

**THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY
IN THE GWGWALADA JUDICIAL DIVISION
HOLDEN AT COURT NO. 13 GWAGWAGLADA
BEFORE HIS LORDSHIP: HON JUSTICE A. S. ADEPOJU
ON THIS 12TH DAY OF FEBRUARY 2024**

FCT/HC/CV/3262/2021

BETWEEN

DR. PAMELA IWUDIBA -----CLAIMANT

AND

MR. TOCHUKWU MADUAKONAM NWOSU -----DEFENDANT

OLUCHI VIVIAN UCHE for the Claimant

OGECHI OGBONNA appears with F. YOHANNA for the Defendant

RULING

for hearing, and in fact, hearing had commenced with the evidence of CW1 and witness for the appellant who had front loaded and adopted the written statement on oath before the lower court.

In the course of the testimony, the appellant sought to tender a document as an exhibit and an objection was taken. The court adjourned to rule on the objection, and in the course of the adjournment, the appellant took further steps by writing to United Bank for Africa to freeze the deceased estate account and also brought a motion to join the bank and one Mrs. Felicia Oyeghuli, the mother of the appellant, as an administrator, alongside the first respondent.

On the date fixed for hearing, the second defendant, after filing the defense, filed alongside a motion challenging the competence of the appellant's case before the court rather than responding to the second respondent's motion, challenging the competence of the appellant's claim before the trial court. The appellant filed a motion by which they sought the need to fully discontinue the suit by having it struck out instead of having it dismissed.

In his ruling, the trial court dismissed the suit, hence the appeal. The appeal was also dismissed. The court held that where a matter has become part of, as in the situation where the claimant had commenced giving evidence, the proper order to be is one of dismissal or notice of withdrawal of the suit. This is especially so.

We are at the stage of *litis contestos* has been reached by the parties in this suit.

Let me quickly observe that in all the authorities cited by the defendant, proceedings therein had gone beyond the mere filing and exchange of pleadings by the parties. Further steps like the filing and hearing of applications had been taken, proceedings that commenced into the matter. This is a common thread that ran through all the authorities cited by the defendant counsel. It is trite that a decision is an authority for what is actually decided. Every court is entitled to decide the issue or issue raised based on the circumstance or circumstances before it. It's also trite that a previous decision is to be followed where the facts or law applicable in that format decision are distinguishable from those of in the latter case. See the case of Adisa versus OIwaola, the citation is provided. Evidently from the circumstances and facts of the authority cited by the Lana defendants counsel, the facts are different from the case and they are distinguishable and therefore they are not applicable to the instant suit under consideration. On the other hand, the Supreme Court case of Bamidele versus B.A. S.D.A. Limited Supra, the Supreme Court while interpreting Order 23 Rule 1 of the Lagos State High Court Civil Procedure Rules, which is in pari materia with Order 24 of the FCT High Court Rule States, that the consequence of a striking order is that an application is at a plaintiff duly discontinues its action without leave, the court should merely strike out the action. See show a term versus Total Nigeria Limited, the citation is provided. It all depends on the state of the law, that is once a litigant withdraws the action in a situation where the leave of court is required, the trial court has no option but to strike out the suit. This is because a court of law cannot force an unwilling plaintiff to continue with an action. I agree with the submission of Lana counsel for the plaintiff that at the state of discontinuance of the plaintiff's case, no evidence was taken and the point of litigant consensual does not exist between the parties. I also abide by the admonition of the Supreme Court in the case of Babatunde Supra, where in the courts the case was also of this which was reproduced by the plaintiff's counsel at page three of the written submission, where the court held that withdrawn cases are not usually dismissed by just the wave of the hand. The trial court must ensure that a point of no return or *litis contestios* has been reached by the party. The court to dismiss a case in *Limine* should be exercised with utmost circumspect and not slightly as a matter of course. It is only when the justice of the case seals heavily in favor of dismissal of an action in *Limine* a trial court should toe that cruel and lonesome path. A path a trial court should really fear to tread unless all other pedestrian able paths including that of striking out

are close to him. The door of the court should be let open for a green person to seek any form of judicial regret or remedy. In this instant case, no evidence was ever taken before a day in Kanji and the point of this litis contestio have never been alleged to exist between the parties at that stage. The trial court should not have shut the gates with finality against the first respondent. More so, where such discontinuance or withdrawal of the action as the case may be should not be a defense to any subsequent action. End of course, the application to discontinue the plaintiff's action in this instant case fits squarely into the provision of Order 24, Rule 1 Sub 1 and 2 of the FCCA and all forms with the case of Babatunje v. PSTA Limited. The need for leave to discontinue the suit is also obviated and the proper order to make in the circumstance of this case is that of striking out. Evidence has not been laid. Consequently, the plaintiff's suit is thereby struck out. The striking out is however without prejudice to the rights of the plaintiff to reinstitute the claim in future if it so desires. Furthermore, going by the second leg of the provision of Order 24, Rule 1 Sub 1, the plaintiff shall pay the defendant the cost of action. In the circumstance, I will allow the defendant to address me on the cost of action.

Your Lordship, we are most grateful. Before we go into cost, we have a counterclaim in this suit and I want to apply to withdraw the counterclaim so that same can be struck out with the principle of action.

All right. Your Lordship, in making this application for the matter to be struck out, I'm most guided by the ruling with this honorable court judge decided to deliver and I seek refuge on that same.

On the issue of cost, we do not seek cost.

So on that, I express my depressed gratitude and thank the court for the work...

SIGN

**HON. JUDGE
12/2/2024**