IN THE HIGH COURT OF JUSTICE FEDERAL CAPITAL TERRITORY
IN THE ABUJA JUDICIAL DIVISON
HOLDEN AT HIGH COURT MAITAMA – ABUJA

BEFORE: HIS LORDSHIP HON. JUSTICE SAMIRAH UMAR BATURE

COURT CLERKS:	**JAMILA OMEKE & ORS**
COURT NUMBER:	**HIGH COURT NO. 32**
CASE NUMBER:	**SUIT NO. FCT/HC/CV/1687/19**
DATE:	**4TH MARCH, 2021**

BETWEEN:

MRS. ENO EKPO.....CLAIMANT

AND

DR. CHRIS ONU.....DEFENDANT

APPEARANCES:
Stanley Umeakuekwe Esq for the Defendant.

Patience Jacob Esq for the Claimant.

RULING

By a Motion on Notice with No: M/11584/2020, dated 6th day of November 2020 and filed on the same day, the Defendant/Applicant prayed the Court for the following reliefs: -

> ***"1. AN ORDER granting leave to the Defendant/Applicant to amend his Statement of Defence in response to the Claimant's Originating processes.***
>
> ***2. AN ORDER granting leave to the Defendant/Applicant to amend his Statement of Defence, attached to the Affidavit as proposed Amended Statement of Defence.***

3. AN ORDER granting leave to Defendant/Applicant to substitute the Witness Statement on Oath dated and filed on 30th January, 2020 with the proposed Amended Witness Statement on Oath in response to the Claimant's originating processes."

In support of the application is an Affidavit of 6 paragraphs deposed to by one Paul Omoluabi Esq, the Principal Counsel in Legal Works Consultants, the Law Firm representing the Defendant in this suit. Also in support of the application is a Written Address also dated 6th November 2020.

Meanwhile, in response and in opposition to the Motion on Notice, the Claimant/Respondent filed a Counter Affidavit of 4 paragraphs deposed to by Eno Ekpo, the Claimant/Respondent in this motion, and a Written Address in support dated 11th day of November 2020.

In the Written Address of the Defendant/Applicant a sole issue for determination was formulated thus:

"Whether it is in the interest of justice to allow this application in the circumstances of this case?"

It is submitted by the Applicant's Counsel, Paul A. Omuluabi Esq, that this Honourable Court is seised of jurisdiction to allow an application of this nature and in the present circumstances. Reliance was placed on Order 25 Rule 2 of the High Court of the Federal Capital Territory (Civil Procedure) Rules 2018.

That likewise, by the combined effect of Sections 6(6)(b) and 36(1) and (2) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) any person who has a claim against another or whom a claim lies against, is entitled to have the issues involved to be properly placed before the Court for a just determination which includes amendment of pleadings.

The learned Counsel submitted that this Honourable Court has the powers to grant leave to the Applicant to amend the Statement of Defence and substitute Witness Statement on Oath in order for the issues in this suit to be brought before it. That this power is discretionary, which must be exercised judicially and judiciously. Reliance was placed on the case of ***ASHCO NIGERIA LIMITED V***

WARD AND GREED (2010) 3 NWLR (Pt. 1181) 302, 321, Para B, per Orji – Abadua J. CA.

It is submitted further that amendment of pleadings can only be refused if it will overreach the other party and thereby occasion injustice to that party. Reliance was placed on the case of ***EGWA V EGWA (2007) 1 NWLR (Pt. 1014) 71, 96 C- D, per Rhodes-Viviour, J.C.A (as he then was).***

Learned Counsel submitted that this application is consequent upon the way the proceeding has taken so much time and the subject matter which the rent has been tied down. That the Applicant is demonstrating seriousness in having this suit prosecuted expeditiously has exhibited the proposed Amended Statement of Defence and Witness Statement on Oath. That the Defendant/Applicant does not intend to delay the proceedings and the Court and Plaintiff will not be prejudiced by the allowance of this application.

That the Applicant's failure for not filing Counter Claim is not intended to disrespect this Honourable Court and or delay proceedings but that same is due the new facts that have unfolded during the proceedings.

Counsel relied on the cases of –

LONG JOHN V IBOROMA & ORS (1990) 6 NWLR (Part 555) 524, 542 – 543.

– BENSON V NIGERIA AGIP OIL CO. LTD (1982) 5 SC; 1

– WILLIAMS V HOPE RISING VOLUNTARY SOCIETY (1982) 1 – 2 SC, 145, 152.

– NALSA TEAM ASSOCAITES V NIGERIA NATIONAL PETROLEUM CORPORATION (1991) 8 NWLR (Part 212) 652.

In conclusion, learned Counsel urged the court to allow this application in the interest of justice.

Meanwhile, on the part of the Claimant/Respondent, eleven issues for determination were formulated by Dr. Celcius Ukpang, learned Claimant/ Respondent's Counsel and they're as follows: -

The first is whether it is in the interest of justice to allow this application in the circumstances of this case?

In arguing the first issue, learned Counsel submitted that the law is that where the issues for determination is not appropriate or insufficient, then the adverse party or the Court suo moto can reframe the issue(s) or distill additional issues in order to do substantial justice. Reference was made to the case of ***CHIEF NKERUWEM UDOFIA AKPAN V FEDERAL REPUBLIC OF NIGERIA (2012) 1 NWLR (Part 1281) Ratio 20 at 411, per Nwodo, J.C.A.***

Still on the same issue, learned Counsel contends that this application is frivolous as it seeks to stand justice on its head.

In placing reliance on Order 25 of the Rules of this Court 2018, learned Counsel submitted that the instant application is not supported by the Rules and neither is it equitable to do so. That the Rules are explicit that amendment can only be made before a pre-trial conference and not thereafter. Secondly, the Rule makes it clear that an amendment cannot be made after the close of the case of a party but must be made before the close of the case. The Court is urged to so hold.

On issue two which is whether the amendment sought will overreach Claimant/Respondent, learned Counsel submitted that same will overreach the Claimant/Respondent who had since testified, was cross-examined and her case closed as such the amendment sought will require her to reopen her case, file additional witness deposition on oath and enter the witness box all over again and indeed restart the trial afresh.

That the amendment sought is so radical that it will change the entire case of the Defendant/Applicant because the Claimant will also be required to make consequential amendments and replies to those fresh pleadings. That clearly this was not the intention of Order 25 Rules 1-2 of the Rules of this Court 2018. Reliance was also placed on the case of ***MOBILE OIL NIG. LTD V I.A.L (2000) 6 NWLR (Pt. 659) 146, Ratio 5 – 6 (SC).***

On issue three, which is whether the Applicants are acting mala fide in bringing this application at this stage of the proceedings, it is submitted that bad faith cannot be regarded as fair game in our adversarial system of adjudication. That same position was restated by the English house

of Lords in the case of celebra Tildesely V Harper (1878) Chancery Division Report 398.

That in the instant case, the Applicant is acting mala fide by waiting until the Claimant has closed her case to bring an application which is unknown to the Rules and expressly prohibited just to stall time, overreach the Claimant and frustrate the quick dispensation of justice. And that same cannot be condoned by this Court.

Reliance was placed on ***TILDESLEY V HARPER (supra); OJAH & ORS V OGBORO & ORS (1976) ALL NLR, P. 227, (1976) 4 SC P. 69; OGUNTIMEHIN V GUBERE (1964) 1 ALL NLR 176 at 179; AMADI V THOMAS AGIM (1972) 1 ALL NLR, 409.***

The Court is urged on the strength of these authorities to throw out this strange application with crushing and exemplary cost.

On issue four, which is whether the amendment sought shall occasion a miscarriage of justice against the Claimant/Respondent? Learned Counsel submitted that this application if granted shall occasion grave injustice to the Claimant since in considering applications of this nature the Courts are enjoyed to pay close attention to the reliefs sought, consider the justice of the case and the competing rights of the parties.

Reliance was placed on the case of ***NWABUEZE V NIPOST (2006) 8 NWLR (Pt. 983) 529, para F, Ratio 32.***

The Court is urged to resolve the issue in favour of the Claimant with exemplary cost.

On issue five which is whether an amendment sought that requires the calling of fresh evidence after the adverse party had closed her case and can no longer reply to those issues can be granted?

It is submitted that this application requires the calling of fresh evidence by the applicant after the adverse party had closed her case and can no longer reply to those issues cannot be granted.

Learned Counsel submitted that there will be incalculable loss of time and resources as such where a proposed amendment would require introduction of fresh evidence equity demands that it be refused.

That in the instant case if the Claimant does not also re-open her case and amend her pleadings and Witness Statement on Oath then she will suffer the ignominy of being shut out. Reliance was placed o the cases of ***BAMGBOYE V UNIVERSITY OF ILORIN (1999) 70 LRCN, P. 2146 at 2197, para D; EHIMARE V EMHOWYON (1985) 1 NWLR (Pt. 2) P. 177; ADEOSUN V ADISA (1986) 5 NWLR (Pt. 40) P. 225 at 235; AKINTOLA V SOLANA (1986) 2 NWLR (Pt.....).***

The Court is also urged to resolve this issue in favour of the Claimant with crushing and exemplary cost.

On issue six which is on the attitudes of the Courts when the sole purpose of an amendment is to resolve from evidence already pleaded and make use of evidence, already given by the adverse party when the Applicant has realized the helplessness of his case, it is submitted by the learned Counsel, this application is seeking to pull the rug from under the feet of the Claimant and that it is trite, that a party must be consistent in stating his case and consistent in proving it and not oscillate from left to right and zig zag. Reliance was placed on the case of ***AMANA SUITES HOTELS V PDP (2007) 6 NWLR (Pt. 1031) p. 453 Ratios 15, 16 and 17; SAMSON SALAKO V BABATUNDE WILLIAMS (1998) 11 NWLR (Pt. 574) P. 505; BIONE-PHARMACEUTICALS INT. LTD V ADSELL NIG LTD (1986) 5 NWLR (Pt. 46) P. 1070 at 1076.*** The Court is urged to so hold.

On issue seven which is whether the Court's discretion can be exercised reasonably and judicially in favour of an Applicant in the peculiar circumstances, it is submitted that the Applicant must show that he is entitled to the discretion shown and that in the instant case there's nothing in the Affidavit that shows any exceptional reasons or justification for the radical amendment sought.

Reliance was placed on the cases of ***AYOTUNDE V KAREEM (2002) 10 NWLR (Pt. 776) 553; COMEX V NAB (1997) 3 NWLR (Pt. 496) P. 643 (SC); VASWANI V SAVALAKH (1992) ALL NIR 483; MARTINS V NICANNAR FOODS (1988) 2 NWLR (Pt. 74) P. 75; SHODEINDE V TRUSTEES (2001) FWLR (Pt. 58) 1065 or (1990) 10 SC; OLUNLOYO V ADENIRAN (2001) FWLR (Pt. 73) P. 41; OKAFOR V NNAIFE (supra).***

It is submitted moreso, that a Counter Claim is not an answer to an action for trespass as Claimant is not seeking or challenging title to the property, that there's a procedure for any claims in possession or rents

as a defence or counter claim in an action for trespass. That the jurisdiction of this Court cannot be invoked in such a strange manner. The Court is urged to so hold.

On issue eight which is whether having regard to the Exhibits annexed to the Motion on Notice, the Applicant is entitled to the relief sought?

It is submitted that the Applicant seeks to withdraw his entire defence and replace same with a fresh one without considering the fact that the Respondent is also entitled to respond. Reliance was placed on provisions of Chapter IV of the 1999 CFRN (as amended) on fair hearing.

The Court is urged to resolve the issue in Claimant's favour.

On issue nine which is whether the cause of action herein, trespass, can be joined with the cause of action proposed in the amendment sought, it is submitted that although causes and matters can be joined, the condition precedent for the commencement of recovery of premises or other rent matters is not the sort to be joined in an action for trespass, the Court is urged to so hold.

On issue ten which is whether the Applicant has been guilty of abuse of process in this proceedings and the appropriate sanctions for same, it is submitted that records of the Court will show such instances of abuse of process just to stall same. In support of this submissions Counsel relied on the cases of ***BADEJO V MINISTER OF EDUCATION (1996) 8 NWLR (Pt. 464) P. 15 at 46 R 11, Para E – P; A G BENDEL V A G FED (1981) 10 SC 1 AT 59; ARUBO V AYELIERU (1993) 3 NWLR (Pt. 280) P. 131; SARAKI V KOTOYE (1992) 9 NWLR (Pt. 261) at 156; SEVEN UP BOTTLING COMPANY V ABIOLA (1996) 7 NWLR (Pt. 714) at 738, Ratio 10, para "C"; AMAEFUNA V STATE (1988) 2 NWLR (Pt.....)***

Lastly on issue eleven which is whether the conduct of the Applicant in this proceeding has been reasonable and whether he has acted bona fide to warrant the grant of the reliefs and indulgence sought? Learned Counsel submitted that the Court must at all times be seen to do equity and that is what the reasonable man present at the trial will go home thinking that justice indeed has been done. On this, reliance was placed on ***ADIGUN V ALI-OYO (1987)1 NWLR 719 – 20; BALAMI V BAWALA (1993) NWLR (Pt. 67) P.51; BASA V NCA TC (1991) 5 NWLR (Pt.1) 192; KOTOYE V C.B.N (1989) 1 NWLR (Pt. 98) P. 419, DENLOYE V M & DPDC (1981) NCR 305, Re-Mohammed Olaoyori.***

Finally, learned Counsel urged the Court to dismiss this application with substantial cost.

I have carefully considered this Motion on Notice, the reliefs sought, the supporting affidavit, the proposed amended Statement of Defence, the proposed amended Witness Statement on Oath as well as the Written Address filed in support of same.

In the same vein, I've equally given due consideration to the Claimant/Respondent's Counter Affidavit in opposition to this Motion on Notice, and the Written Address in support of same.

The Court appreciates the issues for determination formulated on both sides of this Motion on Notice. But, in a bid to determine same, I shall raise a single issue which is whether the Defendant/Applicant has satisfied the Court to be entitled to the reliefs sought in the application.

Let me first of all begin by referring to Order 25 Rule 1 of the Rules of this Court 2018, which provides thus: -

> ***"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."***

Now, it is the contention of the learned Claimant/Respondent's Counsel in the Written Address that the above provision stipulates that an amendment can only be made before the pre-trial conference and that same cannot be made after the close of a party's case.

Well I've carefully looked at Order 25 Rule 1 of the Rules of this Court re-produced above and it is clear that amendment of originating processes and pleadings is permitted under the said rule before pre-trial conference but "before the close of the case".

In addition, it is trite law that the main purpose of amendment of pleadings is to enable the Court to determine the real question or issue in controversy between the parties. In this respect, see the case of ***MOBIL OIL V NABSON & C (1995) 7 NWLR (Pt. 407) 236,*** where the Court held thus:-

> "***In the exercise of its discretion as to whether or not to grant an amendment of pleadings, what should guide the Court is***

that an amendment of pleadings for the purpose of determining the real questions in controversy between the parties ought to be allowed unless such amendment will entail injustice or surprise or cause embarrassment to the other party or where the Applicant is acting mala fide or where it will cause injury to the Respondent which cannot be compensated by cost is to decide the rights of the parties, and not to punish them for mistakes which they make in the conduct of their rights....”

Likewise, it is equally the law that the primary aim of amending a process already filed is to enable the Court resolve the issues in controversy effectively and effectually. Therefore, the weight of judicial authorities lean in favour of allowing a party to amend its legal processes wherever there is need to do so provided injustice is not caused to the other side and is not overreached in such a way that he cannot be compensated with cost. Please see the case of ALSTHOM S.A. V SARAKI (2000) 14 NWLR (Pt. 687) 415 at 424,

In ***RAYMOND EZE V BETRAM ENE & ANOR (2017) LPELER-41916 (SC) Page 19 -21, per Ogunbiy JSC at paragraphs F – A*** held inter alia thus:

“...Relevant to this appeal is to determine the nature of the amendment sought of all parties. It follows therefore that an amendment which will serve the interest of the justice of the case is beneficial to all parties and should be allowed and granted...”

In the instant case, the court is urged to grant this application in the interest of justice. In paragraphs 3, 4 and 5 of the supporting Affidavit. It is averred as follows: -

“3: That there is need to remove paragraph 4(a) of Statement of Defence and Witness Statement on Oath and replace it with a new fact, make paragraphs 4(a) to 4(b), and 4(b) now 4(c).

4. That there is need to incorporate a Counter Claim in the Statement of Defence. The proposed Statement of Defence and Witness Statement on Oath are annexed as Exhibits A1 and A2.

5. That these new facts will assist the Court in reaching in a logical conclusion of the suit."

However in the Claimant's/Respondent's Counter-Affidavit it is averred particularly in paragraph 3 that paragraphs 4, 5, 6 among others of the Applicant's Affidavit in support of the motion are concocted, manipulative and false. In paragraph 3(e) of the Respondent's Counter Affidavit.

It is averred thus:

"Paragraph 4 of the affidavit in support of the application is also strange and a figment of the imagination of the deponent and has nothing to do with my claim before the Court."

Now, the said paragraph 4 mentioned above relates to the issue of the Applicant seeking to bring in a Counter Claim.

And although a Counter Claim is distinct and separate action from the main claim, it is not the law that the Counter Claim sought to be brought in must in any way relate to the Plaintiff's claim.

On this premise, I humbly refer to the case of ***HASSAN V BUNU & ANOR (2019) LPELR – 47746 (CA) per Onyemenam J. C. A at PP 19-21, para A,*** where the Court held thus:

"There are legions of authorities on the meaning and purport of a Counter Claim. See EFFIOM V IRON BAR (2000) 1 NWLR (Pt. 678) 341 where it was held thus: "A Counter Claim is an independent action and it needs not relate to or be in any way connected to the Plaintiff's claim or raise out of the same transaction. It is not even analogous to the Plaintiff's claim. It need not be an action of the same nature as the original claim. A Counter Claim is to be treated for all purposes for which justice requires it to be treated as an independent action...."

In the instant case, i've considered the submissions of the learned Claimant's Counsel that this application seeks to overreach the Claimant who has already closed her case.

Well indeed the Court has taken judicial notice of this fact and the matter was already adjourned for defence when this application was later brought in.

On the meaning of overreaching, the Supreme Court has held in the case of ***IZEJIOBI V EBIGEBU (2016) LPELR – 40507 (CA) per OHO, J.S.C at Page 55 – 56, paragraphs F – C citing the case of NATIONAL INLAND WATERWAYS AUTHORITY V SPDC NIGERIA LTD (2018) LPELR – 1965 (SC) per Tobi JSC*** as follows:

> ***"....Overreaching means to circumvent, outwit or get the better of something by cunning or artifice. It also means to defeat one's object, by going too far. It connotes smartness on the part of a party in the litigation to defeat his opponent by a thoroughly organized plan to frustrate the intention and intendment of the adverse party. An overreaching conduct is an inequitable conduct because it is not fair and just..."***

Now, in the instant case I do agree with the learned Claimant/ Respondent's Counsel that should this Court grant the instant application, the Claimant's case has to start afresh. Amendments to her pleadings will also be made. She will also have to come back to the witness box all over again.

However, although I see it in my humbly view as an inconvenience for the Claimant, I do not regard the Applicant's application as overreaching in any way.

For, it must be re-echoed at this juncture that the purpose of amendment of pleadings is to aid the Court to effectively and effectually resolve issues in controversy in the suit.

Moreover, the rules of this Honourable Court permit amendments under Order 25 Rule 1 (supra).

Nevertheless, in the event that there's an inconvenience forced on the Claimant should the Court grant applications of this nature, the rules of this Honourable Court go further to provide a remedy.

Order 25 Rule 2, of the F.C.T. High Court (Civil Procedure) Rules 2018 provides thus: -

> ***"Application to amend supported by an Affidavit Exhibiting the proposed amendment may be made to the Court and <u>may be allowed upon such terms as to costs or otherwise as may be just.</u>"***

(Underlining mine).

In the circumstances therefore, I find the application to be meritorious. Consequently, the sole issue for determination is hereby resolved in favour of the Defendant/Applicant against the Claimant/Respondent.

In the interest of justice, the application is granted as prayed. However, I order the Defendant/Applicant to pay cost of **₦50, 000.00** to the Claimant/Respondent for filing this application after the close of the Plaintiff's case.

SIGNED

HON. JUSTICE SAMIRAH UMAR BATURE