IN THE HIGH COURT OF JUSTICE
FEDERAL CAPITAL TERRITORY OF NIGERIA
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT APO – ABUJA
ON, 7TH DAY OF OCTOBER, 2021.
BEFORE HIS LORDSHIP:- HON. JUSTICE A. O. OTALUKA.

SUIT NO.:-FCT/HC/CV/3237/2017
MOTION NO.:-FCT/HC/M/3147/2021

BETWEEN:
EDMONTON CONSULTS LTD:…..CLAIMANT/APPLICANT

AND

ATISALAT GLOBAL RESOURCES LTD:……..DEFENDANT/ RESPONDENT

Abel O. Ezeagwunafor the Claimant.
Aboje S. Ataguba with Onomelgwen for the Defendant.

RULING.

By this Motion on Notice dated and filed the 26th day of March, 2021, the Claimant/Applicant prays this Court for the following reliefs;

1. An Order of this honourable Court granting leave to the Claimant/Applicant to recall PW1 in this suit.
2. An such further or other order(s) as this honourable court may deem fit and proper to make in the circumstances of this suit.

In its supporting affidavit deposed to by its Managing Director, Chief IfeatuUzowulu, the Claimant/Applicant averred that it desires the leave of this court to recall the PW1 on record to prove a material fact by tendering the certificate of registration of the company. It averred that the said certificate of incorporation was misplaced while in custody of its legal

counsel but has now been found, hence this application to enable the court do substantial justice to the case.

In his written address in support of the motion on notice, learned Claimant/Applicant's counsel, OnyemaechiA. Ezeagwuta, Esq, submitted a sole issue for determination, to wit;

> ***"With the entire circumstances of this case taken into consideration, whether or not the Applicant isentitled to the grant of the reliefs sought in this application by this honourable court?"***

Arguing the issue so raised, learned counsel posited that the essence of this application is the invocation of the discretionary powers of thiscourt, whichdiscretion, this court has severally been enjoined by the superior courts, to exercise judicially and judiciously, taking into account all the materials the Claimant/Applicant has placed before the court.

He contended that the Claimant/Applicant has placed sufficient materials before this court to warrant the grant of this application.

He referred to **N.I.W.A. v. S.P.D.C. (Nig) Ltd (2008) All FWLR (Pt.443) 1402 at 1416, H.A. Willoughby v. International Merchant Bank Nig. Ltd. (1987) 1 SCNJ 1 at 161.**

Arguing that the document sought to be tendered by the Claimant was pleaded in its statement of claim, he submitted, relying on **O.M.P.A.D.E.C. v. DalekNig. Ltd (2003) FWLR (Pt.140)1949,** that once a document ispleaded, an application to tender same, even after close of a party's case should be granted.

He further relied on **Oloba v. Akereja (1992) 2 NSCC 120 at 136,** to posit that courts are enjoined to do substantial justice as against technicalities.

He urged the court to grant the application in the overall interest of justice.

Following the filing of counter affidavit in opposition to the application by the Defendant, the Claimant/Applicant filed a 5 paragraphs further affidavit and Reply on points of law.

In the further affidavit deposed to by one Joy Ashia, the Claimant/Applicant averred that this application is not misleading and that same will not engender delay as the Claimant/Applicant's final written address has been filed and served in the Defendant/Respondent. Furthermore, that the document in question is not a fresh fact and that the grant of this application will not prejudice the Defendant/Respondent or occasion miscarriage of justice.

Replying on points of law to the Defendant/Respondent's counter affidavit, the Claimant/Applicant submitted that it is a trite law that whenever a party to an action has detected an error in the proceeding which if uncorrected, will adversely affect his chances, and has by application made effort to correct such errors; that the principles of justice demand that he should not be denied the opportunity to do so. She referred to**Odie v. Fawehinmi (2006) All FWLR (Pt.301) 1848 at 1868, NALSA & Team Associates v. NNPC (1961) 6 LRCN 1973 at 1996.**

Placing reliance on **FAMFA Oil Ltd v. AGF (2008)11 MJSC 66,**the Claimant/Applicant further submitted that the law is trite that courts of law should not be unduly tied down by

technicalities, particularly where no miscarriage of justice would be occasioned. That justice can only be done in substance.

The Claimant/Applicant further submitted, with reliance on **Omoregbe v. Lawani (1980) 3-4 SC 108,** that the court has unbridled power to recall any witness so as to arrive at the justice of the case.

The Applicant urged the court in conclusion, to resolve the issue in favour of the Claimant/Applicant and grant the application so that justice in its real sense will be undoubtedly seen to be done.

In opposition to the application, the Defendant/Respondent filed a 3 paragraphs counter affidavit deposed to by one Friday Okpetu, litigation clerk in the law firm of A & G Solomon, counsel to the Defendant/Respondent.

He averred that paragraph 2(b-d) of the affidavit in support of the motion on notice is untenable as the Claimant/Applicant never brought this fact to the attention of the court in the course of the proceedings before the court.

The Defendant averred that the witness which the Claimant/Applicant seeks to recall has testified as PW1 and had the opportunity to adduce evidence as to the juristic personality of the Claimant and its locus standi, but failed to do so. That this application is an afterthought and that the relief sought is designed to overreach the issue raised in the Defendant's final written address on the Claimant's locus standi to institute this suit.

Furthermore, the Defendant/Respondent averred that the Claimant/Applicant had filed a similar application with Motion No. M/8523/2020 dated 10/7/2020 to amend its statement of

Claim and call a fresh witness, which application was dismissed by the court with cost of N10,000.00.

That the Applicant is in contempt of court, having failed to pay the cost awarded and that this application is an attempt to circumvent the ruling of the court striking out the said Motion No.M/8523/2020. Also, that the grant of this application will greatly prejudice the Defendant/Respondent as well as unjustly delay this matter as the parties have concluded their cases.

The learned Defendant/Respondent's counsel, E.T. Ugela, Esq., in his written address in support of the counter affidavit, submitted a sole issue for determination, to wit;

> ***"Whether it is equitable to grant the relief sought by the Applicant in this Motion?"***

Proffering arguments on the issue so raised, learned counsel posited that the grant of this application will amount to overreaching the Defendant as parties have closed their cases, final written addresses filed and exchanged between the parties and the matter slated for the adoption of the addresses.

Relying on **Durbar Hotel v. Kasaba United Ltd (2017) 2 NWLR (Pt.1549) 321** and **Onwuka v. Owolewa (2001) 7 NWLR (Pt. 713) 695,** he posited that a party applying to recall a witness must supply the court with sufficient facts relating to why the witness should be recalled and what he intends to put to the witness. He argued that the Applicant in this application has not placed sufficient facts that will warrant the grant of this application before the court.

He contended that the document which the Applicant is proposing to tender through the witness sought to be recalled is a public document which certified true copy is admissible in evidence. That theClaimant/Applicant ought to have applied for

the certified true copy of same and tendered it is evidence before the close of evidence by the parties.

The learned counsel posited that the crux of the Defendant's objection to this application is that if same is granted, it would overreach the issue one raised by the Defendant in its final written address already filed and served on the Claimant. That if the application is granted, the witness would have to be cross examined and the final written address already filed and served would have to be amended to take care of the new facts. He submitted that there must be an end to litigation.

He further posited that when the onus is placed upon a party to present andprove his case, the party must present all the documents relevant to his case and adduce all his evidence and may not be allowed after close of case to adduce additional evidence to strengthen his case. He referred to **EdeaniUwaiwu&Ors v. Chief Patrick Okoye&Ors(2009) All FWLR (Pt.451) 815.**

He argued that this application is an afterthought as the issue of juristic personality was raised in the Defendant's final written address, and that by this application, the Applicant seeks to adduce additional evidence to strengthen its case.

He contended further that this application, by all standards, is merely frivolous and vexatious in view of the fact that same was made after close of evidence by the parties.

He submitted that by the authority of **Chukwuma v. F.R.N. (2011) 13 NWLR (Pt.1246)SC 391 at 413,** after close of a case, no further evidence ought to be given by any of the parties. That once parties have closed their respective cases, an application to recall a witness to testify can only be granted if the adversary does not oppose same.

He urged the court in conclusion, to dismiss this application with heavy cost as same is lacking in merit.

What the Court would consider in the grant or refusal of application to recall a witness to tender a document that was pleaded.

It is a fact of unquestionable notoriety that the court of law is a court of justice. Justice is the fulcrum of every judicial proceeding.Therefore, in allapplications and cases before the court, the interest of justice; substantial justice, is paramount. That is no different with regards to the instant application.

In **Odu v. Duke &Anor (2004) LPELR-5335(CA)** the Court of Appeal, per Dongbam-Mensem, JCA, held thus:

> ***"The current trend in judicial circle is the doing of substantial justice. Efforts must be geared towards upholding the rights of individuals without sacrificing the general interest."***

On the desirability of substantial justice, the Supreme Court, per Tobi, JSC, held in**Omoju v. F.R.N. (2008) All FWLR (pt.415) 1656 at 1671-1672,** thus;

> ***"Substantial justice which is actual and concrete justice, is justice personified. It is secreted in the elbows of cordial and fair jurisprudence with a human face and understanding. It is excellent to follow it in our law. It pays to follow it as it brings invaluable dividends in any legal system anchored or predicated on the rule of law, the life blood of democracy."***

In the consideration of this application therefore, this court will be guided by the imperative of doing substantial justice.

The Applicant in this application, seeks the leave of court to recall the PW1. This sort of application is not granted as a matter of course. The fundamental consideration is the interest of justice.

In **Eleko v. Olokunboro,** unreported Court of Appeal case in Suit No. FCA/B/9/78, the Court of Appeal, per Agbaje, JCA, held thus;

> ***"We are of view that where an application is made to a judge in the course of trial of a civil case to recall a witness who had already given evidence, the overriding factor in the consideration of the application is whether or not the interest of justice require that the application should be granted. In otherwords, an application by a party to recall a witness who had already given evidence should succeed where the interest of justice require it."***

On what a party seeking to have a witness recalled must establish before the court can exercise its discretion in his favour, the Court of Appeal, per Rhodes-Vivour, JCA, held in **Musa v. Dalwa (2010) LPELR-9154 (CA),** thus:

> ***"… a party seeking to have a witness recalled must:-***
>
> ***(a) Supply the court with good enough facts as to why he wants the witness recalled.***
> ***(b) What question he intends to ask the witness.***
>
> ***It is only on (a) and (b) that the trial Judge can exercise his discretion to grant the application."***

In the instant application, the Claimant/Applicant stated that the reason for seeking to recall PW1 is to enable it tender the certificate of incorporation of the Applicant which was in the custody of its counsel where it was misplaced but has now

been found. I refer to paragraph 2(a),(b),(c) &(d) of the affidavit in support of this application.

To my mind, this is sufficient fact to warrant the exercise of the discretion of this court in favour of the grant of this application, particularly as it is trite law that the sin of counsel should not be visited on the litigant.

It is noteworthy that the facts of registration of the Applicant with the Corporate Affairs Commission as a limited liability company was pleaded by the Claimant in paragraph 1 of its amended statement of claim and the PW1 gave evidence on same in paragraph 2 of his witness statement on oath. Therefore, the document which the Applicant seeks to tender through the witness which it proposes to recall, will merely support averments in the pleadings and testimony already in evidence before the court.

However, the parties at this point have closed their respective cases. In situations where parties have closed their cases before an application to recall a witness is made, the success of the application ordinarily depends on the consent of the adverse party. An objection from the adverse party, as in this case, could defeat the application.

In **Nebo v. F.C.D.A &Anor (1998) LPELR-6460 (CA),** the Court of Appeal, per Ejiwunmi JCA, held thus;

> ***"In Ojiegbe&Anor v. Ubani&Anor (1961) All WLR 277 at 280; (1961) 1 SCNLR 389 at 393. In that case, after the case on either side had been closed, the petitioner's counsel sought to recall a witness to put a document in evidence. The other side objected. The court ruled that the witness cannot be recalled without the other side consenting to it. On appeal to the***

Supreme Court, Ademola, C.J.F. (as he then was) upholding the ruling of the lower court at page 280, said:-

"This appears to be the correct practice and I fail to see how this can be regarded as a refusal to admit a document in evidence."

It would appear then that a party seeking to re-open his case after the case on either side had been closed would require the consent of the other party to the action. In the absence of such a consent, the party seeking to have his case reopened in such circumstance would then have to depend on the exercise of the discretionary power of the court to do so."

What is apparent from the above case is that the refusal of consent by the adverse party does not ipso facto result in the death of the application to recall a witness after both sides had closed their cases. Where the adverse party objects to the application, the discretionary power of the court in such circumstance,is not circumscribed by such objection. The Court could still exercise its discretionary power in favour of the grant of the application depending on where the interest of justice lies in the particular case.

For the interest of justice, the grant of this application, in my considered view, will not occasion a miscarriage of justice, neither will it overreach the Defendant/Respondent, contrary to its contention. This is particularly so as the facts which the proposed document seeks to support are already before this court as stated earlier in this ruling.

On the contrary, the grant of the instant application will ensure that substantial justice is done to the parties.

Litigation is not a game of hide and seek, and as ministers in the temple of justice, it behoves counsel on either side to aid the court in doing substantial justice by laying all their cards on the table, and not to attempt to frustrate steps that could lead to doing substantial justice to the parties.

It is also worthy of note that the motion No.M/8523/2020 was not an application for the recall of witness as alleged by the Defendant/Respondent. Rather, it was an application for joinder of parties and for consequential amendment which this Court in a considered ruling dismissed for lack of merit. The contention by the Defendant/Respondent that the instant application is similar to the Motion No.M/8523/2020, is therefore misconceived and by paragraph 3(j) & (k) the Claimant/Applicant averred that the N10,000.00(Ten Thousand Naira) cost had been paid.

Accordingly therefore, this application succeeds, and in the exercise of the discretionary powers of this court, this court orders as follows:

1. Pursuant to the omnibus prayer in relief 2, an order is made reopening the case of the Claimant/Applicant.
2. Leave is granted to the Claimant/Applicant to recall PW1 in this suit for the purposes of tendering the Certificate of Incorporation of the Claimant/Applicant.
3. No cost awarded.

HON. JUSTICE A. O. OTALUKA
7/10/2021.