IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY
IN THE ABUJA JUDICIAL DIVISION (APPELLATE DIVISION)
HOLDEN AT COURT 11, BWARI, ABUJA

BEFORE THEIR LORDSHIP:
HON. JUSTICE S. B. BELGORE (PRESIDING JUDGE)
HON. JUSTICE A. A. FASHOLA (HON. JUDGE)
CLERKS:
(1) ESEOGHENE EJOVI
(2) GBENGA FATADE
(3) PRECIOUS UGO DIKE

SUIT NO: FCT/HC/CVA/13/19
CVA/583/2020
DATE: 22/09/21

BETWEEN:

BARRISTER MOSES J. DANGANA……APPELLANT

AND

NDUBUEZE MADUBUIKE……RESPONDENT

JUDGMENT

This is an appeal against the brief Ruling of the trial Chief District Court Judge, Kubwa, Abuja, presided over by Hon. Maimunat Folashade Oyekan.

The appellant is a legal practitioner with a law firm in the Federal Capital Territory where he carries out his law practice. He was the Defendant in the lower Court. The only Respondent, Mr. Ndubueze Madubuike a businessman of N.D. Plaza, Near A. A. Rano Filling Station Abuja was the Plaintiff.

The case had actually had a chequered history. It was originally filed at Kuje Chief District Court. However, on an appeal by the

appellant, Barr. Moses Dangana, the appeal panel of this Court, Coram D. Z. Senchi J. (as he then was) and B. Kawu J. held on 16/10/19, in Appeal No: FCT/HC/CVA/102/19, that another District Court, should get seized of the matter and determine same. Hence the case was transferred to the Chief District Court Judge Kubwa for adjudication.

Subsequently, the Appellant was served a hearing Notice against 30/3/20. That was on 11/3/20. This prompted the Appellant to file a counter-claim claiming some sundry reliefs against the Respondent.

On the said 30/3/20, the Court did not sit because of the general lock down as a result of the COVID-19 crisis that led to general closure of Courts in our country.

Now, on the 29th of June, after the easing of the lock-down, the Court sat and struck out the entire suit. No evidence that the Defendant was communicated with the 29/6/2020 date of hearing.

The above in brief is the facts leading to this appeal as can be garnered from the printed record.

A perusal of the Notice of appeal revealed two grounds of appeal with the Appellant seeking two principal reliefs. The grounds of the appeal are:

(1) The learned trial Chief District Court Judge, Kubwa, Hon. Memunat Folashade Oyekan, occasioned a gross miscarriage of justice by unfairly and unconstitutionally colluding with the Plaintiff (now Respondent in this appeal) in prematurely striking out the entire suit No: CV/13/2019 on 29th June, 2020 on the pretext that none of the parties to the suit appeared in Court when in fact, the

Defendant (now Appellant in this appeal) was not served whatsoever with any hearing Notice by the trial Court.

(2) The Judgment of the trial Court is against the weight of evidence.

Subsequently, Brief of Arguments were filed by Counsel from both parties.

In the Appellant's Brief of Argument settled by the Appellant, a sole issue for determination was framed, to wit:

> ***"WHETHER THE LEARNED KUBWA CHIEF DISTRICT JUDGE, HON. MEMUNAT FOLASHADE OYEKAN, ACTED FAIRLY, JUDICIOUSLY IN HIS RULING OF 29TH JUNE, 2020 IN SUIT NO: CV/13/2019 BY STRIKING OUT THE ENTIRE SUIT IN THE ABSENCE OF THE DEFENDANT (NOW APPELLANT IN THIS COURT) WHO WAS NOT SERVED WITH A HEARING NOTICE AGAINST THAT DATE OF 29TH JUNE, 2020.***

On the other hand, learned Counsel for the Respondent, George C. Anumba Esq. in the Respondent's Brief of Argument, identified one issue also, for determination. The issue is:

> ***"Whether the appellant was denied fair hearing when suit No. CV/13/2019 was struck out by the lower Court."***

In arguing the Appellant's sole issue, Mr. Dangana submitted that he was not given fair hearing. This is the gravamen of his complaints in this Court.

He strongly queried the striking out of the case on the date fixed for hearing 29/6/2020 – when no hearing Notice was issued. Learned Counsel/Appellant adopted his Brief of Argument and relied on the cases cited therein. The cases are **NIGER-BENUE TRANSPORT CO. LTD VS. OGELE COURT (2010) NWLR (PT. 1196) 238; MAKO VS. UMOH (2010) 8 NWLR (PT. 1195) 82; AND OLUMESAN VS. OGUNDEPO (1996) 2 NWLR (PT. 433) 628.**

Learned Counsel went further to say that the Respondent's Brief argument filed on 15/3/21 is statute barred and therefore worthless. His argument was that he served the Respondent with his Brief on 24/2/21, which expired on 10/3/21 but that they filed their own on 15/3/21. He relied on **Order 50 Rule 10(c)** of the Rules of this Court and the case of **SEBILINI VISION (NIG) LTD VS. SV LTD (2011) 8 NWLR (PT. 1244).**

Finally, Mr. Dangana urged us to allow the appeal, set aside the Ruling made on 29th June, 2020 by Hon. Maimunat Folashade Oyekan and order a retrial of the suit before another Chief District Court Judge.

On his part, learned Counsel for the Respondent submitted that the Appellant was served with a hearing Notice of 30/3/2020. He was not in Court because according to him (Appellant) there was COVID-19 lock down. Another date of 29/6/20 was fixed and again the Appellant was absent in Court. This according to Mr. Anumba was what led to the striking out of the case by the learned Chief District Court Judge when he was referred to the record of that 29/6/20 as shown in the Record of Appeal, Mr. Anumba of Counsel to Respondent, agreed that both the record of that day and the Record of Appeal as compiled by the lower Court did not show that the appellant was informed of the sitting of 29/6/20. He said he too was surprised that the Record of Appeal did not reflect service of hearing Notice on the Appellant.

On the issue of the counter-claim filed by the Appellant before the learned District Court Judge, Mr. Anumba argued that the counter-claim is independent of the suit struck out.

Learned Counsel, having adopted the Brief of Argument filed as his argument, urged us to dismiss the appeal. For all his argument he cited, *inter alia,* the cases of **PDP VS. INEC (2018) 12 NWLR (PT. 1634) 533; OGUNSHEINDE VS. SOCIETE GENERALE BANK LTD (2018) 9 NWLR (PT. 1624) 230; ATIBA IYALAMU SAVINGS & LOAN LTD VS. SUBERU (2018) 13 NWLR (PT. 1637) 387; ARDO VS. INEC (2017) 13 NWLR (PT. 1583) 450; KOLO VS. COP (2017) 9 NWLR (PT. 1569) 118; CBN VS. AKINGBOLA (2019) 12 NWLR (PT. 1685) 84; etc.**

We have considered this appeal as argued before us both in writing and orally in Court by both Counsel. In brief, we like to emphasise that the following facts were not in dispute;

(1) The Appellant was served with a hearing Notice against 30/3/2019 date.

(2) There was an intervening Act of God situation that prevented the Court from sitting and hearing the case on 30/3/2019.

(3) The Court recovered and entertained the matter subsequently on 29/6/20.

(4) There was no evidence before us that the Appellant was duly informed of the hearing date of 29/6/20. In fact, Mr. Anumba himself, in the best tradition of this profession conceded eloquently to this cold fact. Meaning no hearing Notice was served on the Appellant.

(5) There was (and still there is) a pending counter-claim as at the time the learned Chief District Court Judge struck out the case on that 29/6/20.

Against the background of the above patent facts, or scenario presented, can we say the Appellant was accorded fair hearing in the lower Court? This is the crux of this matter.

The principle that sprung up here quickly is *Audi Alterem Partem.* This maxim relates to Administration of Justice and is translated to mean "no man shall be condemned unheard". It's a maxim that enunciates the very important and indispensable requirement of justice which places a duty on the *judex* to ensure all parties are each given the opportunity to hear what is said or alleged against him or her. Basically, no one should be condemned, punished or deprived of his or her property in any judicial proceeding, unless he/she has had the opportunity of being heard. This principle equally covers the essentials of service in that all Defendants must have notice of the Court processes filed against them so they may have the opportunity of answering to same. See the cases of **CEEKAY TRADERS LTD VS. GENERAL MOTORS CO. LTD (1992) 2 NWLR (PT. 222) 132 (SC); YAKUBU VS. GOV. KOGI STATE (1997) 7 NWLR (PT. 511) 66 (CA); and NEPA VS. AROBIEKE (2006) 7 NWLR (PT. 979) 249 (CA).**

In all situations, a Court of law must be seen to give all parties appearing before them fair hearing before any issue can be properly decided. This is the firm intendment of **Section 36(1) of the 1999 Constitution**(as amended). This is the essence of fair hearing as a Constitutional right.

Now, the question may be pertinently asked at this juncture thus: what do we found in this case? I agree with the Appellant that he was not given fair hearing. The learned trial Chief District Court sat on a day not communicated to the Appellant. An in one sentence,

the Chief District Court Judge strike out the case. When it is realised that the Appellant had a pending counter-claim, then it would be easy to understand that the lower Court Judge acted in grave error. No date was fixed for the hearing of his counter-claim. We looked at the Ruling only to discover that the Judge closed the case and all proceedings relating thereto in a matter of minutes.

We wouldn't have taken the trouble to set-out in full what happened on that 29/6/2020, but because of the fuss and heavy weather made of the independent nature of a counter-claim in our Civil law jurisprudence by the Respondent's Counsel, Mr. G. C. Anumba. And in any case, where a party seeks to set-aside the proceedings or Judgment of a Court, such a party has a duty to exhibit such proceedings or Judgment before the Court. This is because no Court would make an Order setting aside or nullifying proceedings or Judgment on which it has never set it's eyes upon. Thus failure to exhibit such proceedings or Judgment is a serious error that may amount to abuse of Court process. See **LEKWOT VS. JUDICIAL TRIBUNAL (1997) 8 NWLR (PT. 515) 22 (SC).**

So, for the above fine principles it would be fine to bring out the Ruling under reference in full. This would enable us to find out the status of the appellant counter-claim before the Chief District Court, Kubwa.

The Ruling or the proceeding of 29/6/20 goes thus:

"RECORD OF PROCEEDINGS
COURT RESUMES SITTING 29/6/2020

BETWEEN

NDUBUEZE MADUBUIKE ……..PLAINTIFF

AND

BARR. M. J. DANGANA …… DEFENDANT

C. E. Ojotuke for the Plaintiff.
Defendant absent and unrepresented.

C.E. – Case is for further mention. However, the plaintiff wishes to withdraw the matter.

Court – Plaintiff Counsel application is granted as prayed. Case – suit CV/13/2019 is struck out.

Signed:……

CM2 – 29/6/2020"

We can now ask the question, is the counter-claim still pending in the lower Court? If yes, what date is it adjourned to? It is clear that the learned Chief District Court Judge did not say or refer at all to the counter-claim. And as far as the Court and the Respondent are concerned, the matter has ended having been struck out. This cannot be. It was the Plaintiff/Respondent's case that was struck out and not the Defendant/Appellant's counter-claim.

And in the absence of a clear date on record as to when the counter-claim would be heard, then the right of the Appellant to be heard has been infringed upon. We can feel his frustration. We can feel his pain. We can reason along with him that unless we intervene in this Court, the lower Court has shut the door against him permanently.

We all know that a counter-claim is for all intents and purposes, a separate, independent and distinct action. A counter-claimant, like all other Plaintiffs, must prove his claim against the person being counter-claimed before he can obtain Judgment on the counter-claim. See **MUSA VS. YUSUF (2006) 6 NWLR (PT. 977) 454.** So, how would such a counter-claimant like the Appellant obtain Judgment when he was not given any date of hearing? No opportunity extended to him to prove his counter-claim.

We are happy with the learned Counsel to the Respondent for his professional stand on the findings in the Record of Appeal. In the best practice of this our noble profession he agreed that many information were missing therein. At a point he expressed surprise that no hearing Notice was served on the Appellant for the proceedings of 29/6/20.

What all the above portends is that there is merit in this appeal.

For completeness of dwelling on all issues raised in this appeal, we like to advert to the submission of the Appellant, Mr. Dangana, that the Respondent's brief was filed out of time and should therefore be discountenance with. He relied on Order 50 Rule 10(c) of the Rules of this Court. Our short answer to this argument is that although they filed their Brief out of time, it can be treated as a mere irregularity, for which there must be an application made within reasonable time to set aside such an irregular process. **Order 5 Rule 1(2)** reads:

> ***"Where at any stage in the course of or in connection with any proceedings there has by reason of anything done or left undone been a failure to comply with the requirements as to time, place, manner, or form, such failure may be treated as an irregularity. The Court***

may give any direction as he thinks fit to regularise such steps."

And **Order 5 Rule 2(1)** reads:

"An application to set aside for irregularity any step taken in the course of any proceedings may be allowed where it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity."

So, we find no such application before us. We therefore discountenance the argument and prayer of the Appellant in disregard.

In conclusion, we found merit in this appeal. This lower Court was in grave error to have struck out the suit in the absence of the Appellant when no hearing Notice was serviced on him for the proceedings of 29/6/20. Moreso, that the appellant's pending counter-claim was not taken cognisance of and no date given to hear same.

Consequently, the Ruling of 29th June, 2020 is hereby set aside. It is declared a nullity for all the reasons given earlier in this judgment. The entire suit No: CV/13/2019 hereby sent to the Deputy Chief Registrar (Magistrates) for re-assignment to another Chief District Court Judge for re-trial.

Hon. Justice Suleiman B. Belgore
(Presiding Judge)
22/9/21

Hon. Justice A. A. Fashola
(Judge)
22/9/21