IN THE HIGH COURT OF JUSTICE FEDERAL CAPITAL TERRITORY
IN THE ABUJA JUDICIAL DIVISION (APPELLATE DIVISION)
HOLDEN AT MAITAMA – ABUJA.

BEFORE THEIR LORDSHIP: HON. JUSTICE Y. HALILU – PRESIDING JUDGE,

HON. JUSTICE ELEOJO ENENCHE – HON. JUDGE

THIS 28TH DAY OF FEBRUARY, 2024.

APPEAL NO. CVA/46/2023

SUIT NO. FCT/MN/73/2022

BETWEEN:

ABBAS OCHOGWU --------------- APPELLANT

AND

1. U.C. MERCHANTS LTD
2. UCHENNA CYRIACUS ADIBE --------------- RESPONDENTS
3. MR. ORJI OBINNA PETER

J U D G M E N T

The Appellant, dissatisfied with the decision of the District Court of the FCT Coram: Farida Ibrahim sitting at Wuse Zone 6, Abuja, more particularly stated in paragraph 1 of the Notice of Appeal, has filed this appeal.

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The grounds upon which this appeal is premised are as stated in paragraph 2 of the Notice of Appeal. The reliefs being sought by the Appellant, as set out in paragraph 3 of the Notice of Appeal, are as follows:

1. To allow the appeal.
2. To set aside the Ruling (Judgment of the District Court sitting at Wuse Zone 6 Per Farida Ibrahim, which was delivered on the 30th January 2023 and enter judgment in terms of the Appellants Default Summons filed 30th September 2022 before the lower court.

Learned counsel to the Appellant filed an 18-page Appellant's Brief of Argument dated 2/5/2023 and filed on the same day wherein counsel relayed the statement of facts at paragraph 2.0 to 2.38; same is adopted as forming part of this judgment and also nominated the following issues for determination:

1. Whether the learned District Judge was right when he gave his ruling and granted an unargued preliminary objection in favour of the 1st and 2nd Respondents/Applicants.
2. Whether the ruling of the District Court Judge striking out the 1st and 2nd Respondent's names for misjoinder of parties was right.
3. Whether the entire judgment of the lower court is against the weight of evidence.

On Issue 1, it is the submission that the District Court Judge erred in law by granting an application filed by the 1st and 2nd Respondents/Applicants without

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hearing the said application while relying on the case of ***ADEGBOYEGA ADEBAYO v ADEFUNKE ADEBAYO*** in his ruling.

It is submitted that it is an established principle that an application that has not been moved, argued or adopted cannot be ruled upon. See case of ***NELSON BENJAMIN v FUFRE & ORS (2022) LPELR – 58421 (CA) (pp. 28 – 29 Paras F – B)***.

It is submitted that the trial District Judge failed to consider that filing an application in court without the Applicant doing anything else to show interest in the case is insufficient for the prosecution or defence of a case in court.

It is the submission that the only instance in which a court may grant an application that is not moved or adopted is where there is no Reply opposing that application. See case of ***OFORKIRE & ANOR v MADUIKE & ORS (2003) LPELR – 2269 (SC) (pp. 17 – 17 Paras E – F)***. In the instant case, the Appellant/Respondent opposed the application before the lower court; the trial court was therefore not correct in ruling on an application that was never moved or argued.

On Issue 2, it is the submission of counsel that the trial court proceeded in error when the District Court Judge struck out the names of the 1st and 2nd Respondents/Applicants without duly considering the argument proffered by the Appellant/Respondent in his Reply to the preliminary objection, filed by the 1st and 2nd Respondents/Applicants.

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Counsel contended that the trial court failed to consider that the 1st Respondent/Applicant, with the authorisation of the 2nd Respondent/Applicant, supplied the Honda Accord V6 Engine and Catalyst through the 3rd Respondent and as evidence of the payment (receipt) made by the Appellant reveals. See case of ***OLAWOYE v JIMOH & ORS (2013) LPELR – 20344 (SC) (pp. 24 – 25 Paras E – B.)***

It is the contention of the Appellant that the trial District Judge failed to consider that the 1st and 2nd Respondents/Applicants are necessary parties. See cases of ***PORPYE v MAKARFI (2018) 1 NWLR Pt 1599 Pg 91 at 142***; ***GREEN v GREEN (1987) NWLR Pt 418***.

On Issue 3, it is the submission that the lower court gave its judgment without properly considering the evidence provided by the Appellant as well as the argument proffered. The 1st and 2nd Respondent failed to comply with the rules of the court by filing a preliminary objection rather than a Notice of Intention to Defend and substantive defence as required. The Appellant raised this issue in his reply to the preliminary objection filed by the 1st and 2nd Respondents/Applicants. The court is referred to Page 188 of the Record of Appeal. Counsel notes that, the lower court ignored that fact and proceeded to rule in their favour.

It is contended that the lower court also failed to consider the exhibits annexed to the processes filed by the Appellant at the District Court, particularly Exhibit 5,

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which was the receipt issued in the name and with the authority of the 1st and 2nd Respondents. The court is urged to allow the appeal and set aside the ruling/judgment of the learned District Court Judge.

From the record of the court, the Respondents were duly served with the processes of court but, in their wisdom, elected not to respond to same.

We have carefully considered the processes filed and submission of learned counsel to the Appellant, and we are of the view that the sole issue that calls for determination is:

> ***"Whether the learned District Judge was correct when he gave his ruling and granted an unmoved/unargued preliminary objection in favour of the 1st and 2nd Respondents/Applicants".***

The Appellant came by way of Default Summons before the trial court by filing an application for the issuance of Default Summons Plaint, dated 30th September 2022. The 1st and 2nd Respondents filed a Notice of Preliminary Objection dated 12th December 2023, challenging the court's jurisdiction and seeking that the 1st and 2nd Respondent's names be struck out for misjoinder of parties. The application was duly responded to by the Appellant/Respondent vide a Reply Address filed on 15th December 2022; the said preliminary objection came up for hearing three times viz: 23/1/2023, 25/1/2023 and 30/1/2023, but was not moved by the 1st and 2nd Respondents' counsel.

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On 30/1/2023, when the said preliminary objection came up for definite hearing, the 1st and 2nd Respondents' counsel failed to show up to move and/or adopt the application. The Appellant then applied to the court for the preliminary objection to be struck out for want of diligent prosecution.

In its considered Ruling dated 30/1/2023, the lower court, rather than give a ruling on the application of the Appellant urging the court to strike out the 1st and 2nd Respondent/Applicants' preliminary objection, chose to grant the prayers sought in the preliminary objection, hence this appeal.

It is settled law that an application that has not been moved, argued or adopted, especially where issues are joined, cannot be ruled upon. In the case of ***NELSON BENJAMIN v FUPRE & ORS (2022) LPELR – 58421 (CA),*** the court held thus:

> ***"Again, a court cannot rule on a motion that has not been moved, since the motions itemised above had not been moved at the trial court nor can they or have they been moved in this court; the court was not clear for the judgment to be delivered by the lower court and so this court cannot proceed to exercise its power under Section 15 of the Court of Appeal Act to enter judgment one way or the other"***

Also, in the case of ***ONAMADE v A.C.B. LTD (1997) 1 NWLR (Pt 480) 123***, the court held that:

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"An issue or a preliminary objection in respect of which no argument is advanced in the Brief of Argument and therefore not canvassed before the court must be deemed abandoned…"

It is the law that an application filed must be moved, and the court must grant it before the prayers sought can be the basis of invocation in the court. See ***CONSOLIDATED BREWERIES PLC v AISOWIEEN (2001) 15 NWLR (Pt 736) 424 (P. 447 Para G – h)***.

The Supreme Court in G***ODIYA & ORS v SANUSI & ORS (2022) LPELR – 58932 (SC) (PP 8 – 9; Paras E – B*** has this to say:

"A court process which is not moved in court is as good as not filed. Furthermore, it is the bounding duty and obligation of counsel to move his motion to enable the court rule on it one way or the other. Filing a process in court is different from arguing or moving it in court"

In the light of the cases above, it is the duty of an Applicant of a motion or any application to adopt, move and/or argue same before a Judge in court or chambers as the case may be, and failure to do so should warrant the striking out of such an application. The only instance in which a court may grant an application that is not moved or argued is when no reply opposes that application. See the case of ***OFORKIRE & ANOR v MADUIKE & ORS*** (Supra), where the Apex Court held as follows:

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“A court process which is not moved in court is as good as not filed unless the process is not opposed by the Respondent. In that respect, the court will deem the motion as moved.”

In the instant case, the Appellant filed a Reply opposing the Notice of Preliminary objection filed by the 1st and 2nd Respondents/Applicant at the lower court.

It is also on record that the 1st and 2nd Respondent, after filing the preliminary objection, failed to show up in court to move same, despite the adjournment made at their instance. And upon an application by the Appellant/Respondent to strike out the preliminary objection for want of diligent prosecution, the trial District Judge ought to have struck out the same and not to proceed to grant an unmoved or unargued application.

In conclusion, we hold the strong view that this appeal is of merit. We order as follows:

1. This appeal is allowed.
2. The Ruling/Judgment delivered by His Worship, Farida Ibrahim, on the 30th Day of January 2023, is hereby set aside.
3. The case is returned to the District Court for retrial by another District Court Judge.

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HON. JUSTICE Y. HALILU
PRESIDING JUDGE

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