

SUPREME COURT OF NIGERIA
FRIDAY 21ST FEBRUARY, 2014. SC. 116/2011
**CORAM:- W. S. N. ONNOGHEN, M. S. MUNTAKA-
COOMASSIE, K. B. AKA'AH, K. M. O. KEKERE-EKUN,
J. I. OKORO, JJSC**

1. CITEC INTERNATIONAL ESTATE LTD
 2. SAKA OLUDARE BELLO
 3. MRS. ADERONKE BELLO
 4. AKIN FAYINMINU
 5. NURUDEEN JINADU APPELLANTS
 6. GOKE ODUNLAMI
- AND
1. JOSIAH OLUWOLE FRANCIS
 2. JOSIAH OLUSOLA BIODUN (MRS.)
 3. JOSIAH MICHAEL
 4. FASUBAA ALBERT ADEMOLA RESPONDENTS
 5. CORPORATE AFFAIRS COMMISSION

SUPREME COURT - Judgment - Finality of - By 1999 Constitution s. 235 - SC cannot sit on appeal over its judgment - Although it has inherent powers to set aside same in appropriate cases - But such cannot be converted into appellate jurisdiction (H1)

SUPREME COURT - Judgment - Setting aside - Applicant seeking to set aside judgment of the court - Must show evidence of non-compliance with the rules - Or for other irregularities arising from rules of practice and procedure (H2)

APPEALS - Enlargement of time - Application for - Fair hearing - In considering the application - Court must also consider any counter affidavit of respondent before arriving at a decision - As failure to so do is clear denial of fair hearing to respondent (H3)

SUPREME COURT - Judgment - Setting aside - Validity - Justice demands that the order made on 28/9/11 be set aside - Since panel of the Justices were not aware of counter affidavit of respondent (H4)

SUPREME COURT - Judgment - Setting aside - Conditions - The court can set aside its decision made without jurisdiction - If such decision is a nullity - Or that the court was misled into making same (H5)

FACTS

By a motion on notice filed before the Supreme Court of Nigeria, respondents/applicants prayed for order setting aside the ruling made by the court in Chambers on 28th September 2011 wherein appellants were granted the trinity prayers to appeal against the decision of the Court of Appeal Abuja Division in *Josiah Oluwole Francis & 3 Ors v. CITEC International Estates & 6 Ors - CA/A/179/M/2007* contained in the Motion on Notice dated and filed on the 5th of April 2011. Respondents also inter alia sought for order restoring the Motion on Notice dated and filed on the 5th April 2011 to the cause list for hearing on its merits. Respondents' contention is that due to late service on them of appellants' motion filed on 5th April 2011 for the trinity prayers, they (respondents) were only able to file their counter affidavit in opposition and their written address in respect thereof one day to the hearing of the application, which was heard in Chambers.

They contended that having filed their processes just one day to the hearing, the same could not have been brought to the attention of the court. This situation they argued, led to the granting of all appellants' reliefs as if the application was unopposed. Respondents further argued that the court was misled into granting the application without affording them a hearing thereby rendering the order made a nullity. They submitted that although respondents filed their processes within the time prescribed by the rules of the court, the time was too short for the processes to be brought to the court's attention. Appellants opposed the application and contended that respondents were duly served eight days prior to the hearing of the application and that all relevant processes were before the court when it sat in Chambers. Prior to the hearing of the application, appellants informed the court of their notice of preliminary objection, seeking for order dismissing respondents' application for lack of jurisdiction and for constituting a gross abuse of the process of the court.

ISSUE FOR DETERMINATION

Whether or not the order of this court made in Chambers on the 28th of September, 2011 granting the Appellants/Respondents leave and extension of time to file this appeal ought to be set aside ex debito justitiae.

HELD (Unanimously granting the application per
OKORO JSC)

SUPREME COURT - Judgment - Finality of

1. Having said that may I state that by virtue of Section 235 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended), the Supreme Court cannot sit on appeal over its own judgment. The provision gives a stamp of finality to any decision of the Supreme Court. There is no constitutional provision for the review of the judgment of the Supreme Court by itself. However, it has been held by this court that the Supreme Court possesses inherent power to set aside its judgment in appropriate cases but that such inherent jurisdiction cannot be converted into an appellate jurisdiction as though the matter before it is another appeal, intended to afford the losing litigants yet another opportunity to re-state or re-argue their appeal. (p. 917 H)

SUPREME COURT - Judgment - Setting aside

2. Order 2 Rule 29(1) of the Supreme Court Rules (as amended in 2008) provides:

“29(1) An application to strike out or set aside for non compliance with these Rules, or for any other irregularity arising from the rules of practice and procedure in this court, any proceedings of any step taken in any proceedings or any document, judgment or order therein shall only be entertained by the court if it is made within a reasonable time and before the party applying has taken any fresh steps after becoming aware of the irregularity.”

From the above rule of this court, an applicant seeking to set aside any order or judgment given as per these rules,

must show evidence of non-compliance with the rules or for other irregularities arising from the rules of practice and procedure in the court. Reading through the facts leading to this application, one would readily see that there was some non-compliance due to lapses caused by the Appellants/Respondents and the Registry of this Court. (p. 921 B)

APPEALS - Enlargement of time - Application for - Fair hearing
3. In Order 6 Rules (2) and (4) of the Rules of this court, in an application for leave to appeal or for enlargement of time within which to seek leave to appeal, a respondent may, if he so desires, file in reply a counter affidavit. It follows that in considering the application for leave to appeal, the court has a duty to also consider the counter affidavit of the Respondent before arriving at a decision. Failure to consider the counter affidavit, as was done in this case is not only an irregularity but a clear denial of fair hearing to the Respondent/Applicant herein. (p. 921 E)

SUPREME COURT - Judgment - Setting aside - Validity
4. From the ruling of this court made on 28/9/11, there is no indication that the panel was aware of the counter-affidavit of the Respondents/Applicants. If they were aware, I am sure they would have referred the matter to be heard in the open court as usual. It is not the practice of this court to hear contentious matters in chambers. I think it is in the interest of justice that the said order should be set aside, the fact that the Respondents/Applicants have not paid cost earlier awarded against them notwithstanding. It cannot affect the justice of this case due to its peculiar facts. (p. 922 G)

SUPREME COURT - Judgment - Setting aside - Conditions
5. In sum, I hold firmly that where a judgment of this court or an order thereof is adjudged a nullity, a party affected thereby is entitled to have it set aside ex debito iustitiae. The court has inherent jurisdiction or power to set aside its own order or decision made without jurisdiction if such order or decision is in fact a nullity or was obtained by fraud or if the court

was misled into granting same by concealing some vital information or facts. (p. 923 A)

REPRESENTATION

Prof. Taiwo Osipitan, SAN, with Dr. Olumide Ayeni, Esq., A. M. Kayode Esq., Ezenwa Ibegbunam, Esq. P. O. Abang, Esq., Phoebe Egbele (Miss), Festus Ukpe Esq., C. U. C. Mgbe, Esq, and Obarafor K. G. (Miss), for the Appellants B
Kehinde Ogunwumiju Esq., with Bamikole Aduloju Esq., and Bridget Omon-Oleabhiele Esq., for 1st - 4th Respondents/Applicants C
O. O. Olowolefe Esq., for the 5th Respondent

CASES REFERRED TO

Omogu v. Federal Republic of Nigeria (2008) 7 NWLR (pt. 1085) 1
Onyeabuchi v. INEC (2002) 1 NWLR (pt. 769) 417 D
Ogojeifo v. Ogojeifo (2000) 3 NWLR (pt. 966) 205
Arubo v. Aiyeleru (1993) 3 NWLR (pt. 280) 126
Igwe v. Kalu (2002) 14 NWLR (pt. 787) 435
Obioha v. Ibero (1994) 1 NWLR (pt. 322) 503
Dingiyadi v. INEC (No.1) (2010) 18 NWLR (pt. 1224) 1 E
Ede v. Mba (2011) 18 NWLR (pt. 1278) 236
Ojukwu v. The Military Governor of Lagos State (1986) 1 NWLR (pt. 18) 621
Okoli V. Morecab Finance Nig. Ltd (2007) 14 NWLR (pt. 1053) 37 F
Inakoju v. Adeleke (2007) 4 NWLR (pt. 1025) 427
Salu v. Egeibon (1994) 6 NWLR (pt. 348) 23
Agunbiade v. Okunoga (1961) ALL NLR 110
Obimonure v. Erinosho (1966) 1 ALL NLR 250
Olorunfemi v. Asho (2000) 2 NWLR (pt. 643) 143 G

STATUTES & RULES REFERRED TO

Constitution of the Federal Republic of Nigeria 1999 (as amended), ss. 233(4)(6), 235
Supreme Court Act Cap. S.15 LFN 2004, s. 27(2)(a),(3)(4) H
Evidence Act 2011 (as amended), s. 168(1)
Supreme Court Rules 1985 (as amended), O. 2 rr. 28 & 31, O. 6 r. 2(1)(5)

LEAD JUDGMENT BY OKORO JSC

The point of law involved in this ruling is a very short one. It is not new. However, it is a point of law of immense constitutional importance. The point of law we are called upon to decide is whether or not the order of this court made in Chambers on the 28th of September, 2011 granting Appellants/Respondents leave and extension of time to file this appeal ought to be set aside *ex debito justitiae*.

By a motion on notice dated 9th September, 2012 and filed on the same date, the 1st - 4th, Respondents/Applicants prayed for the following orders:-

“1. *AN ORDER setting aside the Order/Ruling made by this Honourable Court in Chambers on the 28th of September, 2011 wherein the Appellants/Respondents were granted the trinity prayers to appeal against the decision of the Court of Appeal, Abuja Division in Josiah Oluwale Francis & 3 Ors V. CITEC International Estates & 6 Ors, CA/A/179/M/2007 contained in the Motion on Notice dated and filed on the 5th of April, 2011.*

2. *AN ORDER restoring the Motion on Notice dated and filed on the 5th of April, 2011 to the Cause List for hearing on its merits.”*

The grounds upon which this application is predicated are as stated in the motion paper which are as follows:

“1. *On the 5th day of April, 2011, the Appellants/Respondents filed a Motion on Notice at the Registry of this Honourable Court containing the trinity prayers to appeal against the ruling of the Court of Appeal, Abuja Judicial Division that was delivered on the 7th day of March, 2011 in Francis & 3 Ors V. CITEC Estates & 6 Ors; CA/I/179/M/2007.*

2. *Upon filing the said Motion on Notice on the said 5th day of April, 2011, instead of allowing the registry of this Honourable Court to serve the said process, on the Respondents/Applicants, Counsel to the Appellants/Respondents, MESSRS. OLUMIDE AYENI & CO. undertook to effect personal service.*

3. *Despite this undertaking, Counsel to the Appellants/Respondents, MESSRS. OLUMIDE AYENI & CO, did not effect service on the Respondents’ Counsel until the 20th of September 2011 (more than 5 clear months after filing).*

4. *Under the Supreme Court Rules, the Respondents/Appli-*

cants had a duty to file a Reply Brief and/or Counter Affidavit if they intended to oppose the Motion on Notice within 7 days of their being served with the Motion on Notice.

5. Since the Applicants/Respondents hail good grounds to oppose the application dated the 5th of April, 2011 but served on their Counsel on 20th of September, 2011, the Applicants/Respondents duly filed and served the Reply Brief and their Counter Affidavit to the Motion on Notice on the 27th of September, 2011. B

6. Unfortunately, because the Appellants/Respondents delayed the service of the application to just eight days before it was to be heard in Chambers, the Counter-affidavit and reply brief filed by the Respondents/Applicants on the day before the motion was to be heard in Chambers were not brought to the attention of the Court and this misled this Honourable Court into granting the Motion on Notice dated and filed on the 5th of April, 2011. C D

7. The Ruling of this Honourable Court dated the 28th of September, 2011 granting the prayers contained in the Motion filed on the 5th of April, 2011 in SC.116/2011 is a nullity due to the fact that the Applicants/Respondents were not afforded their right to fair hearing and the Rules of this Honourable Court were breached. E

8. The Ruling of this Honourable Court dated the 28th of September, 2011 granting the prayers contained in the Motion filed on the 5th of April, 2011 in SC.116/2011 ought to be set aside and the said Motion listed afresh for hearing. F

In support of this application is an affidavit of 17 paragraphs, deposed to by one Isiaka Popoola, a litigation clerk in the Chambers of Applicants' Solicitors. Annexed to the affidavit are 5 exhibits numbered 1 - 5 which includes Exhibit "2" the said Order sought to be set aside. Also in support is a 24 paragraphs further affidavit with exhibits 6 - 13 attached. There is also a 2nd further affidavit of six paragraphs deposed to by one Mike Dogo 'M' who also deposed to the further affidavit. He is also a litigation clerk of the Applicants' Counsel. One exhibit is annexed to this latest affidavit. G

In response, the Appellants/Respondents filed a six paragraphs Counter Affidavit in opposition to the application. It was deposed to by one Anietie Udo Esq., legal practitioner in the Law Firm of Messrs Olumide Ayeni & Co., one of the Counsel retained by the Appellants. Appellants/Respondents also filed a 2nd counter affidavit of 9 H

paragraphs with one exhibit annexed and tagged “Exhibit 14 Series.”

The background facts leading to the filing of the motion giving birth to this Ruling are as encapsulated both in the grounds and the various affidavits filed in support. Having set out the grounds upon which the application is predicated and in view of the fact that the facts deposed to in the affidavits are in tandem with the grounds, it may not be necessary to reproduce the affidavits again except as may be necessary to make reference to in the course of this ruling. There is no dispute as to the facts.

Both parties filed written addresses which were adopted on 2nd December, 2013 when this application was heard. But before the hearing of the application, the Learned Senior Counsel for the Appellants/Respondents drew the court’s attention to the Notice of preliminary Objection filed by them on the 15th of December, 2012.

The said preliminary objection was taken before the motion itself was heard. I intend to resolve first the issues raised in the preliminary objection.

The Notice of Preliminary Objection states:

“*TAKE NOTICE that the Appellants/Respondents shall at or before the hearing of the Notice of Motion dated and filed on 9th February, 2012 in Appeal No.SC/116/2011 by the 1st - 4th Respondents/Applicants between Citec International Estates Limited & 5 Ors V. Josiah Oluwole Francis & 4 Ors raise a Preliminary Objection to the jurisdiction of this Honourable Court to hear, entertain and/or determine the said Notice of Motion and shall pray this Honourable Court for:*

AN ORDER dismissing the said Notice of Motion for lack of jurisdiction and for constituting a gross abuse of the process of this Honourable Court.”

The grounds upon which the preliminary objection are predicated are as follows:-

“(i) *It is an abuse of the process of this Honourable Court for the 1st - 4th Respondents/Applicants to seek to surreptitiously litigate again issues or questions already decided against them on 28th September, 2011 (Coram: Mukhtar, Tabai, I. T. Muhammad, Galadima and Ngwuta, JJSC).*

(ii) This Honourable Court cannot review its decision on the

merits of 28th September, 2011.

(iii) This Honourable Court is constitutionally bereft of jurisdiction to entertain the said Notice of Motion vide Section 213(4) Constitution of the Federal Republic of Nigeria, 1999 (as amended).

(iv) A process in any proceedings before a court found to constitute an abuse must attract the sanction of dismissal.

(a) Similar Notice of Motion was filed on behalf of the 1st - 4th Respondents/Applicants on 13th October, 2011."

Arguing the said preliminary objection, the Learned Senior Counsel for the Appellants/Respondents, Prof. Taiwo Osipitan, SAN made reference to the following legislations to wit:

Section 233 (4) & (6) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) Section 27(2)(a), (3) & (4) Supreme Court Act Cap. S.15 LFN 2004, Order 2 Rules 28 & 31 Supreme Court Rules 1985 (as amended) and Order 6 Rule 2(1) & (5) Supreme Court Rules, 1985 (as amended) and submitted that all appropriate constitutional and valid steps were taken in the allowance of Exhibit 2, the Order of Court sought to be set aside. He submitted further that the 1st - 4th Respondents/Applicants have not demonstrated any material or evidence to show that this Court in allowing exhibit 2 on 28th September, 2011 did not afford any consideration to Exhibits 3, 4 and 5 to Isiaka Popoola's Affidavit of 9th February, 2012.

Learned Senior Counsel further stated that the surreptitious motive of the 1st - 4th Respondents/Applicants in this Application is to seek to re-litigate the Processes leading up to Exhibit 2, which according to him, this Court has no power to do. He posits that this is an abuse of court process. He urged this court to hold that there is no power in the Supreme Court to review its own judgment relying on these cases: *Omogu v. The Federal Republic of Nigeria* (2008) 7 NWLR (Pt. 1085) 1, *Onyeabuchi v. INEC & 4 Ors* (2002) 1 NWLR (Pt. 769) 417 at 443, *Ogojeje v. Ogojeje* (2000) 3 NWLR (pt. 966) 205.

In conclusion, learned senior counsel opined that there is no iota of law in support of the 1st - 4th Respondents/ Applicants' present Application particularly in the light of the clear position of the law in Section 233(4) of 1999 Constitution of the Federal Republic of Nigeria (as amended) and the cases of *Arubo V. Aiyeleru & Ors* (1993) 3 NWLR (Pt.280) 126 where it was held that once a court is satisfied

that any proceeding before it is an abuse of process, it has power and duty to dismiss it. He urged this court to dismiss the Notice of Motion of the 1st - 4th Respondents/ Applicants.

In his response to the preliminary objection, learned counsel for the 1st - 4th Respondents/Applicants contended that the submission of the Appellants/Respondents that this application is an attempt to surreptitiously relitigate issues or questions validly decided by this court portrays a total misconception of the application before the court. That this court is only being called upon to decide whether the order in issue ought to be set aside in the interest of justice having regard to the fact that the order is a nullity. It is his submission that this court has the vires/inherent powers to do this without any issue of surreptitious re-litigation arising. He relies on the case of *Igwe V Kalu* (2002) 14 NWLR (Pt.787) 435. He urged this Court to overrule the preliminary objection.

I shall now consider the arguments. In trying to proffer argument in support of the preliminary objection, the learned Senior Counsel for the Appellants/Respondents/Objectors, has extensively delved into issues which ought to be ventilated in the main motion which if considered at this stage, would determine the motion without considering it. I shall therefore limit myself strictly to the issue as to whether this court has jurisdiction to hear the motion or not.

The learned senior counsel had submitted that this court is constitutionally bereft of jurisdiction to entertain this Notice of Motion vide Section 233 (4) & (6) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended). The said section states:

“234 - (4) The Supreme Court may dispose of any application for leave to appeal from any decision of the Court of Appeal in respect of any civil or criminal proceedings in which leave to appeal is necessary after consideration of the record of proceedings if the Supreme Court is of opinion that the interest of justice do not require an oral hearing of the application.

(6) Any right of appeal to the Supreme Court from the decisions of the Court of Appeal conferred by this Section shall, subject to Section 236 of this Constitution, be exercised in accordance with any Act of the National Assembly and Rules of Court for the time being in force regarding the powers, practice and procedure of the Supreme Court.

Also, Section 236 of the Constitution states:

“236. Subject to the provisions of any Act of the National Assembly, the Chief Justice of Nigeria may make rules for regulating the practice and procedure of the Supreme Court.

The learned senior counsel had argued strenuously that by Section 233(4) of the Constitution (supra) only the record of proceedings is to be considered by this court in considering an application for leave to appeal. This line of argument cannot be true in view of the provision in subsection (6) thereof already reproduced.

Section 233 (4) (supra) cannot be read and acted upon in isolation. Sub-section (6) clearly states that any right of appeal to the Supreme Court from the decision of the Court of Appeal shall, subject to section 236 of the Constitution, be exercised in accordance with any Act of the National Assembly “and rules of court for the time being in force regulating the powers, practice and procedure of the Supreme Court.” It has to be noted that as empowered by Section 236 of the Constitution (supra) the Chief Justice of Nigeria has made Rules of Court for regulating the practice and procedure of the Supreme Court. Thus, in Order 6 Rule 2 (4) of the Supreme Court Rules (as amended in 2008), it is provided thus:

“(4) The Respondent may, if he so desires, file in reply a counter affidavit not later than two days before the hearing date.”

As was rightly submitted by the learned counsel for the Respondent/Applicant, it cannot be the right or correct position of the law that such counter processes filed by a respondent, pursuant to the Rules of Court, can be discountenanced as irrelevant in the determination of the application for extension of time and leave to appeal. My view is that if the intendment of Section 233 (4) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) was that this court should consider record of proceedings only and not take cognizance of counter processes filed, it could have specifically said that the motion should be ex-parte. Also the said Constitution would not have given the Chief Justice of Nigeria power in Section 236 thereof, to make rules for regulating the practice and procedure of the Supreme Court. For me, there is no abuse of court process in the filing of the present motion.

Having said that may I state that by virtue of Section 235 of the Constitution of the Federal Republic of Nigeria,

1999 (as amended), the Supreme Court cannot sit on appeal over its own judgment. The provision gives a stamp of finality to any decision of the Supreme Court. There is no constitutional provision for the review of the judgment of the Supreme Court by itself. See Eleazor Obioha V. Innocent Ibero & Anor (1994) B 1 NWLR (pt. 322) 503. **However, it has been held by this court that the Supreme Court possesses inherent power to set aside its judgment in appropriate cases but that such inherent jurisdiction cannot be converted into an appellate jurisdiction as though the matter before it is another appeal, intended to afford the losing litigants yet another opportunity to re-state or re-argue their appeal.** C

In Chief Kalu Igwe & 2 Ors V. Chief Okuwa Kalu & 3 Ors (2002) 14 NWLR (Pt. 787) 435 at 453 paragraphs F - H and p 454 D paras A - C, this court per Ogwuegbu, JSC, held as follows:-

"I shall state that this court possesses inherent power to set aside its judgment in appropriate cases. Such cases are as follows:

(i) *When the judgment is obtained by fraud or deceit either in the court or of one or more of the parties. Such a judgment can be E impeached or set aside by means of an action which may be brought without leave. See Alaka V. Adekunle (1959) 6 Ch. D. 297, Olufumise v. Falana (1990) 3 NWLR (pt.136) 1.*

(ii) *When the judgment is a nullity. A person affected by an order of court which can properly be described as a nullity is entitled F ex debito justitiae to have it set aside. See Skenconsult Ltd V Uke (1981) 1 SC 6, Craig V. Kanssen (1943) KB 256, and 263, Ojiako & Ors V. Ogueze & Ors (1962) 1 SCNLR 112, (1962) 1 ALL NLR 58, Okafor & Ors V. Anambra State & Ors (1991) 6 NWLR (pt.200) G 659, 680.*

(iii) *When it is obvious that the court was misled into giving judgment under a mistaken belief that the parties consented to it. See Agunbiade v. Okunoga & Co. (1961) ALL NLR 110 and Obimonure v. Erinosho (1966) 1 ALL NLR 250.*

H In Olorunfemi V. Asho (2000) 2 NWLR (pt.643) 143, this court in its unreported Ruling dated 19/3/99 set aside its judgment delivered on 8/1/99 on the ground that it failed to consider the respondents, cross-appeal before allowing the appellant's appeal. It ordered that the appeal be heard de novo by another panel of jus-

tices of this court. See generally Alao V. ACB Ltd (supra). ”

Having had the benefit of the views of this court in previous decisions on the issue at hand, I hold that it is beyond conjecture that this court is imbued with the vires or jurisdiction, to hear the motion of the Respondents/Applicants, the said motion not being afflicted by any known and/or incurable virus. The preliminary objection of the Appellants/Respondents is accordingly lacking in merit and is hereby overruled. B

I shall now proceed to consider the motion on the merit. Applicants’ argument is hinged on a tripod as contained on page 6 of their written address. They are:- C

“1. That this court has the inherent jurisdiction to set aside its order in chambers where the right to fair hearing of a party was breached in the process of making the order.

2. That by a combination of the deliberate acts of the Appellants/Respondents and the inaction of the Registry of this Court, the Respondents/Applicants, right to fair hearing was breached.

3. That it will be in the overall interest of justice if this application is granted.”

On the first leg, learned counsel for the Applicants submitted that application to set aside judgment or order is not to be made frivolously without any basis because of the general principle of law that once this court or any other court makes a decision, it becomes functus officio and it lacks the jurisdiction to revisit that decision. Learned Counsel admits that there are exceptions to this general rule for which he has referred to the following cases: Igwe V Kalu (supra), Vulcan Gases Ltd V. G. F. Ind. AG (2001) 9 NWLR (Pt.719) 610 at pp 544 - 645 paras H - A. Learned Counsel submitted further that an order made in breach of a party’s right to fair hearing is a nullity, citing the case of Ndakauba V. Kolomo (2005) 4 NWLR (pt. 915) 411 at 430 - 431 paras H - D. Referring also to Order 2 Rule 29(1) of the Supreme Court Rules, he urged this Court to hold that this is an appropriate case in which the decision of this court should be set aside in view of the facts of the case. E F G H

On the second leg, learned counsel, after reviewing the facts, submitted that it is beyond argument that the Ruling of this Court sought to be set aside was given without any knowledge of their Lordships that Respondents/Applicants had an opposition to the motion.

That the grant of the application without the consideration of their processes filed amounted to a breach of their right to fair hearing and that makes the order a nullity, he opined.

Referring to Order 6 Rule 3 (1) of the Supreme Court Rules, learned counsel submitted that before the power granted by this rule can be validly exercised, the Court must have the benefit of all papers filed by both parties. It is his view that this court can only hear applications in chambers on matters which are not opposed by the other party. He referred to the case of *Dingiyadi V INEC* (No.1) 2010) 18 NWLR (pt.1224) 1 at 120 - 121 paras H - F, *Ede V. Mba* (2011) 18 NWLR (pt.1278) 236 at 266 - 267 paras C - F.

On the last leg, he submitted that it is in the interest of justice to grant this application because if it is not granted, a precedent would most likely be laid where subsequent applicants to this court may file frivolous applications, undertake to serve the other party and hold them back until the motions are deemed uncontested and granted. He urged this court to grant the application in the interest of justice.

In response, the learned Senior Counsel for the Appellants/ Respondents submitted that the applicants having failed to pay the various costs awarded against it by this court in favour of the Appellants, they are not qualified to seek the discretion of this court relying on the case of *Ojukwu V The Military Governor of Lagos State & Ors* (1986) 1 NWLR (pt 18) 621 at 633 paras F - G.

The Learned Senior Counsel further submitted that the applicants misrepresented facts and used the word "fraudulent" against them. According to him, the applicants "have falsely and reprehensibly attempted to smear the Appellants/Respondents with fraudulent conduct by asserting unfounded yet irrelevant facts vide the facts deposed in paragraph 10 of *Isiaka popoola's Affidavit* of 9th February, 2012". He urged the court to reject the use of the word "fraud" by the Applicants referring to the case of *Okoli V. Morecab Finance (Nigeria) Ltd* (2007) 14 NWLR (pt.1053) 37 at 72 paras C - D. He also opined that a party seeking fair hearing must also be fair in the litigation to the adverse party which he allege, the Applicants have failed to do. He relies on the case of *Inakoju & 17 Ors V Adeleke & 3 Ors* (2007) 4 NWLR (Pt.1025) 427 at 627 - 628 F - A.

The other issue raised by the Learned Senior Counsel is that the Applicants failed to challenge, deny and/or in any way or manner

controvert the Appellants/Respondents' counter affidavit deposited by Anietie Udo on 15/2/12 particularly paragraph 5(1)-(xiv) thereof. He urged this court to dismiss this application. The Learned Counsel for the 5th Respondent did not file any process in this matter and at the hearing had nothing to urge on the court.

Order 2 Rule 29(1) of the Supreme Court Rules (as amended in 2008) provides:

“29(1) An application to strike out or set aside for non compliance with these Rules, or for any other irregularity arising from the rules of practice and procedure in this court, any proceedings of any step taken in any proceedings or any document, judgment or order therein shall only be entertained by the court if it is made within a reasonable time and before the party applying has taken any fresh steps after becoming aware of the irregularity.”

From the above rule of this court, an applicant seeking to set aside any order or judgment given as per these rules, must show evidence of non-compliance with the rules or for other irregularities arising from the rules of practice and procedure in the court. Reading through the facts leading to this application, one would readily see that there was some non-compliance due to lapses caused by the Appellants/Respondents and the Registry of this Court.

In Order 6 Rules (2) and (4) of the Rules of this court, in an application for leave to appeal or for enlargement of time within which to seek leave to appeal, a respondent may, if he so desires, file in reply a counter affidavit. It follows that in considering the application for leave to appeal, the court has a duty to also consider the counter affidavit of the Respondent before arriving at a decision. Failure to consider the counter affidavit, as was done in this case is not only an irregularity but a clear denial of fair hearing to the Respondent/Applicant herein.

Let me consider the salient facts which are settled in this case. The motion which order, granted by this court, is sought to be set aside, was filed on 5/4/11 in the Registry of this court. The Appellants who were Applicants therein undertook to serve the Respondents/Applicants. The Appellants did not serve the Respondents until 20th

September, 2011 i.e. about five months after the filing of the said motion and eight days to the hearing of the motion in chambers. The Respondents/Applicants filed their counter affidavit on 27th September, 2011 which was within the time allowed by the Rules of Court. Unfortunately, because the Appellants/Respondents delayed the service of the application to just eight days before it was to be heard in Chambers, the Counter-Affidavit and reply brief filed by the Respondents/Applicants on the day before the motion was to be heard in Chambers were not brought to the attention of the court and this misled this court into granting the motion on notice as if it was unopposed by the Respondents. Clearly, the above facts show that the ruling of this court dated 28/9/11 granting the prayers contained in the motion filed on 5/4/11, by the Appellants is a nullity due to the fact that the Applicants/Respondents were not afforded their right to fair hearing and being that the Rules of this Court were breached.

In *Salu v. Egeibon* (1994) 6 NWLR (Pt.348) 23 at 44, this court held as follows:-

*"It also has to be remembered that the denial of fair hearing was a breach of one of the rules of natural justice, that is, the requirement that a party must be given a fair hearing. The consequence of a breach of the rule of natural justice of fair hearing is that the proceedings in the case are null and void... If a principle of natural justice is violated, it does not matter whether if the proper thing had been done, the decision would have been the same; the proceedings will still be null and void. In other words, if the principles of Natural justice are violated in respect of any decision, it is immaterial, whether the same decision would have been arrived at in the absence of the departure from the essential principles of justice. The decision must be declared to be no decision. See also *Ndakauba V Kolomo* (2005) 4 NWLR (pt.975) 411 at 430 - 431 paras H - D."*

From the ruling of this court made on 28/9/11, there is no indication that the panel was aware of the counter-affidavit of the Respondents/Applicants. If they were aware, I am sure they would have referred the matter to be heard in the open court as usual. It is not the practice of this court to hear contentious matters in chambers. I think it is in the interest of justice that the said order should be set aside, the fact that the Respondents/Applicants have not paid cost earlier awarded

against them notwithstanding. It cannot affect the justice of this case due to its peculiar facts.

In sum, I hold firmly that where a judgment of this court or an order thereof is adjudged a nullity, a party affected thereby is entitled to have it set aside ex debito justitiae. The court has inherent jurisdiction or power to set aside its own order or decision made without jurisdiction if such order or decision is in fact a nullity or was obtained by fraud or if the court was misled into granting same by concealing some vital information or facts. See Igwe V. Kalu (supra), Vulcan Gases Ltd v. G.F Ind. AC (2001) 9 NWLR (pt.719) 610 at 644 - 645 paras H - A.

In view of all I have endeavoured to say above, I hold that this application has merit and is accordingly granted by me. I hereby make the following orders:

1. I hereby order that the order/ruling made by this court in Chambers on the 28th of September, 2011 wherein the Appellants/ Respondents were granted the trinity prayers to appeal against the decision of the Court of Appeal Abuja Division in Josiah Oluwale Francis & 3 Ors v. CITEC International & 6 Ors, CA/A/179/M/2007 contained in the Motion on Notice dated and filed on the 5th of April, 2011 be and is hereby set aside.

2. The said motion on notice dated and filed on the 5th of April, 2011 is hereby restored to the Cause List for hearing on the merit.

3. I make no order as to costs.

ONNOGHEN JSC

I have had the benefit of reading in draft the lead ruling of my learned brother Okoro JSC just delivered.

I agree with his reasoning and conclusion that the preliminary objection has no merit, and should consequently be dismissed while the application should be granted as same is meritorious.

The reasons for the above conclusions have been exhaustively stated in the lead ruling which I adopt as mine and order accordingly.

I abide by the consequential orders made in the said lead ruling including the order as to costs.

Application ordered as prayed.

MUNTAKA-COOMASSIE JSC

I have had the privilege of reading in draft the lead ruling of my learned brother, Okoro, JSC just rendered by him. I have closely followed the reasons and conclusions and I adopt same as mine. The appeal honestly is pregnant with merit and it deserved to be allowed. I also allow this appeal. The preliminary Objection lacks merit same is hereby dismissed. The motion on Notice filed on 5/4/11 is hereby restored to the cause list for hearing on its own merit. Appeal therefore is allowed.

AKA'AHS JSC

My learned brother, Okoro, JSC made available to me the leading Ruling with which I am in complete agreement.

One of the grounds on which this court can exercise its inherent jurisdiction to set aside its judgment is when it is obvious that the court was misled into giving judgment under a mistaken belief that the parties consented to it. See: Agunbiade VS. Okunoga & Co. (1961) ALL NLR 110; Obimonure VS Erinoshio (1966) 1 ALL NLR 250; Olorunfemi VS Asho (2000) 2 NWLR (Pt.643) 143 and Igwe VS Kalu (2002) 14 NWLR (Pt.787) 435.

The 1st- 4th respondents/applicants' prayer to set aside the ruling made by this Honourable Court in Chambers on 28/9/2011 granting the appellants leave and extension of time to appeal contained in the motion filed, on 5/4/2011 in SC/116/2011 was predicated on the ground that the court had assumed that the respondents did not object to the granting of the application whereas they had filed a counter - affidavit and respondents' brief opposing the motion two days to the hearing of the motion but the processes were not brought to the attention of the Justices. The court was therefore misled to believe that the respondents were not opposing the application.

I therefore agree that the application is meritorious and ought to be granted.

Accordingly the order granting leave and extension of time to the applicants to appeal against the decision of the Court of Appeal Abuja Division in Josiah Oluwole Francis & 3 Others VS CITEC

International & 6 Others in Appeal No. CA/A/179/M/2007 is hereby set aside and the Motion on Notice filed on 5/4/2011 is restored to the cause list for hearing on the merit. No order on costs is made.

KEKERE-EKUN JSC

I have had the benefit of reading in draft the lead ruling of my learned brother, OKORO, JSC, just delivered. I am in entire agreement with him that the application is meritorious and should be allowed. My comments support of the lead ruling and for emphasis.

By their motion on notice filed on 9/2/2012, the 1st - 4th respondents/applicants (hereinafter referred to as the applicants) sought the following reliefs from this court:

1. An order setting aside the order/ruling made by this Honourable Court in chambers on the 28th of September 2011 wherein the appellants/respondents were granted the trinity prayers to appeal against the decision of the Court of Appeal, Abuja Division in Josiah Oluwole Francis & 3 Ors. Vs CITEC International Estate Ltd. & 6 Ors., CA/A/179/M/2007 contained in the motion on notice dated and filed on the 5th of April, 2011.

2. An order restoring the motion on notice dated and filed on the 5th of April, 2011 to the Cause List for hearing on its merits.

The grounds of the application have been fully set out in the lead ruling.

In a nutshell, the applicants contend that due to very late service on them on 20th September 2011 of the appellants'/respondents, (hereinafter referred to as the respondents) motion filed on 5th April 2011 for the trinity prayers, they were only able to file their counter affidavit in opposition and their written address in respect thereof one day to the hearing of the application, which was heard in chambers on 28th September 2011. It is their contention that having filed their processes just one day to the hearing, the processes could not have been brought to the court's attention, which led to the granting of all the respondents' reliefs as if the application was unopposed. It is the applicants' further contention that the court was misled into granting the application without affording them a hearing thereby rendering the order made a nullity. They noted that even though learned counsel for the respondents undertook to effect ser-

vice of the application of the parties, this was not done until eight days before the application was due to be heard. That although the applicants filed their processes within the time prescribed by the rules of this court, the time was too short for the processes to be brought to the court's attention.

B It is the contention of the respondents on the other hand that the complaint is unfounded as the applicants were duly served eight days before the hearing of the application and that all relevant processes were before the court when it sat in chambers on 28/11/2011. They are of the view that the present application is merely an attempt to *"surreptitiously induce the Supreme Court to review its valid order of 28th September, 2011"*.

The 5th respondent (Corporate Affairs Commission) did not file any process in respect of the application and does not oppose it.

D It is settled law that once a court of law delivers its judgment or makes an order in respect of a matter before it, it becomes functus officio and is precluded from reviewing or varying such judgment or order apart from the correction of clerical mistakes or accidental slips. See: Nigerian Army Vs Iyela (2008) 7-12 SC 35; Dingyadi & Anor. Vs INEC & Ors (2011) 10 NWLR (Pt.1254) 347 @ 391-392 B-B; 411-412 D-B; (2011) LPELR-SC.32/2010; First Bank of Nig. Plc. Vs TSA Ind. Ltd. (2010) 15 NWLR (Pt.1216) 247 @ 305-306 H-A; (2010) LPELR-SC.316/2006. This legal position is of even greater significance with regard to a decision of this court, being the final court of justice in this country and which decision is final. See Section 235 of the Constitution of the Federal Republic of Nigeria 1999 (as amended) and Order 8 Rule 16 of the Supreme Court Rules. There are however some exceptions to this general principle. The Supreme Court, and any other superior court of record, possesses inherent power to set aside its judgment in appropriate cases. Such circumstances include:

- a. When the judgment is obtained by fraud or deceit
- b. When the judgment is a nullity and a person affected by the order is entitled ex debito justitiae to have it set aside.
- c. When the court was misled into giving judgment under the mistaken belief that the parties had consented to it.
- d. Where judgment was given in the absence of jurisdiction.
- e. Where the procedure adopted was such as to deprive the

decision or judgment of the character of a legitimate adjudication.

See: Adegoke Motors Ltd. Vs. Adesanya (1989) 3 NWLR (Pt.109) 250; A.D.H. Ltd. Vs Amalgamated Trustees Ltd, (2007) ALL FWLR (Pt.392) 1781 @ 1840 C - F; Alao Vs A.C.B. Ltd. (2000) FWLR (Pt. 11) 1858; (2000) 9 NWLR (Pt.672) 264; Igwe Vs Kalu (2002) 14 NWLR (Pt.787) 435; Madukolu vs Nkemdilim (1962) B SCNLR 341; Obimonure Vs Erinoshio (1966) All NLR 245.

By virtue of O. 6 r. 3(1) of the Supreme Court Rules, this court is empowered to hear applications in chambers. It provides thus:

“3. (1) Without prejudice to the powers of the Court to hear oral argument, an application under Rule 2 of this Order may be considered and determined by the court in chambers, only on the written argument and document, as required by the rule, submitted by the applicant in support, without hearing oral argument either in open court or in chambers. The Court may, under this rule, refuse such application, only if in its opinion the application is completely devoid of merit.”

Although the rule empowers the court to hear and determine applications in chambers, the provision is expressly stated to be *“without prejudice to the powers of the Court to hear oral argument”*. In other words the court has discretion to hear oral argument on the application, which would normally take place in open court. Furthermore, the rule refers specifically to documents and written arguments submitted by the applicant in support. It cannot therefore be correct, as urged upon us by learned senior counsel for the respondents at the hearing of the application, that an application for leave to appeal could be heard and determined in chambers by reference to the record of appeal alone without considering counter processes filed by the other party. As rightly observed by learned counsel for the applicants, the right of appeal to this court from decisions of the court of Appeal conferred by section 233 (6) of the 1999 constitution is exercisable *“subject to section 236 of this Constitution... in accordance with any act of the National Assembly and rules of court for the time being in force regulating the powers, practice and procedure of the supreme court.”* I agree with learned counsel for the applicants that the exercise of the court’s discretion under Section 233 (4) of the 1999 Constitution, must be in accordance with the extant rules of this court.

It would therefore be correct to say that where an opposing party files any processes in compliance with the rules of this court, such as Order 6 Rule 2 (4) & (5), the court has a duty to consider them before reaching a decision.

It is not in dispute that upon being served with the respondents, motion on 20th September 2011, the applicants filed their counter affidavit and reply brief in this court on 27th September 2011. The issue is whether those processes were brought to the court's attention when the application was heard on 28th September 2011. There is a presumption as to the regularity of official acts as provided for in Section 150 (1) of the Evidence Act 2004 now Section 168 (1) of the Evidence Act 2011 (as amended). It is a rebuttable presumption. See: *Moss & Ors. v. Kenrow (Nig) Ltd. & Ors.* (1992) 9 NWLR (264) 207 @ 222 E - F. It is appropriate at this stage to reproduce the proceedings of 28th September 2011, which is attached to the supporting affidavit and marked Exhibit 2. It reads:

*"RULING DELIVERED BY A. M. MUKHTAR, JSC, CON
Order as prayed. Time within which to seek leave to appeal against the decision of the Court of Appeal Abuja is extended. Leave is hereby given to appeal, and time within which to appeal is extended by 14 days from today."*

It is quite clear from the record of proceedings that no mention was made of the counter processes filed by the applicants. It is not the practice of this court to hear and determine contentious applications in chambers. It is therefore reasonable to presume that had the processes, which had only been filed the previous day, been brought to the courts attention, the application would have been adjourned for hearing in open court to afford both parties an opportunity to be heard. As this court held in: *Dingyadi Vs INEC (No.1)* (2010) 18 NWLR (Pt.1224) 1 @ 52 - 53 A - H, notwithstanding the power conferred on this court by Order 6 Rule 3 (1) of the Supreme Court Rules to hear and determine applications in chambers, the rule does not empower the court to gloss over or ignore pending processes validly filed before the court. The applicants had done all that was required of them to ensure that their processes were before the court for consideration. Unfortunately, due to some lapse in the Registry they were not brought to the court's attention during the chambers sitting of 28th September 2011. Thus, through no fault of

theirs, the applicants were denied their right to fair hearing. See: Dingyadi Vs INEC (No.1.) (supra); Ede v. Mba (2011) 18 NWLR (Pt.1278) 236 @ 266 - 267 C - F. The effect of a denial of the right to fair hearing is that the entire proceedings and any judgment or order in respect thereof is a nullity. See: Salu Vs Egeibon (1994) 6 SCNJ 223; (1994) 6 NWLR (Pt.348) 23 @ 44 F - G; Adigun Vs. A.G. Oyo State (1987) 1 NWLR (Pt.53) 678. In the instant case, the applicants have satisfied the court that they are entitled, ex debito justitiae to have the order made on 28th September 2011 set aside.

For these and the more comprehensive reasons ably advanced by my learned brother, OKORO, JSC in the lead ruling, I also dismiss the preliminary objection and set aside the order granting leave to the 1st-4th appellants/respondents to appeal against the decision of the Court of Appeal, Abuja Division in Josiah Oluwole Francis & 3 ors. vs. CITEC International & 6 Ors. in Appeal No.CA/A/179/M/ 2007. The motion on notice filed on notice filed on 5/4/2011 is hereby restored to the cause list for hearing on the merit. I make no order for costs.

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