

IN THE FEDERAL HIGH COURT OF NIGERIA
IN THE ABAKALIKI JUDICIAL DIVISION
HOLDEN AT ABAKALIKI

ON THURSDAY THE 30TH DAY OF MARCH, 2017
BEFORE HIS LORDSHIP, HON. JUSTICE AKINTAYO ALUKO
(JUDGE)

SUIT NO. FHC/AI/CS/8/2017

BETWEEN:

- 1. CHIEF EGBARADA NWANKWAGU EZE**
- 2. CHIEF NWIBO NWAOGBAGA**
- 3. CHIEF CHRISTOPHER NWAIFURU**
- 4. COMRADE SUNDAY OGBAGA**
- 5. MRS MARIA NKWOEGU**
- 6. MRS FELICIA IGWE**

(SUING FOR THEMSELVES AND ON BEHALF OF THE SEVERAL PERSONS WHO ARE INDEGENES AND INHABITANTS OF NDIEZE INYIMEGU UNUPHU IZZI-AMEGU VILLAGE OF EBONYI STATE)

APPLICANTS

AND

- 1. THE ATTORNEY GENERAL OF
EBONYI STATE**
(SUED AS REPRESENTING THE GOVERNMENT OF
EBONYI STATE)
- 2. THE NIGERIAN ARMY**
- 3. THE COMMANDER, NIGERIAN ARMY,
NKWAGU MILITARY CANTONMENT
ABAKALIKI**
- 4. COMMISSIONER OF POLICE,
EBONYI STATE.**



RESPONDENTS

RULING

This a ruling on the Motion on Notice dated 16th day of March, 2017 filed on the 20th day of March, 2017 on behalf of the 2nd and 3rd Respondents.

The application in the main is praying the following reliefs:

- (1) An order of leave extending the time within which the 2nd and 3rd Respondents may file and serve their memorandum of appearance and counter affidavit in opposition to the application of the Applicants.*
- (2) An order regularizing the aforesaid processes and deeming same as properly filed and served before the court.*
- (3) And for such further order(s) as this Honourable Court may deem fit to make in the circumstances.*

Counsel to the 2nd and 3rd Respondents indicated his desire to move the application. Counsel to the Applicants who admitted that the Applicants were duly served with the application on Monday the 27th day of March 2017 and who did not file any counter affidavit against the application however sought the leave of court to respond on points of law which the court obliged him in the interest of justice. Counsel to the 1st Respondent was indifferent to the application. Counsel to the 2nd and 3rd Respondents moved the application at about 10.15 am this morning. While moving same, Counsel told the court that he had filed the memorandum of appearance and counter affidavit

in opposition against the application for the enforcement of the applicants' fundamental rights.

He relied on a six (6) paragraph affidavit and exhibits A, B and C attached to the process. He urged the court to grant the application by deeming the counter affidavit and written address of the 2nd and 3rd Respondents as properly filed and served.



While opposing the application on point of law, Counsel to the Applicants submitted that the Fundamental Rights (Enforcement Procedure) Rules, 2009 encourage speedy and efficient hearing and determination of fundamental human right applications because of their urgent nature. He relied on the provision of order IV rule 2 of Fundamental Rights (Enforcement Procedure) Rules, 2009. Counsel submitted that the records of the court would show that the Respondents were duly served with the processes of court in the case within time and that the Respondents failed and neglected to respond to the application for more than two weeks until judgment in the case was reserved.

Counsel further submitted that the affidavit in support of the application for extension of time does not show any reason why the Respondents failed to heed the law. He submitted that it is the law that a party who fail to make use of the opportunity or right of fair hearing created by the law cannot turn around to accuse the court of

denying him of fair hearing. Counsel maintained that the fair hearing provided in the Constitution is not for the lazy or indolent litigant.

Counsel cited and relied on the case of Newswatch Communication Ltd vs. Aliyu Ibrahim Attah giving citation as Sc/101/2001. Counsel submitted that the Respondents were aware of the pendency of the case but waited until same was fixed for judgment. He finally submitted that the orders sought by the application of the 2nd and 3rd Respondents are equitable remedy and that equity aids the vigilant not the indolent.



Due to the nature of the case being fundamental right proceedings, which require speedy hearing in appropriate circumstances, the court decided to fix ruling on the instant application for extension of time filed by the 2nd and 3rd Respondents to 2. 30pm today.

I have gone through the application of the 2nd and 3rd Respondents and the affidavit in support of same including the written address of the 2nd and 3rd Respondents' Counsel. I have also gone through the three exhibits attached to the affidavit in support of the application. These are; letter appointing the 2nd and 3rd Respondents' Counsel as the external advocate to represent them in this case dated 6-3- 2017, letter of acceptance by their Counsel to represent them in this suit dated 8/3/2017 and the receipt showing or evidencing that

the 2nd and 3rd Respondents paid default fee covering the period over which they were in default.

The summary of the reason given by the 2nd and 3rd Respondents' Counsel in their 6 paragraph affidavit and exhibits A, B and C attached for not filing their process within time is, delay in briefing their Counsel to take up the matter on their behalf due to chain of bureaucracy in the affairs of the 2nd and 3rd Respondents.

It is of note that the Applicants did not controvert the depositions in the affidavit in support of the application of 2nd and 3rd Respondents. The law is that depositions or averments not controverted or denied in an affidavit are deemed admitted. See Tukur vs. UBA (2012) LPELR-9337 (SC).



It is however not correct as argued by the Applicants' Counsel that the 2nd and 3rd Respondents' affidavit does not show any reason why they fail to heed the law or file their process within time. Applicants' Counsel is though on firm ground in his argument that the 2nd and 3rd Respondents were taken to have knowledge of the pendency of the action. He is also correct in his submission that the 2nd and 3rd Respondents were given opportunity to defend the suit and cannot turn around to accuse this court of denying them fair hearing in this case.

I also agree with Counsel that equity aids the vigilant and not the indolent. However, since the 2nd and 3rd Respondents have decided to make up from their seeming slumber and are now ready to defend the action when it is not yet too late and since the Applicants' interest cannot be said to be adversely affected, the interest of justice demands that they be allowed to come in.

The law is that when there is an application for extension of time within which to do certain things like in the present case, or to take procedural steps prescribed by the rule of court, the court is enjoined to always bear in mind that Rules of court must prima-facie be obeyed and that to justify the exercise of the court's discretion; there must be some concrete material upon which to base such exercise of discretion. See Long-John & Ors vs. Blakk & Ors (1998) LPELR-1791 (SC) per Iguh JSC pp. 19-20 paragraphs G-A.



In the instant application, the 2nd and 3rd Respondents have by their 6 paragraph affidavit, exhibits A, B and C attached to same, the counter affidavit which they intend to regularize and the written address in support of same placed some concrete material before the court to demonstrate some seriousness on their part (even though belated but never too late) justifying the exercise of the discretion of the court in their favour.

The Apex court has also held that in situations like the present one, substantial justice to the parties has always been the cardinal determinant. The Applicants' Counsel has relied on the case of Newswatch Communication Ltd vs. Attah (2006) 12 NWLR (Pt 993) p. 144. It is true that the Supreme Court in the said case held that the court must hear the parties, both parties to the case but that the court is not a slave of time that must wait indefinitely for a party to decide when to come to present his case.



The said decision does not say that the court should deprive or deny parties who have filed their counter affidavit and written address against an application and who have paid default fee covering the period of such default, the right to defend the action on the merit. This is particularly so when the date for judgment has not yet been fixed.

The issue here is the exercise of court's discretion. It must be borne in mind that the exercise of Judicial discretion must be seen to be exercised both judicially and judiciously. It depends on the facts and circumstances of each case. Accordingly, the court cannot be bound by a previous decision to exercise its discretion in a particular way, because that would in effect be putting an end to the exercise of discretion. See Long-John & Ors vs. Blakk & Ors (supra) at pp. 42 paragraphs C-D.

In the exercise of court's discretion therefore in an application for extension of time, the court must be guided by consideration of doing substantial justice between the parties by hearing the matter on its merit provided always that no injustice is thereby caused to the other side. It therefore seems to me that the interest of justice demands that the 2nd and 3rd Respondents should be afforded the opportunity for their rights to be determined on the merit so long as the equities of the matter are not defeated and no injustice to the Applicants is thereby occasioned. See Long-John & Ors vs. Blakk & Ors (supra) at pp. 30-31.



It is true that this is a fundamental right suit where time is taken to be of essence. That notwithstanding, it will be foolhardy and a travesty of justice to deny the 2nd and 3rd Respondents from coming in at this stage when they have demonstrated their readiness to defend the action thereby presenting to the court the opportunity to hear the case on the merit.

The Applicants are not in detention. There is nothing to be suffered by them by the grant of this application. This is more so, that the court has by its order of 17th day of February 2017 directed parties to maintain status quo in this case. The Applicants' Counsel have not informed or told the court that the Respondents have breached or violated the said order.

I am of the view that it will and it is undesirable to give effect to the rules which will merely enable one party to score not a victory on the merit, but a technical knock out at the expense of a hearing on the merit. See Long-John & Ors vs. Blakk & Ors (supra) at p. 42 paragraphs C-D.

In the interest of justice and as provided by the provision of order IX Fundamental Rights (Enforcement Procedure) Rules 2009, the failure of the 2nd and 3rd Respondents to file their counter affidavit and written address within the time stipulated under the said Rules will not nullify their counter affidavit and written address more so when judgment is yet to be delivered and when no date has been fixed for judgment and that particularly so since the 2nd and 3rd Respondents have paid penalty in form of default fee covering the period over which they were in default.



It is true that application for extension of time is not provided for under Fundamental Right (Enforcement Procedure) Rules, 2009 but by the provision of order XV rule 4 of the same Rules (i.e FREPS) recourse is permitted to be made to the Civil Procedure Rules of this court in cases and instances not covered by Fundamental Right (Enforcement Procedure) Rules, 2009.

Furthermore, the provision of order 48 rule 4 of the Civil Procedure Rules of this court of 2009 gives this court power to extend

the time for doing any act or taking any proceedings provided the party in default in performing the act within time shall be made to pay default fee.

It is against the background of the above that the court strongly feel and is of the firm view that in the interest of justice, the 2nd and 3rd Respondents ought to be allowed to defend the action on the merit. The application of the 2nd and 3rd Respondents therefore succeeds and it is hereby granted.



HON. JUSTICE AKINTAYO ALUKO
PRESIDING JUDGE
30 - 3- 2017

ENDORSEMENT:

Motion on Notice argued by:

- (1) J.E. Okika Esq for the 2nd and 3rd Respondents.
- (2) Ifeanyi Edemba Esq with Kelvin Ofoke Esq for the Applicants.
- (3) P. M. Awada Esq with S.N. Ogbuinya Esq for the 1st Respondent.