

IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY

IN THE ABUJA JUDICIAL DIVISION

HOLDEN AT GUDU - ABUJA

ON TUESDAY THE 20TH DAY OF OCTOBER 2020.

BEFORE HIS LORDSHIP; HON. JUSTICE MODUPE OSHO -ADEBIYI

SUIT NO. CV/404/2019

MOTION NO. M/7591/2020

MOTION NO. M/7694/2020

- 1. MARLINE MARITIME LIMITED ---- CLAIMANTS/RESPONDENTS**
- 2. MR GBENGA BALOGUN**

AND

HIGH CHIEF HIGGINS O. PETERS DEFENDANT/APPLICANT

RULING

Defendant/Applicant by a motion on notice M/7591/2020 dated the 11th day of June, 2020 approached this Honourable court for the following orders:-

1. An order dismissing this suit, suit No: CV/404/19 for amounting to abuse of court process.
2. And for such orders or further orders as this honourable court may deem fit to make in the circumstances.

The grounds upon which the application is brought are as replicated in the affidavit in support of this motion. The said affidavit is of 7 paragraphs

and is deposed to by one Cordelia Ogbonna, a litigation secretary in the Law Firm of the Defendant/Applicant.

It is the deposition of the Defendant/Applicant that the 1st Claimant is his landlord on property situated at Plot 8B, Thaba Tseka Street, Wuse 11, Federal Capital Territory, Abuja while the 2nd Claimant is the agent and property manager of the 1st Claimant. That as a result of the actions of the Claimants/Respondents to wrongfully terminate the tenancy agreement between them, the Defendant/Applicant commenced suit no: FCT/HC/CV/2637/19 in the High Court of the Federal Capital Territory, Abuja against the Claimants/Respondents, during the 2019 Legal vacation. That the said suit is challenging the actions of the Claimants/Respondents to forcefully and wrongfully evict the Defendant/Applicant from the property without following due process. The suit was assigned after vacation to Court 6, sitting at Apo, presided over by Hon. Justice Oriji. That the originating processes of the said suit No: FCT/HC/CV/2637/19 was duly served on the Claimants/Respondents in August 2019 and the Claimants/Respondents filed their statement of defence to the suit in October, 2019. That notwithstanding the pendency of suit No: FCT/HC/CV/2637/19 the Claimants/Respondents went ahead to file this present suit on the 22nd of November. 2019. The said originating process of suit No: FCT/HC/CV/2637/19, the statement of defence and hearing notices were annexed as Exhibits 1, 2, 3 and 4. That the present suit is an abuse of court processes.

A written address was equally filed wherein counsel raised a sole issue for determination which is whether Suit no. FCT/HC/CV/404/2019 filed on 22nd November 2019 over three months after the Defendant/Applicant filed suit no FCT/HC/CV/2637/2019 at the High Court of the Federal Capital Territory, Abuja in August 2019, on the same subject matter and parties does not amount to abuse of Court process warranting it to be dismissed? In arguing this issue, Applicant's Counsel submitted that on the strength of Exhibits 1 and 2, this present suit filed by the Claimants, has the same parties and subject matter as that filed at the FCT High Court Apo, which amounts to an abuse of Court process and liable to be dismissed. Counsel submitted further that in situations such as this, the Court hearing the latter suit is enjoined to dismiss the suit and urged this court to dismiss this suit and award cost in the sum of ₦1,000,000.00 against the Claimants/Respondents. Counsel relied on the following authorities in his written address;

1. O.S.S.I.E.C V. N.C.P (2013) 9 NWLR (Pt.1360) 451 at 466
2. UNITY BANK PLC V. OLATUNJI (2013) 15 NWLR (Pt.1378) 503
3. N.I.M BANK LTD V. UNION BANK NIG. LTD (2004)4SC (PT.1) 143
4. ADUBA V. REG. TRUSTEES LIVING CHRIST MISSION (1994) 4 NWLR (PT.339) 476 AT 484

Upon service, the Claimants/Respondents informed the Court that he responded to the Defendant's motion by filing a motion with No: M/7694/2020. The said motion is seeking for an order to discountenance the application of the Defendant/Respondent seeking the dismissal of the substantive suit for abuse of court process and an order refusing the

extension of time sought by the Defendant/Applicant in motion No. M/7591/2020. The Claimants/Applicants in their written address filed in support of their motion on notice raised a sole issue to wit “whether this Honourable Court can grant the reliefs sought by the Claimants/Applicants as it appeared on the motion paper. Counsel submitted that the matter before this Court is a tenancy matter and the tenant in the other suit served the Claimants fake processes without proper filing and the matter was also not assigned to any judge at the time Claimant was served. Submitted that the Defendant is using frivolous means to delay justice and urged the Court to discountenance the reliefs sought by the Defendant. Counsel relied on the following cases;

1. NIGERIA AGIP OIL COMPANY LIMITED VS. CHIEF GIFT NWEKE & ANOR (2016) NGSC,139.
2. CHIME V. CHIME (2001) 2 NWLR (PT.701) 527 AT 553
3. AKPAJI V. UDEMBA (2009) 10 NWLR (PT.1138) 545
4. NKEMDILIM V. MADUKOLU (1962) JELR 409 17 (SC)
5. EGHAREVBA V. ERIBO (2010) 9 NWLR (PT.1199) P.411
6. AG FED V. GUARDIAN NEWSPAPERS LTD (1999) NWLR (PT618)

On the other hand, the Defendant filed a counter affidavit opposing the Claimants’ motion no. M/7694/2020. Also filed is a written address. Counsel in the written address, submitted that the Claimants/Applicants motion meant and intended to oppose the Defendant’s application is strange, alien and procedurally irregular to the Rules and practice of this Honourable Court. Counsel submitted further that the Claimants having failed to file a Counter affidavit in compliance to the rules of this Court,

the motion filed to oppose the application of the Defendant is incompetent and should be struck out. Counsel relied on the case of UNITY BANK PLC VS. OLATUNJI (2015) 5 NWLR (PT.1452) 2013 AT 230 PARA B-D.

Upon a careful perusal of the motion paper, the grounds upon which the application is brought, the affidavits filed and the addresses of counsel, it is my humble view that two issues call for determination in this motion.

They are:

1. Whether the Claimants/Applicants can counter a motion on notice by filing another motion on notice.
2. Whether the Defendant/Applicant has been able to prove that the substantive suit no. CV/404/2019 is an abuse of court process.

ISSUE NO 1: “Whether the Claimants/Applicants can counter a motion on notice by filing another motion on notice”.

Generally, a party who intends to oppose an application is required to file an affidavit called the counter affidavit in opposition. By this, the Respondent challenges the truth of the facts contained in the affidavit in support of the application or deposes to facts which contradict the facts in the supporting affidavit or some facts why the application should not be granted. It is also trite that where however, the Respondent to a motion on notice wants to rely on points of law alone or on the facts as deposed to by the Applicant himself, he need not bother to file a counter affidavit.

Order 43 Rules 1 (3) of the High Court of the Federal Capital Territory (Civil Procedure) Rules 2018 provides as follows:

“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”.

Rules of court are meant to be obeyed and are not in our statute books for fancy. The Court of Appeal in **Unity Bank Plc v. Olatunji (2014) LPELR-24027 (CA)** held that:

“... This is in consonance with the principle of law that says that Rules of Court partake of the nature of subsidiary legislation by virtue of Section 18(1) of the Interpretation Act and consequently have the force of law and they must prima facie be obeyed and followed by all the parties before the Court. The Rules of Court are part of the machinery of justice made by the Courts to regulate their proceedings and to help parties present their cases within a procedure made for the purpose for a fair and quick trial and it is compliance with them that gives predictability and clarity to the system of administration of justice...”

When a motion on notice is filed as an interlocutory application, the burden of proof is on the Applicant to prove with affidavit, written address and exhibits (if necessary) that the Court should grant the prayers as stated on the face of the motion. Once the burden of proof is discharged, it shifts to the Respondent who will file a counter affidavit or a reply on points of law. Once Respondent discharges this burden of proof, it automatically shifts back to the Applicant to reply on points of law (where necessary) else, the burden of proof ends with the Respondent if he chose

to file a reply on points of law to the Claimant's motion on notice. In this motion on notice, Claimants having failed to file a counter affidavit nor written address simply means the motion on notice filed by the Defendant/Applicant is not only unchallenged but uncontroverted although the Court still has a duty to evaluate same and ascertain that Applicant has indeed proved that he is entitled to the prayers on the face of the motion. See **MUSA & ORS VS. YERIMA & ANOR (1997) 7NWL (PT.511) 27 @41-42** where the Court held that a piece of evidence is said to be unchallenged and uncontroverted where the opposing party led no credible evidence to the contrary but the court still has a duty to evaluate same and ascertain its authenticity.

It is interesting to note that Claimants adopted a strange procedure in replying to the Defendant's application/motion on abuse of Court process. Claimant informed the court that rather than file a counter affidavit to the said motion, he had surprisingly filed another motion on notice. Much more interesting is the fact that Defendant upon being served with Claimants' motion no. M/7694/2020 had promptly in accordance to laid down procedure, filed a counter affidavit.

It is my humble view and I so hold that the Claimants/Respondents having failed to file any counter affidavit in response to the motion on notice no. M/7591/2020, the application of the Defendant/Applicant is therefore unchallenged and uncontroverted by the Claimants/Respondents. It is settled that where there is unchallenged and uncontroverted evidence, a

Court has a duty to act on it where credible. See **State v. Haruna (2017) LPELR-43351 (CA)**.

On the 2nd issue, “Whether the Defendant/Applicant has been able to prove that suit no. CV/404/2019 is an abuse of court process”.

The Supreme Court (per Karibi-Whyte, JSC) opined in **SARAKI v KOTOYE [1992] 9 NWLR (PT. 264) 156 at 188 E - G** that:

“The concept of abuse of judicial process is imprecise. It involves circumstances and situations of infinite variety and conditions. It’s one common feature is the improper use of the judicial process by a party in litigation to interfere with the due administration of justice. It is recognized that the abuse of the process may lie in both a proper or improper use of the judicial process in litigation. But the employment of judicial process is only regarded generally as an abuse when a party improperly uses the issue of the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. This will arise in instituting a multiplicity of actions on the same subject matter against the same opponent on the same issues.... Thus, the multiplicity of actions on the same matter between the same parties even where there exists a right to bring the action is regarded as an abuse. The abuse lies in the multiplicity and manner of the exercise of the right, rather than the exercise of the right per se.”

I have averted my mind to the basis or essential elements that would constitute abuse of Court process as concisely and precisely stated in **Ogojeifo V. Ogojeifo (2006) 3 NWLR (Pt. 966)205 SC**, to wit:

- a. There must be, at least, two matters filed in two different Courts.*
- b. The said different suits are instituted with the goal of pursuing the same rights (even though on different grounds).*
- C. The subject matter and or the questions for determination in the two suits must be substantially the same.*
- d. Frivolous and scandalous use of a lawful Court process to the irritation and embarrassment of another party.*

In essence, the multiplicity of actions on the same subject matter, between the same parties, even where there exists a right to bring the action, is an Abuse of Court Process. It should be noted that it is not the exercise of the right to file a suit against a wrong allegedly committed that is in question, but the abuse lies in the multiplicity and manner of the exercise of the right.

In determining whether there is abuse of court process, the court looks at the originating processes in the two actions to ascertain whether the two actions are between the same parties and in respect of the same subject matter or issue. Fortunately, the writ of Summons, Defendant's Statement of Defence and hearing notices in Suit No. FCT/HC/ CV/2637/19 are annexed to the affidavit in support of preliminary objection as Exhibits 1, 2, 3 and 4, and duly certified.

The claims and parties in Suit No. FCT/HC/ CV/2637/19 as contained in Exhibits 1 attached to the Motion on Notice is hereunder reproduced as follows;

BETWEEN

HIGH CHIEF HIGGINS O. PETERS -----CLAIMANT

AND

MARLINE MARITIME LIMITED -----DEFENDANT

- a. An order that the condition precedent for the issuance of the “Notice to Tenant of the Owner’s intention to apply to recover possession” served on the Claimant on 15th July, 2019, in respect of the 4 Bedroom Terrace Duplex, situate at Plot 8B, Flat 8B, Thaba Tseka Street, Wuse 11, Abuja has not been fulfilled;
- b. An order that the Notice to Tenant of the Owner’s intention to apply to recover possession” served on the Claimant on 15th July, 2019, in respect of the 4 Bedroom Terrace Duplex, situate at Plot 8B, Flat 8B, Thaba Tseka Street, Wuse 11, Abuja without first reconciling and ascertaining the actual amount of rent owed the Defendant by the Claimant was without due process and therefore null and void and of no effect whatsoever;
- c. An order of this Honourable court restraining the defendant, its privies, agents, assigns, legal representatives or any person howsoever called, acting for or on behalf of the Defendant from taking any further step or steps aimed at evicting the Claimant from the 4 Bedroom Terrace Duplex, situate at Plot 8B, Flat 8B, Thaba

Tseka Street, Wuse 11, Abuja without first reconciling and ascertaining the actual amount of rent owed the Defendant by the Claimant ;

d. The cost of this suit.

Also, the parties and reliefs sought in the writ of Summons before this Honourable Court is reproduced below;

BETWEEN

1. MARLINE MARITIME LIMITED ----- CLAIMANTS
2. MR. GBENGA BALOGUN

AND

HIGH CHIEF HIGGINS O. PETERS ----- DEFENDANT

The reliefs sought are;

- a. A declaration that the Claimants are the beneficial owner of the (4) Bedroom Terrace Duplex and its appurtenances situate at Plot 8B, Wuse 2 Abuja wherein the Defendant resides at the same property within the jurisdiction of this Honourable Court.
- b. A declaration that the defendant delivers up possession of the said property and its appurtenances which he held onto the Claimants back to the Claimants forthwith.
- c. An order of this Honourable Court directing the defendant to pay the Claimant the sum of
 - i. ~~₦~~8,200,000 as rent he owed the Claimants in arrears.
 - ii. ~~₦~~1,3000,000 for service charged also in arrears

The total of ~~₦~~9,500,000.00 which the defendant is owing the Claimants for the period of two years being the rents of 2018 and 2019 respectively.

- d. An order of this Honourable Court directing the defendant to pay mesne profit since when the notice to quit was served on him.
- e. Cost of this action ~~N~~500,000.00

I have given a careful and insightful consideration to the Writ of Summons in Suit No. FCT/HC/ CV/2637/19, as well as compared same with the Writ of Summons in the present action. The parties in both suits are the same. As can be gleaned from the foregoing, even a perfunctory examination of the reliefs sought in both suits will reveal that reliefs (a) and (c) (reproduced above) in Suit No. FCT/HC/CV/2637/19 is the same as relief (b) in this present suit, just as all the other reliefs in both suits are inter related. The Defendant/Applicant also averred in their affidavit in support of their motion that the originating processes of the said suit No: FCT/HC/CV/2637/19 was duly served on the Claimants/Respondents in August 2019 same as hearing notices and the Claimants/Respondents filed their statement of defence to the suit on 4th of October, 2019, said Statement of Defence and hearing notices were attached to the motion as Exhibits 2, 3 and 4. From the attached Exhibits, Suit No: FCT/HC/CV/2637/19 was filed earlier in August, 2019 while this present suit was filed in November, 2019.

It has been held that filing two suits between the same parties on the same subject matter and where the end result of both suits was the same, even though the reliefs in the two suits were worded differently, would constitute abuse of court process. The Court in OBU V. J.O. OLUMBISE PRINTERS LTD (2013) LPELR-20415 (CA) Per OTISI JCA in page 27-28, para G-A) held,

“Abuse of court process simply denotes a situation where a party has instituted a multiplicity of suits against the same opponent in respect of the same subject matter and on the same issues.....to institute an action during the pendency of another suit, claiming the same relief is an abuse of court process”.

See also **ALI v ALBISHIR [2007] LPELR-8319 (CA)** and **MINISTER FOR WORKS & HOUSING v TOMAS (2002) 2 NWLR (Pt. 752) 740**. It has also by the Supreme Court in the case of **AKILU V. FAWEHINMI (NO.2) (1989) LPELR-339 (SC)** that the court will regard as vexatious an action brought by a defendant against the Plaintiff in respect of the same subject matter in the same action in which he is the defendant.

It is therefore obvious that the Respondent/Applicant’s contention that this suit constitutes an abuse of court process is well founded. One would have expected the Claimants/Respondents in the present suit to have counterclaimed in the previous suit before my Learned Brother in Court 6 Apo rather than filing the present suit thereby avoiding multiplicity of cases as reliefs sought in this present suit if granted will hinder the perfection of the relief sought in Suit No. FCT/HC/CV/2637/19 still pending. In **CENTRAL BANK OF NIGERIA v. JAMES EJEMBI OKEFE (2015) LPELR-24825(CA)** Per **OMOLEYE, J.C.A** held that;

“The learned counsel has stated the correct position of the law that where two processes are pending in the same court or two-different courts between the same parties, on the same subject-matter and

seeking the same relief(s), the one that is later in time constitutes an abuse of court process and liable to be dismissed”

The preliminary objection therefore succeeds on the ground of abuse of process.

It is the duty of the Court to evaluate and rule on any process in the Court’s file. As earlier stated, Claimants/respondent had un-procedurally filed a motion on notice no.M7694/2020 seeking 2 prayers:

1. An order of this Court to discountenance the application of the Defendant seeking the dismissal of the substantive suit for abuse of Court process.
2. An order refusing the extension of time brought by the Defendant.

Having granted the prayers of the Defendant that the substantive suit filed by Claimant is an abuse of Court process, the prayers of Claimant as reproduced above automatically becomes extinguished as the substantive suit which forms its foundation has been aborted. It is trite that one cannot put something on nothing as it will collapse. Going into the merits or otherwise of the above prayers has become unnecessary. Where the resolution of a conflict is not necessary, it becomes an academic exercise in futility. In AWOJUGBAGBE LIGHT INDUSTRIES LTD VS. CHINUKWE (1995) 4 NWLR (PT.390) 397 @410 Para D; BELLO CJN (as he then was) HELD that the Courts will not indulge itself in the luxury of academic exercise. Moreover, it is the duty of the Court to determine live issues, not dead issues. It is my humble view that the prayers of the Claimants as contained in its motion No. M/7694/2020 is dead on

arrival and therefore unnecessary to delve into. Consequently, motion M/7694/2020 is hereby struck out.

In light of the above, Suit No: FCT/HC/CV/404/2019 is hereby struck out for abuse of court process. Cost of ₦50,000.00 (Fifty Thousand Naira) only is awarded against the Claimants/Respondents.

Parties: Parties absent.

Appearances: C. M. Chikwe, Esq., appearing with Botu Samuel Esq., for the Claimants/Respondent. Micheal Ajara, Esq., for the Defendant/Applicant.

HON. JUSTICE M. OSHO-ADEBIYI

JUDGE

20TH OCTOBER, 2020