IN THE HIGH COURT OF JUSTICE
OF EDO STATE OF NIGERIA
IN THE UROMI JUDICIAL DIVISION
HOLDEN AT UROMI
BEFORE HIS LORDSHIP, HON.JUSTICE P.A.AKHIHIERO,
ON THURSDAY THE
4TH DAY OF MARCH, 2021.

BETWEEN: SUIT NO: HCU/13/2015

MR GODDEY .E. EIGBE----------CLAIMANT/RESPONDENT

AND

MR JEGBEFUMEN EIYENYEN----------DEFENDANT/APPLICANT

RULING

This is a Ruling on a Motion on Notice, filed on the 18th of December, 2019 brought pursuant to Order 10 Rule 11, Order 30 Rule 5 (2) of the Edo State High Court (Civil Procedure) Rules, 2018 and under the inherent jurisdiction of the court.

By the Motion, the Defendant/Applicant is seeking the order of this Honourable Court to set aside the judgment delivered on the 14th day of May, 2020 in default of the Applicant to defend the above suit. The application is supported by a 25 paragraph affidavit deposed to by the Applicant and a Written Address of his counsel.

In his written address, the learned counsel for the Applicant, ***F.Dawodu Esq.*** submitted that in his affidavit in support of this application, the defendant has clearly stated that the major reason for some of his absence in court was due to ill-health. Furthermore, he referred to paragraph 6(b) of the supporting affidavit where the defendant deposed to the fact that he had commenced his evidence in chief, when some discrepancies were discovered in his statement on oath and this prevented him from continuing his evidence. He said that this led to a further amendment of his processes which took the former lawyer a while to achieve.

He contended that the main objective of this application is to appeal to the Court to set aside its judgment and allow the Defendant/Applicant to present his defence since the defendant has a good defence and counter claim to the said suit.

Learned counsel referred to the case of ***SEEPC (Nig.) LTD V P.B.N LTD (1992) TNWLR part 252 at page 253 at Ratio 4*** where the court considered the following factors on whether to set aside a default judgment:

1. The reason for the applicant's failure.
2. The time in which the application to set aside judgment was brought.
3. Whether the party in whose favour the judgment was entered would not be embarrassed upon an order of re-trial.
4. Whether the applicant's case is manifestly unsupportable.

Counsel submitted that in view of the above stated factors, the questions to be asked should be answered in favour of the applicant for the following reasons:

1. The applicant in the supporting affidavit, particularly in paragraphs 6, 7, 8,9,10 and 11 stated the major reasons for his inability to put forward his evidence and those of the witnesses.
2. The default judgment was delivered on the 14th day of May, 2020 and within the same period the applicant filed this application timeously and promptly.
3. The court ought to be allowed to come to a just decision of any case, judicially and justiciably.

He posited that the applicant has filed a well thought out statement of defence and has substantial witnesses who made statements on oath. That the Respondent is already aware of the statement of defence and no new matters can be put forward by the defendant except those already in the pleadings. That the Respondent has similarly made a reply to the statement of defence and counter claim and there is no way any embarrassment can occur. He contended that the Respondent is still capable of cross-examining the defendant and his witnesses on the said averments in their depositions. He said that on all fronts, the court would be able to properly put both parties on the scale of justice and come to the just decision of the case and no embarrassment or ambush is envisaged in all situations.

4. On whether the applicant's case is manifestly unsupportable, he submitted that as to the main suit, the applicant has a good defence to the statement of claim of the Respondent. That the court alluded to this in the default judgment that the defendant has filed all the necessary pleadings.

Learned counsel submitted that the applicant has shown vividly the major reasons for his inability to attend court and that he was surprised when the supposed written address was served on him and he never knew that his former counsel had withdrawn his appearance for him.

He referred to the case of ***SEEPE (Nig) Ltd V P.B.N Ltd supra particularly at page 233 Ratio 4***, where the court added a fifth factor, to wit: that the applicant's conduct throughout the proceeding i.e. "from the service of the writ upon him to the date of judgment" has been such as to make his application worthy of sympathetic consideration. He submitted that immediately the writ was served on him, he contacted a lawyer, entered appearance and put forward his pleading and even took oath before this honourable court until the discrepancies were observed and objected to, and that was not the fault of the applicant otherwise he would have concluded his evidence as scheduled. He contended that the court can see from the processes that the applicant was ready to defend this claim and further prove his counter-claim.

Furthermore, learned counsel posited that the enabling Rules of court gave power to the court to look into issues of default judgment and set same aside. He referred the court to ***ORDER 30 Rules 5(2) of the Edo State High Court Civil Procedure Rules, 2018*** which provides as follows:

"5(2) Any judgment obtained where any party does not appear at the trial may be set aside by the judge upon such terms as he may deem fit for good cause shown. "ORDER 10 Rule 11 states as follows;

"Where judgment is entered under any of the proceeding rules of this order, the court may on an application by the defendant set aside or vary such judgment on terms. The application shall be made within a reasonable time, showing evidence at payment of penalty, a good defence to the claim and a reasonable cause for the default."

From the above provision of the law, he urged the court to set aside the judgment obtained by the Respondent on the 14th day of May, 2020 as a default judgment and not one made on merit. He referred to the case of ***FOINTRADE V UNIVERSAL LTD (2001) W.R.N Vol.34 page 25 at page 27 Ratio 2*** where the court held as follows:

"It is well settled now that there is a tight limit on the extent to which a judgment obtained by the plaintiff in default of appearance by a defendant can go. First of all, a default judgment is not a judgment on the merit, which terms is defined as a judgment where the case has been argued and the court has decided which party is right, on the other hand a judgment is not on the merits when it is founded on some technical rules of procedures, technically it must be concluded, default by a defendant either to enter appearance or to file a defence maybe regarded as an implied admission of the plaintiff's case, this however cannot constitute the judgment obtained thereby into a judgment on the merit"

He therefore urged this honourable court to set aside the default judgment and consider and determine the whole case on the merit. He said that the above position was affirmed by the Supreme Court in the case of ***AKINRIBOYA V AKINSOLA (1998) 3 NWLR pt 540 page 101***.

See also the following cases: ***ADELOYE V OLONA MOTORS (NIG) LTD (2002) 2 NWLR pt 769 page 445 and MALGWI V GADAZAMA (2000) 11 NWLR (pt 103 244 at 28 2283) BELLO V WEC (2010) 8 NWLR (pt. 1196) 342 S.C.***

From the foregoing he urged the Court to grant this application and set aside the default judgment.

In opposition to the application, the learned counsel for the Claimant/Respondent, ***J.E.Enaholo Esq.*** filed a 29 paragraphs counter-affidavit and a written address of counsel.

In his written address, he formulated three issues for determination as follows:

1. ***Whether the Judgment was a default judgment in default of Defendant/Applicant's appearance?***
2. ***Whether there was service and/or proper service of all processes in respect of this suit? And***
3. ***Whether failure by the Defendant/Applicant to utilize the opportunity of fair hearing can translate to a denial of same to amount to a default judgment?***

Thereafter he argued the three issues seriatim.

ISSUE 1

Whether the Judgment was a default judgment in default of Defendant/Applicant's appearance?

Arguing issue one, learned counsel submitted that the judgment of this Honourable Court delivered on the 14th day of May, 2020 was not a judgment in default of appearance of the Defendant/Applicant, rather it was a judgment delivered as a result of the total neglect and voluntary abandonment of the defence and proof of his Counter Claim by the Defendant/Applicant for a very long time after series of unnecessary adjournments.

On the meaning of voluntary abandonment, he referred this Honourable Court to page 2 paragraphs 3 and 8 of the ***Black's Law Dictionary, Ninth Edition, by Bryan A. Garner, Editor in Chief*** where it was defined thus: ***"The relinquishing of a right or interest with the intention of never reclaiming it". While paragraphs 8 is voluntary abandonment "As a ground for divorce, a final departure without the consent of the other spouse, without sufficient reason and without the intention to return".***

He submitted that it is in the deposition of the Defendant/Applicant as shown in some paragraphs of his supporting affidavit most particularly paragraphs 3, 4, 5, 6, 7, 9, 11, 13, 14, 15 and 16, that he was aware of the pendency of the suit and was always present. That he knew when the Claimant closed his case and was even called to the witness box but could not testify due to certain discrepancies in his processes.

That the Claimant's sole witness testified and was cross-examined by the Defendant/Applicant's Counsel on the 27th day of February, 2018 and 20th day of March, 2018 after which the Defendant/Applicant decided to abandon his defence and Counter Claim even as alluded to in his own personal applications by Defendant's Counsel, Lucas Okojie Esq. on the

7th day of May, 2018 and on the 11th day of February, 2020 to withdraw his representation for the Defendant.

He posited that the first application to withdraw his representation was made by Lucas Okojie Esq. on the 7th day of May, 2018 being the following adjourned date after the closing of the Claimant's case i.e. a period of 48 days. That it was the service of a hearing notice on him that made the defence counsel (Lucas Okojie Esq.) to reply to defend the matter on the 11th day of June, 2018 which he still failed to defend, hence abandoning his averments and that of his so called witnesses. He cited the case of ***UNILORIN VS. ADESINA (2009) 25 W.R.N PG. 97 AT PG. 105 RATIO 7.***

On the meaning of ***default judgment***, he referred to ***Black's Law Dictionary, 9th Edition by Bryan A. Garner (Editor in Chief) pages 480 paragraphs 10*** which read thus:

"A judgment entered against a Defendant who has failed to plead or otherwise defend against the Plaintiff's claim. A judgment entered as a penalty against a party who does not comply with an order, especially an order to comply with a discovery request – Also termed judgment by default".

He submitted that in the instant case, the Defendant complied with the Rules of Court by frontloading and filing all his processes and even had the services of a counsel – Lucas Okojie Esq. but only chose to voluntarily abandon his defence and Counter-Claim on two separate occasions i.e. 7th day of May, 2018 and 11th day of February, 2020 when he finally abandoned his defence and Counter-Claim.

He submitted that it is trite law "that the Court waits for no man (litigant) rather it is the litigant that waits for the Court". That the judgment being a final judgment and same not being a default judgment, that this Court is functus officio and cited the following decisions on the point: ***ASSOCIATED DISCOUNT HOUSE LIMITED VS. MIN. OF FCT. & ANOR (2013) VOL. 219 LRCN (PT. 2) PG. 113. AT PG. 116. RATIO 3. DINGYADI VS. INEC (2011) 40 W.R.N PG. 1 AT PG. 15-16 RATIO 7 & 8.***

He maintained that once a Court delivers its judgment in a suit, it becomes functus officio with respect to the suit and cannot reopen the suit for any purpose whatsoever even by application by one or all the parties and cited the case of ***YAKUBU VS. OMOLABOJE (2006) 4 M.J.S.C PG 188 AT PG. 190 RATIO 2*** on bindingness of judgment on Court and parties where the court stated thus:

"Parties and the Court are bound by the judgment of the Court including the award therein".

He submitted that to grant the Defendant's application will amount to calling on the Court to sit on appeal over its own judgment already delivered. He referred to the case of ***ABIODUN VS. HON CHIEF JUDGE OF KWARA STATE (2009) 25 W.R.N PG. 26 AT PG. 37-38*** where the Court stated thus:

"It is settled law that, generally, a Court of law becomes functus officio, that is to say no longer seized of a matter once it gives its decision in the matter".

Counsel submitted that a Court cannot revisit its decision once given, that to do so will amount to a Court sitting on appeal over its own decision. He said that this general rule applies to bar a Court from changing its decision once it has been given and a party who is not satisfied by the decision of a Court can only go on appeal to have the decision set aside.

On the option open to a party who is dissatisfied with the decision of a lower Court, he referred to the case of ***SANNI VS. ABDULSALAM (2009) 22 W.R.N PG. 77 AT PG. 80 RATIO 1*** where the Court stated thus:

"Where a party is dissatisfied by the decision of a Court there are several options known to law open to him. The main recognized option is to file an appeal to a higher Court seeking to upturn, discharge and/or vary that decision, while awaiting a hearing on an appeal filed however, a party is at liberty to seek out the option of minimizing real, imagined or perceived damage or injury to himself or others by staying the decision of the Court where it is executory

or in appropriate situations, seeking an interim interlocutory mareva or anton piller order of injunction to restrain the other party from insisting on his adjudged rights pending the hearing and determination of the appeal filed".

He therefore urged the Court to hold that the judgment of this Honourable Court delivered on the 14th day of May, 2020 was not a judgment in default of the Defendant's appearance. Rather a judgment in abandonment of the Defendant's defence/proof of his Counter-Claim.

ISSUE TWO

Whether there was service and/or proper service of all processes in respect of this suit?

Learned counsel submitted that the Claimant/Respondent has been able to prove that the Defendant/Applicant was duly served and was in receipt of the processes of this Court in respect of this suit. He said that the service and receipt of the processes were confirmed and admitted by the Defendant/Applicant himself in paragraphs 3, 4, 5, 6, 7, 9, 11, 13, 14, 15 and 16 of his supporting affidavit and further confirmed by the Notice of entering of appearance filed by Lucas Okojie Esq. dated the 14th day of December, 2015 and hearing notice issued and served personally on the Defendant on the 28th day of May, 2018.

He said that despite the receipt of the Claimant/Respondent's Written Address by the Defendant on the 23rd day of March, 2020 as confirmed by paragraphs 15 of his supporting affidavit, the Defendant/Applicant still chose to do nothing either by motion to arrest judgment or to defend himself and/or prove his Counter-Claim even after the cross-examination of the Claimant and his sole witness.

He referred the Court to the following decisions on the point: whether the Court can refuse to hear an application to arrest its judgment filed by the Applicant with a view to defending the pending suit: ***INTERNATIONAL BANK FOR WEST AFRICA VS. SASEGBON (2008) VOL. 16. W.R.N PG. 110 AT PG. 118; & NEWS WATCH COMM. LTD. VS ATTA (2006) 7 M.J.SC PG. 88 AT PG. 92 RATIO 2 & 3.***

He also referred to the case of ***ONYEKWULUJE VS. ANIMASHAUN (1996) 3 NWLR (PT. 439) 637*** where the Supreme Court held that it was a cardinal principle of the administration of justice to let a party know the fate of his application whether properly or improperly brought before the Court. That it will amount to unfair hearing to ignore an objection raised by a party or his counsel against a slip in the proceeding. That the Court is duty bound to express in writing whether it agreed with the objection or not. That although the issue may be technical in nature, where technicality touches the foundation of fair hearing it cannot be ignored.

Based on the above principle of law he urged the Court to discountenance this application most especially on the failure of the Defendant/Applicant to utilize the above Supreme Court's position to arrest the judgment during the pendency of the suit being the point of the receipt of the written address but not after the judgment has been delivered and same being a final judgment of this Honourable Court since the Court cannot sit on appeal over his own judgment.

He posited that it is trite law that it is the litigant that waits for the Court not the Court that waits for the litigant and it is crystal clear from the supporting affidavit of the Defendant/Applicant that he was aware of the pendency of this suit and even participated in the trial for a period of four years from 2016 to 2019 before abandoning the case and before the judgment of the 14th day of May, 2020.

He urged the Court to hold that the Defendant /Applicant was properly and duly served with all the necessary processes of this Honourable Court but only chose to ignore the proceedings mid-way after cross-examining the Claimant and his sole witness.

ISSUE THREE

Whether failure by the Defendant/Applicant to utilize the opportunity of fair hearing can translate to a denial of same to amount to a default judgment?

Here, learned counsel submitted that a party to a proceeding as in this case, the Defendant/Applicant who refused to utilize the opportunity of fair hearing afforded him by the Constitution cannot complain. He cited the following cases: ***OKIKE VS. LEGAL PRACTITIONERS DISCIPLINARY COMMITTEE (2006) 1 NWLR (PT. 960) PG. 67 AT PG. 72 AND AYOOLA VS. AJIBARE (2013) 10 W.R.N PG. 162 AT PG. 167 RATIO 3, 5 & 6.***

Learned counsel pointed out that the Defendant/Applicant under paragraphs 6 and 6A of his supporting affidavit alleged that there was a mistake in his statement on oath hence his inability to testify and in paragraph 7 he stated that he has three others witnesses who made statements on oath in support of his defence. He however never informed the Court the reason while the three witnesses did not testify in this matter despite the provision on fair hearing as enshrined in section 36 of the 1999 constitution of the Federal Republic of Nigeria.

He submitted that the Defendant was only being indolent and an indolent party as the Defendant who chose to sleep over his right cannot come up under a flimsy excuse of ill-health to complain of unfair hearing. He relied on the case of ***OLUFEMI VS. INEC (2009) 25 W.R.N PG. 169AT PG. 173*** where the Court stated thus:

"An indolent petitioner, who fails to comply with the Electoral Act and the practice and procedure, along with the direction on procedure in election matters as in the instant appeal, does so at his own peril and cannot be heard to complain of unfair hearing or deliberate discountenance of his application for extension of time as done by the appellant".

He submitted that fair hearing is for both parties to a suit and a Court cannot unnecessarily over indulge a party against the other as this will amount to injustice and referred to the cases of ***AFARIOGUN VS. LAWAL (2012) 6 W.R.N PG. 122 AT PG. 125-127 RATIO 1 AND NEWS WATCH COMM. LTD VS. ATTA (2006) 7 M. J. S. C. PG. 88 AT PG. 93-94 RATIO 5.***

Counsel submitted that the failure and abuse by the Defendant/Applicant to utilize the opportunity afforded him by the constitutional provision of fair hearing during the pendency of the suit cannot now be re-awakened at the expense of the Claimant/judgment Creditor/Respondent and the Court. He therefore urged the Court to hold that the Defendant/Applicant has failed to utilize the principle of fair hearing hence he cannot be given a second chance.

He submitted that no special circumstances has been disclosed by the Defendant/Applicant to warrant the Court to set-aside the final judgment and cited the case of ***S & D CONSTRUCTION COMPANY LTD VS. AYOKU (2003) 5 NWLR (PT. 813) PG. 27 AT PF 282-283.***

He submitted that even if the judgment was to be a default judgment which he submitted it is not, that the Applicant has failed to present special circumstance that would have warrant the grant of his application.

He therefore urged the Court to dismiss the entire application with substantial costs in favour of the Claimant/Respondent.

I have carefully examined the affidavit and counter-affidavit filed in respect of this application together with the written addresses of the learned counsel for the parties.

It is settled law that every court of record possesses inherent powers to set aside its own judgment where such a judgment is afflicted by fundamental vices such as, where the suit was commenced without due process of law or was wrongly constituted or vitiated by fraud or breach of right to fair hearing or lack of jurisdiction or given in default. See ***Madukolu V. Nkemdilim (1962) 2 All NLR 581. See also P. E. Ltd v. Leventis Trading Co. Ltd. (2002) 5 NWLR (Pt. 244) 693; Petro Jessica Ent. Ltd V. Leventis Trading Co. Ltd. (1992) 5 NWLR (Pt 244) 132; Okereke V. Yar'Adua (2008) AII FWLR (Pt. 430) 25; Essien V. Esssien (2010) All FWLR (Pt 523)***

1992; ACB V. Losada Nig. Ltd (1995) 7 NWLR (Pt. 405) 260; AG. Lagos State V Dosunmu (1959) 3 NWLR (Pt. 111) 552.

However, it is firmly settled that application for the setting aside of a default judgment is not granted as a matter of course. An Applicant must show by credible evidence and satisfy the Court that the facts and circumstances of the case warrant the setting aside of such judgment. See: ***RIVTRUST SECURITIES LIMITED & ORS v. ASSET MANAGEMENT CORPORATION OF NIGERIA (2019) LPELR-47966(CA).***

When a Court is asked to set aside its judgment given in the absence of one of the parties, the following conditions must be in existence:

1. The Applicant must show good reasons for being absent at the hearing;
2. There must be no undue delay in making the application to set aside the judgment so as to prejudice the party in whose favour the judgment subsists;
3. The party in whose favour the judgment subsists would not be prejudiced or embarrassed upon an order for rehearing of the suit being made, so as to render such a course inequitable;
4. The Applicant must show that there is an arguable defence to the action, which is not manifestly unsupportable;
5. The Applicant's conduct throughout the proceedings i.e. "from the service of the writ upon him to the date of judgment" has been such as to make his application worthy of a sympathetic consideration.

See the following decisions on the point: ***Sanusi v Ayoola (1992) 9 NWLR Part 265 Page 275 at 294- 295 Para H-D per Karibi-Whyte JSC; Williams v Hope Rising Voluntary Funds Society (1982) 1-2 SC 145 at 160 lines 1-20 per Idigbe JSC*** .

In the instant case, the major reason given by the Applicant for some of his absence in Court during his defence was due to ill-health. Furthermore, he pointed out that he had already taken his oath to start his evidence in chief, when some discrepancies were discovered in his deposition which prevented him from continuing with his evidence.

Again, he alleged that he has filed his statement of defence and he has substantial witnesses who have made statements on oath. That the Respondent is aware of his defence and has filed a reply to his statement of defence and counter claim. That the granting of this application cannot cause any embarrassment to because the Respondent is aware of the Applicant's defence and will be at liberty to cross-examine the defendant and his witnesses. He said that the Applicant was not aware that his former counsel had withdrawn his appearance for him.

I shall now consider each of the factors enumerated in the cases of ***Sanusi v Ayoola and Williams v Hope Rising Voluntary Funds Society, supra,*** considered as the ***loci classici***, on the factors to be considered by the Court in setting aside its judgment.

Firstly, is the requirement that the Applicant must show good reasons for being absent at the hearing. In his supporting affidavit, the Applicant tried to explain his absence during his defence. He hinged it primarily on his alleged protracted ill-health. According to him, he was bedridden for over five months. He alleged that he communicated his alleged ill-health to his former counsel.

However in paragraph 23 of his counter-affidavit, the Respondent denied the Applicant's allegation of ill-health and stated that the Applicant operates his Electrical Workshop close to the Respondent's Counsel's Office at Angle 90 Junction, Uromi and was always in his workshop from January till date. He said that the Applicant was never absent from work because he has never been sick or bedridden.

I am of the view that the evidential burden of proof of the alleged ill-health is on the Applicant. This is the burden of adducing evidence to prove or disprove a particular fact. When a party wishes the Court to believe any fact, then the burden of proof as to that fact rests on that

party. See: ***GABRIEL DAUDU v. FEDERAL REPUBLIC OF NIGERIA (2018) LPELR-43637(SC).***

Furthermore, since the Respondent vehemently denied the ill-health of the Applicant, the Applicant would have taken further steps to substantiate his allegation of ill-health. Curiously, the Applicant did not supply any medical report to substantiate his allegation of ill-health. I am of the view that he has not discharged the burden to prove that he was absent from Court as a result of ill-health.

Secondly, on the issue of whether there has been undue delay in making the application to set aside the judgment, I observed that the Judgment was delivered on the 14th of May 2020 and the application to set aside the judgment was filed on 28th of May, 2020. Reasonably speaking, there appears to be no undue delay that could have prejudiced the Respondent.

On the requirement of whether the Respondent would be prejudiced or embarrassed upon an order for rehearing of the suit being made, so as to render such a course inequitable, I observed that although the Applicant made a blanket statement in paragraph 26 of his supporting affidavit that ***"if this application is granted it will not be prejudicial to the Respondent as it will enable the court to come to the just-decision in the above suit"***, in paragraphs 26 to 28 of the Counter-Affidavit, the Respondent deposed to facts to show how he may be prejudiced if the application is granted. In the said paragraphs he stated as follows:

"26. That the Claimant will be greatly prejudiced if this Court should exercise her discretion over a matter upon which final judgment has been entered by compelling the Claimant to further expend more in the defence.

27. That a judgment creditor should be allowed to enjoy the fruit(s) and gain of his judgment hence this application should be refused/rejected in the interest of justice.

28. That granting this application is tantamount to giving the Defendant a second bite in a defence he has intentionally abandoned and totally against the interest of fair hearing and justice."

From the foregoing, I am of the view that the Respondent will be prejudiced by compelling him to continue a case which the Applicant abandoned for no just cause and without any reasonable explanation.

On the requirement that the Applicant must show that there is an arguable defence to the action, which is not manifestly unsupportable, by his Statement of Defence and Counter-Claim, I think the Applicant has shown that he has an arguable defence to the action.

On the requirement that the Applicant's conduct throughout the proceedings i.e. "from the service of the writ upon him to the date of judgment" has been such as to make his application worthy of a sympathetic consideration, I am of the view that the Applicant's conduct from the service of the writ upon him to the date of judgment is not such that would make his application worthy of any sympathetic consideration.

Even if the allegations of the Applicant's ill-health and the purported defect in his deposition were substantiated, the question one would ask is what about his witnesses who made valid depositions? Why did they not testify? I agree entirely with the submission of the learned counsel for the Respondent that even if there was a mistake in the Applicant's deposition which prevented him from testifying, he never informed the Court of the reason why his three witnesses did not testify in this matter.

It is also on record that in the course of the proceedings, the Applicant had some personal issues with his Counsel, Lucas Okojie Esq. which culminated in his counsel withdrawing his legal representation for the Applicant. His counsel reported to the Court that his client was not forthcoming. Even when his counsel withdrew his representation, the Court ordered that the Claimant's Final Written Address should be served on the Applicant personally and service was effected on him but he refused to come to Court or brief another counsel. He only briefed a new counsel after the Court delivered its judgment. He appears to have treated the entire proceedings

with complete disdain. I do not think his application to set aside the judgment is worthy of sympathetic consideration.

On the whole, it is clear that for the Court to exercise its discretion judicially and judiciously with regards to an application to set aside a default judgment, the Applicant must comply with all the five requirements stipulated in the case of ***Williams v. Hope Rising Voluntary Funds Association Supra***. In the aforesaid case, ***Irikefe J.S.C.*** held that ***"all of these matters ought to be resolved in favour of Applicant before the judgment should be set aside. It is not enough that some of them can be so resolved".***

In the instant application, the Applicant only met with two of the requirements to wit: that it appears that there was no undue delay in making the application to set aside the judgment; and the Applicant was able to show that there is an arguable defence to the action, which is not manifestly unsupportable. Unfortunately, these two factors are not sufficient to warrant the exercise of the discretion of the Court to set aside the judgment. Consequently, this application is bound to fail.

On the whole, this application lacks merit and it is accordingly dismissed with costs assessed at N50, 000.00 (fifty thousand naira) in favour of the Respondent.

P.A.AKHIHIERO
JUDGE
4/03/2021

<u>COUNSEL:</u>
A.Agbator Esq.……Applicant.
J.E.Enaholo Esq...…….Respondent.