

**IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY
IN THE GWAGWALADA JUDICIAL DIVISION
HOLDEN AT COURT NO. 13 GWAGWALADA FCT
BEFORE HIS LORDSHIP HON. JUSTICE A. S. ADEPOJU
ON THE 30TH DAY OF SEPTEMBER, 2022**

SUIT NO: FCT/HC/CV/1923/2020

BETWEEN:

FIRST BANK OF NIGERIA LIMITED.....CLAIMANT/RESPONDENT

AND

| | | | |
|-------------------------------------|----------|--------------|------------------------------|
| 1. SATIC OIL NIGERIA LIMITED | } | | DEFENDANTS/APPLICANTS |
| 2. EMMANUEL CHUKS UKAHA | } | | |
| 3. WILLANDAS NIGERIA LIMITED | | | DEFENDANT/APPLICANT |
| 4. SAMUEL NWOGA | | | DEFENDANT/APPLICANT |
| 5. SAMUEL NNENNA | | | DEFENDANT/ APPLICANT |

AND

| | | | |
|---|----------|--|--|
| 1. POLARIS BANK PLC | } | | |
| 2. UNITY BANK PLC | } | | |
| 3. FIRST BANK OF NIGERIA LIMITED | } | | |
| 4. UNITED BANK FOR AFRICA PLC | } | | |
| 5. ZENITH BANK PLC | } | | |
| 6. FIRST CITY MONUMENT BANK PLC | } | | |
| 7. ACCESS BANK PLC | } | | |
| 8. ECO BANK PLC | } | | |
| 9. ENTERPRISE BANK PLC | } | | |
| 10. FIDELITY BANK PLC | } | | |
| 11. KEYSTONE BANK PLC | } | | |
| 12. MAINSTREET BANK PLC | } | | |
| 13. STANBIC IBTC BANK PLC | } | | |
| 14. STERLING BANK PLC | } | | |
| 15. UNION BANK OF NIGERIA | } | | |
| 16. STANDARD CHARTERED BANK PLC | } | | |
| 17. ASO SAVINGS AND LOANS BANK PLC | } | | |
| 18. HERITAGE BANK PLC | } | | |
| 19. GUARANTY TRUST BANK | } | | |
| 20. JAIZ BANK PLC | } | | |

RESPONDENTS

Claimant not in Court

CHINEDU ODOH for the 3rd Defendant.

1st, 2nd, 4th and 5th Defendants not in Court.

RULING

The 1st and 4th Defendants/Applicants brought a Motion on Notice dated 10th September, 2021 and filed on 13th September, 2021. The motion is brought pursuant to Order 7, Rules 2 and 8, Order 43, Rules 2 and 3, section 6 (6) (b) of the Constitution of the Federal Republic of Nigeria (as amended) and under the inherent jurisdiction of the Honourable Court.

The 1st and 4th Defendants/Applicants, vide their said motion, prayed this Honourable Court for the following orders:

1. An order of the court discharging the exparte order of mareva injunction freezing the 1st and 4th Defendants/Applicant's bank accounts and attaching the said bank accounts of the 1st and 4th Defendants/Applicants.
2. An order of the court discharging the exparte order of mareva injunction attaching the filling station, of the 1st Defendant/Applicant, including the tank, fuel pumps, the land and equipment therein, the upstairs and bungalow behind the fuel pumps, at Tunga Maji new layout, Zuba, Gwagwalada, Abuja.
3. An order of the court discharging the order of mareva injunction restraining the 1st and 4th Defendants/Applicants from dealing in any form or manner with the properties/money and physical properties including the BVN by opening any fresh (new) account with the BVN as specified.
4. An order of the court declining jurisdiction to determine this suit for failure of the Claimant/Respondent to serve the originating processes issued in the suit on the 1st and 4th Defendant/Applicant.

5. And for such further order as the Honourable Court may deem fit to make in the circumstance.

The grounds upon which the 1st and 4th Defendants/Applicants premised their motion are as follows:

- i. That by the rules of this court the life span of an exparte order is seven days and if extended, for another seven days, making it a maximum of fourteen days.
- ii. That this exparte order has arbitrarily lasted for more than ten months.
- iii. That the continuous operation of the exparte order has no basis in law.
- iv. That the exparte order was obtained by fraud, the Claimant/Respondent having concealed relevant facts from the court.
- v. That the exparte order is an abuse of court process, the subject matter of this suit having previously been determined by this court in Suit No: **FCT/HC/CV/769/2016. FIRST BANK OF NIGERIA PLC V. EMMANUEL CHUKS UKAHA.**
- vi. That the exparte order is also an abuse of court process, the subject matter of this suit being the subject matter of Appeal No: **CA/A/554/2017, EMMANUEL CHUKS UKAHA V. FIRST BANK OF NIGERIA PLC.**
- vii. That the originating processes issued in this suit have not been served or properly served on the 1st and 4th Defendants/Applicants in accordance with the law.

The 1st and 4th Defendants'/Applicants' said motion is supported by an Affidavit of 25 paragraphs deposed to by the 4th Defendant/Applicant in his capacity as the Managing Director of the 1st Defendant/Applicant. The 1st and 4th Defendants/Applicants relied on all the paragraphs of the said Affidavit as well as the 5 Exhibits (Exhibits A-E) mentioned therein, although

the 1st and 4th Defendants/Applicants only attached 3 Exhibits to their said Affidavit, Exhibits A, B and C, namely; ex parte order of mareva injunction dated 8th October, 2020, offer letter dated 24th June, 2014 and judgment of Honourable Justice A. O. Ebong dated 22nd May, 2017 respectively.

The 1st and 4th Defendants/Applicants also filed a Written Address in Support of their motion in line with the Rules of Court and they adopted same as their arguments in support of their said motion.

The 1st and 4th Defendants/Applicants formulated the following four issues for determination in their Written Address:

1. Whether by the provisions of Order 43 Rule 3 (2) of the High Court of the Federal Capital Territory Civil Procedure Rules, 2018, the said exparte order made on the 8th day of October, 2020 has not abated and accordingly ought to be discharged by the court.
2. Whether the said exparte order of the 8th day of October, 2020 ought not to be discharged, the application upon which it was made being an abuse of court process for the reason that the subject matter of the suit has previously been determined by this Honourable Court and is still pending at the Court of Appeal.
3. Whether or not an order of mareva injunction is applicable in this case and ought to have been granted, having regard to the circumstances of the case.
4. Whether or not this Honourable Court ought not to decline jurisdiction to determine this suit, having regard to the failure of the Claimant/Respondent to serve the originating process issued in this suit on the 1st and 4th Defendants/Applicants.

On Issue 1, learned counsel to the 1st and 4th Defendants/Applicants referred to Order 43 Rule 3 (2) of the High Court of the Federal Capital Territory Civil Procedure Rules, 2018 which provides thus:

“an order of injunction made upon an application ex parte shall abate after seven (7) days”.

Learned counsel submitted that Exhibit E, which is the said ex parte order, was made on the 8th day of October, 2020 and has been in operation for eleven (11) months. Counsel further submitted that by the provision of the said Order 43 Rule 3 (2) of the Rules of this court, the continuous operation of the said ex parte order is baseless in law. Counsel referred the court to the case of **ADEGBITE V. AMOSU (2017) ALL FWLR (Pt 870), P. 1069** where the Supreme Court held thus:

“The application of the rules of court is mandatory, that is to say, the rules of court are mandatory provisions which must be obeyed.”

On this, Counsel also relied on the case of **MGBENWELU V. OLUMBA (2017) ALL FWLR (Pt. 884) P. 1598**.

Learned counsel submitted that the rules of this court have provided that an ex parte order of injunction shall abate after seven (7) days and that in the instant case, the ex parte order of the 8th day of October, 2021 having abated on the 16th day of October, 2020 as provided by Order 43 Rule 3 (2) of the Rules of this court, ought not to continue in operation till date. Counsel urged this court to so hold and discharge the said ex parte order of mareva injunction.

On the 1st and 4th Defendants'/Applicants' second issue, learned counsel referred to paragraphs 17, 18, 19, 20 and 21 of the 1st and 4th Defendants'/Applicants' Affidavit in Support of Motion where the deponent averred that the Claimant/Respondent has previously filed a suit with respect to the same cause of action and subject matter of this suit before this same court sitting at Zuba and that judgment has been delivered on the said previous suit which is still pending at the Court of Appeal. Learned

counsel also referred to the judgment in the said previous suit, the Notice of Appeal against the said judgment and a motion for stay of execution of the judgment annexed to the 1st and 4th Defendants'/Applicants' Affidavit in Support of the present application and marked as Exhibits C, D and E respectively, even though Exhibits D and E, that is, the Notice of Appeal against the said judgment and a motion for stay of execution of the judgment, were not annexed to the 1st and 4th Defendants'/Applicants' said Affidavit in Support.

Learned counsel also submitted that the Claimant/Respondent at paragraph 20 of its Affidavit in Support of the motion for mareva injunction upon which the court made the said exparte order admits that this same court sitting at Zuba in another previous suit had given judgment with respect to the subject matter of this suit and that by commencing this suit, the Claimant/Respondent is re-litigating on the same subject matter twice. Learned counsel further submitted that this suit and the exparte order of injunction made pursuant thereto are an abuse of court process, and that the said order, having emanated from an abuse of court process, cannot stand.

Learned counsel referred the court to the case of **CHIEF JAMES IRIANGA OTOKO V. 2 ORS V. CHIEF SOLOMON ADERIA & 3 ORS V. CHIEF ERNEST IKPANTE NDE EKOR & 3 ORS (2018) ALL FWLR (Pt. 937) P. 1662 at, PP 1679-1680** where the Court of Appeal held as follows:

“The circumstances which give rise to abuse of court process includes:

- a. Instituting a multiplicity of actions on the same subject matter against the same issues, on multiplicity of actions on the same matter between the parties even where there exist a right to begin the action.*

- b. Instituting different actions against the same parties simultaneously in different courts even though on different grounds.*
- c. Where two similar processes are used in respect of the exercise of the same right, for example across-appeal and a respondent's notice.*
- d. Where an application for adjournment is sought by a party to an action to bring an application to court for leave to raise issues of fact already decided by the lower court.*
- e. Where there is no law supporting a court process or where it is premised on frivolity or recklessness.*
- f. Where a party has adopted the system of forum shopping in the enforcement of a conceived right.*
- g. Where an appellant files an application at the trial court in respect of a matter which is already subject of an earlier application, when the appellant's application has the effect of over-reaching the respondent's application".*

On this, learned counsel also relied on the case of **BENKAY (NIG.) LTD V. CABDURY (NIG.) PLC (2012) ALL FWLR (Pt. 631), P. 1450.**

Learned counsel submitted that the Claimant/Respondent had clearly used two similar processes in approaching the same court in exercising the same right by first commencing Suit No: FCT/HC/CV/769/2016 at the High Court sitting at Zuba under the undefended list procedure and now commencing this suit by way of Originating Summons to recover the same term loan, which is clearly a case of abuse of process.

Learned counsel submitted also that the Claimant/Respondent had adopted the system of forum-shopping in the enforcement of his conceived right by first commencing Suit No: FCT/HC/CV/769/2016 at the High Court sitting at Zuba and now instituting this instant suit over the same subject matter.

Learned counsel submitted further that the Claimant/Respondent instituted a multiplicity of actions over the same subject matter by first instituting Suit No: FCT/HC/CV/769/2016, against which an appeal is still pending at the Court of Appeal, before instituting this suit which is a clear abuse of court process. Counsel referred to the case of **CHIEF JAMES IRIANGA OTOKO V. 2 ORS V. CHIEF SOLOMON ADERIA & 3 ORS V. CHIEF ERNEST IKPANTE NDE EKOR & 3 ORS** (Supra) where it was held that where a suit constitutes an abuse of court process, the court shall dismiss it.

Learned counsel therefore submitted that the instant suit is an abuse of court process and as such, the exparte order of mareva injunction made on the 8th day of October, 2020, on the premise of the suit, is equally an abuse of court process. Counsel therefore urged this court to discharge the said exparte order of mareva injunction of the 8th day of October, 2020.

On the third issue of the 1st and 4th Defendants/Applicants, learned counsel referred to the case of **AKINGBOLA V. CHAIRMAN, E.F.C.C.** (2012) 9 NWLR (Pt. 1306), P. 415, at Pg 8 where the Court of Appeal, Per Saulawa, J.C.A. listed some of the principles guiding the grant of mareva injunction, namely:

- i. There must be a justiceable cause of action against the Defendant.
- ii. There must be a real and imminent risk of the Defendant removing his assets from jurisdiction of court and thereby rendering nugatory any judgment which the plaintiff may obtain.
- iii. The Applicant must make a full disclosure of all material facts relevant to the application.
- iv. The applicant must give full particulars of the assets within the jurisdiction.
- v. The balance of convenience must be on the side of the applicant, and

- vi. The applicant must be prepared to give an undertaking as to damages.

Learned counsel also referred to the case of **SOTUMINU V. OCEAN STEAMSHIP (NIG) LTD** (1992) 5 NWLR 1 where the Supreme Court similarly outlined the above pre-conditions for the grant of an order for mareva injunction.

Learned counsel submitted that in the instant case, the Claimant/Respondent has not shown these reasons in the Affidavit in Support of its application for the said exparte order as to necessitate the grant of the application.

Learned counsel submitted that one of the cardinal requirements for the grant of an order of mareva injunction is that there must be a real and imminent risk of the Defendant removing his assets from the jurisdiction of the court and thereby rendering nugatory any judgment which the plaintiff may obtain.

Learned counsel submitted further that in the instant case, the 1st Defendant/Applicant is a company registered in Nigeria and doing business in Abuja within the jurisdiction of this Honourable Court, while the 4th Defendant/Applicant resides in Abuja within the jurisdiction of this Honourable Court. According to learned counsel, there is no real or imminent risk of the 1st and 4th Defendants/Applicants removing the assets from the jurisdiction of this court.

Learned counsel submitted that the Claimant's/Respondent's Affidavit in Support of the application upon which the mareva injunction was granted does not contain any evidence of real and imminent risk of the 1st and 4th Defendants/Applicants removing assets from jurisdiction of the court and that the Claimant/Respondent has not shown cause why the application for mareva injunction should be granted in the first place.

Learned counsel submitted that an order of mareva injunction is not applicable in the instant case and urged the court to discharge the said exparte order of mareva injunction made on the 8th day of October, 2020.

On the 1st and 4th Defendants'/Applicants' issue four, learned counsel submitted that it is a trite law that proper service of originating process as provided for under the law is a condition precedent for the assumption of the jurisdiction to determine a suit. Learned counsel relied on the case of **ALHAJI MOMOH BAJEHSON V. CAPTAIN HAKEEM OLADAPO NIYI OTIKO & ANOR (2018) ALL FWLR (Pt. 966), P.281, at P. 305-306, Paras H-A** where the court held as follows:

"A court is competent when

- a. It is properly constituted as regards members of the bench and no member is disqualified for one reason or another.*
- b. The subject matter of the case is within jurisdiction and there is no feature in the case which prevents the court from exercising its jurisdiction, and*
- c. The case comes before the court of law and upon fulfillment of any condition precedent to the exercise of jurisdiction."*

On this, learned counsel also relied on the case of **MADUKOLU V. NKEDILIM (1962) 1 ALL NLR, 567**.

Learned counsel also referred to Order 7 Rules 2 and 8 of the High Court of the Federal Capital Territory (Civil Procedure Rules) 2018 which provide as follows:

"2. An officer of court or process server shall serve an originating process by delivering to the party to be served a copy of the process duly certified as provided by Order 6 Rule 2(3)".

“8. Subject to any statutory provision regulating service on a registered company, corporation or body corporate, every originating process requiring personal service may be served on a registered company, corporation or body corporate, by delivery at the head office or any other place of business of the organization within the jurisdiction of the court.”

Learned counsel submitted that in the instant case and as averred at paragraphs 5, 6, and 7 of the Affidavit in Support of the 1st and 4th Defendants'/Applicants' application, the originating process issued in this suit has not been served on the 1st and 4th Defendants/Applicants in accordance with the rules of this court as stated above.

Learned counsel submitted again that the originating process has not been served or properly served on the 1st and 4th Defendants/Applicants and urged the court to so hold.

The Claimant/Respondent, in opposing the 1st and 4th Defendants'/Applicants' application, filed a Counter-Affidavit of 44 paragraphs deposed to by one Abiodun Paul Ogunmodede, a Counsel in the Law Firm of I. H. Yamah & Co, Claimant's/Respondent's Legal Practitioners. The Claimant/Respondent relied on all the paragraphs of its said Counter-Affidavit. The Claimant/Respondent also relied on the four Exhibits attached to its said Counter-Affidavit, that is, Exhibits A – D.

The Claimant/Respondent, in line with the Rules of Court, filed a Written Address in Support of its Counter-Affidavit and adopted same as its arguments in Support of its said Counter-Affidavit.

Learned counsel to the Claimant/Respondent in the latter's Written Address, submitted that the position of the law with regards to the 1st - 4th Defendants'/Applicants' motion is stated by the Court of Appeal in the case of **DR. ERASTUS B. O. AKINGBOLA V. THE CHAIRMAN, ECONOMIC AND**

“On Essence of Mareva Injunction – A Mareva Injunction is a preserver order. Mareva Injunction is to prevent the dissipation or dealing with properties (pending the determination of a dispute) that could be rendered the judgment of a court or the resolution or the resolution of that dispute nugatory. They therefore operate until the determination of the civil rights and obligations of the parties with regard to the subject properties. (7-Up Bottling Co. Ltd. V. Abiola & Sons (Nig.) Ltd. (1995) 3 NWLR (Pt. 383) 257 referred to.) (P. 500, Para. E.G) Per AKAHS, JCA at pages 500, Paras F-H; 501-502, PARAS. E-A: “The application for Mareva injunction made ex-parte pending the arrest and trial of Dr. Erastus B.O. Akingbola was in order and a lawful practice before the Federal High Court. There is as yet no determination of the civil rights and obligations of the appellant as the trial of the appellant in the criminal charges in Case No. FHC/I/CS/443C/2009 has not been determined. Consequently, the granting of the ex-parte order for the preservation of the properties which was not done in open court did not infringe on the appellant’s right to fair hearing as enriched in section 36(1) and (3) of the Constitution ----”.

Learned counsel also reiterated the position of the law that a Party shall not benefit from its own wrongful act and submitted that it is trite that he who comes to equity must come with clean hands (or alternatively, equity will not permit a party to profit by his own wrong). On this, Learned counsel referred the court to the case of **P.D.P. & ORS V. EZEONWUKA** (2017) LPELR 42563 (SC) where Per Eko JSC held thus:

“Equity, acting in personam, would not allow a party to benefit from his own iniquity; it insists that whoever comes to it for Justice must do justice and must not come to the temple of Justice with dirty hands.”

Learned counsel further submitted that the essence of the reliefs sought in the Claimant’s motion is to preserve the assets of the Respondents before their rights are finally decided, so that when the money of the Respondents is persevered, the Honourable Court can order the Judgment debts and the accrued interest to be satisfied forthwith from the preserved money and from the preserved properties before the Respondents completely dissipate same. Learned counsel referred to the case of **DR. ERASTUS B.O. AKINGBOLA V. THE CHAIRMAN, ECONOMIC AND FINANCIAL CRIMES COMMISSION** (Supra) as Per AKAAHS, JCA, where the Court held thus:

“On THE Essence of Mareva Injunction – By virtue of the nature of and objective thereof, a Mareva Injunction prevents the injustice of a defendant taking away his property or assets from the jurisdiction of the Court, which assets might otherwise have been able to satisfy a judgment. (P. 507. Paras. G-H)”.

Learned counsel also referred the court to the case of **EFE FINANCE HOLDING LTD V. OSAGIE, OKEKE, OTEGBOLA AND CO. & 3 ORS** (2000) FWLR (Pt. 8) 95, P. 962, Paras. E-F, & P 962, Para E-G where the Court of Appeal held that the Mareva order of Injunction is, in reality, a security for judgment.

Learned counsel submitted that mareva injunction applies in principle to a creditor who has a right to be paid the debt owing to him, even before he has established his right by getting judgment for it. If it appears that the debt is due and owing, and therefore there is a danger that the debtor may dispose of his assets so as to defeat it before judgment, the court has jurisdiction in a proper case to grant an interlocutory judgment so as to

prevent him from disposing of those assets. It operates to stop a defendant against whom a plaintiff has a good arguable claim from disposing of or dissipating his assets pending payment to the plaintiff.

Learned counsel submitted also that the injunction can also be granted against anybody who is in possession of the defendant's assets and on this, he referred the court to the case of **SOTUMINU V. OCEAN STEAMSHIP NIGERIA LIMITED** (1992) 5 SCNJ 17 – 22 (1992) 5 NWLR (Pt. 239) [P 1990, Para E-F]. Counsel submitted that the Supreme Court in the above case has affirmed the position that the monies of the Respondents in the hands of the Respondents' Banks or in the hands of anybody who is in possession of the Respondents' assets can also be attached by Order of Mareva Injunction.

Learned counsel also submitted that the content of the Claimant's/Respondent's Counter-Affidavit shows that the Claimant/Respondent has a right to be paid the judgment sum and the accrued interest thereon.

Learned counsel went further to submit that in **BEDDOW V. BEDDOW** (1878) 9 CH. D. 89, Jessel MR gave a very wide interpretation to that section when he said "I have unlimited power to grant an injunction in any Case where it would be right or just to do so ---." There is only one qualification to be made. The Court will not grant an injunction to protect a person who has no legal or equitable right whatever.

Learned counsel also referred the court to the conclusion of Lord Denning MR at page 215 where Lord Denning MR stated thus:

"In my opinion that principle applies to a creditor who has a right to be paid the debt owing to him, even before he has established his right by getting Judgment for it. If it appears that the debt is due and owing, and there is danger and that the debtor may

dispose of his assets so as to defeat it before Judgment, the Court has Jurisdiction in a proper Case to grant an interlocutory Judgment so as to prevent him disposing of those assets.”

Learned counsel reiterated other English principles and cited other cases in his rather surprising effort of re-arguing the Claimant's/Respondent's motion for mareva injunction instead of contesting the 1st and 4th Defendants'/Applicants' motion to discharge the court's order of mareva injunction.

Finally, learned counsel submitted that Lord Denning, after reviewing the previous cases on mareva injunction, held that the trial court also has the power to extend the injunction beyond the date earlier granted (in Case Money enters the account or further properties are acquired after the earlier date expired). According to learned counsel, Lord Denning relied on S.25(8) of the Judicature Act 1873 (Statute of General Application in Nigeria) which provides that mandamus or an injunction may be granted or receiver appointed by an interlocutory order of the Court (including this Court) in all cases in which it shall appear to the Court to be just or convenient.

Learned counsel concluded by urging the court to refuse the 1st – 4th Defendants'/Applicants' motion.

The 3rd Defendant/Applicant on its part, filed a Motion on Notice dated 13th September, 2021, which motion is brought pursuant to Order 7 Rules 2 and 8, Order 43 Rule 3 (2) of the Federal Capital Territory High Court (Civil Procedure) Rule 2018, Section 36 of the 1999 Constitution as amended and under the inherent jurisdiction of the Honourable Court.

The 3rd Defendant/Applicant, vide its said motion, prayed the Court for the following orders:

1. An Order vacating the interim order of mareva injunction made by this Honourable Court on 8th day of October 2020 freezing and attaching

the Bank account of the 3rd Defendant/Respondent/Applicant for payment of the Judgment debt to be delivered by this Honourable Court pending the hearing and determination of final Judgment on this suit and pending payment of the Judgment sum to be delivered in this suit and the interest till full liquidation of the judgment proceeds or to pay the Judgment proceeds and interest till date into court to satisfy the Judgment to be delivered in the suit.

2. An Order vacating the interim order of mareva injunction made by this Honourable Court on 8th day of October 2020 freezing and attaching the Bank account of the 3rd Defendant/Respondent/Applicant, the Building where the Bakery is being operated therein the Equipment for the production and sale of the Bread.
3. An Order vacating the interim order of mareva injunction made by this Honourable Court on 8th day of October 2020 restraining the 3rd Defendant/Respondent/Applicant from dealing in any form or manner with the properties (money and physical properties including the BVN, by opening any fresh account with the BVN) as specified herein except by selling the said landed properties and or authoring payment from the account into the 1st defendant's account pending when the debt in the 1st defendant is fully paid into the account of the 1st defendant with the Plaintiff to satisfy the Judgment to be delivered in this suit.
4. An Order of the Court declining Jurisdiction to hear and determine this suit for failure of the Claimant/Respondent to serve the originating processes issued in this suit on the 3rd Defendant/Applicant.
5. AND for such further or other orders as this Honourable Court may deem fit to make in the circumstance.

The grounds upon which the 3rd Defendant/Applicant premised its application are as follows:

1. That an order of injunction made upon an application ex-parte abates after 7 days.

2. That the time duration for the said order made by this Honourable Court against the Applicant on 8th day of October 2020 elapsed and abated on 16th day of October, 2020.
3. That despite that the said interim order granted by this Honourable Court abated on 16th day of October, 2020, the 1st to 20th banks herein affected by the order have refused to reopen the 3rd defendant Bank account.
4. That the proper service of the originating processes in this suit was not done or served on the 3rd defendant/Applicant.

The 3rd Defendant's/Applicant's motion is supported by an Affidavit of 15 paragraphs deposed to by one Dzungwe Eunice Tersoo, Litigation Secretary in the Law Firm of Chinedu Odo & Co., Solicitors to the 3rd Defendant/Applicant. The 3rd Defendant/Applicant relied on all the paragraphs of its said Affidavit.

The 3rd Defendant/Applicant also filed a Written Address in support of its motion, in line with the Rules of this Honourable Court, and adopted its said Written Address as its arguments in relation to the motion in question.

The 3rd Defendant/Applicant formulated a sole issue for determination in its said Written Address, that is, whether an application made ex parte and order granted therein abates after seven (7) days.

Learned counsel to the 3rd Defendant/Applicant referred to Order 43 Rule 3(2) of the Rules of this Honourable Court which provides that an order of injunction made upon application ex parte shall abate after 7 days and submitted that since abatement of this order on 16th day of October, 2020, the 1st to 20th banks herein affected by the order have refused to reopen the 3rd Defendant's bank account.

Learned counsel submitted that this court is a court of justice and that justice demands fair hearing pursuant to section 36 of the 1999 Constitution

as amended. Learned counsel also submitted that it will be wrongful for a party to continue to suffer in perpetuity a cause which has not been determined against it and also that the Plaintiff/Applicant has in the face of unproven allegation, used the said order made on the 8th day of October, 2020 to put both the life and business of the Applicant and the benefitting workers therein on hold.

Learned counsel submitted further that the Plaintiff/Applicant did not show in its application that any of the items affected by the order is capable of escaping the jurisdiction of this court to warrant order of this court.

Learned counsel therefore submitted that this court has power to expressly vacate its order made on 8th day of October, 2020, same having been abated by effluxion of time and urged this court to so hold and vacate the said order made on the 8th day of October, 2020.

In its opposition to the 3rd Defendant's/Applicant's motion, the Claimant/Respondent filed a Counter-Affidavit of 42 paragraphs deposed to by one Abiodun Paul Ogunmodede, a Counsel in the Law Firm of I. H. Yamah & Co., Claimant's/Respondent's Legal Practitioners. The Claimant/Respondent relied on all the paragraphs of its said Counter-Affidavit as well as the four Exhibits attached thereto, that is, Exhibits A – D.

The Claimant/Respondent, in line with the Rules of Court, filed a Written Address in Support of its said Counter-Affidavit and adopted the Written Address as its arguments in Support of its said Counter-Affidavit.

The Claimant/Respondent repeated, *ipsissima verba*, the submissions in the Written Address in Support of its Counter-Affidavit to the 1st and 4th Defendants'/Applicants' motion and for that reason, it will be needless to reproduce the said submissions all over again.

In the same manner learned counsel urged the court to refuse the 1st – 4th Defendants'/Applicants' motion, learned counsel urged the court to refuse the 3rd Defendant's/Applicant's motion.

The 2nd Defendant/Applicant also filed a Motion on Notice dated 20th November, 2020. The motion is brought pursuant to Order 43 Rules 2 and 3, and Section 6 (6) (b) of the Constitution of the Federal Republic of Nigeria, 1999.

The 2nd Defendant/Applicant, vide his said motion, prayed this court as follows:

- 1) An Order discharging the order of mareva injunction granted ex- parte restraining certain bank listed as co-respondents Nos 1 – 20, in the order dated 8th October, 2020, in the above suit, for abatement.
- 2) An Order discharging the Order granted ex-parte of mareva injunction, having obtained same by concealment of vital facts and for coming under the wrong laws.
- 3) An Order discharging the mareva injunction for the proceedings appear and infact were an abuse of the due process of court.
- 4) Such other or further orders as the Hon. Court may deem fit to grant having regard to the circumstances of the plaintiff's suit and for compensation to the respondent.

The 2nd Defendant's/Applicant's said motion is supported by an Affidavit of 13 paragraphs deposed to by the 4th Defendant/Respondent, Samuel Nwoga, in his capacity as the Managing Director of both the 1st Defendant/Respondent and the 3rd Defendant/Respondent. The 2nd Defendant/Applicant relied on all the paragraphs of his said Affidavit. The 2nd Defendant/Applicant also relied on the three (3) Exhibits (Exhibits A, B & C) attached thereto.

The 2nd Defendant/Applicant filed a Written Address in Support of his motion and adopted same as his arguments in relation to his said motion.

The 2nd Defendant/Applicant formulated the following two issues for determination in relation to his motion:

- 1) Whether in bringing the motion ex-parte for an order of mareva injunction and the service of same, the plaintiff did comply with the rules of court.
- 2) Whether the facts of the pending appeal CA/A/554/2017 and the judgment of the court in Suit No. FCT/HC/CV/769/2016 do not vitiate the order of mareva injunction and constitute an abuse of the courts process.

With regards to the 2nd Defendant's/Applicant's issue one, learned counsel submitted that section 97 of the Sheriff and Civil Process Act 1990 deals with the service of processes especially service outside jurisdiction and that Order 44 (2) deals with some forms of injunction under which a mareva injunction could be brought.

Learned counsel also submitted that the order requires the procedure to be that of a judicial review and that importantly:-

- a) Leave of court is required to proceed.
- b) A statement of the applicant to be filed.
- c) A verifying affidavit of the applicant to be filed.
- d) A written address in support of application for leave.

Learned counsel submitted further that none of these procedures were followed and that Order 44 (3) of the Rules says *"No application for judicial review shall be made unless the leave of the court has been obtained in accordance with this rule."*

Learned counsel also submitted that service is said to be germane to jurisdiction and that the Applicant has deposed to the facts in paragraphs 9

(a), (b) and (e) that the core Respondents have not been served with the processes in this suit. According to learned counsel, this only shows that the Plaintiff is playing a game calculated to destroy the 1st, 2nd and 3rd Respondents' business interests by publishing to all banks in Nigeria that the Respondents are "Bad customer" who ought to be avoided.

Learned counsel referred to Order 43 (3) (1) which stipulates that no application for injunction shall be made ex-parte in any action unless the applicant files with it a motion on notice. Learned counsel also referred to Order 43 (3) (2) which states that "An order of injunction made upon an application ex-parte shall abate after seven (7) days".

Learned counsel submitted that the Order of Mareva Injunction that was admittedly made on the 8th day of October, 2020, was not made to last until the hearing of the motion on notice and that in the absence of any extended time or application for extension of time, the order had lapsed since the 16th day of October, 2020, so that the service of that order after day is in itself mischievous.

Learned counsel also submitted that the service of the order on Eco Bank, the 8th Co-respondent, after the 15th day of October, 2020 is stale and otiose as the order has lapsed and that an order ex-parte after seven (7) days expires, necessary steps to review it or sustain it, not having been taken.

Learned counsel further submitted that when the law has specified the mode of doing an act or following a step in proceeding, that mode must be strictly complied with and he referred to the case of **ABUBAKAR V. NASAMU** (NO. 2) (2012) 17 NWLR (Pt 1330) P. 523.

Learned counsel urged the court to pronounce that the order for mareva injunction dated 8th October, 2020 has abated by effluxion of time and for non-compliance with the relevant rules of procedure and practice.

On the 2nd Defendant's/Applicant's issue 2, learned counsel referred the court to paragraph 20 of the Affidavit of Bulama Abdullahi, that is, the Affidavit in Support of the Claimant's/Respondent's Motion Exparte for mareva injunction dated 9th July, 2020, where the deponent averred thus:

"The FCT High Court Zuba has given judgment to sell the property mortgaged but the Defendant had refused to pay the sum of money to the plaintiff showing that the Defendants have abandoned the Account after collecting and utilizing the Loan and accrued agreed interest."

It is clear, according to learned counsel, that the plaintiff misdirected the court on the true position of the suit at Zuba High Court and Exhibits A, B and C attached to the Affidavit of Samuel Nwoga are very clear indications of a pending suit the plaintiff is trying very hard to conceal.

Learned counsel submitted that the issues canvassed or to be canvassed in the present suit and the previous suit now on appeal are the same and that the same Exhibits 1,2,3 and 5 of the Affidavit of Bulama Abdullahi, were the same Exhibits displayed and argued upon in Suit No. HC/CV/769/2016 at the High Court, Zuba. According to the learned counsel, claims for possession and the recovery of term loan are two sides of the same coin.

Learned counsel referred the court to sections 173 and 174 of the Evidence Act, 2011 which says "... Every judgment is conclusive proof as against parties and privies, of facts directly in issue in the cause actually decided by the court and appearing from the judgment to be the ground on which it is based, and on this, learned counsel relied on the cases of **BARMANI VENTURES LIMITED V. KINGSFOAM & CHEMICAL INDUSTRIES LIMITED (2002) FWLR (Pt 124) 412 @ 436 CA** and **MAYA V. OSHUNTOKUN (2001) FWLR (Pt. 81) 1777 @ 1799 CA.**

Learned counsel also reiterated the following principles of law:

(1) In determining the issues or subject matter of two suits, to decipher whether estoppel arises, the pleadings, proceedings and the judgment in the previous and other relevant issues must be looked at, to discover what the issues were in the previous suit; the question of whether the parties, subject matter and issues are the same is a question of fact and on this, learned counsel relied on the case of **ADONE & ORS. V. IKEBUDU & ORS. (2001) FWLR (Pt. 72) 1893 @ 1916 SC.**

(2) There is no particular way of pleading estoppel; the adverse party must however be notified that the party raising it means to rely on. **ALAKIJA & ORS. V. ABDULLAHI (1988) 6 NWLR (Pt. 552) 1 SC.**

(3) A plea of *Res Judicata* (Cause of action estoppel or issue estoppel) can be maintained only when the same question that has been judicially decided on the merits was again raised between the parties for the purpose of: interest *reipublicae ut sit finis litium: nemo debet bis vexari pro una et eadem causa.* **RANKING UDO & ORS. V. MBIAM OBOT & ORS. (1989) 1 SC (Pt.1) 64 @ 73.**

(4) A plea of *Res Judicata* is a bar to any further action and as evidence it is conclusive of the issue or point so raised. **ABUBAKAR V. FEDERAL MORTGAGE BANK LIMITED & ORS. (2003) FWLR (Pt. 151) 1918 @ 1926 and MADUKOLU & ORS. V. NKEMDILIM (1962) 2 SCNLR (P. 341) OR (1962) 1 All NLR 587@ 595 FSC.**

Learned counsel submitted that the doctrine of *lis pendens* will not allow a lower court to dispossess the appeal court of jurisdiction, power and control over property which is in litigation and which the Court of Appeal is seized of for determination.

Learned counsel submitted further that the procedure adopted by the plaintiff in obtaining the order of injunction is that of garnishee proceedings provided under sections 83-92 of the Sheriff and Civil Process Act and that the demand of the Plaintiff for Co- respondents to furnish in Affidavit the

sums in the Respondents' accounts show that of the garnishee. **ADENIYI V. FRN (2012) 1 NWLR (Pt. 1281) page 284 and NYAH V, NOAH (2007) 4 NWLR (Pt. 1024) page 320.**

Learned counsel finally urged the court to discharge the order of mareva injunction declared on the 8th day of October, 2020 for all the reasons adduced in the 2nd Defendant's/Applicant's Motion, Affidavit and Written Address.

In opposing the 2nd Defendant's/Applicant's motion, the Claimant/Respondent filed a Counter-Affidavit of 21 paragraphs deposed to by one Victor Grace Akara, Litigation Secretary in the Law Firm of I. H. Yamah & Co., Legal Practitioners to the Claimant/Respondent herein. The Claimant/Respondent relied on all the paragraphs of its said Counter-Affidavit and also adopted the Written Address filed in support of the said Counter-Affidavit in line with the Rules of this Court.

The Claimant/Respondent formulated a sole issue for determination in its said Written Address, that is, whether the Application of the Defendants to set aside the judgment has merit and if this Court has the power to grant the N31 Million the Defendants freely admitted in their Affidavit Evidence.

The Claimant/Respondent again retained the submissions in the Written Address in Support of its Counter-Affidavit to the 1st and 4th Defendants'/Applicants' motion and urged the court to refuse the 2nd Defendant's/Applicant's motion and enter judgment against the Defendants for the N31 Million freely admitted by them.

The 5th Defendant/Applicant also filed a Motion on Notice dated 16th September, 2021. The motion is brought pursuant to Order 43 Rules 2 and 3, Section 6 (6) (b) of the Constitution of the Federal Republic of Nigeria, 1999 (As Amended) and under the inherent jurisdiction of the Honourable Court.

The 5th Defendant/Applicant, vide his said motion, prayed this Honourable Court for the following orders:

1. An order of the court discharging the exparte order of mareva injunction to freezing the 5th Defendant's/Applicant's bank accounts and attach the said bank accounts of the 5th Defendant.
2. An order of the court discharging the exparte order of mareva injunction attaching the filling station of the 5th Defendant Respondent, including the tank, fuel pumps, the land and equipment therein, the upstairs and bungalow behind the fuel pumps, at Tunga Maji, new layout, Zuba, Gwagwalada, Abuja.
3. An order of the court discharging the order of mareva injunction restraining the 5th Defendant/Applicant from dealing in any form or manner with the properties/money and physical properties including the BVN by opening any fresh (new) account with the BVN as specified.
4. And for such further order as the Honourable Court may deem fit to make in the circumstance.

The grounds upon which the 5th Defendant/Applicant premised his motion are as follows:

- i. That by the rules of this court the life span of an exparte order is for seven days and if extended for another seven days making it a maximum of fourteen days.
- ii. That this exparte order has arbitrarily lasted for more than ten months.
- iii. That the continuous operation of the exparte order has no basis in law.
- iv. That the exparte order was obtained by fraud, the Claimant/Respondent having concealed relevant facts from the court.

- v. That the exparte order is an abuse of court process, the subject matter of this suit having previously been determined by this court in Suit No: **FCT/HC/CV/769/2016. FIRST BANK OF NIGERIA PLC V. EMMANUEL CHUKS UKAHA.**
- vi. That the exparte order is also an abuse of court process, the subject matter of this suit being the subject matter of Appeal No: **CA/A/559/2017, EMMANUEL CHUKS UKAHA V. FIRST BANK OF NIGERIA PLC.**

The 5th Defendant's/Applicant's said motion is supported by an Affidavit of 7 paragraphs deposed to one by Priscilla Usidame, a Counsel in the Law Firm of Priscilla Usidame & Co., Legal Practitioners to the 5th Defendant/Respondent herein. The 5th Defendant/Applicant relied on all the paragraphs of the said Affidavit and also adopted his Written Address as his arguments in relation to his said motion.

The court however found that the 5th Defendant's/Applicant's Written Address is neither dated nor signed by learned counsel to the 5th Defendant/Applicant. The court shall, in the circumstance, not give any consideration to the said Written Address, the same being worthless, unreliable, lacking in legal status and incurably bad. On this, see the cases of **FIRST GUARANTEE PENSION LTDV. NATIONAL PENSION COMMISSION & ANOR.(2016) 10 NWLR (PT. 1519) 39 AT 49, PARA. G; MAKU V. AL-MAKURA (2016) 5 NWLR (PT. 1505) 201 AT 246, PARAS B-C; NNALIMUO & 3 ORS. V. ELODUMUO & 2 ORS (2018) 8 NWLR (PT. 1622) 549 AT 561, PARA. E.**

In any case, the Claimant/Respondent reacted to the 5th Defendant's/Applicant's said motion by filing a Counter-Affidavit of 45 paragraphs deposed to by one Abiodun Paul Ogunmodede, a Counsel in the Law Firm of I.H Yamah & Co., Claimant's/Respondent's Legal Practitioners.

The Claimant/Respondent relied on all the paragraphs of its said Counter-Affidavit as well as the four Exhibits attached thereto, that is, Exhibits A – D.

The Claimant/Respondent, in line with the Rules of Court, filed a Written Address and adopted same as its arguments in opposition to the 5th Defendant's/Applicant's said motion.

It must be noted again that the Claimant/Respondent repeated, *ipsissima verba*, the submissions in the Written Address in Support of its Counter-Affidavit to the 1st and 4th Defendants'/Applicants' motion and for this reason, there will be no need to reproduce the said submissions all over again.

Learned counsel to the Claimant/Respondent however urged the court to refuse the 5th Defendant's/Applicant's motion.

I have painstakingly reviewed, together with the written submissions, the motions in question, namely: (1) the 1st and 4th Defendants'/Applicants' Motion on Notice dated 10th September, 2021 and filed on 13th September, 2021 (2) the 3rd Defendant's/Applicant's Motion on Notice dated 13th September, 2021 and filed on the same day (3) the 2nd Defendant's/Applicant's Motion on Notice dated 20th November, 2020 and filed on the same day and (4) the 5th Defendant's/Applicant's Motion on Notice dated 16th September, 2021 and filed on the same day.

I have equally given due consideration to each of the Counter-Affidavit and Written Address the Claimant/Respondent filed in opposition to each of the above motions.

As far as this court is concerned, the issues that call for determination with regards to the above motions are two in numbers, that is, (1) whether the originating process herein had been served on the Defendants/Applicants to confer this Honourable Court with the required jurisdiction to proceed further with this suit and (2) whether this suit and indeed the ex parte

motion that formed the basis of the order of court sought to be vacated by the Defendants/Applicants is not caught by the doctrine of *res judicate* and does not constitute abuse of process.

Concerning issue 1, that is, ***whether the originating process herein had been served on the Defendants/Applicants to confer this Honourable Court with the requisite jurisdiction to proceed with the hearing of this suit.***

The Defendants/Applicants, particularly the 1st and 4th Defendants/Applicants and the 3rd Defendant/Applicant in their motions dated 10th September, 2021 and dated 13th September, 2021 respectively, urged this court to decline jurisdiction to determine this suit for failure of the Claimant/Respondent to serve on them with the originating process issued in this suit. See the 1st and 4th Defendants'/Applicants' motion particularly, prayer 4 and ground vii thereof as well as paragraph 22 of the Affidavit in Support of the said motion where the deponent deposed thus: "I have not received the originating processes issued in this suit as same have not been served on me to the best of my knowledge ". See also the 3rd Defendant's/Applicant's motion particularly, prayer 4 and ground 4 thereof as well as paragraph 13 of the Affidavit in Support of the said motion where the deponent deposed thus: "The 3rd Defendant/Applicant has not been served with the originating process in this suit". See also paragraphs 8 and 9 (a) of the Affidavit in Support of the 2nd Defendant's/Applicant's motion dated 20th November, 2020 for similar depositions.

The importance of service cannot be overemphasized as service goes to competence and confers jurisdiction on the court to hear the suit before it. In **GARBA & ORS V. UMMUANI (2015) LPELR – 40731 (CA) the Court of Appeal, Per Mukhtar, JCA (as he then was) (Pp 10 paras. C)** had this to say about the competency of a suit:

In a case where the competence of an action is in issue, the court not only has the authority but also the duty to determine the

*action in limine, where lack of competence is established. This is because the competence of an action robs on the jurisdiction of the court to hear it within the classification of the elements that make jurisdiction as expounded in **MADUKOLU V. NKEMDILIM (1962) 2 SCNLR 341**. See **NNONYE V. ANYICHIE (2000) 1 NWLR (Pt. 639) 66**.*

Competence is the soul of adjudication and competence cuts across both civil and criminal proceedings. See **OGUNDEJI V. STATE OF LAGOS (2018) LPELR-46564 (CA)** and **OGBUANYINYA & ORS. V. OKUDU & ORS. (1990) LPELR-2294 (SC)**.

A distinction can be drawn between two types of jurisdiction, namely; jurisdiction as a matter of procedural law and jurisdiction as a matter of substantive law. Whilst a litigant can waive the former, no litigant can confer jurisdiction on the court where the Constitution or a statute or any provision of the common law says that the Court does not have jurisdiction. See the cases of **NDAYAKO V. DANTORO (2004) 13 NWLR (880) 187**; **ONYENUCHEYA V. MILITARY ADMINISTRATOR IMO STATE (1997) 1 NWLR (Pt 482) 429**; **MULTI-PURPOSE VENTURES LTD V. A-G RIVERS STATE (1997) 9 NWLR (Pt 522) 642**; **NKUMA V. ODILI (2006) 6 NWLR (Pt 977) 587** and **LUFTHANSA AIRLINES V. ODIESE (2006) 7 NWLR (Pt. 978) 39**.

Where an action is not competent or properly constituted, it robs the court of the jurisdiction to entertain same and that such a complaint raises the issue of jurisdiction of the trial court and ought to be dealt with first and foremost since a judgment delivered in an action outside the jurisdiction of the court amounts in law to a nullity irrespective of how well the proceedings was conducted by the trial judge. See **OFIA V. EJEM (2006) 11 NWLR (Pt 992) 652**; **ODESSA V. FRN (No. 2) (2005) 10 NWLR (Pt 934) 528**; **FABS V. IBIYEYE (2008) 14 NWLR (Pt 1107) 375** and **RIRUWAL V. SHEKARAU (2008) 12 NWLR (Pt 1100) 142**.

I have noted the claim of the Claimant/Respondent at paragraph 40 of its Counter-Affidavit to the 1st and 4th Defendants'/Applicants' motion and paragraph 40 of its Counter-Affidavit to the 3rd Defendant's/Applicant's motion that "the Bailiff of this Honourable Court has effected service of the originating processes on the 3rd Defendant according to the Rules of this Honourable Court ---".

I have also carefully perused paragraph 9 (a) and (b) of the Affidavit in Support of the 2nd Defendant's/Applicant's motion wherein the 2nd Defendant/Applicant deposed thus:

"9. That my counsel E.C Chukwu informed me in his chambers on Thursday, 19th November, 2020; at 10.30 am of the following fact which I believe to be true:

a) That I.H Yamaha counsel for the Claimant collected all the service copies from the court, having signed an undertaking to effect service by himself.

b) That all the 20 respondent banks have been served, but not the 5 co-respondents."

Furthermore, I have given due consideration to the rather contradictory deposition of the Claimant/Respondent at paragraph 16 of its Counter-Affidavit (deposed to on 15th December, 2020) in opposition to the 2nd Defendant's/Applicant's motion wherein the Claimant/Respondent deposed as follows:

"16. That the efforts to serve the correspondents by the Plaintiff proved abortive, as they cannot be found at the Mortgaged Properties and the Filing Station at Tunga Magi they gave as their only address to the Plaintiff. It is in circumstance the Plaintiff chose to serve them by substituted service recognized by law devoid of any sinister motive as alleged. That this Suit and the Suit

No. FCT/HC/CV/769/2016 have no nexus whatever as each Suit seeks different Relief know to law as shown in the Written Address of the Plaintiff.

I am not unmindful of the fact that the 1st respondent is a corporate body where the 4th defendant is a Director supposedly; Same with the 3rd defendant.

Of course, the proper way to prove service on a party, where the party has not submitted to the jurisdiction of the court, is through an Affidavit of Service which is duly sworn to by the Bailiff of court.

In the case of **INTERNATIONAL BANK OF WEST AFRICA V. SASEGBON** (2007) 16 NWLR (PT. 1059) 195 at 218, Para. H, the Court of Appeal held that where an Affidavit of Service has been sworn to by a Bailiff, the presumption is that proper service has been effected. This is not to say that an Affidavit of Service is a conclusive proof of service for an Affidavit of Service is only prima facie evidence of service. See **NIC OIL NETWORK SERVICES (NIG.) LTD & ORS V. BAMOND OIL (NIG.) LTD** (2014) LPELR – 24629 (CA).

Furthermore, in the case of **UWEMEDIMO V. MOBIL PRODUCING (NIG) UNLTD** (2019) 12 NWLR (PT. 1685) 1 at 19 paras. D – G, the Supreme Court held as follows:

“.....It has been long settled that the issue of service of process is essential aspect of our procedural law as it is a jurisdictional issue. The court has no jurisdiction over a litigant who has not been served. Service of a process in all proceedings except in exparte proceedings is fundamental to the assumption of jurisdiction. See Sken Consult (Nig.) Ltd. v. Ukey (1981) 1 SC p. 6; ACB v. Losada (Nig.) Ltd. (1995) 7 SCNJ p. 158, (1995) 7 NWLR (Pt. 405) 26; Auto Import Export v. Adebayo (2003) 1 SCN p. 154, (2002) 18 NWLR (Pt. 799) 554; Agip (Nig.) Ltd. & Ors v. Ezendu & 9 Ors (2010) 1 SC (Pt. ii)

p.98 reported as Agip (Nig.) Ltd. v. Agip Petroli Int'l (2010) 5 NWLR (Pt. 1187) 348.

However the court has jurisdiction over a litigant who is not served process but submits to the jurisdiction of the court. That is to say the litigant waives service."

Having not found any proof(s) of service in the file, I resolve Issue 1 in the negative and hold that the Defendants/Applicants have not been served with the originating process herein to confer this Honourable Court with the requisite jurisdiction to proceed with the hearing of this suit.

As to issue 2, that is, ***whether this suit and indeed the ex parte motion that formed the basis of the order of court sought to be vacated by the Defendants/Applicants is caught by the doctrine of res judicate and constitutes an abuse of process.***

In the case of **MOMOH V. ADEDOYIN** (2018) 12 NWLR (Pt. 1633) 345 at 377, para. C, the Court of Appeal held that abuse of court process and *res judicata* are jurisdictional issues.

Concerning abuse of process, the Supreme Court has held that abuse of court process means that the judicial process has not been used bonafide and properly. See **ARUBO V. AIYELERU** (1993) 3 NWLR (Pt. 280) 126 at page 142, para. B.

In the case of **ETTE V. EDOHO** (2009) 8 NWLR (Pt. 1144) 601 at 609-610, paras. H – D, the Court Appeal stated thus concerning abuse of process:

".....To begin with, an abuse of process would occur in one or more of the following situations:

"(a) Where the parties, subject matter and the issue in the previous and the later suits are the same.

(b) Where different actions based on the same facts between the same parties are filed in different or the

same court simultaneously in respect of the same right and subject matter.

- (c) Where a party litigates again on the same issue which has already been litigated upon between him and the same person by facts on which a decision has already been reached.*
- (d) Where the proceedings is wanting in bonafide, or is frivolous, vexation, oppressive or amounts to abuse of legal procedure or improper legal process.”*

Concerning *res judicata*, the Court of Appeal in **SKYBLIND (NIG.) LTD V. NEWLIFE COOPERATIVE SOCIETY & 3 ORS.** (2020) 9 NWLR (Pt. 1730) 541 at 564 paras. E – G, stated thus:

“The expression “res judicata” means “a thing adjudicated”; a thing judicially acted upon or decided; a thing or matter sewed by judgment. It came out of the original expression “res adjudicate”. The principle enshrined in res judicata is derived from the maxim “nemo debet bis vexari si contest curiae quod sit pro una et eadem causa which when literally translated means: no man ought to be twice vexed, if it proved to the court that it is for one and the same cause....”

On conditions precedent for the successful plea of *res judicata*, the Court of Appeal held as follows in the same case of **SKYBLIND (NIG.) LTD V. NEWLIFE COOPERATIVE SOCIETY & 3 ORS.** (Supra) at 566 paras. D-F,

“It is settled law that for a plea of estoppel per rem judicata, be it cause of action estoppel or issue estoppel to succeed, the party relying on it must establish the following requirements or preconditions, namely:

- i. that the parties or their privies are the same in both the previous and present proceedings;*

- ii. *that the res or the subject matter of the litigation in the two cases is the same;*
- iii. *that the claim, in the case of cause of action estoppel, or the issue or issues in dispute, in case of issue estoppel, is the same;*
- iv. *that the decision relied upon to support the plea is valid, subsisting and final; and*
- v. *that the court that gave the decision relied upon is a court of competent jurisdiction.”*

See also **PAM & 7 ORS. V. INCOPORATED TRUSTEES OF ASSEMBLIES OF GOD NIGERIA** (2020) 14 NWLR (Pt. 1745) 393 at 413, paras. A-D.

The 1st and 4th Defendants/Applicants at paragraphs 17 - 21 of their Affidavit in Support of their motion (dated 10th September, 2021) deposed as follows:

“17. That the Claimant/Respondent has previously approached this court for the recovery of the said term loan being subject matter of the earlier Suit with No: FCT/HC/CV/769/2016 FIRST BANK OF NIGERIA LIMITED V. EMMANUEL CHUKS UKANA.

18. That the said suit proceeded to trial and upon which judgment was delivered by the trial judge, Honourable Justice A.O. Ebong. A copy of the said judgment is hereby annexed as Exhibit C.

19. That being dissatisfied with the judgment in the said suit the said Emmanuel Chucks Ukaha has appealed to the Court of Appeal. The Notice of Appeal is annexed as Exhibits D.

20. That Emmanuel Chuks Ukaha has also filed a notice for stay of execution of the said judgment. A copy of the motion for stay of execution is annexed as Exhibit E.

21. That having elected to proceed against the Emmanuel Chucks Ukah who is the 2nd Defendant/Respondent to recover the term loan in a previous suit and obtained judgment against him, the Claimant/Respondent cannot again institute this suit to recover the same term loan from the 1st Defendant/Applicant''.

The 2nd Defendant/Applicant, at paragraphs 4, 6, 7 and 9 (c) of the Affidavit in Support of his own motion (dated 20th November, 2020) deposed thus:

- 4. That the issues of the Housing loan and the subsequent restructuring, represented by EXHS 1,2 3 and 5 in the affidavit of Bulama Abdullahi in support of motion ex-parte; have already been litigated upon in Suit No. FCT/HC/CV/769/2016 between FIRST BANK OF NIGERIA LIMITED V. CHUKS UKAHA; and constitute ISSUE ESTOPEL and LIS PENDENS.*
- 6. That the Judgment of Hon. Justice A.O Ebong delivered on the 22nd May, 2017 was appealed against to the Court of Appeal Abuja, in Appeal No. CA/A/554/2017. Copy of the recently filed motion on notice by I.H Yamah Esq., filed on 14/9/2020 is here exhibited and marked as EXH B.*
- 7. That pending at the Court of Appeal also is an application for stay of execution. Copy of the motion and affidavit dated and filed the 13/12/2017 is here exhibited and marked as EHX C. that the appeal is fixed for hearing on 1st December, 2020.*
- 9(c). That the Claimant or their counsel have motive to destroy the business interests of the 5 core Respondents. That this*

present suit; and Suit No. FCT/HC/CV/769/2016 are two sides of the same coin.

See also paragraph 4 (a) of the Affidavit in Support of the 5th Defendant's/Applicant's motion (dated 16th September, 2021) where the 5th Defendant/Applicant deposed *"That the commencement of this suit by the Claimant/Respondent over the term loan having previously commenced Suit No. FCT/HC/CV/769/2016. FIRST BANK OF NIGERIA LIMITED V. EMMANUEL CHUKS UKAH, which is in respect of the same subject matter amounts to an abuse of court process."*

The Claimant/Respondent, on the other hand and at paragraphs 4 – 9 of its Counter-Affidavit to the 1st and 4th Defendants/Applicants motion, reacted as follows:

- "4. It is not true that the Expert Order is abuse of court process as the claim here is not earlier determined by Zuba High Court in Suit No. FCT/HC/CV/769/16 and it is not subject of Appeal No. CA/559/17.*
- 5. Claimant Respondent will be prejudiced if the Order has not been realized until after the final determination of this Suit.*
- 6. Paragraph 4 (a) offends S. 128 (1) of the Evidence Act because the copy of the judgment in Suit No. CV/769/2016 and the copy of the Appeal No. CA/A/559/17 have not been attached for this Court to be able to differentiate the adjudged claim in that suit and this present Suit.*
- 7. That the Judgment in that Suit only directed the Emmanuel Chuks Ukaha to give possession of the Land in Mabushi, Plot 1305 Katampe District, Cadastral Zone B07, Abuja, Nigeria to the Claimant which Order of the possession only is subject of the Appeal No. CA/A/559/2017.*

8. That the Order made herein for mareva injunction is an attachment of the Plot of Land with the Filing Station in Tunga Magi of Gwagwalada Area Council and this is a post Judgment execution in satisfaction of recovery of Liquidated Claim/Sum to be given at the end of the hearing of this Suit.

9. That this Suit is for Recovery of Liquidated money while the Judgment in Suit No. CV/679/16 and the Appeal No. CA/A/559/17 arising from the Suit for possession of land to only part of the debt granted to SATIC OIL NIG. LTD.”

See the same averments at paragraphs 4 – 9 of the Claimant’s/Respondent’s Counter-Affidavit to the 3rd Defendant’s/Applicant’s motion and also at paragraphs 4 – 9 of the Claimant’s/Respondent’s Counter-Affidavit to the 5th Defendant’s/Applicant’s motion.

See also paragraphs 10 - 12 of the Claimant’s/Respondent’s Counter-Affidavit to the 2nd Defendant’s/Applicant’s motion (dated 20th November, 2020) where the Claimant/Respondent deposed thus:

“10. That this Suit is brought before this Court for the recovery of the Loan and the Accrued interest granted to the Defendants which the Defendant have not repaid till date.

11. That this Suit does not in any way connected with the Recovery of the Possession of the Mortgaged Property of which the Possession was granted to the Plaintiff in the Suit No. FCT/HC/CV/769/2016 between First Bank of Nigeria Ltd and Emmanuel Chuks Ukaha.

12. That this Suit does not in any way whatsoever and however constitute abuse of Court Process, Estopped and/or Lis Pendens and that the Defendants are deceiving this Noble Court as shown by the very Judgment attached.”

I have carefully considered the Affidavit evidence from both sides. To do justice to this matter, the court shall take the liberty to look into its record in order to arrive at a just determination of the issues in question. Of course the court is entitled to look into its record and make use of any document it considers relevant in determining issues before it in order to arrive at a just decision. See the Supreme Court cases of **ABIODUN v F.R.N** (2018) 11 NWLR (Pt. 1629) 86 at 103, paras. B-C and **AGBAREH v. MIMRA** (2008) 2 NWLR (Pt. 1071) 378 at 411-412, paras. H-B.

A cursory look at the court's record will show that the Claimant/Respondent commenced the present suit against the Defendants/Applicants on 22nd June, 2020 by Originating Summons claiming against the Defendants/Applicants as follows:

- "1. An order directing the Defendants to pay the Debts in the sum of **N121,560,069.54 Kobo**, they undertook to pay to the Plaintiff as per the Deed of Legal Mortgage dated 18/8/2014, Offer Letter dated 24/2/2014 and instrument/Letter dated 25/4/14.*
- 2. An order directing the Defendants to pay the Agreed interest rate of 26% per annum in the offer Letter dated 24/6/2014 and Deed of Legal Mortgage Registered on the 4th Day of January, 2012 at Clause 2(a)(b) of the Deed of Legal Mortgage Deed.*
- 3. An order directing the Defendants to pay 10% post judgment interest as prescribed by Order 39 Rule 4 of the Rules of the Rules of the FCT High Court Rule, 2018.*
- 4. An Order Lifting the veil of Incorporation from the 1st and 3rd Defendants to make the 4th and 5th Respondents pay the Indebtedness of the Defendants jointly along with the 1st to 3rd Defendants. "*

At paragraph 4 of the Affidavit in Support of the Originating Summons, the deponent stated that the Claimant/Respondent on the 16th day of March, 2011 offered the 1st and 3rd Defendants Term of Loan of N11,900,000.00 (Eleven Million, Nine Hundred Thousand Naira) and at paragraphs 6 and 7 of the same Affidavit, the deponent reveals that on 24th day of June, 2014 the Claimant/Respondent offered the 1st and 3rd Defendants/Applicants another loan (restructured) of N31,402,000.00 (Thirty-one Million, Four Hundred and Two Thousand Naira), which loan the 1st Defendant/Applicant accepted on the same 24th day of June, 2014 through its Managing Director, Nwoga Samuel, the 4th Defendant/Applicant.

Exhibit 4, a Tripartite Legal Mortgage Agreement (executed by the 2nd Defendant/Applicant, the Claimant/Respondent and the 1st Defendant/Applicant) attached to the Originating Summons and also to the Claimant's/Applicant's Motion Ex parte for mareva injunction herein shows that the 2nd Defendant/Applicant is the surety for the said loan and that the security for the said loan is all that piece and parcel of land with improvements thereon lying, situate and being at Katampe District Cadastral Zone BO7, Abuja, Federal Capital Territory of Nigeria measuring approximately 816.87 Square Metres, which piece of land is more particularly as Plot 1305 Katampe District, Cadastral Zone BO7, Abuja, Nigeria.

The Claimant/Respondent stated at paragraph 20 of the Affidavit in Support of the Originating Summons herein and also at paragraph 20 of the Affidavit in Support of its said Motion Ex Parte that *"the FCT High Court, Zuba has given judgment to sell the property mortgaged but the Defendant had refused to pay the sum of money to the Plaintiff showing that the Defendants have abandoned the Account after collecting and utilizing the loan and accrued agreed interest"*.

The Claimant/Respondent did not deem it necessary to exhibit the originating process or judgment in the said Zuba suit to the Originating Summons and Motion Ex Parte herein. The Claimant/Respondent did not also disclose in the Originating Summons and/or Motion Ex Parte that the said suit before the Zuba Division of this Honourable Court has gone on appeal.

At paragraph 6 of each of the Claimant's/Respondent's Counter-Affidavits to the following three motions: the 1st and 4th Defendant's/Applicant's motion, the 3rd Defendant's/Applicant's motion and the 5th Defendant's/Applicant's motion, the deponent, Abiodun Paul Ogunmodede, deposed thus:

“Paragraph 4 (a) offends S. 128 (1) of the Evidence Act because the copy of the judgment in Suit No. CV/769/2016 and the copy of the Appeal No. CA/A/559/17 have not been attached for this Court to be able to differentiate the adjudged claim in that suit and this present Suit.”

I shall reproduce the said section 128 (1) of the Evidence Act 2011 hereafter for ease of reference. The said section provides thus:

“When a judgment of a court or any other judicial or official proceedings, contract or any grant or other disposition of property has been reduced to the form of a document or series of documents, no evidence may be given of such judgment or proceeding or of the terms of such contract, grant or disposition of property except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under this Act; nor may the contents of any such document be contradicted, altered, added to or varied by oral evidence. ---”

The judgment in Suit No. FCT/HC/CV/769/2016 is attached as Exhibit C to the Affidavit in Support of the 1st and 4th Defendants'/Applicants' motion

and as Exhibit A to the Affidavit in Support of the 2nd Defendant's/Applicant's motion. Although none of the Defendants/Applicants exhibited the Notice of Appeal in Appeal No. CA/A/559/17, it is not in dispute that an appeal is pending (Appeal No. CA/A/559/17) against the judgment of this Honourable Court, coram: Honourable Justice A.O. Ebong in Suit No. FCT/HC/CV/769/2016. Attached to the 2nd Defendant's/Applicant's Affidavit in Support of motion, is Exhibit B, that is, the Claimant's/Respondent's Motion on Notice (at the Court of Appeal) for extension of time within which to file the Claimant's/Respondent's Brief of Argument at the Court of Appeal, amongst other prayers.

I hold therefore that section 128 (1) of the Evidence Act 2011 is not offended in any way and is therefore not applicable to this case since parties are ad idem as to the existence of a judgment and pending appeal in Suit No. FCT/HC/CV/769/2016 and Appeal No. CA/A/559/17 respectively.

Furthermore, I have carefully perused the Claimant's/Respondent's reliefs in the Originating Summons herein, and I have noted that the Claimant/Respondent is seeking amongst other things, an order directing the Defendants to pay the sum of **N121,560,069.54 Kobo**, being the debt they allegedly undertook to pay to the Claimant/Respondent as per the Deed of Legal Mortgage dated 18/8/2014, Offer Letter dated 24/2/2014 and instrument/Letter dated 25/4/14.

I have noted also that the Claimant/Respondent had been given judgment in Suit No. FCT/HC/CV/769/2016 to take possession of the property which formed the basis of the Tripartite Legal Mortgaged Agreement (executed by the 2nd Defendant/Applicant, the Claimant/Respondent and the 1st Defendant/Applicant) attached to the Originating Summons as Exhibit 4.

The said Tripartite Legal Mortgaged Agreement, Exhibit 4, puts no one in doubt as to the intention of parties when it provides thus, at paragraph 12 thereof,:

“This security shall not be considered as satisfied by any intermediate payment satisfaction of the whole or any part of any sum or sums of money owing as aforesaid but shall be a continuing security and shall extend to cover any sum or sums of money which shall for the time being constitute the balance due from the Borrower to the Bank.”

It is clear from the above provision that the said security for the loan (that is, all that piece and parcel of land with improvements thereon lying, situate and being at Katampe District Cadastral Zone BO7, Abuja, Federal Capital Territory of Nigeria measuring approximately 816.87 Square Metres, which piece of land is more particularly as Plot 1305 Katampe District, Cadastral Zone BO7, Abuja, Nigeria) is intended to be a continuing security which is to extend to cover any sum or sums of money which shall for the time being constitute the balance due from the borrower to the bank.

The Claimant/Respondent having decided to take out Suit No. FCT/HC/CV/769/2016 against the 2nd Defendant/Applicant (the surety of the loan) in relation to the mortgaged property and having been given judgment in the said suit in respect of the said mortgaged property which is the security for the loan that was restructured to N31,402,000.00 (Thirty-one Million, Four Hundred and Two Thousand Naira), cannot be allowed to relitigate on the same term of loan or indebtedness arising therefrom, if any.

A litigant is not permitted to nibble at and break down his claims and take them in piece-meal. I am fortified in my view by the Court of Appeal's decision in the case of **SKYBLIND (NIG.) LTD V. NEWLIFE COOPERATIVE SOCIETY & 3 ORS.** (Supra) at 570, paras. B-G, where the Court held thus:

“What the first plaintiff in suit No. FHC/KD/CS/33/2010 has done in the present case was to attempt to use the façade of the corporate personality of the appellant to pursue the claims that were refused him by the Federal High Court in that suit. It is recognized that as part of the principle that society must discourage prolongation of litigation, the doctrine has been developed that a party to civil proceedings is not allowed to make an assertion against the other party, whether of facts or legal consequences of facts, the correctness of which is an essential element in his previous cause of action or defence, if the same assertion was an essential element in his previous cause of action or defence, in a previous suit between the same parties or their predecessors in title, and was determined by a court of competent jurisdiction, unless further material be found which was not available, and could not, by reasonable diligence, have been made available in the previous proceedings – Aro v. Fabolude (1983) 1 SCNLR 58, Faleye v. Otapo (1995) 3 NWLR (Pt. 381) 1, Ito v. Ekpe (2000) 3 NWLR (Pt.650) 678 , Nikagbatse v. Opuye (2010) 14 NWLR (Pt. 1213) 50. The sound reasoning behind the principle is that a litigant is not permitted to nibble at and break down his claims and take them in piece-meal. He is expected to bring all his claims, belonging to the same subject matter, at one and the same time. If he chooses to bring them piece-meal he may be met by the doctrine of cause of action estoppel or, where appropriate, issue estoppel ---.”

The Claimant/Respondent cannot be allowed to relitigate on the loan term or indebtedness arising therefrom where it has already obtained judgment in relation to the loan security and the judgment, from the Affidavit evidence before the court, is the subject of Appeal No. CA/A/559/17. Being allowed to relitigate on the same subject matter will amount to being made to have a bite at the cherry twice.

I hold that the conditions for the successful plea of *res judicata* apply to this suit and I do not agree with the deposition of the Claimant/Respondent at paragraph 11 of its Counter-Affidavit to the 2nd Defendant's/Applicant's motion (dated 20th November, 2020) that this suit does not in any way connect with the Recovery of the Possession of the Mortgaged Property of which possession was granted to the Claimant/Respondent in the Suit No. FCT/HC/CV/769/2016 between First Bank of Nigeria Ltd and Emmanuel Chuks Ukaha, the 2nd Defendant/Applicant herein.

Suffice to say that issue 2 is answered in the affirmative, this suit having been caught by the doctrine of *res judicata* and the same having amounted to an abuse of process. I hold that the issues of the housing loan and the subsequent restructuring, represented by Exhibits 1,2 3 and 5 in the Affidavit of Bulama Abdullahi in Support of Originating Summons have already been litigated upon in Suit No. **FCT/HC/CV/769/2016 between FIRST BANK OF NIGERIA LIMITED V. CHUKS UKAHA**, the 2nd Defendant/Applicant herein.

It is a settled law that when the process of court is abused by the filing of another similar suit, the latter suit must be struck out. See **ETTEV. EDOHO** (Supra) at 613 -614, paras F – B.

On the effect of *res judicata*, see the case of **MOMOH V. ADEDOYIN** (2018) 12 NWLR (Pt. 1633) 345 at 375, para.E where the Court of Appeal held that where a plea of *res judicata* succeeds, a court of law is stripped of the requisite jurisdiction to try the matter in which it is raised.

Accordingly, the applications of all the Defendants/Applicants succeed and I discharge the interim orders of mareva injunction made herein on 8th October, 2020 and strike out this suit in its entirety for want of jurisdiction.

SIGNED

**HON. JUDGE
30/9/2022**

CHINEDU ODOH: We are asking for cost of ~~N~~**500,000 (Five Hundred Thousand Naira)** against the Claimant/Respondent having hold all the parties down for this long. The Applicants have all suffered by the application of the Claimant/Respondent.

COURT: The Sum of ~~N~~**500,000 (Five Hundred Thousand Naira)** is granted as cost against the Claimant/Respondent Each Defendant/Applicant is to be paid a cost of ~~N~~**100,000 (One Hundred Thousand Naira)** for the filling of this application.

SIGNED

**HON. JUDGE
30/9/2022**