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# PROCEDURE FOR OBTAINING OR SETTING ASIDE DEFAULT JUDGMENT IN THE NATIONAL INDUSTRIAL COURT OF NIGERIA- A CONTEMPORARY OVERVIEW

By

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**ABSTRACT:** This paper examined the unique provisions for either obtaining or setting aside default judgment under the extant “National Industrial Court of Nigeria (Civil Procedure) Rules, 2017”. This was undertaken to dispel the ill understanding that a Defendant under the weight of default judgment in that Court is left with no other options. Adopting the doctrinal research method, the paper critically analyzed stipulations of the extant 2017 Rules on default judgment and interpretations placed on them by the superior Courts. The paper found that “a defendant must not treat Court processes with contempt or levity as his failure, refusal or neglect to either enter appearance or defense within time will compel the Court to enter judgment against him in default”. The paper further established that although default judgment is final but the Court can reverse it aside on grounds of fraud, non-service or of lack of jurisdiction and upon such terms as the Court may deem fit. As this judicial discretion must be exercised judiciously, it was recommended that the 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 to set aside its default judgment’. This is because equity assists the vigilant and not the indolent.

**KEYWORDS:** Aside, Court, Default, Judgment, Process

## INTRODUCTION

The “National the National Industrial Court of Nigeria”<sup>i</sup> is established under *section 254A* of the Constitution of the Federal Republic of Nigeria,<sup>ii</sup> 1999 as amended as “a Court of exclusive jurisdiction in civil causes and matters relating to labor, including trade unions, industrial relations and related matters”.<sup>iii</sup> Regarding its Rules of Procedure, both *section 254(F)(1)* of the CFRN, 1999 as amended and *section 36* of the NICN Act, 2006 empower the President of the NICN to “make Rules of Court for carrying into effect sundry jurisdictions of the Court”. In exercise of this power, “the President of the

NICN” made the extant “NICN (Civil Procedure) Rules 2017” which by the provisions of Order 1, Rule 1 revoked the National Industrial Court Rules, 2007 and Practice Direction, 2012. Under Order 1, Rule 2, the NICN (Civil Procedure) Rules 2017 came into effect on 5<sup>th</sup> January 2017.

Against the foregoing background, this paper will examine the specific provisions of the NICN (Civil Procedure) Rules 2017 on obtaining judgment in default as well as for setting it aside. Given that the general rule is that “a Court becomes *functus officio* once it delivers any judgment”, the paper will explicate how the Civil Procedure Rules of the

NICN permit it to deliver judgment and still have power to set it aside without offending the ageless rule of *functus officio*. The paper will also throw light on the quantum and quality of evidence a defendant should place at the disposal of the Court to warrant it to "set aside a default judgment". It will also unfurl principles that should guide the Court to exercise its power judicially and judiciously in "the grant or refusal of an application to reverse its judgment". This research effort is important because among other things, the NICN is a special Court that has limited but exclusive jurisdiction over labour related issues that are not every day matters concerning the ordinary citizen, so to speak. Hence, many litigants and lawyers alike are not familiar with the unique Rules of civil procedure in the NICN and especially as it relates to default judgment. This is unlike "the High Court of a State with unlimited jurisdiction" over assortment of issues that warrant that sundry matters are placed before it every other time for adjudication by many litigants and lawyers alike. For ease of understanding, the paper is divided into the following sub-heads namely: Meaning of "default judgment"; "Provisions for default judgment in the NICN (Civil Procedure) Rules, 2017"; "Judgment given in default of appearance"; "Failure to comply with time limit and or default of pleadings"; "What a party against whom a default judgment may elect to do"; "Discharging the burden on a Defendant desirous of setting aside a default judgment in the NICN"; "Duty of the NICN in an application to set aside a default judgment"; and "Conclusion and recommendations".

## 2.0 Meaning of "default judgment"

Under the NICN (Civil Procedure) Rules, 2017, there is no specific interpretation or definition of the term or phrase "default judgment" although it provides for it. Rather, Order 1, Rule 10 interprets that "decision" means "any determination of the Court and includes, a judgment, ruling, decree, order, conviction, sentence or recommendation of the Court". Hence, "judgment" means "decision of a Court" and by extension therefore, "default judgment" connotes a decision of the Court given in default. "Judgment" was defined in *Oboh & Anor v NFL Ltd & Ors*<sup>iv</sup> 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. Default judgment is simply a judgment obtained on some procedural error or for technical non-compliance. It is not judgment on merit, though it is final unless and until set aside. In *Bello v INEC & Ors*,<sup>v</sup> default Judgment was interpreted 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*<sup>vi</sup> 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 on the authority of *Mohammed v Husseini*<sup>vii</sup> noted 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.

Furthermore, the decision in *Olawunmi v Ugwu & Ors*,<sup>viii</sup> relied on *Akune Ziri v Okinawa & Ors*,<sup>ix</sup> 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”, it is provided under Rule 7 of Order 35 that “any judgment by default 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”. With the above in mind, the next segment of this paper will examine the specific stipulations in the Civil Procedure Rules of the NICN on default judgment.

### **3.0 Provisions for default judgment in the “NICN (Civil Procedure) Rules, 2017”**

Under the “NICN (Civil Procedure) Rules, 2017”, “judgment may be given in default either (a) in default of appearance; or (b) failure to comply with time limit and or default of pleadings”. Both classes of default judgment are not judgment on merit and their different provisions and respective protocols are discussed below.

#### **3.1 Judgment given in default of appearance**

Many principles fall for consideration with respect to “judgment in default of appearance” under the Rules of Court and they need to be discussed differently in an orderly manner. These are as follows:

(a) Failure to enter appearance and its implication or effect

Rule 1 of Order 9 of the NICN (Civil Procedure) Rules, 2017 provides that every person served with an originating process shall, within the time stipulated therein and if no time is stipulated shall within fourteen (14) days of the service of the originating process, file a Memorandum of Appearance in the Registry of the Court. “Originating process” is interpreted in rule 10 of Order 1 as “a complaint or originating summons or any other court process(es) by which a suit or action is initiated before the Court”. However,

under Rule 5(1) of Order 9, “where a defendant or respondent fails to file a Memorandum of Appearance within the stipulated time, or fails to file appropriate processes in defense of the action within the prescribed time, and also fails to file a declaration of intention not to defend the action, the Court may proceed to hear the matter and give judgment”. This import of this provision is that the business of Court cannot be brought to abrupt end by the whims and caprices of a recalcitrant or uncooperative party. A party served originating process must file a Memorandum of appearance within a time limit fixed at 14 days. Where he fails, refuses or neglects to do so, the Court may give judgment against him. This is called “judgment in default of appearance”. The procedure that may be deployed to set it aside is discussed in the paragraph below.

(b) Power “to set aside judgment in default of appearance”

The Court, meaning NICN, is under full authority to “set aside a judgment” it gave in default of appearance upon the application of the defendant. Support is found for this proposition in the provision of Rule 5(2) of Order 9 of the NICN (Civil Procedure) Rules 2017. It is provided therein that where the defendant or respondent during the hearing, or within a reasonable time after conclusion of hearing and judgment applies to the Court giving satisfactory reasons for the failure to appear and defend the action, and demonstrates readiness to defend the action, the Court may in its discretion set aside any judgment given in default of appearance or defense, and allow the defendant or respondent to appear and defend the matter on its merit, on such terms as to costs or otherwise. Grant or refusal of this application is at the discretion of the Court.

(c) Time limit for “application to set aside judgment in default of appearance” and unfettered power of Court to enlarge time

A defendant under the weight of “judgment in default of appearance” does not have the luxury of eternity to apply to “set aside the judgment”. Apart from giving cogent reasons for the default, the application to set aside judgment and rehear matter must be made within 30 days. It is expressly provided under Order 9(6) that “no application to set a judgment aside and rehear the matter under Rule 9(5) shall be made or entertained after the

expiration of 30 days from the date of the judgment sought to be set aside.” Regardless of the above, however, under Order 57(4)(1), (2), (3) and (4) time may be extended “either on application of party or *Suo motu* (on its own accord)”. The “power of the Court” to “extend time” contained in the provisions of Rules of Order 57 are reproduced verbatim below -

(1) Notwithstanding anything contained in these Rules, the Court may, as often as it deems fit, and either before or after the expiration of the time appointed by these Rules or by any judgment or order of the Court extend or adjourn the time for doing any act or taking any proceeding.

(2) Subject to the provisions of any Act or law to the contrary, the Court may *suo motu* or on application and on good cause shown, extend or abridge any period prescribed by these rules.

(3) If a party fails to comply with any notice or direction given in terms of these rules, any interested party may apply on notice for an order that the notice or direction be complied with within a period that may be specified, and that failing compliance with the order, the party in default may not be entitled to any relief in the proceedings.

(4) The Court may on good cause shown, condone non-compliance with any period prescribed by these rules and extend the time within which to comply.

It must be highlighted however that this power of Court to extend time under Order 57, Rule 4 quoted above is curtailed by the provision of Order 57, Rule 6(5) which is that “Notwithstanding Rule 4 of this Order, extension of time to regularize a party’s position to file a particular process or processes out of time shall not be granted more than two times.” In sum, the combined reading of the above provisions in the Rules is that the Court may extend time to set aside judgment given in default of appearance but it must not do so more than twice.

### (c) Penalty for default on order or directive

A party who is out of time in filing a process is liable to pay penalty. It is provided in Order 57, Rule (6) that where by the Rules of the NICN, a party is required to file a process or comply with a Directive or Order or perform any other act as ordered by the Court within a specified time and the party fails or neglects to do so, the party shall pay a penalty of N100.00 (One Hundred Naira) per

day for the first fourteen (14) days of default and N200.00 (Two Hundred Naira) for each day of further default for another fourteen (14) days of default. Provided that at the expiration of the second period of fourteen (14) days, a party in default shall pay a penalty of N500.00 (Five Hundred Naira) for each day of default until the order or directive is complied with. Compliance with this stipulation for payment of penalty is mandatory before the NICN will “assume jurisdiction to hear an application brought to extend time required for application for setting aside a default judgment.”

### 3.2 Failure to comply with time limit and or default of pleadings

Judgment “in default of failure to comply with time limit and or default of pleadings” is another way in which judgment may be given against a recalcitrant defendant under the NICN (Civil Procedure) Rules 2017. The steps leading to this kind of judgment in default and how a Defendant may apply to have it set aside are discussed serially below.

#### (a) Duty to enter a defense on time

A party who intends to defend a duly served Court process has an obligation to enter a defense on time. Under “Rule 10 of Order 1” of the NICN (Civil Procedure) Rules, 2017, “Court process” or “process” are used interchangeably as generic or omnibus terms encompassing “originating process, complaints or originating summons, notice of appeal or other notices, pleadings, orders, motions, summons, warrants and all other documents or written communication filed in the Registry of the Court for which service is required in any proceeding before the Court.” The duty of a party served with process to respond in a timely manner is clearly enunciated via Rule 1 of Order 15 of the NICN (Civil Procedure) Rules, 2017 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 defense in the Complaint, file:

(a) a statement of defense 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.

Remarkably, this duty is mandatory and failure to enter defense within time attracts consequences as discussed below.

(b) Effect of failure to respond on time or file a defense on time

When "a party fails to comply with time limit to file response", the effect is clearly articulated under Order 15, Rule 8 of the NICN (Civil Procedure) Rules, 2017 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.

Relative to specific claims, Order 35 of the NICN (Civil Procedure) Rules, 2017 makes the following direct provisions namely:

(i) "Claim for debt or liquidated demand".

Where "the claim is for debt" or "liquidated demand" only, and the Defendant does not within the time allowed for the purpose file a Defense, the Claimant may, at the expiration of such time apply for final judgment for the amount claimed with costs.<sup>x</sup>

(ii) Default of one Defendant out of Several Defendants.

When in any such action as in Rule 1 of Order 35 there are several Defendants, if one of them makes

a default as mentioned in Rule 1 of Order 35, the Claimant may apply for judgment against the Defendant making default and issue execution upon such judgment without prejudice to Claimant's right to proceed with the action against the other party or parties as the case may be.<sup>xi</sup>

(iii) Pecuniary Damages.

Under Order 35, Rule 3(1), if the Claimant's claim be for pecuniary damages, and the Defendant or all the Defendants, if more than one, make default as mentioned in Order 35, Rule 1 above, the Claimant may apply to the Court for judgment against the Defendant or Defendants and the amount of the pecuniary damages, or the damages only as the case may be, shall be ascertained in any way the Court may order. However, in a trial of unascertained damages and where declaratory reliefs are sought, the Court shall not grant judgment in default. The Court is required under Order 35, Rul 3(2) to mandatorily set down the matter for trial.

(iv) When Claimant may apply for judgment against defaulting Defendant(s).

When in any such action as in Order 35, Rule 3 there are several Defendants, if one or more of them makes default as mentioned in Rule 1 of this Order, the Claimant may apply to the Court for judgment against the Defendant or Defendants so making default and proceed with Claimant's action against the others; as the case may be. Provided that the amount of damages against the Defendant making default shall be assessed at the trial of the action or issues therein against the other Defendant, unless the Court otherwise order.<sup>xii</sup>

(v) Defense filed to only part of Claim

Where the Claimant's claim is for a debt or liquidated demand or for pecuniary damages only, and the Defendant files a Defense which purports to offer an answer to part only of the Claimant's alleged cause of action, the Claimant may apply for judgment, 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 Claimant's claim shall not issue without leave of the Court.

(c) Instances of mandatory trial where there is no defense

It should be pointed out that it is not every claim where there is default in filing defense that can lead to judgment in default. In some instances, evidence must be introduced on record. For example, Order 35, Rule 6(1) enacts that “in all actions other than those in the preceding rules of this Order, if the Defendant makes default in filing a Defense, the Claimant may apply to the Court for judgment, and such judgment shall be given upon the Statement of Facts as the Court shall consider the Claimant to be entitled to.” Furthermore, Order 35, Rule (6)(2) provides clearly that where there is no Defense and the matter before the Court cannot be adjudged without the Claimant adducing evidence to prove the case before the Court, the Claimant shall make an application to set the matter down for trial before the Court which shall upon consideration and grant of the application proceed to hear the matter at the trial Court.

(d) Validity of a default judgment and application to set aside.

Rule 7 of Order 35 of the NICN (Civil Procedure) Rules 2017 is explicit that

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.

It is evidently deducible that by the provision of Orders 15 and 35 above, the Court is empowered to enter judgment against a party who does not respond within time or is in default of filing his defense. However, as will be seen below, the Defendant must take steps to have the judgment reversed within a stipulated time or period of time.

(c) Time limit for application to set aside judgment in default of defense

(i) With respect to liquidated demands or debts listed in Order 35 of the NICN (Civil Procedure) Rules 2017, there is no specific number of days prescribed under Order 35, Rule 7 for applying to set aside a default judgment. The Rule makes such judgment final but defeasible on limited grounds (such as “fraud, non-service, or lack of jurisdiction”). By virtue of Order 57, Rule 4(1), such an application is procedurally open-ended, subject to the Court’s discretion to entertain it “as it deems fit.” The applicant, however, must act promptly once the defect becomes known and

must satisfy the Court that the application is made bona fide and not an abuse of process.

(ii) Under Order 57, Rule 8, an application to set aside or remit an award may be made at any time within four (4) weeks after the award is made and published to the parties but the Court may by order extend the time either before or after it has elapsed. Provided that it shall be regular and normal for any process to be filed during vacation. Any process filed in compliance with the Rules of the Court during vacation shall be competent.

(iii) There is a limit to extension of time. Order 57, Rule 6(5)) provides that notwithstanding Rule 4 of Order 35, extension of time to regularize a party’s position to file a particular process or processes out of time shall not be granted more than two times. By the combined reading of the above provisions, the “Court may extend time to set aside judgment given in default” but it must not do so more than twice.

## 4.0 What a party against whom a default judgment may elect to do

The objectives and intent of the Rules of the NICN are many including to establish an enduring, equitable, just, fair, speedy and efficient fast track case management system for all civil matters within the jurisdiction of the Court.<sup>xiii</sup> The device of giving judgment in default ensures that Court processes are not treated as a trifle for which reason 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. 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 Court to set aside the default judgment nor appeal against it. (b) A choice to move the 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 including payment of penalty. The Court may grant or refuse the application at its discretion.

Where the application is granted, “the default judgment is set aside and the case is listed back on the cause list for 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). No party is allowed to approbate and reprobate.<sup>xiv</sup>

## 5.0 Discharging the burden on a Defendant desirous of “setting aside a default judgment” in the NICN

In an “application for setting aside a default judgment” under the NICN (Civil Procedure) Rules 2017, the double barrel onus is on the Defendant 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 are to be borne in mind by a defendant desirous of presenting a successful application to set aside a default judgment in the NICN namely-

### (a) Irreducible minimum threshold of proof and evidence

In the NICN, an application that does not meet the irreducible minimum threshold for “setting aside default judgment” under the Rules will not be granted. A defendant “against whom a default judgment is entered either for failure to enter appearance” under Order 9, Rule 5(1) or “failure to comply with time limit and or default of pleadings” under Order 15, Rule 1 and Order 35 respectively of the NICN (Civil Procedure) Rules, 2017 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 defense on the basis of which the Court's discretion can be exercised in his favor”. At all material times, it is the responsibility

of the applicant to discharge this burden. In *Rivtrust Securities Ltd & Ors v AMCON*,<sup>xv</sup> 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. A frivolous application will not be granted. An applicant must cautiously seize the window of opportunity to have the judgment obtained in default set aside by the Court. He will not be assisted if he failed to diligently utilize the opportunity.<sup>xvi</sup>

### (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 the NICN is doomed. No leave of Court is required when application is brought within time. Application within time is not a mere formality. it must disclose a good defense to the claim and just cause for the default in appearance. Under the NICN (Civil Procedure) Rules, 2017, 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*,<sup>xvii</sup> 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”.

On the other hand, application outside time must first apply for “extension of time within which to apply for setting aside the default judgment” in addition to disclosing – “(1) receipt of payment of for the period of default; (2) a good defense to the claim; and (3) just cause for the default in appearance.” As a precondition, mandatory fees for “penalty for the period of default” must be paid and evidence of payment attached in the affidavit evidence disclosing “good defense to the claim and a just cause for the default”. In *Williams & Ors v Hope-Rising & Voluntary Funds Society*,<sup>xviii</sup> 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". Succinctly stated, 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". Failure to do attacks the jurisdiction of the Court. In *Raylcon (Nig) Ltd & Anor v AMCON*,<sup>xx</sup> 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 that the trial Court's jurisdiction to entertain the application was not activated by due process of law. There was jurisdiction for the trial Court to either entertain or consider the application in the first place.

In addition, 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. This principle has been upheld in a long line of cases like *Nigeria Reinsurance Corporation v Alsagar National Insurance Co*<sup>xxi</sup> and *Churchgate (Nig) Ltd v Uzu*.<sup>xxii</sup> 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*<sup>xxiii</sup> and *Adigwe v FRN*,<sup>xxiv</sup> the Court's discretion cannot be exercised in a vacuum without any defense placed before it.

## 6.0 Duty of the NICN in "an application to set aside a default judgment"

Under the Order 35 of the NICN (Civil Procedure) Rules, 2017, "grant or refusal of an application to set aside a default judgment" is at the discretion of the Court. However, it is settled law that judicial discretion must be exercised judiciously. As expatiated in *Agbenyi v Abo*,<sup>xxv</sup> 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 weighing them in order to arrive at a just or fair decision. A valid exercise of discretion is one that is "exercised judicially and judiciously having regard to the facts and circumstances of the case".<sup>xxvi</sup> 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. The Supreme Court in *Ogolo v Ogolo*<sup>xxvii</sup> 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 defense, 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 manifestly unsupportable can only be judicially and judiciously settled when his defense is also scrutinized.

Several factors will assist the NICN 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.<sup>xxviii</sup> 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 defense 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*<sup>xxix</sup> 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.

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.

## 7.0 Conclusion and recommendations

The default judgment procedure in the NICN is designed to ensure that the administration of justice ecosystem is held to ransom by an uncooperative Defendant who may not want to

enter appearance to a Court process or enter a defense to a duly served Court process. This is a welcome procedure as obedience to the rule of law will compel that parties to a suit lodged in Court must expeditiously file appearances and responses to Court processes in a timely manner and not at the whims and caprices of the Defendant. 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 established that the NICN (Civil Procedure) Rules, 2017 ensures that a defendant under the weight of default judgment in the NICN is not without further remedies. 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 the Court should not hesitate to refuse any application that does not satisfy all the conditions stipulated in the Rules as well convince the Court by sworn evidence that there is merit in the application.

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## REFERENCES

- 1) Hereinafter abbreviated and referred to as "NICN".
- 2) Hereinafter abbreviated and referred to as "CFRN". The NICN was established courtesy of *section 6* of the Constitution of the Federal Republic of Nigeria (Third Alteration) Act, 2010 and under *section 1* of the NICN Act, 2006.
- 3) Both *section 254C* of the CFRN, 1999 as amended and *section 7* of the NICN Act, 2017 contain a long list of matters within reserved for exclusive adjudication by the NICN.
- 4) (2020) LPELR-55520(SC) (Pp. 6 paras. D) relying on *A-G of Oyo State v. Fairlakes Hotel Ltd* (1988) LPELR-42926 (SC) per Agbaje, JSC, citing *Ex P. Chinery* (1884) 12 QBD 342.
- 5) (2010) LPELR-767(SC) (Pp. 36 paras. A), per, Bello, JSC (as he then was). See also *Alapa v Sanni* (1967) NMLR 397 and relied upon per Senchi, JCA, in in *Colvi Ltd & Ors v Bacab Properties Ltd* (2023) LPELR-61341(CA) (Pp. 25-28 paras. D).
- 6) (2009) LPELR-3256(SC) (Pp. 16 paras. B) per Onnoghen, JSC.
- 7) (1998) LPELR-1896(SC) (Pp. 55 paras. A).
- 8) (2022) LPELR-59116(CA) (Pp. 13-14 paras. D).
- 9) (2000) LPELR - 393 (SC).
- 10) Rule 1 of Order 35.
- 11) Order 35, Rule 2.
- 12) Rule 4 of Order 35 of the NICN (Civil Procedure) Rules, 2017.
- 13) Rule 4(1) of Order 1 of the NICN (Civil Procedure) Rules, 2017. See Order 4 generally on other objectives and intents of the NICN (Civil Procedure) Rules 2017.
- 14) *Mohammed v Husseini* (1998) LPELR-1896(SC) (Pp. 85-87 paras. G) and *Young v Bristol Aeroplane Co* (1946) 1 All ER 98 are

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instructive for further discussion on the common law principle.

15) (2019) LPELR-47966(CA) (Pp. 21-22 paras. F).

16) This was the decision of the Supreme Court in *University of Calabar v AMCON & Ors* (2024) LPELR-62596(SC) (Pp. 33-34 paras. A).

17) (2020) LPELR-51394(CA) (Pp. 27 paras. A).

18) (1982) 1 - 2 SC 145.

19) (2020) LPELR-50984(CA).

20) (2021) LPELR-53304(CA) (Pp. 25-26 paras. A).

21) (2005) LPELR-11404(CA) (Pp. 31-33 paras. A).

22) (2013) LPELR-2213(CA).

23) (2015) 18 NWLR (Pt. 1490) 105.

24) (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).

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

26) (2006) LPELR-2311(SC).

27) *Macfranklyn Engineering & Services v Daewoo (Nig) Ltd & Anor* (2024) LPELR-62633(SC) (Pp. 34-35 paras. C).

28) (1982) 1 - 2 SC 145.