**IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY,**
**IN THE ABUJA JUDICIAL DIVISION,**
**HOLDEN AT COURT NO. 11 BWARI, ABUJA.**
**BEFORE HIS LORDSHIP: HON. JUSTICE O. A. MUSA.**

**SUIT NO: CV/1882/2015**

**MOTION NO:GWD/M/189/2020**

**BETWEEN:**

**1. S.H. ASHARA (Etsu Ashara) Paramount Chief of Ashara suing for himself and as the accredited representative of the Gangana (Abawa) Communities --- PLAINTIFF/RESPONDENT**

AND

1**. HON. MINISTER, FCT. -- DEFENDANTS/RESPONDENTS**

2**. ALH. IBRAHIM D. SULEIMAN (Chief of Wako)**

# RULING

## DELIVERED ON THE 15TH FEBRUARY, 2021

The Motion on Notice brought pursuant to **Order 13 Rule 19 (1) of the extant Rules of this Court** before me as dated and **filed on the 2nd day of October, 2020** by the 2nd Defendant/Applicant seeks for the following reliefs:

1. **AN ORDER** of the Honourable Court dismissing this suit against the 2nd Defendant for want of jurisdiction.

**ALTERNATIVELY: AN ORDER** of this Honourable Court striking out the name of the 2nd Defendant from this suit.

1. AND FOR SUCH FURTHER ORDER(S) that this Honourable Court may deem fit to make in this (sic) circumstances.

The ground upon which the Applicant anchored its application are set out as follows:

1. The 2nd Defendant was personally promoted by the 1st Defendant, the rex in this matter
2. That the 2nd Defendant was sued in his personal capacity as the Chief of Wako and he defended the suit as such
3. That I know as a fact on (sic) 20th June, 2020; the 2nd Defendant passed on (May Allah grant him janatufirdau's).
4. That suit is not such that can outlive him as it had been in person am

There is an affidavit of seven (7) paragraph deposed to by Sunday Solomon who described himself as the Litigation Secretary in the law office of the 2nd Defendant/Applicant's Counsel in support of the application with an exhibit attached. The salient portion of the said supporting affidavit (paragraphs 3 and 4 thereof) provide as follows:

2. That I have been informed by Iliyasu Wako, son of the deceased 2nd Defendant in the company of M.A. Alemeru, Esq. of Counsel handling this matter in our office on Thursday the 20th day of August, 2020 at the hour of 10: 20am, the information I verily believe to be true as follows:

(a) That the 2nd Defendant was personally promoted by the 1st Defendant, the rex in this matter

(b) That the 2nd Defendant was sued in his personal capacity as the Chief of Wako and he defended the suit as such

(c) That I know as a fact on (sic) 20th June, 2020; the 2nd Defendant passed on (May Allah grant him janatufirdau's). Photocopy of the Dead (sic) Certificate is hereto attached as **Exh "A"**

3. That I know as a fact that this suit is not such that can outlive him as it had been in person am as all appointment was in the name of the deceased 2nd Defendant.

When served with the 2nd Defendant/Applicant's Motion on Notice, the Plaintiff/Respondent opposed the Motion by filing a counter-affidavit of five (5) paragraphs deposed through one MIKE ODEY Esq., who deposed to being a Litigation Secretary in the Law firm of the Plaintiff/Respondent's Counsel. Remarkably, paragraph 4 of the said counter-affidavit provides thus:

a. That the cause of action and the claim before this Honourable Court, the action against the 2nd Defendant is not a personal action
b. That the action is instituted against the 2nd Defendant in his capacity as the "Chief of Wako".
c. That the deciding of the present suit as presently constituted will not in any way be prejudicial to the 2nd Defendant.
d. That the 2nd Defendant/Applicant has not the furnished the Court with sufficient materials for the court to grant his prayers as contained in its motion paper.
e. That this Honourable Court is precluded from insinuating or speculating the existence of facts.
f. That it is against the interest of justice to grant this application.

In support of the divergent positions of the parties, there are written addresses.

I have carefully gone through all the processes filed in elucidation of the different agitations of the respective parties. I have intimately read the affidavit, counter-affidavit and the annexed exhibit, written addresses filed on behalf of the parties in thus forensic hostility. The singular issue that has

fallen for the resolution of this Court in disposal of this Motion is formulated by the Applicant at paragraph 2.0 of their written address thus:

> **Whether the suit as originally constituted survived the death of the 2nd defendant, Late Alh. Ibrahim D. Suleiman, who died on 30/06/2020 or died with him?**

The Plaintiff/Respondent restyled the issue for the resolution thus:

> **"Whether looking at the facts and circumstances of this case and the present application at hand, the application has merit and ought to be granted"**

I am of the view that the question as framed by the 2nd Defendant/Applicant, the owner of the Application which I have been called upon to dispose, aptly captures the controversy to be resolved. After all, the two issues as framed by the both parties are still two ways of asking the same question.

In resolution of the above solitary issue, diverse arguments have ably been advanced by the parties in hostility, both for and against, each relying on different decided authorities, all of which I have dispassionately digested.

**ARGUMENTS OF PARTIES: APPLICANT'S ARGUMENT**

Relying on **IN RE: JOE (2019) LPELR-47028(CA); Akumoju v. Mosadoloran (1991) 9 NWLR (PT. 214) 236**, the 2nd Defendant/Applicant forcefully submitted that the instant suit was instituted against the late 2nd Defendant/Applicant in his personal capacity and since he is late, the action should abate forthwith.

**PLAINTIFF/RESPONDENT'S ARGUMENT:**

The Plaintiff/Respondent, argued per contra, citing **ONI VS. CADBURY NIG. PLC. (2016) 9 NWLR (PT. 1516) 80** and a host of other earlier authorities,

that the Court can determine the suit as constituted without its jurisdiction being affected. It asserted further that **Exh "A"** attached to the 2nd Defendant/Applicant's affidavit is the Death Certificate of one "**IBRAHIM USMAN**" whereas the name of the 2nd Defendant/Applicant as appears in the proceedings (which the 2nd Defendant/Applicant never challenged) has been "**ALH. IBRAHIM D. SULEIMAN"**. Citing and relying on **DURWODE V. STATE (2000) 2 NWLR (PT. 645) 392 at 412**, Counsel submitted that the Court is precluded from speculating or assuming that the 2nd Defendant/Applicant is dead as averred by the 2nd Defendant/Applicant's application. In sum, the Plaintiff/Respondent urged this Court to dismiss this application with cost (without claiming any specific amount) for lacking in merit.

**RESOLUTION OF THE SOLE ISSUE:**

He who asserts proves has been one of the cornerstones of evidence law known to lawyers and judicial proceedings in this country. This is codified in **Sections 131 and 132 of the Evidence Act, 2011**. In restatement of this uncontroverted principle, the Supreme Court in **MAIHAJA v. GAIDAM (2017) LPELR-42474(SC)** clarified thus:

> "Section 131(1) of the Evidence Act, 2011 provides that whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts shall prove that those facts exist. Put streetwise, he who asserts must prove his assertion. It therefore logically follows that what is alleged without proof can be denied without proof. When a fact is asserted without proof then the existence of the alleged fact is not established. That is why Section 132 of the Evidence Act provides further that the burden of

proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."

The question that has fallen for the resolution of this Court in the instant Motion is restated thus:

**Whether the suit as originally constituted survived the death of the 2nd defendant, Late Alh. Ibrahim D. Suleiman, who died on 30/06/2020 or died with him**

From the issue as framed, it is obvious that no meaningful answer could be returned to this question unless and until there is a determination of the preliminary question whether or not the "2nd Defendant/Applicant" is dead. This is because, the said question as framed by the 2nd Defendant/Applicant is couched in a manner that presupposes that the "death of the 2nd Defendant/Applicant" is taken for granted or taken as conceded by the Plaintiff/Respondent. It is only with the establishment of that salient fact that the issue of what becomes the position with respect to the established fact would be attended to. We are here confronted with the Plaintiff/Respondent's flat denial of that fact and frontal attack on **Exh "A"** as tendered by the 2nd Defendant/Applicant, that first hurdle must be crossed if any progress is to be meaningfully made into the issue as framed?

Now, has the 2nd Defendant/Applicant proved the existence of the death of 2nd Defendant/Applicant by any credible evidence. In an attempt to prove this crucial, if not decisive, fact, the 2nd Defendant/Applicant annexed **Exh "A"** professing it to be the Death Certificate of the 2nd Defendant/Applicant. It is this linchpin of evidence that the Plaintiff/Respondent frontally assaulted by pointing out that the name of the person on the said Death Certificate is one "**IBRAHIM USMAN**" in contradiction to the 2nd Defendant/Applicant's name

which, at least all along in this proceedings, has been "**ALH. IBRAHIM D. SULEIMAN".** Ordinarily, this serious attack launched on **Exh. "A"** ought to elicit a clinical reaction from the 2nd Defendant/Applicant by way of a further affidavit at least to offer sufficient explanation as to how the Death Certificate it is relying on is reading a name different from that of the 2nd Defendant/Applicant. None came from the 2nd Defendant/Applicant. Mum is the word that came from its mouth. Is the 2nd Defendant/Applicant entitled to remain silent in the face of the attack hurled at its **Exh. "A"** in the circumstances of this case? I think not. How does the law view this kind of situation? I proceed to find the answer.

When faced with circumstances akin to that manifest in the instant situation, the Supreme Court, while invoking **Sections 131 and 132 of the Evidence Act** postulated **JIMOH v. HON. MINISTER FEDERAL CAPITAL TERRITORY & ORS (2018) LPELR-46329(SC)** thus:

> "...Both the applicant and the Court are left in the dark to fish out the uncertified documents in the 535 proposed Records of Appeal. Certainly, neither the Court nor the Applicant, the adversary of the objector, are expected to discharge the burden of proving the objector's assertion. This burden rests squarely on Mr. Anachebe, SAN and his client by dint of Sections 131 and 132 of the Evidence Act. He who asserts a fact must prove that the fact he asserts exists. Otherwise, he shall not be entitled to the verdict or judgment of the Court."

Yet again, in **AGBABIAKA v. FIRST BANK (2019) LPELR-48125(SC)** the age-long principle of who asserts must prove was re-affirmed by the Supreme Court in this plain language:

> **"Whoever desires any Court to give him judgment, as to any legal right or liability dependent on the existence of facts which he asserts, has the onus of proving that those facts exist: Sections 134(1) and 135 of the Evidence Act, 1990 LFN (now Sections 131(1) and 132 of the Evidence Act, 2011."**

Coming to the same decision and in espousal of the same view, the Court in **DASUKI v. FRN & ORS (2018) LPELR-43897(SC)** enunciated the principle thus:

> **"The law is settled: he who asserts must prove. That is the essence of Section 131(1) of the Evidence Act, 2011. The burden of proof in every suit or proceeding lies on the party who will fail if no evidence at all were given on either side: Section 132 of the Evidence Act."**

With all these expositions above in mind, can it be said that the death of the 2nd Defendant/Applicant has been proved satisfactorily, that is on the balance of probabilities, to enable this Court enter into examination of the applicable principle of law to such factual situation? The answer is no.

There is no doubt that the party who would fail in the absence of any evidence is the 2nd Defendant/Applicant in the instant situation. That is the situation that has crystallized in the instant case and by dint of **Sections 131 and 132 of the Evidence Act**, the fact of the 2nd Defendant/Applicant's death is not established by credible and cogent evidence.

It has long been the law that a Court does not go on a voyage of speculation imagining things which either happened or might have happened or did not happen. This was the view of the Court as expressed by Ubaezuonu, J.C.A. in

**COKER v. ADETAYO & ORS (1992) LPELR-15369(CA)** where it was expressly stated that:

> **"...A Court does not go on a voyage of speculation imagining things which either happened or might have happened or did not happen. It is the defendant/appellant who seeks to falsify exhibit "C" that should lead credible evidence to that effect. He has failed to do so."**

Courts have remained consistent in their view that any attempt by a trial court to substitute assertion for proof or evidence amounts to speculation. Thus in **WEMA BANK PLC v. FOLORUNSO (2013) LPELR-22040(CA)** the Court aptly stated thus:

> **"He who asserts must prove. See Ejemo and others v. Omolade& Others (1968) NMLR 359 Imana v. Robinson (1979) 3-4 SC 1 Kate Enterprises LTD v. Daewoo Nig Ltd (1985) 2 N.W.L.R (Pt.5) 116. Also, a party must prove his case by credible evidence, any attempt by a trial court to substitute assertion for proof or evidence as in the instant case amounts to speculation."**

The trite law is that where there is an allegation of the existence of a particular fact, it is the duty of the person who alleges to prove his allegation, **ABBA & ANOR v. JUMARE & ORS (1999) LPELR-6684(CA)**. In **AMASA & ORS v. THE CHAIRMAN, NATIONAL POPULATION COMMISSION & ORS (2014) LPELR-22772(CA)**, it has been stated that Courts do not speculate. This Court, being a Court of law, cannot speculate on this unproved assertion of the 2nd Defendant/Applicant, **Ikenta Best (Nig.) Ltd v. Attorney- General, Rivers State (2008) NWLR (Pt.1084) 612**, for it

is outside its purviews, **Ejezie v. Anuwu (2008) 12 NWLR (Pt.1101) 446**.

What this comes to is that the basis upon which this Court would have made the finding of whether the instant suit as constituted "***survived the death of the 2nd defendant, Late Alh. Ibrahim D. Suleiman***" is non-existent because it is still indeterminate or yet to be established by credible evidence whether indeed the said ***Alh. Ibrahim D. Suleiman*** "***died on 30/06/2020***" or not. Having taken this position, no judicial energy would be directed to discussing whether this suit as constituted "***survived the death of the 2nd defendant, Late Alh. Ibrahim D. Suleiman***" as same will serve no useful purpose. That has not become a live matter yet in this proceeding. The time and energy of the Court is really scarce and should only be deployed to live matters. It is well-known that Courts of law exist to settle issues which has utilitarian value to the parties before it, **Adelaja v. Alade (1999) 6 NWLR (Pt. 608) 544**. In other words, Courts of law do not embark on academic exercise, **Okulate v. Awosanya (2000) 2 NWLR (Pt. 646) 530** because they are not academic institutions, **UBN Plc. v. Sepok (Nig.) Ltd. (1998) 12 NWLR (Pt. 578) 439**.

For the purpose of completeness, I most humbly invite Tobi, J.S.C. (of blessed memory) to speak directly on this proposition as he spoke in **BUHARI & ORS v. OBASANJO & ORS (2003) LPELR-813(SC):**

> **"It is elementary law that courts of law, like nature, do not act in vain but for a purpose and the purpose must exist and be identifiable and identified. Courts of law do not embark on academic exercise because they are not academic institutions. Courts of this country are enjoined to exercise their judicial**

**functions within the provisions of Section 6 of the Constitution and the section does not anticipate exercise of their equitable jurisdiction of interlocutory injunctions in respect of completed acts."**

I shall not embark on an academic exercise, **UBN Plc. v. Sepok (Nig.) Ltd. (supra)**, neither shall I indulge in speculation of facts, **Ejezie v. Anuwu (supra)**, because I am forbidden from doing so, **Ikenta Best (Nig.) Ltd v. Attorney- General, Rivers State (supra)**. On the whole, this application, which I find to be lacking in merit, fails. I shall have no other duty than to dismiss same. I hereby enter an order dismissing same.

This is my Ruling which I reserved on the 19th day of January, 2021.

**APPEARANCE**

Y. G. Haruna Esq. with S.B. Imokondo Esq.

B. A. Ubana Esq. for the Claimant/Respondent.

The Defendant/Applicant not in court.

Sign

Hon. Judge

15/02/2021