

THE JURISPRUDENCE OF  
INSTITUTING AN ACTION AGAINST  
AN UNKNOWN PERSON:

A PAPER PRESENTED BY:

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EDO STATE HIGH COURT OF JUSTICE

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# **THE JURISPRUDENCE OF INSTITUTING AN ACTION AGAINST AN UNKNOWN PERSON**

## **A. INTRODUCTION**

Sometimes, a situation may arise where the Claimant is unable to discover the identity of the person who is infringing on his right. Such a situation may be as a result of the clandestine activities of the tortfeasor. For instance, in a case of trespass to land, where the workmen only build on the site late at night. It may also be occasioned by the fact that there were other persons involved in the incident who have since disappeared from the scene. In the event of litigation, in any of these situations, it may be difficult to know who to hold liable.

The problem becomes more complex and intricate where the cause of action is time bound. The action may become statute barred by limitation of time if the Claimant is unable to file his suit because he is trying to unravel the identity of the defendant. The operative maxim is: *vigilantibus non dormientibus, jura subveniunt* (the law aids the vigilant; it does not aid those who sleep).

This dilemma has made many Claimants to file actions against “unknown defendants”. This paper intends to examine the legality of instituting a suit against unknown or unnamed persons under Nigerian law.

## **B. PARTIES TO A SUIT**

Every action commenced in court by a Writ of Summons must have a Claimant and a Defendant and the entire civil proceedings are based on this principle<sup>1</sup>. It is essential that the names of every Claimant and Defendant whom it is proposed to make parties to the action should be set out at the head of the writ

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<sup>1</sup> 1. Chairman L.E.D.B. vs Onimole and others (1940) 6 WACA, 96 at 98

or originating process<sup>2</sup>. Any error in this regard may affect the competency of the action.<sup>3</sup>

A Claimant in an action must be competent to institute the action and if his competency is challenged, then the onus is on him to prove that he has the legal capacity to institute the action<sup>3</sup>.

It is essential that the parties to the suit must be legal persons. If it is shown that any party to the suit is not a legal person that party should be struck out of the suit. If such a party is the Claimant, then the entire suit should be struck out<sup>4</sup>. Similarly, if the non-juristic party is sued as a Defendant, the party should be struck out. In: *Agbonmagbe Bank Ltd. Vs G.B.Ollivant Ltd. & Anor.*<sup>5</sup>, it was held that since “*General Manager G.B.Ollivant Ltd*” was not a juristic person, that defendant could not be made a party to the action and should be struck out from the proceeding. See also the following cases: *Martins vs. Federal Administrator General & Anor.*<sup>6</sup>; and *University of Jos & Anor. Vs Carlen (Nigeria) Ltd.*<sup>7</sup>. Also, in: *Federal Government of Nigeria & 2 O others vs. Shobu Nigeria Ltd. & Anor.*<sup>8</sup>, the Court of Appeal, sitting at Ibadan, held that:

*“In the present circumstances, the 2nd Appellant, the Federal Ministry of Works was wrongly joined, and is struck out from this appeal not being a juristic personality”.*

In the unreported case of<sup>9</sup> : *Trust Fund Pensions Plc & 2 Others Vs. Pensions, Names Unknown*, Kolo J. of the F.C.T High Court, Abuja concluded thus:

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<sup>2</sup> 2. Aguda: Practice and Procedure of the Supreme Court, Court of Appeal and High Courts of Nigeria, 2<sup>nd</sup> Edition, par. 12.03, p. 90.

<sup>3</sup> *Quo Vadis Hotel vs Commissioner for Lands* (1973) 5 S.C. 71; *John Holt Ltd. Vs Leonard Ezeafulukwe* (1990) 2 NWLR 520

<sup>4</sup> . *Okechukwu & Sons vs Ndah* (1976) NMLR 368 at 370.

<sup>5</sup> (1961) All NLR 116.

<sup>6</sup> (1963) LLR 65.

<sup>7</sup> . (1992) 5 NWLR 352

<sup>8</sup> (2013) LPELR-21457(CA)

<sup>9</sup> SUIT NO. FCT/HC/CV/2511/2012

*“As a general rule, only natural persons, that is to say, human beings and juristic or artificial persons such as bodies, corporate are competent to sue and be sued before any law Court. In other words, no action can be brought against any party other than a natural person or persons unless such party has been given by statute expressly or impliedly or by common law either a legal capacity under the name by which it sues or is sued or a right to sue or be sued by that name. See Fawehimi v N.B.A (No2) 1989 2 NWLR (PT. 105) 558 at 595. This is because a law suit is in essence, the determination of legal rights and obligations in any given situation. Therefore only such natural and juristic persons in whom the rights and obligations can be vested as capable of being proper parties to law suit before Courts of law” Per Mahmed Mohammed, JSC (P 50, Paragraphs B– F). See: the Administrators/Executors of the Estate of General Sani Abacha (deceased) v Samuel David Eke Spiff and others (Supra). Following this general rule, where either of the parties is not a legal person capable of exercising legal rights and obligations under the law, the other party may raise this fact as a preliminary objection which if upheld, normally leads or results in the action being struck out. See SHITTU V LIGALI (1941) 16 NLR21 ;OLU OF WARRI V ESSIA AND ANOR (1958) 3 FSC 94 and AGBONMAGBE BANK LTD VG.M.,G.B OLIVANT LTD AND ANOR (Supra) In fact, in line with the above Holden/decision, the learned counsel for the applicant has urged the Court to strike out this preliminary objection. I will conclude by stating that in view of the analysis and all the authorities cited I hold that failure of the plaintiff/respondent to commence this action/suit against juristic persons robs this Court of jurisdiction to entertain them. It is therefore struck out”*

In the case: *Ndoma-Egba vs. Government of Cross River State*<sup>10</sup>, Niki Tobi J.C.A. reiterated that: *“Only a natural or juristic person can be joined as a party. Thus, the same rules apply in respect of the original parties in the action, either plaintiff or defendants”*. Also, in: *C.O.P. Ondo State vs. Obolo*<sup>11</sup>, Salami J.C.A. observed thus: *“The only life issue it, seems to me, is the propriety of suing the “Divisional Police Officer” Okitipupa who is not known to law. It is only a legal person that can sue and be sued”*

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<sup>10</sup> (1991) 4NWLR (Pt.188) 773 at 787.

<sup>11</sup> (1989) 5 NWLR (Pt.120) 130 at 141.

Applying the foregoing principles to the status of an “unknown defendant” or “unnamed defendant”, it is apparent that it may be difficult to classify such a nebulous entity as a juristic person with the competence to sue and be sued. In the *TRUST FUND PENSIONS PLC* Court case (supra)<sup>12</sup>, the Court observed:

*“For them to be persons unknown? This will best be answered in the substantial. This could only be determined by the Court and the plaintiff/respondent has a duty to furnish the Court with the real names of the occupants of the premises in question and their identities and I so hold. As general rule only natural persons, that is to say, human beings and juristic or artificial persons such as bodies corporate, are competent to sue and be sued before any law Court”.*

The sum total of the foregoing postulations is that a suit instituted against an unknown person is defective because an unknown person is a nebulous entity without any clear cut features of juristic personality. It will be difficult to ascertain the legal status of such an entity. Is the person a natural person or an artificial person? Herein is the legal dilemma. What then is the way out of this logjam?

### **C. SUITS AGAINST UNKNOWN TRESPASSERS**

In the course of my sojourn on the Bench, I have found that our courts are being inundated with suits against unknown trespassers. Sometimes, the Claimants have some difficulties with discovering the true identities of the alleged trespassers. In a desperate bid to unravel the identities of such trespassers, they are constrained to file the action that way.

The first problem they usually encounter after filing is how to effect service of the court process on the unknown and unnamed Defendant. Sometimes; they attempt to surmount this hurdle by effecting service by substituted service usually by pasting the process on the land. In their view, when the trespasser sees the Court process he will show up in court.

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<sup>12</sup> SUIT NO. FCT/HC/CV/2511/2012: TRUST FUND PENSIONS PLC & 2 Others vs. PENSIONS, NAMES UNKNOWN

From experience, sometimes, the unknown trespasser actually shows up in response to the process. However, oftentimes, the unknown trespasser never shows up. We are thus stuck with a fictitious suit. It may result in a legal absurdity if the court proceeds to hearing and delivers judgment in the circumstance. This may be tantamount to an abuse of court process.

The judicial process should not be used for such extra judicial procedures. In the reported case of: *Amaefule vs. The State*<sup>13</sup>, the court held that: “Abuse of process can also mean abuse of legal procedure or improper use of legal process...” In my view, it is the duty of the Claimant or his counsel to privately investigate in order to identify the defendant trespasser before filing the suit.

The investigations may not even involve the police or any law enforcement agents. The claimant can gather relevant information by asking discreet questions from workmen on the site. It is even more reasonable to sue a known workman on the site than to sue an unknown defendant. If the Claimant files a suit against the workman, he will naturally disclose the identity of the person who hired him. The claimant can thereafter join the actual defendant in the suit. Of course, the processes can be amended to discontinue against the workman. The practice of filing the suit in order to identify the defendant is to put the cart before the horse.

Some rules of courts have made provisions for some special procedures to institute suits against unknown defendants in actions for possession of land. Let us briefly examine the application of such rules relating to the subject under consideration.

#### **D. SPECIAL PROCEDURE IN SUITS AGAINST UNKNOWN SQUATTERS**

In some jurisdictions in Nigeria, there are provisions under the Court rules for a special procedure to evict unknown squatters from land. See for example: *Orders 53 of the Lagos and Ogun State High Courts (Civil Procedure) Rules, 2012 and 2009 respectively and 50 of the High Court of Kaduna (Civil Procedure) Rules, 2007 and Order 51 of the Edo State Civil Procedure Rules, 2012.*

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<sup>13</sup> (1988) 2 NWLR (Pt.200) 659.

This procedure is *Sui generis*. It has some peculiar and unique features which must be properly understood. It is an exception to the rule against filing a suit against an unknown or unnamed defendant.

Using the *Edo State Civil Procedure Rules, 2012* as our example, the procedure is enshrined in *Order 51* of the rules. It provides as follows:

*“ORDER 51*

*1. Application of this Order*

*(1) This Order shall not apply where the person in occupation of land is:*

*(a) a tenant; or*

*(b) a tenant holding over after termination of his tenancy; or*

*(c) a licensee of the owner or person entitled to possession; or*

*(d) a person who had the consent of the predecessor-in-title of the person who is entitled to possession.*

*(2) Where a person claims possession of land which he alleges is occupied solely by persons other than those listed in sub-rule 1, proceedings may be brought by originating summons in accordance with the provisions of this Order.*

*2. Proceedings to be brought by originating summons: Form 36*

*The originating summons shall be in Form 36 and no acknowledgment of service shall be required*

*3. Affidavit in support*

*The claimant shall file in support of the originating summons, an affidavit stating*

*(a) his interest in the land;*

*(b) the circumstances in which the land has been occupied without license or consent and in which his claim to possession arises; and*

*(c) that he does not know the name of any person occupying the land who is not named in the summons*

*4. Service of originating summons*

*(1) Where any person in occupation of the land is named in the originating summons, the summons together with a copy of the affidavit shall be served on him:*

*(a) personally or in accordance with Order 7 rule 1 sub-rule 2; or*

*(b) by leaving a copy of the summons and of the affidavit, or sending them to him at the premises; or*

*(c) in such other manner as the Judge may direct.*

*(2) The summons shall, in addition to being served on the named defendants, if any, in accordance with sub-rule 1 of this rule be served, unless the Judge otherwise directs, by:*

*(a) affixing a copy of the summons and a copy of the affidavit to the main door or other conspicuous part of the premises; and*

*(b) if practicable, inserting through the letter box at the premises, a copy of the summons and a copy of the affidavit enclosed in a sealed envelope addressed to "the occupiers".*

*(3) Every copy of an originating summons for service under sub-rule 1 or 2 of this rule shall be sealed with the seal of the Court out of which the summons was issued.*

#### *5. Application by occupier to be made a party*

*Without prejudice to rule 16 of Order 13, any person not named as a defendant who is in occupation of the land and wishes to be heard in the question whether an order for possession should be made, may apply at any stage of the proceedings to be joined as a defendant.*

#### *6. Order for possession*

*(1) An order for possession in proceedings under this Order shall be in Form 37 with such variations as circumstances may require.*

#### *Form 37*

*(2) The Judge may forthwith, order a writ of possession to be issued.*

*(3) Nothing in this Order shall prevent the Judge from ordering possession to be given on a specified date, in the exercise of any power which could have been exercised, if possession had been claimed in an action begun by writ.*

#### *7. Writ of possession*

*(1) No writ of possession to enforce an order for possession under this Order shall be issued after the expiration of 3 months from the date of the order without the leave of the Judge.*

*(2) The application for leave may be made ex-parte unless the Judge otherwise directs.*

#### *8. Setting aside of order*

*(1) The Judge may, on such terms as he deems fit, set aside or vary any order made in the proceedings under this Order.*

*(2) In this Order, "landed property" means land with or without building thereon."*

In the case of: *Emeka Okoli & Ors. Vs. Alhaji Ibrahim Gadan*<sup>14</sup> the Court of Appeal explained the application of this special procedure thus:

*“The provisions of Order 50 [High Court of Kaduna Civil Procedure Rules, 2007] are similar to the provisions of Order 113 Rule 1 of the Supreme Court Practice of England and the provisions of Order 59 Rule 1 of the High Court of Lagos State (Civil Procedure) Rules 1994 and Order 53 Rule 1 of the High Court of Lagos State (Civil Procedure) Rules, 2014 [ which is impari materia with the provisions of Order 53 of the extant Lagos High Court (Civil Procedure) Rules, 2012]. In proceedings under this order, the only claim that can be made in originating process is for recovery of possession of land; no other cause of action can be joined with such a claim in such proceedings, whether for payment of money, such as rent, mesne profits, damages for use and occupation or other claim for damages or for injunction or declaration or otherwise. The Order is narrowly confined to the particular remedy described in Rule 1. No order for costs can be made except there is a named defendant..... “*

Essentially, the rule enables a land owner whose land is in the occupation of a squatter(s) or a person (s) occupying the land without his consent to commence summary proceedings against the squatter for possession of his land. The procedure offers a Claimant the opportunity to recover possession of land wrongfully occupied by unknown persons. This is contrary to the normal procedures where the person in illegal possession should be identified and named as a defendant so that he can be bound by the order of the court in the suit.

This special procedure was introduced to avoid the injustice and hardship on the part of claimants who are unable to proceed against unknown trespassers because of their inability to identify and serve them as defendants in the suit. See: *Nnodi vs. Thanks Investment Ltd.*<sup>15</sup>. The Order applies where the occupier has entered into occupation without license or consent of the person in possession or of any predecessor of his. See: *County & City Bricks Development Company Ltd. vs. UACN Property Development Company Ltd.*<sup>16</sup> In the cases of : *Bristol Corporation vs. Persons Unknown*<sup>17</sup> and *Fiyakola House Development Company Ltd. vs. Persons Unknown & 7 Ors.*<sup>18</sup>, the courts held that the procedure also applies to a person who has entered into possession of land with a license but has remained in occupation without a license. However, in : *Ganiyat Buraimoh vs. Persons*

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<sup>14</sup> (2014) LPELR-23067 (CA). per Abiru, JCA at pages 28-30, Paras E-A

<sup>15</sup> (2005) 11 NWLR (Pt.935) 29.

<sup>16</sup> (2008) BLR (Pt.1) p.423.

<sup>17</sup> (1974) 1 WLR 365

<sup>18</sup> (1974)

*Unknown & Anor.*<sup>19</sup>, the court held that the procedure is not intended to dispossess a known person who claims to be in possession of property as a tenant or to shut out persons whose right of occupation needs to be determined.

It is to be noted that under the rules, "landed property" means land with or without building thereon<sup>20</sup>. So the property that can be subject to the procedure is not limited to undeveloped land but also include developed property.

Under this procedure, the Claimant shall commence the action by Originating Summons, without any requirement of acknowledgment of service of the summons by the person unlawfully occupying the land. In the Court of Appeal case of: *Persons, Names Unknown vs. Sahris Int'l Ltd.*<sup>21</sup>, the Court held that an aggrieved person whose land is occupied by persons unknown should file in support of his originating summons an affidavit stating the following facts:

- (a) his interest in the land;
- (b) the circumstances in which the land has been occupied without license or consent and in which his claim to possession arises; and
- (c) that he does not know the name of any person occupying the land who is not named in the summons.

However, where any person in occupation of the land is named in the originating summons, the summons together with a copy of the affidavit shall be served on him in the manner prescribed under the rules.

Notwithstanding the liberal provisions of this Order, where the suit is uncontested, the Claimant still has the onus to prove the claim. However, in: *Olumuyiwa Odejayi & Anor. vs. Person Unknown*<sup>22</sup> the court held that the burden is of such minimum proof as is sufficient to establish their entitlement to judgment.

Where the Court is satisfied that the Claimant is entitled to possession, the court may forthwith order a writ of possession to issue and may at its discretion fix a particular date when possession must be handed over by the trespasser in the same manner as the Court may order delivery of possession in an action commenced by Writ<sup>23</sup>.

Finally, any order for possession obtained under this procedure must be enforced within a period of three months from the date of issue. Failure to enforce

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<sup>19</sup> Suit.No:ID/536m/2005 (unreported)

<sup>20</sup> See:Ord.51 Rule 8(2) Edo State Civil Procedure Rules, 2012

<sup>21</sup> (2006) 8 NWLR (Pt. 982) Pg 255

<sup>22</sup> Suit No: ID/97M/2005(unreported)

<sup>23</sup> See: Order 51 Rule (6)3 Edo State High Court Civil Procedure Rules, 2012.

same renders it ineffective. However, the Court may exercise its discretion to extend the time if the leave of Court is sought<sup>24</sup>.

#### **D .CONCLUSION**

On the whole, we have examined the legal implications of filing civil suits against unknown defendants. From the weight of legal authorities considered we can safely posit that the general rule is that such suits are incompetent because an unknown or unnamed defendant is not a person known to law. Following this general rule, where either of the parties is not a legal person capable of exercising legal rights and obligations under the law, the other party may raise this fact as a preliminary objection which if up-held, normally leads or results in the action being struck out. See: *Shittu V Ligali*<sup>25</sup> of *Warri V Essian and Anor*<sup>26</sup> and *Agbonmagbe Bank Ltd VG.M. G.B Olivant Ltd and Anor (supra)*.

However, a major exception to this rule is the special procedure for the possession of landed property occupied by squatters or without the owner's consent. It is seriously suggested that claimants and their counsel should avail themselves of the benefits of this pragmatic procedure in situations where they are unable to discover the identity of the person(s) in illegal possession of the landed property. However, it is an elementary principle of law that where a specific procedure is provided for commencing an action, a party seeking to use that procedure must bring his case within the ambit of those covered by the said procedure otherwise his action will be incompetent<sup>27</sup>.

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<sup>24</sup> See: Order 51 Rule (7)1&2 Edo State High Court Civil Procedure Rules, 2012.

<sup>25</sup> (1941) 16 NLR 21 Olu

<sup>26</sup> (1958) 3 FSC 94

<sup>27</sup> See: Saleh vs.Monguno (2003) 12 NWLR (Pt.801) 221 at 262; United Bank of Africa Plc. vs.Ekpo (2003) 12 NWLR (Pt.834) 332 at 342; and Ojong vs. Duke (2003) 14 NWLR (Pt.841) 581 at 618.