IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT MAITAMA-ABUJA
ON 20TH DAY OF OCTOBER 2021

BEFORE HIS LORDSHIP HON. JUSTICE CHIZOBA N. OJI
PRESIDING JUDGE

SUIT NO: FCT/HC/CV/1332/13
MOTION NO: M/9153/2020

BETWEEN:

1. **MURSEL GULSEN**
   (Suing through his Attorney
   Mohammed Bawa Gummi) } **PLAINTIFFS**
2. **AK-AY ELEKTRIK NIGERIA LIMITED**

AND

BONIFACE IKECHUKWU IFESIE …… DEFENDANT

APPEARANCES:
GODWIN SUNDAY OGBOJI ESQ. FOR THE PLAINTIFFS.
S.C PETERS ESQ. FOR THE DEFENDANT.

RULING

By a motion on notice no M/7404/2020 filed on 8th June 2020 the Plaintiffs/Applicants seek:

> "1. An order of court granting leave to the Plaintiffs/Applicants to amend their statement of claim to bring the pleadings in line with evidence already before the court by reflecting the amendment as shown in the underlined portions on the proposed Amended Statement of Claim attached as Exhibit "A" and to reopen their case.
>
> 2. And for such further or other order(s) as this Honourable Court may deem to make in the circumstances of this case."

The application is supported by an 11 paragraph affidavit deposed to by Paul Timothy – Litigation Secretary in the law firm of Godwin Sunday Ogboji & Co, counsel to the Plaintiffs/Applications to which the proposed Amended Statement of Claim marked Exhibit "A" is attached. Also filed was learned counsel's written address.

The Defendant in opposition to the application on 15th June 2020 filed an 11 paragraph counter affidavit deposed to by the Defendant himself to which Exhibits A, B and C are attached.
Also filed was counsel's written address.
In response thereto, the Plaintiffs/Applicants filed a 13 paragraph further and better affidavit deposed to by Samuel Akpenpuun, counsel in Ogboji & Co. with a reply on point of law on 25th September, 2020.

At the hearing of the application Mr Godwin Sunday Ogboji for the Plaintiffs/Applicants submitted that their application is aimed at aligning pleadings with evidence led at trial, and that even though parties have closed their respective cases, that an amendment will still be allowed to bring the pleadings in alignment with the evidence on record.

He urged that by virtue of Order 52 Rule 13 of the Rules of this court, the court can order the reopening of the Plaintiffs' case in the interest of substantial justice in the matter.

Reliance was placed on Order 25 Rules 1, 2, 3 and 8, Rules of this court, **DIAMOND BANK LTD V UGOCHUKWU (2007) ALL FWLR (384) 290 AT 298, RATIO 15, COMPAGANIE GENERALE DE GEOPHYSIQUE (NIG) LTD V JUMBO IDORENYIN (2015) ALL FWLR PT 804 PAGE 209 @ 2111**. He prayed that their application be granted.

Mr S.C. Peters adopting the written address of E.J. Ayinmode Esq. for the Defendant vehemently opposed the application.

He argued that the Plaintiffs/Applicants did not comply with Order 25 Rules 3 of the Rules of this court by failing to file the list of any additional

witness, written statement on oath and copy of any document to be relied upon to enable the court exercise its discretion in their favour. Citing **NWADINOBI V MCC (NIG) LTD (2016) 1 NWLR (PT 1494) PAGE 427 AT 451 PARAGRAPH C-E,** decided on similar provisions in the High Court of Rivers State (Civil Procedure) Rules 2010. He urged that the application is incompetent.

He further argued that the Plaintiffs did not place before the court via their affidavits the evidence led during the trial for which they seek the amendment, rather the Plaintiffs want to bring in new facts to the detriment of the Defendant who can no longer react to these new facts.

He urged that an amendment sought at this stage of proceedings in bad faith and to overreach the Defendant should not be allowed.

See **C.G.G (NIG) LTD V IDORENYIN (2015) 13 NWLR (PT 1475) PG 149 AT 165 – 167 PARAGRA E-B; JONASON TRIANGLE LTD V C.M & PARTNERS LTD (1999) I NWLR PAGE 555 AT 570 PARAGRAPH F-H**.

Finally it was argued that this application is an abuse of court process, the Plaintiffs having filed an appeal against the court's ruling rejecting their documents, which same documents the Plaintiffs now seek to bring in by this amendment whilst their appeal is still pending. Thus using two processes to achieve the same purpose, simultaneously. See **LOKPOBIRI V OGOLA (2016) 13 NWLR (PT 1499) 328 AT PP 383-384 PARAS H-G.** The court was urged to dismiss the application.

In his reply on point of law Mr Ogboji on Order 25 argued that they do not need to file a list of additional witness or witness statement an oath as the evidence is already before the court.
That they intend to subpoena the bank to produce documents and they do not know who the bank will send.
Regarding frontloading, he submitted that the documents are with the bank while the secondary documents are with the Respondent.

The issue before the court is whether the Plaintiffs/Applicants are entitled to the grant of this application for amendment brought at the final address stage of this case.

This application was brought, inter alia, pursuant to Order 25 Rules 1, 2, 3 and 8 and Order 52 Rule 13 of the Rules of this court.
Order 25 Rules 1, 3 and 8 provide:-

> ***"1. A party may amend his originating process and pleading at any time before the pre-trial conference and not more than twice during the trial but before the close of the case."***
>
> ***3. Where any originating process of a pleading is to be amended a list of additional witness to be called with his written statement on oath and a copy of any document to be relied upon on such amendment shall be filed with the application.***
>
> ***8. Subject to the provision of Rule 1 of this order, the court may at any time and on such terms as to cost or otherwise as may be just, amend any defect or error in any proceedings."*** **(Emphasis mine)**

Order 25 Rules 1 and 8 on which Mr Ogboji relies on for this application presupposes that any amendment to originating processes and pleadings may be done before the close of the case.
In the instant case, Mr Ogboji proposes an amendment of his originating process after the close of the case of the parties – precisely at the point of adoption of final written address to bring in facts and documents that were not properly pleaded even though the evidence on same is already before the court.

At the same time the Plaintiffs/Applicants seek to reopen their case.
The question is, if these facts and documents are already before the court, why is there need to reopen the case of the Plaintiffs to tender "material facts and documents" again. Wouldn't an amendment of pleadings have been sufficient?

It will be recalled that the Plaintiffs/Applicants earlier tried to tender certified true copies of private documents through counsel from the bar, during the cross examination of DW1.

The court rejected the documents for reasons stated in the Ruling of 12th April 2019 and marked the documents 'rejected'.
Mr Ogboji filed an appeal to the Court of Appeal to set aside the Ruling of 12th April 2019 and to order this court to admit the documents. The Appeal is still pending at the Court of Appeal.

It is clearly still for the said documents that the Plaintiffs/Applicants seek an amendment to enable them tender same in evidence.

I agree with Mr Peters that this application in an abuse of court process for the simple reason that Mr Ogboji is trying to use it and his pending appeal to achieve the same purpose simultaneously.

While it is true that amendment of pleadings may be allowed at any stage of trial, different considerations apply depending on what stage of proceedings the amendment is sought.

Amendment of pleadings after the close of the case will only be allowed where evidence in support of the amendment is already on record, so as to enable the court use the evidence already on record. See **COMPAGNIE GENERAL DE GEOPHYSIQUE NIG LTD V JUMBO IDORENYIN** supra cited by Mr Ogboji.

The fact that Mr Ogboji requires to put in a witness to bring in material facts and documents (see paragraph 5 of the affidavit in support of the application) shows that this application is not required to bring pleadings in line with evidence on record but to enable the Plaintiffs introduce new facts and lead new evidence.

Again the Plaintiffs/Applicants neglected to file a list of any additional witness to be called, with the written statement on oath and a copy of any document to be relied upon, along with the application.

He kept the court in the dark? Why? When the Rules of court are very clear. How does he then expect the court to exercise its discretion in his favour when he has not placed sufficient materials before the court?
I think it is because it is the same documents earlier rejected by the court he seeks to bring.

Indeed Mr Ogboji stated so himself in his arguments on this application when he stated that the court rejected the certified true copy of the document so he now seeks to bring in the originals of the same documents.

I do not buy his argument that they do not need to file witness statement on oath or supply the list of documents. Clearly what Mr Ogboji seeks to do is an abuse of court process.

In **ITA V EKPEYONG (2000) LPELR 5614 CA –** on effect of document rejected in evidence at page 39 paragraph C-F Simeon Osuji Ekpe JCA had this to say:-

> ***"Furthermore, the purchase agreement having been rejected and marked 'rejected' by the court below, the application for leave to amend the statement of defence whereby the purchase agreement was then pleaded for the sole purpose of reintroducing it at the trial for admission in evidence seems to me to constitute an abuse of process of the court. It has been decided by this court that a document which is marked rejected when tendered in evidence cannot subsequently be tendered and admitted in evidence as an exhibit in the case. It cannot be made use of as it has no value. So OYETUNJI V AKANNI (1986) 5 NWLR (PT 42) 461 AT 470; AGBAJO V ADIGUN (1993) 1 NWLR (PT 269) at 272…"***

In that case the application for amendment was brought by the Defendants/Appellants at the final address stage after parties had closed their respective cases.

From the proposed amended statement of defence, it was obvious that the purpose of the amendment sought was to:

1) Amend the statement of defence by adding paragraph 11A thereto and pleading a photocopy of the purchase agreement the original copy of which had been earlier tendered in evidence and rejected by the court and marked 'rejected'.
2) Substitute a new paragraph 14 for the existing paragraph 14 of the statement of defence.
3) Add a new paragraph 15 and thereby introduce a new defence of laches and acquiescence.

On their guiding principles distilled from the decided cases on amendment of pleadings.

The court held that a court ought to refuse an application for amendment where:-

1) It is made male fide
2) It would cause unnecessary delay
3) It will in any way unfairly prejudice the opposite party
4) It is quite irrelevant, useless or immaterial
5) It will entail injustice to the respondent
6) By his blunder the applicant has done some injury to the respondent which, cannot be compensated by costs or otherwise
7) It would only and merely raise technical issues

The Court of Appeal held that the refusal of the application for amendment by the trial court was proper because the application was brought in bad faith and in abuse of the process of the court because the application if granted would have had the effect of admitting in evidence the purchase agreement that had been earlier tendered and rejected, a situation stressed against in **BELLO V GOVERNOR OF KOGI STATE (1992) 9 NWLR (PT 521) 496 AT 501** thus:-

> ***"A document once tendered and rejected, stands rejected. It is therefore not for any of the parties to start perfecting any imperfections thereon, thereby facilitating its easy acceptance as an exhibit in the same proceedings."***

Secondly, the amendment sought to bring in a new defence when parties had closed their respective cases, which would result in prejudice, injury and overreaching to the opposite party which cannot be compensated by costs.

It would also cause further delay arising from consequential amendment of the pleading of the opposite party, followed by fresh evidence for the parties and fresh addresses by the counsel for the parties before the eventual determination of the case.

Again the Plaintiffs intend to call fresh witnesses at this stage of proceedings.

In **CCG NIG LTD V IDORENYIN (2015) LPELR – 24685 (SC) @ PAGE 29 PARA A-B** Mary Ukaego Peter-Odili JSC held that:-

> ***"An amendment which will entail calling of fresh witnesses where both parties have closed their case will certainly not serve the course for justice because any further delay will certainly defeat the very purpose thereof."***

Having stated the above, I hold that the Plaintiffs are not entitled to a grant of the application for amendment sought. It is an abuse of court process and intended to afford the Plaintiffs an opportunity to reopen their case.

Accordingly the application is dismissed.

Hon. Judge

Peters: We shall be asking for costs. We filed papers. We ask for costs of ₦100,000. We have spent more than that.

Court: Is the appeal still pending?
Ogboji: Our appeal is still pending
We do not concede costs because parties have the right to exercise their right to amendment which we thought we had. That our application was refused is enough punishment. We pray no costs be awarded.
Peters: No party has any right to abuse the process of the court against his opponent's right of having the suit before the court adjudicated timeously. Blunders are expected in litigation but they are punished with costs.
Court: I have ruled that the Plaintiffs/Applicants' application is an abuse of court process.
I award costs of ₦10,000 against the Plaintiffs/Applicants in favour of the Defendant.

Hon. Judge