

IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY

IN THE ABUJA JUDICIAL DIVISION

HOLDEN AT MAITAMA

BEFORE HIS LORDSHIP : HON. JUSTICE Y. HALILU

COURT CLERKS : JANET O. ODAH & ORS

COURT NUMBER : HIGH COURT NO. 22

CASE NUMBER : SUIT NO: CV/1949/15

DATE: :MONDAY 21ST JUNE, 2021

BETWEEN

**1. CHIEF BENJAMIN IFEANYI ORAJIAKU
2. CHIEF ERNEST ELOCHUKWU
3. NESTELLO GATEWAYS GROUP LTD CLAIMANTS
4. NES DYNAMIC OIL SERVICES LTD**

AND

**1. MR. OGU IFEANYI BIADUO
2. PRINCE OBINNA KANU
3. MR. KEHINDE BELLO
4. OKEY ODO ONAH
5. K & B ATLANTIS INTEGRATED LTD**

DEFENDANTS

RULING

The Claimants/Applicants commenced this action vide Motion on Notice filed on the 20th March, 2019 for the following reliefs;

- i. An Order of this Honourable Court granting leave to the Applicants to consolidate their statement of claims in this suit.
- ii. An Order of this Honourable Court granting leave to the Applicants to amend their statement of claim and witness statement on oath in the manner as shown in the proposed amended statement of claim and witness statement on oath.
- iii. An Order of this Honourable court amending the originating processes, pleadings and all other

processes in this suit in the manner as contained in the proposed Amended Statement of claim and witness statement on oath herein attached as Exhibit “1”, “2”, and “3”.

- iv. An Order of this Honourable Court granting leave to the Applicants to recall PW1 and PW2 for the purposes of examination in chief.
- v. And for such further Order the Honourable Court may deem fit to make in the circumstance of this case.

In support of the motion is a 15 paragraph affidavit deposed to by one Nasiru John of 12 Agadez Street, Wuse II, Abuja.

It is the deposition of the Applicant that the 1st Claimant initially commenced this suit sometime in 2015 against the 1st, 2nd and 5th Defendant but was

by Order of the court joined the 2nd, 3rd and 4th Plaintiffs as Defendant. On further application of the 2nd, 3rd and 4th Plaintiffs, the court also made an Order joining the 2nd to 4th Claimants as parties to this suit and the 2nd to 4th Claimants thereupon which they filed their statement of claims against the Defendants.

That as the date of filing this application there are multiple statements of claims before the court, one by the 1st Plaintiff and another by the 2nd – 4th Plaintiffs.

That while in the process of consolidating the said statement of claims, the Applicant stumbled upon a cache of very vital documents that were not within their reach prior to the filing of their original pleadings.

That some of these documents include documents on how the 2nd Defendant mis-managed the business of the 2nd and 3rd Plaintiffs as well as cheques, payment vouchers for salaries, forged letters of the 3rd Plaintiffs which the 2nd Defendant used to sell off the 3rd Plaintiffs property and evidence of monies that was released to the Defendant by the 3rd Claimant.

That the claimant has already called PW1 and PW2 who testified for the Plaintiff and was discharged. But on the application of the counsel to the 1st, 2nd and 5th Defendants, this Court made an Order to recall PW1 and PW2 for the purposes of cross – examination by the Defendants.

Witness statement on oath filed was accompanied with a written address wherein a sole issue was raised to wit;

“Whether this Honourable Court should exercise its discretionary powers to grant this application in the circumstances.”

Learned counsel submits that the Rules of this court, especially Order 25 Rules 1 and 2 empower the court to grant an application for amendment in deserving situations. The rule equally provides that a party seeking an amendment should file copy of a new witness statement on oath sought to be relied upon. ***MELIFONWU VS EGBUNIKE (2001)1 NWLR (Pt. 694) 271 at 281, Paragraphs B-D and EGWA VS EGWA (2007) 1 NWLR (Pt. 1014) 71 at 95, paragraph B were cited.***

Learned counsel further submit that it is only when an amendment is brought in bad faith or will lead to injustice or over reach a party that the court will not allow it. ***CROPPER VS SMITH (1884) 26 CH.D 700, 710 and 711; BANKOLE VS DAD (2003) 11 NWLR (Pt. 830) 174 were cited.***

On the application of the Applicant to recall PW1 and PW2, learned counsel submit that it is a trite law that the court will grant such an application where cogent reasons are placed before the court. ***OGBUDU VS OGBUDU (1967) NMLR VOL. 2015 SGT. ALFRED KEJAWA VS THE STATE (2013) 3 NWLR (Pt. 1341) 383 were cited.***

On his part, Defendants/Respondents file counter affidavit upon service and deposed to by one Samuel

I. Igwe of suite SC 22 & 51 Old Banex Plaza, Wuse II, Abuja.

It is the deposition of the Defendants that paragraph 7(a),(b),(c),(d),(e) and paragraphs 8(a),(b),(c),(d) of the claimants' affidavit are defective.

That paragraph 10 is untrue to the extent that Plaintiffs commenced this suit clandestinely before this court while using the sister case with suit No. FCT/HC/CV/173/11 as a veneer, until the 1st, 2nd and 5th Defendants discovered it in the twilight of 2017 hence the said application for extension of time to enter appearance.

That inspite of the ensuing ill – health of the 1st and 2nd Defendants, they had made out a statement of defence which they intended to file before the Plaintiffs served them with a motion for amendment

of their writ of summons, statement of claims and other processes in this suit dated 20th March, 2019.

That while the application for amendment is still pending before the court, the Plaintiffs brought two application through the 1st Plaintiff dated 2nd April, 2019 and 6th May, 2019, praying the court to enter final judgment for them against the 1st, 2nd, 3rd, 4th and 5th Defendants in default of pleading.

That paragraph 9, 10 and 11 of the affidavit are untrue to the extent that the 1st, 2nd and 5th Defendants considered it in appropriate to file their statement of defence while the Plaintiffs have a pending application before the court for amendment of their writ of summons and pleadings.

That the application if granted, will prejudice the 1st, 2nd and 5th Defendants.

That it will be in the interest of justice for the court to discountenance the Plaintiffs' application.

A written address was filed by the Defendants/Respondents wherein a sole issue for determination was raised to wits;

“Whether in view of Order 21 Rules 1 and 9 of the High Court of the Federal Capital Territory (Civil Procedure Rules), 2018, the Applicants are entitled to the reliefs”?

Learned counsel submit that the affidavit of the Plaintiffs are defective as such in clear violation of section 115 (2) of the Evidence Act, 2011.

Learned counsel further argued that extraneous matters whether by way of objection, prayer or legal argument from the writ of summons, statement of claim or witness statement on oath should not form

part of the content of an affidavit. If it does, it renders the affidavit defective and grossly untenable to support the motions hence it should be struck out. Section 115(1) of the Evidence Act, ***AHMED VS C.B.N (2013)11 NWLR (Pt. 1365) 352 were cited.***

Learned counsel submit that the relief of the 1st Claimant and indeed other Plaintiffs does not fall with the ambit of liquidated demand, more particularly, reliefs c, d and e. ***EKO ODUME & ORS VS UME NNACHI & ORS (1964) 1 ANULR 329 at 333 as deprecated by the supreme court was cited.***

Learned counsel made further submission that it is unfortunate that the Plaintiffs only recently, precisely on 20th March, 2019 brought an application for amendment of their writ of summons, pleadings

and other processes in this suit. While the said application for amendment was still pending before this court, the Plaintiffs/Applicants through the 1st Plaintiff brought two other applications dated 2nd April, 2019 and 6th May, 2019 respectively, asking the court to enter judgment for the 1st Claimant as per the same writ of summons and statement of claim which they sought to amend. Order 21 Rules 1 and 9 of the High Court of Federal Capital Territory (Civil Procedure) Rules 2018 was cited.

Learned counsel submit that the action of the 1st Claimant and indeed all the claimants constitute an abuse of court process. He therefore urge the court to strike out the Plaintiffs' application with cost.

Upon the service of counter affidavit, on the Plaintiffs/Applicants, Plaintiffs/Applicants file

further and better affidavit deposed to by one Faith Saiki of Agadez Crescent Wuse II, Abuja wherein the deponent deposed to as follows;

That the Applicant denies paragraph 3 of the 1st, 2nd and 5th Respondents' counter affidavit and state that the said paragraph 7(a) to (e) is a mere restatement of the reliefs in the statement of claims before this Court. It is not a new relief sought by the Applicants in this motion.

It is further the deposition of the Applicants that contrary to paragraph 4 of the counter affidavit, the Defendants/Respondents were served with the originating processes in this suit in 2015 and the amended copy were served on them in 2017. That the Respondents failed to file their statement of

defence since 2017 when they entered appearance in this matter.

That all the Claimants/Applicants' witness have testified in this suit. That contrary to paragraph 5 of the 1st, 2nd and 5th Defendants' counter affidavit, the 1st and 2nd Defendants are not sick, but have been on the run since 2011 when the (EFCC) and the Nigeria Police respectively declared them wanted for various crimes committed against the Claimants.

That it will be in the interest of justice to enter judgment for the Claimants for continuous failure to file defence by the Defendants.

The Claimants/Applicants in their reply on point of law raised a sole issue to wit;

“Whether from facts deposed to in the 1st, 2nd and 5th Respondents counter affidavit is

sufficient to warrant the refusal of the Claimants/Applicants application for final judgment in this suit”?

Counsel submit in the negative that the 1st, 2nd and 5th Defendants/Respondents’ counter affidavit have not disclosed any material facts to warrant the refusal of the application by the court. The law is settled that he who asserts a fact must prove same by credible evidence. See 131 of the evidence Act; produce *ASSOCIATION OF NIGERIA LTD (GTE) & ANOR VS UDOM UDOM & 2ORS (2014) 8 NWLR (Pt. 1410) 479; FEDERAL MORTGAGE FINANCE LTD VS EKPO (2004) 2 NWLR (Pt. 856) 100 and NWOSU VS UDEAJA (1990) 1 NWLR (Pt. 123) 188.*

Learned counsel aver that the law is settled that depositions in an affidavit which are not challenged, controverted or countered in a counter affidavit must be accepted and acted upon by the court as true. ***EGBUNA VS EGBUN (1999) 2 NWLR (Pt. 106,) page 773 was cited.***

Learned counsel submit that, the 1st, 2nd and 5th Respondents in paragraph 5 of their counter affidavit made a feeble attempt to give excuse on why they failed to file their defence on ground of ill health of both the 1st and 2nd Respondents but failed to provide any medical report in proof of the fact alleged. It is trite law that a party who seeks the court to exercise its discretion in his favour has the onus to supply enough materials, considering the circumstances of that case, upon which the court can exercise its discretion. ***UDENSI VS ODUSOTE***

(2003) 6 NWLR (Pt. 817) 545 at 558 paragraph B; OGBUEHI VS GOVERNOR IMO STATE (1995) 9 NWLR (Pt.417); OTAIGBE VS BENDEL CEMENT COMPANY LTD (2014) LPELR – 22763 (CA) were cited.

Learned counsel further submit that in response to paragraph 4.1 to 4.4 of the 1st, 2nd and 5th Respondents' written address, we submit that the Respondent's submission on the said paragraph are unattainable in view of the Rules upon which this application is being brought. This application is brought pursuant to Order 21 Rules 1 and 9 of the Rules of this court but the Respondent chose to close their eyes to sub rule 9 of the said rules which provides application of final judgment in all actions other than those in the preceding rules.

Learned counsels humbly urge the court to overrule the 1st, 2nd and 5th Respondents in their objection to the application and enter judgment in favour of the 1st Applicant as per his reliefs in the statement of claim.

On the part of Court, I have gone through the affidavit in support of the reliefs herein contained on the face of the application in view, on one hand, and the counter affidavit in opposition to the application on the other hand.

Our adjectival law leans heavily in favour of amendments and is generally against the refusal of amendments.

Although the pendulum tilts in favour of amendment, court of law are entitled to refuse amendment in deserving cases.

Trial courts must examine the application for amendment very carefully in the light of the affidavit evidence.

The peculiarity of each case shall be considered. See *AKANINWO VS NSIRIM (2008) 1 SC (Pt. 111) 151.*

It is established that every opportunity must be afforded parties to a dispute in court to put their case fully before the court.

In a case conducted on the basis of pleadings, it certainly cannot be said that a Defendant has been allowed to put his case before the court when the opportunity to amend his pleadings has been denied him.

Refusal to allow a party amend his pleading certainly translates into refusing him the liberty to

call the evidence which would have been necessary had the amendment sought being granted.

The consequence is denial to fair hearing. See *AKANINWO VS NSIRIM (2008) WRN (Vol. 20) 99 at 106 – 107, page 128 – 129, lines 40-5 CS.*

I however must be quick to mention that all cases are not the same. There are circumstances upon which application for amendment can be refused, the following are factors to be considered in granting or refusing an application for amendment.

- a. The attitude of parties.
- b. Nature of the amendment sought in relation to the suit
- c. The question in controversy
- d. The time application is made

- e. The stage at which it is made and
- f. All other relevant circumstances.

See ***ANAKWE VS OLADEJI (2008) 2 NWLR (Pt. 1072) 506 at page 550 – 521 paragraphs G-A.***

The granting or refusal of amendment involves an exercise of discretionary power and such discretion must be exercised judicially and judiciously.

See ***OJEBODE & ORS VS AKANO & ORS (2012) LPELR - 9696***

An Applicant therefore who seeks to be allowed to do an act which he omitted to do when he ought to have done it during the trial, has a duty to give reasons that are adequate and reasonable to explain his omission and or failure to do the act at the appropriate time during the said trial.

It is not sufficient for the party in the wrong to merely ask for the order of court to that effect.

Above position was espoused in the case of ***OJIEGBE & ANOR VS UBANI & ANOR (1961)*** ***ALL NLR 277 at 280*** where the CJN (as he then was) AdetokunboAdemola upheld the decision of the lower court when it refused to allow a party to amend his case that had been closed, same having been objected to, as in the case in view by the other side.

This is a 2015 matter. Hearing and defence got protracted due to joinder of parties which necessitated this application partly for consolidation of statement of claims in order to put the record straight, more that Applicant stated that it stumbled on a cache of very vital documents which were not

within their reach prior to the filing of their original pleadings.

I must observe here that, in law to amend any legal process affords a party whether a Plaintiff or Defendant and even the appellant or respondent on appeal opportunity to correct an error in the legal document. Such correction can be made informally where the process is yet to be served. After service however correction of legal process may be effected, depending on the prevailing rules of court, either by consent of both parties or upon motion on notice, like the case in hand, such correction are commonplace. Amendment enables the blunders, errors and inadvertence of counsel to be corrected, in the interest of justice, ensuring always that no injustice is occasioned to the other party. *FIVE*

***STAR INDUSTRIES LTD VS BOI LTD (2013)
LPELR 22081 (CA).***

From all I have seen based on the affidavits of both parties, I am of the firm view that this application ought to be granted.

Indeed the appeal to the discretionary power of this court must be based on sound reasons and reasoning.. My conscience as court, from the totality of Plaintiff's affidavit in support, has been appealed.

I shall therefore grant this application. Consequently, same is hereby granted as;

- i. An Order of this Honourable Court granting leave to the Applicants to consolidate their statement of claims in this suit is **hereby granted.**

ii. An Order of this Honourable Court granting leave to the Applicants to amend their statement of claim and witness statement on oath in the manner as shown in the proposed amended statement of claim and witness statement on oath is **hereby granted.**

iii. An Order of this Honourable court amending the originating processes, pleadings and all other processes in this suit in the manner as contained in the proposed Amended Statement of claim and witness statement on oath herein attached as Exhibit “1”, “2”, and “3” is **hereby granted.**

iv. An Order of this Honourable Court granting leave to the Applicants to recall PW1 and PW2 for the purposes of examination in chief is **hereby granted.**

Justice Y. Halilu
Hon. Judge
21st June, 2021

APPEARANCE

Samuel Osayande holding the brief of Chinedu G.U
– for the Claimant/Applicant.

E. Ukaego with P. I Olatubonsun – for the 1st, 2nd
and 5th Defendants/Respondents.

3rd and 4th Defendants not in represented.