

**IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY  
IN THE ABUJA JUDICIAL DIVISION  
HOLDEN AT GWAGWALADA-ABUJA  
ON THURSDAY THE 7<sup>TH</sup> DECEMBER, 2023**

**SUIT NO: FCT/HC/CV/1751/2022  
MOTION NO: M/9001/2023**

**BEFORE HIS LORDSHIP: HON. JUSTICE A. I. AKOBI**

**BETWEEN**

**SAIDU MUSTAPHA YANWARE.....CLAIMANT/RESPONDENT**

**AND**

**FIRST CITY MONUMENT BANK PLC....DEFENDANT/RESPONDENT**

**AND**

**UNION BANK PLC.....PARTY SEEKING TO BE JOINED**

**R U L I N G**

The Claimant caused a Writ of Summons to be issued against the defendant, filed on the 25/05/2022 seeking for declaratory and restraining order. While the suit is pending, the defendant (First City Monument Bank) filed a motion on notice to join Union Bank of Nigeria Plc as a co-defendant in the suit. The motion was heard, ruling delivered on the 15<sup>th</sup> day of November, 2022; the court considering the facts disclosed in the affidavit in support of the motion for joinder in its ruling refused to join Union Bank of Nigeria Plc because the court did not consider it a necessary party to be joined as co-defendant in the suit.

Few months afterward, precisely on the 3/5/2023, Union Bank of Nigeria Plc herself filed a motion on notice with motion no: M/9001/2023 seeking inter alia that she be joined as a defendant in suit No:FCT/HC/CV/1751/2022. The motion was heard on the 25/09/2023 for which the ruling is being delivered now (07/12/2023). The motion is brought pursuant to Order 13 Rule 21(1) of the Federal Capital Territory Abuja (Civil Procedure) Rules, 2018 and under the inherent jurisdiction of this Honourable Court. The said Order 13 Rule 21(1) provide as follows:

Where it appears to the court that any person not a party in the proceedings may bear eventual liability either in whole or in part, the court may upon an ex parte application allow that person to be joined as a third party by any of the defendants. The application shall state the grounds for the applicant's belief that such third party may bear eventual liability.

The applicant seeks the following reliefs:

- 1. An Order of this Honourable Court joining Union Bank of Nigeria Plc as a Defendant in this suit.**
- 2. An Order of this Honourable Court directing parties to amend all processes filed in this suit to reflect the joinder of Union Bank of Nigeria Plc as a Defendant in this suit.**
- 3. And for such further Order(s) as the Honourable Court may deem fit to make in the circumstances.**

The application is anchored on 7 grounds. The grounds are:

1. That the party seeking to be joined caused the instruction which led to the restriction on the claimant's account, the subject matter of this suit, to be sent.
2. That the facts and case of the party sought to be joined would assist the court in determination of the issues before the court;

3. The party sought to be joined is a necessary party in this suit without whose presence the court cannot be said to have effectively and completely determine the instant suit to conclusion;
4. It is most desirable and convenient that the party sought to be joined be heard so that this Honourable Court would be sure it has effectively and completely adjudicated or settled all the questions in the case;
5. The defendants/respondents and the party sought to be joined would not be prejudiced by the grant of this application;
6. This application is brought to avoid multiplicity of action;
7. That this application is brought in the interest of justice.

In support of the application are 17 paragraphs affidavit deposed to by Favour Otuneye, one of the counsel engaged by the Party seeking to be joined to prosecute this matter on its behalf. The applicant also filed a written address as their argument in urging the court to grant their application. The applicant averred in various paragraphs of his affidavit that certain exhibits were attached, but they were not. In view of that, the applicant filed further affidavit on the 19/5/2023, and additional further affidavit on the 26/05/23 where they attached the exhibits they omitted to attach in their affidavit to wit: bank statements of account of **ENL Consortium Ltd** and exhibits marked as **Union Bank 1 to Union Bank 3**.

The applicant submitted a sole issue for the determination of the Court thus:

**“Whether this instant suit can be properly and effectually determined without the joinder of the Applicant herein?”**

The argument of the applicant in support of the sole issue is that the facts and circumstances that led to the institution of the suit revolves and centers on the applicant such that she ought to have been

joined at the first instance and that the failure to join amount to non-joinder on the part of the claimant/respondent. Cited **AYORINDE V ONI (2000)3 NWLR (pt. 649) 348 SC; IBEGWUA ORDU AZUBUIKE V PEOPLES DEMOCRATIC PARTY & ORS, LEGAL PEDIA CITATION: LC (2014) S. 476/2012.** The Court is urged to exercise its discretion in favour of the applicant.

The applicant reiterated the trite position of law that the grant or refusal of an application for joinder is an exercise of the court's discretion and that such discretion cannot be exercise in vacuum; rather, that the party seeking for the exercise of the discretion in his favour must put cogent and credible facts upon which such discretion can be exercised. It is therefore submitted that the applicant have copiously put before the court facts in its affidavit which demonstrates that the restriction on the claimant's account was due to a criminal breach of its customers' account from where funds were siphoned to several accounts including the account of the claimant domiciled with the defendant.

On receipt of the claimant/respondent's counter affidavit in opposition to the applicant's motion on notice for joinder, the applicant reacted by filing on 21/09/23 a further and better affidavit and reply on points of law. The applicant's complaint against the claimant/respondent's counter affidavit in its paragraph 6 of the further and better affidavit and paragraph 1.3 of the reply on points of law is that paragraphs 4 and 13 of the counter affidavit contains legal arguments and conclusion contrary to section 115(2) of the Evidence Act of 2011 and therefore called on the court to expunge the said paragraphs. Cited **Bamaiyi v. State (2001)8 NWLR (PT.715) SC** and restate the holding as follows: "extraneous matter in affidavit ought to be struck out".

Section 115 of the Evidence Act provide thus:

- (1) Every affidavit used in the court shall contain only a statement of facts and circumstances to which the witness deposes, either of his own personal knowledge or from information which he believes to be true.
- (2) An affidavit shall not contain extraneous matter by way of objection, or prayer, or legal argument or conclusion.

This means that where depositions in an affidavit offend this basic law, the offending paragraphs of such an affidavit must be struck out. **See ATTORNEY GENERAL, ADAMAWA STATE & ORS V. ATT. GEN. OF THE FEDERATION (2005) 18 NWLR (Pt. 958) 581.** Considering the mirage of issues raised by the parties, I considered it pertinent else I forget to first consider and resolve the issue of non-compliance with the provision of section 115 of the Evidence Act.

To discern and ascertain whether paragraphs 4 and 13 of the counter affidavit of the Claimant/respondent runs counter to the provision of section 115 of the Evidence Act 2011, as alleged by the applicant; I had to take a careful reading of the said paragraphs of counter affidavit side by side with section 115 of the Act vis-à-vis the Supreme Court judicial pronouncement in the case of **Bamaiyi v. State** (Supra); I have no iota of doubt that the above reproduced paragraphs of the counter affidavit are nothing but legal argument, conclusion and/or submission which the counsel should urged upon the court and not in an affidavit. For example paragraph 4(a) &(d) and paragraph 13(d) are conclusion that should have been left for the court to draw or urged upon the court to hold. In view of the aforesaid, I cannot but agree with the applicant that those paragraphs offend section 115 of the Evidence Act. For quick reference I restate hereunder the offended paragraphs:

**Para 4(a):** that the instant application is an abuse of court process;

**(d):** that this court is estopped from re-determining the issue of joinder of the same party which was earlier determined;

**(e):** that this issue can only be determined by the court of appeal;

**Para 13(a):** that the implication of the joinder is an invitation for the court to re-open pleadings and start the hearing of the case denovo.

**(d):** that there is no cause of action whatsoever against Union Bank Plc (Party Sought to be joined) and does not seek any relief against her.

**(e):** what the court needs to determine in this matter is whether or not the defendant obtain a valid and subsisting order of court before restriction was placed on the claimant's;

**(g):** that the case is not base on fraud rather it is based on non compliance with extant laws that mandate the defendant to obtain an order of court before restricting the claimant's account.

The offending paragraphs are hereby expunged for non-compliance with section 115(2) of the Evidence Act.

A lot has already been said about the claimant/respondent counter affidavit as captured above, it is however important to put the record straight that upon being served with the applicant's motion, the respondent reacted by filing a counter affidavit of 20 paragraphs out of which some paragraphs have been expunged for non compliance with section 115 of the Evidence Act as reflected above. The counter affidavit was filed on the 26/5/2023 deposed to by Saidu Mustapha Yanware, the Claimant/Respondent himself in this suit. Annexed as exhibit 'A' thereto is a copy of ruling of this Court delivered on the 15/11/22; and in support is a written address wherein the Claimant adopts the sole issue of the applicant which is

that: **Whether this instant suit can be properly and effectually determined without the joinder of the applicant herein.**

The Claimant answer to the above issue is in the affirmative. In support of his stance, he argued that the issue and substance of the application filed by the applicant identified as motion no: M/9001/2023 has already been determined by this Honourable Court in an earlier motion with no: M/10686/2022 filed by the defendant (First City Monument Bank Plc) and then submitted that the applicant's motion is caught up by **issue estoppels** and an abuse of court process same having been determined and refused by this Honourable Court. Cited **SARAKI V. KOTOYE (1992) 9 NWLR (pt. 264) 156** and **IGBEKI V. OKADIGBO (2013) 12 NWLR (pt. 1368) 225 @ 244-245 para G-A**. I hold that the court having struck out those paragraphs of counter affidavit, which include **issue estoppel** and **abuse of court process** they no longer have probative value and do not form part of the counter affidavit and cannot be relied upon.

The Claimant also in reaction to the applicant's further and better affidavit and the reply on point of law both filed on the 21/9/2023; contended by Mr. Zakeri Garuba that their counter affidavit was served on the applicant on 29/5/2023, while they filed their further and better affidavit and the reply on point of law in reaction to the said counter affidavit out of time on the 21/9/23 without first seeking and obtaining leave for extension of time to file same and that there is no evidence of payment of default fees. In view of the above facts, the court is called upon to discountenance the said processes and expunged them for non compliance with the rules of the court.

To resolve the issue of filing further and better affidavit out of time without first seeking leave for extension of time to do so, I found Order 43 of the rules of this court relevant. It provide thus:

**Order 43 Rule (1):** Whereby in this rules any application is authorized to be made to the court, it shall be made by motion which may be supported by affidavit and shall state the rule of court or enactment under which the application is brought.

**(2):** Every application shall be accompanied by a written address.

**(3):** Where the other party intends to oppose the application, he shall within 7 days of the service on him of such application, file his written address and may accompany it with a counter affidavit.

**(4):** The applicant may within 7 days of being served with the written address of the opposing party file and serve an address in reply on points of law with a reply affidavit.

The applicant in line with the rules reproduced above is required upon being served with counter affidavit to file a reply on point of law with a reply affidavit within 7 days of service of the counter affidavit. In the instance case, before the applicant filed his reply on point of law, he had filed multiple further affidavit tagged: Further Affidavit in support of Motion on Notice for Joinder filed 19/5/23; Additional further affidavit in support of motion on notice for joinder filed the 26/5/23 and further and better affidavit in support of motion on notice filed 21/09/23. The applicant had though, explained in both paragraphs 5 of the further affidavit and additional further affidavit that they inadvertently omitted to attached the exhibits they had referred to in their affidavit in support; hence, the need to file those affidavit to attach the exhibits.

I went through the case file and I found no motion for extension of time corroborating the assertion of the claimant that the further and better affidavit and reply on point of law were filed out of time without first seeking and obtaining leave to do so. What is the effect of failure to seek leave to file a court process out of time? In answering that question, the Court of Appeal in the case of **Emerald**

**Energy Resources Ltd v. Signet Advisors Ltd (2020)LPCLR-61385(CA)**

state as follows: “ The last point of the preliminary objection is that the Respondent submitted that the Appellant brief was filed out of time. The position of the law is clear on this. If a party is out of time in filing his process, he must seek leave of Court to file it out of time and to regularize his process. This is trite position of the law. If the process is out of time and leave is not sought, that process will be ignored as it is of no moment. No Court shall allow any party takes it for granted by filing processes out of time. A Court must jealously protect its rules. The rules of this court provide adequate provision for time limit of filing processes of this nature. He posited that his counter affidavit which I found to be true was served on the 29/05/2023; the applicant filed its further and better affidavit and a reply on point of law on the 21/9/23.

By the provision of Order 43 Rule 1(3) & (4) reproduced above the applicant is required on being served with a counter affidavit in opposition to its motion to within 7 days file and served its address in reply on point of law with reply affidavit. The applicant no doubt filed processes in response to the counter affidavit served by the claimant; but the argument is that he filed it out of time. It is my view that a litigate who wants to be made a party in a suit must be ready to comply with the rules of the court. The applicant having been served with the claimant's counter affidavit on the 29/05/23, the law requires of him to file its response within 7 days. But he filed over a period of three months. The law is trite that If a party is out of time in filing his process, he must seek leave of Court to file it out of time and to regularize his process. If the process is out of time and leave is not sought, that process will be ignored as it is of no moment. Taking a cue from the judicial authorizes of **Emerald Energy Resources Ltd v. Signet Advisor (supra)**, the further and better affidavit and reply on point on law having been filed out of time without first seeking and

obtained the leave of the court to file the processes out of time will be based on the said processes filed.

For a party that is out of time, not to seek leave to file its process out of time and to regularize the process earlier filed but insist that a Court should accept the process, shows a mark of arrogance on part of counsel. The elementary rule of Court is that rules of Court which are for the practice of parties before a Court are to be obeyed as they are not made for fun. See **Asika & Ors vs. Atuanya (2013) 14 NWLR (Pt. 1375) 510; G.M.O. Nworah & Sons Co. Ltd vs. Akputa (2010) 2 FWLR (Pt. 519) 2909.**" Going by the above judicial authorities, I have no doubt that the failure to file application for extension of time to file court process out of time is a fundamental flaw beyond mere irregularity. It follows therefore, that there is no further and better affidavit and reply on point of law against the counter affidavit of the claimant.

In an attempt to resolve the sole issue in this matter, the applicant submitted that she is a necessary party for the effectual determination of this suit and that these facts have clearly been set out in her affidavit in support and the exhibits attached to the processes filed. For easy comprehension of the facts I hereunder restate the relevant facts deposed to by the applicant as follows:

**Para 5:** That I was informed by Umar Dikko, zonal legal officer of the applicant, on 25<sup>th</sup> day of February, 2023 at 2:00pm noon, in a telephone conference, of the following which I verily believe him to be true and correct that:

- i. That sometimes in April, 2022, the party seeking to be joined received a fraud petition from one of its customers, ENL Consortium's corporate accounts, stating that the sum of N523, 337, 100.00 (Five Hundred and Twenty-Three Million, Three Hundred and Thirty-Seven Thousand Naira) had been

- illegally online transferred and hacking on its corporate account with account number **0050546481** domiciled with the party seeking to be joined;
- ii. That upon receipt of this complaint and in the course of investigations, it was discovered that the sum was found to have been stolen through an online hacking and over the weekend, filtered through Eighteen (18) accounts within the Bank and subsequently to over 100 accounts in twenty-eight (28) banks, including that of the **Claimant/Respondent with account number: 7789485014** domiciled with the defendant/respondent;
  - iii. That the applicant immediately took steps to mitigate the fraud, once its investigation connected the claimant/respondent's account with the fraudulent transfers from its customer's corporate account;
  - iv. That in line with the established procedures under the CBN Regulations, Idemudia Osayande, a team member of the applicant's Fraud Desk Team sent an email to the defendant/respondent on 28<sup>th</sup> April, 2022, informing it that the claimant was suspected to be a beneficiary of fraudulent inflow from the Applicant's customer's account.
  - v. That it was requested that the Claimant's account be restricted in order to secure and the salvage the stolen funds;
  - vi. That this was necessary to prevent the transferred funds from being dissipated as it was observed that the beneficiaries of the fraudulent transfers were dissipating the funds very fast, this being consistent with the pattern of operation with the perpetrators of wire scams/online banking scam;
  - x. That by requesting that the lien be placed on the claimant's account amongst many others temporarily, the funds traced

to their respective accounts would be preserved pending the determination of the ongoing criminal investigation.

Based on the above facts they submitted that the claimant's suit cannot be effectively determined without the presence of the party sought to be joined.

The Claimant/Respondent on the contrary relying on the ruling of this court delivered on the 15/11/2022, raised two basic arguments why this court cannot grant this application. (1) **Issue Estoppel** and (2) **Abuse of Court Process**. Issue Estoppel and Abuse of Court Process having been struck out earlier on for offending section 115 of the Evidence Act, they cannot be relied upon for any decision on this application.

The Claimant's other leg of opposition to the application for joinder canvassed in his written address that an unwilling person cannot be made or compelled to institute action as a claimant against a person he has no cause of action against. In support of this he commended the court to a Supreme Court case of **Sifax (Nig) Ltd v. Migfo (Nig) Ltd (20189 NWLR (PT.1623)138**, wherein her Lordship Peter-Odili JSC held thus:

A Claimant is entitled to pursue his remedy against only the defendant he conceives he has a cause of action against and a plaintiff is not to be compelled to proceed against person it has no desire or intention to sue.

They argued that the present application is one aimed at compelling the claimant to institute an action and pursue a remedy against a party whom the he has no claim against. He went on to state that for a court to determine whether the Claimant has a cause of action against the defendant, it is the Writ of Summons and Statement of Claim that should be considered. He urged the court to closely examine the writ and statement of claim of the claimant

and it will find that the claimant made no allegation against the applicant to necessitate it being joined as a party in this suit. The counsel cited so many judicial authorities on this which I considered notorious not to reproduce them here.

The applicant as expected reacted to the claimant's counter affidavit by filing further and better affidavit and a reply on point of law. However, the claimant/respondent urged the court to ignore the further and better affidavit and the reply on point of law filed by the applicant on ground that they were filed out of time. The court considered the argument and the statutory provision of order 43 of the rules of this court as clearly outline above, resolved the issue in favour of the claimant/respondent and hereby struck out the further and better affidavit and the reply on point of law for being filed out of time without first seeking and obtaining leave for extension of time to file same out of time.

The claimant has argued strongly too that he has no cause of action against the party seeking to be joined and that he cannot be compel to bring an action against a person he has no desire to sue. The claimant is absolutely right in the eyes of the law that he cannot be compel to sue person he do not want to. See **Ebele & Anor v. Ikweki & Ors (2012) LPELR-7919(CA)**, wherein the court held that "Where a Plaintiff sues a particular Defendant, he is entitled to pursue his remedy against that Defendant only and should not be compelled to proceed against any other person whom he has no desire and no intention to sue. See **GREEN V. GREEN (1987) 3 NWLR (Pt.61) page 480...**"

Flowing from this principle of law stricto sensus, the claimant cannot be compelled by the court to proceed against the party seeking to be joined. It is also true and I agree with claimant that it is the claimant's writ of summons and statement of claim and not statement of defense that determines whether a person is a

necessary party. I have closely examined the writ of summons and the claimant's statement of claim and I entirely agree with the claimant that there is no relief or cause of action against the party sought to be joined, on that note, she cannot be said to be a necessary party.

However, the party sought to be joined deposed to vital facts in her affidavit in support of the application for joinder, some of which I reproduced above. The applicant via her averment has demonstrated sufficient interest in the matter and has also shown that the decision of this court in respect of this suit will directly affect her interest and will irreparably prejudice her; I therefore and in order to avoid multiplicity of action and for interest of justice, I joined as 2<sup>nd</sup> defendant the party sought to be join (Union Bank of Nigeria) as an interested party.

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**HON. JUSTICE A. I. AKOBI**  
**07/12/2023**