their counsel from Olaolu Olugbodi, Esq. to Darlington Onyekwere, Esq. who filed motion M/528/2022.

Attached to this application is a written address wherein learned counsel raised a sole issue for determination to wit;

“Whether in the circumstances of this case, the proceeding of this Honourable Court of 5th April, 2022 is not liable to be set aside for nonservice of hearing notice on the Defendants”.

Summarily, learned counsel submitted that service of hearing notice is a principle of law fundamental or pivotal to any adjudication which failure to adhere to it will automatically render the proceeding in which the breach occurred null and void and of no effect whatsoever, however conducted. He referred the court to the decisions in **MILITARY GOVERNOR LAGOS STATE V. ADEYIGA (2012) 5 NWLR (PT. 1293) 291** and **OKON & ANOR V FIELD BIRD CO-OPERATIVE LTD &**

ANOR (2013) LPER - 20790 (CA). That service of hearing notice touches on a Party's fundamental right to fair hearing. He referred the court to the decisions in **DARMA V. OCEANIC INTERNATIONAL LIMITED (2005) 4 NWLR (PART 915) 391 at 406 to 407** and **DINGYADI V. INEC (NO. 1) (2010) 18 NWLR (PART 1224) 1 at 90 para D-F.** Counsel submitted that what the rule of doctrine of fair hearing means is that the parties must be given equal opportunity to present their case to the court and no party should be given more opportunity or advantage in the presentation of his case, citing **Inakoju v. Adeleke (2007) 4 NWLR Pt 1025, 423 @ 618 para c-E.** In their reply address counsel submitted that the Claimant's Counsel deposed to the Claimant's counter affidavit in opposition to the contentious application filed by the Defendants which amounts to Counsel acting as witness for the Claimant which is forbidden by Rule 20(4) of the Rules of Professional Conduct (RPC). As a result, thereof, contends that the said counter affidavit ought to be discountenanced in line with the Supreme Court decision of **Akinlade v. INEC (2020) 17 NWLR 438 at 457 para D.** That the Claimant's counter affidavit is grossly incompetent and liable to be struck out. Counsel submitted that the Defendants' motion M/1528/2022 is competent having been filed by the Defendants' Counsel in view of the notice of change of counsel filed on 17th November, 2022 in exercise of the Defendants' right of counsel of their choice guaranteed under **Section 36 of the 1999 Constitution of the Federal Republic of Nigeria (as amended)** and urged the court to grant the reliefs sought by the Defendants/Applicants in the overall interest of Justice and fairness.

The Claimant filed a 24 paragraph counter affidavit deposed to by Edwin Eboigbe, Esq, a legal practitioner in the law firm Nwachukwu Nwachukwu & Co. of counsel to the Claimant in opposition. The deponent averred that contrary to the deposition in paragraph 3(a) of the Defendants/Applicants' affidavit in support of their motion, hearing notices were served on the Defendants for every day the substantive suit came up in court including the 5th day of April 2022 and received by the staff of the defendants. That this Honourable Court checked its record on the 5th of April, 2022 and confirmed that the Defendants were served with hearing notice before the court allowed the Plaintiff to call the PWI. That the Plaintiff is not privy to the deposition in paragraph 3 (C) of the Defendants' affidavit as the facts therein are within the

exclusive knowledge of the Defendants and the said Mike Enahoro Ebah. That it is not the counsel to the Plaintiff that filled the hearing notice attached to Defendants/Applicants' affidavit but the registry of this Honourable Court. That all the Plaintiff's counsel did was to mobilise the Registry of this Honourable Court to serve hearing notice being referred to by the Defendants/Applicants in paragraph 3 (F) and (G) of their affidavit. That the Defendants were afforded the right to cross-examine the PWI and to object to the admissibility of documents but the Defendants did not show up in court despite the service of hearing notice on them. That the Defendants filed a notice of change of Counsel dated 24th of April 2018 wherein the Defendants changed their Counsel from one D. I. Onyekwere Esq of J. Gadzama LLP to one Olaolu Olugbodi Esq of Constellation Legal Services. That the motion before this Court being filed by one Darlington Onyekwere Esq. of J. K. Gadzama LLP who has been changed by the Defendants is incompetent. That both Darlington Onyekwere Esq and D. I. Onyekwere who was removed as a Counsel in this case are one and the same person and of the same law office as can be seen from the face of their motion paper. That there is no record before this Court that the Defendants has further changed their Counsel from Olaolu Olugbodi Esq. of Constellation chambers to any Darlington Onyekwere Esq. That the motion before this Court is a tactic by the Defendants to further delay and frustrate this case.

Attached to the counter affidavit are eight (8) exhibits and a written address where Learned counsel raise two (2) issues for determination to wit:

1. Whether this application is incompetent having being filed by a counsel unknown to this Honourable Court?
2. Whether this application is not liable to be dismissed with substantial cost for lacking in merit and a calculated attempt to mislead this Honourable Court?

Summarily, counsel submitted it is an established principle of law that where a party changes his Counsel, it is the duty of both the previous and new counsel to inform the Court by bringing a notice of change of Counsel to that effect, citing the case of **ADEYINKA & ORS V AGBAKWURU & ORS (2019) LPELR-46824**. Counsel submitted that the record of the court will show that the Defendants have filed notice of change of counsel from D. I. Onyekwere of J-K GADZAMA LLP to

OlaoluOlugbodi Esq. of Constellation chambers and there is nothing before the court to show that the Defendants changed their counsel back to D. I. Onyekwere of J-K GADZAMA LLP. Counsel therefore submitted that the counsel on record and before the court is still OlaoluOlugbodi and not D.I. Onyekwere who has been debriefed and evidence of the said debriefing properly communicated to this honourable court. Counsel submitted that the action of the Defendants failed woefully in not sending representative to court despite the service of hearing notice on the Defendants/ address as contained in the processes before the court. That they equally failed to appear before the court on the 4th of October, 2022 when their right of defence was foreclosed, **TAKON V MTN (Nig) Comm. Ltd (2019) 10 NWLR(1679) SC 23 at p 34 Paras B-C**. Counsel also submitted that the court under these circumstances will have to consider the interest of justice and parties in determining whether or not to grant this type of application. That where an application is aimed at overreaching the other party, the courts have been urged to refuse same, relying on **IZEJIABI-V-EGBEBU (2016) LPELR-40507 (CA) PP 55-56 Paras F-C**. Counsel submitted that there cannot be more indulgence than what the court had afforded the Defendants but the Defendants failed to utilize the opportunity. That the right as contained in **Section 36 of the 1999 Constitution of the Federal Republic of Nigeria (As Amended)** have been interpreted by the Supreme Court not to inure in perpetuity. It means that the right is subject to waiver, citing **A. ARIORI & ORS. v. MURAINO B.o. ELEMO & ORS (1983) LPELR-552(SC)**. Counsel then submitted that this Application is incompetent, baseless, frivolous and lacking in merit. In conclusion counsel submitted that the Defendants have not made out a case for the grant of this application. That the application was brought in bad faith, a calculated attempt to mislead the court and urged the court to dismiss same with substantial costs. Counsel relied on the above mentioned cases amongst others.

First and foremost, the Plaintiff's contends that this motion is incompetent on the ground that the motion was filed by a counsel other than the counsel on record. I have perused through the processes filed, there is a change of counsel in the court file, filed 17/11/2022 (the same day the motion was filed) appointing the counsel that filed this motion

(Darlington Onyekwere Esq.) as their counsel on record. Hence the assertion of the Plaintiff goes to no issue.

I have carefully considered the submissions of both counsel for and against the grant of this application, the affidavit evidence, the judicial authorities cited as well as the annexed exhibits and find that in this application, only one (1) issue can be distilled for determination and that is;

“Whether the Applicant has made out cogent grounds for the grant of the reliefs sought”.

The importance of hearing notice in the adjudication process and the prime place accorded to it by law is to enable parties to be duly notified of the hearing of their cases in order to be personally present or represented by counsel in Court. The essence of service of the hearing notice, is that it is designed to put parties on Notice of a future date in which the suit will be called or heard. The objective, is to give the parties opportunity of fair hearing, to be heard before any decision affecting their rights is taken as provided under **Section 36(1) of the Constitution of Federal Republic of Nigeria 1999 (as Amended)**. See the case of **FBN V. KUNLE(2019) LPELR-49611(CA)** where the Apex Court held thus;

“It is settled law that service of hearing notice is sine qua non in any judicial proceedings and failure to serve hearing notice robs the court of its competence to hear and determine a matter. It is the bedrock of any judicial proceedings and fundamental to the exercise of jurisdiction by any Court”.

It is the right of every litigant to be informed of the date for hearing and failure to serve a hearing notice would amount to a breach of the litigant’s fundamental rights to fair hearing as was held in **Okeke v. Lawal (2018) 12 NWLR (Pt. 1634) 393**. The contention of the Applicant is that they were not served with the hearing notice in this Suit after the reassignment of this suit to this honourable court, especially for 5th April, 2022. That the interest of justice will be better served by setting aside of the entire proceedings of 5th April, 20-22 to give equal opportunity to the Defendants to participate in the trial. Against this, the Claimant contends that the Defendants’ claim that they were not served with the hearing notice of this Suit or aware of the proceedings

against them particularly for 5th April, 2022 is not only false but a calculated ploy to delay this case inordinately.

It is trite that Affidavit of Service is prima-facie proof of service on a party unless there is evidence to contradict same. I have here carefully gone through the process filed, service on the Defendants particularly for the 5th of April, 2022 were effected on the defendants on the 23rd of February, 2022 and was received by Anthony E. Enechukwu, legal adviser at No 33 Ahmed Musa Crescent, Off Ebitu Ukiwe Street by Chida Hotel, Jabi as exhibited in the affidavit of service deposed to by the bailiff of court. By **Section 78 of the Companies and Allied Matters Act** Court process shall be served on a Company in the manner provided by the rules of Court. The relevant Rules of Court in this respect is contained in **Order 7 Rule 8 of the High Court of the Federal Capital Territory (Civil Procedure) Rules, 2018** which provides mode of service of Court process on a Company thus;

“Subject to any statutory provision regulating service on a registered company, corporation or body corporate, every originating process requiring personal service may be served on a registered company, corporation or body corporate, by delivery at the head office or any other place of business of the organisation within the jurisdiction of the Court”.

I have gone through the process file and did not see address for service on the 1st Defendant on the originating process. However, the defendants admitted in paragraph 4 (c) of their reply affidavit in support of their application of service on the 1st Defendant and was received by a staff. The deponent avers as follows;

“Contrary to paragraphs 6, 7, 8, 9, 15 and 16 of the Claimant's counter affidavit, the said Anthony E. Enechukwu who supposedly acknowledged receipt of hearing notices, including for 5th April 2022, has since left the employment of the 1st Defendant and did not bring the said hearing notice to attention of any of the Defendants”.

By the above assertion in paragraph 4 (c) of the Defendants reply affidavit, it is clear that the Defendants admitted to knowing Anthony E. Enechukwu, who received the hearing notice of 5th April, 2022 as being their staff, it goes further that the said staff received the processes in the office and address of the 1st Defendant. Their defence is

that he is no longer in the employment of the 1st defendant and that he did not bring the said hearing notice to the attention of any of the Defendants. It is also the law that an agent acting on behalf of a known and disclosed principal can incur liability. In **FGN & ORS V. SHOBU NIGERIA LTD & ANOR(2013) LPELR-21457(CA)** the court held;

"...It is trite that an agent acting on behalf of a known and disclosed principal incurs no liability. This is because the act of the agent is the act of the principal. It was the principal who did or omitted to do what the agent did or omitted to do. The common law rule is expressed in Latin maxim qui facit per alium facit per se, a sum facere inde pur which means he who does an act through another is deemed in law to do it himself, an action against an agent in its private capacity for acts done on behalf of a known and disclosed principal is incompetent..."

I am of the view therefore that since Anthony E. Enechukwu was in the employment of the 1st defendant and acted as an agent (legal adviser) of the 1st Defendant by receiving the hearing notice in the office of the 1st defendant, it is proper service on the 1st Defendant and the 1st Defendant cannot be heard to say they were not served hearing notices particularly for the 5th of April, 2022. Whatever issue that transpired between the 1st defendant and the said staff which made him leave the employment of the 1st defendant without handing over court processes he received on behalf of the 1st defendant is definitely not the business of this court.

On the issue of 2nd defendant not being served, it is worthy of note that the 2nd Defendant is an individual hence personal service is required. The Defendants has contended that service of the hearing notices was not served on the 2nd defendant but on the 1st Defendant.

There are basically 2 methods of service of Court processes, the first is personal service while the second is substituted service. Personal service is service on the individual personally by delivering a copy of the process, in this instance a hearing notice. The requirement for personal service on a defendant is not only a requirement of the rules of Court but one that is a condition precedent to the invocation of the Court's jurisdiction. Therefore, failure to comply has a serious effect on the jurisdiction of the Court. The failure is not a mere irregularity but a

fundamental defect which calls to serious question the issue of jurisdiction and renders the entire proceedings a nullity as provided in **MADUKOLU V NKEMDILIM (1962) 2 SCNLR 342**. This suit was first assigned to Late Hon. Justice Ndukwe's court, on his demise the suit was reassigned to this court and it started de novo. I have gone through the affidavits of service of hearing notices, it is clear that service on the 2nd Defendant was affected on the 1st Defendant. There is no court order for substituted service on the 2nd defendant. The 2nd Defendant being a natural person ought to be served personally with the hearing notice or by substituted means via an order of court. Therefore, the service of hearing notice for the 2nd Defendant on the 1st Defendant is hereby declared invalid.

Having established that the 2nd defendant was not served with a hearing notice particularly for 5th April, 2022, it is without any doubt that the proceedings conducted on the 5th April, 2022 is a nullity against the 2nd defendant. Therefore, the proceedings in this suit is hereby set aside for non-service of hearing notice on the 2nd Defendant.

Parties: Absent

Appearances: Esther Nchowu appearing for the Plaintiff. Darlington Onyekwere appearing for the 1st and 2nd defendant.

**HON. JUSTICE MODUPE R. OSHO-ADEBIYI
JUDGE
2ND MAY, 2023**