

**IN THE HIGH COURT OF FEDERAL CAPITAL TERRITORY
IN THE FEDERAL CAPITAL TERRITORY JUDICIAL DIVISION
HOLDEN AT JABI FCT ABUJA**

SUIT NO: CV/839/2022

BEFORE HIS LORDSHIP: HON. JUSTICE BABANGIDA HASSAN
BETWEEN

**WAIRIMU EBERE NDIOMU _____ PLAINTIFF/APPLICANT
AND**

- 1. BOLINGO HOLDINGS LIMITED _____ DEFENDANT/APPLICANT**
- 2. CYPRIAN OKECHUKWU IGWE _____ DEFENDANT/RESPONDENT**
- 3. DR. (MRS.) BEKKY KETEBU IGWE _____ DEFENDANT/APPLICANT**

RULING

The claimant filed a Notice of Discontinuance of this suit dated the 14th day of October, 2022 and asked the court to discontinue with the suit, and the counsel to the 1st and 3rd defendants asked the court to dismiss the case and not to strike out in which the court requested the parties to make submission in writing as to the reasons the court should make or not make a dismissing order irrespective of the wordings of the provisions of Order 24 of the Rules of this court.

The 1st and 3rd defendants filed his written address 25th day of October, 2022 while the claimant's counsel filed his written address on the 2nd day of November, 2022.

In his written address the counsel to the 1st and 3rd defendants raised this issue for determination, thus:

Given the stage of the present proceedings, what is the appropriate order this Honourable Court should make having regard to the claimant's Notice of Discontinuance?

The counsel submitted that the claimant has a right to voluntarily discontinue and withdraw her claim before the court, however given the stage of the matter, the

claimant's right to discontinue the suit becomes subject to the discretion of the court and the consequential order to be made, and he cited Order 27 Rule I (3) of the Rules of this court to the effect that such discontinuance is however to the terms and conditions as the court may deem fit and order, and he submitted that the proper order the court should make is the order of dismissal and also cited the case of **Eronini V. Iheuko (1989) 2 NWLR (pt 101) 46** which the court set the ground upon which the order the court should make, that is to say, the Supreme Court alluded an appeal from the Court of Appeal that dismissal order is appropriate when statement of defence was filed. The counsel cited the case of **The Young Shall Grow Motors Ltd V. Okonkwo (2002) 16 NWLR (pt 974) 536** to the effect that hence a statement of defence has been filed in a matter and the claimant withdraws the suit, the appropriate order to make by the court is that of dismissal and not striking out.

The counsel submitted that in instant case, the 1st and 3rd defendants have filed their statement of defence, and therefore, the court is to make a dismissal order instead of the striking out.

On his part, the counsel to the claimant adopted the issue already formulated by the counsel to the 1st and 3rd defendants and in his submission, the counsel agreed with the 1st and 3rd defendants' counsel that the claimant has an unqualified right to withdraw her case, and he cited the case of **The Vessel "St. Roland" V. Osinloye (1997) 4 NWLR (pt 500) 387 at 407**.

The counsel submitted that where statement of defence has not been filed, no leave of court is required to the withdrawal, and the proper order to make is that of striking out, and he cited the case of **Dalfam Nig. Ltd. V. Okaku Int'l Ltd (2001) 15 NWLR (pt 735) 203 at 252**.

The counsel asked this question **whether the 1st and 3rd defendants or any of the defendants have or has filed a statement of defence in this case?**

The counsel submitted that where the Rules demands that leave of the court is required and such leave is not sought, the step taken within such leave cannot be said to have been properly taken, and he quoted the provisions of Order 15 Rule I (2) of the Rules of this court as to the requirement within 21 days after service on the defendant of the originating processes for him to file his statement of defence and that the counsel submitted that the 1st and 3rd defendants filed their statement of defence outside the 21st days as provided by the Rules without a leave to seek for enlargement of time, and he cited the case of **Olu V. ACB Int'l Ltd (2008) 3 NWLR (pt 1073) 179 at 198 and Amechi V. INEC (2008) 5 NWLR (pt 1080) 227 at 318.**

The counsel submitted that as at the time the Notice of Discontinuance was filed, there was not statement of defence filed and argued that since the statement of defence was filed outside the prescribed time, then leave is required and where no leave is required to regularised the process such process cannot be said to have been so competent, and therefore, to him, the 1st and 3rd defendants have no statement of defence, and he urged the court to strike out this suit.

Thus, the parties are in agreement that a party can at any time withdraw or discontinue with his case and to this, I am also in agreement with them, that the claimant has the right to discontinue with his suit. See the case of **Mabamife V. Otto (2016) All FWLR (pt 828) p. 887 at pp.898 -899, paras. A.A.**

The counsel to the claimant agreed with the submission of the counsel to the 1st and 3rd defendants that where

statement of defence was filed by the defendants, the appropriate order to make is that of dismissal, and to this, I also agree with the submission of the counsel to the 1st and 3rd defendants.

See the case of **The Young Shall Grow Motors Ltd. V. Okonkwo (supra)**, however, the claimant's counsel argued that in the instant case, there is no statement of defence filed because the 1st and 3rd defendants filed their statement of defence outside the prescribed period as required by Order 15 of the Rules of this court, and therefore, the statement of defence filed and no leave is obtained to regularise same becomes incompetent.

The position of the Rules of this court as per Order 25 Rule I (2) provides that the defendant shall file his statement of defence within 21 days after service, and therefore, where such is not done, it behooves upon such defendant to regularise by seeking the leave of this court to file out of time.

In the instant suit, the 1st and 3rd defendants filed their notice of counter claim on the 22nd day of June, 2022 which they received the writ of summons and statement of claim on the 24th day of April, 2022, this is barely two months in between, and therefore, they cannot be said to have filed their statement of defence or rather notice of counter claim as captured in the process. Even though a motion was filed by the 1st and 3rd defendants to seek leave to file the counter claim outside the prescribed time, however, the motion is not heard until when the claimant filed the Notice of Discontinuance, and I therefore so hold that the notice of the counter claim filed by the 1st and 3rd defendants is not competent before the court which cannot be relied upon and to this, I so hold. See the case of **S.B. Plc V. Penbury (Nig.) Ltd (2016) All FWLR (pt 833) p. 1887 at 1899, paras. A-C**

where the Court held that an incompetent process cannot be relied upon to erect an action. In the instant case, leave is required to be obtained to regularise the notice of the counter claim filed by the 1st and 3rd defendants outside the prescribed period, and such leave was not obtained, and the application is that the process is incompetent, and to this I so hold. See the case of **Okusaga V. L.S.G. (2015) All FWLR (pt 806) p. 269 at 281, paras. C-D.**

The notice of the counter claim having filed outside the prescribed time and no leave is obtain is incompetent and therefore cannot be relied upon to hold that the 1st and 3rd defendants have filed the statement of defence which will warrant this court to invoke its order dismissing the suit, and to this, I so hold.

The matter is deemed withdrawn, and it is hereby struck out.

Hon. Judge
Signed
30/5/2024

Appearances:

Toyin Adegbehingbe Esq for the claimant.

E.N. Odeyemi Esq appeared for the 1st and 3rd defendant.