

**IN THE HIGH COURT OF JUSTICE OF THE
FEDERAL CAPITAL TERRITORY ABUJA
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT JABI - ABUJA**

BEFORE: HON. JUSTICE O. C. AGBAZA

COURT CLERKS: UKONU KALU & GODSPower EBAHOR

COURT NO: 11

SUIT NO: FCT/HC/PET/76/2019

BETWEEN:

OLANREWAJU FEMI FALADE.....PETITIONER

VS

1. ADEBIMPE ADENIKE FALADE

2. COL FUNSO OYINLOLA.....RESPONDENTS

RULING

By a Motion on Notice dated 4/3/19, but filed on 8/3/19, with Motion No. M/3972/19, brought pursuant to Section 36(1) of the Constitution of the Federal Republic of Nigeria 1999, Order 13 Rule 5, Order 25 Rule 1 of the High Court of the Federal Capital Territory Civil Procedure Rule 2018, Order viii of the Matrimonial Causes Rules and under the inherent jurisdiction of this Honourable Court. The Petitioner/Applicant seek the court the following reliefs.

1. An Order of this Honourable Court granting leave to the Petitioner/Applicant leave to amend the name of the Co-Respondent from "COL. FUNSO OYINLOLA" on the Notice of Petition; to "BRIGADIER-GENERAL FUNSO OYINLOLA" on the Petition to "BRIGADIER-GENERAL FOLUSO OYINLOLA" and

accompanying processes filed on the 7th of January 2019. The Proposed Amended Originating processes having been attached herein as Exhibit "A".

2. And the omnibus relief.

Attached to the Motion is a 4 Paragraph affidavit with Exhibit "A" attached, deposed to by one John Danjuma a litigation clerk in the Law Firm of Petitioner/Applicant's Counsel. Filed along is a Written Address in compliance with the Rules of Court and adopts same as their oral argument in support of the Motion.

Petitioner/Applicant filed a Reply on points of law on 10/5/19.

Opposing the Motion, 1st Respondent filed a Nine (9) paragraph counter-affidavit deposed to by one Titilope Bamidele, a litigation clerk in the law firm of 1st Respondent's Counsel, also filed a Written Address in compliance with Rules of Court and adopts same as their oral argument.

In their Written Address, Petitioner/Applicant's Counsel formulated a sole issue for determination that is;

"Whether the Petitioner/Applicant can amend the Notice of Petition and Petition filed in this matter"

The submission of Applicant's Counsel in brief is that the Provisions of Order 13 Rule 3 and Order 25 Rule 1 of the Rules of Court, Order viii Rule 3 of the Matrimonial Causes Rules allows for an amendment of pleadings. Submits further that the import of Order viii Rules 3(1)(a) and (2) (2) (a) of the Matrimonial Causes Rules is that the Petitioner could amend his process

at the preliminary stage even without the leave of court in as much as a compulsory conference has not held, like in the instant case. Submits further reply on Section 115(c) of the Matrimonial Causes Act that the right to correct a defective name as well as amend pleadings where necessary, before trial, is conferred on parties, in as much as it does not have the effect of instituting proceeding of a different kind.

Submits finally that the court has inherent powers to grant the application and urge court to grant the amendment sought. Refer to cases of Chief Rex Kola Olawoye Vs Engineer Rapheal Jimoh & Ors (2013) LPELR – 20344 SC and Ezechukwu Vs Onwuka (2006) 2 NWLR (PT. 963) @ 160.

In their Written Address, 1st Respondent's Counsel formulated a sole issue for determination that is;

“Whether considering the amendment made by the Petitioner on his proposed amended process (marked as Exhibit “A” and attached to the affidavit in support of the Motion) this Honourable Court ought to exercise its discretion in granting leave to the Petitioner to amend his Petition”

Submits that the grant of the application is at the discretion of court, refer to the case of Oriju Vs Ofomata (2007) 13 NWLR (PT. 1052) 487 @ 502 – 503 H. And Respondent is not opposed to an application, where it is sought to aid the court in the determination of the real question in controversy between the parties, but is opposed to this application because as evident, the Petitioner/Applicant has not only amended the Petition itself, so as to ensure that the verifying affidavit in support of the Petition is now on the

same continuous document as the Petition itself. That by this application Petitioner seeks to amend a defect in his originating process under the pretence of an application for an amendment of the name of the Co-Respondent; relies on the maxim; he who comes to equity must come with clean hands. Refer to the case of Emeshie Vs Abiose (1991) 2 NWLR (PT. 172) @ 200 Para D.

1st Respondent's Counsel submits on the strength of the cases of Nwankwo Vs Yar'Adua (2010) 12 NWLR (PT. 1209) 518 @ 502 Paras B – C and Nwankwo Vs Vononoeze – Madu (2005) 4 NWLR (PT. 916) 470 @ 482, that court should first determine whether or not the originating processes filed by the Petitioner has conferred jurisdiction on this court, that in the unlikely event that the court grants the application and allows the Petitioner to amend his originating processes and then later decides that the original originating processes were incompetent and defective, the amendment of the original processes would be akin to putting on nothing and expecting it to stand. It would have been a futile exercise as the amendment would have no foundation upon which to stand on. Submits further that an amendment can only cure a defective process where there is no jurisdictional issue at stake refer to the case of Madukolu Vs Nkemdilim (1962) 2 NSCC 374 @ 379 – 380 1962 2 SCNLR 341 @ 348. That the incompetence of the case of the Petitioner has robbed court of jurisdiction refer to Olagbenro Vs Olayinka (2014) 17 NWLR (PT. 1430) 313 @ 368.

Submits finally that the incompetence of the Petition constitutes a fundamental irregularity as to declare the processes void abinitio refer to

Alhaji Fatai Ayodele Alawiye Vs Mrs. Elizabeth Adetokunbo Ogunsanya (2012) LPELR 1966 SC and N.N.B Plc Vs Denclaq Ltd (2005) 4 NWLR (PT. 910) 549 @ 574 Para G – H. Urge court to dismiss the application.

In his reply on point of law, to the 1st Respondent's Written Address in support of their counter-affidavit, submits that pleading may be amended at any stage of proceedings before judgment in order to bring the real issue of controversy between the parties before the court and that it is also trite that errors or mistakes in a process filed by a litigant will not preclude the litigant from presenting his case provided that such amendment does not amount to instituting an entirely fresh action or resuscitating a suit that is dead on arrival. Refer to NBC Plc Vs Edward (2015) 2 NWLR (PT. 1459) 505 @ 535 Para A – D. And with leave of court submits that the Provision of Order viii Rules 3 of the Matrimonial Causes Rules permits amendment by a party without the leave of court at least once.

Having carefully considered the submission of both Counsel and the judicial authorities cited, I find that the issue which calls for determination is;

“Whether the Applicant has made out a ground so as to be entitled to the relief sought?”

The grant or otherwise of an application of this nature is at the discretion of the court and in the exercise of that discretion, the court is enjoined to do so judiciously and judicially. The principle which guides the court on whether or not to grant the relief sought by the Applicant were stated in the case of Adekanye Vs Grand service Ltd (2007) All FWLR (PT. 387) 855 @ 857 Ratio 2 to include;

- (a) The court considers the materiality of the amendment sought and will not allow an inconsistent or useless amendment.
- (b) Where the amendment would enable the court to decide the real matter in controversy and without injustice.
- (c) Where the amendment relates to a mere misnomer, it will be granted almost as a matter of course.
- (d) The court will not grant an amendment where it will create a suit where none existed.
- (e) The court will not grant an amendment to change the nature of the claims before the court.
- (f) Leave to amend will not be granted if the amendment would not cure the defect in the proceedings.
- (g) Amendment would be allowed if such an amendment will prevent injustice.

The grouse of the 1st Respondent against this application is that the Petitioner/Applicant's Counsel has surreptitiously amended the Petition so as to ensure that the verifying affidavit in support of the Petition is now on the same continuous document as the Petition itself, therefore seeks to amend a defect in his originating process under pretence of an application for an amendment of the name of the Co-Respondent. On the other hand the Petitioner/Applicant's Counsel contended that the amendment complained of by the 1st Respondent's Counsel is in line with the Provision

of Order viii Rule 3 of the Matrimonial Causes Rules. Cannot prevent the grant of leave to amend the Petition.

The Order viii Rule 3 of the Matrimonial Causes Rule relied on by the Petitioner/Applicant reads;

“Subject to sub-Rule (2) of this Rule where a pleading filed on behalf of a party to proceedings has been served on another party to the proceeding or on a person on whom service of the pleading is required by these Rules to be effected although the person is not a party to the proceedings the pleading may be amended by the party who filed it.

- (a) If it has not been amended after having been so served without the leave of the court or a Registrar or
- (b) If it has been amended on a previous occasion after having been so served by leave of the court or a Registrar.

In resolving the contending position of the parties, the court must take a look at its records particularly the originating process filed on 7/1/19 and the proposed amendment attached as Exhibit “A” to the affidavit in support of the application and this court is empowered to do. See *Agbareh Vs Mimrah* (2008) All FWLR (PT. 409) 559@ 585 Paras D – F. Having taking a look at the said processes I find that the Petitioner’s verifying affidavit which is in fulfillment of the requirement of Order V Rule 10 of the Matrimonial Causes Rules, which prescribes that the Petition be verified is contained at the notice of proceeding and not on the Petition as required. And on the proposed amendment, the Petitioner’s verifying affidavit is

contained on the Petition thus confirming that the Petitioner has indeed amended the processes without the leave of court. This, in my view, is in consonance with the Provision of Order viii Rule 3(1) (a) of the Matrimonial Causes Rules, which allows a Petition to be amended, if it has never been amended after having been served, without the leave of court. Therefore this ground avails the Petitioner and can rely on it.

The question which follows is whether or not court can grant the proposed amendment for change of name. I have stated the criteria which will guide the court in the determination of whether or not to grant an amendment. The reason behind the application for amendment is contained in Paragraph 3(iii)(iii) (iv)(v) of Applicant's supporting affidavit and it is made in order to effect correction in the name of the Co-Respondent, on the other hand 1st Respondent did not challenge the application to correct the name of the Co-Respondent but on other ground which the court has determined above. From the affidavit of the Applicant the amendment relates to correcting an error made in the process and this the court regards as a mere misnomer and which the court is allowed to grant as a matter of course. See *Adekanye Vs Grand Service Ltd (Supra)*.

The reason behind the application for amendment as contained in the Applicant's affidavit has met the expectation of the law and, in my view, is brought in good faith therefore the application has merit and should succeed.

In the final analysis I hold that this application for amendment having being found to be meritorious is hereby allowed. Accordingly the court

hereby grants leave to the Petitioner/Applicant to amend the name of the Co-Respondent from "Col. Funso Oyinlola" on the Notice of Petition: To "Brigadier-General Foluso Oyinlola" on the Petition to "Brigadier Foluso Oyinlola" on the Notice of Petition, the Petition and accompanying processes filed on 7th of January 2019.

Signed

HON. JUSTICE O. C. AGBAZA

Presiding Judge

21/10/2019

APPEARANCE:

A. A IBIKUNLE – AWOPETU FOR THE PETITIONER/APPLICANT

O.S. KEHINDE FOR THE 1ST RESPONDENT