

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

THE..... DAY OF FEBRUARY, 2025.
BEFORE HIS LORDSHIP:
HONOURABLE JUSTICE JUDE O. ONWUEGBUZIE – JUDGE

SUIT NO: PET/397/2022
MOTION NO: GAR/M/1771/24

RULING

BETWEEN:

IFEANYI GRANDISON CHUKWU----- PETITIONER/APPLICANT

AND

NGOZI PERPETUAL IFEANYI CHUKWU-----RESPONDENT

This is a ruling on a motion on notice with number GAR/M/1771/2024 dated 22nd day of October, 2024 and filed on the 23rd day of October, 2024. The application is brought Pursuant Order 43 Rule (1), of the High Court of FCT (Civil Procedure) Rules 2018, Sections 6(6)(B) & 36(1) of the Constitution of the Federal Republic of Nigeria 1999 as amended, and under the Inherent Jurisdiction of the Honourable Court.

The application prays for the following:-

1. An Order setting aside the order striking out the petition of the Petitioner/Applicant for lack of diligent prosecution.
2. An order allowing the Petitioner/Applicant to conclude his evidence in this suit.

3. For such further order or orders as the honourable court may deem fit to make in the circumstances of this case.

The Grounds upon which the application is brought are:

1. The Petitioner/Applicant instituted this suit against the Respondent vide petition no. 397/22.
2. In response to the Respondent's response to the petition the Petitioner/Applicant filed an Answer on the 1st November, 2022.
3. The Petitioner/Applicant opened his case but was not present in court at subsequent adjournments.
4. The Petitioner/Applicant was deceived by his former counsel, Elochukwu Nweke, which acts prevented the Petitioner/Applicant from attending the court proceedings.
5. That the Petitioner/Applicant did not conclude with Elochukwu Nweke for him to be away from court proceedings.
6. There was intentional misrepresentations of facts by the said Elochukwu Nweke in the representation of the Petitioner/Applicant.
7. The Petitioner/Applicant was never aware of the dates his matter came up after the day that he opened his case due to the fact that his former counsel deliberately kept him in the dark.
8. The Petitioner/Applicant is eager and serious about proceeding his case with utmost diligence, which is the reason he filed the petition in the first place.
9. The Honourable Court has the unfettered power to exercise discretion in granting this application in the overall interest of justice.

The application is supported by a 25 paragraph affidavit deposed to by the Petitioner//Applicant, reliance was placed on all the averments of the affidavit. In compliance to the rules of this court the Applicant filed a written address as his legal submission in support of the motion.

This motion was dully served on the Respondent and in reaction; the Respondent filed a Counter-Affidavit of 18 paragraphs, deposed to by one Eme Bassey Hogan a ligation staff in the law firm of the Respondent's counsel. Attached to the

counter-affidavit are Exhibits A,B,C and D respectively. The Respondent also filed a written address in support of the counter affidavit as her oral submission in opposition to the granting of the application.

THE PETITIONER/APPLICANT'S CASE

I, Ifeanyi Grandison Chukwu, male, adult, Christian, Nigerian citizen of 44, Ebitu Ukiwe street, Jabi, Abuja do hereby make oath and state as follows:

1. That I am the Petitioner/Applicant in this petition.
2. That by virtue of my position I am conversant with the facts deposed herein.
3. The facts deposed to in this affidavit are within my knowledge except where otherwise stated.
4. That I opened my case on 28th September, 2023, and I have not testified further in the matter.
5. That I asked my former lawyer, E.C. Nweke several times the status of my case and he kept telling me that I should hold on and that there was no need for me to be in court yet.
6. That I got really disturbed over the situation, even though I paid him for his professional fees and appearance fees.
7. That I had reasons to believe that the said E.C. Nweke was no longer acting in my interest, nut against me.
8. That I had to sever my relationship with the said E.C. Nweke and appointed my current lawyer, C.J. Dimgba to prosecute this case on my behalf.
9. That I was informed by C.J. Dimgba on Saturday, at about 11:30am of 19th October, 2024, that the records of proceedings that he had obtained in respect of this suit showed that my case had been struck out for lack of diligent prosecution.
10. That I shocked and alarmed at the information I got from C.J. Dimgba.

11. That my relationship with E.C. Nweke was terminated sometime in the middle of August, 2024.
12. That I was never aware of what was happening in court in my matter.
13. That I made several efforts to find out from my former lawyer, but he deceived me by asking me to hold on.
14. That I filed my Petition with the intention of having same prosecuted, but E.C. Nweke treated my case with levity, utmost negligence and lack of professionalism.
15. That I never conspired with E.C. Nweke not to attend the proceedings of the court for my Petition.
16. That I caused to be filed a response to the counter-petition of the Respondent/Respondent because I was very much interested in having my Petition heard and determined.
17. That I have not deliberately conducted myself in a manner that is disrespectful to the honourable Court.
18. That I have respect and regards for the honourable Court.
19. That I was in Court on 21st October, 2024, because C.J. Dimgba informed me that he received a call informing him that the case would be coming up on that day, even though the hearing notice stated the 24th October, 2024.
20. That I know that it will serve the overall interest of justice to hear my case in determining the Petition before the honourable Court.
21. That there was no way for me to know that my former lawyer, whom I trusted, would deceive me and withhold vital information from me in my case.
22. That the lack of diligent prosecution was due to the sinfulness of my former lawyer, and not my doing.
23. That I know that the overall interest of justice will be best served if this application is granted.
24. That the Respondent/Respondent will not be prejudiced in any way by the grant of this application.

25. That I swear to this affidavit conscientiously and in good faith believing same to be true and correct in accordance with the Oaths Act 2004.

THE RESPONDENT'S CASE

I, Eme Bassey Hogan, female, adult, Christian and a Nigerian citizen of El-Grace Law Consult Suite B1, NNPC Mega Station, Opposite Gaduwa Estate, Abuja do make oath and state as follows:

1. That I am a litigation staff of El-Grace Law Consult of Counsel for the Respondent/Cross Petitioner in this matter and by my said position I have personal knowledge of the facts of this case and I have the consent and authority of both my employer and the Respondent/Cross Petitioner to make this affidavit,
2. That the allegations contained in paragraphs 5, 6, 7, 8, 9, 12, 13, 15 and 22 are unfounded fabrications of the Petitioner/Cross Respondent/Applicant without any iota of proof attached thereto.
3. That there is nothing before the Court to proof or affirm these allegations against E.C. Elochukwu.
4. That E.C. Elochukwu did not stop or prevent the Petitioner/Cross Respondent/Applicant from coming to the Court's Registry by himself to make inquires on his matter.
5. Had the Petitioner/Cross Respondent/Applicant been diligent he would have approached the Registry of this Court to find out the position of his matter.
6. That the allegations contained in paragraphs 5, 6, 7, 8, 9, 12, 13, 15 and 25 of the affidavit in support of the application do not qualify as mistake or sins of Counsel as envisaged by the law as to attract the favourable discretion of the Court.
7. That there is nothing before this Court to show any action whatsoever taken by the Petitioner/Cross Respondent/Applicant to make the said E.C Nweke pay for the alleged sins which bothers on professional misconduct.

8. That the grant of this application on the strength of paragraphs 5, 6, 7, 8, 9, 12, 13, 15 and 22 of the affidavit in support of the application will amount to this Honourable Court passing an order of guilt and or active indictment for professional misconduct on Elochukwu Nweke without an opportunity of being heard and without any proof of the allegations against him.

9. That the Petitioner/Cross Respondent/Applicant has so far employed the services of three different lawyers at different times so far in the cause of prosecuting this matter all in a calculated enterprise to unduly delay the diligent prosecution of this matter and this present application is another tool in the Petitioner/Cross Respondent's tools box to delay this matter.

10. That from the inception of this matter the Petitioner/Cross Petitioner/Applicant has never showed any zeal to the expeditious prosecution of this matter rather he has expressed preference for the use of extra legal means through trumped up allegations and phantom charges by the police and self-help against the Respondent/Cross Petitioner and it was his reliance on these extra legal means, trumped up allegations and phantom charges that deceived him into non diligent prosecution of this matter as can be seen in the attached F.C.T, Upper Area Court, Kado, Direct Criminal Complaint, Police Bail Condition Form dated 28th April, 2023 and F.C.T High Court processes in Charge No: CR/308/24 marked as Exhibits CP 'A', CP 'B' and CP 'C' respectively.

11. That the Petitioner/Cross Respondent had placed all his hopes on the success of these extra-legal attempts, trumped up allegations and baseless and phantom charges against the Respondent/Cross Petitioner and wherein he would have emptied this matter from the back door and then abandoned the matter having gotten what he wanted.

12. That there was no good reason for the Petitioner/Applicant to abandon his evidence half way for 9 months from 28th September, 2023 to 6th June, 2024 and his conduct throughout this matter has without doubts fallen far short of diligence hence, does not merit a sympathetic consideration from this Court more so that he has not shown any serious commitment to diligently prosecute this matter.

13. That this application is a further brazing of non-diligence by the Applicant whose matter was struck out for want of diligent prosecution in 6th June, 2024 and he is only bringing this application 4 months afterwards as against six days allowed by the Rules of this court for to do so.

14. That the grant of this application is not as of right as this Applicant is insinuating and fair hearing and interest of justice does not connote over indulgence or support for indolence.

15. That both the interest of justice and the Respondent/Cross Petitioner will be greatly jeopardized by the grant of this application and which grant will amount to over indulgence by the Court to the Applicant who has formed the habit of taking this Court for granted.

16. That this application is incompetent and an abuse of Court process.

17. That the application having not been made within six days from the day the order was made ought to be made with the leave of Court with evidence of payment of the prescribed penalty.

18. That I make this affidavit in good faith and in accordance with the Oath Act.

COURT'S ANALYSIS

The Petitioner/Applicant through his Counsel formulated in his written address a sole issue for the determination of this Court to wit:

Whether the Honourable Court has the powers to order relisting of this suit.

While the Respondent on their part formulated also a sole issue for the consideration by this court to wit:

Whether regard being had to facts of this case and the position of law it will be just to grant this application.

Having carefully read through the facts and submissions of both counsel in their separate written addresses, the court thinks that the most suitable issue to consider is:

Whether the Applicant is entitled to the reliefs sought in the circumstances.

The Petitioner/Applicant's Counsel submitted at paragraphs 3.3 to 4.1 of his written address in support of his application that

They shall resort to the decisions of the Court in addressing whether this court has the powers to order relisting of a suit struck out. In *ALOR V. NGENE* (2007) ALL FWLR (PT. 362) 1836 AT 1848 PARA. G (SC), the Court stated the position thus: Where an action is struck out for want of prosecution, it can be relisted by a motion on notice. In such a situation, the matter has not totally left the cause list because by the order of striking out, the plaintiff is at liberty to file a motion to relist the cause.

Also in *PANALPINA WRLD TRANSPORT NIG. LTD. v. J. B. OLANDEEN INTL. & ORS* Suit No: SC.30/2003 the court considered the nature of an order of court striking out a matter where an application was not heard on merit, and whether such a matter can be re-listed. O. O. ADEKEYE, J.S.C. while delivering the Leading Judgment at Pp.22-23, Paras.D-C stated the position of the law on the issue, thus

That at this juncture, it is imperative, that he amplify on the position of the law as supported by the Rules. When an order of court is made in respect of an application not heard on the merits, it amounts to striking out simpliciter. Even where an order of dismissal is made following a hearing which is not based on the merits, such order is still considered in law a mere striking out. When a matter is struck out in such circumstance, there is a liberty to relist That the simple

explanation is that while the matter is discontinued as from that date, it is still alive and kept in the court's general cause list and can be brought back to the hearing cause list when an application to relist has been granted. That in such case, the plaintiff still has another opportunity to re-open the action after rectifying the deficiency that resulted in the striking out of the action. That this is applicable even where the court has not included in the order of striking out that the plaintiff has an option to relist. That the matter struck out has not left the cause list - as it is still a pending case or pending cause. The same procedure applies even when a matter has been decided many years ago. The Counsel relied also in *Alor v. Ngene* (2007) All FWLR pt.362 pg.1836 and *Waterline Nigeria Limited v. Fawe Services Limited* FWLR pt.163 pg.88.

Submitting further the counsel said, an order striking out a matter not heard on merit may be relisted. However, being an order subject to the discretion of the court same must be exercised judicially and judiciously.

It was the counsel's submission that the grounds for the non-representation and the absence of the Petitioner/Applicant at previous dates before and on 6th June, 2024 are stated specifically in paragraphs 5, 6, 7, 8, 9, 12, 13, 15 and 22 of the affidavit in support of this application. The omission is entirely the sin of the former counsel of the Petitioner/Applicant and we urge the court not to penalise the Petitioner/Applicant for that.

He urged the court to consider the decision in *ELIAS V. SOWEMIMO & ANOR* CA/L/1013M/2010 where it has been held that mistake of counsel should not be visited on the litigant. That the court would readily exercise its discretion to extend the time prescribed for doing an act if it is shown as in this case to the satisfaction of the court that the failure by a party to do the act timeously was caused by the

negligence or inadvertence of his counsel. He cited *Akinpelu v. Adegbore* (Supra); *Doherty v. Doherty* (1964) 1 All NLR 299; *Ahmadu v. Saulawa* (1974) 11 SC 43; *Bowaje v. Adediwura* (1976) 6 SC 143." Per OKORO, J.C.A (Pp. 9-10, paras. E-A).

In conclusion the counsel submitted and referred the honourable Court to the case of *S7D CONSTRUCTION CO. LTD. V. AYOKU & ANOR.* (2011) LPELR-2965 SC, where the Supreme Court held thus:

"Conditions for re-listing a matter that was struck out for want of diligent prosecution:

"It is now settled law that a party applying that his matter struck out or dismissed for want of diligent prosecution be relisted must fulfill the following conditions:

- a. There must be good reasons for being absent at the hearing;
- b. That there has been not been undue delay in bringing the application as to prejudice the Respondent;
- c. That the Respondent will not be prejudiced or embarrassed if the order for re-hearing is made.
- d. That the Applicant's case is not manifestly unsupportable;
- e. That the Applicant's conduct throughout the case is deserving of sympathetic consideration.

The Counsel then prayed the court to grant the application.

While the Respondent contended in opposition at paragraphs 3.2 to 4.1 of her written address that in addressing this issue, they will with haste answer it in the negative. Because that, it is settled law that the grant or otherwise of an application to set aside the Order of Court is at the discretion of the Court and for the Court to do so, the applicant must place before the Court cogent facts to rely on and they

submitted here that the Applicant in this case has placed no cogent facts in accordance with the law to warrant the grant of this application.

That in the case of WILLIAMS V. HOPE RISING VOLUNTARY FUNDS SOCIETY (198) 1 ALL NLR 1, the Supreme Court laid down the conditions for setting aside a default judgment as follows -

- a. Whether the applicant had good reason for being absent at the hearing.
- b. Whether he has shown that there was a good reason for the delay in bringing the application i.e whether there was undue delay in bringing the application so as to prejudice the party in whose favour the judgment subsists.
- c. Whether the Respondent will not be prejudiced or embarrassed if the order to relist is made.
- d. Whether the applicant's case was manifestly unsupportable and
- e. Whether the applicant's conduct throughout the proceedings is deserving of sympathetic consideration.

That again in, BARRISTER ORIKERJEV & ORS V. IYORTOM & ORS (2015) NWLR (pt 1483) 484, the Supreme Court held as follows;

"The Supreme Court possess inherent powers to set aside its judgment in appropriate or deserving cases, such cases are as follows-

- a. When the judgement is obtained by fraud or deceit either in the Court or of one or more of the parties such a judgment can be impeached or set aside by means of an action which may be brought without leave.
- b. When judgment is nullity such as when a Court itself was not competent and the person affected by an order of Court which can properly be described as a nullity is entitled exdebito justitiae to have it set aside.
- c. When it is obvious that the Court was misled into giving a judgment under a mistaken belief that the parties consented to it.

d. Where judgment was given without jurisdiction.

e. Where the procedure adopted is such to deprive the decision or judgment of character of legitimate adjudication."

The Counsel further submitted that from the facts of this case and indeed the affidavit in support of this application, it is obvious that the applicant here had no good reason to abandon his matter for over nine months from September 28, 2023 to June 6, 2024 when his matter was struck out by this Court. The applicant has also not shown any good reason for bringing this application far too late (six months) from the six days required of him to do so under Order 32 Rule 5 (1) - (2) of the rules of this Honourable Court, 2018. There is no proof to show that the Respondent whose Cross Petition is due for hearing will not be greatly prejudiced and embarrassed by the grant of this incompetent application and from the conduct of the Petitioner/ Applicant which conduct led to the matter being struck out and hence this incompetent and belated application, it has not been shown that the Applicant is deserving of the sympathetic consideration of this Court as to grant this application. In the unreported case of AYODEJI ADELEKE AKINJOKUN V. CAPITAL HOTEL PLC & 2 ORS - SUIT NO: FCT/HC/CV/669/2021, Hon. Justice U. P Kekemeke of the FCT High Court in a Ruling delivered on 28th October, 2021 in Motion No: M/8069/2020 held thus:

The Claimant/ Applicant adopted his Written Address filed along with the motion. He postulated two issues for determination

(1) Whether the order striking out the suit was made without jurisdiction

(2) Whether the power of Court to declare the order made on 10th June, 2020 has a retroactive effect.

I have read both issues. While the 2nd issue is irrelevant to this application, the 1st is not competent before this Court. This Court struck out the suit for want of diligent prosecution. If the Claimant/ Applicant is challenging the

competence of the order or the fact that this Court has no jurisdiction to make that order. The proper venue to ventilate that dissatisfaction is the Court of Appeal. The real issue as contained in the Claimant's/ Applicant's Motion in my view is whether or not the Claimant/ Applicant has made out a case for relisting the suit struck out in his absence for lack of diligent prosecution.

As rightly argued by 1st Defendant/ Respondent Counsel in his Written Address, the factors to be taken into consideration is application such as this are;

- (1) The reasons for Applicant's failure to appear in Court.
- (2) Whether there has been undue delay in making the application.
- (3) Whether the Respondent would be prejudiced or embarrassed upon an order for rehearing being made so as to render it inequitable to permit the case to be reopened.

The Claimant/ Applicant stated in his affidavit and Written Address that he was not served a hearing notice. I have gone through the records of the Court. On 9th November, 2017, the Court was informed by the Clerk of Court that it was the Claimant who came to Court to pick that date but the Claimant was absent on the said date he picked. The case was further adjourned to 31st January, 2018.

On 31st January, 2018, the Claimant was still absent and the case was struck out. The Claimant initiated this case. He was in Court to pick the earlier date. It is the duty of the Litigant/ Counsel to be abreast of his case. If he fails to track his case or when he is reasonably supposed to be aware and fails to attend Court in respect of a case he filed, he cannot stand on the roof top to shout lack of fair hearing. A delinquent litigant cannot have the support of our Courts. Equity aids the vigilant and not the indolent. The first factor is therefore resolved in favour of the Defendant/ Respondent against the Claimant/ Applicant. On whether there is undue delay in bringing this application. The order for striking out of this suit was made on 31st January, 2018. This motion was filed on 15th June, 2020, a period of more than 2

years. One of the grounds for the application is that the order for striking out the suit was not brought to Claimant/Applicant's attention on time. The Claimant also deposed to the facts that the case file was missing or that complaints were made to the Hon. Chief Judge. There are no materials to prove those assertions. In my humble view, there has been undue delay in bringing the application for relisting and I so hold.

On the 3rd condition, whether the Respondent will be prejudiced upon an order for rehearing. The Defendants/Respondents' Counsel argued that they will be prejudiced if the application is granted because the 2nd and 3rd Defendants/ Respondents who are foreign Nationals have completed their

term of employment and have left Nigeria. By order 32 Rule 5 (3) of the rules of Court states that a party who fails to file an application to relist a cause struck out or to apply to set aside a judgment within 6 days after the order or judgment was delivered or such longer period as the Court may allow shall at time of filing the application pay a fee of \$200 for each day of default. Proof of payment shall be attached to the application for extension of time.

I have looked at the Motion on Notice. The logo of the NBA is not embossed on the process's as enjoined by the Practice Direction made pursuant to the Civil Procedure Rule, 2018. This application was filed more than 2 years after the suit was struck out. The Claimant/Applicant failed or neglected to seek for an extension of time within which to file the application. The Claimant also failed to pay the requisite N200 fee for each day of default after the expiration of the requisite 6 days. The application is incompetent.

For the reasons stated, the application for relisting fails and it is dismissed".

The Counsel contended further that as can be seen in Exhibits attached to the Respondent/Cross Petitioner's Counter affidavit to this application, the Petitioner/Applicant deliberately abandoned this matter and instead resorted to the use of illegitimate means and methods to seek to empty this matter and while in pursuit of these illegitimate actions, his matter was duly struck out for want of

diligent prosecution and whereas the illegitimate actions all failed and then he is now running back to this Court with empty hands through an incompetent application brought six months after his matter was struck out and without complying with Order 32 Rule 5 (3) of the rule of this Court.

That there is no proof before the Court to show the much-taunted deceit of his former Counsel which purportedly led him into his matter being stuck out. That the evidence before the Court is that he is the litigant, indeed the Petitioner, he filed this matter and has the duty to track his case. That there is evidence before this Court that the Petitioner/Applicant is in the habit of changing his lawyers as he has used three lawyers so far in this matter who floods this Court with all manners of frivolous applications all in a corrupt bid to stall the efficient and speedy dispensation of this matter and thereby holding the Respondent down and running away from his responsibilities to his children whom he abandoned for the Respondent and eloped with another woman for over three years now.

He submitted that it is settled law as held in the case of *EBE V. EBE* (2004) 3 NWLR (pt. 860) p. 221, that where as in this case a document such as this application was filed out of time (i.e. 6 days as per Order 32 Rule 5 (3)) without leave of Court, the document amounts to a nullity hence this application being an application filed out of time without the leave of Court in accordance with Order 32 Rule 5 (3) of the rules of this Court is incompetent and an abuse of Court process.

That it is also settled law as seen in *NWADIOGU V. AIRBDA* (2010) 44 NSCQR 36, a party who had reasonable opportunity to act but he neglected to do so, as in this case, cannot plead fair hearing. Also, in *A. C. N V. LAMIDO* (2012) 49 NSCQR 658, it was held that a party given ample opportunity to present his case

but failed to do so (as in this case) could not turn around to complain of lack of fair hearing, see also OGUN STATE INEC V. AC (2011) 47 NSCQR 178.

That the Petitioner/Applicant has not shown that the order striking his matter was obtained by fraud or deceit either in Court or one of the parties. He has not also shown that the order is a nullity or that the court itself was not competent. There is no evidence that this court was misled into given this order striking out the Applicant's case for want of diligent prosecution. Also, there is no evidence that the order was made without jurisdiction and or that the procedure is such to deprive that decision or judgment of character of legitimate adjudication.

That in the face of all these infractions and failures, the question will now be on what basis will this Court find a cogent reason to grant this incompetent application. it was his argument that the mistake of Counsel is not a ground or factor for consideration in an application to set aside an order of a Court hence, the reliance or excuse or defense of unsubstantiated claim of mistake of Counsel cannot help the Applicant in this application same not being a ground for setting aside an order of Court.

The Respondent's Counsel concluded that the application of the Petitioner/Applicant not being in compliance with the requisite provisions of Order 32 Rule 5 (3) of the rules of this Court and not satisfying the grounds or conditions for setting aside an order of a Court as per Supreme Court in WILLIAMS V. HOPE RISING VOLUNTARY FUNDS SOCIETY (Supra) and BARRISTER ORIKERJEV & ORS. V. IYORTOM & ORS (Supra), this application is therefore incompetent and an abuse of Court and hence the Court should dismiss same as in AYODEJI ADELEKE AKINJOKUN V. CAPITAL HOTELS PLC & ORS (Supra).

It is trite that the grant or otherwise of an application such as this is at the discretion of the court and in exercising its discretion the court must do so judicially and judiciously, hence an Applicant who seek the discretion of the court must place cogent facts before the court to enable the court exercise its discretion in the manner mentioned above. In the exercise of Court's judicial discretion the Court has to apply its mind, not to any hypothetical set of facts, but to the material before it, and if either party wishes to invoke the discretionary power of the Court in his favour, it is for him to lay a basis for its exercise. I place reliance in **OLADIMEJI V. QUEEN (1964) LPELR-25162(SC) (PP. 8 PARAS. D).**

The Applicant on the face of the motion has encapsulated the grounds upon which this application is brought. This is also stated in his affidavit in support of the application. For the avoidance of doubt I would like to recopy same here. They are:

1. The Petitioner/Applicant instituted this suit against the Respondent vide petition no. 397/22.
2. In response to the Respondent's response to the petition the Petitioner/Applicant filed an Answer on the 1st November, 2022.
3. The Petitioner/Applicant opened his case but was not present in court at subsequent adjournments.
4. The Petitioner/Applicant was deceived by his former counsel, Elochukwu Nweke, which acts prevented the Petitioner/Applicant from attending the court proceedings.
5. That the Petitioner/Applicant did not conclude with Elochukwu Nweke for him to be away from court proceedings.
6. There was intentional misrepresentations of facts by the said Elochukwu Nweke in the representation of the Petitioner/Applicant.
7. The Petitioner/Applicant was never aware of the dates his matter came up after the day that he opened his case due to the fact that his former counsel deliberately kept him in the dark.
8. The Petitioner/Applicant is eager and serious about prosecuting his case with utmost diligence, which is the reason he filed the petition in the first place.

9. The Honourable Court has the unfettered power to exercise discretion in granting this application in the overall interest of justice.

This Court having read and considered all the averments in the affidavit evidence of the Applicant in this application, the legal arguments and submissions of both counsel, it is my humble thought that the grounds upon which this application is brought are so humiliating and insulting to this court. It appears some litigants aided by some counsels takes the court for ride, to say the least. That a party will be so confident enough to state the reason his application for re-listing on the ground that 'his Counsel deceived him' this in my opinion is hilarious. If I may ask, was it the Counsel that filed the case or the Applicant? The Applicant never made any personal effort to know the status of his petition, if he claims he is diligent with this case. The Applicant stopped or suspended his evidence in chief since the 23rd day of October, 2023 till on the 6th day of June, 2024 when the Court struck out the Applicant's petition. It was either one frivolous motion or no reason for their continued absence in court.

If I may reluctantly agree that the Applicant's Counsel whom he briefed to handle his case deceived the Applicant on the 29th day of November, 2023, for both the Applicant and his Counsel to be absent in court without any communication or reason for their absence, when the Applicant knows he supposed to continue his evidence in chief. The Court on the said date refused application by the Respondent/Cross-Petitioner's application to foreclose the Petitioner/Applicant's further evidence in chief. The next adjourned dates were the 23rd and 24th day of January 2024 which was for the motion filed by the Applicant. The Applicant and his Counsel deliberately absented themselves on the next date being the 24th day of January, 2024. On the 8th day of March, 2024 the Applicant was absent, one Akubueze Esq., held brief for the Applicant's Counsel and adjournment was taken.

What of on the 22nd day of April, 2024? When the Applicant and his Counsel were not in court again and no reason was communicated for their absent.

In the interest of justice the matter was subsequently adjourned to the 6th day of June, 2024 for definite hearing. On this date the Applicant was absent, the Counsel holding brief for the Applicant's Counsel orally informed the Court that Applicant was unavailable to continue his evidence in chief due to ill health and then asked for another adjournment. The Respondent's Counsel objected to the adjournment highlighting and submitting a deliberate intention to use the petition to punish the Respondent and the education and welfare of the children of the marriage are at jeopardized by the continued lingering of this petition in court; hence asked the Court to strike out the petition for lack diligent prosecution. The Court in her wisdom granted the application and struck out the petition for want of diligent prosecution.

The Courts have in quite a number of decisions held that fair hearing in essence, means giving equal opportunity to the parties to be heard in the litigation before the Court. Where parties are given equal opportunity to be heard, they cannot complain of breach of the fair hearing principles. Fair hearing also means a trial conducted according to all the legal rules formulated to ensure that justice is done to the parties in the litigation. Speaking of fair hearing, **Obaseki, JSC in Otapo v Sunmonu & ors (1987) 2 NWLR (pt 58) 587 at 608**, made the following observations:-

A hearing can only be fair when all parties to the dispute are given a hearing or an opportunity of a hearing. If one of the parties is refused a hearing, or not given an opportunity to be heard, the hearing cannot qualify as fair hearing.

It follows that where both parties in the litigation have been given equal opportunity to be heard, a complaint of denial of fair hearing becomes inconsequential. I get my support from the cases of **Mohammed v Kano N. A. (1968) 1 All NLR, 424, Ariori & ors v Elemo & ors (1983) 1 S.C. 13, (1983) 5 LPELR - 552 (SC), Ntukidem v Oko (1986) 5 NWLR (pt 45) 909, Shyllon v Asein (1994) 6 NWLR (pt 353) 670.**

The law is trite that a party, who had the opportunity of being heard but failed to utilize same, as herein, cannot complain of breach of fair hearing. I resort to help from the cases of **UKWUYOK & ORS V. OGBULU & ORS (2019) LPELR-48741(SC); S & D Construction Co. Ltd. v Ayoku (2011) 13 NWLR (pt 1265) 487 at 509 paragraph E, Ogunsanya v The State (2011) 12 NWLR (pt 1261) 40 at 429.**

COURT'S DECISION

It is therefore my humble finding that if this court continues to indulge the Petitioner/Applicant in his shenanigans to prosecute this petition it will amount to a great injustice to the other party as justice also involves given equal opportunity to both parties in a suit. The faith of this petition needs to be determined at this time so as to determine the faith of the children of the marriage. This is a petition for divorce involving welfare of children filed since July 2022.

However, for the interest of justice, this Court will still bend backwards for the last time to indulge the Petitioner/Applicant but on terms as it is trite that cost follow events.

In the light of the above foregoing therefore, the application is granted and the Court hereby orders as follows:

1. That the Order striking out the petition of the Petitioner/Applicant for lack of diligent prosecution is hereby set aside.
2. The Petitioner/Applicant is hereby allowed to conclude his evidence in this suit within a reasonable time.
3. The cost of N200, 000 (Two Hundred Thousand Naira) is awarded against the Applicant.

This is the ruling of the court.

Hon. Justice Jude O. Onwuegbuzie

Appearances :

1. C.J Dimgba Esq. with Kinsley Braimoh Esq., for the Petitioner/Applicant
2. George Presley Uchechukwu Esq., with Eme Bassey Hogan Esq., for the Respondent.