

**IN THE HIGH COURT OF JUSTICE OF THE
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/353/2014

BETWEEN:

MRS. ABIGAIL FUNMILAYO ILUGBUHI.....CLAIMANT

VS

1. MRS. LEMMY UGHEGBE

2. MR. ADEYEMI GEORGE ILUGBUHI.....DEFENDANTS

RULING

By a Motion on Notice dated 12/11/21 and filed same day with Motion Number M/7886/2021, brought pursuant to Order 11 Rule 19 (1) and 30 of the High Court of the Federal Capital Territory Abuja (Civil Procedure) Rules 2018 and under the inherent jurisdiction of this Honourable Court, the Applicant seek the court the following reliefs;

- (1) An order of this Honourable Court striking out the name of the Plaintiff in this matter by reason of death and substituting it with Adeyemi George Ilugbuhi, representing the Estate of the deceased Plaintiff and to allow the proceedings to be carried on between the Applicant and the Defendant.
- (2) And the omnibus relief.

The application is supported by a 10 Paragraph Affidavit deposed to by the Applicant with one (1) Exhibit attached also filed a Written Address and adopts same as oral argument in urging the court to grant the application. The processes were served on the Defendant Respondent, who responded by filing a seven (7) Paragraph Counter affidavit on 24/11/2021 as well as a Written Address and adopts the Written Address as oral argument in urging the court to refuse the application.

Upon receipt of Defendant/Respondent's counter – affidavit, Applicant filed a further and better affidavit in support of the motion on 14/3/22.

In the Written Address, Applicant's Counsel Obong Michael Israel Esq. formulated a sole issue for determination, that is;

“Whether this Honourable Court has the power to substitute a party by reason of death”

Submits that Order 13 Rule 19 (1) of the Rules of Court empowers the court to substitute a party with another. Relying on the definition of substitution contained in Black's Law Dictionary 8th Edition and the case of Yakubu & Ors Bukola & Ors (2014) LPELR – 22769 (CA), Shenshui Construction Co. (Nig) Ltd & Anor Vs Inter Continental Bank Plc & Ors (2015) LPELR 40893 (CA) and insider Communications Ltd Vs Citi Bank & Anor (2019) LPELR 47005(CA), submits that the affidavit in support of the application shows that the Applicant has satisfied all the condition for the grant of the application.

Finally urge court to grant the application.

In the same vein, Defendant/Respondent's Counsel formulated a sole issue for determination that is;

"Whether the Applicant has placed evidential material before this Honourable Court to be entitled to the Reliefs sought"

Submits that the order sought by the Applicant; striking out the name of the Plaintiff and substituting same with the Applicant is contradictory therefore court lack the power to grant the relief. Refer to the case of Registered Trustees of Iroyin Ayo Baptist Church Vs Sanusi (2020) All FWLR (PT. 1040) 882 @ 945 – 946, Para G – A, when the name of a Person is struck out what is left is a non-juristic person and would be a misnomer to substitute the Applicant having struck out the Plaintiff's name from the suit.

Submits further that the language upon which Applicant's relief is couched is vague, rigmarole and leaves the Defendant and the court in a state of speculation and conjecture therefore urge court to strike out the application Refer to AG Lagos State Vs AG Federation (2003) LPELR 260.

Submits that, Applicant failed to discharge the burden of proof imposed on him by Section 131 (1) and (2) of the Evidence Act as his affidavit does not provide evidence that he is indeed a son of the Claimant, neither did the show that he has the consent of the persons referred to in Paragraph 2 of the supporting affidavit to be substituted for the Claimant. Refer to the cases of Ivienagho Vs Gazuage (1999) 9 NWLR (PT. 620) 552 @ 561 Abulaka Vs Minister of Health & Anor (2005) LPELR 5572 UBA Plc Vs Astra Builders (WA) Ltd (2010) 2 SCNJ 84. Urge court to refuse the application.

With leave of court submits on point of law that Paragraph 4 of their counter – affidavit was not challenged nor controverted in Applicant’s Further and Better Affidavit. Submits further that Paragraphs 4, 5, 6 and 7 of the Further & Better affidavit is an invitation of the court to determine the substantive matter that has been joined by the Claimant in their pleading at this interlocutory stage urge court to discountenance same.

Having carefully considered the affidavit evidence of both parties, submission of Counsel as well as the judicial authorities cited, I find that only one (1) issue calls for determination, that is;

“Whether the Applicant has made out sufficient ground so as to be entitled to the relief sought”

This application seeks the powers of the court to make a substitution of a party as empowered by the court to do as provided by Order 13 Rule 19 of the Rules of Court. The powers of the court to grant an application of this nature has been affirmed in the case of *In Re Ogundahunsi* (2008) All FWLR (PT. 420) 671 @ 692 – 63 Para G – A, where the court held thus;

“Where a sole surviving Plaintiff dies or sole surviving Defendant also dies, provided the cause of action is such that survives, the facts of the death of both parties will not cause the abatement of the suit although proceedings will be temporally stayed until an order can be obtained substituting the names of such other persons for the deceased parties. An order could be made with leave of court for the action to be continued in the names of the legal or personal representatives of the parties”

And in considering the grant of an application for substitution the court in the above stated case, mentioned the conditions which an Applicant must fulfill as follows;

- (1) The nature of the action.
- (2) The fact that action survives.
- (3) The death of other changed circumstances that has occurred to the original Plaintiff.
- (4) Interest or liability of the party by or against whom is proposed the proceedings shall continue and
- (5) The order for which the application is praying all of these facts must be stated in the affidavit in support of the application.

See in *Reogundahunsi* (Supra) 693 Paras B – C.

Now from the averments in the affidavit of the Applicant, including his further and better affidavit, the Exhibits attached and the counter affidavit of the Defendant/Respondent vis-à-vis the arguments of Counsel on their behalf, can it be said that the Applicant have fulfilled the conditions for the grant of the application? I am of the firm view that the Applicant has sufficiently done all that the law requires him to do for the success of the application. However the Defendant/ Respondent by their argument is not in agreement that the condition no. 5 above is; the order for which the application is praying, where the Applicant prayed the court to “Strike out the name of the Plaintiff by reason of death and substitute it with Adeyemi George Ilugbuhi” and called on the court to refuse the application. Granted

that the Applicant employs the words "Striking out" in his application would it be a cogent ground to refuse the application having substantially fulfilled the condition for the grant of the application and where the averments in his affidavits clearly shows that indeed he seeks the relief of substitution of a party to the suit owing to the death of the Plaintiff? I am of the firm view that the grouse of the Defendant/Respondent that the Applicant wants the court to strike out the Plaintiff's name and then substitute Applicant as Plaintiff is not cogent to warrant the refusal of the application this is because doing so will amount to allowing technicality to defeat the cause of justice. The position of the court on technicality was stated in the case of Kumala Vs Shefiff (2008) All FWLR (PT. 431) 1032 @ 1040 Paras A – B, thus,

"The courts have for some time now refused to resolve cases on technicalities the courts now prefer substantial justice rather than dwell on technicalities the courts are courts of justice and not court of technicalities"

From the foregoing, having fulfilled the conditions for the grant of an application for substitution of party, this court holds that the application have merit and should succeed, I agree with the Defendant/Respondent submission that the facts stated by the Applicant in Paragraph 4, 5, 6 and 7 of his further and better affidavit are matters for the substantive suit. Accordingly, the relief of the Applicant is hereby granted. It is hereby ordered;

- (a) The name of the Plaintiff in this matter is hereby substituted with Adeyemi George Ilugbuhi representing the Estate of the Deceased Plaintiff to allow the proceedings to be carried on between the Applicant and the Defendant.
- (b) The processes of court shall be amended to reflect in the name of Adeyemi George Ilugbuhi.

Hon. Justice C.O Agbaza

Presiding Judge

14/6/2022

APPEARANCE:

LOIS DANJUMA ESQ. FOR THE APPLICANT

G.P OLAGUDOYE FOR THE DEFENDANT/RESPONDENT