

**IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY**  
**HOLDEN AT JABI, ABUJA**

**THIS THURSDAY THE 16TH DAY OF JANUARY 2025.**

**BEFORE: HON. JUSTICE ABUBAKAR IDRIS KUTIGI -- JUDGE**

**SUIT NO: CV/2828/21**

**MOTION NO: M/5286/2023**

**BETWEEN:**

1. OKANI EMMANUEL  
2. CHINELO EZEAMAMA } ...**JUDGMENT CREDITORS/RESPONDENTS**

**AND**

1. SANI ABDULLAHI YUSUF.....**JUDGMENT DEBTOR/RESPONDENT**

2. ABIA ABIA ATINGHA.....**JUDGMENT DEBTOR/APPLICANT**

**RULING**

By a motion on notice dated 22<sup>nd</sup> February, 2023, the 2<sup>nd</sup> Defendant/Judgment Debtor/Applicant prays for the following Reliefs:

1. **AN ORDER of this Honourable Court setting aside the Judgment of this Honourable Court delivered in SUIT NO: CV/FCT/CV/2828/2021 between Okani Emmanuel & Anor Vs Sani Abdullahi Yusuf.**
2. **AN ORDER of this Honourable Court extending time within which the Applicant may enter appearance and file his Statement of Defence to the Claimants' Writ of Summons dated 26<sup>th</sup> October, 2021 and Counter Affidavit to motion for summary Judgment dated 25<sup>th</sup> October, 2021.**
3. **AND SUCH ORDER(S) as this Honourable Court may deem fit to make having regards to the circumstance of this suit.**

The grounds on which the application is predicated as contained on the motion paper as follows:

1. **That sometime in January, 2022, the Applicant was served with Writ of Summons, motion on notice for summary Judgment dated 25<sup>th</sup> October, 2021 and a hearing notice for mention of the matter scheduled for 2<sup>nd</sup> March, 2022.**
2. **That upon perusal of the processes served on the Applicant, the Applicant discovered that the suit emanated from a loan transaction between the 2<sup>nd</sup> Claimant land (sic) the 1<sup>st</sup> Defendant which he is a guarantor of the 1<sup>st</sup> Defendant.**
3. **That the Applicant immediately called the 1<sup>st</sup> Defendant who confirmed he was also served with the process and the 1<sup>st</sup> Defendant told him not to bother himself as he will settle the matter with the Claimants before the scheduled dated.**
4. **The Applicant later called the 1<sup>st</sup> Claimant who told (sic) also not worry as they are settling the issue with the 1<sup>st</sup> Defendant.**
5. **The Applicant was surprised when recently it was brought to his attention that a garnishee order Nisi was made in respect of this matter and when he caused search to be conducted he discovered that the matter was not settled or defended by the 1<sup>st</sup> Defendant and this Honourable Court entered Judgment in favour of the Claimants which led to the garnishee proceeding that the order nisi was made.**
6. **Aside the hearing notice dated 25<sup>th</sup> January, 2022 scheduling the matter for mention on 2<sup>nd</sup> March, 2022, the Applicant was not served any hearing notice again so he thought the matter was settled.**
7. **That it is in the interest of fair hearing as provided in Section 36 of the Constitution of the Federal Republic of Nigeria 1999 (As Amended) that subsequent hearing notice must be served on the 2<sup>nd</sup> Judgment Debtor/Applicant before the hearing and determination of this suit.**
8. **The failure to serve the 2<sup>nd</sup> Judgment Debtor a hearing notice or communicating the hearing date to him is a breach of his right to fair hearing.**

9. **It is in the interest of justice to set aside the judgment of this Honourable Court delivered in this matter and allow the 2<sup>nd</sup> Defendant file his defence to the suit.**
10. **This Honourable Court has the inherent jurisdiction to set aside its own judgment where the Judgment is a default Judgment; on grounds of fraud and misrepresentation of facts or breach of the 2<sup>nd</sup> Judgment Debtor's right to fair hearing.**
11. **The Rules of this Honourable also empowers this Honourable Court to extend time within which the Applicant is to file his memorandum of appearance, Statement of Defence and Counter affidavit to the motion for summary Judgment.**

The application is supported by an eleven(11) paragraphs affidavit with two annexures marked as **Exhibits A and B**, a proposed 2<sup>nd</sup> Defendant's Counter affidavit to motion on notice dated 25<sup>th</sup> October 2023 and a 2<sup>nd</sup> Defendants proposed statement of defence.

The application is supported by a written address in which one issue was raised as arising for determination:

**“Whether the 2<sup>nd</sup> Judgment Debtor/Application is entitled to the reliefs sought on the face of the motion paper?”**

Submissions were made on the above issue which forms part of the Record of Court to the effect that the Applicant has on the facts and the law met the legal requirements to allow the Court grant the application to set aside the Judgment of this Court delivered on 4th July, 2022 and to allow the Applicant file his Counter affidavit to the motion for summary Judgment and also to file his Statement of Defence.

The main contention made by Applicant is that the Judgment is a default Judgment as the 2<sup>nd</sup> Defendant did not defend the suit and that under the provision of **Order 21 Rule 12 of the Rules of Court**, the Court can properly set aside such a default Judgment where vitiating elements such as fraud, non service or lack of jurisdiction are disclosed.

The Applicant further submits that the Judgment Creditor misrepresented facts leading to the Judgment. It was contended that the Applicant was not a party to the

loan agreement and that on the basis of the agreement, the Applicant did not at any time agree to pay the sum of ₦345,000 per day if the 1<sup>st</sup> Judgment Debtor defaults in payment of the loan.

It was also submitted that on the materials supplied by the Judgment Creditors, they only gave a loan of N15,000,000 to the 1<sup>st</sup> Judgment Creditor who has paid ₦4,500,000 leaving a balance of N11,500,000. That the 30% interest which the Judgment Creditors calculated as part of their claim based on the balance of N11,500,000 is not the actual balance of the loan and accordingly that they misrepresented facts in order to obtain Judgment. The cases of **Sanusi V. Ayoola (1992)23 NSCC (pt111)420; (1992) NWLR (pt.265)275** was cited.

It was also further submitted that from the records, the 2<sup>nd</sup> Judgment Debtor was only served hearing notice dated 25<sup>th</sup> January, 2022 which fixed the case for mention on 2<sup>nd</sup> March, 2022. That even though he was not in court on that date, fair hearing demands that he be served with hearing notice in the case and that the failure to serve him hearing notice amounts to a denial of fair hearing. The cases of **Alhaji Sani Abubakar Danladi V. Barr. Nasiru Audu Dansiri & 4Ors (2014)LPELR-24020; Consolidated Tin Mines Ltd V. Sylvester Dung & 2 Ors (2021)10 NWLR (pt1783)169 and Eco Bank (Nig) Plc V. Onadiran Hakeem Kunle & 4Ors (2019)10 NWLR (pt.1679)91** were cited.

At the hearing, counsel to the 2<sup>nd</sup> Defendant/Judgment Debtor/Applicant relied on the paragraphs of the Affidavit and adopted the submissions in the written address in urging the court to grant the application.

In opposition, the Judgment Creditors/Respondents filed a 7 paragraphs Counter-Affidavit with one annexure, the Judgment sought to be set aside marked as **Exhibit A**. A written address was filed in compliance with the Rules of Court in which one issue was raised as arising for determination to wit:

**Whether thus court can exercise its discretion in granting this application giving (sic) the circumstances of this case?**

Submissions were made on the above issue which forms part of the Record of Court to the effect that nothing of substance on the facts and the law has been preferred providing any basis to set aside the Judgment of Court.

Firstly it was submitted that the court having given its Judgment is *functus officio* and cannot sit on appeal over its Judgment except under the slip rule principle to correct a typographical error which is not the case here. The cases of **Anatogu V.**

**Iweka 11(1995) NWLR (pt.415)547 and AG Kwara State & Or V. Hon Ishole Lawal (2017)38 WRN 31** were cited.

It was contended that on the materials supplied by the Applicant himself, he has shown that he was served with all the originating processes, the motion for summary Judgment but he chose not to respond and as such cannot be heard to argue that he was not given fair hearing. The cases of **Okeke V. Uwachina (2023)2 WRN 82; Adebayo V. A.G Ogan State (2008)7 NWLR (pt1085)201** were cited.

At the hearing counsel to the Judgment Creditor/Respondents relied on the paragraphs of the counter-affidavit and adopted the submissions in the written address in urging the court to dismiss the application as wholly lacking in merit.

I have carefully considered the processes filed and the submissions made on both sides of the aisle.

Now it is common ground that by **Exhibit A** attached to the counter affidavit of the Judgment Creditors/Respondents, the court entered summary judgment against the Judgment Debtors/Applicants on **4<sup>th</sup> July, 2022**. It is this Judgment that the 2<sup>nd</sup> Judgment Debtor/Applicant seeks to set aside on grounds as already streamlined.

Let me start by making a prefatory remark on whether an application can be countenanced to set aside the court's Judgment in response to the submissions made by the Judgment Creditors that it cannot be countenanced as the Court was *functus officio*.

Now it is settled principle of general application that there are indeed grounds on which a court can properly set aside its decision or a decision of a court of coordinate jurisdiction. These grounds abound in a legion of authorities of our superior courts. It is however important to state that the exercise is not one lightly done and it is not based on flimsy and or whimsical grounds. This is so, because generally when a court completes a case by hearing parties on the grievance submitted for resolution, and delivers its judgment, it ceases to exercise further powers in dealing with the matter except of course to ancillary post judgment issues or matters such as stay of execution, garnishee proceedings, instalmental payment etc. In legal parlance, the court is said to be *functus officio* in the case. Therefore the steps to reverse the judgment does not fall within the jurisdiction of the court but that of the Superior Court of Appeal. See **Onyemobi V. President Onitsa Customary Court (1993) 3 NWLR (pt.381) 50; Edem V Akamkpa**

**Local Govt. (2000) 4 NWLR (pt.651) 70 and Abana V Obi (2005) 6 NWLR (pt.920) 183.**

The foregoing does not however affect the inherent powers of a judge or court to set aside its own judgment or order(s) including judgments, order(s) made by a court of coordinate which for any reason is a nullity. See **Ogueze V Ojiako (1962) 1 SCNLR 112, Abana V Obi (supra).**

Indeed our extant Rules of Court allows for the setting aside of a judgment obtained in the absence of one of the parties or in default of pleadings.

Also, under its inherent jurisdiction or powers, a court can set aside its judgment in the following circumstances:

- (a) When judgment is obtained by fraud or deceit either in the court or of one or more of the parties. Such judgment can be impeached or set aside by means of an action which may be brought without leave.
- (b) When the judgment is a nullity and the person affected by the order is entitled *ex debito justitiae* to have it set aside.
- (c) When it is obvious that the court was misled into given judgment under a mistaken belief that the parties consented to it.
- (d) Where the judgment was given in the absence of jurisdiction.
- (e) Where the procedure adopted was such as to deprive the decision or judgment of the character of a legitimate adjudication.

See **Abana V Obi (2005) 6 NWLR (pt.920) 183 at 203; Ojiako V Ogueze (1962) 1 SCNLR 112; (1962) 1 All NLR 58; Craig V Kanseen (1943) KB 256; Agunbiade V Okunoga (1961) All NLR 110; Edem V Akampka Local Government (2000) 4 NWLR (Pt.651) 70; Igwe V Kalu (2002) 14 NWLR (Pt.787) 435.**

See also **Section 64 of the Evidence Act** which further validates the principle that an adverse party is allowed to show that a decision was delivered by a court without jurisdiction or was obtained by fraud or collusion.

Having determined the question that the Court can in appropriate cases, set aside its Judgment, we now come to the crux of the application as to whether the 2<sup>nd</sup>

Judgment Debtor/Applicant has made out any case to warrant the setting aside of the Judgment in this case.

Now reading the whole or entirety of the **11 grounds** on which the application is predicated as streamlined on the motion paper and the entire **11 paragraphs** affidavit in support of the application, the plank of the application is that of absence of fair hearing which according to Applicant undermined the case. There is however no where, where **misrepresentation** as a ground was defined or streamlined clearly as a ground to situate or support the setting aside of the Judgment. In paragraphs (i) and (j) of the affidavit in support, the Applicant deposed to the following:

- “**i. That he did signed a loan agreement between the 2<sup>nd</sup> Claimant, 1<sup>st</sup> Defendant and himself but the 1<sup>st</sup> Claimant was not part of the agreement.**
- j. That the said loan agreement does not provide that he will pay the 2<sup>nd</sup> Claimant as a guarantor the sum of N345,000 (Three Hundred and Forty Five Thousand Naira) daily from the 23<sup>rd</sup> October, 2021 until liquidation of the loan.”**

Whether the above projects any misrepresentation, we shall soon resolve but the point to underscore is that submissions in an address cannot be made outside of the context of the issues or points complained of and encapsulated clearly in the motion, the grounds and the facts in the affidavit supporting the grounds. I pause here for now.

Now on the key complaint or foundation on which the entire application is predicated on which is lack of fair hearing, the Applicant himself happily has conceded to certain very critical facts as follows:

- “**4 That I was informed by the Applicant on the 18<sup>th</sup> January, 2023 around 11:00am in our office at House 1, Dutsima Close, Off Kano Street, Area 1, Garki-Abuja, Federal Capital Territory Abuja of the following facts which I believe him to be true and correct as follows:**
- a. That the Judgment Creditors caused the Registrar of this Honourable Court to issue Writ of Summons in this suit dated 26<sup>th</sup> October, 2021 claiming several reliefs against the Applicant and the 1<sup>st</sup> Judgment Debtor.**

- b. That the Judgment Creditors also filed a motion on notice dated and filed on 25<sup>th</sup> December, 2021 praying this Honourable Court for summary judgment as per their claims contained in the writ of summons.**
- c. That sometime in January 2022, he was served with Writ of Summons, motion on notice for summary Judgment dated 25<sup>th</sup> October, 2021 and a hearing notice for mention of the matter scheduled for 2<sup>nd</sup> March, 2022.**
- d. That upon perusal of the processes served he discovered that the suit emanated from a loan transaction between the 2<sup>nd</sup> Claimant and the 1<sup>st</sup> Defendant wherein he acted as a guarantor of the 1<sup>st</sup> Judgment Debtor in the transaction.**
- e. That he immediately called the 1<sup>st</sup> Defendant who confirmed that he was also been served with the process and the 1<sup>st</sup> Defendant told him not to bother himself as he will settle the outstanding debt with the Claimants before the scheduled date or he will get a lawyer to represent their interest in the suit and defend the matter filed in court.**
- f. That he later called the 1<sup>st</sup> Claimant who told also not worry as they are settling the issue with the 1<sup>st</sup> Defendant.**
- g. That he was surprised when recently it was brought to his attention that a Garnishee Order Nisi was made in the course of executing Judgment delivered in this suit and when he caused search to be conducted he discovered that the matter was not settled or defended by the 1<sup>st</sup> Defendant and this Honourable Court entered Judgment in favour of the Claimants which led to the garnishee proceeding that the Order Nisi was made.**
- h. That aside the hearing notice dated 25<sup>th</sup> January, 2022 scheduling the matter for mention on 2<sup>nd</sup> March, 2022, he was not served any hearing notice for hearing of the suit therefore he thought the matter was settled and the Claimants withdrew the suit.”**

The 2<sup>nd</sup> Defendant/Applicant himself here admits or concedes to the fact that sometime in January, 2022, he was served with the originating court processes, the motion for summary Judgment and a hearing notice scheduled for 2<sup>nd</sup> March, 2022.

By his own **admission**, and for reasons best known to him, he chose or elected not to come to court, or brief counsel to respond to the contents of the allegations made against him as contained in the processes he received.

By this admission, he again concedes that he was from the very beginning accorded event opportunity to respond to the allegations made against him.

The next logical question to ask is did he take advantage of the opportunity or come to court on the scheduled 2<sup>nd</sup> March, 2022? The answer is an emphatic **No**.

The next follow question is what then happened? In answering the question, we must now have recourse to the record of court and I will here situate the essence of what transpired from the Record of Court itself.

On **2<sup>nd</sup> March, 2022**, which Applicant had knowledge of, the matter came up, the Claimants were represented but the Defendants were not. Counsel to the Claimants informed the Court that the Defendants were served with the originating court processes, the motion for summary Judgment and hearing notices but prayed for a date to hear the application for summary Judgment.

The court on record confirmed service of these processes and adjourned to 12<sup>th</sup> May, 2022 for hearing of the motion for summary Judgment and ordered that **hearing notices** be served on Defendants.

On **12<sup>th</sup> May, 2022**, the Claimants were represented but the Defendants were not. Counsel to the Claimants' informed the court that they were served hearing notices as ordered but they were not in court or represented.

The court confirmed that they were indeed served hearing notices vide **certificate of service** filed by the **bailiff of court** as stated clearly in the Record and accordingly proceeded to hear the application for summary Judgment and Judgment was then subsequently delivered.

I have at length situated the trajectory of the facts of this case and it is difficult to situate the basis of the complaint that the Applicant was denied fair hearing or that he was not served with a hearing notice on the date fixed for hearing.

It is correct that any proceeding conducted behind the back of a party without service of hearing notice is without any doubt compromised. That scenario did not

play out in this case by any stretch of the imagination. The Applicant on the record, clearly was served with all processes including hearing notices as deposed to by the bailiff of court vide the certificate of service.

In law, evidence or proof of service is conclusive where a bailiff deposes to an affidavit to that effect. Indeed an affidavit of service deposed to by the bailiff who effected service as in this case setting out the facts, place, mode and date of service and describing the process or document served should be prima facie proof of the matters stated in the endorsement on the affidavit. See **Estate of Late Chief H.I.S Idisi V. Ecodril (Nig) Ltd (2016)12 NWLR (pt.1527)SC**. Where there is an affidavit of service of court process as in this case but service is been denied, the person denying been served has to swear to a counter-affidavit. See **UBA Plc V. V.J.M & Co (Nig)Ltd (2016)5 N.W.L.R (pt1504)171; Ethiopia Air Lines V. Ona (2005)11 N.W.L.R (pt.939)214**

The Applicant did not file any counter-affidavit or indeed make any representation challenging the contents of the affidavits filed by the bailiff of court on service of hearing notices on the date or day the motion for summary Judgment was heard and it is accordingly deemed admitted. It is simply obvious from the narrative of Applicant that he chose not to come to court to defend the action on the rather flimsy and untenable argument that he was informed by 1<sup>st</sup> defendant and 1<sup>st</sup> Claimant that he should “**not worry**” and that they are “**settling the issue**”

It is important to also underscore the point that no evidence of any kind was attached to support these averments that he was hold not to worry and that they are settling the issue and in the absence of evidence, those representations are deemed as abandoned.

The bottom line is that the Applicant was given every opportunity to defend this action but he chose not to. No one bedgrudges his election. He cannot however now complain. It has never been the duty of the court to wait for a party who was duly served with the processes of court but fails to show up. The court is entitled to proceed with hearing as done here once the court is satisfied that the parties were duly served with hearing notices. See **UBA Plc V. J.M & Co (Nig) Ltd (2016)5 N.W.L.R (pt.1504)171; Nyamati Ent. Ltd V. N.D.I.C (2086)AII FWLR (pt293)350**

Fair hearing is obviously very important in any well conducted proceedings but it is a right that must be circumscribed around proper limits and not allowed to run wild. No party including Applicant has till eternity to defend any action.

The provision dealing with fair hearing under **Section 36 of the 1999 Constitution** is for the protection of all parties to a case, the Plaintiffs and the Defendants alike. It will be utterly oppressive to interpret the provision as done by Applicant here as conferring a protection on just one of the parties to a case. No. See **Willoughby V. I.M.B (Nig) Ltd (1987)1 NWLR (pt.48)105 at 131.**

It is needful that it is stressed that a party who is not ready to pursue or defend a case with diligence, upon which all courts must insist despite service of requisite hearing notices has no business complaining of lack of fair hearing. The complaint of lack of fair hearing has no merit and is discountenanced.

On the issue of misrepresentation, as stated earlier, nowhere was this complaint properly identified and streamlined in the motion and the affidavit in support. The address as stated earlier which made submissions on misrepresentation cannot be made in a vacuum, but on the basis of the complaints situated in the motion and the affidavit. It is really difficult to discern the complaint of misrepresentation made in this case.

Now even if out of caution, I countenance the issue of misrepresentation, the critical question is where is the misrepresentation in this case?

The Applicant has not in all the processes filed impugned the very basis of the relationship that parties had the fact that some amount was advanced to the 2<sup>nd</sup> Defendant by Claimant which he guaranteed and which has not been fully paid back till today. There is no dispute on these fundamental material blocks of the relationship. If as contended in paragraph 4(i) of the affidavit, that 1<sup>st</sup> Defendant was not part of the agreement between 2<sup>nd</sup> Claimant, 1<sup>st</sup> Claimant and Applicant that has nothing to do with the case of 1<sup>st</sup> Applicant that he brokered the agreement and brought 2<sup>nd</sup> Claimant who agreed to give the loan. In any event, this is a joint action by the Claimants and one fails to see any misrepresentation here as alleged.

On the contention that the agreement does not provide that he will pay the 2<sup>nd</sup> Claimant as a guarantor the sum of N345,000 daily from 23th October, 2023 until the liquidation of the loan, this sum on the materials before court represents the 3% default payment which the Judgment Debtor agreed to pay which the Claimants claimed. In paragraph 4 of the agreement, parties inserted this clause:

**“In the event of default or failure to return the entire sum in full on the 13<sup>th</sup> December, 2018, the borrower and guarantor shall pay the lender jointly and**

**severally a default fee of 3% daily on the outstanding sum until final liquidation.”**

The above is clear. I need not say more.

Finally on the complaint of the alleged wrongful computation of the sums due, that cannot be a function of misrepresentation. The alleged wrongful computation does not change in any way the fact of indebtedness which was guaranteed by Applicant and which has not been paid back. Rather than for the Applicant to ensure that he takes necessary steps to see that the moneys he guaranteed are paid back, he has resorted to this dilatory tactics which essentially is aimed at denying Applicants their due entitlement and the fruits of the Judgment.

On the whole, this application completely lacks merit and is dismissed.

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**Hon. Justice A.I. Kutigi**

**Appearances:**

- 1. Emmanuel Okani, Esq., with Jennifer Ugwoke, Esq., and P.N. Nwokoho for the Judgment Creditors/Respondents.**
- 2. Martins Ekpa, Esq., for the 2<sup>nd</sup> Judgment Debtor/Applicant**