IN THE FEDERAL HIGH COURT OF NIGERIA

IN THE ABUJA JUDICIAL DIVISION

HOLDEN AT ABUJA

ON WEDNESDAY, THE 7TH DAY OF DECEMBER, 2016

BEFORE HIS LORDSHIP HON. JUSTICE A. R. MOHAMMED

(JUDGE)

SUIT NO. FHC/ABJ/CS/786/2012

BETWEEN:

CHIEF SEGUN ONI .... PLAINTIFF

AND

1. MTN NIGERIA COMMUNICATION LTD
2. NIGERIAN COMMUNICATIONS COMMISSION ..... DEFENDANTS.

RULING

Any application to discontinue a suit before this Court is governed by the provision of order 50 of the Federal High Court Rules, 2009.

While rule 2(1) of order 50 permits the Plaintiff to discontinue a suit without leave of the Court, rule 3(1) of the same order 50 requires the Plaintiff to seek leave where pleadings have been filed and exchanged by the parties. In this instant case, pleadings have

been filed and exchanged by the parties, therefore the Plaintiff's request to discontinue this suit ought to be by an application seeking leave to do so. Having not formally seek for leave, the Court should have reject the Notice of discontinuance dated 11/8/16 outrightly. However, improper as the Notice of discontinuance may appear to be, none of the Defendants is strictly objecting to it. In fact, the 2nd Defendant specifically conceded to it unconditionally. The 1st Defendant's grouse with the discontinuance is on the order to be made, which learned silk for the 1st Defendant contended should be an order of dismissal because pleadings have been filed and exchanged and issues joined as far back as in the year 2013. Learned senior counsel also asked for cost of ₦1 million against the Plaintiff for the discontinuance of the suit.

Now since none of the Defendants seems to be objecting on the manner in which the Notice of discontinuance is brought, the Court would not insist on strict adherence to the provision of order 50 rule 3 of Federal High Court Rules, after all, the concession by the Defendants is akin to waving the right to insist on adopting the proper procedure of seeking to discontinue the suit.

As I stated earlier, the only issue in contention is the order to be made. The Court had been referred to the case of **OMO VS. AMANTU** supra at pages 195-196, where the Court of Appeal took

the view that any suit withdrawn after issues have been joined should be dismissed and not merely struck out. See specifically page 196 paragraphs A - B of the case of **OMO VS. AMANTU** supra.

However, in the recent case of **BABATUNDE VS. P.A.S. & T.A. LTD (2007) 13 NWLR PART 1050, PAGE 113 at pages 163-164 paragraphs F - A,** the Supreme Court, per Ogbuagbu JSC, held as follows:-

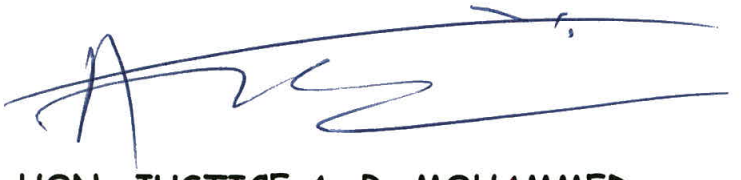
> *"In summary, I have gone this far because firstly, what has to looked for and considered by a trial Court are the wordings or provisions of each particular rules of that Court governing discontinuance or withdrawal of an action/suit. Secondly, when an application for discontinuance of an action is made, one of the things to be considered by a trial Court is at what stage the said application is made. If it is made before a hearing date has been fixed, it seems to me that it is now firmly settled that the proper order to make is one striking out. This is because there has been no litis contestation and a determination on the merits has not been made after hearing evidence of either the whole or some fundamental part of the action.*

If the application is made after hearing has commenced, the trial Court must weigh and consider all the circumstances of the cases in the interest of justice and thus balance the interest of the parties involved including the balance of convenience and disadvantage which might be suffered by any of the parties concerned".

Flowing from the above holding of the Supreme Court, it is to be noted that hearing has not commenced in this suit. The parties have not even begun argument on the Notices of preliminary objections filed, thereby justifying the commencement of hearing in this suit. In this situation, I cannot see how an order to strike out the suit could prejudice any of the Defendants, especially when they are not even opposing the discontinuance per se.

On the issue of cost, order 50 rule 3 (1) clearly gives the Court a discretion to impose terms as to cost or otherwise as it thinks just. There cannot be a better instance to award cost than in the present situation. This is because the Plaintiff brought the 1st Defendant to Court, made the 1st Defendant to react to the suit by filing statement of defence and other processes and made it to appear in the suit for a number of occasions. I therefore hold that the 1st Defendant is entitled to cost, which I assessed at ₦100,000.00

against the Plaintiff. This suit, having been discontinued, is hereby struck out.



HON. JUSTICE A. R. MOHAMMED
JUDGE
7/12/16.

APPEARANCES:-

C. O. Agwu (Mrs.) for the Plaintiff.

Olabisi O. Soyebo SAN with Sale Sule Esq. for the 1st Defendant.

Adesewa Adebayo-Aroye (Mrs.) with Oluwasheye Afolabi Esq. for the 2nd Defendant.