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Guiding Principles for Setting Aside Default Judgment –A Panoramic Overview Through Decided Cases

*N.O. Obiaraeri**

Abstract

In the administration of justice ecosystem, it is a perennial question whether default judgment can be set aside and, if in the affirmative, what steps can a defendant take to get the trial Court to set it aside? There is also related concern about the legal principles that should guide a trial Court in granting or refusing an application to set aside a default judgment. To resolve these legal posers, this paper deployed the doctrinal research method to consider provisions of various Rules of Courts on default judgment and the interpretations placed on them in decided cases. The paper established that, although not on merit, default judgment is final until set aside. Hence, Rules of Courts commonly provide the defendant with opportunity to set aside default judgment. The paper further found that satisfying the requirement for setting aside default judgment is a herculean task on the part of the applicant and an onerous judicial discretion that must be exercised judiciously by the trial Court. The paper recommended that the trial Court should not hesitate to refuse any application for setting aside a default judgment that falls short of the conditions stipulated in the Rules since equity assists only the vigilant.

Keywords: Appearance, default, judgment, merit, set aside

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1. Introduction

The nature of default judgment, the generally applicable parameters for consideration of an application to set aside a default judgment and the power of a Court to set aside a default judgment are often least understood. Default judgment is one of the many types of judgments available in the adjudicatory ecosystem in Nigeria. “Judgment” was tersely defined by the Supreme Court, per Eko, JSC in *Oboh & Anor v NFL Ltd & Ors*¹ 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. As will be shortly shown, default judgment is not judgment on

* LL. B (Hons), B.L. (Hons), LL.M, Ph.D (Law), FHRI, FCAI, KJW; Professor of Law and Former Dean, Faculty of Law, Imo State University, Owerri, Nigeria; Nigerian Association of Law Teachers (NALT) Taslim Elias Awardee, 2017; Former Visiting Scholar and Fellow, Human Rights Institute, Columbia University, New York, NY, USA; E-mail: profnoobiaraeri@imsuonline.edu.ng; noobiaraeri@yahoo.com; Tel: +2348035524442.

¹ (2020) LPELR-55520(SC) (Pp. 6 paras. D) relying on *Attorney-General, Oyo State v. Fairlakes Hotel Ltd* (1988) LPELR-42926 (SC) per Agbaje, JSC, citing *Ex P. Chinery* (1884) 12 QBD 342.

merit. More often than not, it is given for failure, refusal or neglect to obey or comply with the Rules or when a defendant fails to comply with responses or answers to processes under the specific Rules of Court within the stipulated time. Different procedures for attainment of default judgment and or its consequential vacation or setting aside exist under the different Rules of Court. However, irrespective of these differences, there are still common principles that must be obeyed in the attainment of default judgment or its setting aside by an aggrieved defendant. Against this background, the aim of this paper is to explain in full the meaning of default judgment, its general principles and the options open to a party against whom a default judgment has been given. This intervention will help to enlighten that a person under the weight of default judgment is not doomed forever as the law has provided steps which he can take to obtain redress in deserving cases. For ease of understanding, this paper is further divided into the following parts namely: Meaning of “default judgment”; Provision for default judgment in select Rules of Court; Options open to a party against whom a default judgment has been given; What an applicant must show in an application to set aside a default judgment; Duty of Court in an application to set aside a default judgment; and Conclusion and recommendation.

2. Meaning of default judgment

“Default judgment” is simply a judgment obtained on some procedural error or for technical non-compliance. Default Judgment is 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.² 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*³ 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. The striking differences between “default judgment” from “judgment on the merits” were noted in the case of *Mohammed v Husseini*⁴ to be that a judgment on the merits is one based on legal rights as distinguished from mere matters of procedure or jurisdiction. A judgment on the merits is thus a decision that was rendered 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 on the merits is therefore one 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. In that case, 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 signify 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.

² This was defined by Per Mohammed, JSC, in *Bello v INEC & Ors* (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).

³ (2009) LPELR-3256(SC) (Pp. 16 paras. B) per Onnoghen, JSC. The case of *Cardoso v Daniel & Ors* (1986) 2 NWLR (Pt. 20) 1 was cited with approval.

⁴ (1998) LPELR-1896(SC) (Pp. 55 paras. A).

Furthermore, in *Olawunmi v Ugwu & Ors*,⁵ the Court of Appeal relied on the Supreme Court decision in the case of *Akuneziri v Okenwa & Ors*,⁶ to expatiate that a judgment on the merit is a decision that was rendered on the basis of the evidence and facts introduced. It must be a decision made after hearing argument and investigation and where it is determined which party is the right, as distinguished from a judgment rendered upon some preliminary or formal or merely technical or procedural point, or by default and without trial.

It must be accentuated that, notwithstanding that a default judgment is not a judgment on merit, any judgment by default is final and remains valid unless and until set aside upon application to the Court on grounds of fraud, non-service or of lack of jurisdiction and upon such terms as the Court may deem fit.

3. Provision for default judgment in select Rules of Court

Default judgment is usually provided for in the Rules of superior Courts so that a recalcitrant or defendant who fails, refuses or neglects to timeously appear in person or through Counsel when required to do so; file, respond to or answer or defend Court processes does not hold judicial proceedings hostage. Under the relevant Rules of Court, default judgment may be given against such stubborn or obstinate defendant. Expectedly, provisions for default judgment are not uniform in the different Courts as some Rules of Courts provide for variations on sundry procedural steps including mandatory requirement of time frame, payment of penalty fees or no payment at all as pre-condition for application for setting aside default judgment. This paper will cite verbatim provisions for default judgment and how it may be set aside from the Rules of three Courts namely: (a) the Federal High Court (Civil Procedure Rules), 2019; (b) the National Industrial Court of Nigeria (Civil Procedure) Rules, 2017; and (c) the Imo State High Court (Civil Procedure) Rules, 2017. These specific provisions drawn from two Federal Courts and one State High Court will assist in subsequent discussions in this paper on the general principles on the procedure for setting aside a default judgment and what is expected of both the applicant and the trial Court.

In the Federal High Court,⁷ various Rules of Order 8 of the Federal High Court (Civil Procedure) Rules, 2019 provide for default appearance as follows-

1. 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.
2. 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.
3. 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.

⁵ (2022) LPELR-59116 (CA) (Pp. 13-14 paras. D).

⁶ (2000) LPELR - 393 (SC) citing *Cardoso v Daniel & Ors* (1986) 2 NWLR (Pt. 20) 1.

⁷ Established under *section 249* of the Constitution of the Federal Republic of Nigeria, 1999 as amended.

4. 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.
5. 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.
6. 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.
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.

(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.
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.

(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.
9. In any case to which rules 2, 3, 4, 6, 7 and 8 of this order 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 Judgement 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.
10. 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.
11. 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.

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 mandatorily (the word “shall” is used) be made within 14 days of the giving of the default judgment. In addition, it is compulsory that the application 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.

In the National Industrial Court of Nigeria,⁸ Order 15, Rule 1 of the National Industrial Court of Nigeria (Civil Procedure) Rules, 2017 provides generally regarding duty of a party served with complaint as follows:

Where a party served with a Complaint or any other originating process and the accompanying documents as stipulated in Order 3 of these Rules intends to defend and/or counter-claim in the action, the party shall not later than fourteen (14) days or any other time prescribed for defence in the Complaint, file:

- (a) a statement of defence and counter-claim, (if any), which may include any preliminary objection the party wishes to raise to the Claimant’s action;
- (b) a list of witnesses;
- (c) a list and copies of documents and other exhibits to be relied upon at the trial;
- (d) Written Statements on oath of all witnesses listed to be called by the Defendant other than witnesses to be subpoenaed.

Regarding default judgment or when a party fails to comply with time limit, Order 15, Rule 8 of the National Industrial Court of Nigeria (Civil Procedure) Rules, 2017 provides as follows:

Where notice has been served on a party to file a notice of response within the time allowed by Rule 1 of this Order and that party fails to comply, the matter shall nevertheless be set down for hearing and if on the day of hearing, the defaulting party -

- (1) appears and shows good cause why the party did not file a notice of response, the Court may according to the nature of the case, or as the justice of the case requires -
 - (i) postpone the matter to enable the defaulting party to comply, or;
 - (ii) proceed to hear and determine the matter; or
- (2) does not appear or show good cause why the party did not file a response, the Court may, according to the nature of the case, or as the justice of the case may require-
 - (a) enter a default judgment against the defaulting party; or
 - (b) proceed to hear and determine the matter.

⁸ Established under *section 254A* of the Constitution of the Federal Republic of Nigeria, 1999 as amended courtesy of *section 6* of the Constitution of the Federal Republic of Nigeria (Third Alteration) Act, 2010.

Thus, expressly, Order 15, Rule 8(2)(a) of the National Industrial Court of Nigeria (Civil Procedure) Rules, 2017 above authorises a Court to enter a default judgment against a defaulting party. It must be noted that Order 35, Rule 7 of the National Industrial Court of Nigeria (Civil Procedure) Rules, 2017 provides for validity of a default judgment and application to set aside as follows-

Any judgment by default whether under this Order or under any Order of these Rules shall be final and remain valid and may only be set aside upon application to the Court on grounds of fraud, non-service or of lack of jurisdiction and upon such terms as the Court may deem fit.

The phrase “upon such terms as the Court may deem fit” gives the Court the discretion to consider the application to set aside default judgment on other meritorious grounds other than the three listed grounds (fraud, non-service or of lack of jurisdiction).

Lastly, in Imo State High Court,⁹ under the Imo State High Court (Civil Procedure) Rules, 2017, an elaborate protocol or procedure for award of default judgment and consequences of default of pleading including how to set aside default judgment are provided. The verbatim provisions of Order 20 of the Imo State High Court (Civil Procedure) Rules, 2017 are as follows:

Claim for debt or liquidated demand.

1. If the claim is only for debt or liquidated demand, and the Defendant does not within the time allowed for the purpose, file a Defence, the Plaintiff may, at the expiration of such time, apply for final judgment for the amount claimed with costs.

Several Defendants: default of one.

2. When in any such action as in Rule 1 of this Order there are several Defendants, if one of them makes default as mentioned in Rule 1 of this Order, the Plaintiff may apply for final judgment against the Defendant making default and issue execution upon such judgment without prejudice to his right to proceed with his action against the other Defendants.

Damages and detention of goods.

3. (1) If the Plaintiffs claim be for pecuniary damages or for detention of goods with or without a claim for pecuniary damages only, and the Defendant or all the Defendants, if more than one, make default as mentioned in Rule 1 of this Order, the Plaintiff may apply to a Judge for interlocutory judgment against the Defendant or Defendants and the value of the goods and the damages, or the damages only as the case maybe, shall be ascertained in any way which the Judge may order.
- (2) Where damages are to be ascertained and in all cases where declaratory reliefs are sought the Judge shall set down the matter for trial.

⁹ Established under section 270 of the Constitution of the Federal Republic of Nigeria, 1999 as amended.

Default of one or more Defendants.

4. When in any such action as in Rule 3 of this Order there are several Defendants, if one or more of them make default as mentioned in Rule 1 of this Order, the Plaintiff may apply to a Judge for interlocutory judgment against the Defendant or Defendants so making default and proceed with his action against the others. In such case the value and amount of damages against the Defendant making default shall be assessed at the trial of the action or issues therein against the other Defendants, unless the Judge shall otherwise order.

Debt or damages and detention of goods or damages.

5. Where the claim is for debt or liquidated demand and also for pecuniary damages or for detention of goods with or without a claim for pecuniary damages and includes a liquidated demand and any Defendant makes default as mentioned in Rule 1, the Plaintiff may apply to a Judge for final judgment for the debt or liquidated demand, and may also apply for interlocutory Judgment for the value of the goods and damages, or the damages only as the case may be, and proceed as mentioned in Rules 3 and 4.

Recovery of land.

6. In an action for the recovery of land, if the Defendant makes default as mentioned in Rule 1, the Plaintiff may apply for judgment that the person whose title is asserted in the Writ of Summons shall recover possession of the land with costs.

Claim for Mesne profits, arrears or damages.

7. Where the Plaintiff has endorsed a claim for mesne profits or arrears of rent in respect of the premises claimed, or any part thereof or damages for breach of contract or wrong or injury to the premises claimed upon a Writ for the recovery of land, if the Defendant makes default as mentioned in Rule 1, or if there be more than one Defendant, some or one of the Defendants make such default, the Plaintiff may apply for final judgment against the defaulting Defendant or Defendants and proceed as mentioned in Rules 3 and 4.

Defence to part of claim only.

8. If the Plaintiff's claim is for a debt or liquidated demand or for pecuniary damages only, or for detention of goods with or without a claim for pecuniary damages, or for any such matters, or for the recovery of land, and the Defendant files a Defence which purports to offer an answer to part only of the Plaintiff's alleged cause of action, the Plaintiff may apply for judgment, final or interlocutory, as the case may be, for the part unanswered:

Provided that the unanswered part consists of a separate cause of action or is severable from the rest, as in the case of part of a debt or liquidated demand:

Provided also that where there is a Counter-Claim, execution on any such judgment as above mentioned in respect of the Plaintiff's claim shall not issue without leave of the Judge.

Default of Defence.

9. (1) In all actions other than those in the preceding Rules of this Order, if the Defendant makes default in filing a Defence, the Plaintiff may apply to a Judge for judgment, and such judgment shall be given upon the Statement of Claim as the Judge shall consider the Plaintiff to be entitled to.

(2) Where there is no Defence and the matter before the Court cannot be adjudged without the Plaintiff adducing evidence to prove the case before the Court, the Plaintiff shall make an application to set the matter down for trial before the Judge who shall upon consideration and grant of the application proceed to hear the matter as the trial judge.

One of several Defendants in default.

10. Where in any such action as mentioned in Rule 9 of this Order, there are several Defendants, if one of such Defendants makes such default as aforesaid, the Plaintiff may apply for judgment against the Defendant so making default, and proceed against the other Defendants.

Default of Third party.

11. In any case in which issues arise in a proceeding other than between Plaintiff and Defendant, if any party to any such issue makes default in filing any pleading, the opposite party may apply to a Judge for such judgment, if any, as upon the pleadings he may appear to be entitled to, and the Judge may order judgment to be entered accordingly or may make such other order as may be necessary to do justice between the parties.

Setting aside judgment by default.

12. Any judgment by default whether under this Order or under any Order of these Rules shall be final and remain valid and may only be set aside upon application to the Judge on grounds of fraud, non-service or lack of jurisdiction upon such terms as the Court may deem fit.

Significantly, under Rule 12 above, it is clear that judgment obtained by default shall be final and remain valid and may only be set aside upon application to the Judge on grounds of fraud, non-service or lack of jurisdiction upon such terms as the Court may deem fit. Regarding time frame, Order 10, Rule 11 of the Imo State High Court (Civil Procedure) Rules, 2017 provides that a Judge may set aside or vary any judgment on just terms upon an application by the Defendant. The application shall be made within seven days, showing a good defence to the claim and a just cause for the default.

From the different Rules of the three different Courts discussed above, it is evident that they all provide commonly that a default judgment can be set aside by a trial Court upon an application made within different stipulated time frames by a Defendant. The next segment of this paper will discuss the options open to a party against whom a default judgment has been given and their various implications.

4. Options open to a party against whom a default judgment has been given

The objective of the Rules of Court is for the just and expeditious disposition of cases.¹⁰ A default judgment is final until set aside by a Court. However, a party under a default judgment has not been shut out completely from the corridors of justice. Against this backdrop therefore, once a default judgment has been given against a party, that party has the following mutually exclusive three options open to him namely: (a) a choice of either accepting the judgment and abide 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 to the trial Court to set aside the default judgment nor appeal against it. (b) A choice to move the trial Court to set the default judgment aside and hear the suit 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 the time and in strict compliance with conditions stipulated in the Rules. Grant or refusal of the application is at the discretion of the Court. 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 maxim: *allegans contraria non est audiendus* (he is not to be heard who alleges things contradictory to each other). It is trite law that a party is not allowed to approbate and reprobate.¹¹

5. What an applicant must show in an application to set aside a default judgment

In an application for setting aside a default judgment, the double barrel onus is on the applicant to (a) satisfy the conditions stipulated in the Rules and (b) also satisfy the trial Court that his application has merit, is not frivolous or vexatious. The following general principles aggregated from decided cases by the superior Courts especially the apex Supreme Court must be therefore be borne in mind by a defendant desirous of presenting a successful application to set aside a default judgment namely-

(a) Irreducible minimum threshold of proof and evidence

Irrespective of the Court involved, any application that does not meet the irreducible minimum threshold for setting aside the default judgment will not be granted. A defendant against whom a default judgment is entered, either for failing to appear at a date fixed for pre-trial conference or hearing, or failing to file his statement of defence within the period prescribed by the Rules of Court, who claims to be desirous of defending the action ought, at the very least, to place before the Court necessary materials in the form of a proposed statement of defence on the basis of which the Court's discretion can be exercised in his favour. At all material times, it is the responsibility of the applicant to discharge this burden. In *Rivtrust Securities Ltd & Ors v AMCON*,¹² it was reiterated that it is firmly settled that application for the setting aside of a default judgment is not

¹⁰ Order 1, Rule 4 of the Federal High Court (Civil Procedure) Rules, 2019 speaks to this objective.

¹¹ *Mohammed v Hussein* (1998) LPELR-1896(SC) (Pp. 85-87 paras. G) and *Young v Bristol Aeroplane Co* (1946) 1 All ER 98 are instructive for further discussion on the common law principle.

¹² 2019) LPELR-47966(CA) (Pp. 21-22 paras. F).

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. On the facts of this case, the Court of Appeal considered the appeal against refusal of the Learned trial Judge to set aside the default judgment as 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 predicated their complaint is grossly misconceived, erroneous and not well founded.

An applicant must cautiously 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 diligently utilize the opportunity. In *University of Calabar v AMCON & Ors*,¹³ the Supreme Court interpreted the implication of Order 9, Rules 21 and 22 as well as Order 19, Rule 3(2) of the Federal High Court (Civil Procedure) Rules, 2019 which provides 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".

¹³ (2024) LPELR-62596(SC) (Pp. 33-34 paras. A).

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.

On the facts of this case, the apex Court held that the Appellant never took advantage of these provisions. Having so failed to make the necessary application to the trial Court, it is deemed to have accepted the judgment.

(b) Rules of Court must be obeyed

An application to set aside a default judgment must be brought in strict compliance with the specific Rules of the specific Court. An application brought contrary to the Rules of Court is doomed. Where applicable, mandatory fees for penalty for the period of default must be paid and evidence of payment attached in the affidavit evidence disclosing good defence to the claim and a just cause for the default. In *Williams & Ors v Hope-Rising & Voluntary Funds Society*,¹⁴ the apex Court in Nigeria held that where a legislation creates or gives a right and prescribes the method for the exercise of that right, it is that method that must be followed to validly exercise that right.

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

There is no leave of Court required where an application to set aside a judgment is brought within time. It will be an overkill to insist otherwise. In *Kemek Nig Ltd v Apapa Local Government*,¹⁵ 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.

(d) Application out of time- mandatory requirement for application for extension of time

It is not the intention of the Rules that the right to file an application to set aside a judgment entered in default of appearance or pleadings be available to a party without a time limit. Such an interpretation will lead to absurdity. Where the application is brought out of time or beyond the time allowed for making the application, the applicant must firstly apply for extension of time. The affidavit in support must explain why the application to set aside the judgment was not brought within time. An application for setting aside a default judgment outside the time limit without leave of Court first sought and obtained is doomed to fail. In *Nigeria Reinsurance Corporation v Alsagar National Insurance Co*,¹⁶ the Court of Appeal pronounced on 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 Federal High Court (Civil Procedure) Rules, 2019. It was held that the appellant having prayed 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 Court of Appeal held that the Record of Appeal showed that the default judgment was entered in favour of the Respondent against the Appellant on the 25th September, 2017, while the motion to set same aside was filed on the 10th November, 2017, clearly outside the 14 days period provided by the Rules of the trial Court. There was therefore the need for the Appellant to place before the trial Court; (1) receipt of payment for the period of default, (2) a good

¹⁴ (1982) 1 - 2 SC 145.

¹⁵ (2020) LPELR-51394(CA) (Pp. 27 paras. A).

¹⁶ (2021) LPELR-53304 (CA) (Pp. 25-26 paras. A).

defence to the claim and (3) just cause for the default in appearance. It was held that failure of the appellant to firstly apply for extension of time in the trial Court within which to apply for setting aside the default judgment was fatal to the appeal.

In addition, in *Churchgate (Nig) Ltd v Uzu*,¹⁷ the Court of Appeal, per Aka'ahs, JCA., emphasised on the requirement of application for extension of time where same is filed out of time when it held that the interlocutory appeal was incompetent since the application to set aside the judgment on which the interlocutory appeal was based was not filed within six days of the default judgment and there was no application for extension of time to apply to set aside the judgment. No answer was given in the Reply Brief to this submission. For an application to set aside default judgment to be competent, it must be filed within six days of the trial, failing which there must be a prayer for extension of time within which to so apply. Judgment was delivered on 21/12/95 and the application to set it aside was filed on 8/1/96 which is 18 clear days after trial. For the application to be competent there must be a prayer for extension to apply to set aside the judgment and the affidavit in support must explain why the application to set aside the judgment was not brought within time. If this had been done, the submissions made by learned counsel for the Appellant regarding the conditions which applicant must satisfy in an application to set aside a default judgment would then merit a consideration.

Conclusively, a Court can only exercise the discretionary power to extend the time for filing an application to set aside a default judgment upon an application by the defaulting party and upon the fulfillment of the conditions set down in the Rules of Court where the application is brought. As variously held in *Udotim & Ors v Idiong*¹⁸ and *Adigwe v FRN*,¹⁹ the Court's discretion cannot be exercised in a vacuum without any defence placed before it.

6. Duty of court in an application to set aside a default judgment

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*,²⁰ acting judiciously means, (a) proceeding from sound judgment; (b) having or exercising sound judgment; (c) marked by discretion, wisdom and good sense. Acting judiciously is also said to import the consideration of the interests of both sides and weighing them in order to arrive at a just or fair decision. A valid exercise of discretion is one that is exercised judiciously and judiciously having regard to the facts and circumstances of the case.²¹ Thus, a default judgment is not set aside as a matter of course or pleasure because any judgment by default 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. Thus, the first duty of a Court in an application to set aside a default judgment is to determine whether the application has merit. No Court will entertain a frivolous application for setting aside a default judgment. In *Governor of Nasarawa State & Ors v Shewaza & Ors*,²² the Court of Appeal relied on the judgment of the Supreme Court in *Ogolo v Ogolo*²³ to hold 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

¹⁷ (2005) LPELR-11404 (CA) (Pp. 31-33 paras. A).

¹⁸ (2013) LPELR-2213 (CA).

¹⁹ (2015) 18 NWLR (Pt. 1490) 105.

²⁰ (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).

²¹ *El-Asbab Hotel & Investment Ind (Nig) Ltd & Anor v Eco Bank* (2024) LPELR-62448 (SC) (Pp. 19-20 paras. F).

²² (2017) LPELR-44032(CA) (Pp. 19 paras. A) per Otisi, JCA.

²³ (2006) LPELR-2311(SC).

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 manifestly unsupportable can only be judicially and judiciously settled when his defence is also scrutinized. Consequently, the Court of Appeal held that “if the learned trial Judge in the instant appeal had heeded to the caution in *Ogolo v Ogolo* (supra), her decision would have been otherwise”.

Several factors will 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 extension of time within which to apply for setting aside the default judgment? In *Raylcon (Nig) Ltd & Anor v AMCON*,²⁴ 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 Court of Appeal further held that the result was that the ruling delivered by the trial Court below having been delivered without jurisdiction was 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. Furthermore, in *Macfranklyn Engineering & Services v Daewoo (Nig) Ltd & Anor*,²⁵ the Supreme Court held among other things that Order 30 Rule, 4 of the Delta State High Court (Civil Procedure) Rules, 2009 requires that an application to set aside a judgment should be filed or made within 6 days after the decision or within such longer period as the Court may allow for good cause. It means, therefore, that any such application filed outside the 6-day window will be incompetent and the Court will lose the jurisdiction to entertain same. However, the phrase “or within such longer period as the Court may allow” indicates that the Court may extend time to file such application if good reasons are given by the Appellant. In the instant case, the Application was made about seven (7) months after the date of the decision (well outside the 6 days allowed by the rules). No acceptable or special reason was given for not making the application within the time prescribed for making the application. Conclusively, the Supreme Court held that “Indeed, the Application for extension of time was not made at all. In that respect the request to set aside the judgment of the trial Court delivered on the 7/4/2020 is incompetent, and a nullity”.

The next other important consideration will be whether mandatory fees for penalty for the period of default was paid. The last will be a consideration whether the affidavit evidence disclosed good defence to the claim and a just cause for the default. 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.

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*²⁶ 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.

²⁴ (2020) LPELR-50984(CA).

²⁵ (2024) LPELR-62633(SC) (Pp. 34-35 paras. C).

²⁶ (1982) 1 - 2 SC 145.

- (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.

It is strongly opined that all of the above parameters ought to be resolved in favour of the applicant's application before any default judgment should be set aside.

7. Conclusion and recommendation

Default judgment is designed to ensure that the wheel of justice is not unreasonably delayed by a recalcitrant or non-challant party duly served Court processes. Parties to a suit must expeditiously file, reply, respond to and or answer Court processes timeously in order not to occasion unreasonable delay. Justice delayed is justice denied and default judgment is a readymade judicial cure for indolence, tardiness and delay on the part of a defendant. This paper has shown that a defendant under the weight of default judgment is not shut out completely from the throne room of justice as he is allowed to apply to set aside the default judgment. However, the applicant is duty bound to satisfy the conditions stipulated in the Rules as well as satisfy the trial Court that his application has merit. The general principles that should guide the applicant in presenting a meritorious application to set aside a default judgment and what factors the Court should take into cognisance in the grant or refusal of the application have been robustly discussed in this paper. It is therefore recommended that a Court should not hesitate to refuse any application that does not satisfy all the conditions stipulated in the Rules as well satisfy the trial Court by affidavit evidence that there is merit in the application which includes but is not limited to - (a) receipt of payment for the period of default, where applicable; (b) a good defence to the claim and (c) just cause for the default in appearance. It is further recommended that in granting the application, the Court should act judicially and judiciously knowing that the Court is not Father Christmas and that equity does not assist the indolent. It remains settled law that discretion is not "an indulgence of a judicial whim but the exercise of judicial judgment based on facts and guided by the law and equitable considerations, nor does it brook any capricious exercise of power according to private fancies and affection".²⁷

²⁷ Per Nweze, JCA, (as he then was in *Udotim & Ors v Idiong* (supra) and cited with approval in *Musa v Naseer* (2022) LPELR-58342(CA).