IN THE HIGH COURT OF THE FEDERAL CAPITALTERRITORY ABUJA

IN THE ABUJA JUDICIAL DIVISION

HOLDEN AT APO ABUJA

ON 17TH FEBRUARY, 2020

BEFORE HIS LORDSHIP HON. JUSTICE CHIZOBA N. OJI

PRESIDING JUDGE

SUIT NO. FCT\HC\CV\2780/16

BETWEEN

1. LUKA AYINU
2. OPEJIN ADEBISI AREMU } **PLAINTIFFS**

AND

1. HONOURABLE MINISTER FCT
2. FEDERAL CAPITAL DEVELOPMENT AUTHORITY
3. DANTATA TOWN DEVELOPERS LIMITED } **DEFENDANTS**

AND

1. FRESH FRUITS ENTERPRISES CINTERNIL LTD **APPLICANT**

PARTIES ABSENT.

UCHE UZUKWU ESQ FOR 1ST & 2ND DEFENDANTS. MARY FRANCES ORJI FOR THE 3RD & 4TH DEFENDANTS.

RULING

By a motion on notice no M/7419/19, filed on 21st June 2019, the plaintiff's applicants seek.

(1) An order of court striking out the name of the 2nd plaintiff in this suit

(2) An order granting leave to the 1st plaintiff Lukas Ayinu to sue through his lawful attorney Opejin Adebisi Aremu in this suit.

(3) An order granting leave to amend the writ of summons statement of claim and other originating processes in this suit in terms of the Reposed Amended Writ of Summons and Statement of Claim attached hereto and marked Exhibit C.

(4) And order deeming the Amend Writ of Summons and other processes already filed as property filed and served, appropriate fees having been paid.

The application was predicated on 4 grounds and supported by an 11 paragraph affidavit of Akan N. Essien, a legal practitioner in S.I Imokhe & Co counsel to the plaintiffs/Application.

In counsels written address, a sole issue for determination was raised thus:-

"Whether given the peculiar facts and circumstances of this case this application ought to be granted".

It was submitted that the depositions in the supporting affidavit to the application disclose that the 2nd plaintiff is an attorney to the 1st plaintiff, therefore the 1st plaintiff is the person with full capacity to sue and maintain reliefs against the defendants. It the becomes unnecessary to make the 2nd plaintiff a party to the proceedings, being an agent of a disclosed principal. That the Rules of court ..... the court to strike out names of persons unproperty joined in a suit, court will grant an amendment to enable it determinae the real issues an controversy between the parties, where it is brought in good faith and will not in any way prejudice the respondent.

It was for the submitted that the Applicants have met all the requirements to warrant the exercise of the courts discretion in their favour (GC (Nig) Ltd V

Idorenyin (2015) 13 NWLR (Part 1475) at 149; ALSTHOM S.A & ANOR V CHIEF DR OLUSOLA SAVAKI (2002) 10-11 SC YUSUF (2012) 9 NWLR (PT 1304) 47 @ 57 INTERALIE ER RELIED UPON.

the 1st and 2nd defendants did not oppose the application. The 3rd & 4th defendants however filed a written reply opposing the application wherein they raised two issues as follows;

"1. Whether the court is not bound to determine issues of jurisdiction first before further steps

3. Whether the court can grant an application to amend processes that are ab initio incompetent".
4. Arguing both issues together, it was the contention of learned counsel that the orders sought are not grantable because then the first order is granted, the second order cannot be granted because the 1st plaintiff does not need leave of court to sue as a lawful attorney, and that the 1st plaintiff requires the appendage of the 2nd plaintiff to be able to present himself before the court and this affects the order amending the originating processes seemingly prayed by the 1st plaintiff.
5. It was submitted that an incompetent originating process does not exist on the eye or the law and cannot be amended and, any order ..... from such proceeding is liable to be set aside as a nullity.

Furthermore, that there is nothing in the affidavit supporting the application to sway the court to exercise its discretion in the Applicants favour Ngere V Okuruket "XIV" 2017 All FWLR (Pt 882) 1302 at 1331-1332 paragraph G-A; KASALI V SANNI (2017) All FWLR (Pt 917) 1684 at 7709 paragraphs F-G

amongst others were relied upon. Thus the court was urged to dismiss the application.

I have considered the submissions of learned counsel on both sides. The question before this court is whether given the peculiar facts and circumstance of this case this application ought to be granted.

It is on record that upon service of the originating processes on, them the 3rd and 4th defendants filed in preliminary objection challenging the plaintiff's suit on the ground that the plaintiff ought to have sued by his lawful attorney (the 2nd plaintiff).

The plaintiffs upon being served the notice of prelim objection filed motion M/7419) pryaing for the aforementioned orders.

Now, the 3rd and 4th defendants have raised the issue whether the court is not bound to determine the issue of jurisdiction first before further steps.

My simple answer to that issue is this that the general practice now is as stated in Attorney General of the Federation V A.I.C Limited & Ors (1995) LPELR – 629 (SC) at page 7, paragraph A-C, per Idris Legbo Kutigi JSC (of blessed memory).

"That where in the same case there are two adversely competing motions before a court, one "Constructive" and the other potentially "destructive" the court will normally proceed to take the former motion first unless it will be inequitable to do so, so that if it succeeds, there would be no need for the latter motion which will then be withdrawn and struck out accordingly".

Also in M.N.I Emordi, Esq. V Hon Egwu Arong Egwu & Anor (2016) LPELR – 40123 (CA) at page 15-16 paragraph C –A Elechu JCA had this to say.

In the presence of the above three applications, how should a court exercise its discretion in handling both the 1st motion meant to regularise the process and the other two meant to terminate the proceedings.

In MOBIL PRODUCING NIGERIA UNLIMITED & ANOR V NONOKPO (2003) 18 NWLR (PT 852) 346, UWAEFO JSC heed that;

.....The practice has always been to give priority to hearing such motion seeking to regularize a process. That is the hallmark of a proper exercise of discretion. It the motion to regularise succeeds, the other motions or motion seeking to terminate the proceedings will be withdrawn and in appropriate cases, that will be compensation by way of costs. This has eloquently been law down by this court.

See NALSA & TEAM ASSOCAITES V NNPC (1991) 8 NWLR (PT 212) 652, LONGJOHN V BLAKK (1998) 6 NWLR (PT 555) 524 at 550, 551-552".

Therefore in this instance it was proper to hear the plaintiffs motion to regularise the suit first rather than the 3rd & 4th defendants preliminary objection to terminate same in urine.

Now, to the tmerits of the application. Did the lawyer affix his seal?

The reason given for the affidavit in support of the application sworn to by Akem N. Essien, a legal practitioner in S.I Imokhe & Co, counsel to plaintiffs (Applicants is interalia that 1st plaintiff original allotee of the plot in question, doated a power of attorney to the 2nd plaintiff.

It is trite law that a done of a power of attorney can only sue in the name of the donor.

See Vulcan Gases Limited V Gesellschaft Fur Industries Gaskerwertung (2001) LPELR – 3465 (SC) (AG. GIV). It was therefore clearly wrong for the 2nd plaintiff to have sued in his our name in this suit. However, I do not agree that the mis joinder of 2nd plaintiff as a plaintiff inthis suit in an incurable defect. Afterall, the 1st plaintiff is still a plaintiff in the suit with the capacity to sue in his own name. Can it be argued that this the striking out of the 2nd plaintiffs name will adversely affect the suit. It would have been a different matter of the 2nd plaintiff had sued in his own name only, that is if the done had sued in his own name only, that would have been an incurable defect.

See Ifeanyi V Osom 20115 LPELR 25600 (CA) at page 7 paragraph D-F, page 17 paragraphs C-A.

See also Adegin V Ibadan North Local Govt (2016) LPELR – 41385 (CA) page 29 paragraph A-B, per Daniel Kaho JCA.

The 2nd plaintiff being a done of a power of attorney is not a proper party to this suit.

The rules of court empower the court to struck out the name of a party improperly joined.

See order 13 Rule 18 (1) & (2) & order 19 (1) Rules of this court.

Accourdingly, I strike out the name of 2nd plaintiff from this suit. The court is equally empowered under the rules to join a part y who ought to have been added in the first place.

See order 13 Rule 18 (3) order 13 Rule 19 (1) provides for an application to add, strike out, substituted or vary the name of a claimant or defendant. I do not subscribe to the 4th defendants argument that the 2nd order sought cannot be granted because the 1st plaintiff does not require leave of court to sue through his lawful attorney.

The fact remains that the 1st plaintiff needs leave of court to amend the capacity in which he is suing, which is through his lawful attorney now, which he did not do ab initio, therefore in amending his writ, he needs leave of court.

I do not see the reason for the objection to this application. It is an application which the court can grant and i am satisfied that the applicants have showing sufficient reason to entitle them to the application.

According, I grant all the prayer in the application as prayed.

Hon. Judge

Uzukwu: we were served the amend writ of 23rd January, 2019.

Orji: we were served the amend writ of 23rd January, 2019.