

## **SETTING ASIDE DEFAULT JUDGMENT IN THE FEDERAL HIGH COURT IN NIGERIA- PRINCIPLES, PRACTICE AND PROCEDURE**

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**ABSTRACT:** This paper critically analysed stipulations of the Federal High Court (Civil Procedure) Rules, 2019 on default judgment and decided cases on them. It established that though default judgment is a final judgment, a Defendant under the weight of default judgment in the Federal High Court is not shut out forever from the altar of justice. The paper further found that satisfying the requirement for setting aside default judgment is a herculean task on the part of the Defendant and an onerous judicial discretion that must be exercised judiciously by the trial Court. Hence, the paper graphically revealed what steps a defendant should can timeously take to get a reversal of default judgment in this Court. Being that default judgment is not set aside as a matter of course, the paper aggregated in a concise manner the legal principles that should guide this cadre of Court in yielding or rejecting to yield to upturn its judgment given in default. The paper viewed strongly that indolence in judicial proceedings should not be rewarded hence it recommended that the Court should not hesitate to refuse any application to disaffirm its default judgment that falls short of the stipulated Rules since equity assists only the vigilant.

**Keywords:** *court, default, discretion, federal, judgment, set aside.*

## **1.0 Introduction**

The Federal High Court as established *under section 249* of the Constitution of the Federal Republic of Nigeria, 1999 as amended is a Court with exclusive jurisdiction over a range of matters listed in *section 251* of the CFRN, 1999 as amended the exhaustive list of which is not under focus in this paper. As affirmed in *FAAN v Nwoye*, irrespective of judicial divisions, “the Federal High Court is one and the same throughout the Nigeria by virtue of *section 249* of the Constitution of the Federal Republic of Nigeria 1999 as amended which provides that (1) There shall be a Federal High Court. (2) The Federal High Court shall consist of -(a) A Chief Judge of the Federal High Court; and (b) Such member of Judges of the Federal High Court as may be prescribed by an Act of the National Assembly.” Regarding its practice and procedure, it is provided under *section 254* of the CFRN, 1999 that “Subject to the provisions of any Act of the National Assembly, the Chief Judge of the Federal High Court may make rules for regulating the practice and procedure of the Federal High Court”. Pursuant to the above stated powers, the Chief Judge of the FHC made the Federal High Court (Civil Procedure) Rules, 2019 which in Order 1, Rule 1 revoked the Federal High Court Civil Procedure Rules, 2009 for the reason of “just and expeditious disposition of cases”.

Against this backdrop, this paper is devoted to an analysis of the default judgment procedure under the extant Civil Procedure Rules of the FHC. Consequently, the paper will in the different ensuing segments examine the following namely: Meaning of default judgment; Provisions for Appearance in answer to Court Process; Provisions on Default of appearance and consequential default judgment; What a Defendant under the weight of a default judgment may elect to do; How judgment given in default may be set aside; and Conclusion and recommendations. It is believed that this research effort will illuminate the law and practice relating to judgment obtained in default in the Federal High Court in Nigeria.

## **2.0 Meaning of default judgment**

The FHC (Civil Procedure) Rules, 2019 does not define either “judgment” or “default judgment” in its interpretation clause contained in Order 1, Rule 5. It is

however enacted in Order 1, Rule 6 thereof that “Words other than those defined in Order 1, Rule 5 of these Rules shall have the same meaning as in the Act”. Simply stated, default judgment is one of the many types of judgments available in the adjudicatory ecosystem in Nigeria. “Judgment” was defined by Eko, JSC in *Oboh & Anor v NFL Ltd & Ors* as “the sentence of the law pronounced upon the matter contained in the record and that the reasons for the judgment are not themselves the judgment though they may furnish the Court's reasons for judgment and thus form a precedent.” Judgment may either be on merit or default. Thus, a “default judgment” is a judgment obtained on some procedural error or for technical non-compliance. In *Bello v INEC & Ors*, “default judgment” was explained to mean “judgment given in default of appearance or pleadings against a Defendant or a Plaintiff in a cross-action whose names appear as such Defendant or Plaintiff in the record of the trial Court”. Default judgment is a final judgment until set aside but it is not judgment on merit. Judgment or decision on merit was aptly described in *Tomtec Nigeria Ltd v FHA* “as one rendered after argument and investigation and a determination as to which of the parties is in the right, as distinguished from a judgment or decision rendered upon some preliminary or formal part or by default and without trial”.

A judgment on the merits is one predicated on legal rights which is different “from mere matters of procedure or jurisdiction”. A judgment is on the merits if it is delivered on the basis of the evidence led by the parties in proof or disproof of the issues in controversy between them. Normally, a judgment based solely on some procedural error is not, as a general rule, considered as a judgment on the merits. A judgment is said to be on the merits if it is arrived at, after “considering the merits of the case - the essential issues, the substantive rights presented by the action, as contradistinguished from mere questions of practice and procedure”. Finally, on this issue, in *Mohammed v Husseini*, Onu, JSC, elaborately held that

“The word default which qualifies the noun ‘judgment’ as used in this appeal seems to me to mean a judgment obtained by a plaintiff in reliance on some omission on the part of the defendant in respect of something which he is directed to do by the rules. The word is used very widely to identify situations where a person has omitted

to do what he is required to do having regard to the law governing his actions to the relations he occupies. In ordinary parlance, it means not doing what is reasonable in the circumstances.”

### **3.0 Provisions for Appearance in answer to Court Process**

Succinctly stated, under Order 7 of the FHC (Civil Procedure) Rules, 2019, there is elaborate provision for how a Defendant served with process may enter appearance, meaning indicating willingness to attend Court an answer to the claim. Order 1, Rule 5 of the FHC (Civil Procedure) Rules, 2019 interprets that Originating Process “means any Court process by which a Suit is initiated” while “Court process” or “Process” includes “writ of summons, originating summons, originating motions, originating process, notice, petition, pleading, order, motion, summons, warrant and all document or written communication of which service is required”. The timeline as fixed under Order 7, Rule I is that “a defendant served with an originating process shall within (30) days file in the Registry, along with the processes mentioned in order 13 Rule 2(1) of these Rules, the original and copy of a duly completed and signed memorandum of appearance as specified in Form 11 of Appendix 6 to these Rules with such modifications or variations as circumstances may require.” Under Rule 2, on receipt of the memorandum of appearance, the Registrar shall- (a) make an entry of it and stamp the copy with the seal showing the date he received it; and (b) return the sealed copy to the person making the appearance. A Defendant who files a memorandum of appearance after the time prescribed in the originating process is liable to pay to the Court, an additional fee as specified in Appendix 2 to these Rules for each day of default.

The FHC (Civil Procedure) Rules 2019 upholds the constitutional right of a Defendant to either appear in person or through a legal practitioner. Thus, under Order 7, Rule 2(1) “a defendant appearing in person shall state in the memorandum of appearance (a) an address for service which shall be within the judicial division of the Court; (b) a mobile telephone number; and (c) an e-mail address where available”. Conversely, where a defendant appears by a legal practitioner, it is a requirement of Order 7, Rule(2)(2) that the legal practitioner shall furnish the following details in the memorandum of appearance namely- (a) his place of

business and an address for service which shall be within the judicial division of the Court; (b) a mobile telephone number; (c) an e-mail address where available; and (d) the name and place of business of the principal legal practitioner he is representing where he is only the agent of another legal practitioner. Where two or more defendants in the same action appear through the same legal practitioner, the memorandum of appearance shall include the names of all the defendants represented. These protocols are made in order to ensure that Defendant is not overreached and that Court process is duly brought to the attention of the Defendant. Service of Originating process is essential and cannot be waived. The requirement of entry of appearance with a known and fixed address helps to ensure that the Defendant is served processes. Hence, in addition, the Registrar is expressly authorised not to accept any memorandum of appearance which Memorandum does not contain an address for service under Order 7, Rule 3. Thus, address for service is a compulsory component of any Memorandum of Appearance filed in the FHC. Finally, it is a requirement of Order 7, Rule 5, that a person under legal disability shall enter appearance through his guardian.

#### **4.0 Provisions on Default of appearance and consequential default judgment**

A defendant served with an Originating Process is under a mandatory duty to enter appearance if he is desirous of defending the matter. The wheel of justice cannot grind to a halt because an intransigent, lazy, carefree or obdurate defendant has failed, refused or neglected to enter appearance within time and in the prescribed manner elaborately discussed in the preceding part of this paper. Thus, the consequences for default of appearance are provided under the various Rules of Order 8 of the FHC (Civil Procedure) Rules, 2019. Under Order 8, Rule 1 thereof, it is provided that “where a defendant fails to appear, a plaintiff may proceed upon default of appearance under the appropriate provision of these Rules upon proof of service of the originating process.” It may not be too hasty to point out at this juncture that proof of service of the Originating process is a condition precedent that must be established with cogent evidence before a plaintiff may proceed to apply for default judgment. In *Harry v Menakaya* the apex Court decided in an elaborate manner that “the law is trite and well settled on the fact that service of the originating

process or hearing notice constitutes the foundation on which the whole structure of litigation or appeal is built, and in its absence, the entire proceeding will be rendered void and any decision reached thereon is a nullity. Therefore, the issue of service of an initiating process, be it a Writ of Summons, an Originating Summons, a Notice of Appeal or a Notice of Petition, whether in election matters or in winding-up proceedings et cetera, is so central, fundamental and very Germane to the proceedings springing or emanating from such processes. Service is the very pillar or foundation upon which any proceeding is built, before any Court no matter its status. In other words, the principle applies evenly whether before inferior Courts, Tribunals, or superior Courts of record. Apart from the fact that it is a fundamental human right of a party, extracted from his right to fair hearing as entrenched under *section 36* of the CFRN, 1999 as amended to have an initiating process or hearing notice in respect of any Proceedings served on him, such service or non-service, as the case may be goes to the root of the jurisdiction of the adjudicating Court. Put differently, a Court will not be clothed with jurisdiction to adjudicate on any matter if one of the parties has not been served with either the initiating process of the hearing notice for a particular day or proceedings.”

Against the foregoing general rule on default of appearance, below are provisions regarding how default judgment may be obtained on specific demands made against one or more defendants namely-

**(a) Liquidated demand.**

Where the claim in the originating process is a liquidated demand and the defendant or all of several defendants fail to appear, a plaintiff may apply to a Judge for Judgement for the claim on the originating process or such lesser sum and interest as the Judge may order.

**(b) Liquidated demand: several defendants**

Where the claim in the originating process is a liquidated demand and there are several defendants of whom one or more appear to the process and another or others fail to appear, a plaintiff may apply to a Judge for Judgement against those who have not

appeared and may execute the Judgement without prejudice to his right to proceed with the action against those who have appeared.

**(c) Several defendants**

Where the claim in the originating process is as specified in rule 7 of this order and there are several defendants one or some of whom appear while another or others do not appear, a plaintiff may apply for Judgement against the defendant failing to appear and the value of the goods and or the damages only as the Case may be, shall be ascertained in such manner and subject to the filing of such particulars as a Judge may direct before Judgement in respect of that part of the claim.

**(d) Default of appearance by person under legal liability**

Where no appearance has been entered for a person under legal disability, a plaintiff shall apply to a Judge for an order that a person be appointed guardian for such defendant and when appointed the person may appear and defend such a person. It is a requirement of Order 8, Rule 6 that the application to appoint a guardian shall be made after service of the originating process and notice of the application shall be served on the person intended to be appointed the guardian of the defendant.

**(e) Detention of goods and damages**

Under Order 8, Rule 7(1), where the claim in the originating process is for pecuniary damages or detention of goods with or without a claim of pecuniary damages, and the defendant or all of the several defendants fail to appear, a plaintiff may apply to a Judge for judgment. However, under Order 8, Rule 7(2), the value of the goods and damages or the damages only as the case may be shall be ascertained in such manner and subject to the filling of such particulars as a Judge may direct before judgment in respect of that part of the claim.

**(f) Detention of goods, damages and liquidated demands**

Under Order 8, Rule 8(1), where the claim in the originating process is for pecuniary damages, detention of goods with or without a claim for pecuniary damages and includes a liquidated demand, and any of the defendants fail to appear, a plaintiff

may apply to a Judge for judgment while under Order 8, Rule 8(2), “the value of the goods and damages or the damages as the case may be shall be ascertained in such manner and subject to the filing of such particulars as a Judge may direct before Judgment in respect of that part of the claim”.

**(g) Judgment for costs: upon payment, satisfaction *etcetera***

In any case to which Rules 2, 3, 4, 6, 7 and 8 of Order 8 of the FHC (Civil Procedure) Rules, 2019 do not apply and the defendant or all of several defendants fail to appear, but by reason of payment, satisfaction, abatement of nuisance, or any other reason, it is unnecessary for a plaintiff to proceed, he may apply to a Judge for Judgment for cost: Provided that such application shall be filed and served in the manner in which service of the originating process was effected or in such manner as a Judge shall direct.

It should be clearly noted that the procedure for default judgment is restrictive and not available to every form of claim. Order 8, Rule 11 provides that “In any other claim not specifically provided for under this order, where the party served with the originating process does not appear within the time prescribed in the originating process, a plaintiff may proceed as if appearance had been entered.” This means that in those groups of claims not covered by Rules 2, 3, 4, 6, 7 and 8 of Order 8 of the FHC (Civil Procedure) Rules, 2019, where appearance is not entered, the Plaintiff will not be entitled to default judgment. Rather, he will have to introduce evidence, call witnesses and prove his case as meritorious relative to the reliefs sought.

**5.0 What a Defendant under the weight of a default judgment may elect to do**

A default judgment is final until set aside by a Court. However, a party under default judgment has not been shut out completely from the corridors of justice. Against this backdrop therefore, once judgment has been rendered in default, the Defendant may wish to explore any of the following three mutually exclusive options namely: (a) a choice of either to accept the judgment and be bound by it. Where this option is taken, that marks the end of the case and the default judgment remains final and binding. The party will neither apply for a reversal of the decision nor appeal against it. (b) A choice to move the trial Court to set the upturn the judgment and hear the



suit afresh on its merit. In this case, the defendant has not accepted to be bound by the default judgment. However, the application must be supported with cogent reasons, brought within time and in strict compliance with conditions stipulated in the Rules. Success or failure of the application is a decision for the Court to make on sound principles. Where the application is granted, the default judgment is set aside, and the case is listed back on the cause list or hearing on the merit. (c) The party may also elect to appeal against the default judgment. In this case, the defendant has not approached the trial Court to set aside the default judgment.

It is important to accentuate that in the three scenarios above, the party is put to his election and where the party has made his election, he loses the other remedy or remedies. Thus, in the election of remedies, a party is not entitled to more than one of the three options. Exercise of one, leads to loss of his right to thereafter exercise the other. The principle has its root in the Latin maxim: “*allegans contraria non est audiendus* (he is not to be heard who alleges things contradictory to each other). No one is allowed to approbate and reprobate.”

## **6.0 How judgment given in default may be set aside**

The FHC (Civil Procedure) Rules 2019 provides a window of opportunity for a defendant to set aside default judgment obtained under Order 8, Rules as amply discussed in the foregoing segment of this paper. Specifically, it is provided in Order 8, Rule 10 as follows: “Where Judgement is entered pursuant to any of the preceding rules of this order, a Judge may set aside or vary such Judgement on just terms upon an application on notice by the defendant; the application shall be made within 14 days and shall be accompanied with treasury receipt showing payment of penalty for the period of default, and show a good defence to the claim and a just cause for the default.” Needless to overemphasise that the provisions of this Order regarding setting aside default judgment is the fulcrum of this paper. It is of significance to this paper that under Order 8 Rule 10 above, a Judge has the discretion (the word “may” is used) to set aside a default judgment. However, the application by the defendant must be on notice and it is mandatory (the word “shall” is used) that it shall be brought not outside fourteen days of the giving of the judgment in default. In addition, it is compulsory that the application shall meet the following

requirements- (i) evidence of treasury receipt disclosing payment of penalty for the period of default must be attached; (ii) a good defence to the claim and (iii) a just cause for the default.

## **7.0 Guiding principles for setting aside a default judgment**

It is hornbook law that a Court has no power to review its own decision on a matter or revisit it after it has given judgment as it is *functus officio*. In *Refuge Home Savings & Loans Ltd v Garkuwa & Ors*, it was emphasised that once a Court seized with a matter has delivered a final judgment, the Court is deemed to be functus officio on the matter. Functus officio is a Latin phrase or term meaning that a duty has been performed. It is not the intention of our jurisprudence that a party that was served with originating processes and hearing notice and which had opportunity to appear in Court and present its objections should willingly stay away from the Court. Once opportunity is given to a party, he cannot claim that he was denied his right to fair hearing. In the light of the foregoing, outstanding discussions in this segment will be two-fold namely- (a) principles that should guide a Defendant and (b) principles that should guide the Court. They are discussed seriatim below.

### **(a) Principles that should guide a Defendant**

In an application for setting aside a default judgment, the onus is on the applicant to satisfy the conditions stipulated in the Rules and also satisfy the trial Court that his application has merit, is not frivolous or vexatious. The following general principles must be therefore be borne in mind by the Defendant namely-

#### ***(i) Threshold of proof and evidence***

An applicant must place sufficient facts before the Court to warrant grant of the relief of setting aside. Any application that does not meet the irreducible minimum threshold for setting aside the default judgment will not be granted. At all material times, it is the responsibility of the applicant to discharge this burden. The affidavit evidence must disclose good defence to the claim and just cause for the default. In *Rivtrust Securities Ltd & Ors v AMCON*, it was reiterated that “it is firmly settled that application for the setting aside of a default judgment is not granted as a matter

of course. An applicant must show by credible evidence and satisfy the Court that the facts and circumstances of the case warrant the setting aside of such judgment". The Court of Appeal held that the present appeal against refusal of the Learned trial Judge to set aside the default judgment was frivolous and lacking in merit. Providing justification for this conclusion, Kolawole, JCA held as follows:

Considering the facts put forward by the Appellants in the Application to set aside the default judgment, I have no hesitation in reaching the inevitable conclusion that the Learned trial Judge was on the right pedestal when he refused to set aside the judgment entered in default against the Appellants in this case. In the instant case, it is not the complaint of the Appellants' counsel that the Appellants were not afforded the opportunity to be heard before the judgment in default was entered against them; rather, their complaint, as highlighted in the affidavit filed in support of the motion to set aside the default judgment and in their Brief of Argument, is that their 'constitutional right to fair hearing was jeopardized by their counsel who failed to file processes in defence of the suit.' The Learned trial Judge did not find the said ground satisfactory enough to warrant setting aside the default judgment. I am clearly of the view, that the ground upon which the Appellants are predicating their complaint is grossly misconceived, erroneous and not well founded.

An applicant must seize the window of opportunity to have the judgment obtained in default of appearance set aside by the trial Court. He will not be assisted if he failed to utilize the opportunity In *University of Calabar v AMCON & Ors*, the implication of Order 9 Rules 21 and 22 as well as Order 19 Rule 3 (2) of the FHC (Civil Procedure) Rules, 2019 fell for consideration by the apex Court. The said Orders and Rules provide as follows:

Order 9 Rule 21- where a third-party duly served with a third-party notice does not enter an appearance or defaults in filing any

pleading which he has been ordered to file, he shall be deemed to admit -

- a) any claim stated in the third-party notice and shall be bound by any judgment given in the action, whether by consent or otherwise, and by any decision therein or any question specified in the action; and
- b) his liability in respect of a contribution or indemnity or other relief for remedy when contribution or indemnity or relief for remedy is claimed against him in the notice.

22-where a third-party defaults in entering an appearance or filing any pleading which he had been ordered to file and the defendant giving the notice suffers judgment by default, the defendant shall be entitled at any time, after satisfaction of the judgment against himself, or before the satisfaction by leave of the Court or a Judge in Chambers to enter-

(a)XXX

(b)XXX

(2)-The Court or a Judge in Chambers may set aside or vary the judgment against the third-party upon such terms as may seem just".

Similarly, Order 19 Rule 3(2) provides that:

‘A judgment obtained where any party does not appear at the trial may be set aside by the judge upon such terms as he may deem fit.

Conclusively, it was adjudged that the appellant never took advantage of the above clear provisions. Having so failed to make the necessary application to the trial Court, it is deemed to have accepted the judgment.

(ii) Rules of Court must be obeyed- mandatory penalty fees must be paid as a condition precedent

An application to set aside a default judgment must be brought in the manner and form required by the Rules. This may not be waived. An important consideration will be whether mandatory fees for penalty for the period of default was paid? An application which does not meet and satisfy any or all of the above conditions and pre-conditions is bound to fail and should not be granted. For instance, under Order 8 Rule 10 of the Federal High Court (Civil Procedure) Rules, 2019, the application must be brought within 14 days and it shall be accompanied with treasury receipt showing payment of penalty for the period of default, and show a good defence to the claim and a just cause for the default. Rules of Court must be obeyed as held by Supreme Court, per Garba, JSC, in *Macfranklyn Engineering & Services v Daewoo (Nig) Ltd & Anor*.

(iii) No leave of Court required when application is brought within time

There is no leave of Court required where the application is brought within the stipulated fourteen-day time frame. It will be an overkill to insist otherwise. In *Kemek Nig Ltd v Apapa Local Government*, it was held that “while it is necessary for a party who is in default of carrying out an act within the time prescribed by the law to bring an application for extension of time, there are no Rules or any decided cases where leave is necessary to bring such an application more so, an application to set aside a default judgment”. It is opined that this judgment is loaded with logic and clarity of thought.

#### **(iv) Application out of time**

The affidavit must also disclose a defence on the merit where the time had elapsed. It is not the intention of the Rules that the right to of a Defendant present an application to reverse a judgment reached in default should be available endlessly. Such an interpretation will lead to absurdity. Hence, time limit of fourteen days is imposed. However, where the application is brought out of time or beyond the time allowed for making the application, the applicant must firstly apply for and obtain leave of Court extending time as failure to do spells doom for the application. The decision in *Nigeria Reinsurance Corporation v Alsagar National Insurance Co* illuminated what is expected of a party filing an application to set aside a default judgment out of time

under the Order 8 Rule 1 and 9 of the FHC (Civil Procedure) Rules, 2019. It was held that a prayer for extension of time within which to file "an application" means and "must be interpreted to mean that the Appellant knew and admitted that it was out of time, and has hitherto not entered appearance in the suit thereby bringing its application within the purview of Order 8 rules 1 and 9 of the trial Court's Rules". The appellant's failure to firstly apply for extension of time in the trial Court proved fatal to the appeal.

(b) Principles that should guide the trial Court

The following may be aggregated as some of the key principles that should guide a Court that has been invited to set aside its judgment given in default namely:

(i) No jurisdiction where process is not duly served

The service of process on the defendant so as to enable him to appear to defend the relief being sought against him and the appearance by the party or any counsel must be those fundamental conditions precedent required before the Court can have competence and jurisdiction. This very well accords with the principles of natural justice. Service of process is indispensable in the adjudicatory process. Failure, refusal or neglect to serve a named party with Court process gravely violates fair hearing principles guaranteed in *section 36(1)* of the CFRN, 1999 as amended. Any breach of this principle renders proceedings nullity. Undoubtedly, service of process is a fundamental issue and condition precedent before the Court can have competence to adjudicate. The absence of service forecloses foundation and as established in the famous case of *Macfoy v UAC Ltd*, "you cannot put something on nothing and expect it to stay there. It will collapse."

(ii) Leave must first be obtained when application is out of time

Order 8, Rule 10 of the FHC (Civil Procedure) Rules, 2019 provides a 14 day window for a Defendant to "apply for the default judgment to be set aside". The Court also had unfettered discretion to set aside or vary the Judgment upon the application of the Defendant provided the application was made within time 14 days of the delivery of that Judgment and upon the Defendant showing a good defence

and a just cause why he defaulted to appear before Judgment was entered against him. Any application brought in beyond fourteen days must fail if no leave was first sought and obtained extending time. In *Raylcon (Nig) Ltd & Anor v AMCON*, the appellants did not ask for extension of time and did not comply with any of the conditions stipulated by the applicable Rules of the Federal High Court. It was held by the Court of Appeal that the trial Court's jurisdiction to entertain the application was not activated by due process of law. The trial Court had no jurisdiction to entertain or consider the application in the first place. The ruling delivered by the trial Court having been delivered without jurisdiction was declared a nullity and consequently set aside. The application to set aside the judgment was struck out for being incompetent having been filed outside the time prescribed by the Rules. This principle was also upheld in *Macfranklyn Engineering & Services v Daewoo (Nig) Ltd & Anor*. Where an application for extension of time is not first made and obtained, the request to reverse the judgment of the trial Court remains incompetent and nullity.

(iii) Judicious exercise of judicial discretion

Grant or refusal of an application to set aside a default judgment is at the discretion of the trial Court. However, it is settled law that judicial discretion must be exercised judiciously. As expatiated in *Agbenyi v Abo*, acting judiciously means, (a) proceeding from sound judgment; (b) having or exercising sound judgment; (c) marked by discretion, wisdom and good sense. Acting judicially is also said to import the consideration of the interests of both sides and weigh them in order to arrive at a just or fair decision. Judicial discretion is validly exercised when it is exercised judiciously, regarded as being had to the facts and circumstances of the particular case. Thus, a judgment or decision given in default is not set aside as a matter of course or pleasure because it is final and remains valid until set aside upon application to the Court on reasonable grounds such as fraud, non-service or of lack of jurisdiction or upon such terms as the Court may deem fit. In sum, the discretionary power of the Court to set aside its own default judgment has to be exercised judiciously, guided by the following principles pronounced by the Supreme Court in *Williams & Ors v Hope-Rising & Voluntary Funds Society* namely: “(1) The reasons for the applicant's failure to appear at the hearing or trial of the case in

which Judgment was given in his absence. (2) Whether there has been undue delay in making the application to set aside the Judgment so as to prejudice the party in whose favour the Judgment subsists. (3) Whether the party in whose favour the Judgment subsists would be prejudiced or embarrassed upon an order for rehearing of the suit being made, so as to render such a course inequitable. (4) Whether the applicant's case is manifestly unsupportable; and (5) Whether the Applicant's conduct throughout the proceedings, that is, from service of the writ upon him to the date of judgment, has been such as to make his application worthy of sympathetic consideration.”

(iv) There must be merit in the application

In an application to set aside a default judgment, the Court is under obligation to consider whether the application has merit or is frivolous. Courts do not honour frivolous applications or grant manifestly unsupportable reliefs or prayers. In *Ogolo v Ogolo*, it was held that a Court before which an application to set aside a default judgment is brought must determine whether the applicant's case is manifestly unsupportable. In so doing, the applicant's defence, which must be exhibited to his affidavit in support of the application to set aside the default judgment, has to be examined by the Court. The requirement that the applicant's case must not be unmistakably indefensible or unsustainable can only be judicially and judiciously settled when his defence is also scrutinized.

Several factors will also assist the Court in arriving at the determination whether the application has merit or not. A key consideration on the checklist is that the Court must ensure that the stipulated preconditions and conditions for bringing the application are met and satisfied. Such considerations include the question whether the application was brought within time or after the time stipulated under the Rules? Where the application was brought after the expiration of the stipulated time, was leave of Court applied for and obtained for time enlargement of time?

## **7.0 Conclusion and recommendations**

The question of setting aside a default judgment is a discretionary power inherent in the Court that delivered it. Furthermore, this paper has shown that the Federal High Court has the additional statutory power conferred on it by the FHC (Civil Procedure



Rules) 2019 to reverse itself in exceptional cases. The protocols erected for rendering default judgment and its setting strikes a formidable balance between granting Defendant another chance to defend the case brought against him and the need to ensure that the wheel of justice is not unreasonably delayed by an uncooperative or stubborn Defendant. Premised on the age-long principle that justice delayed is justice denied, it is recommended that where a Defendant fails to expeditiously, and without cogent reason, file, reply, respond to and or answer Court processes, he should be visited with the full weight of the law as provided under the Civil Procedure Rules of the Federal High Court.

## REFERENCES

1. Hereinafter abbreviated simply as “FHC”.
2. (2012) LPELR-8377(CA) (Pp. 33-34 paras. G) per Denton-West, JCA.
3. Under *subsection of section 19* of the FHC Act, 2004 it is provided that “The Court shall have and exercise jurisdiction throughout the federation, and for that purpose the whole area of the Federation shall be Divided by the Chief Judge into such number of Judicial Divisions or part thereof by such name as he may think fit for the Division of the FHC into Divisions.”
4. Note that in *subsection I of section 44* of the FHC Act, 2004 “the Chief Judge may, with the approval of the President, make rules of Court” for carrying the FHC Act into effect on sundry matters listed therein.
5. (2020) LPELR-55520(SC) (Pp. 6 paras. D).
6. (2010) LPELR-767(SC) (Pp. 36 paras. A). See also *Alapa v Sanni* (1967) NMLR 397 and relied upon per Senchi, JCA, in *Colvi Ltd & Ors v Bacab Properties Ltd* (2023) LPELR-61341(CA) (Pp. 25-28 paras. D).
7. (2009) LPELR-3256(SC) (Pp. 16 paras. B) per Onnoghen, JSC.
8. (1998) LPELR-1896(SC) (Pp. 55 paras. A).
9. (2017) LPELR-42363(SC) (Pp. 19-25 paras. A).

10. Order 8, Rule 2 of the FHC (Civil Procedure) Rules, 2019.
11. Order 8, Rule 3 of the FHC (Civil Procedure) Rules, 2019
12. Order 8, Rule 4 of the FHC (Civil Procedure) Rules, 2019
13. Order 8, Rule 5 of the FHC (Civil Procedure) Rules, 2019
14. Order 8, Rule 9 of the FHC (Civil Procedure) Rules, 2019
15. The case of *Young v Bristol Aeroplane Co* (1946) 1 All ER 98 is very instructive on this common law principle.
16. (2021) LPELR059982(SC).
17. *Segun Ogunsanya v State* (2011) LPELR-2349(SC).
18. 2019) LPELR-47966(CA) (Pp. 21-22 paras. F).
19. (2024) LPELR-62596(SC) (Pp. 33-34 paras. A).
20. (2024) LPELR-62633(SC) (Pp. 32-33 paras. C).
21. (2020) LPELR-51394(CA) (Pp. 27 paras. A).
22. (2021) LPELR-53304(CA) (Pp. 25-26 paras. A).
23. (1962) AC 152.
24. (2020) LPELR-50984(CA).
25. (2024) LPELR-62633(SC) (Pp. 34-35 paras. C).
26. [1994] 7 NWLR (Pt. 359) 735 at 747 cited with approval in *Wobo v Wali & Anor* (2023) LPELR-60009(CA) (Pp. 12-13 paras. F).
27. *El-Asbab Hotel & Investment Ind (Nig) Ltd & Anor v Eco Bank* (2024) LPELR-62448(SC).
28. (1982) 1 - 2 SC 145.
29. (2006) LPELR-2311(SC).