IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT GWAGWALADA

THIS TUESDAY, THE 9TH DAY OF MARCH, 2021

BEFORE: HON. JUSTICE ABUBAKAR IDRIS KUTIGI – JUDGE

SUIT NO: CV/2157/2014
MOTION NO: M/15842/2020

BETWEEN:

FIRST BANK OF NIGERIA PLC ……. CLAIMANT/APPLICANT

AND

1. **BAYCO NIGERIA LIMITED**
2. **LUBB UNION CONSTRUCTION COMPANY LIMITED**
3. **SDV SECURITY COMPANY LIMITED**
4. **ALH. SHEHU MOHAMMED NDANUSA (alias Shehu MahmuD Abubakar)**
5. **ABUJA GEOGRAPHIC INFORMATION SYSTEM (AGIS)**
6. **FEDERAL CAPITAL DEVELOPMENT AUTHORITY**
7. **MINISTER OF THE FEDERAL CAPITAL TERRITORY**

…DEFENDANTS/ RESPONDENTS

RULING

By a motion on notice dated 11th February, 2020, the Claimant/Applicant seeks for the following Reliefs:

1. **An Order of this Honourable Court granting leave to the Claimant/Applicant to file further Statement on Oath of Godwin Iji out of time in this Suit.**

2. **An Order of the Honourable Court deeming the said Claimant/Applicants further Statement on Oath of Godwin Iji herein attached and marked as Exhibit A as properly filed and served, requisite fees having been paid.**

The application is supported by an 11 paragraphs affidavit with one annexure, the further witness statement on oath of **Godwin Iji**.

A very brief written address was filed in which one issue was raised as arising for determination to wit: **Whether this Honourable Court can exercise its discretion and grant this application**.

It was submitted that by virtue of the provisions of **Order 49 Rule 4** and **Order 43 Rule 4 of the Rules of this Court**, that the court has the unfettered discretion to grant or refuse the application.

It was further submitted that in the exercise of judicial discretion, the primary objective is the attainment of substantial justice and accordingly that the court should grant the application in the interest of justice. The case of **United Spinners Ltd V Chartered Bank (2001) 14 NWLR (pt.732) 195 at 216 B** was cited.

The plaintiff then filed an extensive Reply on points of law in response to the address of the 5th – 7th Defendants which forms part of the Record of Court. The Reply in substance sought to further accentuate the points made that the court can properly grant the application and that nothing in the Rules of Court or Judicial Authorities precludes the filing of a witness deposition in support of a Reply pleading.

At the hearing, counsel to the Plaintiff/Applicant relied on the paragraphs of the supporting affidavit and adopted the submissions in the written addresses in urging the court to grant the application.

The 1st and 2nd Respondents did not file any process in opposition. The 3rd and 4th Defendants on their part indicated that they had no objection to the grant of the Application.

The 5th – 7th Defendant however in opposition filed a six (6) paragraphs counter-affidavit and a written address in which one issue was raised as arising for determination as follows:

"Whether given the decision of the Court of Appeal in Chief Nkpa V Champion Newspaper Ltd & Anor (CA/L/412/2012) 2016 NGCA 75, it is permissible for a claimant to file a witness statement on oath on the basis of facts stated in Reply to the Defendants Defence."

It was contended that the Rules of Court does not permit a claimant to file a witness statement on oath on the basis of facts contained in a Reply pleadings in response to a statement of Defence. The case of **Nkpa (supra)** and the provisions of **Order 2 Rule 2 (2) c**, **Order 17 Rule 1** and **Order 18 Rule 1** were cited in support.

At the hearing, counsel to the 5th – 7th Defendants/Respondents similarly relied on the contents of the counter-affidavit and adopted the submissions in the written address in urging the court to refuse the application.

I have carefully considered the processes filed and the submissions of learned counsel on both sides of the aisle. The issue raised by the extant application is no doubt important. It revolves around situating the import of a Reply and then with specific respect to this facts of this case, whether a witness deposition can be filed in support of the Reply pleading.

Now in law, on service of a statement of defence, a Reply may be served in answer to the defence within fourteen (14) days within the confines of **Order 15 Rule 1 (3) of our Rules.**

The Reply no doubt is part of the pleadings because if no reply is served to a defence unaccompanied by a counter-claim, there is an implied joinder of issue on the defence and the plaintiff will be precluded from giving evidence on issues raised in the defence which a reply ought to supply an answer. Indeed if evidence is led on facts not contained in a reply, where one ought to have been filed, such evidence will go to no issue.

It is true that in many cases, it may be unnecessary to file a reply but on the authorities it will be necessary to file a reply in the following situations as follows:

(a) if he desires to admit, so as to save unnecessary costs, some of the facts alleged in the defence , while denying others, or if he desires to admit the facts, or some of the facts, alleged in the defence, and to meet them by asserting new and additional facts;

(b) if he desires to plead an objection in point of law;

(c) if he desires to plead in answer to the defence that it misstates the cause of action;

(d) if the defendant has pleaded a counterclaim which the plaintiff desires to contest; for he must, in his reply and defence to counterclaim, deal specifically with every allegation of fact contained in the counterclaim of which he does not admit the truth, except damages.

A joinder of issue operates as a denial of all material allegations in the defence, if pleaded to the whole defence, and if pleaded only to a part of the defence, to a denial of all such allegations in that part. The reply should answer the whole of the matters to which it is pleaded.

Rather than simply traverse the defence, the plaintiff may often be required by the nature of the defence to set up some affirmative case of his own in the Reply in answer to those facts averred by the defence.

Accordingly, the proper function of the Reply is precisely to raise in answer to the defence any matters which must be specifically pleaded, which make the defence not maintainable or which otherwise might take the defendant by surprise or which raise issues of fact not arising out of the defence. The reply is the proper place for meeting the defence by confession or avoidance. See **Chief Achike & Anor V Osakwe & 5 ors (2000) 2 NWLR (pt.646) 630 at 633.**

Let me give one or two examples. In order to defeat the defence of the limitation Act, the plaintiff must specially plead in his reply any fact upon which he relies to take the case out of the statute. Also in actions for libel or slander, if the plaintiff intends to set up express malice in answer to the defence setting up publication on

a privilege occasion, or as being fair comment on a matter of public interest, he must serve a reply setting out the facts on which he relies. See **Bullen & leake and Jacobs** precedent of pleading at page 107.

Having streamlined above some of the basic functions of a Reply pleading, the pertinent question that arises in the context of the present despite is this: where a plaintiff in reply to the defence meets the averments by asserting new and additional facts within for example the two examples or scenario highlighted above, how will he establish those facts, if he is not allowed to proffer evidence bearing in mind the age long and consecrated principle that pleadings is not evidence and without evidence in support, the pleadings completely lacks value?

In the case of **Chief S.B. Bakare and Anorther V Alhaji Ibrahim (1973) 2 ECLR (pt.3) 485**, the defendants/appellants admitted publication of the words complained of, but put forward a plea of fair comment in the form known as rolled-up plea. They also supplied particulars of the facts upon which they relied on their defence of fair comment. The Plaintiff/respondent did not deliver any reply alleging express malice. Yet, the learned trial judge found that the facts in the publication have been proved to be substantially true after adverting to the issue of express malice which was no way raised on the pleadings, he found as a fact that the defendant/appellant were actuated by malice and gave judgment against them.

On appeal to the Supreme Court, it was held, inter alia, that in an action for defamation, where it was intended to allege express malice in answer to a plea of fair comment or qualified privilege, it was necessary to deliver a Reply giving particulars of the facts from which express malice was to be inferred.

Also in the case of **Mba & 2 ors V Agu & 6 ors (1999) 12 NWLR (pt.629) 1 at 5**, the Supreme Court affirmed the same principle when it stated as follows:

"If a plaintiff does not agree with the averments contained in the defendant's statement of defence, he is duty bound to file further pleading to deny the averments. In the instant case, the appellants (as plaintiffs) having not filed a reply to counter the plea of estoppel per *rem judicata* raised by the respondents (as defendants), the evidence they led challenging the said plea goes to no issue."

On the basis of the above decisions of the Supreme Court, I incline to the view that it will be completely wrong to construe the Rules as constituting a barrier to the filing of an additional witness statement in support of a Reply.

The facts and justice of each case dictates how the issue of filing of a witness deposition to support a Reply and in all cases must be approached. Once a Reply is filed in accordance or as allowed by the Rules, evidence must be led in support of those facts if the Reply is to have factual and legal traction. Indeed if evidence is not led or in this case a party is effectively prevented from leading evidence to support the averments in the Reply to show for example that the defence raised in the defence is not maintainable, the implication is that aspect of the Reply will be deemed as abandoned and the fate of a case may even be decided on that basis as exemplified in the cases of the Apex Court earlier highlighted. Indeed if the contention of Respondent is accepted, the implication is that a party has effectively been denied fair hearing and effectively shut from presenting its case.

The point to underscore is that Rules of Court are designed to assist the parties in putting forward their cases before the court. They are not designed or intended to deny parties of the opportunity of presenting their cases, thereby resulting in injustice. See **Savannah Bank of Nigeria Plc V Jatau Kyentu (1998) 2 NWLR (pt.536) 41 at 59.**

Indeed for courts to read rules in the absolute without recourse to the justice of the case, which is the route that is urged on by the objection to the extant application will be making the courts slavish to the Rules. This is certainly not the *raison d'etre* of Rules of Court. See **Anatogu V Anatogu (1997) 9 NWLR (pt.519) 49 at 67.**

I have not been therefore persuaded that there is anything in the Rules of Court preventing the filing of a witness deposition in support of a Reply which is a pleading too in appropriate cases such as the extant situation.

There is no doubt that this case has a chequered history and has dragged for far too long. It is not in dispute that in response to the defence of 3rd and 4th defendants and 5th – 7th defendants, the plaintiff filed Replies to each of the above processes. These Replies were regularized as far back as 22nd November, 2016 and hearing commenced same date. There was no challenge to the Replies filed and indeed the

5th – 7th Respondents have not challenged the propriety of the Replies at any time. The narrow complaint has to do with the additional witness deposition.

It is important to state that the plaintiff's witness, **Mr. Godwin Iji** is still yet to conclude his evidence and the matter has suffered delays largely occasioned by actions of the plaintiff which effectively stalled proceedings up to this point where a new counsel is now appearing for the plaintiff and who filed the extant application.

It is difficult to situate what prejudice the 5th – 7th Respondents will suffer in the circumstance, since it is the same PW1 that will adopt the additional deposition in support of the Reply and the defendants have every opportunity to cross-examine him and to effectively put up a case in rebuttal.

The application has merit and is granted and ordered as prayed. I call on all counsel in the matter in view of the age of the case to act post haste and ensure that this matter is determined without any further delays.

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Hon. Justice A. I. Kutigi

<u>Appearances</u>:

1. **Dr. J.A. Akubo, Esq., for the Plaintiff/Applicant.**

2. **John Alu, Esq., for the 3rd and 4th Defendants/Respondents.**

3. **Marcel Osigbemeh, Esq., for the 5th – 7th Defendants/Respondents.**