

IN THE HIGH COURT OF JUSTICE
IN THE BENIN JUDICIAL DIVISION
HOLDEN IN BENIN CITY
BEFORE HIS LORDSHIP, HON.JUSTICE P.A.AKHIHIERO,
JUDGE, ON MONDAY THE 16TH DAY OF MAY, 2016.

BETWEEN:

SUIT NO: B/216/16

MRS. EHIMWENMA EHANAHCLAIMANT/APPLICANT

AND

- 1. MISS. ROSEMARY OSAYANDE) ...DEFENDANTS/RESPONDENTS**
- 2. MR. FRANK OSAYANDE)**

RULING

This is a Ruling on a Notice Of Preliminary Objection dated and filed on the 27th of April, 2016, by the learned counsel for the Claimant/Applicant, praying the Court for an order striking out the Defendants/Respondents' Motion on Notice, dated the 22nd of April, 2016. The grounds for the objection as enumerated in the Notice are as follows:

1. That this Court cannot hear the motion because it is copiously incompetent, the supporting affidavit and the exhibits are seriously tainted with defectiveness and irregularities in the eyes of the law.
2. That the reliefs and parties are therefore not properly before the Court.
3. That the Court in the interest of justice should refuse the application and strike it out.

The Notice of Preliminary Objection is supported by an affidavit of 9 paragraphs and a Written Address of Counsel.

Arguing the preliminary objection, Pat Ugbogbo Esq., adopted his written address and submitted that the affidavit in support of the Defendants/Respondents' Motion on Notice, dated the 22nd of April, 2016 is defective. He informed the Court that the said affidavit was deposed to by P.K. Omoike Esq., who is the learned counsel to the Respondents. According to him, it is contrary to law for a counsel to depose to an affidavit in a suit where he is representing one of the parties. He referred the Court to the following decisions: EKPE TO Vs WANOGHO (2004)9-12 SCM Pt.2, p.36 at p.49 and GARAN Vs STAFF OLOMU (2001) FWLR Pt.41, p.1859 at 1865. He also referred the Court to sections 112 and 113 of the Evidence Act, 2011.

Still submitting on the defective nature of the aforesaid affidavit, learned counsel submitted that by the combined effect of the provisions of Order 32, Rules 3 & 9 of the Edo State High Court Civil Procedure Rules, 2012, every affidavit together with the exhibits attached, must be signed and endorsed by the Commissioner for Oaths. Counsel informed the Court that the affidavit and the exhibits attached to the Defendants/Respondents' Motion on Notice, dated the 22nd of April, 2016 were neither signed nor endorsed by the Commissioner for Oaths. Consequently, he maintained that there is no valid affidavit in support of the said motion. He cited the case of MACFOY Vs UAC (1962) A.C. 150 at 160 and submitted that you cannot put something on nothing. According to him, it must collapse.

In the course of the arguments, the Court drew the attention of learned counsel to the fact that the Court's copies of the supporting affidavit and the exhibits were duly signed and endorsed by the Commissioner for Oaths. Responding to this information, counsel maintained that the affidavit is still fundamentally defective because it was deposed to by counsel to the Respondents. This he insisted was contrary to law. To further buttress his point, Counsel relied on Rule 20(3) of the Rules of Professional Conduct for Legal Practitioners, 2007 and submitted that the said affidavit is in breach of the said provision. He urged the Court to strike out the defective motion with substantial costs in favour of the Claimant/Applicant.

Responding, to the arguments on the preliminary objection, the learned counsel for the Defendants/Respondents, first sought the leave of the Court to reply orally to the Preliminary Objection, not having filed a written address. The Court granted him the leave to make a reply orally without a written address. Submitting, counsel posited that the Preliminary Objection is misconceived. On the first point, he submitted that there is no provision in the Evidence Act which prohibits a counsel from deposing to an affidavit on behalf of his client in deserving circumstances, provided such an affidavit complied with the provisions of sections 115(1) to (4) of the Evidence Act, 2011. He maintained that the affidavit which he deposed to was in compliance with the aforesaid sections. According to him, the affidavit is regular and the Court can rely on it.

Replying on the arguments on section 112 of the Evidence Act, counsel submitted that the said section simply enumerates the categories of persons who cannot act as Commissioners for Oath. He maintained that section 112 does not apply to the instant case since the counsel who deposed to the oath did not sign as the Commissioner for Oaths. For this proposition he referred the court to the case of BUHARI Vs INEC (2008) 4 NWLR (Pt.1078), 546. Submitting further, counsel stated that section 113 Of the Evidence Act, which counsel referred to is a saving provision for a defective affidavit. He submitted that the issue to be considered is whether the affidavit complained of has occasioned any miscarriage of justice in the circumstance. He maintained that the said affidavit has not occasioned any miscarriage of

justice. According to him, the supporting affidavit to the Preliminary objection did not state that the offending affidavit occasioned any miscarriage of justice. He maintained that the authorities of EPETE Vs WANOGHO (supra) and GARAN Vs STAFF OLOMU (supra) are not applicable in the circumstances of the affidavit complained of. He submitted that the affidavit is regular and the Court can rely on it. On the issue of non-signing and non-endorsement of the affidavit and the exhibits, counsel observed that the Court's copies were duly signed and endorsed. He urged the Court to dismiss the preliminary objection with costs assessed at N10, 000.

In his final reply on point of law, Pat Ugbogbo Esq. submitted that by virtue section 112 of the Evidence Act, the Court should reject the affidavit deposed to by the counsel. He urged the Court to uphold the preliminary objection and award costs of N25, 000 in favour of the Claimant/Applicant.

I have carefully considered the arguments of counsel on this Preliminary Objection. Essentially, the challenge is on the competence of the Defendants/Respondents' motion dated and filed on the 22nd of April, 2016. The main attack is on the validity of the supporting affidavit and the documents exhibited therein. In a nutshell, it is a two pronged attack. Firstly, the learned counsel has challenged the validity of the affidavit on the ground that the deponent is the counsel handling the matter on behalf of the Defendants/Respondents. Secondly, he seeks to invalidate the said affidavit on the basis of the alleged failure of the Commissioner for Oaths to sign and endorse same.

I will first address the second limb of the objection. According to the learned counsel for the Claimant/Applicant, the copy of the said affidavit together with the documents exhibited therein, were neither signed nor endorsed by the Commissioner for Oaths. This is clearly in violation of the provisions of Order 32, Rule 9 of the Edo State High Court Civil Procedure Rules, 2012 which states as follows: *"Every certificate on an exhibit referred to in an affidavit signed by the Commissioner before whom the affidavit is sworn (underlining, mine), shall be marked with the short title of the cause or matter"*. However, when this point was raised during the argument on the Preliminary Objection, the Court drew the attention of both counsel to the fact that the Court's copies of the affidavit and exhibits were duly signed by the Commissioner for Oaths. It appears that the failure to sign the counsel's copy was an inadvertent omission by the said official. I regard this as a mere procedural irregularity on the part of the Court Registry. It has been decided by a long line of cases that such an irregularity cannot vitiate proceedings or the judgment of a Court unless it occasions a miscarriage of justice. See the following decisions on the point: OLUBADE Vs SALAMI (1985) 2 NWLR Pt.7, p.282 and SHUAIBU Vs NIGERIAN ARAB BANK LTD. (1998) 5NWLR Pt. 551, p. 582 at 602-608. Furthermore, I am of the view that the said irregularity has not occasioned any miscarriage of justice.

The matter is however laid to rest by the provisions of section 108 of the Evidence Act, 2011 which states thus:

“ Before an affidavit is used in the court for any purpose, the original shall be filed in the court, and the original or an office copy shall alone be recognised for any purpose in the court. (Underlining mine)”

By virtue of this provision, the Court cannot take cognisance of the unsigned copies of the affidavit and exhibits in possession of learned counsel. The only authentic copy to be recognised in these proceedings is the original or the official copy which was duly signed. In the event, the objection of learned counsel on this ground cannot be sustained.

Coming to the first ground of objection, it is an undisputed fact that P.K. Omoike Esq., who is the counsel for the Defendants/Respondents personally deposed to the affidavit in support of the motion dated and filed on the 22nd day of April, 2016. The issue to be resolved is whether the said affidavit is valid. The point must be made straightaway that the Courts have consistently admonished against the practice of a counsel deposing to an affidavit in a case where he is representing one of the parties. This practice must be discouraged because of the unwholesome consequences that may follow in the event of a conflict of facts which can only be resolved by the deponent giving oral evidence from the witness box. In that case, counsel will be placed in the invidious position of being a witness and a counsel at the same time. This type of situation should be avoided. In the case of *EKPETO Vs WANOGHO* (2004) 9-12 SCM Pt.2, p.36 at p.49; *NSCQLR VOLUME 20* (2004) PAGE 334 ;(2004) 18 NWLR (PT. 905), referred to by learned counsel for the Claimant/Applicant, the Supreme Court observed thus:

“From the record of appeal, both Chief A. O. Giwa and H. A. Abolajo Esq. who are appellants’ counsel in this matter filed two separate motions on behalf of their clients but each of them swore the affidavit in support of their respective motion. This is a very undesirable practice since it means the counsel is giving evidence in a case in which he is appearing. Also if there is conflict in affidavits and evidence is called to clarify or resolve such conflict, the counsel who swore the affidavit must give evidence. This is undesirable and should be avoided”.

Furthermore, in the case of *UNION BANK OF NIGERIA PLC Vs NDACE* (1998) 3NWLR (Pt. 541) 331 at 337, the court frowned at the practice and warned that *“...This practicemay result in the counsel stepping down in the case to be a witness where for instance, there is conflict in the affidavits of the parties”.*

From the foregoing remarks, there is no doubt that the practice of counsel deposing to an affidavit in a case where he is representing a party is quite undesirable. However, the fact that the practice is undesirable does not make it illegal. As a matter of fact, there is no law prohibiting a counsel from deposing to an affidavit, especially if he is conversant with the facts

or if the facts are peculiarly within his knowledge. In the old case of IRIS HORN Vs ROBERT RICKARD (1963) All NLR 486, the Court held that an affidavit sworn by counsel representing a party to the proceedings is not objectionable in principle provided it does not by reason of its subject matter offend against the rule that a client's communication to his counsel are privileged, or the requirement that counsel should not put himself in a position where he may be subject to cross-examination or in any way enter personally into the dispute. Furthermore, in the case of CHIEF HAROLD SODIPO Vs LEMMINKAINEN & ANOR (1986) All NLR 78 ;(1986) 1 NWLR (Pt.15) 220, the Supreme Court held that an affidavit sworn to by a junior counsel in the Chambers of the Counsel to the plaintiffs was proper in law.

In his submissions before this Court, the learned Counsel for the Claimant/Applicant also argued that the affidavit was in breach of Rule 20(3) of the Rules of Professional Conduct For Legal Practitioners, 2007. For the avoidance of doubt the said Rule 20(3) provides as follows:

*“(3) When a lawyer knows, prior to trial that he would be a necessary
neither witness except as to merely formal matter, he nor his firm may conduct
the trial.”*

Going through the said provision, I do not see the relevance of this provision to the present application.

On the whole, I am of the view that the Preliminary Objection lacks merit and it is hereby overruled and dismissed with costs assessed at N3,000.00 (three thousand naira) in favour of the Defendants/Respondents.

P.A.AKHIHIERO
JUDGE

16/05/16

COUNSEL:

1. PAT UGBOGBO ESQ.CLAIMANT/APPLICANT

2. KEHINDE P. OMOIKE ESQ.....DEFENDANTS/RESPONDENTS