

IN THE HIGH COURT OF JUSTICE OF THE F.C.T.

IN THE ABUJA JUDICIAL DIVISION

HOLDEN AT KUBWA, ABUJA

ON THURSDAY THE 16TH DAY OF JUNE, 2021

BEFORE HIS LORDSHIP: HON. JUSTICE K. N.OGBONNAYA

JUDGE

SUIT NO.: FCT/HC/CV/15/19

BETWEEN:

SUNMART PROGRESS NIG. LTD. ----- } PLAINTIFF

AND

**1. D.A. CONSTRUCTION LIMITED
2. DEPUTY SHERRIFF OF FCT HIGH COURT ----- } DEFENDANTS**

JUDGMENT

In an Originating Summon filed on the 13th of November, 2019 Sunmart Progress Nigeria Limited sued D.A. Construction Limited and Deputy Sherriff of FCT High Court. They want this Court to interpret the two (2) questions raised therein which are:

(1) Whether the trial Judge was right to have held in Suit No: FCT/HC/CV/1128/ 16 in his Judgment delivered on 15th February, 2018 amounting to a consent Judgment in respect of the issues of breach

of contract by one of the parties and if not this Court has an inherent Jurisdictional power to entertain this Originating Summons and therefore the Claimant/Applicant is entitled to the Reliefs sought.

- (2) Whether by the Terms of Settlement dated 15th February, 2018 in the said Suit No. FCT/HC/CV/1128/ 16 and entered as Consent Judgment of the parties on 15th February, 2018 against the Claimant/Applicant when the said Consent Judgment was obtained by deception, concealment of truth, misrepresentation of facts and undue pressure on the Claimant.
- (3) Insofar as maybe necessary that the Court makes the following Order for the Claimant as per her Claims:
- a. An Order setting aside and/or nullifying the Consent Judgment Hon. Justice O.O. Goodluck delivered on the 15th February, 2018 in Suit No: FCT/HC/CV/1128/16 for want of Jurisdiction.
 - b. An Order of Mandatory Injunction reversing/setting aside any act of the Defendants by themselves, their staff, agents or anybody whosoever described which act

amount to giving effect to the Consent judgment of the Court.

c. Omnibus prayer.

The Originating Summons was supported by an Affidavit of 27 paragraphs. They attached 6 Exhibits mainly receipts and cheques as well as evidence of electronic money transfer made and instruction to make payments. There is also Letter of Termination of Contract as well as Judgment Enforcement Form. In the Written Address the Plaintiff Counsel raised the same questions.

In question No.1 the Plaintiff Counsel submitted that where the decision of the Court was a nullity, the principle of *Functus Officio* does not apply since such decision was obtained by fraud, mistake and misrepresentation. Such flaws cannot be out of the reach of the Court to set it aside. He referred to the case of:

**Enterprise Bank Limited V. Aroso & Anor
(2015) LPELR 24720 (SC)**

That where a judgment is entered in error or mistake be it by Consent or Regular, the Court has no power to set it aside except on certain grounds. He referred to the cases of:

**Obimonure V. Erinsha
(1996) ANLR 245**

**Adeigbe V. Kusimo
(1965) NWLR 284**

**Azogor V. State
(2019) All FWLR (PT. 990) 1409 SC @ 1414 Ratio 2**

That based on the decision in the above cases, it is self evident that paragraphs 1 – 27 of the Affidavit in support to the Claimant’s Originating Summon will serve as pathfinder for the conditions stated above. That Claimant is in Court to urge Court to set aside the said Consent Judgment and in respect of which an Order was drawn up and signed on the 15th of February, 2018. That it is in contention that the said Judgment was obtained in fraud and deceit by the 1st Defendant.

That the Defendant knowing fully well that the contract between it and Claimant is a fixed price, non-fluctuating contract, refused to disclose this to the Court even when settlement was drawn up and presented to Court and that the Plaintiff was to pay to the Defendant the sum of Sixty Two Million, Two Hundred and Sixty Seven Thousand, Eight Hundred and Forty Naira (**₦62, 267,840.00**) when in all sincerity of purpose, it was the 1st Defendant who had been overpaid by the Claimant to the tune of Sixty One Million, Nine Hundred Thousand, Five Hundred and Twenty Seven Naira, Seventy Four Kobo (**₦61, 900,527.74**).

That the first phase of the price, non-fluctuating contract is a total payment of Four Hundred and Sixty Five Million, Eighty Three Thousand, Four Hundred and Seventy Two Naira, Twenty Six Kobo (**₦465, 083,472.26**) to be made to the 1st Defendant but the total sum eventually paid to the 1st Defendant as at the date Terms of Settlement was signed and Consent Judgment was given was Five Hundred and Twenty Six Million, Nine Hundred and Eighty Four Thousand Naira (**₦526, 984,000.00**). Significantly that the sum of Sixty One

Million, Nine Hundred Thousand, Five Hundred and Twenty Seven Naira, Seventy Four Kobo (~~₦61,900,527.74~~) was overpaid to the 1st Defendant. That based on that the Consent Judgment should have been in favour of the Claimant not on the 1st Defendant as erroneously drawn up as terms of which the Court relied on to deliver Judgment.

That in deciding whether a Consent Judgment can be set aside, the grounds for setting aside has been laid down in the case of:

**Ishmael & Ors V. Ukaegbu
(2018) LPELR 46626 (CA)**

That based on the deceit and fraud, the said Judgment can and should be set aside. That in the present case, the 1st Defendant surreptitiously agreed to Consent Judgment which it has fraudulently mislead the Claimant to consent to and after the Consent Judgment it brought up another claim insisting that Claimant must pay the sum of One Hundred and Ninety Eight Million, Two Thousand and Fifty Three Naira, Ninety Kobo (~~₦198,002,053.00~~). According to it the further claim was not decided/settled before the terms of Consent Judgment was drawn up.

That if the 1st Defendant is now instituting another action as stated in its letter dated 25/2/19 to the Claimant, it means that the Terms of Settlement purportedly presented before the Court as Consent Judgment, purported agreed to by the parties did not ban the 1st Defendant from instituting another Suit to claim the amount it had agreed to forgo.

The mere fact that the 1st Defendant by that letter of 25th February, 2019 to Claimant, deceived the Claimant into agreeing to the said Terms presented before the Court as Consent Judgment and as such the said Consent Judgment of 15th February, 2018 was a nullity because the Court was misled into giving/entering the said Consent Judgment.

That it is very clear in the matter handled in the Suit by the Court, very clear by the letter of 1st Defendant to Claimant dated 25/2/19 where the 1st Defendant is demanding the payment of One Hundred and Ninety Eight Million, Two Thousand and Fifty Three Naira, Ninety Kobo (**₦198, 002, 053.00**) before the contract between the Claimant and the 1st Defendant could be terminated. That from the action of the 1st Defendant it follows that there was no agreement of the parties on all aspect of the matter to be covered by the Consent Judgment.

That in the instance case, the parties agreed on other and they should have been permitted to reach an agreement on the letter or resolve the points of disagreement before the Terms of Agreement was filed before the Court. Having not done so have given the any of the parties the right to set aside the Consent Judgment, given by the Court on the 15th of February, 2018. They referred to the case of:

**Vukan Gases V. Gessell Shaft Fur Ind. AG
(2001) LPELR – 3465 (SC)**

That the Plaintiff has proved beyond shadow of doubt that it is entitled to be awarded all Reliefs claimed in its Originating Summon.

That granting the Reliefs automatically leads to other Reliefs being granted since if the Consent Judgment is set aside then execution carried out by the Defendants on 6/7/18 becomes unlawful and should therefore be set aside. Likewise the occupation of Plot 1505 CAD B06 Mabushi District, Abuja by the 1st Defendant then becomes illegal and it should vacate therefrom/promptly. That all cited authorities permit the Court to grant the application.

Upon receipt of the Originating Summon the 1st Defendant – D.A. Construction filed a Counter Affidavit of 59 paragraphs and a Written Address. They did not attach any document.

In the Written Address they raised two (2) Issues for determination which are:

- (1) Whether having regards to the facts leading to the delivery of the Consent Judgment, this Court can set aside the said Consent Judgment.**
- (2) Whether the Claimant have met the conditions to warrant the Court to set aside the Consent Judgment in the Suit No. FCT/HC/CV/1128/16.**

On Issue No.1, they submitted that this Court has the requisite jurisdiction to entertain the Suit that gave rise to the Consent Judgment being a State High Court. That based on the decision of the Court in the case of:

**Vulcan Gases Limited V. G.F. Ind. AG
(2001) 9 NWLR (PT. 719) 610 @ 646**

That the Court rightly assumed jurisdiction to entertain the said Suit HC/CV/1128/16 and gave effect to the voluntary wishes of the parties making same its Judgment. That the parties had therefore applied and the said terms adopted as Consent Judgment. That the parties both negotiated and agreed as to the said terms after several meetings with their representative times. That they were ad idem in the said agreement.

That the parties did robust joint valuation of the work on the site covering phases 1, 2, & 3 before the terms were reduced into writing, executed and adopted by the Court as Consent Judgment entered voluntarily and by parties Agreement. He urged the Court to so hold.

On Issue No.2, on whether the Claimant met the condition to warrant the Setting Aside of the Consent Judgment, the 1st Defendants submitted on parties' agreement and such agreement is put in writing and adopted as Judgment of the Court, such agreement becomes binding on the parties. He referred to the case of:

**Afegbua V. A – G Edo State
(2001) 14 NWLR (PT. 733) 454 Paragraph D – F**

That the 1st Defendants had shown that the Consent Judgment was by consent of the parties, entered into voluntarily without any misrepresentation, fraud, mistake or arm twisting as shown in the 59 paragraphs Counter Affidavit in opposition to this Originating

Summons. That it was the idea of the Claimant ab initio to settle the dispute amicably,

“having been fully abreast of the fact and circumstances of the contract between the parties since 2010.”

That since the Claimant voluntarily entered into the amicable settlement/Consent Judgment, it cannot apply for Court to set it aside on ground of fraud and misrepresentation. That the parties complied with all the conditions in the Supreme Court case of

**SPM Limited V. Adetunji
(2009) 13 NWLR (PT. 1159) 668**

before the said Consent Judgment was entered.

That the Claimant has not through its Affidavit, established a prima facie fraud against the Defendants to warrant the setting aside of the said Consent Judgment. That there was no fraud before, during or after the contract was awarded or before the terms were entered as Consent Judgment in the Suit HC/CV/1128/16. That this application is malafide. That the allegation of overpaying the Defendant by Sixty One Million, Nine Hundred Thousand, Five Hundred and Twenty Seven Naira, Seventy Four Kobo (**₦61, 900,527.74**) is unfounded having paid Five Hundred and Twenty Six Million, Nine Hundred and Eighty Four Thousand Naira (**₦526, 984,000.00**) rather than Four Hundred and Sixty Five Million, Eighty Three Thousand, Four Hundred and Seventy Two Naira, Twenty Six Kobo (**₦465, 083,472.26**) for phase I. That the payment made to 1st Defendant cut across phase 1, 2 & 3 of the contract.

That based on the joint valuation, the work done by 1st Defendant as at 2014 was for Five Hundred and Seventy Seven Million, Two Hundred and Fifty One Thousand, Eight Hundred and Forty Naira (**₦577, 251,840.00**) and that the Claimant paid Five Hundred and Fourteen Million, Nine Hundred and Eighty Four Thousand Naira (**₦514, 984,000.00**) leaving balance of Sixty Two Million, Two Hundred and Sixty Seven Thousand, Eight Hundred and Forty Naira (**₦62, 267,840.00**).

That the parties agreed to that amount outstanding and due to 1st Defendant as per Valuation No.1, the subject of the Suit FCT/HC/CV/1128/16.

That Claimant has not been able to support their allegation of fraud with any evidence to warrant the Court to set aside the said Judgment. They urged the Court to so hold.

That Claimant also failed to establish fraudulent misrepresentation. The Claimant failed to show how and where and at what point the arm-twisting and misrepresentation was made which led to them to enter into the said Settlement that should warrant the setting aside of the Judgment.

That all parties were fully represented throughout the negotiation of the Settlement that culminated into the Consent Judgment. That parties arrived at the unanimous conclusion. They urged Court to so hold.

That since the 1st Defendant had established that the Judgment was not obtained by fraudulent misrepresentation, this Court lacks the jurisdiction to set it aside. They cited the case of:

**Ochijenu Acana V. Ejiga & Anor
(2008) LPELR – 45958 (CA)**

They urged Court to refuse the application and uphold the said Consent Judgment as not doing so will deny the 1st Defendant the fruit of its Judgment.

The Claimant filed a 50 paragraphs Further and Better Affidavit to the 1st Defendant's Counter Affidavit. They attached four (4) documents marked as EXH A – D. the Exhibits include the Letter of Award of Contract, Letter of Terminal of Contract dated 12/12/17. Reply to the letter by the 1st Defendant. The Writ filed by the 1st Defendant on the 16th of October, 2019.

In the Written Address the Claimant raised an Issue for determination which is:

“Whether upon the determination of the questions presented by Claimant, the Claimant is entitled to the Relief claimed in the Originating Summons.”

He submitted that the Plaintiff is entitled to have the Judgment set aside. That Court has the jurisdiction to set aside the Consent Judgment. That they are entitled ex debito justitiae to have it set aside. They referred to the case of:

**Okafor V. A – G Anambra
(1991) 6 NWLR (PT. 200) 659 @ 678**

That a Court of competent jurisdiction can set aside such Judgment where there is allegation of fraud. That the renegotiated terms of the Consent Judgment delivered on the 15th of February, 2018 in effect constitutes a fresh

contract and supersedes the Consent Judgment. That the Consent Judgment in that wise is a nullity and of no effect.

That the letter of 12th December, 2017 written by Plaintiff to 1st Defendant for the determination of the contract between the parties was never captured by the Consent Judgment and as such the Consent Judgment cannot be called a final Judgment.

They also submitted that if till date the 1st Defendant is still in occupation of the property of the Claimant under construction, it is right to state that the Consent Judgment never had the consent of the parties and is therefore a nullity. That if the said Judgment which was expected to have addressed all issues emanating in the Suit did not capture the main grievances of the parties and the 1st Defendant instituted Suit FCT/HC/CV/37/19 for payment of job it claimed to have been done as at 2017 even before the said Consent Judgment of 15th February, 2018 it means that the Consent Judgment is a nullity.

Again, that the 1st Defendant by letter of 12th September, 2019 to Claimant and the subsequent Suit No.: HC/CV/37/19 is re-negotiating the terms of the contract between the parties and the said Consent Judgment purportedly entered into by the parties.

That all the above analysis establishes that the Consent Judgment can be set aside by a Court of competent jurisdiction whereas in this case the Contractual Agreement could be voided or rescinded. That the re-negotiated terms in effect constitute a fresh contract and

therefore supersedes the Consent Judgment which therefore should be set aside. They relied on the case of:

Union Homes Savings & Loans Ltd. V. CPL Ind. Ltd. (2009) LPELR – 8154 (CA)

That it is clear from the letter of 12th September, 2019 Suit No.: HC/CV/37/19 that the Terms of Settlement of the Consent Judgment are being re-negotiated by the 1st Defendant which the 1st Defendant has the right to do. But any dispute arising from that re-negotiation creates fresh cause of action which therefore renders the Consent Judgment unenforceable and a nullity. They relied on the case of:

Abey V. Alex (1999) 14 NWLR (PT. 637) 148

They also relied on the old English case of

Mcalcum V. County Residences Limited (1965) 1 WRL 657 & 660

That by paragraph 52 of the 1st Defendant's Counter it stated that the Consent Judgment is an offshoot of the contract. They urged Court to grant their prayers and discontinuance and dismiss the 1st Defendant's Counter Affidavit. They also cited the case of:

Julius Berger V. Ugo (2020) All FWLR (PT. 1047) Page 9 Ratio 5

COURT:

In this Originating Summons the Claimant wants the Court to interpret whether it has rightly challenged the Consent Judgment of 15th February, 2018 in that the Judge has

no right to have held in the said Judgment in the issues of breach of contract by one of the parties. That if the Court finds that the Judge was wrong in entering the Consent Judgment, this Court should therefore hold that it has jurisdictional power to entertain this Originating Summons and hold that the Claimants are entitled to its Reliefs. The Claimant also want an interpretation on whether the 1st Defendant – D.A. Construction Limited, is entitled to forcibly execute the said Consent Judgment which was obtained by fraud, deception, concealment of truth, misrepresentation of facts and undue pressure on the Claimant. The Claimant want a Consequential Order to set aside or nullify the Consent Judgment for want of jurisdiction and to reverse and set aside the act of the 1st & 2nd Defendants which amounts to giving effect to the Consent Judgment.

The Court has summarized the submission of both parties above. The Court had also dismissed the Preliminary Objection filed by the 1st Defendant challenging the Originating Summons. The Court holds that the said Ruling dismissing the Preliminary Objection filed by 1st Defendant forms part of this Judgment as if same is set here under seriatim.

As can be distilled from the two (2) questions the Claimant is challenging the Consent Judgment and the jurisdiction of the Court to entertain the Suit and hold that the Consent Judgment was not settlement of the issues in dispute on allegation of party's breach of contract and that the Court should nullify/set aside the Consent Judgment and any enforcement of same.

To start with, in every contract, it is a common mantra that parties are bound by the terms of contract they have entered into and that any breach of such terms by any of the parties is an actionable wrong. This is captured in the Latin maxim **“Pacta Sunt Servanda.”** It is also a known principle of law and it is trite to that where there exists a Consent Judgment that any of the parties who alleged that the Judgment was obtained by fraud has a right and duty to file a fresh Suit or appeal against the Judgment. But such party cannot do both.

In this case the Plaintiff had challenge the Consent Judgment as having been obtained by fraud, misrepresentation, concealment of facts/truths and undue pressure. It is very imperative to look at the Contract Agreement which is as at the center of the debacle in this case. On the 10th February, 2010 the said Agreement was entered into for the Hotel Development for Dilimi Investment Limited at Plot 1505 CAD Zone B06 Mabuchi, Abuja FCT. The construction was to be done in phases. The parties agreed that the contract thus:

“This is a fixed time price non-fluctuating contract.”

They also agreed that the payment should:

“Payment should be stage payments made in advance against each milestone as per attached schedule for Phase I.”

While payment for Phase 2 & 3 of the works SHALL be subsequently worked out and agreed between both parties.”

From the content of the Agreement above, it is clear that the parties cannot enter into another phase without an agreement to do so. That means that before the Defendant can go into the 2nd and 3rd phase there must be:

“Schedule for the 2nd & 3rd must be worked out and agreed by the parties.”

That means that the 1st Defendant getting into the 2nd & 3rd stage without the schedule for the phases worked out and agreed by the parties is a breach of the fundamental term of the Contract Agreement of 10th February, 2010. The amount for the 1st phase was well spelt out too.

From the Agreement, the first phase payment was to be made in advance against such milestone as per the first phase work. The cost of the first phase was Four Hundred and Sixty Five Million, Eighty Three Thousand, Four Hundred and Seventy Two Naira, Twenty Six Kobo (~~₦~~465, 083,472.26). According to the calculation of the Plaintiff, its then Chairman/CEO Late Dr. Sunday Igwe paid the sum of Four Hundred and Eighty Three Million, Nine Hundred and Eighty Four Thousand Naira (~~₦~~483, 984,000.00) as at 1st July, 2014 between 6th April, 2010 to 30th June, 2014 when he suddenly died. As at that date he had paid up all the money for the first phase of the construction work. That means he “overpaid” by Eighteen Million, Nine Hundred Thousand, Five Hundred and Twenty Seven Naira, Ninety Four Kobo (~~₦~~18, 900,527.94).

In the Terms of Settlement which was entered into as Consent Judgment of the parties, the 1st Defendant had

made a claim for payment of outstanding sum of Sixty Two Million, Two Hundred and Sixty Seven Thousand, Eight Hundred and Forty Naira (N62, 267,840.00) which they claimed was for part of the work they did in 2nd & 3rd phases. The 1st Defendant had also claimed that they had gone ahead to go into the 2nd & 3rd phase and had demanded for the payment of the said sum of Sixty Two Million, Two Hundred and Sixty Seven Thousand, Eight Hundred Naira (N62, 267,800.00). They never showed to Court any evidence that they had agreed with the Late Dr. Sunday Igwe to go into the 2nd & 3rd phase or that there was any Board Resolution of the Claimant authorizing 1st Defendant to go into 2nd & 3rd phases as clearly spelt out in the Agreement.

The failure of the 1st Defendant to disclose the authorization to enter into the 2nd & 3rd phase of the Construction/Development of the project is a breach of the fundamental terms of the contract. So this Court holds. Therefore any Terms of Settlement entered into as Consent Judgment of the parties in which the Claimant made any payment or is purported to be indebted to the 1st Defendant on work done on the 2nd & 3rd phases of the work is a nullity.

Such Consent Judgment ought to be set aside because it is based on a breach of the fundamental terms of the contract agreement which stipulates that:

“Phases 2 & 3 of the work shall be subsequently worked out and agreed by the parties.”

There is no evidence that that terms of the contract was complied with before the 1st Defendant hurriedly went

into the 2nd & 3rd phases after the said Dr. Sunday Igwe was suddenly murdered by unknown persons. The claim by 1st Defendant that they had an agreement with the widow of the said Late Chairman/CEO – Mrs. Precious Igwe is wrong, illegal, unfounded, misleading and covered in deceit. This is because the 1st Defendant was dealing with Sunmart Progress – a registered company with a Board. The 1st Defendant knows that any decision, particularly as the Chairman had died, must be based on the Board resolution. The 1st Defendant never presented any document before this Court or the Court in Suit HC/CV/1128/16 to show that Precious Igwe was endorsed by the Board of Sunmart Progress Limited. In all the letters written to the 1st Defendant by Precious and the letter written to Precious by 1st Defendant and their representative responses, there is no one that stated that Precious Igwe had taken the place or was approved or appointed by the Board of the Claimant as the Chairman/CEO of the Claimant. In the letter to the 1st Defendant dated 16/11/15, the Counsel described Precious as the widow.

“Precious Igwe, the widow to the Late Sunday Igwe the Chairman/CEO Sunmart Progress Nigeria Limited.”

In the length and breadth of the letter there was nowhere the said Precious was described as the Board appointed or nominated Chairman/CEO of Sunmart Progress Nigeria Limited. The Defendants knows that they were dealing with a company and that their dealings were to be with the company and not with the widow of the Late Sunday Igwe, who from all indication had little or no

knowledge of the 1st Defendant's dealings with Sunmart let alone knowing the stage of the contract and the details of the project for the construction of the said Hotel Project. The 1st Defendant, suddenly working and relating to the said Precious on issue concerning the project and doing valuation of work and coming up with indebtedness on the amount owed to the 1st Defendant is to say the least, fraudulent. It is obvious that they "cashed" on the vulnerability of the poor woman who was mourning the sudden death of her husband. They also cashed on the fact that she was obviously not aware on the stage of the project or the phase and the details of the project. The 1st Defendant deliberately cowed the woman into succumbing to their calculated plans by presenting to her the company's indebtedness on works allegedly done on phase 2 & 3 when the 1st Defendant knew that the parties were yet to agree on the schedule for the said phases 2 & 3 and are yet to work out the said phases.

It is the humble view of this Court that by so doing the 1st Defendant acted fraudulently. They hid the true fact from the said Precious Igwe. The 1st Defendant misrepresented the facts and placed undue pressure on the Claimant through the said Precious and deceived her to going into settlement agreement and deceived the Court into entering the fraudulently gotten Terms of Settlement to be entered into Consent Judgment of the parties. That is why this Court holds boldly that the said Consent Judgment obtained on 15th of February, 2018 in Suit No.: CV/1128/18 was based on fraud, gross deception, misrepresentation of facts, concealment of the

truth and undue pressure on the Claimant. This Court also holds that they would not ordinarily have entered the said Terms of Settlement as Consent Judgment if the 1st Defendant who was the Claimant in HC/CV/1128/18 had disclosed to the Claimant and the Court the real truth/facts in that case. Precious would not have agreed to enter into the so called Terms of Settlement had she known that the 1st Defendant was not allowed to bill the Claimant for works done on the 2nd & 3rd phases where there was no previous agreement between the parties for the 1st Defendant to enter into those phases. Claiming the payment for the work on phase 2 & 3 by 1st Defendant is fraudulent and a breach of the Terms of the Contract. Making any payment on the said phases by Precious is based on the manipulation and pressure mounted on her by the 1st Defendant who obviously cashed on the turbulence in the family of the Late Sunday Igwe following his sudden demise. Again, inability of the 1st Defendant to respond to the Further and Better Affidavit by Claimants means that they accepted all those facts as contained therein. It is more so when the 1st Defendant could not tender any document to show that Precious Igwe was actually appointed or endorsed by the Board of the Plaintiff to act as the new Chairman/CEO of the Claimant. It is trite that uncontroverted facts are deemed admitted.

It is imperative to reiterate that the said Consent Judgment was obtained by fraud. The Judge was not right to have said that the said proceeding in the said Suit was for Settlement of Issue of Breach of Contract.

The Judge would not have held so had the 1st Defendant stated the truth and not concealed the facts.

It is imperative to point out that in any matter where the parties had on their own volition decided to explore amicable settlement of the Issues in dispute and had penned down the Terms of Settlement, the Court has no power to add or subtract from the Terms. The Court believes that since the parties has decided to so settle, so be it. Once the Terms are filed and presented before the Court the only duty of the Court after the parties have adopted the said Terms, is to say "AMEN" to the said Terms. That is exactly what the Hon. Justice O.O. Goodluck did in the Suit CV/1128/18. Little did he know that the said Terms of Settlement was froth with deceit, misrepresentation and concealment of truth and undue pressure. The Judge ought not to have held so as he did had he known the truth. That is why this Court holds boldly that the said Consent Judgement was obtained by fraud, cheat and deceit as such should be set aside and declared a nullity. And so this Court holds and declares.

Also any execution/enforcement carried out based on the said fraudulent Judgment ought to be nullified and set aside.

It is the law, it is absolute and has been held in plethora of cases that once a Judgment or decision of the Court was obtained by fraud particularly where such Judgment is Consent Judgement that the party alleging the fraud has a right to challenge the said Consent Judgment by way of filing fresh action or appealing against such Judgment. Such party is prohibited from filing a fresh

Suit and appealing the same Judgment at the same time. This is the decision of the Court in the case of:

Julius Berger V. Ugo

(2020) All FWLR (PT. 1047) Page 9 Ratio 5 where the Court held that:-

A party who seek to set aside a Judgment of a Court having been obtained by fraud, can do so either of two ways namely:

- a. By means of Appeal against the said Judgment or**
- b. By means of fresh action seeking to set aside the said Judgment.**

The party cannot take the two options simultaneously or after failure of the other.

From the above, it is obvious that like the Claimant did in this case, by filing the present Originating Summon, that is the right thing to do as there is no pending appeal on the said Consent Judgment filed by the Claimant. Most importantly whereas the Plaintiff had done in filing this Originating Summon which is a fresh action, seeking for the setting aside/nullification of the said Consent Judgment, it is the right and most appropriate step to take.

Again, the Court has requisite jurisdiction to hear the said Originating Summon and to answer the questions posed by the Claimant and has the right to grant the Consequential Orders as appropriate. Besides the Plaintiff had presented facts in both Affidavit and the main Originating Summon and the Further and Better

Affidavits with credible documents and facts supporting and succinctly establishing the allegation that the Consent Judgment was obtained by fraud, deceit and misrepresentation of facts. The Claimant is also right to seek for the setting aside and nullification of the said Consent Judgment and its execution and enforcement by the 1st & 2nd Defendants. The Claimant had by the tendering of the Contract Agreement or Letter of Awards of Contract show that the contract was a fixed price – non fluctuating contract. That the project was phased and that phase 2 & 3 were to be agreed and the work thereon scheduled by the parties before commencement. They have shown that the 1st Defendant claiming payment for phase 2 & 3 where the parties never agreed or work scheduled as spelt out in the contract was a breach of the fundamental terms of the contract. They have also established that the Plaintiff never authorized Precious to act as Chairman/CEO after the sudden and painful death of Dr. Sunday Igwe and that all the so called actions of the said Precious which the 1st Defendant are anchoring on in their claim on the legitimacy of the Consent Judgment and Terms of Agreement were all fraudulent, deceitful and gross misrepresentation of facts and that the said Consent Judgment ought to be set aside and nullified having been obtained by fraud.

It is evidently clear that by the letter of Termination dated 12/12/17 that the Plaintiff realised that there was fraud and notified the Defendant terminating the contract. The 1st Defendant bent on their calculated plan to defraud the Claimant, continued with the Court case

and covered the Precious to agree to the so called Terms of Settlement when they know that the Claimant had terminated the contract with the 1st Defendant.

The 1st Defendant acted fraudulently and they knew it when they wrote to the widow of the said Late Sunday Igwe demanding through their Counsel, Samuel Zibiri SAN & Co, demanding immediate payment of outstanding sum of One Hundred and Fifty Three Million Naira (₦153, 000,000.00) when they had stated that the late Sunday Igwe paid them more than the contract sum for Phase I of the project before he died suddenly.

Again, the 1st Defendant stating in paragraph 52 of their Counter Affidavit thus:

“That the Consent Judgment of 25th of February, 2018 was an offshoot of the Terms of Settlement ...”

shows that the 1st Defendant knew that the Consent Judgment did not cover the issues in dispute as to the breach of the contract.

If actually the Plaintiff was in breach, the 1st Defendant would have gone on appeal against the said Consent Judgment instead of further breaching the contract terms and condition and anchoring on a fraudulent Judgment gotten by fraud and deceit of the widow of the Late Sunday Igwe.

The 1st Defendant knew what they were doing and perfected same by the forcible execution of the said Consent Judgment gotten by fraud.

A closer look at the content of the response of Precious to the Letter of Demand from the 1st Defendant written shows that the 1st Defendant capitalised on the traumatic situation and vulnerability of the said Precious to torment and demand for the payment of money for the work on the Phases 2 & 3 of the project. To start with, the said Precious was pregnant when her husband was shot and killed by unknown gunmen. The money was demanded while she was still mourning her husband and nursing a child and yet to recover from the shock of the demised. Because of her condition, coupled with the fact that she knew little or nothing about the business, and her traumatic condition, she was gullible to the lies and deceit of the 1st Defendant who cowered her into subjugation to agree to pay when the Plaintiff is not owing. The 1st Defendant followed that up by instituting the action that ended up as Consent Judgment. When the Claimant filed a Counter-Claim to the Suit HC/CV/1128/16, the 1st Defendant changed their plan and resorted to amicable settlement rather than following up the case to a conclusion by coming up with the lopsided Terms of Settlement which was entered as Consent Judgment of the parties. Meanwhile, while the case was going on, the Claimant had written a letter to terminate the contract with 1st Defendant. Rather than follow the Terms of the Agreement, the 1st Defendant capitalized on the fact that the Suit HC/CV/1128/16 was still pending when they received the Counter-Claim, the same 1st Defendant resorted to settlement out of Court because they know that Precious did not know all the facts of the case.

It is very obvious that the Terms of Settlement and the Consent Judgment did not cover all the issues in dispute. For instance, the Consent Judgment did not cover the issue of handover of the vacation from the site by the 1st Defendant since they have demanded and were paid part of the so called money they expended in Phase 2 & 3 which was contrary to the Terms of the Contract Agreement.

That is why this Court holds that actually the Consent Judgment was obtained by fraud, misrepresentation of facts, concealment of the truth, undue pressure on the Claimant, did not cover the issue of breach of the contract and was a nullity and ought to be Set Aside by this Court as sought by the Claimant in his Originating Summon.

Again, the 1st Defendant, filing the said Suit HC/CV/32/19 of 16th October, 2019 after the Consent Judgment had been fraudulently obtained and forcibly enforced, shows that the issues in dispute were not totally resolved and that the Consent Judgment was fraudulently obtained. One wonders why it was not covered in the Consent Judgment since the Claimant had ...

It further shows that the Consent Judgment did not cover the issues in dispute between the parties in the contract and that the Court had no right to enter the Terms as Consent Judgment and should not have held that it was in final determination of the issues in dispute. The 1st Defendant, turning back after two (2) years of the notification of the termination of the contract and making claims for damages and loss of profit and

expenses have all shown how fraudulent the 1st Defendant had been and that the Consent Judgment was a fraud.

The Claimant had challenged the said Consent Judgment through the filing of fresh Suit. It is the right and proper step to take. Again, the Plaintiff is right, seeking for the setting aside of the said Consent Judgment having established that it was fraudulently obtained. They are equally right to seek for the nullification and setting aside of the said Judgment obtained by fraud, deceit and misrepresentation of facts.

The Claimant has demonstrated that this Court has the right and jurisdictional powers to entertain this Suit because the claims of the Defendant are within what this Court can entertain. Again, the issue in dispute is based on simple contract and the issue happened within the territorial jurisdiction of this Court. That is why this Court holds that it has jurisdiction to entertain the Suit and answer the question posed for interpretation by the Claimant.

Again, that the Claimant having established the fraud in obtaining the said Consent Judgment and is entitled to the Consequential Order sought in this Originating Summons. Besides, Originating Summons is one of the ways by which matters are settled in Courts within the jurisdictional sphere of this Court.

This Court therefore holds that the Court was not right in giving the Consent Judgment because the 1st Defendant deliberately misrepresented the facts to the

Court in the Terms of Settlement which metamorphosed as Consent Judgment, it was obtained by fraud.

This Court therefore Order that the said Consent Judgment of 15th February, 2018 in Suit No.: **FCT/HC/CV/1128/16** be set aside/nullified same having been obviously obtained by fraud for want of jurisdiction.

This Court also gives an Order of mandatorily reverses and set aside any act of the 1st & 2nd Defendants by themselves, their agents, staff and anybody whosoever described which act amounted to given effect to the said Consent Judgment which was fraudulently obtained on the 15th of February, 2018 in Suit No.: FCT/HC/CV/1128/16.

This Court nullifies any execution and enforcement carried out in respect of the said Consent Judgment of 15th February, 2018 in Suit No.: FCT/HC/CV/1128/16.

This is the Judgment of this Court.

Delivered today the ____ day of _____ 2021 by me.

**K.N. OGBONNAYA
HON. JUDGE**