IN THE HIGH COURT OF JUSTICE FEDERAL CAPITAL TERRITORY

IN THE ABUJA JUDICIAL DIVISION

HOLDEN AT JABI, ABUJA

BEFORE HIS LORDSHIP: HON. JUSTICE D. Z. SENCHI

HON. JUDGE HIGH COURT NO. 13

COURT CLERKS: T. P. SALLAH & ORS

DATE: 17/09/2020

FCT/HC/CV/538/2019

FCT/HC/M/6046/2020
BETWEEN

MOHAMMED ARGUNGU
Suing through his lawful Attorney] **CLAIMANT/RESPONDENT**
Rotimi Olugbenga]

AND

HON. PRINCE HENRY OLUOLA---------- **DEFENDANT/APPLICANT**

RULING

On the 14th February, 2020 the Defendant/Applicant closed its defence and the case was subsequently adjourned to the 23rd March, 2020 for address. Then on 4th March, 2020 the Defendant/Applicant filed the instant motion on notice No. FCT/HC/M/6046/2020 praying the Honourable Court for the following orders:-

1. An order of this Honourable Court granting leave to the Defendant/Applicant to reopen his defence.
2. An order of this Honourable Court granting leave to the Defendant/Applicant to amend his statement of defence.
3. An order of this Honourable Court granting leave to the Defendant/Applicant to call additional witnesses.
4. An order of this Honourable Court granting leave to the Defendant/Applicant to file additional witness statement on oath.
5. An order of this Honourable Court deeming the separately filed and served amended statement of defence and additional

statement on oath as properly filed and served, necessary fees having been paid.

6. An order of this Honourable Court deeming the already filed and served additional witness statements on oaths as properly filed as served.
7. And for such further other order(s) as this Honourable Court may deem fit to make in the circumstances.

In support of the motion on notice the Defendant/Applicant filed an affidavit of 14 paragraphs with two exhibits marked exhibit A and B respectively. The affidavit in support of application was sworn to by one Anthony Ndanusa, a legal practitioner and Counsel to the Defendant/Applicant. He also filed a written address in support of the application on behalf of the Defendant/Applicant.

The motion on notice and other accompanying processes were served on the Plaintiff/Respondent on 4th March, 2020 the same date the processes were filed. The Plaintiff/Respondent, from the records in this case and the submission of his Counsel, did not file any response to the Defendant/Applicant's motion on notice. However, Counsel to the Plaintiff/Respondent with leave of Court,replied on points of law which the Defendant/Applicant's Counsel opposed same.

Having put the records as they were, in the written address of the Defendant/Applicant's Counsel, he formulated the issue for determination as follows:-

> "*Whether this Court has the inherent power to grant leave to the Defendant/Applicant to reopen his case and to call more witnesses having regards to the surrounding circumstances of this case."*

In arguing the sole issue, learned Counselsubmitted that this Court has the inherent power to grant the application in order to do substantial justice and he relied on the case of ***MOHAMMED V BABALOLA (2012) ALL FWLR (pt23) page 1899***. He also cited and relied on order 43(1), Rules of this Court. According to Counsel to the Defendant/Applicant, the principle of fair hearing empowers a party to employ every option legally acceptable to state/prove his case. That what the Defendant/Applicant seeks

with this application is simply to utilise his right of fair hearing and the interest of justice would be served.He relied on section 36 of the Constitution of the Federal Republic of Nigeria 1999 as amended and the case of ***OGUNDOYIN C ADEYEMI, (2001) 13 NWLR (pt730) page 43 and KALU V STATE, (2011) 4 NWLR (pt1238) page 429.***

The Plaintiff/Respondent's Counsel in his reply on points of law, refer me to order 25(1) Rules of this Court and submitted that parties had closed their respective cases and that amendment cannot be granted at the instant case.He submitted that the present application by the Defendant/Applicant is for the purposes of re-opening the case and thus to introduce fresh evidence. He urged me to disallow the application.

In opposing the reply on points of law, the Defendant/Applicant's Counsel stated that the Plaintiff/Respondent's Counsel has no right to reply on points of law and he then referred me to order 43, Rules of this Court that enjoins the Plaintiff/Respondent to file a written address if he desires to oppose the application.

To now resolve the instant application, I will adopt the sole issue for determination as distilled by the Defendant/Applicant's Counsel with a slight amendment as follows:-

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

Before I proceed to consider the above issue for determination of the main application, the Plaintiff/Applicant (hereinafter referred to simply as the Applicant) had submitted that the Plaintiff/Applicant hereinafter called the Respondent) had no right of reply on points of law to the instant application.

Now order 43 Rules 1-4, Rules of this Court provide thus:-

1. Whereby in this rules any application is authorised to be made to the Court, it shall be made by motion which may be supported by an affidavit and shall state the rule of Court or enactment under which the application is brought."
2. Every application shall be accompanied by a written address.
3. Where the other party intends to opposethe application, he shall within 7 days of the service on him of such application file

his written address and may accompany it with a counter affidavit.

4. The Applicant may within 7 days of being served with the written address of the opposing party file and serve an address in reply on points of law with a reply affidavit.

In the instant case, did the Respondent's Counsel strictly comply with provision of order 43, Rules of this Court especially Rule3 as it affects the Respondent? For the avoidance of doubt Rule 3 says:-

> "*Where the other party intends to oppose the application, he shall within 7 days of the service on him of such application file his written address and may accompany it with a counter affidavit"*

The above provision specifically refers to the Respondent where he intends to oppose the application on both facts and law, then it is incumbent on the Respondent to file a written address and a counter affidavit. Although the drafters of this Rules provided that a counter affidavit may be filed to accompany the written address, I am of the considered view that the reverse ought to be the case. The reason being that motions generally are determined on affidavit evidence and not written addresswhich has been made mandatory to be file within 7 days as provided by order 43 Rule 3, Rules of this Court. I hope that the Rules committee of the Court will have a second look at order 43 rule 3 Rules of this Court.

Now in the instant case, the Respondent's Counsel did not file a written address as envisaged by Rule 3 of order 43. The question now is what is the effect of the Respondent's oral submission on points of law to the Applicant's application?

Firstly, a reply on points of law is provided by Rule 4 of order 43, Rules of this Court. By the Rule, it is the Applicant that has the right to reply on points of law upon serviceof any written address by the Respondent. In any event, this issue does not require over flogging as the Honourable Court in the exercise of its inherent powers granted leave to the Respondent to reply on points of law. It is trite that any point of law raised in a proceedings i.e by a party's pleading, such a point of law so raised shall be disposed of by the judge at or after the trial. The point of law so raised by the

Respondent is pursuant to order 25(1) Rules of this Court to the effect that parties had closed their respective cases. Thus, by the reliefs sought by the Applicant, he seeks an order to re-open his case and to amend his statement of defence. In otherwords the points of law so raised was pursuant to the processes filed by the Applicant in which the Respondent is contending that the Applicant has not complied with the law.

Thus, by order 25 (1), Rules of this Court, it provides:-

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

In the instant casereliefs 2,3,4,5 and 6 are all anchored on amendment of the applicant's pleading. And the application for amendment was not brought during pre-trial conference nor during trial but rather it was brought and filed after the closedof case.

In the instant case therefore, the Applicant is clearly in breach of order 25 Rule 1 of the Rules of this Court. And it was held in the case of ***DANJUMA GIDEON & ORS V STATE, (2016) LPELR 40322,***the Court of Appeal held thus:-

> "*Rules of Court are meant to be obeyed and so they must be strictly followed.*
>
> They bind all parties before the Court."

See***GMO NWORAH & SONS CO. LTD V AKPUTA, (2010)9 NWLR (pt 1200)page 443; DR. JACOB OLUWAFEMI FASANYA & ORS V PA ADAMU ADEWOLE, (2015)LPELR 25675,*** the same Court of Appeal held that " Rules of Court are meant to be obeyed and it shall not be condoned where an infraction has not been acknowledged by the infractor or equitable relief or discretion sought."

FABIYI JSC (as he then was) in the case of ***NONYE IWUNZE V FRN, (2014) LPELR 22254(SC)*** *p*ut it this way:-

> "*Appellant's Counsel tried to cling tenaciously to substantial justice principle. I dare say it that same can only come into play where the initiating process- notice of Appeal is competent. The Appellant should appreciate the point that rules of court are meant to be*

obeyed. Failure to obey can be costly for a recalcitrant Applicant."

Thus, in the instant case, the Applicant having waited until the case was closed and he then brought and filed his application for amendment contraryto order 25 Rule 1 of the Rules of this Court, such a delay is expensive and it is costly as well. Accordingly reliefs 2-6 are hereby refused and dismissed.

The relief one (1) on the face of the motion is for an order of this Honourable Court granting leave to the Applicant to re-open his defence.The principles governing the re-opening of cases is basically at the discretion of the Court upon good reason(s) shown in the affidavit evidence. The exercise of the discretion by the Court must not be arbitrary but the discretion must be judicially and judiciously taking into account the interest of the other or opposing party.

It thus behoves on the Applicant in the instant case who is seeking to re-open his case already closed and to call additional witnesses to adduce sufficient and credible reasons to convince the Court why his application should be granted.

In the instant case, I have gleaned through the records and proceedings in this case as well as the affidavit in support of application; at paragraphs 8,9 and 10 of the said affidavit, the Applicant deposed to facts necessitating the re-opening of the case. The facts as deposed are to the effect that reopening of the casewould enable the Applicant call additional witnesses and then amend his statement of defence to accommodate the additional witnesses.

I had earlier consider reliefs 2-6 which bothers on amendment and I held that the reliefs were not grantable in view of the express provision of order 25 (1) Rules of this Court. Thus, to therefore reopen a case where both parties (as in this case) had concluded their respective evidence and closed the case for address by parties, the Court of Appeal in the case of***ALIYU V ALMU, (2013) LPELR 21857****,it held:-*

An application to reopen a case which has been closed by both parties and the matter adjourned for the filing and adoption of written final addresses is no doubt a major interlocutory application. In***NEBO V FCDA (1998) 11 NWLR (pt 574) page***

480.This Court held inter alia of the principle regulating the reopening of a case closed thus:-

> "*An application by a party to reopen an already closed case is an invitation to the Court to exercise its discretion in his favour in which case the Applicant must disclose reasons sufficient to persuade the Court to exercise its discretion in his favour."*

The principles here is similar to when a party has failed to take a legal step within the time stipulated is now seeking the Court's indulgence to have time extended for him,which must be backed up with convincing reasons to enable the Court exercise its discretion in his favour. Some of the reasons the Applicant could canvass include lack of means, mistake, or accident. A party seeking to reopen his closed case would require the consent of his opponent; in the absence of which he has to depend on the discretion of the Court."

See also ***WILLOUGHBY V INTERNATIONAL MERCHANT BANK NIGERIA LIMITED, (1987) LPPPPELR 3495 (SC).***

In the case at hand, the application by the Applicant is not simply to reopen his case and recall his witness but rather the application is to re-open his case, to amend his defence and call additional witnesses. The Applicant, as I had earlier held did not comply with order 25 Rule 1, Rules of this Court and if, as rightly earlier held that reliefs 2-6 were refused and dismissed, the order seeking to reopen the case becomes otiose. In otherwords, even if the first relief for an order to reopen is granted reliefs 2-6 cannot scale through in view of the express provision of order 25 Rule 1 Rules of this Court.

In view of the forgoing the objection on points of law succeeds and the entire application is hereby refused and dismissed.

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HON. JUSTICE D.Z. SENCHI
(PRESIDING JUDGE)
17/09/2020

Parties:- Plaintiff represented by his attorney Mr.SegunOlakangudu

Defendant absent

O.F Ekengba:- For the Claimant.

Defendant's Counsel absent.

Ekengba:- Having disposed of the motion of the Applicant/Defendant, I apply for a date for address.

Court:- Case adjourned to 15th October, 2020 for address. Hearing notice be issued and served on the Defendant's Counsel.

Sign
Judge
17/09/2020