**INGOSSTRAKH INSURANCE COMPANY LIMITED**

**V.**

**FIOGRET LIMITED & ORS**

IN THE COURT OF APPEAL OF NIGERIA

ON TUESDAY, THE 29TH DAY OF JANUARY, 2013

CA/L/652/09

**LEX (2013) - CA/L/652/09**

**OTHER CITATIONS**

2PLR/2013/84 (CA)

(2013) LPELR-19957(CA)

**BEFORE THEIR LORDSHIPS**

RITA NOSAKHARE PEMU, JCA

CHINWE EUGENIA IYIZOBA, JCA

FATIMA OMORO AKINBAMI, JCA

**BETWEEN**

INGOSSTRAKH INSURANCE COMPANY LTD - Appellant(s)

AND

1. FIOGRET LIMITED

2. MV TAHOMA REEFER

3. TAHOMA ENTERPRISES LTD

4. STARVIEW NIGERIA LTD - Respondent(s)

**ORIGINATING STATE**

FEDERAL HIGH COURT, LAGOS JUDICIAL DIVISION (Abutu J., Presiding)

**REPRESENTATION**

L. N. MBANEFO SAN with B. OREKYEH (MRS) - For Appellant

AND

PROF. J. N. MBADUGHA - for the 1st Respondent

EMEKA OKPOKO ESQ with IFEYINWA EMESIBE-ENE (MRS) for 2nd - 4th Respondents. - For Respondent

**ISSUES FROM THE CAUSE(S) OF ACTION**

ADMIRALTY AND MARITIME LAW:- Contract for the carriage and bailment of perishable goods and delivery of same in time and under due care – Enforcement – What owner of goods is entitled to claim as damages – International insurance of carriage of goods by sea between foreign shipping company and their foreign based insurers – Whether can be enforced in Nigeria – Relevant considerations

COMMERCIAL LAW – CONTRACT:- Privity of contract – Contract between shippers/bailees and their cargo liability insurers – Whether can be enforced by third party cargo owner/bailor – Judgment accruing to shippers thereto – Whether can be assigned to third party cargo owners

ETHICS – LEGAL PRACTITIONER:- Management of client brief - Failure to advert to key ground of appeal – Failure to obtain requisite leave of court to argue key but fresh issue – Effect on success of client’s brief – Attitude of court thereto

INSURANCE AND REINSURANCE:- International contract of insurance for the carriage of goods by sea/bailment – Enforcement – Whether can be at the instance of third party bailers – Section 68 of the Insurance Act of 1997 which makes a third party entitled to claim against an insured in respect of a risk insured against a right to join the insurer of that risk in an action against the insured in respect of the claim – Whether repealed by Insurance Act 1997 which contained no provision giving right to a third party to claim against Insurance Company

INSURANCE AND REINSURANCE:- Where Nigerian law forbids and imposes a penalty on any importer of goods to Nigeria who insures the said goods with a non-Nigerian Insurance Company on grounds of policy – Whether a contract of insurance with a non-Nigerian insurer for the bailment of goods is nevertheless valid and enforceable where privity of contract is not between the importer and insurer but between non-Nigerian carriers and non-Nigerian insurers

INTERNATIONAL TRADE – IMPORT OF GOODS – BAILMENT – CARGO INSURANCE:- International contract of sale for the import of perishable goods into Nigeria – Consideration satisfied by way of Letters of Credits in favour of seller through Nigerian Banks by way of credit facilities granted by banks – Execution of bills of lading for the carriage and bailment as bailees for the said consignment with shippers/carriers under contract of carriage by sea for carriage to and delivery in time and under due care at Nigeria ports – Failure to deliver goods due to damage – Reliefs available to importer – Liability of the cargo liability insurers of the ship – Whether can be enforced in Nigeria

**PRACTICE AND PROCEDURE ISSUES**

APPEAL - INTERFERENCE WITH THE EXERCISE OF DISCRETION:- Rule of law that an appellate court will not interfere with the exercise of discretion of a lower court unless it is shown that the discretion was not exercised judicially or that it was based upon wrong principle or that the conclusion arrived at cannot be supported by the evidence before the court – Effect

APPEAL - RAISING FRESH ISSUES:- Point not raised as an issue at Court of Appeal – Whether can be raised as a fresh point on appeal to the Supreme Court without the prior leave of court

JUDGMENT AND ORDER - DEFAULT JUDGMENT:- Considerations for setting aside default judgment - Where it can be shown that the judgment was obtained by fraud practiced by one of the parties – Where there are good reasons for the applicant's failure to appear at the hearing of the case in which judgment was entered in his absence - Whether the party in whose favour the judgment subsists would be prejudiced or embarrassed if an order of re-hearing of the suit were to be made thus rendering such a course inequitable - Whether there has been undue delay in making the application - Whether the applicant's case is manifestly unsupportable - Whether the applicant's conduct throughout the proceedings had been such as to make his application worthy of a sympathetic consideration

JUDGMENT AND ORDER - DEFAULT JUDGMENT:- What an application for an order to set aside a judgment in default of defence must show – Whether cannot be granted the court is satisfied that the applicant has a defence on the merit – Justification

JUDGMENT AND ORDER – TYPES OF DEFAULT JUDGMENT:- Application of the Federal High Court (Civil Procedure) Rules 2000 – Different types of default judgment and how they are set aside - Order 12 rules 17 to 25 relating to Third Party proceedings - Order 15 rules 5 and 6 relating to where a party did not enter appearance at all before judgment is given against him - Order 38 relating to trial proceedings in general and specifically rule 9 thereof relating to situations where a party fails to appear at trial and judgment is given in his absence – Power of the Federal High Court to set aside default judgments obtained under different circumstances – Situations where the Rules impose a time limit for bringing applications to set aside and where it does not

INTERPRETATION OF STATUTE - ORDERS 12 RULE 22, ORDER 15 RULES 5 AND 6 AND ORDER 38 RULE 9 OF THE FEEDRAL HIGH COURT CIVIL PROCEDURE RULES:- Interpretation of

WORD AND PHRASES - LATIN PHRASES- “ut res magis valeat quam pereat”

**MAIN JUDGMENT**

**CHINWE EUGENIA IYIZOBA, J.C.A. (Delivering the Leading Judgment):**

This is an appeal against the ruling of Abutu J. of the Federal High Court Lagos Division delivered on the 22nd day of May 2009 refusing to set aside its default judgment entered against the appellant on 15/3/08.

The action leading to this appeal was an admiralty action in rem initiated on the 15th day of September, 2006 by way of writ of summons and Statement of Claim filed by the 1st Respondent herein as Plaintiff against the 2nd to 4th Respondents who were the initial Defendants. On 25/9/06 the said 2nd to 4th Respondents filed a joint Statement of Defence admitting substantially the claims of the Plaintiff/1st Respondent. The 2nd Respondent is a vessel owned by the 3rd Respondent while the 4th Respondent is their agent in Nigeria.

The facts of the case are that the 1st respondent, a company registered in Nigeria, on 19th and 20th July 2006 entered into an international contract of sale with Gales Maritime Inc of Torre Ibe Piso Av. M. Espinosa Batis - Panama for supply of 64,383 cartons or 1,931,388 metric tonnes of fish at a value of US$1,528,231.74. For payment for the said consignment of fish it claimed that it opened letters of credit in favour of the seller through Intercontinental Bank Plc and Stanbic Bank Ltd based on facilities granted by these banks. The 1st Respondent also pleaded that by virtue of three bills of lading numbers 2, 3 and 4 dated 24th July 2006 issued at Las Palmas, Spain the 2nd and 3rd Respondents agreed to carry and acknowledged receipt on board the 2nd Respondent the said consignment of fish in good order as bailee for bailment and/or as carriers under contract of carriage by sea for carriage to and delivery in time and under due care at Lagos and Warri Ports in Nigeria to the 1st Respondent. The 1st Respondent claimed that the goods were to arrive in Nigeria on the 13th August 2006 but when the 2nd to 4th Respondents failed to deliver the goods, upon its demand, it was initially informed that the 2nd Respondent developed a minor engine fault in Liberia but it was subsequently informed that the cargo was completely damaged in an incident involving the 2nd Respondent. The 1st Respondent, among others, averred that the Appellant was at all times material to the case the cargo liability insurers of the 2nd Respondent with respect to the goods on board the 2nd Respondent. It then claimed as follows in its writ of summons and in paragraph 12 of its Statement of Claim:

(1) "The sum of $4,522,987.00 (Four Million, Five Hundred and Twenty-two Thousand, Nine Hundred and Eighty - seven US Dollars) being special and general damages arising from the Defendants failure and refusal to deliver to the Plaintiff 64,383 cartons of frozen fish pursuant to the bailment and/or contract of carriage and/or arising from the Defendants negligence as averred in the Statement of Claim.

(2) Interest on the special damages at 22% from 14th August 2006 till judgment and thereafter at the same rate till satisfaction of the judgment debt and costs

(3) Costs of this action inclusive of legal costs."

As said previously, the 2nd to 4th Respondents in their Statement of Defence filed on the 25/9/06 admitted that they were duty bound to deliver the cargo in issue and that they are liable to the C&F value of the fish and also the custom duties and VAT and other charges paid by the 1st Respondent in respect of the cargo as pleaded in paragraph 12 of the Statement of Claim.

On 3/11/06, the 1st Respondent filed a Motion on Notice dated 2/11/06 seeking to join the Appellant, Ingosstrakh Insurance Company Ltd of Russia as the 4th Defendant in the action. The Application was granted on 26/11/06. Upon being served with the order of joinder, the Appellant through its counsel filed a Motion on Notice dated 12th January 2007 praying that its name be struck out as it was not a proper party to the action. Meanwhile on the 11th of January, 2007 the 1st Respondent filed a Motion seeking that judgment be entered in its favour against the Defendants based on admission and failure to file defence. Further, on 8th February, 2007 the 1st Respondent filed another Motion on Notice for leave to amend its Writ of Summons and Statement of Claim to reflect the joinder of the Appellant. The application for amendment was taken first and granted on 5th March 2007. The trial court subsequently heard the application seeking the order striking out the name of the Appellant on the 28th March 2007 and in a considered ruling delivered on the 9th May, 2007 it granted it and struck out the name of the Appellant. Being dissatisfied the 1st Respondent appealed against this decision to the Court of Appeal but as it appears, it is not prosecuting the appeal. The notice of appeal with regard to that appeal is not part of the records of this appeal but the Appellant averred to this fact in its application to set aside the judgment in issue in this case and that averment was not denied by the 1st Respondent.

Meanwhile, on the 19th November, 2007, the 2nd to 4th Respondents filed an application (Motion Ex-parte) dated 5th November, 2007 seeking the leave of the trial court to issue and serve Third Party Notice on the Appellant in Russia and also praying that the Appellant be joined as Third Party in the action. This Application was granted on the 27th November, 2007. On 15th January 2008 when the matter came up before the trial court, counsel to the 2nd to 4th Respondents who was the only counsel that appeared informed the court that they have served the Third Party Notice and asked for adjournment to enable the Third Party appear. The case was then adjourned to 12th February 2008. On this date, only the counsel for the 1st Respondent was in court. He informed the court that there was an appeal in the matter and that he did not know if the Third Party Notice had been served. He asked for a date for hearing of the Motion for judgment dated 11th January 2007. The court adjourned for this purpose to 4th March 2008. In the interval and specifically on the 27th February 2008 the counsel for the 2nd to 4th Respondents filed a Motion on Notice dated 25th February 2008 seeking the following reliefs:

"1. An order granting leave to enter judgment against the 3rd Party/Respondent in favour of the applicants in the same terms as was entered in favour of the Plaintiff pursuant to her motion on notice of 11th January, 2007.

2. An order entering Judgment against the 3rd Party/Respondent in favour of the Applicants in the same manner as was entered in favour of the Plaintiff pursuant to her motion on notice of 11th January, 2007.

3. A order deeming the Judgment obtained herein assigned by the Defendants/ Applicants to the Plaintiff."

On 4th March, 2008 the Motion on Notice dated 11th January 2007 was moved and granted without opposition by the counsel to 2nd to 4th Respondents. Thus the trial court entered judgment in favour of the 1st Respondent and against the 2nd to 4th Respondents. On 13th March 2008 the trial court also granted the 2nd to 4th Respondents Motion on Notice dated 25th February, 2008 entering judgment against the Appellant.

Further on 13th May 2008 the 1st Respondent and 2nd to 4th Respondents filed terms of settlement by which the 2nd to 4th Respondents assigned the judgment entered in their favour to the 1st Respondent.

On 16th June 2008 the Appellant filed an application praying the trial court for an order setting aside the default judgment entered against it on the 15th March 2008. The ground relied upon by the Appellant for its prayer in the Motion on Notice is "That the applications pursuant to which the default judgment was granted was an abuse of court process."

The Appellant later filed two additional affidavits in support of the application: one on the 14th of July 2008 and the other on the 2nd October, 2008. The two sets of Respondents also filed two affidavits in opposition of the application. The 1st Respondent filed one on the 19th September, 2008 and another on 15th October, 2008 while the 2nd to 4th Respondents filed one on 18th September, 2008 and the other on 15th October, 2008. The 1st Respondent still filed a Further and Better Counter-Affidavit on 24th October, 2008. The application was argued by counsel on 5th February 2009, 2nd March 2009, 23rd March 2009 and 28th April 2009. On 22nd May 2009, the trial court in a considered ruling dismissed the application.

Being dissatisfied the Appellant filed a Notice of Appeal containing four grounds of appeal on 5th June 2009. Out of the said Notice of Appeal the Appellant has formulated three issues for determination which are:

1. Whether the learned trial Judge was correct in holding that an application to set aside a Third Party default judgment must be filed within 6 days.

2. Whether there were irregularities in the proceedings leading to the entry of judgment in default of appearance

3. Whether in all the circumstances of the case the learned Judge exercised his discretion properly in failing to set aside the default judgment.

The Respondents adopted the issues formulated by the Appellant.

**ISSUE ONE**

Whether the learned trial Judge was correct in holding that an application to set aside a Third Party default judgment must be filed within 6 days.

While arguing issue one, learned Senior Advocate for the Appellant submitted that Order 38 rule 9 of the Federal High Court (Civil Procedure) Rules 2000 is not applicable to determination of an application to set aside default judgment arising from Third Party proceedings but that instead the provisions of Order 12 rule 22 of the Federal High Court (Civil Procedure) Rules 2000 is what governs the situation. He submitted that it is difficult to appreciate why the trial Judge preferred the provisions of Order 38 rule 9 which deal with judgments in general to the provisions of Order 12 rule 22. He argued that the trial Judge erred in failing to give adequate consideration to the provisions of Order 12 rule 22. He is of the view that Order 12 rule 22 does not limit the time for the bringing of an application to set aside Third Party judgment. He submitted that even if both provisions of Order 12 rule 22 and Order 38 rule 9 were applicable, the learned trial Judge ought to have applied the maxim of statutory interpretation: "ut res magis valeat quam pereat" which means that the interpretation which keeps alive the issue in dispute is better than one which does not.

Counsel to the 1st Respondent and counsel to the 2nd to 4th Respondents in their briefs contended that Order 38 rule 9 of the Federal High Court (Civil Procedure) Rules 2000 is applicable to an application to set aside default judgment obtained against a Third Party in Third Party proceedings because by the language of the provision it applies to any default judgment. They referred to the case of University of Ilorin v. Oyalana (2001) 15 NWLR (pt.737) 648 at 701. They submitted that Order 12 rule 22 of the Federal High Court (Civil Procedure) Rules 2000 relates to the power of the court to vary or set aside a third party default judgment while Order 38 rule 9 relates to procedure for bringing such application to set aside such default judgment. They referred to Order 15 rules 5 and 6 as provisions which lend credence to their contention and therefore submitted that for an application to set aside default judgment to be competent it must be filed within 6 days. It is the view of counsel that the trial judge was right to have held that the application to set aside the default judgment in this case must be filed within 6 days. The rest of the argument of counsel under this issue and the additional issue formulated by the 1st Respondent as its issue one will be considered under issue three of the Appellant.

In resolving this issue it is helpful to take a close look at the provisions of Order 12 rule 22(2); Order 15 rules 5 and 6 and Order 38 rule 9 of the Federal High Court (Civil Procedure) Rules 2000 referred to by counsel.

Order 12 rule 22 provides:

"22(1) Where a third party makes default 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 -

(a) To enter Judgment against the third party to the extent of any contribution or indemnity claimed in the third party notice, or by leave of the Court or Judge in Chambers,

(b) To enter judgment in respect of any other relief or remedy claimed as the court or Judge in Chambers shall direct.

(2) It shall be lawful for the Court or Judge in Chambers to set aside or vary the judgment against the Third party upon such terms as may seem just."

Order 15 rules 5 and 6 provide:

"5. In all actions not specifically provided for in this order, if the defendant fails to enter appearance within the stipulated time, the plaintiff may apply for the case to be set down for hearing, and upon the hearing, the court may give any judgment that the plaintiff appears to be entitled to on the facts.

6. Where judgment is entered pursuant to any of the preceding rules of this Order, it shall be lawful for the Court or a Judge in Chambers to set aside or vary the judgment upon such terms as may be just."

Order 38 rule 9 provides:

"Any judgment obtained where one party does not appear at the trial may be set aside by the court upon such terms as may seem just, upon an application made within six days after the trial or within such longer period as the Court may allow for good cause shown."

In consideration of these provisions, it is important to note that Order 12 rules 17 to 25 relates to Third Party proceedings while Order 15 rules 5 and 6 relates to default of appearance by a party to an action by a defendant. The provisions of Order 38 relates to trial proceedings in general and specifically rule 9 thereof relates to situations where a party fails to appear at trial. To this end, it seems to me that these Orders provide for different situations. All these provisions give the trial court power to set aside default judgments obtained under different circumstances. Thus it is clear that the provision of Order 38 rule 9 applies to situations where trial had been conducted in the absence of a party and judgment given and thereafter the party comes forward to apply for setting aside of the judgment. It is required that such an application must be brought within six days or such longer period as the court may allow. Order 15 rules 5 and 6 govern situations where a party did not enter appearance at all before judgment is given against him. In such a situation the Rules did not specifically provide any time limit for filing such application for setting aside. This is similar to the situation under Order 12 rule 22(2).

Based on the foregoing it seems to me that the provisions of Order 38 rule 9 do not apply to setting aside default judgment given in third party proceedings so as to make it mandatory that such application must be brought within 6 days. This is because Order 38 rule 9 applies specifically to "judgment obtained where one party does not appear at the trial". As said earlier Order 38 rule 9 applies to situations after trial must have been conducted and not where judgment was obtained merely based on application made for that purpose upon default of appearance and defence as in this case. My view in this regard is strengthened by the decision in the case of University of Ilorin v. Oyalana (2001) 15 NWLR (pt.737) 648 referred to by counsel. It is not a case of default judgment obtained in third party proceedings. In that case which was an application for order of mandamus, the defendant appeared by counsel in the matter but only failed to file a defence within the time allowed to it by the trial court. Counsel for the defendant also failed to attend court on the date fixed for hearing of the case and so the matter was heard by the court on a date the Defendant did not attend and judgment entered in plaintiff's favour. I think that having regards to the facts of that case Order 38 rule 9 was applicable to the case as the matter was fixed for hearing in the presence of both counsel but one of them (the Defendant) failed to attend court on the date fixed for hearing.

The situation in this case is different because judgment was entered against the Appellant in default of appearance to the Third Party proceedings. Order 12 rule 22(2) which specifically provides for setting aside default judgment obtained in third party proceedings did not provide any time limit for filing application for setting aside such judgment. The trial court was therefore wrong in holding that the application must be filed within 6 days to be competent. Issue one is therefore resolved in favour of the Appellant.

**ISSUE TWO:**

Whether there were irregularities in the proceedings leading to the entry of judgment in default of appearance.

In arguing this issue the learned senior counsel for the Appellant referred to the motion for judgment filed on behalf of the 2nd to 4th Respondents at page 174 of the records and submitted that the motion was filed prematurely and that the learned trial Judge erred in entertaining it. Buttressing this contention, he stated that the said motion filed on 25th February 2008 sought leave of court to enter judgment against the Appellant "in the same term and in the same manner as was entered" in favour of the Plaintiff/1st Respondent pursuant to its motion on Notice of 11th January 2007. He contended that as at the time the 2nd to 5th Respondents' Motion for judgement was filed the 1st Respondent had not obtained any judgment against the 2nd to 5th Respondents hence the application was premature. He referred to Order 12 rule 22(1) which states:

"22(1) Where a third party makes default 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 -

(a) to enter Judgment against the third party to the extent of any contribution or indemnity claimed in the third party notice, or by leave of the Court or Judge in Chambers,

(b) to enter judgment in respect of any other relief or remedy claimed as the court or Judge in Chambers shall direct."

Learned counsel submitted that the learned trial Judge ought to have struck out the Motion on the date it came up before him for hearing on 13th March 2009 and since the trial court acted on the said motion an irregularity has occurred in the proceedings. Learned Senior Counsel submitted that the Appellant is entitled to have the default judgment set aside.

While responding to the Appellant's argument, Counsel to the Respondents argued that this issue did not arise from any ground of appeal and was not also raised at the lower court and as such must be discountenanced. Reference was made to the case of Agbeotu v. Brisibe (2005) 10 NWLR (pt.932) 1 and Order 6 Rule 2(1) of the Court of Appeal Rules 2007. Counsel further contended that the notice referred to in Order 12 rule 22(1) means third party notice and not Motion on Notice for default judgment. They argued that default judgment will be entered against a third party in favour of the defendant after judgment had been entered against the defendant himself in the substantive suit. Counsel further argued that Order 12 rule 22 provides for when default judgment will be entered against a third party and not when application for default judgment will be filed against the third party. It was submitted that the time the application for default judgment is made is irrelevant in determining whether there is an irregularity in the proceedings. He submitted that there is no irregularity in the proceedings.

Learned counsel further submitted that even if there was irregularity the Appellant has waived its right to raise the point having regard to the provisions of Order 3 rules 1 and 2 of the Federal High Court (Civil Procedure) Rules 2000 as the Appellant has taken a step in the proceedings before complaining.

On careful examination of the record of appeal and the court file, I discovered that there is an Amended Notice of Appeal filed on 29/9/10 pursuant to an order of the court granted on 28/9/10. The original notice of appeal was amended to include Ground 5 which states thus:

5. The learned Judge erred in law in entering a default judgment against the Appellant (Third Party) pursuant to a Motion for Judgment filed before judgment had been entered in the main suit against the 2nd and 3rd Respondents.

Contrary to the contention of the Respondents, the Appellant did amend his grounds of appeal to include this issue. But surprisingly, the appellant in his brief of argument did not refer to this amended notice of appeal. At page 4 of the appellant's brief of argument, reference was made to the Notice of appeal at page 279 of the records containing the original four grounds of appeal which were even set out in the brief. No mention was made of the amended notice of appeal or the 5th ground included in the amended notice of appeal. I have also carefully looked at the record of appeal at pages 250 to 265 which contained the arguments of the parties in this matter on the application for setting aside default judgment resulting in this appeal and I did not see where the learned senior counsel for the appellant raised or canvassed the issue of irregularity complained of in this appeal at the lower court. It is therefore a fresh point being raised for the first time on appeal. It is required by practice that such fresh points must be raised only with the prior leave of court. See Agbeotu v. Brisibe (2005) 10 NWLR (pt.932) 1 at 38 G-H.  The said leave has not been sought for and obtained in this case. The issue is accordingly incompetent and must be struck out. Based on the foregoing I hold that the point canvassed under issue two in the Appellant's brief of argument being fresh points raised without leave of court is incompetent and is accordingly struck out.

**ISSUE THREE:**

Whether in all the circumstances of the case the learned Judge exercised his discretion properly in failing to set aside the default judgment.

I must start consideration of this issue with the contention of the 1st Respondent that this issue did not arise from any ground of appeal and is therefore incompetent. See paragraph 5.2 of the 1st Respondent's brief of argument. It is clear that this issue is covered by grounds 1 and 2 of the Appellant's grounds of appeal. I therefore hold that the submissions of the 1st Respondent in this regard is misconceived and must fail. The Appellant's issue three is competent and has to be considered on the merits.

Under this issue the Appellant referred to the Second Further Affidavit filed in support of its motion to set aside default judgment and submitted that it contains ample reasons for the failure of the Appellant to enter an appearance to the Third Party proceedings. It quoted paragraphs 5, 6, 7 and 8 of the said Affidavit and submitted that as the averments therein were not countered by the Respondents they should have swung the balance in favour of allowing the Appellant to defend itself.

In reply, the respondents contended that they countered the said Second Further Affidavit of the Appellant. To this end the 1st Respondent filed its Further Affidavit of 15th October, 2008, see pages 239-241 of the records, while the 2nd to 4th Respondents filed their Further Counter-Affidavit of 15th October, 2008, see pages 236 - 238 of the records. They referred also to the 2nd to 4th Respondents Counter-Affidavit of 1st September, 2008. It was consequently submitted that the Appellant missed the point in contending that its Further Affidavit was not countered. Learned counsel further submitted that even if the learned trial Judge had accepted the averments in the affidavit of the Appellant the balance would not have swung in favour of the Appellant.

Counsel submitted that paragraph 5 of the Appellant's Further Affidavit of 2nd October, 2008 offends the provisions of section 89 of the old Evidence Act as it did not contain reasonable particulars of the informant and paragraph 6 offends section 86 and 87 of the Act as it contains extraneous matters by way of legal arguments and conclusions and the trial court ought to have struck them out. Counsel relied on the case of Josien Holdings v. Lornamead (199) 1 SCNJ 133 at 141.

It was further submitted that the Appellant did not attach any proposed Statement of Defence to his application to show that it has a defence on the merits and also it did not give any reason for its default in filing Statement of Defence and for non appearance.

Counsel outlined the 5 considerations for setting aside default judgment citing the cases of Williams v. Hope Rising Voluntary Funds Society (1982) 1-2 SC 70 at 77; Sanusi v. Ayoola (1992) 9 NWLR (pt.265) 275 and Sokoto State Government v. Kamdax Nig Ltd (2004) 9 NWLR (pt.878) 345 at 369.

It was argued that all the five considerations must be satisfied by the Appellant and not just some of them. It was submitted that the learned trial Judge exercised his discretion properly in refusing the Appellant's application as the Appellant did not meet the requirements for setting aside the default judgment.

Counsel for the 2nd to 4th Respondents further argued that it is only when a trial Judge exercised his discretion upon wrong principles or mistake of law or under misapprehension of the facts or took into account irrelevant matter thereby occasioning injustice that an appellate court can interfere with the exercise of discretion. Counsel cited Ogolo v. Ogolo (2006) 2 SC (pt.1) 61; Oyekanmi v. NEPA (2000) 15 NWLR (pt.690) 44 and Arbicol Ltd v. Odogwu unreported appeal No. CA/L/465/99. It must be noted that the case of Arbicol Ltd v. Odogwu unreported appeal No. CA/L/465/99 was not properly cited by counsel as the date of the decision was not supplied which is very important to facilitate reference to the judgment.

The issue here is whether in all the circumstances of the case the learned Judge exercised his discretion properly in failing to set aside the default judgment. I have resolved to determine this appeal on the merits without considering the technical issue of competence of affidavit evidence raised by the Respondents, particularly as they did not raise this issue before the trial court hence the point they made in their objection to the appellant's issue two has caught up with them as well.

In the case of Sokoto State Government v. Kamdax Nig Ltd (2004) 9 NWLR (pt.878) 345 at 369, cited by all counsel this Court per Aderemi, JCA ( as he then was) outlined the considerations for setting aside default judgment as follows:

(a) where it can be shown that the judgment was obtained by fraud practiced by one of the parties, the judgment must be set aside;

(b) the reasons for the applicant's failure to appear at the hearing of the case in which judgment was entered in his absence;

(c) whether the party in whose favour the judgment subsists would be prejudiced or embarrassed if an order of re-hearing of the suit were to be made thus rendering such a course inequitable;

(d) whether there has been undue delay in making the application;

(e) whether the applicant's case is manifestly unsupportable;

(f) Whether the applicant's conduct throughout the proceedings had been such as to make his application worthy of a sympathetic consideration.

In the court below, the sole ground relied upon by the Appellant in seeking to set aside the default judgment was that the application pursuant to which the default judgment was granted was an abuse of court process. While considering this issue the trial Judge said at page 277 of the record:

"Having regard to the affidavit evidence in this application, particularly the affidavit evidence relating to service of the Third Party Notice and the Motion for default judgment on the Third Party I think the contention of the learned counsel for the Third Party/Applicant that the processes leading to the default judgment constitute an abuse of court process is unfounded. There is no abuse of court process. The Third Party in this case failed to respond appropriately to the process served on it. The Third Party is therefore to be blamed for the situation in which it now finds itself in his case."

It is necessary to restate the circumstances that gave rise to this appeal in order to determine whether there was indeed abuse of court process. The 1st Respondent herein had by motion on notice dated 2/11/06 sought the leave of the court to serve the writ out of jurisdiction and to join the appellant, an insurance company based in Moscow as the 4th defendant to the suit. In doing so it relied on Section 68 of the extant Insurance Act of 1997 which provides as follows:

"S. 68.  Rights of Third Party Against Insurer:

"1. Where a third party is entitled to claim against an insured in respect of a risk insured against, he shall have a right to join the insurer of that risk in an action against the insured in respect of the claim."

The prayers of the plaintiff were granted by the learned trial Judge. The writ was served on the Appellant in Moscow by courier. The Appellant then instructed a Nigerian Counsel Louis Mbanefo SAN to represent it in the proceedings. The appellant entered appearance and then by motion on notice dated 12/1/07 sought an order striking out the appellant from the said suit on the grounds that it was not a proper party in the suit. It placed reliance on the Insurance Act 2003 which had repealed the Insurance Act 1997 and which contained no provision giving right to a third party to claim against Insurance Company. The motion was argued on 28/3/07 before Abutu J. The learned Judge granted the Appellant's application in a ruling delivered on 9/5/07 and ordered that the appellant be struck out of the suit. The 1st Respondent appealed against the ruling, which appeal is still pending. By motion ex-parte filed on 5/11/07 the 2nd Respondent sought and obtained leave to join the Appellant as third party in the proceedings. The 2nd Respondent also sought and obtained an order to serve the Third Party Notice on the Appellant out of jurisdiction and in Moscow. Learned senior counsel had contended that the 2nd Respondent in his affidavit in support of his application to join the appellant as a Third Party did not disclose that the appellant had just been struck out as a party in the same suit. I do not think the 2nd respondent was under any obligation to do so as the third party proceeding is indeed a fresh proceeding independent of the previous one in which the appellant was struck out. Learned senior counsel had also contended that since it is known that he represented the appellant in the case, he should have been notified of the new development. The answer here also is that being new proceeding, the originating process had to be served on the appellant and not his counsel. I agree with the learned trial Judge that there is no abuse of court process. One of the considerations for setting aside default judgment as set out above is the reasons for the applicant's failure to appear at the hearing of the case in which judgment was entered in his absence. In this case the reason given by the Appellant in its Second Further Affidavit in Support of Motion at pages 233 to 235 of the record of appeal was:

"That though the 3rd Party Notice in this matter was sent to the Third Party in Moscow by courier, the manager of the said company filed it away thinking that since the law firm of Louis Mbanefo & Co were already representing the interests of the Third Party in Nigeria, it was handling the matter."

There is no doubt that the circumstances surrounding this case could confuse a non-lawyer. Given that they had just been informed of the striking out of the appellant from the suit, the manager unfortunately assumed that their lawyer was handling the matter and filed away the process. That action is indeed unfortunate. The fact that he is not a lawyer is the more reason why he should have immediately forwarded the process to their lawyer instead of filing it away. The learned trial Judge is right that the appellant is totally responsible for what happened to it. It is surprising that a manager of a company will file away court process served on it without caring to send same immediately to the lawyer already appointed to handle the case on its behalf. The manager did not treat the matter with the kind of urgency and seriousness it deserved or which is expected of his office. I must say, with all due respect to learned senior counsel for the appellant that the reason given by the Appellant for its failure to appear in the matter does not attract any sympathetic consideration. Further, the 2nd respondent had applied for and had obtained an order for judgment in default of appearance and defence. In their brief the respondents had contended that the appellant had not attached any proposed statement of defence to show that it has a defence on the merit. Although the appellant did not file a proposed statement of defence, in its second further affidavit in support of the motion to set aside the default judgment it deposed thus:

6. "That I am informed by my principal, Mr. L. N. Mbanefo SAN., and verily believe him, that Nigerian law forbids and imposes a penalty on any importer of goods to Nigeria who insures the said goods with a non-Nigerian Insurance Company.

7. That the purported insurance of their cargo with the Third Party is contrary to the Public Policy of Nigeria and may only be pursued outside the jurisdiction of this Honourable Court."

Despite the incompetence of the above paragraphs as they are legal arguments and conclusions, they appear to be the defence the appellant intends to pursue if the appeal succeeds and the default judgment is set aside. The Respondents however in their counter-affidavit and argument contended that there was no privity of contract between the importer, the 1st respondent and the appellant; that the insurance was taken out by the 2nd - 4th Respondents, the ship owners and their agent who are not bound by the said law. In the circumstances, it appears the appellant has not disclosed any defence on the merit justifying the setting aside of the default judgment. See OGOLO V. OGOLO (2006)5 NWLR (Pt. 972) 173; per Onnoghen J.S.C.

"An applicant who fails or neglects to exhibit a proposed statement of defence to an application for an order to set aside a judgment in default of defence cannot be granted that indulgence because he must satisfy the court that he has a defence on the merit before he can be allowed to defend the action."

It is the law that an appellate court will be slow in interfering with the exercise of discretion of a lower court unless it is shown that the discretion was not exercised judicially or that it was based upon wrong principle or that the conclusion arrived at cannot be supported by the evidence before the court. See Federal Housing Authority v. Abosede (1998) 2 NWLR (pt.537 177 at 185 F.

Based on the foregoing reasons this issue is resolved against the Appellant and in favour of the Respondents.

Having resolved the first issue in favour of the appellant, the appeal succeeds in part. The part of the ruling of the learned trial Judge that an application to set aside a Third Party default judgment must be filed within 6 days is hereby set aside. Subject to this, the appeal fails and is hereby dismissed. The ruling of Abutu J. in Suit No. FHC/L/CS/765/2006 delivered on the 22nd day of May 2009 is affirmed. Parties to bear their respective costs.

**RITA NOSAKHARE PEMU, J.C.A.:**

I have been privileged to be afforded a draft of the judgment just delivered by my brother CHINWE EUGENIA IYIZOBA J.C.A. and I agree with his opinion and conclusion.

In the exercise of its discretion to set aside default judgment, the Court, as rightly adumbrated in the lead judgment, must consider some factors, one of which is the reason for the Applicant's failure to appear at the hearing of the case in which judgment was entered in his absence.

He who seeks equity must do equity.

For a Manager of a company to file away a vital court process in which litigation is pending, and which was served on him properly, without intimating the company's lawyer of same is not the best thing to do for someone who seeks equity. That conduct was clearly reprehensible.

The reason given by the Appellant for its failure to appear in Court does not attract any sympathetic consideration.

I abide by the consequential order made in the lead judgment.

**FATIMA AKINBAMI, J.C.A.:**

I have read in advance the judgment of my learned brother Chinwe Eugenia Iyizoba, JCA just delivered.

I agree with the reasoning and conclusions therein and abide by the Order on costs.