

IN THE HIGH COURT OF JUSTICE
IN THE BENIN JUDICIAL DIVISION
HOLDEN AT BENIN CITY
BEFORE HIS LORDSHIP, HON.JUSTICE P.A.AKHIHIERO,
JUDGE, ON THURSDAY, THE 3RD DAY OF NOVEMBER, 2016.

BETWEEN

SUIT NO: B/125/06

G.E.E. INVESTMENT NIGERIA LIMITED í
AND

CLAIMANT/RESPONDENT

1. MR. ADAMS ABURIME
2. MR. TONY USIFO ABURIME
3. MR. NAPOLEON ABURIME
4. MR. WHITE ABURIME
5. MRS. MARIA AMAGBAMA (Nee ABURIME)
6. DR. S. O. OLUSOJI.....

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1ST ó 5TH DEFENDANTS/
APPLICANTS

6TH DEFENDANT/RESPONDENT

RULING

This is a Ruling on a Motion on Notice, brought pursuant to under Order 37 Rules 1 and 2 and Order 30 (1) of High Court Civil Procedure Rules 2012 and under the inherent jurisdiction of this Honourable Court.

The Applicants are praying the Court for the following orders:

1. An order granting leave for to the 1st ó 5th Defendants/Applicants to prosecute this case through their lawful Attorney, George Aburime for themselves and the late Aburime's children and family members;
2. An order to amend all the processes in this suit to reflect the status of the Attorney; and
3. An order to file the 1st ó 5th Defendant/Counter-claims(sic), Amended Statement of Defence, Statement/Evidence on Oaths, list of witnesses and list of Exhibits to be relied upon which are herein attached as Exhibits A, B, C and D respectively.

To deem the said exhibits A, B, C and D as properly filed and served, the necessary fees having been paid.

And for such further order or orders as this Honourable Court may deem fit to make in the circumstances of this case.

The motion is supported by an Affidavit of 6 paragraphs and 4 Exhibits and a Written Address filed by one Miss N.O.Momoh on behalf of the Law Firm of G.E.Oaikhena & Co.

In the said Written Address, the learned Counsel for the Applicants submitted that a Power of Attorney as an instrument means a document affecting land in the state whereby one party (hereinafter called the Grantor) confers, transfers, limits, charges or extinguishes in favour of another party (hereinafter called the Grantee) any right of title to or interest in land in the state.

He submitted that through a Power of Attorney, a person can appoint another person to represent him to institute, defend and do every other thing on his/her behalf if he so wish. He maintained that in the instant case, the 1st ó 5th Defendants have decided to appoint Mr. George Aburime as their Attorney to continue this suit from where they stopped.

He identified the Power of Attorney power which is annexed in the supporting affidavit as Exhibit A.

Counsel submitted that a person to whom an obligation is owed may bring an action by donating his power to institute the action to another person through a Power of Attorney and relied on the case of: *MR. SYLVESTER LAAH & ANOR. VS. MR. I. P. OPALUWA (suing as the Attorney of MR. [PAUL Meriga 2003) 46 WRN pg 12 ratio 3, 4, 5.*

Furthermore, he submitted that a Claimant must be someone capable of demanding or claiming a right or an obligation against a Defendant and where for some reasons the Claimant is not in a position to bring or continue the action in person, he may do so by donating his rights to bring the action to another person through a Power of Attorney.

Counsel argued that in the instant case, the Power of Attorney was expressly donated to the Donee to continue this action on behalf of the donor and the donor of the power is bound by the outcome of the proceedings as if he had taken out the writ of summons personally and not through an Attorney.

He urged the Court to grant this motion in the interest of justice and that granting same will not prejudice the Defendant (sic).

In opposition to the Application, the learned Counsel to the Claimant/Respondent, L.I.Edeki Esq. filed a 15 paragraphs counter-affidavit and a Written Address dated 13th May, 2016.

Counsel referred the Court to paragraphs 6, 7 and 8 of the counter affidavit where they stated that G.E.Oaikhena Esq. had been disqualified from appearing or franking court processes in this suit by a Court Order made on 27/1/2014, with

costs of N20, 000.00 each awarded in favour of the Claimant and the 6th Defendant's Counsel. He maintained that despite the order, the said Counsel, G. E. Oaikhena Esq., and lawyers from his Firm, still frank processes in this suit in clear violation of the order of Court. He argued that by virtue of this order, all Court processes signed by them in this suit are illegal, null and void and of no legal consequence and he urged the Court to so hold.

He maintained further that by virtue of Order 47 Rule 8 vis-a-vis ó Rule 9(sic), the 1st ó 5th Defendants' Applicants' counsel cannot be heard in this application. He submitted that the non-payment of costs and the signing and franking of Court processes in this suit is a clear violation of the order of this Court which amounts to contempt.

Counsel submitted that a person who is in contempt cannot be heard or participate in proceedings in the same cause until he has purged himself of the contempt and relied on the authority of: *A. G. ONDO STATE VS. CO-OPERATIVE BANK PLC (2004) ALL FWLR (PART 203) PAGE 2084 and MOBIL OIL NIG LTD VS. ASAARI 91995) 8 NWLR (PART 142) PAGE 129.*

He submitted that parties are to be properly identified before the Court and that the purported document with which they are bringing an Attorney is also illegal, null and void and of no legal consequence.

The Applicants' Counsel filed a Further Affidavit/Reply to the 6th Defendant/Respondent's Affidavit in support of the application wherein they stated *inter alia* that the Law Firm of G, E, Oaikhena & Co. is distinct and different from G. E. Oaikhena Esq. and that the Law Firm was not disqualified.

Furthermore, that the issue of the disqualification of G. E. Oaikhena Esq. is pending at the Court of Appeal, Benin Division. That the 1st ó 5th defendants have the legal right to appoint an attorney to prosecute the case on their behalf being a member of the family who is resident in the family house as the suit affects all the children of Aburime including the Attorney.

That the 6th defendant has not filed his front loaded process in line with the Court Rules. That the power of attorney was prepared before the order restraining G. E. Oaikhena Esq., was made which is now pending at the Court of Appeal Benin City and that the 1st to 5th Defendants consented to the Power of Attorney.

In further opposition to the application, the learned Counsel to the Claimant/Respondent filed a further affidavit which he captioned: Further Counter-Affidavit/Reply To 1st ó 5th Defendants Further Affidavit/Reply Filed 24th May, 2016. It was dated and filed on the 13th of June, 2016. He also filed a Written Address in support of same.

In his address, Counsel denied the contents of paragraphs 3 (ii), (iv), (v), (vii), (viii), (ix) 4 and 5 of the 1st ó 5th Defendants/Respondents' further Affidavit/Reply. He maintained that the Power of Attorney annexed as Exhibit òÄö

was forged as it was not consented to and authorized by the 4th and 5th Defendants/Applicants as the other Applicants are trying to portray. Furthermore, he stated that the 5th Claimant denied giving her consent to the Donee of the Power of Attorney.

Also in opposition to the application, the 6th Defendant/Respondent filed a Counter-Affidavit of 22 paragraphs and a Written Address. His Counsel, P.O.Ugbebor Esq. relied on the Counter-Affidavit and adopted the Written Address as his arguments in opposition to the application.

He submitted that the 1st ó 5th Defendants/Applicants had disobeyed the court order made on the 27th day of January, 2014 where the 1st ó 5th Defendants/Applicants were ordered to pay the sum of N20, 000.00 each in favour of the Claimant/Respondent and the 6th Defendant/Respondent respectively. He added that in the said order, G. E. Oaikhena Esq., and the chambers were restrained from further appearance and filing of any court process(s) in this suit.

Counsel maintained that despite the restraining order, G. E. Oaikhena Esq., and his Law Firm still filed processes of court in respect of this suit in clear violation of the order of Court.

Counsel argued that by virtue of Order 47 Rule (8) and (9) of the High Court civil procedure Rules 2012 and under the inherent jurisdiction of this Court the 1st ó 5th Defendants/Applicants cannot be heard and he therefore urged the Court to disregard that Motion on Notice and mark it rejected.

Furthermore, he argued that the failure of the 1st ó 5th Defendants/Applicants to pay the sum of N20, 000.00 to the 6th Defendant/Respondent as ordered amounts to contempt of court. He therefore urged the Court to refuse this application.

At the hearing of this application, the learned Counsel for the 6th Defendant/Respondent made a further oral submission to the effect that the Power of Attorney annexed as Exhibit A is not valid in law because it was not notarised. He relied on the case of: *Melwani vs Five Star Industries (2002) 3 NWLR (753) 217* and urged the Court to strike out the application.

In her oral response to the opposition of the Respondents' counsel, the learned counsel for the Applicants, Mrs.Ekejiuba informed the Court that the Further Counter-Affidavit of the Claimant/Respondent dated 13th of June, 2016 was never served on them. Furthermore she submitted that there is no provision for the filing of a Further Counter-Affidavit under the Rules of Court and she urged the Court to expunge same.

On the objection against the Power of Attorney, she submitted that Exhibit A is valid in law because it was signed before a Commissioner for Stamp Duties and the appropriate fees duly paid. On the non production of the written authority of the 1st to 5th Applicants, counsel maintained that the Power of Attorney itself is the written authority of the Applicants.

I have carefully gone through all the processes filed in this application together with the addresses of learned counsel for the parties. Essentially, the Applicants are seeking the leave of this court for leave to defend and prosecute their case through their lawful Attorney named George Aburime. The application also seeks to amend all the processes in this suit to reflect the status of the Attorney; and to file the 1st ó 5th Defendant/Counter-claims (sic), Amended Statement of Defence, Statement/Evidence on Oaths, list of witnesses and List of Exhibits to be relied upon at the trial.

All the Respondents vehemently opposed the application particularly as regarding the Power of Attorney. It is settled law that where a party relies on a Power of Attorney in a suit, the onus is on him to prove not only that such a Power of Attorney exists but that its contents are true and correct. See: *Bamgbose vs. Jiaza (1991) 3 NWLR (Pt.177) 64 at 74.*

A major objection to the document is that it was not notarised. I have read the case of: *Melwani vs Five Star Industries (2002) 3 NWLR (753) 217* which was cited by the learned counsel for the 6th Defendant/Respondent. The decision in that case is to the effect that a Power of Attorney which was not executed before and authenticated by a notary public as provided in section 118 of the Evidence Act, Cap.112, Laws of the Federation of Nigeria, 1990, will not be presumed to have been made by the donor. The authority is on the proof of the validity of the Power of Attorney by presumption under the Evidence Act. The case did not decide that failure to notarise the Power of Attorney renders it invalid. In fact, in the *Melwani vs Five Star Industries case* (supra) at 247 to 248, Ayoola JSC categorically stated thus:

“Section 118 deals with proof of facts of execution and authentication and not with the validity of the document. That execution and authentication of a document which purports to be a Power of Attorney cannot be presumed in terms of section 118 does not mean that the, the Power of Attorney is invalid”

The respondents have also challenged the validity of the Power of Attorney on the grounds that it was forged as they alleged that it was not consented to and

authorized by the 4th and 5th Defendants/Applicants. They pointed out that the 4th and the 5th Applicants did not sign the document.

The allegation of forgery is a very serious one. It is an allegation of the commission of a crime. It is settled law that although in civil proceedings, proof is by the preponderance of evidence, any allegation of crime must be proved beyond reasonable doubt. See: Section 135(1) of the Evidence Act, 2011; and the cases of: *Agbi vs. Audu Ogbah (2006) 5 SC (Pt.11) 129*; and *Biezan Exclusive Guest House Ltd. vs. Union Homes Savings & Loans Ltd. (2011) 7NWLR (Pt.1246) 246 at 283*. The allegations of fraud must be proved beyond reasonable doubt by the Respondents. It is not sufficient to merely observe that the 4th and the 5th Applicants did not sign the Power of Attorney. I think the Respondents ought to have gone further to obtain the depositions of the two Applicants to prove their lack of consent.

Again, in the *Melwani vs Five Star Industries case* (supra) at 236, the Court held that: "Where a party, in reliance on a Power of Attorney sues on behalf of the Plaintiff, it is the Plaintiff and not the Defendant who can complain about whether the Power of Attorney actually empowers the party to sue on his (Plaintiff's) behalf. Based on this authority, it is for the 1st to 5th Defendants/Applicants to complain and not the Respondents. They have not complained of lack of consent. Moreover, they are being represented by the counsel who brought this application on their behalf. In so far as the Applicants have not debriefed their counsel, I do not think any of the Respondents' counsel can complain on their behalf. A counsel cannot represent the Applicants and the Respondents in the same application.

Upon a careful consideration of the objections raised by the Respondents, I do not see what they stand to lose if the said Attorney is granted leave to prosecute the suit on behalf of the Applicants. The fact that the Attorney is standing in for the Applicants does not exclude them from the benefits or burdens arising from the action. They are still Defendants in the suit. The donee of the power (George Aburime) is simply the agent of the donors (the 1st to 5th Defendants/Applicants). If judgment is obtained against the donee, the donors will be liable.

In view of the foregoing, I hold that the objections against the validity of the Power of Attorney cannot be sustained and they are accordingly overruled.

In the course of proceedings in this application, the Respondents made heavy weather of the order of Court which restrained G. E. Oaikhena Esq. and his Law Firm from further appearance and filing of any court process(s) in this suit. They accused the counsel of committing contempt for flouting the order. I am aware that the matter is pending before the Court of Appeal. Furthermore, I take judicial notice of the fact there is a motion for stay of execution of the said order pending before this Court. It is settled law that failure to obey the order sought to be stayed pending appeal does not amount to contempt of court. See: *Irukwu vs. T.M.I.B (1997) 12 NWLR (Pt.531) 113 at 128-129*. Moreover, since the matter is on appeal, I cannot make any finding on the conduct of this suit by G. E. Oaikhena Esq., or lawyers from his Law Firm. Neither can I make any pronouncement on the validity of the Court processes filed by them.

On the issue of nonpayment of solicitors costs awarded against G.E, Oaikhena Esq., the provisions of Order 47 Rules 8 & 9 cited by learned counsel for the Claimant/Respondent and the 6th Defendant/Respondent are very clear. Failure to pay the costs does not disqualify the counsel from appearing in the matter. Rule 8 recognises: “... *the use of any other lawful method of enforcing payment*”. They are at liberty to enforce payment of the costs as they deem fit.

In the event, I am of the view that the objections raised by the Respondents lack merit and they are overruled. Accordingly, this application is granted as follows:

- 1. The 1st – 5th Defendants/Applicants are granted leave to prosecute this case through their lawful Attorney, George Aburime for themselves and the late Aburime’s children and family members;**
- 2. They are further granted leave to amend all the processes in this suit to reflect the status of the Attorney; and**
- 3. Leave to file the 1st – 5th Defendants Amended Statement of Defence/Counter Claim, Evidence on Oaths, List of witnesses and list of Exhibits to be relied upon which are attached as Exhibits A, B, C and D respectively;**
- 4. The Applicants shall file clean copies of the amended processes and serve the Respondents within 14 days from today and upon**

service on them, the Respondents are given 14 days thereafter to file any consequential amendments.

I make no order as to costs.

P.A.AKHIHIERO
JUDGE
03/11/16

COUNSEL:

G.E.OAIKHENA ESQ.1ST – 5TH DEFENDANTS/APPLICANTS.

L.I.EDEKI ESQ.....CLAIMANT/RESPONDENT

P.O.UGBEBOR. ESQ.....6TH DEFENDANT/ RESPONDENTS