THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY
HOLDEN AT ABUJA

THIS WEDNESDAY, THE 23RD DAY OF JUNE, 2021

BEFORE: HON. JUSTICE ABUBAKAR IDRIS KUTIGI – JUDGE

SUIT NO: FCT/HC/CV/43/17
MOTION NO: GWD/M/58/2021

BETWEEN:

MR MARKUS APMATOZON .....PLAINTIFF/APPLICANT
(Suing for himself and on Behalf of Jankaro Family)

AND

JUST UNIQUE BOUTIQUE LIMITED .....DEFENDANT/RESPONDENT

RULING

By a motion on notice dated 12th February, 2021, the Plaintiff/Applicant seeks for the following Reliefs:

1. **An Order of the Honourable Court granting leave to the Plaintiff to substitute the Plaintiff Markus Apmatozon in this suit who is deceased with his son Daniel Markus Apmatozon of Kabusa Village, Abuja Municipal Area Council of the Federal Capital Territory, Abuja.**

2. **An Order of this Honourable Court substituting Markus Apmatozon the plaintiff in this suit who is now deceased, with his son Daniel Markus Apmatozon of Kabusa Village, Abuja Municipal Area Council of the Federal Capital Territory, Abuja.**

3. **And for such further order(s) as this Honourable Court may deem fit to make in the circumstances.**

<u>GROUNDS FOR THE APPLICATION</u>:

1. **The proceedings of this matter shall not abate by reason of the death of the Plaintiff since the cause of action survives by devolution of title pendent lite as the issues of facts and judgment in this case can be entered notwithstanding the death of the Plaintiff.**

2. **The prompt and diligent prosecution of this suit will be frustrated unless this application is granted.**

In support of the application is a six (6) paragraphs affidavit. A brief written address was filed in which one issue was raised as arising for determination as follows:

"Whether the Plaintiff/Applicant is entitled to the grant of his Application for the survival of this action"

It was submitted relying on the provisions of **Order 13 Rules 30 and 31 of the FCT Rules of Court** and the affidavit in support that facts have been supplied to allow for the substitution of the deceased (who sued for himself and on behalf of the Kalawa Jankoro family) with his son since the cause of actions which substantially is for claim for title, possession and compensation survives the deceased.

At the hearing, counsel to the Plaintiff/Applicant relied on the paragraphs of the affidavit and adopted the submissions in the written address and urged the court o grant the Application.

In opposition, the Defendant/Respondent filed a thirteen (13) paragraphs counter-affidavit and equally filed a brief written address in compliance with the Rules of Court in which one issue was raised as arising for determination, to wit:

"Whether the said application to substitute the claimant as it is presently brought before the court is meritorious and ought to be granted."

The basis of the opposition is simply that the Applicant has not put any material before the court by way of a death certificate or an obituary poster or flier or some

document showing the death of original plaintiff to allow the court grant the application. It was also submitted that nothing was put forward before the court like a will to show any link between the deceased and the party seeking to substitute him.

At the hearing, counsel to the Respondent relied on the paragraphs of the counter-affidavit and adopted the submissions in the written address in urging the court to grant the Application.

I have carefully considered the processes and submissions made on both sides of the aisle and the narrow issue is simply whether the court should grant the application to substitute the plaintiff who is now said to be deceased?

Now a convenient starting point is to situate the foundational premise of the entire action and then explain the import of a representative action. By a writ of summons and statement of claim dated 17th May, 2017, the plaintiff commenced this action in a representative capacity suing for himself and on behalf of the **Kalawa Jankaro family**. The substance of the reliefs sought bother on claim of title, trespass, injunction and damages for trespass.

Now our Rules of Court under **Order 13 Rule 1** and **Order 14 Rules (1)** and **(2)** provides for the filing of this type of representative action where more persons than one have the same interest in a suit. In such situation, one or more of such persons may be authorised by the other persons to sue or defend the suit on their behalf and or for the benefit of all. It is a salutary and common sence provision, for where the parties are numerous, it will be cumbersome if every interested person is made a party and indeed the job of adjudication will be much more difficult if everyone interested has to be named on the writ as a party. Thus, given a common interest or grievance as reflected on the extant writ by the Kalawo Jankaro family, a representative action was in Order as the reliefs sought are beneficial to all the persons represented by Mr. Markus Apmatozon. See **Durbar Hotel Plc V Ityough (2011) 9 NWLR (pt.1251) 41; Atanda V Olanrewaju (1988) 4 NWLR (pt.89) 394**.

It is important to equally point out that in law an Action based on personal right(s) of the deceased dies with him and is not transmissible. In determining whether an action is a personal right or whether it survives a party, the nature of the action or

the capacity in which the party sued or was sued must be considered. If the party sued or was sued in a representative capacity, the right of action survives the death of such a person and others who have an interest in the subject matter can apply to substitute the deceased party. See **Incorporated Trustees of Jamatul Muslim Council of Lagos A.K.A. Lagos Central Mosque V Hon. Chief T.A. Bankole Oki (SAN) (2010) 1 NWLR (pt.1176) 616 at 624 E-H**.

In this case, I have already situated above the action or the case filed by the deceased which is clearly not personal and therefore transmissible and he also clearly filed the action in a **representative capacity** for himself and on behalf of the entire **Kalawo Jankaro family**. In the circumstances, any member of the family can apply to substitute the deceased party.

On the materials before the court, Mr. Markus Apmatozon is said to be now deceased and his son, Daniel Markus Apmatozon has been put forward to replace or substitute him.

The Respondent has contended firstly, that the death of Markus Apmatozon has not been established in that no death certificate or any document showing his death was attached. Secondly that there is nothing showing any link or nexus between the deceased and the person who is to substitute him.

The starting point here is that the defendant, a corporate body is obviously not a member of the **Kalawo Jankaro family**. Therefore if Mr. Markus Apmatozon is deceased, they the family are certainly in a better position to say so. I agree that a death certificate is helpful but it is not decisive in the circumstances. The defendant is certainly in no position to say that Mr. Markus Apmatozon is alive or that he is not deceased; the question then is what have they put forward to impugn or controvert the death of the deceased? Absolutely nothing. They submit that the court should not speculate but the challenge they have made here is wholly on bare speculations. The deposition on the death of Markus Apmatozon clearly has not been contradicted or challenged beyond speculative posturing by defendant and is deemed to be correct. See **Kotoye V Saraki (1993) 5 NWLR (pt.296) 710 at 723 H.**

The contention that there has to be evidence of link between the deceased and the person seeking to substitute him before the order for substitution can be made

clearly has no legal basis. Again it is not for defendant to demand for any evidence. Indeed they cannot in law demand for any evidence of any link or authorization before anybody from the Kalawo Jankaro family can apply to substitute the deceased as earlier demonstrated.

The point to underscore is that it is only a member of a group; family or community who can dispute, intervene or challenge the proper representation or the capacity in which a plaintiff or plaintiffs sue. The defendant, a corporate body is not a member of the Kalawo Jankaro family. Indeed they have on the materials not made any pretentions to been part of the family, so the logical question is this: What is really their business on how or who the family chooses to present or defend its common interest over the disputed plot against defendant? I just wonder. I think the defendant should as is said in popular parlance mind its business.

Indeed in law, it would even be futile for a defendant who is not one of those the plaintiff(s) purport to represent to challenge the plaintiffs' authority to represent the family because if the plaintiffs win, the losing party cannot share in the victory and if the plaintiffs case is dismissed, such dismissal can never affect the defendant adversely. See **Durbar Hotel Plc V Ityough (supra) 41; Shell Petroleum Dev. Co. Nig. Ltd V Edalkue (2009) 14 NWLR (pt.1160) 1**. The objections of the defendant will in the circumstances not fly and shall be discountenanced.

As I round up, it is important I call on counsel on both sides to now act post haste and ensure this drawn out case is determined with the minimum of delay. Counsel should all remember that this is a transferred matter filed as far back as 2017. It cannot be right or fair that four years later, so much time has been taken by needless interlocutory applications and the substantive action to be determined on fairly settled principles has been sidelined completely. I say no more.

On the whole, the application has considerable merit and is granted and ordered as prayed. The plaintiff/applicant should amend the originating process forthwith reflecting the substitution and same be served on defendant. The matter will be granted accelerated hearing.

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Hon. Justice A.I. Kutigi

Appearances:

1. **P.I. Okoh, Esq., for the Plaintiff/Applicant.**

2. **Iorker Daniel, Esq., for the Defendant/Respondent.**