

**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: 11

SUIT NO: FCT/HC/CV/5246/2011

BETWEEN:

MR NINO ABOKHAI.....CLAIMANT

VS

1. LIVING SOLUTION NIG LTD

**2. C. OSITA ANENE(Trading under the Name & Style
of C.O. Anene & Co.....DEFENDANTS**

RULING

By a Motion on Notice dated 4/2/2019 and filed same day, brought pursuant to Order 39 Rule 4 OF FCT High Court (Civil Procedure) Rules 2018 and under the inherent jurisdiction of the Court, the Applicant prays the court for the following reliefs:-

(1) An Order of the court granting leave to the Applicant/Judgment Debtor to effect or make an installmental payment of the Judgment of this Honourable Court in the following manner:-

(a) 1st Installment or down payment of the sum of ₦500,00.00 (Five Hundred Thousand Naira) only.

(b) Subsequent monthly installmental payment in the sum of ₦50,000.00 (Fifty Thousand Naira) only per month till final liquidation of the Judgment debt.

(2) And for such further or other orders as this Honourable Court may deem fit to make in the circumstance.

The grounds upon which this application is predicted are;

- (a) The Hon. Court in its judgment delivered on the 16th day of October, 2015 dismissed the Applicant's claim and entered judgment for the Respondent/Counter-Claimant.
- (b) That the Hon. Court granted the claims of the Respondent of mesne profit in the sum of ₦250,000.00 per month with total sum granted coming to ₦3,000,000.00 (Three Million Naira).
- (c) The Applicant being dissatisfied with the said decision, has appealed against the said judgment to the Court of Appeal, Abuja and applied for stay of the execution of the judgment which was denied by the Hon. Court.
- (d) The while the Applicant is desirous of pursuing his appeal, he wishes to comply and pay the judgment sum but is hampered financially to pay the whole sum in bulk due to current economic difficulties and hardships in his business as well as other financial education and family financial needs as a family man.

- (e) The Applicant is able to raise a substantial sum to pay a down payment while he seeks the leave of the court to enable him adopts a flexible payment plan in other to offset the total judgment debt.
- (f) The Applicant in this regard proposes to make a 1st installment or down payment of the sum of ₦500,000.00 (Five Hundred Thousand Naira) only and then subsequent monthly installment payment in the sum of ₦50,000.00 (Fifty Thousand Naira) per month till final liquidation of the judgment debt.
- (g) That compelling the Applicant to pay the whole judgment sum of once will work extreme hardship on him as well as severely impair his ability to pursue his appeal and meet his family and other financial obligations.
- (h) The application is brought in good faith.

The Motion is supported by an affidavit of 5 Paragraph deposed to by Ugochukwu K. Ogidi, with two (2) annexures marked as Exhibit "A" and "B". Also filed is a Written Address, which counsel adopts. In response to the counter-affidavit of the Respondent, Applicant filed a Reply affidavit of 5 paragraphs deposed to by Lydia Sule, along with a Reply on points of law, in all urging the court to grant the reliefs, sought and discountenance the obligation of the Respondent.

In response, the Respondent in opposition, filed a 24 paragraph counter-affidavit deposed to by the 2nd Judgment/Respondent. Also filed is a Written Address, which counsel adopts in urging the court to dismiss this application. By way of adumbration, submits that the Exhibits filed along with the affidavit fails to comply with the Provisions of Section 84 (1) (4) of the Evidence Act 2011, by supporting it with Certificate of Compliance, therefore, urge the court to discountenance the said Exhibits.

Responding of the issue raised by Respondent Counsel in respect of Section 84 (1) (4) of the Evidence Act, 2011, and submits that it is trite that affidavit by themselves consist of Evidence, and every content of it act contradicted by another affidavit is deemed admitted. Further that the Applicant has failed to demonstrate by law, how the application of Section 84 (1) (4) of Evidence Act, 2011 would foreclose the court from looking or considering this instant application. And urge the court to discountenance the objection of the Respondent and granted the reliefs sought.

In the Written Address of the Applicant, settled by Chibuike Ezeokwuora Esq, Applicant Counsel, formulated one (1) sole issue for determination, which is;

“Whether having regards to all the circumstances of this case, this is a proper case for the exercise of the court’s discretion in favour of the Applicant”.

And in the reply on point of law, Applicant contend that in law it is the Respondent who have the burden to prove the fact alleged not to have been disclosed by the Applicant to sway the court to exercise of its

discretion in favour of the Applicant; and relies of several judicial authorities.

In the Written Address of the Respondent, settled by ILo Emmanuel Esq, Respondent Counsel , formulated one (1) issue for determination which is;

“Whether it is just and equitable to grant this application having regard to the circumstances and facts of this case?

I have given an insightful consideration to the submission of both Learned Counsel the judicial authorities cited and find that only one (1) issue calls for determination, which is;

“Whether from the totality of the facts as put forward by the Applicant, the Applicant has placed sufficient facts to warrant this court to exercise its discretion in granting this application”.

The grant or otherwise of an application of this nature by the court, which discretion the court, is expected to exercise judicially and judiciously, and not as a matter of course. See the case of Metuh Vs Federal Republic of Nigeria (2017) ALL FWLR (PT. 901) 722 @ 725. In other words, the discretionary powers must not be exercised in vacuum but in relation to the existing facts of the particular case.

In this instant case, the Applicant is seeking leave of court for an order of installmental payment of the judgment sum in the instant case. In support of the application, the Applicant relied heavily on their supporting affidavit in particular Para 4 (a-i) and Exhibit “A” and “B” and Paras 4 (a – i) of the

Reply affidavit to the Respondent's counter-affidavit to Motion for installmental payment of the judgment sum.

On the other hand, the Respondent, in line with their Written Address and relying on the facts deposed in their counter-affidavit in opposition, contend that the Applicant has failed to disclose full and frank facts relied on to sway the court to grant this application. The Respondent amongst other contend that the Applicant has failed to disclose his full earnings, Account Bank Statement. Further, that it is trite that a court ought not to deny a judgment creditor the fruits of his judgment except where there are special or exceptional circumstances justifying the grant of such an application.

Responding on this points, the Applicant Counsel relying on point of law, submits and relying on Section 135 of the Evidence Act and case of Sokwo Vs Kpongbo (2008) ALL FWLR (PT. 410) 680 @ 700 – 701 Para H – B. P^P701 – 702 Para H – A, that it is the Respondent who is contending those facts, that has the burden to prove those facts. Urge the court to hold that the Applicant has discharged that burden sufficient to sway the court to grant the reliefs sought.

In considering the grant of an application of this nature, the court must consider the facts before it. In this instant, the Applicant has stated facts in their affidavit in support, in particular Paras 4 (a – i) and Exhibit "A" and "B". Against this, in opposition, is the contention of the Respondent that the Applicant has failed to disclose all facts, firstly this submission is coming from counsel, and not by evidence, and is trite that no matter how

brilliant submission of counsel can be, it cannot take the place of Evidence. See Chasaya Vs Anwasi (2010) ALL FWLR (PT. 528 Pg 828 @ 861.

Secondly, it is trite that he who asserts has the onus to establish those facts, see Section 135 of the Evidence Act. In this instant, the Respondent did not furnish this court with facts to the contrary to show the earning capacity of the Applicant different from what was stated.

Granted that this application is coming up after a long time, the judgment was delivered by this court and also granted that a successful party should not be deprived of the fruit of his judgment, in my firm view has not taken away the powers of court to exercise its discretion when invited to consider an application of this nature.

From all of these, the court have found from the facts before it, holds that it can indeed exercise that discretion in favour of the Applicant. Accordingly, the order is hereby granted as prayed.

Leave of court is hereby granted to the Applicant.

(1) To make installmental payment of the judgment sum of this Honourable Court in this suit delivered on 16/10/15 in this manner.

(a) 1st Installmental or down payment of the sum of ₦500,00.00 (Five Hundred Thousand Naira) only.

And

- (b) Subsequent monthly installmental payment in the sum of ₦50,000.00 (Fifty Thousand Naira) only per month till final liquidation of the Judgment sum.

This payment shall take effect upon the grant of this order.

Signed

HON. JUSTICE O. C. AGBAZA

Presiding Judge

21/11/2019

APPEARANCE:

CHIBUIKE EZEOKWUORA ESQ FOR THE APPLICANT

ILO EMMANUEL ESQ FOR THE RESPONDENT