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

ON MONDAY, 21ST DAY OF SEPTEMBER, 2020

BEFORE HON. JUSTICE SYLVANUS C. ORIJI

SUIT NO. FCT/HC/CV/1580/2016

MOTION NO. M/5600/2020

BETWEEN

1. OMEGAH INT'L VENTURES LIMITED	}	**PLAINTIFFS/**
2. DR. PHILIPS O. SALAWU		**RESPONDENTS**

AND

1. POLARIS BANK LTD.	**---**	**DEFENDANT/RESPONDENT**
2. DEBT MANAGEMENT OFFICE	**---**	**DEFENDANT/APPLICANT**

RULING

The antecedents of this case are that the plaintiffs filed this suit on 26/4/2016 against Skye Bank Plc.alone. Their claims were hinged on the alleged *"refusal of the Defendant to return the original Certificate of Occupancy [C. of O.] in respect of the 2nd Plaintiff's property known and situate at Plot 1981 Lome Street Wuse Zone 7 Abuja, long after the loan with which it was used to secure has been fully liquidated, as well as the inordinate silence of the Defendant to the various and numerous requests of the Plaintiffs to release the said C. of O."* From the plaintiffs'

pleadings, 1st plaintiff obtained the said loan from Afribank Plc., which later became Mainstreet Bank. Mainstreet Bank was acquired by Skye Bank Plc.

On 14/6/2017, Skye Bank Plc. filed its statement of defence and denied the plaintiffs' claims. In paragraphs 3, 4, 5 & 6 thereof, it averred:

3. Further to paragraph 2 above, the defendant states that it acquired Mainstreet Bank in 2015 and, by necessary implication, acquired its assets and liabilities, excluding litigation liabilities.

4. In further response to the plaintiffs' statement of claim, the defendant states that it has no record whatsoever in respect of plaintiffs' alleged transaction with the then Mainstreet Bank with it.

5. The defendant avers further that it is not in possession of the plaintiffs' Certificate of Occupancy as alleged in their statement of claim or any other document belonging to the plaintiffs.

6. The defendant avers that under the buyout purchase agreement between the defendant and Debt Management Office, the defendant is exempted from litigation liabilities arising from the acts of Afribank/Mainstreet Bank Ltd.

Based on the above averments, the plaintiffs, on 9/10/2017, filed *Motion on NoticeNo. M/10007/2017* for an order of the Court joining Debt Management Office as the 2nd defendant in this suit.On 11/10/2017, the Court granted the

application and joined Debt Management Office as 2nd defendant in the suit. The Court ordered the parties to amend their processes to reflect the joinder. The plaintiffs' amended processes were filed on 15/12/2017. In paragraphs 34 & 35 of the amended statement of claim, the plaintiffs averred:

> 34. *Prior to now, the plaintiffs have no direct contact or transaction with the 2nd defendant as regards the subject matter of this suit, and it only became necessary to join 2nd defendant as a co-defendant when the 1st defendant by way of its defence stated that it was the 2nd defendant that handed the defunct Mainstreet Bank Ltd. to them, and that at the time of handover, they [1st defendant] were expressly exempted [by the 2nd defendant] from "litigation liabilities."*
>
> 35. *The above being an indemnity claim by the 1st defendant against the 2nd defendant [if established], the plaintiffs shall claim against the 2nd defendant in like manner as against the 1st defendant.*

On 29/12/2017, 2nd defendant filed its statement of defence wherein it denied the existence of the Buy-Out Purchase Agreement between the defendants relied upon by the 1st defendant. On the same date, the 2nd defendant filed a notice of preliminary objection challenging the Court's jurisdiction to hear the plaintiffs' suit. One of the grounds of the preliminary objection is that the suit did not disclose a reasonable cause of action against the 2nd defendant. The 2nd defendant urged the Court to strike out its name from the suit.

In its ruling delivered on 3/5/2018, the Court dismissed the preliminary objection and held, *inter alia,* that: *"… from the averments in paragraphs 34 & 35 of the amended statement of claim and the claims of the plaintiffs, the suit has disclosed a reasonable cause of action against the 2nd defendant."*

On 4/12/2018, the plaintiffs filed *MotionNo. M/1183/2018* for, *inter alia,* an order to substitute Skye Bank Plc. [the 1st defendant] with Polaris Bank Ltd. The Court granted the application on 5/12/2018. The plaintiffs filed their amended writ of summons, statement of claim and other accompanying processes on 10/12/2018 to reflect the change in the name of the 1st defendant as ordered by the Court.

On 11/12/2018, the 1st defendant filed an amended statement of defence wherein it deleted its averment in paragraph 6 of its statement of defence filed on 14/6/2017 earlier set out. The said averment isrepeated here for ease of reference, thus:

> *The defendant avers thatunder the buyout purchase agreement between the defendant and Debt Management Office, the defendant is exempted from litigation liabilities arising from the acts of Afribank/Mainstreet Bank Ltd.*

Based on the said amended statement of defence of the 1st defendant, the 2nd defendant filed *Motion on NoticeNo. M/2603/2019* on 27/2/2019 praying the Court for an order striking out its name as a party to this suit.

In the Ruling delivered on 29/4/2019 in respect of the said motion, I referred to the above antecedents. I dismissed the application on two grounds.

The first ground was based on the principle that court processes can only be amended with the leave of the court; a party is not entitled to unilaterally amend his process without leave of court. The Court relied on the decision inthe case of **Husseni&Anor. v. Mohammed&Ors. [2014] LPELR-24216 [SC]**to the effect that whether the error or mistake be that of learned counsel for the party or that of the party, there can be no amendment or correction of the error or mistake without the leave of the court first sought and obtained.

The Court held that the 1st defendant unilaterally deleted the averment in paragraph 6 of its statement of defence filed on 14/6/2017 without leave of the Court as the removal of the said averment was not covered by the order of the Court made on 5/12/2018 for the parties to amend their pleadings to reflect the change in the name of the 1st defendant.The Court then concluded: *"The effect is that the purported amendment is incompetent. Thus, the present motion of the 2nd defendant, which is based on the said amendment, cannot stand."*

The second ground for dismissing the 2nd defendant's said motion was that the 2nd defendant was joined as a party in this suit upon the plaintiffs' motion. The Court relied on **Onwuka v. Maduka [2002] 18 NWLR [Pt. 799) 586**where the Supreme Court held that where a person has been made a party to a proceeding by an order of the court, that order cannot be reviewed by

theJudge who made the order or any other Judge of co-ordinate jurisdiction. It is only an appellate Court that may do so. But when such an order has been shown to be incompetent and a nullity, a court of co-ordinate jurisdiction which has the necessary competence may set aside the order.

The Court concluded that: *"… since the 2nd defendant was joined to the suit by order of the Court and in the light of the earlier ruling of the Court that the suit has disclosed a reasonable cause of action against the 2nd defendant; the Court cannot strike out the name of the 2nd defendant from this suit. …"*

Now, on 5/7/2019, the 1st defendant filed *MotionNo. M/7879/2019* praying the Court for leave to amend its statement of defence by deleting paragraph 6 of its statements of defence and replacing same with a new paragraph 6; and an order deeming the amended statement of defence filed on 11/12/2018 as properly filed and served. The Court granted the application on 3/12/2019. The Court also made an order that the plaintiffs and the 2nd defendant are entitled to make consequential amendments to their respective pleadings within 14 days.

The present Ruling is on the 2nd defendant's*MotionNo. M/5600/2020*filed on 21/2/2020 praying the Court for an order striking out its name as a party to this suit; and for such further orders as the Court may deem fit to make in the circumstances.

In support of the motion, Sam Okpo, a senior operations officer in the 2nd defendant, filed a 5-paragraph affidavit; attached thereto are Exhibits A, B & C. AkinolaFasanmiEsq. filed a written address along with the motion. In opposition, plaintiffs' counsel, GodswillMrakporEsq. filed a written address on 5/3/2020. On 11/3/2020, AkinolaFasanmiEsq. filed the 2nd defendant'sreply on points of law. At the hearing of the application on 24/6/2020, counsel for the 2nd defendant and for the plaintiff adopted their respective processes.

In his affidavit, Sam Okpo stated that:

i. The plaintiffs have refused to file consequential amended statement of claim as ordered by the Court on 3/12/2019 to effect the necessary amendments in their pleadings by deleting paragraphs 34 & 35 of their statement of claim as well as their reliefs against the 2nd defendant which were hitherto based on the deleted portion of the 1st defendant's defence.

ii. The leave granted by the Court on 3/12/2019 to amend 1st defendant's statement of defence rendered the plaintiffs' pleadings in paragraphs 34 & 35 of their statement of claim and their reliefs against the 2nd defendant ineffective.

iii. The leave granted by the Court on 3/12/2019 rendered the continuous presence of the 2nd defendant as a party to this suit improper and unnecessary for the effective determination of this suit.

From the processes filed by the parties, the issue for determination is whether in the circumstances of this case, the name of the 2nd defendant, i.e. Debt Management Office, ought to be struck out from this suit.

Learned counsel for the 2nd defendant stated that courts are not competent to adjudicate over suits where the issues in dispute have become lifeless and academic. He argued that in view of the leave granted to the 1st defendant to amend its statement of defence, plaintiffs' claims against the 2nd defendant have become academic and there is no longer any issue in dispute between them and the 2nd defendant. He referred to **Okoye v. Tobechukwu [2011] LPELR-41508 [CA]** among other cases to support the principle that courts should not embark on issues that are academic or which are no longer necessary for proper determination of a case.

AkinolaFasanmiEsq. further posited that the present application is notfor this Court to sit on appeal over the joinder of the 2nd defendant by the Court on 11/10/2017 orthe previous rulingson applications for its name to be struck out of the suit. The focus of this motion is that by virtue of the leave granted to the 1st defendant on 3/12/2019 to amend its statement of defence, the presence of the 2nd defendant as a party to this suit is no longer necessary. Therefore, the Court is empowered to strike out its name. He stressed that the amendment of the 1st defendant's statement of defence deleted the foundation of the plaintiffs' cause of action against the 2nd defendant.Learned counsel concluded that the 2nd defendant is no longer a proper party to this suit.

For his part, learned counsel for the plaintiffs stated that this is the third time the 2nd defendant is inviting the Court to strike out its name from this suit. He argued that the present application is an abuse of judicial process because it was filed in the face of disobedience of orders of the Court made on 3/5/2018 and 29/4/2019 for payment of costs of N25,000 and N30,000 respectively to the plaintiffs. GodswillMrakporEsq.referred to the case of**Agudosi&Anor. v. Agudosi [2017] LPELR-42689 [CA];**in support of his argument. He urged the Court not to grant audience to the 2nd defendant in respect of this motion.

The plaintiffs' counsel further submitted that the Court does not have the *vires* to grant the application because it is *functus officio* with regards to the necessity of the 2nd defendant being a party in this suit especially as it was joined based on the order of the Court. Therefore, the question of the propriety of the 2nd defendant as a party in this suit is caught by the doctrine of issue estoppel.

In the reply on points of law, Mr.Fasanmi argued that the submissions of Mr.Mrakporon *functus officio* and issue estoppel are not applicable to the 2nd defendant's motion, which is brought under different set of circumstances from its earlier motions. He also stated that the 2nd defendant is law abiding and has no intention to disobey the order of the Court for payment of the total cost of N55,000.00 to the plaintiffs. According to the learned counsel, government processes involved in making payment of this nature are responsible for the delay in payment of the costs. He referred to the facts of

the case of **Agudosi&Anor. v. Agudosi [supra]**and submitted that the decision is not applicable to the instant case.

Let me first consider the submission of Mr.Mrakpor that the Court should not grant audience to the 2nd defendant in respect of this application as it has not paid the total costs of N55,000 to the plaintiffs. In**Agudosi&Anor. v. Agudosi [supra]**, the Customary Court of Appeal struck out the appellants' notice of appeal, which was withdrawn. The Court ordered the appellants to pay cost of N10,000.00to the respondent before they may take any fresh step in the appeal. There was no evidence to show thatthe appellants made any move to pay the costs before filing another application. The Court of Appeal affirmed the decision of the Customary Court of Appealthat the application is incompetent having been filed without compliance with a condition precedent to filing it. I agree with Mr.Fasanmi that the decision in that case is not applicable to the instant case because this Court did not make payment of cost a condition before the 2nd defendant can take any fresh step.

Part of the submissions of Mr.AkinolaFasanmi in support of the grant of the application is that in view of the amendment of the 1st defendant's statement of defence, there is no longer any dispute between the plaintiffs and the2nd defendant. Thus, the 2nd defendant is no longer a necessary or proper party in this case. The position of the law is that in order to determine whether there is a dispute between the plaintiffs and the 2nd defendant or whether thesuit has disclosed a reasonable cause of action against the 2nd defendant, the Court

must only consider the averments in the statement of claim.See the cases of**Ecobank [Nig.] Plc. v. Gateway Hotels Ltd. [1999] 11 NWLR [Pt. 627] 397**and **Mohammed v. Babalola, S.A.N. [2011] LPELR-8973 [CA].**

It is correct that in its amended statement of defence filed on 11/12/2018, the 1st defendant deleted paragraph 6 of its original statement of defence, which gave rise to the averments in paragraphs 34 & 35 of the amended statement of claim. I note that the Court made an order on 3/12/2019 that the plaintiffs are *"entitled to make consequential amendments"* to their pleadings.So far, plaintiffs have not made any consequential amendment to their pleadings and have therefore retained the said paragraphs 34 & 35. The point must be made that the Court cannot compel the plaintiffs to delete paragraphs 34 & 35 of their statement of claim. What is left is for the plaintiffs to adduce evidence at the trial to prove the averments.

In the circumstance, I hold, as I did in my Ruling dated 3/5/2018, that *"… from the averments in paragraphs 34 & 35 of the amended statement of claim and the claims of the plaintiffs, the suit has disclosed a reasonable cause of action against the 2nd defendant."* I am not persuaded by the submission of Mr.Fasanmi that the 2nd defendant is no longer a necessary party in this action.

The other argument put forward by Mr.Fasanmiis in paragraphs 4.22 & 4.23 of the 2nddefendant's written address. He posited that 1st defendant placed on record the Purchase and Assumption Agreement between it and Nigeria

Deposit Insurance Corporation [NDIC] dated 21/9/2018. He argued that by virtue of the said Agreement, the 1st defendant is prepared to defend the suit alone, having assumed the assets and liabilities of the defunct Skye Bank Plc.

The reaction of the learned counsel for the plaintiffs is that the 2nd defendant predicated the motion on events that allegedly occurred after the writ of summons had been filed. He argued that suits are decided based on events that occurred prior to the filing of the writ of summons and not on subsequent events based on the maxim: *ante litem motem.*He referred to the case of **Nwafor v. Anyaegbunam [1978] LPELR-2765 [SC].**In the reply on points of law, Mr.Fasanmi stated that the maxim: *ante litem motem* is not applicable to this case.

In the affidavit in support of the 1st defendant's *MotionNo. M/7879/2019* filed on 5/7/2019 for leave to amend its statement of defence, the said Purchase and Assumption Agreement was attached as Exhibit A. In the 1st defendant's amended statement of defence filed on 11/12/2018, it averred that *"it only acquired Sky Bank's assets and liabilities in September, 2018"*and denied the plaintiffs' claims. I holdthe opinion thatthe said Purchase and Assumption Agreement- executed on 21/9/2018 after the filing of this suit- cannot be a ground for striking out the name of2nddefendant from this suit.

Before I conclude, let me refer again to myprevious Rulings dated 3/5/2018 and 29/4/2019 where I relied on the principle in the case of**Onwuka v.**

Maduka [supra]. As I pointed out before, the 2nd defendant was joined or added to this suit by order of the Court made on 11/10/2017. I take the view that the 2nd defendant has not disclosed any circumstance or ground to warrant the striking out of its name from the suit especially in the light of the pleadings of the plaintiffs.

CONCLUSION

From all that I have said, this application is refused with cost of N30,000.00 payable by the 2nd defendant to the plaintiffs.

HON. JUSTICE S. C. ORIJI
[JUDGE]

Appearance of Counsel:

No counsel.