

SUPREME COURT OF NIGERIA

FRIDAY 21ST JUNE, 2013. SC. 18/2012, 18A/2012

**CORAM:- I. T. MUHAMMAD, C. M. CHUKWUMA-ENEH,
S. GALADIMA, C. B. OGUNBIYI, S. S. ALAGOA, JJSC**

1. CHIEF GREAT OVEDJE OGBORU
 2. DEMOCRATIC PEOPLES PARTY APPELLANTS
AND
 1. DR. EMMANUEL EWETAN UDUAGHAN
 2. PEOPLES DEMOCRATIC PARTY RESPONDENTS
 3. INDEPENDENT NATIONAL ELECTORAL
COMMISSION
-

COURT PROCESSES - Abuse - Meaning - Abuse features where a party improperly uses process of court - To the irritation and annoyance of his opponent (H1)

LEGAL PRACTITIONERS - Authority - Conduct of case - Where counsel acts within scope of authority - Without express or implied limitation - Client is bound by exercise of such authority (H2)

AFFIDAVITS - Deposition - Proof - To substantiate the allegation against counsel - Evidence must be adduced to show that exhibit E was served on him (H3)

MOTIONS - Striking out - Regularization of - Party whose motion is struck out - Can either file fresh application or apply for relisting - But the options do not avail applicants - Since their application constitutes abuse of process (H4)

COURTS - Process - Abuse - Prevention - Court has inherent power to ward off abuse of its process - For purpose of maintaining its sanctity and dignity (H5)

FACTS

Appellants/applicants filed this application before the Supreme Court of Nigeria, seeking for an order of the court to set aside its decision made on the 2nd March 2012 in the consolidated Appeals

Nos. SC.18/2012 and SC.18A/2012. The application was supported by affidavit and a written address. Applicants contend that their earlier similar application for review of the judgment via their former counsel - Sebastian T. Hon. (SAN) was unjustly withdrawn by the said counsel on 15th October 2012 even when the court had adjourned hearing on same to 8th November 2012. Hence, they argued that the need arose for them to file the present application on 19th November 2012, seeking for the same relief. Respondents filed preliminary objections to the hearing of the application.

At the hearing, learned counsel for applicants when asked by the court to address it on the competence or otherwise of the present application, argued that the former counsel to applicants was not given authority to withdraw the application on the 15th October 2012. Hence, according to learned counsel, applicants' present application does not constitute an abuse of the process of the court. Learned counsel for 1st respondent vehemently opposed applicants' submission. He contended that applicants having given their counsel authority to represent them are bound by the position taken by the counsel in the matter. 1st respondent therefore urged the court to dismiss the application for being abuse of process. 2nd and 3rd respondents aligned themselves with the submission made by 1st respondent.

HELD (Unanimously dismissing the application per
OGUNBIYI JSC)

COURT PROCESSES - Abuse - Meaning

1. The Black Law Dictionary Ninth Edition at page 10 gave the definition of the word "abuse" as "a departure from legal or reasonable use; misuse." The phrase "abuse of process" was also defined at page 11 as:

"The improper and tortuous use of a legitimately issued court process to obtain a result that is either unlawful or beyond the process's scope."

On close perusal of the two motions, it will be discovered that, not only are the parties the same, but the subject matter and the reliefs sought are also the same. The concept of "abuse of

court process” has been given a precise definition, which is to say the process of the court has not been used bona fide and properly.

It involves an improper use of judicial process by a party in litigation.

Furthermore, the concept is also characterized as an action initiated without a just or reasonable cause. It merely takes an undue advantage of the reason that the process is available for indulgence. It is also a situation where the law is wrongly interpreted for purpose of accommodating actions in bad faith. It impugns the dignity of the court. Further still, and in the legal parlance, the phrase abuse of judicial process is generally employed when a party improperly uses to the irritation and annoyance of his opponent the efficient and effective administration of justice. An example is where a multiplicity of actions on the same subject matter are instituted against the same opponents on the same issues. The concept of abuse therefore lies in the multiplicity and the manner employed for the exercise the right. (pp. 2990 H/2996 B)

LEGAL PRACTITIONERS - Authority - Conduct of case

2. The conclusion that can be drawn from the foregoing view point is obvious; that is to say, the conduct of a case lies wholly with counsel. A free hand concept given to counsel therefore includes his compromising a client’s case even to the extent of submitting to judgment provided he acted in proper manner, good faith and not shown to overreach or defraud his client. In other words, where a party chooses a counsel he should be given a free hand to act and conduct his client’s case in a manner befitting his professional competence and ability. The independence of a counsel should be asserted; this is not however to encourage a counsel to be negligent in the conduct of his client’s case. On the part of a client, he is also expected to deliberately engage a diligent counsel whom he believes would deliver and not act to his detriment or put his interest in jeopardy.

A counsel stands in a position of an advocate in place of his client as fully empowered and not in half measure. To hold

a counsel in less capacity or esteem is to set a dangerous precedent for the legal profession and erode independence of representation. The fiduciary relationship of counsel and client is that of trust.

Put in another way, where a counsel apparently acts within the scope of actual authority without any express or implied limitation, the client is bound by the exercise of such authority. The duty of a counsel is to advise his client out of court and to act for him in court, and until his authority is withdrawn, he has, with regard to all matters that properly relate to the conduct of the case, unlimited power to do that which is best for his client. Counsel therefore has general and apparent authority to exercise his discretion within the professional skill and act in the best interest his client. (pp. 2992 A/2994 C)

D
AFFIDAVITS - Deposition - Proof

3. I hasten to also add that with the learned counsel Mr. Hon, SAN being a very senior member of the bar, the nature of allegation against him had put his reputation and integrity at stake. In other words, the use of the words, “gross misconduct against him,” are so weighty and require the confirmation that he is properly and adequately informed. I am mindful that the signatories to exhibit “E” were the clients who are laymen. However and that notwithstanding, they are adequately guided and represented by legal practitioner in the calibre of Dr. Osuala, who with all respect and without reservation I would say should not glory in subjecting the honourable profession to ridicule at the altar of disrepute. It is significant to note further that the deponent of the affidavit is one Chukwudebelu Ejike, a counsel in the law firm of Dickson I. Osuala & Co, who is also of the legal profession. Emphatically and for all intent and purpose, I hold the firm view that it is not enough as shown on the deposition at paragraph 20 of the affidavit in support and earlier reproduced that the learned counsel Mr. Hon, SAN had in fact been put on notice.

There is no conclusive evidence before us that exhibit ‘E’ was in fact ever served on the senior counsel, Mr. Hon. Paragraph 20 of the affidavit has not in my opinion disclosed enough

material substantiating the allegation levied. The court acts on facts and not mere speculation. (p. 2994 H)

MOTIONS - Striking out - Regularization of

4. The general principle of law as rightly submitted by the learned counsel Dr. Osuala is well established that a party whose motion is struck out has the option and is at liberty to either file a fresh application or apply that the one struck out be re-listed.

I have said earlier in the course of this ruling that as a general rule, a party whose application is withdrawn and struck out has the option to re-file a fresh application. The situation at hand, I repeat is however distinguishable where the application filed 19th November, 2012 is employed for purpose of disowning the representation and also challenging the authority of the senior counsel Mr. Hon, as well as bringing his integrity into question. I have also held the firm view that acceding the application will work a dangerous precedent against the entire legal profession especially where the use of judicial process against a very senior counsel without any iota of proven evidence to substantiate is reckless and frivolous. The applicant in the case at hand had not justified their right to institute a fresh action in place of the earlier one withdrawn and struck out. There must be an end to litigation and hence the applicants have as a result lost the opportunity to re-litigate the application filed 19th November, 2012 which is hereby dismissed as an abuse of court process. (pp. 2995 H/2997 C)

COURTS - Process - Abuse - Prevention

5. The power of the court to ward off an abuse of its process is inherent for it to exercise for purpose of maintaining its sanctity and dignity. (p. 2997 B)

REPRESENTATION

Dr. Dickson I. Osuala with Prof. J. N. Mbanugha, Nelson O. Imoh, M.G. Duku, for the Applicants

Chief Wole Olanipekun, SAN with Dr. Alex Izinyon, SAN; K. E. Mozia,

SAN, V. O. Grant, Esq., E. Ohwovoriole, Esq., O. Adeyemi, Esq., O. Ibori, Esq. and L. O. Fagbemi, Esq., for the 1st Respondent

J. O. Adesina (Mrs.) SAN with J. Ikomi, Ayo Asala, Kehinde Ogunwumiju, E. O. Abang, O. S. Adwara, D. Okere-Emeka (Mrs.),
B J. O. Eluemi and Chinedu Umeh, for the 2nd Respondent

Dr. Onyechi Ikpeazu, SAN with Uju Ikeazor (Mrs.), Prisca Ozoilesike and Mavis Ekwechi, for the 3rd Respondent

C **CASES REFERRED TO**

- Akanbi v. Alay (1989) 3 NWLR (pt. 108) 118
Adewunmi v. Plastex (Nig) Ltd. (1986) 2 NSCC 852
Afegbai v. A-G Edo State (2001) 14 NWLR (pt. 733) 425
D Ukachukwu v. Uba (2005) 18 NWLR (pt. 956) 1
Akpan v. Ekpo (2001) 5 NWLR (pt. 707) 502
Central Bank of Nigeria v. Ahmed (2001) 5 SC (pt. II) 146
Edjerode v. Ikine (2001) 12 SC (pt. II) 125
Agwasim v. Ojichie (2004) 10 NWLR (pt. 882) 613
E Okorodudu v. Okoromadu (1977) 3 SC 21
Okafor v. A-G Anambra State (1991) 6 NWLR (pt. 200) 659
A.C.B. Plc v. Nwaigwe (2011) 7 NWLR (pt. 1246) 380
Harriman v. Harriman (1989) 5 NWLR (pt. 119) 6
F Papersack (Nig) Ltd v. Odutola (2011) 10 NWLR (pt. 1255) 244
Borishade v. N.B.N. Ltd. (2007) 1 NWLR (pt. 1015) 217
F.R.N. v. Adewunmi (2007) 10 NWLR (pt. 1042) 399

BOOKS REFERRED TO

- G Black Law Dictionary 9th Edn. p. 10
Halburys' Laws of England, 3rd Edn. vol. 3 p. 52 para. 76 & 4th edn. vol. 3 para. 1180

LEAD JUDGMENT BY OGUNBIYI JSC

- H The two appeals in this case were by the order of this court consolidated and fixed for hearing on the 25th March, 2013. On the said date, the three sets of respondents through their respective counsel intimated the court of their notice of preliminary objection challenging the competence of the application on notice filed by the appel-

lants/applicants on the 19th November, 2012. The submissions on the objections are all filed vide the written address therein.

On the onset and just before the hearing of the appeal, the learned, counsel Dr. Dickson I. Osuala representing the appellants informed the court of the aforementioned existing motion which seeks for three reliefs predicated on 24 grounds. It is also supported by an affidavit and a written address. The totality of the application is for an order of this court setting aside its decision made on the 2nd day of March, 2012 in the two consolidated appeals SC.18/2012 and SC.18A/2012.

At this point and as revealed from its proceedings on the 15th October, 2012, the court informed itself of a similar motion by the same applicants which was withdrawn and struck out on an oral application by a different counsel, in the person of Mr. Sebastian T. Hon, SAN, who represented the appellants/applicants. As a result of this discovery, the counsel Dr. Osuala was called upon to address this court as to why the application now before us should not be treated as an abuse of court process in view of the earlier similar application which was struck out on the 15th October, 2012.

The reproduction of the pending application is as follows:

“1. An order setting aside the judgment of this honourable court delivered on the 2nd day of March, 2012 in consolidated appeals Nos. SC. 18/2012 and SC.18A/2012: Chief Great Ovedje Ogboru & Anor. v. Dr. Emmanuel Ewetan Uduaghan & 2 Ors.

2. An order directing the said consolidated appeals to be determined on the merit by a re-constituted panel of seven (7) Justices of this honourable court.

3. Such further or other order(s) as this honourable court may deem fit to make in the circumstances.”

The 24 grounds predicating the application are all clearly spelt out and supported by 21 paragraphs affidavit deposed to by one Chukwudebelu Ejike, a counsel in the law firm of Dickson D. I. Osuala & Co., solicitors to the appellants/applicants.

In defence of the question raised by the court on the competence of the application, the learned appellants/applicants’ counsel, Dr. Osuala submitted that the withdrawal of the earlier motion by Mr. Hon, SAN on the 15th October, 2012 was done on his own instruction and authority. Reference was drawn to the letter exhibit ‘E’ at

paragraph 20 of the affidavit in support of the application which the learned counsel submitted was addressed to, the Chief Justice of Nigeria (CJN) and he therefore sought to rely thereon as evidence of the applicants disassociating themselves from the unauthorized withdrawal of their motion. The learned senior counsel Chief Olanipekun B represented the 1st respondent and vehemently disagreed with the submission put forward on behalf of the applicants on the extent and authority of a client's control over his counsel. Put differently he argued, that having been briefed, the counsel is deemed well equipped C to handle matter as an authority on behalf of his client. To further drive the point squarely home, he emphasized that a counsel is neither a steward nor a servant of his client and therefore needed no further added instruction to perform his duties but stands sufficient. See *Akanbi v. Alay* (1989) 3 NWLR (Pt. 108) P. 118 and *Adewunmi D v. Plastex (Nig) Ltd.* (1986) 2 NSCC 852; (1986) 3 NWLR (Pt. Pt.32) 767. Learned counsel therefore urged that the application be dismissed.

Mrs. J. O. Adesina of counsel represented the 2nd respondent and aligned with the submission advanced by 1st respondent's counsel. Also in further substantiation and to re-establish her stance, reliance was placed on the case of *Afegbai v. A.-G. Edo State* (2001) 14 NWLR (Pt. 733) p. 425. E

The learned counsel re-iterated that whatever decision was taken by Sebastian Hon, SAN on the 15th October, 2012, it stands binding F on the clients, the order striking out, counsel submitted, did not give further authority to reopen. On the totality therefore she also urged in favour of dismissing the application with substantial costs.

On behalf of the 3rd respondent, the learned counsel Dr. G Ikpeazu, SAN implored the court to consider the proceedings of the 15th October, 2012 when a similar application seeking to set aside the judgment of this court was the subject matter: that the withdrawal made and followed by the subsequent order striking out are still binding on the applicants. Counsel related to the authority the case of H *Ukachukwu v. Uba* (2005) 18 NWLR (Pt. 956) page 1 and also prayed that the application be dismissed.

Responding to the submission supra, Dr. Osuala, the learned counsel re-affirmed his stance and argued as inapplicable the cases cited on behalf of the 1st respondent on the ground that none is

related to failure to act on clients' authority. In further reiteration, learned counsel restated the established position of the law whereby a withdrawal of one motion does not preclude or shut out a party from filing a subsequent application. See *Akpan v. Ekpo* (2001) 5 NWLR (Pt. 707) p. 502. The application, learned counsel argued, was never heard on its merit and hence the counsel Mr. Hon., SAN ^B had no reason to have withdrawn same without authority.

The only issue at hand and which calls for determination relates to the competence or not of the application filed the 19th November 2012 in view of the withdrawal of a similar motion on the 15th October, 2012 and which was struck out. ^C

In order to properly comprehend and appreciate the proceedings which transpired in court on the 15th October 2012, a recapitulation is very necessary. At the initial inception for instance, all counsel representing the various parties announced their appearances, ^D wherein the learned counsel Mr. S. T. Hon, SAN represented the applicants and introduced their application filed 8th May 2012. The three sets of respondents each filed notice of preliminary objection challenging the competence of the motion. The learned counsel Messrs. Wole Olanipekun, SAN, A. Adenipekun; SAN and C. Ikpeazu (Miss) ^E represented the three sets of respondents respectively.

At the point of commencing the hearing of the application, the learned senior counsel Mr. Hon, sought the court's indulgence for an adjournment on the ground that he needed time within which to ^F prepare his response to the list of authorities just served on him in court. Consequent upon the application for adjournment, and despite the objection raised by the learned senior counsel Chief Olanipekun, the court nevertheless obliged and adjourned for hearing on the 8th November, 2012. ^G

Sequel to the order for an adjournment and on an application at the instance of the senior counsel Mr. Hon, which was not objected to by any of the respondents' counsel, the motion filed the 8th May, 2012 and earlier adjourned was again recalled by the court.

At the point in time, Mr. Hon, SAN applied orally to withdraw ^H the said motion and in the absence of any objection from respondent counsel, same was accordingly struck out. Subsequent to the striking out, the same applicants on 19th November 2012 filed another similar motion, now before us and seeking the following reliefs:

“1. An order setting aside the judgment of this honourable court in consolidated appeals nos. SC. 18/2012 and SC.18A/2012: Chief Great Ovedje Ogboru & Anor. v. Dr. Emmanuel Ewetan Uduaghan & 2 Ors.

2. An order directing the said consolidated appeals to be determined on their merit, either by the Supreme Court or the Court of Appeal, by a different panel of justices.

3. Such other order(s) as this honourable court may deem fit to make in the circumstances.”

On a critical perusal of the reliefs sought on the earlier application filed on 8th May, 2012 vis-à-vis those of the 19th November, 2012, the totality reveal that the two are very similar in nature. The certainty of this fact is conceded to by the applicants themselves at paragraphs 19 and 20 of their affidavit in support of the motion wherein the former counsel Mr. S. T. Hon, SAN was seriously indicted for allegedly acting without the clients’ authority in withdrawing the motion earlier struck out. The reproduction of the paragraphs are pertinent as follows:

“19. That the said Sebastian T. Hon. (SAN), without the authority of the appellants/applicants and for some very curious reasons, withdrew the motion on the 15th Day of October, 2012, even when this honourable court had adjourned the matter to November 8, 2012.

20. That the appellants/applicants wrote a letter to the Chief Justice of Nigeria (CJN) to disassociate themselves from the unauthorized withdrawal of their motion for a review of the consolidated appeals nos. SC.18/2012 and SC.18A/2012. Same was dispatched through DHL by one Mr. Efe Duku, an aide to the 1st appellant/applicant. A copy of the said letter with DHL’s dispatch note/receipt are attached herewith and marked exhibit ‘E’”

While all the learned counsel representing respondents submitted as incompetent the subsequent application filed the 19th November, 2012 and therefore an abuse of court process, applicants’ learned counsel argued the contrary and held same as competent.

The Black Law Dictionary Ninth Edition at page 10 gave the definition of the word “abuse” as “a departure from legal or reasonable use; misuse.” The phrase “abuse of process” was also defined at page 11 as:

“The improper and tortuous use of a legitimately issued court process to obtain a result that is either unlawful or beyond the process’s scope.”

It is an established fact by the deposition of the applicants on their affidavit in support of the motion at paragraph 18 that Mr. Sebastian T. Hon, SAN was legitimately briefed to represent them as counsel in handling their application which was earlier struck out. The averment for instance has this to say:

“18. That the appellants/applicants being dissatisfied with the judgment of this honourable court of 2nd day of March, 2012, through the 1st applicant, then briefed Mr. Sebastian T. Hon (SAN) on Tuesday, 1st day of May 2012 to file an application for a review, by this honourable court, of its judgment of March 3, 2012 in the consolidated appeals Nos. SC.18/2012 and SC.18A/2012 with a view to getting same determined on the merit by the noble Justices of the Supreme Court.”

Interestingly, the very mandate and authority given Mr. Hon, SAN as shown in paragraph 18 supra is now a serious subject of question by the applicants per their deposition at paragraphs 19 and 20 of the affidavit reproduced earlier in the course of this judgment. Following from the foregoing deductions, the pertinent question begging for an answer is, would Dr. Osuala be right on his allegation against Mr. Hon, SAN that he acted without authority on the 15th October, 2012? In other words, was the senior counsel not competent in representing the applicants? The answer to this question is not far fetched in view of paragraph 18 of the affidavit of the applicants supra. On whether or not the exercise of discretion by counsel could be subject to question, judicial authorities on the views held by this court are very instructive. For instance in the case of Akabi v. Alao (supra) his Lordship Craig, JSC subscribed and adopted the view held by Eso, JSC in the case of Mosheshe General Merchants Ltd. v. Nigeria Steel Products Ltd. and said:

“A counsel who has been briefed and has accepted the brief and also has indicated to the court that he has instructions to conduct a case has full control of the case. He is to conduct the case in the manner proper to him; so far he is not in fraud of his client. He can even compromise the case. He can submit to judgment. Sometimes he could filibuster, if he considers it necessary for the conduct of his

case but subject to caution by the court. The only thing open to the client is to withdraw instructions from the counsel or if the counsel was negligent sue in tort for professional negligence. Such are the powers but such are also the risks.” (Italics are mine).

- The conclusion that can be drawn from the foregoing**
- B view point is obvious; that is to say, the conduct of a case lies wholly with counsel. A free hand concept given to counsel therefore includes his compromising a client’s case even to the extent of submitting to judgment provided he acted in**
- C proper manner, good faith and not shown to overreach or defraud his client. In other words, where a party chooses a counsel he should be given a free hand to act and conduct his client’s case in a manner befitting his professional competence and ability. The independence of a counsel should be asserted;**
- D this is not however to encourage a counsel to be negligent in the conduct of his client’s case. On the part of a client, he is also expected to deliberately engage a diligent counsel whom he believes would deliver and not act to his detriment or put his interest in jeopardy.**
- E A counsel stands in a position of an advocate in place of his client as fully empowered and not in half measure. To hold a counsel in less capacity or esteem is to set a dangerous precedent for the legal profession and erode independence of representation. The fiduciary relationship of counsel and client**
- F is that of trust.**

- As rightly submitted and argued by the learned senior counsel Chief Olanipekun, a counsel is neither a steward nor a servant of his client but stands at the bar as an authority. The, learned authors
- G Halburys’ Laws of England, 4th Edition, Volume 3 at paragraph 1180** had set out the scope and authority of counsel conducting case or an appeal on behalf of his client. In defining the general framework of a counsel’s duties as agent and representative of his client therefore, it was specifically; said as follows:

- H** *“When a counsel is instructed, then to his duties to the court, and subject to his right to advise another course of action, he must accept and adhere to the instructions given by or on behalf of his client, but counsel is entitled to insist and as a general rule, ought to have complete control over how those instructions are carried out*

and over the actual conduct of the case. If he is not given this control he is entitled to refuse or return the brief."

A counsel's control over the instructions given him by client must either be complete and total or none. On the affidavit evidence supporting the motion, the applicants alleged that their former counsel Mr. Hon, SAN did not consult them before he withdrew the motion and hence he acted without instructions. In the circumstance at hand, and before the depositions could hold ground, the applicants must as a matter of obligation prove that the general authority given Mr. Hon, SAN in conducting their case was expressly and specifically limited to the exclusion of the withdrawal made. Regrettably, such facts have not been placed before this court on the affidavit evidence. A client, having engaged a counsel to conduct his case, is bound by that counsel's agreement, however much he may disapprove of that course. See *Adewunmi v. Plastex (Nig.) Ltd.* Vol. 17 (1986) (Pt. II) NSCC p. 852 at 861; (1986) 3 NWLR (Pt. 32) 767. The brief facts in the foregoing case are intriguing where Plastex Nig. Ltd. were the tenants of Festus Adewunmi who sued for recovery of the premises and arrears of rent. In the absence of Plastex calling any evidence at the trial, judgment was given in favour of the plaintiff. On appeal before the lower court, the learned counsel representing Plastex sought leave to adduce additional evidence. The application was refused and counsel applied to withdraw the appeal. In the absence of any objection from the respondent's counsel, the appeal was accordingly dismissed.

Interestingly, and consequent upon the dismissal, Plastex briefed another counsel who applied to the Court of Appeal for reinstatement of the appeal on the ground that the former counsel had no instructions to withdraw same. The lower court granted the application following which Adewunmi was aggrieved and therefore appealed to this court. The main issue for determination in the appeal was the scope of authority of counsel in a case. In allowing the appeal, Eso, JSC at pages 863-864 in his concurring judgment had this to say:

"Once a counsel appears in court in a case, and announces his appearance, the court assumes he has the authority of his client for the conduct of the case. It is not for a client to announce the appearance of his counsel... It is not for the court to start an enquiry into his authority and the court never does... once he is so instructed, and his

appearance and announcement in court, that he is so instructed, raises the presumption of his authority he assumes full control of the conduct of his client's case... once a matter is within the ordinary authority of counsel... For a client to jettison one counsel for another, for the simple reason that the first counsel failed to win his case, and the other would be required to conduct the same case in that court, or to make such failure to win a case a ground of appeal in a higher court is a complete misconception of the authority of the lawyer." (Italics mine).

The foregoing pronouncement is clear and speaks for itself. **Put in another way, where a counsel apparently acts within the scope of actual authority without any express or implied limitation, the client is bound by the exercise of such authority.** See *Afegbai v. A.-G., Edo State* supra. **The duty of a counsel is to advise his client out of court and to act for him in court, and until his authority is withdrawn, he has, with regard to all matters that properly relate to the conduct of the case, unlimited power to do that which is best for his client.** See again *Afegbai v. A.-G., Edo State* at 458. **Counsel therefore has general and apparent authority to exercise his discretion within the professional skill and act in the best interest his client.**

From the community reading of the views held by this court on the authorities in reference supra, the applicants on their affidavit in support of the application at hand, have not shown sufficient reason that Mr. Hon, SAN did act without their authority on the 15th October, 2012. In other words, there was no express evidence adduced to show that the learned senior counsel exceeded authority given him. I have expressed an earlier view that the applicants are introducing a very dangerous trend which no doubt will subject a counsel to the clients' intimidation. This precedent will certainly not augur well for the legal profession which from time immemorial had recognized the liberty of a counsel's exercise of discretion to act on behalf of his client. This does not however condone negligence or purposeful compromises in the conduct of a client's case to his detriment which can be subject of Intervention by the Legal Practitioners Disciplinary Committee (LPDC).

I hasten to also add that with the learned counsel Mr. Hon, SAN being a very senior member of the bar, the nature

of allegation against him had put his reputation and integrity at stake. In other words, the use of the words, “gross misconduct against him,” are so weighty and require the confirmation that he is properly and adequately informed. I am mindful that the signatories to exhibit “E” were the clients who are laymen. However and that notwithstanding, they are adequately guided and represented by legal practitioner in the calibre of Dr. Osuala, who with all respect and without reservation I would say should not glory in subjecting the honourable profession to ridicule at the altar of disrepute. It is significant to note further that the deponent of the affidavit is one Chukwudebelu Ejike, a counsel in the law firm of Dickson I. Osuala & Co, who is also of the legal profession. Emphatically and for all intent and purpose, I hold the firm view that it is not enough as shown on the deposition at paragraph 20 of the affidavit in support and earlier reproduced that the learned counsel Mr. Hon, SAN had in fact been put on notice. Even at the risk of being repetitive, I will still restate as unfortunate, and also heart breaking that clients as laymen should be allowed to castigate and reduce a very senior counsel to the level of such lowest ebb. The present counsel Dr. Osuala who is promoting their cause, is more to blame than the petitioners. **There is no conclusive evidence before us that exhibit ‘E’ was in fact ever served on the senior counsel, Mr. Hon. Paragraph 20 of the affidavit has not in my opinion disclosed enough material substantiating the allegation levied. The court acts on facts and not mere speculation.**

On the question of exercise of authority by Mr. Hon, SAN therefore, it is my firm view that he acted within the powers given him by the applicants who were his clients. The withdrawal of the motion on the 15th October, 2012 was efficiently and rightly exercised within that mandate.

In view of the foregoing conclusion, the next point for consideration is the pending application. While all the respondents’ counsel submitted it is an abuse of court process, the learned counsel Dr. Osuala on behalf of the applicants argued the contrary.

The general principle of law as rightly submitted by the learned counsel Dr. Osuala is well established that a party whose motion is struck out has the option and is at liberty to

either file a fresh application or apply that the one struck out be re-listed. See Akpan v. Ekpo (supra). The question however is whether the said principle applies to the case at hand. The answer to this question will require a critical analysis of the motion filed 8th May, 2012 which was struck out on 15th October, 2012 as against the one
 B filed on 19th November, 2012, now before us. ***On close perusal of the two motions, it will be discovered that, not only are the parties the same, but the subject matter and the reliefs sought are also the same. The concept of “abuse of court process”***
 C ***has been given a precise definition, which is to say the process of the court has not been used bona fide and properly.*** See Central Bank of Nigeria v. Ahmed & Ors. (2001) 5 SC. (Pt. II) 146; (2001) 11 NWLR (Pt. 724) 369; Edjerode v. Ikin (2001) 12 SC (Pt. II) 125; (2001) 18 NWLR (Pt. 745) 46. ***It involves an im-***
 D ***proper use of judicial process by a party in litigation.*** See Agwasim v. Ojichie (2004) 10 NWLR (Pt. 882) 613 at 624-625.

Furthermore, the concept is also characterized as an action initiated without a just or reasonable cause. It merely takes an undue advantage of the reason that the process is
 E ***available for indulgence. It is also a situation where the law is wrongly interpreted for purpose of accommodating actions in bad faith. It impugns the dignity of the court. Further still, and in the legal parlance, the phrase abuse of judicial process***
 F ***is generally employed when a party improperly uses to the irritation and annoyance of his opponent the efficient and effective administration of justice. An example is where a multiplicity of actions on the same subject matter are instituted against the same opponents on the same issues.*** See Okorodudu
 G v. Okoromadu (1977) 3 SC 21; Okafor v. A.-G., Anambra State (1991) 6 NWLR (Pt. 200) 659 and A.C.B. Plc v. Nwaigwe (2011) 7 NWLR (Pt. 1246) 380. ***The concept of abuse therefore lies in the multiplicity and the manner employed for the exercise of the right.*** See Saraki v. Kotoye (supra). In other words, the right
 H availing the applicants to either re-file or re-list a motion struck out is not applicable to the case at hand as “wrongly conceived and submitted by their learned counsel. This is not to say however that the right does not at all exist in appropriate, situational circumstance. In the case at hand for instance, the applicants have lost the opportu-

nity in view of the manner they sought to portray their former counsel in bad light. With the earlier motion having been struck out, the subsequent refilling of the present application without any reasonable facts deposed to on the affidavit in support, is in itself a gross abuse of court process. The abuse consists in the intention, purpose and aim of the person-exercising the right to harass, irritate and annoy the adversary and which will interfere with the administration of justice. See *Harriman v. Harriman* (1989) 5 NWLR (Pt. 119) 6. ***The power of the court to ward off an abuse of its process is inherent for it to exercise for purpose of maintaining its sanctity and dignity.*** See *Papersack (Nig) Ltd v. Odutola* (2011) 10 NWLR (Pt. 1255) 244 at 250. B C

I have said earlier in the course of this ruling that as a general rule, a party whose application is withdrawn and struck out has the option to re-file a fresh application. The situation at hand, I repeat is however distinguishable where the application filed 19th November, 2012 is employed for purpose of disowning the representation and also challenging the authority of the senior counsel Mr. Hon, as well as bringing his integrity into question. I have also held the firm view that acceding the application will work a dangerous precedent against the entire legal profession especially where the use of judicial process against a very senior counsel without any iota of proven evidence to substantiate is reckless and frivolous. The applicant in the case at hand had not justified their right to institute a fresh action in place of the earlier one withdrawn and struck out. There must be an end to litigation and hence the applicants have as a result lost the opportunity to re-litigate the application filed 19th November, 2012 which is hereby dismissed as an abuse of court process. D E F G

The application is dismissed and I make an order that N50, 000.00 cost be awarded to each set of respondents against applicants.

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MUHAMMAD JSC

The motions in SC.18/2013 and SC. 18A/20 13 were consolidated for the purposes of hearing. They were both heard on the 25th

day of March, 2013 and a ruling reserved for today.

My learned brother, Ogunbiyi, JSC, has done full justice to the motions and I agree with her in her reasoning and conclusion which I adopt as mine. I have nothing more to add. I abide by her conclusion and other orders made in the lead ruling, costs inclusive.

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CHUKWUMA-ENEH JSC

I have read before now in draft the lead ruling of my learned brother, Ogunbiyi, JSC in this matter and I agree with him for the reasons and conclusion that have been ably expounded therein that notwithstanding the brilliant industry of the applicant's counsel, Dr. Dickson Osuala who has a bad case, the instant application for an order of this court to set aside its judgment delivered on 2nd day of March 2012 in the above mentioned consolidated appeals is a gross abuse of the process of this court and should be dismissed. This court has so held in similar circumstances as per PD.P. v. C.P.C. in the consolidated appeals nos. SC.272/2011 delivered by this court on 31/10/2011; reported in (2011) 17 NWLR (Pt. 1277) 485 and Buba Marwa v. Murtala Nyako in the consolidated appeals Nos. SC.141/2011, SC.766/2011, SC267/2011, SC365/2011 and SC. 357/2011 delivered by this court on 22/1/2012, reported in (2012)6 NWLR (Pt. 1269) 199 that it has no jurisdiction to deal with the instant application hence it has been struck out and so it cannot revisit its decision in the same matter with a view to overruling itself. Simply put, it constitutes an abuse of process as there must be an end to litigation. In these cases from the available record their respective appeals, each of them have arisen after 60 days of the lower courts' decisions have been delivered. The facts of the instant matter are on all fours with the facts in the above cited appeals and so is bound to suffer the same fate as those cited appeals.

However the important question that has cropped up in the matter concerns the control and authority of counsel in the conduct of his client's case in a court proceeding as the instant one. See *Borishade v. N.B.N. Ltd.* (2007) 1 NWLR (Pt.1015) 217. This discourse has been provoked by the serious depositions in support of the instant application filed by the new counsel in this application.

In the affidavit in support of the application in this cause filed

his new counsel Dr. Osuala this court has been asked to set aside its judgment in the aforesaid consolidated appeals. The crux of the depositions otherwise castigating senior counsel Mr. Hon in his professional status. The synergy in the relationship of counsel and his client should at all times howbeit must be free from rancour as it is supposed to be one of absolute confidence. The depositions as follows: B

“18. That the appellant/applicant, being dissatisfied with the judgment of this honourable court on 2nd day of March, 2012 through the 1st appellant, then briefed Mr. Sebastian T. Hon. (SAN) on Tuesday, 1st day of May 2012 to file an application for a review, by this honourable court of its judgment of March 2, 2012 in the consolidated appeal nos. SC.18/2012 and SC.18A/2012 with a view to getting same determined on the merit by the noble Justices of the Supreme Court. C

19. That the said Sebastian T. Hon (SAN) without the authority of the appellants/applicants and for some very curious reasons, withdrew the motion on the 15th day of October 2012, even when this honourable court had adjourned the matter to November 8, 2012. D

20. That the appellants/applicants wrote a letter to the Chief Justice of Nigeria (CJN) to dissociate themselves from the unauthorised withdrawal of their motion for a review of the consolidated appeals nos. SC.18/2012 and SC.18A/2012. Same was dispatched through DHL by one Mr. Efe Duku, an aid to the 1st appellant/applicant. A copy of the said letter with DHL's dispatch note/receipt are attached herewith and marked exhibit 'F'. E F

By any standard the foregoing depositions have attacked Mr. Hon (SAN) in his professional status and in principle he must be put on due notice which has not been done here. An application of this nature ought not to be decided without involving both counsel and his client as it borders on professional misconduct and it raises an issue of breaching Mr. Hon's right to fair hearing where an inquiry as the instant one is conducted behind him. The appellant/applicant by the foregoing depositions has put it as clearly as can possibly be that the withdrawal of the substantive motion in this matter on 15/10/2012 has been unauthorised by him, hence the instant application now before my noble Lords is to set aside this court's judgment in the said consolidated appeals given on 2/3/2012. This cause has prima- G H

rily raised beyond question the extent and, scope of a solicitor's control and authority of his client's matter in the proceedings before the court.

It is settled that the relationship that arises from a litigant instructing a solicitor to act on his behalf in a court proceeding (as the instant one) gives rise to a solicitor and client relationship otherwise founded on agency and in strict confidence. By this relationship, Counsel rightly takes over completely the control and conduct of his client's case in court and this situation underscores the proposition of the presumption though rebuttal that once counsel has announced his appearance in court as counsel representing acting on behalf of a litigant in any proceedings before the court, counsel is presumed not only to be legally qualified qua counsel to act in that capacity but also in doing so he is taken as having been fully instructed to act in the matter in the proceedings. In other words, counsel is given a free hand in the conduct of the matter it couldn't be otherwise albeit to save turning the relationship of solicitor and client into a charade. Although it is true to say that appearance of counsel in the circumstance may have something to do with adjudication, but certainly not with the competence of the court to adjudicate over a matter and therefore with the jurisdiction of the court. This is not to say that the control and conduct of the proceedings in a case in a court may not be restricted specifically as to its extent and scope; although this is not normally so in regard to compromising or settlement of proceedings already in court and as in this instance as in will show anon. Invariably, this can be done by written instructions to counsel and counsel is not expected to go beyond the instruction so given. Counsel therefore by virtue of this relationship becomes the dominus litus in regard to the control and conduct of his client's case in court albeit to the best of his ability. See: *FR.N. v. Adewunmi* (2007) 10 NWLR (Pt.1042) 399. It cannot be otherwise as counsel is supposed to operate within his instructions and thus stave off the unnecessary embarrassment in court of counsel constantly having to be seeking further instructions as issues keep cropping up in court in the course of the proceedings, must observe that on a few occasions such incidents have arisen before us, this court has always taken umbrage at the manner of counsel not having taken full instructions in the matters already in before the commencement of the proceedings and on those occasions it has

admonished counsel to save this court and counsel on the other side the unwarranted distractions so caused in the court proceedings albeit pointing to the unpreparedness of counsel in dealing with their matters.

Coming to the instant case the arguments of the appellant/ applicant cannot hold sway on the peculiar facts of this case that the senior counsel - Sebastian I. Hon (SAN) has acted without authority in withdrawing the instant application which has accordingly been struck out even given the ground that guided by the previous decisions on similar subject-matters-the application no-basis. What I have by the foregoing reasons attempted to show here is that Mr. Hon, learned senior counsel in this matter on having been instructed by the appellant assumes completely the control and conduct of the matter to the best of his ability otherwise counsel cannot function effectively and unequivocally.

I must observe that based on decided authorities, it is settled that counsel as the ostensible agent of his client binds his client where he makes a compromise or settlement during the course of a trial; in that case the client is bound even though he has given his counsel no authority to do so. This view is solidly founded on the case of *Strauss v. Frances* (1866) L.R. 1 Q.B. 379. The same conclusion goes for an unauthorised admission by counsel as where it cannot be withdrawn if the circumstances are such as to give rise to an estoppel as the party has acted to his disadvantage relying on it and the injustice so occasioned cannot be avoided.

The practice in this country is moderated considerably in this regard by the practice in England. In *Halsbury's Laws of England*, 3rd Edn., Vol.3 p.52 para.76 under the heading "Barristers" the learned authors said:

"The statements of counsel, if made on the trial of an action or in the course of any interlocutory proceedings in the presence of the client or his solicitor or someone authorized to represent the solicitor and not repudiated at the time, bind the client, and may be used as evidence against him". And therefore clients are bound by the statements made in many cases by their counsel. It shows the extent and scope of the manner of the control counsel exercises in conducting his client's case."

This statement is based on the dictum of Burrough J. in the

case of *Colledge v. Horn* (1825) 3 Bing. 119 at 122. The foregoing proposition of the law in England is similar to the position here, n
 However some judicial opinions are to the effect that the statement is too wide and this view has come up for discussion in the case of *Clark (Woncaster) Ltd. v. Wilkinson* (1965) 2 WLR 751, wherefore
 B the Court of Appeal has examined the statement to determine to what extent it is too wide.

In the cited case, counsel appearing for the appellant admitted without instruction that the first solicitor in the matter has had au-
 C thority to sign an estate contract in regard to the auctioneer's sale of the plaintiff's/respondent's property. The High Court relying on the above quoted statement in the aforesaid Halsbury's Laws held that the defendant/appellant is bound by what his counsel has said. The Court of Appeal unanimously allowed the defendant's/appellant's
 D appeal. Lord Denning M.R. in showing the extent to which the above statement in Halsbury's Laws etc could hold, has said that an admission made by error in a pleading can be withdrawn if the other party has not been prejudiced and that even under the Rules of Court that formal admission in a pleading can also be withdrawn at any time on
 E such terms as may be just. Salmond L.J. in the cited case went even further in this respect, his Lordship has said that if a man who appears in person in court makes an admission in the course of the proceedings can withdraw it unless the other party has acted on it to his detriment;
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"I do not see... how a man can be any worse off in this respect because, instead of making the admission himself the admission is made on his behalf by counsel".

It is beyond argument that the relationship of counsel and cli-
 G ent is overshadowed by the implications of this case. And so that where counsel has taken no instruction not to mention specific instructions having been given, in other words has acted without instruction (for example in land disputes in view of their sensitive and critical nature in this country), the court may intervene to set aside
 H the deal'. That is to say that the control and authority of counsel in the conduct of his client's matter in court cannot be said to be absolute to the extent that the court may not intervene as in the above cited case. Although, the cited case has showed the extent and scope of the statement in Halsbury's Laws there can be no doubt that on

decided authorities that the two occasions in which a client as here is bound by unauthorised statement by his counsel being his client's ostensible agent is where he makes a compromise or settlement during the course of a trial even although he has given his counsel no authority to do so; again see: *Strauss v. Frances* (1866) L.R. 1 Q.B. 379 and secondly, an unauthorized admission cannot, be withdrawn where the circumstances have given rise to an estoppel and again in the circumstances where the other party to the case has acted to his prejudice relying on the admission and the injustice cannot; in any way be avoided. Such admission cannot be withdrawn as in the circumstances he is estopped. There can, therefore, be no doubt that on the peculiar facts of this matter that the appellant is bound by his counsel's (Mr. Hon's) withdrawal of the instant application and has undertaken to compromised settle the matter ostensibly acting on the binding decisions of this court. In my judgment Mr. Hon has acted as a good counsel would have acted in the face of similar circumstances. I must appreciate his courage which is worthy of emulation by any other counsel acting in such circumstances bearing in mind that he is first and foremost an officer of the court.

Besides, it must be borne in mind that this court has no jurisdiction to entertain the substantive matter in these proceedings. And so there can be no question of a miscarriage of justice having arisen in this matter. Furthermore, the instant application to revisit the afore-said decision of court on this matter in all its ramifications constitute a gross abuse of court process. There must therefore be an end to litigation.

For these reasons and the fuller reasons in the lead judgment I too dismiss the application and abide by all the orders therein contained.

GALADIMA JSC

I have had the opportunity of reading the draft copy of the ruling of my brother, Ogunbiyi, JSC just delivered. The applicants herein have not justified their right to institute a fresh action to replace the earlier one they have withdrawn and was struck out. I agree that the applicants have, as a result, lost the opportunity to relitigate the application they filed on 19/11/2012, and it ought to be

dismissed and is hereby dismissed as an abuse of the process of this court.

Accordingly, the application is dismissed. I too make an order that N50,000.00 costs be awarded to each set of the respondents against the applicants.

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ALAGOA JSC

I read before now in draft form the lead ruling just delivered by my learned brother, Clara Bata Ogunbiyi, JSC and I agree that the application is an abuse of process and should be dismissed. The point is well taken and the authorities of *Mosheshe General Merchants Ltd. v. Nigeria Steel Products Ltd and Adewunmi Plastex (Nig.) Ltd.* are apposite that a counsel has full control and authority of his client's case once he takes up his client's brief and announces his appearance in court as counsel for his client.

On the duty of a legal practitioner in the conduct of a client's case this court per Ogundare, JSC, in *Attorney-General of the federation v. A.J.C. Ltd. & Ors* (1995) 2 NWLR (Pt.378) 388 held follows:

"A counsel retained to conduct a case has general authority to consent to the withdrawal of the case and a compromise is within his apparent authority and binding on the client notwithstanding that the client may have dissented unless the dissent was brought to the notice of the opposite party at the time. The apparent authority with which a counsel is clothed when he appears to conduct a case is to do everything which in the exercise of his discretion he may think best in the interest of his client in the conduct of the case if within the limits of this apparent authority he enters into an agreement should be held binding on his client. But this general authority is predicated on the existence of a counsel/client relationship." (Italicizing mine for emphasis)

In *Chief John Oyegun v. Chief Francis Arthur Nzeribe* (2010) 16 NWLR (Pt. 1220) 568, this court per Ogbuagu, JSC also held

"I take it that, this is not a matter of technicality but an established principle and firmly settled law, where a counsel has been briefed and he accepted the brief and" has even appeared before the court and announced his appearance, obviously he has full control of the

case and he is expected to take full responsibility in respect thereof.” (Italicizing mine for emphasis) See also Edozien v. Edozien (1993) 1 NWLR (Pt. 272) 676.

It is for this reason that courts are not patient with litigants who, while proceedings are going on interrupt counsel and sometimes even the court, creating a nuisance of themselves when they have the in- B
kling or convince themselves that their matters are not being properly presented by their counsel. What a client does with his counsel outside court is between him and his counsel but once proceedings in court are in progress, his counsel is master of his client’s case and C
whatever pronouncements he makes in court regarding his client’s case will be seen by the court as authoritative and as representing his client’s position. Clients are not masters to their counsel and how they conduct their client’s cases in court are entirely up to them. It will be setting a dangerous precedent if the reverse were the case. D

There is a fiduciary relationship between a counsel and his client which should ensure that a client’s rights are fully being advanced and protected. There is a duty on counsel to present his client’s case with utmost devotion, sincerity and honesty. In doing so, he must stand firm and refuse to be dictated to by his client. I also dismiss the E
application for this and the fuller reasons given in the lead ruling and award N50,000.00 costs to each set of the respondents against the applicants. Application dismissed.

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