

IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT GUDU – ABUJA
DELIVERED ON THE THURSDAY 20TH DAY OF APRIL, 2023.
BEFORE HIS LORDSHIP; HON. JUSTICE MODUPE OSHO-ADEBIYI
CHARGE NO.CV /2541/2016
MOTION NO: M/1358/2022

ECHEIPU ODOH OKLOBIA-----CLAIMANT/APPLICANT

(Suing through his next of friend,
Mrs. Florence Omadachi Oklobia)

AND

**THE INCORPORATED TRUSTEES OF
AMERICANINT'L SCHOOL OF ABUJ----DEFENDANT/RESPONDENT**

RULING

On the 4th day of October, 2022, this Honourable Court granted the oral application of the Defendant counsel for foreclosure of the Claimant's counsel from further cross examination of the DW1as S. O. N. Nwogu counsel to the Defendant stated that he was holding brief because the lead counsel was tied down on his way from Lagos to Abuja because of flood, which said oral application was granted. Counsel to the Defendant has now filed a Motion on Notice dated 21/10/2022, brought pursuant to **Section 36(1) of the Constitution of the Federal Republic of Nigeria 1999 (as amended), Order 43 Rule 1(1), (2) & (3) of the FCT High Court Civil Procedure Rules 2018** and under the inherent Jurisdiction of the Court praying the Court for the following orders:

1. AN ORDER OF THE HONOURABLE COURT setting aside the order of this court of 4th October, 2022 foreclosing the Claimant/Applicant's right to continue the cross examination of the DWI, Mr. Bolanle Adedoyin.
2. AN ORDER OF THE HONOURABLE COURT recalling Mr. Bolanle Adedoyin (DWI) for continuation of cross-examination by the Applicant's Counsel.
3. AND FOR SUCH FURTHER ORDER OR ORDERS that this HONOURABLE COURT may deem appropriate to make in the circumstances of this case.

Attached is a 6 paragraph affidavit deposed to by Miss Rejoice Cordelia Samuel, the litigation secretary in the law firm of Messrs Acelaw Partners with a written address in support. Summarily, That the matter

came up on 4th October, 2022 for continuation of cross-examination of the DWI. That when the matter came up Samuel O. Nwogu, who is not abreast with the facts of the case, held the brief of Mr. Michael B. Omosegbon hence cross-examination of DWI could not go on. That Mr. Michael B. Omosegbon was held up in the traffic along Lokoja- Abuja Road for two days owing to the ravaging flood. That there was telephone conversation in respect of the plight of Mr. Michael B. Omosegbon on the 4 October, 2022 to Mr. Godwin Abarikeon 070381353. In the written address counsel raised a sole issue for determination to wit;

“Whether this Application can be granted by this court in the light of the supporting affidavit”

Learned counsel cited the case of **Ogoro v. Seven-Up Bottling Co. Plc (2016) 13 NWLR (pt. 1528) I CA.**

In opposition learned counsel to the Defendant filed a written address wherein he also raised a sole issue for determination to wit;

“In light of the circumstances of this case and the clear position of the law, whether Motion no. M/1358/2022 is not incompetent and liable to be dismissed in the circumstances”.

Summarily counsel submitted that it is a fact that once a judgment or order is delivered, the Court becomes *functus officio*. They ordinarily have no powers to do or say anything in respect of the case again except to entertain certain applications as applicable under the rules of the honourable court. Citing **Buhari vs INEC & Ors (2008) LPELR - 814 SC**. That the said application seeks the exercise of the discretion of this Honourable Court, which an avalanche of authorities has reiterated must be exercised judicially and judiciously. He relied on **Saffidine v. C.O.P. (1965) 1 All NLR 54**. That the grounds and circumstances when a court of law may set aside its own orders are clearly as set out in **G.T.B. Plc v. Innoson (Nig.) Ltd. (2022) 6 NWLR (Pt. 1825) 35** and **Akpan v. Ekpo (2001) 5 NWLR (Pt. 707) 502 P. 514, pan. H**. Counsel further submitted that a party who fails to utilize the opportunity provided to it cannot be heard to complain of a breach of the right to fair hearing, relying on **N.F.V.C.B. v. Adegboyega (2019) 4 NWLR (Pt. 1662) 283**. That the law is now settled in Nigeria that where a counsel appears on the date fixed for hearing, that counsel is deemed to have full instructions and cannot be heard to complain or refuse to proceed with the proceedings fixed for that day. He referred the court to **Shona-Jason Ltd, v. Omega Air Ltd (2006) | NWLR (Pt. 960) 1**. That a perusal of the Affidavit in Support of the instant motion will reveal that nothing has been placed before the

Honourable Court meeting the standards shown in **Willoughby vs. I.M.B. Ltd (1987) 1 NWLR (Pt. 48) P. 105**. Also, counsel submitted that an applicant who seeks a judicious and judicial exercise of the court's discretion in its favour ought not to attempt to mislead the court as the applicants' statement in paragraph 5 and paragraph 5(iv) of the affidavit show that the Applicant has attempted to do. In other words, material contradictions in the evidence of a party cannot and will not lend itself to the exercise of discretion in their favour. See **UWEMEDIMO v. MOBIL PRODUCING (NIG.) UNLTD (2019) 12 NWLR (PT. 1685) 1 at 24 PARAS. D-E**. That the court is enjoined to reject the entire evidence as it cannot pick and choose which of the conflicting versions to follow. See **ZAKIRAI v. MUHAMMAD & ORS (2017) LPELR 42349 PP. 70-71 PARAS. F-A**, **KAYILI v. YILBUK & ORS (2015) LPELR-24323(SC)**. That where a person desires for the court to give him equitable reliefs, he must act quickly as delay defeats equity and urged the court to discountenance the application of the Claimant and dismiss their application.

I have gone through the processes filed by respective counsel and I have also read the record of proceeding of 4/10/2022. One of the fundamental pillars of fair hearing is the right to examine witnesses of the opponent. The importance of fair hearing was stated in the case of **SIMON VS. STATE (2017) LPELR-41988 (SC)** where the Apex court HELD;

“when a witness (the adversary) testifies on a material fact in controversy in the case, the other party, if he does not accept the witness testimony as true should examine him on that fact. The germane question in considering whether to set aside an order of foreclosing made as in this case is whether or not the interest of justice requires that the application be granted. This largely depends, on the peculiar facts and circumstances of the case although the decision by the court to grant or refuse same is largely discretionary, such discretion to be exercised judicially and judiciously”.

The Applicant counsel in this case was not absent from court on the 4/10/2022 rather a counsel appeared but informed the court that he was holding brief for the lead counsel and he cannot go on with the further cross examination of DW1 as the lead counsel was delayed due to flood.

It is a well-established principle of law that the mistake of a counsel should not be visited upon the litigant' this fact was observed in

CROPPER VS. SMITH (1884) 26 CUD 700 @ 710 wherein **Bowen, L. J.** stated

"It is a well-established principle that the object of a Court is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights, I know of no kind of error or mistake which, if not fraudulent or intended to overreach the Court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy..."

The application for foreclosure was made on 4/10/2022 and was granted same date. The conduct of the Claimant's counsel is not worthy of sympathetic consideration. Learned counsel to the Claimant S. O. N. Nwogu in court on the said 4/10/2022 prayed the court for a short date, however this motion was filed 21/10/2022 that is 17 days gap. Certainly, there has been undue delay in bringing this application. In all litigations it is the duty of the Court to aim at doing and to always do substantial justice. I am of the view that justice would not be served with the order for foreclosure of further cross-examination as it is the Claimant who would have been denied fair hearing consequent upon the mistake of the Claimant's counsel which should not be visited upon the litigant. The order foreclosing the Claimant was made on the 4/10/2022; they filed their application to set aside the said order on the 21/10/2022 about 17 days after the order was made. **Order 32 Rule 5 (3) of the FCT High Court (Civil Procedure) Rules 2018** provides that applicant has 6 days from the day the order was made to apply to set aside the order of court and when in default will pay a fee of N200.00 (Two Hundred Naira) only for each day of default.

This court in exercise of its discretion will be gracious to give the Claimant the last opportunity to further cross examine the DW1 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 afforded adequate and equal opportunity to present their cases before the court as held in **DIDE & ANOR. V. SELEILETIMIBI & ORS. (2008) LPELR-4037 (CA)**. As earlier stated, this Court will consider the principle that the sins of Counsel should not be visited on the litigants and adjourn this case for continuation of further cross

examination of DW1 by the Claimant's counsel and for defence to reopen their case(having closed their case) in the effect there's need for re-examination of the DW1 by the Defendant's counsel. Defence counsel should be in Court on the said date with their witness. This Court will not entertain any further adjournment by either party. In compliance with the rules of this court in **Order 32 Rule 5 (3) of the FCT High Court (Civil Procedure) Rules 2018**, the proof of payment of default in filing this motion by the Claimant must be presented at the next adjourned day.

Therefore, it is hereby ordered as follows;

1. The court hereby sets aside the order of this court of 4th October, 2022 foreclosing the Claimant/Applicant's right to continue the cross examination of the DWI, Mr. Bolanle Adedoyin.
2. Mr. Bolanle Adedoyin (DWI) is hereby recalled for continuation of cross-examination by the Applicant's Counsel.
3. The Claimant to show proof of compliance to **Order 32 Rule 5 (3) of the FCT High Court (Civil Procedure) Rules 2018**, at the next adjourned day.

Parties: Absent

Appearances: Michael B. Omosogbon appearing for the Claimant. Defendant is not represented.

HON. JUSTICE M. OSHO-ADEBIYI
JUDGE
20TH APRIL, 2023