IN THE HIGH COURT OF JUSTICE OF THE FEDERAL CAPITAL TERRITORY
HOLDEN AT MAITAMA ABUJA
ON THE 20TH DAY OF MAY, 2020
BEFORE HIS LORDSHIP: HON. JUSTICE MARYANN E. ANENIH
(PRESIDING JUDGE)

SUITNO:FCT/HC/CV/989/19
MOTION NO: M/5077/19.

1. EMEKA AGARA
2. PASTOR DAVID STEPHEN AGARA ……APPLICANTS

AND

1. HON. SIDI BELLO RUFAI
(THE PRESIDING JUDGE UPPER AREA COURT, GUDU ABUJA)

2. AGAMEBU PROPERTIES LTD……RESPONDENTS.

JUDGEMENT

Before this Honourable is a motion on notice filed on the 8th of April, 2019 and brought pursuant to Order 44 Rule 1(2), 3 (1) (2) and 5 of the Federal Capital Territory High Court (Civil Procedure) Rules 2018, Section 11(1) (B) and Section 12(1) and (3) of the Area Courts (Repeal and Enactment) Act, 2010.

The Applicants prays the Court for the following reliefs.

1. Declaration that the applicants being christians and having not given their consent, are not subject to the jurisdiction of the Area Court by virtue of S. 11(1) (b) of the Area Court Act, 2010.

2. An Order removing the proceedings in CV/07/18 from the Upper Area Court Gudu Abuja to the High Court for the purpose of being quashed.

3. An Order prohibiting or restraining the 1st Respondent from proceeding any further in the case in excess of its jurisdiction.

4. And for such further order or orders as this Honourable Court may seen just or fit in the circumstances.

The application is supported by a 14 paragraph affidavit deposed to by Emeka Agara with attached Exhibits and a statement brought pursuant to Order 44 Rule 3(2) High Court of the Federal Capital Territory High Court (Civil Procedure) Rules 2018 and an accompanying written address.

The grounds upon which the application is brought are as follows:

a. The Applicants are Christians.

b. The 2nd Respondent filed a suit against the Applicants at the Upper Area Court sitting in Gudu Abuja in suit No. CV/07/18.

c. The Area Courts (Repeal & Enactment) Act, 2010 makes only Muslims subject to the jurisdiction of the Court as of right and any other person who elects to be so subject.

d. The said Area Court Act empowers the Court to apply and administer the Islamic law of Maliki School of jurisprudence and no other in any cause or matter before it.

e. On the first day the case came up before the Area Court being 12th of February, 2018 the Applicants were not represented by Counsel and the Court did not inform them of their right of election nor enquired of their religion.

f. On the next day the case came up being the 20th March, 2018 the Applicants were represented by Counsel who then informed them of their right whereupon they elected not to be subject to the jurisdiction of the Court and counsel did also object to the jurisdiction of the Area Court on their behalf.

The 1st Respondent was served on 11th April, 2019 with the motion on notice but there is no response to this application from him.

The 2nd Respondent in opposition to this application, filed a counter affidavit on 15th of November, 2019. The 10 paragraphs counter affidavit is deposed to by lady Hilary Chidinma Udebuani with an accompanying written address.

I have considered the application before the Court, the supporting affidavit, the attached Exhibits, the counter affidavit and the written and oral submissions of parties. And I am of the view that the issues for determination are:

1. Whether the application before the court is properly constituted.
2. Whether the application sought ought to be granted as prayed.

I have carefully gone through the affidavit in support of this application particularly paragraphs 6, 7, 8 and 9 where the applicants averred that they do not have an understanding of

the Sharia law of the Maliki school of thought which the Upper Area Court is empowered to administer in any cause or matter before it. And that the Applicants do not want to subject to the jurisdiction of Upper Area Court since they are christians and not muslims. And that they are ready to defend the suit in any other court where the common law or statute laws are applied.

The 2nd Respondent in paragraphs 3 and 4 (a) to (j) of her counter affidavit averred that the depositions of the Applicants are false, misleading and has no bearing with the case pending at Upper Area Court. That the exparte order of Court in suit No. FCT/HC/CV/989/19 for judicial review is different from the case in Gudu Upper Area Court and that the parties in this case are 1. Emeka Agara 2. Pastor David Stephen Agara as Applicants Vs. 1. Hon. Sidi Bello Rufai (The presiding judge Upper Area Court Gudu Abuja) (2) Agamebu Properties Ltd as Respondents.

It is also averred in the counter affidavit of the 2nd Respondent that the case before Upper Area Court in Gudu is between AGAMEBU PROPERTIES LTD VS. (1) EMEKA AGARA (2) PASTOR DAVID STEPHEN AGARA ***(3) UCHEGOD OKEKE***. And that CV/07/2018 which is the case at the Upper Area Court is radically different from suit No. FCT/HC/CV/989/19 where judicial review is sought in line with the Rules of this Court. And that the 3rd defendant in suit No. CV/07/2018 on the 12th February, 2018 submitted to the jurisdiction of the Court upon reading the plaint before them and explaining same to them by the presiding Area Court Judge wherein the 1st and 2nd defendants denied the claim of the plaintiff. And that when the 3rd defendant came to Court he admitted the claim of the plaintiff and also said that he wants the case to be tried in the Upper Area Court, FCT which was also the position of the first and second defendants. That the refusal of the Applicants to

bring the 3rd defendant at the Upper Area Court, as a party before this Court is deliberate and intentional.

In paragraphs 5 and 8 of the counter affidavit, the deponent further averred that this court has no jurisdiction to proceed against party that is not before it on review proceedings, but was a party in the original suit. And that this suit is not the same suit that is pending before the Upper Area Court and this Court cannot even by consent extend its jurisdiction to the case that is not before it.

I have carefully gone through the case file and it is observed that the Applicants in the instant case before the court did not file a further and better affidavit to clarify and rebut the facts stated in the counter affidavit of the 2nd Respondents. The Applicants who was represented by J.A. Kalu Esq in his oral submission stated that the 2nd Respondent served them with a counter affidavit but he found no need to file a further affidavit.

It is important to state that, a further affidavit or Reply would have been necessary to shed more light on the depositions in the counter affidavit of the 2nd Respondent if any of the facts was to be disputed. From the records, there is annexed to the instant application, an Application for Plaint and Record of proceedings from the lower Court which clearly shows the names of parties at the lower court. In absence of any reaction or further affidavit to the facts deposed to in the counter affidavit by the Applicants, those facts are deemed admitted by the Applicants.

It is trite law that where there are depositions in a counter affidavit stating a particular state of affairs which are not challenged by further affidavit, such averments will be admitted as correct. See

OWURU & ANOR. V. ADIGWU & ANOR. (2017) LPELR-42763 (SC) PP.28-29, PARAS. D-C Per Kekere -Ekun, JSC.

See also
MANA V. PDP (2011) LPELR - 19754 (2011) (CA) Pg. 41, Paras. C-E where the Court held that:

> *"It is settled that where a party deposed to a fact in a counter affidavit which the other party ought to rebut in a further affidavit but later fails to do so he is deemed to have admitted such facts in the counter affidavit. See the case of ASOL NIG. LTD V. ACCESS BANK NIG. PLC (2009) 10 NWLR Part1140 Page 283"* Per Bada, J.C.A.

It is in the light of the foregoing that I am of the humble view that the facts deposed to in the counter affidavit are deemed admitted by the Applicants.

From the names of the parties aforementioned above, it does appear that the parties in the Court below are not exactly the parties in the instant application before this Court.

The question now is, whether the non-inclusion of the 3rd defendant in the lower court in the present suit before this Court, renders or robs this Court of the jurisdiction to proceed with this matter.

The omission to reflect the 3rd defendant in the instant case, is fundamental and cannot be glossed over or shoved aside. The outcome of this application could affect his interest one way or the other. This is even more-so when one of the reliefs sought is for an order to transfer the case to the high court for the purpose of quashing same.

The Applicants did not file a further affidavit nor a Reply to the counter affidavit of the 2nd defendant/Respondent. The plaintiffs/Applicants cannot therefore unilaterally herein exclude the 3rd defendant who is a party in the action at the Upper Area Court.

It is important to state that all the processes before this Court should ordinarily reflect the names of the parties as shown in the Area Court. The Applicants cannot on their own volition and for reasons best known to them, dump party(ies) at will in the face of a matter instituted by the adverse part before the court below.

A glean of the attached Plaint and the Record of Proceedings at the Area Court shows clearly that defendants in the lower Court are: (1) EMEKA AGARA (2) PASTOR DAVID STEPHEN AGARA and ***UCHEGOD OKEKE***. Clearly, the name of the 3rd defendant (***UCHEGOD OKEKE)*** at the lower court is conspicuously absent in the instant case in which a review is sought.

It is trite that when there are improper parties in an action or originating process, the proper order to make is an order striking out the said process. See

VERALAM HOLDINGS LTD V. GALBA LTD & ANOR. (2014) LPELR-22671 (CA) PG.9, Paras. C-F Per Eko.

See also;

CHIEF BEN OBI V. EMEKA ETIABA ESQ (2015) 6 NWLR PT. (1455) Pg. 377 Pp. 389-390, paras. E-B; 399, Paras. A-C. where the Court held as follows:

"...In the instant case, at the trial Court the appellant was the 1st defendant and along with him as defendants were sub Sahara Press Ltd, Clement Okitipi, Oluwasegun Abifarin and Jude Atupulazi as 2nd 3rd 4th and 5th defendants where unilaterally removed in clear disregard to the mandatory provisions of Order 6 rule 2(1) of the Court of Appeal Rules 2011

The argument of the appellant that the 2 -5th defendants can join the appeal if they so desire is of no moment since the 2-5th defendants are not strangers to the case. To proceed with the appeal in their absence and later expect them to join the train in which they are legitimate passengers will in my view work great injustice to their right to fair hearing.

This Court has held as recently as January 2014 in the case of Veralam Holdings Ltd v. Garba Limited & Anor. (2014) LPELR 22671 (CH) that a unilateral alteration of parties in a suit as pleaded in the trial court without the input of the Court renders the notice of appeal incompetent. In that case my learned brother, EJEMBA EKO states the law on the point:

"The unilateral alteration of the parties in the suit as pleaded in the court below by the appellant as reflected in the notice of appeal renders the notice of appeal incompetent.
With these parties improperly altered on the notice of appeal the said notice of appeal is liable to be struck out and it is hereby struck out". Per Tukur J.C.A.

And at page 399 Paras. B-C, his lordship NDUKWE-ANYANWU JCA had this to say:

> *"...The appellant in his notice and grounds of appeal dropped the names of the other defendants in the suit. Agreed some parties might not want to appeal on the issues he is appealing against. However their names must be included in the process, after all, the respondent in the Court below took out an action against all the defendants. It is still a continuation of that suit."*

It has already been observed that the parties in the instant application are different from the parties in the lower court which are as follows:

" *IN THE UPPER AREA COURT AT FCT*
HOLDEN AT GUDU
Suit No. CV/07/18

AGAMEBU PROPERTIES LTD.....PLAINTIFF

AND

1. *EMEKA AGARA*
2. *PASTOR DAVID STEPHEN AGARA*
3. *UCHEGOD OKEKE.....DEFENDANTS"*

Flowing from the above, it is apparent that the plaintiff at the lower court is the 2nd defendant before this court who instituted her action at the lower court against three defendants and not two parties as presented before this court.

It is observed that the names of the plaintiffs in Exhibit A and B are the same with the current case before this court. However the 3rd defendant in Exhibits A and B is not a party in the instant application before this court.

There's no clarification from the Applicants of this difference in the parties. The above discrepancies have neither been explained nor resolved by the arguments or processes filed by Applicant who was in Court and represented by Counsel. It would not be in the interest of justice and fair hearing to determine this application one way or the other in the absence of the 3rd defendant before the lower court whose interest maybe thereby affected.

It is in the light of the foregoing that I am of the view that the plaintiffs/Applicants application for judicial review as presently constituted is found incompetent.

Issue number two has become otiose and consequently of no moment.

This application therefore cannot be determined one way or the other, thus the entire application is hereby accordingly struck out.

Signed

Honourable Justice M.E. Anenih.

Appearances:
J.A. Kalu Esq for the Applicants.
Kenneth Ezewuzie Esq for 2nd Respondent
1st Respondent unrepresented.