

IN THE HIGH COURT OF JUSTICE
FEDERAL CAPITAL TERRITORY OF NIGERIA
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT APO – ABUJA
ON, 14TH DAY OF MARCH, 2022.
BEFORE HIS LORDSHIP:- HON. JUSTICE A. O. OTALUKA.

SUIT NO.:-FCT/HC/CV/1250/17
MOTION NO.:-FCT/HC/M/3203/2021

BETWEEN:

ELEOJO ODINIYA:.....CLAIMANT/APPLICANT

*(Suing through or by his
Attorney, Musa Odiniya)*

AND

1) MATTHEW EGBUNNA

2) FEDERAL HOUSING AUTHORITY:..DEFENDANTS/RESPONDENTS

UbuorEyo for the Claimant/Applicant.
ChineduNnadi for the 1st Defendant.
2nd Defendant unrepresented.

RULING.

By a Motion on Notice dated and filed the 29th day of March, 2021, the Claimant/Applicant brought this application seeking the following orders:

1. An order of this honourable Court extending time within which the Claimant/Applicant may apply to restore or relist Motion No. M/6849/19 struck out on the 10th of February, 2020 to be heard on the merit.
2. An order for leave of this honourable Court restoring or relisting Motion No. M/6849/19 that was struck out on the 10th of February, 2020 in suit No. CV/1250/17 to be heard on the merit.
3. An order setting aside the Order/Ruling of this Court made on the 10th of February, 2020 in the matter.

4. And for such further or other orders as this honourable Court may deem fit to make in the circumstance of this case.

In the supporting affidavit deposed to by one Ibrahim Mohammed, a para-legal officer in the law firm of Claimant/Applicant's Solicitors, the Applicant averred that this suit came up for hearing on the 23rd of September, 2019, but owing to the absence of payment of cost awarded against the Claimant/Applicant, the matter was adjourned by agreement of all counsel to 11th November, 2019 to enable the Claimant comply with the order of cost.

The Applicant averred that on the 11th of November, 2019 to which the case was adjourned, the Court did not sit, the said date being a public holiday, consequent upon which the Court suo moto adjourned the case to the 10th February, 2020. That on the said 10th February, 2020, none of the parties had notice of the hearing date, as result of which the Claimant/Applicant's counsel was absent in Court to move the Applicant's counsel pending motion.

The Applicant further averred that the seeming delay in bringing this application was occasioned by the fact that a greater part of the year 2020 was ravaged by the Covid-19 pandemic as well as the ill-health of Claimant/Applicant's counsel caused by accident since the beginning of the year 2021.

In his written address in support of the Motion on Notice, learned Applicant's counsel, U.B. Eyo, Esq, raised a sole issue for determination, namely;

“Whether having regard to the proceeding of 10th February, 2020, was the Claimant/Applicant's right to fair hearing as guaranteed under Section 36 of the

***1999 Constitution of the Federal Republic of Nigeria
not breached?”***

Proffering arguments on the issue so raised, learned counsel argued that the proceeding of this Court that was conducted on the 10th February, 2020 culminating into the striking out of the Claimant's Motion on Notice, was done without issuance of hearing notices to the Claimant/Applicant, and that as such, that the Claimant/Applicant has been denied his constitutional right to fair hearing.

He posited that non service of hearing notice is a breach of the Claimant's fundamental right to fair hearing as it amounts to a denial of the essential elements of audialterampartem.

He relied on **Mankanu v. Salman (2005)4NWLR (Pt. 915) 270 at 292-293,** to further posit that the Court has the duty to ensure the service of hearing notice on either the Claimant or his counsel since the Court did not sit on 11th of November, 2019 which was the date on record scheduled for the hearing of the Motion on Notice.

He further referred inter alia to **A.G. rivers State v. Ude (2006)17 N.W.L.R (Pt. 1008) 436 at 457,** Section 36 (1) of the 1999 Constitution of the Federal Republic of Nigeria; and **Onyekwulufe v. Benue State Government (2005)8 NWLR (Pt.928)614 at 642.**

He contended that the unjust and unfair act of conducting proceedings without affording the Claimant/Applicant fair hearing, is an affront to the constitutional provision of section 36(1) of the 1999 Constitution. He posited that it is the law that mandatory provisions of Section 36 (1) of the Constitution relating to fair hearing cannot be waived, but must be strictly adhered to by every person(s) and authorities. On this point, he

referred to **Gyang&Anor v. C.O.P. Lagos State &Ors (2013) LPELR-21893(SC); Baba v. Nigeria Civil Aviation &Anor (1991) LPELR-692(SC).**

He submitted that the breach of substantive provision of the Constitution as in the instant case when the Claimant/Applicant was denied fair hearing, rendered the proceedings of 10th February, 2020, null and void.

He urged the Court to grant this application as doing so will be in the interest of justice and will not be prejudicial to the Defendants.

In opposition to the application, the 2nd Defendant/Respondent filed a 6 paragraphs counter-affidavit deposed to by one Faith Magaji, a litigation officer in the law firm of counsel to the 2nd Defendant/Respondent.

The 2nd Defendant/Respondent averred to the effect that the Claimant/Applicant's case was dismissed by this Court on the 28th day of May, 2019 contrary to the stance of the Claimant that his case was struck out.

In his written submission in support of the counter-affidavit, learned 2nd Defendant's counsel, Olusegun A. Adekunle, Esq, raised two issues for determination, namely;

- i. Whether gleaning the records of proceedings and the antecedents of this case, it could be held that the fundamental right to fair hearing of the Claimant has been breached?
- ii. Whether given the fact that this case was dismissed on the 28th day of May, 2019, the Court can yet re-open it for the purpose of relisting it in the general cause list?

Proffering arguments on issue one, learned counsel contended that the records of this Court shows that the Claimant was given ample opportunity to prosecute his case but failed to utilize the opportunity.

He referred to **Darma v. Eco Bank Nig. Ltd (2017)FWLR (Pt.887) 124 S.C. at 144**, and posited that the Claimant cannot complain of the breach of his right to fair hearing when it is abundantly clear from the records that he failed to utilize the opportunity granted to him.

On issue two, learned counsel submitted that it is elementary law that where a matter is dismissed, the option open to the parties thereto, is to institute an appeal at the appellate Court. He referred to **PDP v. Godwin (2017) All FWLR (Pt.890) 600 at 629-630.**

He urged the Court to strike out the Claimant's motion for relisting as same is ill-conceived and an abuse of Court process.

Replying orally on points of law, learned Claimant/Applicant's counsel relied on **Dava v. EFCC (2020) 5 NWLR (Pt.1717) 226 at 241** to urge the Court to discountenance the 2nd Defendant/Respondent's counter-affidavit, as same was filed out of time without the leave of Court.

The first issue to be considered in the determination of this application, is **whether the 2nd Defendant/Respondent's counter-affidavit is competent?**

The records of this Court shows that the 2nd Defendant/Respondent was served with the Claimant/Applicant's motion on notice on the 15th day of September, 2021.

By virtue of Order 43 Rule 1(3) of the High Court of the Federal Capital Territory, Abuja (Civil Procedure) Rules, 2018, the 2nd Defendant had within 7 days to file its opposition to the Claimant's motion. However, the 2nd Defendant's counter-affidavit and written address were filed on the 11th day of February, 2022, well over 5 months of being served with the Motion on Notice.

The 2nd Defendant/Respondent was therefore, clearly out of time, and having not sought the leave of this Court to enlarge time for it to file its counter affidavit and written address in opposition to the Claimant's motion on notice; the said counter affidavit and written address are therefore, incompetent and are hereby, struck out.

The next issue for consideration is **whether the Claimant/Applicant's application is not an abuse of Court process?**

The fact that the only counter affidavit to the Claimant/Applicant's application has been struck out for being incompetent, does not ipso facto mean that the Applicant's application will be granted as a matter of course.

The instant application is an appeal to the discretionary powers of this Court, which must be exercised judicially and judiciously, as it is well settled law that an exercise of discretion must be based on sound judgment on a given set of facts and circumstances. See **Tarivandighi v. Sebastian Hale**, Suit No. CA/YL/58/2013.

This Court must thus, put the peculiar facts and circumstances of this case into consideration in the determination of this application.

In this connection therefore, having recourse to the records of this Court, this Court observed that on the 28th day of May, 2019, with the Claimant and other parties in the suit duly represented by their respective legal counsel, and the Claimant's counsel refusing to proceed with the case, this Court in a considered ruling had this suit dismissed, the parties having all joined issues in the matter.

Following the said dismissal of this suit on the 28th day of May, 2019, this Court became functus officio in respect of this matter. Thus, the motion to relist the suit filed by the Claimant/Applicant, was an abuse of Court process, and it was an error on the part of the Court to have struck same out rather than dismissing same for want of jurisdiction.

The instant application to relist the said Motion No. M/6849/19 by the Claimant/Applicant, equally constitutes an abuse of Court process. This Court has become functus officio in relation to the Suit No. CV/1250/17, and any further claim or contention in respect thereof, can only be ventilated at the Court of Appeal.

Accordingly, this Motion No. M/3202/2021, being an abuse of Court process, is hereby dismissed; the jurisdiction of this Court over the substantive suit having been spent.

HON. JUSTICE A. O. OTALUKA
14/3/2022.

