

IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY
IN THE ABUJA JUDICIAL DIVISION
HOLDEN ATHIGH COURT 28 GUDU - ABUJA
ON THURSDAY THE 26TH DAY OF NOVEMBER, 2020.
BEFORE HIS LORDSHIP; HON. JUSTICE MODUPE R. OSHO-ADEBIYI
SUIT NO. FCT/HCCV/967/2013

FIRST BANK NIGERIA PLC-----CLAIMANT

AND

- 1. AMAGEN NIGERIA LTD**
- 2. PRINCE EMMANUEL AMAEFULE**
- 3. MRS. GENEVIEVE AMAEFULE-----DEFENDANTS**

RULING

On the 4th of November 2020, the Defence through the DW2 sought to tender a death certificate of the 2nd Defendant issued by the National Population Commission as evidence before this Court. The Plaintiff's Counsel objected to the admissibility of the documents on the following grounds:-

1. That the document was not pleaded anywhere in the 2nd Defendants' statement of Defence.
2. That the document is dated the 26th day of June 2019 and the record of this Court shows Claimant has already testified and has been discharged by this Court, as a result the document is overreaching on the ground that it is denying the Claimant its right to fair hearing as guaranteed by Section 36(1) of the 1999 Constitution of the Federal Republic of Nigeria.
3. That the DW2 is not the maker of the document. Counsel relied on Section 83 of the Evidence Act 2011 and the case of Lateef & 4 Ors Vs. FRN (2010) AFWLR Pt.539 Pg.1171 and finally;

4. That the document was not in existence as at the time of filing pleadings, hence this suit predates the document. Counsel relied on Section 83 of the Evidence Act 2011 and urged on the Court to reject the document on the grounds so mentioned.

The Defence Counsel in response to the objection raised by the Plaintiff Counsel submitted that by the rule of pleading by reference, a document need not be specifically pleaded if there is a content in the pleading making the tendering of the said document necessary. Counsel relied on the case of *Alaibe Vs. Okwuwonu* (2016) 1 NWLR Pt.1492 at pg.41.

Counsel further submitted that a document need not be tendered by the maker, rather, it can be tendered by whom the document was issued to. Counsel relied on the case of *UTC Nig. Ltd. Vs. Lawal* (2014) 5 NWLR Pt. 1400 at Pg. 22.

On the document emanating during the pendency of this suit, is the contention of the Defence Counsel that a person interested in the suit ought not make up a document during the pendency of the suit. Counsel relied on the case of *UTC Nig Ltd V. Lawal* (supra) and Section 83 (3) of the Evidence Act 2011.

Counsel urged the court to discountenance the objection of the Claimant Counsel and admit the document in evidence.

In reply, Plaintiff Counsel contended that contrary to the submission of the Defence Counsel, there is nothing before this Court to suggest that the death certificate was issued to the 3rd Defendant and urged the Court to uphold the objection.

I have considered the arguments of Learned Counsel to the Claimant along with the argument proffered by the Defence Counsel. With respect to the first ground of Claimant's counsel's objection that

document is not pleaded. I agree with the Claimant's Counsel that the document sought to be tendered is not pleaded. However, the law is trite that admissibility is a rule of evidence and it is based on relevancy. Admissibility of evidence, particularly documents depends on the purpose for which it is being tendered. The test to be applied in consideration of whether evidence is admissible is whether it is relevant to the matters in issue. This was the position of the Court in the case of *Elegushi & Ors. V. Oseni & Ors.* (2005) LPELR-1111 (SC). I have gone through the Statement of Defence, although the document was not pleaded, however, the fact of the death of the 2nd Defendant was pleaded in paragraph 2 of the Defendants Statement of Defence. It is also worthy to note that documents in support of the fact of the death of the 2nd Defendant had been tendered and admitted in exhibit (that is, the death certificate from the hospital, obituary from sun newspaper and Daily sun) as Exhibits D1, D2 and D3 respectively. It is trite that facts are pleaded and not documents, hence documents are merely tendered in support of facts pleaded. See *OGHOYONE VS. OGHOYONE* (2010) 3 NWLR (Pt.1182) 564 @589 para B-C, Per Rhodes Vivour JCA (as he then was). Hence, documentary evidence needs not be specifically pleaded to be admissible in evidence so long as facts and not the evidence by which such document is covered are expressly pleaded. In my view, the document sought to be tendered is to further establish the already pleaded fact that the 2nd Defendant is dead which said fact is stated in the Statement of Defence and is definitely related to the matter in issue. The death certificate sought to be tendered is aimed at establishing facts that have been pleaded as same is consistent with the pleading of the Defendants.

I will take the other grounds raised by the Defence Counsel simultaneously. The Defence Counsel is contending that the witness is not the maker of the document sought to be tendered, that the suit precedes the document and it will be in breach of the Claimant's right to fair hearing. There is no inflexible rule that makers of documents must tender the document as it is not mandatory that a document must be tendered through its maker. The Court in the case of OMALE FEDERAL MINISTRY OF LANDS HOUSING AND URBAN DEVELOPMENT & ORS (2015) CA (Pp. 18-19, paras. E-B) Per Adefope-Okojie JCA held

"It is also unnecessary, I hold, for the document to be tendered by the maker. It was held in the case of Udo v Eshiet (1994) 8 NWLR Part 363 Page 483 at 500 Para E per Tobi JCA (as he then was) that a document can be tendered in the absence of a maker, by a person in whose custody it is, such as the Appellant, in this case to whom it was written....."

Hence, a document can be tendered by a party to it or by one who has proper custody of it and Section 156 of the Evidence Act 2011 defined document in proper custody to mean if they are in the place in which and under the care of the person with whom, they would naturally be, but no custody is improper if it is proved to have had a legitimate origin. In this instant case, the document sought to be tendered is a death Certificate from the National Population Commission, although not made by the DW2, it is in the custody of the DW2, who is the alleged widow of the 2nd Defendant. DW2 being the widow is the appropriate person to have proper custody of a death certificate of her dead spouse. More so as part of the requirement by the National

Population Commission vested with the duty and authority to issue death certificate can only issue to a relative of the dead person. In other words, it can be said that the DW2 who has proper custody of the death certificate can tender same irrespective of the fact that she is not the maker of the document.

The Defence Counsel relying on Section 83 is urging on this Court not to admit the document as the DW2 is not the maker of the document and the suit predates the document sought to be tendered. By virtue of the provision of Section 83(3) of the Evidence Act 2011, which provides that

“Nothing in this section shall render admissible as evidence any statement made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to any fact which the statement might tend to establish”.

The question to be answered is whether the maker of the document sought to be tendered is an interested person in relation to this suit. An interested person means any person, whatsoever, provided that he is interested. In this circumstance, there must be a real likelihood of bias before a person making a document can be said to be a person interested. Whereas a person who has no temptation to depart from the truth on one side or the other, a person not swayed by personal interest but completely detached, judicial, impartial and independent is not a person interest. Therefore, under Section 83(3) of the Evidence Act 2011, where a document was made when a case was pending or anticipated, it will be admissible if the maker is not an interested person. In this case, the document in question was made by the National Population Commission and there is nothing before

me to suggest that the National Population Commission is interested in this proceeding or has any reason to depart from the truth therein. The National Population Commission being the maker of the document sought to be tendered in my opinion, has no interest in the result of this matter, as they have no reason to pervert the truth in result of this proceedings. I will at this point state that the argument of the Claimant's counsel that the Claimant had closed his case and bringing in this document at this point will have an overreaching effect on the Claimant's case is not tenable as the Claimant's Counsel can still apply to cross-examine the DW2 on that document. Consequently, all the objections of the Claimant Counsel are hereby overruled, and the Death Certificate is hereby admitted in evidence as Exhibit D11.

Parties: 3rd Defendant present.

Appearances: Ben Okezie for the 3rd Defendant.

HON. JUSTICE MODUPE OSHOE-ADEBIYI

JUDGE

26TH NOVEMBER 2020