

IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT GUDU - ABUJA
ON WEDNESDAY THE 15TH DAY OF FEBRUARY, 2023.
BEFORE HIS LORDSHIP; HON. JUSTICE MODUPE OSHO-ADEBIYI
SUIT NO: FCT/HC/PET/467/2020

BETWEEN

JOSEPHINE ONYEJE ITUNBE ----- PETITIONER

AND

ASHIPLE F. ITUNBE----- RESPONDENT

AND

AGI GODWIN AFUOH -----CO-RESPONDENT

RULING

There is before the court two applications. The first is a motion on notice filed 31/10/2022 for extension of time to enter conditional appearance, file counter affidavit and a deeming order while the second filed 21/11/2022 is preliminary objection seeking to dismiss the motion on notice for being incompetent. I will take both simultaneously.

By a Motion on Notice dated and filed the 31/10/2022, the Applicant brought this application seeking the following orders:

1. AN ORDER of this Honourable Court extending the time within which the Applicant can enter a Conditional Appearance and to file its Counter Affidavit.
2. AN ORDER of this Honourable Court deeming the Notice of Conditional Appearance and Counter Affidavit as filed on the 31st day of October, 2022 as properly filed and served, Applicant having complied with the Rules of the Court, paid the requisite penalty fees.
3. AND FOR SUCH FURTHER ORDER OR ORDERS as this court may deem fit to make in the Circumstance.

In the supporting affidavit deposed to by Blessing Favour Elem, a counsel in the law firm of Icons of Justice, Applicant's Solicitors. The deponent averred that shortly before the last adjourned date their client was bereaved and could not give instructions on the matter. That by the time they were instructed by their client they were already out of time. That pursuant to the rules of this court they have filed this Motion for Extension of time to file their Counter Affidavit and have also paid the penalty fees for late filing of the said process. That the late filing of the said processes was not deliberate or intended to disrespect this

Honorable Court. That the grant of this application is necessary in the circumstance to enable their client to exercise his constitutional right of fair hearing. That it is in the interest of Justice to grant this Application having complied with the provisions of the Rules of Court by paying the penalty fees. That the Respondent will not be prejudiced by the grant of this Application.

In their written address in support, learned counsel raised a sole issue for determination, namely;

Whether in the circumstance, this Honourable Court can grant this Application?

Proffering arguments on the issue so raised, learned counsel argued that **Order 49 (4) (5) of the High Court of the Federal Capital Territory (Civil Procedure Rules) 2018** has made provisions for any party in a suit who is out of time to enter appearance and file the relevant processes to seek an order for enlargement of time from the court by an application. That despite compliance with the provisions of the Rules, it is still an application seeking the discretionary exercise of the powers of this Honourable Court which he prays this Court to exercise in the Applicant's Favour. Counsel submitted that application is in furtherance of the principles of fair hearing and natural justice which forms the very rock upon which the legal profession is built consequent upon which they are seeking a judicious and judicial exercise of the powers of this Court in line with the circumstantial demands of equity impartiality and fairness, relying on **Section 36 (1) and (4) of the 1999 Constitution of the Federal Republic of Nigeria (as amended)**. Counsel further cited **Ndato V. Obiese (2000) NWLR (Pt. 692) pg 820 at 825** and **Danbaba V. State (2000) 14 NWLR (pt. 687) pg 396 at 408** and urged the court to resolve the sole issue herein in favour of the applicant and on the strength of the arguments contained in their address, to grant the said Application to enable the Applicant file his Counter Affidavit in this suit in keeping with the tenets of justice, Equity and Fairness.

It is evident in the court file that the Petitioner and the Cross Petitioner were served with this application through their counsel on the 18/11/2022 however, neither of them controverted the averments in the affidavit by way of a counter affidavit rather Cross Petitioner filed a notice of preliminary objection no M/1679/2022 filed 21/11/2022 seeking for an order dismissing the motion on notice for extension of time filed by the applicant on the grounds that the applicant did not annex the counter affidavit he seeks to regularize to the said motion.

I have considered the facts put forward by the party sought to be joined in support of this application. From the court's records, it is clear that the party sought to be joined had earlier filed a counter affidavit which was struck out on the grounds of incompetence as no motion to regularize the process was filed same having been filed out of time. The proceeding in this suit was adjourned for adoption of final written address on 28/6/2022 before the Cross Petitioner filed an application to join a 3rd party in the suit. Counsel to the party sought to be joined was served with the motion for joinder in the open court on the 13/7/2022 and they have deposed in their affidavit in support of the motion for extension of time that party sought to be joined was bereaved and could not give them instructions on the matter. They have also averred in paragraph 4 (d) of their affidavit in support of payment of penalty for late filing of the said process. The only objection that counsel to the Respondent has to the motion for extension of time filed by the applicant is as contained in his Preliminary Objection which is to the effect that the applicant in his motion for extension of time did not attach the counter-affidavit as an exhibit nor was it annexed to the affidavit in support of the motion. I have looked at the motion on notice and it is indeed true that the said counter- affidavit was not annexed to the affidavit and therefore not marked as an exhibit. Respondent Counsel relied on **UBA PLC OR E.I. NATAMA ENT'L COMPLEX LTD (2020) LPELR-51981 (CA) AND ROUGH DIAMOND TELECOMS VS MIN. FCT & ANOR (2019) LPELR-48371 (CA)** unfortunately these cases are not on all fours with the present case.

In this present case Applicant Counsel had filed a motion for extension of time within which to file his counter affidavit and a deeming order "deeming the notice of conditional appearance and counter affidavit as filed on the 31/10/2022 as properly filed and served". Respondent on the other hand by his Preliminary Objection has contended that the said counter-affidavit ought to have been attached to the motion. I have looked at the counts file and indeed the counter – affidavit is not attached to the motion rather the counter-affidavit which was filed on 31/10/2022 at the court registry was likewise forwarded to this court and filed inside this courts record on the same 31/10/2022. Nowhere in the motion on notice did Applicant Counsel pray the court that motion attached be deemed as properly filed and served. The fact that Applicant used the word "deem" does not necessitate that same be attached to the motion on notice rather the phrase used by the applicant in the deeming leg of his motion ought to be given its proper

and simple interpretation. The second leg of Applicant prayer is reproduced below as follows:

“An order of this Honourable Court deeming the Notice of Conditional appearance and counter-affidavit as filed on the 31/10/2022 as properly filed and served...”

The Supreme Court in **ANTHONY ASUQUO ANI VS EKPO OKON ABASI OTU (2017) 12 NWLR (Pt. 1578) 30 @ 70** paragraph H-B where Paul Adamu Galinje (JSC) held that;

“The documents which a court can deem are those which parties exchange between themselves during the course of proceedings such as statement of claim or defence and briefs of arguments and not those which require the signature of the registrar for their validity.”

For emphasis, a document which requires the signature of the registrar for validity are documents which commences an action i.e. originating processes as they need to be signed by the registrar before it comes alive and passes the test from a mere document to a court processes which will be filed in the courts file.

Respondent Counsel has not denied service of the said counter- affidavit consequently it is not in doubt that the said counter-affidavit has been filed and served on the Respondent. Going by the Supreme Court’s decision in **ANTHONY ASUQUO ANI VS. EKPO OKON ABASIOTU (Supra)** it is not in doubt that processes as in this case the counter-affidavit having been duly served on the Respondent is qualified to fall under processes which the Applicant Counsel can “deem” as properly filed and served not minding that same was not attached to the motion for extension of time. It is evident in the courts file that the said counter-affidavit had previously been filed in the courts file with proof that it has also been previously served on parties. Consequently, the non attachment of the counter affidavit to the motion does not qualify as a ground to dismiss the motion as there is proof in the court file that the counter affidavit had earlier been filed and inserted in the court file also it had earlier been served on the parties before moving the motion for extension of time. A deeming order in that circumstance is appropriate.

Consequently, the Preliminary Objection is hereby struck out. Having struck out the only grounds of objection to the application of defendant’s motion on notice, this court has read the said motion and it is my humble view that applicant’s prayer as contained in his motion on notice be granted and I so hold.

In view of the reasoning stated in this ruling so far, the application of the party sought to be joined succeeds. Accordingly, the application is hereby granted and it is hereby ordered as follows:

1. An order is hereby granted extending time within which the party sought to be joined can enter a conditional appearance and file its counter affidavit.
2. An order is hereby granted deeming the conditional appearance and counter affidavit filed on the 31st day of October, 2022 as properly filed and served.

Parties: Petitioner is present. Respondent is absent.

Respondent: C. O. C. Emeka-Izima appearing for Petitioner/Cross Respondent. M. U. Idakwo appearing with F. H. Maikano for the Respondent. O. J. Ochunu appearing for party sought to be joint.

HON. JUSTICE MODUPE R. OSHO-ADEBIYI
JUDGE
15/02/2023