IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY
HOLDEN AT JABI, ABUJA

THIS MONDAY, THE 28TH DAY OF NOVEMBER, 2022.

BEFORE: HON. JUSTICE ABUBAKAR IDRIS KUTIGI – JUDGE

SUIT NO: FCT/HC/CV/2529/2021
MOTION NO: M/7954/2022

BETWEEN:

ADELEKE ONI
(SUING THROUGH HIS ATTORNEY, ISAH OKWONU) }**……...CLAIMANT/APPLICANT**

AND

IHS NIGERIA LIMITED……DEFENDANT/RESPONDENT

RULING

By a motion on notice dated 15th June, 2022, the Claimant/Applicant seeks for the following Reliefs:

1. **An order granting leave for the Claimant/Applicant to reopen his case for the sole purpose of calling a Subpoenaed Witness.**

2. **An order granting leave for the Claimant/Applicant to call a Subpoenaed Witness.**

3. **And for such further or other order(s) as this Honourable Court may deem fit to make in the circumstances of this application.**

The grounds on which the application is based are as follows:

1. **The Claimant's Counsel, in the course of trial, saw the need to call a Subpoenaed Witness i.e. Access Bank Plc, in view of the surrounding facts and circumstances regarding the alleged payment of Eight Million Five Hundred Thousand Naira (N8,500,000) purportedly made by the Defendant to the Claimant's Attorney.**

2. **The claimant's counsel therefore caused a Subpoena Ad Testification Et Duces Tecum to be issued and same was accordingly issued on the 24th day of May, 2022, and equally served on the Subpoenaed Witness i.e. Access Bank Plc.**

3. **The Subpoena Ad Testification Et Duces Tecum specifically require the Subpoenaed Witness i.e Access Bank Plc to give evidence and to confirm whether or not the sum of Eight Million, Five Hundred Thousand Naira (N8,500,000) only from the Account of the Defendant's agent, TONYFIELD AND TOMMY LIMITED, with account Number 0044976058 via a Diamond Bank Cheque dated 12th January, 2017, with Cheque Number 71579382, was paid to the Claimant's Attorney, ISAH OKWONU, and to also bring with it and produce before the Honourable Court the original copies, for the inspection of the Honourable Court, the following documents:**

   (a) **The original copy of a Diamond Bank Cheque bearing the name of the Defendant's agent, TONYFIELD AND TOMMY LIMITED, with account Number 0044976058, and Cheque Number 71579382, dated 12th day of January, 2017**
   (b) **The statement of account of the Defendant's agent, TONYFIELD AND TOMMY LIMITED with account Number 0044976058, from the 1st day of January, 2017, till the date of receipt of service of the said Subpoena.**
4. **The sum of Eight Million, Five Hundred Thousand Naira (N8,500,000) is directly in issue as same is specifically pleaded and relied upon by the Defendant as the amount the Defendant (purportedly) paid to the Claimant's Attorney, ISAH OKWONU, through its agent, TONYFIELD**

AND TOMMY LIMITED (paragraphs 17 and 18 of the Defendant's Counter-Claim).

5. **The Defendant also pleaded and relied on the Certified True Copies (CTC) of the pleadings in Suit No: FCT/HC/CV/583/2018 AND that of the appeal processes in respect of the same suit (paragraphs 22(c) and 24 of the Defendant's Counter-Claim). The Defendant eventually tendered in evidence the CTC of the records of proceedings in Suit No: FCT/HC/CV/583/2018 which was admitted and marked as Exhibit D3.**

6. **The Defendant, in Exhibit D3 referred above, particularly at page 341 and specifically in paragraphs 29 and 30 on the said page, mentioned that the sum of Eight Million Five Hundred Thousand Naira (N8,500,000) was paid via the 2nd Defendant's (which is same as the Defendant's agent in the instant suit) Diamond Bank cheque with No. 71579382 which is also the same as the cheque in respect of which Access Bank Plc (which has acquired and taken over Diamond Bank sometime in 2019) has been subpoenaed to give evidence on whether or not the said cheque was actually received by the then Diamond Bank or even the current Access Bank Plc and also to confirm whether or not the sum of Eight Million, Five Hundred Thousand Naira (N8,500,000) was actually paid to the Claimant's agent, ISAH OKWONU, as alleged by the Defendant.**

7. **The Claimant's Counsel, on the 14th day of June, 2022, while speaking from the Bar, informed the Honourable Court of the presence of the Subpoenaed Witness in Court i.e. Access Bank Plc.**

8. **The Claimant's Counsel had earlier on in the course of proceedings inadvertently omitted to inform the Honourable Court that the Claimant intended to call a Subpoenaed Witness before he opened and closed the Claimant's case on the 12th day of April, 2022.**

9. **The Honourable Court, however, guided the Claimant's Counsel on the proper steps to take before calling another witness after parties have closed their respective cases i.e. to bring the necessary application such as the**

instant one. This is because the Claimant had opened and closed his case on the 12th day of April, 2022, while the Defendant opened and closed its case on the 14th day of June, 2022, and the Honourable Court was to adjourn for final written addresses of Counsel on behalf of parties.

10. **The instant application is in good faith and will not prejudice the Defendant in any way as same is simply aimed at aiding substantial justice particularly as regards the alleged payment of Eight Million Five Hundred Thousand Naira (₦8,500,000) which forms the crux and the centre piece of the entire subject matter of the substantive suit.**

The application is supported by a 4 paragraphs affidavit with 2 annexures marked as **Exhibits A1 and A2 Exhibit A1** is a copy of *Subpoena Ad testification et duces* tecum while **A2** is a copy of Diamond bank cheque dated 12th January, 2017 in the name of Isah Okwonu.

A brief written address was filed in compliance with the Rule of Court in which one issue was raised as arising for determination as follows:

"Whether it is proper and in the interest of justice to grant leave for the Claimant to re-open his case for the sole purpose of calling a subpoenaed witness having regards to the surrounding facts and circumstances of this case."

The submissions on the above issue forms part of the record of court to the effect that it is proper and in the interest of justice to grant leave to the Claimant to re-open his case to call the subpoenaed witness having regards to the surrounding facts and circumstances of this case. The cases of **Amere Gafaru Akintayo V. George Jalaoye & 253 Ors (2010)LPELR-3688 (CA); Hon. Chide Ibe MFR & Anor V. Hon. Raphael Nnanna Igbokwe & 13 Ors (2012)LPELR-15351 (CA)** were cited in support.

At the hearing, counsel to the Plaintiff/Applicant relied on the paragraphs of the supporting affidavit and adopted the submissions in the written address in urging the court to grant the application.

In opposition, the Defendant/Respondent filed a counter-affidavit of 17 paragraphs and a written address in which one issue was raised as arising for determination to wit:

"Whether from the facts and circumstances of this case, this Honourable Court can exercise its discretion to grant the application and the reliefs thereof."

The submissions made in the above issue equally forms part of the Record of Court to the effect that on the materials and fact of this case, while it is conceded that the court has the discretion to grant the application, however that no valid case has been made by the Applicant to allow for the re-opening of Plaintiff's case at this late stage after parties have filed their addresses and the matter ready for adoption.

It was submitted that the grant of re-opening of a case is not done arbitrarily but judicially and judiciously taking into consideration the interest of the opposing party and therefore before it can be granted especially at this late stage after closure of cases of parties, it must be based on cogent facts and or materials and that such facts were not disclosed in this case.

The Respondent further contends that another disqualifying element is that in the entirety of the case of the Claimant as denoted in their pleadings which streamlines the facts in dispute in this case, they never pleaded the cheque and statement of account sought to be tendered now through the subpoenaed witness and that in such a situation, no purpose will be served granting the application.

Furthermore that to grant the application will occasion grave injustice to the Respondent as the cheque even sought to be tendered does not belong to any of the parties subject of this action. It was finally contended that the Plaintiff had ample time to have taken steps after the issuance of the subpoena to reopen their case but deliberately refused to do anything and waited and watched Defendant opened and closed its case with the aim to achieve an unfair advantage.

At the hearing, counsel to the Defendant relied on the contents of the counter-affidavit and adopted the submissions in the written address in praying the court to refuse the application.

I have carefully considered the processes filed on both sides of the aisle and the oral submissions of counsel. The narrow issue to be resolved as captured by parties on all sides is whether having regard to the facts and circumstances or this case, the application should be granted?

Now an application to re-open a case and call an additional witness particularly here where all parties have closed their cases and the matter adjourned for filing an adoption of final addresses certainly cannot be granted as a matter of course or on whimsical or no grounds at all. Special circumstances must on the materials be disclosed by the applicant putting the court in a commanding height to exercise its undoubted discretion in Applicants favour. This discretion it must be underscored, the court exercises with utmost circumspection, regard being had to the overall interest of justice and providing a fair and even template for parties to present their grievances. No side should be given an undue advantage in any situation.

In determining the fairness and justice of this Application, it appears important to situate certain foundational facts. I will only highlight facts that are relevant in resolving the extant application.

The Plaintiff/Applicant filed this action vide writ of summons dated 30th September, 2021 seeking for declaration of title, trespass, damages for trespass and injunction among other reliefs. The **Defendant** filed a **defence** and set up a **counter-claim** against Plaintiff who filed a reply and defence to the counter-claim.

These **pleadings** clearly defined or streamlined the facts and or issues in dispute. Hearing then commenced. The Plaintiff called his one and only witness on 6th April, 2022. He gave evidence, was cross examined and the Plaintiff then closed his case and the matter adjourned to 14th June, 2022 for defence when Defendant also called his only witness who gave evidence, was cross examined by counsel to the Plaintiff. The Defendant then closed its case and with agreement of counsel the court then ordered for the filing of final written addresses and adjourned the matter for adoption on 11th October, 2022. Indeed from the Record, the Defendant has already filed its final written address.

Now the basis of the present call to reopen Claimants case is so that they can call a **subpoenaed witness.** From the record and vide Exhibit A1 attached to the motion on notice, the subpoena issued by court is dated 1st June, 2022. It is clear that the subpoena predicated or was filed and issued well before the Defendant led evidence in defence and the Plaintiff did not take any steps to file an application to reopen his case which would have readily been accommodated since the Defendant was at that point yet to lead evidence in support of his defence. It is obvious that the application to reopen was only filed on 15th June, 2022 after the Defendant has led evidence and closed his case and one wonders at the bonafide or good faith of the application particularly when it was filed. As rightly submitted by defence counsel, it appears that the exant application is aimed at deriving an unfair advantage and overreaching.

Counsel to the Plaintiff had made heavy whether of the principle of **fair hearing**. The right to fair hearing is obviously very important in any well conducted proceedings but it is a right not only to be enjoyed by one party to litigation but all parties. It is also a right that must not be overstretched beyond acceptable limits and allowed to run wild. Properly understood, it means every party in litigation be given every opportunity to present its case or grievance unfettered and in a fair manner. No party is entitled to any undue advantage. As I have demonstrated above, the Plaintiff had all the time to present its case unhindered. Fair hearing is thus not some magical ward or panacea to cure avoidable lapses in the presentation of cases by legal practitioners. The reliance on fair hearing will not fly here.

Most importantly, as stated earlier, **the pleadings of parties streamlines or defines the issues in dispute**. Pleadings in this case were settled long ago, well before Plaintiff opened and closed its case, so every party in this case knew, as it were, the contested assertions and where each party stood. The aim of pleadings therefore is to give notice of the case to be met which enables either party to prepare his evidence and documents upon the issues raised by the pleadings and saves either side from being taken by surprise. Parties thus has more than sufficient time to prepare and lead evidence in support of their cases respectively.

That right I must again underscore was all accorded to parties in this case and there was no complaints of any kind throughout the proceedings.

I must underscore the fact that the importance of parties pleadings need not be over-emphasised because the attention of court and the parties is focused on it as the pivot around which the case revolves and the case of parties can only be determined on the basis of facts pleaded. Anything outside the confines of the body of facts pleaded in the pleadings will be irrelevant and be discountenanced. In this case, parties had more than ample time to present their grievances as allowed by law which they exercised as stated earlier and this culminated in the matter been adjourned for adoption of final addresses.

Flowing from the above and in the context of the facts streamlined on the pleadings, let us now situate the basis of the extant application I prefer here to allow the grounds for the application as streamlined by Applicant himself thus:

1. **The Claimant's Counsel, in the course of trial, saw the need to call a Subpoenaed Witness i.e. Access Bank Plc, in view of the surrounding facts and circumstances regarding the alleged payment of Eight Million Five Hundred Thousand Naira (N8,500,000) purportedly made by the Defendant to the Claimant's Attorney.**

2. **The claimant's counsel therefore caused a Subpoena Ad Testification Et Duces Tecum to be issued and same was accordingly issued on the 24th day of May, 2022, and equally served on the Subpoenaed Witness i.e. Access Bank Plc.**

3. **The Subpoena Ad Testification Et Duces Tecum specifically require the Subpoenaed Witness i.e Access Bank Plc to give evidence and to confirm whether or not the sum of Eight Million, Five Hundred Thousand Naira (N8,500,000) only from the Account of the Defendant's agent, TONYFIELD AND TOMMY LIMITED, with account Number 0044976058 via a Diamond Bank Cheque dated 12th January, 2017, with Cheque Number 71579382, was paid to the Claimant's Attorney, ISAH OKWONU, and to also bring with it and produce before the Honourable Court the original copies, for the inspection of the Honourable Court, the following documents:**

(c) **The original copy of a Diamond Bank Cheque bearing the name of the Defendant's agent, TONYFIELD AND TOMMY LIMITED, with account Number 0044976058, and Cheque Number 71579382, dated 12th day of January, 2017**

(d) **The statement of account of the Defendant's agent, TONYFIELD AND TOMMY LIMITED with account Number 0044976058, from the 1st day of January, 2017, till the date of receipt of service of the said Subpoena.**

4. **The sum of Eight Million, Five Hundred Thousand Naira (N8,500,000) is directly in issue as same is specifically pleaded and relied upon by the Defendant as the amount the Defendant (purportedly) paid to the Claimant's Attorney, ISAH OKWONU, through its agent, TONYFIELD AND TOMMY LIMITED (paragraphs 17 and 18 of the Defendant's Counter-Claim).**

Now it should be noted the facts situated above were not facts disclosed by the Claimant in his pleadings. I have read the claim of Plaintiff and no where did **Access Bank, Tony Field and Tommy Limited** appear. Indeed it is in the defence and counter-claim of Defendant wherein it was averred that its Agent Tony Field and Tommy Limited paid Claimants Attorney **Isah Okwonu** the sum of ₦8,500,000 for the disputed subject matter of this suit and situates those facts as the basis for its claim of ownership in the counter-claim.

Now in the **Claimant's Reply and Defence to the Counter-claim**, the Claimant unequivocally denied that Isah Okwonu sold "**my portion of land**" to the Defendant or its agent and which he described as **"purported."** The Claimant also positively stated that neither him or his agent, Isah Okwonu has ever been paid the sum of ₦8,500,000 by the Defendant or any of its purported agent and puts the Defendant to the **"strict as proof at the hearing."**

It is therefore strange that the **Claimant** who has join issues with these assertions/averments with respect to the payment for the and by Defendants agent to his agent wants now to use these denied assertion as a basis to call a fresh witness on subpoena. It is indeed strange. It is trite principle for which no authority needs be stated that he who asserts must prove. The contention that any

payment was made to Plaintiff's agent for the disputed land was made by Defendant and denied by Claimant/Applicant. It is for the Defendant to prove the affirmative contents of its pleadings. That burden is not on Claimant who has denied comprehensively these assertions in the 5 paragraphs Reply to the defence and 21 paragraphs of the defence to be counter-claim and on which his sole witness has already led evidence.

In the light of the pleadings in this case which has defined the issues in dispute and the evidence already led on record, it is really difficult to define and situate the relevance and materially of these subpoenaed documents to the case of Claimant/Applicant. The Claimant has denied completely the narrative or facts related to those documents. The dispute or case of Plaintiff and the counter-claim set up are clear and the burden of proof and on whom it lies are also clear. The remit of the grievance cannot be expanded at this point as parties are bound by their pleadings. On the whole, as I have demonstrated at length, it is difficult to situate the relevance of the documents sought to be tendered through the witness sought to be subpoenaed in the context of the dynamics of the interplay of facts and issues joined on the pleadings. The valuable tool of reopening of a case is not a conduit or an opportunity to alter the character of a case already presented or to have as it is said in popular parlance, a second bite at the cherry or an opportunity to patch up lapses in the initial conduct of a case.

In conclusion, the Claimant/Applicant has not satisfied the court that there are substantial and cogent reasons to reopen the case of Applicant and to call the subpoenaed witness. As I have stated already and at the risk of prolixity, justice is not only for one of the party in a case but for all parties. Any undue advantage granted to one party at the expense of the other party or adversary will amount to an injudicious exercise of discretion particularly in the absence of clear and sufficient materials as in this case to support the exercise of discretion.

The only point to perhaps underscore as I round up is that in the exercise of the court's discretion, it is now trite principle that the court must act judicially and judiciously. This means that some material of value must be placed before the court which will enable it decide whether the circumstances of the application justify the exercise of the court's equitable jurisdiction in the applicants favour.

Where such materials are absent, the application is inevitably compromised. See **Akpoku V Ilombu (1998) 8 NWLR (pt.561) 283 at 291 F-G.**

On the whole, the application fails and it is dismissed. I call on counsel to plaintiff to act post haste and file its final address so that this matter can be finally determined without any further delay.

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Hon. Justice A.I. Kutigi

Appearances:

1. **Patrick Peter, Esq., for the Claimant/Applicant**

2. **M.J. Haruna, Esq., with J.S. Adamu, Esq., for the Defendant/Respondent**