

IN THE HIGH COURT OF JUSTICE
IN THE BENIN JUDICIAL DIVISION
HOLDEN AT BENIN CITY
BEFORE HIS LORDSHIP, HON. JUSTICE P.A. AKHIERO,
ON MONDAY THE
17TH DAY OF FEBRUARY, 2025.

BETWEEN:

SUIT NO: B/1129/2023

HERITAGE ENERGY SERVICES LIMITED -----CLAIMANT/APPLICANT
AND

WELLSTEER OILFIELD TECHNOLOGY -----DEFENDANT/RESPONDENT
SERVICES LIMITED

RULING

This is a Ruling on a Motion on Notice, brought pursuant to *Order 30 Rule 11(1) and (2) of the High Court of Edo State (Civil Procedure) Rules 2018*, and under the inherent Jurisdiction of this Honourable Court.

The Claimant/Applicant is praying this Court for the following orders:

- 1) An Order granting leave to the Applicant to substitute Ms. Tobi Oluitan for its witness on record in this suit, Mr. Prince Aigbedion;***
- 2) An Order granting leave to the Applicant to file a Witness Statement on Oath for Ms. Tobi Oluitan;***
- 3) An Order deeming the Witness Statement on Oath of Ms. Tobi Oluitan already filed and served as having been properly filed and served.***

And for such order or further order(s) as this Honourable Court may deem fit to make in this circumstance.

The application is supported by a six paragraphs affidavit and a written address of the Claimant's/Applicant's counsel.

From the facts contained in the Claimant/Applicant's supporting affidavit, their case is that in their originating processes, they listed one Mr. Prince Aigbedion, as their witness in this suit and his Witness Statement on Oath was frontloaded along with their originating processes.

According to them, Mr. Prince Aigbedion is no longer available to testify on behalf of the Claimant/Applicant in this suit and they have decided to field one Ms. Tobi Oluitan who they allege is also aware of the material facts relating to this suit.

They are seeking the leave of the Court to call the said Ms. Tobi Oluitan as a witness in place of Mr. Prince Aigbedion in order to place material facts before the court in support of their case.

They have attached a copy of the Proposed Witness Statement on Oath of Ms. Tobi Oluitan to their affidavit in support of this application.

In opposition to this application, the Defendant/Respondent filed a counter-affidavit of twenty two paragraphs and a written address of their counsel.

In their counter affidavit, the Defendant/Respondent alleged that the facts contained in the Applicant's supporting affidavit are false, misleading, and calculated to overreach the Defendant.

They maintained that the Claimant/Applicant's initial witness: Mr. Prince Aigbedion was very much available to testify for the Claimant until the Defendant filed its Statement of Defence/Counter Claim wherein the said witness was indicted in paragraph 67 of the Defendant's Statement of Defence/Counter Claim.

They alleged that the Claimant/Applicant decided to remove Mr. Prince Aigbedion as its sole witness, when they discovered that he was linked to the dubious and questionable acts that resulted in this suit.

According to them, if this application is granted, some facts will be suppressed which would have aided this Court in the determination of this matter more judiciously.

They alleged that the aim of the Claimant/Applicant is to substitute Mr. Prince Aigbedion who was directly involved in the failed contract; the subject matter of this suit, with Ms. Tobi Oluitan, who has no idea of what happened in the contract in order to overreach the Defendant.

They maintained that the Applicant should have disclosed the reason for the disengagement of Mr. Prince Aigbedion from the company.

They said that the Claimant/Applicant will not be prejudiced if this application is refused.

Upon receipt of the counter affidavit, the Claimant/Applicant filed a Further Affidavit and a Reply on Points of law.

The said Further Affidavit mainly traversed the contents of the counter affidavit.

In his written address in support of this application, the learned counsel for the Claimant/Applicant formulated a sole issue for determination as follows:

“Whether in the circumstance of this case, the Applicant’s Application ought to be granted”?

Arguing the sole issue, the learned counsel posited that the ***Order 30 Rule 11 (1) and (2) of the High Court of Edo State (Civil Procedure) Rules, 2018*** provides for a party to call any witness not being a witness whose deposition accompanied his pleading, provided the leave of court is obtained and the deposition on oath of the proposed witness is annexed as an exhibit to the application for leave.

He submitted that based on the foregoing provisions of the Rules, a party is allowed to call an additional witness or substitute a witness, and file a Witness Statement on Oath, for the new witness, to prove its case before the court. He said that this provision is in tandem with the principle of fair hearing enshrined under the ***Constitution of the Federal Republic of Nigeria, 1999 (as amended)***.

He posited that it has become necessary for the Applicant to place before the Court, material evidence needed for the proper determination of this suit, by substituting Ms. Tobi Oluitan for Mr. Prince Aigbedion, the witness on record who has left the Applicant’s employment.

He said that Ms. Tobi Oluitan is currently in the Applicant’s employment and she is available to testify on the Applicant’s behalf and in compliance with ***Order 30 Rule 11(1) and (2) of the Rules***, the Witness Statement on Oath of Ms. Tobi Oluitan was attached to the application.

He submitted that the grant of an application of this nature is premised on the discretion of the Court which must be exercised judicially and judiciously in the overall interest of justice.

He referred the Court to the case of ***Mohammed vs. Babalola (2012) 5 NWLR (Pt. 1293) 395 at 410*** where the Court of Appeal defined judicial discretion to mean the exercise of judgment by a judge or a court based on what is fair under the circumstances and guided by the rules and principles of law. He also relied on the cases of ***Oyegoke v Hamman [1990] 4 NWLR (Pt143) 197at 205-206*** and ***University of Lagos & Anor v M.I. Aigoro (1985) 1 NWLR (Pt1) at 143.***

Finally he submitted that in view of the circumstances of this case and in the interest of justice, the Court should exercise its discretion to grant the application.

In his written address in opposition to this application, the learned counsel for the Defendant/Respondent *Wilson A. Ibhazobe Esq.* formulated a sole issue for determination as follows:

“Whether this application can be granted by this Honourable court?”

Arguing the sole issue, the learned counsel submitted that the Defendant’s depositions have extensively explained the reason for the Claimant’s application for substitution of witness, which is to suppress facts before this Court that could have aided the dispensation of justice in this case.

He submitted that although the provisions of *Order 30 Rule 11 (1) & (2), of the High Court Law (Civil Procedure) Rules, 2018*, allows the Claimant to call any witness who is not a witness to testify, the rule cannot be used as an avenue to suppress facts that would lead to the just determination of the suit.

He submitted that from the Affidavit evidence, it is clear that the Claimant had failed to disclose any reason for the witness’s unavailability.

He said that the Claimant’s failure to disclose any reasonable ground for the Court to exercise its discretion, amounts to suppression of facts, which is overreaching on the Defendant and he relied on the case of *National Inland Waterways Authority v. SPDC Nigeria Ltd. (2008) LPELR-1963, SC* where *Tobi, JSC* defined “Overreaching” in the following words: ***“Overreaching means to circumvent out with or get the better of something by cunning or artifice. It also means to defeat one’s object by going too far. It connotes smartness on the part of a party in the litigation to defeat his opponent by a thoroughly organized plan to frustrate the intention and the intendment of the adverse party. An overreaching conduct is an inequitable conduct because it is not fair and just”***

Learned counsel submitted that the pleadings have successfully identified the said witness, Mr. Prince Aigbedion, as one of the Claimant’s staff who actually participated in the matters that led to this suit.

He therefore urged the Court not to exercise its discretion in favor of the Applicant and relied on the case of *AJUWA & ANOR v. SPDC NIG. LTD, (2011) LPELR-8243(SC)*.

He submitted that the granting of this application will amount to an infringement of the principle of fair hearing in this case and he cited the case of *Salu v. Egeibon (1994) 6NWLR (PART 348) 23*.

Counsel submitted that the Claimant's application amounts to an abuse of court process for all that it is worth and should be dismissed in its entirety. He referred the Court to the case of *R-BENKAY NIGERIA LTD v. CADBURY NIGERIA LTD (2012) LPELR-7820(SC)* where abuse of court process was defined by the apex Court as follows:

"Abuse of court process means that the process of the court has not been used bona fide and properly. See Central Bank of Nigeria v. Saidu H. Ahmed &Ors. (2001) 5 SC (Pt.11) 146; Edjerode v. Ikine (2001) 12 SC (Pt.11) 125. The concept of abuse of court process is imprecise. It involves circumstances and situations of infinite variety and conditions but it has a common feature in improper use of the judicial process by a party in litigation to interfere with the due administration of justice. See Agwasim v. Ojichie (2004) 10 NWLR (Pt.882) 613 at 624-625 (SC)."

Furthermore, on the circumstances that may give rise to an abuse of court process, counsel referred to the same case of *R-BENKAY NIGERIA LTD v. CADBURY NIGERIA LTD (supra)*.

Finally, he urged the Court to dismiss this application in its entirety with heavy costs.

In his Reply on Points of law, the learned counsel for the Claimant/Applicant reiterated that the Defendant cannot force the Claimant to call a particular witness, just as the Claimant cannot force the Defendant in this regard. He said that the hallmark of fair hearing is that parties have the uninhibited prerogative to prosecute their case in the manner that they deem fit. He urged the Court to reject the attempt of the Defendant to fetter the Claimant's right and he cited the case of *K Line Inc. v K.R Int (Nig) Ltd (1993) 5 NWLR (Pt. 292) 159*.

I have carefully studied all the processes filed by the parties in this suit together with the written addresses of their counsel.

The sole issue for determination in this suit is whether the Claimant/Applicant is entitled to the reliefs which he seeks in this application.

This application is for leave to substitute a new witness in place of an existing witness whose deposition was frontloaded and to frontload the deposition of the new witness to enable him testify in place of the former witness.

The relevant provisions of our rules on the subject of calling additional witnesses is ***Order 30 Rule 11 of the Edo State High Court (Civil Procedure) Rules, 2018***, which provides as follows: -

"11(1) A party who desires to call any witness not being a witness whose deposition on oath accompanied his pleading shall apply to the Judge for leave to call such witness;

11(2) An application for leave under sub-rule (1) shall be accompanied by the deposition on oath of such witness."

From the above provisions, it is apparent that with the leave of Court, a party can call a fresh witness whose deposition on oath was not initially filed along with the pleadings.

Such an application for leave shall be accompanied by the deposition on oath of the new witness.

An application for leave to call a fresh witness in place of another witness is an application that requires the exercise of the discretion of the Court.

Discretion in the judicial and legal context means equitable decision of what is just and proper under the facts and circumstances of a particular case guided by the principles of law. See ***ARTRA INDUSTRIES NIG. LTD. V NIG BANK FOR COMMERCE INDUSTRIES (1998) 4 NWLR (PT. 546) PG. 357, DOHERTY V DOHERTY (1964) ALL NLR PG. 299.***

An exercise of discretion is a liberty or privilege to decide and act in accordance with what is fair and equitable under the circumstances of the case. See ***OWNERS OF M.V. LUPEX V. N.O.C LTD. (2003) 15 NWLR (PT. 844) PG. 469, PANALPINA WORLD TRANSPORT (HOLDING) AG V JEIDOC LTD. (2011) LPELR 4828.***

The rules of practice and procedure are meant to provide the means for the just and equitable determination and enforcement of rights and obligations in every given case. Their compliance should not be aimed at defeating the ends of justice and foreclosing fair trial of disputes. Thus, the Court should not be enslaved to the rules or interpret them in a manner to cause injustice by shutting out a party from prosecuting or defending the suit.

In accordance with the provisions of ***Order 30 Rule 11(2) of the Edo State High Court (Civil Procedure) Rules, 2018***, in the instant case, the application for leave was accompanied by the deposition on oath of the new witness.

Furthermore, in the supporting affidavit, the Applicant has given sufficient reasons why they are substituting the new witness for the previous one. According to them, Mr. Prince Aigbedion is no longer in their employment and is not available to testify on behalf of the company hence

they decided to field one Ms. Tobi Oluitan who they allege is also aware of the material facts relating to this suit.

There is nothing to substantiate the allegation of the Defendant/Respondent that the substitution is meant to suppress facts before the Court that could have aided the dispensation of justice in this case.

Furthermore, the Defendant/Respondent has not shown that the deposition of the intended witness has gone outside the pleading of the Claimant/Applicant. A party is at liberty to call a host of witnesses so far as the evidence of the witness is within the confines of his pleadings.

From the materials placed before the Court, that is the affidavit in support of the application and the counter-affidavit, the deposition of the witness to be called was annexed to this application more so, the content of the deposition are within pleaded facts. Thus the issue of being ambushed or over-reached by the Claimant's application cannot therefore arise.

Consequently, it will be inequitable to shut out or deny the Claimant/Applicant the right to file a fresh witness deposition on oath in order to field a new witness in place of the initial one. See the case of *UNITY BANK V. KWARA CHEMICAL CO. LTD & ANOR (2019) LPELR-48468(CA) (PP. 26-30 PARAS. C-C)*.

Sequel to the foregoing, the sole issue for determination is resolved in favour of the Claimant/Applicant and the application is granted as follows:

- 1) *An Order granting leave to the Applicant to substitute Ms. Tobi Oluitan for its witness on record in this suit, Mr. Prince Aigbedion;*
- 2) *An Order granting leave to the Applicant to file a Witness Statement on Oath for Ms. Tobi Oluitan; and*
- 3) *An Order deeming the Witness Statement on Oath of Ms. Tobi Oluitan already filed and served as having been properly filed and served.*

The Defendant/Respondent shall pay the sum of N50, 000.00 (Fifty Thousand Naira) as costs to the Claimant/Applicant.

P.A.AKHIHIERO
JUDGE
17/02/2025

COUNSEL:

OLAWALE ADELIYI ESQ.....CLAIMANT/APPLICANT
WILSON IBHAZOBE ESQ.....DEFENDANT/RESPONDENT

