

**IN THE HIGH COURT OF JUSTICE OF THE
CAPITAL TERRITORY ABUJA
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT MAITAMA - ABUJA**

BEFORE: HON. JUSTICE O. C. AGBAZA

COURT CLERKS: UKONU KALU & GODSPOWER EBAHOR

COURT NO: 6

SUIT NO: FCT/HC/CV/0352/2017

BETWEEN:

- 1. MESSRS AUGUSTINE UZUOKWU & SONS ENTERPRISES**
- 2. MESSRS PHILKRUZ W.A. LIMITED...PLAINTIFFS/APPLICANTS**

VS

- 1. TIMVIC NIGERIA LIMITED**
- 2. ROSULA NIGERIA LIMITED**
- 3. THE CHIEF REGISTRAR/DEPUTY SHERIFF
HIGH COURT OF FCT, ABUJA.....DEFENDANTS/RESPONDENTS**

RULING

By a Motion on Notice dated 15/12/2021 and filed same day with Motion Number M/9250/2021 brought pursuant to Order 43 Rule (1) of the FCT High Court (Civil Procedure) Rules 2018 and under the inherent jurisdiction of this Hon. Court for the following Reliefs;

- (1) An Order of the Honourable Court relisting the Plaintiffs/Applicants claims in this Suit. Suit No. CV/0352/17 which was dismissed on the 13th day of November 2018.
- (2) And the Omnibus Relief.

The application is supported by a Thirteen (13) paragraphs affidavit deposed to by one Emmanuel Ovhakioyamhe a lawyer in the firm of Applicant's counsel. Also filed a Written Address and adopts same as oral argument in urging the court to grant the application.

The process was served on the Defendants/Respondents. 1st /2nd Defendants/Respondents reacted by filing a Twelve (12) Paragraph Counter-Affidavit with one (1) Exhibit attached marked as Exhibit "A" deposed to by one Erezi Joy Elemic. Also filed a Written Address and adopts same as oral argument in urging the court to refuse the application.

3rd Defendant/Respondent failed to react the Motion.

In their Written Address, Applicant Counsel formulated a sole issue for determination that is;

"Whether the Honourable Court has power to grant this application"

Submits that it is trite law that where a Claimant claim is dismissed without being heard on its merit same can be relisted by the same court or another court having jurisdiction and the dismissal shall have the effect of a striking out. Refer to Dingyadi vs INEC (2011) 128 NWLR (PT.1224) 154 @ 189 – 190, Panalpina World Transport (Nig) Ltd Vs J.B. Olandeen International (2010) NWLR (PT.1226) 1 @ 20.

Submits that from the authorities cited, the word "dismissed" as pronounced by this Hon. Court, when the Applicant's claim was dismissed on 13/112/2018 should the effect of a striking out, because this Applicants'claim was not heard on the merit before the claim was

dismissed. Further refer to *Owoh Vs Asuk* (2008) ALL FWLR (PT. 429) 449 @ 459.

Submits finally that the court is a court of justice and substantial justice is done through a fair trial which involves hearing and determination of the claims and rights of the parties. Refer to *Eastern Breweries Plc Vs Inuea* (2007) 3 NWLR (PT.650) @ 602. That a failure to grant this application shall have an overreaching effect on the Applicants.

In the same vein Respondent's counsel formulated a sole issue for determination that is, whether having regard to the facts deposed to in the Plaintiff/Applicant's affidavit in supported dated 15/1/2021 and the 1st and 2nd Defendants/Respondents' Counter-Affidavit Plaintiffs/Applicants suit ought to be relisted by the Honourable Court.

Submits that an application for relisting seeks the exercise of the discretionary powers of the court and relying on the cases of *Omorose Vs Ogbonwan* (2019) LPELR 47214 (CA) and *Onwuka Vs Nigerian Ports Authority* (2018) LPELR 45013 (CA) submits further that the 3 (three) years between the date the case was dismissed and the filing of this application shows a high level of negligence and disregard towards the court.

Submits that the present counsel of Plaintiffs/Applicant have been indolent as it took them three years after taking over the suit from the previous counsel to bring this application. And before the court can consider an application for relisting, the Applicant must give cogent reason refer to *Chief Nicholas Banna Vs Telepower Nigeria Ltd* (20060 LPELR – 1352).

Submits finally that the Plaintiffs/Applicants have by the themselves been indolent as they failed to address the continuous negligence of their counsel. This the reason that the previous counsel in the suit lacks due diligence in prosecuting the suit cannot be sustained.

Having carefully considered the affidavit evidence and Exhibit of both parties, submission of counsel as well as the judicial authorities cited for and against the grant of the application the court finds that only one (1) issue calls for determination which is;

“Whether the Applicant have submitted sufficient facts to warrant the court to exercise its discretion in granting their reliefs”

The grant or otherwise of an application of this nature by the court is at the discretion of the court. And over time the court has been admonished to exercise its discretionary powers judicially and judiciously and not as a matter of course or at its whims. See *Metuh Vs Federal Republic of Nigeria* (2017) ALL FWLR (PT. 901) 722 @ 725 See also, *Aregbesola Vs Oyinlola* (2008) ALL FWLR (PT.436) 2018 @ 2023 Para H. In other words, the discretionary powers must not be exercised in vacuum, but in relations to the existing facts of the particular case.

In the instant case, the Applicant seek to make the court relist the suit No. CV/0353/17 which was dismissed on 13/11/2018 and states the reason and grounds for the application in Paragraphs 4, 5, 6, 7 and 8 of the affidavit in support of the application, which in essence was due to the absence in court of the former counsel of the Applicant leading to the dismissal of the suit without being heard on the merit and are now willing to pursue the

case further, further urge that the court should take the said dismissal to be a striking out order since the case was not heard. On the other hand, the Respondent contends that both the former and present counsel as well as the Applicant themselves have not been diligent in prosecuting their case also citing negligence on the part of counsel and Respondent, owing to the time lapse in filing of the suit, appointing a new counsel and the new counsel taking steps to apply for the relisting of the dismissed suit informing court that the grant of the application will cause a grave injustice to the 1st and 2nd Respondents.

In considering the competing claims of the parties as summed up above the court must consider the facts before it. Granted that, this case was dismissed by a court , where the case had not been heard on the merit has the effect of a striking out order and can be relisted upon application, however, it is not a matter of course as the Applicant must present cogent facts to enable the court exercise its discretion in his favour and relist the case for hearing. The pertinent question which arise are, have the Applicant shows due diligence in prosecuting the case as contended by the Defendant? Secondly, has the Applicant shown cogent fact to sway the court to grant the application? A review of the records of the court shows that the Applicants' counsel failed to show due diligence in prosecuting the case and the court takes cognizance of this facts, a look at the Applicants affidavit particularly Paragraph 4, 5, 6, 7, 8 and 9 of it and the grounds for the application, this court find the facts deposed therein as supportive of the application; moreover, a litigant should not be punished for the sins of his counsel. Justice is said to be a two-way traffic and in administering

justice to parties the Supreme Court has admonished the court to maintain balance between parties before it. See Oninbuariri Vs Igbogiyi (20100) ALL FWLR (PT. 69) 1059 @ 1070 – 1071 Para H – A. And it is in line with maintaining that balance between the parties and in the interest of justice, as well as the Applicant having shown cogent facts to support the grant of the application even though the court notes the tardiness of Applicants' counsel, that the court will allow the application.

Consequently, this application for relisting the Plaintiffs/Applicant's claims in the suit No. CV/0353/17 which was dismissed on 13th day of November 2018 is hereby granted as prayed.

HON. JUSTICE O. C. AGBAZA

Presiding Judge
23/6/2022

APPEARANCE

EMMANUEL OVHAKIOYAMHE ESQ FOR THE CLAIMANTS/APPLICANTS

EREZI EFEMIRI FOR THE 1ST/2ND DEFENDANTS/RESPONDENTS.

ANGELA OSINACHI FOR THE 3RD DEFENDANT/RESPONDENT.

