

IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY

HOLDEN AT ABUJA

ON FIDAY, 12TH DECEMBER, 2023

BEFORE THEIR LORDSHIPS: HON JUSTICE O. A. ADENIYI

HON. JUSTICE BABANGIDA HASSAN

SUIT NO: CV/310/2021

MOTION NO: M/29/2021

APPEAL NO: CVA/851/2021

BETWEEN:

NICHOLAS AMADIN EKHORTOMWEN... .. APPELLANT

AND

1.MR AHMED MUSA }
2.AYODELE DAVID }

RESPONDENTS

JUDGMENT

1. This is an interlocutory Appeal against the ruling of His Worship, **Nwecheonwu Chinyere Elewa**(as he then was) of the District Court Holden at Life Camp, in the Federal Capital Territory Division, rendered on the 28th July, 2021.

2. A summary of the facts of the case is that the 1st Respondent (Plaintiff at the lower Court), instituted an action on 24/04/2019, against the 2nd Respondent, on recovery of premises on a property known as No. 6, 69(A) 5 Road, Gwarimpa II Estate, Abuja. In its judgment, delivered on 19/11/2020, the trial Court granted the claims of the Plaintiff/1st Respondent, and directed that the 2nd Respondent be evicted from the property.
3. The Appellant, as an interested party at the lower Court, filed a Motion to set aside the said Judgement on the ground that the Judgment was obtained by the parties through fraud and misrepresentation of facts. According to the Appellant, who claims to have purchased the property from the previous owner, Ambassador Ighali and now in occupation, had his workmen evicted from the property, pursuant to the execution of the Judgment of the lower Court. The Appellant was neither made a party to the suit nor

notified of same. On becoming aware of the suit after eviction of his workmen, the Appellant filed an application at the lower Court seeking to set aside the judgment on grounds that he was not notified of the suit and that the parties at the lower Court deliberately misrepresented the facts and created a false impression that they had a landlord and tenant relationship.

4. The Lower Court in its Ruling dismissed the application on ground that it lacked jurisdiction to make pronouncements on matters concerning ownership and title to any property, which according to the Court, is what the application was seeking.
5. The Appellant dissatisfied with the Ruling of the trial Court has appealed against it and is seeking the relief set out as follows:

An order allowing this Appeal and setting aside the decision of the District Court, Abuja, delivered on the 28th of July, 2021 by Nwecheonu Chinyere Elewa

and in its place granting the prayers contained in the Appellant's Motion No. M/29/2021 dated the 2nd day of March, 2021.

The grounds of the appeal are as follows:

- (i) The lower Court erred in law when it held that it had no jurisdiction to determine the application before it.
- (ii) The lower Court erred in law by failing to resolve any and all of the grounds of material non-disclosure, fraudulent misrepresentation, and failure to put the Appellant on notice, upon which the motion before it was based.
- (iii) The lower Court erred in law by not holding that the prayers before it were hinged upon settled law viz the record of proceedings before it.
- (iv) The Honourable erred in law by disregarding the various rules, legal principles and applicable laws in relation to the Appellant's application before the lower Court.

- (v) The decision was against the weight of the evidence before the lower Court.

SUMMARY OF THE APPELLANT'S BRIEF OF ARGUMENT

6. The Appellant respectfully submits two issues for determination in this Appeal.
- (i) *Whether the lower Court was not in error when it declined jurisdiction and held that the Appellant's Motion was an application for declaration of title. (Distilled from Grounds 1 and 3)*
- (ii) *Whether the judgment of the lower Court dated 19th November, 2020 and the execution of its order of Possession of 15th December, 2020 in view of the totality of the facts and principles presented before the lower Court ought not to be set aside. (Distilled from Grounds 2, 4 and 5)*
7. On the first issue, the Appellant's learned counsel contended that the lower Court was in error when it held that the Appellant's Motion was an application for declaration of title and subsequently declined

jurisdiction. He submitted that the jurisdiction of Court is determined by Statute and the Claims before the Court. He referred to the case of Ekweozorvs Reg. Trustees, S.A.C.N.¹

8. Learned counsel submitted that the lower Court failed to appreciate that the Appellant's Motion was not a separate suit but one predicated on an existing suit in which the Court had rightly assumed jurisdiction. Counsel went further to submit that the lower Court's jurisdiction on the Appellant's Motion is predicated on the prayers in the Motion. He submitted that based on the prayers in the Motion, the Appellant's Motion was an application to set aside its decision in respect of recovery of possession and not in respect of title with reasons that the lower Court did not have jurisdiction in respect of a matter of title. Counsel has also referred the Court to page 164 of the records where the lower

¹[2014] 16 NWLR (Pt. 1434) 433 at 462

Court in an interlocutory application stated that the Claims of the party does not suggest the issue of title.

9. On the second issue, learned counsel, urged on the Court to determine the merits of the application of which the lower Court declined jurisdiction. Learned counsel referred the Court to the Affidavits in support of the Motion, which can be found at pages 79 – 82 and pages 133 – 136 of the records, submitting that the affidavit showed that the Respondents being the two parties at the Lower Court did not present the true and complete fact regarding the ownership of the property, and in essence the lower Court was misled into making recovery orders against the Appellant.
10. Learned counsel also submitted that the Appellant which was not a party to the suit in the lower Court cannot be bound by the judgment of the Court. He relied on the authority of Uwazuruikevs A.G., Federation.²

²[2013] 10 NWLR (Pt. 1361) 130

11. It is learned counsel's contention that from the evidence before the lower Court, there were several indications warranting joining the Appellant as a party. He referred the Court to PW1's evidence at page 151 of the records, DW1's evidence at page 166 of the records, DW1's evidence at page 152 of the records and PW1's evidence at page 152 of the records. Learned counsel submitted that the Court has the duty to join a party who will be affected by the outcome of the suit. He relied on Igbokwe vs Kehinde.³ Learned counsel further submitted that failure to join the Appellant as a party to the action at the lower Court amounted to a fundamental breach of the Appellant's right to fair hearing. He cited the authority of Gov., Zamfara State vs Gyanlange,⁴ and **Section 67** of the District Court Law, which provides that the District Judge may set aside any judgment or order made against a party in the absence of such party.

³[2008] 2 NWLR (Pt. 1072) 441 @ 451

⁴[2013] 8 NWLR (Pt. 1357) 462

12. Counsel to the Appellant contends that the suit at the lower Court was based on deliberate non-disclosure, misrepresentations and fraud. He referred the Court to the Counter Affidavit filed at the lower Court on pages 111 – 115 of the records. He contends that the 1st Respondent had no direct transaction with Ambassador Ighali. He further referred the Court to the Better Affidavit filed at the lower Court on pages 133 – 136 of the records, where the 1st Respondent knowing he had no title to the property wrote a petition to the Economic and Financial Crimes Commission. He submits that these acts of misrepresentation were intentionally and fraudulently made to give the impression that the 1st Respondent was in possession.

13. Counsel cited the cases of Adebiyi vs Adekanbi,⁵Eke vs Ogbonda,⁶ and other cases in submitting that any Court has the inherent powers or jurisdiction to set aside its own decision or judgment.

⁵[2018] 16 NWLR (Pt. 1645) 377

⁶[2006] 11 – 12 SC 38

SUMMARY OF RESPONDENT'S BRIEF OF ARGUMENT

14. On his part, the 1st Respondent's learned counsel adopted the two issues as distilled by the Appellant. On the first issue, the 1st Respondent submitted that flowing from the application filed by the Appellant at the trial Court, the Appellant and 1st Respondent are claiming title of the property. He submitted that the Appellant's application is praying the trial Court to seize the title from the 1st Respondent and hand same over to the Appellant. Learned counsel also submitted that what confers jurisdiction on the Court is that Statement of Claim, in this case the Civil Summons file by the Plaintiff and not the processes filed by the Appellant in this Appeal. He cited the case of A.G. Federation vs A.G. Lagos State.⁷

15. Learned counsel further submitted that the Appellant cannot contest the ownership of the said property with the 1st Respondent at the trial Court but the High Court

⁷[2017] 8 NWLR (Pt. 1566) 20 @ 36 paras E – F.

of a State, which is the Court having jurisdiction. Learned counsel cited the authority of Emejuruvs Abraham;⁸ and further contended that the legal effect of the Appellant's application is that either the 1st Respondent or the Appellant will be determined as the rightful owner of the said property, and the trial Court having realised this dismissed the Application.

16. On issue two, the 1st Respondent's learned counsel submitted that setting aside a judgment on grounds of fraud and misrepresentation of facts is not won by merely asserting but by proving such allegations beyond reasonable doubt. He submitted that both the grounds of application and the Affidavit in support of the application are bereft of particulars of fraud on how the Respondent misled the trial Court. He relied on John Holt Co. (Liverpool) vs Henry Fajemirokun.⁹ Learned counsel also referred the Court to pages 151 – 157,

⁸[2019] 4 NWLR (Pt. 1663) 541 @ 563, paras D – E; 565 – 566, Paras F – A; 567 Paras E – F

⁹ (1961) ALL NLR (Reprint) 513

166 – 174 and 189 – 193 of the Records of Appeal, in urging the Court to dismiss the appeal.

APPELLANT'S REPLY ON POINTS OF LAW

17. Appellant's counsel in response to the 1st Respondent's counsel's arguments contended further that Courts are bound by the materials placed before them; that there was no material placed before the lower Court on ownership of title and thus, the lower Court acted in error when it based its consideration on ownership of title.
18. Learned counsel further argued that Courts of law do not act on speculations that the lower Court speculated when it declined jurisdiction to entertain the Appellant's application based on the apprehension that it would lead to determination of title. Learned counsel further submitted that, it is the law that, proof beyond reasonable doubt is not akin to proof beyond a shadow of doubt; that the Appellant demonstrated in his affidavit before the lower Court that the

Respondents deliberately misrepresented the facts regarding the possession and ownership of the lower Court and consequently misled the lower Court.

DETERMINATION OF ISSUES

19. Now, with respect to the first issue for determination, we had examined the motion in contention, filed on 03/03/2021. The application, predicated on eight grounds, sought the following reliefs:

- (i) *An order of the Honourable Court setting aside both the Judgment dated 19th of November, 2020 and the order of Possession dated 15th December, 2020 made in this suit for being predicated on fraud and misrepresentation of facts.*
- (ii) *An order of the Honourable Court setting aside the execution of the Order of Possession dated 15th December 2020, carried out on 16th February, 2021 for being predicated on the judgment dated 19th of November, 2020.*

20. As correctly argued by learned counsel on both sides, it is the claims before the Court that confers jurisdiction on the Court, and the lower Court rightly assumed jurisdiction and delivered a judgment based on the claims before it. The Appellant's application before the lower Court was to set aside the judgment of the Court considered to have been given on the basis of fraud and misrepresentation of facts.

21. The law is well settled that as a general rule, the Court lacks the jurisdiction under any circumstances to alter or vary a judgment or order drawn up, except so far is necessary to correct errors in expressing the intention of the Court or under the slip rule. However, an exception to this general rule is that where judgment of a Court is considered a nullity, the party affected thereby is availed of three options to take in order to have the judgment vitiated. The party affected could either appeal the judgment, or file a separate action to have the judgment set aside, or return to the same Court that

delivered the judgment, by motion on notice, to have it set aside. See Olufumisevs Falana;¹⁰Yakubu vs Gov., Kwara State;¹¹Mark vs Eke.¹²

22. In the present case, the Appellant, who claimed to have been affected by the judgment of the lower Court, opted to file a Motion on Notice before the Court to have the judgment set aside.

23. Again, the circumstances under which a party may apply for setting aside of a final judgment of a Court by the same Court that delivered it has also been circumscribed by judicial precedent. In First Bank of Nigeria Plc. vs T. S. A. Industries Limited,¹³the Supreme Court re-established the circumstances as follows:

(1) Where the judgment is obtained by fraud or deceit either in the Court or of one or more of the parties.

¹⁰ [1990] 3 NWLR (Pt. 136) 1

¹¹ [1997] 7 NWLR (Pt. 511) 51

¹² [2004] 5 NWLR (Pt. 865) 54

¹³[2012] LPELR-9714(SC)

See Alaka vs Adekunle;¹⁴Plowers vs Lloyd;¹⁵Olufunmisevs Falana.¹⁶

(2) Where the judgment is a nullity and a person affected by the order of Court which can be described as a nullity is entitled *ex debitojusticia* to have it set aside. See Sken Consult Ltd. vs Ukey;¹⁷Craig vs Kansen;¹⁸Ojiako&Ors vs Ogueze;¹⁹Okafor &Ors. vs A.G. Anambra State &Ors.²⁰

(3) When it is obvious that the Court was misled into giving judgment under a mistaken belief that the parties consented to it. See Agunbiade vs Okunoga& Co.;²¹Obimonurevs Erinosh.²²

(4) Where the judgment was given in the absence of jurisdiction, for instance where there is a failure to

¹⁴ [1959] LLR 76

¹⁵ [1877] 6 Ch.D 297

¹⁶ [1990] 3 NWLR (Pt. 136) 1

¹⁷ [1981] 1 SC 6

¹⁸ [1943] 1 KB 256, 262 and 263

¹⁹ [1962] 1 SCNLR 112

²⁰ [1991] 6 NWLR (Pt. 200) 659 at 680

²¹ [1961] All NLR 110

²² [1966] 1 All NLR 250

comply with an essential provision such as service of process. Madukoluvvs Nkemdilim &Ors;²³Sken Consult vs Ukey.²⁴

(5) *Where the procedure adopted was such as to deprive the decision or judgment of the character of a legitimate adjudication. See Igwe &Orsvs Kalu &Ors;²⁵Alao vs ACB Ltd.²⁶*

See also Alawiyevs Ogunsanya;²⁷ACB Plc. vs Lesada Nigeria Limited.²⁸

24. Now, in the instant case, the Appellant's first relief in the motion at the lower Court sought to set aside the judgment, while the second relief is seeking to set aside the execution of the judgment.

25. It is pertinent to further underscore that a judgment can be set aside whether it has been executed or not and when a judgment is set aside, any execution which had

²³ [1962] 2 SCNLR 341

²⁴ [1981] 1 SC 6

²⁵ [2002] 14 NWLR (Pt. 987) 435; [2002] 12 SCM 89

²⁶ [2000] 9 NWLR (Pt. 672) 264.

²⁷ [2013] 5 NWLR (Pt. 1348) 620

²⁸ [1995] 7 NWLR (Pt. 405) 26 @ 27

already taken place goes with it. See Ibrahim vs Ojonye.²⁹

26. It is our view that, in determining the Appellant's motion, the question the lower Court ought to have answered is whether or not the affidavit in support of the application has provided the relevant facts needed to support the grant of the application; which, invariably, must disclose the particulars of fraud and facts purported to have been concealed or misrepresented by the parties to the suit in the lower Court? The rationale behind this, especially with regards allegation of fraud, being criminal in nature, is that it will be required to establish the allegation beyond reasonable doubt, in order to set aside a judgment on that ground. In other words, the Court considering the application must find that the judgement was procured

²⁹[2011]LPELR-3737(CA)

by fraud in order for the application to be granted.
See Bangulvs Jingi;³⁰ Olufunmisevs Falana.³¹

27. In the present case, the failure of the trial Court to determine the Appellant's application on its merits was clearly prejudicial to his case. The lower Court ought not have declined jurisdiction to hear the motion, there being sufficient legal basis for the Court to have proceeded to determine the application one way or the other.
28. Having determined that the lower Court ought to have determined the application on its merits, we had proceeded to examine the affidavit filed in support of the motion at the lower Court, deposed to by one Ambassador Igali, who introduced himself as the previous owner of the property. It is stated therein that he had sold the said property to the Appellant. He also deposed that the Defendant/2nd Respondent fraudulently procured the title documents of the

³⁰[2017]LPELR-43270 (SC)

³¹[1990]LPELR-2616 (SC)

property and went ahead to sell the property to the Plaintiff/1st Respondent, without his knowledge. He deposed further that he received the sum of Twenty Million Naira sent to him by the Defendant/2nd Respondent, which was later refunded. He stated that the Defendant/2nd Respondent was apprehended and kept in the custody of the Economic and Financial Crime Commission. He went further to state that the judgment of the lower Court was based on misrepresentation of facts by the parties and that there was never a landlord and tenant relationship between the parties.

29. The question then is, whether on the basis of these facts, the lower Court ought to have set aside its judgment given in favour of the 1st Respondent/Plaintiff?
30. It is also trite that the fraud alleged must relate to matters which prima facie would be reason for setting the judgment aside if established and not matters which are merely collateral. See Olufunmisevs Falana (*supra*).

31. It is our considered opinion that the affidavit in support of the application is bereft of the particulars of fraud and the lower Court ought to have based its Ruling on that, rather than declining jurisdiction to entertain the application. We further hold that no materials were placed before the lower Court to suggest that the Plaintiff/1st Respondent fraudulently acquired the property in question or that he was aware that Ambassador Igali sold the property to a third party.
32. The Appellant further failed to adduce cogent evidence to support his claim that the Defendant/2nd Respondent forged the Ambassador's signature in the process of selling the property to the Plaintiff/1st Respondent.
33. In our view, where fraud is alleged in a situation of this nature, the option that ought to have been taken by the interested party (in this case, the Appellant) was to institute a fresh action whereby he would have been availed the opportunity to prove the alleged forgery or fraudulent Act. Fraud and forgery being criminal

allegations cannot be appropriately established by affidavit evidence. See the authorities of Edevbie vs Orohwedor³² and APC vs Elebeke.³³ Again, in the very recent decision of Isa vs APC & Ors.,³⁴ the Supreme Court, relying on the authority of APC vs Ebeleke (supra), held, per **Augie, JSC**, as follows:

“The case of APC V. Elebeke (supra) dealt with the allegations of forgery, etc., but the basic principle gleaned therefrom is that allegations of crime in cases where facts are likely to be in dispute cannot be proved on the basis of affidavit evidence and on Originating Summons.”

34. As such, having made allegation of forgery against the 1st Respondent and on which basis the Appellant had sought that the judgment of the lower Court be set aside, he ought to have filed a fresh action to ventilate that ground or accusation. We so hold.

³²[2022] LPELR-58931(SC)

³³ [2022] 20 NWLR (Pt. 1837) 1

³⁴[2023]LPELR-60150(SC)

35. Again, the Appellant, having introduced the issue of dispute of ownership of the property by the application filed at the lower Court, which was not an issue in the matter upon which the lower Court rendered judgment, it is apparent that the Appellant ought to have filed a proper civil action before the High Court to challenge the Plaintiff/1st Respondent's acclaimed title over the property. More so, from the materials placed before the lower Court, it will appear that both the Appellant and Plaintiff/1st Respondent seem to trace the root of the acclaimed title over the property to the same vendor.

36. In the final analysis, this appeal succeeds in part on grounds of the failure of the lower Court to exercise jurisdiction to entertain the application on its merits. We further hold that the substantive application before the lower Court having now been determined on its merit in this appeal, the same is accordingly dismissed. We make no orders as to costs.

OLUKAYODE ADENIYI

(Presiding Judge)

11/12/2023

Legal representation:

Enewa Rita Chris-Garuba, LLM (Lond.) – *for the Petitioner*

Respondent unrepresented