

**IN THE HIGH COURT OF JUSTICE OF THE
FEDERAL CAPITAL TERRITORY ABUJA
IN THE ABUJA JUDICIAL DIVISION**

HOLDEN AT JABI - ABUJA

BEFORE: HON. JUSTICE O.C. AGBAZA

COURT CLERKS: UKONU KALU & GODSPower EBAHOR

COURT NO: 18

**SUIT NO: FCT/HC/CV/316/2010
MOTION: M/4382/2019**

BETWEEN:

- 1. IBRAHIM DANBAWA**
- 2. KANAYO UGHAMADU**
- 3. MANSOUR SALAUDIN LAFENWA.....APPLICANTS**

IN RE

- 1. IFEANYI ORAKWE**
- 2. PETER AMAECHI MADUKA**
- 3. EMAOJO ABU.....PLAINTIFFS/RESPONDENTS**

AND

- 1. FEDERAL CAPITAL TERRITORY ADMIN**
- 2. ABUJA GEOGRAPHIC INFORMATION SYSTEM**
- 3. MINISTER OF THE FCT.....1ST – 3RD DEFENDANTS/RESPONDENTS**
- 4. KENECHUKWU UGHAMADU.....4TH DEFENDANT/RESPONDENT**

RULING

By an Originating Motion with No. M/4382/19 dated 13/3/2019 but filed on 14/3/19 brought pursuant to Section 6 and 36 (A) of the Constitution of

the Federal Republic of Nigeria 1999 and under the inherent jurisdiction of the court, the Applicants seek the following reliefs;

- (1) An Order setting aside the judgment of this Honourable Court delivered on 01/7/2014 by His Lordship Hon. Justice O.C. Agbaza in Suit No. FCT/HC/CV/316 2010 (Mr. Ifeanyi Orakwe & 2 Ors Vs Federal Capital Territory Administration & 3Ors) on grounds of deceit misrepresentation, suppression of facts and non-service of Originating Processes of Court in the case on the 2nd Applicant herein, sued as Kenechukwu Ughamadu or the 4th Defendant in the said case.
- (2) And the Omnibus relief

Filed in support of the Motion is a joint affidavit of 13 Paragraphs affidavit with Exhibits "A", "B", "C", "D", "E", "F", "G", "H", "I", "J", "K", "L". "M", "n", "O". "P". The affidavit was deposed to by the 2nd Applicant. Also filed along a Written Address in compliance with the Rules of Court.

On 13/6/19, Applicant filed a 7 Paragraph further affidavit deposed to by one Samson Adaweno together with a Written Address dated 13/6/19.

The 1st – 3rd Plaintiffs/Respondents filed a 28 Paragraph counter-affidavit with Exhibits "PA", "PB", "PC" "PD", "PE", "PF" attached. Also filed a Written Address in compliance with the Rules of Court.

The 1st – 3rd Defendants/Respondents were served the process and they responded by filing their reply on point of law dated 28/5/2019. Pleadings having been filed and exchanged, the Motion was set down for argument.

On 12/9/19 and the parties through their counsel adopted their written submission as oral argument in support of their respective positions.

In their Written Address, Applicant's counsel formulated a sole issue for determination that is;

Whether having regard to all the facts of this case, (particularly the non-service of the originating processes in the case of the 2nd Applicant herein sued as Kenechukwu Ughamadu or the 4th Defendant in the case and the circumstances under which the said name was removed from the case while the claim proceeded against him and in his absence to judgment) this is not a proper case in which the same court which gave the judgment can set it aside ex-debito justitae as judgment given without jurisdiction same being fraught with deceit misrepresentation and suppression of vital facts from the court.

In the same vein, 1st – 3rd Plaintiffs/Respondent's counsel formulated a sole issue for determination that is;

“Whether the Applicants have made out a good case for setting aside the judgment of this Honourable Court.

In their reply on point of law, 1st – 3rd Defendants/Respondents counsel adopts the sole issue for determination, formulated by Applicant's counsel and urge court to set aside its judgment.

Having carefully considered the affidavit evidence, written submission of counsel and the judicial authorities cited for and against the grant of this application, and having also considered the Preliminary points raised by

counsel for the 1st – 3rd Plaintiffs/Respondents, the court find that two (2) issues calls for determination that is;

- (1) Whether this application is competent.
- (2) Whether the Applicants has made out a ground so as to be entitled to the reliefs sought.

On the issue of whether this application is competent, it is the contention of the contention of the 1st – 3rd Plaintiff/Respondent that the application ought not to filed this application by Originating Motion, against the Provision of Order 2 Rule 1 of the Rules of Court whereas it is the contention of Applicant that this application is a fresh action but merely inserted the suit number of the present suit for reference purpose indeed Order 2 Rule 1 of the Rules of Court prescribes the mode of commencement of any action, one of which is by Originating Motion by which Applicants commenced their application. I am of the view that approaching this court in this manner is in order moreso as Order 5 Rule 1 of the Rules of Court stipulated that failure to comply to the Rules of Court shall not nullify the proceedings.

On the claim that the Applicants did not disclose their capacity to file this application and failed to seek leave of court before filing this application since they were not parties to the Suit whose decision they seek to set aside, the parties particularly 2nd Applicant have disclosed their capacity to file this application in their supporting affidavit, I have perused the Rules of Court and no Rule specify that Applicant must seek the leave of court

before bringing an application of this nature, therefore failure to seek the leave of court will not preclude the court from determining this application on its merit. It is trite that an application to set aside a judgment can be brought with or without leave of court. See Babale Vs Eze(2012) ALL FWLR (PT.635) 287 @ 341 Paras C – G.

Finally on the Preliminary points, 1st – 3rd Plaintiffs/Respondents claims that Applicant having failed to comply with the Provisions of Order 11 Rule 11 of the Rules of Court, this renders the application incompetent. Against this claim, Applicant's counsel contends that the said Order cannot apply to this application. I have given an insightful consideration to the said Order 11 Rule 11 of the Rules of Court and I find that, that Order, is in reference to judgment in default of appearance. Whereas the Applicant claims that they are parties who ought to be joined in the suit and were not joined nor served court processes in line with the Provision of Fair hearing, therefore the Order 10 Rule 11 of the Rules of Court cannot apply to the Applicant; therefore this ground to hold that the application is incompetent cannot avail the 1st – 3rd Plaintiffs/Respondents.

From all of this, this court holds that this application brought by Originating Motion is competent and is hereby resolved in favour of the Applicant.

On the second issue; whether the Applicant have made out a ground so as to be entitled to the reliefs sought.

The grant or otherwise of the relief sought by the Applicant, is at the discretion of the court, which the court must exercise judicially and judiciously. And to be able to do so, the Applicant must place before the

court cogent facts to rely on. See *Anachebe Vs Ijeoma*(2015) ALL FWLR (PT. 984) 183 @ 195 Para D – F; where the Apex court stated thus.

“The discretion vested in a court is required to be exercised judicially and judiciously, as it entails application of application of legal principles to relevant facts/materials to arrive at a just and equitable decision. It is thus not an indulgence of a judicial whim, but the exercise of judicial judgment based on facts and guided by the law or the equitable decision”.

Overtime, the court have stated the grounds upon which it may set aside its own judgment, they are;

- (1) Which the judgment is obtained by fraud or deceit, either in the court or of one or more of the parties, such a judgment can be impeached or set aside by an action which may be brought with or without leave or
- (2) When the judgment is a nullity. A person affected by an order of court which can properly be described as a nullity; is entitled *ex-debit justitae* to have it set aside or
- (3) When it is obvious that the court was misled into given a judgment under a mistaken belief that the parties consented to it or
- (4) When the judgment was given in the absence of jurisdiction or

- (5) Where the procedure adopted was such as to deprive the decision or judgment of the character of a legitimate adjudication see Babale Vs Eze (2012) ALL FWLR (PT. 635) 287 @ 341 Pars C – G. See also Igwe Vs Kalu (2002) ALL FWLR (PT. 122) 1.

In the instance case, it is the contention of the Applicant that the Judgment of this court was obtained by deceit and misrepresentation by the 1st – 3rd Plaintiffs/Respondents, who commenced the action by suing him as kenechukwu Ughamadu, knowing well his real name and address and thereafter asked the court to remove his name from the Suit even when paragraph 6, 24 and 26 of their Statement of Claim made specific allegation against 2nd Applicant herein requiring a defence on the merits from him. To assuage this court in their position referred to several judicial authorities stating the position of the law when the court can set aside its own judgment. See Adegoke Motors Ltd Vs Adesanya (1989) 3 NWLR (PT. 109) 250, ADH Ltd Vs Amalgamated Trustees Ltd (2007) 12 SCM (PT 2) 163; Alao Vs A.C. B Ltd (2000) 9 NWLR (PT. 672) 264, Igwe Vs Kalu (2002) 14 NWLR (PT. 787) 435; Madukolu Vs Nkemdilim (1962) SCNLR 341 and Obimomnure Vs Erinoshu (1966) ALL NLR 245. Citec International Estate Ltd & Ors Vs Francis & Ors (2014) 2 SC (PT.11) 118140 – 141. Submits further that the judgment given in the absence of the 2nd Applicant is in breach of the Rules of natural justice and Section 36 of the Constitution of the Federal Republic of Nigeria 1999. That the judgment having being obtained without the 2nd Plaintiff is liable to be set aside. Refer to the case of Achuzia Vs Ogbomah (2016) 2 SC (PT.11) 73 @ 85 –

86. On the other hand 1st-3rd Plaintiffs/Respondents contends that they did not in any way misrepresented facts or misled the court. That deposition in paragraphs 7 and 9 of Applicant's supporting affidavit supports this claim. Submits further that the said Kenechukwu Ughamadu or Kanayo Ughamadu and indeed all at the Applicants herein claim their root of title to the land in disputes from the 1st – 3rd Defendant/Respondent, consequently any judgment obtained the 1st – 3rd Defendants/Respondents notwithstanding that they were not made a party thereto is binding on the Applicants. Refers to Section 173 of the Evidence Act and the cases of Njoku Vs Dikibo (1998) 1 NWLR (PT.534) 496 @ 510, Clay Industries Nig Ltd Vs Aina (1997) 8 NWLR (PT. 516) 208 @ 229 – 230, Osurinde Vs Ajamogun (1992) 6 NWLR (PT.246) 156 @ 187. Agbogunleri Vs Depo & 3 OERS (2008) 1 SC (PT.11) 158 @ 175 – 176 Paras 30 – 10.

It is the further submission of 1st – 3rd Plaintiffs/Respondents counsel that the principle of privies is an exception to the principle of fair hearing. Refers to the cases of Ajoboye Vs Olabanji (1998) 7 NWLR (PT. 558) 464 @ 470 Paras B – C; Akpan Vs Utin (1997) 7 NWLR (PT. 463) 634 @ 673 Paras D – F, Bright Motors Ltd Vs Honda Motors Co Ltd (1998) 12 NWLR (PT. 577) 230 @ 249 – 250; Paras G – A, Coker Vs Sanyaolu (1976) 9 – 10 SC 203 – 223; Okoronanka Vs Odiri (1995) 7 NWLR (PT. 408) 411 @ 437 Paras B – C and Agumuo Vs Azubuike (1999) 5 NWLR (PT. 604) 649 @ 550 G – H. Submits that the Applicant being privies of 1st – 3rd Defendants/Respondents are bound by the judgment sought to be set aside and are therefore estopped by res judicata. Urge court to dismiss the application with substantial cost.

The 1st – 3rd Defendants/Respondents did not file a counter affidavit to the affidavit in support of this application, therefore it is deemed that they have accepted the depositions of the Applicant in their affidavit in support as true and correct. See *Military Government Lagos State Vs Ade Oyo* (2012) 5 NWLR (PT. 1293) 291 @ 331 Para H 332 Para A – B. They however, urge court to set aside its judgment as prayed by the Applicant.

I have taken an insightful look at the completing claims of the parties and I find the evidence of the 1st – 3rd Plaintiffs/Respondents that he sought to make the 3rd Applicant a party to the suit, but could not serve him court processes hence his name was struck out from the suit I also find from the exhibit "L" attached to the Applicant's supporting affidavit that the portion of the Statement of claim referring to the Applicant as admitted by the 1st – 3rd Plaintiffs/Respondents were retained in paragraph 6, 24 and 26 as well as the claim against him in the 1st – 3rd Plaintiffs/Respondents Statement of Claim. The question is does this amount to deceit or misrepresentation thus sufficient to set aside the judgment of this court?

In the case of *Olufumise Vs Falana* (1990) 3 NWLR (PT.136) 1. www.Nigeria.Law.Org the Supreme Court held;

"Misrepresentation which is necessary to found an action of deceit or an action to set aside judgment obtained by fraud must be misrepresentation as to a past or existing fact. It is established clearly that a representation of present intention whether the intention be that of the representation (sic) or of a third party is

sufficient representation of an existing fact to form the foundation of an action for deceit”.

The court went further to hold that the court must have been influenced by the misrepresentation. This the party relying on misrepresentation or fraud must show that the misrepresentation caused him damage.

It is trite law that a Claimant is at liberty to maintain an action against anybody whom he conceives he has a cause of action against. See the case of Green Vs Green (2001) ALL FWLR (PT.76) 795 @ 813 Paras C. Flowing from these at the point where the 1st – 3rd Plaintiffs/Respondents decided not to proceed, with the case against the 4th Defendant, it became incumbent on them to also strike out the claims made against the 4th Defendant now the 2nd Applicant. Merely striking out the names of the 4th Defendant is not enough. It is either they had the intention to sue him or not to sue him and retaining those claims against him in my view warrants the service of court processes on him to enable him defend those claims made out against him. And this is a right guaranteed by Section 36 of the Constitution of the Federal Republic of Nigeria 1999. And failure to do so means that the 2nd Applicant had been denied the right of fair hearing and is also capable of misleading the court.

By Paragraph 1, 3, 4, 5, 6 and 8 of their affidavit in support of the application as well as the exhibits attached to the application, Applicants have shown interest in the subject matter of the suit which entitles them to be heard, as necessary party to the suit. See the case of Green Vs Green (Supra) 814 Paras G – H having not been heard and with both parties

claiming ownership of the same property the principle of privies as contended by the 1st – 3rd Plaintiffs/Respondents cannot prevail over this matter. I am even more convinced on this ground when the 1st – 3rd Defendants/Respondents failed to put up any defence, however, feeble in the matter whose judgment the Applicant seek to set aside.

From all of these and having found the misrepresentation of the 1st – 3rd Plaintiff/Respondent by striking out the name of the 4th Defendant in that suit, who is now admitted by the parties as the 2nd Applicant herein and who has shown interest in the property, subject matter of that suit, and without striking out the claims made out against him and who sought to have been heard but not heard, this court having found same capable of misleading the court, is of the firm view that this is an occasion that the court can indeed exercise that discretion in favour of the Applicant. Accordingly, this application has merit and should be allowed.

It is hereby ordered as follows:-

- (i) An Order setting aside the judgment of this Honourable Court delivered on 01/7/2014 by His Lordship Hon. Justice O.C. Agbaza in Suit No. FCT/HC/CV/316 2010 (Mr. Ifeanyi Orakwe & 2 Ors Vs Federal Capital Territory Administration & 3Ors) on grounds of deceit misrepresentation, suppression of facts and non-service of Originating Processes of Court in the case on the 2nd Applicant herein, sued as Kenechukwu Ughamadu or the 4th Defendant in the said case.

(ii) The Suit accordingly returned to the Cause List.

HON. JUSTICE O. C. AGBAZA

Presiding Judge

2/12/2019

APPEARANCE:

G.U. NWANERI WITH HIM SHERIFF MOHAMMED; ALEX O.C. IBE; NANCAP
BENSHAK FOR THE APPLICANTS

NNAEMEKA AMACHUNA WITH HIM MARK EZUGWU FOR THE
PLAINTIFFS/RESPONDENTS

J.O. ABARI FOR THE 1ST – 3RD DEFENDANTS/RESPONDENTS