

**IN THE HIGH COURT OF JUSTICE OF THE  
FEDERAL CAPITAL TERRITORY ABUJA  
IN THE ABUJA JUDICIAL DIVISION  
HOLDEN AT MAITAMA - ABUJA**

**BEFORE: HON. JUSTICE O. C. AGBAZA**

**COURT CLERKS: UKONU KALU & GODSPOWER EBAHOR**

**COURT NO: 6**

**SUIT NO: FCT/HC/CV/1248/2016**

**BETWEEN:**

**MILLENNIUM COLLECTION AND DESIGN LTD.....CLAIMANT**

**VS**

**MALLAM JIMOH ABDULAZEEZ.....DEFENDANT**

**RE: KHADIJAT O. ABDULAZEEZ.....APPLICANT**

**RULING**

By a Motion on Notice dated 18/10/2021 and filed same day, with Motion No. M/6921/2021 brought pursuant to Order 13 Rules 13 (1) (2) 30 and 31 of the High Court of the Federal Capital Territory Abuja (Civil Procedure) Rules 2018 and under the inherent jurisdiction of the Honourable Court, the Applicant prays the court the following reliefs;

- (1) An Order of court granting leave to the Applicant to defend this suit as the Administratrix of the Estate of Mallam Jimoh Abdulazeez, sequel to the death of the Defendant.

- (2) An Order of Court substituting the Defendant Mallam Jimoh Abdulazeez (now deceased) with the Applicant – Khadijat .O. Abdulazeez as the Defendant in this suit.
- (3) An Order of Court granting leave to the Applicant to file and substitute the Witness Statement on Oath filed on the 10<sup>th</sup> of February, 2017 by Mallam Jimoh Abdulazeez (now deceased) with the Witness Statement on Oath filed by the Applicant.
- (4) An Order of Court deeming the Applicant's Witness Statement on Oath already separately filed and served as properly filed and served appropriate filing fee having been duly paid.
- (5) An Order of Court granting leave to the Defendant to recall the Plaintiff witness (Anthony Izunobi) for Cross -Examination by the Defendant.
- (6) And the Omnibus relief.

The Motion is supported by a Sixteen (16) Paragraph affidavit with one (1) Exhibit attached and marked Exhibit "A", deposed to by the Applicant. Also filed a Written Address and adopts same in urging the court to grant the prayers.

Upon being served, Respondent through his Counsel filed a Five (5) Paragraph Counter Affidavit with one Exhibit attached, with leave of court the said Counter Affidavit was deposed to by one Blessing Etu a Counsel in the Law Firm of Respondent's Counsel. Also filed a Written Address and

adopts same in urging the court to refuse the relief number 5 of the Applicant.

In the Written Address of the Applicant, Chukwunonso E. Odum Esq of Counsel formulated a sole issue for determination that is;

“Whether having regards to the circumstances of this case and the affidavit in support of this application, the Applicant is entitled to the reliefs sought”

Submits that the Rules of court particularly Order 13 Rule (1) (2) empowers Administrators of Estate such as the Applicant to sue and be sued in that capacity. Submits further that the judicial attitude to application for substitution is that no action shall be defeated or abated upon the death of a party, where the cause of action survives. Refer to Guvani Vs Egbule (1990) 5 NWLR (PT. 149) Pg. 201 @ 207 Eyesan Vs Sanusi; (1984) 4 SCP 115 @ 134.

Submit finally that Applicant has shown sufficient reasons why Counsel could not cross-examine the witness sought to be recalled and that the law is settled that the court reserves the discretionary powers to order the recall of a witness who has been examined and discharged for the purpose of Cross-examination. Refer to the cases of Tiwani Ltd Vs CTMB Ltd (1997) 8 NWLR (PT. 515) 140 @ 152 Para C – D, Ukeje Vs Ukeje (2001) Vol. 27 WRN 142 @ 158-159, Ogar Vs James (2001) 10 NWLR (PT. 722) 621 @ 636 and Elendu Vs Ekwuoba (1995) 3 NWLR (PT. 386) 704 @ 749 Para E-F. Urge court to grant the application.

Respondent's Counsel C. Dim Izunobi Esq. adopted the sole issue formulated by the Applicant for determination and relying on the authority of News Watch Communications Ltd Vs Atta (2006) 2 NWLR (PT. 993) 144 @ 171 C 179 B – D and 181 C – 182 E, that it is the duty of the court to create the atmosphere for any party to be heard and not the duty of the court to make sure that the atmosphere is utilized, Defendant was duly served with hearing notice of that date, but exercised his Constitutional Right to stay away from court, urge court to refuse relief 5 of the Applicant.

Having carefully considered the affidavit evidence of the parties, submission of Counsel and the judicial authorities cited the court finds that only one issue calls for determination that is;

“Whether the Applicant has made out sufficient ground to warrant the grant of the relief sought”

The grant or otherwise of the relief sought by the Applicant is at the discretion of court, which the court must exercise judicially and judiciously and for court to exercise that discretion in favour of Applicant, Applicant must show sufficient grounds as the court will not exercise its discretion by its whims.

I have taken a considered look at the deposition of the Applicant in Paragraph 1, 2, 3, 4, 5, 6, 7, of the affidavit in support of the application as well as the Exhibit “A” attached, I find that they are sufficient and in conformity with the law. And the Rules of Court permits the application. Furthermore the Respondent is not objecting to the reliefs 1, 2, 3, and 4 of

the application. However the Respondent vehemently challenges the grant of relief 5 which seeks the recall of the Claimant's witness for Cross-examination.

The grounds for opposing the recall of the witness is that the Defendant was foreclosed from Cross-examining the witness – PW on 22/3/2021 nearly two years after the Plaintiff testified in-Chief and Exhibit "A" Certified True Copy of Hearing Notice attest to the fact that the Applicant were aware of the hearing but no representation lastly the witness is currently in Australia undergoing a course for three (3) years and will be practically impossible to call him back.

I have considered the competing positions of the parties and I must state that the paramount consideration of the court in this application is what would promote the interest of justice in *Adekanye Eleko Vs Akinrinola Williams Olokinboro (1978) LPELR FCA/B/9/78*, the court stated factors which a court may consider in an application for the recall of a witness who had already given evidence thus;

"We are of view that where an application is made to a judge in the course of the trial of Civil Cases to recall a witness, who had already given evidence, the factor in the consideration of the application is whether or not the interest of justice required that the application should be granted. In other words an application by a party or Counsel to recall a witness who had already given evidence should succeed where the interest of justice requires it"

In the determination of this application the court must consider its record and this the court is empowered to do. See Agbareh Vs Mimra (2009) All FWLR (PT. 409) 559 @ 585 Para D – F. I have taken a careful look at the records of court reveal that the Counsel for the Deceased Defendant was served Hearing Notices on the adjourned dates, but he failed to be in court, it is the unchallenged evidence of Applicant that the deceased Defendant took ill and died on 13/2/2020. Although the court was not informed of the period of illness before the subsequent demise of the Defendant, the court is of the view that the Counsel for the Defendant failed to appear in court despite receipt of Hearing Notices, and this case of the Defendant should not suffer on account of the omission of the Deceased Defendant. It is therefore the view of the court that the litigant should not be made to suffer due to the act of the Counsel, thus it will be in the interest of justice to grant the application more so as the Claimant/Respondent failed to show any documentary evidence of the Sojourn of the PW1 in Australia, therefore this court will not accede to the prayers of the Respondent not to grant the application.

In conclusion having found the reliefs 1, 2, 3 and 4 of the Applicant, in conformity with the Rules of Court, having also found that refusing the Applicant's relief Number 5, would amount to visiting the sin of the Counsel on the litigant and thus make the case of the Defendant to suffer for the sin of Counsel. This court therefore holds that it will be in the interest of justice to allow the relief No. 5 of the Applicant. Accordingly the application succeeds and it is hereby ordered as follows;

- (1) Leave of court is hereby granted to the Applicant to defend this suit as the Administratrix of the Estate of Mallam Jimoh Abdulazeez, sequel to the death of the Defendant.
- (2) An Order of Court substituting the Defendant, Mallam Jimoh Abdulazeez (now deceased) with the Applicant Khadijat O. Abdulazeez as the Defendant in this suit.
- (3) Leave is hereby granted to the Applicant to file and substitute the Witness Statement on Oath filed on 10<sup>th</sup> February 2017 by Mallam Jimoh Abdulazeez (now deceased) with the Witness Statement on Oath filed by the Applicant.
- (4) The Applicant's Witness Statement on Oath already filed separately and served is hereby deemed properly filed and served.
- (5) Leave is hereby granted to the Defendant to recall the Plaintiff witness (Anthony Izunobi) for Cross-examination by the Defendant.
- (6) The Claimant is hereby ordered to reflect the name of the Applicant in all the processes in this suit and serve on all the parties.

**HON. JUSTICE O. C. AGBAZA**

Presiding Judge

12/4/2022

**APPEARANCE:**

C. I. EZUNOBI ESQ. FOR THE CLAIMANT/RESPONDENT

C. E. ODUM ESQ. FOR THE DEFENDANT/APPLICANT