

IN THE FEDERAL HIGH COURT OF NIGERIA  
IN THE ABAKALIKI JUDICIAL DIVISION  
HOLDEN AT ABAKALIKI  
ON TUESDAY THE 11<sup>TH</sup> DAY OF OCTOBER, 2016  
BEFORE HIS LORDSHIP  
HONOURABLE JUSTICE AKINTAYO ALUKO

SUIT NO: FHC/AI/CS/20/2016

IN THE MATTER OF AN APPLICATION  
BY HON. EMMANUEL NWUZOR  
FOR AN ORDER FOR THE ENFORCEMENT  
OF HIS FUNDAMENTAL HUMAN RIGHTS

BETWEEN:

HON. EMMANUEL NWUZOR

AND

1. H.R.H. EZE PAUL NWEZE
2. HON. SUNDAY OGBONNA
3. MR. EMMANUEL OGAYI
4. HON. IGNATIUS MBAM
5. MR. EPETE MICHAEL
6. MR. FIDELIS OFOKE
7. MR. EDWARD NWEWE
8. MR. ENYI Nwigube
9. MR. OKECHUKWU OMINYI
10. DSP OBIORA IKECHUKWU
11. COMMISSIONER OF POLICE,  
EBONYI STATE.

APPEARANCES:

1. C. N. OGAYI Esq. Holding the brief of U. O. IGWE for the Applicant.
2. SILAS Nwanja for the 1<sup>st</sup> - 9<sup>th</sup> Respondents.
3. A. D. ELUMARO Esq. For the 10<sup>th</sup> and 11<sup>th</sup> Respondents

This suit was initiated vide an originating Application by the applicant on the 5<sup>th</sup> April, 2016 seeking for the enforcement of his Fundamental Human rights. The 1<sup>st</sup> - 9<sup>th</sup> Respondents joined issues with the Applicant by filing their processes namely; motion dated 20<sup>th</sup> July 2016 and Counter Affidavit deposed to on the 21<sup>st</sup> day of July 2016.

The 10<sup>th</sup> and 11<sup>th</sup> Respondents joined issues with the Applicant over this suit by filing a preliminary objection against the suit on the 27<sup>th</sup> day of September 2016.

By the agreement of parties and their Counsel, this matter was on the 26<sup>th</sup> day of September 2016 adjourned to 6<sup>th</sup> day of October 2016 for hearing.

After the matter had been slated for hearing, the Applicant through his Counsel filed a Notice of discontinuance/withdrawal of the suit dated 5<sup>th</sup> October 2016 but filed on the 6<sup>th</sup> day of October 2016, the day fixed for the hearing of the case.

On the date fixed for the hearing of the case, the Applicant's Counsel drew the attention of the Court to his notice of

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discontinuance/withdrawal and by that indicated his intention to

discontinue the suit.

Counsel to the 1<sup>st</sup> - 9<sup>th</sup> Respondents submitted that they have joined issues with the Applicant by filing their several processes namely; Counter affidavit and written address and that the 1<sup>st</sup> - 9<sup>th</sup> Respondents have also paid default fee. Counsel maintained that as a result of the effect and psychological trauma which the institution of the case caused them, the 3<sup>rd</sup>, 5<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> Respondents fell sick upon hearing of the case. Counsel added that the suit caused a set back to the health condition of the Respondents. Counsel said he had put up three appearances in the case before the Applicant truncated same without adducing any reason for the withdrawal. For the above reasons, Counsel to the 1<sup>st</sup> - 9<sup>th</sup> Respondents though did not oppose withdrawal of the suit, asked for cost in the sum of N100,000.00.

In his own turn, counsel to the 10<sup>th</sup> and 11<sup>th</sup> Respondents aligned himself with the submission made by Counsel to the 1<sup>st</sup> - 9<sup>th</sup> Respondents. Counsel also maintained that although he would not be opposed to the withdrawal but he asked for cost in the sum of N150,000.00. He hinged his request for cost on the statutory

provision of Section 2 of the Public Officers protection Act. While relying on the said provision, counsel submitted that when a Public Officer is dragged to Court and the outcome of the case is in favour of the Public Officer, the Applicant must pay cost to the Public Officer.

In his reply on point of law, the Applicant's Counsel submitted that the Applicant has inherent right to withdraw or discontinue his action in Court, he cited and relied on the provision of order 50 Rules 1, 2, and 3 of the Rules of this court.

On the issue of costs, counsel submitted that both parties have spent money on the suit and that the application is brought in good faith towards achieving ever lasting peace in their community. He submitted that the 10<sup>th</sup> and 11<sup>th</sup> Respondents did not pay filing fees or spent any money with regards to filing of the case and that the provision of Section 2 of the Public Officers Protection Act is in - applicable in the kind of circumstance of the present case. He urged the Court to order parties to bear their respective costs.

The relevant issues in the present scenario or situation of this

case are:

(1) Is discontinuance or withdrawal of action by the Applicant automatic?

(2) In what circumstance will a Court of law permit discontinuance or withdrawal of an action?

(3) What are the likely orders or consequential orders the Courts are legitimately required to make?

By the provisions of the Rules and following Judicial pronouncements, leave of Court is usually required to discontinue or withdraw an action especially when parties have joined issues. See Umeanadu vs. AG, Anambra & Anor (2008) LPELR – 3362 (SC) where it was held that leave is required when the case has been fixed for hearing.

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Flowing from the above however, there are four instances where there can be discontinuance or withdrawal of action without leave of Court, they are:

(1) If such discontinuance or withdrawal is made not later than 14 days after service of the defence on the Plaintiff or Applicant.

(2) If there are two or more Defendants or Respondents, not later than 14 days after service of the last defence.

(3) If all the parties agreed by consent by filing a written consent signed by all the parties at the Registry of the Court, see Order 50 Rules 2(1) and (5).

(4) If the matter has not been fixed for hearing.

By the way, a Defendant may also without leave withdraw or discontinue his defence or part of it at anytime or may withdraw or discontinue his counter-Claim or any particular claim therein at anytime not later than 14 days after service of the defence to counter-claim on him or if the counter-claim is made against two or more parties not later than 14 days of the service of the defence to the counter-claim last served. See order 50 Rule 2(2)(a)(b).

The import of the Supreme Court decision in Umeanadu vs. AG. Anambra & Anor (supra) and the provision of order 50 Rules 1 and 3 of the Rules of this court is that if the matter sought to be withdrawn or discontinued does not fall within the four instances mentioned above; the leave of the Court will be required to discontinue such an action in Court.



By the provision of order 50 Rule 3(2) of the Rules of this Court, leave or application for leave to discontinue is made by Summons or Motion on Notice.

In answering the first and 2<sup>nd</sup> questions therefore, I am of the considered view that discontinuance or withdrawal of action by an initiator of action like the Applicant in the present case is not

automatic and the circumstance under which discontinuance will be permitted depends on the stage or level the case has reached or attained before the intended discontinuance. The law is that if hearing has not been fixed, the Applicant or plaintiff as the case may be, may discontinue or withdraw without leave, conversely if hearing has been fixed, leave is required. See Ekudano Anor vs. Keregbe & Ors (2008) LPELR - 1100 (SC).

From the records, it is not in doubt that the Notice of discontinuance filed by the Applicant was filed after the matter had been slated and fixed for hearing, thereby requiring the leave of the Court to discontinue or withdraw same.

It is also clear from the records that the Applicant and his Counsel did not seek for the leave of this Court before withdrawal or discontinuance of the action or before filing his notice of discontinuance, see order 50 Rule 3(1) and (2).

Even though it has been held that if the notice of discontinuance is filed after the matter has been fixed for hearing, the provisions of order 50 rule 3(1) of the Rules of this court should apply and the action can only properly be discontinued with the leave of Court: and despite the fact that the present action has been fixed for

hearing before the Applicant filed his notice of discontinuance which normally demands that he should have obtained the leave of Court by filing Summons or Motion on Notice which he did not do; this Court will nevertheless allow the discontinuance and treat the failure to obtain leave as an irregularity which will not nullify the notice of discontinuance see Amechule & Anor vs. Nmecha & Ors (2013) LPELR - 20632 (CA); the Young Shall Grow Motors Ltd vs. Okonkwo & Anor (2010) LPELR - 3235 (SC); Order 51 Rule 1 of the Rules of this Court; Registered Trustees of Eket commercial Motorcyclists Association vs. Eket Local Government Council & Ors (2013) LPELR - 21998 (CA).

The above is particularly so, as the Respondents and their Counsel are not opposed to the withdrawal but are only asking for cost as palliative.

The 3<sup>rd</sup> question which is; what are the likely orders or consequential orders the Court is legitimately required to make in the circumstance of this case. relates to the issue of costs being requested for by the Respondents. With regards to Notice of discontinuance, the Court can legitimately make either of two consequential orders namely; order for dismissal or striking out of



the suit subject to award of costs. If a matter has proceeded to hearing and the evidence adduced has done irretrievable damage to the Plaintiff's or Applicant's case before filing notice of discontinuance, the Court will make an order for dismissal but if no evidence has been adduced, the appropriate order will be for striking out subject to award of costs, see Ekudano & Anor vs. Keregbe & Ors (2008) LPELR -1100 (SC).

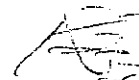
In the present case, the matter has not been heard even though hearing date has been fixed before filing of the Applicant's notice of discontinuance, that notwithstanding the matter will not be dismissed.

On the issue of cost and the provision of Section 2(b) of the Public Officers Protection Act which the 10<sup>th</sup> and 11<sup>th</sup> Respondents' Counsel relies on, the said provision is unhelpful to the request of Counsel, the Section only gives a Public Officer who is a defendant in an action, a right to recover the cost he properly incur in defending the action from the Plaintiff if there is judgment in favour of the Public Officer. No judgment has been obtained by the 10<sup>th</sup> and 11<sup>th</sup> Respondents in this case and in addition the 10<sup>th</sup> and 11<sup>th</sup>

Respondents did not incur any expenses in this case because they did not pay filing fees in this case being Public Officers.

On the request of the 1<sup>st</sup> - 9<sup>th</sup> Respondents for cost, I have gone through the records, there is evidence that they paid the sum of ₦17,860.00 for filing of their response at the registry of this Court, it is also on record that their Counsel had appeared in this matter for not less than 3 times. Some of the Respondents have also been present in Court.

I am therefore of the considered view that they are entitled to award of cost. Order 50 rule 3(1) of the rules of this Court empowers this Court to award cost in favour of the 1<sup>st</sup> - 9<sup>th</sup> Respondents while allowing or permitting the Applicant to discontinue or withdraw his action see Amefula & Anor vs Nmecha & Ors (supra).



The interest of justice in this case and balancing the interest of the parties demand that the 1<sup>st</sup> - 9<sup>th</sup> Respondents are entitled to cost.

In conclusion, I grant the request of the Applicant and make the following consequential orders:

- (i) Having countenanced the Notice of discontinuance of the Applicant dated and filed the 5<sup>th</sup> and 6<sup>th</sup> days of October, 2016 respectively; this suit is hereby struck out.
- (ii) I award cost in the sum of N50, 000 in favour of the 1<sup>st</sup> – 9<sup>th</sup> Respondents and against the Applicant.
- (iii) I award no cost in favour of the 10<sup>th</sup> and 11<sup>th</sup> Respondents.



AKINTAYO ALUKO  
PRESIDING JUDGE

**ENDORSEMENT:**

- (I) C. U. OGAYI Esq. with the brief of  
U. O. IGWE Esq. for the Applicant
- (II) SILAS I. NWANJA Esq. for the 1<sup>st</sup> – 9<sup>th</sup> Respondents
- (III) A. D. ELUMARO Esq. for the 10<sup>th</sup> and 11<sup>th</sup> Respondents