

**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/333/18

BETWEEN:

WILFRED ENEYE.....PLAINTIFF

VS

1. GODILOGO FARMS LIMITED

2. GODDY –JEDY AGBA.....DEFENDANTS

RULING

The Defendants/Applicants herein by Notice of Preliminary Objection dated 5/2/19 and filed same day, challenges the competence of this Suit and the jurisdiction of court to hear the Suit as whole and/or under the Undefended.

The grounds of objection are:-

- (1) That the Writ of Summons was not signed by the Plaintiff/his Legal Practitioner.
- (2) The Writ of Summons was not personally served on the Defendants.
- (3) That the present Suit is caught up by the principle of estoppel per rem judicatam.

In support of the Preliminary Objection is an affidavit of four (4) paragraphs deposed to by Oluchukwu Nwakor, a Litigation Assistant in the law firm of counsel for Applicants with two Exhibits annexed and marked Exhibit "1" and Exhibit "2". Also filed a Written Address and adopts the Address in urging the court to dismiss the Suit with cost.

In response, Plaintiff/Respondent filed a counter-affidavit of Nine (9) paragraphs in opposition dated 20/2/19 and deposed to by Plaintiff himself. Also filed a Written Address in support and adopts the said Address.

In the Written Address of Defendants/Applicants, Obi C. Nwakor of counsel raised two (2) issues for determination;

- (1) What is the effect of non-signing of the Writ of Summons by the Legal Practitioner who took out in Writ and non-personal service of the Writ of Summons on the Defendants.
- (2) Whether the present suit is not caught up by the principle of estoppel per rem judicatam. If yes, what is the effect?

And submits, on issue 1, that for court to have jurisdiction to entertain a suit, the suit must have been initiated by due process of law and upon fulfillment of any conditions precedent to the exercise of jurisdiction and there must be no feature in the case that prevents court from exercising jurisdiction, refer to *Madukolum Vs Nkemdile* (1962) 2 SCNLR PT 1322, 341. That in this instant, one feature which robs court the jurisdiction to hear this Suit is that the Writ of Summons is not signed by Plaintiff himself or the Legal Practitioner who issued it as mandatorily provided by Order 6 Rule 2 (3) of Rules of Court. That the non-signing of the Writ of Summons

by the Legal Practitioner issuing it is fundamental and goes to the root of the matter and competence of court to hear it and refer the court to Kiga Vs Ogunmola (2006) 13 NWLR PT. 997, 377 at 399, Oyeyemi Vs Mobil Oil (Nig) (2014) 7 WRN 139 at 158. Further that no personal service of the Originating Processes on Defendants thereby depriving court jurisdiction to hear the Suit, refer to Ajibola Vs Sagoke (2001) 23 WRN 68.

On issue 2, submits the parties to Suit No. FCT/HC/CV/1206/18 as shown on the Exhibit 1 attached to the affidavit are the same parties in this present Suit, same claim, same subject matter and the issues are the same. That this court on 31/10/18 dismissed Suit No. FCT/HC/CV/1206/18 and refer court to the Exhibit 2 attached to the affidavit. That the Suit No: FCT/HC/CV?1206/18, therefore, creates a bar to the new Suit of Plaintiff on the same subject matter and claim against the same Defendants, refer to Rodrigues Vs Public Trustees (1977) 4 SC, 17. That a Suit dismissed in the circumstances in which Suit No. FCT/HC/CV/1206/18 was dismissed operates as a bar to a subsequent litigation on same subject matter/issue and parties and therefore oust the jurisdiction of court in the proceedings in which it is raised, refer to Ntuks Vs NPA (2007) 13 NWLR PT 1051, 392.

In the Written Address of Plaintiff/Respondent settled by C.I. Egbuchunem, two (2) issues is submitted for determination;

- (1) Whether an Order of Dismissal by a court pursuant to a Notice of Discontinuance amounts to mere order of striking out/whether an order of dismissal by a court in a Suit not heard on the merit amounts to a mere order of striking out?

- (2) Whether this present Suit is caught up by the principle of estoppel per rem judicatam?

On issue 1, submits that an Order of dismissal of a Suit in respect of an application not heard on the merit amounts to striking out. That even where such an Order of dismissal is made following a hearing not based on the merit, is still considered a mere striking out. Commend the court to *Panalpina World Transport (Nig) Ltd Vs J.B. Oladeen Int'l & 4 Ors* (2010) 19 NWLR PT. 1226, 1 SC, *Ogidi Vs Nig Immigration Services* (2017) LPELR – 43401 (CA) and Order 24 Rule 1 (1) of Rules of Court. Submits, therefore, that an order of court dismissing Plaintiff's Suit which was not heard on the merit pursuant to a notice of discontinuance, amounts to a mere striking out and will not in any way determine the rights of the parties.

On issue 2, submits estoppel per rem judicatam is a principle of law that precludes a party from disputing in any subsequent proceedings matters which have been adjudicated upon previously by a competent court between him and his opponent and is only applicable when the issue in the previous case is resolved on the merit and finally disputed of, refer to *Abubkara Vs Ya'Adua & Ors* (2008) LPELR – 51 (SC), *Ayito & Anor Vs Edem & Ors* (2017) LPELR – 45 608 (CA). Also that by Order 24 Rule 1 (3) of Rules of Court, discontinuance of a Suit cannot be a defence by Defendant for a subsequent Suit as it is in this present Suit, therefore, a Plaintiff who discontinued a Suit by notice of discontinuance cannot be barred from re-litigating same as the principle of estoppel per rem judicatam will be inapplicable.

I have given insightful consideration to the affidavit evidence of the parties, the submission of both counsel, the authorities cited as well as the annexed exhibits and finds that two (2) issues are for determination namely:-

- (1) Whether this instant Suit of Claimant/Respondent is caught up by the principle of estoppel per rem judicatam or applicable to the Claimant/Respondent Suit.
- (2) Whether an order of dismissal made by court pursuant to a notice of discontinuance or withdrawal amounts to Order of Striking out.

The Applicants, on issue 1, contends that this instant Suit of Claimant is caught up by the principle of estoppel per rem judicatam in that the court earlier on 31/8/18 dismissed Suit No. FCT/HC/CV/1206/18 instituted by Claimant against Defendants/Applicants with same parties, same subject matter same issues and claim. That the earlier Suit creates a bar to this instant Suit of Claimant which is of same parties, same subject matter, same issues and claim with the earlier suit; while Claimant/Respondent, on the other hand, contend that the principle of estoppel per rem judicatam does not apply to the instant case and cannot be a defence in this instant because a Claimant who discontinues Suit by notice of discontinuance, as in the instant, cannot be barred from re-instituting the Suit.

Estoppel per rem judicatam is a principle of law that precludes a party from disputing in any subsequent proceedings matters which had been adjudicated upon previously by a competent court between the party and

his opponent. See the case of *Offor Vs Leaders & Co Ltd* (2007) 7 NWLR PT 1032 1 at 4 – 5. See also *N.I.C. Vs F.C. I Co Ltd* (2007) 2 NWLR PT 1019 610 at 612 – 613. See further *Black's Law Dictionary Eighth Edition* at 279. And for a party to successfully rely on the plea of estoppel per rem judicatam, he must prove the following.

- (1) That the parties or their privies are the same.
- (2) That the claim or the issues in dispute in both proceedings are the same.
- (3) That the subject matter or the "Res" in the two cases is the same.
- (4) The decision relied on to support the plea is valid, subsisting and final.
- (5) The court that gave the previous decision relied upon to sustain the plea is a court of competent jurisdiction.

See the case of *Nigergate Ltd Vs Niger State Govt* (2008) 13 NWLR PT. 1103 111 at 117. See also *Agbogunleri Vs Depo* (2008) 3 NWLR PT. 1074 217 221 – 222 (SC). The above are pre-conditions which must be established by a party in order to sustain the plea of estoppel per rem judicam. The question here is; whether the Defendants/Applicants, in this instant, has established the above conditions to rely on the plea of estoppel per rem judicam; or whether it can be said that the principle of estoppel per rem judicatama is applicable to the case of the Claimant from the facts before the court and in view of the conditions a party must fulfill in order to successfully rely on the principle. My Answer to the poser is No. Indeed, it

is on record that the Claimant/Respondent herein in an earlier Suit No. FCT/HC/CV/1205/18 instituted an action against Defendants/Applicants which Suit has same parties, same subject matter and issues and same reliefs as in the instant Suit No: FCT/HC/CV/333/18 of Claimant as can gleaned from the Exhibit 1 of Applicants annexed to their affidavit. Earlier the court on 31/10/18 as evidenced by Applicants Exhibit 2 dismissed the earlier Suit of Claimant consequent upon his application for discontinuance. It is on this basis the Defendants/Applicants (who were also Defendants in the earlier Suit) raised the defence of estoppel per rem judicatam in that the earlier suit having been dismissed and since it involves same parties, same subject matter and issues and same reliefs is caught up by the principle of estoppel per rem judicatam.

From the foregoing of what has been stated of the principle of estoppel per rem judicatam and the conditions the party relying on it must established for a successful plea, it is obvious that Applicants have not satisfied or established the conditions to plead the principle and the principle cannot be suit to apply to the case of Claimant/Respondent. Granted that the parties in the earlier Suit are same parties with this instant Suit, same subject matter and issues and same reliefs, the earlier suit however, did not go into hearing on the merit and judgment given to qualify it as one in which the principle of estoppel per rem judicatam may be applicable. I have earlier stated that for a party to successfully rely on the principle must established all the conditions as stated above. See *Offor Vs Leaders & Co Ltd (Supra)* at 4 – 5. See also *N.I.C. Vs F.C.I. (Supra)* 612 -0 613. This principle of estoppel per rem judicatam, therefore, is not applicable to this

instant suit of Claimant/Respondent. The issue 1 for determination is therefore answered in the negative.

On issue 2, whether an order of dismissal made by court pursuant to a notice of discontinuance or withdrawal amounts to order of striking out. It is the contention of Defendants/Applicants that the earlier suit of Claimant with No. FCT/HC/CV/1206/18 which was dismissed by order of court on 31/8/18 consequent upon application of Claimant creates and operates as a bar to a subsequent litigation on same subject matter, same issues and parties and therefore oust the jurisdiction of court in the proceedings in which it is raised. Claimant/Respondent, on the other hand, contends that the order of dismissal of suit not heard on the merit amounts to striking out. And that even when such order of dismissal is made following a hearing not based on the merit is still amount to striking out.

The consequential order the court will make when a matter is withdrawn or discontinued is an order of striking out or dismissal based on the circumstances of the case. See the case of *Olayinka Rodrigues & 6 Ors Vs The Public Trustee & 2 Ors* (1977) 5 & 5 SC at 21 – 22. In this instant case, the Claimant/Respondent herein in an earlier Suit with No. FCT/HC/CV/1206/18 under the undefended List Procedure instituted an action against the Defendants/Applicants herein (who were also Defendants in the earlier suit). After pleadings have been exchanged and parties joined issues but before hearing, the Claimant filed notice of discontinuance of the suit. In consideration of the Claimant's application to discontinue the suit and based on the circumstances of the case, the court on 31/8/18 dismissed the Claimant's earlier suit with No.

FCT/HC/CV/1206/18. The Claimant has now filed another suit with same parties, same subject matter and issues and same reliefs. His argument is that the earlier dismissed suit with No. FCT/HC/CV/1206/18 was not heard on the merit and as such the order of dismissal of court amounts to striking out. The court earlier on 31/8/18, and in line with the law as enjoined in the case of Egbukohia Vs Onyebule (2015) 8 NWLR PT 1461 377 at 382 to the effect that once pleadings have been filed in a case and issues joined between parties, a case sought to be withdrawn at that stage will be dismissed and not struck out, dismissed the earlier suit of Claimant with No. FCT/HC/CV/1206/18 based on the circumstances of the case. And there is a world of difference between dismissal and striking out of a suit. The law is settled that the dismissal of a suit puts an end to such suit while a case that is struck out may be relisted. See the case of Ozoemena Ugwokeh – Omena Vs Stanbic IBTC Bank Plc & Ors (2014) WRN 132 at 135. Therefore, the earlier suit of Claimant having being dismissed can no longer be entertain by this court as to do so will amount to the court sitting on appeal on its earlier decision.

On the issue that the Writ of Summons of the instant suit was not signed by the Plaintiff/his Legal Practitioner, the Defendants/Applicants had contended that the Writ of Summons was not signed by the Plaintiff or his Legal Practitioner as enjoined by Order 6 Rule 2 (3) of the Rules of Court and as such is fundamental and goes to the root of the matter and competence of court to hear the matter. I have looked at the said Writ of Summons and note, however, that the Writ was signed by one Ifeanyi Ezeuko, who happened to be the Legal Practitioner on record to the

Claimant. In any event, the non-signing of the Writ of Summons is treated as mere irregularities under the Rules of court, see Order 5 Rule 1 of the Rules, and it does not nullify the proceedings or affects the jurisdiction of court.

On the issue that the Writ of Summons was not personally served on the Defendants. The Applicants have argued that the non-personal service of the Originating Processes of the instant suit on Defendants robs the court of the jurisdiction to hear the suit. It is law that the court is empowered to look at its record in consideration of any matter before it. See *Agbarah Vs Mimra* (2008) 2 NWLR PT 1071, 378 (SC). From the record of court, the 2nd Defendant was served the Originating Processes of this Suit pursuant to Order of Court on 7/2/19 to serve 2nd Defendant by substituted means and there is on the record of court, an affidavit of service as proof to that effect. Regarding the 1st Defendant who is a Corporate body, there is proof on the records of court that the Originating processes was served on 1st Defendant through one Rufus Okoh, Office Assistant of 1st Defendants. The question is; whether this is proper service on 1st Defendant being a company. The answer is yes. I say so because by the Rules of Court, Order 7 Rule 8 thereof, originating process requiring personal service may be served on the company by delivering same at the head office or any other place of business of the organization within jurisdiction. See also the case of *NBC Plc Vs Ubani* (2009) 3 NWLR PT 1129 512 at 517. In any case, the best proof of service of process on a party is the presence of the person on whom the process was actually meant to be served. See the case of *Nitel Plc Vs I.C.I.C. (Directory Publishers) Ltd* (2009) 16 NWLR PT.

1167 356 at 368 1, therefore, not in agreement with the argument of Learned Counsel for the Applicant on these issues.

In all of these, it is the findings of the court that the Preliminary Objection of the Defendants/Applicant succeeds in parts and consequently this suit of Claimant/Respondent with No. FCT/HC/CV/333/18 is hereby dismissed.

I made no orders as to cost.

HON. JUSTICE O. C. AGBAZA

Presiding Judge

6/12/2019

APPEARANCE:

OBI C. NWAKOR ESQ – DEFENDANTS/APPLICANTS

G.N. ENEYE WITH HIM E.C. ATTAMAH – FOR THE
CLAIMANT/RESPONDENT