

IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT GARKI ABUJA

CLERK: CHARITY ONUZULIKE
COURT NO. 10

SUIT NO: FCT/HC/CV/018/2020
DATE: 22/3/2023

BETWEEN:

1. FRONTIERS PROPERTIES INVESTMENT LTD }
2. IBRAHIM ALIYU ABUBAKAR } **CLAIMANTS**

AND

1. JAIZ BANK PLC }
2. UBANI INTERCONTINENTAL NIGERIA LTD } **DEFENDANTS**

RULING
(DELIVERED BY HON. JUSTICE S. B. BELGORE)

In this Preliminary Objection vide Motion number M/9456/2020 wherein the 1st and 2nd Defendants/applicants prayed the Court to dismiss this case for being incompetent and same being abuse of Court process of this Honourable Court.

He predicated this Preliminary Objection on three (3) grounds to wit:

- (1) That the Claimant earlier filed suit No. CV/1311/2020 dated 5th of March, 2020 and discontinued vide Notice of Discontinuance filed 4th May, 2020 after issues had been joined and the Defendants had filed a Statement of Defence and Counter-claim 20th April, 2020.
- (2) That the counter-claim of the Defendant in suit No. CV/1311/2020 dated 20th April, 2020 has not been heard.

- (3) That suit No. CV/018/2020 now filed by the Claimant is the same with Suit No. CV/1311/2020 already discontinued and same constitutes an abuse of the process of this Honourable Court as the issues raised therein are in substance, the same as in Suit No. CV/1311/2020 involving the same parties.

It is brought pursuant to Order 5 Rule 1 of the Rules of this Court. And in support is a 12-paragraphed affidavit with 3 exhibits attached and a written address.

In moving this objection, he submitted that his point is that once issues are joined before withdrawal, the appropriate Order is that of Dismissal and not striking out.

He referred the Court to his further affidavit filed in response to the counter affidavit dated 3/3/21 which was filed same day and a written address.

He finally urged the Court to grant his application and dismiss suit No. CV/018/2020 and allow them to prove their Counter-claim.

On the other hands, the Plaintiff/Respondents submitted in opposition to the grant of the Preliminary Objection that they have filed a counter-affidavit of 5 paragraphs dated and filed 27/1/2021. Also, a written address was filed. He relied on all the processes and urged the Court to dismiss the Preliminary Objection.

While adumbrating in Court, he contended with submission of the applicant that the suit ought to be dismissed and not struck-out since issues were joined. He said the applicant has not filed any appeal on that and that striking out Order of this Court remains valid, subsisting and binding. He relied on the case of **FRN VS. DURU (2019) LPELR – 47695 (CA)**.

He disagreed with the submission of the learned Counsel to the Applicant that they cannot file this suit again. He said Order 24 Rule 1 (2) of the Rules of this Court applies.

Very importantly, he said their notice of discontinuance to withdraw the previous action was filed about 4 months before the defendant's Statement of Defence was served on them. He cited the case of **AGHADIANO VS. ONUBOGU (1998) 5 NWLR (PT. 548) 16.**

Finally, he referred to the applicant's reply address as incompetent being a repetition of earlier address. He urged the Court to dismiss this Preliminary Objection with substantial cost.

The salient facts of this case is that the Claimant/Respondent filed suit No. CV/1311/2020 against the defendants on 5/3/2020 which they subsequently discontinued vide a Notice of discontinuance, the said suit was formally struck out by this Honourable Court on 1/6/2020.

The Claimants filed this instant suit on 5/5/2020 (one day after they had filed the Notice of Discontinuance). The 1st Defendant was served with the Originating processes before it was discontinued. The 2nd Defendant who is raising the instant Preliminary Objection was never served with the originating processes in the suit and therefore could not have validly filed any statement of defence in the suit.

The Defendants/Applicants served their purported Statement of defence and counter-claim in the defunct suit on the Claimants Counsel only on 3/9/2020 (more than four months after the Claimants/Respondents had filed Notice of discontinuance of the suit and more than three months after the suit had been formally struck-out.

Both learned Counsel submitted two issues each for determination of this Preliminary Objection.

Mr. Yamah, learned Counsel to the Applicant's issues are:

- (1) ***Whether in view of the provisions of Order 24 Rule 1 (3) of the Rules of this Honourable Court, this suit is competent?***

- (2) ***If the above is answered in the negative, whether the suit should not be dismissed in its entirety with substantial cost.***

While Mr. Haruna, learned Counsel to the Respondents issues are:

- (1) ***Whether the 2nd Defendant at whose instance the Preliminary Objection is brought is competent to raise the objection regard being had of the fact that it was never served with the originating processes in the defunct suit No. CV/1311/2020 before the suit was discontinued; and***
- (2) ***Whether the instant suit constitutes an abuse of the process of this Hon. Court on account of the fact that the Claimant earlier filed suit No. CV/1311/2020 which has since been discontinued.***

I have considered this Preliminary Objection. I have read through the written addresses of both learned Counsel. And I have digested the two addresses.

The question here is, what is the position of law as regards counter-claim filed by Defendants/Applicants in this case in the earlier case discontinued by the Claimants/Respondents.

In a quick and straight answer, the position of law is clear, that in an action where a Defendant after or along with his/her Statement of Defence filed a counter-claim, the counter-claim filed by such a Defendant is another action on its own different from that of Claimant or Plaintiff that brought such a defendant to Court.

A Plethora of cases attested to this clear position of law.

In the case of **IDAM VS. NLPC PENSIONS FUND ADMINISTRATORS & ANOR (2021) LPELR 53400 (CA)** where it was held by the Appellate Court thus:

“It is well settled that a counter-claim is a separate, independent and distinct action in which the counter-claimant must prove his counter-claim to obtain judgment thereon; USMAN VS. GARKE (2003) LPELR – 3431 (SC); OGLI OKO MEMORIAL FARMS LTD & ANOR VS. NACB LTD (2008) LPELR-2306 (SC); JERIC (NIG) LTD VS. UBN PLC (2000) LPELR-1607 (SC). The separate and independent nature is borne out of the fact that it allows the defendant maintain action against the Plaintiff as profitably as in a separate suit. It is a weapon of defence that enables the defendant to enforce a claim against the Plaintiff as effectively as an independent action; see OROJA & ORS. VS. ADENIYI & ORS. (2017) LPELR – 41985 (SC).”

From the above authority, the counter-claim of the Defendants/Applicants still pending in the suit No. CV/1131/20 wherein the Writ of Summon and Statement of Claim of the Claimants/Respondents was discontinued by them. I so hold.

Based on my holden, on the first issue, the next question is whether or not instituting the suit No. CV/018/20 constitutes abuse of Court process or not?

Having held above that the counter-claim of the Applicant still pending wherein the two parties will swap positions, for any of the party to have filed another suit as done by the Respondent will have no nomenclature than abuse of Court process.

In the case of **DANA AIRLINES LTD VS. AMIAKA & ORS (2017) LPELR 43050 (CA)**, the Court of Appeal held:

“.....the essential elements that would constitute abuse of Court process namely; (a) There must be, at least, two matter filed in two different Courts, (b) The said different suits are instituted with the goal of perusing the same rights (even though on different grounds), (c) The subject matter and or the questions for

determination in the two suits must be substantially the same, (d) Frivolous and scandalous use of a lawful Court process to the irritation and embarrassment of another party. See OGOEJEFO VS. OGOEJEFO (2006) 3 NWLR (PT. 966) 205 SC.

I have no difficulty in holding that subsequent suit No. CV/018/2020 filed by the Claimants/Respondent fall in the realm of abuse of Court processes which make it incompetent and it is therefore struck-out.

SIGNED

S. B. Belgore

(Judge) 22/3/2023