

**IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY**

**IN THE ABUJA JUDICIAL DIVISION**

**HOLDEN AT APO-ABUJA**

**ON 24<sup>TH</sup> DAY OF JANUARY, 2020**

**BEFORE HIS LORDSHIP HON. JUSTICE CHIZOBA N. OJI**

**PRESIDING JUDGE**

**SUIT NO: FCT/HC/CV/2630/18**

**BETWEEN:**

1. MRS OLAJUMOKE AYOOLA AKIN-AINA
2. OREOLUWA ADEOLA AKIN-AINA
3. OLUWAFIKUNMI ROTIMI AKIN-AINA
4. OLUWATITOFUNMI MOSOPE AKIN-AINA

**PLAINTIFFS/APPLICANTS**

**AND**

1. YETUNDE OLUWATOYIN AKIN-AINA
2. OBALOLUWA AKIN-AINA
3. ESEOLUWAAKIN-AINA
4. EYINOLUWA AKIN-AINA
5. THE PROBATE REGISTRAR,  
FCT HIGH COURT

**DEFENDANTS/RESPONDENTS**

**KINGSLEY OSUJI FOR THE CAIMANTS  
KELVIN KETTUS FOR THE 1<sup>ST</sup> TO 4<sup>TH</sup> DEFENDANTS  
5<sup>TH</sup> DEFENDANT ABSENT AND UNREPRESENTED**

**RULING**

By a motion on notice on M/4543/19 filed on 25<sup>th</sup> March 2019, the Plaintiffs/Applicants seek leave to amend their statement of claim and witness statements on oath all dated the 29<sup>th</sup> day of August, 2018 to reflect all facts available to the Plaintiffs/Applicants with regards to the subject matter of this suit as shown in the proposed amended statement of claim and witness

statements on oath dated the 25<sup>th</sup> day of March, 2019 attached to the application by adding the paragraphs 13 (a) – (c), 14 and 16 (d).

(2) An order granting the Plaintiffs/Applicants extension of time within which to file their Reply to the 1<sup>st</sup> to 4<sup>th</sup> Defendants' statement of defence.

(3) An Order deeming the amended statement of claim and witness statement on oath dated 25<sup>th</sup> March, 2019 as properly filed and served appropriate fees for clean copies thereof having been paid.

(4) An Order of court deeming the annexed Plaintiff's Reply to the 1<sup>st</sup> – 4<sup>th</sup> Defendant's statement of defence dated the 25<sup>th</sup> day of March, 2019 as properly filed, clean copies having been filed and default paid;

And further orders.

The grounds for the application are as stated on the face of the motion paper. The application is supported by the 4 paragraph affidavit of Yandue Philip Zahemen, litigation secretary in the office of Messrs Taiwo Abe and company, counsel to the Plaintiffs/Applicants and counsel's written address wherein a sole issue for determination was submitted thus:

"Whether the Plaintiff/Applicant (sic) have shown by her (sic) affidavit evidence why the court's discretion should be exercised in her (sic) favour".

Mr Taiwo Abe, for the Plaintiffs/Applicants submitted that their affidavit evidence in support of their application clearly shows cogent, verifiable and convincing averments why this honourable court should exercise its discretion in their favour.

He submitted that Order 25 of the Rules of this court empowers this Honourable court to grant leave to a party in an action to amend his/her

pleadings at any stage of the proceedings for the purpose of determining the real question in controversy between the parties.

Such amendment may be allowed even on appeal for the purpose of determining the real questions in controversy, unless the amendment will result in injustice or surprise or embarrassment to the other party or the Applicant is acting malafide or by his blunder the Applicant has done some injury to the Respondent which cannot be compensated by costs or otherwise. Reliance was placed in **M. T MAMMAN V A.A SALAUDEEN 2006 ALL FWLR PART 298 AT 1169 AT 1183 – 1184 PARAGRAPHS F-A** Per ONNOGHEN JSC (as he then was); **EDMUND I. AKANINWO & 4ORS VS CHIEF O.N NSIRIM & 3ORS (2008) ALL FWLR PT 410 Page 610 at 656 paragraphs B-D**. On powers of court to enlarge time, see **CHIEF SAMUEL OMODELE OLOPO V EKITI STATE GOVERNMENT & ORS (2007) ALL FWLR PART 387, PAGE 958 AT 973**.

Thus the court was urged to exercise its discretion in favour of the Plaintiffs/Applicants.

In opposing the motion, on 27<sup>th</sup> May 2019 Mr Barnabas Tunde Onamusi for the 1<sup>st</sup>-4<sup>th</sup> Defendants/Respondents filed a 4 paragraph counter affidavit deposed to by Dorothy Agbese, Litigation secretary in the law firm of Charis Hills solicitors, solicitors to the 1<sup>st</sup> – 4<sup>th</sup> Defendants, with a counsel's written address argued by Mr Ernest Elaigwu. Therein a similar sole issue was raised thus;

“Whether the amendment sought ought to be granted in view of the circumstances of this case and the facts before your Lordship”.

Mr. E. Elaigwu for the 1<sup>st</sup>-4<sup>th</sup> Defendants submitted that the amendment sought is in bad faith and should not be granted as it fundamentally alters the character of the Plaintiffs' case by seeking to introduce the allegation of fraud and forgery for which the Plaintiffs have no basis, and which the Plaintiffs never raised previously, until they saw the 1<sup>st</sup>-4<sup>th</sup> Defendants' line of defence.

It was contended that fraud and forgery in the will are not and have never been the real issue in controversy in this suit, therefore an amendment to introduce same is improper and unnecessary.

That the Plaintiffs never raised the issue of fraud or forgery until they saw the 1<sup>st</sup> - 4<sup>th</sup> Defendants' processes of opposing the Plaintiffs' motion for injunction, wherein they highlighted the Plaintiffs' failure to plead any of the grounds for validly challenging a will, which implied that the Plaintiffs had no reasonable cause of action for filing the suit or seeking the injunction.

That the Plaintiffs were therefore seeking this amendment by clever trick to place a premeditated wedge to close any meaningful pleading of the 1<sup>st</sup> - 4<sup>th</sup> Defendants. In other words, the amendment is being sought to overreach the Defendants. See **AKANINWO V NSIRIM (2008) ALL FWLR PART 410 -610 AT 659 PART D-F** per Nike Tobi JSC (of blessed memory) on the meaning of "overreach".

Learned counsel submitted that the Plaintiffs should not be allowed to approbate and reprobate. That having made a case that their only quarrel with the will in issue is that they were not included, cannot suddenly turn around and claim that the will was a fraud or forgery. To allow them to do so, he

urged, will clearly entail injustice, surprise and embarrassment to the 1<sup>st</sup>-4<sup>th</sup> Defendants. Thus the court was urged to refuse the application as they will be overreached. Mr Abe for the Plaintiffs/Applicants responded that the Defendants have not shown that they will be overreached or prejudiced by the grant of the application particularly as the Defendants are at liberty to amend their pleading. Learned counsel to the Defendant further supplied by letter the authority of **NSE & ANOR V KATCHY (2017) 7 NWLR PAR 1564 PART 278 AT 310 – 311 PARAGRAPHS G TO A** Per Agim JCA. He said he copied counsel to Plaintiffs.

I have considered the affidavits and written and oral arguments of learned counsel on both sides.

The question before this court is whether the amendment sought to bring in the issue of fraud/forgery of the will at present ought to be granted.

In **KODE V YUSUFF 2001 4 NWLR PART 703, 392, (2001) 2 SC PAGE 99**, the Supreme Court held that, “an amendment could be allowed at any time provided the amendment is not intended to overreach, or will entail injustice to the other party or that the party seeking the amendment is acting malafide.”

Order 25 Rule 1, of the High Court of the Federal Capital Territory Abuja Civil Procedure Rules 2018 provides;

“A party may amend his originating process and pleadings at any time before the pre-trial conference and not more than twice during trial but before the close of the case”.

In the instant application the Plaintiffs seek to amend their statement of claim at quite an early stage before the trial of the case, therefore by the provisions of Order 25 Rule 1, they are within time to file this application.

A party seeking the exercise of the court’s discretion in its favour has the duty to place cogent and compelling facts upon which the court may exercise its discretion favourably towards the said party.

In the instant application, the reason for the amendment sought is offered in paragraph 3 of the affidavit in support of the application.

3 (a) – (d) as follows:

“a That the Plaintiffs/Applicants had earlier filed and served her writ of summons, statement of claim and witness statements on oath dated the 29<sup>th</sup> day of August 2018 through solicitors - Messrs Taiwo Abe & Co.

(b) That the Plaintiffs/Applicants’ witness - 1<sup>st</sup> Plaintiff as at then only came in to Nigeria briefly and left without several other details which she later discovered.

(c) In the course of further pre-trial conferencing with the Plaintiffs/Applicants’ witness - 1<sup>st</sup> Plaintiff with Taiwo Abe Esq. of Messrs Taiwo Abe & company it was discovered that so many new facts revealed by the Plaintiffs/Applicants’ witness – 1<sup>st</sup> Plaintiff were not captured in the already filed and served statement of claim and witness statement on oath.

(d) That counsel's discovery necessitated an amendment to the statement of claim and witness statement on oath which cannot be filed without the leave of this Honourable court".

The 1<sup>st</sup> to 4<sup>th</sup> Defendants have objected to the grant of this application mainly on the ground that the amendment being sought is an afterthought as the Plaintiffs did not mention fraud or forgery of the will until they saw the line of defence of the 1<sup>st</sup> to 4<sup>th</sup> Defendants.

That prior to this application, that the complaint of the Plaintiffs had only being that they were excluded from the will of Late Michael Abiodun Akin – Aina. That the amendment sought has nothing to substantiate it.

The essence of an amendment is to bring to the fore, all the matters in controversy between the parties. The Plaintiffs had complained that they were excluded from the will of late Michael Abiodun Akin-Aina. In the Notice of Caveat Exhibit DAI attached to the counter affidavit of the 1<sup>st</sup>-4<sup>th</sup> Defendants, the solicitors to the 1<sup>st</sup> to 4<sup>th</sup> Plaintiffs wrote interalia:

"it is our client belief that we challenge the form and substance of the said will as the legitimate wife and children of the deceased are not provided for nor captured in the purported will ...."(Emphasis mine)

I have looked at the Order 25 Rule 1 of the Rules of this court and it does not restrict the form which an amendment sought may take.

In the instant case no evidence has been led by either side therefore either side can amend its pleadings to bring in relevant facts it claims it omitted before now without overreaching the other side. I must also not fail to state that at this stage of proceedings the court is not concerned with evidence in proof of the allegation in pleading, but with facts upon which documents and other evidence can be adduced at trial.

In **AKANINWO V NSIRIM 2008 9 NWLR (PART 1093) 439 AT 1660 PARAGRAPH F-G**, cited by both parties Mohammed JSC in his lead judgment allowed the amendment of a statement of defence after the cross examination of the Plaintiffs' second witness. In that case the Defendant sought to amend 10 out of 23 paragraphs of the statement of defence.

The amendments sought would affect their main defence to the suit and would have the effect of allowing the Defendants/Applicants to withdraw or abandon paragraphs in which part of the claim of the Plaintiffs/Respondents had been admitted thereby forcing the Plaintiffs/Respondents to have to file a reply to the new statement of defence and having the necessity of recalling the two witnesses who had already testified.

The Supreme Court held that the trial court ought to have found that the amendment being sought was necessary for the purpose of determining the real questions in controversy between the parties and therefore should have been granted in order to prevent manifest injustice to the Defendants/Applicants by allowing them to plead their main defence to the case against them.

The Supreme Court did not buy the argument that the amendment amounted to a substitution of the Defendant's case.



The Supreme Court held that to deny the Defendants the amendment amounted to a breach of fair hearing.

I am not unmindful of the dictum of Niki Tobi JSC (of blessed memory) cited by counsel to the 1st-4<sup>th</sup> Defendants, however, that is from a dissenting judgment which did not form the decision of the court.

Applying the principle in **AKANINWO V NSIRIM** to the instant case, the Plaintiffs are seeking declaratory reliefs. The onus is on the Plaintiffs to lead evidence in proof of declaratory reliefs as they are not granted even on admission by the Defendants in a suit.

The Defendants at this early stage have ample opportunity to counter any amendments now being sought by the Plaintiffs if granted, by amending their own statement of defence.

I do not think that the Defendants will be overreached by the granting of this amendment, nor can they be taken by surprise since the 1<sup>st</sup> to 4<sup>th</sup> Plaintiffs have always contested the will. In **DIAMOND BANK V UGOCHUKWU 2007 LPELR – 8093 CA**, Olabode Rhodes Viour JCA (as he then was) at page 39 paragraph D held that before trial, a Plaintiff may change his case by pleading a new cause of action, a new claim and the Defendant, a new defence.

If that be the case, therefore the issue of malafide cannot arise where a Plaintiff seeks to add a new claim or plead a new cause of action. That is my understanding of that dictum.

Having considered the application, I am of the view that it should be allowed. I therefore grant the application as prayed.

Parties to bear their own costs.

**Hon. Judge**