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

CLERK: CHARITY ONUZULIKE
COURT NO. 15

SUIT NO:FCT/HC/2101/15
M/6748/2020
DATE: 02/02/2021

BETWEEN:

AMBORG GLOBAL RESOURCES LTD……..PLAINTIFF/APPLICANT

AND

WILBAHI ENGINEERING LTD & 1 OR……DEFENDANTS/RESPONDENTS

RULING
(DELIVERED BY HON. JUSTICE S. B. BELGORE)

This application vide Motion number M/6748/2020 brought by the Plaintiff /Applicant sought for a sole relief: to wit;

> *"An order of this Honourable Court admitting/or adopting the record of the proceedings conducted in this case by Late Hon. Justice Valentine Ashi between March 2015 and June 2019 containing the previous testimonies of:*
>
> *(a)Mr. Andrew Chikwelu Nweke*
>
> *(b) Director of Legal Services, Independent Corrupt Practices Commission (ICPC).*

The Motion was brought pursuant to **Section 46** of the **Evidence Act, 2011** (as amended) and under the inherent jurisdiction of Honourable Court.

It was supported by a 5 paragraphed affidavit dated 24th February, 2020 but filed on the 20th March 2020. Attached to the Motion paper is a record of proceedings before My Learned Brother Hon. Justice Valentine Ashi (of blessed memory) and a written address.

In moving the application, the learned Counsel to the Plaintiff/Applicant, Mr. Ikechukwu Uzuegbu told the Court that the 1st Defendant / Respondent did not file any counter-affidavit to their motion. But the 2nd Defendant/Respondent vide a written address in opposition to the grant of this application. He submitted that the cases cited by the 2nd Defendant/Respondent are not applicable. He argued that in those cases, the earlier trial Judge adjourned for Judgment before another Judge now took over. In this case however, according to him, the former Judge had not concluded trial.

He said this case at hand is in its 7th year. If he was to call the witnesses again, they may not be available. He told the Court that Mr. Nweke is outside the Country and may not come back again. And that it was not easy bringing the Director Legal Services of ICPC down to the Court.

For all his arguments, he cited the cases of **R VS. CASTILLO (1996) ICRPPPR 438; EZE VS. ENE (2007) ALL FWLR (PT.361) 1810** in urging the Court to grant his application.

As for the 1st Defendant/Respondent's learned Counsel who was in Court with another application for extension of time within which to respond to the Motion on Notice just moved which was granted by the Court before proceeding to the hearing of the application under consideration.

As for the 2nd Defendant/Respondent's learned Counsel, he submitted that he had filed a written address in opposition to the motion and referred to it as incompetent. He argued further that even if we believe every deposition as contained in the supporting affidavit, the law would not allow this application to flow.

For all the above submission, he relied on the case of **EGHOBAMIEN VS. F.M.B.N (2002) 17 NWLR (PT. 797) 488** and finally he urged the Court to dismiss this application.

I have considered this simple application as well as the arguments of both Counsel.

The focus point in determining and coming to the just resolution of this application is to contrast the provision of **S. 46 of the Evidence Act** under which this application is brought and principle of fair hearing as enshrined in **S. 36 of the Constitution of the Federal Republic of Nigeria 1999 (as amended).**

Section 46 of the Evidence Act 2011 (as amended) provides thus;

> *(1) "Evidence given by a witness in a judicial proceeding, or before any person authorised by law to make it, is admissible for the purpose of proving in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding the truth of the facts which it states, when the witness cannot be called for any of the reasons specified in section*

39, or is kept out of the way by the adverse party. Provided that:

(a) The proceeding was between the same parties or their representatives in interest.

(b) The adverse party in the first proceeding had the right and opportunity to cross-examine; and

(c) The questions in issue were substantially the same in the first as in the second proceeding."

Contrasting the above quoted provision of **S.46 of Evidence Act 2011** (as amended) sharply with the principle of natural justice as provided in **S**. **36 of 1999 Constitution** (as amended), the sole issue formulated by the applicant's learned Counsel for consideration in this application would be answered in the negative. The question or issue is; whether this is an appropriate case for the adoption of the record of a previous proceeding? Why do I say so? The Apex Court when confronted with the same question in the case of **EGHOBAMIEN** (Supra) held thus;

> *"A trial must be conducted by Judge himself and at the end of the hearing, he will write a Judgment which is the authentic decision based on the evidence he received and recorded. It is therefore, a mistrial for one Judge to receive evidence and another to write Judgment on it.*

In the instant case, the Plaintiff had closed his case and the defendants/respondents are expected to open their defence but alas! The learned Judge who heard the evidence and recorded it as presented by the Plaintiff is no more.

Another Judge who did not watch the demeanour of the witnesses of the Plaintiff is now being called upon by this application to adopt the evidence as presented and recorded before my learned brother Hon. Justice Valentine Ashi (of blessed memory) as his own.

The instant case is at the defence stage and the Plaintiff does not want to start the case *de novo* considering the age of the case in Court and the rigour of securing the presence of the witnesses in Court.

It is highly unfortunate, that this is the situation but there is nothing I can do about it. The position of law is undoubtedly clear as stated above and reaffirmed by the Apex Court again in the recent case of **OLAYIOYE VS. OYELARAN (2019) 4 NWLR (PT. 1662) 351.** PER **PETER ODILI JSC** held as follows;

> *"……..A number of local decisions of our Courts pointedly endorse the postulation that a Judge who did not conduct either the entire or part trial cannot write and/or express a Judgement predicated on the evidence he did not hear. A decision by a Judge who did not participate in the hearing proceedings is a nullity."*

Perhaps I must dwell on the precise meaning or interpretation or purport of the provisions of **S. 39 & S.46 of the EvidenceAct**.

The provision does not say the Court can adopt the evidence of a witness in a previous proceeding hook, line and sinker for purposes of judgment by a later *Judex* in a previous proceeding. The provisions merely provides, in my view, that fact of statements, oral or written by a person of a relevant fact or facts in issue when the person is dead, or cannot be found or subsequently becomes incapable of giving evidence or when his attendance cannot be procured without an amount of delay or expenses which under the circumstances of the case appears to the Court unreasonable would be admissible in the same procedure between the same parties. For example,if it gave evidence before Judge X in a proceeding.if A dies,his evidence can be taken before the Court in the same proceeding before another Judge in the same proceeding or narrated to the other Court by another person.

It is not that another Judex who did not receive the evidence in court can just merely adopt the previous record and take a decision on it.

Furthermore, S.46 of the Evidence Act did not provide for adoption of such evidence in previous proceeding. Such fact as evidence of what happened in the previous proceedings must be received in evidence formally and as the truth of what happened in previous proceedings before the Judge in subsequent proceeding can act on it. And that is having regard to the provision in S. 46 of Evidence Act and the reasons stated in 39 of the same Evidence Act.

It is for the above reasons that I am in complete agreement with the submission of the learned Counsel to the 2nd Defendant/Respondent that, I cannot embark on the voyage of discovery or adventure the applicant wants the Court to embark upon. The Apex Court said I cannot do it.

Therefore, this application in my humble opinion and in the light of Supreme Court decisions that I hold that this application is incompetent and it is hereby dismissed.

The proper procedure is to commence the hearing of this matter *de novo.*

…….
S. B. Belgore
(Judge) 2-2-2021.