IN THE HIGH COURT OF FEDERAL CAPITAL TERRITORY
IN THE ABUJA JUDICIAL DIVISION (APPELLATE DIVISION)
HOLDEN AT COURT NO. 7, MAITAMA – ABUJA.
ON THE 28TH DAY OF JUNE, 2019
BEFORE THEIR LORDSHIPS:HON. JUSTICE M.E. ANENIH (PRESIDING JUDGE)
HON. JUSTICE B. HASSAN (HON. JUDGE)
APPEAL NO: CVA/277/2018
SUIT NO: AB/SDC/CV/52/2018
BETWEEN:

HON. AGBO GABRIEL_____APPLICANT

AND

ALHAJI SALISU BASHIR HAIBA_____RESPONDENT

JUDGMENT
(Lead judgment delivered by Hon. Justice B. Hassan)

The respondent herein by a plaint filed with No. CV/52/18 before His Worship M.I. Jobbo, Senior District Court II sought for orders of the trial Court to recover vacant possession of his property occupied by the appellant and the payment of arrears of rent and mesne profit.

The appellant challenged the jurisdiction of the trial court not to entertain the suit on the ground that the respondent had previously filed a suit with the same subject matter, parties and issues before another court which was struck out for want of diligent persecution, and the ruling was delivered the 13th day of August, 2018, thereby discountenanced with the objection.

Dissatisfied with the ruling, the appellant filed this appeal contending that the learned trial judge erred in law when he held that a suit struck out is dead, and that the trial judge assumed jurisdiction in the case in error which has occasioned a miscarriage of justice.

Both counsel have filed their briefs which they all adopted as their oral argument in support of their assertions, and the record of appeal is before the court.

The counsel to the appellant raised the following questions for determination:

1) Whether the trial court was right in its decision that it has jurisdiction to entertain the suit instituted by the respondent?
2) Whether the ruling is against the arguments adduced before the trial court in this case?

In giving an answer to the first question, the counsel submitted that the grouse of the appellant is about the conduct of the respondent in commencing an action for recovery in the trial court while previous action commenced in respect of the same subject matter, same parties, issues and the same District Court is still pending, and to this, the trial court erred in law when it assumed jurisdiction of the case despite the fact that there is a pending suit with Plaint No. CV/03/2015 before the District Court 13, Wuse Zone 2 which significantly dealt with the same subject matter, parties and issues and in the same District Court, and he referred to pages 13-19 of the record of appeal, and he then submitted that where a court lacks jurisdiction, the proceedings however well conducted is a nullity, and he referred to the cases of **Olofu V. Itodo (2010) LPELR 2585 (SC), Lakanmi V. Adene & Others (2003) LPELR 1750 (SC).**

On the second issue the counsel to the appellant submitted that the suit struck out for want of diligence can be relisted by the same court, and he referred the case of **Habib Bank Nig. Plc V. Lodigiani (Nig.) Ltd (2010) LPELR 4228(CA)** to the effect that whether a suit struck out by a court may be relisted by it, if the circumstances warrant doing so, and the answer is in the affirmative given in the above case.

The counsel further submitted that the order of the trial court striking out the suit was interlocutory in nature and the suit filed after the striking out order is incompetent, and that the mere fact that the action could be instituted in another court does not detract from the final nature of the order in the first court that made the striking out order, and he referred to the case of **Chief Ozo Nwankwo Alor & Ano. V. Christopher Ngene & Ors (2007) LPELR 431 (SC)** on whether a suit already struck out can be relisted, and the Supreme Court held that where a suit is struck out, the plaintiff, in most cases, had another opportunity to commence the action after curing the

deficiency which resulted in the striking out of the action, and where an action is struck out for want of prosecution, it can be relisted by a Motion on Notice, and in that situation, the matter has not totally left the cause list because by the order of striking out, the plaintiff is at liberty to file a motion to relist the case, and to him, in the instant case the striking out order for want of diligent prosecution is interlocutory in nature and can be relisted and he also referred to the case of **Jolimair (Nig.) Ltd & Anor V. Liberty Bank Plc (2016) LPELR 41459 (CA)** to the effect that a suit or cause of action is pending when any proceedings can be taken in it, and so when a matter is struck out, it is still alive and kept in the court's general cause list, and when an order is made on a matter not heard on the merit, it amounts to striking out simpliciter, and he referred to the case of **Panalpina World Transport (Nig) V. J.B. Oladeen International & Ors (2010) 19 NWLR (Pt 1226) 1 at 20.**

The counsel further submitted that by filing a fresh suit following the striking out order instead of filing a motion for relisting of same amounts to forum shopping, and he then cited the case of **Idemudia V. Igbenedion University, Okada & Ors (2015) LPELR 24514 (CA).**

The counsel finally submitted that the subsequent suit on the same subject matter, parties and issues on the same court following the one struck out amount to an abuse of court process and he cited the case of **Idowu V. FRN (2011) LPELR 3793 (CA),** and he then urged the court to set aside the trial court's ruling and order the matter to be transferred to the District Court 13 where the case is pending in the interest of justice.

The respondent's counsel in his brief of argument raised the following question for this court to determine:

> Whether the trial court was right in its decision that it has jurisdiction to entertain the suit instituted by the respondent/plaintiff?

The counsel to the respondent in his submission conceded to the position of law, which the counsel to the appellant also posited, that a suit struck out for want of diligent prosecution may and can be relisted by the court that struck it out, however, he further submitted that relisting a suit out of want of diligent prosecution is not

the only option open to a party whose case is struck out for want of diligent prosecution as it is well established principle of law that a party whose case is struck out has two options open to him, either he applies to court that struck the said case out for an order relisting the said suit or files a fresh action, and they both relied on the case of **Habib Bank Nig. Plc V. Lodigiani (Nig.) Ltd (Supra),** and in that case, he submitted that, the court also held that it is a long-aged principle, which was also embedded in the rules of High Court of Kaduna State that an order striking out a matter, giving an opportunity to a party who instituted the action to apply to the court for an order relisting the same, or to file a fresh action. He further submitted that this position has enjoyed judicial recognition in the case of **Ogbonmwan V. Aghimien (2016) LPELR 40806 (CA) at PP. 18-19 paras. C-B** to the effect that the settled position is that the party is put to his election as to which course to pursue; either to apply to relist or to file a fresh action, and he also cited the cases of **UGENE V. SIKI** and **Mohammed V. Husseini (1998) 14 NWLR (Pt 584), 108.**

The counsel further submitted that it is the contention of the appellant that since the parties, subject matter and reliefs sought in the suit that was struck out and the one which gave rise to this appeal are the same, the later becomes an abuse of court process irrespective of the fact that the former suit was by their own admission struck out on the 21st day of June, 2016, and to him, this admission is in record more particularly in paragraph 2 of the grounds of the Notice of preliminary objection found at page 9 of the record of appeal, paragraph 3(e) of the affidavit in support of the preliminary objection found at page 12 of the record of appeal, and at page 19 of the record of proceedings attached as EXH 'A' where the presiding judge granted an application that the suit of the plaintiff be struck out for want of diligent prosecution, and also to him, the only authority cited by the appellant is the case of **Habib Bank Plc V. Lodigiani (Nig.) Ltd (Supra)** which is in favour of his argument to the effect that a party whose suit is struck out has the option to file a fresh action, and that the argument of the appellant that the option of filing a fresh action is an abuse of court process is an argument in futility as it is not shown by the appellant that the respondent was pursuing both actions at the same time, and to him,

the mere filing of a fresh action following a striking out order does not amount to an abuse of court process, and he urged the court to dismiss the appeal.

Now having summarized the grounds upon which the file was filed together with the parties' briefs of argument, to my mind, the issues identified by the appellant are apt, and I will not hesitate to adopt same that:

1) Whether the trial court was right in its decision that it has jurisdiction to entertain the suit instituted by the respondent?
2) Whether the ruling is against the arguments adduced before the trial court in this case?

Thus, it is the contention of the appellant that the learned trial judge erred in law when he assumed jurisdiction of the case, an error which has occasioned a miscarriage of justice to the effect that a suit that is struck out for want of diligent prosecution can be relisted by the same court in which he cited the case of **Habib Bank Plc V. Lodagiani (Nig.) Ltd (Supra)** and to this the counsel conceded to the same position in which he too relied on the same case, and to my mind relying on the above case, both counsel have posited currently that a party whose suit was struck out is at liberty to apply to the court that struck it out for relisting. I also hold the position that when a suit is struck out is said to be still pending in a court of justice, and an application for relisting a case struck out must be made by motion on notice to all interested parties supported by an affidavit setting down all the material facts upon which the applicant wants the court to exercise its discretion in his favour, and this is the decision of the Court of Appeal, Calabar Division in the case of **Alphonsus Akpan Essien & 6 Ors V. Chief Usen Ekanem & 5 Ors (2010) All FWLR (Pt 523) p. 1995 at 2010 paras. A-B,** and to this we so hold that a party whose suit is struck out is at liberty to apply to the court for relisting by filing a motion on notice to be accompanied by an affidavit setting down the material facts to convince the court to grant such an application in his favour.

Now, what is in contention between the two parties in this case is whether trial judge acted rightly in assuming jurisdiction in the matter that was struck out, that is to say, the propriety or otherwise in filing a fresh suit instead of making an application before the same

court for relisting. The learned counsel to the appellant contended that the order of the trial court striking out the suit was interlocutory in nature and that the suit filed after the matter was struck out is incompetent, and if a proceeding can still be taken on a matter that is struck out, the striking out order is interlocutory, but if the striking out order has put an end to the suit that no proceeding can be taken any more on the suit in same court, then the order is final.

Thus, the order striking out order was on the ground of lack of diligent

prosecution, and so it could be said that the order has not put an end to the suit, and this has been settled.

Now whether the respondent has the option of filing a fresh suit before a different court on the same subject matter, parties and issues instead of applying to the court for relisting?

This question is to be answered in the affirmative, relying on the case of **Panalpina World Transport (Nig.) Ltd V. J.B Olandeen International & 4 Ors (2010) 19 NWLR (Pt 1226) p.6 at 20 paras. F-H** where the Supreme Court held that an applicant whose motion is struck out can either file a fresh motion or file an application to relist it, depending on the circumstances that led to the striking out of the motion or the nature of the order made. Where there was an attack on the contents of such motion prior to it being a struck out, a fresh motion must be filed. Also, a motion filed under the prerogative jurisdiction of the court, which is struck out can be refiled and brought before another judge of the same jurisdiction. This the counsel to the appellant also relied upon however, he did not provide an answer to the question posed above, that is to say, the counsel did not categorically or unequivocally provide any answer to the question as to whether a party whose suit was struck out has an option to file a fresh action. However, the counsel to the respondent relying on the case of **Ogbonmwan V. Aghimien (2016) LPELR 10806 (CA)** where it was held that the settled position is that the party is put to his election as to which course to pursue, either to apply to relist or to file a fresh action. By the above authorities, it could be inferred that a party whose suit was struck out has the option to file a fresh suit instead of applying to relist same, and to this

we so hold. That the trial judge was right to have assumed jurisdiction in the matter that is the subject of this appeal.

Thus, it is also one of the grounds of this appeal in which the appellant contended that the trial Magistrate erred in law when he held that a suit struck out is dead, and this he relied on the case of **Panalpina World Transport (Nig.) V. J.B. Olandeen International & Ors (Supra)** to the effect that the court held that when a matter is struck out, it is still alive and kept in the court's general cause list and can be brought back to the hearing cause list when an application to relist has been granted. In the circumstances, it is still alive only when an application to relist is granted, and in the instant case the party whose case was struck out opted to file a fresh suit, an option given to him by the law.

So, even though the trial Magistrate pronounced in his ruling that the suit being struck out is dead, without proceeding to add that until when application for relisting is granted will not make this court to temper with his decision. See the case of **Ebhonu V. Ebhonu (2017) All FWLR (Pt 917) P. 1610 at 1619 para. E** where the court held that once a suit is struck out it becomes a dead action until is relisted by court order, and to this, I am in total agreement with the argument of the learned counsel to the respondent that the trial magistrate acted rightly in assuming jurisdiction on a fresh action filed by the respondent as it is allowed by the law, and to this we stand.

We go further to hold that the filing of a fresh action before the trial Magistrate on the same subject matter, parties and issues does not constitute an abuse of court process as filing a fresh action before a different court within the same jurisdiction instead of filing an application to relist upon an order striking out the suit is not one of the instances or circumstances that constitute an abuse of court process. See the case of **United Cement Company (Nig,) Ltd V. Ike (2018) All FWLR (Pt 934) P. 1195 at pp. 1206-1207 paras. F-F.**

It is the contention of the counsel to the appellant that the learned trial Magistrate's ruling is against the arguments adduced before the court in this case, and to this, I refer to the case of **Olaniyan V. Adeniyi (2007) All FWLR (Pt 387) p. 920 at 933 para. G** where the court held that addresses are designed to assist the court. No amount of brilliance in a fine speech can make up for lack of

evidence to prove or establish or else disprove and demolish points on issue. In the instant, where the trial Magistrate found no importance in the argument of a counsel which tends not to establish a point on issue, I think he has the right not have taken such argument as useful in the course of taking a decision, and to my mind, the contention goes to no issue, and we therefore, so hold.

It is also the contention of the appellant before the trial court as one of his grounds to raising a preliminary objection that the court is a forum non conveniens chosen by the plaintiff for reasons of forum shopping. Thus, by the definition given in Black's Law Dictionary, see **BRYAN A. GARNER (EIGHT EDITION)** Black's Law Dictionary p. 680 that the court in which an action is most appropriately brought, considering the best interest and convenience of the parties and witnesses.

Now, looking at the affidavit in support of the notice of preliminary objection filed by the appellant at the trial court more particularly at page 11 of the record of Appeal, it could be inferred that the appellant did not place any material showing clearly that the respondent has taken his best interest and convenience to the disadvantage of the appellant, rather it was in his written address he raised this issue which to our minds, an address of counsel without be in place of any evidence, and to that the trial judge was right for not having taken into consideration this argument of the counsel to the appellant and we therefore, so hold. See the case of **Odoakpu Community Bank Nig. Ltd V. Ibeto and Company Ltd (2007) All FWLR (Pt 350) p. 1410 at 1413 para. C-E** where the Court of Appeal, Enugu Division held that counsel's address is part and parcel of the case of a party and a trial court or any court for that matter should use it to assist it in fully appreciating the case of the party. However, failure to take counsel's address into consideration cannot vitiate the judgment of a court unless it is shown clearly that, that failure caused the court to derail in the judgment. In the instant case, and going by arguments before the trial court and before this court of the counsel to the appellant, and more particularly the argument before this court, the counsel only submitted that the suit before the trial court amounts to forum shopping on the ground that the respondent has filed similar suits but intends to stop the one before the trial court,

and that for the convenience of the appellant who was served with statutory notices before the commencement of the pending suit, subsequent service of statutory notices will be prejudicial to the case of the appellant, and he relied on the case of **Idemudia V. Igbinedion University, Okada & Ors (2015) LPELR 24514 (CA)** and further submitted that the rights of the parties will be effectively determined and a complete relief obtained in District Court 13 where the first suit is pending. Thus, the argument, however, in the affidavit in support of the notice of preliminary objection as earlier said does not suggest that there was a forum shopping, and therefore, the failure on the trial court to consider the argument of the counsel alone will not vitiate the ruling entered by the trial court, and to this we therefore so hold.

Based upon the above considerations, this appeal lacks merit, and it is hereby dismissed and the ruling of the trial court is hereby affirmed. The trial court should continue to hear the suit accordingly.

(Signed)
Hon. Justice M.E. Anenih
(Presiding Judge)

(Signed)
Hon. Justice B. Hassan
(Hon. Judge)

Appearances:

E. C. Attama Esq for the Appellant.

J. J. Odeh Esq for the Respondent.