

IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY

IN THE ABUJA JUDICIAL DIVISION

HOLDEN AT, ABUJA

BEFORE HIS LORDSHIP: HON. JUSTICE MUHAMMAD S. IDRIS

COURT: 28

Date:- 29TH MARCH, 2022

FCT/HC/CV/384/2016

BETWEEN:

**ISAAC A. ANDOMA-----
(Suing through his authorized attorney
EXPERIMA CENTURY NIGERIA LTD)**

PLAINTIFF/RESPONDENT

AND

**1. ADAMU YAKUBU KUBARACHI }
2. M.B. YAHAYA }
3. WOODROCK INT'L LIMITED }**

DEFENDANTS/APPLICANTS

RULING

The Applicants filed this Notice of Preliminary Objection dated 11th November, ,2020 on 16th November,2020 seeking the court for an order dismissing the Motion on Notice No. M/8169/2020 filed on 17th February, 2020 by the Plaintiff/Respondent. The preliminary objection was supported by a 26-paragraph affidavit deposed to by one Ikechukwu Maduikwe, a Counsel in the law firm of the Applicant's counsel. The ground of the Applicant's Notice of preliminary objection is that the Court lacks jurisdiction to entertain the motion on notice in the light of the two (2) appeals

pending on this suit before the Court of Appeal-Abuja Division. Appeal No. CA/A/396/2018 and Appeal No. CA/A/396/M/2018, as well as a pending Application for leave to appeal as interested parties against an alleged consent judgment in suit No. FCT/HC/CV/858/2009, and the said application for leave is also between the same parties. The Applicant's counsel also filed a written address dated 11th November, 2020 and filed on 16th November, 2020, wherein counsel argued that the Respondent's motion on notice amounts to an abuse of Court process, as the Court of Appeal is seized of the whole proceedings as between the parties. Counsel urged the court to refuse the invitation to entertain the Plaintiff/Respondent's Motion on Notice.

The Plaintiff/Respondent in response to the Applicants Notice of Preliminary Objection filed a 20 paragraphs Counter Affidavit deposed to by one Onyebuchi Ikonne, Esq, the Company Secretary of the Plaintiff's Attorney Company, and a written address both dated and filed on 21st December, 2020. In the counter affidavit, the Plaintiff/Respondent denied the existence of any pending or concluded suit filed by the Plaintiff seeking determination of conflicting titles between the present parties on record, that the entering of the interlocutory appeal No. CA/A/396/2018 challenging the decision of the Court on 13th February, 2018 does not operate as stay of proceedings, and that the 1st – 3rd Defendants are yet to procure prior mandatory leave to embark on the said interlocutory Appeal. The Deponent further averred in paragraph 18 of the Counter Affidavit that a preliminary objection is not a suitable means of challenging a Motion on Notice.

In his written address, counsel to the Plaintiff/Respondent raised a sole issue for determination thus:

Whether the 1st – 3rd Defendants' Preliminary Objection is a suitable means of challenging the Plaintiff's Motion No. M/8169/2020 seeking preservation of the res.

Counsel argued that an interlocutory appeal does not operate as stay of proceedings. He referred the court to the case of ***EMIR of KANO V. AGUNDI (2005) LPELR-7503 (CA)***, et al. He further submitted that their Motion on Notice does not amount to an abuse of Court process, and that a Preliminary Objection is not a suitable means of challenging a Motion on Notice but a Counter Affidavit.

The Defendants/Applicant filed a further affidavit in response to the Respondents Counter Affidavit, dated and filed on 16th March, 2021, wherein they further argued that the pending appeal at the Court of Appeal had been properly entered, and that they required no leave to appeal, the grounds of Appeal being on law alone. Consequently, they urged the court to strike out the Respondent's motion on notice.

For a proper determination of this application, I shall adopt the issue raised by the Plaintiff/Respondent, to wit:-

"Whether the 1st – 3rd Defendants' Preliminary Objection is a suitable means of challenging the Plaintiff's Motion No. M/8169/2020 seeking preservation of the res."

A Respondent served with a motion on notice who intends to oppose the application must by law file a counter-affidavit opposing the facts deposed in the applicant's affidavit. Where applicable, he must also file a written address to canvass argument why the application should be refused.

The law does not however preclude the respondent from filing a notice of preliminary Objection to oppose the application on points of law and to seek the striking out of the application. This view was upheld in the case of ***SADAM & CO. LTD V. NDIC & ORS (2018) LPELR-46569(CA)*** and ***HONEYWELL FLOUR MILLS PLC VS ECO BANK NIG. LTD. (2016) LPELR - 40221 (CA)***

I am not aware of any provision in the Rules of this Court or any decided authority that prohibits a Respondent to an application from filing both a counter-affidavit and a Notice of preliminary objection against the hearing of the motion itself and or the grant of the prayers sought.

Nevertheless, the Respondent must as a matter of law file a counter affidavit, if he intends to oppose the motion on notice. It is trite and elementary principle of law that a party who fails to file a counter affidavit, reply or further and better affidavit in order to challenge or controvert the depositions in the adverse party's affidavit is deemed to have accepted the facts deposed in the affidavit in question. It is thus established that unchallenged facts in an affidavit are treated as established before the Court. See ***RAKOL CLINIC AND MATERNITY HOSPITAL V. SUPREME FINANCE & INVESTMENT CO. LTD. (1999) 7***

NWLR (PT. 612) 613; COMPTROLLER, NIGERIA PRISON SERVICE V. ADEKANYE (1990) 10 NWLR (PT. 623) 400; AYOOLA V. BARUWA (1999) 11 NWLR (PT. 628) 595.

It is to be noted that the Applicant in this Notice of Preliminary Objection did not file a reply, response or further and better affidavit to the respondent's Motion on Notice. Thus, the depositions in the affidavit in support of the Plaintiff/Respondent's Motion on Notice remained unchallenged and uncontroverted by the applicants.

A careful look at the Notice of Preliminary Objection filed by the Applicant also reveals issues bothering on substantive issues, which if the Court pronounce on, may affect the substantive matters or issues in the suit filed by the plaintiff. The Applicant by this Notice of Preliminary Objection is seeking to divest the court of jurisdiction not only over the motion on notice filed by the Plaintiff/Respondent, but over the entire suit on grounds that there are two (2) appeals pending on this suit before the Court of Appeal-Abuja Division. Appeal No. CA/A/396/2018 and Appeal No. CA/A/396/M/2018, as well as a pending Application for leave to appeal as interested parties against an alleged consent judgment in suit No. FCT/HC/CV/858/2009, and the said application for leave is also between the same parties.

These are issues which if determined at this stage, may dispose of the Plaintiff's suit. It has been a long-standing principle of Court, pronounced in numerous decided cases, that a Court must be cautious in its judgment at an interlocutory stage, not to make pronouncements or observations on the facts which might appear

or tend to predetermine or pre-judge the main issue or issues in the proceedings which are yet to be concluded by the Court. See ***AGIP (NIG.) LTD. V. AGIP PETROL INTERNATIONAL & ORS. (2010) 1 NMLR 94/130, (2010) 5 NWLR (PT. 1187) 348.***

It would have been more appropriate if the Applicant had brought the Preliminary Objection against the substantive suit, since the issues of jurisdiction and abuse of court process are addressed therein. Nonetheless for the smooth running of the system particularly in line with principle of justice and equity having raised the fundamental issues it is my humble opinion that this Court lacks jurisdiction having compiled the record and transmitted same to the Court of Appeal. This Court lack the requisite jurisdiction to proceed with the case. Consequently I hereby grant the application of the Applicant reason being that the application is meritorious.

HON. JUSTICE M.S IDRIS
(Presiding Judge)