IN THE HIGH COURT OF JUSTICE FEDERAL CAPITAL TERRITORY JUDICIARY
HOLDEN AT HIGH COURT BWARI – ABUJA

BEFORE HIS LORDSHIP: HON. JUSTICE M. A. MADUGU
COURT CLERKS: M.S. USMAN & OTHERS
COURT NUMBER: THIRTY NINE (39)
SUIT NUMBER: FCT/HC/CV/3261/2022
MOTION NUMBER: FCT/HC/M/76/2023
DATE: 11TH JUNE, 2024

BETWEEN:
1. MR. ADEYINKA BAREWA
2. CHIEF INNOCENT IKE --------------CLAIMANTS/RESPONDENTS

VS
1. ASABE WAZIRI ------------------------------1ST DEFENDANT/APPLICANT
2. ABEH SIGNATURE APARTMENT LTD----2ND DEFENDANT/RESPONDENT

Parties absent.

M. E. HANDAN (Esq) for the Claimants/Respondents.

OLADIMEJI EKENGBA (Esq) with him O. A. BANKOLE (Esq) for the 1st Defendant/Applicant.

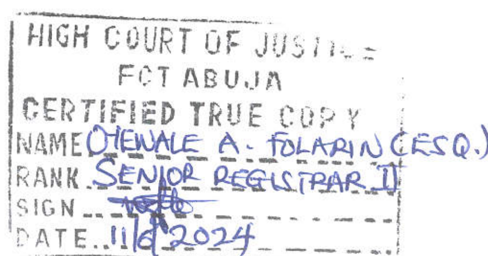
RULING

By way of motion on notice dated and filed on 8/12/2023, the 1st Defendant/Applicant brought this application praying for the following orders;

1. An order of this honourable Court setting aside/vacating the Interlocutory Order made by this Honourable Court on 22nd February, 2023 in favour of the Claimants/Respondents against the 1st Defendant/Applicant as same is vitiated by improper service, deliberate misrepresentation, suppression, concealment and non-disclosure of material facts and lack of fair hearing.

2. For such further order or orders as this honourable court may deem fit to make in the circumstances.

The grounds upon which the application is predicated are hereby reproduced as follow: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i. The parties in this instant suit are the same parties in SUIT NO: FCT/HC/CV/1846/2022 ABEH SIGNATURE LIMITED, ADEYINKA BAREWA & INNOCENT IKE V. ASABE WAZIRI & TONY CHUKWUEMEKA UBANI (DIRECTOR ENFORCEMENT UNIT, FCT HIGH COURT) before the FCT High Court 36, Garki and also in MOTION NO: (M / 11210) / 2022 - MR ADEYINKA BAREWA & CHIEF INNOCENT IKE V. ASABE WAZIRI & ABEH SIGNATURE LTD before FCT High Court 7, Jabi at the same time this instant suit was instituted.

ii. With full knowledge of the above pending suits, the Claimants instituted this instant suit and mischievously effected substituted service of the Originating processes and Motion for Interlocutory Injunction on the 1st Defendant/Applicant by pasting the processes at an address that is different from the 1st Defendant/Applicant's address on record, hence denying the 1st Defendant/Applicant the opportunity to be heard in the matter.

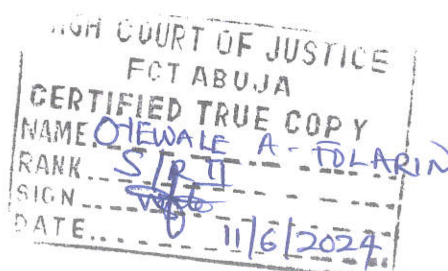
iii. Relying on their mischief, the Claimants then proceeded to obtain an Interlocutory Injunction against the 1st Defendant/Applicant in her absence and without her notice.

iv. The 1st Defendant/Applicant have become aware of this instant suit and is desirous of setting aside the Interlocutory Order made in her absence and defending herself in the matter.

v. The interest of justice and fair hearing requires that the Interlocutory Order be set aside by this Honourable Court

The motion is supported by an 11-paragraph affidavit deposed to by one Habila Danladi, a litigation secretary in the law firm of the 1st Defendant/Applicant's counsel. Also filed along the motion is a written address of the Applicant's counsel.

In response to this application, the Claimants/respondents filed a counter-affidavit dated 13/2/2024 but withdrew same by making an



oral application during the hearing of the motion. The Claimants/Respondents' counsel however filed and adopted a written address on point of law dated 26/4/2024 in response to the motion.

The crux of the affidavit in support of the 1st/Defendant/applicant's motion is that the 1st Defendant/Applicant purchased and occupied Flats 3C and 3B at Abeh Signature Apartments in February 2021. On March 18, 2022, the 2nd Defendant/Respondent forcefully and illegally evicted the 1st Defendant/Applicant without a court order, and the Claimants/respondents unlawfully moved into the property shortly after. The Claimants/respondents, with the connivance of the 2nd Defendant/respondent, filed multiple lawsuits against the 1st Defendant/Applicant across different courts, seeking similar reliefs without disclosing these pending suits to the current court.

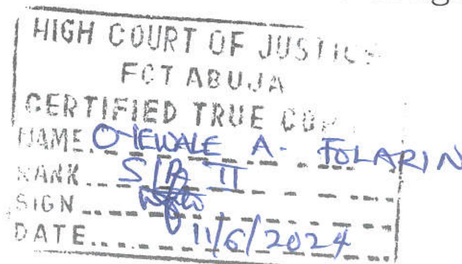
The affidavit stated that the Claimants/Respondents improperly served court documents at an incorrect address, denying the 1st Defendant/Applicant the opportunity to be aware of and respond to the suit. That the Claimants/Respondents misrepresented to the court that the 1st Defendant/Applicant had been properly served, resulting in the issuance of an interlocutory order without the 1st Defendant/Applicant's knowledge or opportunity to be heard.

It is stated that the interlocutory order should be set aside due to improper service, misrepresentation, and the need for a fair hearing.

In the written address of the learned counsel to the Applicant, a sole issue was formulated for determination, thus:

"Whether the 1st Defendant/Applicant is entitled to the reliefs sought in this application in the interest of justice".

The learned counsel for the 1st Defendant/Applicant submitted that the 1st Defendant/Applicant was entitled to the reliefs sought, having met



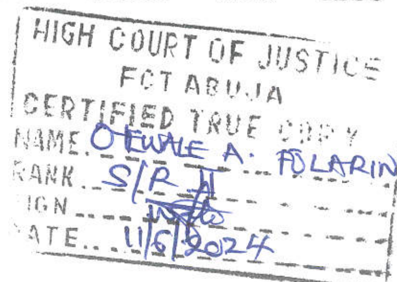
the necessary conditions. The affidavit showed that the Claimants/respondents served the originating processes improperly by pasting them at an incorrect address, misleading the court to grant an interlocutory injunction in their favor without the 1st Defendant/Applicant knowledge or presence. This improper service was deemed defective and void, as the 1st Defendant/Applicant was not given the opportunity to be heard or represented by counsel.

The counsel argued that factors for setting aside a court order, as established in case laws, include the applicant's failure to appear due to improper service, the timing of the application and the supportability of the application.

The counsel further asserted that a court had inherent powers to set aside its own orders in the interest of justice, especially when such orders were made due to error, fraud, misrepresentation, or improper service. The interlocutory injunction in this case was obtained through deliberate misrepresentation and improper service, which denied the 1st Defendant/Applicant a fair hearing.

The learned counsel concluded that the court should exercise its inherent powers to set aside the interlocutory order, as it was obtained in the absence of the 1st Defendant/Applicant due to improper service and misrepresentation by the Claimants/respondents. That this action is necessary to uphold the principles of justice and fair hearing. The counsel prayed that the court grant the application in the interest of justice.

In the written address of the learned counsel to the Claimants/Respondents, a sole issue was also formulated for determination, i.e.:



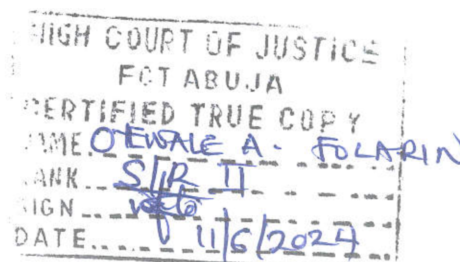
"Whether this Honourable Court has the Jurisdiction to set aside its order for interlocutory injunction upon the facts and circumstance grounding this application?"

The Claimants/Respondent's counsel contended that the court lacked jurisdiction to set aside the interlocutory injunction, arguing that the Applicant had not presented sufficient evidence to support the application. The counsel criticized the affidavit evidence of Habila Danladi, a litigation secretary, asserting it was inadmissible hearsay because it was based on information from the Applicant's counsel, not directly involved in the transaction. Placing reliance on the case of **IBETO & ANOR v. OGUH (2022) LPELR-56803(CA)**, he emphasized that affidavits from litigation clerks or secretaries were generally regarded as hearsay and insufficient to prove the truth of the matter asserted. He maintained that only the 1st Defendant/Applicant, having direct knowledge, could provide admissible evidence.

Additionally, the counsel pointed out that the service of the originating processes and the motion for an interlocutory injunction was carried out according to a valid court order for substituted service. This order was still in effect, and the 1st Defendant/Applicant had not filed any application to challenge it.

Citing **Akinyemi v. Soyanwo (2006) 13 NWLR (Pt.998) 496** and **Odogwu v. Odogwu (1992) 2 NWLR (Pt. 225) 539**, he submitted that parties must comply with subsisting court orders, regardless of any perceived irregularities, until such orders are set aside. That the 1st Defendant/Applicant, having failed to challenge the service or respond in a timely manner, could not now seek to benefit from this neglect.

In conclusion, the Respondent's counsel urged the court to dismiss the 1st Defendant/Applicant's application in its entirety.

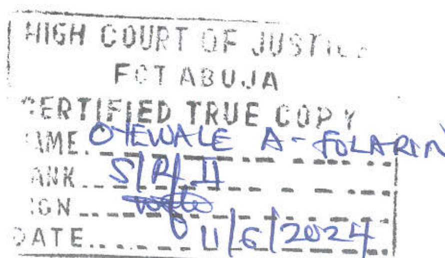


I have gone through the Applicant's application and the counter reaction of the Respondents' counsel via a written address on point of law who vehemently opposed to the grant of this application.

There is no doubt that an order of substituted service was granted by this Court on the 1st Defendant/Applicant upon the application of the Claimants/respondents on 6/12/2022. It is also on record that there is an order of interlocutory injunction restraining the 1st Defendant/Applicant from the subject matter before this court. The said interlocutory injunction was granted on 21/2/2023 upon a motion on notice filed by the Claimants contrary to the date, i.e. "February 22nd 2023 contained in prayer 1 of the motion.

Now, the 1st Defendant/Applicant is before this court with a motion praying for an order to set aside/vacate the Interlocutory Order made by this Honourable Court on 21/2/2023 in favour of the Claimants/Respondents against the 1st Defendant/Applicant on the ground that same is vitiated by improper service, deliberate misrepresentation, suppression, concealment and non-disclosure of material facts and lack of fair hearing.

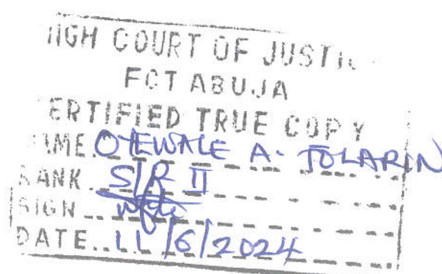
It is as true, as it is well settled, that a court of law has an inherent jurisdiction to set aside its own order where the conditions for doing so have been met by a party seeking to set aside. See **Noga Hotels International S.A vs NICON Hilton hotels LTD & ors (2006) LPELR – 11811 (CA).** It is also a well settled principle, that the Rules of Court and inherent jurisdiction of Court, allow for an applicant to bring an application on grounds of non-service, fraud and lack of jurisdiction to set aside judgment by the same court that gave the judgment or order.



As earlier mentioned, the grounds upon which this motion is predicated is on the ground of fraud, misrepresentation and improper service on the 1st Defendant/applicant. That the Claimants/Respondents instituted this instant suit and mischievously obtained and effected substituted service of the Originating processes and motion for Interlocutory Injunction on the 1st Defendant/Applicant by pasting the processes at an address that is different from the 1st Defendant/Applicant's address on record, hence denying the 1st Defendant/Applicant the opportunity to be heard in the matter.

It is a well known principle that an order which is a nullity owing to failure to comply 'with an essential provision such as service of process, fraud or lack of jurisdiction, can be set aside by the Court which gave it or made the order. In such a case, where the Defendant proves non-service, fraud or lack of jurisdiction, the whole proceedings become a nullity and the trial court has the jurisdiction to set it aside. **See MADUKOLU v. NKEMDILIM (1962) 1. ALL NLR 187; MADUKA v. UBAH (2014) 11 CLRN 157. YAU-YAU v. A.P.C. (2023) ALL FWLR 3.**

The Applicant's Motion on Notice is one which invokes the equitable jurisdiction of this Court. This entails the exercise of the Court's discretionary powers which as in all such exercises, must be done judicially and judiciously, and based on the materials placed before the Court. Apart from the materials placed by both parties, it's a discretion which the Court is required to exercise with great judicial circumspection and to have due regard to the peculiar facts and circumstances of the case.The applicant in this nature of application is expected to prove via his affidavit in support the grounds upon which the application to set aside a particular order is based. The court requires a strong case to be established before it will set aside an order



or judgment on the grounds mentioned above.See **Tiv v. Wombo (1996) 9 NWLR (Pt. 471)**.

In opposition to the Applicant's motion, the Respondents pointed out that the affidavit supporting the application was deposed to by a litigation secretary, Habila Danladi, whose testimony was based on information from counsel, and therefore violated section 115 of the Evidence Act 2011 and constituted inadmissible hearsay. The Respondent cited ***IBETO & ANOR v. OGUH (2022) LPELR-56803(CA)*** **and *Lam-Anko (Nig) Ltd v. Zakaria Okanga Properties (Nig) Ltd & Ors (2022) LPELR-59212 (CA)*** to emphasize the inadmissibility of such evidence.

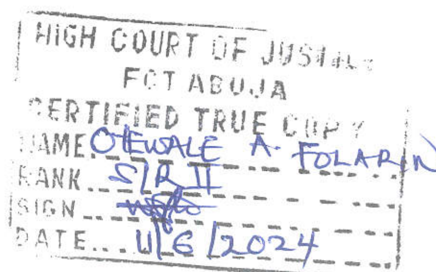
This court finds it imperative to address the issue of the competence of the applicant's affidavit as it is upon the resolution of same that the motion can be properly decided.

According to Section 115 of the Evidence Act;

"(**1**) Every affidavit used in the court shall contain only a statement of facts and circumstances to which the witness deposes, either of his own personal knowledge or from information which he believes to be true.

(**2**) An affidavit shall not contain extraneous matter, by way of objection, or prayer, or legal argument or conclusion.

(**3**) When a person deposes to his belief in any matter of fact, and his belief is derived from any source other than his own personal knowledge, he shall set forth explicitly the facts and circumstances forming the ground of his belief.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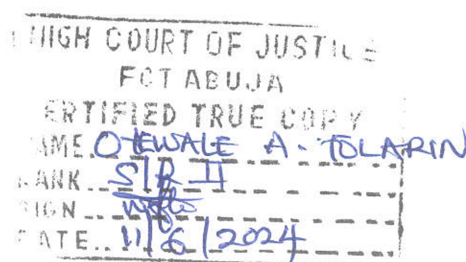
(**4**) When such belief is derived from information received from another person, the name of his informant shall be stated, and reasonable particulars shall be given respecting the informant, and the time, place and circumstance of the information."

From the above provision of the Evidence Act, it is clear that a deponent of an affidavit in any proceeding before a court of law is a witness in the matter. Section 115 [1] of the Act enjoins the deponent as a witness to depose to facts in the affidavit that are "either of his own personal knowledge or from information which he believes to be true". It is not enough to set out in the preamble paragraph of an affidavit for the deponent to restate that facts that he has been authorised either by his principal or employer, and the client to make the affidavit; and that he derived the facts averred in the affidavit in the course of his employment and/or from his personal knowledge and/or information generally. For every assertion in a specific averment the deponent, consistent with Section 115 [1], [3] and [4] of the Evidence Act, must disclose his source of information and belief. See **JIMOH vs. HON. MINISTER, FEDERAL CAPITAL TERRITORY [2018] LPELR-46329 [SC]**

According to the introductory paragraphs of the affidavit deposed to on behalf of the applicant, it was stated as follows:

"*I, HABILA DANLADI, Male, Adult, Christian and Nigerian Citizen of No. 103 Ebitu Ukiwe Street, Jabi District, Abuja do hereby make oath and state as follows:*

***1**. That I am a Litigation Secretary (1) in the Law Firm of CHIMAOBI ABENGOWE & CO, Counsel to the 1st Defendant/Applicant and by virtue*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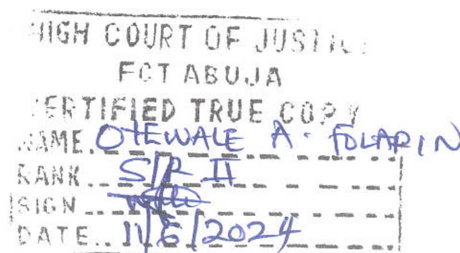
of my position and schedule of duties, I am conversant with the facts of this case.

***2**. That I have the consent and authority of the 1st Defendant/Applicant as well as that of my employers to depose to the facts stated herein.*

***3**. That I was informed by C. J. Abengowe, Esq, the Counsel handling this matter in chambers on the 27th day of November, 2023 at 10am of the following facts which I verily believe to be true."*

In the above preamble paragraphs of the affidavit sworn by Habila Danladi, a litigation secretary at the law firm representing the applicant, it is stated that the facts relied upon to support this application were provided by C.J. Abengowe, Esq., the counsel representing the 1st Defendant/Applicant. However, the affidavit does not specify how C.J. Abengowe, Esq., came into possession of this information before relaying it to Habila Danladi. The subsequent paragraphs of the affidavit contain details that should be within the exclusive knowledge of the 1st Defendant/Applicant, unless communicated to a third party. There is no indication in the affidavit explaining how the 1st Defendant/Applicant conveyed these specific facts to the deponent.

A deposition in an affidavit that is not within the personal knowledge of the deponent and for which the deponent did not disclose the source of information certainly dwells in the realm of rumour or plain gossip and a violation of the provisions of the Evidence Act. Failure to state the source of information and belief of the truth thereof, erodes the capability of the Court to favourably ascertain the veracity or authenticity of the facts alleged therein. This is because the Court cannot utilize unqualified and unascertainable information to make any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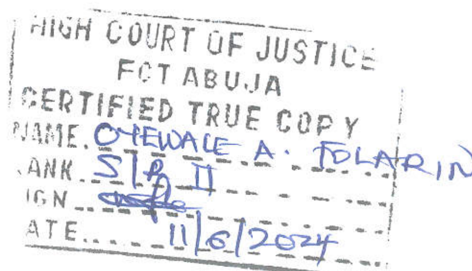
evaluation. See **AHMED & ORS V. CBN (2013) LPELR - 20744 (SC); OKOYE & ANOR V. CENTREPOINT MERCHANT BANK LTD. (2008) 15 NWLR (PT. 1110) 335.**

The legal practitioner who is the counsel to the 1st Defendant/Applicant by his training is the master of the law and not the facts of the case of his client. The facts of any case or by the nature of this application and the grounds relied on, is within the province of the litigant who has engaged a counsel to employ his mastery in law to present his facts in the best and legal way to gain him victory in his legal adversary. In the instant case, the fact belongs to the 1st Defendant/Applicant and within her personal knowledge and the means in which the the Applicant's counsel got the information was not revealed or stated to have competently feed the deponent the facts relied on to set aside the order of this court.

Consequently, the statements made by Habila Danladi, which aim to establish the veracity of the interactions between the Claimants/Respondents and the 1st Defendant/Applicant, in order to establish the grounds of this motion amount to inadmissible hearsay. These statements fail to meet the requirements of Section 115 (3) and (4) of the Evidence Act and are therefore insufficient to substantiate the assertions of the 1st Defendant/Applicant.

It is rudimentary law that any paragraph of an affidavit which offends against the provisions of Section 115 of the Evidence Act may be struck out, but if it is not struck out, no weight should be attached to it. See EDU **vs. COMM. FOR AGRIC. (2000) p12 NWLR (PT 681) 318, Lagos State v NDIC (2020)(CA/L/124/2003/R**. In other words, any paragraph of an affidavit which offends Section 115 of the Evidence Act



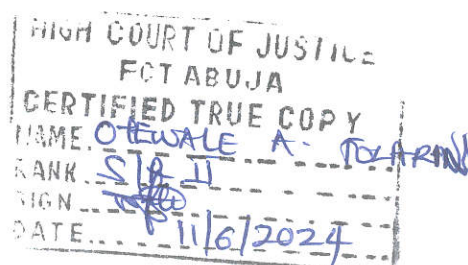
ought not to be acted upon. It is liable to be discountenanced and struck out. See **EURO BATI CONCEPT S.A. vs. TROPICAL INDUSTRIAL CO. LTD (2001) 18 NWLR (PT 744) 165** and **A-G ADAMAWA vs. A-G (FED) (2005) 18 NWLR (PT 958) 581 at 625 and 657-658.**

The Supreme Court has also stated in **MGBENWELU vs. OLUMBA [2017] All FWLR [Pt.884] 1598 at 1622** that courts ought not to act on affidavits bereft of facts showing the source of information of the deponent where the deponent was not deposing from personal knowledge.

This failure of the affidavits to comply with the requirements of Section 115 of the Evidence Act affects paragraphs 3(a) to 10 of the affidavit in support of this motion. These paragraphs of the affidavit are hereby struck out.

With this development, the main facts of this application of the 1st Defendant/Applicant has been rejected. There is no evidence remaining in the affidavit filed in support of this motion to establish the grounds to set aside the order of this court sought to be vacated. The result is that the Applicant's motion has not been proved. The only option left for the court at this point is to dismiss the motion. This application with motion number FCT/HC/BW/***M/76/23*** is accordingly dismissed.

Now, having dismissed the motion of the applicant, I find it pertinent to address a Certified True Copy of the Court of Appeal judgment in appeal number **CA/ABJ/CV/246/2022 Asabe Waziri v. Abeh Signature Ltd**which was tendered by the 1st Defendant/Applicant's counsel without objection or opposition from the claimants/respondent's



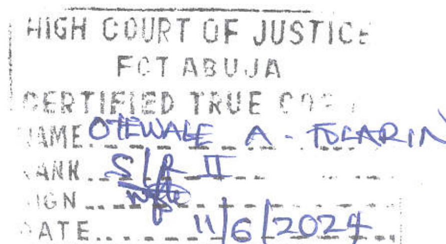
counsel on 27/05/2024 from the bar and of which this court took judicial notice.

Having thoroughly examined the judgment of the Court of Appeal in **Asabe Waziri v. Abeh Signature Ltd**, it is evident that the facts and subject matter of the case are intricately intertwined with the present suit before this court.

The primary claim in the writ of summons filed by the claimants in this suit is for a declaration that they are the bona fide owners of the apartments described as Flat 3B and Flat 3C, both being two-bedroom buildings with Boys' Quarters, located within the Abeh Signature Apartments estate at Plot 3213, Cadastral Zone A06, Maitama District, Abuja, also known as No. 1, Mekong Close, Maitama, Abuja.

Notably, the subject matter before the Court of Appeal involved the same properties, namely Flat 3B and Flat 3C, situated within the Abeh Signature Apartments estate at the same address. In the matter concluded before the Court of Appeal, the trial court, presided over by Hon. Justice Othman Musa, ordered the 1st Defendant/Applicant to vacate the two-bedroom property she had purchased from the 2nd Defendant after repudiating the contract of sale.

However, the Court of Appeal, in its unanimous decision, overturned and vacated the judgment of the trial court, thereby pronouncing the 1st Defendant/Applicant as the legal owner of the subject matter. Consequently, the Court of Appeal's judgment is binding on this Court and renders any judgment or order made by this court that conflicts with the appellate decision nugatory. Furthermore, any hearing in this suit would be futile and a mere academic exercise, as the superior court



has already made a pronouncement on the subject matter at hand. Given this pronouncement, it is also my respectful view that any further action taken in this matter would result in a situation of fait accompli for this court.

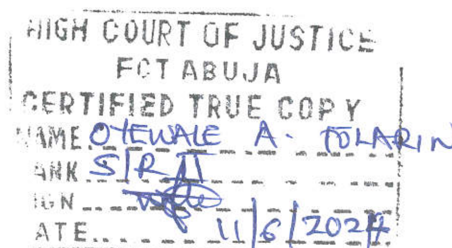
In light of the foregoing, it is clear that proceeding with this suit would be an exercise in futility, as this court cannot disregard the binding decision of the superior court. In other words, any action taken in this matter will result in a mere academic exercise and collision with the decision of the Court of Appeal. Therefore, this court should refrain from wasting its time on this matter or engaging in what would amount to a prohibited and redundant endeavour. This Court is not ready to swim in a stormy and forbidden river, lest it commit judicial suicide. On this, I shall say no more.

Consequent upon the above, the order of interlocutory injunction earlier made by this court in motion number M/11211/2022 on the 21/2/2023 is hereby set aside and vacated accordingly.

This matter with suit number CV/3261/2022 is hereby dismissed accordingly for want of jurisdiction, the Court of Appeal having been seised and determined the subject matter of the dispute between the parties before this Court.

I must place on record, however, that there is a remedy or option opened to the Claimants/Respondents against the judgment of the Court of Appeal. It is out of place for this court to suggest such a remedy or option.

This is the ruling of this court in this case.



Signed
Hon. Justice M. A. MADUGU
(Presiding Judge)
11/06/2024