

**IN THE HIGH COURT OF JUSTICE FEDERAL CAPITAL TERRITORY
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT HIGH COURT MAITAMA – ABUJA**

BEFORE THEIR LORDSHIPS:

- (1). HON. JUSTICE C. N. OJI
(2). HON. JUSTICE S. U. BATURE**

**SUIT NO. FCT/HC/CV/1654/2020
APPEAL NO. CVA/35/2023
MOTION: NO. FCT/HC/M/316/2023
DATE: 13TH FEBRUARY, 2024**

BETWEEN:

MISTEC PROCON LTDAPPLICANT/APPELLANT

AND

DURUMI PROPERTIES LTD.....RESPONDENT

APPEARANCES:

Celina .S. EzeEsq with Rebecca S.TyogyerEsq for the Respondent.
Appellant absent and unrepresented.

(DELIVERED BY HON. JUSTICE S. U. BATURE)

RULING

By a Motion on Notice with Motion number M/316/2023 dated 23rd day of October, 2023 and filed on the 25th day of October, 2023 brought pursuant to Section 36 (6) (b) of the Constitution of the Federal republic of Nigeria 1999 (As Amended).

The Applicant herein prayed this Honourable Court for the following orders:-

1. An order of this Court setting aside the order made by the Honourable Court on the 14th day of June, 2023 awarding cost in the sum of ₦200,000.00 (Two Hundred Thousand Naira), against the Applicant/Appellant in this suit.
2. And for such order or further orders as this Honourable Court may deem fit to make in the circumstance.

The grounds upon which the Application is brought are as follows:-

- 1) That the cost was awarded upon a mistaken belief that the Appellant/Applicant had not complied with the conditional stay of execution granted to it by the trial Court.
- 2) That the Applicant/Appellant was granted a conditional stay of execution by the trial Court upon payment within Seven (7) days the Judgment sum (₦683,306.00) into the Bank account of the Chief Registrar of the High Court of the FCT.
- 3) That the Applicant/Appellant complied with the condition within the stipulated time, however, he was unable to provide a printout evidencing the said payment due to the problem with the internet server, and same is a circumstance beyond his control.
- 4) That he was obliged to make another Application for stay of execution before this Court, in view of the fact that the Respondent was bent on executing the Judgment as soon as the Seven days lapses.
- 5) That at the hearing before this Court the Applicant informed the Court of the fact that he has complied with the conditional stay granted by the lower but was yet to provide evidence of such due to issues relating to the means of payment.
- 6) That the Respondent seriously misrepresented fact to this Court, in order to be awarded cost.

Filed in support of the Motion is a 16 paragraphed Affidavit deposed to by one Rejoice Nduka a litigation Secretary in the law firm of H. C. EZEUDU & CO, attached to the supporting Affidavit are annexures marked as Exhibits

A & B respectively. Also filed in support is a written address dated 23rd day of October, 2023

In the said written address, Counsel formulated a lone issue for determination which is whether from a dispassionate consideration of the Affidavit in support of the Application, the Appellant/Applicant's prayers are meritorious as to warrant a grant of same.

In arguing the issue, Counsel submitted that a critical scrutiny of the Affidavit evidence before this Honourable Court reveals an affirmative position in favour of the Applicant as it is trite law that a Court of law reserves the vires to set aside its own Ruling/Judgment which was given otherwise than on the merit where good ground is shown. Counsel cited the case of **MARK VS EKE (2004) LPELR – 1841 (SC)**.

In another submission, Learned Counsel stated that any Court of record including Supreme Court has the inherent jurisdiction to set aside its own Judgment/order given in any proceeding in which there have been fundamental defeats. In this respect reliance was placed on the cases of **OLABAJI VS ODOFIN (1992)2 SCNJ 242 at 247 and BARRISTER ORKER JEV& ORS VS IYORTOM & ORS (2015) NWLR (PT. 1483) 484 (SC)**.

Consequently, Learned Counsel submitted that the grant of an Application of this nature is at the discretion of the Court exercise of which must be done judiciously and judicially in the interest of justice. Counsel cited the case of **NATIONAL INLAND WATERWAYS AUTHORITY VS SHELL PETROLEUM COMPANY NIG. LTD (2008) VOL NSCQR 618 AT 623 RATIO 6**.

Finally counsel urged the Court to exercise its discretion in favour of the Applicant.

In opposing the Application, Respondent/Respondent filed 8 paragraphed Counter Affidavit deposed to by one Francis Onoduagu, a facility Manager

of the Respondent, also filed in support of the Counter Affidavit is a written address dated the 2nd day of November, 2023.

In the said written address, Counsel formulated a sole issue for determination to wit:-

"Whether this Court can set aside the order for cost made on the 14th of June, 2023 against the appellant in this case."

In arguing the issue, Counsel stated that a trial Court generally has the power to set aside its decision and order and the said power of the trial Court to do so is discretionary and must be exercised judicially and judiciously guided by the principles of law. Counsel referred the Court to the case of **TENO ENG LTD VS ADISA (2005) 10 NWLR (PT. 933) PG 346 SC.**

In further opposing the Application, Counsel contended that the authorities cited by the Appellant/Applicant in its written argument said the same thing that Courts have the inherent powers to set aside its Judgment/orders but has failed to bring to the notice of the Court that this discretion can only be exercised in appropriate cases not in this case. That the order was made with proper jurisdiction, it is not a nullity and the Court was not misled into any mistaken belief. That the records of this Court bore testimony of the facts that led to the order and the Application was validly made before the Court. Reliance was placed on the case of **TOMTEC NIG. LTD VS FHA (2009) 18 NWLR (PT. 1173) PG 358, 383 PARA D –G.**

In another submission, learned Counsel referred the Court to all its Affidavit evidence particularly paragraphs 4 (i –iv) – 6 of its Counter Affidavit and urged the Court to take cognizance of these depositions as the Court only has the inherent jurisdiction to set aside its own judgment where there has been a fundamental defect, such as one which goes to the issue of jurisdiction and competence of the Court. That in the instant case, there was no fundamental defect with regard to the order of this Honourable Court made on the 14th of June, 2023. He referred the Court to the case of

**KALU MARK & ANOR VS GABRIEL EKE (2004) LPELR – 1841 (SC)
PP 23 – 24, PARAS G – B.**

Furthermore, Counsel stated that it is trite that where an Applicant asks the Court to set aside its judgment and in this case, an order of the Court, the Court must be satisfied that the Application is worthy. That the Applicant in this case has not shown good faith as they are used to disobeying Court orders as shown in the Respondent's Counter Affidavit and the records of this Honourable Court. Counsel cited the case of **MOHAMMED S. M. D V TERSOOKPELA (2001) FWLR (PT. 68) 1404.**

In conclusion, Counsel submitted that he who comes to equity must come with clean hands as the Appellant/Applicant is in disobedience of the order of this Court and therefore urged the Court to refuse the Application to set aside the order of this Court as the Appellant was fully represented in Court on the 14th June, 2023 by its Counsel and the said order was validly made. Now we have carefully perused the Motion on Notice, the reliefs sought, the grounds upon which the Application is predicated, the supporting Affidavit, the annexures attached therewith and the written address in support. We have equally perused carefully the Counter Affidavit as well as the written address in support of the Counter Affidavit.

Therefore, it is our humble view that the issue for determination is whether the Appellant/Applicant herein has made out a case for the grant of this Application.

It is important to begin by pointing out that the basis of this Application is that the Appellant/Applicant is seeking an order of this Court to set aside the order by this Honourable Court on the 14th day of June, 2023, awarding cost in the sum of ₦200,000.00 (Two Hundred the Thousand Naira) against the Appellant/Applicant in this suit in favour of the Respondent/Respondent. In that respect, it is trite law that the grant and/or refusal of an Application of this nature involves an exercise of discretionary power and such discretion must be exercised judicially and

judiciously. In support of this, see the case of **ITEOGU VS L. P. D. C (2018) 4 NWLR (PT. 1630) P 387 PARA E** where the Supreme Court per Sanusi J.S.C held that:-

"A Court can set aside its own Judgment only in exceptional circumstances or conditions. The discretion of Court to set aside its earlier Judgment must always be exercised judicially and judiciously and must also be applied sparingly to avoid causing injustice or to breach public interest or possible public uproar."

Similarly, it was held in the case of **HAYATUDEEN VS GAMBO & ORS (2015) LPELR – 4074 (CA) PP 11 -12 PARA A – A PER AKEJU J. C. A** where it was held thus:-

"By the decisions of the Supreme and this Court, it is beyond any doubt that a Court of record can set aside its own judgment including judgments and orders made by colleagues of the same jurisdiction where such order is a nullity but the Court will not allow its powers of setting aside to be abused. A Court can set aside its judgment in the following circumstances i.e that the judgment was obtained by fraud or deceit either in the Court or of one or more parties, when the judgment is a nullity in which case a person affected by such order of Court which can properly be described as a nullity is entitled ex debito to have it set aside, when the Court was obviously misled into giving the judgment under the belief that the parties consented to it, where the Judgment was given in the absence of jurisdiction; and whereby the procedure adopted, the judgment is deprived of any legitimate adjudication."

See also **DISCOVERY (NIG) LTD VS CARDINAL OHAMS LTD & ANOR (2021) LPELR – 52458 (CA) PP 47 – 50 PARAS A – D.**

At this juncture, it is worthy of note that the Appellant/Applicant deposed in the supporting Affidavit particularly at paragraphs 6, 7, 8, 9, 10, 11, 12 and 13 as follows:-

Paragraph 6 reads:-

"That the trial Court in its wisdom granted a conditional stay of execution, whereby it ordered the Appellant/Applicant to pay the judgment sum into the account of the Chief Registrar of the High Court of Federal Territory within of Seven (7) days."

Paragraph 7 reads:-

"That the Applicant/Appellant thereafter frantically commenced making efforts in order to source the Judgment sum and pay same into the Bank account of the said registrar."

Paragraph 8 reads:-

"And that the Applicant/Appellant was able to make the said payment before the expiration of the given seven (7) days, however, he was unable to get the printout of the Evidence of payment."

Paragraph 9 reads:-

"And that consequently, in order not to be caught up by the time frame of seven days which was on the verge of expiration, the Applicant had to file another stay of Execution before this Court, and that this Court in its wisdom equally granted a conditional stay of execution, ordering the Applicant/Appellant to pay the judgment sum into the bank account of the FCT High Court registry."

Paragraph 10 reads:-

"And that the Respondent erroneously informed the Court that the Applicant has not complied with the conditional stay granted them by the trial Court."

Paragraph 11 reads:-

"And that consequently this Court believed the Respondent and thereafter awarded the cost of ₦200,000.00 (Two Hundred Thousand Naira) to the Respondent because according to this Court the Applicant ought to have complied with the order of the lower Court i.e by paying the judgment sum."

Paragraph 12 read:-

"That all attempts to make the Court believe that the Judgment sum has been paid was refused on the ground that there was nothing before the Court to prove that the judgment sum has been paid."

Paragraph 13:-

"That the applicant has attached the evidence of the payment in respect of the Judgment sum, and that the date of the payment precedes the date of this Court delivered its ruling on the stay of execution. That the receipt of the payment dated the 13th day of June, 2023. And the certified copy of the ruling of this Court on the stay of execution, are hereby attached and marked Exhibit A& B respectively."

On the other hand, the Respondent/Respondent equally deposed in the Counter Affidavit in opposition to the motion particularly at paragraphs 4 (i), (ii), (iii), (iv), (v), (vi) and (ix) as follows:-

Paragraph 4 (i) read thus:-

"That on the 14th of February, 2023 the lower Court entered Judgment in favour of the Respondent.

Paragraph 4 (ii) read thus:-

"That the said Judgment was appealed against by the Appellant/Applicant."

Paragraph 4(iii) read thus:-

"That on the 30th of March, 2023 the Appellant filed a motion for stay of Execution before the lower Court and the said motion was heard on the 24th of May, 2023 wherein a conditional stay of execution was granted to the Appellant/Applicant to pay the Judgment sum within 7 days of the order for conditional stay."

Paragraph 4 (iv) read thus:-

"That rather than the Appellant comply with the order of the lower Court or seek extension of the time granted him to comply maliciously filed another motion for stay of execution before this Honourable Court on the 25th of May, 2023."

Paragraph 4 (v) read thus:-

"That the said Motion came up for hearing on the 14th of June, 2023 wherein the Court in their wisdom granted a conditional stay on the Appellant to comply within 7 days of the order."

Paragraph 4 (vi) read thus:-

"That the Court also granted cost of ₦200,000.00 against the Appellant/Applicant for disobeying the order of the lower Court."

Paragraph 4 (iv) read thus:-

"That on the 16th of June, 2023, we were served an Affidavit of compliance by the Appellant showing that the Appellant complied to the order of the lower Court 22 days after the order was given the said Affidavit of compliance and receipt of payment is hereby attached and marked as Exhibit D1."

In the light of the above, a careful study of the Affidavit evidence will reveal that the Appellant/Applicant instead of complying with the order of the trial Court made on 24th day of May, 2023 granting a conditional stay of execution by depositing the Judgment sum in the account of the F.C.T High Court within 7 days, the Appellant/Applicant proceeded to file another Motion for stay of execution on the 25th day of May, 2023.

The trial Court in its wisdom granted another stay of execution and awarded a cost of **₦200,000.00 (Two Hundred Thousand Naira)** against the Appellant/Applicant for disobeying the orders of the lower Court.

The Appellant/Applicant Claims by this Application, that he has complied with the said order and even made payment but was unable to get printout of the evidence of payment.

However, a close look at Exhibit A, annexed to the Counter Affidavit will show that payment was made by the Appellant on 13th day of June, 2023 at 9:40 am. Now, although this Court granted the conditional stay on 14th day of June, 2023 a day after the Appellant had made payment. (But was not at this Court's disposal), the fact still remains that the payment. Made by Appellant on the 13th day of June, 2023 was way beyond the time ordered by the Court for payment to be made. i.e the 7 days stipulated by the trial Court in its order of 25th day of May, 2023. Therefore, the Appellant has failed to comply with the said order. We so hold.

It is therefore, our considered opinion, that the depositions in the Affidavit in support of this Motion to set aside the order of this Court is not sufficient

to warrant this Honourable Court to exercise its discretion in granting the Application. We so hold.

Before we conclude let us refer to the case of **TOTAL ENGINEERING SERVICES TEAM INC VS CHEVRON (NIG) LTD (2010) LPELR- 5032 (CA) PP 39 – 40 PARAS B – A PER OGUNBIYI J.C.A.** Where it thus:-

"I would further wish to restate the trite law that a Court has an absolute and unfettered discretion to award or refuse cost in any particular case but the discretion must be exercised judicially and judiciously. The award of cost or refusal to award costs is a matter in the discretion of the Court, subject to the only qualification that the Court's discretion must be seen to have been judicially and judiciously exercised. In this regard it is a popular saying that cost follows event in the sense that although every litigant has a right to obtain an order as to cost nevertheless he may waive it assessment of the amount allowed, in terms of an award of costs is the Responsibility of the Court who determines what are reasonable costs in the circumstances."

Therefore From the records before us it is abundantly clear that this Honourable Court per Coram justice O. Okpe (Presiding Judge) and Justice M. A. Hassan (Hon. Judge) Exercised their discretion judicially and judiciously by awarding cost of **₦200,000.00 (Two Hundred Naira)** only against the Appellant/Applicant in favour of the Respondent. We so hold.

In view of this and without further ado, we hereby resolve the issue for determination against the Appellant/Applicant in favour of the Respondent and hold very strongly that this Application lacks merit and is accordingly dismissed.

Sign

Sign

Presiding Judge

Hon. Judge

Hon.

HON. JUSTICE C. N. OJI

HON. JUSTICE S. U. BATURE