IN THE HIGH COURT OF FEDERAL CAPITAL TERRITORY
IN THE FEDERAL CAPITAL TERRITORY JUDICIAL DIVISION
HOLDEN AT JABI FCT ABUJA

BEFORE HIS LORDSHIP: HON. JUSTICE BABANGIDA HASSAN

SUIT NO: CV/076/2018

BETWEEN:

1. HAJIYA MAIMUNA ALI DIKWA
2. EZE SOLOMON ODEGBA } **__CLAIMANTS**
3. SOLNALI INNOVATION CONCEPT LIMITED

AND

1. JULKAT DANKIN
2. GRACE K. KOLO
3. JULKAT GOMWALK
4. NENDEL GOMWALK } **_DEFENDANTS**
5. IKECHUKWU EBOWUSI JOACHIM
6. LEONARD OKOLIE
7. ABUJA MARKETS MANAGEMENT LIMITED
8. FEDERAL CAPITAL DEVELOPMENT AUTHORITY
9. HON. MINISTER FEDERAL CAPITAL TERRITORY

RULING

When this matter came up for hearing, the counsel representing the claimant informed this court that this matter was initially adjourned sine die for hearing, and that they were not ready to proceed with the hearing on the ground that they have not been able to serve subpoenae on the witnesses, and therefore asked for an adjournment to enable them bring their witnesses.

The counsel to the 1st, 2nd, 3rd and 4th defendants opposed the application for an adjournment and argued that the last adjourned date of this matter was 29th day of June, 2022 which is more than three years and some months, and therefore, he said, on behalf of the 6th defendant on whose behalf the learned counsel appeared on protest, he further argued that the originating was served through another person on the 6th defendant, who

at the time of service was in China. The submitted that the court summoned the process server before it, and the process server informed the court that he served the originating process through another person, and the counsel argued that, that being the situation, the ceased to exist.

On the issue of adjournment, the counsel to the 1st, 2nd, 3rd, 4th as well as 6th defendants argued that by virtue of Order 32 Rule 4 of the Rules of this court 2018, and based upon the unequivocal process before the court, there is no counter claim before it, and this matter is more than three years, and he argued that there is no justification for this matter to proceed in the list of this court. The counsel further informed this court that it was the counsel to the 8th and 9th for every party to appear, and it is more than enough for the claimant to put up all his witnesses. The counsel then applied under Order 32 Rule 4 of the Rules of this court to dismiss the suit.

The counsel to the 5th and 7th defendants aligned themselves with the submission of the counsel appeared for the 6th defendant, and the counsel to the 7th defendant further alluded that if for any reason the court is mindful to grant adjournment, he would be asking for cost of N500,000.00 against the claimant.

The counsel to the 8th and 9th defendants also aligned himself with the arguments of the rest of the counsel, and submitted that this is a 2018 matter, and it was the 8th and 9th defendants that caused for hearing notices to be served on the parties, and this, they would not be the ones that will do the case of the claimant and diligence supposes that parties used counsel for a matter, and they should come to the court and prove their case. The counsel alluded to the fact that an opportunity was given to the claimant to prove his case, and the claimant is not willing, and therefore

applied that the matter be struck out of the cause list. The counsel then submitted that in the event the court is allowing the claimant another time, he asked for a cost of N200,000.00 since there is evidence that there was out of pocket expenses.

The counsel to the claimant responded and submitted that when a party instituted an action seeking for any relief, it behooves upon him to prove the claim, and it behooved upon the defendant to enter appearance or file a counter claim, and in this case, there is non of the defendants has shown any interest to defend the suit, and it is the claimant's responsibility to ask for a date, however, the claimant was served with Hearing Notice.

The counsel submitted further that when there are two applications before the court, one seeking to give life to it, and the other seeking to terminate the matter, in the interest of justice, the court is urged to give credence to the application that seeks to give life to it.

On Order 32 Rule 4 of the Rules of this court, the counsel submitted that it is very clear as it was read by the counsel to the 1st, 2nd, 3rd, 4th and 6th defendants, and submitted that it should have been different if the claimant is not in court, however, the claimant's counsel was in court diligently willing to prosecute this case.

The counsel submitted that cost follows event, and the claimant has told court that he is trying to put his house into order, and therefore urged the court in the interest of justice, grant this application for adjournment as it is the duty of the claimant to issue Hearing Notices and serve on the defendants.

The counsel to the 1st, 2nd, 3rd, 4th and 6th defendants responded on points of law and argued on that by demurrer when a writ is incompetent as to the 6th defendant, if touches on the jurisdiction of the court, and

one of the exception is demurrer challenging the jurisdiction of this court.

The counsel further argued that according to the Supreme Court, the court is bound to take judicial notice of its record of proceedings and from the record all the defendants have entered into appearance.

Thus, now there are two or three applications before the court. One for adjournment and payment of cost, and the other for the dismissal of same.

Let me deal with the issue of adjournment and cost first before treating the issue of dismissal. See the case of **Otokpa V. Ogenyi (2005) All FWLR (pt 272) p. 320 at 332, paras. C-G.**

The grant of adjournment is at the discretion of the court and such discretion has to be exercised judicially and judiciously.

However, this court has to strike a balance in either granting or refusing same, and the deciding factor is justice for the parties on both sides. See the case of **S.P.D.C. Ltd V. Archo-Joe Nig. Ltd (2016) All FWLR (pt 331) p. 1336 at 1346, paras. E-F.**

There is need for expeditious disposal of cases but need should be balanced with a concomitant need not to deny a party justice. See the case of **Uzowulu V. Akpor (2015) All FWLR (pt 763) p. 1963 at 1984-1985, paras. E-A per Yakubu JCA:**

> **"Justice cannot and must not be sacrificed on the altar of speed, which will work injustice to a party in the action"**

The court went further and held that:

> **"Delay of justice is bad, but denial of justice is worse and outrageous. The denial inflicts pain, grief, suffering and untold hardship on those who rely on impartial administration of justice."**

Inspite of the above, a litigant is required to be vigilant and diligent. He has a duty to check on what happened to his case and where he defaults, he pays the price. See the case of **Olumegbon V. HFP Eng. (Nig.) Ltd (2016) All FWLR (pt 814) p. 90 at 104, para. A.** In the instant suit, it is incumbent upon this court to look at its record with a view to see the antecedents of the parties and to see whether the claimant is entitled to the adjournment or not. See the case of **Nigerian Navy V. Garrick (2006) All FWLR (pt 315) p. 52 at 69, para. F** to the effect that a court is entitled to take judicial notice of its own proceedings, records and also their contents.

In a nutshell, the counsel to the claimants applied for the issuance of subpoenae in a letter he wrote to the court on the 17th October, 2019, and on the 28th October, 2019, the counsel to the 3rd defendant filed a notice of preliminary objection with No. M/517/2019 and this preliminary objection was heard and ruling was delivered on the 5th day of May, 2020, and dissatisfied with the outcome of the ruling, the counsel filed an appeal at the Court of Appeal, Abuja via the Notice of Appeal dated the 20th day of May, 2020. The same counsel to the 3rd and 4th defendants filed a motion for stay of proceedings pending the determination of the interlocutory appeal filed against the ruling of this court and the motion for stay was dated 25th day of June, 2020. On the 26th day of June, 2020 the same counsel wrote a letter addressed to the Registrar of this court and sought for an adjournment of this case to any of these dates; 20th, 21st, and 22nd of July, 2020 to move his motion for stay. Prior to that, the counsel has written to the Honourable the Chief Judge for a passionate appeal and request for the transfer of this case from this court on grounds of bias, lack of confidence on the judge, Coram: Babangida Hassan and after considering the passionate

appeal and having looked into the response of this court, the then Honourable Chief Judge, Justice Ishaku Bello wrote to the court to continue with the matter. Still, the counsel wrote to the Honourable Justice Salisu Garba, the then Chief Judge seeking for the transfer of this case from this court, and the then Chief Judge wrote to this court that the matter be continue in this court.

The last time this court sat on this matter was on the 17th day of March, 2021, that was when this court alluded to the fact that the counsel to the 3rd and 4th defendants wrote another application for transfer to the then Chief Judge, Justice Salisu Garba.

The counsel to the claimant in a letter dated the 13th day of January, 2022 informed this court of the position of the appeal filed by the counsel to the 3rd and 4th defendants that the appeal was dismissed, and therefore, applied for a date for the claimant to proceed with the case, and attached to the letter is a Certified True Copy of the decision of the Court of Appeal, Abuja Division.

Now, the counsel to the 8th and 9th defendants issued Hearing Notices to all the parties for this matter to continue, and the counsel to the claimant asked for an adjournment to enable the claimants' subpoenae or issue subpoenae and be served upon certain witnesses.

It is worthy of note that the appeal of the 3rd and 4th defendants was dismissed on the 16th day of September, 2021, and on the 13th January, 2022, the counsel to the claimants applied for a date to proceed with their case.

By the above narration, it can be inferred that the claimant is keen to continue with his case, and therefore, the application is in order, and I am inclined to grant the adjournment.

The arguments of the all the counsel on this, are discountenanced.

Coming to the issue of dismissal of this case to which the counsel to the 3rd and 4th defendants relied on Order 32 Rule 4 of the Rules of this court. The rule provides:

> **"When a cause is called for hearing, if the defendant appears and the claimant does not appear, the defendant if he has no counter claim shall be entitled to judgment dismissing the action but if he has a counter claim, then he may prove such counter claim so far as the burden of proof lies upon him".**

The area of concern in the above quoted rules is the expression **"if the defendant appears and the claimant does not appear".** In the circumstances, the counsel to the claimant was in court. Does it really matter for the claimants to appear personally? It really does not matter. See the case of **Miden System Ltd V. Effiong (2011) All FWLR (pt 591)** where the Court of Appeal, Calabar Division held that in a civil suit, a party need not to be physically present in court before his appearance would be recorded for him. Representation by counsel is sufficient for his appearance. In the instant suit, the counsel to the claimants was in court. Therefore, in giving credence to the above quoted rule of this court, the claimants are not caught by the rule, and therefore, the argument of the counsel to the 3rd and 4th defendants is discountenanced.

On the submission of the counsel to the 3rd and 4th defendants that the 6th defendant was not served as the 6th defendant was in China, however, by the endorsement at the back of the writ of summons and statement of claim, that is the proof of service, the 6th defendant has been duely served. See the case of **Nigerian Navy V. Garrick (supra) at p. 69, paras. E-G** where the Court of Appeal, Calabar held that where in a proceeding the question arises whether or not a process of court has been served in

the proceedings, a court may rely on the proof of service afforded by its own record on the proceedings and hold that such process has been served. In the instant case, the court relied on the proof of service to hold that the originating processes have been duely served on the 6th defendant. There is also that presumption of regularity in favour of a plaintiff that the defendant was served unless such presumption is rebutted. See the case of **Aluko V. Ogungbemi (2008) All FWLR (pt 397) p. 184 at 197-198, paras. G-A.**

It was also held by the Court of Appeal, Ilorin Division that the rigour of an affidavit of service can be greatly reduced where the person served with the writ suddenly appears. That being the case, there shall be no further need to insist on the proof of service. In other words, there cannot be any best or better proof than the presence of the person on whom the process was to be served. See the case of **Idolosi Local Government V. Aluko (2007) All FWLR (pt 352) p. 1809 at 1817, paras. F-G.** In the instant suit, the counsel to the 3rd and 4th defendants, on the 24th October, 2023 announced appearance for the 1st, 2nd, 3rd and 4th defendants and also announced appearance for the 6th defendant on protest.

Therefore, the affidavit or certificate of service contained in the case file is a prima facie evidence of proper service, and the only way to challenge an affidavit of service is to file a counter affidavit in rebuttal. See the case of **I.B.W.A. V. Sasegbon (2007) All FWLR (pt 388) p. 1107 at 1117, paras. F-G, and p. 1118, paras. A-B.**

In the instant, all the counsel to the 1st, 2nd, 3rd, and 4th as well as 6th defendants on protest is saying and raising concern is that there was no service as the 6th defendant was in China as at the time of the service, and that to my mind, cannot suffice. See the case of **Uko V. Ekpenyong**

(2006) All FWLR (pt 324) p. 1933 at 1950, paras. F-H. where the Court of Appeal, Calabar Division held that where there is a proof of service on a party by means of an affidavit of service by a bailiff or an officer of the trial but, the only acceptable way of challenging or rebutting the presumption of such service by the party concerned is by filing a counter affidavit to controvert the affidavit of service.

The failure by the party's counsel to file such counter affidavit is fatal to his case and his oral argument on the hearing date that he was not served with the motion and other processes cannot avail him. In the instant suit, all hies and cries of the counsel to the 6th defendant on protest cannot avail him, and to this I so hold.

The application for dismissal of this suit is hereby dismissed, and no cost is awarded.

Hon. Judge
Signed
24/1/2024

Appearances:

Peace Johnson Johnson appeared for the claimant.

Echefu Jude Esq appeared for 8th and 9th defendants.

CT: The matter is adjourned to 17th day of April, 2024 for hearing.

Hon. Judge
Signed
24/1/2024